Third Country Nationals and the Treaty on European Union

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I. Introduction

The Treaty on European Union follows well-established Community practice in treating third country nationals[1] separately from EC nationals (i.e. nationals of Member States). Article 100c was introduced into the EC Treaty to empower the Council to enact measures regarding visa requirements for TC nationals engaged in 'international movement', meaning movement between the Community and a third country. Competence may also be acquired pursuant to Article K of the Treaty on European Union as regards 'internal movement', i.e., movement between Member States, by TC nationals as well as other aspects of international movement by such persons. Pending such acquisition, Article K envisages such matters being treated within the framework of cooperation in the fields of justice and home affairs. No attempt is made in these provisions to link treatment of TC nationals and the freedom of movement of EC nationals.

Separate treatment might be thought to simply reflect the fact that in the case of TC nationals, the EC Treaty provides for no equivalent of the common customs tariff or the common commercial policy, which apply to trade in goods with third States. However, this justification may be of more formal than substantial significance. The absence of a common customs tariff or common commercial policy for coal and steel products under the ECSC Treaty did not prevent the European Court from ruling that this Treaty secured free movement for coal and steel products originating in third States, once they had been properly admitted to one Member State.[2] In any case, provision for the common customs tariff and the commercial policy in the EC Treaty did not in itself ensure that problems of separate treatment in the case of trade in goods were resolved. Indeed, such provision implied separate treatment of international trade and internal trade, and

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1 Hereafter referred to as TC nationals.

2 Joined Cases 9 and 12/60, *Société Commerciale Antoine Vloeberghs, S.A. v. ECSC High Authority* [1961] ECR 197, 216-217.

lack of progress in developing the common commercial policy led, in practice, to separate treatment of products originating within the Community and products originating in third countries, even in the context of internal trade. It was only the drive towards completion of the internal market which broke the effective dependence of internal liberalization on harmonization in the commercial policy field and meant that Member States generally felt compelled to accept full liberalization in the case of products from third countries in free circulation within the Community, and to agree on further harmonization of commercial policy measures.

In fact, in the case of TC nationals a more sophisticated approach is permitted by the EC Treaty than one which might be developed by analogy with rules governing trade with third countries. As regards establishment, Article 58 of the Treaty assimilates to EC nationals subsidiaries of third-country companies, formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community. Provided they have an 'effective and continuous link with the economy of a Member State',[3] such subsidiaries are entitled to freedom of establishment. Article 59 provides for the Council to extend freedom to supply services to TC nationals established in the Community. Provided they are so established, the Council is competent to confer on such persons the freedom to supply services. Article 48(1) refers to freedom of movement for 'workers of Member States'. While this expression requires some link between a beneficiary and a Member State, it does not appear to exclude TC nationals.[4] In other words, the Treaty provides a basis for the development of rules determining those TC nationals who are entitled to freedom of movement within the Community.[5] Indeed, Article 48(3), which confers no rights on job-seekers, might seem, at least by analogy, to constitute a possible basis for liberalization of international movement by TC nationals.

It is only in implementing measures that freedom of movement for natural persons is made essentially dependent on possession of the nationality of a Member State.[6] The effect is that both international and internal movement by TC nationals is left in the hands of individual Member States. The result is not simply to render

3 See the General Programme on the abolition of restrictions on freedom of establishment JO (1962) 36.

4 An analogy might be drawn with Article 95 of the Treaty, which only refers to 'products of other Member States'. The European Court has found it to be applicable to products from third States which have been put into free circulation in the Community. See Case 193/85, *Cooperativa Co-Frutta v. Amministrazione delle Finanze dello Stato* [1987] ECR 2085.

5 Academic research has shown that extending free movement within the Community to cover TC nationals would be unlikely to cause significant immigration flows having an economically disruptive effect. See Hoogenboom, 'The Position of Those who are not Nationals of a Community Member State', in A. Cassese *et al.* (eds), *Fundamental Rights and the European Community: Methods of Protection* (1991) 351, 359.

6 See, in particular, Directive 68/360 JO 1968 L 257/13 and Directive 73/148 OJ 1973 L 172/1. See generally Evans and d'Oliveira, 'Nationality and Citizenship', in A. Cassese *et al.* (eds), *supra* note 5, at 299.

freedom of movement exclusive, in principle, to EC nationals but also, in practice, to jeopardize full realization of this freedom even for EC nationals. If Member States remain empowered to control international movement by TC nationals, steps to liberalize internal movement by such persons are likely to be perceived as undermining such control. Even internal movement by EC nationals may have to be controlled in order to ensure that their freedom of movement is not 'abused' by TC nationals.

In other words, the integration processes which both structure, and are structured by, Community law have failed to achieve the fundamental objective of a 'frontier-free Europe' for persons, as embodied in Article 7a of the EC Treaty.[7]

These processes may be endogenous or exogenous. The former kind proceed incrementally on the basis of the practice of the Community institutions. Issues concerning TC nationals are approached from the perspectives of Community policies, notably social policy and completion of the internal market, which are perceived to be affected by the entry of such persons into, and their movement within, the Community.[8] Exogenous integration proceeds on the basis of bargains between Member States and becomes most visible in agreements or 'conventions' concluded between the Member States themselves, in amendments to the EC Treaty and in new treaties, such as the Treaty on European Union. As the latter Treaty highlights, the interaction between the two kinds of integration processes may be decisive for development of EC policy regarding TC nationals.

II. Endogenous Integration

A. Social Policy

Implementation of Community social policy is seen as demanding Community action regarding TC nationals. It is feared that discrimination against such persons could lead to 'social dumping' within the Community. Counter-measures are sought in the form of harmonization of national law governing their treatment.[9]

Such a perspective may lead to a narrow approach to the problems involved. For example, in November 1976 the Commission submitted to the Council a proposal

7 Article 7a, like Article 3(c), refers to the free movement of 'persons'. Article 6 requires Member States to treat 'persons in a situation governed by Community law' equally with their own nationals. See joined Cases C-92/92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft GmbH* (not yet reported).

8 While TC nationals may be a matter of interest to the Community, 'celle-ci ne s'est préoccupée sérieusement de créer un statut communautaire de l'immigration en provenance des pays tiers'. See de Lary, 'Libre circulation et immigrés à l'horizon 1993', *Revue française des Affaires sociales* (1989) 93, 103.

