

To Circumvent or Implement: Prospects for the Future Development of a European Union Anti Race Discrimination Policy

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INTRODUCTION

Between June and November, 2000, the Council of Ministers of the European Union unanimously approved two anti-discrimination directives and an action program designed to facilitate implementation of the directives (Council 2000 a, b, c). Both directives were based on the recently incorporated anti-discrimination article (Article 13) of the Amsterdam Treaty, which provides the legal competence to combat a variety of forms of discrimination. The first directive aims to implement “the principle of equal treatment between persons irrespective of racial or ethnic origin” across a broad range of areas including access to employment, social security, goods and services, and housing (Council 2000a). The goal of the second directive is “to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation” (Ibid, 2000b).

The following analysis focuses on the prospects for implementation of the first directive (racial and ethnic discrimination) with a particular emphasis on issues related to the legal position of third country nationals, who, although specifically addressed in the directive are at the same time subject to vague exceptions, conditions, and caveats.¹

My principle argument is that *effective* implementation (law on the books and enforcement practice) of the directive prohibiting racial and ethnic discrimination requires full and unambiguous protection for long-term, legally resident third country nationals. Although the directive purports to protect third country nationals, it permits the perpetuation of their ill-defined legal status by explicitly excluding nationality as one of the prohibited grounds and further, by excepting from the directive’s scope unspecified, but already existing “provisions and conditions” related to third country nationals’ current legal status, treatment, entry, residence, employment and occupation (recital #13; Article 3.2). The significance of these exclusions and conditions for implementation of the equal treatment principle will be analyzed further in part two of this essay.

The directive’s ambiguous clauses regarding conditional protection of third country nationals insures that their rights to equal treatment, especially on the EU level, will

remain uncertain, until their rights in other areas of EU law are clarified and harmonized. This will depend in part on development of legal measures based on provisions in Title IV of the Amsterdam Treaty which outline some limited rights of residence, work, and free movement of third country nationals. Development in these areas, however, is unlikely to bolster the integrity of the equal treatment principle, unless the principle of nondiscrimination on the basis of nationality—which is excluded from the directive as one of the prohibited grounds—is extended to all long-term, legally resident third country nationals.

Nondiscrimination on the basis of nationality is a well-developed concept in EU law and has provided the legal basis for the European Court of Justice's (ECJ) extensive development of free movement for workers as a fundamental right. The justification for the exclusion of nationality from the new directive is that both the Treaties (Article 12, 39) and Regulations (such as 1612/68) already cover it. Nevertheless although the Treaty articles do not specify the meaning of "nationality", it has been applied by the Court exclusively to citizens of the Member States (*Meade* 1984, para. 7; *Awoyemi* 1998, para. 29), while Regulation 1612/68, meant to clarify Treaty articles related to free movement of workers, repeatedly declares that [only] nationals of the Member States (and their family members) enjoy rights to freedom of movement. Furthermore, although some limited free movement rights (travel for up to three months) have been granted to third country nationals and others related to provision of services are being proposed (European Commission 2001a), as of now, the most relevant and basic freedom of movement principles relating to rights to reside in, to look for work and/or work in a Member State other than the Member State of residence are still after fifteen years of debates among Member States and between them and EU institutions, a source of controversy.

The connection between anti-race discrimination measures, freedom of movement and equal treatment for third country nationals inheres in the long-standing Member State ambition (reflected in Article 14) to develop an internal market without frontiers. This development requires full freedom of movement for persons, capital, goods, and services. Indeed the European Commission, the European Parliament, and NGO's have over the past fifteen years consistently urged the reluctant Member States to recognize that the development of the internal market depends on freedom of movement and

nondiscrimination for *all legal residents* within the EU as per Articles 12 and 14 (see documentary history in Handoll 1995). The problem is that most legal residents do not enjoy equal rights with EU citizens to freedom of movement and nondiscrimination on the basis of nationality—a major tenet of internal market laws and rules.

Whereas EU citizens possess supranationally guaranteed rights to secure residence, freedom of movement within the EU, free access to a wide range of employment opportunities, and protection against discrimination based on nationality, non-EU residents are largely subject to the variable national laws on these matters (Rittstiegl and Rowe 1992, 17-18). Their freedom of movement within the internal market of the EU, in particular, is sharply limited. For third-country nationals, therefore, internal borders are still formidable barriers to equal treatment, in spite of the European Court of Justice's (ECJ) increasingly more liberal interpretations of residence and work rights for some legal residents covered by Association and Cooperation Agreements. The Agreement with Turkey (in force, 1963) and the Association Council Decision (1/80), for example, offers some rights to Turks residing and working in the member-state of residence pertaining to family members, employment, freedom of movement, and discrimination based on nationality, which have been reviewed, sanctioned, and in some cases given direct effect by the ECJ (meaning that they can invoke these rights in national courts). One of the most recent and increasingly rare examples of the Court's expansive and liberal interpretation of these rights is the recent case in which it decided that the equal treatment rule in the Turkish Association Council Decision (3/80 regarding social security) has direct effect and that therefore, Turkish workers in the EU are entitled to rely on it before the courts of the Member States (*Sürül* 1999, para. 74, 102-104). For the most part however, rights deriving from Association Agreements and Court interpretations of them are considerably limited, qualified and conditional in comparison with EU citizens.

Other categories of third country nationals who enjoy some limited rights to free movement and nondiscrimination are family members of EU citizens as well as those traveling with EU service providers (see Craig and de Burca, ch.16, for an overview of law and policy). But these rights are limited, conditional and derivative, not independent. Furthermore, those third country nationals not protected at all by Association Agreements

may have some variable rights on the national level, but are virtually invisible--aliens in a profound sense, on the European level (Faist 1995, 179).²

Prospects for effective implementation of the new anti-discrimination directive and its relation to the development of rights for third country nationals can be analyzed in terms of the specific processes which have influenced the initiation and development of the policy to date. The political and legal issues as well as the changing construction of these issues over the last fifteen years by Community institutions, Member States, and members of the transnational anti-race discrimination network show a continuity regarding factors obstructing as well as facilitating progress in this area. The debates regarding the relationship between third country nationals' rights to equal treatment and the development of an EU-level anti-race discrimination policy, for example, have significantly influenced the political processes, policy justifications, legal debates, and omissions which constitute the fits and starts of policy development. Therefore, in order to examine how the overlap between anti-race discrimination proposals and migration policy have affected development of rights for both citizens and noncitizen minorities, I will first analyze legal and political processes which have influenced the initiation and development of anti-race discrimination policy up until 1997. Then I will examine recent (post-1997) political and legal texts, debates, and proposals, highlighting the procedural and substantive factors which are contributing to or complicating prospects for further policy development.

The goal of the first section is to show how policy issues were gradually being redefined and renegotiated across borders and levels of government over a fifteen year period beginning in 1985. The goal of the second section is to employ the empirical examination of the first section to analyze the post-Amsterdam policy jam at the intersection of race, nationality, and citizenship. I'll conclude by speculating, in light of this analysis, on prospects for effective implementation of the new anti-race discrimination directive (deadline, July 2003).

I. POLICY INITIATION AND DEVELOPMENT

Competence Games

The first concrete step toward the development of an EU level anti-race discrimination policy, after more than a decade of declarations and resolutions, was

taken in June 1997 with the incorporation a new anti-discrimination Article into the first pillar of the EU Treaty which enables Community action to combat racial discrimination:

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 13).

The new Article eliminated a major obstacle to Community action: the claim made at different times by different Member States, but most consistently by the United Kingdom (UK) under Margaret Thatcher and John Major, that the Community lacked legal competence to legislate in this policy area because there was no specific Treaty Article which addressed racial discrimination .

This claim regarding the lack of a Treaty Article was more a politically contrived excuse for nonaction than a bona-fide legal obstacle to Community legislation. The invocation of the legal gap disguised the political resistance to ceding sovereignty in an area traditionally dominated by member states.

A common argument (pre-Amsterdam) which purported to explain the omission of a common anti-race discrimination policy, for example, contended that neither the original Rome Treaty nor the Treaty on European Union (TEU) contained provisions on race discrimination, and that therefore, there was no European level competence to pass legislation in this area. This is supposed to explain also, why gender and nationality policies (Articles 119 and 48 TEU, now 141 and 39) existed, but not anti-race discrimination policies. A treaty provision, however, does not guarantee policy development any more than a lack of a provision prevents policy action (Nugent 1994, 270). In the environmental area, for example, policymaking competence, beginning in the early seventies, incrementally shifted to the EU level, despite the lack of a provision in the Treaty of Rome. (Ibid. 218, 270). The competence in this case, which developed without explicit Treaty foundation by means of legislation and ECJ interpretation of it, was confirmed and extended by subsequent Treaty amendments, but not created by them.

Furthermore, although Article 119 (now 141) provides a Treaty base for legislation on equal pay for men and women, it lay dormant for almost 20 years before it was actually utilized to promote equality policies which extended far beyond equal pay (Mazey 1998).

