Joanna Apap

The Rights of Immigrant Workers in the European Union

An Evaluation of the EU Public Policy Process and the Legal Status of Labour Immigrants from the Maghreb Countries in the New Receiving States

Kluwer Law International

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KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

A C.I.P. Catalogue record for this book is available from the Library of Congress

ISBN 90-411-1922-1

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in North, Central and South America
by Kluwer Law International,
101 Philip Drive, Norwell, MA 02061, U.S.A.
kluwerlaw@wkap.com

In all other countries, sold and distributed
by Kluwer Law International, Distribution Centre,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Printed on acid-free paper

Printed in the Netherlands.

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PREFACE AND ACKNOWLEDGEMENTS

Human rights and fundamental freedoms are of concern to everyone, not just to European citizens. The development of European citizenship, which is a desirable goal in its own right, depends upon building bridges between European Union (EU) citizens and third country nationals who have been residing and working in the EU for at least 5 years. The present gap between the position of the 5.5 million EU citizens who have exercised their right to free movement and the 19 million legally resident third country nationals is quite wide. There is also a considerable gap between rights in theory and rights in practice for third country nationals residing in the EU. This book deals with the evolving policy process with respect to Maghrebin nationals legally residing and working in the EU, especially in Italy and Spain. It is important to observe the evolving situation in Italy and Spain since they are the 'receiving' countries for Maghrebin labour migrants wishing to establish themselves in the EU in the past decade.

In this evaluative study, there is an underlying issue regarding the relationship between democracy and the status of foreigners. Foreigners, in addition to their definition as migrants, are those persons affected by norms regulating their rights and duties arising from the fact that they are not nationals of the country where they currently reside. So far the rights of third country nationals have been a matter of sovereignty of the individual member states. However, following the removal of internal borders in 1992 to implement the Single European Market the question of free movement for non-EU nationals is particularly evident. Some argues that the full realisation of the free movement of workers is necessary to achieve an efficient functioning of the internal market that requires the free movement of capital, goods and services. This implies that the free movement is not just for member states nationals, but also for those third country nationals who are legal resident of a member state for the purpose of engaging in economic activity (see Commission initiatives explained in Chapter 2). This would imply that Community powers now have to be continually enhanced with regards to immigrant rights. Of course, this is a highly debated matter because national governments have different opinions upon this matter.

This book contains one of the few studies that evaluates the evolving policies towards third country nationals residing and working in the European Union (EU). Other studies have analysed the existing legal framework of citizenship and migrants' rights in the EU, and the flow of migrants into the Community. However,

much less comparative research has been carried out regarding the actual position and the practice of migrants' rights in the receiving countries, especially within the context of an ever-integrating EU and the removal of internal borders. The focus of this book centres upon the consequences of the increasing number of Maghrebin residing in Italy and Spain – both for EU policy and in respect to these two countries as receiving states. The two main research questions upon which this study is based on are:

- What public policy implications does the labour immigration from the Maghreb Countries have for the EU as a supranational Community rather than for the member states individually?
- To what extent can citizenship rights be extended to third country nationals legally residing in a European Union, which has as one of its aims the free movement of its own citizens and the removal of internal borders?

Following these two leading questions, the study is divided into two parts. The first chapter sets out the background story and introduces to the reader the objectives and main questions that are addressed in the rest of the book. Chapters 2, 3 and 4 analyse EU policy towards the Maghreb and the Maghrebin residing within EU. The main purpose of this first section is to evaluate what kinds of policy and jurisprudence are emerging in the EU and how the positions of Maghrebin workers and their families are dealt with. The second part, Chapters 5 and 6, is based upon fieldwork done in Italy and Spain. The intention of these chapters is to complement the commentary on the EU with detailed empirical research in order to explain what is happening 'on the ground'. Chapter 7 then draws a common thread through the different chapters as a conclusion for the reader.

Among the main sources used were interviews carried out in Brussels and host countries of Maghrebin workers, in particular Italy and Spain. An extensive use is made of European Court of Justice Reports, the European Community Treaties, the Single European Act, Treaty on European Union and the Treaty of Amsterdam. The following are also used extensively: EEC-Maghreb Co-operation Agreements, the Community Charter of the Fundamental Social Rights of Workers and Action Programmes of the Commission of the European Communities, Agence Europe Bulletins, newspapers of different EU member states Migration Newsheet Statewatch reports issued by pressure groups, editions of Social Europe and the Journal of European Public Policy. National legislation on the position of third country nationals in receiving counties and census data collected in Italy and Spain are also employed. Existing literature (other books, papers and articles) had been utilised to a minor extent in order to carry out the analysis of relevant schools of thought over the years.

I would like to thank Professor Helen Wallace, Dr. Jeff Pratt, and Professor Zig Layton-Henry for their intellectual inspiration. I am also grateful to Dr. Sarah Collinson for her readiness to read and her ability to produce constructive comments on short notice. I would also like to thank Fabrice van Michel for his assistance in

updating the book. And especially to Hsuan Chou who gathered the most recent statistical data, edited and updated all the chapters.

Finally, a very special thanks for their friendship, understanding and moral support goes to my parents, my husband François, Assuntina, Roberta and Kyran who stood by me in times of stress.

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ABBREVIATIONS

ACP	African, Caribbean, and Pacific countries
ADDE	Association pour le droit des étrangers
AMU	Arab Maghreb Union
Benelux	Belgium, Netherlands, and Luxembourg
CAP	Common Agricultural Policy
CEECs	Central and East European Countries
CFSR	Czech and Slovak Federal Republic
CIS	Commonwealth of Independent States
CMEA/Comecon	Council for Mutual Economic Aid
Coreper	Committee of Permanent Representatives
CSCE	Conference on Security and Cooperation in Europe
CSCM	Conference on Security and Cooperation in the Mediterranean
DG	Director General (Commission of the European Communities)
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECAS	European Citizen Action Service
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EDF	European Development Fund
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EIB	European Investment Bank
EIS	European Information System

EMS	European Monetary System
EMU	European Monetary Union
EP	European Parliament
EPC	European Political Cooperation
EPU	European Political Union
ERDF	European Regional Development Fund
ESC	European Social Committee
ETUC	European Trade Union Confederation
EU	European Union
EUR	Euro
Euratom	European Atomic Energy Community
Europol	European Police Office
FIS	Front Islamique du Salut
FLNA	Front de Libération National Algérien
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GDR	German Democratic Republic
IGC	Intergovernmental Conference
IMF	International Monetary Fund
IMP	Integrated Mediterranean Programmes
JHA	Justice and Home Affairs
K4	Committee of Senior Officials for JHA
MED	Mediterranean
MEP	Member of the European Parliament
NGO	Non-governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Cooperation in Europe
PNA	Palestinian National Authority

QMV	Qualified Majority Voting
R&D	Research and Development
SEA	Single European Act
SEM	Single European Market
SIS	Schengen Information System
TEU	Treaty on European Union
Trevi	Terrorism, Radicalism, Extremism and International Violence
UK	United Kingdom
UN	United Nations
UNICE	Union of Industries of the European Community
US, USA	United States (of America)
WEU	West European Union
WG	Working Group
WTO	World Trade Organisation

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1. INTRODUCTION AND RESEARCH DESIGN

1. INTRODUCTION

> 'Freedom, wherever it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the borders of national territory or the walls of the city-state comprehended and protected a space in which man could move freely. Treaties of international guarantees provide an extension of this territorially bound freedom for citizens outside their own country, but even under these modern conditions the elementary coincidence of freedom and a limited space remains manifest. What is true for freedom of movement, is to a large extent, valid for freedom in general. Freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle but, again, applicable only with limitations and even within spatial limits. If we equate these spaces of freedom ... with the political realm itself, we shall be inclined to think of them as islands in a sea or as oases in a desert. This image, I believe, is suggested to us not merely by the consistency of the metaphor but by the record of history as well' (Hannah Arendt, *On Revolution*, 1963).

Questions of citizenship, nationality, democracy, immigration and rights of immigrants, poverty, discrimination, social exclusion are high on the agenda of the European Union (EU). This book is about the evolving policy process with respect to Maghrebin nationals legally residing and working in the EU, in particular Italy and Spain. It is interesting to observe the evolving situation in Italy and Spain because they are the 'receiving' countries for Maghrebin labour migrants wishing to establish themselves in the EU. Much literature has been written about flows of immigrants entering the EU; however, the position of third country nationals already residing in the EU and the related EU policy process in this complex area has not received sufficient attention. A comparison of the arising situation in the nineties and its continuation in these two countries with the previous situation of France, Belgium, Germany and Netherlands (which have been the main recipient countries of Maghrebin nationals in the past) will be carried out.

The focus of this book, as stated above, will be on Maghrebin labourers in the EU (the Maghreb region - Algeria, Tunisia and Morocco being the 'third country' in this case). The Maghrebin immigrants are chosen as the focal subject because they constitute a high percentage of immigrants residing and working presently in the EU

- about 3 million (CEC, 2000).[1] And also, as it will be explained later on in this chapter, the migration from the Maghreb region has increased again in the nineties and has sustained until now. This is due to:

a) The rise in poverty measures, unemployment and uncurbed boom in population growth increased the pressure for emigration from the Maghreb countries; and
b) The political, religious and ethnic conflicts have led to a worldwide increase in migration (especially for our purpose, in the case of Algeria) (CEC, Supplement 1/91: 25).

The status of foreigners is an issue that interests an increasing number of disciplines. Demographers, sociologists, anthropologists, philosophers, lawyers, economists, political scientists, and in general most of the social sciences disciplines are furnishing data and ideas of an increasingly complex reality. This demonstrates that the study of foreigners involves an active engagement of several disciplines. It draws on several other studies and approaches that are intrinsically interdisciplinary. This book hereby draws from the political perspective, especially from legal evidence since the emerging legislation and jurisprudence have a particularly strong impact on EU policy.

Many studies attempt to bring order to the subject from the perspective of political theory. Issues relating to migration touch the principles and the practices of liberal-democracy, where all the definitions and hence potential practice of citizenship are being questioned in relation to the variable statuses of foreigners. Bourdieu sums up the link between foreigners and citizenship in a concise manner:

> 'Il (l'immigré) oblige à repenser de fond en comble la question des fondements légitimes de la citoyenneté et de la relation entre l'Etat et la Nation ou la nationalité. Présence absente, il nous oblige à mettre en question non seulement les réactions de rejet qui, tenant l'Etat pour une expression de la Nation, se justifient en prétendant fonder la citoyenneté sur la communauté de langue et de culture (sinon de 'race'), mais aussi la 'générosité' assimilationiste qui, confiant que l'Etat, armé de l'éducation, saura produire la Nation, pourrait dissimuler au chauvinisme de l'universel' (P. Bourdieu, 1991: 9).

The study of the foreigners' status in a liberal democratic context can be used as an analytical means to understand the contents of the concentric circle that places citizenship as its centre – a notion developed in the 18th century by political thinkers. In a way the current position of foreigners in our liberal democracies is similar to those experienced by the majority during the 19th century who, in spite of being nationals, lacked the democratic rights, such as the right to vote, which we now consider basic. Today, the criterion for legitimating the exclusion of foreigners is not, as it was for the majority of the population in the 19th century, economic (they were not owners) or gender (they were not men), but nationality (Balibar, 1992; Hammar, 1989; 1992; Schnapper, 1994). The relationship, which now deserves special attention, is the link between nationality, citizenship and

1 CEC stands for Commission for the European Communities.

democracy, especially when we note the variable status of foreigners in our analysis of liberal democracy (Miller, 1995).

The aims of this book are as follow: first, to examine the relationship between democratic principles (both at EU and national level) and the status of foreigners. Second, to analyse the way in which policy-making and policy-implementation regarding third country nationals residing and working in the EU is subject to policy both at the national and at the supranational level.

For practical reasons this book is restricted to legal resident migrant workers in the EU and their families. They form an extremely large section of the total number of immigrants in the EU, but the remarks can be regarded in certain specific circumstances as being relevant to other groups as well.[2] From a legal point of view, the position of illegal immigrants is so different from that of legal immigrants that it would not be fruitful to compare their position to that of EU nationals. However, the fact that there are so many illegal immigrants adds to the contours of the policy challenges. Several Community values, which are supposedly shared in the policies of member states, will be adopted as a yardstick for assessing the position of legal resident Maghreb nationals. They are the ones that pervade the Community' s whole legal system: *free movement of persons within the Community in order to work in another member state, democracy, equal treatment, and social justice.* These four highly related principles will be the basis for assessing existing and possible social policies for Maghreb labour immigrants in the EU. The tensions arising from the relationship between democracy and the status of foreigners will be used as a means to qualitatively configure the democratic limits of evolving immigration policies in the new receiving states - Italy and Spain - and how far, in terms of what we know about these two countries, they will influence the whole EU policy.

This has to be seen in the context of efforts attempting to establish a 'Social Europe' founded on values of peace, justice and social integration, which is contested by the phenomenon of rising nationalistic, racist and xenophobic currents. It should also be noted that the implementation of certain social policies in the EU has had a double-edged effect. On the one hand, one observes that the position of the nationals of EU member states has been strengthened considerably by the recent addition of rights stemming from being a citizen of the EU. Social policy in the EU has meant mainly employment policy in the past. Nowadays social policy encompasses themes such as social inclusion/exclusion and free movement of labour in addition to employment policy. On the other hand, this emphasises the exclusion of non-EU citizens from these newly acquired rights, hence leading to the deterioration in social political rights of third country immigrants who are workers or dependants of workers.

In this book, the reader will frequently come across two key words: *immigrant* and *immigration*. The term immigrant is at times used in the broad sense of its root-

2 It is difficult to determine whether the number of legal immigrants is actually higher or lower than that of illegal immigrants as there are no precise records documented with regard to the numbers of illegal immigrants in the EU coming from the Maghreb region.

word – *migrant*, who is a person that moves from one country to another. However, the term immigrant can be used even more specifically, thus meaning 'a person who migrates to a country with the intention of taking up permanent residence'. The ways in which the term immigrant will be used in this book will be in between the definitions of *settler* and *migrant*:

- Immigrant is someone who goes to a country and resides there for more than three months - thus requiring a residence permit. However, this study shall be looking mostly at long-term residing migrants, who have been in the EU for five years or more (for legal reasons) - this is explained further on in this chapter. The decisive criterion is the actual time period a person resides in country, since those who do not intend to return anymore to their country of origin become settlers.
- Immigration denotes the actual entrance into a country by a single person or group of persons with the intention of staying there for more than three months. However, this does not imply that these persons may not decide to return to their country of origin after a period of time.

These two terms are applied in a different way in each of the EU member states, where related policies are shaped by each country' s experience and the particular national needs. For this reason, the definitions offered here might not be at times fully convergent with the definitions which some of the EU countries attribute to these terms. As T. Hammar (1992: 12) stated, 'There is an obvious relation between a country' s immigration policy and its terminology'. He also offers the following examples of different terms used for migrants in a selection of countries of immigration. In Germany and Switzerland immigrants are 'foreign workers' (*ausländische Arbeitnehmer* in Germany and *Fremdarbeiter* in Switzerland) and they are controlled by *aliens bureaux* (*Ausländerbehörde*, or in Switzerland *Fremdenpolizei*). France has always used the term *les immigrés* and *l'immigration*, Sweden also used similar terms - *invandrare* and *invandring* (in 1960s when it launched its new immigrant policy). Britain has used the term 'immigrant', especially for coloured people, and defines its immigration policy as including *race relations*,[3] whereas in the Netherlands the new policy for immigrants is called *minorities policy* (Hammar, 1992: 12). Terminology tends to influence the way in which immigration policy is conceived and understood in each country, and these terms, initially instruments of description, then became fixed concepts limiting flexibility and creativity. So the terms 'immigrant' and 'immigration' will be hereby used in strict adherence to the above definitions so that the reader has a reference point when comparisons are made between the different countries of immigration.

3 There are three categories of UK immigration policy: control over those entitled to enter the UK; those who have British nationality but living abroad; and race relations for those legally resident (both UK nationals and other races who are not UK nationals).

2. OBJECTIVES OF THE STUDY

In this book on labour immigration in the EU from the Maghreb region, the following shall be analysed:

- Some of the factors that lead to the immigration problem being dealt with as part of the home (national) affairs (concerning especially some of the Southern member states - Italy and Spain, in this case) and not dealt with at Community level;
- The extent to which legal residents in EU countries receive a treatment similar to those of EU citizens, when comparing their position along the 'continuum of citizenship rights' (Collinson, 1993b: 31)[4] of the EU with regard to social policies for migrants;
- The different policy choices open to the EU with respect to social policy for third country nationals; and
- The impact of the EU rules and policies on the changes in social policies, given the increasing number of immigrants.

Likewise, this study will observe the contribution of the EU social protection policies on immigrants' entitlements in order to evaluate their relevance for the former. There are, of course, many definitions of social protection, yet within this study, it is meant by the following:

- To ensure a decent[5] minimum standard of living which preserves human dignity; and
- To foster an economic and social integration[6] within the 'host' society.

The aim here is not to provide a blueprint for a European social policy for immigrants, but to clarify different policy choices and to analyse such a policy through the attempt to answer questions of the following type:

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4 The continuum of citizenship rights could be depicted as, 'illegal immigrants – temporary visitors – legally resident (long-term) foreigners – full EU citizens'.

5 Decent in the sense that the minimum remuneration obtained from regular employment or social benefits compares adequately to the cost of living of that particular country.

6 Social integration in the sense that these immigrants can afford a standard of living similar to the nationals of the host country, and hence avoid social exclusion due to poverty and relegation to ghettos. The term 'exclusion' is used by experts to describe the long term insecurity that has become the norm for a large part of the population, as a result of either long term unemployment, a succession of short term jobs or the need to take any part time employment that happens to be available. Two aspects of this problem require consideration, first the provision of emergency assistance, and second, the provision of assistance for reintegration. This poses the question of possible changes to the way in which people obtain the right to social security, so that people whose careers have been interrupted or halted are not unduly penalised.

- What are the policies of the EC (now EU) member states in relation to the immigrant Maghreb labour force and hence what is their impact on developments in the Maghreb?
- How compatible are these policies with the idea of positive freedom of movement of labour in a Single European Market and hence a Europe without internal borders?
- What differences prevail in the interpretation of EU approaches affecting third country nationals in the individual national policies of Italy and Spain, respectively, towards labour immigrants from the Maghreb?
- What kind of protection is being offered to the immigrant workers to safeguard their rights within the EU member states and hence avoid ethnic tension?
- What are the implications for the EU in regards to the plans that deal with immigration problem under the first, Community pillar, as opposed to confining it as part of the third pillar?
- What are the main obstacles to convergence of the national social policies for legally residing labour immigrants into a single integrated EU policy administered at Community level, is there an alternative to convergence, which can still bring about co-operation in immigration policy process?
- What are the policy implications, of acceptance of entry and extension of residence permits with respect to third country nationals, for EU countries *vis-à-vis* the regimes of the countries of origin (opposition groups, religious rights, cross-border influences, etc.)?

There have been various documents and related literature produced in recent years about the values of Europe and with respect to immigrants [this literature generally defines Europe as the EU (previously known as the EC) even though this is an imprecise equation]. One such document is entitled 'European Community and Human Rights':

> 'The construction of Europe is not solely a matter of economics. Beyond the pragmatism of the Community's common policies - the fruits of history, necessity and will - human rights and fundamental freedoms are part of the common heritage of Europeans' (Commission of the EC, 1989a: 10).

The study is centred more at the vertical level (the relationship between foreigners and policy-makers at both national and supranational level), and not heavily at the horizontal levels (the relationship among foreigners themselves, or between foreigners and citizens). This latter aspect will also be mentioned, because the horizontal relationship can bear serious implications for the vertical *rapport* and also, *vice versa*.

This chapter will commence with an overview of policy initiatives that have affected the position of the third country nationals residing and working on EU territory. Afterwards, it will go more in depth into the more influential policies and agreements - with respect to the status of foreign workers. This chapter will analyse the evolution of the relationship between the position of third country nationals and the EU as a supranational structure and the individual EU member states. The Treaty

of Rome already had some provisions for free movement of workers and equal treatment. However, the distinction between the position of EU nationals and third country nationals was not made clear in the main text. The differentiation emerged in protocols attached to the Treaty of Rome and afterwards, especially since the Single European Act, in the Schengen Conventions, the Treaty on European Union (TEU) and the Third Pillar, until the signing at Amsterdam – on 2 October 1997. The changes introduced by the Amsterdam Treaty and the new developments after the Tampere European Council (1999) will be noted. This Chapter will present the evolution of events with respect to how third country nationals have been affected, in order of importance, rather than in a strict chronological order.

3. THE EVOLUTION OF EU POLICY TOWARDS THIRD COUNTRY NATIONALS

In the 1960s there was a substantial increase in the range of policy-making within the European Community. However, areas like immigration, along with other social policy areas such as health and social welfare, remained less developed, despite their bearing on the functioning of the Community's internal market. Accordingly, one can say, 'the very construction of immigration as a weak *formal* policy area can be seen as indicative of the emerging mode of European polity' (Soysal, 1993: 171).

The founding fathers of the Treaty of Rome of 1957, while emphasising that the main objective of this treaty was to implement a customs union, also included in its preamble a statement which presented some social objectives, regarded by some commentators as being: '... absolutely predominant, like the lighthouse guiding the efforts of the economic and political union' (Rifflet, 1985: 19). The social objectives according to the Treaty of Rome included 'an ever closer union among the peoples of Europe'[7] with regard to both economic and social standards.

Alongside the European Community, the Council of Europe included activities designed to develop concepts of human and social rights. Established in 1949, the Council of Europe[8] also played an important role in promoting the social dimension

7 Europe in this case implies the member states of the EEC which was still to become the EC and now, finally the EU. The 15 EU member states are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

8 The Council of Europe is made up of 43 member states but so far the Council of Europe lacks the legal dimension which makes declarations of the EC (now EU) Treaties more enforceable. The member states are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino,

of Europe. The European Convention on Human Rights and Fundamental Freedoms was produced in 1950, to be supervised by the European Court of Human Rights.[9] In 1961, the European Social Charter (also produced by the Council of Europe) was to extend the field of human rights to the broader context of social, economic, and cultural rights. This aimed to give a more positive meaning to the term 'rights'. Whereas before the notion of rights was related to freedom from state interference, it is now more on the lines of a relationship based on reciprocity between the state and the individuals residing in the signatory states. Hence the idea of universal social protection evolved in individual west European countries, alongside the lines of, for example, the British Beveridge Report.[10] Various texts (Dupeyroux, 1966; Spitaels and Klaric, 1968) attribute the enlargement of the social protection concept after the Second World War to British influence. The Beveridge report was believed to represent the ideas of universality, citizenship, and the welfare state. These ideas lie at the root of various terms used in the language of social policy (Apap, 1994: 14).

At this point it is also worth stressing that, as in 1789, when the representatives of the people in France laid down their demands, in 1989 it was the European Parliament, the representative organ of the Community, which has put forth a 'Declaration of Fundamental Rights and Freedoms',[11] designed to operate in the *field of application of Community law*. It has been the European Parliament that has continually stressed the importance of a 'Community Human Rights Policy' stating that it:

> '...believes that while there is no clearly defined Community human rights policy as such, a basis for such a policy has begun to emerge and that there is an increasing awareness that concern for human rights is one of the elements which binds the Community together and gives it its particular identity vis-à-vis third countries or group of countries.'[12]

This declaration has no real legal effect; however, many view it as a first step towards a Community Bill of Rights, which eventually solidify a decade later as the

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Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom.

9 The aim of this convention was to free citizens from state interference and called for the respect of privacy – an understandable move following the abolishment of fascism.

10 Social protection encompasses within its parameters the right to: form a trade union, health care, education and vocational training, social security and social assistance. The right for this type of social protection is to include also migrant workers and their families as stated. One must note here that any claims to social protection did not make the claimant a second-class citizen in any way as in the case of charity and the Poor Law. Social Protection was to be perceived as a right and placed the signatory states under an obligation to provide such an aid.

11 Adopted 12 April 1989 OJ C 120/52, 16 May 1989.

12 See Human Rights in the World for the Year 1985/86 and Community Policy on Human Rights resolution of 12 March 1987, paragraph 11.

Charter of Fundamental Rights of the European Union. After 1984, Jacques Delors (president of the Commission of the European Community 1984-1994) actively promoted the social dimension, arguing in his preface to the Cecchini Report (1988: xi) that the single market:

> '... has a social as well as an economic dimension, and must lead to a more unified Community. The twelve member states have rightly decided that it should be accompanied by policies that will lead to greater unity as well as more prosperity.'

Yet due to the current climate of high unemployment with increased competition for jobs and for public provision of social services, policy-makers face a real dilemma: (1) how to tighten borders to control further influx of illegal and potential migrants. And (2) how to simultaneously deal with those third country nationals already in the EU as legal residents. The member states, especially the main receiving states, remain on the defensive with respect to immigration. There has been a trend to establish policies that control and regulate immigration; hence, the term immigration policy in the European Community became synonymous with immigration restriction and control. The emphasis was placed on 'putting right the mistakes of the past: to integrate those immigrants who had settled and to begin closing doors to any further immigration, especially from outside Europe' (Collinson, 1993b: 37) Unemployment did not inhibit moves to liberalise controls on the movement of persons within the European Community (partly because of low take up of mobility by EU nationals). 'While economic and political concerns seemed to be calling for the closing-off of some migration channels, they were simultaneously motivating an expansion of others.'[13] The Single European Act (SEA), which was ratified in 1987, introduced a new article which was to be included in the Treaty of Rome - the Article 14, ex Article 7a. Article 14 of the EEC Treaty states mainly that:

> 'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.... 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.'

This article advocated that an internal market without 'internal frontiers' be established by 31 December 1992, thus allowing the provisions already established in the Treaty of Rome for free movement of *goods, persons, services and capital* to come into effect. However, the freedom of movement of persons in this case came to be interpreted as applicable to EC (now EU) citizens only. On the other hand, this implied that the member states would need to establish collectively the external borders for the whole Community. The need for greater co-operation between the member states as regards to the immigration of third country nationals was expressed in a declaration accompanying the SEA:

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13 Idem., p. 37

> 'In order to promote the free movement of persons, the member states shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, nationals and movement of third countries.'[14]

The rights of long-term migrants vary between European countries, depending upon the host country's general policy towards immigrants, whether the migrant has 'privileged alien' status (maybe due to past colonial links) or not, and even upon the particular legal system of the host country - this will be elaborated further in subsequent chapters. Hence, it was impossible to the then EC to make a general statement about migrants' rights. Control over the admission and welfare of *aliens* within the member states of the EC/EU had been viewed as within the core domain of national sovereignty. In this book the hypothesis that *the capability of national policy for controlling immigration at national borders is quite weakened, especially due to the dismantling of internal barriers in the Single European Market and the prospects of eastern Enlargement, hence the pressures are increasing for more policies at Community level* will be tested.

The existence of different policy regimes leads to tensions between supranational (EU) interests and national interests, and the controversies remained, if not fuelled, after the increasing volume of policies being produced in Justice and Home Affairs. Indeed, the current circumstances of eastern Enlargement and event post 11 September 2001 are pushing the European governments towards further co-operation in this domain.

4. THE MEDITERRANEAN CHALLENGE

The 'Mediterranean' has become somewhat of a geographical label since politically, economically and culturally speaking – to take into consideration three areas as examples – the differences between the north, east and south of the sea have become quite large. There are two distinct blocs: the EU countries, on one side, and the Arab countries of the Mediterranean on the other. Some countries fit into neither bloc – the Balkans, Cyprus, Israel, Malta and Turkey (Council of Europe, 1995: 10).

In addition to the North-South division, the Mediterranean countries also differ greatly in size, economic structure and resources. They have, furthermore, followed different growth and development strategies over the last thirty-five years or so. On the other hand, even though these countries show disparate economic, political and cultural characteristics, some of them at the same time, share similar problems and prospects due to geographical proximity and cultural heritage. Due to past colonial links and a history of immigration as well as a number of other policy considerations (drugs, organised crime, external security, etc.) some of the individual member states of the Community have established agreements with the Maghreb countries

14 Political Declaration by the Governments of the Member States on the free movement of Persons - attached to the SEA.

and are promoting EU-Maghreb dialogue. Today, economic and political ties, more than historical ones, link many of the non-EU Mediterranean countries to the EU. Bilateral agreements especially with France and Belgium have existed since the early seventies and EEC Co-operation agreements with Morocco, Algeria and Tunisia followed suit in 1978.

A novel aspect, which emerged in international migration during the 1980s, was the transformation of Southern European countries from sending to becoming the receiving countries. The underlying reason behind this change may be attributed to the concomitant action of three different factors: the economic growth in Southern Europe, the stop policies in Central-North Europe, and the marked increase in push factors almost everywhere throughout the Third World. Irrespective of the different contribution of each factor, this radical turnaround called for a complete reform of the tools used to collect information, and the analysis, interpretation and policies are introduced to address this phenomenon.

This process has been particularly marked in Spain and Italy.[15] When the first immigration flows took place during this century (as will be explained more in detail in Chapters 5 and 6), statistics were geared to measure outgoing migration, and were totally unprepared to determine the size of incoming flows and of foreign communities already in the country. Migration studies concentrated on issues related to emigration *from* as opposed *to* Southern Europe and the world of research, at least initially, was not yet ready to analyse and interpret a phenomenon which, moreover, was quite different compared with migration flows in the 1950s and 1960s. Legislation procedures referred to the foreigner as 'tourist' rather than 'immigrant worker'. Thus an effort has been made, particularly in the last years, to gather statistics which were more suited to this new situation and which analyse more precisely and in greater detail immigration and its implications as well as furnish appropriate legislation which could better cope with the new problems involved.

The study of this process of change and the implications involved go beyond the specific instance of Italy or Spain as such as they are, from many aspects, emblematic of more recent features of international migration. Indeed, looking at Europe, the break between migrations during the 1950s and 1960s and latter day migration is quite obvious. The predominance of push over pull factors, the limited capacity of the labour markets of the receiving countries and increased migration for political reasons are all elements which, interacting with the migration dynamics over the last years, are greatly responsible for this break with the past. New

15 There were similar processes taking place in Italy and Spain in the late 1980s. However, as one can see from the next chapters, there were also differences between the emerging situation of the two countries with respect to, for example: the numbers of migrants present, their geographical and sectoral distribution in the host country, resulting policies, etc. For these reasons, the representation of the data will at times differ in the next two chapters and direct parallelisms cannot always be drawn because some processes taking place in the one do not occur in the other. This will become more evident as the reader progresses through the next two chapters.

immigration flows are only partly absorbed in the hidden economy of the receiving countries and in sectors and jobs where the distinction between legal and illegal is minimal. This encourages the social marginalisation of the immigrant as well as compromising their integration with the receiving society, not to mention the ethnic, cultural and religious divide, which often separates the immigrant from the local population.

In countries which have a tradition of immigration, these new aspects are not so visible given the effects of the greater problems caused by immigration in preceding decades and where well-established and rooted foreign communities already exist. Indeed, Southern Europe and Central-Northern Europe are going through two different stages of the migratory cycle: the former is currently experiencing the arrival of immigrants and the settling-in of the first foreign community and the latter their consolidation and integration (or the lack thereof) within the local community. However, given the different contexts wherein immigration takes place today, in contrast to the past, the experience gained by the latter countries is not always of use to those that have only recently become receiving countries. This occurs at a time too when a wave of restrictive policies are sweeping across Europe, and when there are urgent calls for a European response capable of tackling the underlying causes of this phenomenon.

Today, the term South-North migration has an extremely precise meaning, the global migration from underdeveloped countries to the more prosperous areas of the globe. In the global *scenario* of South-North migrations, Western Europe is probably the most outstanding case. The reason that has been stated on various occasions in earlier works is evident: the contrast between the socio-economic development of Western Europe and that of North Africa or Eastern Europe is quite dramatic because of their proximity. Nowadays the emigration factors outweigh those of immigration, especially in the case of the migrations through the Mediterranean (Golini et al in Bodega, 1995: 800-801).

The 1985 Schengen agreement between Benelux, France and Germany - to which Italy, Portugal, Spain and others were later incorporated - defines a single border with respect to other countries, abolishes internal borders, and establishes the technical means of achieving this, as well as a system of information and of mutual judicial assistance. The implementation of this agreement has provoked many criticisms, since in the background are two serious contradictions: on the one hand, that of a 'strainer' Europe which opens itself up to all the migratory currents; on the other hand, that of a 'fortress' Europe which erects a wall to the 'South' - to the South and another one to the East (Golini et al in Bodega, 1995: 801). However, even though all EU member states are in favour of restricting immigration, the most prominent receiving countries (Germany,[16] France, Luxembourg, Spain and Italy) nevertheless want to keep the door open for a policy of labour immigration. Through

16 For example, IT specialists from India were especially welcome under the Schröder government.

arrangements like short-term contracts, quotas, and 'green cards' etc., these governments hope to keep some flexibility in relation to the needs of the labour market, while at the same time retaining a restrictive general immigration policy (Daniele in Brochmann, 1996: 143). So, one can state at this point that with respect to the labour markets of these member states, having *no clearly defined policy* IS *their policy* so that it makes allowances for any flexible adaptations which they need to do according to necessity.

The problem of South-North migrations has an important political component and the North either institutes changes in the power structure or will be forced to accept them in the very near future. An economic take-off in the South, or at least in part of the South, will greatly alleviate the current situation. To do this, it is necessary to invest in those countries - enacting simultaneous institutions or projects, which control and verify where the investment is actually going - and to find a realistic, yet appropriate, solution to their current debt. In the meantime, one has to facilitate the integration of immigrants, although many may return to their country of origin after a couple of years.

The impact of immigration in South Europe must be assessed by taking into account both the novel aspects involved, and the interplay between the national and European contexts. This dual reading of the situation is necessary to come to grips with the phenomenon and, in this case, to fully assess what is, for all intents and purposes, a work in progress whereby the questions far outweigh the answers.

In the late 1980s, due to the upheavals in Eastern Europe, the question of EU-Maghreb relations, including immigration from the Maghreb region, was somewhat put aside at Community level, and resumed only in late 1991. On 25 June 1989, the Economic and Social Committee of the European Community issued a statement intended to serve as the basis for an extension of the Mediterranean policy, arguing that the new dimension of the geo-political situation, the globalisation of the economy, the increasing imbalances between North and South and the completion of the Single Market demand a redefinition of the role of the Community on both the political and economic world stage,[17] but nothing resulted. The revolutionary upheavals of autumn 1989 commanded Western Europe's whole attention. In May 1990, the Economic and Social Committee emphasised that an accentuation of the economic and social imbalance between the Community and Mediterranean third countries[18] would be unacceptable. Stability and economic equilibrium in the Mediterranean were in the EC's (EU) interest and had direct implications on the security of the Community. The then Spanish Foreign Minister Ordonez, in 1991,

17 Stellungnahme des Wirtschafts - und Sozialausschusses der Europäischen Gemeinschaft zum Thema 'Die Mittelmeerpolitik', CES (89) 835 12.7.1989, S.12 (Opinion of the Economic and Social Committee on the European Community's Mediterranean Policy).

18 Ergänzende Stellungnahme des Wirschafts - und Sozialausschusses zu dem Thema 'Die Mittelmeerpolitik der Europäischen Gemeinschaft' CES (90) 512, 2.5.1990. S.3 (Supplementary opinion of the Economic and Social Committee on the European Community's Mediterranean Policy).

submitted a report to EC (now EU) on 'Europe and Maghreb', which showed that the EC had a clearly insufficient programme for the key region of the Mediterranean. Yet it was not until the end of November 1991 that the Council did empower the Commission to negotiate with the Maghreb countries Algeria, Morocco and Tunisia concerning a new protocol. These negotiations concern structural support policies, fisheries, agricultural agreements, etc. However, Spanish pressure for an overall European Mediterranean concept included another question: migration movements. Like Italy, a great migration pressure, which C. Nigoul has described as a 'Socio-cultural earthquake', affects the Iberian Peninsula (Nigoul, 1993: 377).

The EU officials have repeatedly considered a possible Mediterranean policy - including the Maghreb region. However, internal EU conflicts have shifted the focus of the EU to other affairs that the Community had to deal with. Association agreements with the countries of the Arab-Maghreb Union have existed for a long time, but the debate nowadays seems to be focused on Euro-Mediterranean interdependence, notably in environment, energy, trade, investment, security and migration issues. The EU has accepted that it has a vital interest in helping Mediterranean countries to meet the challenges they face. The objective is to work towards an Euro-Mediterranean Partnership. This would start with a process of progressive establishment of free trade supported by financial aid. It would then develop through closer political and economic co-operation towards a closer association, the content of which will be jointly defined at a later stage. However, without political resolve and further legal arrangements, this concept will not prove to become a milestone. The existing imbalances, trade deficit, different standards of living, problems accentuated by the population explosion[19] as well as loss of roots and unemployment, pressure from Islamic fundamentalists are sources of the social unrest being exported to Western Europe through continuous migration. Unfortunately, social problems in the poorly prepared host countries are legionary. Integration and/or especially assimilation[20] do not occur because the immigrants equate it with giving up their cultural identity. The preservation of their home traditions and of Islam is identity forming and leads to deliberate dissociation. In the labour market of their host countries, the immigrants often repeat the experience of being treated as inferiors.

Awareness of the need for a more concrete policy towards the Maghreb is strongest in that part of Europe where there is a history of relations with the Maghreb states and where the problem is felt most directly - France, Spain and Italy. How this manifests itself will be addressed later in this book. These countries are the

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19 According to United Nations calculations, by the year 2025, there will be 131 million people in Morocco, Algeria and Tunisia, in the region with a present population of sixty million. Every year the birth rate in the Maghreb rises by 3%.

20 These terms will be explained in greater detail in the next sub-section of this chapter.

most affected due to their geographical proximity, economic relations (trade relations or divergence of the respective labour markets), cultural closeness, privileged political relations due to past colonial ties, language reasons and also apparently for the 'potential of return migration'. This latter factor seems also to be one of the main criteria affecting mobility rate (CEC, 1994: 80).

The principal concern regarding migration into Europe centres around three main issues: external migration pressure, immigration control, and immigration integration. Hence in three policy areas, the Commission agreed that current and future joint approaches are necessary towards immigration to the EU:

- Taking action on migration pressure by making migration-control an integral element of Community external policy;
- Controlling migration flows through harmonised monitoring, measures to combat illegal immigration, approximation of criteria for reuniting families; and
- Strengthening integration policies for the benefit of legal immigrants (CEC, 1994).

The Commission of the European Union, in one of its communications to the Council and the European Parliament, stated that:

> 'The inauguration within the European Community of the free movement of persons on 31 December 1992 and the abolition of internal frontiers ... could entail a risk that the absence of checks at internal borders will render any control of immigration impossible ... This has led the Member states to recognise the need for a common approach ... and to discuss ways in which they can co-operate. The interdependence of various national situations, taken together with the permeability of borders, requires joint action, if only on the grounds of efficiency' (CEC, SEC Report, 1991: 8).

However a concerted type of action cannot proceed automatically due to the diversity of the member states. There are various arguments, pros and cons in equal numbers, with regard to the extent in which national policy objectives should be integrated. Yet the school of thought which has established the pace and structure of integration of Western Europe was dominated by the view that matters dealing with third country nationals are matters related to sovereignty matters and hence administered mainly by the national governments of the EU member states. One of the views held is that the development of the EU is fundamental to the 'European rescue of the nation-state' (Milward, 1992). Milward views the EU as 'an international framework constructed by the nation-state for the completion of its own domestic policy objectives' (Milward, 1992: 182). This viewpoint would explain why policy harmonisation in areas such as immigration has not been a straightforward procedure, given the large variations in national contexts and approaches as well as the sovereignty features that define citizenship. However, the neofunctionalist school of thought might suggest that the stimulus for a concerted action might emerge as a consequence of the Single Market and a European political and economic union. Problems like secondary movements of migrants out of an initial country of immigration, and/or changes taking place in labour-market conditions as a result of indirect impact caused by alterations in immigration

patterns, seem inevitable. This situation has both economic and political consequences, the latter including the possible reinforcement of xenophobic attitudes. Thus, a number of pressures for a joint EU approach have accumulated.

As long as disparities between the levels of industrialisation and employment and earning prospects in the receiving and sending countries prevail, the pressures for migration from the less developed countries are likely to persist. Indeed these grew in the nineties and continue to grow today. Böhning called this the 'self-feeding process of migration' (Böhning, 1990: 79). This self-feeding immigration is engendered by two factors. At the initial phases of the immigration process, the foreign workers take on jobs that are unattractive to nationals. After a certain period, they then obtain jobs that indigenous workers leave for status or prestige reasons. As it is easy to get foreign workers, more newcomers replace their predecessors in the jobs that the latter now find 'socially undesirable'. For nationals, therefore, the employment of foreigners may afford them greater vertical mobility.

On the other hand, another cause of self-feeding immigration is that foreign workers tend to bring their families, friends and acquaintances into the country. A migration push will continue to exist as long as there are enormous wage and employment opportunity disparities between the receiving country and the country of origin. This cannot in principle be excluded even for a saturated labour market, as evidenced by the influx of emigrants from the Maghreb region into the EU, which suggest that migration pressures will persist. If the EU countries closed down their frontiers, this might create a boomerang effect by provoking an upsurge of illegal immigrants, (crucial issue for the current policy process in the EU).

The Euro-Maghreb agreements (see Chapter 3) aim to step-up trade relations as part of their main objectives. Classical foreign trade theory states that, if the prosperity gap is diminished, this will eventually deter migration. This could be envisaged up to a point in the case of the Maghreb countries, although sectoral or qualification-linked labour strategies in the EU may continue to attract immigrants and the enormous increase in population of working age and corresponding unemployment in the Maghreb region are major factors. One cannot expect that these people will wait until foreign investment and trade are stepped up following the implementation of agreements between the two regions. Markusen (1983) argues that, the more commodity trade is based on the relative factor endowment differences that prevail, differences in returns of scale, imperfect competition, differences in production and factor taxes, and different production technology, the more probable it is that international trade and international labour migration would be complements rather than substitutes. Many people point to this phenomenon in the USA - Latin American situation. When third country nationals, whose economy is underdeveloped, see an inflow of wealth in the form of aid and/or trade coming from a richer region like the EU or the USA, the reaction tends to be that they go to the donating region instead of staying in their own country, with the ambition to get themselves and their families rich quickly. As Francois Heisbourg (1991: 35) asked: will the Maghreb become Europe's Mexico? Such a development could enforce racist and nationalistic attitudes articulated by right-wing groups throughout the EU

and evident in the electoral terminology of some political parties. It could extol extreme anti-immigrant policies.

Giuseppe Sciortino (1991) argued further that there is no evidence that the position of migrant workers already settled in receiving countries improves when those countries' border controls are increased. His view is that, strict controls are often associated with undermining the position of existing minorities. Moreover, the author points out that amnesties for irregular migrant workers have limited effects - this could be observed from the effect of the infamous patrial clause in 1971 Immigration Act in Britain. The conferment of labels on certain groups of immigrants such as ineligibility for residence, combined with restrictive definitions of belonging culled from the meanings attributed to 'nationhood' and 'race', may indeed serve to generate division and social discord.

Furthermore, as the Danish researcher Jan Hjarnø (1991) points out, certain migrants, due to economic constraints as a result of being paid very low wages, come to depend on welfare in the 'host' country in order to afford housing and the cost of living of that particular country. The danger is ever present that less generous welfare will be legitimised by reference to the needs and demands of marginalised minorities. For example, in Italy, under the first Berlusconi government, social security benefits were to be funded mainly by the taxes that national workers pay to the government, thus questions of citizenship, nationality and eligibility to social benefits would definitely arise especially if Italian nationals found that their taxes were also being used to finance the social security benefits of immigrants. For all these reasons ethnic tension and waves of xenophobia against 'immigrants' are high on the agenda of social concern throughout the fifteen member states of the EU, especially given the levels of unemployment within the EU.

The increasingly restrictive policies of the Northwest European countries, in their efforts to control migration flows, have a large impact on the Southern member states, because they lose their function as country of transit for the migrants from the Maghreb region. In the long run, the 'waiting rooms' are converted into a 'terminus'. We can observe that the Southern countries have started to suffer economically and politically due to the new burden of migration, especially from the Maghreb region. Moreover, immigration from these countries is not only a burden for the administrative capacity of the Southern member countries (i.e. 'regularisation policy'); but it also contributes to the overstraining of social infrastructure - already overstrained by rapid structural changes. Poverty, lack of housing, lack of education and medical care favours the occurrence of criminality and racist/ethnic tensions. These factors can be expected to have an impact on the social stability in the Southern member countries. Hence, it is a major concern of this study to explore ways in which the Southern EU countries have responded and affected by this reconfiguration of EU immigration patterns.

5. THE IMPACT OF EUROPEAN LAW ON THE INTEGRATION OF THIRD COUNTRY NATIONALS

The impact of EU rules and legislation on third-country-national factor stems from long established provisions of Community law. The Rome Treaty applied to nationals of EU member states, leaving the definition of nationality and the status of third country migrants to individual national laws. Nonetheless, EU provisions tend to affect the status of third country nationals and with increasing concerns about migration in general, these two sets of issues here cannot be dealt with separately. This concern has been expressed, as mentioned beforehand, by all the various institutions of the EU, but, due to the fact that it is such a highly sensitive matter consisting of complex legal issues, it has remained an area under state sovereignty in accordance with the principle of subsidiarity. At this point it seems relevant to explain the principle of subsidiarity and a valuable description has been offered by Cassese, Clapham and Weiler (1991: 6): 'The Community cannot offer a panacea for all the social and economic problems of Europe; this is equally true in the field of human rights'. Consequently, respecting the principle of subsidiarity, the EU concentrates on areas where the Community is clearly better placed than the member states. However, it is difficult to reconcile this view with the needs of the Single Market and this can be clearly seen in the debates about the possibility of a transfer of member state authorities to the Community.

The position of permanently resident legal immigrants of the Community, which is both formally and materially weak and unequal, is reflected in the much-debated issue on whether or not the free movement of persons pursuant to EC Treaty[21] can, or indeed should, be granted to them. This matter is rightly linked to the issue of integration in their host societies and the meaning attributed to the term 'integration' also tends to vary between the different member states. After all, integration could be a means of removing inequality between various population groups. Not allowing freedom of movement is one way of ratifying the inequality factor. There is clearly a realism here as to whether depriving legally and permanently[22] residing nationals of third states of free movement within the Community corresponds with the fundamental principles of the Community as well as the idea of justice, which can be distilled from the Community principles and policies.

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21 Refer to a review of the Court's case law by Willy Alexander (1992) – 'Free movement of Non-EC Nationals' in ibid., p. 53.

22 It is not necessary to adopt a yardstick in terms of a minimum number of years as is done in the Council of Europe: See Council of Europe, Parliamentary Assembly, Report on the right of permanent residence for migrant workers and members of their families. Doc. 5904: for example, would also be possible to adopt the period imposed by the various national rules in respect of permanent residence.

When one states the term 'integration' one assumes that it is meant to be a process through which the indigenous population and the minority settled in the same place gradually intermingle and move towards equality on the socio-economic, cultural and political levels, becoming a single population unit (with its own cultural traits, of which language is a fundamental component) that shares the same identity but differs from other population, units or groups (Solé, 1981; 1988). This concept of integration differs from that of assimilation, which implies the cultural, social and political subordination of one group to the other - which Solé (1988) describes as 'the melting pot idea'. This implies the partial or total loss of immigrants' identity as they merge with the majority group. A receiving society can, however, develop selective mechanisms vis-à-vis the immigrants, foreigners or otherwise, who settle there. Potential intra- and inter- class conflicts are aggravated by the introduction of ethnic discrimination which limits the opportunities open to certain immigrants, regardless of how well their education and experience compare with those of the local population (more concrete discussion of these definitions will take place in Chapters 5 and 6 which deal with the empirical findings of this research).

The position of non-EU nationals who are residing within the EU gives rise to tension and leads to further restrictions on freedom of movement. The tightening of external border controls certainly does not alleviate feelings of racism and xenophobia projected towards these 'alien' residents. Granting more powers to EU institutions or making use of intergovernmental provisions to bring about a greater convergence in the related provisions might offer a possibility to finding solutions. This latter approach has been firstly adopted as can be seen from the Schengen (and Dublin) convention. Of course one must note that simple intergovernmental conventions shut out institutions such as the European Parliament and the Court of Justice, thereby international conventions are not part of the scope of the EEC Treaty and their legitimacy. It is therefore doubtful whether uniform implementation of the regulations and legal protection against their application can be assured. Nevertheless, the TEU contains the possibility of establishing the Court's jurisdiction to interpret provisions of intergovernmental conventions with regard to entry and movement of nationals of third countries on the territory of member states, and their conditions of residence including family reunion and access to employment.[23] Of course it is important to note that the transfer of the movement issues into the Community Pillar grants the European Court of Justice (ECJ) some jurisdiction to interpret these policies, when it is brought to the Court. Maybe a solution, which has been proposed by researchers like Thomas Hoogenboom, could be found in granting dual nationality to nationals of non-member countries (Hoogenboom, 1992: 38).

The internal market has brought about a removal of internal borders within the EU, hence allowing EU nationals to move freely within the Community without being subject to border controls, to thus take up employment in another member

23 Article 35, ex Article K.7 of TEU.

state. However, it is not clear that this freedom is also or not extended to legal resident from a third country. This freedom depends on the attitude of the member states involved towards these third country nationals and their interpretation of the social rights that these immigrants can possess within their territory. Barriers to this movement (this is actually quite contradictory to the idea of removal of internal borders in the internal market) or internal policing of migrants' movements within the Community only help to reinforce the inferiority of status of these third country nationals.

5.1 The Schengen Model[24]

The Schengen agreement provided one model of co-operation. It envisaged the gradual abolition of controls at the common frontiers of France, Germany, and the Benelux countries as from 1985. The original aim was to simplify border controls with respect to the movement of persons and goods between the aforementioned countries. However, a key objective of this agreement then became the achievement of a swifter progress in implementing Article 14 of the EC Treaty than was being made by the European Community as a whole.

Accordingly, Schengen covers a wide range of issues related to cross-border movements - including the entry of asylum-seekers and illegal immigrants. Since April 2002, Schengen has been put into practice by fourteen states: Germany, Belgium, Luxembourg, Netherlands, Portugal, Spain, Italy, Austria, France, Greece, Sweden, Finland, Norway and Iceland. And France has suppressed internal border checks at its frontiers with Germany and Spain, but not fully at its borders with Belgium and Luxembourg, blaming the 'lax' attitude of the Dutch authorities with respect to 'soft drugs'. France claims that checks are still essential to combat 'drug tourism', referring to those who supposedly go shopping for drugs in the Netherlands. The Schengen now has also an external border next to Russia.

The idea of abolition of internal frontiers proved to be a complex process, especially with regard to the implementation of controls and the activity of freedom of movement of persons. This initiative has been the topic of many debates. The Commission and other EU member states have viewed it positively as a 'pilot study' - a kind of laboratory experiment for developments that might eventually take place within the whole EU. However, some EU member states have been reluctant to accept the full jurisdiction of the Community in matters which are close to the core of national sovereignty, and of course, Britain and Ireland chose to remain outside Schengen.

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24 There are also other policy regimes like the Scandinavian Model and the Liberal (UK) model re-immigration, but this study chose to focus on Schengen as it is the model which almost all of the EU member states, including Italy and Spain, have adopted as an approach to co-operation on immigration policies.

Schengen served as a model for the Draft Convention on the Crossing of External Borders drawn up by the Ad Hoc Group on Immigration (set up in 1986, and brings together officials responsible for law enforcement)[25] and the 1989 recommendations of the Group of Co-ordinators (set up in 1988) - the Palma Document.[26] These two latter groups (including the Trevi Group[27] and the European Political Co-operation – which was to include police co-operation) were established by the European Council to speed up work to meet the 1992 deadline and to ensure coherence among the different bodies (Collinson, 1993a: 39). This reflected the high degree of inter-group influence and consultation that characterised the whole intergovernmental process (Collinson, 1993a: 39). The Maastricht Treaty further institutionalised the intergovernmental method, which seemed to have only limited provision for the transfer of competence in immigration matters to the Community through Article 100c (Article 100c has been repealed, consider Article 95). The provision on common visa policy and all matters related to co-operation between member states in the area of migration are found under the third pillar of the TEU under Title VI 'Co-operation in the Fields of Justice and Home Affairs', more precisely in part 3 of Article 29 (ex Article K1). Immigration policy and policy regarding national of third countries:

- Conditions of entry and movement by nationals of third countries on the territory of member states,

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25 This Convention on the Crossing of External Borders is one of the two principal Community instruments associated with the creation of the internal market that explicitly address migration policy. The second was the Convention Determining the State Responsible for Examining Applications for Asylum - the Dublin Convention. The Dublin Convention came into force on 1 September 1997, seven years after it was signed, in order to prevent multiple asylum applications in the member states of the EU and to regulate which country was responsible for determining any claim. Apart from determining the state responsible for the claim, the Convention's other main provisions are to deal with information exchange. States are expected to regularly exchange general information about refugee numbers, flows and routes of entry as well as on conditions and the human rights situation in the countries of origin. This is then stored into the Schengen Information System (SIS), which allows the member states to access the provided information.

26 The Palma Document was issued by the European Council in 1989 and it focused on lists of problems to be solved if the free movement of persons in the Community was to be achieved

27 The formation of the Trevi Group in 1975 enabled officials and ministers from the interior and justice ministers of EC member states to concentrate upon issues demanding co-operation between governments and enforcement agencies dealing with internal security and criminal activities. The decision of the Council to set up an ad hoc Working Group on Immigration (WGI) in 1986 grew out of the work of the European Political Co-operation, the Trevi Group, and the increasing acknowledgement that the creation of the Single European Market would throw up immigration issues which ministers and their officials had to resolve intergovernmentally.

- Residence conditions of third country nationals on the territory of member states, including family reunion and access to employment;
- Combating unauthorised immigration, residence and work by nationals of third countries on the territory of member states.

According to the Schengen agreements which came into force on 26 March 1995, 'aliens' with visas may move freely within the Schengen[28] area for a period of three months, whereby it is not supposed that these 'aliens' will stay three months in each of the Schengen countries. Article 22 of the 1990 Schengen Convention provides for another restriction. Nationals of third countries who enter a Schengen country are to report to the appropriate authorities on, or within, three days of entry into that country. This means that internal controls of a different kind persist. Moreover, if these restrictions were to be extended across the EU, this might imply the possibility of a risk of corruption of Community principles of freedom of movement especially for residents of third country origin.

Schengen was criticised, because on the one hand the signatory states remained protective towards their national sovereignty in these matters, and on the other hand the interests and concerns of individual member states have not entirely coincided at times with the Schengen initiatives. Another main criticism has been that inter-group influence has not been matched by dialogue with national parliaments or non-governmental bodies and hence, the Ad Hoc Group, Schengen and Trevi Groups have been accused of a lack of transparency in their negotiation process.

6. THE EU AND EUROPEAN CITIZENSHIP

Moreover, the development of the EU has also renewed interest in the concept of European citizenship. Much literature has focused on legal assessments of Union citizenship, which sheds light on the limitations of the current understanding of what is meant by EU citizenship. In identifying limitations and restrictions in Union citizenship, legal approaches have often adopted a minimalist perspective on citizenship. Elizabeth Meehan states that:

> 'a new kind of citizenship is emerging that is neither national nor cosmopolitan but that is multiple in the sense that the identities, rights and obligations associated [...] with citizenship, are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions and alliances of regions' (Meehan 1993: 1).

If this notion were to leave the realm of European rhetoric and were, according to the Treaty on European Union,[29] transformed into a legal status, it would emphasise

28 Refer to Chapter 4 for more details.

29 See Article 17 in which the Citizenship of the Union is established and see also the Commission of the European Communities, 'First Contributions of the Commission to the Intergovernmental Conferences on Political Union' SEC (91) 500, as partly reproduced in

the fact that there are two main sorts of persons living within the Community: EU citizens and persons who can be regarded as 'second-class residents' (which certainly does not fit the conception of progressive democracy) (Advisory Council for Ethnic Minorities, 1989: 17-21). One of the basic principles protecting human dignity is the principle of non-discrimination, which is designed to abolish barriers and pejorative distinctions between individuals. It is therefore contrary to the basic essence of the doctrine of human rights to disregard persons coming from third countries and residing on the territory in one of the fifteen EU countries.

Only the citizens of a member state living within the border of the state, which grants them nationality, enjoy full civil, socio-economic and political rights; in other words full citizenship. In terms of the set of rights they enjoy, they are the only fully included category, even though a growing number of them may be excluded from the redistribution of economic, social and political resources. The citizens of a member state enjoy more limited political rights when they are living in another state (mainly the right to vote and to be elected at the local and European level). Moreover, the right to freedom of movement is very much economically linked. One has to show that one has an employment or sufficient means of subsistence in the host member state before one can exercise one's rights as an EU citizen. The other two categories are the 'denizens' and the 'margizens'. The 'denizens', citizens of non-EU member states legally settled in Europe, are part (to a certain extent) both of the civil and of the socio-economic European society. But they generally enjoy limited political rights in the EU.[30] However, one must note that the EC Treaty did not explicitly restrict free movement and equality of treatment only to EU nationals. 'Margizens' (persons who find themselves on the margins of society, that is, the most socially excluded),[31] possess extremely limited civil and socio-economic and political rights. In many cases, they have almost no rights at all because they are illegally in a member state. 'Denizens' and 'margizens' are grouped together in the same category because they suffer analogous mechanisms of exclusion from cultural and political 'Europeanness'.

Third country nationals frequently face discrimination and reduced benefits because of their nationality of origin. They are often among the least privileged groups in society (Geddes, 1996). There is no coherent set of rights for third country nationals in EC law.[32] Instead, there is a whole array of actual and potential rights

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Migration News Sheet No. 98/1991-05 (May 1991) 8.

30 In the framework of the negotiations between the EU and some EFTA states concerning the possible enlargement of the EU and their accession to it, the status of citizens of those EFTA states had evolved rapidly.

31 See Martiniello, M (1995) – 'European citizenship, European identity and migrants' in Miles, R. and Thränhardt, D (Eds.) *Migration and European Integration*, London: Pinter Publishers, p. 37-52; Zolberg, A (1987) 'Keeping them out: ethical dilemmas of immigration policy' in Robert J. Myers, *International ethics in the nuclear age*, Lanham, Maryland, University Press of America, p. 261-297.

32 See Alexander, 'Free movement of non-EC nationals: A review of the case-law of the

that they may be gleaned from international agreements and indirectly from rights granted to citizens of the European Union. Human rights and fundamental freedoms are of concern to everyone, not just to European citizens. Access to documents and to courts should be, it can be argued, a right held by everyone residing on the territory of the Union, not just the nationals of member states, or the ones in a financially comfortable position. The development of European citizenship therefore depends on building bridges between EU citizens and third country nationals in order to minimise social exclusion.

There are two levels of EU citizenship – EU nationals who live in their country of origin, and EU nationals who have exercised their right of freedom of movement in the EU. The hypothesis of the aforementioned 'triangular structure' (EU member states nationals, denizens and margizens) faces limitations due to its normative nature. In fact, the practical implementation of the rights associated with citizenship sometimes makes the distinction between 'nationality', 'denizenship' and 'margizenship' less clear-cut in daily life. It is a whole spectrum of rights (and responsibilities) and the position of third country nationals, depending on their status, runs along this spectrum. According to Marco Martiniello (1995: 40), European citizenship is a compromise that does not irreversibly commit the member states in one way or another. European citizenship as introduced at Maastricht can therefore at present be analysed in terms of a renewal of the nationalistic logic in the Gellnerian sense (Ferry 1990)

It is not surprising therefore that in the present state of affairs European citizenship as designed in Maastricht is nothing more than a 'functional' citizenship as opposed to a 'substantial' one.[33] It merely formalises and associates a set of pre-existing rights and adds some new ones in the same 'chapter' of the Treaty.

The Amsterdam Treaty[34] has made some ambiguous reforms to the concept of European citizenship:

- On the one hand, European citizenship underwent no change, other than the clarification, that it does not replace national citizenship.

Court of Justice', 3 EJIL (1992), 53; Evans, 'Third country nationals and the Treaty on European Union', 5 EJIL (1994), 199; Hailbronner and Polaliewicz, 'Non-EC nationals in the European Community: The need for a co-ordinated approach', 3 Duke J. Int'l & Comp. L (1992), 36; Oliver, 'Non-Community nationals and the Treaty of Rome', 5 YEL (1985), 57; and Plender, 'Competence, European Community Law and nationals of non-Member States', 39 ICQ (1990), 599. The rights of refugees and asylum-seekers are beyond the scope of this study.

33 One has to see how the concept of EU citizenship has evolved following the entry into Force of the Amsterdam Treaty.

34 The Amsterdam Treaty has been signed. The first preliminary signing of the text took place 20th June 1997 but the final draft was signed 2nd October 1997. It was not ratified until 1 May 1999 due to disagreements about the interpretation and possible implementation of some parts of the text.

- On the other hand, 'Europe belongs to its citizens' was the slogan presented, and indeed there are changes that strengthen the concept of a citizen's Europe.