9 Own-initiative Opinion of the Economic and Social Committee of 24 April 1991 OJ 1991 C 159/12.

for a Directive,[10] which was revised in April 1978,[11] to harmonize national law concerning illegal migration and illegal employment.[12] The Preamble to the proposal maintained that the social aims of the EC Treaty involved the full employment of EC nationals under the best conditions.[13] Exploitation of illegal immigrants from third countries was prejudicial to the employment of all workers.[14] It, therefore, constituted an obstacle to achievement of these aims, particularly the improvement of living and working conditions, which the Member States had recognized the need to promote in Article 117 of the Treaty. Moreover, in view of the growing interdependence and integration of national labour markets, measures taken by Member States individually against migration for the purposes of employment, or the absence of such measures, inevitably impinged on the effectiveness of measures taken by the other Member States.

The discrepancy between the generalized justification advanced for the proposal and its narrow scope might be taken to indicate that the main concern of the Commission was to establish Community legislative competence in this field.[15] However, harmonization of national law regarding illegal immigration and illegal employment without harmonization of migration policy generally might be regarded as too narrow to effectively tackle the problems with which the former was concerned.[16] The problems result directly from the fact that TC nationals whose labour is in demand have no right to enter the Community to meet this demand and indirectly from distortions of the labour market attributable to a failure of the law effectively to prevent employment under 'abnormal' conditions. Since EC nationals may also be employed under such conditions, the exploitation of illegal immigrants from third countries may merely be a particularly serious example of a more general

10 OJ 1976 C 277/2.

11 OJ 1978 C 97/9.

12 This proposal reflected concern that illegal migration had negative effects on the national workforce and on foreigners legally resident and on the lot of the victims of these illegal activities. See the *Guidelines for a Community Policy on Migration (Communication from the Commission to the Council)*, COM (85) 48, 14.

13 The European Parliament subsequently called for the proposal to be considered in the light of ILO Convention 143, on illegal migration and the fostering of equal opportunities and equal treatment for migrant workers, which practically no Member State had ratified. See the Resolution of 18 November 1983 OJ 1983 C 342/139.

14 According to the Economic and Social Committee, 'everything must be done to stamp out illegal immigration from third countries'. See the Opinion of 1 July 1982 OJ 1982 C 252/39.

15 Even so, legal controversy arose. The proposal was based on Article 100 of the Treaty. On the other hand, the Council preferred in its Resolution on the Social Action Programme OJ 1974 C 13/1 to invoke Article 235. The Economic and Social Committee favoured use of both provisions. See the Opinion of the Economic and Social Committee of 24 February 1977 OJ 1977 C 77/9. There were also objections to the idea of using a directive rather than a non-binding recommendation. See Duyssens, 'Migrant Workers from Third Countries in the European Community', 14 *CML Rev.* (1977) 501.

16 According to the Economic and Social Committee, measures against illegal employment and migration should go hand-in-hand with coordination of migration policies. See the Opinion of 24 February 1977 OJ 1977 C 77/9.

social policy failure, which is unlikely to be remedied through separate treatment of EC nationals and TC nationals.

Even from a technical legal perspective, reliance on harmonization in the absence of liberalization rendered the approach too narrow. Such reliance meant that typical problems associated with the 'old approach' to harmonization might arise. The freedom of movement secured for EC nationals reduces the need for harmonization of national laws governing expulsion and violations of immigration rules, because such laws have very limited application to such persons. In the case of TC nationals, the demands on harmonization may be far greater.

According to the European Parliament, measures aimed at harmonizing national legislation, with particular reference to the definition of identical offences and the stipulation of equivalent penalties, ought to have been proposed. In the absence of such harmonization, differences in national attitudes and policies towards illegal migration and illegal employment might jeopardize efforts to combat these phenomena. The Parliament also hoped that in the longer term the Community would succeed in achieving 'common legal standards', including penal provisions, in the critical area of the protection of fundamental rights, both civil and social.[17]

The Economic and Social Committee also stressed the importance of approximation of criminal law regarding the offences mentioned in Article 3(a) and (b) of the proposal, so as to ensure that sanctions were uniformly applied everywhere and to prevent illegal trafficking in labour becoming centred in Member States where the law was less stringent.[18] An 'agreement' should be concluded between the Member States, under the aegis of the Council of Ministers, to try an experiment in 'Community criminal law' in this area.[19]

A broader starting point, though one less intrusive into national legal systems, was adopted in the Guidelines for a Community Policy on Migration, approved by the Council of Ministers on 16 July 1985.[20] It was noted that pursuant to Article 117 of the Treaty, Member States had agreed upon the need to promote improved working conditions and an improved standard of living for all workers within the Community.[21] Development of a Community policy on incorporation, integration and participation of TC nationals in the society of the host Member State was necessary. To this end, consultation and cooperation were required at Community

17 Resolution of 15 November 1977 OJ 1977 C 299/16.
18 Opinion of 24 February 1977 OJ 1977 C 77/9.
19 Opinion of 1 June 1978 OJ 1978 C 269/38.
20 OJ 1985 C 186/3.
21 More particularly, reference was made to Directive 77/486 OJ 1977 L 199/32 concerning the education of the children of migrant workers. The original Commission proposal OJ 1975 C 213/2 for this measure, based on Articles 49 and 235, envisaged that it would apply to the children of migrants from third States as well as to the children of Community migrants. The Member States merely expressed the political will, when adopting the Directive, that they should provide the same educational facilities for the children of all migrants, whether EC nationals or not. See the *Guidelines for a Community Policy on Migration*, COM (85) 48. Note also the aid towards courses of specialized teaching for children of migrant workers generally, which was provided for by Council Regulation 1761/74 OJ 1974 L 185/1 and Council Decision 77/703 OJ 1977 L 337/12.

level in the implementation of national migration policies *vis-à-vis* third countries. However, matters relating to the access, residence and employment of TC nationals fell under the jurisdiction of the Member States, without prejudice to Community agreements concluded with third countries.