In the early phases of the development of anti-race discrimination policy, several NGO's, such as the Starting Line Group in 1992, found a way out of the competence trap by relying on legal interpretations of already existing Treaty articles (such as 235, now 305). Armed with these interpretations of Community competence, the group proposed an anti-race discrimination directive based on the 1976 Equal Treatment Directive dealing with sex discrimination (Starting Line Group 1993). The hope was that the Commission would present this text as a draft proposal to the Council of Ministers. The Commission was reluctant, however, to propose legislation without a clear Treaty base. Past experience had shown that even in less controversial areas than anti-race discrimination, Member States had manipulated the competence card to prolong negotiations in order to kill or significantly dilute proposals they did not favor (see Simitis 1995, on such difficulties concerning data protection policy)

The next opportunity to propose a Treaty amendment conferring the necessary legislative competence, would not come until the start of the 1996 IGC. In the meantime, the European Commission and NGO's began to fashion arguments and devise strategies and campaigns to drum up political support in all of the Member-States for an amendment. By 1995, there were several proposals for Treaty amendments tabled by EU institutions as well as NGO's (Starting Line Group 1994; Standing Committee of Experts 1995; Consultative Commission 1995; Irish Presidency 1996) And finally, in June 1997, the Member-States voted unanimously to incorporate a version of these proposals into the Amsterdam Treaty.

The key question, given almost two decades of Member State resistance to any form of EU-level measures, is how and why did the issue of racial discrimination reach the EU agenda in the mid-nineties and not earlier?

There are a variety of ways one might attempt to answer this question. I am going to focus in this section on the policy issues as defined and debated by two sets of key actors—the transnational policy network which emerged in Europe in the late eighties to promote measures to combat racial discrimination and the Member States.

The Network

Leading actors in the anti-discrimination network were the European Parliament (EP), the European Commission, and founders of the transnational NGO, the Starting Line Group (SLG). Founders of SLG included the Churches Commission for Migrants in Europe, the Commission for Racial Equality (CRE) in the UK, the Dutch National Bureau Against Racial Discrimination (LBR), and a bit later, the Berlin Foreigner Commissioner and the Belgian Center for Equal Opportunities.

Nations and Networks

In addition to these central members of the transnational network, the Member-States themselves as official participants in the European Council and the Council of Ministers also played rather diverse and often antagonistic roles on the periphery of the anti-discrimination policy network and thus influenced the timing and content of network proposals.

The multi-level policy environment, especially in the mid-nineties, enabled NGO's, rogue government agencies, such as the CRE, and sub-national organizations, such as the Berlin Foreigner Commissioner, to challenge or even undermine official national policy by cultivating cross-national relationships and by lobbying at the EU, national, and local levels.

The European Commission during this time cultivated close relationships with several key NGO's and sympathetic governmental agencies. In this way the Commission indirectly lobbied the national governments, sounded out the political mood, and acquired comparative and technical information relating to national policies, law, and enforcement mechanisms. This information strengthened the negotiating position of the Commission by enabling it to devise strategic arguments for its proposals to make them more acceptable to Member-States. In the run up to the IGC 1996, for example, the Commission actively encouraged NGO's to submit proposals for reform of anti-discrimination law and policy (Hix and Niessen 1996, 14). (For a detailed discussion of early network building processes and proposals see Wallace 2000, chps. 3-4).

Agenda Setting Phases of Policy Development

Policy development entailed two main phases: The pre-1994 phase was dominated by a diffusion of policy ideas, the coalition building and lobbying activities of the developing transnational network, while the post-1994 phase, leading to the 1996 IGC, was largely driven by Member States' initiatives. These initiatives, however, were based on proposals, justifications, and texts already prepared by network actors, who in turn continually sounded out Member State preferences. (on agenda-setting see: Dearing and Rogers 1996; Kingdon 1995; Peters 1994; Baumgartner and Jones 1993; van Dijk 1993, 1997; Schain 1993; Baumgartner 1989; Edelman 1988; 1964; Bachrach and Baratz 1970 [1962]; Lasswell 1949; for phases see: Kenis and Schneider 1991, 43; Staeck 1996, 284)

Pre-1994: Network Building and Issue Definition

The pre-1994 phase (beginning in 1985) consisted of attempts of various actors on national and European levels to rally support for a Community level anti-race discrimination policy. This entailed, first of all political mobilization strategies to attract allies in anti-discrimination organizations across Europe. Secondly, actors forming transnational alliances began to identify problems and frame justifications for Community action (human rights, internal market logic, freedom of movement), basically turning the raw social condition of racism within Europe into a Community policy problem.³

The specific policy justifications, however, revolved around the resurgence of racism and xenophobia in Europe during the eighties and to the lack of provisions against racial discrimination in the newly drafted Single European Act (SEA) (1986). Various actors came together in a variety of venues to analyze the reasons for the increase in racist behavior within the Community and its implications for the rights of minorities, particularly in light of the planned completion of the borderless internal market. Efforts, however, on the part of the European Commission to promote equal treatment policies encountered stiff resistance from Member States intent on guarding labor markets, national sovereignty, and access to citizenship.

Many of the Community-level disputes about competence in the anti-race discrimination area had arisen (and still do) out of the overlapping conflicts within two related areas of social policy: labor law and migration policy.

The European Commission attempted on numerous occasions to resolve issues related to disputes in these areas, especially those disputes which impeded development of measures promoting the integration of third country nationals. By the mid-eighties, it issued its Guidelines for a Community Policy on Migration, to justify Community coordination of Member State policies in order to better insure the integration of both citizen and noncitizen migrants. More specifically, it stressed the need for coordinated policies in light of the changed economic and social circumstances of the mid-eighties compared to a decade earlier: shortage of jobs, new technologies, structural changes and a new settled immigrant population. Uncoordinated policies had resulted in non-implementation of Association and Cooperation Agreements, injustice and discrimination, social exclusion, contradictory and vague rules regarding work and residence permits, and lack of information regarding the rights of migrant workers. The Commission further argued that “migrant communities, whether of Community or non-Community origin, face much the same problems in their social and working life. It is a constant factor of the Community approach to these problems that the aim should be equality of treatment in living and working conditions for all migrants, whatever their origin, and workers who are nationals” (European Commission 1985 b, 5; 7--8; 16).

The European Parliament was generally in favor of the Commission’s proposals for a Community migration policy which included equal treatment for third country nationals but thought more attention should be paid to the situation of migrant women and the coordination of national laws to combat racism and xenophobia (EP 1985 b, 464, 466-467).

The Council’s response to the Commission’s Guidelines, although vaguely positive, nevertheless included a pointed assertion of Member State jurisdiction in certain areas of migration policy: “whereas, however, matters relating to the access, residence, and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States, without prejudice to Community agreements concluded with third countries...” (Council 1985, 18).

By July 1985, after a series of futile attempts to coordinate member state migration policies by means of non-binding instruments (Mancini 1988, 21-25, 42), the European Commission issued a Decision (based on the social policy provisions of former Article 118) setting up a prior communication and consultation procedure on

migration policies regarding third countries (1985a). Article I of the Decision required states to inform the Commission and other Member-states of all measures and draft measures relating to non-Community workers' entry, residence, and employment situations, including equal treatment in living and working conditions, integration into the workforce, cultural integration, and finally, policies of voluntary return. An additional Commission objective was to ensure that national policies in this area conformed to Community policies (Ibid.).

Two months later, the Federal Republic of Germany, the United Kingdom, France, the Netherlands, and Denmark challenged the Commission's Decision setting up a consultation procedure, claiming that Article 118 did not confer power on the Commission to issue binding decisions in the area of migration policies regarding non-member countries. Most Member-States supported this claim with two main overlapping arguments 1) Migration policy falls outside the scope of Article 118; 2) This policy area also falls within the exclusive jurisdiction of the Member-States.

The European Court of Justice (ECJ) decided that migration policy, including workforce integration of third-country nationals, does fall within the scope of Article 118, since this issue is related to Community social policy--in particular, labor market policy. Furthermore, Article 118 does grant the Commission procedural competence to issue binding decisions in this same area. Nevertheless, the Court declared the Commission's Decision void in so far as it had *exceeded* the powers conferred on it by Article 118 by first extending the scope of the consultation procedure to cover cultural integration of third-country nationals, and second, by exceeding its purely procedural powers by imposing a substantive obligation on Member-states intended to prevent them from adopting measures which might not be in conformity with Community policies (*Germany and Others v. the Commission*, also known as the *Migration Policy Case*: ECJ 1987 at para. # 42).

Shortly after this partial Member-state victory regarding their jurisdiction over matters relating to third-country nationals, the European Parliament (EP) published the Evrigenis Report in December, 1985, on the rise of racism and xenophobia in Europe.

This represented one of the first efforts to conduct an organized transnational debate on the Community level about the issue of racial discrimination. The report based on a series of public and private hearings drew on the written and oral submissions of

Commission officials, members of national parliaments, individual experts, and a multitude of national and international organizations. It concluded that xenophobia and increasing tension between different communities

has a distressing effect on the immigrant communities which are daily subject to displays of distrust and hostility, to continuous discrimination, which legislative measures have failed to prevent, when seeking accommodation or employment or trying to provide services, and in many cases, to racial violence, including murder... (101).

Persistent racism and xenophobia was attributed to Member States' varying laws and lax enforcement of laws that did exist, and to the lack of explicit Community competence to develop remedial policies (Ibid., 78, 80, 96, 105;). Consequently, it called for the creation of Community competence, and/or more favorable interpretations of it, to enable the development of concrete Community level anti-racist policies which included equal treatment for third country nationals.

Following up on one of the Evrigenis Report's recommendations, the European Parliament, the Council and the Commission in 1986 issued a Joint Declaration against racism and xenophobia. The Declaration professes a deep commitment on the part of Community institutions "to ensure that all acts or forms of discrimination are prevented or curbed" and affirms respect for fundamental rights, human dignity, and the "principle of freedom of movement" for both citizens and non-citizen workers (European Commission 1997, 12; OJ C 158, 25. 6. 1986).