7. EU CITIZENS VIS-À-VIS RESIDENT THIRD COUNTRY NATIONALS IN THE EU

One of the reasons given for not developing a more socially based European citizenship in the Amsterdam Treaty was that to do so, it would have widened the gap between the 5.5 million EU nationals who have exercised their right to free movement and are living in another member state, and the 19 million legally residing third country nationals. The current resurgence of nationalism could be an explanation of the exclusion of third country nationals from European citizenship. This exclusion, however, could not find a legal justification in the case of dissociation between nationality and citizenship. This is quite an important point. The granting of European citizenship is a significant advancement in the sense that the objective criterion of residence would replace the criterion of nationality to determine who should be granted the rights commonly associated with citizenship. If this perspective were effectively adopted, it would be incoherent and discriminatory to limit access to full European citizenship to solely self-supporting nationals of the fifteen member states of the European Union.

Third country nationals who are workers and their family members enjoy some basic rights and freedoms as provided for in the European Convention on Human Rights and its Protocols, but these instruments, however, do not regulate the entry, the length of residence or the working conditions of aliens. These flow from the national legislation of each of the member states, as well as the Community legislation so far established. A study of this body of law makes it advisable for the purpose of this study to focus on legal residents who have resided in the Community for a minimum of five years, since only then do they start to benefit from national and supranational legislation that grant them rights. How could the legal situation of these individuals be described? Cassese, Clapham and Weiler (1991: 49) state that there are four factors involved:

1) Wide-ranging differences among the national legislation of EU member states on the treatment of aliens concerning admission, the granting of a residence or work permit, the granting of specific rights related to working activities, and expulsion; all tend to highlight the differences between EU nationals and non-EU nationals.
2) The labour market situation is generally the decisive criterion used by national authorities when deciding on whether to issue a residence permit and for how long.
3) Member states are allowed to discriminate on the basis of nationality between EU nationals and third states' nationals in the field of entry, residence and access to work, to the extent that such discriminatory measures are authorised by national legislation.

4) Even those aliens who have legally resided in one of the member states for more than five years have no right to move freely within the Community territory.

What has been done so far at Community level to cater to the needs of alien migrant workers? Apart from a few resolutions of the European Parliament and a Decision of the Commission (adopted in 1985 and revised in 1988- these resolutions are described in greater detail in the next section), a Regulation adopted by the Council in 1968 (n. 1612/68 and revised in 1976 Reg. 312/76) should also be mentioned. While reaffirming that member states are not prevented from discriminating between EU nationals and non-EU nationals, the Regulation accords a privileged position to those family dependants of EU nationals who have the nationality of a third state. According to Article 11 the spouse and children have the right to accept any form of wage-earning employment on the territory of a member state, even if they do not have the nationality of any of the EU member states (Cassese, Clapham and Weiler 1991: 50).

The classification of policies for third country nationals (who have immigrated to the EU for labour reasons) as being of the discretion of the individual member states can be justified on the basis of *efficiency, equity and/or solidarity* (Kleinman and Piachaud, 1993: 1-2) in accordance with the principle of subsidiarity.

When one tries to explain the term efficiency, issues are raised about diversity versus uniformity, cross-national externalities, and about lack of transparency. In terms of the Community, Kleinman and Piachaud state that efficiency is an allocative kind of efficiency rather than a technical one - the economic liberalism that pervades the EEC Treaty and its subsequent revisions give priority to the allocative function of public policy, which is related to who are the decision-makers in the design of the policy in question rather than what are the distributional objective (such as supply of health care or education). Thus, a socially efficient threshold would be reached when social benefits and social costs are equated at the margin providing for a correct level of social policy intervention.

In terms of equity, closer European integration might lead to disparities and inequalities both within and between member states. State intervention on these terms calls for at least one decision rule as regards to the definition of equity. Such a decision could be formulated of equal standards or access in terms of social protection and benefits received by the residents in a EU member state - citizens or immigrants.

Some agreements, which have been established between the Community and states like the Maghreb countries, provide that EU member states will not discriminate against the nationals of these countries in respect to conditions of employment and remuneration (this will be explained further in Chapter 3 where it shall analyse the Association agreements carried out with these countries). However, all this is no doubt little in comparison to the magnitude of the problem.

The controversial Social Charter, the Charter of Fundamental Rights of the European Union, and the Charter of Fundamental Social Rights of Workers had little to say about third country immigrants in the EU and their legal status. Intergovernmental decisions have simply perpetuated previous national trends,

whereby still many questions remain to be asked as regards to the socio-economic rights of workers from third countries like Maghreb in the EU. Since solidarity, complex questions of citizenship and inclusion arise. The question of the type of social policy appropriate to the European level cannot be addressed without trying to envisage the type of patterns emerging in Europe. The EC Treaty, stipulates in Article 2 that:

> 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Article 3 and 4, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, the high degree of 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 among Member States.'

By its adoption on 27 July 1992 of a recommendation to member states on the convergence of social protection objectives and policies (92/442/EC), the Council of the EU has clearly set out Community policy in this area: to promote the convergence of policies in member states around common objectives whilst fully respecting the independence and diversity of systems operating in each member state. These common objectives are defined in the text of the recommendation naming three essential tasks of social protection (Apap, 1994: 11-13).

Under Community law (refer to Chapter 4 for specific case studies presented in national courts with respect to rights of third country nationals) the rights of non-EC nationals with regard to entry, residence, work, social security benefits and other tax advantages are based either on their relationship with EU nationals or firms or on their status as a national of a country with which the Community has concluded an international agreement - as in the case of the Maghreb. The attitude of the ECJ varies widely depending on which of these grounds is invoked either on basis of freedom of movement or on Community's external relations.

If so far, little has been achieved with respect to rights and social protection of third country nationals, this could also be due to the pressing demands of EU workers who, faced with increased unemployment, exact greater protection for themselves especially in view of the impending dismantling of the last barriers to free movement of EU nationals (Apap, 1994: 51). In fact, it would be quite naïve to believe that by simply erecting or strengthening barriers, the growing influx of foreign workers from third countries would be stopped.

In the view of the Economic and Social Committee this implies that the Community should pursue without any further delay a dual aim: national legislation and administrative practices must be harmonised, and the conditions for implementing the free movement of immigrants from third countries must be laid down at the same footing as for EU nationals.[35]

35 Economic and Social Committee. Own Initiative Opinion on the Status of Migrant Workers from Third Countries (91/159/05) OJ C 159/12 of 17 June 1991.

One crucial question of relevance to third country nationals concerns the material differences between them and individual citizens of EU member states, e.g. access to work, housing and education. Attempts to improve these conditions were relatively slow to start. The host societies were initially interested only in the work and not in the workers. Policies of the member states and Community that were aimed at integration came late, if at all. Member states like France, Belgium, Netherlands and Germany, which had an influx of workers from the Maghreb region in the sixties and early seventies (this influx occurred in varying proportions mainly due to language barriers), realised too late that these workers did not come only to work, but also to remain in their new host countries. They started off as 'temporary workers' and later became immigrants. The host countries realised too late that their societies' capacity to absorb these people was limited and they did very little to encourage integration. The result brought about vulnerable immigrant groups, uncertain about their future, dreaming of returning to their country of origin but knowing that neither they nor their children would 'belong' there any longer. Often they are living with bleak prospects of work and poverty.

8. THE INTERNAL MARKET AND FREE MOVEMENT

Article 14 of the EC Treaty states that the internal market is an area without internal frontiers. This is an area in which there has been an effort to remove internal controls, but it is compensated by the strengthening of the external borders.

In Article 14 the main objective was to remove obstacles to free movement of capital, goods and services. The internal market was to be considered a type of economic co-operation in the narrow sense of the word. Free movement of labour/persons was not as emphasised. As a corollary to the first three freedoms, internal borders were removed for economic purposes. However, this manoeuvre highlighted the significance of external border controls. All this took place without there being sufficient thought given to the consequences of free movement of individuals and therefore the policy-makers who designed Article 14, had to deal with the impact of their economic objectives. The designers of this article seemed to forget that in a Single European Market without internal borders, free movement of persons could come about for three different reasons:

- To carry goods (including drugs);
- As workers providing services in another member state, and
- As EU citizens.

On the other hand, now that the Single Market has become such an integral part of the EU, to retract in such a way as to re-introduce internal borders would create havoc.

However, as one can observe from the EC Treaty and the SEA, both of these documents call for a promotion of democracy based on fundamental rights that are acknowledged in the member states, in the European Social Charter (especially those rights related to freedom, social justice and equality). This shows clearly that the

idea of the internal market is situated in a setting permeated with certain issues of rights, freedoms (including freedom of movement of individuals, especially third country nationals) and morality factors which have their bearing on the labour market of the EC (now EU). This certainly could provide the basis for policy spillover.[36] The Single Market, which is economically driven, puts pressure on other policy areas.

9. MOVING TOWARDS A POLITICAL UNION[37]

The question of the free movement for non-EU nationals is particularly evident in what could be described as the battle for Community powers and it is a battle waged at various levels. Some argue that the full realisation of the free movement of workers within the internal market implies the free movement not just for the member states nationals, but also for those third country nationals who are legal resident in a member state, for the purpose of engaging in economic activity.

A recurrent element featuring in the debate about the EU internal market seems to be that it can succeed only on the condition that immigration of third country nationals is limited. Current EU policies have come to centre upon the need to restrict immigration by harmonising visa regulations and implementing stricter border controls. One can observe similar developments – national policy under the Schengen convention.

However, some continuation of immigration occurs due to several reasons (quite apart from illegal immigration):

- Humanitarian obligations of the member states to allow families to reunite;
- To admit persons seeking asylum (including people leaving because of extreme malfunctions[38] in their home countries - as in the case of the Maghrebin nationals), (SEC 91 in MNS, June 1991: 1),[39]
- Economic needs of labour market,
- Historical obligations, and
- Intercultural marriages.

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36 See Chapter 2 for a more detailed explanation.

37 It would be interesting for the reader to refer to C.W.A. Timmermans – 'Why do it the Intergovernmental Way? Free Movement of Persons and the Division of Powers Between the Community and its Member States', paper presented at the conference on 'Free Movement of Persons in Europe: Legal Problems and Experiences' organised by the TMC Asser Institute on 12 and 13 September 1991 in the Hague, The Netherlands.

38 To a certain extent these migrants could also be described as refugees. In the words of the then UN High Commissioner for Refugees - Sadako Ogata, 1993: 'Today, more than ever, refugees (and migrant workers, one may add - JN) are part of a complex migratory phenomenon in which economic, political, ethnic, environmental and human rights factors contribute to displacement and lack of national protection.'

39 MNS stands for *Migration News Sheet.*

Paragraph 21 of Section three titled 'Fair treatment of third country nationals' from the Tampere Presidency Conclusions states the following:

> 'The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.'[40]

The magnitude of this declaration can be seen as a great leap forward in putting the rights of third country nationals legally residing in an EU member state on the agenda. Although it can be understood that the rights of the third country nationals legally residing in an EU member state will not be the same as those of the EU nationals, it is nonetheless significant in terms of granting a set of rights as equally as possible. In addition, the opportunity to eventually become an EU national can even be realised.

The guarantee of such rights would also promote the greater integration into European society of third country nationals who already live and work there, helping the fight against xenophobia and racism. This is an essential element of the wider need to promote solidarity both between and within the member states. The Community has a two-tier system, where about nineteen million workers (Eurostat, 2000) are permitted to contribute economically, but are being denied many basic worker rights and protections. 'The integration of third country nationals promotes not only their interests but the interests of everyone living in the Union since it will contribute to a more cohesive society.'[41]

However, there are various controversies involved. The first controversy deals with the interpretation of the provision in the original EC Treaty governing the free movement of persons. One can argue that the Community also has powers in respect to the free movement of non-EU nationals that might include them under similar regulations to those devised for nationals of the Community. After all, the EC Treaty does not restrict free movement and equality of treatment just to EU nationals. Article 3(c) advocates the free movement of *persons*, without limiting it to solely EU nationals, and Article 12 –13, ex Article 6 and 6a, which contains the prohibition of discrimination, and Article 39, ex Article 48 - which lays down the free movement of workers, do not reserve these norms for citizens of member states only.[42]

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40 See Tampere European Council: Presidency Conclusions, 15-16 October 1999.

41 Mr. Flynn in the speech he delivered in Porto, 1994. In this speech he mentions 'integration' various times but does explain what he, as former Commissioner for DG V (Employment, Industrial Relations and Social Affairs) understands by this term.

42 Unlike Treaty provisions on the right of establishment and freedom to provide services

However there are diverging opinions on this point.[43] The free movement of these residents is indeed also the subject of secondary legislation. Article 10 of EC Regulation 1612/68, concerning the free movement of workers within the Community, provides for that spouses of member states nationals working in another territory of the EU (and dependants) can take up residence with the worker in question in the other member state irrespective of their nationality, and they may accept employment in that State (Article 11). However, it is the EU national who can exercise the right to freedom of movement, this right is not extended to the spouse and dependants.[44] They can only benefit from this right granted to the family member who is an EU national indirectly, by accompanying him/her to another member state (however, the necessary visa need to be obtained). Article 4 of Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community contains a similar provision.[45] However, if one takes Article 2 (1), regulation 1408/71 it is to *apply to employed or self employed .. who are nationals of one of the member states .. as also to members of their families.*

Even though EC Treaty does not limit free movement to workers, the secondary legislation however does place some restrictions, as rights are expressly granted to nationals of third countries (see Chapter 4). In the white paper on the Internal Market, the Commission implicitly puts forward the view that the Community has powers with respect to rights of third country nationals, as it suggests adopting a directive on the harmonisation of the regulations concerning the status of non-EU nationals. However, due to difficulties in achieving a consensus in the Council,[46] the proposals of the Commission with respect to third country nationals remained, until Amsterdam, very much an area of 'soft law' (see the next chapter).

The Community, though, certainly has power to promote close co-operation between member states in the social field through Articles 138 – 140, ex Article 118,

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(which are expressly limited to the nationals of Member States). See Article 43, ex Article 52, of the EEC Treaty.

43 With regard to the view that the regulation of the legal position of citizens from third countries does not fall outside the scope of the Treaty see: Kapteyn, VerLoren van Themaat and Gormley in L.W. Gormley (ed.) (1989 2nd ed.) - *Introduction to the Law of the European Communities*, p. 415-416; R. Plender (1988) - *International Migration Law*, p.197-198; the summary of 'The Rush Portuguesa Decision. A New Turn in the Free Movement of Workers in the European Community Law'; Sundberg-Weitman (1977) - *Discrimination on the Grounds of Nationality; Free Movement of Workers and Freedom of Establishment under the EEC Treaty*, p.100-101; and P. Oliver (1985) - *Non-Community Nationals and the Treaty of Rome*, YEL, p.59-60.

44 Court of Justice in Joined Cases 35 & 36/82, *Morson and Jhanjan v. the Netherlands* (1982) ECR 3723 and the decision of in Joined Cases C-297/89 and C-197/89, *Massam Dzodzi v. Belgium* (1990) ECR 3783.

45 OJ (1971) L 149/2.

46 Article 95(2), ex Article 100(A) 2 EC.

of the EEC Treaty and has already used it in the past. In two separate instances, in 1985 and 1988, the Court decided that matters dealing with third country workers can fall within the social field especially if the situation is related to the workers' impact on the Community labour market and work. However the Community has had so far quite a modest role in areas connected with cultural integration of workers/nationals of third countries and their families, or with respect to making the securing of conformity between draft national measures and policies, as well as actions of the Community an objective of consultation.[47]

10. THE TEU AND THIRD COUNTRY NATIONALS

The Treaty on European Union, signed in Maastricht on 7 February 1992, is subdivided into three main pillars. Pillar I deals with Common Provisions Amending the Treaties Establishing the European Economic Community, European Coal and Steel Community and the European Atomic Energy Community with a view to establishing the European Community. Pillar II deals with provisions on a common foreign and security policy, while Pillar III deals with the co-operation in the field of justice and home affairs (JHA) (asylum, immigration policy, and controls over third country nationals have been moved to Pillar I following the Amsterdam Treaty in 1999) (See Chapter two for a detailed explanation of the transfer of competence since Amsterdam.)

11. THE PRESERVATION OF NATIONAL CONTROLS BY THE MEMBER STATES

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

This was an express reservation of national controls made in annex to the SEA in a general declaration accompanying Articles 13 to 19 by the contracting parties. One of the main complicating factors for the Community when taking measures is actually the attitude that member states adopt towards their sovereignty - this is elaborated further in Chapter 2. On the other hand, when one combines the above declaration to the political declaration also made in the Single European Act by the governments of the member states on free movement, which starts:

> 'It can be deduced that on the one hand the Member states wish to retain their power to control immigration into their territories but on the other hand they acknowledge the

47 Court of Justice in Cases 281, 283-285 and 287-85, *Germany and others vs. Commission* (1987) ECR 3254.

> powers of the Community in the fields of entry, movement and residence of non-EU nationals concerning the crossing of the internal borders.'[48]

Although the above declarations do not represent treaty provisions, they can still be utilised in the interpretation of them, and are certainly politically significant. These declarations indicate that unlike their power in the area of free movement of EU nationals, the Community's power in this respect is not exclusive. From the point of view of a clear demarcation of competence between the Community and the member states, this is quite debatable. In the field of immigration and granting rights to non-EU nationals, the member states have established collaboration on the areas of common interest without prejudice to the powers of the Community.

Ironically, the traditional view of sovereignty may also lead to a situation where nationals of third countries are granted free movement. Although there still remains the question of nationality under Community law,[49] it is up to the member states to determine for themselves who are their nationals. Dual nationality could be a solution, and this is the path that the Netherlands seems to favour.[50] Such a systematic policy of integration has been a policy followed for years by the Netherlands.

12. DEMOCRACY AND THE STATUS OF FOREIGNERS

There is an underlying issue regarding the relationship between democracy and the status of foreigners. Foreigners, in addition to their definition as migrants, are those persons affected by norms regulating their rights and duties arising from the fact that they are not nationals of the country where they are residing. Such conditions and norms that regulate the activities of foreigners stem from the sovereignty of the State, in defining the status of persons on their territory.[51] In a democratic polity, foreigners may be granted social, economic and civil rights, but often lack the

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48 Political declaration made in the SEA by the governments of the member states on free movement.

49 Court of Justice Case 36/75, *Rutili vs. Ministre de l'Intérieur*, (1975) ECR 1753.

50 See Netherlands' Government Memorandum 'rechtspositie en sociale integratie' (Legal Position and Social Integration), announced and summarised in STCRT, 1994:94; Dutch Lower House, 1990-1991, 22, 138, No.2

51 The power of the state to determine those conditions is not unlimited, but depends on an international framework that is two-sided: on the one-hand, the norms of the International Law in general; on the other, and in particular, the international (bilateral or multilateral) agreements and treaties that the state has ratified. These two sides of the international framework have evidently an inclusive consequence for the status of foreigners. At this point it is imperative that one does not confuse international agreements and duties with the specificity of the state's immigration policy.

opportunity to participate in the exercise of political power. Resident foreigners who are not citizens of the host country, participate in the welfare state, contributing economically, but are not entitled to elect representatives that regulate the tax system. The presence of residing and economically active aliens in a country thus puts into question the classic democratic slogan of the 18th century of no *taxation without representation*. J. Habermas (1990), among others, points out the distinctive importance of political rights in the dichotomy separating democracy from authoritarianism. From an analytical point of view, citizenship and nationality are fixed or static notions, which describe a stable and defined status; 'foreigners' is a dynamic or fluid term, which describes an unstable situation. Consequently, even though 'citizenship' can be viewed as having a single meaning, the term 'foreigners' includes different situations which range from 'extremely irregular' to one of 'regularity'; even within regular status there are also various situations in function of two main variables: the length of residence and the purposes of residence. Thus, it is necessary to develop a *plural conception of foreigners* from the beginning.

In the subsequent discussion of Italy and Spain, this study will elaborate these definitions of democracy normatively, constituting a set of principles that aim to configure and orientate political institutions. This conception of democracy combines four particular principles that constitute four limits that will help to evaluate the characteristics of immigration policy in general, and the Italian and Spanish cases in particular. These principles are: collective autonomy; equality within pluralism; inclusion; and the public principle. To grasp their distinctive character it is useful to contrast them with the opposing principles: authority, discrimination, exclusion, and the private principle (Beetham, 1994) It is assumed that the first group constitutes democratic principles while the second group is non-democratic.

12.1 The Principle of Collective Autonomy

Under this principle there is an important characteristic of democracy, it is the question of control over the political decision-making process (Beetham and Boyle, 1995) This control, in a democracy, must by definition arise from the citizens - the *demos*. Here important classical notions come into play such as 'popular sovereignty', 'popular self-determination', 'popular will', and is hereby being called 'collective autonomy', that is, the final decision on the norms ruling a political society must come, directly or indirectly, from citizens through a collective process.[52]

52 It should be emphasised that the autonomy principle here is a collective not an individual notion. Individual autonomy is a liberal notion, since it does not necessarily have to take others into account or be exercised outside the private sphere. By collective autonomy it is meant that its outcome must be the product of a collective decision realised in the public sphere.

Collective autonomy is not in itself a democratic principle, since democracy presupposes the determination of demos, and not the other way around. Hailbronner (1989: 76) highlights the specific character of the *demos* as naturally exclusive:

> '... Foreigners exclude themselves from [...] citizenship as much as they are excluded from it. [...] Foreigners are not excluded from the political process. Some political rights are granted to non-citizens, for example the right to express political opinion, freedom of association, and the right of assemble and demonstration.'

This text states that by posing the relationship between foreigners and democracy as a problem is to put the cart before the horse. Thus, one can say the problem being discussed remains a false problem. Resident foreigners without citizenship - possess almost all of the citizen's rights outside the political sphere. In these circumstances, it is reasonable to state that the few privileges that remain in the hands of nationals are a contingent aspect that in no way will improve much more the economic, social and even, psychological problems the foreigners experience. One has to analyse how to improve the legal status of permanent resident aliens who are not willing or are not able to apply for citizenship (for example, Moroccan immigrants), than to pretend to resolve matters through eventual naturalisation. Basic democratic principles are threatened when a number of adults fully capable of being collectively autonomous are subject to a political authority that leaves them no opportunity to control it, in contrast with adult 'nationals'. The argument could be illustrated as follows:

> 'To exclude long-term residents from political participation by making it difficult or impossible for them to become citizens is to undermine the basic principle of a democratic society, that legitimate political authority rests upon the consent of the governed' (Carens, 1989: 36-37).

12.2 The Principle of Equality within Pluralism

This principle can be defined in negative terms as the principle of non-discrimination. As such, it is important to determine the interpersonal and relevant variables that play a benchmark role for applying equality (Sen, 1992) At this level, and from the viewpoint of immigration policies, both discretionary subjective and objective reasons come into play.[53]

Objective reasons are those that not necessarily depend on criteria, such as, skin colour, sex, religion, nationality, language, and so on; while with subjective reasons, the most frequent and 'essentially contested' are those where the criteria to determine action are value judgements. These subjective reasons are, for instance, the interests of the state, national security, public order, and even public health, as

53 By discretion one does not necessarily imply that administrative authorities could act arbitrarily. Discretion is always exercised in conformity with the prevailing legislation and constitution.

will be seen later in the following chapters. The former tends to be justified in terms of national identity; the latter takes the identity of foreigners as its reference rather than the identity of the country of reception.

This principle insists that equality has to be viewed in two forms: equality of treatment and equality of opportunities. The first stresses that a differentiated treatment is undemocratic and it is connected with legality of the immigration policy; the second specifies that a differentiation of conditions is undemocratic and is linked to the welfare that an immigration tends to produce. This principle also indicates that equality has to be applied *within pluralism*, which questions precisely the implicit 'cultural cement' of these debates.

12.3 The Principle of Inclusion

In introducing the element of the foreigners' status within a wider reflection on democracy, one of the main problems that we encounter is determining who is included within the demos and who is excluded (Walzer, 1993). Those who belong to the demos are citizens, and those excluded are those that fall outside this category, that is non-citizens. In this sense, the demos generically designates the citizen and equates citizenship, hence a clear definition of citizenship is required. A political democratic society would then be one where exclusion would only affect children, but not adults residing in it (Beetham and Boyle, 1995). The argument starts with the premise that from the viewpoint of democratic principles, residence, and citizenship, it might coincide with each having some implications for the other.[54]

In effect, one of the more striking democratic problems concerns the difficulty we have for defining and delimiting the *demos*.[55] Two basic questions cause this difficulty: which persons have the legitimate right to be included within the *demos?* And what legitimate rights are there for controlling the boundaries of this *demos*? Both combine the problem of inclusion with the final authority controlling this inclusion. Inclusion appears then as one of the distinguishing principles of democracy, while exclusion, meaning that a person must obey the laws of a country, which are not the results of his control, and it would characterise the non-democratic element. The principle of inclusion determines those who are in and those who are outside of *demos*. It can also be considered, as generating a second problem related to this one, in fact the core problem of the principle of inclusion is namely, that the foundation of this gap is national identity.

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54 It is important to emphasise that the problem between *demos* and population is not an issue that has concerned classical political thought, since traditional theories on democracy have been based on a false implicit congruence between the two. See R. Dahl (1992) - *La democracia y sus criticos*, Barcelona, Paidós, Chapter 9 who criticises thinkers with such a distinct logic such as Rousseau and Schumpeter. In spite of their well-known differences, both implicitly share the identification of *demos and population*.

55 From now on, 'cultural pluralism' will be used in the sense of ethnic pluralism, unless otherwise stated.

Equally, exclusion may be universal or selective, that is, it can be applied to all foreigners, without objective discrimination, or can depend on variables such as language, culture, historical and geographical affinities, and so on. If we take Italy and Spain as an example, especially Spain, it is clear as can be seen from Chapters 5 and 6, that there is discrimination between Spanish citizens and foreigners, and discrimination among foreigners. We can thus term the first form as *universal discrimination* and the second as *selective discrimination.* The difference between them is that the second supposes the first but not the other way around. In terms of the principle of equality and exclusion, selective discrimination has a lesser limit of democracy than the first, since it legitimates *selection on the grounds of various nationalities.* The question is *'how to reach an inclusive democracy without threatening national identity?'* (Layton-Henry, Z., 1990: 22-23).

12.4 The Public Principle

This principle has two readings: on the one hand, it insists on the context where the relationship between *demos* and the state takes place. The *demos* can practice collective autonomy, the control of government, in the public sphere. On the other hand, it stresses the difficulty in delimiting what any democratic theory needs to establish: the so-called *'public good'*.

If one takes into account the principle of inclusion, it specifies that the exclusion at the *external level from the demos*, does not signify exclusion from the private sphere but rather from the public one. It is in the public sphere where the collective activity of control of the political government decision-making and of the political representatives takes place. In this sense, and by admitting nuances, one can make the analytical distinction - foreigners who are in an irregular situation cannot act in neither the private nor the public sphere; whereas those in a regular situation, can only have a private life, but not a full public one. According to I.M. Young (1989) even though the activity of citizens is functionally determinant as an instrument of inclusion (at the internal level), it is also implicitly exclusive for those groups that cannot express their distinguishing traits in a publicly recognised form. This issue cannot be solved by categorically rejecting the implicit universalism of the notion of citizenship, but it is necessary to re-elaborate the public framework to thus make it more permeable to differences - and hence a *differentiated citizenship* evolves.

The sense of public good implies that in introducing the variable status of foreigners, the state in general, and the government in particular, do not take into account the interests of aliens at the same level as the interests of its nationals. This is for two main reasons, on the one hand, for politicians the interests of foreigners simply do not belong to the public good; on the other hand, the fulfilment of the interests of foreigners are not politically cost-effective from an electoral point of view.

After having reviewed the complexity in the provisions of EU treaties and agreements with respect to third country nationals and the criteria inherent to an

inclusive democracy, what methodology can be used to analyse the EU policy process in relation to resident third country nationals? How can one evaluate the democratic limits in Italian and Spanish policies towards foreigners residing on their territory, in particular, Maghrebin immigrants?

13. RESEARCH DESIGN

> 'There is no sharp distinction between the rights enjoyed by citizens and those of non-citizens ... there is something like a continuum of rights between members of European states, from those with almost no rights to those with all the rights and privileges of citizenship' (Layton-Henry, 1990: 189).

T.H. Marshall (1964: 78), in his classic account on citizenship defines this term as follows:

> 'As a normative concept citizenship is a set of rights, exercised by the individuals who hold the rights, equal for all citizens, and universally distributed within a political community, as well as a corresponding set of institutions guaranteeing these rights.'

There are various approaches to carrying out research about emerging policies towards third country nationals residing in the EU. One may believe that the appropriate way to do this is by dealing with it as migration research. However, the method that this study will adopt is a two-fold approach. In the first part of the book (Chapters 2, 3 and 4) policy analysis are used to evaluate what kind of policy and jurisprudence is emerging and how the position of Maghrebin workers and their families is dealt with. The second part, that is, Chapters 5 and 6 are based on fieldwork in Italy and Spain because it is important to match the EU focus with the results of empirical research to understand what is truly happening 'on the ground'.

The usual assumption with respect to rights of immigrants is that the concrete policy depends on the receiving country. Most analyses tend to assume that the position of immigrants after entry is that they gain access to internal rights gradually which can be granted or denied at the discretion of the receiving state, but not demanded by immigrants. This book will be centred upon two main issues and eventually relate these to one another - migration rights and rights of migrants and hence how the status of legal immigrants within communities of citizenship is defined.

The next chapter will present a conceptualisation of the previously stated questions in the introduction and focus on their combination. The underlying hypothesis is that with the Single Market, the removal of internal borders, and the capability of the individual states to control immigration at national borders (hence to curb the freedom of movement of third country nationals within the EU) is diminishing. Therefore the pressures for a continuous joint approach at Community level are strong. However, the position of third country nationals continues to be closely related to the extent of how much the host country is prepared to integrate

and extend the rights of citizens to legally residing foreigners. It is important to stress that little has been done so far to uniformly converge the position of third country nationals who have been residing and working in the EU legally for more than five years with those of the EU nationals.

The mode of analysis is mostly explanatory and based on 'qualitative and inductive analysis': it consists of 'summative evaluation',[56] and is also partly descriptive in the way of looking for categorical distinctions covering a broad range of immigration policies. In the subsequent chapter, an analysis of the association and co-operation agreements (and their application) between the Maghreb countries and the EU (previously EC) and their development in light of the Single Market, Schengen Agreement and External Borders Convention will be carried out. It will explore the normative implications of these agreements with respect to the idea of citizenship and present more detailed conceptualisations of each of the two issues separately. The fourth chapter will focus on the case law which so far has helped substantially in clarifying the status of legal immigrants from the Maghreb, who are working within the EU. Law is a powerful instrument of policy-making and hence in a study that deals with the evolution of policies, the study of case law provides a strong platform for research evaluation. The general statement that the rights of migrants are at the discretion of the receiving state is in a sense quite true. However, one must bear in mind that a minimum level of rights for immigrants is enshrined in international law.

The following chapters present a comparative analysis of the situation and policies of receiving countries, and how these policies have changed over time, due to an ever increasing number of immigrants entering and settling in the EU countries. The particular focus is upon the policies of the 'new immigration countries of Southern Europe' and the way in which the immigration from the Maghreb in the nineties has become concentrated in these southern European States (Italy and Spain mainly). Some differences exist in the attitudes and reactions of these two states. This study shall explore, and try to evaluate, how the strategies adopted so far by these two countries have contributed to public sentiments about foreigners. A study on which specific domestic and/or international factors (including nationalistic feelings, the meaning attributed to a pluralistic society, the idea of citizenship, etc.) have been particularly influential in framing different policy choices towards migrant workers in each of the main recipient EU countries that are destinations of Maghreb labour immigrants will be carried out. Finally, this study will also observe the characteristics of policy-making in the EU *vis-à-vis* the migrant workers from the Maghreb region. In particular it will consider the relationship between these policies and the development of a Single European Market, without internal borders; and the differences in the interpretation of the relevant EU social/immigration policies towards legally residing labour immigrants from the Maghreb.

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56 These terms will be explained in greater detail in the following section.

The book mainly draws on two approaches to research. The first one is based on already existing literature (other books, papers and articles), drawing extensively on the various sources that have characterised relevant schools of thought over the years. This literature has been supplemented by a number of interviews to gain deeper insights into the policy process and to build the theoretical framework. The second approach is based on fieldwork, especially data collection and analysis of the present migration situation in Italy and Spain, as these countries have been the main access ports for Maghrebin workers to the EU in the nineties. This experience is compared with data on the previous migration of the sixties, when most Maghrebin workers went to France and Belgium. This data was substantively collected through qualitative interviews with national ministry civil servants, academics, and international lawyers, EU Commissioners and members of the relevant committees in the European Parliament. This fieldwork consisted in analysing the experience of Italy and Spain as receiving countries and this is then drawn on for further insights into EU policy response.

13.1 Qualitative Data and Analysis for Evaluation

Other research methods, besides the aforementioned ones, were collected for the purpose of this study. Two different types of data: first being related to policy process in the EU, and the second relating to the phenomenon of migration in Italy and Spain. When using different research methods, one has to consider the relative strengths and weaknesses of qualitative and quantitative data. Qualitative methods permit the evaluator to study selected issues in depth and detail. Approaching the fieldwork without being tied down by predetermined categories of analysis allows for a qualitative inquiry of depth, openness, and rich in details. Quantitative methods, on the other hand, require the use of standardised measures so that the varying perspectives and experiences of people can fit into a limited number of predetermined response categories to which numbers are assigned (Patton, 1990: 13-15)

Both of these methods have their advantages and shortcomings. The advantage of a quantitative methodology is that it is possible to measure the reactions of many people to a limited set of questions, thus facilitating comparison and statistical aggregation of the data. This gives a broad, generalisable set of findings presented succinctly and parsimoniously. By contrast, qualitative methods typically produce a wealth of detailed information about a much smaller number of people and cases. This increases the understanding of the specific cases and a situation studied but reduces generalisability. Validity in quantitative research depends on careful instrument construction to thus be sure that the instrument measures exactly of what it supposed to measure. The focus is on the measuring instrument - the test items, survey questions or other measurement tools. In qualitative research, the researcher is the instrument. Validity in qualitative methods, therefore, hinges to a great extent on the skill, competence, and rigour of the person doing fieldwork. Guba and

Lincoln call this the 'naturalistic inquiry'; because the researcher is the instrument itself, changes in fatigue levels, shifts in knowledge, and co-optation, as well as variations resulting from differences in training, skill, and experience among different 'instruments' can easily occur. Yet Guba and Lincoln state that this loss of rigour can be more than offset by the flexibility, insight, and ability to build on tacit knowledge that is the particular province of the human instrument.[57] Both qualitative and quantitative methods involve differing strengths and weaknesses, they constitute alternative, but not mutually exclusive, strategies for research. Both qualitative and quantitative data can be collected in the same study. In fact in Chapters 3, 5 and 6, statistics are collected from census surveys to reinforce particular parts of the arguments, but the final analysis and the overall type of methodology used was qualitative.

Qualitative interviews are normally distinguished from survey interviews in being less structured in their approach and they allow individuals to expand on their responses to questions. Qualitative methods involve at least three kinds of data collection: (1) in-depth interviews (open-ended and/or structured); (2) direct observation; and (3) written documents. The data from interviews consist of direct observations from people relevant to the topic under investigation about their experiences, opinions, feelings, and knowledge. The data from observations consist of detailed descriptions of people's activities, behaviours, actions, and the full range of interpersonal interactions and organisational processes that are part of observable human experience. Document analysis in qualitative inquiry yields excerpts, quotations or entire passages from organisational, clinical, or programme records, memoranda and correspondence; official publications and reports; personal diaries and open-ended written responses to questionnaires and surveys. In this book questionnaires and surveys were not used. Instead, the method used was one based mostly on open-ended and semi-structured questions, which varied according to the area of interest of the interviewee. They were not too rigid in order to help build up a conversation and extract information from the interviewee that is maybe at times not completely documented in official publications. Trevor Lummis (1987: 62) stated that:

> 'The art of good interviewing lies in being able to keep most of the interview conversational while following various digressions, remembering which questions the flow of information has answered and yet being prepared to question more deeply and precisely when necessary.'

Interviewers use their knowledge of the topic to enable them to probe beyond the 'yes' or 'no' responses which are more common in survey interviews. The approach used in qualitative analysis is more of the semi-structured types where questions are written in full, however the questions may not be used as written, and the questions

57 Guba, E.C. and Lincoln, Y. S (1981) - *Effective Evaluation: Improving the Usefulness of Evaluation Results through Responsive and Naturalistic Approaches*, San Francisco, Jossey-Bass, p.113.

tend to be more open-ended. Even though there are various interviewing techniques, Devault (1990) states that there has been a gradual departure recently from stressing the interviewer as an objective observer (a detached 'outsider'). And this has led to the recognition of possibilities for researchers to be 'insiders' in the research relationship involving an 'understanding beyond' rising out of an awareness of social and cultural factors which both parties bring to the encounter. This goes beyond establishing a simple *rapport* with whom they are speaking and observing. The result of these developments has been to a certain extent an individualisation of interviewing techniques.

13.2 An Inductive Approach: Policies vis-à-vis Third Country Nationals

To a great extent, qualitative methods can be described as being inductive because they are especially oriented towards exploration, discovery and inductive logic. Evaluative research is inductive to the extent that the researcher attempts to make sense of the situation without imposing pre-existing expectations on the phenomenon or setting under study. Inductive analysis starts off with specific observations and then builds up towards general patterns. Categories or dimensions of analysis emerge from open-ended observations as the evaluator comes to understand programme patterns that exist in the empirical world under study. Inductive analysis contrasts with hypothetical-deductive approach of experimental designs that requires the specification of main variables and the statement of specific research hypothesis preceding any data collection takes place.

The strategy of inductive analysis is to allow the important dimensions of analysis to emerge from patterns found in the cases under study without presupposing in advance what the important dimensions will be. The qualitative methodologies attempt to understand the multiple interrelationships among dimensions that emerge from the data without making prior assumptions or specifying hypotheses about the linear or correlative relationships among narrowly defined, operationalised variables. The evaluator looks at the data as a whole and searches for the unifying factor in the particular settings. This is called a *'holistic approach'*.

Thus, fieldwork is the central activity of qualitative inquiry. 'Going into the field' means having direct and personal contact with people under study in their own environments. Qualitative approaches emphasise the importance of getting close to the people and situations being studied in order to understand personally the realities of the daily life of the subject group. That many quantitative methodologists fail to ground their findings in personal qualitative understanding poses what sociologist John Lofland calls a major contradiction between their public insistence on the adequacy of statistical portrayals of other humans and their personal everyday dealings with judgements about other human beings.

In contrast, quantitative analysis has been at times criticised in the way that it:

- Oversimplifies the complexities of real-world experiences;
- Misses major factors of importance that are not easily quantified; and
- Fails to portray a sense of the programme and its impacts as a 'whole' (Patton, 1990: 40-50).

The advantages of qualitative portrayals of holistic settings and impacts is that greater attention can be given to nuance, setting, interdependencies, complexities, idiosyncrasies and context. The qualitative-naturalistic approach is especially appropriate for developing, innovative or changing programmes/policies where the focus is on programme/policy improvement, facilitating more effective implementation, and exploring a variety of effects on participants.

Policies and programmes are designed when decision-makers believe they have possibly a solution to a problem. Policies/programmes will thus intervene in society and bring about change, hopefully to ameliorate the situation. However, the effectiveness of any given human intervention is a matter subject to study. In this book, a study is carried out on what is called 'summative evaluation' which serves the purpose of rendering an overall judgement about the effectiveness of a programme or policy for the purpose of saying that the idea itself is or is not effective. Therefore, it has the potential of being generalisable to other situations. Summative evaluations, thus, examine and study specific programmes, and policies in order to generalise about the effectiveness of human action under investigation for the purpose of deciding if that programme or policy is effective within its limited context and under what conditions it is likely to be effective in other situations or places.[58]

13.3 Identifying the Study-Framework

The aim of carrying out interviews is to broaden information collected from primary sources and hence to[59] construct various variables on the characteristics of policies concerned with immigrant workers to thus be able to formulate a hypothesis on the possible aspects of a policy for immigration into a Europe without internal borders. Of course the method of interviewing is highly valuable, however not completely reliable in itself because the topic is sensitive so the observations of interviewees could contain bias and speculations. Thus, it was necessary to crosscheck and interview more than one person working in a particular field of expertise to ascertain

58 As stated earlier, there are other forms of research, e.g. 'formative' and 'action' research which were not directly relevant to this study. They can be are very important methodological tools for researchers, but the choice of methodology depends much on the research questions under investigation.

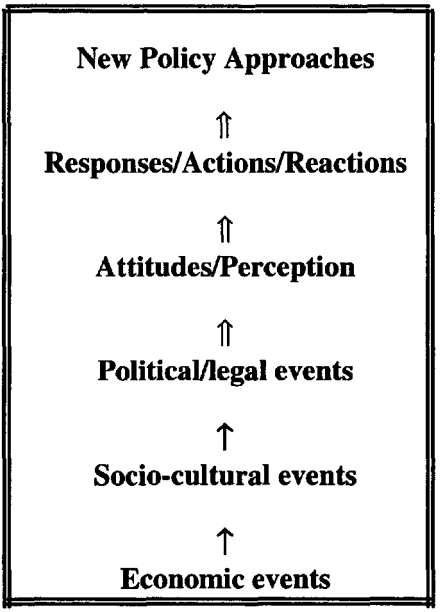
59 It is imperative that the researcher, during interviews, maintains empirical neutrality and not become too subjective as is the risk one runs when using qualitative interviewing. This is especially so because the researcher is the instrument of both data collection and data interpretation and if the researcher is not neutral, this could discredit his/her research.

the validity of the results of the interviews. The framework on which this study is based upon are the following two elements:

- The structural context in relation to the socio-economic and material circumstances of the Maghreb in comparison with the EU's receiving states;
- The behaviourist response of host societies - the actions and reactions of policy-makers which could be well influenced by reactions of individuals who are nationals of the host societies.

Figure 1.1 pictorially depicts the study framework. The two middle sections of this diagram (attitudes/perceptions and responses/actions/ reactions) are the two main sets of factors that influence decision-making and implementation. At the base one finds the economic, social/cultural, and political/legal framework of a society. Marx's concepts of structure and superstructure are combined here; although the conditioning relationship (hence ↑) is still adhered to (see Carver, 1982 and Debray, 1983 for discussion on this form of relationship).

Figure 1.1: The Study Framework



The second layer, (responses/actions/reactions and attitudes/perceptions), which is conditioned but not determined by the first, is part of the behavioural response. Here the processes of perception and cognition influence the formation of attitudes amongst individuals and groups. These in their turn give rise to forms of

actions/reactions or behaviour, although once again the relationship is not an automatic one. The top layer represents the outcome, which is observable, measurable, and recognisable as pattern.

So far, research concerning immigration has been either overtly positivistic in its approach, (new policy approaches), or in some cases humanistic. A limited amount of research has attempted to provide an alternative framework based on relating types of migratory movements to modes of production within a Marxist framework, but most research has simply plunged into empirical analysis of available sources.

13.4 Previous Approaches to Migration Research

In recent years a wide range of approaches has been used in studies of migration in the past. At a micro-scale the detailed study of movement into and out of individual communities, whether rural or urban, using the widest possible range of sources, still provides the essential building blocks for more general studies. Many different types of migration have been identified. Some classifications have been based on motive (subsistence/betterment) or on the positive and negative influences that lay behind mobility (push/pull). Other studies have focused on the mobility patterns of specific socio-economic groups including vagrants, farm and domestic servants, apprentices, and women at marriage. Many kinds of migration were purely temporary and short-term such as the frequent but extremely short-distance movements of young men and women in agricultural and domestic services, or the seasonal movement of migrant harvest workers.

Migration is an interesting phenomenon in itself but is also an important indicator of differences in the social and economic structures of different areas and regions. Variations in the social composition of migratory flows, temporal and spatial differences in the scale and pattern of movement, the motives involved in migration, the policies of receiving countries towards these migrants, the information flows and personal contacts which aided migration, the characteristics of sources areas and destinations, and the official and unofficial reactions of nationals of the host countries (favourable and unfavourable) - all influence and at the same time reflect the nature of society in the areas which send and receive the migrants.

Aggregate and quantitative studies tend to represent migrants as independent beings who move within or between countries, with little regard for the geography of history through which they move. Thus migration must be explicitly related to factors such as regional economic prosperity, variations in wage rates and employment opportunities, the availability and cost of transport and the topography over which a move took place, the availability of information, through kin, friendship networks or propaganda, social and cultural barriers of language and culture which may have inhibited movement, and political controls on movement and immigration. The importance of such factors for the understanding of migration

is obvious, but it is quite surprising how few studies have taken them explicitly into account.

13.5 Problems in Migration Research

According to Colin G. Pooley and Ian D. White (1991: 4), there seems to be five main ways in which existing migration research could be seen as being defective - in the sense that they reflect clearly the problems involved when working with migration. They state that a majority of published material, especially written by geographers, reports the aggregate analysis of migration patterns. The development of increasingly sophisticated computer packages for statistical analysis seems to have had a considerable impact on research. Geographers and historians seem to be the pioneers on application of statistical modelling and econometric analysis. Heavily quantified studies using large data sets tend to produce an impersonal and dehumanised approach in which flows replace individuals and the motives for migration in a simplistic and generalised way to a point where they have little or no significance. Although such work does provide valuable information, and can clearly demonstrate patterns of inter-regional and intergenerational migration (which is what it sets out to do), the macro-scale analysis of migration tells us little or nothing about the causes and effect of migration.

On the other hand, too much migration analysis is static in nature, providing a cross-section in time rather than a dynamic view of an evolving process. This is especially the case for research that is heavily dependent on one single source for example, a single conceptual lens or published census data. Third, few studies seem to have made a genuine attempt to compare different places and time periods. Small-scale detailed studies with a humanistic bias, based on the evidence of the diaries and correspondence of migrants or interviews, may inform us about the detailed experience of individuals or small groups but may not allow us to relate them to a wider canvas.

Fourth, where there is explicit information about the motives for and effects of migration, this tends to be anecdotal and, possibly, unrepresentative of a wider community. Few studies did not seem to have tried to collect a large volume of individual experience on migration, nor have they tried to check the representativeness of this material. Undoubtedly the motives involved in migration are highly complex and there have been various attempts to simplify these processes. Classification of 'types' of migration such as 'push/pull' or the ideas of subsistence and betterment migration are a useful shorthand device as long as one remembers their conceptual limitations. Finally, because more data are available for some periods than others, information about migration tends to be time-specific. It should be emphasised that most of these deficiencies are inherent in the data and are an inevitable outcome of the sources and methods used. Probably this study will also suffer from some of the problems mentioned above, but it shall try to overcome these difficulties in the next chapters by taking different conceptual perspectives and

then drawing out a comparison at the end. The field of this research has its own pitfalls because it needs constant updating as the subject matter is related to movement of persons and important changes in the character of the related phenomenon and policy responses to it in the EU.

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2. THEORETICAL FRAMEWORK

Preferences and Predicaments in Establishing a Collective European Policy towards Third Country Nationals

1. INTRODUCTION

> 'Immigration has become one of the most dynamic and challenging issues facing policy-makers in a Europe of changing boundaries... With approximately 15[1] million 'foreigners' residing in Europe today immigration issues pose a critical challenge to European policy-makers, forced to deal with increasing agitation of their publics and the reality that many foreigners have become permanent residents. Although certain issues experience larger foreign concentrations than others, it can be argued that in every west European country, immigration has emerged as a salient issue' (Lahav, 1997: 377).

So far there has been an increasing number of third country nationals in Italy and Spain (see Chapters 5 and 6). This chapter will identify some key questions about how EU policy as regards to third country nationals has impacted on the national policies of individual member states – in particular in Italy and Spain, and hence which analytical framework can best be used to describe this process. As stated in the introductory chapter, this book concerns the rights of third country nationals already residing in the EU. The policies applicable to the position of these migrants are not the same as those for migrants still seeking entrance to the EU. However, one cannot avoid referring to the latter type because EU entry policies tend to compliment strongly and do bear an impact on national policies which in turn determine the rights for those already in.

The analytical focus of this study deals with linkages between domestic policies within member states and policy at Community level. **The aim of this chapter is to establish a model, which helps to explain the persistence of cross-national differences of preference and policy in the EU, despite common challenges relating to policy towards resident third country nationals in the EU and immigration.** An evaluation of the EU policy process will be used because EU integration provides us with some explanations about why so little convergence of individual member states' policies towards third country nationals has been achieved yet. And hence shed light on the development of the Third Pillar of the TEU and the Amsterdam Treaty.

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1 Currently 19 millions, Eurostat (2000).

At face value, one might expect those differing national preferences of member states and intergovernmental practices would continue to dominate this broad policy sector. However, a number of factors suggest a poor consistency between an intergovernmental approach and the way that the EU has dealt with issues concerning third country nationals. While the creation of the Third Pillar seemed highly intergovernmental, the tilting of the balance between the Third pillar and the First Pillar, as now formulated in the Treaty of Amsterdam, suggests a different phenomenon. This study will focus more on policy process theories than integration theory, because these seem more useful in interpreting the mixed and fluctuating evolution of policy in the areas addressed within this study.

The methodological approach to these key points is informed by the following: (a) a recognition of the important role that domestic political contexts play in shaping the European-level immigration policy paradigm. (b) An awareness of the relevance of new legal, political and institutional responsibilities at European-level, which 'channel' debates about and establish the scope for representation. And (c) acknowledgement that formal institutional contexts are configured by a range of ideas and concepts, in this case regarding migration, migrants, and European integration.

The 'Pendulum Model' (Wallace and Wallace, 1996) will be applied in this study because it provides us with a bridge between transnational and national policies, and the latter shall be related to the relevant stages of the evolution of the EC/EU's policy-making process with respect to the third country nationals. At a country level, there have been variations in degrees of reliance on local and supranational regimes. Different countries have different policies: for example, in Germany, policy-makers tend to favour strongly collectivisation of policy, whereas the UK policy-makers want much more to safeguard UK sovereignty especially in internal and home affairs.

The two main questions guiding the research for this chapter are:

- How do we explain the development of a policy which is split between some European rules (with both areas of hard and soft law) and national policies?
- What does this indicate about the nature of the European policy process?

These two general questions can lead to a range of more detailed empirical and analytical questions such as:

- How do third country nationals, already residing legally in the EU, as opposed to potential immigrants, obtain rights?
- How much about migrants' rights has been established under the EC framework, the so-called first pillar, as opposed to the 3rd Pillar of the TEU?
- What is the role of the Commission and what has conditioned its functions?
- What was the interaction of intra- and inter-EU institutions in the context of migration policies?
- How does case law help develop policy?
- How much does the external immigration policy debate affect the discussion about the rights of third country nationals already inside the EU?

- What factors help/hinder convergence of national immigration policies in the EU in such a sensitive policy area?
- What is the role and relevance of the EU institutions in shaping policies at national level?
- What has been the evolution of EU policy-making powers in this area over time and its impact on EU integration?
- What possible parallels can be drawn with other policies in the EU?

Besides the results of interviews with Brussels officials, some of the academic literature has been particularly helpful in furthering the understanding of these underlying issues. The main authors whose writings this study used as a springboard to formulate the central argument are Simon Bulmer, David Cullen, Laura Cram, Ernst Haas, Stanley Hoffmann, Robert Keohane, Gallya Lahav, Giandomenico Majone, David Mitrany, Andrew Moravcsik, Donald Puchala, Fritz Scharpf, Philippe Schmitter, Wolfgang Streeck, Helen Wallace, William Wallace, and Carol Webb. Other authors have also played quite an important role in helping to identify the focus of this chapter and also helped to build up the background knowledge on this topic.

2. THE RESEARCH ANALYSIS

In this study, a general assumption is made that the key decision-makers in the EU policy process are the incumbent member governments in so far as they have the power to approve or oppose the proposals of the EU Commission. This study utilises Laura Cram's analysis as the departure point for the policy process in the EU in relation to the situation of third country nationals residing and working on the territory of one of the EU member states. Helen Wallace's 'pendulum metaphor' is the analytical tool for indicating the changes in relationships to the member states and EU institutions with respect to power/authority and decision-making (this will be explained in greater detail further on in this chapter).

One way of characterising the relationship, which prevails between the member states and the Commission, is as one of principal-agent. Member state principals delegate certain powers to the Commission - the agent. This does not mean that the member states are not affected by their own decisions. As Laura Cram states:

> '[Thus], the member states may experience unintended consequences of their actions and these unintended consequences may have a major impact upon the process of European integration. Not least the attempts by the CEU [Commission of the European Union] to maximise its autonomy from the member states have been an important unintended consequence of member state actions.' (Cram, 1997: 6)

This particular principal-agent relationship is depicted by Laura Cram as the following:

Table 2.1: Cram's Principal and Agent Relationship

	Domestic interest – national governments	National governments -- Commission
Relationship	Societal principals delegate power to governmental agents.	Governments delegate Power to international institutions.
Preferences/Role of agent	Determined by domestic societal pressures.	Determined by member states.
Primary goal of agent	To remain in power.	Not to have its power curtailed.
Secondary goal of agent	To maximise autonomy from domestic interests.	To maximise the scope of its competencies.
Constraints	Where domestic societal interests are clear and powerful views are expressed; actions of governmental agents tightly constrained.	Where national agents have clear and strongly expressed stances on an issue the actions of the CEU are tightly constrained.
Opportunities	Where domestic societal interests are ambiguous, where a range of potentially acceptable solutions exists: some 'agency slack' and greater discretion for governmental agent (may pursue strategies to promote re-election).	Where national government's opinion is ambiguous, where a range of potentially acceptable solutions exists: greater discretion for CEU, may increase the scope of its competencies.
Choice of bargaining strategy	Governmental agents respond to strategic opportunities according to the particular constraints and opportunities prevailing.	CEU responds to strategic opportunities according to the particular constrains and opportunities prevailing

The Commission, thus far, has sought to maximise its manoeuvring room in the policy process while attempting to avoid direct conflict with the member states. Laura Cram (1997) argues that the Commission has learned to make adept use of its crucial functional role in the policy making process, because it requires the support of the member states and also it lacks the range of policy instruments in which national governments have traditionally employed as incentives or sanctions against interests (Cram, 1997: 6).

Many of the actions of the European Commission might well be interpreted as an attempt to expand gradually the scope of its competence without alienating national governments or powerful sectoral interests. So one can say that the European Commission, although acting within its many constraints, has played an important

role in shaping the environment in which policies are developed. In addition to justifying a role for the EU, mobilising support for its action, and selecting the types of policy intervention pursued by the EU. One can even say that day-to-day events in policy-making process must be understood as a fundamental aspect of the process of European integration: altering the environment in which major decisions are taken and even the very perceptions which actors, such as national governments, hold of their own interests. Major theoretical attempts to conceptualise the European policy process must, it is often argued, take account of the important role played by opportunistic institutions and the impact of their activities on the integration process more generally.

3. THE PENDULUM MODEL

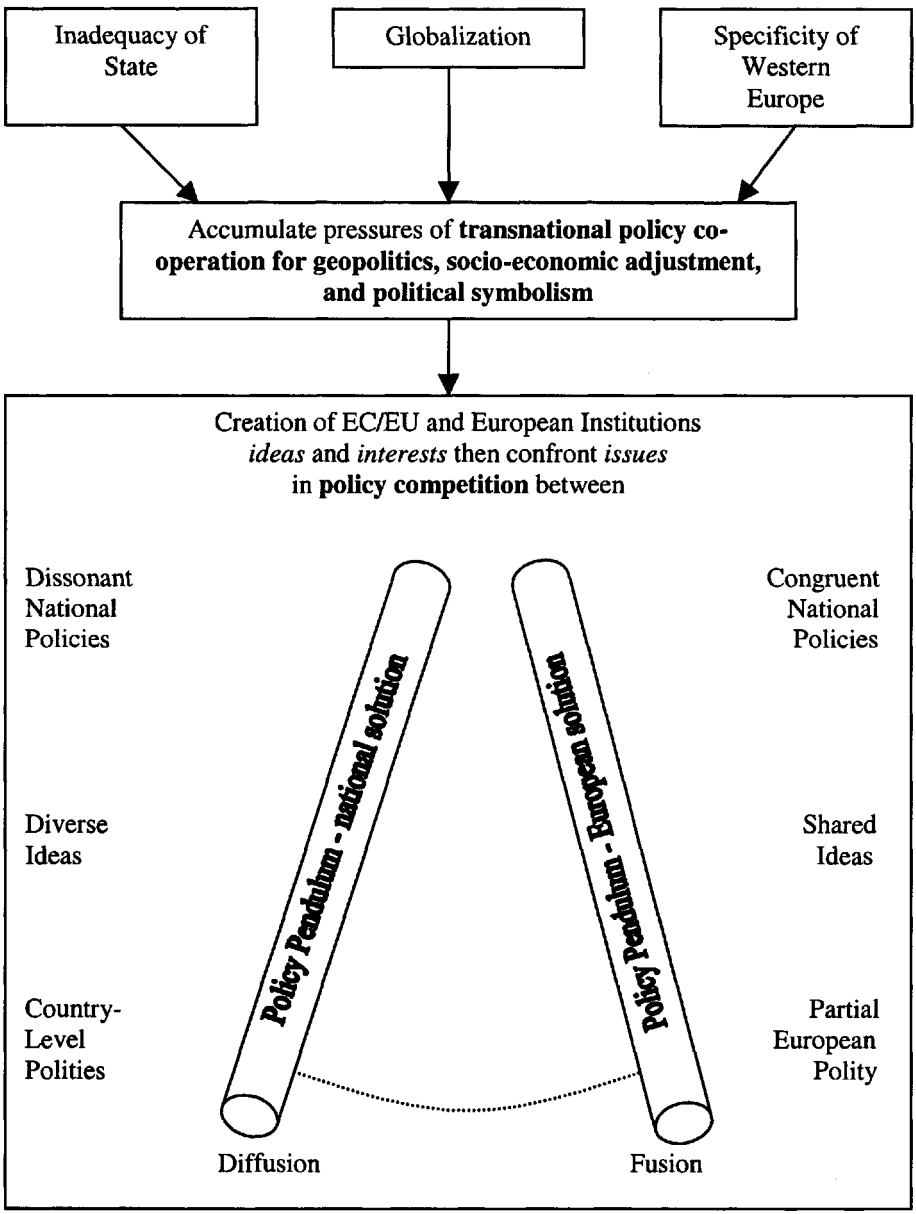
The analytical framework that provides us with the best explanation in respect to the questions put at the beginning of this chapter is the 'pendulum model'. Helen Wallace (Wallace, 1996: 13), in her chapter on 'The Challenge of Governance', depicts this shift between interests and loyalties and hence the shift between nationally-oriented and supranational-oriented policies by a 'swinging pendulum model' representing policy co-operation. Wallace presents the metaphor of a pendulum oscillating between two magnetic fields, one country-based and the other one transnationally-leaning.

The propensity for national or transnational policies to be adopted depends on the relative strength of each field. If both sides are weak then no coherent policy will emerge either at the transnational or at the national level. The strongest transnational policy arena is located around the European institutions, whereas the national-level governance is based on the core of national polity, but in some west European countries there exist also minor magnetic fields at regional and local levels. The movement of the pendulum symbolises the process of European integration, at times regular, other times irregular, and at some instances stationary (Wallace, 1996: 12). As it will be explained later in this section, the pendulum model is highly valuable in depicting the balance in the emergence of both national and EU interest policies in the area of third country national residents' rights in the EU. However, this model cannot be applied to the same degree in all the sections of this study. The usage scope of the pendulum model will be discussed later on in this chapter when the shifting context of policy and its implications are elaborated.

The pendulum model (Wallace, 1996: 12) is based on three premises:

- The west European state is politically inadequate;
- Globalisation has a significant impact; and
- The (west) European region has specific features.

Figure 2.1: The Pendulum Model



Helen Wallace affirms that these three factors lead to choices between national policy and various forms of transnational collaboration, these choices being subject to endemic political and policy competition, thus inherently unstable or fluctuating because it does not settle into a sustained and regular pattern. This policy competition could be played out as a function of the interplay of ideas, interests and institutions - authority thus centred on the choices made by a variety of actors on how to respond to issues. As Haas (1958) established (see 'Neo-functionalism'), in the context of European integration, these issues are influenced by geographical stabilisation/spillover, socio-economic adjustment and political symbolism and attitudes. When ideas and interests are broadly congruent and shared across borders and hence mutually compatible and reinforcing, then there will be a higher incidence and potential for policies at the transnational level and the European integration process enhanced. The development of supranational institutions has enhanced the 'strength of the EU magnetic field'. This of course draws competition from other international venues and then the states react according to individual interests and loyalties, thus the pendulum swings, at times producing strong European policy, at times weak, and every time engaging policy actors to different extents.

As Laura Cram (1997: 15) states:

> 'A self-interested shift in loyalty, or in the focus of political activities, by the political elite will increase the dynamic towards the development of the new political community whether it results from positive or from negative long-term expectation of the integration process. It is this process which is usually referred to as "political spill-over."'

So, if we visualise the pendulum as moving with respect to traditional receiving countries of immigrants and in turn, Spain and Italy, the pendulum has different positions for different countries. Italy and Spain have been quite passive and were initially much on the edge of other European policy-makers' maps in respect to policies towards third country nationals. However, we shall see how the position of the pendulum shifted with the higher influx of migrants into these countries.