Commission Decision 85/381,[22] based on Article 118 of the Treaty,[23] favoured a more 'supranational' approach. It referred in the Preamble to the importance of ensuring that the migration policies of Member States in relation to third countries took into account common policies and actions taken at Community level, in particular, within the framework of Community labour market policy, in order not to jeopardize the results of the latter.[24] It established a prior communication and consultation procedure regarding national policies and agreements with third countries in this field. The aims of the procedure included ensuring that national policy measures and agreements with third countries were in conformity with, and did not compromise, the results of Community policy, examining the possibility of adoption of Community measures harmonizing national legislation on TC nationals, promoting the inclusion of a maximum of common provisions in bilateral agreements and improving the protection of EC nationals working and living in third countries.[25]

While this measure had an ostensibly broader approach to migration issues than the 1976 proposal, the underlying motivation remained limited. In seeking to demonstrate the legality of this decision before the European Court, the Commission in *Germany, France, Netherlands, Denmark and the United Kingdom v. EC Commission*[26] stressed the need to protect Community social policy.[27] According to the Commission, measures taken by the Member States regarding TC nationals must not conflict with the social policy pursued by the Community, such as the priority of Community workers[28] with regard to access to employment[29] and the operation of the European Social Fund.

22 OJ 1985 L 217/25. See now Decision 88/384 OJ 1988 L 183/35.

23 Article 121 of the Treaty, according to which the Council may assign to the Commission tasks in connection with the implementation of common measures in the social policy field, particularly as regards social security for the migrant workers referred to in Articles 48 to 51, was regarded as inapplicable because of the narrow interpretation given to the last two provisions.

24 According to Advocate General Mancini in Joined Cases 281, 283 to 285 and 287/85, *Germany, France, Netherlands, Denmark and the United Kingdom v. EC Commission* [1987] ECR 3203, 3229, if the Commission had stressed the perspective of the Community labour market, the Decision would have been more acceptable to Member States.

25 Article 3 of the Decision *supra* note 22.

26 *Supra* note 24.

27 Ibid., at 3216. This view was supported by Advocate General Mancini (ibid., at 3239).

28 With respect to TC nationals, nationals of other Member States enjoy the precedence which is granted to nationals of the Member State of employment. See Advocate General Mancini, ibid., at 3238; Article 43 of Regulation 15/61 (JO (1961) 1073), Regulation 38/64 (JO (1964) 965), Article 1(2) of Regulation 1612/68 (JO 1968 L 257/2) and Council Regulation 2434/92 amending Part II of Regulation 1612/68 (OJ 1992 L 245/1).

29 Article 104 of the Treaty required the Member States 'to ensure a high level of employment'. The Community is involved through the European Social Fund (Article 123) and the common vocational training policy (Article 127).

The kind of reasoning which apparently produces such approaches has been elaborated by the Economic and Social Committee. According to the Committee, workers coming from other Member States must be put in a different category to workers from outside the Community, and must be treated in the same way as an indigenous worker. Such treatment would enable workers from Member States to feel that they were genuinely 'Community workers' and not just nationals of a Member State. The interests of workers from third States ought, on the other hand, to be protected by migration policies and in accordance with the Council Resolution of 21 January 1974.[30] In other words, while social policy for EC nationals is linked with the liberalization entailed by freedom of movement, in the case of TC nationals, it is dependent on harmonization of national migration policies.

The assumption that the issues raised should be tackled through harmonization is reflected in attitudes to liberalization requirements, notably interpretation of individual legal provisions. According to the Commission, the wording of Article 49 of the Treaty 'militates against' extension of Regulation 1612/68 so as to cover nationals of third States.[31] However, Article 49 makes no mention of nationality as a condition for enjoyment of free movement. More particularly, in *Diatta*,[32] where the position of a third-country spouse of an EC national was at issue, the Advocate General demonstrated his 'concern to provide a strict interpretation'[33] of Article 11 of Regulation 1612/68,[34] which confers a right to work on the spouse and dependants of a worker exercising his freedom of movement, and the Court itself ruled that this provision could not entail independent rights of residence. However, the safeguarding of derived rights alone may not necessarily effectively secure freedom of movement for the primary holder of rights.[35]

The demands implied for harmonization in this field may be too onerous for this process. Quite apart from technical legal differences, the interests and attitudes of the Member States may be too diverse. For example, the Danish Government, conscious perhaps of its Nordic Council obligations, questions the binding force of 'Community priority'. In particular, it maintains that Community law does not

30 Opinion of 30 October 1975 OJ 1975 C 12/4. An analogy might be drawn with the view of Advocate General Lenz that the intention of Article 95 was to secure undistorted competition in the common market, whereas protection against competition from third States was ensured by the common customs tariff and specific agreements. See Case 193/85, *Cooperativa Co-Frutta v. Amministrazione delle Finanze dello Stato* [1987] ECR 2085, 2101-2102.

31 Joined Cases 281, 283 to 285 and 287/85, *Germany, France, Netherlands, Denmark and the United Kingdom v. EC Commission*, *supra* note 24, at 3216.

32 Case 267/83, *Aissatou Diatta v. Land Berlin* [1985] ECR 567.

33 Ibid., 572.

34 This provision entails the right for dependants to take up work, but if they do so they apparently cease to be dependants and may lose the right to work. They also only have the right to reside in the Member State where the worker resides. The Commission proposed amendments to Regulation 1612/68 OJ 1989 C 100/6.

35 See Weiler, 'Thou Shalt Not Oppress a Stranger: on the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *EJIL* (1992) 65.

preclude the possibility of a Member State giving the same priority, or the same right to equal treatment, to nationals of a third State.[36]

B. Completion of the Internal Market

Completion of the internal market is regarded as demanding harmonized treatment of TC nationals.[37] The demands may be general or particular.