The European Parliament, from the mid-eighties through the nineties, repeatedly criticized both the Commission and the Council for the absence of policy relating to non-discrimination and freedom of movement of non-Community migrants. As early as 1989, it exhorted the Commission to draft a directive "for the harmonization of the most effective measures in the legislation of the member states designed to combat discrimination against immigrants and ethnic minorities" (EP 1989, 43). Shortly thereafter, it reprimanded the Council for excluding third country nationals from its resolution on combating racism and xenophobia in the Community and admonished it to adopt a declaration on these issues which does include them (EP 1990b, 179; see also EP 1990c)

In 1990, the EP, in response to five years of nonaction, once again held a series of hearings and transnational debates and issued an even more extensive report on the rise of racism and xenophobia. The report reiterated earlier recommendations and added proposals for Treaty amendments and directives, again including rights for third country nationals. The most significant recommendation was for a draft directive to be completed by March 31, 1991 "to provide a Community framework of legislation against any discrimination connected with belonging or not belonging to an ethnic group, nation, region, race or religion, covering all Community residents" (#31, 158). It also called for a European Residents Charter to address the issue of freedom of movement and discrimination regarding third country nationals in light of the coming establishment of the internal market and in view of the lack of provisions in the SEA to address the rights of members of third countries in relation to these issues. (#33, 158).

Most of the Committee's recommendations for European level anti-discrimination provisions were incorporated into the European Parliament's November 1990 resolution on the upcoming IGC on European Union (which was to begin in Rome in December). Articles 49 and 51 of this resolution, for example, dealt explicitly with equal treatment and free movement for citizens and resident noncitizens of third countries (EP 1990d, 225).

The Commission, as well, issued several communications on the same themes, calling for policies outlawing racial discrimination and for equal treatment and freedom of movement for third country nationals legally resident in the community (see for example, European Commission 1991, 25, 26; 1992, 1, 3-4, 7). The Commission proposals, studies, and reports, EP resolutions and NGO (Starting Line) campaign texts for an anti-race discrimination directive became increasingly more pointed in the run-up to the Maastricht IGC 1990-1991.

By the Maastricht IGC 1990--1991, in the context of unemployment, immigration and asylum debates, and prospects for further enlargement, it became clear that neither the Community institutions, the Member States, nor the two sides of industry were going to cooperate in any effective way to propose solutions to the Community wide problem of racial discrimination and equal treatment for third country nationals.

At Maastricht, the usual politics of nondecision with regard to fundamental rights, equal treatment for third-country nationals, and measures against racial discrimination

was perpetuated. Part of the problem, aside from an overall lack of political will, was that the connection between citizenship, immigration and free movement rights and their relevance to social policy (itself set on two separate tracks, one inside the Treaty and one attached to it by means of a protocol) was not recognized, evidenced by the fact that they were placed in different sections of Treaty and subject to different voting procedures, with different legal weight (Article K.1 in JHA, Article 100c in the Treaty proper, and Article 2.3 in the Social Protocol, for example). Furthermore, the establishment of EU-level citizenship (Article 8) did not include legally resident, long term third-country nationals (Shaw 1994, 297; 302). Consequently, in spite of the Joint Declaration on Fundamental Rights in 1977 and Joint Declaration Against Racism and Xenophobia in 1986 and years of impassioned pleas for competence to combat racial discrimination, the issues of legally binding fundamental rights as well as racial discrimination did not make the active agenda at Maastricht.

The Sovereignty Shield

Member State resistance forms the countercurrent to the development of anti-race discrimination policy, especially in the pre-1994 phase of policy (non)development.

Member States, especially in the eighties--given increased immigration (settled immigrants, family unification, a bit later refugee flows), high levels of unemployment and the intermittent politicization of these issues--became increasingly concerned about the erosion of sovereignty in the areas of migration and social policy, but particularly in the area of immigration policy and labor market access.

States' vigilance over immigration policy, in particular, was a major stumbling block for advocates of a Community policy against racial discrimination which included equal treatment and freedom of movement rights for third country nationals.

As long as a common policy regarding external borders of the EU remained elusive, States insisted on retaining control over internal, national borders (except with regard to EU nationals, but even here there was plenty of resistance and numerous court cases).⁴

Thus, with each new step toward European integration and formal declarations of commitment to development of the internal market, Member States insisted more adamantly on confirming their control over national immigration policy pertaining to

third country nationals (this concern was also reflected in their preference for ad-hoc “cooperation” and intergovernmental instruments, such as Schengen agreement of 1985, as opposed to binding Community measures). In 1986, for example, they proclaimed their exclusive competence regarding immigration policy in two declarations attached to the Single European Act (1986) (see extracts in Handoll 1995, 472). Although the Member States acknowledged some already established Community powers regarding third country nationals, the extent of these powers, even including consultation procedures and Association Agreements, was not clearly specified in the Treaties and was thus still open to interpretation and political challenge (see, for example, the above mentioned *Migration Policy Case 1987* and several ECJ cases pertaining to the interpretation of Association Agreements such as *Demirel 1987*; *Sevince 1990*; *Kus 1992*; *Eroglu 1994*; *Yousfi 1994*, to name a few)⁵

The Commission, in attempting to limit the political force of Member States’ nationality and migration declarations (which in any event were not capable of undermining the legal effects of the SEA), argued that the establishment of the internal market must, by definition and “logic”, include freedom of movement for all legally resident individuals. It reinforced this assertion by reminding the Member States that policies relating to the establishment of the internal market falls within its exclusive competence and therefore leaves no margin of discretion to the Member States (d’Oliveira 1994, 267--268, referring to the Commission Communication of 6 May 1992 in Bull EC 5, 1992; and Handoll 1995, 383-384, referring to a similar Commission statement in SEC (92) 877 fin)

The Member States, however, were determined to retain control over immigration policies and their related citizenship and naturalization laws. The occasion for yet another declaration of control over these areas arose with the establishment of Citizenship of the Union by means of Article 8 in the Maastricht Treaty. This time they explicitly asserted that

wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency

and may amend any such declaration when necessary (text in Handoll 1995, 479).

Denmark (whose first ratification referendum failed) added its own separate protocol on the same theme. By 1997, the same Member State trepidations regarding loss of control of citizenship and nationality rules is apparent in an added clause in the citizenship Article (renumbered 17) of the Amsterdam Treaty which emphasizes that “citizenship of the Union shall complement and not replace national citizenship.”

Issue Definition: Logical but Untenable links

In light of Member State concerns about labor market access, the relationship between external and internal borders, and sovereignty regarding nationality and citizenship rules, the link forged by proponents of a common anti-race discrimination policy between citizens and noncitizens constituted the major obstacle to Member State acceptance of a common anti-race discrimination policy. Freedom of movement for workers constituted this link between citizens and noncitizens.

Thus, political arguments in favor of maintaining the link contained two basic elements: 1) Freedom of movement for *citizens* was undermined by the lack of Community provisions against racism. Minority citizens--deprived of a common policy to coordinate the various levels of Member State protection to insure legal recourse in cases of racial discrimination--would not in fact be “free” to move freely. Although citizens might be able to rely on prohibitions pertaining to discrimination on the basis of nationality, this would not adequately address the specific issue of racial discrimination. The lack of a common policy against racial discrimination, in other words, turned freedom of movement into a sham for minority citizens. 2) Lack of freedom of movement rights for legally resident *non-citizens* was viewed as a form of institutionalized racism and more, put them at a disadvantage vis à vis citizens regarding access to employment in the internal market and thus reinforced their inequality .

(Hoogenboom 1992, 16)

In sum: the key issue for ethnic minority citizens, then, was defined as the lack of EC level anti-race discrimination provisions to create a uniform level of protection which could be relied upon when exercising their freedom of movement rights. The key issue for legally resident noncitizens (third country nationals) was the lack of freedom of

movement rights or only limited and conditional ones. The issue in common was racial discrimination, i.e., de facto discrimination based on color, ethnicity and religion, regardless of citizenship status.

These overlapping issues informed the Starting Line Group's (1992) campaign for an EU level anti-race discrimination directive (modeled on the 1976 Equal Treatment Directive regarding sex discrimination). But given the intransigence of Member States at Maastricht, the Commission was reluctant to propose measures without explicit competence and informally suggested abandoning the directive campaign in favor of a campaign in the run up to the next IGC for a Treaty Amendment (which would create the necessary competence). The pre-1994 period, therefore, is primarily about the legislative proposals the Commission did *not* make because it "anticipated that they would provoke strenuous opposition...and perhaps sanction" (Bachrach and Baratz 1970 [1962], 272, 273).

The pre-1994 agenda-setting phase might also be characterized as a long "softening up" process, described by John Kingdon as a prolonged preparatory period during which advocates raise the policy problem, float proposals for solutions, and push their ideas in many different forums in order to gain the attention and acceptance of potential allies and key policymakers. "Then when a short-run opportunity to push their proposals comes, the way has been paved, the important people softened up" (1995, 128).

Post-1994 Agenda-Setting: Forging and Breaking the Link Between Anti-Race Discrimination and Equal Treatment for Third Country Nationals

The short-run opportunity was the run up to the 1996 IGC. During this second agenda-setting phase, which began in the mid-nineties, the Starting Line Group shifted its strategy from promotion of a directive to promotion of an anti-race discrimination Treaty amendment.