4. THE PRINCIPLE OF SOVEREIGNTY: THE NATIONAL AND SUPRANATIONAL CONTEXT

The issue of third country nationals has somewhat blurred between national, international, and supranational arenas, as it has challenged the traditional notion of state sovereignty, or the state's prime tasks of defining citizenship and deciding who shall enter and/or reside on its territory (Papademetriou and Miller, 1983; Layton-Henry, 1990; Soysal, 1994; Hollifield, 1992). Beliefs about immigration and racial minorities often cut across normal lines of political battle (Freeman, 1979:101). In 1986, the SEA (see Chapters 1, 3 and 4) had emphasised the need for the introduction of 'an area without internal frontiers and free movement of persons'. The TEU introduced a concept of European citizenship at the same time as it

formally recognised the need for a serious common immigration policy. Although ex Article K of the Treaty defined 'matters of common interest' such as asylum policy, visa policy, immigration policy, third-country nationals and illegal migration, they were to be dealt with on an intergovernmental basis for a transitional period of five years following the entry into force of the Amsterdam Treaty, leaving goals and implementation strategies to national and administrative interpretation. In 2004, on the basis of a unanimous vote, qualified-majority voting may be adopted in this area. The 1996-1997 Intergovernmental Conference (IGC) reviewed the three pillar structure established by the Maastricht Treaty, with many contentious points to be resolved concerning immigration related issues, and the intergovernmental third pillar, to which most migration matters had been assigned as part of Justice and Home Affairs (JHA).

Among these divisive issues have been questions of the jurisdiction of the European Court of Justice; whether the JHA pillar should be merged into the EC framework (the first pillar); institutional efficiency/democracy; the establishment of a European Information System (EIS); how to establish a common policy against racism and xenophobia; and issues of basic human rights, including accession to the Council of Europe's Convention on Human Rights (Hix and Niessen, 1996). Despite the significant list of provisions adopted by the Council of Ministers since 1995 (including a common visa list) the EU has yet to solidify the rights of 'third country' nationals or nationals of non-member states who have acquired the right of residence in a member state.

Article 13 of the Amsterdam Treaty prohibits discrimination on the basis of race (amongst others, but not nationality[2]). Lobbyists campaigning for the rights of legally residing third country nationals hope that this could be a step forward towards better policies for third country nationals, and hence more democratic practices in the EU. However, as it stands, Article 13 bears no direct effect except on the basis of racism (see the Council Directive of June and November 2000 – prohibiting discrimination on the basis of racism and in the work place, respectively). It still lacks a legal basis in the treaty, as there is no directive to strengthen it and to make it more than simply a recommendation to the member states.

The IGC had to contend with the prevailing differences that arise from different debates and policies about third country nationals in the EU member states. The willingness to address the immigration problem at the EU level reflects the convergence of national preoccupations. This can be taken to the extent that the realisation of a single market in the EU, a notion anchored to the 1957 Treaty of Rome, relies on the success of freedom of movement; a harmonised immigration policy serves as a major test of a frontier-free Europe. Different viewpoints have permeated decision-making in this area. How are different focuses of political orientation established (such as party groups, ideology and national interests)?

2 Article 12 of the EC Treaty only safeguard EU nationals from discrimination on the basis of nationality and not third country nationals.

If the framing of the issues concerns alleged differences between contending parties (Lipset and Rokkan, 1967; Butler and Stokes, 1969, 1974; Lane and Ersson, 1987), then the case of immigration presents an interesting policy which still needs to be better understood. How do issue cleavages determine the politics of immigration policy in an EU whose members represent diverse cultural experiences, different ideological convictions and party affiliations? (Lahav, 1997: 381). Governments, parties and policy-makers throughout Western Europe have been traditionally organised along the lines of the left-right continuum. This is the historical rationale, which shapes the organisation of the European Parliament (EP) that is supposed to represent the main concerns of political opinion.

Emerging controversies and the changing nature of debates led scholars in the 1960s to start questioning the entire framework of how to conceptualise the ideological conflicts which 'liberated the citizen from traditional alignments, fidelities and ties, creating a shift in value systems.' (Inglehart, 1977). They drew their evidence from the greater prevailing voter volatility, the growth of single-issue movements, and the consolidation of extreme-right parties. The migration issue surfaced in 1980s and 1990s and, borrowing Gallya Lahav's words, represented '... [the] demise of ideology' (Lahav, 1997: 382). Yet, the more politicised the migration debate, the greater its elusiveness.

The whole migration issue cuts across the national and international political arenas. Current European national debates have shown thus far that even differences between mainstream parties may become blurred on this issue. Moreover, in western European countries the immigration debate is hugely uneven and political parties do not expect to gain votes by favouring new migration or by promoting rights such as voting rights for migrants. This is a point to be explored later in the fieldwork performed in Italy and Spain (see Chapters 5 and 6).. The EP reflects both traditional party and national interests and indicates some evolving transnational allegiances. The influence of the EP in the EU has been much debated, however the most pertinent factor here is the role of the members of the European Parliament (MEPs) as directly elected deputies. As Tsebelis (1992: 26-7) states, 'like traditional parliamentarians, their attitudes and discussions reflect the parameters of debate'.

The construction of Europe in the form of the EU affects thinking on immigration and has mobilised new alliances in the 1990s. It poses institutional and psychological questions in an evolving European landscape and thus it lends itself to the argument that institutional and psychological processes of shaping a common identity may mitigate traditional attitudes. The drive towards a collective European framework may affect thinking in two ways. First, the institution building and consolidation in a new transnational community require consensus and power shifts to support the process (Shepsle and Weingast, 1987; March and Olsen, 1989; Huntington, 1968)

The 'new institutional' literature argues that the institutional differences are a key factor behind partisan behaviour. Power struggles are evident inside the EU institutions as well as outside, through national, intergovernmental and *ad hoc* institutions that seek to retain domestic sovereignty. The EP's activity on

immigration reflects the traditional conflict between supranational institutions and intergovernmental ones (Callovi, 1992; Ireland, 1993, Lahav, 1995). As stated earlier, the EP reflects public opinion because the public directly elects the MEPs. The results of the public's voting reflect European citizens' opinions towards the policies of the EP. However, one can argue that people vote for what they believe is in their best interest; people choose what is in their best interest depending on the type of information they receive regarding particular topics. If they do not receive clear explanations of underlying issues they cannot, and do not, make well-informed choices. As can be seen in Chapters 5 and 6, representatives of civil society such as NGOs have helped, through making information more accessible to the citizens of Europe, to bring about a rethinking and a balance tilt in favour of extending rights to third country nationals.

Most of the matters relating to third-country nationals are being dealt with at an intergovernmental level and proper parliamentary and judicial control by Union institutions is lacking.[3] Although the transferring of provisions related to immigration and asylum have moved from Pillar III to Pillar I, thus granting the ECJ some control. Non-governmental organisations (NGOs) do not have an official position vis-à-vis the Union institutions and the role of civil society is yet to be recognised in treaties. A commitment to consolidate the influence in decision-making of the individual EU institutions such as the EP entails overcoming the tendencies toward intergovernmentalism.[4] Decisions are typically made behind closed doors with little or no references to formal debates in a public forum. The Amsterdam Treaty has proposed to shift this balance back to EU institutions like the EP, allowing MEPs to be more influential with respect to upcoming immigration policies.

The second element, which influences European integration, is the idea of 'us' and 'them'. The term 'us' represents a group of people, working as one political entity which will eventually share a common political fate and outcome. 'Europeanness', the identification with a larger community is quite a significant mobilising drive. When applied to the debate on immigration, 'Europeanness' is

3 Association and Co-operation Agreements between the Union and third states contain provisions concerning migration-related matters. The ECJ has ruled, on more than one occasion, that Association and Co-operation Agreements have a direct effect on all member states and that decisions based on these agreements and taken by Association or Co-operation Councils are binding upon member states if these decisions are clear and precise. See Chapters 3 and 4.

4 Three types of schools of thought have especially influenced the construction of a unified Europe: intergovernmentalism, neo-functionalism, and federation. Intergovernmentalism, as opposed to the other two, does not assume either federation or supranationality. The tilting of the balance between the move towards federation/supranationalism on the one hand and intergovernmentalism on the other have dominated the evolution of European integration.

defined in an *inclusive* manner, but simultaneously it is an *exclusionary* force, inherently excluding foreigners.

Decision makers frequently justified the need for unanimity as a prerequisite to establish a 'European' culture, a culture consisting of a common religion, shared visions, and the legal entity of the common market. The movement towards a common European identity, with strong supranational institutions, generates counter reactions that can be found both inside and outside the EU institutions. These reactions are often expressed as support for nationalism and a drive for intergovernmentalism. The issue of European integration plays a central part in distinguishing between the political tendencies of the different actors involved. The European factor serves to diffuse a dualism that may be applicable to immigration policies:

> 'The range of polarisation includes the degrees of cultural homogeneity desirable; the lines between a "Europe without frontiers" and a "fortress Europe"; supranational v. national approaches to decision-making approaches to decision-making; or put in old fashioned terms, the 'left' or 'right'. The European factor builds on older schisms, but in the context of a world of change and insecurity. Moreover, polarisation in an enlarged Europe continue to distinguish between those who have more to gain and those who have more to lose - by the European order, and by immigration' (Lahav, 1997: 402).

One of the main reasons why it took so long to develop a convergence of policies towards third country nationals was because initially the 'problem' of immigration was perceived as being a very localised issue relevant only to the receiving countries, recalling the principle of subsidiarity. Then with the removal of internal border controls (not removal of internal checks by police within the receiving states), neighbouring states became also vulnerable to movements of third country nationals within the EU and hence a need to co-ordinate was felt. However, the evolving policies were conceived or expected to be a set of similar policies, so that neither national sovereignty nor national prerogatives need to be infringed.[5] But the reason for the snail's pace can especially be attributed not so much to the *intergovernmental* processes as much as to the *intragovernmental* level.[6]

An analytical account of the EU integration process, and the way in which it has developed since 1957, is important to help the reader grasp why there has been little strong coherent policy at EU level regarding such a sensitive topic such as the rights of third country nationals residing in the EU.

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5 Interview with former DGV (Employment, Industrial Relations and Social Affairs) and DGXV (Internal Market and Financial Services) officials, June 1997.

6 See Puchala, D. (1990) - 'Worm Cans and Worth Taxes' in Wallace, H., Wallace, W. & Webb, C. (Eds.) *Policy Making in the European Community*, 2nd edition, UK, Wiley & Sons, Ltd, p. 237-264, because parallelisms could be drawn from the situation with fiscal policy when compared to migration policies in the EU.

5. THE INTEGRATION PROCESS AND THE RATIONALES BEHIND THE EU POLICY PROCESS

To be able to understand the reasons why so far, there has been little convergence or dialogue among member states on sensitive policies such as policies towards third country nationals, one has to look at the different phases of the EU integration process. There have been different periods in the evolution of EU integration process. However, two approaches to integration came about quite clearly in the post-war period - the federalist and the intergovernmentalist. These two approaches to decision-making, especially the intergovernmentalist and to some extent, the federalist mode of analysis, if not necessarily their full advocacy, continued to prevail. Developments of these approaches have surfaced more conspicuously from time to time, and have been reflected in new waves of theorising.

5.1 Federalism

For many academics and decision-makers alike, the best solution to conflict between European nations in the post-war period lay in the development of a federation of European nations. The idea of a European federal political structure seemed to offer a big peace-making potential. The federalist movement found its roots strongly planted in the European resistance movement (see for example Coudenhove-Kalergi, 1934, and 1938).. This federalist Europe idea was later on taken up by Jean Monnet, Walter Hallstein and Alterio Spinelli. To an extent, they were later to be disillusioned by the slow progress in Europe, with the result of the virtual abandonment of any attempt to create a full European federation. 'The end result was to fall far short of the ideals of these federalists' (Cram, 1997: 8). Hodges (1972: 13) describes the result to achieve a federalist Europe as, 'the federalist approach is more a strategy for fulfilling the common purpose and needs than a theory explaining how these integrative forces arise.'

5.2 The Intergovernmental (Realist) Approach

The realist approach was prevalent in the post-war period. Morgenthau (1948) identified a world system in which the dominant actors were rational unitary states, prepared to use whatever means to achieve their goals. From a realist point of view, the interaction between states in a conflicting international environment was central and the balance of power was constantly changing. Thus, co-operative ventures between nation-states were likely to only constitute a temporary equilibrium, from which partners were at liberty to withdraw should they no longer feel that their interests were best served by membership. However, there have been various criticisms of the realist approach because with evolution it was discovered that there

was no way in which states could be characterised simply as unitary actors. Stanley Hoffmann (1966), in his intergovernmentalist critique of the neo-functional approach, developed some elements of the realist school. He emphasised the importance of the international environment and the role that national governments played within an adversarial world system. Hoffmann argued that it is the logic of diversity, as opposed to the drive towards complete harmonisation, that prevails and also which sets limits to the 'spillover' anticipated by neo-functionalists. Forms of intergovernmental analysis here remained highly influential in the debate on how best to characterise the politics of west European integration.

5.3 The Transactionalism/Communications School Of Thought

A contrasting approach is to be found in the transactionalist or communicative school of thought.

When looking at European integration through this conceptual lens, many scholars like Deutsch (1957, 1964, 1966, and 1967), Inglehart (1967) and Puchala (1970) focused and wrote on the conditions that allow political integration to occur. Deutsch insisted that for political integration to take place, mutual transactions were necessary. Mutual transactions for Deutsch were imperative, but on the other hand insufficient on their own, the complimentary infrastructure was also necessary such as travel, trade, telecommunications and postal links accompanied by mutual responsiveness. According to Deutsch (1966: 96-97) mutual responsiveness resulted from quite an intricate process involving shared symbols, identities, habits of co-operation, memories, values and norms. - 'a historical process of social learning in which individuals, usually over several generations, learn to become a people' (Deutsch, 1966: 174).

On the other hand, Inglehart (1967) and Puchala (1970) greatly criticised Deutsch's and the transactionalist/communication school's approach for its methodological focus on transaction flows that do not provide an adequate picture of the multifaceted integration process. However, as Hodges (1972: 19) points out Deutsch was influential in highlighting the importance of *socio-psychological* aspects of community formation in the field of European integration. Deutsch was a great influence on Haas's neo-functionalism (see the following sections).

5.4 Functionalism

During the 1950s and 1960s, a different literature emerged on both European Integration and comparative regional integration, with its predominant themes drawn from functionalism. Borrowing Hoffmann's definition (1982: 25) the EU (at the time - EC) '... is an international regime which promulgates principles, norms, rules, and decision-making procedures around which actor expectations converge' in given issue-areas, through which 'the actions of separate individuals or organisations -

which are not in pre-existing harmony - [are] brought into conformity with one another through a process of negotiation ... often referred to as policy co-ordination' (Krasner, 1983: 1; Keohane, 1984 : 51).

One of the most influential works was by David Mitrany (1966: 82).. Mitrany strongly opposed to the divisive organisation of states in the international system, in which he described as arbitrary 'political amputations' (1966: 96). He argued that with respect to a federalist Europe, the 'problems which now divide the national states would almost all crop up again in any territorial realignment; their dimensions would be different, but not their evil nature' (1966, 46). Mitrany agrees with federalists that 'co-operation for the common good is the task' (1966: 97-98), and he argues that it would be 'senseless' to tie this co-operation to a territorial authority. The number of necessary co-operative activities for Mitrany would remain limited while, he argued, 'their range is the world'. Moreover, all proposed federal solutions were limited, either territorially or ideologically and a stronger political consensus was required to achieve a real federation. Mitrany likened the federation idea to a 'Janus Head' - 'federation like other political formations, carries a Janus head which frowns division on one side in the very act of smiling union on the other' (1996: 72).

Mitrany advocated the development of technical international organisations, structured on the basis of functional principles. For Mitrany, what mattered was the principle of 'technical self-determination'(1966: 72) rather than territorial structures or national politicians, since the format would facilitate the decline of ideological conflict, the demise of nationalism, and would allow peaceful co-operation to develop on a worldwide scale. Only through co-operation in technical/functional organisations might it be possible, he believed, to 'set going lasting instruments and habits of a common international life' (Mitrany, 1966: 58).

With respect to European integration, Mitrany's functionalism remains influential because of its importance for two architects of the European Community - Jean Monnet and Robert Schuman. Thus, Monnet and Schuman employed Mitrany's ideas on technical, sector-specific integration, and his emphasis on avoiding political debates about the surrender of national sovereignty, in order to facilitate the incremental establishment of a non-territorially based organisation and the creation of a new regional authority structure. Functionalism met with many criticisms, according to Laura Cram (1997: 11), not least because of the rather naïve belief that a neat division between technical/functional issues and political/constitutional issues could be sustained.

5.5 Neo-Functionalism

Neo-functional political scientists argued that the division between technical, non-controversial, economic issues on the one hand, and political issues on the other, was untenable: 'economic integration, however defined, may be based on political motives and frequently begets political consequences' (Haas in Cram, 1997: 12). Ernst Haas (Haas in Cram, 1997: 12) defined the Western Europe at that time as '[a]

living laboratory for the study of collective action between European states'. A wide range of organisations required the collaboration of European governments operating in Western Europe. Yet as Haas (1958: 4) asserted, 'detailed data on how - if at all - cohesion is obtained through these processes is lacking'. It was this precise process that Haas started to analyse with the evolution of neo-functionalism. The main premise that neo-functionalism was based upon was the integration of Europe. In itself, it was a conceptual lens that sought to explain what was taking place in Europe and to provide a conceptual framework within which the developments in Europe could be understood, the focus of the study being the political integration *per se*. According to Haas:

> 'Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing nation states' (Haas, 1958: 16).

One important difference between Mitrany's functionalism and Haas's neo-functionalism is that in neo-functionalism the basic unit remained a territorially based system, which had been greatly opposed by Mitrany. European level institutions merely supplemented the territorially based organisations in neo-functionalism.

Haas viewed the central government, in the neo-functionalist perspective, as 'essentially institutional' and a national (European, for example) consciousness as 'essentially social'. The links with the federalist and communications conceptual lenses are quite clear. Although Haas recognised the importance of the insights developed by Deutsch, and in particular of the importance of an emergent European-centred belief system, he stated that 'the existence of political institutions capable of translating ideologies into law is the cornerstone of the definition' (Haas, 1958: 7). This contrasts greatly with Mitrany's work, which claimed 'for an authority which had the title to do so would in effect be hardly less than a world government; and, such a strong central organism would inevitably tend to take unto itself rather more authority than that originally allotted to it' (Mitrany 1966: 75). In Haas's approach, the propensity of organisations to maximise their powers is an important element for the process through which the political community is formed. Thus, the supranational institutions are ascribed a key role as potential 'agents of integration' (Haas, 1958: 29). The supranational institutions are expected to facilitate to the European level and to play the 'honest broker' bringing about a smoother decision-making process between uncompromising national governments (Cram, 1997: 14).

Neo-functionalism can be seen as more realistic than functionalism in the sense that no one is assumed to be politically neutral when it comes to decision making. Even less idealistic in Haas's view is the role for the national political actors who can very well be *pro* as much as against European integration depending on how their interests are served. In turn, an evaluation of the political elite's interests would result in a possible transformation of traditional nationally centred belief systems.

> 'As the process of integration proceeds, it is assumed that values will undergo change, that interests will be redefined in terms of regional rather than a purely national orientation and that the erstwhile set of separate national group values will gradually be superseded by a new and geographically larger set' (Haas, 1958:13).

In this respect, neo-functionalism links up well with the functionalist and communication school of thought. However, this is not merely a mono-directional process, although the attitudes of national political elite can surely influence the development of the integration process, supranational political elite also had a role in encouraging the integration process.

Lindberg and Scheingold (1970) stressed the importance of the extent to which policy-making authority has been transferred to the European level. They argue that the degree to which 'authority-legitimacy' transfers occur is a reflection of the progress towards a more integrated political community. According to Haas (1958: 16) the 'authority-legitimacy' model was not the only criterion one could use to measure political unity. Change in focus of 'loyalties' of the political elite and a change in their 'expectations and political activities' were also, according to Haas, very important to note. Of course, these changes in loyalty, expectations and political orientations need not be permanent.

Neo-functionalism lost much of its explanatory power in the late 1960s and especially in the 1970s both due to the alleged stagnation in the Community due to international events, and because of some spectacular clashes between sovereign states arising from their diverging national interests. General de Gaulle's interventions were the famous illustrations of the fading plausibility of achieving supranationalism at the time. Moreover, in the 1970s and 1980s scholars concerned with the EC viewed the community as a unique organisation not susceptible to generalisation and hence they mainly concentrated on aspects of its activity (Cafruny and Rosenthal, p.2). Scholars such as Keohane and Nye started to argue that empirically robust explanations of international policy co-ordination are likely to incorporate at minimum, theories of both national preference formation and intergovernmental negotiation, each grounded in explicit assumptions about actor preferences, constraints and choices (Keohane and Nye, 1975; Moravcsik, 1992). The contestability of neo-functionalist predictions suggests, moreover, that such theories can easily explain rather than merely describe the evolution of the EU.

The intergovernmentalist critique of neo-functionalism presents to us a distinction between issues of 'low politics (economic and welfare policies) and matters of 'high politics'. Neo-functionalism is too ambiguous to work well when matters of high politics are discussed and which require clear and consistent goals because national governments cannot be persuaded with anything less (Hoffmann, 1966: 883). The pace of the EU integration process has been greatly determined by levels of conflict of interest at both transnational and national levels. Shifts took place over time in the way member states related themselves with the EU. The reason for these shifts can be mainly attributed to self-interest.

However we should note that even in Hoffmann's 'low politics' area, problems such as unemployment can prove to be extremely divisive amongst the member

states. This in turn causes the member states to become highly protective regarding interests of their own nationals that results in that the matters dealing with third country nationals become exceedingly sensitive issues. To this end, member states have been reluctant to give up their sovereignty completely and the evolution of the EU integration process depicts the 'peaks and troughs' of the shifts in levels of protectionism towards national interest. For example, the greater the sensitivity of the national situation, the more enforced would be 'the closed door policy' of the member states towards third country nationals wishing to gain access to employment and social security rights on their territory. This causes the magnetic field of national interests to become stronger, pulling the pendulum towards it, thus causing a shift from the federal model towards the more intergovernmental approach. At this point, convergence of policy regarding sensitive issues such as the rights of third country nationals would be even harder to achieve.

6. MACRO-THEORIES AND THEIR LIMITATIONS

Keohane and Hoffmann (Keohane and Hoffmann in Wallace, 1990: 280) argue that the decision-making process in the EU is an experiment to pooling sovereignty, not in transferring it from states to supranational institutions. This does not refute Haas' concept of 'supranationality'. Supranationality can be explained as a process by which decision-making becomes

> 'a cumulative pattern of accommodation in which participants refrain from unconditionally vetoing proposals and instead seek to attain agreements by means of compromises upgrading common interests' (Haas, 1964: 64).

Haas viewed the process of supranationality as similar to a federation system, however these two are not identical. On the other hand, this does not place supranationality at one end of the spectrum and intergovernmentalism at the other. Haas viewed supranationality as a political behaviour shaped by political interests. Haas' view is far removed from the de-politicised perspective of technical decision-making.

In their synthesis, Keohane and Hoffmann depicted the European Community as a set of complex overlapping networks, in which a supranational style of decision-making, characterised by compromises upgrading common interests, can under favourable conditions lead to a pooling of sovereignty.

Keohane and Hoffmann believe that when one discusses the actual dynamics of policy processes in the EU and the extension of Community powers into particular policy areas, one must also investigate policy spillover. However, they argue that 'spillover' is highly dependent upon bargains made with and between major governments. Spillover is an ambiguous term. It is far from being automatic. Joseph Nye (Keohane and Nye, 1975, Moravcsik, 1992) defines spillover as a situation where 'imbalances created by functional inter-dependence or inherent linkages of tasks can press political actors to redefine their common tasks'. This is brought

about by incentives and a shift in interests, as the pendulum model can help us visualise. The change in interests and incentives could explain the transfer of policy-making competency from the state to the Community level. The cause of this change of incentives, may be spillover.

Neofunctionalist literature on political integration yields three hypotheses to explain task expansion in the Community:

1) Task expansion occurs as a result of the impact of new policies on the incentives facing *differentiated* actors, including multinational enterprises, transnational interest groups, Commission officials, and semi-autonomous elements of national bureaucracies. These actors form coalitions to increase the extent of community decision-making in new sectors, in order to protect gains from policy integration in sectors on which agreements have been reached.
2) Task expansion occurs as a result of the impact of new policies on the incentives facing *states*, which remain relatively coherent actors with functioning hierarchies of authority, and which continue to make the crucial policy decisions in the Community.
3) Task expansion occurs as a result of *intergovernmental bargains*, which are not generated by previous decisions to expand Community prerogatives or devise joint policies (Keohane and Hoffmann in Wallace, 1990: 286).

These three hypotheses differ in their perspective. The first one is neo-functionalist, the third one is statist, and the second being a synthesis of the two with the states remaining the crucial actors but responding to conditions created by their past actions which now condition their future decisions.

The focus of this study is not purely on macro-level integration theories, even though they are certainly relevant to the questions put at the beginning of this chapter about the development of policy which is split between European rules and national policies. Integration theory is only a part of the whole picture. Different levels of integration developed according to member states' needs and arising sensitivities, which in turn necessitated policy-making and review in particular areas. So, one can say that when one speaks about the changes in levels of interest which in turn influence the level of policy convergence and the extension of task to Community level, one speaks of the symptom - the result, rather than the causes. One important cause is policy fragmentation as can be clearly seen in the evolution of policy towards third country nationals.

Policy towards third country nationals is especially complex partly because it has become increasingly caught up in issues about immigration on a more general level. Hence it also becomes entangled in the proliferation of policy modes – explicit policy, soft-law, by-products (or unintended consequences) through ECJ jurisprudence, and latterly, the establishment of the third pillar and the Amsterdam reformulation. Issues regarding third country nationals are interesting because they partly involve transnational regime-building and also local societal actors involved in community-based activities (this is identified in the empirical research section, and which will be explained in greater detail in the chapters on Italy and Spain).

Policy towards third country nationals is one clear example to the limitation of European integration. In Maastricht, most of the participants seemed happy to have a reference to the principle of subsidiarity included in the treaty. The EC shall act:

> 'only if ... the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community' (Article 5).

Accordingly, local problems should be solved locally; national problems nationally; European problems at European level; and, what is at times neglected in the European debate, world problems should be solved at world level. The question remains: when is a problem European? Where does Europe stop? Should European integration be limited mainly to facilitate trade or should the scope of integration be much more extensive? For various authors, such as Coombes (1993), Laursen (1992), and Moravcsik (1991), classical integration theory is a type of political economy theory. Coombes (1993) described it as 'the now largely discredited and always deceptively specious theory of "spillover"'.

The most clear-cut alternative to the classic neofunctionalist theory is a neorealist theory emphasising the role of the states on the integration process. With such an approach, integration can be viewed as a 'convergence of national interests' (Moravcsik, 1991). But when and why do national interests change and converge? The answer is usually found in domestic politics. With respect to third country nationals, national interests have somewhat converged to curb down the number of incoming migrants but no real convergence has taken place with respect to policies in order to help integrate and give rights to third country nationals already inside the EU.

Moravcsik's liberal intergovernmentalism is constructed on the assumption of rational state behaviour. Costs and benefits of international interdependence can then be seen as determinants of national preferences. This approach is based on a liberal theory of national preference formation with the focus being on state-society relations. Governments respond to shifting pressures from domestic social groups. A third element is an intergovernmentalist analysis of interstate negotiation. The resulting policy co-ordination is determined by interstate strategic interaction. In reality, liberal intergovernmentalism employs two types of theory sequentially: first a theory of national preference formation, then a theory of interstate bargaining.

Moravcsik (1991: 507) feels that the EC institutions have strengthened the power of member governments in two ways. Primarily, in accordance with the regime theory, they increase the efficiency of interstate bargaining by minimising transaction costs. Secondly, they reinforce the autonomy of national leaders vis-à-vis domestic groups by adding legitimacy and credibility to common policies. Moravcsik explains the difference between neofunctionalism and liberal intergovernmentalism as:

> 'Where neo-functionalism emphasises domestic technocratic consensus, liberal intergovernmentalism looks to domestic coalitional struggles. Where neo-functionalism emphasises opportunities to upgrade the common interest, liberal intergovernmentalism

> stresses the role of relative power. Where neo-functionalism emphasises the active role of supranational officials in shaping bargaining outcomes, liberal intergovernmentalism stresses instead passive institutions and the autonomy of national leaders. Ironically, the EC's 'democratic deficit' may be a fundamental source of its success' (Moravcsik, 1991: 518).

However, not everyone would agree with Moravcsik's synthesis. It is quite correct to state that classical neofunctionalism underestimated the importance of domestic politics. On the other hand, an intergovernmental perspective easily underestimates the importance of the role of supranational institutions. Nor does it take into account all the lobbying which takes place in Brussels or the 'Europeification' of national policy-making, which has occurred.

Big theoretical models are hard to use for such a diffuse set of policy responses because they are not sufficiently detailed to enable one to apply them to such a fragmented and constantly evolving policy area. However, the focus on the policy process and the reference to the pendulum model, is a means to capture the diffuse responses. The pendulum model is a highly suitable analytical tool for this policy area due to its flexibility. The position of the pendulum is not fixed; it is constantly changing and it is much more versatile, thus enabling us to depict changes in interest and responses, in such a fragmented and sensitive policy area such as this one.

7. The Shifting Context of Policy and Its Implications

One key factor affecting movements, in regard to policy *vis-à-vis* third country nationals has been the development of the Third Pillar of the TEU and the instability of subsequent arrangements. The pendulum metaphor seems to be, at first sight, appropriate to comment on the intergovernmental third pillar and the outcome of the Amsterdam Treaty. So far, very little co-operation and coherence in policy-outcome has been achieved explicitly with respect to third country nationals. This is not directly targeted at the third country nationals already residing inside the EU, however, it does affect the way in which they are perceived by the host state and can also affect the extent to which their rights are applied uniformly throughout the EU.

The outcome of the Amsterdam Treaty bears serious implications for national sovereignty in matters relating to third country nationals entering the EU and, in turn, brings about 'political spillover' in policy affecting the position of those already residing on EU territory. The Tampere Presidency Conclusions in 1999 called for the approximation of the legal rights of third country nationals to those of EU nationals. This also affects the strength of the magnetic poles of the pendulum. This study shall apply these developments, both their achievements and failures, regarding the position of Maghrebin in the EU, both at European level (Chapters 3 and 4) and at national and local levels (Chapters 5 and 6).

With respect to immigration policy, one could draw various hypotheses about the outcomes of 'the political spillover effect' with respect to policies regarding third

country nationals. If one was to hypothesise that the EU's Southern member states were unwilling or unable to restrict immigration, then other EU member states could seek to impose a restrictive policy on them by 'pooling' sovereignty and eliminating free rider problems in an integrated single market within which internal frontiers have been abolished. In the case of a 'pooling' of sovereignty, the position of the pendulum would be towards the centre, thus risking lack of coherency of the emerging policy application (see above). When there is co-operation between the member states towards a common aim, the pendulum will start to move towards the pole of interests at transnational level. However if the action is still country based and does not involve the EU institutions, the principle of sovereignty will still dominate, so the pendulum will find a position between the two poles.

The development of EC/EU responsibility for immigration policy is linked to a paradox engendered by the liberalisation contained within the (then) EC's single market programme. The attainment of free movement of people objective (although 'people' actually means EU citizens) implied the abolition of internal frontiers and generated policy spillover which actuated co-operation on a range of what were viewed as internal security issues, including immigration. However, the member states preferred intergovernmental co-operation on immigration policy rather than the creation of a common policy.

Between 1986 and 1991 the member states developed largely ineffective informal intergovernmental arrangements within which member states were hidebound by the absence of EU competence. Moreover, this form of intergovernmental co-operation could be pursued only by the adoption of conventions in international law, which are not directly enforceable by the ECJ. We should note here, that of the two most substantive measures brought forward, the Dublin Convention (DC) on asylum faced huge difficulty to be ratified in all member states and the External Frontiers Convention (EFC) has not been signed by all the member states. The TEU sought to counteract the weakness of informal intergovernmentalism by creating a Justice and Home Affairs (JHA) 'pillar', which recognised immigration and asylum as matters of common interest and introduced a Treaty obligation to co-operate within a single institutional framework.[7]

Transnational co-operation took place mostly in the way of further tightening the external border controls of the EU. This policy was mostly led by traditional receiving countries of emigrants. What can be seen quite clearly in the situation of Italy and Spain (see Chapters 5 and 6 for more detail), traditional receiving states, in particular Germany and France, 'imposed' their own immigration policy via the Schengen convention on the new receiving states. Even though, as was found out later, the context was not the same. When Italy and Spain came to sign the Schengen agreement, very few studies had been carried out on the situation of third country

7 Article 3, ex Article C, of the Treaty on European Union provides that 'the Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while representing and building upon the *acquis communautaire*.'

nationals entering and residing on their territories because until then, both these countries had been countries of emigration.

EU membership has impacted upon Italian policy because, as Martiniello notes, 'migration policy is largely inspired by the European policies' and 'other European countries ... considered Italy as the weak point of the European belt to be constructed' (Martiniello, 1993). Spain's 1985 immigration law, as explained in Chapter 6, was 'almost entirely the result of external pressure associated with Spain's entry into the European Community' (Cornelius, 1994: 322-335). Thus, one may deduce that European countries have been obliged to co-operate with the construction of a Europe that force adoption of tighter restrictions on entry of non-EU citizens, more than the states may have chosen for themselves.

This appears to be good evidence for the emergent Europe with closed external borders, but things may not be as clear-cut as they appear at face value because an examination of the current condition of EU policy towards immigrants prompts the questioning of supranational regulatory capacity. On applying the pendulum model, one can argue, on the basis of the evidence above, that if the magnetic field representing a Europeanisation of interests at transnational level is strengthened (thus allowing an almost full-fledged deflection of the pendulum towards that direction) then a Europeanisation of other policy areas could also follow suit. This is one example of political spillover.

The concept of political spillover was a major step forward upon the original functionalist centre-point - 'technical self-determination' and Mitrany's belief that success in one policy area could necessarily encourage more co-operations in other policy areas. Haas and other neo-functionalist recognised the idea of 'snow-ball effect'. Haas expanded on the idea of spillover by adding other dimensions to the original perspective of political spillover - the functionalist/sectoral spillover and the geographical spillover. This change in focus contributed to the image of political integration in the EU, transforming it, using Laura Cram's words, into 'a snowball, constantly gathering momentum as the process of integration rolled on'.

Thus one can hypothesise that the neo-functionalist metaphor of the snowball can be very well applied, with respect to policies towards third country nationals. When it became quite clear that problems existed with respect to interpretation and administration of the rights of third country nationals residing and working legally on the territory of the European Union, such as Italy and Spain, the more the northern EU member states will apply pressure on Italy and Spain to adopt the restrictive policies of Schengen for tighter external borders. The aim was to avoid 'spillover of the immigration pressure' from the Southern European member states due to northward movements of third country nationals, who initially had entered and resided in Spain and Italy, amongst the other new receiving states.

After the implementation of the internal market in 1992 and hence the removal of internal borders, northern states realised that the situation dealing with third country nationals' movements within the EU was much more complex and necessitated a deeper thinking than simple restrictive measures at domestic level. The question of freedom of movement of workers, as opposed to persons, surfaced

quite often as one can see from Chapter 4 where it explain how case law has clarified existing policies and helped third country nationals establish rights in practice more strongly.

In two aspects, it can be argued that political spillover has already occurred in JHA. First, due to the prospects of an approaching Eastern Enlargement, questions regarding provisions of immigration and labour market policies for the nationals of CEECs during the transitional period has provoked some lively discussions. As to how to provide a smooth transition for the CEECs from countries of emigration to immigration, propositions such as creating long term visas for labour purposes has been put forth. In spite of the lack of dialogue in CEECs regarding this important aspect, it can be seen as an inevitable topic in both the EU and the CEEC forum on Enlargement.

The second viewpoint arguing that political spillover has already occurred in JHA hinges upon the aftermath of post September 11th. These attacks labelled as 'terrorist actions' on the USA have prompted the EU to prepare and strengthen its transnational police (Europol) and also establish its judicial (Eurojust) co-operation (both contained in the JHA pillar). Although it can be argued that the blurring between 'soft' (internal) and 'hard' (external) security has been taking place prior to September 11th, it can be maintained that September 11th has spotlighted this transition continuing since post Cold War.

In the Extra-ordinary European Council Meeting held in Brussels on the 21 September 2001, the Presidency has established a specialist anti-terrorist team within Europol. Special mandate has been given to the Europol for the exchange of information on terrorism between the member states and Europol, as well as allows for the co-operation on terrorism issues between Europol and the relevant US officials. It can be seen that the political spillover has taken place through the widening of Europol's mandate, whereas in the Eurojust, it is its very creation of its institution that marks the political spillover. For JHA, the broadening of the areas in which it has responsibility over constitutes the political spillover.

Yet rather than exhibiting either a clear supranational or intergovernmental bias, the Third Pillar occupies a halfway house, struggling to reconcile two contrasting institutional traditions, while neither has primacy. Naturally, this situation presents the analyst with a number of problems in the application of theoretical paradigms. The codification of justice and home affairs co-operation in the EU's constitutional doctrines has not led to the full 'Europeanisation' of the issue area and the EU's supranational institutions are poorly provided for in Title VI: the employment of supranational theories of integration are thus problematic.

However, in the day-to-day policy making processes of the Third Pillar an intergovernmental analysis is equally lacking in applicability, as it fails to provide the significant contribution domestic politics can make on the European policy level. What has become clear since the TEU is not only the continued hostility of many of the domestic actors (government officials, NGOs, political parties, pressure groups, voters) towards the Third Pillar, but also their ability to influence the European policy process, negating the notion of the monolithic national actor and a single

national interest (Cram, 1997) This can also be seen in Chapters 5 and 6. In both Italy and Spain, one can see that there are different opinions arising from the different sections of society, and the people have applied pressure on the government to shape policies according to the ongoing situation in these two countries. Yet in spite of not being able to strongly characterise the Third Pillar through its occupation of the halfway house, it is clear that there has been a substantial amount of transfer of competence from the Third Pillar to the First.

Other than police (Europol) and judicial (Eurojust) co-operation, much of what composed of the former Third Pillar has been transferred to the First (issues regarding visas, asylum, and immigration...etc.). It is through this transfer of competence gained from shift of JHA provisions within the Pillar system that the other institutions within the EU have come to gain importance in the area of JHA. Amsterdam has fixed a timetable in which most issues relating to Title IV have to be completed. And after the provisional period of five years, the Parliament, with the acceptance of the co-decision procedure by the Council, may even become involve in JHA whereas prior to Amsterdam, they have been completely shut out. Of course, the transfer of competence to the First Pillar grants the ECJ the right to review and assert its authority, where appropriate, in these JHA provisions.

What is of particular importance is that the Amsterdam Treaty grants rights to third country nationals legally residing in a EU member state that have never existed before. The adoption of a visa list showing those third countries whose nationals 'de jure' should require a visa to enter EU and those other third country nationals who are exempt from this process presents a systematic way of admitting third country nationals into the EU. Once present in the EU legally, these third country nationals have the right to travel within the internal border, except in the UK, Ireland and Denmark, without being checked. Although this has been in place for most of the EU member states, it was only post Amsterdam was this right given to third country nationals.

Yet in regards to residence rights of third country nationals, Article 63.3 states that the Council would have competence, five years after the entry into force of the Amsterdam Treaty, in establishing measures relating to immigration policy within the following:

> '(a) Conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion. (b) Illegal immigration and illegal residence, including repatriation of illegal residents.'

In the absence of Community competence within this area, it is unclear how much rights the third country national actually receive. It is important to note, for our purposes, that issues regarding to employment, legal or illegal, of third country nationals have been completely wiped out from the preceding article.

8. THE LEGAL AND LEGISLATIVE REGIME

Superficially, the policy output towards third country nationals, especially those already residing within the EU, at EU level would appear to belie the difficulties faced by policy-makers and certainly there is insufficient scope to chronicle in detail all the decisions reached by the JHA Council.[8] However, it is not so much the extent of policy output that indicates the results of JHA; rather the quality and legal status of the decisions provide a more genuine measure of achievement. The Council has produced a growing number of recommendations, resolutions, decisions, statements and conclusions, all of which fail to legally bind the member states to the substance of the decision. The legally binding Conventions which have been drawn up by the Council are (or have been) paralysed by the decision making process in JHA and the need for unanimity. This is partly the reason why, even though the legal framework does exist to enable a greater convergence of policies towards third country nationals, at best, what has been implemented is policy co-ordination.

When one applies the pendulum model, in the post-Maastricht period until today, the stronger magnetic field with respect to policies towards third country nationals has certainly remained country-based. However, due to an initial lack of analysis of the arising situation in the receiving states like Italy and Spain; and due to the sensitivity of the position of third country nationals resident in the EU, it has been very difficult for some receiving states to design a policy which can resolve all the underlying issues. So emerging policy has not been strong at the country level and even less so at transnational level. In fact, the outcome was the one predicted by the pendulum model; there has been no real coherence in the member states' policies towards immigrants except for the fact that they all aimed to reduce further influx of third country nationals.

Further significant points of reference as to the 'degree of success' of the former Title VI (part of which is now in Title IV of the Amsterdam Treaty) are provided by (a) the (non) use of the new instruments (joint positions and joint actions) and perhaps more importantly (b) the policy sectors where has not been possible. There has been also a new resource to the 'new' policy-making instruments provided for in JHA introduced by Amsterdam (framework decisions) which is supposed to be more binding than the previous type of soft law provisions. Although an increasing number of decisions have been made across the broad spectrum of JHA policy sectors, including recommendations on harmonising the means to combat illegal immigration, a regulation on the third countries whose nationals must be in possession of visas to cross the external frontiers of member states, statements on terrorism and extradition, etc., there have been a number of high profile policy 'failures' in areas with significant implications for the future of justice and home affairs co-operation among member states. The TEU has little innovative impact as

8 For further details see the Council's *Report on the Functioning of the TEU*, Brussels, 1995.

the majority of advances made in policy output emanate from initiatives and proposals, which predate the creation of the Third Pillar (CEC report for Reflection Group, 1995: 51).

Despite the deficit in legally binding decisions, the above analysis can be partially qualified with the acknowledgement that the number of meetings have significantly increased and thus contact between policy makers intensified. This is particularly so since the Amsterdam Treaty – the Tampere Summit certainly highlighted such a meeting between the Leaders of States to discuss developments in Justice and Home Affairs. Interviews carried out during the research for this chapter revealed a widespread dissatisfaction with the progress and nature of co-operation under the Third Pillar and the increasing frustration and resentment of policy-makers and practitioners can only damage the attempts to consolidate justice and home affairs co-operation within the EU.

However, as Giandomenico Majone (1989) states:

> 'The results of institutional change cannot be evaluated with reference to discrete, isolated decisions, but must be assessed in terms of sequences of interdependent decisions taken by a variety of actors over time. This assumption on continuing relationships among policy actors introduces a temporal dimension that is absent in the one-time choice situations usually considered in policy analysis' (Majone in Cram, 1997: 28).

At first appearance, for example, social policy - one of the main policies which affects rights of third country nationals residing in the EU - appears straightforward. However, the main weakness is its legislative profile, the lack of binding legislation. In this context, a study of EU institutions would be incomplete if one forgets the role of the ECJ and of the impact of European law in the process of European integration. The small number of regulations, directives and decisions inherent to this policy, is one indicator. Moreover, these regulations, directives and decisions are strictly limited in scope. However, the jurisprudence of the ECJ has nonetheless had a significant impact, a factor much like what Majone describes more generally.

The most binding provisions are those devoted to the establishment of an institutional framework at EU level. Especially in establishing decision-rules, setting up advisory and standing committees or creating permanent organisations such as the European Foundation for Improvement of Living and Working Conditions, Health and Safety, Equal Treatment of Men and Women, Protection of Workers and Social Security for Migrant Workers, as well as a number of small-scale EU social programmes involving direct EU expenditure. However, these provisions have nothing to do directly with third country nationals residing and working in the EU, these provisions directly affect the well-being of the European citizens only, the only way third country nationals benefit from these provisions is indirectly, most of the time, through secondary legislation.

The broader issues, which include the position of third country nationals residing and working in the EU, fall into Hoffmann's category of '*low politics*' (see above), and remain non-binding, or *soft-law*. In fact so far, the main provisions which have

secured some rights for third country nationals residing and working in the EU, albeit bilateral and multilateral agreements with the countries of origin, has been case law - *hard law*, which will be reviewed and analysed in chapter 4. Thus far, there has been little assurance from the Heads of States and Government expressing their commitment to the social dimension of European integration, especially with respect to policies related to third country nationals already inside EU territory.

9. CONCLUSION

As one can observe from the above analysis, national governments frequently play a dominant role in negotiating policies and thus determine the extent of coherency of policy and possible integration at EU level. However, day-to-day matters can also be very crucial in influencing policy directions and loyalty orientations. The environment in which, the member states - the dominant actors - take critical decisions, the activities of the institutions and other interests have a major impact upon the integration process.

The EU institutions also work under the same conditions and constraints. A learning and an adaptation within the policy process are crucial to thus minimise unexpected outcomes. A thorough analysis of the importance of policy learning and adaptation, in the dissemination of information of the mode of action and the actions of both the EU institutions and the member states, is essential for any form of explanation of a particular policy when it becomes the subject of European regime-building.

The pendulum model suggests that policy assignment shifts according to change in interests, ideas, and the evolution of the policy in question, as well as development in the inherent values. Immigration policy is especially interesting since, on the one hand, member states have widely different expectations and traditions, while on the other hand, there has been an accumulation of pressures and incentives for strengthening collective European measures. Over the past decade these forces have become rather powerful. Some are derived from the direct subject matter of migration, others from different policy domains - a single market without internal borders but with a strong external border. This could cause a 'snowball effect' with the result that other policy areas are transferred to EU competence. The shift in the position of the pendulum could be triggered.

However, if the magnetic field is not strong on either side, causing the pendulum's position to be aligned to the centre, then the development of policy will not be highly coherent. We can still see considerable variations between member states in terms of both their policy doctrines and their concrete responsibilities. At first sight, it is not self-evident that national approaches should converge. Due to the variety of national experiences, one may expect that policy remains located at country level or at least, from time to time, the individual governments may seek to reassert some direct control over the process as it affects them indirectly. Italy and Spain are especially interesting cases, often neglected in the commentary about this

policy domain - a single market without internal frontiers but with a strong external border; or, the new politics of post-cold-war Europe, in which the eastern frontier is no longer protected.

The pendulum model thus offers a frame of reference for the subsequent policy chapters. Chapters 3 and 4 deal with EU – Maghreb relations and lay out some of the elements that have contributed to the strengthening of the EU regime, and the pressures that may follow to further consolidate that regime. Chapters 5 and 6 deal more with the national level – Italy and Spain. These country case studies allow us to examine how far autonomous country policies persist, and whether or not, in practice, national policy-making is yielding to collective EU policy-making. This study will use the pendulum metaphor at different stages in the next chapters to explain specific developments of policy towards third country nationals and it will then discuss the overall policy process in the general conclusion to.

From this two-level analysis this study aims to establish whether the pendulum movements have shifted towards and stabilised around a collective EU regime, or whether, the push/pull between the two levels is more erratic and unstable.

3. EU-MAGHREB CO-OPERATION
The Maghreb and the European Community

1. INTRODUCTION

> 'Most of the Mediterranean countries face a situation of political instability, a high demographic growth rate, important population movements, and high unemployment rates. These problems - particularly in the case of the Maghreb - are also ours' (European Commission, COM (92) 2000, P.15)

'Maghreb' is the Semitic word for the extreme west and this is from where the western-most part of North Africa derives its name. This term has been used in different ways. Some use the word Maghreb to include Morocco, Algeria and Tunisia, Mauritania and Libya; however, this study shall use this term to mean the 'central Maghreb' - Morocco, Algeria and Tunisia - due to the history that these three countries share as past French colonies and as countries of emigration. These characteristics are not shared with Libya and Mauritania.

The last three decades have brought about a profound transformation in the demographic configuration of the Maghreb. The emigration from the Maghreb has had an important impact on the population dynamics of the Maghreb region itself, this being especially prominent in the sixties. This emigration contributed to a diminishing of the overall effect of the rapid increase in population. The situation in the region somewhat stabilised itself in the seventies, in the sense that there was neither a dramatic increase in population growth nor in prevalent birth rate. However, in the late eighties, there was a high incidence of unemployment among those between eighteen and twenty-five years, especially women, and those who worked in the cities. External emigration from the Maghreb has helped to alleviate the weight of the increasing problem of unemployment. Due to more efforts to control the external borders (including at times, the right to visit) in some West European countries, migration to Germany, Netherlands, France or Belgium has diminished recently; however, the numbers of immigrants to Italy and Spain have increased significantly. A prominent characteristic of the last decade has been the considerable increase in Maghrebin immigration to these two latter EU member states. Over the last few years, the EU has undertaken the complicated task of enlarging its membership with the inclusion of the EFTA countries, commencing accession negotiations with the Central and Eastern European Countries (CEECs), and also deepening its ties between members as stated in the TEU signed in Maastricht on 7 February 1992. This process is a demanding one; it has required

some adjustments in EU relations to the rest of the world. This applies especially to those countries like the Maghreb region or the CEECs, which are linked to some of the member states through historical and/or geographical ties; with the result that they share certain common interests and expectations. This last consideration has led the EU towards establishing a special rapport with two areas in particular: Central and Eastern Europe, and the Mediterranean countries (which include the Maghreb). However, even if the EU has tried over the years to develop a clear policy towards the Maghreb countries, in practice, this was less coherent. As one can see later in the next chapters, the policy-process towards the Maghreb and the Maghrebin has been influenced by different interests. Hence, the analytical tool developed in the previous chapter (the pendulum) would rest at a middle position somewhere between the opposing 'magnetic fields' – on the one hand national interests, and on the other hand, supranational interests.

The first part of this chapter will provide a review of the current situation in the Maghreb region and the reasons for instability in some parts of the region and emigration in the nineties. The second part will analyse the agreements enacted between this region and the European Community in response to these challenges.

The Mediterranean area, as stated previously, is of great strategic importance to the Community and hence peace and stability in this region are high priorities on the EU agenda. EU policy-makers have taken this to require that they work to:

- To support political reform, respect for human rights and freedom of expression as a means to contain extremism; and,
- To promote economic reform, leading to sustained growth and improved living standards, a consequent diminution of violence and an easing of migratory pressures (CEC, Com (94) 427: 5).

The Community and its Mediterranean partners share many points of interdependence - this is particularly evident in the issues concerning environmental heritage. The spectrum of interests of Europe within this region is wide ranging and includes various sectors such as migration, trade, investment and energy supply. The tables below set the context thus existing between the EU, Maghreb and Mediterranean countries (all numbers are estimated figures).[1]

Table 3.1: Gross Domestic Product, EU-Mediterranean
(Source: World Development Indicators Database 2002)

Gross Domestic Product (in USD)	2000
European Monetary Union	6.0 Trillion
Mediterranean (minus Libya)	556.9 Billion

1 Mediterranean countries include Morocco, Algeria, Tunisia, Libya, Egypt, Israel, Jordan, Lebanon, Syria, and Turkey.

Table 3.2: Region Population in millions
(Source: Population Reference Bureau, Data Sheet 2001)

	2001	2025 projection
EU-15	324	381.6
Algeria	31	43.2
Morocco	29.2	40.5
Tunisia	9.7	12.5
Mediterranean[2]	244.2	336

Table 3.3: EC/EU trade with the Mediterranean Countries
[Source: (a) Eurostat 2001 and European Commission Trade DG, (b) European Commission Trade DG, (c) Eurostat's Statistics in Focus, Theme 2-13/2002, 'EU trade and investment with Mediterranean Partner Countries: towards a better partnership?']

a. EC/EU trade with the Mediterranean Countries (EUR millions)	1999	2000
Exports to Mediterranean	88.000	84.973
Imports from Mediterranean	63.100	63.805
b. EU Export/Import (EUR millions)	**EU Export to (2000)**	**EU Import from (2000)**
Algeria	6.098	16.480
Morocco	7.689	5.994
Tunisia	6.009	4.762
c. Direct EU foreign investment in the Maghreb (2000)	**Equity and Other Capital In EUR millions**	
Maghreb (Algeria, Morocco, and Tunisia)	326	

2 See Footnote 1.

Table 3.4: Immigrants from the Maghreb in the EU
(Source: Eurostat, 2000); a. Excluding Ireland and Luxembourg, b. excluding Ireland, Luxembourg and UK

Nationality	1987	1998
Algerian	819 000	660 256 (a)
Moroccan	747 000	1 168 156 (a)
Tunisian	238 000	285 345 (b)
Total Maghreb	1 804 000	1 828 412

The main target areas of the EU tend to be for Maghrebin migrants were (see Table 3.5), in order of preference: France, Italy, Belgium, the Netherlands, Germany, and Spain. Statistics do not point out however the numbers of migrants who have already been residing[3] in the above mentioned states since the sixties' immigration flow, the number of migrants have been entering these countries in the nineties, nor the number of children (under the age of eighteen) who belong to the migrant families. According to interviews carried out with officials working in the Ministries of Interior and Immigration officials of Italy and Spain countries, immigration flows, both legal and illegal, have actually increased to these countries. Yet they have been kept much under control in the other four main previous destinations – France, Germany, Belgium and the Netherlands. In Portugal, which is geographically next to Spain and the Maghreb region itself, one would find various seasonal workers from the Maghreb working in the tourist industry without being registered as legal immigrants.

With respect to regional distribution within the EU, Algerians mainly chose to live in France, a minority going to Germany, Belgium, Spain, Italy and the UK. Moroccans go mainly to France, Netherlands, Belgium, UK, and in the nineties, Italy and Spain. Tunisians chose mainly France, Italy Germany, Belgium and Netherlands. It is difficult still for the traditional receiving countries of immigrants to chose what is the best policy towards third country nationals, let alone for the new receiving states. EU rules have borne a different impact on the member states depending on the experience of each receiving state with third country nationals. France still finds it difficult to choose its policy and over the last few years, it has passed through various stages. During the time of Charles Pasqua, the former Minister of the Interior, France had severely tightened its visa controls. Mr. Pasqua was quoted by the press as being 'very brutal' in one of his speeches, when referring especially to *'illegal immigrants'*: he intended to send *them* back 'by the planeload and the boatload' until the world 'gets the message'. As king-maker for the presidential aspirations of the former Prime Minister Mr. Edouard Balladur, Mr.

3 By residing, it is meant that the immigrants have been living for more than three months in an EU state; thus, requiring more than a simple entry and tourist permit.

Pasqua claimed a free hand in promoting repressive policies with respect to immigrants.

Table 3.5: Maghrebin Immigration to the EU, 1998
(Source: Eurostat European Social Statistics, Migration 2000)

	Algeria	Morocco	Tunisia	Maghreb
Belgium	8 878	132 831	4 655	146 364
Denmark	438	3 557	500	4 495
Germany	17 499	83 904	25 394	126 797
Greece	197	428	333	958
Spain	5 801	111 100	469	117 370
France	614 207	572 652	206 336	1 393 195
Ireland	-	-	-	-
Italy	6 285	117 487	44 176	167 948
Lux	-	-	-	-
The Nether-lands	1 070	135 725	1 535	138 330
Austria	135	238	839	1 212
Portugal	75	289	28	392
Finland	230	592	154	976
Sweden	441	1 353	926	2 720
United Kingdom	5000	8000	-	1 300
Total	660 256	1 168 156	285 345	2 113 757

However, the situation seems no more positive under the presidency of Jacques Chirac, who was commenting in one of his pre-election speeches transmitted on the media, about the situation of *'current-day France'*,[4] and the need of more security after the 11th of September. If one looks at Table 3.4, the total number of immigrants from the Maghreb entering the EU increased between 1987 and 1998. However, this is mostly applicable for Moroccans and Tunisians who were re-routing their mode of entry to the EU through countries like Spain and Italy, which did not have such strict immigration controls. Over the eleven-year period represented by Table 3.4, the number of Moroccan immigrants increased by 56.4% and the number of Tunisians went up by 19.9%. Their new entry points to the EU, Italy and Spain, could either serve as 'waiting rooms' or as a 'terminus' (see Chapter 1).

The majority of Algerian emigrants, partly due to Algeria's stronger past colonial ties with France, and partly due to family links and language barriers, went straight away to France, which as stated earlier had strengthened its visa regulations. This made it more difficult for Maghrebin to immigrate and settle down there nowadays, and this could account for the reduction in Algerian immigration. However, the rise of atavistic movements like Islamic Fundamentalism in Algeria could also be a reason for a decrease in immigration[5] numbers especially in the case of those Algerians who are highly nationalistic or extremely religious.

Even though legal application for immigration to most EU countries is becoming tougher, this does not mean that entry is impossible. Once immigrants enter one EU member state, such as Italy or Spain, movement on the continent by train or car, now that the internal border controls have been reduced, is quite easy. Of course, the entry into the second state could very well be considered as a form of illegal immigration; but the fact remains that this form of immigration is difficult to control, especially if the immigrants take up temporary work contracts only. And this 'international spillover' could further increase given both the implementations of the Single Market and the Schengen agreements.[6]

Each worker from the Maghreb is estimated to have at least three dependants with him. As regarding labour provisions, the legal migrant worker is supposed to get the same conditions of work and receive the same social security benefits as their European colleagues, after all, they are also paying taxes and contributing to the economy of the host country. Mr. Padraig Flynn - the then Social Affairs Commissioner, in 1994 stated that: 'We are trying to create a situation where we give them a stake in society. That has to be done by dealing with the whole question

4 In this speech, J. Chirac was referring to the new agenda for social policy in France; highlighting main issues which called for reform in 'current-day France' like employment of immigrants.

5 This is highly debatable as Algerians who are not fundamentalist might actually feel oppressed by this radical and extremist movement and might actually want to leave the country. Thus, one can say that Islamic fundamentalism had a two-way effect.

6 On 26 October 1997, Italy ratified Schengen.

of their residence status and need for free movement to take up employment'.[7] Mr. Flynn said the Commission would have to distinguish between 'the ultimate aim' of naturalisation of all legal residents and the more immediate practical steps, which could enhance their integration. Although many member states have resisted his plan - which would require unanimity under Maastricht for immigration policy to be adopted – Mr. Flynn believed it would help balance an increasingly one-sided anti-immigrant approach in the Community. Although the Commission has been progressive on workers' rights and sex equality, it has hitherto been muted on racial questions. In its Communication of November 2000, the Commission recognises this failure of 'zero-migration policies' in the early Nineties and that the EU need to address on the one hand Labour Market shortages, and Demography issues on the other. The Commission's Communication and subsequent proposals emphasise the need for a 'more open EU migration-', coupled with an anti-discrimination, policy for a sound integration approach. Two directives have since been adopted by the Council to prevent racism (June 2000) and discrimination in the workplace (November 2000).

The Co-operation agreements between EU and the Maghreb towards workers and their families have provided grounds for prevention of discrimination in the work place, as well as entitlements. Entitlements, with respect to Maghrebin working in the EU, have been included in the social dimension of the agreements[8] with the Maghreb countries, although the social security advantages were never really clarified except through case law as will be seen in the next chapter. This could be attributed to the fact that these three countries have never followed up on the EU's proposals on implementing measures.

To put these issues in context, we need to take into account the history of the Maghreb region, the problems it had in the recent past and its prospects for the future, as this could give one a deeper insight into why certain agreements have taken place both between the countries of the Maghreb region and also between the Maghreb countries and the Community.

2. THE MAGHREB: AN OVERVIEW

The Maghreb region is the western-most extent of the Arab-Islamic 'empire'.[9] This region includes Morocco, Algeria and Tunisia - whether it should also include Mauritania, the Western Sahara and Libya has always been a highly debated matter.

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7 'EU scheme to open doors to 9m migrants' in *The Guardian* Date 28 January 1994, p.8.

8 European policy towards the Maghreb countries is partly collective (EC/EU) and partly bilateral as in France - Morocco. The Agreements mentioned here are of the collective type EC/ EU - Morocco/Algeria/Tunisia.

9 Empire is a term used to describe the Arab-Islam region by some Arabs, however, the use of the term here should not be confused with the notion of the empire as in the case of the Roman or British Empire.

This matter has 'depended on subjective criteria as much as the historical or political moment' (Spencer, 1993: 5).

The Maghreb, after Algeria gained independence in 1962, became a term of defiance (Spencer, 1993: 5)[10] - a reaffirmation of the region's deep links to Islam and hence the Middle East. It also echoed the cry for struggle of Morocco, Algeria and Tunisia against French rule. This term became thus a cultural concept - a unifying element amongst people sharing a common heritage.

During the de-colonisation period the ruling classes of the Maghreb were already deeply imbued with a sense of the historical and cultural unity of their countries and were determined that this unity should be given an institutional form at the earliest possible date. Maghreb unity was one of the specific objectives of those who fought to throw off French rule, just as much as unity happened to be one of the dynamic ideas, which inspired the de-colonisation throughout Africa. The Maghreb had never been governed by unitary political institutions except for short periods of time, notably that of Almohades in the 12th and 13th centuries. The area undoubtedly possesses a shared culture, but this has expressed itself mainly throughout history in a tripartite political division similar to that of the present day. The idea of historical and cultural unity has had its political effects. It had a concrete influence during the struggle for independence and continues to have one in the present post-colonial phase.