TC nationals may enjoy derived rights of entry and residence as employees of firms exercising their freedom to provide services in another Member State.[38] Similarly, third-country spouses and dependants enjoy derived rights to accompany EC nationals exercising their freedom of movement.[39]

However, third-country employees and spouses or dependants of EC nationals may be required to obtain a visa in order to accompany a primary beneficiary of freedom of movement. In the case of spouses or dependants, Directive 68/360[40] and Directive 73/148[41] require that 'every facility' for obtaining such a visa must be granted by the Member State concerned. This obligation, however, is uncertain in its terms and may not always be taken seriously by Member States. For example, in 1982 it was the practice of the Belgian Embassy in London to grant a visa to such persons only after fourteen days. According to the Embassy, Community law was irrelevant to such matters. Practices of this kind may seriously jeopardize the freedom of an EC national to travel to Member States other than his own with a spouse or dependant lacking the nationality of a Member State, when a business trip or holiday has to be arranged at short notice.[42]

As regards residence, the very derivative character of their rights renders the position of such spouses and dependants precarious.[43] These rights may, for example, be extinguished by divorce or the death of the primary beneficiary. Such problems are exaggerated in the case of spouses and dependants who are TC nationals, since they lack the possibility of claiming primary rights to replace the derivative rights which have been extinguished. Such a situation is likely to affect the willingness of the primary beneficiary to exercise his freedom of movement.

36 *Supra* note 24, at 3218.

37 See the White Paper on *Completing the Internal Market* COM (85) 310, 15-16.

38 Joined Cases 262 and 263/81, *Seco SA and Desquenne & Giral v. Etablissement d'Assurance contre la Veillesse et l'Invalidité* [1982] ECR 223. See also Case C-119/89, *Rush Portuguesa LdA v. Office national d'immigration* [1990] ECR 1439.

39 Article 11 of Regulation 1612/68 *supra* note 28 covers spouses and dependants of EC nationals, 'irrespective of their nationality'.

40 JO 1968 L 257/13.

41 OJ 1973 L 172/1.

42 The Commission belatedly sought to have such practices terminated. See the Seventh Annual Report to the European Parliament on the Monitoring of the Application of Community Law 1989, COM (90) 288, 24. It seems, however, that Commission efforts have had little success. See the European Parliament Resolution of 25 May 1993 OJ 1993 C 176/35.

43 Article 3(2) of Regulation 1251/70 OJ 1970 L 142/24.

More generally, it is feared that an increasing number of immigrants may seek to use the greater mobility within the Community implied by completion of the internal market as a means of escaping the fluctuations of the national labour markets; this could lead to a sharp increase in undeclared work. For this reason, the Economic and Social Committee considers that the Community should aim to define conditions for implementing freedom of movement for TC nationals under equal conditions to those of EC nationals.[44]

Failure to pursue this aim would not only hinder the proper working of the single market,[45] but would betray the very ideas underpinning it. The aim of a single Community employment market, alongside a single market in goods, services and capital, would effectively be abandoned: national labour markets would remain, kept separate by their different treatment of TC nationals.[46] Failure would also result if entry conditions were so stringent as effectively to halt legal immigration and, inevitably, to generate illegal immigration.[47]

Treatment of issues regarding EC nationals may be affected by the primacy of the objective of completing the internal market. For example, the European Parliament called on the Commission to draw up a proposal for a directive on the coordination of immigration policies, including immigration from third States, 'which should also lay down uniform regulations with a view to eliminating competition'.[48] Apparently, then, coordination should be directed towards protection of the Community labour market.

More particularly, to the extent that progress towards completion of the internal market can be achieved, issues regarding TC nationals may tend to be disregarded. Indeed, according to the Political Affairs Committee of the European Parliament, the easing of checks on individuals moving within the Community could not be made conditional upon the prior modification of visa policy or of the law relating to aliens, residence and asylum.[49]

In reality, only limited easing of such controls may be feasible as long as there are persons lawfully resident in the Community who are denied freedom of movement. As long as this situation persists, Member States may demand the right to impose checks to prevent what they may regard as abuse of this freedom by such persons.

44 Own-initiative Opinion of 24 April 1991 OJ 1991 C 159/12.

45 The Commission considered such harmonization to be a precondition for easing border controls for EC nationals in its proposal of 23 January 1985 OJ 1985 C 47/5. See also the Council Resolution of 7 June 1984 OJ 1984 C 159/1.

46 Confining a considerable part of the Community's labour force to twelve segregated territories conflicts with the goals of the single market. See Bohning and Werquin, 'Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market', *ILO Working Paper* (1990) 9.

47 Own-initiative Opinion of 24 April 1991 OJ 1991 C 159/12.

48 Resolution of 18 November 1983 OJ 1983 C 342/139.

49 EP Doc. 1-160/83, 19.

Little consideration is given to the fundamental issue. Can criteria other than nationality be employed as a basis for recognition of entitlement to free movement and completion of the internal market? Resort to such criteria would not be entirely novel.

The nationality requirement applies for the purposes of Community rules governing the social security rights of migrants at the time of acquiring such rights.[50] The Commission has also proposed that derived rights for the spouse and dependants of an EC national exercising his freedom of movement should continue after the death of a spouse or the dissolution of the marriage.[51] In both cases a right which is originally based, directly or indirectly, on a nationality condition may develop into one which is exercisable independently of this condition.

Article 2 of Protocol 3 to the British Accession Act, on the Channel Islands and the Isle of Man goes further. It provides that Channel Islanders and Manxmen shall not benefit from Community provisions relating to the free movement of persons and services. However, according to Article 6, those who have 'at any time been ordinarily resident in the United Kingdom for five years' are not considered to be Channel Islanders or Manxmen for these purposes. Thus entitlement to free movement may be founded on ordinary residence in a Member State for a given period. Similarly, lawful residence in a Member State might appropriately condition enjoyment of free movement for TC nationals generally within the Community.[52]

Instead of following such an approach, the Community institutions may seek to separate treatment of TC nationals from completion of the internal market and advocate conclusion of reciprocal agreements with third countries.[53] For example, according to the Commission, the passport union envisaged in the 1970s went beyond a mere area of free movement and implied that TC nationals would receive equal treatment from all Member States.[54] Further, it implied negotiations with third States to secure identical treatment for all EC nationals.[55] As with implementation

50 See Case 10/78, *Tayeb Belbouab v. Bundesknappschaft* [1978] ECR 1915.

51 OJ 1989 C 100/6. The explanatory memorandum described the right as conditional on 'a tie to the employment market of a Member State' COM (88) 815, 22. The European Parliament considers that such rights should be unaffected by the death of the primary beneficiary or divorce or *de facto* separation. See OJ 1990 C 175/90, in the case of pensioners; OJ 1990 C 175/96, in the case of students, though here protection against the effects of 'dissolution of the marriage' rather than separation was envisaged. In the case of those exercising their right of residence under the draft for what became Directive 90/364 OJ 1990 L 180/26, it was 'final separation' OJ 1990 C 175/849.