The shift in campaign strategy entailed an appropriation of the Member State definition of the policy problem as lack of competence. Unlike the Member States, however, the network used the definition of the problem to vigorously lobby for the most obvious solution: *creation* of competence at the next IGC via an amendment. Thus Member States found themselves confronted with proposals for a solution to a problem which they had originally defined to *avoid* solutions. Member States could no longer credibly rely on their procedural definition of the problem as lack of competence to keep

the issue off the agenda. They responded, therefore, by attempting to steer negotiations involving the nature of a solution. This allowed them to regain control over the terms of the debate and fence in the final outcome.

A significant turning point in this regard occurred at Corfu 1994. Here the European Council, led by Chancellor Helmut Kohl and President Francois Mitterand proposed the creation of a Consultative Commission

- I. to develop a comprehensive strategy at the Union level aimed at combating acts of racist and xenophobic violence and incitement to racial hatred and to investigate the possibilities for the approximation of legal measures and procedural practices of the Member States in these areas
- II. to introduce common training programs for the relevant authorities in the Member States to better manage the problem of racism and xenophobia, particularly its transnational aspects (my translation from the German version of this text reprinted in Schneider 1994, 72; for excerpts in English, see Commission 1997, 49).

Although these proposals related mostly to criminal law measures which would have been incorporated into the intergovernmental pillar (with limited binding effects), they did place the issue of racism squarely on the IGC agenda. Furthermore, the Consultative Commission, in addition to devising measures based on the Corfu recommendations, also proposed creation of competence to combat racial and religious discrimination, and in this way added the issue of EU-level anti-discrimination policy to the official list of agenda items.

More significantly, the Starting Line Group's proposal for a Treaty amendment (Starting Point 1994) directly influenced the Consultative Commission's own proposals, which was to be expected given the Group's participation in several of this Commission's meetings at which it presented its own draft proposals. (The SLG influence was later informally acknowledged by the chair of the Consultative Commission, Jean Kahn (Chopin and Niessen 1996, 2).

Although it incorporated key elements of the SLG proposal, the Consultative Commission's was a weaker text. It eliminated the positive obligation, hedged on qualified majority voting, and weakened Parliament's role. Also it eliminated any mention of legally resident noncitizens, which had been part of the Starting Line's text.

Nevertheless, the explanatory sections of the Commission's text did elaborate on the connection between effective anti-race discrimination policies and equal treatment for third country nationals. The Consultative Commission emphasized, for example, the equal treatment principle as a core aspect of human rights, the European traditions of tolerance and democracy, and economic considerations such as the smooth functioning of the internal market which necessitates freedom of movement and equal access to employment for all legally resident individuals, citizens or not within the European Union (Consultative Commission 1995, 67).

In this relation, the Consultative Commission further recommended that noncitizens who have been legally resident for at least five years within one Member State should be granted the same rights and duties, including freedom of movement, as citizens of the Union (Ibid., 46). It suggested alternatively that such individuals be granted citizenship of the Union which would automatically grant them freedom of movement rights (Ibid., 54). In addition to grounding these proposals in the fundamental rights which form part of the general principles of Community law (Ibid., 52), the Consultative Commission also argued that delaying equal treatment for legal residents within the Union could not be justified by claims that immigration from outside the European Union was not yet under control. The issue of noncitizens' rights pertained to those already legally resident within the European Union. They should not be penalized for lack of Member State agreement on a common immigration policy. Furthermore, according to the Commission, it made no sense to grant third country nationals rights based on their family relationship with EU citizens and not on their direct relationship with the territory of the Union itself in which they legally reside and work (Ibid., 53). These recommendations, however, did not take the form of proposed Treaty articles and were separated from the formal proposal for an anti-discrimination amendment. This omission and separation was no doubt due to considerable disagreement, ambivalence, and compromise among Member State representatives constituting the Consultative Commission.

Other proposals during the run up to the IGC for anti-discrimination amendments were tabled by NGO's, the EP, and the European Commission. There were also a few Council resolutions and numerous European Council statements indicating varying degrees of approval for EU level anti-discrimination measures (for a full account, see

Wallace 2000, ch. 4). Similar debates and issues and ambiguities regarding the relationship between race, nationality, and citizenship, and also between internal and external borders, however, informed many of these texts and limited their effect on Member States, and thus on the clarification and development of policy.

Reflecting the ambiguous interrelationship between citizenship, nationality, and race, a diluted version (Article 13) of the Consultative Commission's text, was ultimately adopted by the Member States at Amsterdam, suggesting recovery of Member State control over the issue and any further policy development. The new anti-discrimination Treaty amendment also fell far short of the anti-discrimination network's ideas and proposals, particularly the Starting Line Group's, the EP's, and the Commission's. First of all, aside from omitting mention of legally resident noncitizens, the article does not actually prohibit discrimination and does not confer additional rights on individuals (European Policy Center 1997, 91). Second, it involves the EP only minimally (through the consultation procedure) (see also EP 1997, 70). Third, it is subject to the unanimity voting rule which means any one Member State can kill a proposal initiated by the Commission and fourth, it created no positive obligation on the part of the Council, therefore eliminating the possibility of direct effect (meaning that individuals could not invoke the provision in national courts). The weakly worded amendment became the subject of much debate regarding its possible legal effects (see, for example, Moon 2000).

II: THE AREA OF FREEDOM, SECURITY, AND JUSTICE

Freedom of Movement and Equal Treatment for Third Country Nationals?

The issue of third country nationals was treated at Amsterdam as a separate item and most of the issues related to their residence and work rights were transferred from the intergovernmental third pillar to the first ("Community") pillar--mostly under the new Title IV ("Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons"). Some of the provisions of Title IV are part of the Schengen acquis and have been incorporated by means of the Schengen Protocol attached to the Amsterdam Treaty and two Council Decisions in 1999 (#435, #436). One additional article (137) which relates to third country nationals work rights is located within the new Social Policy Chapter.

This communitization process was meant to facilitate the abolition of internal borders by enforcement of policies related to external borders. Nevertheless, although the transfer of competence to the Community pillar has been referred to as “communitization”, given the retention of intergovernmental procedures and special restrictive rules regarding ECJ jurisdiction (which applies to no other section of the first pillar), the communitization is at best partial (Hailbronner 1998, 1053). The subject matter has been communitized while procedures remain largely intergovernmental (Simpson 1999, 109). Claudia Roth, rapporteur of the EP’s Committee on Civil Liberties and Internal Affairs criticized the limited role envisioned for the Parliament and the predominance of the unanimity voting procedure, which she argued, does not represent a “communitization” of the third pillar, but “amounts rather to introducing intergovernmental procedures under the Community framework, thereby setting a disturbing precedent that stands comparison with the tactics of the Trojan Horse” (EP 1997, 67).

Moreover, it is only after the period of five years after entry into force (May 1999) of the Amsterdam Treaty that bona-fide first pillar procedures (such as qualified majority voting and co-decision) *may* be activated, but this is still left up to the discretion of the Council voting unanimously on a proposal from the Commission (The European Policy Center 1997, 143). In the meantime, the Commission must share the right of initiative with the Member States, whereas in other areas of the first pillar it enjoys this right exclusively. The Parliament as well is limited to the consultation rather than the codecision procedure. In sum, the procedures limit substantive development and have been described as “fiendishly complicated” by legal experts (Kuijper 2000, 365), especially given the different opt-out and opt-in procedures pertaining to the UK, Ireland, and Denmark. As Simpson observes: the evolutionary inertia in Member States’ willingness to cede their unilateral control over matters pertaining to the completion of the internal market is underlined by Amsterdam’s procedural compromise” (1999, 109).

The most striking procedural limitations in Title IV are the restrictions placed on the role of the ECJ. Although it retains the power to interpret the Title or rule on the validity or interpretation of acts of Community institutions based on the Title, Article 68 stipulates that the Court “shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62.1 relating to the maintenance of law and order and the

safeguarding of internal security” (68.2). It will be able to decide what constitutes a law and order matter, but once defined, the legality of the measures taken in these areas are not subject to Court scrutiny! (Hailbronner 1998, 1057). Furthermore, national courts’ references to the ECJ (requests for preliminary rulings) requesting interpretations of EU law have been limited to courts of last instance (68.1). Lower courts, which recent research shows are most likely to make ECJ references, have been eliminated from the judicial procedures altogether (Alter 2000, 499-501; Guild and Peers 2001, 280). By denying lower courts the ability to request ECJ interpretations of EU law, one of the most effective ways of enforcing fundamental rights or any other area of EU law, i.e., the reference procedure, has been eliminated from this section of the Treaty.

Finally, the Council, the Commission or a Member State may request the Court of Justice to give an interpretive ruling of the Title or of institutional acts based on it, but this ruling shall not apply to previous judgments on the same issues by Member State courts. If, therefore, a national court has ruled against a claimant, but the ECJ interpretation would suggest the opposite result, the national court ruling would still stand. This could have serious consequences in terms of fundamental rights. As Kay Hailbronner has observed:

The transfer of substantive powers in Title IV which may affect the fundamental rights of individuals again shows that the judicial protection system of the Treaty is not sufficient. There are very few possibilities for an individual to challenge directly Community legislation before the European Court. The limitation of preliminary rulings further reduces the possibility to get effective protection against Community regulations which are claimed to be in violation of fundamental rights. (1998, 1057).

In relation to the substantive elements of Title IV rights for third country nationals, the most important provisions relate to the Council’s obligation within five years after entry into force of the Treaty to adopt

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 (Article 62.1).

While this first clause suggests freedom of movement for third country nationals, another clause within this same Article limits it to 3 months for travel (62.3).