In the Maghreb, the idea of unity has its own political and cultural antecedents in the Arab world. The political concept of a re-born Arab nation is a stimulus to the aspirations towards unity that certainly exist in most Arab countries. Another factor working in the same direction is the idea of the restoration of Islam and the importance of a religious culture transcending individual states.

The idea of unity has generally survived in its functional form. It is a functionalism stripped of political content, which rests on theories of economic integration and does not attempt to emphasise the political implications. The Maghreb countries, so far, had tried to structure closer links with France than with the rest of Africa as a form of experiment in economic co-operation. So the initiative for intra-Maghreb co-operation was initiated by the Tunis and Tangier Protocols of 1964 and the establishment of *Comité Permanent Consultatif du Maghreb* (CPCM). This was an intra-Maghreb organisation to promote first of all co-operation on all levels, but especially in the trade sector between the Maghreb countries and Libya. By these protocols, Libya, Tunisia, Algeria and Morocco agreed to grant one another trade preferences, a common customs union and a joint programme for their principal exports, and to 'co-ordinate and harmonise industrialisation policy for their four countries'. Hence, a Council of Ministers from the four countries was set up, with the CPCM as its permanent secretariat. Due to the fact that this unity was a functional one with little political content, relations between the Council and CPCM

10 Algeria achieved independence after paying a very huge human-life price in one of the bloodiest wars in modern history. About a million of both Algerians and French died in this historical episode.

were based in such a way that initiatives must come from the former. Decisions were in the form of protocols, that is, international instruments which have no binding effect inside the member states.

The first four ministerial conferences were held at Tunis and Tangier (1964), Tripoli (1965), and Algiers (1966) with the result of the CPCM establishment and a number of special committees. During the fifth conference, held in Tunis, there was the institutionalisation of ways and means to bring about Maghreb economic integration. In 1970, the ministerial conference held in Rabat, was quite distinctive in its outcomes:

- The defection of Libya, and;
- The suspension of the initiative of intra-Maghreb co-operation which appeared to have been taken at Tunis in 1967.

Meanwhile, it was quite clear that Maghreb integration, even in the economic sphere, was not turning out to be so effective. As for politics, relations between states in the area seem to follow a certain historical pattern, which was analysed by George Liska (1963: 6) as follows:

> '1. North Africa's tendency, at work since Roman times, to divide into a system of three separate units ... 2. A related tendency for the wing powers (Tunisia and Morocco) to overcome both differences between themselves and affinities with the Algerian centre and to ally themselves against the centre when it engaged in expansionist and subversive policies.'

Following the development patterns in the sixties and the economic crises of mid-70s, in the Maghreb countries a move 'towards democracy, greater regional co-operation and broader external relations' took place (Spencer, 1993: 8). This reaction was provoked by 'long-standing domestic tensions, as much as by development needs and the changing international environment' (Spencer, 1993: 8). However, the withdrawal of Libya from the process due to political disagreements brought about conflicts in the Western Sahara, and this severely affected Algerian-Moroccan relationships for the next twelve years. Diplomatic relationships between these two countries were not resumed until 1988. In 1988, various barriers in the way of co-operation between Algeria and Morocco were abolished and now, Mauritania and Libya were also included, hence, the Arab Maghreb Union Treaty (AMU) was signed on 19th February 1989. One the main objectives of this treaty was to enforce security measures in the region as stated in its Article 14, 'Any aggression to which a Member State is subjected will be considered as an aggression against the other Member States'.

Article 15 of the same treaty states that the member states: 'pledge not to permit any activity or organisation in their territory that could harm the security, territorial integrity or political system of any other Member States.' These articles were very much left up to the individual member states to interpret and implement especially with respect to conflict settlement and maintenance of security in the Sahara region. However, the main purpose of this treaty was once more an economic one and as Article 1 states, '... contributing to the progress and prosperity of their societies ...

and work gradually towards the realisation of the freedom of movement of their people, goods, services and capital'.[11] If this economic co-operation does actualise, North Africa could have a market, which compares well to that of Europe, and this could attract various investors both regional and foreign.

However, co-operation on any level has been so far, so difficult to establish due to the heterogeneity that prevails in the region. Dr. Eberhard Rhein, the former Director of programme for Middle East and Mediterranean Policies, in (DGI External Economic Relations section), described the AMU as not successful and practically non-existent. He stated that twenty or more years are needed before one can actually see a considerable shrinking in the prosperity gap between North and South (which at the moment seems only to increase). More intra-regional dialogue, coherency, transparency and economic development are required in the area for actual improvement of the situation to take place.[12]

On the other hand, the unofficial reason behind the enacting of the AMU seems to go beyond simple economic co-operation. Dr. Jahia Zoubir, an Algerian academic at Thunderbird University, USA stated in an interview[13] that, in his opinion, the main objective behind this initiative was actually the need to fight together the Islamic threat from escalating and spilling over intra-regionally in the Maghreb and Mashrek countries. He defines Islamism as being a *symptom* and not the actual disease, however, it could still become contagious. Max Weber describes this movement as being the 'disenchantment of the world'. The question of radical Islamism in Algeria highlights the phenomenon that bring together former enemies: regional rivals, former regimes and colonising powers; the democrats became close allies of the military (use of military to bring about democracy) and hence the regime's use of Islamic symbols (the FIS used symbols of the FLNA).

One can thus argue that if there is escalation of external conflict, the internal conflicts may escalate like 'the Domino effect' - with crisis factors spreading horizontally, e.g. migratory movements from Maghreb to Libya. This has resulted in the Maghreb's dependence on foreign powers to maintain their stability. Unless sweeping reforms take place there could be an explosion in the Maghreb which could harm Europe in the years to come. The enforcement of Schengen and tightening of the EU's internal borders could cause horizontal immigration (from west to east in North Africa) thus increasing the instability horizontally in the region and hence fuelling further conflicts.

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11 Text of Arab Maghreb Union as reproduced in 'The Maghreb in the 1990s' in *Adelphi*, paper no. 274, p.46.

12 Rhein, E (1995) - Speech delivered during a Wilton Park Conference: *Mediterranean Security*, Monday 22 - Friday 26 May 1995.

13 Zoubir, J (1995) - Qualitative interview held with him on Wednesday 25th May 1995 after he presented his paper 'Algeria and the Stability of the Maghreb' at the Wilton Park Conference: *Mediterranean Security*.

The North African region is definitely not deprived of resources: Morocco is the world's third largest producer of phosphates and Tunisia the fifth, whilst Algeria has large gas reserves. Unfortunately, albeit these natural resources in the Maghreb region, mismanagement, low production and waste of resources have prevailed with the result that the region remains underdeveloped economically. These countries have been induced to liberalise their economies due to the pressure of institutions such as the IMF. However, due to a lack of modernisation, in some parts of the Maghreb more than others, radical Islamism, inflation, international debt, population boom, bread riots, unemployment which led to a legitimacy of corruption, nepotism, social injustice, lack of democracy, mismanagement, and elitism have all contributed to problems especially in Algeria. This prevailing situation has led to an increase in inequality (increase in wealth gap) and the disengagement of the state (*retreat of the welfare state*[14] and people feel abandoned).

The retreat of the welfare state in the Maghreb region has affected the member countries in different ways: housing problems, undergraduate unemployment, gender disparities, wealth disparities, which are in turn coupled with increase in population but lack of economic growth. The Maghreb population is predicted to reach a number in the region of 88 million inhabitants by the year 2010, and 96.2 million by 2025. Before one can speak about democracy and public consensus in the region, the people need to have their basic needs satisfied.

In Algeria, the growing disaffection of sections of the people, notably the youth was met with increasing repression and general government opposition to the development of a participatory civil society and the evolution of genuine power centres separated from government bureaucracy. This effectively precluded the participation of increasingly popular Islamic groups within the political process; their resulting disaffection, notably after the cancellation of the 1992 elections which offered the prospect of power, and consequent governmental repression generated the ongoing armed struggle in the country. While many call for political liberalisation and the construction of a political process that will enable opposition groups to participate effectively in Algerian public life, many remain unconvinced that these changes would be able to forestall the rise to power of extremist Islamic groups whose credentials are equally undemocratic as those held by the existing authoritarian ruling elite. While Islam is popular, not least as a 'movement of rage' against failure and mismanagement, it is unclear whether its advocates will be better able to meet the population's expectations than those of the 'failed' elite or that they will be able to overcome the historical legacy of political violence which has been an intrinsic part of the country's history. Many doubt the Islamic groups' commitment to democracy, noting that it rarely stretches further than applying the principle of 'one man, one vote, one time'.

14 The term welfare state is the term used by Arab academics to describe the socio-economic efforts taking place in the Maghreb region since the de-colonisation period. Thus, the retreat of the welfare state means regression in these socio-economic efforts as the welfare state in the 'Beveridge' sense has never been present in the region.

However, even though the results of the ongoing problems have hit these three countries in different ways, the overall situation has been quite similar. Authoritarian regimes, especially in Algeria and Morocco, have prevailed through repression with the result of the absence of a civil society as politics seem to have taken the back seat for far too long with respect to economic reforms in the region. Due to the very existence of similarities in outcome, the Maghreb countries have a good reason for intra-regional co-operation. Many analysts (Liska, 1963, Spencer, 1993, Rhein, 1995, Zoubir, 1995) agree that the stability of the Maghreb is not primarily dependent upon what happens in Algeria. They note that the region's stability, based largely on authoritarian rule, continues to mask deep problems, which may erupt suddenly.

If Islamists were integrated in the Algerian political system, would this example be followed by the other Maghreb states? This seems to be quite unlikely. Morocco is particularly sensitive to the issue, not least because of its dispute with Algeria over the Western Sahara issue. The Moroccan government has pressed the west to support it as a bulwark against Islamic fundamentalism as a result; a positive western response is deplored by many who argue that it will simply result in the west backing the wrong side if and when the Islamists gain the ascendancy. A growing co-operation between the region's regimes in the face of a perceived common threat - Islamic fundamentalism can be noted; they appear to be increasingly vulnerable to pressure from and dependent upon foreign powers whose support, for example in the provision of food imports, is required to maintain social stability. It can be argued that this approach, containing resentment rather than undertaking reform, will serve only to delay, rather than prevent, an explosion of discontent.

Other observers (Collinson, 1996; Shada, 1990) view the problem in less apocalyptic terms. They note that, while the countries of the region have similar problems, what divides them is more important. Thus, economic growth in Tunisia is occurring faster than population growth. Income distribution is better than in Algeria, while housing is generally of reasonable standards and includes a high proportion of owner-occupiers. Tunisian graduates have reasonable prospects of finding employment. Women are not expected to abide by fundamentalist principles; they are likely to seek to counter any efforts to reintroduce Islamic rules, which would limit their new found freedom. It can be argued that the absence of 'rage' in Tunisian politics shows that the public is generally apathetic and accepts the governmental system. This contrasts sharply with Algeria where all are seeking a fresh start. On the other hand, in Morocco, where the economic growth is slightly higher than in Algeria, due to the high population growth, housing problems, undergraduate unemployment, gender disparities and wealth disparities, there is strong drive to emigrate. Considering the gap between the Northern and Southern shores of the Mediterranean, one can easily see how Italy and Spain cannot be immune to the prevalent situation in the Maghreb region, especially in Morocco.

West European reactions to the situation in the Maghreb involved an initial demonisation of Islamic fundamentalism, and, more positively an increased

commitment to enhancing economic and political linkage with the region. Over the last years, progressive consolidation in the area has been insufficient. Horizontal co-operation, as opposed to relying on co-operation with the EU countries, would be compatible and complimentary to other scenarios of the partnership. This can be made possible if more priority is given to the political agenda, pressure can be exerted instead of sanctions, the cultural gap is reduced if not closed and economic co-operation aimed also at internal reforms. Moreover, the neighbouring country - Libya, has petrol reserves estimated to be worth three billion tonnes; Libya is not immune to the problems which the Maghreb countries are facing, in fact, there is already some migration occurring horizontally towards Libya. Some may argue of course, that Libya is not obliged to subsidise in any way the development in the Maghreb, but on the other hand neither is the EU. It is simply a question of potentiality of spillover of domestic problems internationally because due to the prevalent situation, it does not seem possible that these problems are contained in the Maghreb region solely.

3. THE EURO-MAGHREB TRADE INITIATIVES

The stimulus for inter-regional economic co-operation between the EU and the Maghreb is considerable, especially from the Maghreb's side to gain access to west European markets. The Maghreb region is heavily dependent on its European neighbours especially for trade - 75% of the Maghreb's trade is with the EU and approximately half of this is concentrated in Southern Europe. Due to linguistic, cultural and historical connections, links with France remain and this country represents about a quarter of Morocco's and Tunisia's source for import and export. Germany showed an interest in the 1980s in Tunisia and Algeria with respect to manufacturing opportunities, however this interest was diverted with the events related to reunification. On the other hand, Japan has been highly interested in Algeria's hydrocarbon explorations.

To assist development of the economy of the region, between 1990-1995 ECU (now EUR) 3,3 billion in aid were allotted for the region, to be spent in a five-year period. Although most aid took place in the form of traditional protocols by the EU, a sum of EUR 600 million (m) was considered for easing the social strains and encouraging the implementation of structural adjustment programmes. Domestic agriculture was stepped up to reduce food import bills and to assist industrial developments the EIB provided EUR 3,5 billion in loans for infrastructural developments. In 1996, the MEDA programme armed with the mandate given by the 'MEDA I Council Regulation' provided over EUR 3,4 billion to the region over the span of 1995-1999. The mandate was renewed in 1999, and MEDA II has been allotted the indicated figure of EUR 5,35 billion for the period of 2000-2006 in addition to the EUR 7,4 billion committed by the EIB. MEDA II is considered to be crucial in achieving the task of creating the Euro-Mediterranean free-trade area by 2010 following the Marseilles guidelines, albeit placing more emphasis on

accelerating growth (trade facilitation, liberalisation of services...etc.) and also the social aspects of the position of woman in the Mediterranean society.

Liberalisation of the EU market for the Maghreb's textile exports was also proposed to counter the long-standing complaints of the Maghreb regarding trade barriers. However, far from increasing, the overall EU trade with the Maghreb declined from an already 2% of its total in 1977 to 1% by the late 1980s. Only in limited spheres has it shown signs of any actual increase in trade in the 1990s, this is perhaps most notable in response to southern Europe's energy needs. In 1989, the Spanish national Gas Corporation signed a new agreement with Algeria to meet estimated increases in consumption from 2, 500m cubic metres in 1985 to 7,000m cubic metres by 1995. In March 1991, Italy and Tunisia signed an accord to double the capacity of the 1983 gas pipeline to 40bn cubic metres by the year 2,000; additionally, Tunisia started to export gas-generated electric power to Italy by 1995.

Other sectors like banking and manufacturing have enjoyed some success, but the private sector has relied often on state-backed guarantees to offset perceived political risks (this applies especially to Algeria). The reality is, as it has been stated earlier, that the AMU was not integrated sufficiently to negotiate fruitful intra-regional accords before the mid-1990s and the Maghreb states continued to compete for resources and negotiate new accords with the EU on an individual basis. For example, the renewal of assistance to Morocco in January 1992 was a source of controversy. The EP refused to approve of USD600m in credits on the basis of Morocco's human rights record, although this was finally approved by the EP when a new fishing agreement was signed at the end of February 1992.

In the 1990s, most of the pressure for stronger relations to be forged between the EU and the Maghreb actually came from Spain. The then Spanish Commissioner for the Mediterranean, Abel Matutes, pressed for accords of association and free trade agreements to be signed between the two regions. However, in the sixties, due to its substantial ties with the Maghreb countries and its broader political plans, France played a major role initially within the EEC in the settling of issues with those countries. In 1964, faced with French moves, Italy proposed the 'Saragat Memorandum' whereby the economic-institutional concessions to the countries of the Mediterranean were to be matched by political progress in the European integration process at the time (admission of Great Britain and of North European Countries). This linkage, however, was never put into practice as the Italian representatives actually acted as a brake whenever an increase in the number of the 'members of the EC club' was proposed. The main reason was that Italy actually feared associations 'whose trading could cause imbalances within the Community, making only one or two countries bear the burden of concessions' (Chauvel, 1970: 14).

This implied that Italy demanded guarantees of community preference with respect to those Mediterranean countries 'which are all (including Southern Italy) competitors with each other as regards the exports of agricultural products'. The six member states of the Community at that time, could not wait any longer to settle the EC's vital trade relations with the countries concerned. Tunisia, Algeria and

Morocco obtained association status in March 1969. The protocols were actually limited to the trade sector, putting off to further negotiations the agreement for a full association regime. From the date of entry into force of the association status, industrial products from the Maghreb were to be admitted duty free into the Community area, while a preferential regime was granted for agricultural products, a minimum price on the Community market, and a safeguard clause for the protection of Sicilian products to avoid competition. With regard to energy sources, the Community reserved the right to reintroduce duties on products refined in the countries of origin, whenever their importation could cause real difficulties for EU member countries, especially, whenever such imports exceed 100, 000 tons a year.

As on previous occasions, the Community showed itself incapable of framing an overall policy towards the Mediterranean countries. Although since 1964 the Maghreb countries had indicated an intention, although vague and undefined, 'to co-ordinate their respective positions towards the EEC'[15] and although the Community's negotiators had claimed that they intended to start a general negotiation, the EEC ended up by concluding separate association agreements with each of the countries concerned (which were furthermore limited to the trading area). The 'reverse preferences' system did reappear, although limited to certain products.

In substance, the Community chose the 'national' approach in proposing agreements, which can hardly be said to be free from the peculiar features of the 'vertical' relations dating from the colonial period. These agreements look like a juridical extension to the other Community countries of a policy of 'special relations', already in effect between France and the Maghreb.

Despite this, there existed within the Community the political intent to make an attempt at rationalising all Community relations with the Mediterranean countries by adopting steps to set aside the existing 'patchwork of agreements.'[16] It was voiced in the EP that, in the trade area, the Community (instead of concluding country-by-country agreements) should work out 'product-by-product' agreements of a regional nature with groups of countries. In formulating their attitudes towards the Maghreb, the Europeans have conformed with France's positions, which substantially stemmed from an attempt at mediating the Maghreb's policies towards Europe, and in particular the Algerian demands in the early 1970s. At that time Algeria was increasingly destined to play her role alone and sought a clear-cut and united policy towards the Maghreb in particular and towards all Mediterranean countries in general. Europe can make it possible for these countries not only to deal with larger separate governments, but also to be in a relationship with a larger European group. By doing this, the Community would launch a type of co-operation that could be looked upon as an important step forward in its approach to the Third World, however, the question in this case is when will this be fully implemented?

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15 Document of the Standing Advisory Maghreb Committee, Tunis, 1968.

16 Document 246 PE 25.843/all, Session 1970/71 (18-2-70).

4. ECONOMIC CO-OPERATION AGREEMENTS WITH THE MAGHREB AND MOVEMENT OF LABOUR

In 1978, the European Community had entered into Co-operation Agreements with Algeria[17], Morocco[18] and Tunisia.[19] More recent the Co-operation Agreements between the EU and the Maghreb region were developed further in 1995. However, the new agreements were signed with Morocco and Tunisia only, the situation in Algeria was still too unstable. The EU and Morocco concluded talks on new co-operation agreements on 10th November 1995, the focus was mainly on agriculture, fishing and illegal migration. The EU and Tunisia signed a new co-operation agreement on 17th July 1995. The main focus was economic, cultural and technical co-operation, political dialogue, and the progressive creation of a zone free exchange for financial co-operation. The subject of how to promote agriculture and how to remove barriers to trade in this sector was also discussed in length.

A Council for Co-operation between EU and Algeria met on the 2 October 1995, but agreements for co-operation with Algeria were postponed until the situation became more peaceful and stable. However, issues such as movements for peace (how to promote stability and prosperity in the Euro-Mediterranean region; how to abolish violence and infringement of human rights to thus bring about democracy and the enacting and implementation of a type of economy in Algeria which might help to develop the state of Algeria both domestically and in its relations with the EU) were discussed.

Each of the agreements signed, including the one signed with Algeria in 1978, include regulations with respect to labour migrants:

> 'The treatment accorded by each Member State to workers of (Algerian, Moroccan, Tunisian) 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. Morocco, Algeria and Tunisia shall accord the same treatment to workers who are nationals of a Member State and employed in its territory.[20] *and* Subject to the provisions of the following paragraphs, workers of (Maghrebin) nationality and any members of their families living with them shall enjoy, in the field

17 Council Regulation (EEC-Algeria) No 2210/78 of 27/9/78.

18 Council Regulation (EEC-Morocco) No 2211/78 of 27/9/78.

19 Council Regulation (EEC-Tunisia) No 2212/78 of 27/9/78.

20 This article featured in the three Council Regulations of 27/9/78: Article 38 (Algeria), Article 40 (Morocco), Article 39 (Tunisia).

> of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed.'[21]

The same article has some further provisions on pension rights, family allowances and rates of exchange related to social security benefits between the host country and sending country in the eventuality of return migration on retirement from work. Articles 42 and 43 of Agreements on Co-operation in the Field of Labour between the European Community as a supranational structure and each of the Maghreb countries (Algeria, Morocco and Tunisia respectively) simply reify what has been stated in the previous article and enforce and necessity for its implementation and moreover, state that:

> 'The provisions adopted by the Co-operation Council in accordance with Article 42 shall not affect any rights or obligations arising from bilateral agreements linking Morocco and Member States where those agreements provide for more favourable treatment of nationals of [Morocco, Algeria and Tunisia] or of the Member states.'[22]

However, case law presented in front of the ECJ has demonstrated that in spite of these articles, discrimination on the basis of nationality still occurs. When one looks at the Morocco/EC Agreement one would find that in the *Kziber* case (C-18/90, see Chapter 4 for details of the case) the provision in respect of social security was directly effective. This implies that according to the Agreement a Moroccan worker would not expect to have to contest his/her rights with respect to social security in court, as the Agreement could have been relied upon directly. In Kziber enforcement of this regulation had to be sought by a Moroccan worker residing in the Community in the ECJ against the Belgian government due to discrimination against her/his provision of social security benefits on the grounds of nationality. The ECJ then stated that the provision of the Agreement prohibiting discrimination as regards working conditions and remuneration was also of direct effect. Identical provisions exist in all the three Agreements with Maghreb countries and hence the ECJ's decision to one agreement should apply *mutatis mutandis* to the other two Agreements.

The Agreements cover also those who are involuntarily and temporarily unemployed as regards social security benefits. Family members of the worker who are resident in the Community can also seek protection. The ECJ would rely on EU law with respect to social security rights for EU workers (Regulation 1408/71) to

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21 Article 39 (Algeria), Article 41 (Morocco), Article 40 (Tunisia). The main provisions for bilateral agreements will be presented in the next chapter, which will deal with national policies.

22 Article 41 (Algeria), Article 43 (Morocco), and Article 42 (Tunisia). These articles feature in the three Council Regulations of 27/9/78 of the three respective countries, and in all the three, the wording is identical. This Council Regulation did not go any further than the four mentioned articles in each case with respect to co-operation in the Field of Labour between the Community and three respective Maghreb states.

interpret the Agreement correctly, thus according to this regulation, discrimination in the provision of benefits in the following categories is against the EU law:

- Illness and maternity benefits;
- Invalidity benefits including those intended for the maintenance or improvement of earning capacity;
- Old age benefit;
- Survivor's benefits;
- Benefits in respect of accidents at work and occupational diseases;
- Death grants;
- Unemployment benefits;
- Family benefits (Guild, 1992: 16)

With respect to family members, they can only benefit from social security benefits when they are within the territory of the Community and not in their country of origin. However, as we shall observe in next chapters, interpretation and implementation of these vary in the member states.

The above-mentioned agreements also state quite clearly that nationality could not be used as a justification for discrimination with respect to working conditions and pay. This provision is identical to that in Article 48(2) relating to migration of workers who are EU citizens within the Community. The only exception is that in this latter case is that in this Article 'employment' is spelt out clearly as being an area in which discrimination is prohibited. This implies that there can still be divergences in the interpretation of this provision in the different member states.[23] The interpretation of this kind of provisions can vary at times not simply on the basis of the wording but also on the basis of their objectives (Guild, 1992: 13) Thus, as part of the *acquis communautaire* Maghrebin workers in the Community may be able to rely on the agreements when they are subject to discrimination based on nationality with respect to social security benefits, working conditions or remuneration.

Decisions taken by the ECJ regarding workers' status apply both to active and to retired workers who have either reached retirement age or were disabled due to illness or accident on site. In the case 182/78 Pierik (1979) ECR 1977, the Court decided that a pensioner (in this case, of French nationality), independently of his rights provided for in Article 27 *et seq.* of the Regulation concerning sickness insurance, is entitled because he/she continues to be a worker within the meaning of Article 1 of the Regulation, to benefit under the provisions of Article 22 (Apap, 1994: 67).

With respect to objectives of Co-operation Agreements, one would find that certainly the main aim on this issue is to secure economic and commercial relations primarily between the parties involved. This of course leads to the possibility of prevalence of divergence of objectives between the member states involved in

23 This Article has been widely interpreted, as one can observe from the judgements passed in the *Heylens* Case C-22/86 and the *Royer* Case C-48/76.

signing these agreements. In the case of Kziber (a Moroccan born in Belgium), the ECJ relied directly on the interpretation of the corresponding Community provisions. Hence, one can apply the court's ruling also to working conditions. However, the same phrase could be also interpreted from another perspective that would bear the effect of giving Maghreb workers legally resident in the Community less employment protection rights in comparison with EU nationals. Community law prohibits the discrimination of social security benefits in the Kziber case between 'their nationals' and Co-operation Agreement workers. The main objective hereby, in the area of co-operation in the field of labour, in the Co-operation Agreements is actually the avoidance of discrimination and as the Agreements are the responsibility of the Community and the member states to implement, the type of protection offered as a result should be the same throughout the Community.

The member states are under the obligation to be consistent in interpretation not only to the non-EU state but also to the Community. A state is not allowed to vary from another in the effects of such agreements as concluded in the Kupferberg case C-104/81 (the case of a Turkish national living in Germany).[24] Unfortunately, breaches to this obligation still take place when national law is not convergent with Community law - as in the renewal of work and residence permits. If one considers the case of a Maghrebin worker in the UK, that worker is entitled to secure work and residence rights for 4 years which may carry on to the achievement of a permanent right thereafter. However, the same worker in Ireland would have to renew his/her residence and work permits every six months and each time there would be uncertainty whether these permits would be renewed or not.

It is correct to say that the Co-operation Agreements offer protection to Maghrebin workers residing and working on the territory of the EU member states, however, it would be quite false to believe that inherent to the meaning of these Agreements, one may find the right to claim accession to the Community territory. The Agreements are only meant to protect workers who are legally residing within the Community member states and are not meant to serve as an 'entry passport' to anyone who would like to immigrate into the EU to look for work.

5. Obstacles to Progress in North-South Regional Initiatives

Following the geo-political transformations, which took place in Europe in 1989, the relations between Europe and the Maghreb, took a considerable turn. In Western Europe, the reforms and migration from the former eastern bloc hailed attention to instability in the southern part of Europe and the Mediterranean. All this instability was coupled with Europe's own internal problems of economic recession and lack of integration. 'Soft' security issues began to occupy the scene of policy-making. In

24 Case 104/81 *Hauptzollamt Mainz v. Kupferberg* (1982) ECR 3641.

one of its report the Western European Union (WEU in Collinson, 1996: p.39) declared:

> 'Europe can no longer view its security solely in terms of the establishment of peace on the continent of Europe; it must also bear in mind that its relations with its southern neighbours also concern its security and involve risks which at first sight are probably not of military nature but affect its internal stability and the conduct of its economy and, if allowed to develop, might in the long run jeopardise what now seems to have been acquired in terms of peace...Immigration featured at the top of the list among the risks to security due to the mass exodus from Albania, revolutions in Eastern Europe, the outbreak of war in the former Yugoslavia and hence, the sharp increases in numbers of asylum-seekers arriving at the doors of western Europe, all these events fuelled a growing paranoia in western Europe. On the other hand, unchecked population growth, unemployment, poverty, political and religious extremism and conflict in the south, sent numerous refugees and migrants northwards in search of protection and/or prosperity' (Collinson, 1996: 40).

Maghrebin immigrants became primary targets of anxiety and hostility where their presence was felt considerably. Due to long standing historical clashes between the Christian and Islamic world and then the Franco-Algerian clashes and the problems that the French society presented in coming to terms with Islamic presence in France, the Maghrebin immigrant community had thus to bear the brunt of beliefs of 'cultural diversity' and 'desirable' *versus* 'undesirable' immigrants of those who had posited the problem of immigration as mainly a problem of more or less Arab immigration.[25] Similarly, as will be seen in Chapters 5 and 6 where this study will present the empirical results and analysis on Italy and Spain, parallel situations with France arose.

Spain's intense historical relationship with Morocco came to be reflected in an antipathy towards 'the South' among members of the Spanish public.[26] North Africans are widely associated with fanaticism, underdevelopment and violence in Spanish minds. Spanish public opinion has therefore been highly sensitive to immigration from Morocco and elsewhere in North Africa despite the fact that levels have been quite modest when compared with Italy. Surveys carried out in late 80s and early 90s in Spain, (see Chapter 6), reveal low levels of tolerance for Maghrebin relative to the attitude towards Latin Americans and East Europeans. In Italy, on the other hand, hostility towards Maghrebin immigrants has somehow subsumed traditional hostilities in the industrialised north towards internal migrants from Sicily and other areas of the south. In Spain, however, open nativist attitudes were quickly branded and discredited as Fascist and, as a consequence anti-immigrant sentiments have played a relatively minor role in domestic politics.

Meanwhile, in Italy and France, by contrast, hostility towards North African minority has considerably bolstered the strength of extreme right wing political

25 Ibid., p. 41.

26 This is clearly reflected in the term *'Moros en la costa'*, in ibid. p. 41.

movements. This has attributed towards a shifting in the margins of domestic politics since the late 1980s. Jean-Marie Le Pen, barely mentioned migration issues in his 1974 political campaign, whereas in 1988, 1995, and later on in 2002, he was highly rewarded in his presidential campaign for adopting migration issues as his primary campaigning issues. In Italy, the ultra-right wing 'Lega-Nord' and 'Alleanza Nazionale' became a major political force in the early 1990s by virtue of their anti-immigration stances. Their position helped bring about a major crack down on undocumented immigration and employment of illegal immigrants which was legislated in Italy at the end of 1995.

The Gulf war in 1991, and the September 11th events in 2001 brought about a further entrenchment of anti-Arab and anti-Islamic attitudes in western Europe, and these found much of their expression in growing antipathy, hostility and, at times, violence towards Arab immigrant minorities thus 'replacing the old East-West divide with a North-South cultural and religious frontier in the Mediterranean' with concerns of the perceived threats such as 'over population, religious extremism, migration, terrorism [and] the proliferation of arms of mass destruction' (Wörner in Collinson, 1996).[27] These sentiments are further exacerbated by the events of 11 September 2001, where the 'religious' militancy carried out by one of the most extremist Islamic groups, Al-Qaeda, have allowed many to justify anti-Arab and anti-Islamic actions and propaganda. Thus, once placed on the security agenda, immigration from the Southern shores of the Mediterranean became linked with social and political malaise such as terrorism, delinquents, drugs and violence.

Just as the migration issues gave impetus to the development of the AMU (Arab Maghreb Union), on the other hand, it contributed to their demise. The Gulf war dealt these initiatives their first serious blow, totally overshadowing initiatives to set up a CSCM and bringing up fresh tensions within the AMU, thus stalling progress in discussions between the Maghreb and Europe. The second set of serious blows came in 1992 when, in Algeria there was the cancellation of elections and the breakdown of democracy and afterwards, in April of that same year, the imposition of UN sanctions on Libya over the Lockerbie affair. These two events deprived the AMU of any credibility it ever had, rendering in vain all the efforts of the Tunisian government to keep up the momentum. The Maghreb countries, at this point tried to balance their political interests with the EU Member states, whilst not alienating Colonel Qaddafi. Following Tunisia's apparent lack of support over the Lockerbie affair and then, the opening of a liaison office between Tunisia and Israel, Libya closed its border with Tunisia.[28] Algeria's situation was even more precarious than that of Tunisia. Already crippled by its own domestic political and economic crisis,

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27 Manfred Wörner, Nato Secretary-General, on 17 May 1991 in Collinson, S (1996), idem. op. cit., p.42. Wörner's successor, Willy Claes, in February 1995, came under attack for his lack of diplomacy when he suggested that Islamic militancy posed the single greatest threat to the Alliance and to western Europe since the collapse of communism.

28 'Libyan Leader Closes Border with Tunisia', in *The Herald Tribune*, 15 November 1993.

Algeria was in no position to push forward an ambitious programme for strengthening integration and co-operation with its Maghreb partners. Moreover, the rapid deterioration in Algerian relations with Morocco that followed the killing of two Spanish tourists in Marrakech allegedly by an Algerian gang on 24 August 1994 (Collinson, 1996: 54), brought about an imposition of a visa requirement on Algerian nationals wishing to go to Morocco and a regulation that all Algerians present in Morocco should register with the police. This closure of the Algerian border brought about also tension between Morocco and Tunisia as Tunisia then expelled approximately 600 Moroccan nationals from Tunisia in 1994 and September 1994, Morocco responded by setting up a hostile campaign the Moroccan press against Tunisia. Thus, the Algerian crisis, the Libyan problem and the virtual breakdown of the AMU made it impossible for the EU member states to deal with the Maghreb at a regional level after 1992.[29]

Hence, while migration can be argued to represent an important conduit for cultural exchange and a potential basis for mutual understanding between the two sides of the Mediterranean (as argued by Fernand Braudel in his statement, *'la Mediterranée n'a d'unité que par le mouvement des hommes, les liaisons qu'il implique, par les routes qui les conduisent'* in Braudel, F. 1966, Vol. 1, p.253), it just as often served ideas of conflict, 'on one side, feeding identities of denial founded on Islam, and on the other side the rebirth of extreme right and racist violence.

6. EFFORTS TO MANAGE MIGRATION ISSUES

Following the tensions of 1992, dealings on both sides of the Mediterranean soon reverted to the largely bilateral style of relations between each of the three central Maghreb states, the EU institutions, and EU member states, which had been thus far characteristic of EU-Maghreb relations from the 1960s up to the late 1980s. A form of multilateral debate took place in the conference of Ministers of Foreign Affairs of the Western Mediterranean, which had started initially as a 5+4 summit, in Venice in October 1990 involving Morocco, Algeria, Tunisia, Libya and Mauritania, plus France, Italy, Spain, and Portugal, later to be joined by Malta thus forming the 5+5 group. Concurrent to the setting up of the 5+4, later the 5+5 group, there were talks about regional security in the Mediterranean with the idea of enacting a CSCM –

Conference on Security and Co-operation in the Mediterranean, involving all the EU member states, all Mediterranean littoral states (extending itself from Morocco to Turkey and Yugoslavia), plus the Gulf Co-operation Council (GCC) states - Yemen, Iran, Iraq and the USA and Canada. This formula was criticised by the French government as being too broad and the 5+5 approach was favoured. However, it soon became apparent that there was a lack of agreement about issues to be tackled, such as the rights and status of Maghrebin emigrants in Europe. Albeit its

29 Refer to 'France-Espagne', in *Informations Européennes*, October 1992.

limitations, this was a truly joint initiative, given the limited interests of Libya and Mauritania in this area. Another proposition was to set up a Mediterranean Investment Bank to encourage private investment in the Mediterranean region.

The question one can put at this point is, how much has actually been achieved by the 5+5 process or any other potential process which links the Maghreb almost exclusively to its South European neighbours? The diversity of the nature of the problems present among the AMU states rendered dealings more effective at the bilateral level. One of the main limitations to the 'Mediterranean Forum' (the 5+4, 5+5 process) was that most of the issues being tackled were about trade and immigration and invoked policies affecting the relations between the Maghreb and the European Community as a whole, not just the Southern European states. The 5+5 grouping brought the Maghreb governments, particularly Morocco and Tunisia, into a supposed alliance with their principal supporters of the EC's Common Agricultural Policy (CAP) - a policy which has long been seen by the Maghreb agricultural exporters as one of the main obstacles to their development and growth.

Co-operation at bilateral level portrayed the extent of closure much more clearly than the discussions at regional level. For example, following the drowning of about 400 migrants while trying to cross the Straits of Gibraltar, a 're-admission' agreement was signed between Morocco and Spain in February 1992, whereby the Moroccan government committed itself to re-admitting all undocumented immigrants apprehended in Spain who originated from or had travelled through Morocco. This agreement was offset by another accord to facilitate the travel of Moroccan emigrants legally residing in Western Europe wishing to transit Spain on their way to Morocco. The inclusion of migrants of other nationalities in the readmission agreement reflected the increasing importance of migration networks (controlled in part by traffickers) linking Mali, Senegal and other sub-Saharan countries with Spain via Morocco.[30] Following problems caused by the Moroccan government's refusal to admit anyone who could not be proven by the Spanish authorities to have travelled through Morocco, the provisions for readmission were eventually implemented in late August 1992.

Spain's readmission agreement with Morocco, and a similar confidential agreement reported to have been signed between France and Algeria in 1994,[31] were

30 Principal migration routes identified by the Spanish authorities including Niger-Algeria-Morocco and Senegal-Mali-Mauritania-Algeria-Morocco, crossing into Spain either directly (by boat) across the Straits of Gibraltar or via Melilla or Ceuta. Melilla and Ceuta are Spanish protectorates, as can be seen from Chapter 6. Due to their links with Spain, it is relatively quite easy for persons living in these regions to obtain a one-day visa to do a day-trip to Spain, but some of them simply do not take the return trip back to Melilla or Ceuta, similar methods could be utilised to traffic persons of other nationalities via this route.

31 A confidential Franco-Algerian readmission agreement was reported to have been signed in April 1994 in *Migration News Sheet*, Brussels, November 1994, no. 140 and December 1994, no. 141.

clear examples of a straightforward attempt on the part of EU member states to expand their strengthening migration control 'regime' southwards (Collinson, 1996: 60). The Maghreb governments' willingness to play ball with the EU member states did not reflect shared interests within this context. Yet it is indicative of their economic dependence on the EU and thus of a willingness to trade the migration issue off for the more critical concern to protect and improve their wider commercial, financial and political standing with the Community (Collinson, 1996: 60).

Morocco's move to co-operate with the Spanish government to control emigration and drug-trafficking represented a straightforward trade-off which can be dated back to a high-level bilateral summit held in Morocco, in December 1990, when former Prime Minister González tackled the issue of emigration alongside an offer to step up support to the Moroccan regime after the riots of December 1990. It is however questionable, how much effort the Maghreb governments are actually willing to invest in emigration control, given their implicit interest in maintaining a certain level of emigration to Europe, and given the limited effectiveness of such controls.

The Spanish government, in 1992, launched a new Maghreb initiative which included proposals for the creation of an EC-Maghreb free trade zone and for renewed efforts to alleviate debts, reinforce political dialogue and increase financial aid to the Maghreb. Although no explicit readmission agreements were sought with Tunisia, the arrests and expulsions by the Tunisian authorities of Moroccans apprehended while attempting to migrate to Italy showed Ben Ali's concern to be seen co-operating in this area. It was only the Algerian government, which responded to the new visa regulations by introducing visa requirements of its own for French, Spanish and Italian nationals wishing to enter Algeria. The crackdown of King Hassan of Morocco on undocumented migrants in Tangiers in late 1992 and early 1993 appears to have been short-lived; the same can be said for Morocco's control on drug trafficking. No amount of diplomatic pressure seems to compensate sufficiently for the government's quiet appreciation of cannabis culture as a critical component of the Rif economy.[32]

7. European Community Policy towards the Immigrants from the Maghreb

Lack of common interests between the two sides of the Mediterranean basin, with respect to the migration debate, the complexity and the sensitivity of the situation, made it very difficult for the 'Mediterranean Forum' and 5+4, 5+5 discussions. The debate about migration, although clearly institutionalised in the dialogue, was very often dealt with marginally or in an ineffective manner between the two sides.

32 'Hashish Habit Deepens Farmers' Dependency' in *The European*, 9 November 1995.

Economically speaking, especially with respect to trade, the dependency relationship is quite clear. Western Europe is no more dependant on the Maghreb than before, however, the Maghreb is more dependent than ever on Western Europe for the bulk of its trade, aid and foreign investment.[33] The migration, in the early 1990s, has helped develop a rather different concept of dependency between the two regions - the future security of Western Europe depended also on the maintenance of political and economic stability on its southern and eastern peripheries. In 1994, the former European Commissioner Manuel Marin, in a Communication on strengthening the European Union' Mediterranean policy stated that:

> 'the Mediterranean basin constitutes an area of strategic importance for the European Community, ... political, economic and social conditions in these countries are sources of instability leading to mass migration, fundamentalist expression, terrorism, drugs and organised crime. These have a harmful effect on both the region itself and on the Union. The Union (therefore) has an interest in co-operating with the countries concerned to reduce these sources of instability' (CEC, Marin, 1995: 11).

As stated before, new association agreements were signed with Morocco and Tunisia in 1995. At first appearance, the rationale behind the negotiations seems to be to integrate these countries into an emerging pan-European free trade network and by way of that process these countries had to streamline their regulations and economic policy framework. However, on a closer look, it becomes quite clear that the 'free trade' provisions do not imply any substantive liberalisation of the EU's markets to imports from the Maghreb, at least in the short to medium term.

There are very significant anti-dumping measures on Moroccan and Tunisian agricultural produce as they could otherwise be competing with South European States, only small concessions allowing a marginal quota increases and limited calendar extensions for imports such as oranges and clemetines, tomatoes and olive oil. The Moroccan government argued that if further liberalisation of the European markets to North African produce were to occur, this would certainly increase employment in the region and hence also help curb down migration to the northern banks of the Mediterranean.

The prevalent provisions for further liberalisation of trade between the Maghreb and the Union amount to little more than a further push to Tunisia and Morocco to

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33 See debates on EC-Maghreb and EC-Mediterranean Co-operation, in Commission of the European Communities (1992) - *Communication from the Commission to the Council and European Parliament: The Future of Relations Between the Community and the Maghreb* (SEC (92) 401 final, 30.4.92), Brussels: CEC; Commission of the European Communities (1994) - *Communication from the Commission to the Council and the European Parliament: Strengthening the Mediterranean Policy of the European Union. Establishing a Euro-Mediterranean Partnership* (COM (94) 427 final, 19.10.1994), Brussels: CEC; and, Commission of the European Communities (1995) - *Communication from the Commission to the Council and the European Parliament. Strengthening the Mediterranean Policy of the European Union: Proposals for Implementing a Euro-Mediterranean Partnership (COM (95) 72 final, 8.3.1995)*, Brussels: CEC.

dismantle unilaterally their remaining tariff restrictions on imports from Europe. The underlying concept of the association agreements is that trade and long-term competitiveness of the Maghreb economies and these countries' eventual successful integration into the global economy relies on their markets being opened up further to international competition. Thus the agreements do not change much in the way of what could be described as the structural adjustment and economic liberalisation initiated by Morocco and Tunisia in the 80s. Implementation of 'free trade' is viewed as the final annihilation of any form of protectionism in the area (Collinson, 1996). The agreements give a twelve year transition period; however, it is highly questionable whether the Moroccan and Tunisian economies are actually equipped well enough to cope with the degree of liberalisation envisaged under the new accords. Both countries occupy a fragile position in global economic competition. It seems quite likely therefore, that the association agreements will cause considerable destabilisation in the economies of Morocco and Tunisia.

More concrete efforts to step-up the Euro-Mediterranean process came initially from the Italians and the French, who were later joined by the Spanish who emphasised the need for a Mediterranean dialogue. To this effect, the Spanish initiated the Barcelona process.[34] Some of the costs of liberalisation will be offset by increases of EU aid to the Maghreb, the total set under the framework of the Euro-Mediterranean partnership is of the amount of 4.7 billion ECU for 1995-1999. This was especially one of the main highlights of the Barcelona conference. However, this sum was not worked out on a needs basis, the amount would have otherwise been much larger.

Aid from the EU accounts for only 60 per cent of the aid inflow to the Maghreb. There is a much higher proportion resulting from bilateral arrangements with individual EU member states. In fact, the Barcelona process is not focused only on the Maghreb, it provides a general context for the whole of the Mediterranean and this may cause a dilution of the policy towards the Maghreb region in the Mediterranean context.

7.1 The Barcelona Conference

The Barcelona Conference, which was the first Euro-Mediterranean Conference, took place on the 27-28 November 1995. The main aim of this conference was to enact a Euro-Mediterranean policy. At the end of the two-day 'Euro-Mediterranean' Conference the Foreign Ministers of the 15 EU member states and of the 12 invited Mediterranean states and partners adopted the texts of two related documents. The

34 Refer to 'Barcelona Declaration Adopted at the Euro-Mediterranean Conference (27/28 November 1995) in *Europe Documents*, no. 1964, 6 December 1995. The Valletta conference, which took place in Malta between 14th-16th April 1997, focused much more on peace issues and mediation in the Middle East. See also Collinson, S., (1996), ibid., p.75.

first was the Barcelona Declaration, setting out the principles which are to govern a new Euro-Mediterranean Partnership 'through strengthened political dialogue on a regular basis, the development of economic and financial co-operation and greater emphasis on the social, cultural and human dimension, these being the three aspects of the Euro-Mediterranean Partnership.'[35]

The second document, or annex to the first agreement is the 'Work Programme', the aim of which is 'to implement the objectives of the Barcelona Declaration, and to respect its principles, through regional and multilateral actions. It is complementary both to the bilateral co-operation, implemented in particular under the agreements between the EU and its Mediterranean partners, and to the co-operation already existing in other multilateral fora.'[36]

The main proposals include the creation of a Euro-Mediterranean free trade area by the year 2010, mostly through the conclusion of bilateral Euro-Mediterranean Association Agreements between the EU and the twelve participants invited to Barcelona (Morocco, Algeria, Tunisia, Malta, Egypt, Cyprus, Israel, Jordan, the Palestinian National Authority, Syria, Lebanon and Turkey). The three main areas to be covered by these association agreements go beyond the almost exclusively economic basis of the customs agreements and association accords, which the EU has concluded with a number of these states since 1970s. To quote the European Commission memorandum issued prior to the Barcelona conference, and not substantially altered in the final declaration:

The Declaration encompasses three main issues: (1) The political and security partnership aimed at defining a common area of peace and stability; (2) Economic and financial partnership, aimed at building a zone of shared prosperity, notably by progressively; (3) Social, cultural and human partnership, which is designed to foster exchanges between civil societies.[37]

The main aims were to strengthen a) political dialogue between the partners; b) economic co-operation; and c) the social and cultural context. Emphasis in the Final Declaration was also placed on the respect of human rights under the United Nations Charter and the Universal Declaration of Human Rights, on the development of the rule of law and democracy (but with no specific financial or political leverage attached), and on combating racism and xenophobia. 'The Economist' of the following week, described the provisions in the Barcelona Declaration as being

35 Barcelona Declaration Adopted at the Euro-Mediterranean Conference 27 and 28 November 1995, Final Version 2, Preamble, and p.3.

36 Ibid., Annex - Work Programme, Introduction, p.13.

37 European Commission Spokesman's Service, *The Barcelona Conference and the Euro-Mediterranean Association Agreements*, MEMO /95/156, Brussels 23 November 1995, p.2.

'waffle',[38] however the participating states agreed that these provisions are aspirations towards which the whole region has agreed that it should aspire to.

However, there were some clear trade-offs. Amongst the trade-offs of the Barcelona process one finds in return for the Mediterranean states agreeing to facilitate return of migrants from Europe (this was a point of contention because there was disagreement about whether this should be considered as a 'responsibility' or an 'obligation'), the EU states have agreed to strengthen the application of legislation to protect the rights accorded to legal migrants in Europe.

The ambiguity of the status of migration issues in the co-operation agreements resulting from the Barcelona process can be well observed from the conclusion of the declaration: 'co-operation to reduce migratory pressures ... through vocational training programmes and programmes of assistance for job creation'. This was placed under the heading of 'partnership in social, cultural and human affairs' rather than under that of 'economic and financial partnership creating an area of shared prosperity.'[39] Sarah Collinson (1996: 70) believes that the reason why the issue of migration was excluded from the new trade accords, and is only dealt with in one paragraph in the resulting final declaration is because:

> 'migration pressures in the Maghreb seem to have provided much of the impetus for exploring new avenues of Euro-Mediterranean economic co-operation, it is likely that one of the principal reasons why the migration issue was excluded from the discussions leading to the new trade accords was the implicit recognition on the European side that the policy measures actually under discussion would do little to counter the immediate causes of migration in the region. The twin issues of employment and migration thus served as a rhetorical and poorly defined justification for seeking the new association agreements and for securing increased levels of financial aid to the Maghreb, but they could not be usefully included as a concrete focus for discussion in the negotiation themselves.'

7.2 Following the Barcelona Conference: 1997 – 2002

The Valletta Conference, which served as a follow-up to the Barcelona conference in April 1996 was held in Malta (15 – 16 April 1997), did not tackle much the subject of co-operation between the Northern-shore countries of the Mediterranean and the Maghreb. It focused much more on making the conference an historical moment in the broader context of the Arab-Israeli peace process. The delegations present took the advantage that there were united around the same table ministerial representatives from Israel, Syria, Lebanon, Egypt and the Palestinian National Authority (PNA) to discuss the Middle East peace process.

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38 'A new crusade' in *The Economist*, 2 December 1995, p. 39.

39 See Barcelona Declaration at the Euro-Mediterranean Conference - 27/28 November 1995, in *Europe Documents*, no. 1964, 6 December 1995.

The third Euro-Mediterranean Conference held in Stuttgart, Germany on the 15 – 16 April 1999 treaded mostly on trade and economic issues, yet the following declaration was made:

> 'Ministers welcomed the meeting on migration and human exchanges held in The Hague on 1-2 March 1999 which provided an opportunity for a frank discussion on this important and delicate issue. It was agreed that work should be pursued in this area which could lead to the holding of a high-level meeting.'[40]

The Marseilles Conference (15 – 16 November 2000) constituted the fourth meeting following Barcelona, and it nodded to the conclusions reached by the first of these 'high-level meetings'. The first ad hoc meeting of Senior Officials on migration and human exchanges met on 6 October 2000. The Conference highlighted the need to integrate third-country nationals legally residing in the EU territory in addition to confirming the indicative sum of EUR 5,35 billion to MEDA II along with EIB's EUR 7,4 billion.

The fifth Euro-Mediterranean Conference (22 to 23 April 2002) was held in Valencia, Spain. Having the impending Eastern Enlargement and events of September 11th as its starters, and the continuing dire situation between Palestine and Israel as its main course, the Valencia Conference established an Action Plan that calls for the urgent need for peace in the Middle East. It introduced terrorism into the EU-MED dialogues, stressing that 'the Barcelona Process cannot remain indifferent to the phenomenon of Terrorism'.[41] The Action Plan then confirmed that EIB will offer a net lending of EUR 2 billion per year to financially assist the development within the region until 2006, an increase from the previous conference.

In addition, a Ministerial Conference on Migration and Social Integration of Emigrants will be held in the second half of 2003, with an eye in establishing a cross-country dialogue with the countries of origin of the third country national legally residing in the EU. These dialogues hope to achieve the social integration of the migrant workers legally residing in the EU, as well as manage the migratory flows from the region. Perhaps with the extreme instability in the region, this social integration of legally residing Maghrebin workers in the EU can actually be realised and put higher on the agenda. And lastly, the Algerian President Buteflika and the Spanish Prime Minister Aznar at Valencia formally signed the Euro-Mediterranean Association Agreement with Algeria concluded in 1999, the last of the three Maghreb countries to do so.

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40 See 'Chairman's formal conclusions' from the Third Euro-Mediterranean Conference of Foreign Ministers, Stuttgart, 15-16 April 1999.

41 See the 'Valencia Action Plan' from the Fifth Euro-Mediterranean Conference of Ministers for Foreign Affairs, Valencia, 22-23 April 2002.

7.3 Development as a Substitute to Migration

To what extent would development, in light of the association agreements, reduce migration, is dubious, even if the new agreements were to have an immediate, positive impact on economic growth and job creation in the Maghreb. Political moves to manipulate, in the short-term, development co-operation could in fact jeopardise the possibility for more durable growth and development in the sending countries (Brier, 1994: 175-176; Wood, 1994: 80).

It is of the utmost importance to understand the relationship between economic development and migration and thus the information about this relationship remains inadequate for informing policy in a truly effective way. The validity of the assertion that development would substitute migration is still highly questionable. Migration *per se*, whether within states or across international borders, is not a straightforward process and cannot be simply attributed to migration pressures such as relative poverty, population growth or unemployment. It goes much deeper, migration is a complex component of many forms of micro- and macro- level social, economic and political change, operating at both the 'sending' and 'receiving' ends of the migration process (Collinson, 1996: 80).

Thus, economic development can actually stimulate migration as much as impede it because it produces the incentives for potential migrants because they will be provided with the resources to facilitate the migration process, increasing the communication between receiving and sending countries and by disrupting the prevalent social and economic order in the sending regions (Collinson, 1996: 80).

The variables are numerous, and the factors encouraging or discouraging migration are so complex and diverse in nature, it is almost impossible to devise one single mechanistic relationship between economic growth and development, migration pressures and patterns. However, the main thing agreed upon thus far seems to be that trade liberalisation is the only option for achieving an eventual convergence in living standards. As Tapinos (1994: 222) argues, that one central question which needs to be put when one speaks of an evaluation of migration outcome with increased trade liberalisation is: how does economic integration between states or regions affect convergence in income levels and employment opportunities? Initial conditions (relative size of the economies concerned, difference in wage levels, standards of living and productive structures and degree of initial economic integration) are all necessary elements to set up a 'yardstick' which enables one to measure the migration/development relationship outcome.

8. CONCLUSION

In the Mediterranean two distinct worlds interact: the prosperous and relatively stable countries of the EU and the their poorer and rather unstable neighbours in regions like North Africa. Thus far, attempts from within the region to resolve ongoing conflicts and deep-rooted problems have proved to be largely ineffective.

While there is a general pessimism regarding the ability of the 'west' to influence fundamentally the evolution of the region's crises and to affect its social, political and economic development, there is nonetheless an increasing willingness to respond positively to requests for assistance in engineering 'solutions'. This willingness is reflected most clearly in the EU dialogue with the Maghreb countries.

The EU and the Mediterranean partners share various areas of interdependence, which include mainly environment, energy, migration, trade and investment. Lack of stability in the region would prove to be negative for all the EU countries due to an increase in migration. The population in the Mediterranean non-EU member states could reach 400 million by the year 2035 with an increasing income divide unless the developing demographic figures are not counterbalanced rapidly by fast economic take-off and appropriate population policies (CEC COM (94) 427: 66).

The increased rate of population growth is a severe test of many countries' capacity of absorption and is largely hindering the fruition of results achieved under development policy. In many areas of these developing countries, it is being found difficult to maintain existing standards in schooling, hospitals and housing in town. Which criteria of generosity are being used by the EU member states in aiding the developing of the Maghreb region?[42] If one asks oneself what are the prospects of closer co-operation between the countries on the northern coast of Africa, it must also be decided what is the contribution Europe can make to that co-operation and why it does not seem to be able to refrain from setting up visible and invisible obstacles.[43]

The economic development of lesser-developed countries is to be considered as an essential part of a future system of peaceful international relations. In this sense both the positions of the sending and the receiving countries are to be considered. A great number of resolutions adopted by international organisations are willing to recognise this necessity as far as human rights are concerned; but till now a satisfactory international approach to the question of economic migrations is unavailable. The theoretical background in this field appears insufficient; concrete proposals highly vague; and finally, the real tendency to co-operation for development, including migrations, 'seems to be inadequate at an international level, particularly from an institutional point of view' (Livi-Bacci, 1988: 62).

The Mediterranean region is a clear case of the applicability of such an analysis. This is because the creation of a strong European internal market in 1993 has weakened the economic position of North African and Middle East Mediterranean countries, because the external debt of these countries has increased without a well-established Mediterranean economic co-operation. This co-operation is necessary against increasing political destabilisation in this area due to the fact that the growing demographic dis-equilibrium has added to the tension with increasing

42 It is easier to be generous to a country and its people if the country is starting to do well.

43 These obstacles will be analysed in the next chapter which will focus on national policies of the individual EU member states towards migrants from the Maghreb region.

migrations, short of a positive and negotiated co-operation policy. This is why migrations are an integral part of a new co-operation policy, and also why this has to be created on a negotiated and institutional basis. Intergovernmental co-operation (not simply on economic affairs but also political and socio-cultural dimensions) at a regional level could be premise of a new political multi-plan system.[44]

In the South Mediterranean area economic growth is one of the necessary conditions to reduce the imbalances that prevent the dialogue between the two shores. An essential contribution to economic development can be provided by Regional Economic Co-operation. The setting up of the Arab-Maghreb Union, the Council of Arab Co-operation and the Mediterranean Free Trade area could be a starting point to reach forms of regional economic integration. One of the weak points of European co-operation is the lack of co-ordination between multilateral and bilateral aids, as well as between public and private aids. Hence a considerable waste of resources and disorderly and unorganised development, often not able to benefit the country's general interest.

Demographic analysis highlights not only the cause but also the possible solutions to the problems of migrations from developing countries, and the industrialised countries' activity of co-operation for development to regulate the phenomenon; today however, they lack co-ordination. So far, it has been confirmed by the analysis of the present situation and future hypotheses in developing countries that there is no proportional development to absorb the labour force and increase and support the population with new facilities and social services, which causes an inevitable emigration mainly from the African continent to Europe.

So far, in the less privileged countries the labour force haemorrhage has been an easy solution to the demographic problem and a source of income due to currency remittances[45]; yet, today it is strongly hindered by host countries' closed door policy and a strong migratory pressure from the East European countries. As Sarah Collinson (1996: 96) states:

> 'Migration , is an issue which does not lend itself to 'resolution' in the sense of decisions and measures being taken which can remove it permanently from the political or policy agenda, migration is likely to continue to affect international relations in the region for as long as it continues.'

The future of policy-making in the area is somewhat indicated in the concluding declaration of the Euro-Mediterranean partnership conference held in Barcelona in November 1995. The so-called 'action to address the root causes' would appear set to remain on the sidelines of policy demarcating future economic relations between the southern Mediterranean states and the EU. It is listed in the declaration under the

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44 Livi-Bacci, M. (1995), during an interview at the University of Florence.

45 Since the early 1970s, both Tunisia and Morocco have relied heavily on remittances for the external balance of payments of these two countries. With respect to Algeria, the dependency on remittances from migrants abroad seems to be less evident because of its relative success in the enterprise of energy exports.

heading of co-operation in the social and cultural fields rather than that of economic and financial partnership. However, it is necessary to start a close collaboration between developing and industrialised countries, both trying to work in the sectors where they are more skilled and effective and this is one of the hopes hailed during the Barcelona Conference.[46] What has been achieved so far, despite the above mentioned limitations of EU-Maghreb co-operation, was the emergence of some acceptance within the EU of obligations both to the three Maghreb states and to people from these countries who have been living long within the EU through a mix of national and EU measures. In the next chapter, we shall see how emerging case law in the ECJ helps in establishing rights in practice for third country nationals, in this case, particularly Maghrebin workers and their families who have resided in the EU for more than five years. The emerging case law is a clear example of how the policy process is being affected by the EU legal regime. However, it is extremely important to note that the legal process is not initiated by the policy-makers. The position of policy-makers, as has been depicted by the pendulum model in Chapter 2, is ambivalent; the ECJ compels them to sort out parts of the policy according to the results of cases presented in the ECJ. It is the Maghrebin themselves who must know their rights so that they can contest the *maladministration* of their rights in the ECJ.

46 See Barcelona Declaration at the Euro-Mediterranean Conference - 27/28 November 1995, in *Europe Documents*, no. 1964, 6 December 1995.

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4. CASE LAW AND THE RIGHTS OF THIRD COUNTRY NATIONALS

Movement and Employment of Third Country Nationals Residing Within the European Union

1. INTRODUCTION

> 'Discrimination against aliens, particularly those who are not nationals of one of its Member States, is a source of concern in the European Community. The Council, the Commission and the European Parliament have repeatedly expressed this concern. What is more, this topical and highly sensitive issue is one of extreme political and legal complexity' (Hoogenboom, 1992: 36).

In recent years it has increasingly been argued that there was a case for a greater integration of measures relating to migration at Community level - the Amsterdam Treaty[1] with its 'communitarisation' of most of the provisions on movement of persons and the management of borders is a 'clear signal of this'. Traditionally, however, it had been held that the treatment of aliens remains a provision belonging to state sovereignty. Nonetheless Community measures and Community jurisdiction increasingly come to apply to third country nationals.

This chapter examines the legal grounds on which one can extend the personal scope of application of current Community co-ordination rules in areas such as social security and freedom of movement of persons/workers to those who are third-country nationals legally residing and working in the EU. This chapter will also analyse how the existence of the two categories of third country nationals (that is 1. third country nationals who by agreement between the host EU member state and the sending country have rights of entry and residence in a member state, and in turn, 2. their family) has raised important questions of competence. The scope of an intergovernmental convention is defined in terms of rights under Community law and case law and the latter has been used to re-define emerging policy at national and supranational level, as can be seen from the results of the empirical research carried out in Italy and Spain, in Chapters 5 and 6.