52 An analogy might be drawn with the Council of Europe Convention on the Legal Status of Migrant Workers (1977) European Treaty Series 93. This instrument applies to nationals of a Contracting Party who have been authorized by another Contracting Party to reside in its territory in order to take up employment there.

53 The impression is also given that the attitude of the Court 'varies widely' depending on whether rights derive from the freedom of movement of EC nationals or from agreements concluded by the Community, because the former concerns the common market and the latter the external relations of the Community. See Alexander, 'Free Movement of Non-EC Nationals. A Review of the Case-Law of the Court of Justice', 3 *EJIL* (1992) 53, 63.

54 Towards a Citizens' Europe, *Bull. EC* 7/75, 11.

55 Ibid., at 10.

of the common commercial policy, the replacement of bilateral agreements with Community agreements would be necessary.[56] The emphasis is on securing reciprocity and equality between nationals of the third country concluding such an agreement rather than equality between such persons and EC nationals.[57]

C. Competences of Community Institutions and Member States

Incremental approaches to treatment of TC nationals might be thought to merely reflect political choices and thus to be reversible. However, limitations to such approaches may become 'constitutionalized' in definitions of Community competence.

When the treatment of an EC national is at issue, the starting points are trade liberalization requirements and the demands of 'accompanying' Community policies. In *Sergius Oebel*,[58] for example, the starting point was not whether the Community was competent to regulate social policy matters but whether State regulation in this field impeded the free movement of goods. Moreover, in *Raulin*[59] the Court ruled that the equality of treatment as regards access to vocational training, which was required by Articles 7 and 128 of the Treaty, implied a right of residence for EC nationals enrolled in a training course in a Member State other than their own.[60] Residuary State powers in relation to the residence of EC nationals not covered by the free movement provisions of the Treaty could not jeopardize the vocational training policy of the Community.

In contrast, in *Germany, France, Netherlands, Denmark and the United Kingdom v. EC Commission*[61] the starting point was whether the Commission was competent, in enacting Decision 85/381, to interfere with State regulation of the entry and residence of TC nationals. This starting point entailed a strict interpretation of Treaty provisions on the basis of which competence was claimed. The Court accepted that the employment situation and, more generally, the improvement of living and working conditions within the Community were liable to be affected by the policy pursued by the Member States with regard to TC

56 Ibid., at 15. See also the Opinion of the Economic and Social Committee of 30 October 1975 OJ 1975 C 12/4. In practice, however, Community agreements are likely to depend on negotiations between '*couples*' of States of origin and host States and to lead to demands for similar privileges from other third States. See de Lary, 'Libre circulation et immigrés à l'horizon 1993', *Revue française des Affaires sociales* (1989) 93, 110.

57 Transfer of controls to external frontiers implies equal treatment of nationals of third States by Community Member States. See Towards a Citizens' Europe, *supra* note 54, at 12.

58 Case 155/80, [1981] ECR 1993.

59 Case C-357/89, *VJM Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.

60 Hence, Community legislation on a right of residence for students merely facilitates effective exercise of that right. See Commission Proposal of 14 May 1993 on the right of residence for students, COM (93) 209.

61 Joined Cases 281, 283 to 285 and 287/85, *supra* note 24.

nationals.[62] However, in so far as the second indent of Article 3 of the Decision laid down a precise obligation on the Member States and was intended to debar them from adopting national measures or concluding agreements that the Commission considered not to be in conformity with Community policies and actions, it must be regarded as exceeding the scope of the Commission's powers under Article 118.[63]

More particularly, Articles 59-66 of the Treaty, which make no reference to recipients of services, are interpreted as guaranteeing for EC nationals on holiday in a Member State other than their own equal treatment as regards State schemes for victims of criminal assault.[64] Questions as to the closeness or otherwise of the link between the benefits of such schemes and realization of the freedom to provide services are not considered. In contrast, according to the Court in the above judgment, policy regarding TC nationals was only capable of falling within the social field within the meaning of Article 118 to the extent that it concerned the situation of workers from third States as regards their impact on the Community employment market and on working conditions.[65] Cultural matters were not covered by Article 118.[66] Although cultural matters may be important for social integration, the Court considered that the link between such matters and problems relating to employment conditions was too 'tenuous'.

Again, in exercising their powers under Article 48(3) and Directive 64/221[67] to restrict the free movement of EC nationals on public policy grounds, the Court requires that Member States respect principles enshrined in the European Convention on Human Rights.[68] A contrast may be drawn with *Demirel*.[69] Here the Court noted that the free movement of workers was, by virtue of Article 48 of the Treaty, one of the fields covered by the Treaty and did not accept that the Member States entered into commitments with Turkey concerning this freedom in the exercise of their own powers. These commitments fell within the powers conferred on the Community by Article 238 of the Treaty. However, they merely set out programmes and were 'not sufficiently precise and unconditional to be capable of governing directly the movement of workers'. The Court did not address the question of whether in implementing these provisions the Member States had to respect Community law and, more particularly, fundamental rights.[70]

62 Ibid., at 3251. According to Advocate General Mancini at 3241 it was legitimate for the Commission to fill the lacuna in Article 118 and make cooperation compulsory with a view to avoiding conflicts with the free movement of workers.

63 Ibid., at 3255.

64 Case 186/87, *Ian William Cowan v. The Treasury* [1989] ECR 195.

65 *Supra* note 24, at 3252.

66 Ibid., at 3253.

67 JO (1964) 850.

68 Case 36/75, *Roland Rutili v. Minister of the Interior* [1976] ECR 1219.

69 Case 12/86, *Meryem Demirel v. Schwäbisch Gmünd* [1987] ECR 3719.

70 See Weiler, *supra* note 35. See the argument regarding national implementation of the obligation to hold direct elections in Evans, 'Nationality Law and European Integration', 2 *EL Rev.* (1991) 190, 208.