The next relevant provision in light of almost two decades of proposals for third country nationals' rights to equal treatment and freedom of movement concerns the Council's obligation within five years to adopt "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" (63.4). "May reside *and work*" was the original statement, but "and work", largely due to Helmut Kohl's prodding was omitted (Groenendijk 2001, 235; Geddes 1998, 699-700). This of course diminishes the possibility that legislation will be devised which will address noncitizens' right to move to another member State to accept an offer of employment already made, let alone to move in search of work—rights of free movement defined and confirmed by the ECJ (see *Antonissen* 1991, for example). Apparently, according to this provision in Title IV, these basic rights to freedom of movement are still reserved for EU citizens only.

Furthermore, unlike most of the other provisions in Article 63, the five year time limit for the adoption of measures applying to almost all of the other sections of this provision has been eliminated from 63.4, meaning that development of even this limited nod to freedom of movement beyond travel and the derivative rights already enjoyed could be delayed indefinitely. Also, in contrast to most provisions in Title IV, Article 63.4 does not serve as a legal basis for the Schengen acquis. In fact as P.J. Kuijper points out there is no acquis under Schengen or the EU relating to third country nationals independent rights to reside (let alone work) in other Member States (2000, 362-363) (this is not relevant to a clause in the same article regarding residence permits granted to those entering a Member State for the first time from *outside* the EU). The legal development of these issues, therefore, in addition to (or as a consequence of) being controversial, is obviously not considered a priority (Peers 1998, 1269).

The Directive and Third Country Nationals

The new anti-race discrimination directive, like the newer provisions of Title IV displays the same reticence and ambiguity regarding third country nationals. Although the clauses regarding third country nationals open possibilities for future development, they nevertheless currently reinforce their unstable legal status on both EU and national levels. The explanatory introduction, for example, states that third country nationals "should" be protected, yet they are subject to unspecified "provisions and conditions"

governing entry, residence, and access to employment and to occupation. It's not clear if these reservations refer to provisions governing entry into and residence in a Member State from outside the EU (immigration) or entry and residence of long term third country nationals in a Member State different from the one in which they already enjoy primary residence (freedom of movement). Furthermore, it is unclear which "provisions" are being referred to: Association Agreements, some of which grant rights to equal treatment, some of which do not? Or national provisions? If the latter, does this mean that inadequate and varying legal protection regarding residence and work rights of legal residents or national laws permitting discrimination between citizens and noncitizens regarding access to employment, for example, will be allowed to stand? If so, under what conditions?

Article 3.2 of the directive is just as ambiguous as the explanatory clause. By excluding difference of treatment based on nationality and then emphasizing this point with regard to third country nationals, the directive insures that no development of freedom of movement rights for third country nationals will arise as a result of future claims and judicial interpretations. The original Commission proposal also excluded nationality (1999), while the EP and NGO's argued for its inclusion (Niessen 2000, 212; 214). Unfortunately, the ECJ's recent ruling (*Awoyemi* 1998, para. 29) reinforcing its earlier pronouncements (*Meade* 1984, para. 7) that nondiscrimination based on nationality is reserved for the citizens of the member States lends legitimacy to the directive's exceptions and stipulations regarding third country nationals.

In sum: in spite of the potential of Title IV and the new directive to improve rights of third country nationals, various omissions, exceptions, and ambiguities regarding these rights have turned the fundamental right to equal treatment into a fragmented, unstable, and above all, unreliable, principle.

Intersection of race, nationality, and citizenship⁷

The main problem is that policy related to third country nationals is stalled at the intersection of race, nationality, and citizenship. Pulled in several directions at once by disparate Treaty articles and provisions of various directives and Association Agreements, third country nationals, men and women, do not fit neatly into the existing legal categories of EU law.

Furthermore, the concepts of nationality, race, and citizenship vary markedly on the national level, and this has been often been highlighted as one of the key reasons for marked Member State lack of agreement regarding reform. Nevertheless, members of the transnational network, if not Member States, have been able, in spite of their different countries' histories and use of terms, to agree on proposals for uniform anti-discrimination law which includes third country nationals—justifying these proposals in terms of both the efficient functioning of the internal market and human rights. They finally separated the issue of racial discrimination from the issue of equal treatment for third country nationals only to appease Member States, whose resistance to expanding rights, especially freedom of movement rights for legal residents, would have undermined the development of an anti-race discrimination policy which included such rights.

'Race' has had different connotations in various Member States over time depending on immigration and history. Nevertheless, given international law definitions, as well as the developing political, economic, and social integration of the Union, the current differences among Member States regarding these concepts are beginning to seem contrived. They are, after fifty years of Council of Europe membership and EU development, no longer so profoundly tied to historical and cultural soul of the nation, but rather to political contingencies. The cultural identity and national sovereignty issues, for example, are often politicized on the national level and overworked by politicians of left, right, and radical right parties and the media as a reason for nonaction, or they are deployed as negotiating tactics on the EU level.

The concept of nationality, in particular, has played a major role in preventing more expansive rights for third country nationals. Although Treaty provisions regarding freedom of movement for workers and nondiscrimination on the basis of nationality do not specify that the concept of nationality has to be defined in terms of citizenship and thus do not explicitly exclude third country nationals from protection against discrimination on the basis of nationality, Regulation 1612/68, meant to give substance to Article 39 (Freedom of Movement for Workers), does specify that "workers" are nationals of the Member States. This has been reinforced by the ECJ rulings cited above. These pronouncements may have a profound effect on the extent of future reform of the legal status for third country nationals.

As John Crowley puts it, nationality has become the criteria defining good movement and bad movement. Good if one is a citizen and bad if visibly foreign and noncitizen. This creates a situation in which “ ‘good’ movement of persons may equate to movement of ‘good persons’ ” (2001, 20). Control at the borders becomes control within borders at alternative sites such as gateways to social rights and welfare benefits, where legal noncitizens are automatic suspects as possible bad movers (illegal aliens)—thus subject to higher levels of scrutiny and forced to prove their legitimacy (Ibid., 21-22;26).

An equal treatment provision such as the new directive with its stipulations and exceptions regarding nationality, residence and access to work for third country nationals may be formally implemented, but substantively empty. The directive’s exclusion of nondiscrimination on the basis of nationality—a key tenet of already existing freedom of movement rules--reinforces the ECJ’s restrictive definition of nationality (citizens of Member States) and thus assures the retarded development of full freedom of movement rights for third country nationals. In this regard, citizens, capital, and goods all have more rights than long-term, legally resident third country nationals.

It is difficult to reconcile these omissions regarding third country nationals with the fact that freedom of movement and equal treatment on the basis of nationality (and gender) have been elevated by the ECJ to fundamental rights. The fundamental right to freedom of movement has been framed in terms of social and economic welfare and is not limited to unimpeded physical movement across borders, but includes as a minimum access to employment, social security benefits, right to search for work, secure residence and freedom also from discrimination in the enjoyment of these rights on the basis of nationality. If freedom of movement and equal treatment are indeed fundamental rights, this implies universal application which would by definition and logic extend without conditions and restrictions to at least to long-term legal residents, but does not.

Scholars such as Helmut Rittstiegl and Gerhard Rowe have analyzed the contradictions regarding various overlapping and contradictory “foreigner” categories in EU and national law (1992). Rittstiegl has also emphasized the contradictions within the “third country national” category itself. The privileged position of Turkish nationals with Associated rights, for example, do not stand logical comparison to those with the same links to the country of residence, but who are without Association Agreements and thus without secure legal status (Groenendijk 2001, 238).

Other critics of current policy, echoing the sentiments expressed earlier in the Consultative Commission's recommendations (see pages 19-20) have added that it's difficult to justify equal treatment for noncitizen family members of EU citizens and deny that same treatment to other noncitizens legally residing within a state and wishing to move to another state. Furthermore, freedom of movement rights have already been granted to nationals from the European Economic Area. In light of these contradictions, continuing justifications for exclusive rights for EU citizens to freedom of movement would be difficult to sustain (Groenendijk 2001, 238).

The development of an overarching concept of EU citizenship as well as the fact that national citizenship laws are beginning to converge are positive signs of change, but even citizenship of the Union is still practically dependent on citizenship of Member States and tied to economic status and as such is still largely symbolic. Consequently, noncitizens of diverse religious, ethnic, and cultural groups are still, even if long-term residents, subject to the varying definitions and categories of different national legal systems, and ultimately, even their already uncertain legal status is subject to changing political circumstances regarding immigration politics within the various member States. Thus, with the exceptions already discussed, third country nationals' status on the national level still determines their access to rights and protection from discrimination on the EU level.

Given Member State waffling and the lack of coherent legal categories to address rights of third country nationals on the EU level, advocates for reform have been limited to working within existing categories and promoting only incremental steps to avoid rejection by Member States. The result is that weak political will and fragmented, scattered legal instruments have insured the lack of a common policy on the EU level regarding the fundamental social and civil rights of all legally resident non-EU citizens in comparison to EU citizens.

This state of affairs is confirmed, not resolved, by the new anti-discrimination directives and the convoluted Title IV, which some legal scholars have renamed the Amsterdam Ghetto (Guild and Peers 2001, 282). In the directives, third country nationals are stuffed into ambiguous statements which say nothing about how equal treatment will actually apply to them, only when it will not apply; the new Treaty provisions repeat the Member State wish list but are now hedged in with unanimity voting, lack of direct

effect, and severe limitation on Court participation-- subject to future Council decisions. How is it possible under these conditions to give effect to the well-established community principle of equality and nondiscrimination which purportedly guide the implementation of the new anti-discrimination directives, not to mention the development of the internal market?