This chapter will focus on the discussion of ***natural persons***: non- EU nationals in the Community who are migrant workers and not service providers, although in some cases the same principle will apply. As far as the provision of services is concerned, the major concern of the member states has been to regulate the service provider rather than access to the market (Cremona, 1995: 88). For the scope of this

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1 The Amsterdam Treaty was signed 2 October 1997and has entered into force on 1 May 1999.

book, 'legal' persons (companies or firms) will be excluded. Article 48, ex Article 58, of EC states that 'companies or firms' shall be treated 'in the same way as natural persons who are nationals of Member States', will become relevant only in two cases:

- Firms that have partnerships with non-EU partners. This is still an unclear point in EC law, complicated by differences in the company law of the member states. In the UK, for example, partnerships do not have a legal personality. Much and Séché (1975: 251) expressed the view that non-EC partners in firms could have a right of establishment in another member state by way of their firms establishing there, how much a firm can actually exercise the right of establishment in another member state is not clear.
- The setting up of subsidiaries in another member state brings us to the second case relevant to third country nationals. There have already been some instances of firms being dissuaded from setting up a subsidiary in another state, because the work-force they wished to use in the subsidiary included previously trained non-EU workers who had no freedom of movement (this part will be dealt with in greater detail later in this chapter). This certainly represents a distortion of the operation of the internal market, and is a powerful economic argument (likely to be taken more seriously than the human rights arguments) for extending the benefit of Article 39, ex Article 48, to permanently and legally residing non-EU migrants.

The Commission of the EC stated in 1985 that all workers within the Community, whether they are citizens of member states or not, as well as their families should obtain the same rights pursuant to the social security, this being irrespective of whether or not their situation was provided for by bilateral, association or co-operation agreements or any other instruments of international law (Pieters, 1994: 191) Third country nationals had practically been invisible as far as the treaties were concerned, leaving such rights as they enjoyed only on a precarious basis. Most of the references to the rights of individuals were made to reinforce the rights of Community nationals, thus the broad references to 'persons' in Article 3 and 'workers' in Article 39, the primary beneficiaries of rights of free movement in the secondary legislation are limited to the nationals of member states.

This discrimination is highlighted even further by Article 17, ex Article 8, (EC) which introduced the notion of EU citizenship. Article 18 (1), ex Article 8a (1), states that:

> 'Every citizen of the Union shall have the right to move freely and to reside within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty, and by measures adopted to give it effect.'[2]

2 This type of interpretation was accepted by the ECJ; see C 355/93 *Eroglu*, judgement 5.10.94, in which the Court commented that Article 39 (3) enumerates in a non-exhaustive way certain rights benefiting nationals of member states in the context of the free movement of workers.

Citizenship and related rights are defined in the above article in terms of people holding the nationality of a member state. The link is made even more explicit in Article 2, ex Article B, of the TEU, which includes among the objectives of the Union, 'to strengthen the protection of the rights of and interests of the nationals of its Member States through the introduction of a citizenship of the Union.'

The establishment of nationality (and hence Union citizenship and rights under Community law) is a matter for the member states.[3] In this case, if one were to refer back to the analytical tool presented in Chapter 2 – the pendulum – the dominant magnetic field is the one of national interest due to the policy of principle of subsidiarity with respect to the rights of third country nationals on the territory of the member states. On the other hand, one cannot ignore the EU-third country agreements. What is not so clear is to what extent can the Community agreements with third countries be used to establish rights in practice for third country nationals in the member states, especially when the host state discriminates against the migrants on the basis of nationality. To what extent will the pendulum's position shift away from the pole of national interests when third country nationals establish their rights through case law in the ECJ? Neither the TEU nor the EC Treaty defined nationality. The most concrete explanation of this term is found in a Declaration attached to TEU:

> '...wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses that nationality shall be settled solely by reference to national law of the member states concerned.'

The difference between the status of EU nationals and third country nationals has given rise to a range of provisions governing the position of the latter within the Community. The rights of third country nationals are hence mainly derived from national immigration law. However, some supplementary rights have also developed within the EC treaties:

- The EC Treaty (indirectly), secondary legislation made under the treaties, the Treaty on European Union, intergovernmental agreements and Conventions;
- The relationship a third country national may have with a Union citizen (as a member of family or employee);[4] and

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3 Even though the member states have the right of determining who is a national or not, they must do this in accordance with EC law, see case C-369/90 *Micheletti* [1992] ECR 1-4239.

4 Regulation 1612/68/EEC gives the right to non-EU family members of an EU national. They include: the right to install themselves with a worker, to the spouse, descendants (children and grandchildren) either under the age of twenty-one or dependant, and dependant relatives in the ascending line (such as parents) of the workers and his or her spouse *irrespective of their nationality*. See *Official Journal* Sp. Ed. 1968 (II) p. 475, Article 10.

- International agreements between the EC and third countries (such as association/co-operation agreements) (Cremona, 1995: 88).

The position of migrant workers, especially in relation to access to the labour market, in both material and formal terms is a particularly sensitive issue for the member states, which has given rise to questions of competence. In fact, the demarcation of the boundary between Community and member states competence is still a contentious issue and not yet fully clarified. This is highlighted by the fact that the position of third country nationals is situated along an uneasy spectrum between the EC pillar and the third pillar of the TEU. As has been explained already in the first two chapters, while member states have sought to retain competence over questions of immigration and access to employment, subject to co-operation under the TEU third pillar.

There are some signs of recognition of EU competence to legislate and the willingness to do so in the context both of equality of treatment for those already in legal employment, and of free circulation within the Union (at least on temporary basis) for those who have been legally admitted into a member state. Conditions of employment and free circulation are of course issues directly related to the mechanism of the internal market: a fact which provides both a defensible legal base, and even more importantly, a policy basis for Community action. In this respect various questions can be raised about the admissibility of the technique of interpreting a concept contained in a particular international agreement by reference to a similar expression contained in an internal regulation. At this point one must bear in mind that identical notions contained in different contexts are not necessarily to be interpreted in the same way. Each term is to be interpreted in the specific context in which it is used, and therefore the interpretation of a term cannot be automatically transposed from one context to another. One complication can arise from - '***mixed agreements***', in which the member states appear as contracting parties simultaneously with the Community. In practice, as we shall see in the following sections, it is very difficult to sort out questions related to rights, which fall under mixed agreements.

So far, mixed agreements have been especially relevant to the social integration of resident aliens for a number of reasons:

- They are part of the Community legal order, and the European Court has shown it will take an active role in ensuring their direct applicability, whenever possible, and has confirmed Community responsibility for *all* commitments 'in all fields covered by the EC Treaty',[5] even those made by member state parties to the agreement.
- They are reassuring to states, jealous of their sovereignty in the area of foreigners, because all member states must ratify any such agreement before the Community can conclude it (this has caused delays in the past, but are part of

5 See Demirel judgement.

the price to be paid for persuading the member states to confront these issues in at least a practical Community framework).

- Existing mixed agreements cover the majority of third country workers resident in the EU. The only large group not included being clandestine migrants. The co-operation agreements do not generally include a provision for free movement of workers who are third country nationals, but this could be added. The association agreement with Turkey does mention free movement of workers (Article 12) but this has not been implemented in the envisaged time scale.

The problem of competence looms large when one considers Article 18, added to the Treaty by the SEA, which had as its objective 'an area without internal frontiers' by 1 January 1993. Most, but not all of the Community and member state observers agreed that stricter and more co-ordinated external border controls on the entry and free movement of third country nationals would be a necessary precondition for the abolition of internal border controls. This study does not address all the complex issues of harmonisation of immigration, refugee and asylum policies.

The 'Palma Document',[6] made a distinction between 'essential' and 'desirable' measures for achieving an area 'without internal frontiers'. According to Giovanni Callovi (an official of the EU Commission DG Justice and Home Affairs), for internal borders to be lifted, presumably at least the 'essential' measures would have to have been implemented, the measures included 'the study of abolition of checks on third country nationals at internal frontiers'. However, one must consider that whatever the support may have been given by the Commission, in the member states' declarations annexed to the SEA, there is still much been in force, 'nothing in these provisions [covering the Article 18] shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries' and that,

> 'In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.'

This implies that the states recognised that the Community had some powers in this field. Now, according to the Commission, the states must inform the Commission of the draft measures, and even draft conventions concerning immigration or migration policy.[7] The Commission, in one of its progress reports on completion of the internal market,[8] follows the position that member states have taken in intergovernmental agreements thus far:

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6 *The Palma Document* was issued by the European Council in 1989 and it focused on lists of problems to be solved if the free movement of persons in the Community was to be achieved.

7 December 88/304 *Official Journal* 183/35, 14 August 1988.

8 COM (90) 552 final, 23 November 1990.

> 'The benefit to a non-Community citizen of being able to move freely between Member states 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.'

This shift in position by the Commission gave more importance to Schengen. However, it produced a defensive attitude towards free movement of third country nationals, as opposed to the Community's previous more dynamic attitude.

In the previous chapters, the general position of immigrants with respect to immigration and visa policies in the EU has already been explained.[9] The External Frontiers Convention, mentioned in Chapter 1, applies only to third country nationals who are not 'persons entitled under Community law' [Article 1 (2)]. This latter phrase defines not only the position of citizens of the Union, but also two further categories of third country nationals (in some cases, rather limited rights of free movement):

> '...members of the family of such citizens who are nationals of a third State and have the right of entry and residence in a Member State by virtue of an instrument enacted under the Treaty establishing the European Community...nationals of third states who by agreement between the European Community and it Member states and such countries, have rights of entry and residence in a Member State which are identical with those enjoyed by citizens of the Union, and members of the family of such persons....' (Article 1 (1)(a)).

2. COMMUNITY VIS-À-VIS MEMBER STATE COMPETENCE

As mentioned in Chapter 2, the transfer of competence by way of transferring most instruments relating to the free movement of persons from Pillar III to Pillar I have demonstrated the existing tension between sovereignty and supranationality. The battle between the community method and that of the intergovernmental have since revealed that member states retain much of their competence in what has remained in the third Pillar. While the EU supranational institutions (specially the Commission) have slowly began to exert a low level of control in the JHA issues that have been transferred to Pillar I by way of their right in initiation, thus 'agenda-setting'. Yet, much more community competence has yet to reach its full potential in these JHA instruments, although the Amsterdam Treaty has demonstrated that the right to free movement is also extended to third country nationals and their family.

R. Plender (1990) considers and rejects in turn several bases for the adoption of instruments concerning third country nationals. Although it should be kept in mind, that he is looking mainly at the problem of entry, rather than the situation of residence of non-EU persons, he concluded (as have other authors such as Much and

9 This study will deal with specific countries' policies - Italy and Spain, in the next section of the book, which deals with the empirical research that was carried out.

Séché, 1975; Callovi, Hoogenboom and Hilf in Hailbronner, 1989) that the most practical instrument are association/co-operation agreements under Article 308 and 310. In fact, Article 308 was identified by R. Plender as the appropriate basis for harmonising national migration policy (Article 94 was given as an 'arguable' basis), in evidence given before the House of Lords Sub-Committee on 4 July 1989 (session devoted to the abolition of internal border controls). According to Plender, one advantage is that the convention 'need not confine itself to measures to attain ... any of the objectives of the Community', and need not be signed by all member states. Article 310 and 308 arrangements do call for the Council to act unanimously, and that is a disadvantage: states currently have varying sensitivities due to their differing experiences with immigration and this is reflected in their policies towards third country nationals. The advantage of expansion and more complete implementation of current association agreements would be to place them under the uniform control of the ECJ: the same rights and obligations would be applied to all foreign workers in the same way wherever they live in the Community.

Case law has effectively contributed to providing protection and ensuring implementation of the rights of workers who are third country nationals. In the next sub-section, we shall take different areas of sensitivity related to the position of third country nationals residing and working in the EU, to thus explain how case law has helped establish the rights of third country nationals in practice.

The previous chapter has already explained provisions of the co-operation agreements between the EU (previously EC) and the individual Maghreb countries. The agreements concluded with Tunisia, Algeria, and Morocco enunciate, as the first principle of the co-ordination system, the principle of equality of treatment.[10] These agreements can prohibit discrimination in social security matters and on the basis of nationality for Maghrebin nationals residing in EU countries. Moreover, thanks to these agreements, all the periods of insurance, employment or residence completed by such workers in various countries shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death, including that of medical care for the workers and for members of their families residing in the Community. Maghrebin workers are entitled to receive family allowances for members of their families who are residing in the Community.

The benefits and remuneration that Maghrebin workers and their families are entitled to can be transferred freely to Morocco, Algeria, and Tunisia. In these agreements, the principle of reciprocity applies.[11] The agreements with the Maghreb countries sets up a Co-operation Council with power to lay down rules relating to the application of the principles referred to, but it has not hitherto sought to exercise that power. Nevertheless, difficulties remain albeit these conventions with 'sending countries'. The rights as laid down in the Agreements with Morocco, Algeria, and

10 On the contrary, the so-called 'Europe Agreements' concluded with Hungary, Poland, Czech Republic, Slovakia, Bulgaria and Romania do not provide that principle.

11 See Article 38 and 39 EEC-Algeria: OJ (27.9.1978) L263/2; Article 40 and 41 EEC-Morocco: OJ (27.9.1978) L264/2; Article 39 and 40 EEC-Tunisia: OJ (27.9.1978) L265/2

Tunisia, expressly mentioned the aggregation of periods of insurance, employment and residence in different member states, the right to family allowances for family members resident in the Community, and the right to transfer pensions and other benefits to the state of origin, but 'social security' is not limited to these rights. According to the ECJ, 'the concept of social security in Article 41 (1) of the Agreement must be understood by means of an analogy with the identical concept in Regulation 1408/71...'[12] Difficulties arise in matters such as the right of free movement within the Community; social security; aggregation and exportability of pension rights and the rights of entry, residence and to remain for family members of such migrant workers, as one can see from the case law arising.

A question not explicitly dealt with by the ECJ is the one concerning the division of powers regarding the subject matter of the agreement. As a result of the non-discrimination clause in the Co-operation Agreement, member states have to grant certain rights to third country nationals residing legally on their territory (for example, social security). One may say that provisions such as social security are essentially a matter of the member states, and that the Community under the EEC Treaty has only a co-ordination function, limited mainly to the aim of establishing free movement of workers within the Community. On the basis of this argument, one question which would arise is: how is it possible that the Community can take measures outside the context of the free movement of workers within the Community and prescribe rules governing the relations between a third state (Morocco, Tunisia or Algeria) and the Community member states? Technically speaking, if the EC Treaty does not grant the Community a potential power on matters such as social security with respect to third country nationals, one may find that the ECJ should not be interpreting the questions on its merit, because the jurisdiction of the Court is based on a sphere of action of the Community institutions under the EEC Treaty.

On the other hand, however, one can state that a mixed agreement, being an act of the Community institutions, creates an assumption that a matter *is* within the power of the Community. A study of relevant jurisprudence is certainly a step in the right direction to understand mixed agreements and how, in particular circumstances, they can provide a basis for the ECJ to interpret provisions of such agreements in relation to matters which have remained so far in the exclusive power of the member states. We will now continue with the diverse subject-matter of the agreements between EU and third countries - in particularly the Maghreb to highlight how specific loopholes and uncertainties in the interpretation and application of rights of third country nationals (Maghrebin) came about.

12 Article 41(1) EEC-Morocco Agreement. Case 18-90 *ONEM v. Kziber* (1991) ECR 199, paragraph 25.

3. EMPLOYMENT RIGHTS AND EU-THIRD COUNTRY AGREEMENTS

The area of employment and social security is probably the most technically complex area. Regulation 1408/71,[13] adopted to implement Article 42/EEC relating to social security measures, applies (as amended) to EU employed, self-employed persons, and their families (including non-EU members). The regulation covers survivors of non-EU employed or self-employed persons *if* the survivors are nationals of a member state. 'Family members' however, are not necessarily the same persons as those in Regulation 1612/68, Articles 10 and 11, as they are defined here by reference to national security legislation.[14] Article 3 (1) of the regulation states that:

> 'persons resident in the territory of one of the Member States to whom this regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.'

With respect to social advantages rather than social security benefits, Council Regulation 1612/68, article 7 (2) applies ('He shall enjoy the same social and tax advantages as national workers.'). In this fashion it compensated for a restrictive application of the social security regulation by an extensive application of the 'social advantages' provision. Normally, to benefit from 'social advantages', it should be said that the Community worker whose family wishes to benefit from his position must have the nationality of an EU member state at 'the time of the employment, of the payment of the contributions relating to insurance periods and the acquisition of the corresponding rights.'[15] However, as one can see below, there are evolutions to these rules, due to arising case law.

3.1 Third Country Community Officials

In exceptional cases, non-EU nationals can be recruited as Community Officials according to Article 28 of the Staff Regulations.[16] In *Forcheri v. Belgian State*[17] the Court ruled that:

> 'Officials of the Community in the Member States in which they are employed ... must enjoy all the benefits flowing the Community law for the nationals of Member States in relation to freedom of movement, freedom of establishment and social security.'

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13 *Official Journal* 1983 L 230/8.

14 Articles 1(f) and (g). See P. Oliver, p.83.

15 *Belbouab v. Bundesknappschaft* Case 10/78 (1978) ECR 1915.

16 Council Regulation 259/68; *Official Journal* 1968 1 56/1.

17 *European Court of Justice Reports* Case 152/82 (1983) ECR 2323.

Although the plaintiffs in that case were Community nationals, Article 12 of the Protocol on the Privileges and Immunities of the European Union applies to officials 'whatever their nationality'. This could be interpreted as creating another admittedly small category of non-Community nationals assimilated to nationals of member states (Oliver, 1985: 57).

3.2 Exceptions under Regulation 1612/68, Article 16

This Article sets out the exceptional situations where a third-country national will be able to obtain employment over a member state national. It is also one of the bases for 'Community preference' in access to the labour market. Paragraph 2 reads:

> '... such applications [from another Member State for a job vacancy] shall be submitted to employers with the same priority as that granted to national workers over nationals of non-Member States.'[18]

Paragraph 3 then sets out the exceptions benefiting non-EU nationals where:

> 'such an offer is made to a named worker and is of a special nature (specialist qualifications, confidential nature, previous occupational ties, family ties with the employer or between the prospective worker and a worker already employed in the undertaking for at least a year)...homogeneous groups of seasonal workers...workers resident in regions adjacent to either side of the frontier between a Member State and a non-Member State...for reasons connected with the smooth running of the undertaking where the employment services, having intervened for the purposes of securing the employment of national workers or workers from the other Member states of the Community, are of the opinion that such reasons are justified.'

Whether these provisions apply to third country nationals *outside* the Community, wishing to enter to take up employment, or only applicable for those already resident inside a member state, is presumably a matter for national legislation to determine. Usually they will apply to both, with limitations for resident third-country nationals in some cases. The next category will be placed separately in the next section due to its importance.

3.3 Applying Co-operation Agreements and EC Law

In the previous chapter, we have already seen what Co-operation Agreements exist between the individual Maghreb states and the EU. In this section, the practical implementation possibilities of these EU-Maghreb agreements in Community law will be explained. However, before embarking on case law specific to Maghrebin residing in the EU, two cases will be briefly described that have arisen in the

18 Emphasis added. Article 1 (2) of the Regulation sets out the same principle: '[Any national of a member state] shall ... have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

Luxembourg court as they have much defined the status of Community law with respect to EU-third country agreements. These two cases are the *Demirel v. Stadt Schwäbisch Gmünd*[19] and the *Hauptzollamt Mainz v. Kupferberg* [20].

The case of *Demirel v. Stadt Schwäbisch Gmünd* concerned a request for family reunification. Mrs. Demirel was the wife of a Turkish citizen working in Germany. On a visit to her husband in Germany, she and her son remained after expiry of her visa that had been granted only for a visit. She then sought to rely on the Association Agreement between the European Community and Turkey in order to avoid an expulsion order following the expiry of her visa. She gave birth to the couple's second child, and later contested the expulsion order adopted by the local German authorities. Germany had only recently extended the required period of residence to qualify for family reunification from 3 to 8 years. The referral from the German Administrative Court to the ECJ concerned first the possibility that provisions of the Agreement and Protocol were directly applicable in Community law. The Court referred to its statement in the *Hauptzollamt Mainz v. Kupferberg* case that EU-third country provisions may be directly applicable if they 'contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure', and found that the Agreement with, in this case, Turkey[21], was more in the nature of a general programme setting out 'the aims of the Association and [laying] down guidelines for the attainment of those aims, without itself establishing the detailed rules for doing so. The provisions of the Agreement and Protocol were thus held *not* to be directly applicable. The Court stated that 'there is at present no provision of Community law defining the conditions which member states must permit the family reunification of Turkish workers lawfully settled in the Community.'

Secondly, the Court briefly considered Decision No. 1/80 and its standstill clause [which prohibits the Contracting States (EC and Turkey) from introducing any new restrictive measures] but rejected its application to the *Demirel* case, as it concerns 'access to employment' and not 'family reunification'. This seems quite a harsh distinction to make if one considers that Mr. Demirel's wish to *take up* or *continue* employment in Germany could certainly be expected to be affected by the prospect

19 Case 12/86 (1987) *European Court Reports*, p.3719.

20 Case 104/81 (1982) *European Court Reports*, p.3641.

21 EC-Turkey Association Agreement was signed 12 September 1963 which was confirmed in the name of the Community by a Council Decision of 22 December 1963 - *Official Journal* 1973 C 113 p. 1. An Additional Protocol was signed 23 November 1970 (*Official Journal* 1973 C 113 p. 17) setting out progressive stages for achieving the agreement's objectives, one of which was freedom of movement for workers between the EEC Member States and Turkey by the 22nd year after entry into force of the agreement (i.e. by 1986). In fact, only 2 decisions have been made to move towards the aims of the agreement, which was meant ultimately to prepare the ground for Turkey's accession to the EC: Decision No. 2/76 of 20 December 1976 and Decision No. 1/80 of 19 September 1980.

of an 8-year rather than a 3-year separation from his family. Some years before, the ECJ and other EC institutions accepted that a Community migrant worker is more than an isolated agent, and family reunification would assist their integration in the host state. The Preamble to Regulation 1612/68/EEC indicates that the right granted to family members to join the worker, and other measures designed to further the integration of the family into the host state (such as education rights for children), were designed as part of a package of measures to eliminate obstacles to the movement of workers.

For third country nationals, the reading is definitely more restrictive. Consideration of Article 8 of the European Convention on Human Rights (ECHR)[22] was made impossible here by the national character of the family reunification measures: because they fell outside the Council of Associations decisions, they fell outside the field that is directly applicable to Community law, and the Court could not examine their compatibility with the ECHR. This is a case where Community and national law provides no remedies for the foreigner. If the case had come before the Strasbourg Court, argument could have been made that Mr. Demirel had a 'reasonable expectation', on going to Germany to work, and that his family could join him in three years time (according to an administrative circular of 1975). To more than double the waiting period required (in 1984) would, according to this argument, constitute a violation of the right of respect for family life.

In this case, the ECJ went to great lengths to justify its jurisdiction, and this is important for our study, because matters concerning non-Community nationals are traditionally in the area of competence reserved to Member states. Despite the *mixed* nature of the agreement with Turkey, the Court affirmed that,

> '...the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.'

Admitting that member states may make commitments as part of the agreement, the Court found Article 310/EEC empowered the Community: 'To guarantee commitments towards non-member countries in all fields covered by the Treaty', through its 'responsibility for the due performance of the agreement'. **Community competence has, in a way, 'absorbed' member states competence, by claiming a wider responsibility in the framework of a Community agreement.**

In 1990, *S.Z. Sevince v. Staatssecretaris*,[23] the ECJ reaffirmed its competence to interpret the two Council of association decisions No.2/76 and 1/80, as implementing decisions directly connected to the EC-Third Country Agreements (in this case reference was being made to the EEC-Turkey Agreement). These decisions are 'clear and precise', as opposed to the Agreement itself, and are not dependent on the adoption of any subsequent measure. It was held therefore that they were directly

22 Council of Europe (1994) - *European Convention on Human Rights*, Strasbourg, Council of Europe Press.

23 Case 192/89; judgement 20 September 1990.

applicable in the member states (even the fact they had not been published did not prevent an individual from using them to base a claim). Mr. Sevince, however, was not found to be in a position to be covered by the decisions, because his employment situation was not 'regular' or stable, as required by the text of the decisions (he had worked only in the waiting period pending appeal of his case concerning the right of residence):

> 'The Turkish Worker who has been in regular, legal employment in one of the Member States, after four years, can have free access to any paid employment of his choice in that Member State.'[24]

4. THE ACCRUAL OF RIGHTS FOR THIRD COUNTRY NATIONALS: Third Country National Workers vis-à-vis Third Country National Family Members Of Union Citizens; The Right To Equality Of Treatment and EU-Maghreb Agreements.

4.1 Third Country National Family Members of EU citizens

Here, it would be interesting to compare the position of third country nationals as 'workers' with that of third country nationals who are members of family of a Union citizen. Family members of Union citizens have derived rights of entry and residence within the Community and also the right to equality of treatment. The derived rights include social and tax advantages under Article 7 (2) of Regulation 1612/68/EEC.[25] However, when making a comparison of equality of treatment of third country nationals who are family members of EU citizens, one has to look at the position of EU family members of national workers and *not* the national workers themselves. The rights of the former group are 'derived' not 'independent'. They are only entitled to benefits (such as social security or unemployment benefits) which would be available in a purely 'national' situation to the family of a national of the host state. They are not entitled to benefits in their own right, whereas the workers themselves would have their set of rights. This limitation was illustrated well in two cases - *Deak*[26] and *Taghavi*[27].

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24 Decision No. 1/80; Article 6 (1), cited in *Sevince* judgement, paragraph 4.

25 See Case 32/75 *Cristini* (1975) ECR 1085.

26 Case 94/84 (1985) ECR 1873.

27 Case 243/91; judgement 8 July 1992.

Deak was a Hungarian national living in Belgium with his Italian mother and claimed Belgian unemployment benefit. 'Social advantage' in Article 7(2) is defined to include unemployment benefit. For the son of a worker entitled under Community law, it refers to:

> 'all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seem likely to facilitate the mobility of such workers within the Community' (Paragraph 21).

The Court then held that in so far as these advantages apply to the family of a national worker, they would also be extended to the family of workers from other member states. It being irrelevant (as stated in Article 10 of the same Regulation) that the member of the family maybe a third country national.

Taghavi, an Iranian national married to an Italian who was living in Belgium, asked for benefits for disabled persons under Belgian law, it was reserved to Belgian nationals residing in Belgium. As it would not be available to the (non-Belgian) family of a Belgian worker, Article 7(2) did not oblige the state to grant the benefit to the family of a national of another member state.

Both these cases also consider the applicability to family members of the social security Regulation 1408/71/EEC.[28] Again, it is claimed that third country nationals are solely entitled to 'family benefits', and not to benefits that are 'personal' or to which workers are entitled in their own right. In *Deak* the court held that:

> 'whatever their nationality the member of the family of a migrant worker who is a national of a Member State are entitled only to the benefits provided by the legislation of the member State for the members of the families of unemployed workers...The special unemployment benefits referred to by the national court are benefits made available to young persons seeking work on the basis of their own situation and not by reason of the fact that they are members of a worker's family.'[29]

As a result, Regulation 1408/71 cannot be applied to either of the above cases.[30] One of the most apparent new benefits for third country national family members of EU nationals is the right to free movement. With this possibility, these third country national family members (as well as other third country nationals who do not have family members that are EU nationals) are able to enjoy this right that have previously appeared exclusive for EU citizens only. Articles 10 to 12 of Regulation 1612/68 (of 15 October 1968) elaborates further the rights of family members of

28 Regulation 1408/71 *Official Journal* Sp. Ed. 1971 (II) p. 416. Under Article 2 (1) the Regulation applies to members of the family of employed and self-employed nationals of one of the member states.

29 Case 94/84, at paragraphs 14 and 15.

30 For further reference see: *Morson and Jhanjan v. The Netherlands* Case 35 36/82 (1982) ECR 3723; *Dzodzi v. Belgium* Case 197/89 (1979) Judgement 18 October 1990; *Caisse d'Allocations Familiales v. Mr. and Mrs. Meade* Case 238/83 (1984) 2631.

workers who are nationals of one the EU member states. These rights include those of residence, employment and education (general education, apprenticeship, and vocational training). Yet, the possibilities to expand their spectrum of rights as to align more closely with those of EU nationals lies with the prospect of family re-unification. The Family Re-unification Council directive (which have yet to be approved) can bring rights that are similar (though not the same) from the EU citizens to their family members who are third country nationals; thus providing a possible entrance to granting (similar/same EU citizens') rights towards third country nationals in general.

4.2 The Rights of Maghrebin Workers Residing in the Community

An important case, which confirms the practical implementation possibilities of EC-third country agreements, is specific to the Maghreb, and concerns a Moroccan living in Belgium - *Office National de l'Emploi Belge v. Bahia Kziber.*[31] Past co-operation agreements between the EEC and Maghreb countries prohibit discrimination on the grounds of nationality with respect to working conditions and the pay of employed workers.[32] However, the application of this policy has been set so far by law and legal cases. In an important decision on 1 February 1991, the ECJ ruled that the provisions of such agreements are binding upon every member state. In this recent ruling, the clause contained in Article 41d of the Agreement concluded with Morocco was addressed in relation to the Case C-18/90 Kziber, under which where a Moroccan claimed to have been excluded from unemployment benefits in Belgium on the grounds of her nationality.

Mrs. Kziber lived with her father who had the same nationality and who had retired in Belgium after having been employed in that country. She appealed against a refusal of the Belgian authority to grant her special unemployment benefits provided for school leaves which the ECJ had already defined a social advantage within the meaning of Article 7 (2) of Regulation 1612/68.[33] The Court held, in the first place, that the prohibition on discrimination contained in Article 41 (1) was capable of direct application. It further declared that the concept of 'social security' contained in that Article has a meaning analogous to that found in Regulation 1408/71,[34] and that Article 4 of this Regulation mentions, among the branches of social security unemployment benefits, which included those at issue in this present

31 Case 18/90 Kziber (judgement of 31 January 1991).

32 EEC-Algeria: OJ (1978) L263/2; EEC-Morocco: OJ (1978) L264/2; EEC-Tunisia: OJ (1978) L265/2

33 Case 94/84 *Deak*, (1985) ECR 1873.

34 Regulation 1408/71 entitles members of the family of workers who are nationals of a Member State only to the benefits, which the national legislation provides for the members of the family of unemployed workers.

case. It further stated that: **the concept of 'worker' encompasses both workers in active employment and those who have withdrawn from the employment market because of age or of a work accident.**[35] The EEC-ACP Convention (Lomé II) has Declarations IX and X appended that concerns basic freedoms and equal pay (pension is also part of pay) and conditions for workers of a contracting party employed on the territory of another party. Furthermore, Lomé III and IV have reciprocal social provisions; although it is not thought that these are directly effective.

Prior to the *Kziber case,* in the *Belbouab* (Case 10/78),[36] an Algerian formerly of French nationality (Algerians were considered as French citizens until Algeria gained independence in 1963, hence their citizenship also changed) successfully claimed coverage by Reg. 1408/71, for aggregation of pension rights. Non-EU immigrant workers cannot report their employer *ex post*, and they cannot alter their occupation at will without exposing themselves to reprisals. Thus, more often than not, the influx of immigrants' work is used as a wage-lowering device and also undermines the bargaining power for indigenous workers. On the other hand, involuntary retirement due to redundancy or unacceptable working conditions should not be a reason for further penalisation such as immediate deportation.

The ECJ, in the *Kziber* case, was asked whether the wider EEC-Morocco co-operation agreement could have direct effect. Following its own position in *Demirel* and *Sevince*, the Court considered Article 41 of the EEC-Morocco agreement met the 'clear, precise and unconditional' criteria for direct applicability, and found that:

> '..article 41, paragraph 1, states in clear, precise and unconditional terms that workers of (Maghrebin) 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.'[37]

The *Kziber* case has been followed by *Yousfi v. Belgium*[38] which concerned a claim by a Moroccan national in Belgium for a disability allowance. The Court of Justice expressly confirmed the direct effect of Article 41 (1) and held that disability benefit is within the scope of social security, and also it case law on Regulation 1408/71. This case, when compared with *Taghavi* explained above, depicts a contrasting position in the status of the third country nationals as workers as opposed to family members of EU workers. The position of non-EU persons may be in a more favourable position as workers under Community Agreements of this type than as members of the family of a Union citizen working in another member state.

In contrast to the case law on the Turkish Decision 1/80, in the cases *Belbouab, Yousfi* and *Kziber,* the Court interpreted the term 'worker' as also to include those

35 Case 18/90 Kziber (judgement of 31 January 1991) paragraph 27.

36 *Belbouab v. Bundesknappschaft* Case 10/78 (1978) ECR 1915.

37 Paragraph 17 of the Kziber judgement.

38 Case C-58/93; judgement of 20 April 1994.

who have permanently left the labour force as a result of retirement, illness or injury. In *Kziber* the claim was for unemployment benefit by the daughter of a Moroccan national who had been working in Belgium but was then retired. In *Yousfi* the claimant was injured as a result of an accident at work. The Court relied on the reference in the Agreement to the possibility of transferring pensions and invalidity benefits to Morocco to support their interpretation.

The ECJ had adopted a similar claim in a case brought under the EEC-Algeria Co-operation Agreement. In *Krid v. CNAVTS*[39], the claim was made by an Algerian national, the widow of an Algerian national who had spent all his working life in France, and related to a supplementary allowance payable in addition to a widow's pension. The Court described its earlier decisions on the direct effect of the social security provisions of the EEC-Morocco Agreement as 'settled case law' and applied them to the equivalent provision in the Algerian Agreement [Article 39(1)]. Continuing its broad interpretation of 'workers and members of their families living with them', the term was held to apply to a member of family who continued to live in a member state after the death of a migrant worker.

The widow was therefore covered by the provision and the 'social security' must be interpreted so as to include the supplementary allowance in question, in accordance with the Court's case law on regulation 1408/71, as well as later amendments to the Regulation which take account of that case law. An attempt made by the French government to argue that the allowance was a 'personal' and not a 'derived' right. And therefore should not be available to members of the family of migrant workers. This argument was rejected on the ground that case law on derived rights (such as *Taghavi*) cannot be transferred to the interpretation of Article 39 (1) as the persons covered by that provision are not the same as those covered by the Regulation. Under Article 39 (1) members of the family are entitled in their own right not to be discriminated against.

Caisse Regionale d'Assurance Maladie v. Mrs. O. Djabali, C 314/96.[40] Mrs. Djabali, a wife of Algerian worker claimed discrimination in the field of social security because at first France refrained from paying her a disability pension on the grounds that she had never been employed. She invoked Article 39 (1) of the EEC-Algeria Co-operation Agreement. Again, the French government refused to pay, claiming that Article 38 and 39 of the same Agreement applied to workers. However, on 12 February 1998, France in the final judgement of the case decided to pay. The judgement referred to a previous case of a Moroccan National - Mrs. Hallouzi-Choho (ruling 3 October 1996) which relied on Article 41 of the EEC-Morocco Agreements, which is identical to Article 39. The court then ruled that persons referred to in the said provision 'must be treated as if they were nationals of the Member States concerned.'[41]

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39 Case 103/94; judgement 5 April 1995

40 *Court of Justice in Case Reports* (1996) - *O. Djabali v. Caisse Regionale d'Assurance Maladie* Case C- 314/96, 12 February 1997

41 *Court of Justice in Case Reports* (1996) - *A. Hallouzi-Choho v. Bestuur van de Sociale*

The EEC – Tunisia Co-operation Agreements, although not granting rights of residence or access to employment, does maintain the strong equal treatment provisions for legally employed workers (illegal migrants are explicitly excluded in Article 66) found in the provision on working conditions, remuneration, dismissal (Article 64), and social security (Article 65). Social security is defined more explicitly than in the Co-operation Agreements but in conformity with Regulation 1408/71 and the Court's case law.

One should emphasise that as opposed to *Demirel* and *Sevince*, the latter mentioned cases relating to Maghrebin nationals, it is the agreement itself and *not* the implementing decisions by the Council of Co-operation that is found to be sufficiently clear and unconditional for the provision to be directly applicable. In the *Kziber* case, the Court rejected the argument that the mere provision for a Council of Co-operation as implementing body, implied the agreement itself was conditioned by the Council's implementation, and could not be directly effective.

In addition, the fact that the EEC-Morocco Agreement, as opposed to the EEC-Turkey Agreement, does not have the objective of a future accession of Morocco to the EC, but rather the economic development of Morocco does not prevent certain of its provisions from being directly applicable. The provisions considered in *Kziber* were able to affect the legal situation of individuals rather than having a '*caractère purement programmatique*' as was the case in *Demirel*.[42] At this point, however, one has to mention that the powers of the Association Council (in light of the EU-Turkey Agreement and also Europe Agreements for CEECs[43]) are limited to making recommendations (not decisions) for the improvements to the movement of workers during the second stage of the Agreement. As they contain no general equal treatment clause as in the case of the EU-Maghreb Agreements.

As the vast majority of third country nationals lawfully residing in the Community at present are nationals of countries which have concluded international agreements with the Community, and as most of the agreements contain provisions to workers and employment, the Luxembourg Court's decisions potentially affect large numbers of foreigners. Any provision, whether the agreements themselves or in Council decisions implementing those agreements, becomes directly applicable in all EU member states, if it contains 'a clear and precise obligation which is not

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Verzekeringsbank Case C-126/95, 3 October 1996.

42 Paragraph 22 of the Demirel judgement.

43 CEECs are Central and East European countries. The 'Europe Agreements' include: EC-Hungary Association Agreement *Official Journal* 1993 L347; Poland-Association Agreement, *Official Journal* 1993 L348; Romania Association Agreement *Official Journal* 1994 L357; Bulgaria Association Agreement *Official Journal* 1994 L358; Slovak Association Agreement *Official Journal* 1994 L359; Czech Association Agreement *Official Journal* 1994 L360. All these aforementioned agreements are in force. There are Europe Agreements with the Baltic States and Slovenia, see COM (95) 207 and 341, however they are not yet in force.

subject, in its implementation or effects, to the adoption of any subsequent measure.'[44]

What is at stake in the dispute over Community competence in this field, is the role of the ECJ itself in ensuring uniform application of EU international agreement provisions, where they are 'clear and precise'.

5. FREE CIRCULATION AND THE RIGHT TO PROVIDE SERVICES

At present there is no direct right yet[45] of free circulation under Community law: third country nationals have no right of free movement to other member states, unless within the three month period allowed by Schengen or are moving between countries operating the Schengen Agreement. In the former case, third country nationals have to show that they are in possession of a valid Schengen visa which can be obtained by applying to one of the Schengen state which will be the point of entry into Schengen territory for the third country national. If the third country national is already a legal resident in one Member State, then showing the initial visa obtained to enter that particular member state and the permit to stay allows him/her to travel in the Schengen area for up to three months. If the third country national travels in the EU as a family member of an EU citizen, then he/she will still be subject to visa conditions to enter the host countries, however, the duration of stay can be as long as that of the partner who is an EU national.[46]

The Commission, however, has long supported the view of the internal market, which implies 'free movement of all legally resident third country nationals for the purpose of engaging in economic activity.'[47] By the term 'legally resident' the Commission is not referring to initial entry into the Community but the position of those who have already been accepted by one member state. The argument used by the Commission is that a right of free circulation flows from the requirement to remove internal frontiers as provided for in Article 14 EC. However, some member states see Article 14 as dependent on the nationality-based and economically based rights granted in the specific free movement provisions such as Article 39 EC, without creating a separate concept of free movement for all persons within the internal market.[48]

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44 *Demirel.*

45 See Commission's 'Proposal of directive concerning the status of third country nationals who are long term residents of 13 March 2001'.

46 See Chapter 1.

47 Communication from the Commission to the Council and European Parliament on Immigration and Asylum Policies COM (94) 23 final; 23.02.94, paragraph 127; Commission Communication 8 May 1992 to the Council and Parliament on the abolition of border controls SEC(92)877 final.

48 See Chapters 1 and 2 for an explanation of all the relevant Articles in the Treaties of the

Recently, we have celebrated 35 years of free movement of workers in the Community. However, several authors (such as Evans, 1995 and Oliver, 1985) feel that the term 'worker' is to be given a Community definition (i.e. the ECJ will have the final word as to a person's status as an employed person capable of benefiting from free movement under EEC law). There have been special cases of third country nationals, who as workers have been allowed freedom of movement to provide services as in the *Van der Elst* case[49] (see below). This freedom of movement is not given to 'third country nationals' who are not workers or associated to a citizen of the Union. Therefore, freedom of movement of workers is certainly not synonymous with freedom of movement of persons.

There are no specific Community law provisions, except secondary legislation, which allows non-EU nationals to *provide* services in other member states.[50] So, until the *Van der Elst* non-EU family members of EU citizens providing services in another member state could derive rights from secondary legislation[51] and even then, keeping in mind the temporary nature of provision of services. Residence rights are 'to be of equal duration with the period during which the services are provided.' This may be insufficient basis for family members to claim other rights, such as the right to education.[52] The right to move to another state to *receive* services must also be kept in mind:[53] medical treatment or educational/training might be quite prolonged, and justify even the right to education for the children of the recipient of services. The right to remain in the host state, after provision or reception of services has ceased, does not exist, and the legislation in general will not apply to cases where no inter-state element is present.[54]

5.1 The Right to Provide Services

The point concerning obstacles to establishment of subsidiaries in other member states, where non-EU workers are involved, can really be made, when one speaks

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European Community and the Treaty on European Union.

49 *Court of Justice in Case Reports* (1994) *R. Van der Elst and Offices des Migrationes Internationales* Case 43-93, 9 August 1994.

50 Article 49/EEC, paragraph 2, gives the Council the possibility to extend provisions for freedom to provide services to third country nationals established in the EU, but it is not a settled mechanism.

51 Regulation 1408/71 - on social security; Directive 73/148; Directive 64/221(on special measures concerning movement and residence of foreign nationals, justified on the grounds of public policy. *Official Journal* L 56/64, p.850.

52 In *Jean Noël Royer* (48/75 (1976) ECR 497), the Court affirmed that the principles of non discrimination on grounds of nationality were the same with respect to persons providing services as to employed or self-employed.

53 Directive 73/148 Article 1 (1)(b).

54 *Procurer du Roi v. Debauve* 52/79 (1980) ECR 833.

about right to provide services. In *Seco v. Evi*,[55] two French Firms providing services in Luxembourg, were required by the Luxembourg authorities to pay social security contributions for their third country employees present in Luxembourg, although the workers were not entitled to any benefits in Luxembourg and were already insured in France. The Court held these contributions violated Articles 59 and 60, as they inhibited the French firm's freedom to provide services.[56] It clearly set apart the French firm's rights it was bound to uphold:

> '...A Member State's power to control the employment of nationals from a non-member country may not be used in order to impose a discriminatory burden on an undertaking from another member State enjoying the freedom under Articles 49 and 50 of the Treaty to provide services.'

Going even further, in a ruling considered quite radical in France, *Rush Portuguesa v. Office National d'Immigration* (March 1990),[57] the ECJ held that restrictive national rules for employment of third country immigrants cannot be applied to a provider of services from another member state who wishes to use its own non-EU workforce. The national rules would be a 'discriminatory burden' and put the foreign firm at a disadvantage in relation to his competitors from within the country where the services are to be provided.

The case concerned Portuguese workers. Although Portugal has benefited from freedom of establishment and provision of services since its admission to the EC, it could not benefit from Article 39 and Regulation 1612/68 (Articles 1-6) until the end of the transition period in January 1993. So, for all intents and purposes, Portuguese workers were at the time of the case in the same situation as third country workers, as far as access to the labour market in other member states is concerned.[58] It was submitted that if Rush Portuguesa had employed Senegalese or other non-EU workers instead of Portuguese, the ruling would logically have been the same, as long as the conditions determined by the ECJ were the same, namely that the provider of services use his own non-EU workers for a temporary period only in order to carry out his services, after which time the workers leave the host state. If, however, the real purpose of the foreign firm's activities in the host state was to obtain access for foreign workers to the host state's labour market (as the French government had argued in this case), that activity will apparently no longer fall under Articles 49 and 50.

The most important case for us is the case following the *Rush Portuguesa* case - the *Van der Elst* case.[59] In the *Van der Elst* case, a Belgian construction company

55 Cases 62 and 63/81 (1982) ECR 223.

56 The firm's non-EU employees' rights were not at issue as EC law did not cover them.

57 Case 113/89, judgement 27 March 1990.

58 In fact, the situation is not identical. During the transitional period for the UK, Denmark and Ireland, for example, the Community institutions endeavoured to give workers from those countries preference over non-EU workers [COM(79) 115 final, paragraph 4.1].

59 Case 43-93, 9 August 1994.

was working in France using Moroccan workers, who were legally employed and had work permits in Belgium (the home state of the company providing services). The ECJ stated that it would be contrary to Article 49 for the French authorities to require work permits in France for these workers. A number of points are worth noting. The Court deliberately did not extend this principle to include a right of initial immigration into the Community for third country workers, or even a right of free circulation from Belgium to France. The Court stressed both that the workers were legally residing in Belgium and had work permits there, and that entry visas had been granted to these workers to enter France. So rights of entry were not at issue. Also, the Court decided the case on the basis that these workers, being employees of a company that was only temporarily providing services in the host state, were not seeking - or being granted - access to the host state's labour market. So the right at issue is the right of the employer to provide services, and not the right of the employee to work in another member state. The emphasis the Court places on the temporary nature of the provision of services suggests that the principle would not be extended to cases where the employer-company operated in another member state via a permanent establishment. Similarly to the *Rush Portuguesa*, the Court pointed out that member states are not precluded from insisting that their mandatory labour legislation concerning, for example, minimum wages, must be extended to those workers who are thus temporarily employed and on their territory. This latter point also related to the principle of equality of treatment. The Court's decision needs thus to be viewed as a corollary to the right of freedom to provide services rather than a right to access employment.

6. Overview of the Situation in Individual Member States

Many EU member states have individual bilateral agreements with third countries and this is certainly an obstacle in any harmonisation process concerning treatment of resident aliens. A Community-established standard content for bilateral treaties containing provisions on labour and migration would be useful, as suggested by the Commission.[60]

Third country nationals legally residing (and supporting themselves) in the Netherlands, Belgium, the UK, Denmark, France, Germany and Portugal can, after a number of years, obtain permanent residence. In Italy, Luxembourg, Ireland, Greece and Spain, truly permanent status does not exist and residents must renew their permits at intervals, usually subject to the discretion of the authorities. Moreover, there are no such bilateral agreements between Italy or Spain and the individual Maghreb countries for their nationals working on Italian or Spanish territory. In this

60 Some earlier agreements were called 'manpower' agreements, and provided favourable conditions regarding vocational training, family reunion, lifting restrictions on employment.

case, the immigration and establishment in Italy and Spain of Maghrebin workers is a recent phenomenon and that could be one reason why there were no cases in the ECJ about third country nationals in these two states. The position of third country nationals in Italy and Spain is subject to national legislation. To a great extent, Italy and Spain follow the experience of the more traditional receiving states. The position of Maghrebin in Italy and Spain will be examined in the next two chapters. This greatly undermines any sense of stability and integration the foreign residents might otherwise have in the host states.[61] Six months absence from the host state is often sufficient to cause residence rights to expire.

Permanent residence status grants equal access to the labour market. In Italy and France, a work permit is included in the residence permit. In Denmark, Germany, France, Luxembourg and the Netherlands, it is possible to obtain a special work permit with no limitations. In every EU state there are restrictions on civil service jobs, and in some, immigrants are excluded from certain occupations. In general, family members of the original migrant have easier access to the labour market, but it is well known that since the late 1970s, the employment situation of foreign labour has been more precarious than that of national labour. The second generation, living in urban areas, has the hardest hit. A few states do refuse or restrict the right to work for family members.[62]

'Security of stay' necessary to make social integration, which in turn, is a determining prerequisite for naturalisation, is not guaranteed in all member states, although it is in some. Aggravating factors are the complexity of legislation and administrative measures concerning aliens. Rules are frequently modified and applied at many different levels in society, with the element of discretion usually present in practice: discretionary evaluation of the labour market for renewal of work permits, discretionary evaluation of an individual's behaviour as a threat to public order. Deportation of aliens is within all member states' powers (although the aliens have the right to appeal).

Integration is also impeded by discrimination. In some member states national laws not only make discrimination and racism illegal, but also provide machinery for bringing an action in the case of individual complaints, including by associations defending immigrants' interests. The 1990 Experts' Report to the Commission took not of this, and while 'recognising that systems developed in one member state cannot just be transplanted to another with a very different legal tradition', it hoped all would consider 'more systematic ways of using the law to combat discrimination.'

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61 The first residence permit is usually issued for 1 year, and permits for family members will be valid for the same length of time as that of the head of the household. What makes the problem of divorce so acute is that most member states cancel the ex-spouse's residence permit on dissolution of the marriage, at least in certain circumstances.

62 This policy was quashed by the highest administrative court in France, as a violation of a general principle of law (right to a normal family life).

7. CONCLUSION

Public international law reduces the disadvantages suffered by non-nationals at the hands of systems establishing social solidarity. However, the rules in favour of non-nationals are somewhat haphazard and give rise to inequalities between them. Furthermore, the level of protection varies considerably. The rules are frequently lacking in effectiveness. Each country's experience with its own immigrants is reflected in the resulting policy and there are substantial differences between one receiving state and another and this accounts greatly for the non-uniformity in the position of foreigners residing in the EU. In Chapter 3, we have seen how countries with a tradition of receiving immigrants, such as France, have found it quite hard in defining a truly effective policy. Therefore, as the situation in the Maghreb continues to evolve, there is no reason to believe that it will be an easier task for Italy and Spain. Case law on the other hand has helped in establishing rights in practice for third country nationals.

Community law offers a high level of protection for nationals of the member states, but equality in social solidarity matters and freedom of movement are far from complete. The Community legal order differentiates markedly between the diverse groups of non-nationals, and only partially incorporates certain nationals of third countries and stateless persons into the system of co-ordination established for nationals of EU member states. It is the role of the ECJ at least to reflect a climate where the national affiliations of member states gradually decline in importance in their mutual relations. At the same time it has made clear that 'functional' Community measures such as the rules of free movement can operate so as to 'affect' these national policies (Handoll, 1995: 17) Indeed, to a certain degree, the uncertainties shown up in the ECJ's judgements are the result of the problematic nature of the provision itself, which must take on the ambivalent nature which characterises the relationship between the state - as a sovereign entity - and the state as member states of the EU.

The ECJ, in seeing allegiance to the state and a corresponding reciprocity of rights and duties as the foundation of nationality, has been able to penetrate the wall of nationality and identify a *special relationship* of allegiance and reciprocity to define what is the limit in respect to which nationality, as a condition of access to rights is acceptable. A clear distinction emerged. Immigration and initial access to the labour market are preserved within member state competence, although falling under the 'third pillar' of the TEU and therefore subject to co-operation and joint action. Equality of treatment for established non-EU nationals is becoming increasingly a matter of Community competence, not least as a result of provisions in Community Agreements and willingness of the ECJ to extend the concept of 'direct effect' of secondary legislation adopted under these Agreements. According to Cremona (1995: 113), the controversial question of free circulation for third country nationals falls between these two, hence the limited acceptance - by the Commission when the proposals have not been adopted - of free circulation for short

visits only, longer visits or permanent residence remaining subject to individual member states.

In this chapter we have seen the 'half-thought through' provisions about discrimination, in the Maghreb agreements and other similar agreements, being tested in the ECJ. What can be seen quite clearly is the role that the ECJ plays in defining what policy-makers have not made sufficiently clearly in the agreements with third countries. When third country nationals establish rights in practice by winning their case in front of the ECJ, the position of the pendulum shifts towards the EU magnetic field. However, due to the fact that the case of the third country national is specific to his/her position in the receiving state, the decision of the court is to a great extent reinforced by bilateral agreements between the receiving and the sending states. And so the dominant magnetic field would still be the national one and this prevents the pendulum from deflecting completely towards the EU pole. This is especially where the ambiguity administration of policy about third country nationals comes in. Due to this ambiguity there is no coherent policy throughout the EU about the position of third country nationals. The precision is court-driven rather than policy-maker-developed. However, one may argue that the impact of case law depends on the individual. It is the individual who brings up the cases in front of the court or the local agencies in the member states following the ECJ jurisprudence. So far, there has been no real monitoring by the CEU to check to what extent the application of settled case law is applied uniformly in the member states. To be able to determine this, one has to examine what is happening 'on the ground', in this case, in Italy and Spain. Up to now, jurisprudence has helped clarify and resolve ambiguities about the rights of established migrants, particularly in countries that had bilateral agreements with the sending states. Immigration into Italy and Spain is relatively too recent for the position of the third countries in these two member states to be defined as truly established. Moreover, Italy and Spain have no bilateral agreements with the Maghreb countries to prevent discrimination against Maghrebin nationals residing on their territory. Let us see in the next chapters to what extent are Spain and Italy influenced by the decisions of the ECJ relating to third country nationals living in other EU member states; and to what extent do they enforce settled case law for their own immigrants?

In the next two chapters we shall look at the position of third country nationals in two receiving states - Italy and Spain, in order to analyse their emerging policies towards third country nationals residing on their territory. And also, to evaluate to what extent citizenship rights are being extended to the Maghrebin residing and working legally on the territory of these EU member states.

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NATIONAL POLICIES FOR MAGHREBIN LABOUR IMMIGRANTS IN THE NEW RECEIVING STATES – ITALY AND SPAIN

Italy and Spain have both had previous experiences as countries of emigration and have only recently become countries of immigration within the EU. As can be seen quite clearly from the next two chapters, both Spain and Italy were unprepared to deal with this transformation, and initially both of them followed the policy models of traditional receiving countries and were concerned about conforming to the Schengen agreements. However, with more careful analysis of the situation in each country, Italy and Spain developed their own individual laws for foreigners. The policy process so far has been to a great extent introverted. Each of these two countries was more concerned about the evolving domestic situation than how to influence the EU policy process towards third country nationals. Moreover, neither Italy nor Spain has bilateral agreements specifically regarding the rights of Maghrebin nationals working and residing on a long-term basis on their territory. The position of the Maghrebin migrants evolves with the development of foreigners' laws and migration policy at the local and national level in these two receiving countries. The ECJ has had no role so far in establishing the rights in practice for third country nationals residing there. However, both countries, during their presidencies of the Council in 1996, issued jointly a 'Joint Action Against Racism' (see appendix I). This Joint Action was followed by several Council Decisions and Directives in related fields. The Council Directive of 29 June 2000 set out to implement 'the principle of equal treatment between persons irrespective of racial or ethnic origin'. A framework was set out to define the concept of discrimination, the scope it is contained within. Yet what is of particularly disappointment to the issues at hand is the clear elaboration in Article 3, Section 2:

> 'This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'[1]

It can be inferred from the above statement that indeed the EU has been trying to combat racism, but it is to combat racism on the behalf of their nationals who might be of a particular ethnicity that are discriminated against. The rights of the third country nationals are left out of this Directive. And indeed it re-enforces the gulf

[1] OJ L 180, 19/07/2000, p. 22-6.

between rights of the EU nationals and those of third country nationals legally residing in the member states. This Directive is followed by another Directive to establish a general framework for equal treatment in employment and occupation on 27 November 2000. This directive, although selecting another area, maintains the same quoted statement above regarding third country nationals. The relationship is fairly clear, both regarding the importance by which immigration has become linked to these two Mediterranean states, and the causal factors of North African emigration on the receiving societies; although strong emphasis to develop the rights of these third country national legally residing in the EU has remained in its dormant infancy. The change in public attitudes is a witness to the importance of immigration in the lives of the Italians and the Spaniards in recent years, as well as the growing interest with which this phenomenon is being studied. These interests culminated in a vast array of literature on various aspects of the problem. On the other hand, one must not forget that internal migration took place between regions of Italy and Spain. So, even though Italy and Spain as whole countries have only recently become countries of immigration, certain regions like Cataluña in Spain, and Lomabardia and Piemonte in Italy have had a long tradition of immigration from other parts of Spain and Italy respectively.

Also of importance is an assessment of the situation in Italy and Spain within the European context, beginning with a degree of a common international policy capable of coming to grips with the real roots of the problem posed by migration. We will expand further on this last point in the general conclusions to the book where we will link the EU policy and case law analysis, already discussed in the previous section, with the implications of the emerging situation in Italy and Spain. Let us now examine the evolution of the immigration policy process in Italy and Spain and how each of these two countries has responded to this challenge.

The pendulum is initially somewhere between trans-national interest and national interest as policy was based at the beginning on other countries' policies, namely the policies of traditional receiving states. With more careful study of the national situation, the pendulum started moving towards the pole of national interest, the more the policy became introspective. The pendulum deflected slightly towards the EU interest pole with the 'Joint Action Against Racism', Council Decisions, and Directives in the related fields. Let us now try to visualise the evolving policy towards third country nationals, how it is shaped through public opinion, pressure from other EU member states and the local, regional and national bodies, and let us match this with the movements of the pendulum. The discussion on the shift of the pendulum will be taken up, at the end the country case studies, in the concluding chapter of this book.

5. ITALY

National Policies for Maghrebin Labour Immigrants in the New Receiving States

1. INTRODUCTION: ITALY FROM SENDING TO RECEIVING COUNTRY

During the late 1980s Italy was transformed from a country of emigration to a country of immigration. In chapter 1 we have seen that the main reason for this transformation can be attributed principally to three processes, namely economic growth in Southern Europe; the 'stop' on immigration to northern Europe; and a marked increase in push factors throughout the less developed world and especially in North Africa.

By assessing the overall impact of immigration on Southern Europe and summing up the analysis performed in this study, the attempt was to evaluate emerging trends and possible future scenarios, taking into account the political, economic, demographic and social contexts where future migration will take place.

Migratory history in Italy has been one of emigration and this should not be overlooked if one is to understand the changes which have taken place over the last fifteen or twenty years, when there has been a growing number of immigrants from developing countries.

To gain some insight into the global dimension of Italian emigration abroad, it should be borne in mind that between 1876 and 1971, 25 million persons left the country.[1] Only a part of these emigrated for life, the exact number is difficult to establish. With reference to the same period (1876-1971), on the basis of population balances, the net loss due to migration is estimated to be a little over 8 million, thus it can be presumed that one third of all emigrants settled abroad. Naturally, alternating phases of expansion and reduction characterised this wide span of time. A description of these is outside the scope of the present work. Nonetheless, it is of interest to describe briefly events between 1876 and the beginning of World War I in that these typify conditions of unbalanced development that can also be traced in later periods.

Indeed, Italian emigration was at its most intense in the decade prior to World War I: between 1876-1913, 14 million persons left the country. The highest values

1 To justify the choice of this period, it should be noted that Italian emigration abroad began to be recorded in 1876, whilst 1971 saw the beginning of a period where the number of emigrants and returned migrants tended to balance each other out, both assuming values which were much contained and on the decline.

for the entire period of emigration up until the present date were reached in the first decades of this century.

In the first ten years of this phase, other European countries received 64% of all Italian emigrants, whilst in the following years the attraction exerted by overseas economies became more consolidated. Between 1901 and 1910, some 60% of emigrants headed for North and South America. In brief, it could be said that most migrants from the North of Italy were directed towards Europe and those from the Centre-South, overseas.

On the basis of the data available it would appear that most emigrants, until the end of last century, came from the agricultural sector. Labourers and hand-craft-workers later joined these in the first decade of the twentieth century. The agricultural crisis of the second half of the 1880s, together with the more general economic depression of the early 1890s, placed a heavy burden on the balance between population and resources. Harsher taxes and a number of poor harvests, one after the other, forced the smaller farmer to search out new economic resources beyond national frontiers. People from other social strata too found it difficult to eke out a living in their place of origin. The trade war with France (1888), for example, and the subsequent export blockage, spelt economic ruin in many areas of the South and in Sicily, particularly in those areas where crops tended to be more specialised. Rail construction had come to a halt. This meant that numerous manual workers and labourers no longer had jobs.

These push factors were accompanied by various conditions, which favoured the reinsertion of this manpower surplus in foreign labour markets. Extensive infrastructure schemes, intense construction, and population imbalances in certain production sectors channelled these flows toward France, Switzerland and Austro-Hungarian Empire. Argentina and Brazil actively furthered policies aimed at colonisation of virgin territories by offering subsidies for the initial settling in and funding for travels. Thousands of families from the North of Italy felt the pull of this call and left their home forever to fulfil their dream of becoming landowners.

Towards the second half of the 1890s Italian economic conditions largely improved. The process of industrialisation was underway in the Northwest of the country and the agricultural sector, particularly in Pô valley, was able to enjoy the benefit of modernisation in organisation and technology. The fact that these developments were limited to certain regions once again brought to the fore the push factors, which were already in operation. Emigration was on the increase everywhere: Northerners tended to go towards the nearby industrial neighbours and those from the South to the United States. Manpower recruitment beyond the national boundaries depended not only on middlemen but also on migrants themselves, with the formation of a more or less explicit migratory chain.