Such case-law may reflect political considerations, though there may be circularity in the willingness of the Court to allow Member States the competence implied by such interpretations of the Treaty and the determination of Member States to preserve such competence. For example, consultation regarding migration policies took place in the Technical Committee under Regulation 1612/68, but it 'ended in complete failure'. The Member States regarded such consultation as entailing mere exchanges of information regarding measures already adopted and on their domestic effects. In other words, they applied the criteria on the basis of which meetings were held on similar subjects under the auspices of international organizations such as the Council of Europe.[71]

III. Exogenous Integration

Limitations to incrementalism imply an increased role for exogenous integration, although the relationship between endogenous and exogenous integration may be more complex than one of simple inverse proportionality.

A. Conventions

Article 3(1) of the Schengen Agreement[72] provides that, in principle, external frontiers, which include those between Schengen Parties and the rest of the Community,[73] may only be crossed at official crossing-points and during fixed hours.[74] Article 5(1) lays down the conditions on the basis of which a TC national may be admitted for up to three months. Article 5(2) requires that admission should, in principle, be refused to those who do not meet these conditions. Application of these provisions assumes the maintenance of frontiers which are supposed to be abolished within the Community under Article 7a of the Treaty.

More particularly, Article 6(1) provides for controls at external frontiers to be based on uniform principles. According to Article 6(2)(a), control involves not only the checking of travel documents and other conditions of entry, residence, work and exit, but also investigation of threats to the public policy and national security of the Parties. Article 6(2)(b) requires that all persons must at least be required to establish their identity through the production or presentation of travel documents.[75] Non-EC

71 Advocate General Mancini, *supra* note 24, at 3240.

72 (1991) ILM 73. This Agreement is said to be based on technical arguments for the abolition of internal frontiers and not to involve social policy considerations of the kind taken into account in endogenous integration. See Hoogenboom, *supra* note 5, at 362.

73 See the definitions in Article 1.

74 In Article 4(1) of the Convention applying the Schengen Agreement ((1991) ILM 84) Contracting Parties guarantee that all passengers on flights from non-Contracting Parties who board a flight to another Contracting Party will be subject to a check.

75 Article 6(2)(b) of the implementing Convention refers to 'at least one check making it possible to establish their identities on the basis of their presentation of travel documents'.

nationals must according to Article 6(2)(c) be subjected to more rigorous controls within the meaning of Article 6(2)(a). Nevertheless, the controls envisaged for EC nationals moving within the Community seem incompatible with Article 7a of the Treaty.[76]

Intergovernmental cooperation between the Twelve as a whole[77] has made less progress. A convention determining the State responsible for examining applications for asylum[78] has been signed. However, adoption of a Convention on the management of the external borders of the Community has been delayed by a dispute between Spain and the United Kingdom over its application to Gibraltar.[79]

B. Article 100c of the EC Treaty

The response of the Commission to the lack of 'any meaningful results' from intergovernmental cooperation was to seek intervention by Member States to modify the legal framework. Experience had shown that the provisions of the Single Act were less than satisfactory as regards entry and residence of TC nationals in the Community. Concerned that relations with third States, notably in the areas of immigration and the fight against drug abuse and serious crime, were being undermined, the Commission suggested two possible solutions. An explicit reference could be made in the EC Treaty to a Community competence, which would require unanimity initially at least, in relation to TC nationals to the extent needed for the free movement of persons and the creation of a frontier-free area. Alternatively, the problems raised by the status of TC nationals, again to the extent to which these involved the free movement of persons, could be treated as one of the questions of vital common interest in the common foreign and security policy.[80] In the event, a mixture of the two kinds of possible solutions indicated by the Commission was favoured.

Partial adoption of the former solution led to insertion of Article 100c(1) in the EC Treaty.[81] It provides that the Council, acting unanimously and after consulting

76 Progress has apparently been more concerned with the strengthening of controls on entry into the Community from third States and cooperation relating to the suppression of illegal immigration and crime than with liberalization of movement within the Community. See the criticism in the Resolution of the European Parliament of 14 June 1990 OJ 1990 C 175/170. See also the Resolution of 9 October 1986 OJ 1986 C 283/75.

77 Article K.3(2)(c) of the Treaty on European Union now provides for the conclusion of conventions in this area, without prejudice to Article 220 of the Treaty.

78 (1991) ILM 425. The desire to adopt such formal measures is said to be a manifestation of resistance to refugees. See Hoogenboom, *supra* note 5, at 377.

79 *EC Twenty-Sixth General Report* (1993) 364.

80 Commission Opinion of 21 October 1990 on the Proposal for amendment of the Treaty establishing the European Economic Community with a view to political union, COM (90) 600, 12.

81 The White Paper on *Completing the Internal Market* COM (85) 310, 16 advocated adoption of a Directive on a common visa policy. See generally Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals', 3 *EJIL* (1992) 36. The Dutch draft for the Treaty on European Union made provision in Article 100abis for enactment of measures generally

the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. From 1 January 1996 such decisions are to be adopted by a qualified majority, and before that date the Council shall, acting by a qualified majority on the basis of a Commission proposal and after consulting the European Parliament, adopt measures relating to a uniform format for visas.[82]

However, care is taken to limit encroachment on national powers in this field. In the event of an emergency situation in a third country posing a threat of a sudden inflow of nationals from that country into the Community, the Council, acting by a qualified majority on a recommendation from the Commission, may introduce under Article 100c(2), for a period not exceeding six months, a visa requirement for nationals from the country in question. The visa requirement established under this procedure may be extended in accordance with the procedure referred to in Article 100c(1).

Moreover, Article 100c(5) stipulates that this Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security. It seems unlikely that this provision will be interpreted as narrowly as provisions permitting exceptions from the freedom of movement of EC nationals. According to the European Court, Member States may take measures with regard to TC nationals – either by adopting national rules or by negotiating international instruments – which are based on considerations of public policy, public security and public health and which are, as such, their sole responsibility. The only proviso is that the whole field of migration policy in relation to third States does not necessarily fall within the scope of public security.[83] Whereas in the case of EC nationals, exceptions from their freedom of movement must be justified, in the case of TC nationals, restrictions on State powers must be justified.