The good news is that Member States have unanimously voted to cede sovereignty in a very sensitive policy area (racial discrimination) and have at least advanced, albeit in fits and starts, in the overlapping areas of immigration and freedom of movement for third country nationals.

Furthermore, there is nothing in the Treaty or directives to prevent the Council from devising rules to include more specific and adequate measures to address issues of access to employment ("work") and full freedom of movement rights for legally resident (long-term) noncitizens. There has been some development in this area already, although largely pertaining only to rights on the national level (European Commission 2000a, 15-17, 22; 2000b, 8-9; 2001a, b). There is also a provision in the Social Policy chapter (Article 137) pertaining to prospective legislation regarding conditions of employment for third country nationals, but this is subject to the unanimity voting rule which usually delays policy development and it does not address access to employment or freedom of movement issues.

The Member States have also, post-Amsterdam, indicated a willingness to devise legislation and policies aiming to grant third country nationals rights and obligations *comparable* to those of EU citizens. Furthermore they, as well as the European Commission, have acknowledged the need for immigration due to an aging and diminishing native population, and due to shortage of both skilled and unskilled workers (in spite of relatively high unemployment) (European Council 2000; European Commission 2001c).

Earlier at the Tampere European Council summit, the German Government proposed specific rules regarding equal rights for noncitizens and offers of access to nationality of the country of residence (which would automatically solve the freedom of movement problem) (Groenendijk 2001, 235). As Andrew Geddes points out, however, this focus on nationality of the Member States as opposed to EU citizenship divorced from Member State nationality betrays continuity rather than change, since the focus is

still on Member State control over access to citizenship (2000, 643). Furthermore, nothing specific is mentioned regarding freedom of movement or equal treatment on the basis of nationality.

In reaction to limited Member State moves, the transnational network has continued to campaign for rights for third country nationals. The Commission for Racial Equality, the German Federal Foreigner Commissioner, the Finnish Ombudsman for Foreigners and the Luxembourg Commission for Foreigners (among others) issued a general plea to Member States to establish free movement, equal rights and protection against expulsion for third country nationals born or raised in a Member State (Groenendijk 2001, 238).

While urging Member State action, network actors have already proposed an alternative action program based on the Title IV provisions of the Amsterdam Treaty (Niessen 2000, 205). The program includes proposals for directives containing extensive and detailed rules regarding access to employment and freedom of movement for third country nationals, as well as other proposals pertaining to immigration and asylum. Most of these comprehensive proposals for directives have been devised by the UK's Immigration Law Practitioner's Association and the Brussels-based Migration Policy Group (ILPA/MPG 2000).

Furthermore, members of the network are in the process of launching an implementation campaign regarding the anti-race discrimination directive in particular (Chopin 2000; Niessen 2000). Thus NGO's, although circumscribed in their proposals by limited EU categories and Member State trepidations, have continued to acknowledge the connection between race, nationality, and citizenship in their proposals for the development of an EU anti-discrimination policy. Time will tell if these latest proposals will have any significant influence on Council legislation in the future.

CONCLUSION

The implementation of an anti-race discrimination policy faces several obstacles: procedural and substantive. Substantively, the issue of racial discrimination crosses divisive and politically sensitive boundaries regarding immigration, migration and access to citizenship and is therefore unavoidably connected to the development of measures in

Title IV and the Social Policy Chapter of the Treaty relating to third country nationals' rights.

The procedural limitations of Title IV insure delayed and distorted development of equal treatment and free movement measures which extend beyond the right to travel for three months and derivative rights already enjoyed. In fact the procedural limitations (ECJ restrictions, shared right of initiative of the Commission and Member States, unanimity voting rule, opt-ins and opt-outs for the UK, Ireland, and Denmark, and Council control over changes in all these areas) seem to insure continued intergovernmental decisionmaking in the "Community" pillar.

In terms of institutional capacity, given the ambiguity and procedural complexity of new provisions in the Treaties and new directives, the differences regarding Member State definitions of discrimination, their different emphases regarding criminal and civil provisions, their reluctance to set up independent, investigative anti-discrimination agencies (such as those in the Netherlands, Belgium, and the UK), the prospects for a smooth transition to a uniform anti-discrimination policy seem unlikely (Chopin 2000, 417-427).

Given Member States' experience with the Equal Treatment Directive (gender), they have at least some institutional preparation for implementing the new anti-race discrimination directive, although implementation even in the gender area has been less than optimal. And as indicated by a recent MPG study, States seem reluctant to extend the same level and quality of protection to ethnic minorities as they (at least formally) do to women (Chopin 2000, 426).

Nevertheless, the recent acknowledgement by most Member States as well as the European Commission and Parliament that immigration has become necessary to the economic well-being of Europe may contribute to less restrictive policies regarding rights for immigrants. It might also increase the possibilities for mobilization of ethnic groups themselves, rather than elite representatives acting on their behalf. This would supplement an elite technocratic movement with grass roots action. It would add, in other words, the quality of protest and opposition to the unavoidable cooperative alliances between NGO's, government agencies and European institutions (Geddes and Favell 1999; Geddes 2000).

Protest and bolder proposals coupled with quiet diplomacy and changing immigration requirements may contribute to clearer, fairer, and more consistent policies. Nevertheless, even mobilized non-EU legal residents may not easily win the attention of politicians, unless all are granted full and unconditional voting rights on local and national levels in all Member States and on the European level (EU citizens have the right to vote and stand for election on the local and European levels).

Given existing legal contradictions and ambiguities inherent in past and current policies as well as continued reticence of policymakers to develop concrete measures regarding equal treatment and independent freedom of movement rights for all legally resident, long-term (at least five years) third country nationals, increased immigration, more open immigration policies, and even ethnic mobilization will not automatically lead to clarification and improvement of the legal status of third country nationals. In fact, such phenomena could possibly lead to political backlash and backtracking, depending on domestic political contingencies. Therefore, vague, formal policy changes at the EU level are not enough to insure the development of rights to equal treatment and freedom of movement for third country nationals; nor are such changes enough to encourage proper enforcement of the variable formal rights that do exist, such as the right not to be discriminated against on the basis of race or ethnicity. Continued vigilance, pressure campaigns, and creative legal solutions of the now well-established public interest lawyers and activists within the transnational anti-discrimination network are also necessary to develop and clarify rights embedded in ambiguous legal texts and to promote their enforcement.

The difficulties regarding the intersection of race, nationality, and citizenship shows that it is paradoxically on the European level that citizenship most matters. Regardless of the variable civil and social rights granted on the national level, the criterion of residence on the EU level is “still subordinated to the criterion of nationality” (Martiniello 1995, 42). Some scholars have suggested that the solution lay in a transnational citizenship, one which disconnects citizenship from nationality (Ibid; Soysal 1994). Nevertheless, as Helmut Rittstiegl and Gerard Rowe point out, discrimination against immigrants occurs less often on the basis of formal citizenship status, than on the basis of skin-color, national origin, religion, ethnicity, or race (1992, 71). It occurs, in other words, because one appears literally to be different, other, and alien. Differences

are then exploited by opportunistic actors as political and economic justifications for racist and xenophobic behavior.

Therefore, even a guarantee of citizenship, free movement, and equal treatment is thought to be meaningless without effective protection against race discrimination and the means and the political will to enforce it. Otherwise, even the right to move freely may entail moving freely from one region of discrimination to another. Hence the reason why many advocates for policy reform in this area have called for both general anti-race discrimination provisions which protect citizens and non-citizens as well as explicit rules providing equal treatment and full freedom of movement for legally resident third-country nationals. The recently rejected Charter of Fundamental Rights recognizes these relationships in its non-discrimination provisions (2000, especially Articles 21 and 45). If eventually incorporated into the Treaties, the Charter could serve as the uniform basis for further development of equal treatment policy which includes all long-term, legal residents.

Without freedom of movement rights and the related equal protection on the basis of nationality, third country nationals would be protected perhaps on the national level by the new anti-race discrimination directive, but denied access to basic rights of EU citizens on the EU level. This to some observers constitutes a form of legal discrimination which amounts to institutional racism (Hoogenboom 1992, 16). Furthermore, it is still not clear how the conditional clauses of the directive will be interpreted by courts. It would be illogical and ironic if the new directive offered those most likely to be discriminated against on the basis of race and ethnicity only limited and conditional protection on national and EU levels, thus confirming their current ambiguous and inferior legal status, rather than outlawing it.

ENDNOTES

¹ The ground of religion, although also relevant to the development of policies related to ethnic and racial discrimination, will not be analyzed here, since the political and legal debates as well as the comparative law issues which led to its separation from the first directive and inclusion in the second directive would go beyond the scope of this essay.

² To place the issues regarding rights of third country nationals in perspective, it should be noted that although EU citizens enjoy full freedom of movement rights including nondiscrimination on the basis of nationality, they seldom exercise those rights. In fact “mobility, on an annual basis, of EU nationals within the EU is less than 0.4 per cent of resident population—some 1.5 million people” (Commission 2001c). The reasons for low mobility include reluctance to move which is affected by one’s class position, education level, links in other Member States, language abilities, and family commitments.