Once again, in the aftermath of the Second World War, economic growth and intense migration coincided. Here too, the so-called 'economic-boom' (1958-1965) was accompanied by intense mobility, although levels never reached those registered at the beginning of the century. Migrants tended to be predominantly from the South

and headed not only abroad (in Europe, Switzerland and West Germany in particular)[2] but also towards Rome and industrial centres in Northwest Italy.

The pathological nature of these flows recalls *mutatis mutandis* of those at the beginning of the century. It is quite obvious that the push factors related to the gradual marginalisation of certain social strata (the smaller farmer, for instance, or craftsman or skilled workers and labourers) and the pull factors referred to single destination must be seen in relation to economic trends in the 1950s and 1960s. Emigration reached its height in the first half of the 1960s. The following years registered a steady and irreversible drop and this trend is confirmed by data which show a positive migration balance from 1972 onwards.

From the second half of the 1960s onward, family reunions formed part of these flows, a sign of the maturity of the migration process at this stage. The substitution of older emigrants, who had by then reached a pensionable age, with a new generation of young people willing to emigrate abroad, had almost drawn to a halt. The traditional model of migration seemed to have run out of steam and indeed the increasing importance of migration towards more technologically advanced regions from the second half of the 1970s constituted a novelty in migratory patterns. Italian business tended to become increasingly important at an international level, particularly in those countries where earnings from petrol were reinvested in infrastructure or technical know-how, which brought with it the medium term transfer of highly specialised personnel.

Migration into Italy differs from that in most other industrialised countries. Italy was in fact, as stated above, for a long period a country of emigration, and it is only recently that it has had to cope with the problem of immigration. This change in trend first occurred in the late 1970s, continuing steadily throughout the 1980s, when there was a steep increase in the number of immigrants coming into the country, partially aided by the lack of appropriate legislation. In fact, the first specified law on immigration was passed in 1986 (no. 943/86) and the second in 1990 (no. 39/90) [these two laws are explained in greater detail later see below, section on 'Immigration and Citizenship Policy'].

It could be said that immigration from outside the EU, since the early 1980s till 2000, even though one cannot be precise for the reasons stated above and it is probably quite variable, could be estimated to be around one and a half million – the biggest group constituting the Moroccans.[3] An official estimate made in 2000 (ISTAT[4], 2001) put this also around 1,5 million. Immigrants are spread throughout

2 Once the Second World War had ended, emigration tended to increase in the following years. Europe, Argentina and the United States were the main destinations. Towards the second half of the 1950s overseas destinations became less popular.

3 For comparative statistics on other EU member states, see previous chapter 'The Maghreb and the European Community' and for further statistical breakdown see below, section 'Geographical and Sectoral Distribution of Migrants' which can be found further on in this same chapter.

4 ISTAT is the National Statistics Institute that is annexed to the Ministry of the Interior.

the country but particularly in the Centre-North and certain areas of the South (Sicily and Campania) which are easy landing places for migrants coming by sea from the Maghreb (for more detail see 'Geographical and Sectoral Distribution of Migrants'.

As for the demographic structure, the communities from the Philippines and Cape Verde are mainly composed of women while other non-EU immigrants mainly consist of men. Family reunions were initially quite rare because most immigrants were fairly recent arrivals, but then it increased over time. Nonetheless, mixed marriages, although the numbers are still fairly low, are not unusual. The social impact of non-EU immigrants on the Italian demographic structure is particularly felt in those areas where migrants tend to congregate. This must be seen as relating to the fact that immigrants do not find it easy to have access to work and thus often end up living together in the outskirts of the city. This in turn does little to facilitate their social integration into the country. This is further exacerbated by cultural differences which make contact difficult. Situation such as this often sparks off episodes of intolerance as well as favours forms of criminal behaviour among the immigrant population (for example linked to drug pushing). The economic impact of the immigrant population is somewhat varied and contradictory. In many areas and particularly in the less economically developed regions of South Italy, foreigners tend to be found mainly in seasonal employment, or which is at any rate temporary and transitory as without any contract or social welfare contributions. Vice versa, in the more industrialised regions, the immigrant worker is often in paid employment, with a contract. However, this job is usually to be found in those areas that because of long working hours or the risk involved are avoided by the local labour force. Many women find jobs mainly as housemaids, a job, which the local labour force is no longer willing to undertake. In this case the job is usually covered by a contract, with social contributions being paid.

The self-employed deserve a separate mention; the number of non-EU immigrants involved being quite high, albeit concentrated in particular sectors. Two levels can be distinguished here, the first - usually street-vendors - is fairly precarious. This type of activity, which assumes a variety of forms, is to be found right across the country but again tends to be concentrated in urban areas and particularly in the big cities and is mainly carried out by Africans. A second level is enterprises run by the self-employed particularly in trade and only rarely in the industrial sector, in handicrafts mainly. The main businesses are the restaurants and catering services usually run by Chinese and the carpet trade run by the Iranians.

The political aspects of immigration are still difficult to appraise, as this is a fairly recent question. One can only mention some episodes of racism. These are mainly provoked by the worsening housing shortage, in part brought about by the ever growing number of migrants, and the difficulty in finding a job anywhere in the country. These problems encourage attitudes of rejection or refusal, which have emerged and taken root in certain Italian regions, the origins of which, however, lie elsewhere.

All these elements form part of the wide changes, which profoundly altered Italian society. For instance, the growing role of the welfare state helped the family

income to stretch further, particularly in the poorer areas of the country. Similarly the improvement of the educational status of young people favoured the acquisition of new values and aspirations. So that a job, at any cost and regardless of the conditions, no longer remained acceptable as it had been in the past. Even with regard to internal migration, long range mobility has undergone a steep drop, and the big cities no longer exert the same influence, as was the case at the beginning of the 1960s.

Today, this basic framework is extended to include dark immigrant workers from a number of African and Asian countries; like other countries on the so-called Northern Shore of the Mediterranean, Italy now also finds itself unexpectedly in a new position on the international chess board.

In this chapter, we shall look at the different influences which have helped shape policy towards third country nationals in Italy, both from above and from below. An analysis of the change in public attitude over time is important when carrying out an evaluation of the emerging policies. It reflects the information that people have about the ongoing phenomenon both at national level and in neighbouring countries. The influence the press and politicians may bear on the people, and this in turn reveals how the people apply pressure on the government to react and shape its own standpoint.

2. ATTITUDES TOWARDS MIGRANTS IN ITALY

The Italian public has grown increasingly interested in the question of immigration: both because of greater numbers involved and due to episodes, often quite serious, of intolerance which have caught the attention of the mass media and the general public. Except for a particular number of situations, the impact of migration on Italy compared with other European countries is still quite modest and the costs are limited in terms of the social services and welfare payments to migrants. The fact that numbers are still limited and primarily composed of workers on the economic and social fringes helps contain the impact of migration as well as limits competition between migrants and the local population. This however has not prevented the outbreak of various forms of racism.

A number of opposing reactions has emerged from the Italian society. On the one hand one can find 'solidarity' towards the migrant as expressed by the various catholic voluntary organisations, for example - Caritas, by some political parties, and by trade unions. On the other hand in Italy as in other European cultures, a form of ethnocentrism does exist that under certain conditions could give rise to xenophobic or racist behaviour.

At this stage, the possibility of conflict could arise as the insecurity and marginality heighten the risk of them being caught up in various forms of criminal activity, thus encouraging intolerant and hostile attitudes on the part of the native population toward the marginalised foreigner (Melotti, 1990). Lack of social services and housing is also a source of conflict between the local population and

migrants. The migrant issue has become an important element in Italian political life, which caused clashes between the parties during the Parliamentary debate on the February 1990 law (the Martelli law) and throughout the National Conference of Immigration which took place in Rome, June 1990. Following an initial multi-partisan attitude, the stance taken by the various parties tended to emerge and be shaped by the different party philosophies. At the time, media attention also increased. One of the national television networks (public) has dedicated an entire weekly programme to the problems facing migrants for the last five years. Some studies have thrown light on some of the positive and negative consequences of the way in which the mass media have dealt with the issue (Marletti, 1989). The media have been accused of forcing the issue, of being artificial in their treatment, and exaggerating the handling of the question, which could have provoked indifference and cynicism. The media have also been accused of being schematic with the danger that this could reinforce aggressive attitudes, which were not necessarily racist at the outset.

Political parties such as the Lega Nord (founded in 1991), which has based much of its electoral success on the divide of North and South Italy, as well as the halting of immigration, has emerged in the 1990s. In 1992 the Lega Nord had only 80 members in the Parliament, 25 Senators and 55 Deputies. Yet two years later, in 1994, the numbers of Parliamentarians more than doubled, totalling 180 members, while the Party's Irene Pivetti was elected as the President of the Chamber of Deputies. Its electoral success can be interpreted as to reflect the people's outlook toward issues of immigration, and social integration towards those already legally residing in the country. Its founder, Umberto Bossi, is currently the Italian reform minister, and also the author of the controversial Bossi-Fini Amendment to the Italian Immigration Law (elaborated in the next section).

The increased number of foreign immigrants has led to a number of surveys enquiring into the attitude and opinions of Italians regarding this question. Some have been aimed at specific target groups (schools in Rome, those attending political demonstrations, etc.). Others, with a more rigorous statistical and methodological approach, have used representative samples of the general population.[5] According to

5 At this point mention of three surveys and two research projects in particular should be made. These surveys and research projects have been carried out by DOXA - Institute for Statistical Research and Analysis of Public Opinion and IRP - Institute for research on populations (it has now merged with the Institute for Research for Social Security Dynamics into the Institute for Research on Population and Social Policies), respectively. With respect to the surveys, the first was carried out in July 1987, the second in November 1989 and the third in May 1991 - as part of DOXA's Omnibus Surveys. The two research projects were carried out by IRP as part of its surveys on 'Attitudes and opinions of Italians towards demographic trends'. In the DOXA surveys, they interviewed a sample around 2,000 people over 15 years of age taken from electoral lists in around 200 municipalities. In the 1987-88 IRP survey a sample of 1,800 people aged 18 to 65 was used of which 1,270 were aged between 18 and 49.

the last IRP survey three-quarters of the Italians interviewed think that there are 'too many' foreigners. Taking the group aged 18-49 years, the percentage drops only slightly. Since the previous survey, the increase is still more than 21 percentage points (Table 1). When such high percentages are reached, clearly the idea that there are 'too many' foreigners has become a common feeling in public opinion.

According to the survey conducted between September 1996 and January 1997 by Commission's Public Opinion Analysis Sector, 20% of the Italians feel that immigration from the South of the Mediterranean should be accepted without restriction.[6] While 62% and 14% feel that it should be accepted but with restrictions, and not be accepted respectively. In relations to Table 5.1, the same public opinion survey asked the following question: 'Generally speaking how do you feel about the number of people living in (OUR COUNTRY) who are from countries which are not members of the European Union. Do you think there are...' A total of 13% of the Italians surveyed stated that it is 'Far too many', 58% said 'Too many', a small percentage of 15% shared the opinion 'Just right', and 8% admitted that it is 'Not enough'. It is interesting to note that albeit the questions are slightly different, the results drawn from the 1997 survey and the one obtained in 1991 are practically identical. Combining the 58% with the 13%, we can derive the rough 71.3% of 1991. The 15% and the 8% is approximately the mid-range of 22%.

In the Eurobarometer Opinion Poll on Racism and Xenophobia in Europe conducted between the 26 March and 29 April 1997, 9% of the Italian interviewees indicated that they find themselves very racist, 21% quite racist, and 35% a little racist.[7] In the category 'People from minority groups are being discriminated against in the job market', Italy came in sixth place with 79% agreeing with the statement. On the two options given for integration[8] or assimilation[9], a striking 69% disagrees with both, while 10% agrees with assimilation and 21% with integration. This revealed that the general opinion of the Italians believe that integration does not necessitate giving up one's culture or religion. Yet in terms of further immigration, 62% of the Italians surveyed agreed with the statement 'our country has reached its limits; if there were to be more people belonging to these minority groups we would have problems'.

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6 See Monitoring EUROPINION N° 10, January 1997. This survey was taken by the EURISKO SPA in Italy every four weeks, consisting of 800 phone interviews during each session.

7 See Eurobarometer Opinion Poll N° 47.1, the first results presented at the Closing Conference of the European Year Against Racism, Luxembourg, 18-19 December 1997.

8 For integration: 'in order to be fully accepted members of society, people belonging to these minority groups must give up such parts of their religion or culture which may be in conflict with the law.' Ibid.

9 For assimilation: 'in order to be fully accepted members of society, people belonging to these minority groups must give up their own culture'. Ibid.

3. IMMIGRATION AND CITIZENSHIP POLICY

In Italy, with respect to legislation, the government and the parliament are the bodies responsible for laying down migration policy and laws regarding Italian citizenship. Due to lack of initial legislation it was somewhat difficult to establish the exact numbers of migrants who entered and those who left during the last twenty years. Nor can one know the changes in structural characteristics of immigration for the same reason. The only data available, which enables one to follow this trend, does not allow one to make any sound analyses. The most complete and continuous source of data is the permits of stay issued by the Ministry of the Interior (see below). However, these do not allow one to distinguish which of the 'foreigners' registered could be considered as immigrants, except by referring to the reasons for entering the country. Alongside this source and other official sources, which can not be held to be reliable for a variety of reasons (population register population census). There are also a number of studies carried out by private bodies. These tend to refer only to limited regions and tend to be mainly sample surveys (not particularly exact given the impossibility of referring to a universe). Earlier surveys in Italy usually dealt with structured communities of immigrants coming from the Philippines, Cape Verde, Somalia, Eritrea, Morocco, Tunisia, Egypt, and Iran. Recently the list has expanded to include immigrants from Algeria and other African and Asian countries such as Senegal, Ghana, Sri Lanka, Pakistan, and China.

So far a solidified immigration policy in Italy has yet to emerge, albeit much has been underway in the last few years. Up to date, the two more significant legal norms referred to immigrants in Italy from outside the EU are represented by two laws. The first one was passed in 1986 (Law no: 943: Norms on the employment and treatment of immigrant workers from outside of the EU [still EC in 1986] and the prevention of undocumented migration) and second in 1990, the so-called 'Martelli Law'[10] (Law no: 39: Special measures on political asylum, entry and sojourn for non-EU national and stateless citizens already present in the country). The most recent (2002) and controversial is the 'Bossi-Fini Amendment' (Gianfranco Fini is the leader of the Alleanza Nazionale) to the Italian immigration law (has been under review in the Italian Parliament) would make it possible for immediate enforcement of deportation of legal immigrants when issued (It has been noted that since 1998, a new law immigration has been in force, DGLS No. 286 of 27 July 1998 and DPR No. 394 of 31 August 1999.)

Law no: 943/1986 upholds the principle that non-EU workers already present in the country should enjoy the same treatment and rights as Italian workers. The law is divided into separate administrative provisions, such as the granting of an entry visa being dependent on the existence of the authorisation to work (Article 8). The work and sojourn permits normally last two years and may be extended. Procedures for

10 The 'Martelli Law' was named after the Minister of Internal Affairs - Minister Martelli – who was responsible for designing it in 1990.

access to employment and for training of immigrants are defined. The concession of each individual work permit still depends on the requests made by employers and on labour exchange decisions about the non-availability of Italian or EU workers with the required qualifications. In addition, the Central Employment Commission and the Ministry of Labour's National Council for the Problems of non-EU Workers will be able to give directives on the documentation of vacancies, the keeping of employment bureau registers and mobility of foreign workers. Law 943/86 also provides for the setting up of regional immigrant advisory councils and of new representative bodies of immigrants and of government bodies at the Ministries of Labour and of Foreign Office to foster immigration policy.

Both laws stipulate the criteria, procedures and time limits for the regulations of the status of those immigrants who were in irregular or illegal position. Under the 1986 Law this was possible only for employees, while the 1990 Law made provisions for the broadest category of non-EU nationals (employee, independent worker, self-employed, student).

Law no. 39/90 stipulated new norms for entry, residence and expulsion and approved funds to the Italian regions for the creation of primary reception centres for immigrants. Since 1990, the Italian government has expressed the intention to programme the new immigrants' inflow. The programming of entry flows is established through annual decrees, taking account of the needs of the national economy. This programme ran alongside projects to integrate the third country nationals already inside Italy who are enrolled in labour exchange lists or awaiting the concession of a residence permit. Three categories are envisaged for entry: asylum seekers, family reunification of immigrants legally residing and fully employed, labourers called individually by employers who guarantee, besides the employment, adequate housing. This direct call is considered a pliable instrument apt to meet labour market demands. Seasonal work has not yet been regulated.

In November 1991, the Ministry of Labour issued a Circular letter (no. 156) on immigration abolishing the block for domestic workers, established in March 1990. The Italian employer has to guarantee equal wages and equal legal conditions and social contributions for no less than 40 hours work a week, and has to provide proper accommodation. The request of the employer, presented through diplomatic and consular channels, will allow foreign workers an entry permit to Italy. Even with these provisions, the fight against the irregular and illegal labour market has not been successful.

Italian citizenship is now based on a 'new' law, approved in 1992, which abolished the old 13 June 1912 law on Italian citizenship. The law no. 91, approved on 5th February and published in the official Gazette on 15th February 1992, had become effective on 15th August 1992. The criteria for the acquisition of Italian citizenship have made easier the acquisition of Italian citizenship for people of Italian origin who had adopted a foreign citizenship. For an EU citizen, the new law requires 4 years of legal residence in Italy before receiving Italian citizenship. For third country nationals, 10 years of legal residence are required, while the previous law requested only 5 years of legal residence prior to application for citizenship

status. Here one must note that even if one does actually spend 10 years of legal residence in Italy, naturalisation is not guaranteed. Various factors come into play: e.g. whether those 10 years of legal residence were a full 10 years at a stretch; if at the end of the 10 years the person filing the application for citizenship is of independent means - atypical[11] work presents another obstacle; etc. The restrictive approach of this law explains the very low number of third country nationals applying for naturalisation. Italian citizenship may be acquired by:

- *Jus sanguinis*, i.e. by having Italian parents, or one Italian parent. Minors can also acquire citizenship by adoption.
- *Jus soli,* where the parents of a child found in Italy are unknown.
- *Decree*, to a foreigner whose father or mother was a citizen by birth; to an adult foreigner adopted by an Italian citizen; to a foreigner who has served for at least 5 years as an employee of the State, or to a foreigner who engages in military service in Italy.
- *Naturalisation,* on some conditions, as service rendered to the Italian state for a period of 5 years, even if abroad, or residence in Italy for 5 years. Naturalisation, a decree of the President of the Republic, only comes into effect when loyalty has been sworn to the Republic of Italy and to its President.
- *Marriage,* Italian citizenship may be acquired through marriage to an Italian citizen, after residing legally for at least 6 months in Italy or after 3 years from the date of marriage, if it has not been dissolved.

The Italian authorities can refuse a request for citizenship in the case of a prison sentence of more than one year and for attempt to undermine the security of the Italian Republic. Italian Nationality may only be lost if a serious criminal offence is committed or a new citizenship is acquired.

However, Italian employers have now made the Martelli Law (law 39/1990) more severe due to the ever increasing numbers of immigrants and the ever-soaring exploitation of illegal immigrants. The previous President of the Republic of Italy - Luigi Scalfaro, has on 18th November 1995, approved and signed a decree consisting of fifteen articles, intended to *re-design* the Martelli law. These regulations present a new perspective to the original version of the law, which has given rise to many debates as it has been described as xenophobic. The points that are intended to modify the original version of the Martelli law, deal with:

- **Entry Regulations**: Permits to enter and reside in the country now will be regulated by the labour office of the region annually.
- **Seasonal Labour**: The permit for seasonal work will be of a maximum of six months.
- **Entry visa**: Entry visas won't be released for people who have had in the past committed crimes and been deported from Italy
- **Permit/Visa Renewal**: This renewal will be at the discretion of the immigration officials and the mayor of the town/city where the immigrant intends to reside.

11 Atypical work means work which has no fixed hours, it is usually part-time work.

- **Deportations**: There are four instances that could lead to the expulsion of an immigrant from Italy:
  - As a security measure - (in the case of a person who has committed one or more criminal offence).
  - Expulsion as a prevention (this is applied in the case of those immigrants who are classified as social dangers, this category would include those immigrants involved in illegal activities/behaviour;
  - Administrative expulsions for those, whose residence visa has expired, the sentence of expulsion in this case would take place ten days after the arrest of the immigrant.
  - Illegal immigration: Those caught dealing with the smuggling of illegal immigrants could be imprisoned from one up to three years. Those who are involved in the trafficking of illegal immigrants for the purpose of prostitution could be imprisoned for up to fifteen years and would have to pay a fine between EUR 32,366 and EUR 129,489.
- **Illegal employment of immigrants**: The exploitation of illegal labourers will be penalised by imprisonment of a minimum of 2 years up to a maximum of 6 years.
- **Family reunification**: This is something conceded to those who are legally residing and employed in the country and can demonstrate that their earnings amount to at least the equivalent of 400 pounds sterling (per month).
- **Legalising the status of the immigrant**: Those who are residing in Italy without a legal visa can legalise their position within 120 days from the day of the publication of this decree. They will have to demonstrate that they have been employed for at least 4 months with the same employer (this has to be signed by the employer). And hence if the employer deems fit for the immigrant to remain employed with him/her, he/she must pay the social security and tax contributions which correspond to the length of time of employment of the immigrant in question with this employer. The employer must also pay contributions six months in advance if the immigrant is to be employed for an indefinite period of time or four months in advance if the date of termination of employment has been defined.
- **Health benefits**: All immigrants, even if they are illegal, for health reasons, can utilise hospitals and clinics and obtain preventive medicine on the government health scheme. However, the immigrants will have to prove that they are healthy before they are given permission to enter and reside in Italy.

On 18th July 1996, the original Martelli Law expired and Giorgio Napolitano, the Minister of Affairs at the time, issued a new decree on citizenship on the basis of the amended Martelli Law, which was signed in November 1996. Meanwhile, since the publication of the Martelli Law, the Italian government has issued a number of decrees and amendments to the law, which further regulate flows of new immigrants and conditions for those already in the country. This system is seen as a pliable instrument, able to meet labour market demands although, some have described the

changes as xenophobic (*Migration News Sheet,* December 1995: 3). The Italian government, then, presented in January 1997, a new Aliens Bill to Parliament which, aims on the one hand, to achieve the effective expulsion of clandestine immigrants and on the other hand, to integrate better the migrants already inside the country. On 19 February 1997, the final version of the Aliens Bill was completed and approved by the senate. The Lega Nord then abandoned the hemicycle and condemned the bill as enabling a 'Morocconisation' of the country.

Italy had been under pressure from its Schengen partners to implement the provisions of this Bill as soon as possible especially since Italy became integrated in Schengen on 26 October 1997. The Schengen partners welcomed the Bill because in the past illegal immigrants were given 15 days to leave the country. This was seen as an award by illegal immigrants as it effectively gave them a chance to make arrangements not to leave Italy and either to go underground or to continue their journey to another EU state. Under the new law, they could be expelled more quickly.

The Bill also contains a series of provisions aimed at facilitating the integration of immigrants. A residence permit of unlimited duration will be issued for legal immigrants who have been residing for at least five years in Italy. They will have access to public health services and will be able to apply for social housing. As for family reunion, foreign workers will be able to sponsor even family members of the third degree. The Bill also stipulates that the country's immigration policy will be elaborated every three years in accordance with a programme approved by the parliament. Every year the President of the Council of Ministers will establish an immigration quota in accordance with the country's manpower needs.

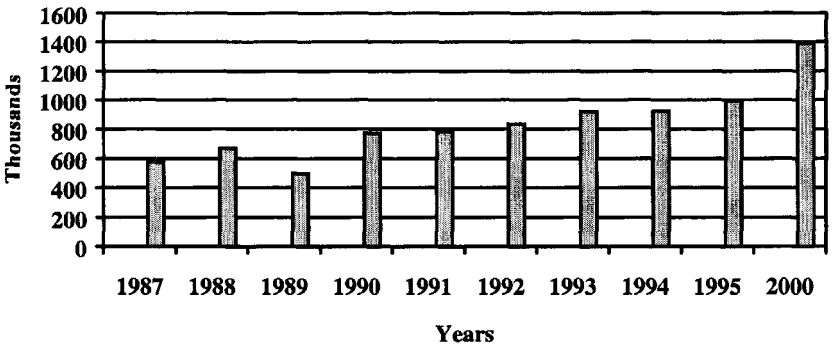
In 1998, there was another law introduced, and it is called Law no. 40, the first real organic law about foreigners' rights. Law 40/98 is the first law, which deals with all aspects of foreigners' rights - hence its description as an 'organic' law. It rationalises the management of the immigration phenomenon; it evaluates the reasons for entry and establishes criteria for residence; guarantees respect for human rights and regulates living and working conditions while allows for expulsion of those who are a threat to public order). It abrogates some of the more xenophobic aspects of the previous laws to promote integration of those already in.

Across these various decrees, there is a clear pattern - the development of a restrictive policy with regards to new immigration, and attempts to assimilate immigrants already in the country. Thus, for example, in Italy measures taken included the allocation of immigrants' children in a dispersed fashion to Italian schools, partly in order to maintain a majority of Italian children per classroom and hence prevent the development of 'immigrant ghettos' in certain neighbourhoods. In this sense, Italy can be seen as moving towards the French model of 'assimilation', which Solé (1988: 60) describes as the melting pot idea' (see Chapter 1). This implies that the cultural, social and political subordination of one group to the other, and the partial or total loss of immigrants' identity as they merge with the majority group. It can be contrasted with 'integration', in which the indigenous population and a minority group gradually move towards equality on the socio-economic, cultural

and political levels, becoming a single population unit (see Solé 1981). In Italy, 118,000 foreigners were regularised in 1987-1989; 235,000 were regularised in 1990-1992, 259,000 in 1995 and final results for 1999 are still to come. Table 5.3 depicts the main reasons why Moroccans and Tunisians had applied to Italy for residence permits. The graphs also show the relevant percentages of applicants in each sector.

4. GEOGRAPHICAL AND SECTORAL DISTRIBUTION OF MIGRANTS

Graph 5.1: Estimated Absolute Number of Foreign Residents in Italy 1987-2000
(Source: Caritas Immigrazione Dossier Statistico 2001)



Graph 5.2: Residence Permits Distributed According to Region 1991 – 1999
(Source: Caritas and Caritas Immigrazione Dossier Statistico 2001)

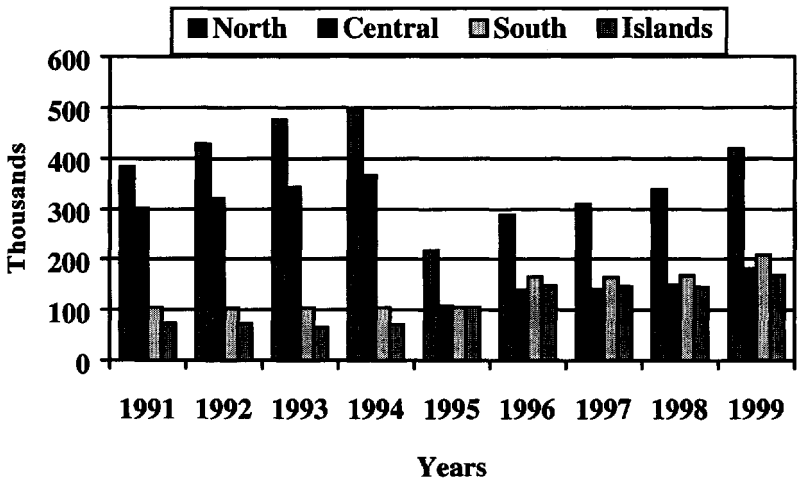


Table 5.1: Estimated Absolute Numbers of Immigrants in Italy in 2000, Annual Variation and Total Population
(Source: Caritas Immigrazione Dossier Statistico 2001)

	Immigrant Population	Annual Variation	Total Population
North West	382 126	13.4 %	15 130 050
North East	327 801	13.6 %	10 621 233
Central	422 483	11.1 %	11 159 583
South	143 121	-0.5 %	14 125 407
Island	61 251	-0.8 %	6 724 744
Italy Total	1 388 153	10.9 %	57 844 019

Table 5.2: Top Ten Italian Regions populated by Third Country Nationals in 2000, Annual Variation and Total Population
(Source: Caritas Immigrazione Dossier Statistico 2001)

	Immigrant Population	Annual Variation	Total Population
Emilia Romagna	113 048	12.1 %	4 008 663
Friuli	43 432	14.6 %	1 188 594
Liguria	38 784	11.7 %	1 621 016
Marche	35 777	18.1 %	1 496 495
Trentino	31 779	8.9 %	943 123
Bologna	30 660	10.7 %	921 907
Umbria	26 068	6.3 %	840 482
Perugia	21 713	5.5 %	617 368
Genova	21 326	7.4 %	903 353
Abruzzo	18 934	19.5 %	1 281 283

Table 5.3: Motivation for Seeking Residence Permits in Italy in 2000 (in percentages), Moroccans and Tunisians[12]
(Source: Caritas Immigrazione Dossier Statistico 2001)

	Morocco	Tunisia
Employed by Others	61.9	68.7
Self Employed	8.7	4
Adoption	0	0
Custody	0.2	0
Political Asylum	0	0.1
Awaiting Asylum	-	0
Judicial Motives and Detention	0.3	1.1
Family	27.2	24.2
Religious Motivation	0	-
Temporary Protection	0	0
Elective Residence	1.3	1.2
Awaiting for Residence	0	0
Health	0.1	0.1
Study	0.2	0.4
Tourism	0.1	0.1
Other Motives	0	0.1
Absolute Number	159 599	45 680

12 Algeria is missing because the value shown are only for the nationals of the top 20 countries (in absolute number) seeking residence permit, and Algeria does not fall into the top 20. Algeria is number 28 in terms of absolute total, it has the value 13 216.

Graph 5.3: Maghrebin in percentages According to Nationality in Italy, 2000
(Source: Caritas Immigrazione Dossier Statistico 2001)

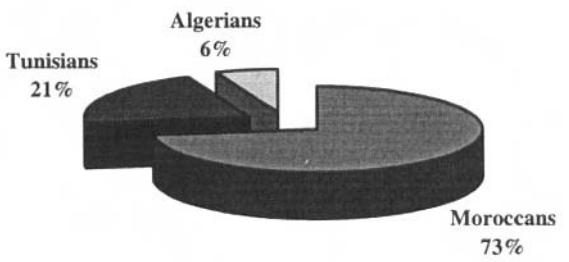


Table 5.4: Total Maghrebin in Italy, 2000
(Source: Caritas Immigrazione Dossier Statistico 2001)

	Morocco	Tunisia	Algeria
% of Overall Immigrant Population	11.5 %	3.29 %	0.952 %
Absolute Numbers	159 599	45 680	13 216

Table 5.5: Percentage of Foreign Temporary and Permanent Residence Distributed by Geographical Area in 1999
(Source: Caritas Immigrazione Dossier Statistico 2001)

Geographical Area	% Temporary Residence	% Permanent Residence
Italy	100 %	100 %
North West	31.6 %	33.1 %
North East	22.5 %	22 %
Central	30.4 %	28.6 %
South	10.6 %	10.1 %
Island	5 %	6.2 %

Table 5.6: Regularisation of 1998, as of July 2000
(Source: Caritas Immigrazione Dossier Statistico 2001)

Regions	# of Cases	% per Region	Accepted 1999	Accepted 2000	Total Accepted	Others
North West	90 727	36.2	43 083	35 452	78 535	12 192
North East	36 127	14.4	24 185	4 730	28 915	7 212
Central	74 924	29.8	41 869	25 853	67 722	7 202
South	36 632	14.6	22 423	6 695	29 118	7 514
Islands	12 556	5	8 041	2 090	10 131	2 425
Italy	250 966	100	139 601	74 820	214 421	36 545

Table 5.7: Total Remittance, 2000 in EUR Millions, Others in Millions of Lire
(Source: Caritas Immigrazione Dossier Statistico 2001)

	2000	Total 1992 to 2000	Average 1992 to 2000
Algeria	0.119	2 195	244
Morocco	20.166	205 087	22 787
Tunisia	0.737	7 583	843

As far as the geographical pattern by region is concerned, it may be noted that, wherever the foreigners come from, Latium (the central region of Italy - Rome is the capital of Latium) generally exerts a considerable attraction, followed by Lombardy (a northern region of Italy with Milan as its capital) at a distance. Within these two regions the phenomenon is polarised in the metropolitan areas of Rome and Milan and also in the network of small and medium-sized industries to be found in Lombardy (see Table 5.5).

There are specific links between the areas of origin and the areas of destination, such as the 'North-African-Sicily axis' where a combination of old and new links between the two geographically close areas has led to the presence of North Africans (mainly Tunisians) in the fishing industry, in farming and working as shepherds and in seasonal work (olive, tomato and grape picking) in south-west Sicily. Another axis has emerged between 'other African countries' and Campania, where the 'metropolis' effect of Naples complements the attraction exerted by the areas of intensive farming on the coast.

In conclusion, while not nearly enough material is yet available for a full analysis of the phenomenon at hand, it seems clear that, with respect to the foreigners present in Italy, the traditional model of immigration, i.e. for economic reasons, is the main motive for immigration from less developed countries (see Table 5.3). The considerable number of young persons and the structure of the labour force together illustrate the economic stimuli which are at the root of these flows, whatever the reasons declared on the residence permit. The provisions made for the regularisation have, in effect, to a certain extent, confirmed how widespread the phenomenon of illegal immigration is amongst some nationalities,[13] - this was

13 As far as the largest groups are concerned, those most likely to contain undocumented immigrants, i.e. those who have taken the most frequent advantage of the 'regularisation' provisions, are Moroccans, Tunisians, Nigerians, Ghanians, Filipinos and Chinese.

established when these groups came forth to regularise their status - and the decision to enrol at the state employment agencies demonstrates the precariousness of their occupation, whatever it may be, hitherto conducted in the informal economy. These and other characteristics may also be deduced from the numerous local surveys undertaken during the 1980s.[14]

Immigration flows from medium developed countries are absorbed more easily into Italian society. Economic motives naturally predominate in this sector too, but workers are integrated into the labour market at a much higher level. Moreover, the presence of the elderly immigrants from the more developed countries suggests that there is a wide range of non-economic motivation, which is more widespread amongst the better-off social classes. The variations in the legal treatment of foreigners therefore seem to have many points of contact with the typology of foreigners suggested by official sources. Immigrants from lesser-developed countries are, in effect, in a worse position, even though the new legislation of the second half of the eighties at least enabled them to enrol at the state employment agencies.

5. THE SOCIO-CULTURAL IMPACT OF IMMIGRATION

A good deal of space has been dedicated in sociological literature to the impact of the arrival of the immigrant on a community:

> 'It is indeed possible that when a new factor enters into contact with people who have found their own equilibrium and thus established a certain order of behaviour, it sets off a series of mechanisms of action and reaction. Within a community, a foreigner is inevitably a factor of social change' (Macioti, 1990: 17).

Immigration from places such as the Maghreb region, Latin America, Asia, etc., and perhaps to a lesser extent Eastern Europe, requires the ability to adapt, malleability, and physical and psychological stamina on the part of the immigrants (Macioti, 1990: 176-177). They must adapt themselves to a society, which is in all probability less welcoming, and less encouraging than that which they were led to expect. Even surviving is a problem, as in most cases there are no structures capable of guaranteeing immigrants decent levels of subsistence. They have to cope with homesickness, both for their native country and for the relatives who have remained behind. They may also be anxious for these relatives' safety in the case of countries torn apart by war or political oppression and conflict, and they have to put up with a

14 Women from the Philippines, the islands of Cape Verde and Eritrea, for example, seem to come for economic reasons, as do men from Morocco and Senegal. Study is a common reason amongst young Iranians and Greeks. Political tensions in the country of origin are the main cause of the forced emigration of Algerian and Eritrean men; political reasons are also present, though to a lesser extent, amongst Iranians, Chileans and citizens of El Salvador.

continuing situation. Even if they deem the conflict to be an emergency, it could well go on much longer, for months or for years, with little hope of predicting its eventual outcome. These are people who have completed high school, if not a few years of University, and speak a European language (often French or English, sometimes Spanish, Portuguese or German). They find themselves living from hand to mouth, sleeping wherever they can, rough, with all risks that this entails (theft, disease, etc).

The Italians with whom they are most likely to come in contact with are often those who are the most unlikely to welcome them: people unable to provide for themselves, they too resorting to the canteens run by the charity organisations in order to get a hot meal once a day. There may often be tramps that will refuse to sit at the same table with them. Otherwise, they may meet with policemen, civil servants and officials who find themselves unable to cope with all the applications for work and residence permits or for assistance towards a further step in the migration process. Alternatively, there may be Italians who exploit this as source for low-paid labour that Italians no longer want to do. Italians are usually protected by the trade unions. Immigrants in regular employment are actually offered a voice in trade unions and the possibility of having their own representatives. However, considering that significant immigration from third countries is quite a recent phenomenon in places like Italy, the immigrants would be fluent neither in the Italian language itself nor in the technicalities behind decision making in the Italian Industry and hence can do very little for themselves at the moment. Alternatively, they may meet with workers in voluntary organisations but under such difficult circumstances that it is difficult to establish warm and friendly relations on equal terms.

The Italians see their equilibria disturbed, and their values and cultural models called into question. They are often forced to think twice about the picture they once had of themselves, that of a kind-hearted people, friendly and willing to help, and knowledge and open-minded towards different cultures. Much of this immigration has been exploited as a source of unprotected labour.

The impact of this effect is difficult on both sides, because the presence of immigrants forces one to be critical of oneself - not an easy task - and to recognise the limits of the Euro-centric cultural perspective in which we have been accustomed to view matters for centuries. For the host society as for the immigrants it is, however, a chance for examining things in a new light, for possible encounters, for getting to know other cultures, for increased open-mindedness, and for fighting dogmatic intransigence and sclerosis of any kind. The better organised groups are trying to make it more accessible to Italians to learn more about the immigrants, their countries, habits, customs and histories which up to now have only been known to few scholars (Federici, 1983). This is with the main purpose to help develop a society which is not solely multiracial but also multicultural, in which differences are accepted, respected as opposed to simply tolerated and above all not necessarily assimilated.

6. SOCIAL ADAPTATION AND INTEGRATION OF IMMIGRANTS

The various economic, institutional, legal and cultural features of immigrants in Italy have been highlighted in numerous studies in recent years. Even though widely documented, this remains a recent phenomenon and the consequent process of adaptation to and integration into the Italian system is only at the beginning.

The general picture appears to present quite a few contrasting features. In addition to positive factors such as the social advancement of many immigrants, there are also many negative factors such as financial problems, and psychological and physical suffering and low morale which result from being uprooted from one's country of origin and been deprived of emotional ties and family links. There are also the forms of deviance which result from social marginalisation, and lastly, racial prejudice and xenophobia.

The precariousness of living conditions, the difficulty of finding permanent work and accommodation, and the temporary nature of sojourn permits and job contracts are factors, which stop many foreigners from integrating properly into Italian society. Also the contrast between the cultural models and values creates problems for those who wish to become integrated as soon as possible, so as to enjoy the same civil rights as the local population, while at the same time wishing to maintain their own identity. The main problem for Maghrebin immigrants seems to be their general state of illegality and the gap between their professional status in the country of origin and in Italy, which is a source of discomfort and cultural alienation.

Discrimination against the immigrant, who is perceived as different and alien to the local culture, has given rise in Italy to forms of racial intolerance which has exploded in situations linked to urban and social marginalisation affecting mainly, the street-vendors, travellers and tramps. These episodes have culminated in acts of violence against and mass intimidation of immigrants (in Florence, Bologna and the region of Campania). There is also racism and inter-ethnic tension within foreign groups, where discrimination may be political, social, religious and cultural, often within the same national group, for historical and ideological reasons.

7. SUPPORT SYSTEMS FOR IMMIGRANTS

The national immigration support system may be considered 'new'. Recent legislation has not only created new institutional responsibilities (ministries, provincial labour offices, INPS[15], local bodies), but it has also defined the instruments to be used in programming the new entries, the bodies which are to represent and protect the immigrants, and those which are to assist them in the search for employment, as well as special security offices.

15 INPS - Istituto Nazionale di Providenza Sociale (National Institute of Social Insurance)

All the various state bodies are involved in policy and in the assistance of immigrants, from centralised bodies such as ministries and police agencies to those at a local level. Of the latter, regional and local authorities have a particularly important role.

It is well known that national legislation was late in coming and as such its dispositions are not always co-ordinated, forcing the voluntary agencies to provide an emergency back-up service with initiatives which are undoubtedly useful, but too fragmented to meet the urgent needs of the immigrants. Initiatives are rarely co-ordinated, integrated with those promoted by other private or public institutions. More often, public intervention is delegated. The state has intervened only in emergency cases, leaving the running of normal initiatives to voluntary organisations. The delays in introducing legislation at national and regional levels are reflected in local policies regarding immigration from outside of Europe: 'Local authority initiatives are often fragmented and insufficiently thought out, and are usually in answer to emergency situations, when the problems finally make the news.' (Nascimbene, 1988; 1990). The guidelines worked out by the local authorities tend to reflect their past performance in the field of social policies.

7.1 Regional Policies

The CENSIS[16] (1990) study examined regional legislation[17] on immigration and the extent to which these measures were actually put into practice, revealing a gap between the planned norm and the concrete initiatives undertaken. Apart from general lack of preparedness, the delays may be attributed mainly to the slowness of administrative procedures. A regional council for Immigration Problems (with the participation of some co-opted or elected immigrant representatives) has been set up in almost all of the regions, but this body only appears to work in a third of the regions. Its responsibilities as far as legislation regarding immigrants is concerned cover cultural and educational initiatives, social welfare initiatives (economic assistance, reception centres, domestic help, accommodation), health care, and initiatives encouraging the formation of associations 'for' and 'of' non-EU immigrants.

Hence, the regions fall into three main groups as far as the extent to which they have managed to activate concrete policies is concerned: Lombardy, Umbria, Piedmont, Liguria, Emilia Romagna and Tuscany demonstrate a high degree of sensitivity as far as planned norms and concrete initiatives are concerned. In Abruzzo, Marches Sicily, Latium, Veneto, Campania, Friuli, Venezia Giulia and the Province of Trento sufficient attention is paid to the problem. In Apulia, Calabria,

16 CENSIS Centro Studi Investimenti Sociali (Centre for Social Investments Studies)

17 In Italy, like in Spain (see next chapter), the regions are granted a degree of autonomy from the central powers of the State to thus administer and implement policy on their territory, within limits, according to their own politics

Basilicata, Sardinia, Molise the Valle d'Aosta and the Province of Bolzano, on the other hand have been less successful in putting these policies into practice.

7.2 Local Authority Policies

The first initiatives regarding immigrants were launched in the early eighties in some of the larger cities of Central and Northern Italy. Public measures have not been so successful in the South of Italy, and social forces and the voluntary sector have acted in a climate of general indifference. In addition to this, the 'private social services' have been swift to act almost everywhere to offer aid and assistance to immigrants. In the absence of any commitment on the part of the public institutions, these have become the only available points of reference for the needs of this new marginalised group.

Some of the most important local-level initiatives have been carried out by the local authorities of the city of Brescia in Northern Italy which have not only organised their own structures, but also co-ordinated the activities of other bodies. In 1989 an *ad hoc* local service was created in Brescia: the Reception and Orientation Office for non-EU foreigners, and it at once assumed an important role in orientating immigrants in the use of the public service. The Office keeps a register of users, as well as helping them find work and accommodation. Initiatives in this field have included the restoration of old buildings, a convention with hotels, and the formation of housing co-operatives. There has also been an increase in the number of immigrants' associations, for which the local authorities act as co-ordinators. The industrial sector has organised an occupational training course for metalworkers (Treves et al, 1989: 47-49).

In the Turin area unions and business have both been active in the sector of work and occupational training. Local authorities have played an important part in job finding, placing many immigrants in some of their building projects or in other areas of public interest. There have been some interesting initiatives in the area of education: apart from reading and writing courses and school integration and middle school certificate projects, there is also a multicultural training course for teachers on the agenda. The meeting of social needs such as accommodation has been less successful in this area. In Mazara del Vallo, a Committee for Multiracial Integration has been created. One of its functions is to co-ordinate the various initiatives. There is however the risk local authorities' measures will be rendered vain in the face of its growing needs, the difficulties of governing it and the new and old poverty and marginalisation area, which keep spreading. In particular, there is little co-ordination of public and private measures, with wasted energy on both sides. Some attempts to unify measures on the part of local authorities end up being isolated from any comprehensive plan and are thus dissipated of scattered financial expenditure. There is a risk of the perpetuation of 'State-of-emergency' policies (Treves et al, 1989: 50). Milan's Foreigners' Centre has been operating only since April 1989, but this has

already led to a more decisive role on the part of the local authorities in launching and planning of services.

7.3 Private Initiatives

The LABOS[18] (1990) survey examined private initiatives regarding immigrants, choosing thirty associations and bodies, which had been operating in the sector for some time. The criteria governing their choice concerned the quality and type of activities and services rendered, the social accountability of their initiatives, the number of people working for the organisations, the way in which they were organised and of course, their geographical location. The basic objective was to identify the various kinds of needs expressed by the immigrants. In the different experiences examined there emerges a wide range of pressing needs in the various sectors of the group constituted by third country immigrants.

Examples of the private associations include: the Centre for International Solidarity of Workers (CESIL) of Milan, the Local Health Service of Reggio Emilia, the co-operative 'African Solidarity' of Ravenna and the association of 'F. Rielo' of Rome. Also, the Association of Immigrated Families (ARFI) of Palermo. However, the weak point of these private organisations, according to many of the official sources interviewed, seems to be the lack of co-ordination between them.

8. Third Country Nationals and Social Services

It is quite difficult to recount the situation of the social services with regard to immigration, as up to December 1989 the basis for discussing such topics were almost entirely missing.

Up until 1989, political refugees (a term which included only East Europeans) had right to food and health service unlike the majority of other third country nationals (Macioti, 1990: 178) Local bodies and some voluntary associations and organisations have attempted to make up for the inadequacies of the State. In Rome, for example, as in Ostia, there are canteens financed by Latium's Regional Council and run by the diocesan charity organisation 'Caritas'. Here immigrants and Italians lacking other means of sustenance can come once a day for a hot meal. Italian courses and similar projects have been launched over the past few years, but they have remained sporadic initiatives with no overall planning. Almost every where local authorities have moved to tackle the most urgent problems, such as the placement of minors in children's homes. In this case too, the situation is difficult because there are serious risks that they will remain there, and with consequences: the mothers are usually housemaids, so they are not usually in a position to take their

18 Laboratorio per le Politiche Sociale (Laboratory for Social Policies).

children back. Another situation not afforded by the state was that of minors arriving on their own. The situation then radically changed with the passing of the law 39/90. For example, non-EU citizens and stateless citizens who apply to regularise their status, may on request receive National Health Insurance and enrol at their local health centre. They are only exempt from paying contributions for the year 1990. Various local authorities have sought to reach a better understanding of the phenomenon of immigration so as to plan measures better. Milan City and Provincial Councils, Rome City Council and Latium Provincial and Regional Councils have organised encounters, debates and conventions and commissioned not only quantitative research, but also studies on the requirements of immigrants and their most urgent needs (Livi-Bacci, 1991). The 1999 law is a real organic law which takes into account social security provisions for third country nationals in employment and self-employment situations.

9. POLITICAL IMPACT OF IMMIGRATION

9.1 Political Attitudes and Participation of Immigrants in Italy

It has been established already in this chapter that policy can be shaped both from above and also by pressures from below. It is by now a well-accepted fact that various ethnic and nation based migratory chains which have developed within the numerous foreign communities involved, influenced the present state of foreign immigration to Italy, as well as other receiving countries. Initially these migratory chains are only founded on strong kin or friendship ties, later reinforced by family reunification.

Due to the strengthening and exploiting to the full of the benefits from these ties, the vast majority of the various communities present in Italy have tended to become more group oriented. They set up both formal and informal groups (which can co-exist side by side within the same community), which provide solidarity and help members to socialise. Their main scope would appear to be to gradually bring together the various family based microcosms and weld them into some sort of cohesive group. This marks the passage from a primary to a higher form of association, whose task is to organise and achieve shared objectives and aims.

Thus the entire process of settling down in the host country is both on an individual and collective basis, inspired by the need to enact precise measures which would render explicit the social needs and values of the communities and at the same time from among the various options available, choose the most suitable procedure capable of achieving the aims set. In other words, the process by which the community acquires the capacity to negotiate and obtain a political-bargaining power albeit remaining excluded (for the moment) from a purely jurisdictional viewpoint. The achievement does not imply that foreign communities can exert

political power in a legitimate and political fashion, in the sense that any action is undertaken by political authorities, i.e. by those enjoying full political rights. Political power is exerted and informally sought, even by 'institutions', in a way which may be described as 'incomplete' and to an extent 'indirect', in that it has not yet been legitimised (or legalised) by the legal system in force.

This incompleteness recalls the questions of citizenship rights. *Activae civitas (Nascimbene, 1990)* a status which generally speaking cannot be acquired by the foreign community, or at least, only when particular agreements have been reached between the different branches of the state. Or as part of a process of general integration, such as that begun by member states of the EU (with regard to its own citizens) and certain American countries where there has been a long history of permanent immigration (Livi-Bacci, 1991).

An 'indirect' approach implies that political action is given some form of recognition, at least with regard to the more social component, in an attempt to safeguard the national identity of each community (the inviolability of the person, protect cultural values, language learning, access to social services, mutual assistance regarding social aspects and solidarity, etc.) through forms of association (arts. 17 and 18 of the Constitution and arts. 2 and 3 of Law no. 943/86) and in respect of the Civil Code (arts. 14, 15, and 16).

In other words, what actually emerges is the *de facto* legitimisation of political action within a social dimension in that, what is foreseen, it is the freedom to meet, freedom of expression and freedom to join local trade union as well as found independent ones. What is excluded, however, is the recognition of political rights, taken as being the expression of a passive or active electorate and fully entitled to achieve public office. The law no. 39/90 lends further strength to this situation in that it extends to self-employed workers the 'guarantees' given to the employed workers at the same time of the previous law. Both these laws, despite the numerous lacunae, guarantee the 'equal treatment' of all immigrant workers from the Third World as well as 'full equal rights with respect to their Italian counterparts'. Both of these aspects are still regarded as mere affirmations but which mark the beginning of a gradual process, with subsequent additions, towards equality, also involving the local authorities, in legislative terms.[19]

The foreign community, during the process of integration and in view of the legal recognition referred to, tends to consider itself and make its presence felt as something which is no longer transitory or which will disappear with time. On the other hand, there is the increasing tendency to express their desire to be taken as collectively made up of individuals who wish to become 'new citizens', whilst maintaining 'those attributes' which mark them as belonging to an 'ethnic

19 A plethora of regional laws, aimed at implementing the provisions contained in Law no. 39/90, were passed throughout 1990. These aimed at setting up 'Consulte' with the participation of representatives from the bigger immigrant associations.

minority.'[20] This implies the recognition of ready-made pluralism, with respect for differences and respective 'senses of individual community awareness'.

Thus, one can understand the importance of national legislation (at the moment, in the absence of a supranational one) which implements the International Labour Office (ILO) Convention no. 143/75 (ratified in Italy by Law 158/81). And consequently the regional legislation which legitimises the right to associate of immigrant workers, i.e. all those structures (simple and complex, formal and informal) which permit these to carry out political and trade union activities, as well as social and cultural activities, both within and apart from their respective communities. This helps to bring together and focus the needs of the different communities as well as to play the role of political-trade union mediator with both national and local bodies, the aim being to satisfy these demands to the greatest extent possible. This situation, particularly with regard to the older communities coming from regions like the Maghreb as well as from Eritrea, Somalia, Philippines and Cape Verde, has undoubtedly influenced the general political background against which the various 'amnesties' were drawn up and which affected immigrants during the last 10 years.

The ties which these associations were able to set in motion with the trade unions and local voluntary associations helped to favour the debate on immigration (i.e. no rights, lack of opportunities to be integrated in the surrounding society, inability to make use of the existing services). As well as outline, at a later stage (on the basis of the EU directives and together with the Italian political parties who wished to introduce legislation on this question) the guiding principles, which provided the basis of subsequent legal provisions. The role played by the immigrant associations, from numerous points of view, was quite considerable in publicising the procedures involved as well as the benefits, which could be derived for the interested parties. Firstly, the associations were further strengthened from a technical-organisational viewpoint and their influence was also extended within their respective communities. Secondly, they were able to test their ability to mobilise and make plans of action together with local social organisations. Moreover they understood and became aware of the fact that to satisfy their demands it is necessary to deal directly with both public and private bodies and began to negotiate with these on feasible objectives. Also, they were able to learn how to manage resources and opportunities they were offered and strengthen and extend these as much as possible so as to facilitate economic and social integration. This goes for all recent and established associations, which are inscribed, on the regional registers foreseen by local legislation, particularly in Latium, Tuscany, Emilia Romagna, Lombardy and Piedmont. Experience has taught these organisations that their strength lies in reaching out to include all the various foreign communities as well as individual

20 These requests emerged from a study of the Islamic community in Europe since the aftermath of the Second World War (Dassetto, F. and Bastenier, A (1988) - *Europa: nuova frontiera dell'Islam*, Roma, Edizioni Lavoro).

groups present in numerous cities throughout Italy and enact a process of exchange on an equal basis with the local associations.

At a political level this favoured the active involvement of some of the communities' leaders in the work of the national and regional 'Consulte' (councils) on behalf of the 'immigrant movement', thus diversifying the different forms of support triggered by this type of participation. These activities take place at various levels: political-trade union, social and cultural, recreational-sport, language-learning and medical-social assistance. The diversification varies according to the type of organisation: whether they are students or workers, employees or self-employed, or whether there is a high or low level of mobility. The social pressure exerted by these associations on the occasion of the amnesties is steadily taking on a more explicitly political role. The current debate includes the question of the right to vote at local elections. This matter has also been taken up by the more progressive political parties, which are trying to change some articles of the Constitution and give foreign residents the right to vote. The debate is only at the initial stages and a solution, at least in the short to medium term, is still a long way off.

9. CONCLUSION

Individual European countries' migratory policies have featured restrictive, undemocratic and coercive elements in recent years. In light of this, the basic need for co-ordination above all has often been felt. Yet, neither the EU nor any other international organisation has so far managed to make effective progress in this direction. The attempt to standardise the practices of European countries does not seem to have overcome problems caused by viewing the issue of immigration in purely conjectural or local terms. In fact, in spite of the same economic crisis, the same social problems and - what seems to be the most important - the same targets (more or less agreed upon), each country still seems to be reacting in its own way: even when a comparison of the solutions adopted (especially restrictive ones) could lead one to think that there might be room for a European agreement on migratory policies.

The main problem that Italy has, with control of inflows of immigrants, is mainly attributable to its long coastline and the lack of information.. Each country's profile as a country of immigration has distinctive characteristics - in fact, the next step is to compare the situation in Italy with that of Spain. There is a wide range of differences between the different EU member states, which experienced migration from third countries, and this resulted in a variation of responses, hence it is quite difficult to find a common ground for a connective EU policy. However, as stated earlier, one cannot avoid dealing with this issue at least to some extent at EU level because borders are so permeable that makes countries easily affected by the predicament of new forms of immigration.

6. SPAIN

National Policies for Maghrebin Labour Immigrants in the New Receiving States

1. INTRODUCTION: SPAIN FROM SENDING TO RECEIVING COUNTRY

Although the emerging situation in Spain is quite similar to the one in Italy, however, there are also differences. Differences exist in the numbers of migrants present, regional distribution; policy development; the economic and sociological impact the immigrants have had on society; and also in the way the different statistical bodies in Italy and Spain collect and classify data in their census reports. For these reasons, it was difficult to draw parallelisms at all levels between the situations in Spain and Italy.

Spain as much as Italy, has undergone a transformation from being a country of emigration to one of immigration. However, immigration from the Maghreb is not a completely novel phenomenon in Spain. Already in the sixteenth century, various Moroccans had settled in Spain as *migrants*[1] (as opposed to occupiers arriving *en masse* as had occurred about seven centuries earlier; Arabs arrived in Spain for the first time in the 8th century A.D.). One has only to think of the South of Spain, for example, like Granada with its famous Alhambra, or the long-standing cotton and textile industry in Sabadell, near Barcelona, etc. to realise that Moroccan migration to Spain is actually not such a new phenomenon. This is highlighted well in Bernabe Lopez Garcia's book: *La inmigracion maghrebí en España: Los nuevos moriscos*.[2]

On the other hand, since the nineteenth century, there were migratory movements from Spain to the exterior. The first massive emigration of Spaniards went to North Africa - Algeria was the first pole of attraction. In 1886, about 150,000 Spaniards were counted in Algeria.[3] This stopped in the last decade or so of

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1 The term 'migrants' here is not to be understood in the same as modern-day migrants. In the sixteenth century, a number of Moroccans took up residence in Spain and settled there, without necessarily taking over control of regions. In those days, persons who moved to another country/region other than their own, were registered as settlers without having to go through the rigorous immigration controls that one has to face nowadays.

2 Bernabe Lopez et al. (1993) - *La inmigracion maghrebí en España: Los nuevos moriscos*, Spain, Colecion Maghreb de la Editorial Mapfre.

3 This figure includes also seasonal migrants. Feelings of disenchantment towards the monarchy, coupled by the rise of socialist movements in Spain, in the later part of the

the last century due to the fact that the migratory wave was diverted towards Cuba and Argentina as well as to other parts of South America (some also went to North America and Australia). A second massive emigration wave of Spaniards took place between 1960 and 1975, this time directed towards northern Europe: Germany, Great Britain, Belgium, Netherlands, and France and Switzerland. Parallel to this, in the late seventies, there was a massive exodus of Spaniards from rural areas to move internally within Spain to the more urban regions (Camps Cura 1990).[4]

In the 1950s, a flow from poorer countries, especially from Morocco, arrived in Spain. It was mostly people who came to work in the construction and small industry sectors. This seasonal migration, for economic purposes, was later coupled with the arrival immigrants from more developed countries, mostly elderly Europeans who were attracted by the increasing provision of tourist services, the good climate and the favourable differences of revenue between their countries and Spain.

In the 1980s, when Spain was starting to be called a country of immigration, foreigners faced a different context from the one that migrants to Europe had experienced in the immediate post-war period. These migrants had to face a situation typified by a large demand for low qualified labour for factories and services during a phase of full employment and high rates of trade unionism. The social model that is developing in Spain nowadays is characterised by a strong *social differentiation.* Income differentiation is no longer being reduced. Industrial employment is declining in favour of both highly qualified workers in the service sector and the entire spread of wages is increasing. This is coupled by an increasing insecurity of large sectors of the population (structural unemployment is affecting more than 18% of the active population, temporary employment affects 33% of the salaried wage-workers, the grey economy incorporated in 1985 about 30% of the active population).

At the same time, the integration of Spain into the EU and the perspective of freedom of movement of community citizens encouraged the arrival of residents from those origins. Thus, the present situation tends to bring on the one hand, settlement and social integration of Europeans coming from the EU, and of highly qualified workers in general. On the other hand, the economic migrants with lower qualifications are restricted to the secondary labour market characterised by low wages, insecurity of employment, absence of legal protection and a low degree of trade unionism.

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nineteenth century gave rise to an exodus of the rural, working class, fortune-seeking Spaniards, who went to underdeveloped parts of neighbouring North Africa, or further away still, the colonies, for a possible successful fresh start to try to better their lot. Some, who were not so adventurous, left their rural abode to move the more industrialised regions of the country - see next footnote.

4 This internal movement of persons from rural to urban parts of Spain was not a new phenomenon, even though it was particularly evident in the seventies, however similar movements were observed and documented even during the nineteenth century.

Facing this specific reality the Spanish Government had not defined anything in the way of an immigration policy until 1985. From that moment onwards, there has been a development of a security concept (control of the Southern frontier of Europe). A legislation on foreigners which is presented as a key element among the instruments of the Spanish administration for the maintenance of the public order and a vacuum of educational, social and labour programmes.

Among the internal reasons presented by Bodega I. et al (1995: 803), as to why Spain became a centre of attraction for immigrants, one finds the political and economic opening of the country and the end of the rural exodus. This was coupled with the expansion of Spain's tertiary sector which provided the Spaniards with the opportunity for social mobility upwards, and in turn it became possible for employment offers to be made for low qualified jobs in the big cities. Among the external causes that they mention, one finds that it could be the anti-immigration policies of the more industrialised countries of Europe, the unemployment existing in the countries of origin, and the triumph of authoritarian governments in Africa and Latin America that forced political dissidents to emigrate (Bodega I. et al., 1990: 803). Moreover, the increase of foreign tourism helped potential immigrants enter the country.

According to 'Spain in Figures 2001' published by the Instituto Nacional de Estadistica, the number of legal immigrants in Spain amounted to a total of 895,720, with 214,996 being in Cataluña as of 1 January 2000. So, taking into account that the population of Spain is estimated to be around 49,499,791 persons, then one can say that legal immigrants constitute 1.81% of the total residents in Spain. Out of this 1.81%, about 22% are Moroccans.[5]

2. ATTITUDES TOWARDS MIGRANTS IN SPAIN

As stated above, Spain's legal immigrant population accounts for less than 2% of the country's total population and that the immigrant proportion of the official labour force is even smaller. Spain's migratory 'impact' is in fact negative: as one can see from the above figures. To truly redress the balance, it would have to absorb more than a million foreigners - which has been more the case in Italy than Spain. They would be absorbed most probably from Spain's former colonies, where over half of the Spanish expatriate population now lives. But still, especially in the period between 1988 and 1992, the press and government encouraged belief that immigration was one of Spain's most serious political and social problems due to its negative effects on the labour market and its implications for petty crime and drug trafficking.