Indeed, the main effect of this provision may be to preserve the freedom of Member States to pursue their own approaches to treatment of TC nationals. On the one hand, according to Article 100c(7), the provisions of the conventions in force between the Member States governing areas covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant to this Article. To this extent, some legitimacy may be conferred on Schengen arrangements.

concerning entry into, and movement on the territory of, Member States by TC nationals. See *Europe Doc.* No. 1733/1734 (3 October 1991).

82 Article 100c(3).

83 Joined Cases 281, 283 to 285 and 287/85, *Germany, France, Netherlands, Denmark and the United Kingdom v. EC Commission*, *supra* note 24, at 3253. The evolution of the CFSP under Article J of the Treaty on European Union may also have an impact on the freedom of Member States to adopt measures unilaterally in relation to security policy. At one stage in the drafting of the Treaty on European Union it was envisaged that visa policy, asylum and immigration matters would be covered by the CFSP. See the draft of 20 June 1991 *Europe Doc.* No. 1722/1723 (5 July 1991).

On the other hand, the interests of conservative Member States may also be protected. According to the Commission, unless the problems preventing signature of the 1990 Convention are resolved, 'the abolition of internal frontier controls in accordance with Article 8a will not be able to take place under satisfactory conditions owing to deficiencies in the administration of internal frontiers'.[84] Such States may now be in a position to prevent adoption of measures under Article 100c(1) and argue that this provision implicitly confirms the legitimacy[85] of controls on movement pending the adoption of such measures.[86]

It is against this background that Article 100c and, more particularly, the potential of Article 100c(6) should be viewed. According to Article 100c(6), this Article shall apply to matters regarding TC nationals if so decided pursuant to Article K.9 of the Treaty on European Union, subject to the voting conditions determined at the same time.

C. Article K of the Treaty on European Union

Article K of the Treaty on European Union provides for cooperation in the fields of justice and home affairs.

In particular, according to Article K.1, matters to be regarded as of common interest without prejudice to the powers of the European Communities, include: asylum policy;[87] rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;[88] immigration policy and policy regarding nationals of third States, particularly conditions of entry and movement on the territory of Member States, conditions of residence, including family reunion and access to employment, combating unauthorized immigration, residence and work by such persons.[89]

Article K.3 provides that Member States shall inform and consult one another within the Council concerning matters of common interest with a view to coordinating their action. Article K.3(2) provides that the Council may adopt joint positions and promote cooperation; adopt joint action in so far as the objectives of the Union may be better achieved by joint action than by the Member States acting

84 See the *Seventh Annual Report on the Implementation of the White Paper*, COM (92) 383.

85 Failure to harmonize national rules governing the entry, movement and residence of TC nationals may be seen as entailing for Member States a legitimate interest in the retention of internal border checks. See D. Wyatt and A. Dashwood, *European Community Law* (1993) 363. See also the Resolution of the European Parliament of 13 June 1985 OJ 1985 C 175/233.

86 In contrast, Article K.7 of the Treaty on European Union provides that provisions of Article K shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for therein. Thus Article K.7 avoids creating the implication that a failure to act thereunder could give legitimacy to maintenance of restrictions.

87 Article K.1(1).

88 Article K.1(2).

89 Article K.1(3).

individually on account of the scale or effects of the action envisaged; and may draw up conventions which it shall recommend to the Member States for adoption.

According to Article K.9, the Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty to action in the areas referred to in Article K.1(1) to (6) and at the same time determine the relevant voting conditions relating to it. The Council shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.[90]

Even before ratification of the new Treaty, inclusion of Article K therein may have provided some impetus to intergovernmental cooperation. According to the Declaration of the European Council in Edinburgh in 1992 on principles governing external aspects of migration policy,[91] the Treaty on European Union, notably its Titles V and VI, 'will provide an adequate framework for ... coordination action' relating to immigration by TC nationals. Uncontrolled immigration could be destabilizing, and 'it should not make more difficult the integration of third country nationals who have legally taken up residence in the Member States'. Following the adoption of a work programme for immigration ministers, endorsed at the Maastricht European Council,[92] a recommendation on the removal of illegal immigrants from third countries[93] has been adopted, a resolution has been made on manifestly unfounded applications for asylum and on host third countries, and conclusions have been reached on countries where there is generally no serious risk of persecution.[94] However, the principal concern seems to be with tightening controls on TC nationals, and this may be a natural consequence of including migration issues within the scope of Article K, thereby linking them with criminal matters rather than with social policy or the freedoms entailed by the internal market.

IV. Fundamental Rights

Under Article K.2 matters of common interest are to be dealt with in accordance with the European Convention on Human Rights. However, the concern underlying this recognition of a fundamental rights dimension seems to be to contain encroachment on such rights rather than to treat Community law as an instrument for promoting them.

90 The possibility of applying Article K.9 to asylum matters is to be considered by the Council before the end of 1993. See the Declaration on Asylum, annexed to the Treaty on European Union.

91 Annex V to Part A of the Conclusions of the Presidency *Bull. EC* 12-1992, 1.31.

92 *Bull. EC* 12-1991, 1.6.

93 Harmonization in this area was considered necessary to prevent a person removed from one Member State from simply entering another. See the *Communication of the Commission on the Abolition of Controls of Persons at Intra-Community Borders*, COM (88) 640.

94 *EC Twenty-Sixth General Report* (1993) 364.

This failure to so treat Community law reflects a well-established tendency in Community practice. For example, the original version of the proposal concerning illegal migration and employment omitted the 'fundamental principle' of the recognition of the rights of illegal migrant workers deriving from the work they had performed and the obligations to be fulfilled by employers in this respect. This omission was only partly remedied[95] following protests from the European Parliament[96] and the Economic and Social Committee.[97]

However, it is possible to interpret integration demands and individual Treaty provisions as demanding more than mere containment of invasions of fundamental rights. For example, the Economic and Social Committee considered that all TC nationals who had been working in the Community for a certain length of time[98] and who wanted to stay should be given the chance to remain in the host Member State.[99] According to the Legal Affairs Committee of the European Parliament,[100] TC nationals must be able to remain if they have jobs and must be protected against arbitrary expulsion and withdrawal of work permits.