Free movement is also inhibited by slow progress in clarifying and simplifying rules regarding access to work, professional qualifications, social security benefits, and rights of family members. Court cases in these areas have revolved around disputes pertaining to the definition of work, worker, temporary employment, and public employment. Barriers can be set up or inadvertently perpetuated by means of unnecessary language requirements, restrictions on job-related social benefits, denial of promotion and training, nonrecognition of diplomas or professional qualifications earned in other Member States, denial of entry to family members from third countries, excessive penalties, such as deportation, for not obtaining a residence permit. Many of these issues arise as a result of willful discrimination, ignorance of the rules, or confusion as to legal interpretation of the rules. Member States have been particularly resistant to hiring non-nationals in public service jobs. Most of the legal terms and issues have been resolved at least formally by the ECJ, but offer examples of some of the obstacles citizens have (and still do) encounter when attempting to exercise their rights to freedom of movement (See Handoll 1995 for the legal history, Craig and de Burca 1998 for a comprehensive treatment of cases, legal scholarship, and policy issues, and Conant 2000 for a lively and detailed account of Member States’ often willful circumvention of freedom of movement rules in the area of social security for both EU citizens and associated third country nationals).

³ Andrew Geddes offers an interesting analysis of the way the interests of elite advocates in NGO’s, the EP, and the Commission coincided to define the issues related to policy development. The definition of the problem as European allowed for the solution, ‘more Europe’. And more Europe provided all with expanded opportunities for action, funding, increased authority, and self-perpetuation. Although this process of issue definition and policy promotion has worked to the advantage of ethnic minorities, the process cannot be described as a mass movement, and especially not a result of ethnic mobilization(Geddes 2000, 637-640; see also Favell and Geddes 1999, 15, 22-25).

⁴ see *supra*, note 2

⁵ Disputes in these cases usually revolved around the issues of ECJ jurisdiction, Community competence, the meaning of freedom of movement provisions within the

Agreements (and Association Decisions) in relation to those within the EC Treaty, conditions of family reunification, the legal implications of key terms such as “legal employment”, “legal residence”, and the relationship between them. Although the ECJ’s decisions became increasingly more advantageous for third country nationals covered by Association and Cooperation Agreements, those not covered, with the exception of family members of EC nationals and those moving with EU service providers, are legally groundless on the Community level and have had to rely on the varied laws and divergent practices of different Member States. For elaboration and analysis, see especially Sieveking (1995) on the different kinds of Agreements and different legal categories of third country nationals, Gutman (1996) on the still controversial free movement provisions of the EC-Turkey Association Agreement and Association Council Decisions, Gürümkcü (1996) on the debates regarding the legal status of Turkish workers in the European Union, Handoll (1995) for a comprehensive treatment of EU law regarding freedom of movement, Zuleeg (1994) for an analysis of key ECJ decisions on Association and Cooperation Agreements, Wornham (1994) for an in-depth analysis of the Turkey-EC Association Agreement itself, and Weiler (1992) for a human rights critique of *Demirel*.

⁶Kimberle Crenshaw (1991) analyzes the intersection of race and sex to critique the lack of legal concepts in American anti-discrimination doctrine relevant to issues related to black women.

References (A. Wallace)

- Alter, Karen J. "The European Union's Legal System and Domestic Policy: Spillover or Backlash?" International Organization vol. 54, no. 3 (summer 2000): 489-518.
- Bachrach, Peter and Morton S. Baratz. "Two Faces of Power." In Frontiers of Democratic Theory. Edited by Henry S. Kariel. New York: Random House, 1970. (originally published in the American Political Science Review vol. 56 (December 1962): 947-952).
- Baumgartner, Frank R. Conflict and Rhetoric in French Policy-Making. Pittsburgh: University of Pittsburgh Press, 1989.
- _____ and Bryan D. Jones. Agendas and Instability in American Politics. Chicago: University of Chicago Press, 1983.
- Charter of Fundamental Rights of the European Union (2000/C 364/01). OJ C 364/1, 18.12.2000.
- Chopin, Isabelle. The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment. Brussels: Migration Policy Group, October, 1998.
- _____. "Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals." European Journal of Migration and Law vol. 2, 413-430, 2000.
- Conant, Lisa. "Transnational Citizenship? Boundaries and Belonging in the European Union." Paper prepared for delivery at the 2000 Annual Meeting of the American Political Science Association, August 31 – September 3, 2000.
- Consultative Commission on Racism and Xenophobia. Report on Racism and Xenophobia, April 1995. (special edition issued by the Council of the European Union during the European Year Against Racism, 1997).
- Council of Ministers. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (#300L0043; OJ L 180, 19/07/2000, p. 0022-0026), 29 June 2000 a.
- _____. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (#300L0078; OJ L 303, 02/12/2000, p. 0016-0022), 27 November 2000 b.
- _____. Council Decision 2000/750/EC establishing a Community action program to combat discrimination (2001-2006) (#300D0750); OJ L 303, 02/12/2000, p. 0023-0028), 27 November 2000 c.
- _____. Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis. 1999/436/EC
- _____. Council Decision of 20 May 1999 concerning the definition of the Schengen acquis... 1999/435/EC
- _____. "Council Resolution on Guidelines for a Community Policy on Migration," 16 July 1985. In Bulletin of the European Communities, Supplement 9/85, 17; OJ C 186, 26 July 1985.
- Craig, Paul and Grainne de Burca. EULaw: Texts, Cases, Materials. (Second Edition) Oxford: Clarendon Press, 1998.

Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics." In Feminist Legal Theory: Readings in Law and Gender. Edited by Katharine T. Bartlett and Roseanne Kennedy. Boulder: Westview Press, Inc., 1991.

Dearing, James W. and Everett M. Rogers. Agenda-Setting. Thousand Oaks, California: Sage Publications, Inc., 1996.

Edelman, Murray. The Symbolic Uses of Politics. Chicago: University of Illinois Press, 1964, 1985.

_____. Constructing the Political Spectacle. Chicago: University of Chicago Press, 1988.

_____. European Commission (Commission of the European Communities). Amended Proposal for a Council Directive extending the freedom to provide cross-border services to third country nationals established within the Community. Document 500PC0271 (02). 19.02. 2001a.

_____. Proposal for a Council Regulation laying down a uniform format for residence permits for third country nationals. COM (2001) 157 final. Brussels, 23.03.2001b.

_____. Communication From the Commission to the Council: "New European Labour Markets, Open to All, with Access for All." COM (2001) 116 final. Brussels, 28.2.2001c.

_____. Communication From the Commission to the Council and the European Parliament on a Community Immigration Policy. COM (2000) 757 final. Brussels 22.11. 2000a.

_____. Communication From the Commission to the Council and the European Parliament: Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union (Second Half of 2000). COM (2000) 782 final. Brussels, 30. 11. 2000b.

_____. Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. COM (1999). Brussels, 25.10.1999.

_____. The European Institutions in the Fight Against Racism: Selected Texts. Luxembourg: Office for Official Publications of the European Communities, 1997.

_____. White Paper on Social Policy ("European Social Policy: A Way Forward for the Union") COM (94) 333, 27 July 1994.

_____. "Immigration and Employment." Commission Staff Working Paper. SEC (92) 955. Brussels, 7 May 1992.

_____. "Commission Communication to the Council and the European Parliament on Immigration." SEC (91) 1855 final. Brussels, 23 October 1991.

_____. "Policies on Immigration and the Social Integration of Migrants in the European Community." Experts' Report drawn up on behalf of the Commission of the European Communities. SEC (90) 1813 final. Brussels, 28 September 1990.

_____. Decision 88/384 (revision of Decision 85/381 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries. OJ L 183/35, 14 July, 1988.

_____. Decision 85/381 (regarding the setting up of a consultation procedure under Article 118). Bulletin of the EC, Supplement 9/85; OJ L 217/25, 1985a.

_____. "Guidelines for a Community Policy on Migration." COM (85) 48 final. Bulletin of the EC, Supplement 9/85b.

European Council. Presidency Conclusions: Nice European Council Meeting: 7-9 December, 2000.

European Parliament, Council, and Commission: Joint Declaration Against Racism and Xenophobia, 11. June 1986. OJ C 158, 25. 6. 1986.

European Parliament, Council, and Commission: Joint Declaration on Fundamental Rights, 5. April, 1977. OJ C 103, 27. 4. 1977.

European Parliament. "Report on the Treaty of Amsterdam." Committee on Institutional Affairs, Annex: Opinions of the other parliamentary committees. (PE 223.314/fin./Ann.) 5 November 1997

_____. "Report of the Committee of Inquiry into Racism and Xenophobia." Rapporteur: Glyn Ford (PE141. 205) 23 July 1990a.

_____. "Resolution on Measures to Combat Racism and Xenophobia." OJ C 175/178, 16 July 1990b.

_____. "Resolution on Migrant Workers From Third Countries." OJ C 175/80, 16 July 1990c.

_____. "Resolution on the Intergovernmental Conferences in the Context of the European Parliament's Strategy for European Union." OJ C 324/219, 24 December, 1990d.

_____. "Report of the Committee of Inquiry into the Rise of Fascism and Racism in Europe." Rapporteur: Dimitrios Evrigenis. December 1985.

_____. "Resolution on Guidelines for a Community Policy on Migration." OJ C 141/462, 10 June 1985b.

European Policy Center. Making Sense of the Amsterdam Treaty. Brussels: European Policy Center, 1997.

Faist, Thomas. "Boundaries of Welfare States: Immigrants and Social Rights on the National and Supranational Level." In Migration and European Integration. Edited by Robert Miles and Dietrich Thränhardt. London: Pinter Publishers, 1995.

_____. "How to Define a Foreigner? The Symbolic Politics of Immigration in German Partisan Discourse, 1978-1992." In The Politics of Immigration in Western Europe. Edited by Martin Baldwin Edwards and Martin A. Schain. Portland, Oregon: Frank Cass, 1994.

Favell, Adrian and Andrew Geddes. "European Integration, Immigration and the Nation State: Institutionalising Transnational Political Action?" EUI Working Papers (RSC 99/32) Robert Schuman Center for Advanced Studies, Florence: European University Institute, 1999.