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5 To be able to appreciate the North-South economic gap prevailing in the Mediterranean which is leading to this South-North migratory wave, please refer to the tables which show the economic divide existing between the North and South shores of the Mediterranean sea, in Chapter 3 of this book.

On an annual basis, the Collectivo IOE carries out a study of various representative sections of Spanish society (company directors, employees, the unemployed, middle class housewives, politicians, the right wing, and liberal media). From their surveys, five distinct attitudes emerged:

- **Nationalism**: This view supports the rights of Spanish citizens and can be found across the entire spectrum of Spanish society and most prevalent in right wing press, a high proportion of employees, the unemployed, but least strong amongst middle class women and civil servants. They tended to overblown the numbers of third country nationals present on Spanish territory. Signs of strong nationalism predominate in the poorer Southern regions of Spain, where Spaniards feel more in competition with immigrants for work in the tourist industry and in manual labour, due to higher levels of unemployment.
- **Company directors:** This group places economic considerations first and foremost, in keeping with Spain's constitutional commitment to the market economy. They justify foreign workers on the grounds that Spanish workers increasingly reject certain forms of employment, or impose demands on their employers that are simply too costly to fulfil. They want the Spanish government to allow foreign workers to be exploited, regardless of their nationality, as they represent a source for Spanish economy.
- **Christian universalists:** Their view defends the concepts of equality and fraternity and purports to wish to support the weakest and most needy elements of the population, in this case, Spain's 'economic' immigrants. Middle class women are the staunchest defenders of this view, although they simultaneously represent the 'nationalists' in still believing that Spanish people should be given first preference for employment.
- **Employees and the unemployed**: This category represents a 'workers' universalist' viewpoint which has more to do with nostalgia for the past than with concrete alternatives for the present. Their version of solidarity is based on raw nationalism.
- **Government departments and the non-governmental organisations:** This final group wishes to see the implementation of better border controls in Spain as well as a move towards legalising the status of most of the country's foreigners whom they openly recognise as marginalised - in relation to work, but also legally and socially. The government overemphasises the need for immigration controls to identify illegal immigrants. Spain's NGOs, on the other hand, consider that the majority of third world immigrants are intolerably exploited and that the latest immigration measures will only make things worse for the immigrants (Collectivo IOE in Bodega et al, 1995: 137-138).

According to the Europinion performed between September 1996 and January 1997, of the Spaniards that were interviewed have the following perceptions regarding immigration from the south of the Mediterranean. Approximately 16% stated that immigration should be accepted without restrictions, while a high 65% and 13% stated that they should be accepted but with restrictions and not to be accepted at all,

respectively.[6] Both the Italian survey (see Chapter 5) and the Spanish survey do not greatly differed in their perceptions towards immigration from the Maghreb region. Yet in their opinions towards immigration extra-community in general, Spain and Italy does differed in their views. Whereas a high 58% of Italians think there are too many immigrants living in Italy, there is only 37% of the Spanish population interviewed that felt there are too many foreigners in Spain. And a surprising 32% of the Spaniards questioned actually expressed that there is not too many immigrants in Spain, while there is only a small percentage of 8% in Italy.

3. IMMIGRATION AND CITIZENSHIP POLICY

In Spain there is no deliberate practice of segregating migrants, yet, most migrants do tend to end up living where other migrants live for solidarity purposes and also to be able to infiltrate already established networks so as to increase chances of success in finding work and making economic progress. Moreover, one must not commit the mistake of thinking that all migrants are living in poor abject conditions. Even though Spain is described as 'a new receiving state', the immigration process has now been taking place over the last seventeen years or so (since 1985 and even before). So, some migrants have been in Spain for quite a long time. They might have started as construction workers themselves at their arrival in Spain, they have now accumulated enough capital and have learnt their way around enough to establish their own construction firm with the result that some have managed to become quite wealthy. This enables them to provide work in their own firm for other compatriots. One must also bear in mind that in the eighties, Spain was economically better off than now, hence pay for workers, including migrant workers was comparatively higher.[7]

The emerging situation in Spain with respect to integration of the migrant can be described as a middle-line between the British interpretation of integration upheld in

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6 See Monitoring EUROPINION N° 10, January 1997. This survey was taken by the Metra Seis SA in Spain every four weeks, consisting of 800 phone interviews during each session.

7 At the time of the fieldwork, in 1996, the average wage of a Spaniard worker is round about 150, 000 Pesetas (approximately EUR 902) a month, whereas migrants are said to earn an average of 60, 000 pesetas (EUR 361) a month. Bank of Spain statistics show that on average, a Moroccan migrant sends back home 60,000 pesetas a year, which is quite low to justify their stay in Spain. This could mean that 60,000 pesetas is sufficient due to exchange rate and cost of living in their home country, or otherwise that they spend their money on rent and living expenses and cannot afford to save a lot. Another possibility could be that they transfer other non-declared money earned from the informal sector by other means. The 'ordinary salary' in the second quarter of 2001 is at 1,190.85 Euro per month. The Spanish has proposed to raise the national minimum wage (Salario Minimo Interprofesional, SMI) by 2% for 2002. Spain has one of the lowest minimum wage in Europe – at less than EUR 2 per hour.

the sixties and early seventies and the French method of assimilation (Solé, 1981; 1988).[8]. Even though one cannot exactly describe Spain as a very religious country, this tends to vary from region to region. In Cataluña, one finds a more secular society that proclaims to be different from the rest of Spain. It asks the rest of Spain to be open-minded and accept the Catalan identity, in return, it has to practice what it preaches by also being open-minded to diversity, which implies tolerance towards the migrant. Moreover, this tolerance and openness towards the migrant is also attributable to the fact that even though Spain as a whole could be described as a country of emigration, however, Cataluña as a rich region has always been a recipient region of migrants - including other Spaniards. Thus, due to current day politics in Cataluña, the Generalitat of Cataluña has enacted a plan of integration for migrants. Cataluña implements the politics of *jus soli*, that is, the children of immigrants born in Cataluña (including other Spaniards) are considered as Catalans. However, this is not officially recognised on a nation-wide basis. The application of the politics of *jus sanguinis vs. jus soli* is left to the jurisdiction of the central state administration, which is in Madrid. Therefore Cataluña, at the moment, has no power to apply the principle of *jus soli* to third country nationals residing upon its territory. It can only decide how to integrate them. In Spain it is the principle of *jus sanguinis* which is applied.

As in Italy, the criteria for the acquisition of Spanish citizenship have been made easier for people of Spanish origin (who had adopted a foreign citizenship or for ethnic minorities originating from Spanish colonies as in the case of groups such as Iberoamericans, Portuguese, Filipinos, Andorrans, Equatoguineans, Sephardies and, the original inhabitants of Gibraltar). These groups are given preferential treatment. For a national member of the EU, the law, like in Italy, requires 4 years of legal residence in Spain before receiving Spanish citizenship. For third country nationals, like Moroccans, 10 years of legal residence are required, while the previous law requested only 5 years of legal residence prior to application for citizenship status. Here one must note that even, like in the case of Italy, if one does actually spend 10 years of legal residence in Spain, naturalisation is not guaranteed, because a lot of factors will come into play, e.g. the interpretation given to 10 years of continuous residence, if at the end of the 10 years the person filing the application for citizenship is of independent means - work on a part-time basis can present another obstacle, etc. So, once again, as in the case of Italy, the nature of the law explains the very low number of third country nationals applying for naturalisation. Spanish citizenship like its Italian counterpart, may be acquired by:

- *Jus Sanguinis*: by having Spanish parents, or one Spanish parent. Minors can also acquire citizenship by adoption.
- *Jus Soli*: where the parents of a child found in Spain are unknown.

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8 See chapter 1 of this book for definitions of integration and assimilation. In Cataluña, as in other migration-receiving societies, certain occupational segments or categories are unofficially reserved for different ethnic groups.

- *Decree*: to w foreigner whose father or mother was a citizen by birth; to an adult foreigner adopted by a Spanish citizen; to a foreigner who has served for at least 5 years as an employee of the State, or to a foreigner who engages in military service in Spain.
- *Naturalisation*: on some conditions, as service rendered to the Spanish state for a period of 5 years, even if abroad, or residence in Spain for 5 years. Naturalisation, a decree of the Head of State, only comes into effect when loyalty has been sworn to the Kingdom of Spain.
- *Marriage*: Spanish citizenship may be acquired through marriage to a Spanish citizen, after residing legally for at least 1 year in Spain or after 5 years from the date of marriage, if it has not been dissolved.

Spain has tightened its borders in full compliance with Schengen and it is the only country in the Southern European region whose government claims to have moved a step further towards producing an immigration policy which is more than just a legislation with respect to migrants. As yet, the social and juridical dimension of Spanish immigration policy are not so well established. Some argue that having no defined policy is also a policy because it gives the state the flexibility it might need according to arising needs (Cornelius in Cornelius et al., 1994).

Thus, the main instrument with respect to immigration is the legislation of 1985 - the *Ley Extranjeria* - which is very much based on the German legislation for migrants.[9]

Until the legislation, which was popularly called '*Ley Extranjeria*' (Foreigners' Law) and was adopted in 1985, there was no single domestic judicial body in Spain to regulate the rights and responsibilities of the foreign contingent in Spain (Bodega et al., 1995: 803)

The need for such a law, as stated previously, arose from continuing migrant pressure within Spain. The main objectives of the law were fourfold and can be summarised thus:

- To systematise the entry and residency procedures of foreigners in Spain.
- To protect the national job market.
- To guarantee acceptable working conditions for foreigners, as well as to assist them to integrate, avoiding illegality and marginalisation.
- To harmonise Spanish legislation with the rest of EU (still EC in 1985) member states, working within the framework of the EU unification process.

However, the Law was extremely difficult to implement in many cases because of its technical complexity and the deficient infrastructure of a 'country unfamiliar with the administrative actions of immigration' (OECD in Bodega et al., 1995: 308).

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9 Spain had been used in previous years as a 'corridor' or 'waiting room' for migrants who wanted move up to Northern Europe. Thus, the immigrant was not viewed, until recently, as a possible settler, but only as a transient person who would carry out seasonal work on a temporary contract and who would leave the country within a short period of time. This led the authorities to base the 'Foreigners' Law' of 1985 on the German '*Gastarbeiter policy*'.

Most of the criticisms about the law were centred upon its discriminatory character. Spain follows European immigration policies which facilitate freedom of movement within EC (now EU) member states but restrict the entry of third country nationals, especially those from the Third World. The justification of the means of self-sufficiency or for having a regular job is clearly discriminatory measures taken against economic immigrants who, to a large extent, involuntarily become illegal.

Discrimination, as stated above, is directed towards various ethnic minorities, however some groups like Iberoamericans, Portugese, Filipinos, Andorrans, Equatoguineans, Sephardies and the original inhabitants of Gibraltar are given preferential treatment. No such treatment exists for Moroccans coming from the region, which used to be a Spanish protectorate until 1956.

This law has been very infamous because when applied to the letter it is very exclusionary, not to say xenophobic. Ironically, it was Cataluña, the region that applied the law in the strictest sense, but then, as time went by, Cataluña, as much as other regions realised, that the so-called term coined by the press and police 'immigration problem' did not really exist. Spain first started becoming aware of the fact that it was becoming a receiving state for migrants in 1985 (1984 - for refugees and asylum seekers). But, the panic amongst the people about increasing numbers of migrants appeared in late 1987/1988 till 1991.[10] This took place because when Spain joined the EC in 1986 it, of course, had to tighten its border controls. Foreigners already residing on the territory started phoning their relatives in Morocco and other regions encouraging them to come over to Spain as fast as possible as Spain might be closing its borders. This resulted in an influx of migrants between the late 1980s and early 1990s. Not all the migrants entering Spain were documented, so one must not simply look at official numbers of immigrants, as these would not be representative of the number of illegal migrants also present. When panic arises in a receiving state, the people in the street do not differentiate all that much between a legal and an illegal migrant. So, even though the purpose of this study focus on legal migrants, the presence of illegal migrant is also relevant because when the nationals of the host state observe the number of foreigners around (irrelevant of the latter's status), their reaction could be a determining factor that would make policies towards migrants harsher or more lenient. On 13th February 1992, a readmission agreement was signed between Rabat and Madrid, which Morocco has shown a great reluctance to apply. However, some of the migrants who entered Spain at that time, moved to Germany, Holland and/or Belgium for family reunification as they were afraid of the restrictions Schengen might bring about.

At this point it would be interesting to note that most of the Moroccans who initially migrated to Spain were from the Rif region, the North part of Morocco which until 1956 was a protectorate of Spain. Due to past historical clashes with France and other French-speaking Moroccans, these Moroccans did not migrate to France but to Spain initially, with the intention of proceeding to Belgium,

10 The king of Morocco at this point in time was asked by the Spanish government to co-operate and try to control the numbers of people leaving Morocco.

Netherlands and Germany. When these three latter countries became more difficult to enter, these migrants enacted a *network* system in Girona (which is the part of Spain in contact with the French border). Pockets of migrants - *'Bolsas d'immigrantes'* – established themselves to enter France and to help compatriots to do so at the first opportunity. When France became harder to enter, more migrants remained in Spain. A lot of researchers attribute this to economic prosperity in Spain. However one must remember that economic prosperity took place in the tertiary sector of economy and not in the primary or secondary sectors which are the sectors which take up most of the immigrants. The migrants gained only indirectly by the prosperity of the tertiary sector because Spaniards moved up the social ladder trying to find better quality jobs, hence leaving 'unwanted work' in the other sectors for migrants.

As a consequence of an increase in numbers of immigrants in Spain in the period of 1990, the government put into force a regularisation process[11] - to regularise the situation of immigrant workers who had entered Spain. In 1991, the citizenship law was revised so that now it recognises the presence of immigrants in Spain and makes the naturalisation easier to achieve for Iberoamericans who are in various ways related to the Spaniards as opposed to for example Moroccans. The previous citizenship law had been enacted in a time when Spain was itself a country of emigration.

The press with its sensationalism about the increase in the number of migrants, caused people to panic about the numbers actually present (which were never really as high as those of other EU member states). Spanish media reports stated that when Schengen was fully implemented, other EU States with a tradition of immigration will tighten their borders, and thus Spain will suffer an invasion of third country nationals. This caused the people to become extremely agitated. The government in 1992, in order to tranquillise the people, modified the *Ley Corcuera*[12] to give more powers to the police. The police could now stop anyone in the streets and demand to see their documents. In addition to this, according to the modified *Ley Corcuera*, the police could enter a private citizen's house without a mandate to check for drugs. Migrants were indirectly thought of as possible drug traffickers, therefore the police took matters in their hands and occasionally were quite brutal with migrants with the excuse of searching for drugs. The latter amendment to the *Ley Corcuera* was later on described as being unconstitutional and therefore was prohibited from being put into force, and as a result the Minister Corcuera resigned from his position as Minister of the Interior.[13] In those days, the people were feeling in a way quite

11 Some migrants were afraid to put themselves forth to regularise their situation as they thought that if they came out in the open the only result would actually be deportation instead of regularisation.

12 *Ley Corcuera*, named after its convenor - the Minister Corcuera, who until 1992 was Minister of Interior Affairs, was a law establishing the powers the police had on Spanish territory in order to cut down on drugs, criminal offences and terrorism.

13 Minister Corcuera had declared that if any part of the law would be called

scared about how the situation with migrants might evolve, they could see the situation in France, Germany and also in Italy, the press was fuelling the 'fear of the foreigner' and the people were not sure how to react.

Thus, demographers started to work on producing and revising the existing statistics to analyse what the real situation actually was. Following the murder of a woman in 1992, and the statistical results that demographers came up with, the state and the people realised that they had overblown the situation. And thus in 1994 a social policy was enacted with respect to migrants working and residing on Spanish territory to try to soften the hard-line regulations of the *Ley Extranjeria* and to avoid further demonstrations of xenophobia. The press practically stopped speaking about the issue and the situation calmed down considerably.

There were events however, whereby police still took advantage of the powers they had with respect to immigration control and deported people from the borders before an appeal could be made in Madrid. In 1993/1994 *CUPO*[14] (which is a quota system for those who are trying to obtain a visa to be able to reside and work on Spanish territory) was enacted. The quota system for 1993, 1994 and 1995 allowed 20,600, 29,349 and 20,600 respectively migrant workers (these workers could include workers who were clandestine workers already residing in Spain who are trying to regularise their situation). In 2000 and 2001, the quota was not set due to the complexity of the application (as mentioned above), yet a quota of 32,100 is proposed for 2002. However, when speaking to migrants' representatives, they said that the general feeling is that the quota system is actually cheating the migrants because some irregular migrants who have been on Spanish territory since 1985 have not yet been given a regular working permit. In order to obtain a work permit they have to leave Spain and go back to their country of origin (which at times could be difficult because of persecution as in Algeria). Then apply through the Spanish Consulate there - but of course there needs to be a Spanish consulate to apply to - to get this visa. Some countries like Gambia and Senegal don't have a Spanish Consulate therefore it is next to impossible for these migrants to obtain a visa from their country of origin. Moreover, if they were already clandestine workers in Spain, leaving the Spanish territory to go back to their country of origin to regularise their position might also mean losing the job they happen to hold at the moment.

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unconstitutional, he would resign.

14 The word *Cupo* in Spanish means quota, that is, the *numerus clausus,* which *is* revised annually, for the third country nationals who would like to regularise their position in Spain and get legal work permits and/or are applying to enter, reside and work in Spain. The numbers stipulated annually determine how many third country nationals will be given the work permits they apply for. Their success in achieving their regular work permits depends heavily on their nationality and the type of job sector they intend to work in as this latter factor dictates the number of vacancies present and hence work permits per job issued per sector. For the benefit of the reader, in the next parts of the chapter, where it shall be referring to this term more frequently during the analysis of these figures, the word 'quota' will be used instead of 'Cupo'. However, one has to be aware of the meaning of this Spanish term, as various authors do tend to use it in the original form.

On the other hand, however, the quota system does give a chance to the migrant to make an appeal, which is a step forward from the more restrictive policies of the past. An Algerian living in Alicante in 1995 appealed to the quota system (*Cupo*), stating that even though in Algeria persecution was on a collective basis and not an individual basis, it was still too much of a risk for him to return there. And hence the Spanish government allowed him to regularise his/her situation in Spain.

As a result of similar appeals, April 23rd 1996 was the onset of two very important processes for migrants in Spain. A new regularisation process aimed at some 50,000 foreigners who are without authorisation of residence and a modification of the Regulations of the *Ley Extranjeria* 'the new law (*reglamento*)' were implemented to thus make the implementation of the section of the *Ley Extranjeria* of 1985, governing the entry and stay of foreigners, more lenient towards foreigners. The new *reglamento* was approved by the Government on 2 February 1996 and entered into force of April 23rd 1996, whereas the new regularisation process, which started also on the same date, lasted until 23 August 1996.

This is in fact the second regularisation process, the first one being in 1991, which was announced as exceptional and would not be repeated. However, the Government has since then been obliged to start another one in view of the fact that there were at least 90,000 foreigners without residence permits. Many of whom became 'clandestine immigrants' as a result of provisions in the former law on *aliens* after their residence or work permits expired.

Of the approximately 50,000 foreigners who were likely to be able to satisfy the criteria for regularisation, 40% were Moroccans, and the majority of the rest were Latin-Americans. In order to be eligible to regularise their situation, they must have held some kind of work or residence permit before 1st January 1996. The spouses and dependants of applicants were also entitled to apply for residence permit. Applicants would, moreover, have to make a declaration of their willingness to enter the labour market. In the first regularisation process, the condition was much stricter as applicants had to produce an employment contract. This requirement was much criticised by unions who informed that it led to a black market of employment contracts - which nowadays, to a certain extent has become a recognised sector in the economy (the informal sector). Of course, if immigrants were to seek jobs in the black market or to work illegally they would be exposing themselves to all sort of exploitation by their employers and can claim no protection from the unions. This exploitation is condemned by the state in Código Penal and if the employer is caught, the fines to be paid would be high with risk of imprisonment for the employer and possible deportation for the immigrant - Article 49 and Article 311 of the Penal Code (*Código Penal*).[15] Article 49 spells out the number of hours in a standard working day and the rights for social benefits of legal workers. Article 311 then lists the fines an employer would have to face if found breaching Article 49.

15 Código Penal (1995) - Boletín Oficial del Estado, Madrid.

Another difference in this second process was that successful applicants no longer obtain their residence permit from the police department[16] but from the administrative authorities. Whilst welcoming the process as positive, unions considered it as insufficient because it leaves out all those who never held a work or residence permit, those who entered the country as asylum-seekers and were later rejected, and those who entered Spain in the hope of being accepted in the immigrant quota - *Cupo* - but failed. If their situation is never regularised, they will continue to constitute a reservoir of cheap labour without any rights whatsoever.

One of the amendments with respect to *the new reglamento* of the *Ley Extranjeria* of 1985 was that immigrants can regularise their status in Spain and they could obtain visa extensions of two years after their first year of residence. Afterwards, the duration would be longer until they would be considered as permanent residents. Previously, they had to renew it on a yearly basis. This law was published on 12 January 1996.

The regularisation process, decided by the Government in February 1996, only concerned immigrants who entered Spain prior to 1st January 1996 and applied for regularisation between 23rd April 1996 and 23rd August 1996. Its objective, as stated earlier, was to put an end to the system of issuing residence permits valid for only one year, the renewal of which depended on being in regular employment. Residence permits are now issued for a three-year period. Various foreign residents thus became illegal immigrants when their employers decided to terminate their official employment contract to thus avoid paying social security contributions. Regularisations were granted only to those who previously held work and residence permits or only a residence permit, or were close family members of legally residing third country nationals. The authorities expected to regularise the situation of some 50,000 'illegal immigrants'. Human rights associations have tried to push for an extension of the deadline but their appeals were rejected. Unfortunately, many clandestine immigrants who have been living in Spain for various years have been unable to fulfil the conditions for regularisation since they were never employed legally.

Another move towards acquiring more rights to migrants took place on 12 April 1996. On that day, the then Ombudsman (*Defensor del Pueblo*), F. Alvarez de Miranda filed a complaint with the Constitutional Court against law 1/1996 on free legal assistance. In Spain, the Ombudsman has three months to file a complaint with the Constitutional Court as commencing from the date of publication in the Official Gazette (BOE) of a law.

The provision which is being challenged is Article 2 which stipulates that free legal aid shall be provided to, among others, 'Spanish nationals, nationals of other EU member states, and foreigners who reside legally in Spain if they prove not to have sufficient means to take legal action'. Mr. Alvarez de Miranda declared that

16 During the fieldtrip to Spain March/April 1996, it is observable that there was a general consensus between almost all the interviewees that the police department is by far the most xenophobic and racist institution in Spain.

this provision is unconstitutional and that free legal aid should be given to all foreigners without sufficient financial means, including those who are residing illegally in Spain. One has to remember that the Spanish legislation is particularly unfair to those immigrants who have at one time worked legally and paid taxes in Spain but who subsequently find themselves unemployed: the law stipulates that they lose their resident's status, and so must leave the country (IOE, 1990).

The new 'Law on Foreign Persons' (officially known as 'Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration', or *Ley sobre derechos y libertades de los extranjeros en España y su integración social*) came into force on 1 February 2000. Its objective was to remove the restrictive immigration policies that have been in practice for the past 17 years. This new law will grant the resident immigrants the same rights as those of the Spaniards – except the right to vote (but allowed in municipal elections). This new law also seeks to improve the lives of illegal immigrant workers by (1) non-immediate repatriation of illegal migrant workers, (2) providing the opportunity to legalise their status when proven that they have been residing in Spain for the past two years independently, and (3) providing a large number of political and social rights to these illegal workers that have previously been non-existent (such as the right to demonstrate, assemble, join trade union and to strike). This law has yet to be fully implemented.

There were quite evident contradictions in the immigration controls in Spain. Spain gets EU funding for agricultural development, however the Spaniards do not want to work so much in agriculture anymore, hence, without the presence of migrants, the Spanish agricultural sector would not survive. The same thing can be said about construction work - most Spaniards nowadays tend to avoid these hard manual jobs. House-proud middle class families where both men and wife work and do not have time for domestic chores, the domestic services are sought and this sector will continue to absorb migrant workers. Spain, like Italy, is aging because of the extremely low birth rate in the country. So, despite the fact that officially Spain states that it is being strict about the entry of migrants onto its territory, Spain does need migrants.

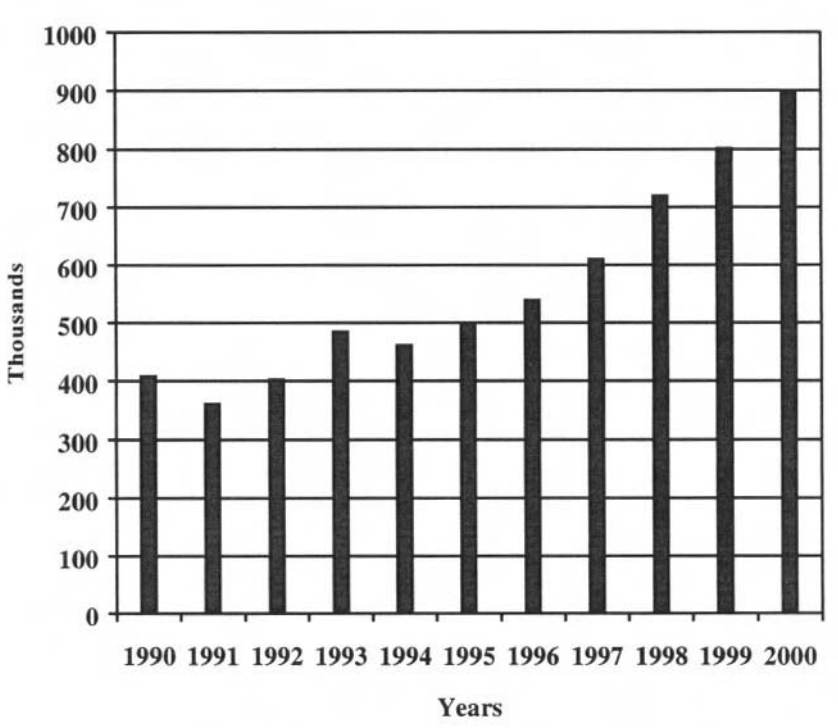
4. GRAPHICAL AND SECTORAL DISTRIBUTION OF MIGRANTS

As stated previously, the entrance of immigrants into Spain and subsequently their registration has, since 1985, by law, been led by two government bodies - the Ministry of Home Affairs (*Ministerio del Interior*) (which is in charge of issuing residence permits, visas, refugee and exile status, etc.), and the Ministry of Labour (*Ministerio de Trabajo*) (which is responsible for issuing work permits). In turn, the National Institute of Statistics (INE) gathers information of foreigners using census and surveys carried out periodically. Each body has its own records and produces its own statistics. At present, total centralisation of data on foreign immigration does not exist - this is something the Ministry of Labour and Social Security is trying to

achieve. For this reason, in some cases there may be discrepancies between different data, depending on the sources consulted. This situation of statistical irregularity is further exacerbated by the lack of published data and information on foreigners crossing Spanish borders. This would be necessary in order to establish a breakdown of immigrants settling in the country.

Another important aspect is that official information refers, logically, to those immigrants who are legally in the country. Illegal immigration into Spain would seem to be quite high, despite government attempts to regularise the situation offering the opportunity of legal status. The case of Cataluña and Madrid, of non-EU foreigners. The non-EU foreigners go to these regions in the hope of finding work in factories, the domestic sector, construction, in the self-employed sector, and to a lesser extent, agriculture.[17]

Graph 6.1: Estimated Foreign Residents in Spain 1990-2000
(Source: Ministry of Interior)



17 Agriculture is more prominent in the South of Spain and to a certain extent, Galicia. It is less evident in areas such as Cataluña and Madrid.

Graph 6.2: Estimated Absolute Number of Emigrated Spaniards 1990-1999
(Source: Ministry of Interior)

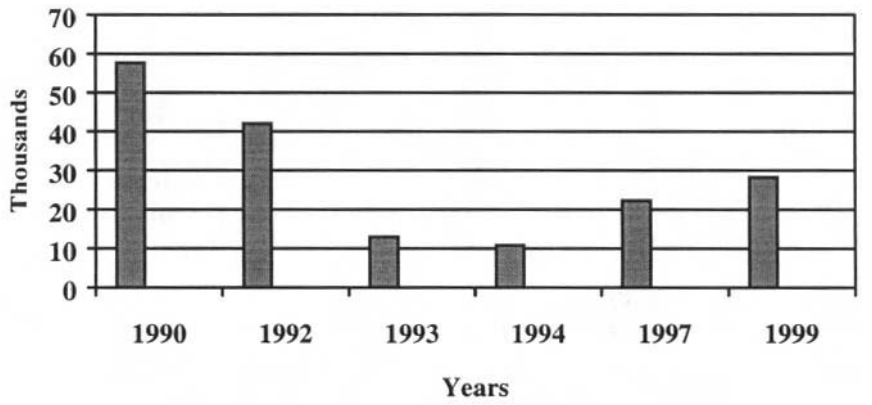


Table 6.1: Estimated Absolute Number of Maghrebin Nationals Working Legally in Spain by Country of Origin, 1990-1994, 1998, 1999
(Source: Ministry of Labour and Social Security)

Country of Origin	1990	1991	1992	1993	1994	1998	1999
Algeria	245	1 937	2 877	2 086	1 863	3 728	3 419
Moroc-co	8 844	41 095	52 501	42 193	43 729	73 287	65 241
Tunisia	81	212	237	153	154	206	204
Total	9 170	43 244	55 615	44 432	45 746	77 221	68 864

Table 6.2: Migratory Movements of the Autonomous Regions of Spain, Internal and External Migration , 1997 and 1999
(Source: Instituto Nacional de Estadistica)

Autonomous Regions	Internal Migration Net Balance 1997 & 1999	External Migration 1997		External Migration 1999	
		Spanish	Foreign	Spanish	Foreign
Andalucia	-6 156	2 953	4 014	3 522	12 149
Aragon	-457	281	168	260	600
Asturias	-1 509	798	305	852	939
Balears (Illes)	8 388	294	984	497	3 513
Canarias	9 311	1 510	5 404	2 102	10 533
Cantabria	1 181	223	81	228	259
Castilla y León	-4 990	968	376	1 061	1 333
Castilla – La Mancha	2 892	307	765	384	1 842
Cataluña	-2 512	2 744	8 288	3 209	13 296
Comunidad Valenciana	8 939	2 142	4 331	2 855	18 032
Extremadura	-1 396	240	376	363	1 436
Galacia	-3 638	5 028	880	6 099	2 407
Madrid	-8 802	3 226	6 863	4 598	25 058
Murcia (Región de)	1 628	548	1 182	650	3 164
Navarra	1 066	141	333	206	539
Pais Vasco	-4 715	737	1 089	1 148	2 956
La Rioja	718	43	154	107	992
Cueta y Melilla	52	78	23	102	54

Table 6.3: Net Balance of Migratory Movements among the Autonomous Regions of Spain, Migration and Immigration, 1997 and 1999
(Source: Instituto Nacional de Estadistica)

Autonomous Regions	1997	1999	Net Balance of 1997 and 1999
Andalucia	2 650	7 676	5 163
Aragon	169	227	198
Asturias (Principado de)	180	-303	-62
Balears (Illes)	7 123	14 941	11 032
Canarias	17 265	20 926	19 096
Cantabria	1 039	2 113	1 576
Castilla y León	-2 828	-3 414	-3 121
Castilla – La Mancha	3 801	5 280	4 541
Cataluña	7 746	14 768	11 257
Comunidad Valenciana	13 862	31 376	22 619
Extremadura	66	-443	-189
Galacia	3 770	3 368	3 569
Madrid (Comunidad de)	906	21 236	11 071
Murcia (Región de)	3 120	5 679	4 400
Navarra	1 215	2 136	1 676
Pais Vasco	-2 464	-1 035	-1 750
La Rioja	574	2 157	1 366
Cueta y Melilla	-317	677	180

Table 6.4: Estimated Absolute Numbers of Spaniards and Foreigners in the Autonomous Regions (in thousands), 1981 and 2000
(Source: Instituto Nacional de Estadistica)

Autonomous Regions	1981		2000	
	Spanish	Foreigners	Spanish	Foreigners
Andalucia	6 441.7	23.1	7 340.052	132.428
Aragon	1 213	1.8	1 189.909	17.590
Asturias (Principado de)	1 127	3.8	1 076.567	9.519
Balears (Illes)	685	12.9	845.630	45.772
Canarias	144.6	23.4	1 716.276	77.594
Cantabria	510.8	1.2	531.159	5.388
Castilla y León	2 577.1	5.1	2 479.118	24.338
Castilla – La Mancha	1 628	0.6	1 734.261	15.835
Cataluña	5 958.2	38.6	6 261.999	214.996
Comunidad Valenciana	3 646.7	19.1	4 120.729	86.994
Extremadura	1 050.1	1.5	1 069.420	10.508
Galacia	2 753.8	10.2	2 731.900	24.141
Madrid	4 726.9	30.5	5 205.408	162.985
Murcia (Región de)	957.6	1.1	1 149.328	22.823
Navarra	507.3	1.3	543.757	11.002
Pais Vasco	2 134.9	5.6	2 098.596	18.822
La Rioja	253.3	0.3	264.178	5.915
Cueta y Melilla	117.5	0.5	141.504	5.574
Total	37 616.9	181.5	40 499.791	892.224

Table 6.5: Estimated Absolute Number of Third Country Nationals from Maghreb Residing in Spain (by Region) in 1999
(Source: Instituto Nacional de Estadistica)

Autonomous Regions	Algerians	Moroccans	Tunisians	Total Africans
Andalucia	437	12 163	28	15 129
Aragon	676	1 711	8	3 839
Asturias	8	102	3	236
Balears (Illes)	82	3 311	5	2 696
Canarias	26	1 392	6	1 906
Cantabria	7	109	1	202
Castilla y León	25	741	1	1 131
Castilla – La Mancha	69	2 250	2	2 458
Cataluña	611	23 872	1	29 490
Comunidad Valenciana	1 029	4 920	69	6 916
Extremadura	14	3 404	-	3 471
Galacia	10	592	3	993
Madrid	188	11 650	53	14 043
Murcia (Región de)	337	8 012	3	8 519
Navarra	282	814	4	1 371
Pais Vasco	42	600	7	812
La Rioja	128	578	1	735
Cueta y Melilla	2	1 492	-	1 501
No Constant Location	2	157	2	271
Total	3 975	77 870	214	95 719

Table 6.6a: Breakdown by Gender and Financial Dependency of Legal Maghrebin Workers in Spain, 1999
(Source: Ministry of Labour and Social Security)

Country of Origin	Gender		Financial Dependency	
	Females	Males	Others	Self
Algeria	321	3 089	3 280	139
Morocco	12 182	53 059	60 549	4 695
Tunisia	42	162	184	20
Total	12 523	56 341	64 010	4 854

Table 6.6b: Breakdown by Employment of Legal Maghrebin Workers in Spain, during 1999
(Source: Ministry of Labour and Social Security)

Country of Origin	Agri-culture	Industry	Construc-tion	Services	Not Classifiable
Algeria	1 444	519	344	908	204
Morocco	23 979	5 214	10 142	22 883	3 023
Tunisia	29	26	20	119	10
Total	25 452	5 759	10 506	23 910	3 237

Table 6.7: Work Permits Issued to Maghrebin Residing in Spain, 1992, 1993, 1994, 1999
(Source: Ministry of Labour and Social Security)

Country of Origin	1992	1993	1994	1999
Algeria	2 058	2 144	1 822	2 426
Morocco	36 602	39 656	39 366	48 259
Tunisia	188	138	134	129
Total	38 848	41 800	41 322	50 814

Table 6.8: Maghrebin Achieving Regularisation in 2000
(Source: Ministry of Labour and Social Security)

Country of Origin	Approved	Refused	Filed	Processing	Total
Algeria	2 852	634	360	3 320	7 166
Morocco	26 436	10 683	726	21 404	59 249
Tunisia	82	14	1	57	154

Table 6.9: Approved Maghrebin Regularisation in 2000
(Source: Ministry of Labour and Social Security)

Country of Origin	Approved			Overall %
	Work and Residence Permit	Residence Permit	EU Community	
Algeria	2 694	111	47	3%
Morocco	25 287	700	449	28.2%
Tunisia	70	12	-	0.087%

Table 6.10: Regularisation in 2000 by Autonomous Regions
(Source: Ministry of Labour and Social Security)

Autonomous Regions	Approved	Refused	Others	Total
Andalucia	16 723	11 792	253	28 768
Aragón	1 638	91	69	1 798
Asturias	871	8	16	895
Baleares	2 017	380	11	2 408
Canarias	7 683	3 677	242	11 602
Cantabria	690	40	-	730
Castilla – La Mancha	1 797	129	53	1 979
Castilla y León	2 057	267	135	2 459
Cataluña	19 146	6 458	1 115	26 719
Ceuta	434	146	164	744
Com. Valenciana	11 429	604	1 190	13 223
Extremadura	1 481	794	-	2 275
Galicia	1 770	70	96	1 936
Madrid	38 370	5 855	1 760	45 985
Melilla	414	418	102	934
Murcia	5 732	945	256	6 933
Navarra	1 139	29	10	1 178
Pais Vasco	1 419	103	45	1 567
La Rioja	947	179	123	1 249
Total	115 757	31 985	5 640	153 382

Table 6.11: Regularisation in 2000 by Employment Sector
(Source: Ministry of Labour and Social Security)

Autonomous Region	Agri-culture	Construc-tion	Domestic Services	Others	Total
Andalucia	18 837	1 577	2 185	19 106	41 705
Aragón	1 896	522	527	1 503	4 448
Asturias	-	-	-	1 198	1 198
Baleares	316	958	609	2 574	4 457
Canarias	778	2 131	765	10 347	14 021
Cantabria	33	39	136	610	818
Castilla – La Mancha	1 111	382	432	1 449	3 374
Castilla y León	438	476	519	1 314	2 747
Cataluña	5 309	5 720	3 518	46 467	61 014
Ceuta	12	57	17	1 104	1 190
Com. Valenciana	4 792	3 144	2 163	12 729	22 828
Extre-madura	1 757	62	180	623	2 662
Galicia	91	86	283	2 298	2 758
Madrid	842	6 770	10 862	36 233	54 707
Melilla	-	73	59	1 286	1 418
Murcia	14 895	643	863	1 988	18 389
Navarra	1 066	321	405	636	2 428
Pais Vasco	112	378	461	1 444	2 395
La Rioja	570	227	167	467	1 431
Total	52 855	23 566	24 151	143 410	243 982

Following the path of other more economically advanced states, in the eighties, Spain, has experienced a rapid increase in the number of legal foreign residents: from 181,544 persons in 1980 to 399,377 in the year 1990, and the numbers continued to increase up to 540,541 in 1995, and it is up until 900,000 by 2000.

5. THE SOCIO-CULTURAL IMPACT OF IMMIGRATION

Prior to evaluating the socio-cultural impact and levels of integration of migrants as a whole group, one has to discern which is the country of origin of these foreign residents. In these aforementioned ten years, the nationalities entering Spain with the intention to take up legal residence were 41.4% Latin Americans, 25.3% European (EU nationals) and 23.3% Africans. So, one can say that in Spain there are three types of migrants: EU nationals who are taking advantage of the freedom of movement of persons within the EU (Single European Act, 1986), persons coming from previous Spanish colonies (such as Argentina, Peru, Uruguay, Paraguay, Philippines, Panama, etc.), and finally the third country nationals whose economic background is much less developed (Maghreb, Senegal, Gambia, Ghana, Pakistan, and China).

Until 15 years ago, immigration to Spain was quite low and principally made up of a non-active population. Immigration to Spain may be distinguished further into two basic categories: 'elite' and 'marginal'. The former is made up of Europeans and US citizens and, to a lesser degree, Latin Americans, and these immigrants have high levels of qualifications, often even higher than that of most Spanish nationals. These immigrants tend to be generally older than the 'marginal' immigrants. A large part of this immigration is economically inactive, basically senior citizens and those on extended holidays. Among the economically active, professionals, company executives, etc. predominate.

'Marginal' immigration is less numerous, when considering only those immigrants who are in a legal situation. It is made up of citizens from less developed countries whose primary objective is to find employment and to better their standard of living. They are principally Portuguese and African, of a low age, with few qualifications, a high rate of economic activity and occupy the lower work positions. By tracing the development over the years, it can be seen that 'elite' immigration, while still numerous, has begun to decrease, whereas 'marginal' immigration is increasing very rapidly, even without taking into account the considerable illegal migrants, who are the most 'marginal' of all, not only in economic terms, but also in social, cultural and human levels.

The socio-cultural impact of the migrants in Spain is not that different from the one in Italy. The only real difference in the socio-cultural position of the immigrants in these two countries may be the proficiency of the language of the migrants entering Spain. Moroccans coming from the Rif region, Latin Americans and Portuguese usually can communicate to some extent in Spanish, whereas immigrants

in Italy find themselves at a greater disadvantage initially with the language. The other problems of adaptation to the host society, home-sickness, exploitation by some employers, living in rough conditions at the margins of society, difficulties with work and residence permits and lack of social assistance prevail in Spain as much in Italy. However, as one can see from the next section, there are organised groups in Spain (similar to Italy) who are trying to make it accessible to the Spanish to learn more about the immigrants residing there, while guiding the immigrants with the Spanish language and way of life, and how to deal with the never ending bureaucracy.

6. SOCIAL ADAPTATION AND INTEGRATION OF IMMIGRANTS

6.1 Regional and Local Initiatives to Integrate Immigrants

In Spain, one does not find so well-pronounced regional policies as one does in Italy because, as one can see from the above figures, the numbers of immigrants are not very high and if the numbers increase dramatically, that usually occurs during the summer period, for a short time, and then the immigrants return back to their country of origin.

However, in Cataluña, because the Catalans are demanding the rest of Spain to be open-minded and to recognise them as an autonomous entity having their own language, in their turn they have to put into practice their own politics and show an open-mind also on their part. One way they went about showing this is by the 'Integration Plan', enacted by the *Generalitat of Cataluña*[18] in collaboration with the trade union CITE and other local organisations which based in Barcelona and neighbouring towns, mentioned later on in this chapter.

Of course, when one speaks of migrants on a regional level in Spain, especially in these days of high levels of nationalistic feelings, with the Basque region and Cataluña wanting their complete autonomy, Spaniards coming from the other autonomous regions are also perceived as migrants. This can be seen quite clear especially in the Catalan case where people are actually communicating amongst themselves in Catalan and children in school are learning Catalan first and foremost, and then Castilian (the so-called standard Spanish). Thus, when one thinks of a person from Andalucia, Galicia or even Madrid moving to Cataluña for work, study reasons, one could identify also different levels of integration of the other non-Catalan speaking Spaniards in this region. There has been evidence that some Spaniards themselves do not manage to integrate in the Catalan community. To a

18 See the '*Pla Interdepartmental d'Immigració*' a publication by the Generalitat de Cataluña, Department of Social Welfare.

great extent, this situation is quite parallel to the Italian one - Southern Italians migrating to the North. Due to the fact that Southern Italians speak in a different dialect (which is not as different to standard Italian as Catalan is to Castilian) and have different life style from Northern Italians, in Northern Italy, they can easily be perceived as outsiders both by themselves and by the local Northern Italians. Thus, at this point, one has to question the definition one usually attributes to the word integration from the policy-makers' point of view and what one means by having achieved integration, from the migrants' perspective.

By the term integration, legally speaking, one might mean the achievement of all the political rights (and obligations) which a citizen of that geographically bound area usually enjoys. This would imply also equal opportunities in the job market and in the eyes of the law. This of course, is something quite difficult to achieve, especially in the current climate of recession and high level of unemployment which Spain, as much as the rest of Europe, is passing through - in fact Spain is estimated to have the highest level of unemployment,[19] it was registered to be about 23% in 1995.[20] The situation gradually eased down to 22.2% in 1996, 14.1% in 2000, and 13% in the third quarter in 2001.[21] The objective of achieving equality in the eyes of the law is still a very faraway milestone because a third country national who has committed a criminal offence can be deported whereas a Spaniard would not (this is valid for all the other EU member states).

In sociological and economic terms, integration of the migrant may be defined in terms of to what extent is the migrant segregated, to what extent can the migrant speak the language of the host society and hence socialises with nationals of the receiving state with also possibilities for inter-marriages, to what extent can the migrant afford a standard of living in the host country comparable to that of a national of the host country and what social benefits are there available for the migrant to enable him to achieve this.

Finally, another dimension associated with the term integration in sociological terms can be added, the so-called French idea of assimilation - to what extent does the migrant manage to identify himself/herself with the host society to the extent that he/she feel they now belong there more than anywhere else. Of course, this last point especially is very highly debated because one may also argue that expecting the migrant to renounce almost completely his/her previous identity could cause serious conflicts and a sense of insecurity within the individual himself/herself

19 The general comment of most economists that are spoken to was that if Spain has such a high level of unemployment and these people are neither taking up once more the 'dirty and heavy jobs' nor using their right of freedom of movement of persons as EU nationals, it must mean that the state, i.e. Spain must be able to afford and maintain its unemployed.

20 This figure is an average for the whole of Spain, richer regions like Navarra, Barcelona and Madrid, their unemployment levels compare well with most other EU countries (between 12 - 15%). These figures were obtained from an article 'Disoccupati in Europa' in *Il Manifesto* (an Italian pro-left newspaper), 25th August 1995.

21 Survey done by the Active Population, obtained from www.eiro.eurofound.ie

especially if he/she have not achieved a full extension of citizenship rights from the host country. Some organisations (almost all voluntary) question highly this contradictory French method of assimilation. These organisations are trying to help the migrants to integrate themselves in Spain but also hold evening classes of Arabic and Arabic culture for people such as the North Africans, so that the children of Maghrebin migrants will always feel they have the choice of returning to their country of origin if they choose to, thus the migrant will feel less pressure of having to succeed and give up his/her previous roots.

7. SUPPORT SYSTEMS FOR IMMIGRANTS

Some of the more well-known organisations who are doing this kind of voluntary work can be found all over Spain, but they are situated mainly in Barcelona, Baleares, Canarias, Malaga, Andalucia and Madrid, because that is where 76% of the migrants reside. Barcelona and Madrid account for 74% of the legal migrants resident in these regions. Amongst these organisations one finds Comissiones Obreras [a trade union which helps migrants through its specialised branched – CITE (Centre d'Informació als Treballadores Estrangers)], Diputació de Barcelona, Federació de Collectius Immigrants a Cataluña, Associació Vallès Sense Fronteres, SOS Racisme, GRAMC, CIDOB, Sopedau, Consell Municipall de Benestar Social, Creu Roja Española, Associació de treballadores I immigrants marroquins a España, Bayt Al-Thaqafa, Associacion de Solidaridad con los Trabajadores Immigrantes (ASTI), CARITAS, Jama Kafo, Collectivo IOE, Direcion General de Migracion.

These organisations organise tours of Barcelona and neighbouring localities, hold classes in vocational training to help the migrants achieve qualifications which are recognised by Spanish employees. Unfortunately, most of the qualifications that some *Maghrebin* hold when they come over from North Africa are not easily recognised as being equivalent to Spanish ones.[22] As a consequence of lack of recognisable qualifications, most migrants end up in construction work, agricultural sectors, and domestic services and as factory workers (especially the textile industry). Some Moroccan women in Madrid and Andalucia tend to work a lot as tourist guides.

In Cataluña, the female migrants from the Maghreb region tend to have more of a rural background when compared to the other Maghrebin women found in other regions of Spain. As a consequence of their rural background, immigrant Maghrebin women in Cataluña are usually there for family reunification more than for economic objectives and some of them rarely go out of their homes, so it is very difficult for them to achieve any form of integration within the host society, not to

22 With respect to Iberoamericans, the problem of recognition of qualifications does not exist because due to bilateral agreements existing between Spain and the Latin American countries regarding education standards. However, some employers do claim that if there had not been these bilateral agreements, the Iberoamerican qualifications would also have been rated as of a lower standard to the Spanish ones.

mention that most of them speak very poor Spanish. Those who do work, usually find jobs in the informal sector - mostly domestic work. Unfortunately for them, due to the fact that they speak poor Spanish they end up with very low paying work when compared to Philippine women who come over independent of family ties and quite fluent in both Spanish and English. This gives them the opportunity to find comparatively well paid employment in the upper-class families who usually want a live-in domestic worker (therefore with no family ties if possible) who is also fluent in English to thus be able to speak and teach their children English.

On the other hand, from the migrant's point of view, integration, besides the above stated definitions, could also mean the extent they have managed to understand the host system and established supportive networks which would enable them to maximise their capital gain in the receiving state and help newcomers to establish themselves. This can be interpreted in various ways. Upon visits to the police headquarters,[23] it has been informed that the highest incidence of reported delinquency is found amongst the Algerian community. If one were to speculate, one might also say that this might mean that the Algerians have got to know their way around the community they are living in to thus enable them to establish a profitable criminal network, as an alternative to taking up the type of badly paid employment which Moroccans find themselves in. This could be another aspect to integration.

8. THIRD COUNTRY NATIONALS AND SOCIAL SERVICES

In Spain, as much as in Italy, no social services provision existed with regard to immigration. As up to December 1989, the basis for discussing such topics was almost entirely missing or otherwise, the migrant was treated as a 'tourist' who passed through Spain on his/her way to the North.

Until 1989, parallel to the situation in Italy, it was only political refugees (a term which included only East Europeans) who had right to food and health service unlike the majority of other third country nationals (Macioti, 1990: 178). On 2 February 1996, a very important step was made in Spain, which so far has found no parallel in any of the other three new receiving states. The Congress of Deputies, in the house of Parliament of Spain, convened an inquiry with respect to 'the situation of foreigners in Spain' - the word foreigners, refers to third country nationals residing in Spain. Article 8 of the Decree, published as a result of the inquiry carried out, states that (my translation):

> 'The foreigners will have access to social security assistance and benefits in case of necessity, especially in the case of redundancy, the benefits will be determined according to the regulations of the relevant Social Security System.'

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23 Fieldtrip to Spain, Police Headquarters in Barcelona, April 1996.

Difficulties however still arise. This could be either due to a lack of information made accessible to the foreigners or due to a lack of initiative from their part to check things out. Migrants are at times afraid of asking for social security assistance because they are frightened of deportation if their situation is not completely regular. Another difficulty could arise from a lack of proficiency in the Spanish language. A common mistake tends to be that some foreigners believe that it is sufficient for one to be registered with the town hall to be able to benefit from the social services offered by the Spanish state to the resident third country nationals. This is not enough. One has to be fully regularised. Full regularisation implies the possession of a proper residence permit and legal residence on Spanish territory for at least four years. A dependant of a labour migrant (e.g. housewife) can claim income support on the basis of poverty. However, in practice, according to officials working in the *Benestar Social of the Generalitat de Cataluña,* only a very minor percentage of migrants appealing for social assistance, have been granted these benefits.

Two things, however, have definitely been implemented to the benefit of all migrants residing legally in Spain as much as for migrants in Italy - a free health system and a free education system for the children of migrants. One very interesting fact came up when speaking to immigrants who work with the organisation Jama Kafo.[24] Some Spanish doctors, who work with migrants, are so dedicated that they take the initiative of studying in quite great depth viruses and pathological bacteria present in the countries of origin of migrants. The reason behind this is that when migrants return to visit relatives and friends in their countries of origin, they become highly vulnerable to disease due to the fact that their bodies would have lost the storage of antibodies, which counteract these pathogens, during their residence in Spain.

9. POLITICAL IMPACT OF IMMIGRATION

9.1 Political Attitudes and Participation of Immigrants in Spain

Despite the strict implementation of the *Ley Extranjeria* in 1986 (refer to the section 'Immigration and Citizenship Policy' in this chapter) this did not deter Moroccans from immigrating into Spain. The flows of Moroccans continued, and in fact over the last few years it has risen and so has the volume of illegal *aliens.* Geographical proximity and access to Spain as tourists have been the fundamental causes. Spain has had a lot of interference from other Schengen members, Germany and France in particular, to control its gaps along the border and as a result visa requirements for Moroccans were introduced. This fundamental measure was intended to curb the

24 Jama Kafo is an organisation run by migrants for migrants, in order to help them meet others in their same situation, helps them appeal for rights and permits, and negotiates with trade unions in situations of exploitation by employers.

flow of illegal immigrants and went into effect on 15 May 1991. The visa requirements of May 1991 ended a phase in the immigration of this group in Spain and began a new phase of marked restrictive character and European inspiration.

The most important political decisions that affected the Moroccan colony of immigrants, chronologically stated are the following:

- Visa requirement at the border established: 15 May 1991.
- The 1991 regularisation process (10 June to 12 December) offering legal status to many Moroccans living in Spain on 15 May 1991, or before. In addition, from 10 December 1991 till 10 March 1992, an administrative procedure was set to regularise family members - those who proved to be in Spain before 15 March 1991. These residence and work permits were easily renewable.
- The treaty signed by Spain and Morocco on 13 February 1992 aimed at solving most of the problems coming from the uncontrolled migration flows. Morocco had to supervise uncontrolled migrant flows through its territory towards Spain. On the other hand, Spain granted free movement for three months to Moroccans who were legal residents in any of the EU countries. Both countries agreed to monitor labour migration between them.
- Increased enforcement of border surveillance, together with the organisation of a special police department to filter out illegal migrants at border.
- A quota system established in 1993. Up to 20,600 foreign workers were allowed to enter the country: 48.5% to work in agricultural sector temporarily or permanently; 5.3% as unskilled construction workers; the remaining 46.1% consisted of service workers, mostly domestic. Applications submitted by people from neighbouring countries or those with a bilateral agreement to be considered first. It was very clear that one of the main goals of this quota system is to draw Moroccans to work in the agricultural sector (Bodega et al., 1995).
- 23 April 1996 the new *'reglamaneto'* and the new regularisation process entered into force.

At the end of summer 1996, good weather conditions and incorrect information on an 'amnesty' for clandestine immigrants led to daily arrivals of small boats *pateras* occupied mostly by North Africans trying to gain entry into Spain. From the beginning of 1996, the expiry date for applications for regularisation, at least 1,250[25] clandestine immigrants were arrested as they tried to disembark on the beaches of Andalucia. The last time when such a high number of clandestine immigrants were arrested was in 1992, despite the readmission agreement signed earlier that year between Spain and Morocco (see previous section for further detail). A total of 1,563 (El Pais, 26 August 1996: 15) clandestine immigrants arriving on board *pateras* were arrested in that year. Officials estimated that the number of immigrants

25 'Spain: Large influx of clandestine immigrants, many misinformed of "amnesty"' in *Migration News Sheet*, Antion Cruz (ed.), Belgium, Brussels, No. 162/96, September 1996, p.6.

arrested only represented 30% (El Pais, 26 August 1996: 16) of those who made the clandestine journey. This would mean that, during that year, some 4,000 (El Pais, 26 August 1996: 16) had managed to enter Spain via Andalucia. Unfortunately, it is actually these numbers, not the numbers of legal migrants, which affected public opinion and attitudes, which in turn shaped political attitudes towards migrants.

10. CONCLUSION

In Spain, as much as Italy, the initial concern, when the number of immigrants entering and staying in Spain increased, was to conform to the policy of Schengen. As we have seen in Chapter 3, Spain initiated the Barcelona process with the aim to help bring development and stability in the Mediterranean region. However, there is little evidence of Spanish direct input with respect to policy towards third country nationals at EU level[26] except for a 'Joint Action Against Racism' produced by the Italian and Spanish presidencies in 1996 (see Annex). The policy process in Spain, as much as in Italy, so far, has been very much concerned with the domestic situation and can be described as quite introverted.

The councillor on social affairs for the government of Andalucia, I. Perez, warned on 14 August 1996 of new waves of illegal immigrants if the European Union does not implement economic measures to alleviate the situation in the sending countries. 'Andalucia cannot be the 'guardian' of the West with merely defensive policies' he was quoted as saying.[27] (I. Perez in MNS, September 1996: 6). The Central Government representative in Melilla acknowledged that neither walls nor barbed wires could hold back those still wanting to go to the West.

If one looks at the European situation from an historical point of view, over the last centuries, 80 million people have left the continent, most of them towards their former colonies. On the other hand, a number not larger than 20 million foreigners have arrived in Europe, most of them from America, Africa and the Commonwealth Countries. In this context, Spain was from the 1950s onwards a poor periphery of Europe sending about 2 million migrants mostly to France, Germany, Switzerland, Great Britain and the Netherlands. In a later period, between the 70s and 80s this flow of migration stopped and there was even a return of half a million migrants between 1975 and 1990. However, there are still more Spanish migrants who have remained abroad than those who have returned (about 1.6 million reside abroad).

This policy, as well as the incipient public debate on the consequences of immigration, reflects more the problems and worries of the Northern Countries of

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26 Various interviewees were asked about Italy and Spain's contribution to the EU policy process with respect to policy about third country nationals, but no evidence of this was found. The Spanish government is known for having introduced European citizenship in the TEU, however this relates to rights of citizens of the EU member states and not of third country nationals.

27 MNS stands for *Migration News Sheet*, Antion Cruz (ed.), Belgium, Brussels.

the EC (now EU) than the result of an analysis of the Spanish reality and of its prospects. Hence, until now the Spanish government is more concerned with satisfying the conditions of the Schengen group than with the design of measures of major juridical stability and social integration for the minority of economic immigrants. In this light, the recent process of legalisation of clandestine migrants - inspired, in part, by the Italian experience of the 90s risks being reduced to a mere parenthesis in a repressive context.

Spain sees itself as a country of 'temporary residence' because of the relatively low numbers of documented migrants who have established themselves there. Spain perceives the immigrant as a non-settler. For this reason its Aliens Bill is similar to the German 'guest worker' programme. This, in fact, is where one of the main differences between Spain and Italy lies. Thus, Spain adopted the German model of immigration law as a basis for its 'Foreigners' Law' (*Ley Extranjeria*). Even though, Spain's immigration is not increasing at the same rate as Italy's. However, the numbers are definitely going up, and in this international scene, it could seem that Spain will have quite a significant role to play as a new host country.

7. GENERAL CONCLUSIONS

1. ITALY AND SPAIN AS 'NEW' COUNTRIES OF IMMIGRATION IN THE EUROPEAN POLITICAL CONTEXT

> 'The nation-state has in Europe today come under pressure from 'above' through the urge towards harmonisation, and from 'below' in terms of increased immigration. This double squeeze has led to a feeling of insecurity among much of the population, which again makes it more difficult for the states to agree to relinquish sovereignty' (Brochmann, 1996: 148).

There are two obvious sources for an immigration wave into the European Union. One is from the countries of the former communist Eastern Europe, especially Russia, where economic decline is coupled with internal political strife, and escalation in criminal activity on a scale similar to that obtained in the USA (Barclay Glen, 1995: 6). Such a westward Slavic flood would be of concern in the first instance for the eastern flank of the EU, meaning Germany and its central and northern European partners, Austria, Finland and Sweden. Although it would not necessarily be a concern for them alone, as illegal immigrants who succeed in establishing themselves in any part of the EU are thereby enabled to move practically unrestricted throughout the Union. The countries on the eastern flank of the EU could not in any case contemplate the prospect of instability on their borders of the order likely to eventuate if they do not divert all their available resources to supporting their economic recovery there. What concerns primarily the countries on the southern flank of the EU such as Italy and Spain,[1] is not so much the rights and integration of third country nationals residing on their territory, as much as an intensification of the number of new migrants from North Africa which has been going on for years already. Some three million citizens of Algerian origin live in France today. Approximately 19 million third country nationals, a great percentage of which are of Maghrebin origin, reside in the EU today, and there is reason to expect that

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1 Italy and Spain have been described in previous chapters and by others as 'new receiving states', however one must bear in mind that this 'new migration' has already been taking place for the last twenty years or so. Not to mention previous migration to these states in previous centuries as in the case of Spain in the sixteenth century – refer to Chapters 5 and 6.

even larger numbers will follow. The migration pressures are necessary and continuing policy preoccupations for the EU and its members.

In the conclusion to this book, we shall not repeat the results of each individual chapter; rather it is imperative to draw out a common thread, which connect the different sections of this book. The importance of studying the current immigration to Europe (and the relevant policies) analytically as a whole has been stressed time and time again, as one migration tide may very well be a resultant of another. One also needs to understand both the structural causes of migration and the individual motivations and aspirations of those who migrate. However, the study of the position of the migrants already residing within the receiving states - their rights and level of integration, not to mention responsibilities - need not be delayed for long because the new receiving states have already been receiving immigrants for at least 15 years. And some of the third country nationals can now even start to be considered as settlers. In fact, this aspect of migration studies has not been so well researched and is highly relevant to the stage that most of the EU member states are undergoing with respect to their resident migrants.