Geddes, Andrew. "Lobbying for Migrant Inclusion in the European Union: New Opportunities for Transnational Advocacy?" Journal of European Public Policy vol. 7, no. 4 (October 2000): 632-649.

_____. "The Representation of 'Migrants' Interests' in the European Union." Journal of Ethnic and Migration Studies vol. 24, no. 4 (October 1998): 695-713.

Groenendijk, Dees. "Security of Residence and Access to Free Movement for Settled Third Country Nationals Under Community Law." In Implementing Amsterdam: Immigration and Asylum Rights in EC Law. Edited by Elspeth Guild and Carol Harlow. Oxford/Portland: Hart Publishing, 2001.

Guild, Elspeth and Steve Peers. "Deference or Defiance? The Court of Justice's Jurisdiction Over Immigration and Asylum." In Implementing Amsterdam. Edited by Elspeth Guild and Carol Harlow. Oxford/Portland: Hart Publishing, 2001.

Gutman, Rolf. Die Assoziationsfreizügigkeit türkischer Staatsangehöriger. Ihre Entdeckung und Ihr Inhalt. Baden-Baden: Nomos, 1996.

Hailbronner, Kay. "European Immigration and Asylum Law Under the Amsterdam Treaty." Common Market Law Review vol. 35 (1998): 1047-1067.

Handoll, John. Free Movement of Persons in the EU. New York: John Wiley and Sons, 1995.

Harlow, Carol. "Access to Justice as a Human Right: The European Convention and the European Union." In The EU and Human Rights. Edited by Philip Alston with Mara Bustelo and James Heenan. Oxford/New York: Oxford University Press, 1999.

Hix, Simon and Jan Niessen. Reconsidering European Migration Policies: The 1996 Intergovernmental Conference and the Reform of the Maastricht Treaty. Briefing Paper published by the Migration Policy Group, Churches' Commission for Migrants in Europe, and the Starting Line Group, November 1996.

Hoogenboom, Thomas. "Integration into Society and Free Movement of Non-EC Nationals." European Journal of International Law vol. 3 (1992): 36-52.

Immigration Law Practitioners' Association/Migration Policy Group (ILPA/MPG). The Amsterdam Proposals: The ILPA/MPG Proposed Directives on Immigration and Asylum. London: Immigration Law Practitioners' Association and Steven Peers, 2000.

Irish Presidency. "Adapting the European Union for the Benefit of its Peoples and Preparing for the Future: A General Outline for a Draft Revision of the Treaties." Conference of the Representatives of the Governments of the Member States (Conf 2500/96) Brussels, 5 December 1996.

Kenis, Patrick and Volker Schneider. "Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox." In Policy Networks: Empirical Evidence and Theoretical Considerations. Edited by Bernd Marin and Renate Mayntz. Boulder, Colorado: Westview Press, 1991.

Kingdon, John W. Agendas, Alternatives, and Public Policies. Second Edition. New York: Harper Collins Publishers, 1995 (1984).

Kuijper, P.J. "Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration Under the Amsterdam Treaty and Incorporation of the Schengen Acquis." Common Market Law Review vol. 37 (2000): 345-366.

Lasswell, Harold D., Nathan Leites and Associates. Language of Politics. New York: George W. Stewart, Publisher, Inc., 1949.

Mancini, Frederico. "Opinion of the Advocate General for the European Court of Justice" (Germany and Others v. the Commission). Common Market Law Reports vol. 51 (5 January 1988): 11-56.

Martiniello, Marco. "European Citizenship, European Identity, and Migrants: Towards the Post-National State?" In Migration and European Integration: The Dynamics of Inclusion and Exclusion. Edited by Robert Miles and Dietrich Thranhardt. London: Pinter, 1995.

Mason, David. Race and Ethnicity in Modern Britain. Oxford: Oxford University Press, 1995.

Mazey, Sonia. "The European Union and Women's Rights: From the Europeanization of National Agendas to the Nationalization of a European Agenda?" Journal of European Public Policy vol. 5, no. 1 (March 1998): 131-152.

Moon, Gay, Editor. Race Discrimination: Developing and Using a New Legal Framework. Oxford: Hart Publishing, 2000.

Niessen, Jan and Isabelle Chopin. Communication to Starting Line Members, 18 December 1996.

Niessen, Jan. "The Amsterdam Treaty and NGO Responses." European Journal of Migration and Law vol. 2, 203-214, 2000.

Nugent, Neill. The Government and Politics of the European Union. Third Edition. Durham, NC: Duke University Press, 1994.

D'Oliveira, Hans Ulrich Jessurum. "Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Areas of Free Movement, Immigration, and Asylum." In Legal Issues of the Maastricht Treaty. Edited by David O'Keefe and Patrick M. Twomey. New York: John Wiley and Sons, 1994.

Peers, Steve. "Building Fortress Europe: The Development of EU Migration Law." Common Market Law Review vol. 35 (1998): 1235-1272.

Peters, Guy B. "Agenda-Setting in the European Community." Journal of European Public Policy vol. 1, no. 1 (June 1994): 9-26.

Rittstieg, Helmut. and Gerard C. Rowe. Einwanderung als gesellschaftliche Herausforderung. Baden-Baden: Nomos, 1992.

Schain, Martin A. "Policymaking and Defining Ethnic Minorities: The Case of Immigration in France." New Community vol. 20, no. 1 (October 1993): 59-77.

Shaw, Jo. "Twin-Track Social Europe--the Inside Track." In Legal Issues of the Maastricht Treaty. Edited by David O'Keefe and Patrick Twomey. London, New York: John Wiley and Sons, Ltd., 1994.

Sieveking, Klaus. "Die Rechtstellung von Drittstaatsangehörigern nach Assoziationsrecht." Zeitschrift für ausländisches und internationales Arbeits-und Sozialrecht Heft 9, no. 2 (1995): 227-252.

Simitis, Spiros. "From the Market to the Polis: The EU Directive on the Protection of Personal Data." Iowa Law Review vol. 80, no. 3 (March 1995): 445-469.

Simpson, Gerald. "Asylum and Immigration in the European Union After the Treaty of Amsterdam." European Public Law vol. 5, no. 1 (1999): 91-124.

Soysal, Yasemin Nuhoglu. Limits of Citizenship: Migrants and Postnational Membership in Europe. Chicago: University of Chicago Press, 1994.

Staeck, Nicola. "Germany." In Policy Networks and European Structural Funds. Edited by Hubert Heinelt and Randall Smith. Aldershot: Avebury, 1996.

Standing Committee of Experts on International Immigration, Refugee, and Criminal Law. "Proposals for the Amendment of the Treaty on European Union at the IGC in 1996." Utrecht, Netherlands, 1995.

Starting Line Group. The New Starting Line: Proposal to the European Parliament, Council, and Commission and to the Member States of the European Community for a Draft Council Directive on the

Elimination of Racial Discrimination; A Head Start: Proposal for a Directive on Third Country Nationals, London, March 1998.

_____. Starting Line: Proposal for a Directive on Racial Discrimination, 1993.

_____. Starting Point: Proposal for an Amendment to the Treaty on European Union in 1996, drafted in 1994.

Suddeutsche Zeitung (SZ). "Das 'Europäische Jahr Gegen Rassismus' endet im Ungefähren." von Frank Gerstenberg. (Dienstag, 23 Dezember 1997): 9.

Van Dijk, Teun A. Elite Discourse and Racism. London: Sage Publications, 1993.

Wallace, Adrienne. The Development of an Anti-Race Discrimination Policy in the European Union. PhD Dissertation, Department of Politics, New York University, May 2000.

Weiler, J.H.H. "A Quiet Revolution: The European Court of Justice and Its Interlocutors." Comparative Political Studies. vol. 26, no. 4 (January 1994): 510-553.

_____. "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals." European Journal of International Law vol. 3 (1992): 65-91.

_____. "Transformation of Europe." Yale Law Journal vol. 100 (1991): 2403-2483.

Wornham, Trevor (under the supervision of Elspeth Guild). The Immigration Lawyer's Guide to the Turkey-EC Association Agreement. First Edition. London: Immigration Law Practitioners' Association (ILPA), 1994.

Winn, David B. Third Country Nationals in the European Union: The Right to Equal Treatment. London: The Immigration Law Practitioners' Association (ILPA), 1995.

European Court of Justice Cases

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

Ayoyemi (C-230/97) [1998] ECR I-6781

Demirel v. Stadt Schwäbisch Gmünd (C-12/86) [1987] ECR 3719

Eroglu v. Land Baden-Württemberg (C-355/93) [1994] ECR I-5113

"ERT"--Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Douvelas (C-260/89) [1991] ECR I--2925

Germany and Others v. the Commission (a.k.a. the Migration Policy Case)(C-281/85, 283-285/85, 287/85) [1987] CMLR vol. 51 (Jan. 5, 1988): 11-56.

Kus v. Landeshauptstadt Wiesbaden (C-237/91) [1992] ECR I-6781

Meade. (C-238/83) [1984-7, parts 7-9] ECR 2631

Onem v. Kziber (C-18/90) [1991] ECR I-199

Rutili v. Minister for the Interior (C-36/75 [1975] ECR 1219

Sürül (C-262/96) 4 May 1999 (available at <http://curia.eu.int>)

S.Z.Sevince v. Staatsecretaris van Justitie (C-192/89) [1990] ECR I-3461

Yousfi v. Belgian State (C-58/93) [1994] ECR I-1353