In the analysis of the effects of migratory flows and problems, evidently transnational phenomena are often neglected: migrations themselves - the very movement of people from one country to another, as well as development imbalances express a mainly transnational dimension. Yet, the analysis of the consequences and possible remedies to the pressure of people's movements is still considered at a regional level and carried out mainly through national instruments. The maximum hint at the transnational dimension is expressed by the so-called international co-operation, whose limits and crisis are nonetheless evident. Current immigration to Europe is portraying quite clearly how dependent the different receiving states are on their pre-existing respective policies even though, as we have seen, these are not adequate responses to the phenomenon. This is particularly evident, as seen in Chapter 1, in the debate about the Single European Act and the abolition of internal frontiers in the context of issue of third country nationals and the possible extension of free movement rights to them.

Italy and Spain have adjusted in similar ways because of a similar history, but there are also differences. The experience of Italy and Spain runs behind the experience of the process in North European states which have had a longer tradition of immigration, although, the policy outcome in each of this countries' feeds back into the policy debate at EU level. There is a wide range of differences between the different EU member states, which experienced migration from third countries (and widely differing source countries), and this resulted in a variation of responses. Hence it remains difficult to find a common ground for a collective EU policy; nonetheless the need for such a common immigration policy cannot be negated as the Tampere Presidency Conclusions so adamantly put forth. As stated earlier, the member states cannot avoid dealing with this issue, at least to some extent, at EU level, because borders are so permeable which makes countries very easily affected by the predicament of new forms of immigration.

As we have seen in Chapter 2, policy on this matter is highly fragmented. Classical macro-integration theories can shed some light on why closer collaboration

in a sensitive area such as policy towards third country nationals has not been achieved yet. Integration theory helps us understand how the member states have related to each other over time. Their relationship has been highly influenced by the sensitivity of the issues concerning their own citizens, for example employment issues, and this determined how protective they were towards their own sovereignty (or not) at particular points in time. The greater the sensitivity of the issue, as in the case of the debate about third country nationals, the greater was the inclination towards the preservation of national sovereignty and hence an intergovernmentalist approach. However, due to the complexity and the fragmentary nature of policy towards third country nationals, it is very difficult to use integration theory on its own for a thorough explanation of the evolution of the EU policy process towards immigrants. As it has been explained in Chapter 2, macro-level theories fail to explain how on a 'day-to-day' basis, processes taking place at local and regional level can at times affect quite significantly, European level policies related to Justice and Home Affairs. A more dynamic and fluid model was necessary to depict the interaction between the different actors and their varying self-interests in the evolution of policy towards third country nationals in the EU. The pendulum model (Wallace, H. in Wallace and Wallace, 1996) was found to be a very suitable tool to depict this process. The pendulum is not a theory in itself; it is a metaphor, which compliments the explanatory power of integration theory. The pendulum moves according to shifts in EU or national interests represented at each end of the pole respectively.

With respect to evolving policy towards third country nationals in Italy and Spain, the pendulum was first in the direction of the field of EU interests, because, as we have seen from the previous chapters, the position of the 'new receiving states' was initially quite passive. However, the position of the pendulum is also quite unstable because there has been very little coherent and concrete policy and practice at EU level. Furthermore, there has been considerable ambiguity in the implementation of the provisions of the EC-Maghreb agreements, especially when it came to rights of Maghrebin workers and the families. The only coherent policy that emerged at EU level was the aim to restrict further entry of third country nationals.

With more careful analysis of the situation over time and the evolution in the attitude of their own nationals, coupled with the demands of other Schengen states to tighten their border controls, policy-makers in Italy and Spain became more active. The policy of Italy and Spain initially matched with that of the EU. The pendulum, due to the pressure from other member states, was drawn towards the transnational/trans-European interest pole. The member states that are part of Schengen do not include all the 15 EU member states and some states were more concerned with what was taking place in Italy and Spain than others were. As a result, the deflection of the pendulum towards the 'transnational/supranational interest pole' was not a full one. With further development of national legislative measures, based on Italy's and Spain's own experience and interests (including the interests of NGOs and the general public), the pendulum started moving towards the pole of national interests. At that point, the evolving policy towards third country nationals was very introspective, in Italy more

than in Spain as the former received more immigrants and the need for a policy/legislation meeting the specific needs of the country and its residents was more imminent. The deflection of the pendulum towards the pole of national interests was stronger for Italy than for Spain. At this point, there was a divergence between these states' interests (at national and local level) and the interests of the rest of the EU. This shift occurred at a time when the EU was in a process of integration and of removing its internal borders to thus facilitate the implementation of the internal market and the movement of goods, services, capital and hence, of European citizens. The result was that the pendulum stopped somehow at a middle position. This implies that the resulting policies in these two countries and at the EU level, on the subject of third country nationals residing in the EU, was not so coherent and remained more reactive than proactive. The evolution of policy towards third country nationals in Italy and Spain, and the way in which they related with the rest of the EU, is summarised below (see also Apap, 1996).

As one can see from Chapters 5 and 6 (from statistics, evolving policies and attitudes) the situation in Italy differs in some aspects from that in Spain, which in turn disproves the notion that the situation in the South European states is homogenous. The predominance of push over pull factors, the limited capacity of the labour markets of the receiving countries and increased migration for political reasons are all elements which, interacting with the migration dynamics, have led to significant changes in migration policy, and in attitudes towards migrants, in Italy and Spain in recent years. New immigration flows are only partly absorbed in the hidden economy of the receiving countries and in sectors and jobs where the distinction between legal and illegal is minimal. This encourages the social exclusion of the immigrants as well as compromising their integration into the receiving society, not to mention the ethnic, cultural and religious divide, which often separates the immigrant from the local population. This increases the gap between the position of third country nationals and that of nationals of the host state. Policies, which aim to protect some citizens' rights to the detriment of other residents, are certainly not in conformity with the principles of democracy explained in Chapter 1. In effect, the list of potential areas for policy development is very vast indeed.

2. SIMILARITIES BETWEEN ITALY AND SPAIN

An initial point to make concerns the similarities between the way in which Spain and Italy have reacted to changes that have affected them. As stated earlier, both Spain and Italy have had past histories as sending countries and both countries in the early 1980s started experiencing the transformation from 'sending' country to 'receiving' country.

In both Italy and Spain, initial policy towards third country nationals was very much informed by the past experiences of Northern EU states and hence the first laws passed were in both cases were highly restrictive and similar to the policies of Schengen countries, which Italy and Spain were seeking to join. There was an inherent lack of democracy and openness towards foreigners. However, with more careful study of the

situation and due to pressure from below as much as from above, the initial foreigner's laws were revised. 'External border' policy continued being restrictive, although a distinction emerged between the restrictive nature and the policies towards third country nationals living legally in Italy and Spain. In both countries, as one can see quite clearly from the results of Chapters 5 and 6, that emerging policy towards non-EU residents became more geared towards the integration of these migrants. Policy towards non-EU residents was influenced by catholic voluntary organisations, NGOs such as Caritas, by some political parties, and by trade unions, as much as by national or supranational decision-makers.

Both countries were used as a passage way to the North of Europe. Later on, after the tightening of visa restrictions in northern Europe and an increase in the prosperity of the tertiary sector in Italy and Spain, both countries have now started to experience the settlement of migrants on their territory. The differential economic growth between the countries of southern and north west Europe has also narrowed considerably as EU membership has brought Italian and Spanish (and to a lesser extent, Greek and Portuguese) wages closer to average EU levels.

In the midst of these dramatic changes, an initial lack of demographic analysis of the situation, coupled with the lack of initial concrete migration policy in Italy and to a lesser extent in Spain, have led to over-reactions by the media and exaggerations of the numbers thought to be present. Earlier surveys in Italy dealt with communities of immigrants coming from the Philippines, Cape Verde, Somalia, Eritrea, Morocco, Tunisia, Egypt, Iran, and recently the list has expanded to include immigrants from Algeria and other African and Asian countries such as Senegal, Ghana, Sri Lanka, Pakistan, China. In the absence of a clear direction from researchers or policy-makers, this apparently unending immigration has led to sporadic acts of xenophobia being carried out against individuals and immigrant communities. Spain has also witnessed its share of these sporadic acts of xenophobia.[2]

However, in both countries a distinction is nonetheless drawn between 'elite' immigrants, and other, more marginalised groups. In both countries, the 'elite' (such as Americans and Japanese) is viewed as 'investors'. Whereas the term 'immigrant' is attributed to the poorer groups of migrants. In Spain, the 'elite' includes northern Europeans who retire to Spain for its climate and lower cost of living, as well as migrants from Spain's former colonies, who are usually very well qualified and manage to secure a standard of living similar to that of the Spaniards, if not better. These groups have a substantially different experience in Spain than those from the 'marginalised' group, composed of North and sub-Saharan Africans, and to a certain extent poorer Portuguese and Filipino immigrants. Yet it is important to keep in mind that as these immigrants have settled down into Spain and Italy, they themselves also become more

2 The well-known racial violence in the Spanish town of El Eijdo can serve to illustrate this point. In February 2000, the alleged killing of a Spanish woman by a Moroccan, ignited the 5 February 2000 mass riot spreading over three weeks that left more than 80 people injured. Local Spaniards attacked the local foreign population, either physically or through the sabotaging of their properties, and also properties that were known to serve them.

integrated, and by comparison, more wealthy than the newly arrived migrants. Therefore, it can be remarked that they have also become a new class of elite of their own. Meanwhile, the most marginalised of all in both countries are the illegal immigrants.

The different demographic regimes between the two sides of the Mediterranean basin act as a strong push factor for immigration, which is common to both Italy and Spain. Equally, an important and common pull factor is the large informal sector of the economy and labour market, which is also significant in both Italy and Spain. Rapidly-rising official wage-rates, a squeeze on productivity, and until recently before the introduction and usage of the Euro, the devaluation of the lira in Italy (and to a lesser extent the peseta in Spain) have led firms to recoup their competitiveness by tax evasion, reduced labour costs and more flexible use of labour. In this context, informal and irregular demand for migrant labour in certain sectors, such as agriculture, construction, the tourist industry and domestic services, is very high. In fact, both Spain and Italy have a problem of expanding informal labour markets, which assimilate undocumented migrants.

In both countries the predominant group of labour migrants from the Maghreb are from Morocco, and in both cases the distribution of migrants on the territory of the receiving states is not homogenous. Reasons for the increase in the number of immigrants from North Africa entering Italy and Spain are various, but a principal one is geographical. The geographical proximity and 'openness' of both Italy and Spain, including their reliance on tourism, and their long coastlines, both make control of migrant inflows extremely difficult.

In terms of immigration policy development, meanwhile, both countries have had amnesty laws for illegal immigrants (Collinson, 1996: 35): in Spain, in 1985-86, 1991 and 1996; and in Italy, in 1982, 1987-89, 1990-92 and 1996. In all of these regularisations, a lower than expected number of undocumented workers actually regularised their position in the host country, probably out of fear of being repatriated. In Spain, for example, the first legalisation process in 1985-86 resulted in 34,832 residence permits being issued (Ministerio dell'Interior 1989), whilst as a result of the 1991 process, a further 109,135 work and residence permits were issued, well below the estimated number of undocumented workers. Across the various decrees in Spain and even more so in Italy, a pattern is clear of the development of a preventative policy with regards to new immigration, and attempts to assimilate immigrants already in the country.

The Spanish and Italian public have grown increasingly interested in the question of migration, both because of greater numbers involved and due to episodes, often quite serious, of intolerance which have caught the attention of the mass media and the general public. Nonetheless, with some local exceptions, the impact of migration on these two South European states is still quite modest in comparison with other European countries; in particular because migrants' access to social and welfare services remains limited - particularly if they are illegal. This, however, has not prevented the outbreak of various forms of racism (Treves et al., 1989: 47-49).

Italy and Spain seem to be adjusting to immigration from regions like the Maghreb quite well. There is an adjustment at the civil society level, which is quite impressive. As we have seen in Chapters 5 and 6, there are various voluntary groups which work to help the migrants integrate, learn about the Spanish and Italian culture and find work. Moreover, the initiative of some Spanish doctors to learn about tropical diseases so that they can offer medical aid to migrants, who contract these diseases when they return to their country of origin to visit family and friends, is certainly praise-worthy. However, in these two countries, there is a problem of modernising and adjusting their legislation and resolving their technical problems with their EU partners regarding border controls. Their North European partners do not trust Spain and Italy in controlling sufficiently their borders.

3. DIFFERENCES BETWEEN ITALY AND SPAIN

Despite these similarities in the position of Italy and Spain with respect to their experience of immigration, differences prevail too. Differences are particularly evident in terms of the types of migrants that are present in Italy and Spain and in the way migrants are perceived.

In Spain, to a great extent migrants are still perceived as temporary workers and policy is very similar to the German legislation for foreigners. Initially, Spain was the only country in the Southern European region that could claim to have moved a step further towards establishing an immigration policy, in its broader sense, rather than just passing legislation on an *ad hoc* basis. The social and judicial dimensions of Spain's policy towards resident non-EU nationals are still not so well established. Of course, it could be argued that having no defined policy is also a policy, since it gives the State the flexibility to respond to arising needs (Cornelius in Cornelius et al., 1994)

One important development in Spain has been the establishment of a quota system for those who apply for work and residence visas. This system allowed 20,600 migrant workers to obtain visas in 1993, 29,349 in 1995, 20,600 in 1995, and 32,100 was set for 2002. These included the possibility for workers who were already residing illegally in Spain to regularise their situation. And the recent amendment of the 'Foreigner's Law' is a step towards further integrating those most non-integrated of immigrants, namely the illegal population. In Italy, 118,000 foreigners were regularised in 1987-1989; 235,000 were regularised in 1990-1992, 259,000 in 1995 and final results for 1999 are still to come.

The interpretation given to the word 'integration' and the extent to which there is integration of the immigrants within the host societies also differs in these two countries. In Italy, much more work has been done to extend citizenship rights to third country nationals working and residing on Italian territory, especially under the government of Romano Prodi, than in Spain. The reason for this could be the difference in numbers of third country nationals present in these two EU member states (approximately 1.39 million legal third country nationals in Italy and 895,720 in Spain in 2000).

As can be seen from the result Chapters 5 and 6, there have been important implications for changing attitudes towards migrants and hence the evolution of immigration and citizenship policies in Italy and Spain. One reason for this difference might be the variations in the spatial distribution of immigrants in the two countries. In Italy, immigrants are spread throughout the country, although they are found particularly in the Centre-North and certain areas of the South (Sicily and Campania) which are easy landing places for migrants coming by sea from the Maghreb. In contrast, in Spain, the majority of the immigrants are in either Madrid or Cataluña, where most job opportunities can be found. Southern regions such as Andalucia have also received a number of seasonal workers, who look for jobs in the tourist sector or on the agricultural harvest, although this conflicts with the interests of the locals who themselves look to the tourist and harvest seasons for extra income from part-time work. As a result of the spatial concentration of immigrants in Spain, one does not find such well-pronounced regional policies as one does in Italy; since the numbers of immigrants are not very high in most regions, and where numbers do increase dramatically, this usually occurs during the summer period, for a short time after which the immigrants return back to their country of origin.

The popular movements are results of global trends which call clearly for international co-operation and decision making; the globalisation of the market place has made the nation-state vulnerable to economic and political processes outside its borders to an accelerating degree over the last decades. The question of national control, as stated in the first chapter, especially with respect to freedom of movement of third country nationals already inside the EU, is losing currency while transnational decision-making is gaining ground due to interdependency of events and processes. It is therefore quite a paradox that in such circumstances, that, using Brochmann's words:

> 'governments entrench themselves in national control systems in relation to immigration; tightening up border controls; reinforcing the internal alien control systems; embarking upon bilateral labour contracts with third countries, and retaining sovereignty in terms of defining welfare provisions, labour market corollaries and other integrative measures pertaining to immigrants' (Brochmann, 1996: 146).

What can be seen quite clearly from the situation in South Europe is the extent to which immigration of workers from poor countries can be described as 'a direct response to specific demands for cheap labour articulated by employers and their representatives in the political and administrative process; or whether the migration process is essentially supply-driven by factors of poverty and demography' (King and Konjhodzic, 1995: 74). It is still unclear to what extent competition exists between immigrants and national workers. Initiatives to integrate legalised immigrants and decisions with respect to the extent that migrants can achieve citizens' rights are still at an early stage and very little has been done to uniformise the position of legal third country nationals who have been resident in the European Union for five years or more. Even in the areas where migrants have secured certain rights, the gap is still very wide between migrants' rights and what is truly done to help them benefit from these rights.

There are various disequilibria prevailing between the Northern and Southern banks of the Mediterranean, which will continue to persist for the time being. Too strict immigration policies will only help fuel an increase in clandestine entries. The main problem is how to target aid to create employment and thus reduce emigration. Of course, this is not an overnight process (See previous chapters that have elaborated the non-existence of overnight success.)

4. THE IMPACT OF EU POLICY DEVELOPMENT ON SPAIN AND ITALY

Individual European countries' migratory policies have featured restrictive and coercive elements in recent years. In the light of this, the basic need for co-ordination above all has often been felt, and now been urged. As explained in Chapter 1, in the provisions made by the Amsterdam Treaty co-ordination will take place in policy areas concerning entry visas and incorporation of Schengen into the first pillar to thus enforce the common external border of the EU. There will also be co-operation in the control of freedom of movement of third country nationals who want to travel for tourism or business purposes within the EU.

There have been various proposals and recommendations put forth by NGOs and the Commission of the European Communities to extend European Citizenship and the right of free movement to look for employment within the EU to those third country nationals who have legally residing and working in one of the EU member states for more than five years. However, neither the Treaty of Amsterdam nor the Nice Treaty contains any such provisions.

The attempt to standardise the practices of European countries does not seem to have overcome problems caused by viewing the issue of immigration in purely conjunctural or local terms. In fact, in spite of the same economic crisis, social problems and - what seems to be the most important - the same targets (more or less agreed upon), each country still seems to be reacting in its own way. Even when a comparison of the solutions adopted (especially restrictive ones) could lead one to think that there might be room for a European agreement on policies towards third country nationals.

A full concertation/convergence of policies towards third country nationals at EU level may, in some cases, proved to be counterproductive. Some member states like Germany tend to use transnational policy to solve their domestic problems. From the results of the research, it is not so evident that Italy and Spain need to rely on policy at EU level to cope with the evolving situation with third country nationals at national level. In fact, if for every policy move they were to depend on the consensus of all the other member states, policy measures such as linear/collective regularisations would have never been implemented, or certainly not as often as they have been.[3] Since 1981,

3 A linear regularisation takes place when the host state offers to regularise all the undocumented migrants who have been on its territory for an established minimum period

as we have seen in Chapters 5 and 6, both Italy and Spain have implemented, on various occasions, this type of regularisation. However other member states like Belgium, even though they have a longer tradition of immigration, they have been much more rigid about the rights they extended to third country nationals on their territory.[4]

Italy and Spain have not had a very active role in contributing to the EU policy debate about the policy towards third country nationals except for the 'The Joint Declaration by the Italian and Spanish Presidencies (1996)' against racism and xenophobia (see Annex). These two member states have raised awareness at EU level about the need to develop further the dialogue with the non-EU Mediterranean countries both because of the historical links with the other Mediterranean countries and also due to their geographical proximity.[5] Spain, in 1995, was the initiator of the Barcelona process. However, the EU-Mediterranean dialogue in the Barcelona process deals much more with the establishment of a free trade area and investment in the Mediterranean; migration issues are treated as somewhat secondary to the debate. Moreover, the EU-Mediterranean dialogue deals with the situation of the Maghreb as part of the whole picture of the Mediterranean region and this brings about a certain dilution of the issues in the Maghreb.

On the other hand, the Spanish government, during the Spanish presidency of the Council promoted the concept of European citizenship, emphasising the rights of EU citizens. Although the link was not explicit, the increase in the rights of EU citizens, caused a deepening of the gap which exists between them and the third country nationals resident in the EU. EU citizens and third country nationals tend to be treated as two separate groups by policy-makers, however, the advantages of the former tend to become the disadvantages of the latter. NGOs have recognised this link and have realised that third country nationals will potentially become more socially excluded if the gap between them and EU citizens became larger.

Citizenship practice in the EU has brought about a new dimension of inclusion; an inclusion based on new institutions and supranational practices. The normative demand for equal access to democratic participation as explained in Chapter 1, highlighted the problem of inclusion and exclusion among member state nationals and 'other' residents in the EU, namely the so-called third country nationals. An analysis of institutions and practices related to citizenship rights in the EU suggests that the problem is actually two-fold. It comprises both a *procedural* aspect, which is the problem of establishing appropriate channels for democratic participation within the Euro-polity, and a *normative* aspect, which is a problem of equality among an increasingly visible and

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of time, for example five years. This does not mean that third country nationals with a criminal record would be able to get regularised so easily.

4 It is not that evident that Belgium would have supported Italy and Spain in their decision to implement linear regularisations on their territory, especially since the removal of the internal borders.

growing diversity of residents. It is important to note that after the Eastern Enlargement, the categorisation of citizenship rights could multiply with the Eastern Europeans, the new 'citizens' of EU.
As stated in Chapter 2, the series of texts and recommendations (often dubbed as 'soft law') - as useless in practice as they are worthy in principle – need to be replaced by a real European planning policy. We are already starting to see development in this area. The aim would be to limit the conjunctural aspect of the migratory phenomenon (as well as of the other economic and social problems), which is at the root of national and nationalist solutions that are inevitably turning out to be repressive, defensive and of no assistance to the development of constructive policies towards third country nationals.

What has been concretely achieved so far is, on the one hand, 'settled case-law' in the European Court of Justice, which asserts the rights of certain groups of third country nationals in practice. Case-law has helped clarify some of the ambiguities about the practice of migrants' rights. This is however still very haphazard and it depends on the individual himself/herself to present their case in front of the national court of the host state and the case afterwards is referred to the ECJ. To be able to do this, the migrant needs to have some knowledge of his/her rights. So far case-law has helped established migrants, especially the second generation, because they are more familiar with the relevant policies and the language of the host state. As can be seen quite clearly in Chapter 4, the case-law emerging in the ECJ was put forth by third country nationals whose country of origin had bilateral agreements with the host state and hence they felt more confident about their rights. Moreover, access to the European Court of Justice is possible only for those third country nationals whose countries have signed co-operation or association agreements with the EU (see Chapter 4). On the other hand, the transfer of most of the third pillar responsibilities to the first pillar in the Amsterdam Treaty will make it more possible for third country nationals to appeal for their rights in the European Court of Justice.

The new tendencies emerging in Europe in the political debate and in new regulations are aimed at reducing the purely protectionist character of migratory measures concerning the labour market. Though still incoherently implemented at a national and policy level, this is taking account of two groups of essential factors: those relating to the overall situation and those relating to the individual. According to the former, access is to a labour market of ever-wider economic dimensions: for example, the then big EC (now EU) market of 1993, or the opening up of East European countries both economically and as far as production is concerned, or even the need for development in Mediterranean countries.

According to the latter, it is no longer just the employed who emigrate as before. The evolution of the problem makes it ever more necessary to take account of self-employed workers, on the one hand, and of the needs of guest workers' relatives in particular, on the other. Thus there has been a major shift from the immigration of workers to the immigration of people. This new trend is evident in the legislation adopted on this matter by Mediterranean countries. As in the rest of Europe, there is increasing debate on the subject in these countries. The first reaction almost everywhere

has been to try to stop immigration flows. This solution has turned out to be probably mistaken, as it does not make sense in the present political and economic climate.

In the medium developed countries, as seen in Chapter 3, a consolidated approach to reduce or to stop immigration from lesser-developed countries has been evident for many years; economic and social reasons are privileged in presenting such policies. A preference for investment programmes in lesser-developed countries is frequently stressed as an alternative to migration flows. Obviously, the idea of a general development of lesser-developed countries is morally alluring. Yet such a *scenario*, together with a parallel one of a total abstinence from migration flows, seems to be at least unrealistic, possibly romantic and surely insufficient: the tendency to the permanence of a certain pressure will continue in the future.

So-called aid for development is effected through the transmission of financial resources without interpreting the needs of a population; it is certainly a useful support, but it does not foster the country's development. Also, scientific texts are beginning to highlight what is still not mentioned by politicians: contributing to a country's development does not only mean allocating funds or favouring local investments in production, but also temporarily accepting the immigration of citizens. This formula was vital for researchers in the past and now it affords them a new interpretation in ethnic terms of aid for development.

Obviously, it is possible to imagine some countries may choose this solution, and theoretically this is quite feasible, with some legislation acknowledging that the migratory flow consists not only of workers but also of citizens. At least the latter should not be deprived of the fundamental human rights they probably enjoyed in their countries of origin. Indeed, it is quite evident today that for many migrants the status of citizen has less value in Europe than it did in their countries of origin, from constitutional, social, ethical and civil points of view. It is therefore necessary that one accepts the principle of the reunion of families, and also, in a period of transition, that one regulates the phenomenon with controlled open-mindedness, consistent with the development but not repressive, i.e. including this demographic question amongst other forms of aid for development.

There are different situations in the various countries. Old immigration countries are discussing integration; schooling and refugees' controls and new immigration countries have different problems due to their inadequate preparation to cope with the migratory flow. There are strong arguments for the states to collaborate with one another and within the EU. In this respect, the weakness of national frontiers, and correspondingly, administrative and normative barriers, is ever more evident. If our age is already characterised by wide regional complexities, it is highly likely that such a strong trend will be confirmed in the future. The very notion of sovereignty needs reconstructing: it proves to be deceptive in the context of a wide diffusion of systems and values, both between North and South, and among Southern countries belonging, for example, to the same cultural area.

5. A EUROPEANISATION OF THE DEBATE ABOUT THIRD COUNTRY NATIONALS RESIDING IN THE EU

The perception of the nation-state is changing and a new balance needs to be found. Thus, without pursuing the utopian plan of universal free circulation, the experimental value of an ever more integrated region, such as the European and Mediterranean one, is particularly evident. In this area, problems of development and demographic balance concern a wider community whose subsidiary character runs through local, regional, national and European institutions, as explicitly recalled in the preparation of the plan for European Union. The EU's interest in migrant workers is also stressed by the Community Charter of Workers' Fundamental Social Rights, adopted by eleven Member Countries' heads of state and government during the European Council held in Strasbourg on 8th and 9th December 1989. The Charter, in Title I, envisages, among other things, 'The harmonisation of residence conditions in all Member Countries with special regard to family reunion'; the removal of 'hindrances to free circulation deriving from the non-acknowledgement of given categories of diplomas or professional qualifications'; and also 'the enjoyment of equal treatment with host country's citizens in all fields, including social and fiscal advantages'. The document, known as the 'European Social Charter', has given rise to much social and political debate in Europe.

The Amsterdam Treaty has brought about a considerable difference to the scope of the treaties in the field of Justice and Home Affairs, much more than many had expected. The institution of a Commissioner for Justice and Home Affairs and the establishment of a full Directorate-General in the Commission will give the Commission a basis for promoting policy, in the area of migration, at EU level. At the Tampere summit, on 15 and 16 October 1999, organised by the Finnish presidency, government ministers (mainly of justice and the interior) have discussed how far their governments are prepared to carry out the commitments they signed up to Amsterdam.At this point one may speculate about ways forward for policy-making in the area of Justice and Home Affairs vis-à-vis the movement of the pendulum:

Is it likely that for Spain and Italy, the 'pendulum' will shift in the direction of an Europeanisation of migration policy, since a call was made for its institutionalisation at Tampere?

With a Europeanisation of policy towards third country nationals, the scope of decision-making and openness towards third country nationals for individual states like Italy and Spain may be constrained insofar as an Europeanisation of migration policy implies an 'approximation' of current national policies on migration of the 15 member states. This will give Italy and Spain more opportunity to discuss matters related to their national situation, with respect to third country nationals, at a European level, but every proposition each government may make will have to be approved by the other states. Under the Amsterdam treaty, a great deal of Title VI of TEU has been transposed into the first pillar to become the new Title IV. However, Title IV deals very much with flows of persons into the EU and not elaborately with the rights of long-term third country who are already inside the territory. Even though political attitudes towards

flows of migrants into the EU do have an effect in influencing emerging policies towards those already within the EU boundary. The agenda of the Tampere European Council suggests little that the specific rights of long-term third country nationals will be discussed in any real detail at a European level. However, the presence of the new Title IV in Pillar I leads us to expect that much more jurisprudence about migrants' rights will emerge from the European Court of Justice on the basis of Article 68 of the Treaty of Amsterdam and the European Parliament will be consulted much more. This may well lead to a monitoring by the European Commission to check that established rights of third country nationals are applied more uniformly throughout the EU. These elements lead us to predict that the pendulum will move to a certain extent in the direction of European level policy development.

However, it is likely that the rights of third country nationals residing in the EU will continue to depend a great deal on developments at a national level in accordance with the principle of sovereignty, with some common approaches at EU level. Any initiatives to grant rights to country nationals at a European level will have to meet general unanimity[6] in the Council. This does not exclude that after these 5 years, decisions are said to be made by quality majority voting; yet this will depend on the 'political will' of the member states. As a result, the deflection of the pendulum will not be as strong as one might have expected towards the European pole.

These factors suggest that the policy-making pendulum continue to fluctuate. It is still unstable and still caught halfway between the national and European poles. It is highly unlikely that coherence will be achieved in migration policy for the time being across the EU, in particular with respect to the rights of long-term resident third country nationals.

The analytical approach adopted in this book sheds light on how the 'struggle' of interests between the supranational and national levels could lead to incoherent policy at both levels. The pendulum model offers the flexible framework to explain the change in the supranational-national relationship arising from fluctuations between EU level and national interests. As we saw in Chapter 1, it applies to a number of other policy areas where the principle of sovereignty has dominated due to the sensitivity of the issue. As we have seen in the analysis of the different phases of the EU integration process, this is not a stable process. Intergovernmentalist approaches have existed alongside more federalist or functionalist ones, and hence the EU policy process can only be depicted by a model, which moves along a spectrum and which depicts the range between these two extremes ends.

6 The general unanimity rule is quite common in the intensive transgovernmental workings of the EU. Even though the Commission or the Parliament might have a say in some workings of the Council, the Council usually agrees by unanimity, and usually not by voting.

ANNEX 1

THE JOINT DECLARATION BY THE ITALIAN AND SPANISH PRESIDENCIES

The impact of the 1996 Italian and Spanish Presidencies with respect to directions to be undertaken by the other EU member states in their policies towards third country nationals. Both Italy and Spain, during their presidencies of the EU in 1996, initiated a 'Joint Action Against Racism'. They succeeded in obtaining the approval of all 15 Member States with respect to a binding instrument to combat racism and xenophobia, an initiative which was started by the Spanish presidency and then followed up by the Italian one This initiative was confronted with the opposition of the British Government[1], who, hostile as a matter of principle, to the idea of a binding instrument in an area, where according to the Home Secretary and Minister of the Interior, at the time, Michael Howard, the UK does not need to receive lessons from anyone, however, the latter actually gave in at the end to the general wish of the other 14 Member States, nevertheless declaring conditions of the implementation of some of the measures proposed in the text of the Joint Action.

On March 19th, 1996, an agreement reached the Council for 'Justice and Home Affairs' (JHA) with respect to the agreement to be adopted in principle. The text forwarded by the Italian presidency is in fact quite on the same lines as the one proposed by the Spanish presidency. Almost all the amendments proposed by the British delegation in November 1995, have not been taken into account by the JHA due to possible parliamentary and linguistic modifications. References to public incitement to discrimination and to religious discrimination and hatred have not been deleted from the text whose formal adoption took place in June 1998 (in the original proposal the deadline was end of June 1997)[2].

Text of 'The Joint Declaration by the Italian and Spanish Presidencies (1996)'

Having regard to Article K.3 (2)(b) of the Treaty on European Union (see Chapter 1), Having regard to the initiative of the Kingdom of Spain, whereas the Member States regard the adoption of rules in connection with action to combat racism and xenophobia as a matter of common interest, in accordance with Article K.1 (7) of the Treaty in particular;

Whereas regard should be had to the conclusions on racism and xenophobia adopted by the European

1 Please refer to *Migration News Sheet*, Brussels, December 1995.

2 See *Migration News Sheet*, Brussels, April 1996. For the text of the Joint Declaration, refer to the following section.

Council in Corfu on 24 and 25 June 1994, in Essen on 9 and 10 December 1994, in Cannes on 26 and 27 June 1995, and in Madrid on 15-16 December 1995;

Whereas despite the efforts made over recent years by the Member States, racist and xenophobic offences are still on the increase;

Concerned at the differences between some criminal law systems regarding the punishment of specific types of racist and xenophobic behaviour, which constitute barriers to international judicial co-operation;

Acknowledging that international co-operation by all States, including those which are not affected at domestic level by the problem of racism and xenophobia, is necessary to prevent the perpetrators of such offences exploiting the fact that racist and xenophobic activities are classified differently in different States by moving from one country to another in order to escape criminal proceedings or avoid serving sentences and thus pursue their activities with impunity;

Emphasising the right to freedom of expression implies duties and responsibilities, including respect for the rights of others, as laid down in Article 19 of the United Nations International Convenant on Civil and Political Rights of 19December 1966;

Determined in keeping with their common humanitarian tradition, to guarantee that, above all, Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 1995 are complied with;

Wishing to build upon the work begun within the framework of Title VI of the Treaty during 1994 concerning the criminal aspects of the fight against racism and xenophobia, has decided as follows:

TITLE I

A. In the interest of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II below, to ensure effective judicial co-operation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:
   (a) Public incitement to discrimination, violence or racial hatred in respect of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin.
   (b) Public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations.
   (c) Public denial of crimes defined in Article 6 of the Charter of International Military Tribunal appended to the London Agreement of 1945 insofar as it includes behaviour which is contemptuous of or degrading to a group of

persons defined by reference to colour, race, religion or national or ethnic origin.

(d) Public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia.

(e) Participation in the activities of groups, organisations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

B. In the case of investigations into and/or proceedings against offences based on the types of behaviour listed in paragraph **A**, each Member State shall in accordance with Title II below, improve judicial co-operation in the following areas and take appropriate measures for:

(a) Seizure and confiscation of tracts, pictures or other material containing expressions of racism or xenophobia intended for public dissemination where such material is offered to the public on the territory of a Member State.

(b) Acknowledgement that the types of behaviour listed in paragraph **A** should not be regarded as political offences justifying refusal to comply with requests for mutual legal assistance.

(c) Providing information to another Member State to enable that Member State to initiate in accordance with its law legal proceedings or proceedings for the confiscation in cases where it appears that tracts, pictures or other material containing expressions o racism or xenophobia are being stored in a Member State for the purposes of distribution and dissemination in another Member State.

(d) The establishment of contact points in the Member States which would be responsible for collecting and exchanging any information which might be useful for investigations and proceedings against offences based on the types of behaviour listed in paragraph **A**.

C. Nothing in this Joint Action may be interpreted as affecting any obligations, which Member States may have under the international instruments listed below. Member States shall implement this Joint Action consistently with such obligations and will refer to the definitions and principles contained therein when doing so:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.
- The Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.
- The United Nations Convention on Genocide of 9 December 1948

- The International Convention on the Elimination of All forms of Racial Discrimination of 7 March 1966.
- The Geneva Conventions of 12 March 1949 and Protocols I and II of 12 December 1977 related to those Conventions.
- Resolutions 827 (93) and 955 (94) of the United Nations Security Council.
- Council Resolution of 23 November 1955 on the protection of witnesses in the fight against international organised crime in cases of criminal proceedings for the types of behaviour listed in paragraph A, if witnesses have been summoned in another Member State.

TITLE II

Each Member State shall bring forward appropriate proposals to implement this joint Action for consideration by the competent authorities with a view to their adoption.

The council will assess the fulfilment by Member states of their obligations under this joint action, taking into account the declaration annexed to it, by the end of June 1998 (which previously was June 1997).

This Joint Action and the annexed declaration, were approved by the Council and which are without prejudice to the application of this Joint Action.'

Divergences in the Interpretation of the Joint Action

After the Joint Action was put forth officially by the Council of the European Union, certain countries like Greece, France, the U.K. and Denmark, declared that due to their Constitution or domestic politics, some aspects of the Joint Action could be interpreted differently by them from the way other member states might interpret them.

Greece declared that with respect to title 1.B (b), it would interpret it in the light of its Constitution, which prohibits any action to be taken against persons facing prosecution on political grounds. The French, on the other hand, pointed out that the Additional protocol 1 of the Geneva Conventions of 1949 cannot be invoked against France due to the fact that France had never ratified nor signed that Protocol and thus, it cannot be taken as a translation of international customary law applicable in armed conflicts.

The United Kingdom stated that for the purpose of the implementation of the Joint Action by the U.K., when taking into consideration the general principles of U.K. criminal law, the U.K. will implement Title I, paragraph A (a to e) and respective references thereto wherever the relevant behaviour is threatening, abusive or insulting and is carried out with the intention of creating and evoking racial hatred. This would then, in accordance, with Title 1B and Title II, enable the relevant U.K. authorities to search for and seize tracts, pictures or other material in

the U.K. which is intended for dissemination in another member state and is likely to evoke racism. The U.K. finally concluded its declaration by stating that if this interpretation would cause problems, it would consult the other Member states in view of overcoming the problems raised.

With respect to Denmark, the Danish delegation stated that for the purposes of the application of the Joint Action, when considering the provisions and general principles of Danish criminal Law, Denmark will implement Title I, paragraph A (a to e) only where the 'relevant behaviour is threatening, insulting and degrading'.

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ANNEX 2

PRESIDENCY CONCLUSIONS: TAMPERE EUROPEAN COUNCIL, 15-16 OCTOBER 1999

The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. At the start of proceedings an exchange of views was conducted with the President of the European Parliament, Mrs Nicole Fontaine, on the main topics of discussion. The European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam.

The European Council sends a strong political message to reaffirm the importance of this objective and has agreed on a number of policy orientations and priorities which will speedily make this area a reality. The European Council will place and maintain this objective at the very top of the political agenda. It will keep under constant review progress made towards implementing the necessary measures and meeting the deadlines set by the Treaty of Amsterdam, the Vienna Action Plan and the present conclusions.

The Commission is invited to make a proposal for an appropriate scoreboard to that end.

The European Council underlines the importance of ensuring the necessary transparency and of keeping the European Parliament regularly informed. It will hold a full debate assessing progress at its December meeting in 2001.

In close connection with the area of freedom, security and justice, the European Council has agreed on the composition, method of work and practical arrangements (attached in the annex) for the body entrusted with drawing up a draft Charter of fundamental rights of the European Union. It invites all parties involved to ensure that work on the Charter can begin rapidly. The European Council expresses its gratitude for the work of the outgoing Secretary-General of the Council, Mr. Jürgen Trumpf, and in particular for his contribution to the development of the Union following the entry into force of the Treaty of Amsterdam.

Given that one of the focal points of the Union's work in the years ahead will be to strengthen the common foreign and security policy, including developing a European security and defence policy, the European Council expects the new Secretary-General of the Council and High Representative for the CFSP, Mr. Javier Solana, to make a key contribution to this objective. Mr. Solana will be able to rely on the full backing of the European Council in exercising his powers according to Article 18(3) of the Treaty so he can do full justice to his tasks. His

responsibilities will include cooperating with the Presidency to ensure that deliberations and action in foreign and security policy matters are efficiently conducted with the aim of fostering continuity and consistency of policy on the basis of the common interests of the Union.

TOWARDS A UNION OF FREEDOM, SECURITY AND JUSTICE: THE TAMPERE MILESTONES

1. From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.

2. The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives.

3. This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.

4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.

5. The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and

enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.

6. People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.

7. The area of freedom, security and justice should be based on the principles of transparency and democratic control. We must develop an open dialogue with civil society on the aims and principles of this area in order to strengthen citizens' acceptance and support. In order to maintain confidence in authorities, common standards on the integrity of authorities should be developed.

8. The European Council considers it essential that in these areas the Union should also develop a capacity to act and be regarded as a significant partner on the international scene. This requires close co-operation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.

9. The European Council invites the Council and the Commission, in close co-operation with the European Parliament, to promote the full and immediate implementation of the Treaty of Amsterdam on the basis of the Vienna Action Plan and of the following political guidelines and concrete objectives agreed here in Tampere.

A. A COMMON EU ASYLUM AND MIGRATION POLICY

10. The separate but closely related issues of asylum and migration call for the development of a common EU policy to include the following elements.

I. Partnership with countries of origin

11. The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.

12. In this context, the European Council welcomes the report of the

High Level Working Group on Asylum and Migration set up by the Council, and agrees on the continuation of its mandate and on the drawing up of further Action Plans. It considers as a useful contribution the first action plans drawn up by that Working Group, and approved by the Council, and invites the Council and the Commission to report back on their implementation to the European Council in December 2000.

II. A Common European Asylum System

13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.

14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR and other international organisations.

15. In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. The Commission is asked to prepare within one year a communication on this matter.

16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States. The European Council believes that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection. The Commission is invited to explore the possibilities for this.

17. The European Council urges the Council to finalise promptly its work on the system for the identification of asylum seekers (Eurodac).

III. Fair treatment of third country nationals

18. The European Union must ensure fair treatment of third country nationals who reside legally on the

territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.

19. Building on the Commission Communication on an Action Plan against Racism, the European Council calls for the fight against racism and xenophobia to be stepped up. The Member States will draw on best practices and experiences. Co-operation with the European Monitoring Centre on Racism and Xenophobia and the Council of Europe will be further strengthened. Moreover, the Commission is invited to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty on the fight against racism and xenophobia. To fight against discrimination more generally the Member States are encouraged to draw up national programmes.

20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.

21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

IV. Management of migration flows

22. The European Council stresses the need for more efficient management of migration flows at all their stages. It calls for the development, in close co-operation with countries of origin and transit, of information campaigns on the actual possibilities for legal immigration, and for the prevention of all forms of trafficking in human beings. A common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary,

the establishment of common EU visa issuing offices.

23. The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end. Member States, together with Europol, should direct their efforts to detecting and dismantling the criminal networks involved. The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children.

24. The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation. In this context, the Council welcomes the memorandum of understanding between Italy and Greece to enhance co-operation between the two countries in the Adriatic and Ionian seas in combating organised crime, smuggling and trafficking of persons.

25. As a consequence of the integration of the Schengen acquis into the Union, the candidate countries must accept in full that acquis and further measures building upon it. The European Council stresses the importance of the effective control of the Union's future external borders by specialised trained professionals.

26. The European Council calls for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States.

27. The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission.

B. A GENUINE EUROPEAN AREA OF JUSTICE

28. In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.

V. Better access to justice in Europe

29. In order to facilitate access to justice the European Council invites the Commission, in cooperation with

other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate 'user guides' on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.

30. The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.

31. Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union.

32. Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

VI. Mutual recognition of judicial decisions

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

34. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

ANNEX 3

PRESIDENCY CONCLUSIONS: EUROPEAN COUNCIL MEETING IN LAEKEN, 14-15 DECEMBER 2001 (EXTRACTS)

A true common asylum and immigration policy

38. Despite some achievements such as the European Refugee Fund, the Eurodac Regulation and the Directive on temporary protection, progress has been slower and less substantial than expected. A new approach is therefore needed.

39. The European Council undertakes to adopt, on the basis of the Tampere conclusions and as soon as possible, a common policy on asylum and immigration, which will maintain the necessary balance between protection of refugees, in accordance with the principles of the 1951 Geneva Convention, the legitimate aspiration to a better life and the reception capacities of the Union and its Member States.

40. A true common asylum and immigration policy implies the establishment of the following instruments:

- The integration of the policy on migratory flows into the European Union's foreign policy. In particular, European readmission agreements must be concluded with the countries concerned on the basis of a new list of priorities and a clear action plan. The European Council calls for an action plan to be developed on the basis of the Commission communication on illegal immigration and the smuggling of human beings;
- The development of a European system for exchanging information on asylum, migration and countries of origin; the implementation of Eurodac and a Regulation for the more efficient application of the Dublin Convention, with rapid and efficient procedures;
- The establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified. These standards should take account of the need to offer help to asylum applicants;
- The establishment of specific programmes to combat discrimination and racism.

41. The European Council asks the Council to submit, by 30 April 2002 at the latest, amended proposals concerning asylum procedures, family reunification and the 'Dublin II' Regulation. In addition, the Council is asked to expedite its proceedings on other drafts concerning reception standards, the definition of the term 'refugee' and forms of subsidiary protection.

More effective control of external borders

42. Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created. It asks the Council and the Member States to take steps to set up a common visa identification system and to examine the possibility of setting up common consular offices.

ANNEX 4

CHARTER OF FUNDAMENTAL RIGHTS OF THE EU (EXTRACTS)

CHAPTER II
Freedoms

Article 18
Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19
Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III
Equality

Article 20
Equality before the law

Everyone is equal before the law.

Article 21
Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23
Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption

of measures providing for specific advantages in favour of the under-represented sex.

Article 24
The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25
The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26
Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER V
Citizens' rights

Article 39
Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40
Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41
Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- The obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42
Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43
Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases 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 their judicial role.

Article 44
Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45
Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46
Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she 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 Member State.

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ANNEX 5

COUNCIL DIRECTIVE 2000/43/EC OF JUNE 2000 IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR ETHINIC ORIGIN

(Official Journal L 180, 19/07/2000, p. 2-26)

Text

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community and in particular Article 13 thereof,
Having regard to the proposal from the Commission(1),
Having regard to the opinion of the European Parliament(2),
Having regard to the opinion of the Economic and Social Committee(3),
Having regard to the opinion of the Committee of the Regions(4),
Whereas:

(1) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.

(2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should 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.

(3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

(6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

(7) The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.

(8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

(9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

(10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.

(11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia(5) under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

(12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.

(13) To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national

judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

(17) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

(18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(21) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

(22) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(23) Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.

(24) Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State,

with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.

(25) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2
Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3
Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals and pay;
(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
(e) social protection, including social security and healthcare;
(f) social advantages;
(g) education;
(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4
Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5
Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6
Minimum requirements

1. 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 this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II
REMEDIES AND ENFORCEMENT

Article 7
Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8
Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing

rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9
Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10
Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11
Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12
Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III
BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of

equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- Without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- Conducting independent surveys concerning discrimination,
- Publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV
FINAL PROVISIONS

Article 14
Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15
Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16
Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take

any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.
When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17
Report

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 18
Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 19
Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council
The President
M. Arcanjo

(1) Not yet published in the Official Journal.
(2) Opinion delivered on 18.5.2000 (not yet published in the Official Journal).
(3) Opinion delivered on 12.4.2000 (not yet published in the Official Journal).
(4) Opinion delivered on 31.5.2000 (not yet published in the Official Journal).
(5) OJ L 185, 24.7.1996, p. 5.

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ANNEX 6

CO-OPERATION AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE PEOPLE'S REPUBLIC OF ALGERIA (EXTRACTS)

TITLE III
COOPERATION IN THE FIELD OF LABOUR

Article 38

The treatment accorded by each Member State to workers of Algerian 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.
Algeria shall accord the same treatment to workers who are nationals of a Member State and employed in its territory.

Article 39

1. Subject to the provisions of the following paragraphs, workers of Algerian 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.

2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, death and invalidity, and also for that of medical care for the workers and for members of their families resident in the Community.

3. The workers in question shall receive family allowances for members of their families who are resident in the Community.

4. The workers in question shall be able to transfer freely to Algeria at the rates applied by virtue of the law of the debtor Member State or States, any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease.

5. Algeria shall accord to workers who are nationals of a Member State and employed in its territory, and to the members of their families, treatment similar to that specified in paragraphs 1, 3 and 4.

Article 40

1. Before the end of the first year following the entry into force of this Agreement, the Co-operation Council shall adopt provisions to implement the principles set out in Article 39.

2. The Co-operation Council shall adopt detailed rules for administrative co-operation providing the necessary management and control guarantees for the application of the provisions referred to in paragraph 1.

Article 41

The provisions adopted by the Co-operation Council in accordance with Article 40 shall not affect any rights or obligations arising from bilateral agreements linking Algeria and the Member States where those agreements provide for more favourable treatment of nationals of Algeria or of the Member States.

ANNEX 7

COUNCIL DECISION CONCERNING THE CONCLUSION OF AN AGREEMENT CONCERNING CERTAIN AMENDMENTS TO ANNEXES 2, 3, 4, AND 6 TO THE EURO-MEDITERRANEAN AGREEMENTS ESTABLISHING AN ASSOCIATION BETWEEN THE EC AND THEIR MEMBER STATES OF THE ONE PART AND THE KINGDOM OF MOROCCO OF THE OTHER PART – 01.02.2000 (EXTRACTS)

TITLE VI
COOPERATION IN SOCIAL AND CULTURAL MATTERS

CHAPTER I
WORKERS

Article 64

1. The treatment accorded by 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, remuneration and dismissal, relative to its own nationals.

2. All Moroccan workers allowed to undertake paid employment in the territory of a Member State on a temporary basis shall be covered by the provisions of paragraph 1 with regard to working conditions and remuneration.

3. Morocco shall accord the same treatment to workers who are nationals of a Member State and employed in its territory.

Article 65

1. Subject to the provisions of the following paragraphs, 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 relative to nationals of the Member States in which they are employed. The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.

These provisions shall not, however, cause the other co-ordination rules provided for in Community legislation based on Article 51 of the EC Treaty to apply, except under the conditions set out in Article 67 of this Agreement.

2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old-age, invalidity and survivors' benefits and family, sickness and maternity benefits and also for that of medical

care for the workers and for members of their families resident in the Community.

3. The workers in question shall receive family allowances for members of their families who are resident in the Community.

4. The workers in question shall be able to transfer freely to Morocco, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits.

5. Morocco shall accord to workers who are nationals of a Member State and employed in its territory, and to the members of their families, treatment similar to that specified in paragraphs 1, 3 and 4.

Article 66

The provisions of this chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries.

Article 67

1. Before the end of the first year following the entry into force of this Agreement, the Association Council shall adopt provisions to implement the principles set out in Article 65.

2. The Association Council shall adopt detailed rules for administrative co-operation providing the necessary management and monitoring guarantees for the application of the provisions referred to in paragraph 1.

Article 68

The provisions adopted by the Association Council in accordance with Article 67 shall not affect any rights or obligations arising from bilateral agreements linking Morocco and the Member States where those agreements provide for more favourable treatment of nationals of Morocco or of the Member States.

CHAPTER II
DIALOGUE IN SOCIAL MATTERS

Article 69

1. The Parties shall conduct regular dialogue on any social matter which is of interest to them.

2. Such dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration for Moroccan and Community nationals residing legally in the territories of their host countries.

3. Dialogue shall cover in particular all issues connected with:
(a) the living and working conditions of the migrant communities;
(b) migration;
(c) illegal immigration and the conditions governing the return of individuals who are in breach of the legislation dealing with the right to stay and the right of establishment in their host countries;

(d) schemes and programmes to encourage equal treatment between Moroccan and Community nationals, mutual knowledge of cultures and civilisations, the furthering of tolerance and the removal of discrimination.

Article 70

Dialogue on social matters shall be conducted at the same levels and in accordance with the same procedures as provided for in Title I of this Agreement, which can itself provide a framework for that dialogue.

CHAPTER III
COOPERATION IN THE SOCIAL FIELD

Article 71

1. With a view to consolidating co-operation between the Parties in the social field, projects and programmes shall be carried out in any area of interest to them.
Priority will be afforded to the following projects:
(a) reducing migratory pressure, in particular by improving living conditions, creating jobs and developing training in areas from which emigrants come;
(b) resettling those repatriated because of their illegal status under the legislation of the state in question;
(c) promoting the role of women in the economic and social development process through education and the media in step with Moroccan policy on the matter;
(d) bolstering and developing Morocco's family planning and mother and child protection programmes;
(e) improving the social protection system;
(f) enhancing the health cover system;
(g) implementing and financing exchange and leisure programmes for mixed groups of Moroccan and European young people residing in the Member States, with a view to promoting mutual knowledge of their respective cultures and fostering tolerance.

Article 72

Co-operation schemes may be carried out in co-ordination with Member States and relevant international organisations.

Article 73

A working party shall be set up by the Association Council by the end of the first year following the entry into force of this Agreement. It shall be responsible for the continuous and regular evaluation of the implementation of Chapters I to III.

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ANNEX 8

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EC AND THEIR MEMBER STATES OF THE ONE PART AND THE REPUBLIC OF TUNISIA OF THE OTHER PART – 26.01.1998 (EXTRACTS)

TITLE VI COOPERATION IN SOCIAL AND CULTURAL MATTERS

CHAPTER I WORKERS

Article 64

1. The treatment accorded by each Member State to workers of Tunisian nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals.

2. All Tunisian workers allowed to undertake paid employment in the territory of a Member State on a temporary basis shall be covered by the provisions of paragraph 1 with regard to working conditions and remuneration.

3. Tunisia shall accord the same treatment to workers who are nationals of a Member State and employed in its territory.

Article 65

1. Subject to the provisions of the following paragraphs, workers of Tunisian 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 relative to nationals of the Member States in which they are employed.
The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.

These provisions shall not, however, cause the other co-ordination rules provided for in Community legislation based on Article 51 of the EC Treaty to apply, except under the conditions set out in Article 67 of this Agreement.

2. All periods of insurance, employment or residence completed by such workers in the various Member States shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and survivors' benefits and family, sickness and maternity benefits and also for that of medical care for the workers and for members of their families resident in the Community.

3. The workers in question shall receive family allowances for members of their families who are resident in the Community.

4. The workers in question shall be able to transfer freely to Tunisia, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits.

5. Tunisia shall accord to workers who are nationals of a Member State and employed in its territory, and to the members of their families, treatment similar to that specified in paragraphs 1, 3 and 4.

Article 66

The provisions of this Chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries.

Article 67

1. Before the end of the first year following the entry into force of this Agreement, the Association Council shall adopt provisions to implement the principles set out in Article 65.

2. The Association Council shall adopt detailed rules for administrative co-operation providing the necessary management and monitoring guarantees for the application of the provisions referred to in paragraph 1.

Article 68

The provisions adopted by the Association Council in accordance with Article 67 shall not affect any rights or obligations arising from bilateral agreements linking Tunisia and the Member States where those agreements provide for more favourable treatment of nationals of Tunisia or of the Member States.

CHAPTER II DIALOGUE IN SOCIAL MATTERS

Article 69

1. The Parties shall conduct regular dialogue on any social matter which is of interest to them.

2. Such dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration for Tunisian and Community nationals residing legally in the territories of their host countries.

3. Dialogue shall cover in particular all issues connected with:
(a) the living and working conditions of the migrant communities;
(b) migration;
(c) illegal immigration and the conditions governing the return of individuals who are in breach of the legislation dealing with the right to stay and the right of establishment in their host countries;
(d) schemes and programmes to encourage equal treatment between Tunisian and Community nationals, mutual knowledge of cultures and civilisations, the furthering of tolerance and the removal of discrimination.

Article 70

Dialogue on social matters shall be conducted at the same levels and in accordance with the same procedures as provided for in Title I of this Agreement, which can itself provide a framework for that dialogue.

CHAPTER III COOPERATION IN THE SOCIAL FIELD

Article 71

With a view to consolidating co-operation between the Parties in the social field, projects and programmes shall be carried out in any area of interest to them.
Priority will be afforded to:
(a) reducing migratory pressure, in particular by creating jobs and developing training in areas from which emigrants come;
(b) resettling those repatriated because of their illegal status under the legislation of the state in question;
(c) promoting the role of women in the economic and social development progress through education and the media in step with Tunisian policy on that matter.
(d) bolstering and developing Tunisia's family planning and mother and child protection programmes;
(e) improving the social protection system;
(f) enhancing the health cover system;
(g) improving living conditions in poor, densely populated areas;
(h) implementing and financing exchange and leisure programmes for mixed groups of Tunisian and European young people residing in the Member States, with a view to promoting mutual knowledge of their respective cultures and fostering tolerance.

Article 72

Co-operation schemes may be carried out in co-ordination with Member States and relevant international organisations.

Article 73

A working party shall be set up by the Association Council by the end of the first year following the entry into force of this Agreement. It shall be responsible for the continuous and regular evaluation of the implementation of Chapters 1 to 3.

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ANNEX 9

RELEVANT PRIMARY LEGISLATION

Treaty Establishing the European Community (extracts)

1. Preamble (extracts)

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples.

2. Part One, Principles

Article 1 (ex Article 1)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

Article 2 (ex Article 2)

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3 (ex Article 3) (part)

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(d) measures concerning the entry and movement of persons as provided for in Title IV;

(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;

Article 5 (ex Article 3b)

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 12 (ex Article 6)

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.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 13 (ex Article 6a)

Without prejudice to the other provisions of this Treaty and within the limits of the powers 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.

Article 14 (ex Article 7a)

1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.

2. 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.

3. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

3. Part two, Citizenship of the Union

Article 17 (ex Article 8)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this

Treaty and shall be subject to the duties imposed thereby.

Article 18 (ex Article 8a)

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.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.

Article 19 (ex 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. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 190(4) and to 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 right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 20 (ex Article 8c)

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. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

Article 21 (ex Article 8d)

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.

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.

Article 22 (ex Article 8e)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on 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.

TITLE III: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

Chapter 1
Workers

Article 39 (ex Article 48)

1. Freedom of movement for workers shall be secured within the Community.

2. 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.

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 within 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.

Article 40 (ex Article 49)

The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 39, in particular:
(a) by ensuring close co-operation between national employment services;
(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of

eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 41 (ex Article 50)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 42 (ex Article 51)

The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:
(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
(b) payment of benefits to persons resident in the territories of Member States.
The Council shall act unanimously throughout the procedure referred to in Article 251.

Chapter 2
Right of establishment

Article 43 (ex Article 52)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting‹up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected,

subject to the provisions of the Chapter relating to capital.

Article 44 (ex Article 54)

1. In order to attain freedom of establishment as regards a particular activity, the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall act by means of directives.

2. The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close co-operation between the competent authorities in the Member States in order to ascertain the particular situation within the Community of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, insofar as this does not conflict with the principles laid down in Article 33(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by co-ordinating to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 45 (ex Article 55)

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are

connected, even occasionally, with the exercise of official authority.

The Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this Chapter shall not apply to certain activities.

Article 46 (ex Article 56)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the co-ordination of the above mentioned provisions.

Article 47 (ex Article 57)

1. In order to make it easier for persons to take up and pursue activities as self‹employed persons, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

2. For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the co-ordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking‹up and pursuit of activities as self‹employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.

3. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon co-ordination of the conditions for their exercise in the various Member States.

Article 48 (ex Article 58)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. "Companies or firms' means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are nonprofit making.

Chapter 3
Services

Article 49 (ex Article 59)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Article 50 (ex Article 60)

Services shall be considered to be "services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services' shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 51 (ex Article 61)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 52 (ex Article 63)

1. In order to achieve the liberalisation of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the European Parliament, issue directives acting by a qualified majority.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 53 (ex Article 64)

The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 52(1), if their general economic situation and

the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 54 (ex Article 65)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.

Article 55 (ex Article 66)

The provisions of Articles 45 to 48 shall apply to the matters covered by this Chapter.

TITLE IV: VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS

Article 61

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 provisions of Article 62(2) and (3) and Article 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;

(e) measures in the field of police and judicial co-operation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.

Article 62

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

(2) measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in

carrying out checks on persons at such borders;
(b) rules on visas for intended stays of no more than three months, including:
(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
(ii) the procedures and conditions for issuing visas by Member States;
(iii) a uniform format for visas;
(iv) rules on a uniform visa;

(3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

Article 63

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, (b) minimum standards on the reception of asylum seekers in Member States,
(c) minimum standards with respect to the qualification of nationals of third countries as refugees,
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:
(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;

(3) measures on immigration policy within the following areas:
(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents;

(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above.

RELEVANT SECONDARY LEGISLATION

Regulations

EEC No 1612/68 of 15.10.1968
on freedom of movement of workers within the Community

EEC No 1251/70 of 2.06.1970
on the right of workers to remain in the territory of a Member State after having been employed in that State

EEC No 1408/71 of 14.06.1971
on the application of social security schemes to employed persons and their families moving within the Community

EEC No 574/72 of 21.03.92
fixing the procedure of the previous regulation

Directives

64/221/EEC of 25.02.1964
on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health

68/360/EEC of 15.10.1968
on the abolition of restrictions on movement and residence for workers and their families

73/148/EEC of 21.05.1973
on the abolition of restrictions on movement and residence with regard to establishment and provisions of services

75/35/EEC of 17.12.1974
extending the scope of the Directive No 64/221/EEC

77/452/EEC of 27.06.1977
concerning mutual recognition of diplomas (nurses)

77/486/EEC of 25.07.1977
on the right of education of the children of migrant workers

89/48/EEC of 21.12.1988
on a system for the recognition of higher education diplomas

90/365/EEC of 28.06.1990
on the right of residence for employees and self-employed persons who have ceased their occupational activity

91/439/EEC of 29.07.1991
on driving licences

92/51/EEC of 18.06.1992
on a general system for the recognition of professional education and training

93/96/EC of 29.10.1993
on the right of residence for students

93/109/EC of 06.12.93
right to vote and to stand in European elections

94/80/EC of 19.12.1994
right to vote and to stand for municipal elections

99/42/EC of 07.06.1999
establishing a system of recognition of qualifications

Decision of the Council

95/553/EC of 19.12.95
regarding the protection for EU-citizens by diplomatic and consular representation

Common Position

of March 2000, on the general system of recognition of qualifications

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