More particularly, the Parliament considers that rights of residence for pensioners should be extended to benefit TC nationals.[101] Thus the Parliament proposed insertion of a clause in the Preamble to the draft for what became Directive 90/365[102] on a right of residence for pensioners, envisaging future measures to recognize rights for TC nationals identical to those of EC nationals. The Directive itself should apply to TC nationals who had lived on a regular basis in a Member State since the age of six, as well as to political refugees and to stateless persons[103] recognized as such in a Member State and residing there.[104]

Again, the Parliament proposed inclusion of a clause in the Preamble to the Commission draft for what became Directive 90/366[105] on the right of residence for

95 OJ 1978 C 97/9.
96 Resolution of 15 November 1977 OJ 1977 C 299/16.
97 Opinion of 24 February 1977 OJ 1977 C 77/9.
98 Resolution of the European Parliament of 13 September 1990 OJ 1990 C 260/167. See also the Report on the Parliamentary Assembly of the Council of Europe on the right of permanent residence for migrant workers and members of the families, Doc. 5904 (1988), which recommended a minimum residence period of five years.
99 See the Opinion of 1 July 1982 OJ 1982 C 252/39. This residence right should be granted regardless of the final employment situation of the migrants concerned. See the Opinion of 25 October 1984 OJ 1984 C 343/28.
100 EP Doc. 1-811/83, 44.
101 Resolution of 13 June 1990 OJ 1990 C 175/89.
102 OJ 1990 L 180/28.
103 Articles 1 and 2 of Regulation 1408/71 JO 1971 L 149/2 expressly assimilate stateless persons and admitted refugees and their relatives to EC nationals for social security purposes. See earlier the declaration of the Representatives of the Governments of the Member States JO (1964) 1225 that refugees within the meaning of the Geneva Convention on the Status of Refugees who were resident in one Member State should be treated as favourably as possible if they wished to enter another Member State for the purposes of taking up employment there. See later OJ 1985 C 210/2, regarding self-employed refugees.
104 See earlier the Resolution of 17 April 1980 OJ 1980 C 117/48.
105 OJ 1990 L 180/30.

students, to the effect that the EC Treaty envisaged a 'right of people to choose to reside in any one of the Member States without any distinction whatsoever'. The Directive should be a point of reference for the extension of the right of residence to students from third countries.[106]

A similar position was adopted in relation to the Commission draft for what became Directive 90/364[107] on the right of residence for EC nationals not covered by other Community measures.[108]

Related procedural rights may also be envisaged.[109] According to the Commission proposal concerning illegal migration, Member States were to take the necessary measures to ensure that migrants sanctioned for breach of such law might appeal against their sentence. Where the sentence was one of deportation, appeal should involve a stay of execution.[110] Member States were also required by the amended version to ensure that an illegal migrant, whether or not subject to deportation, should be given every opportunity to assert his rights and those of his family before the proper authorities. He should also be granted access to all possible supporting evidence and where applicable receive free legal aid.[111]

According to the European Parliament, there must be at least the right to information and legal aid, and rules governing the legal consequences of unlawful or improper action by the authorities are required. Such protection must be afforded not only to EC nationals but to all those legally resident in the Community.[112]

More particularly, recognition of the right to family life is advocated. In its Resolution of 15 November 1977[113] the European Parliament requested the Member States to adopt in national legislation as liberal an attitude as possible when it came to regularizing the position of illegal migrants and their families.[114] Even electoral rights may be advocated. According to a Resolution of the European

106 OJ 1990 C 175/96.
107 OJ 1990 L 180/26.
108 OJ 1990 C 175/84. See earlier the calls for a statute for migrant workers generally in EP Doc. 1-516/79 and EP Doc. 1-535/79/rev. II.
109 It is considered necessary to speed up the procedures for recognizing the status of political refugee. This would make it easier for these refugees to enter the labour market. See the Opinion of the Economic and Social Committee of 25 October 1984 OJ 1984 C 343/28. Such persons were 'a very special category of migrants'.
110 Article 6.
111 Article 7(3).
112 See the Resolution of 22 January 1993 OJ 1993 C 42/250.
113 OJ 1977 C 299/16.
114 See also the Report on behalf of the European Parliamentary Committee on Social Affairs, Employment and Education, EP Doc. 238/78, 12 and the Opinion of the Economic and Social Committee of 30 May 1974 OJ 1974 C 109/52.

Parliament of November 1983,[115] all migrant workers should be given the right to vote and stand for election, at least at the local level.[116]

Failure to follow such paths and to utilize the potential of Community law for promoting fundamental rights in the case of TC nationals may ultimately lead to clashes with the requirements of the European Convention on Human Rights.[117] If the general tendency of Community law is to permit, or even encourage, discrimination between TC nationals and EC nationals, a containment policy may not be sufficient to prevent action contrary to this Convention.

For example, although the Convention does not guarantee rights of entry and residence as such, and the Fourth Protocol to the Convention[118] only guarantees such rights in the case of nationals of the State concerned, exclusion or expulsion of aliens may involve action contrary to other rights which are guaranteed by the Convention. For example, expulsion of a TC national related to someone resident in a Member State may constitute a violation of the right to respect for family life in Article 8 of the Convention.[119] The possibility of there being a breach of the Convention in such circumstances is apparently heightened where discrimination of the kind prohibited by Article 14 is involved.[120] Thus expulsion of such a person on grounds which would not lead to the expulsion of a Community national might be contrary to the Convention. Differential treatment of different categories of aliens, i.e. nationals of other Member States and nationals of third States, may not necessarily be easy to justify.[121] Parties to the Convention and its Protocols cannot lawfully derogate from the rights embodied therein simply by concluding agreements amongst themselves, even one as important as the EC Treaty.[122] There is no equivalent in the Convention to Article XXIV of GATT, and it is unclear whether EC nationality, which lacks the historical foundation of, for example,

115 Resolution of 18 November 1983 OJ 1983 C 342/139. See, most recently, the Resolution of 11 April 1993 OJ 1993 C 150/127, where the Parliament also advocated action regarding access to citizenship for TC nationals, grant of citizenship to all children born in the Union and adoption of a Resident's Statute for 'non-nationals'.

116 See also the Opinion of the Economic and Social Committee of 25 February 1989, CES (89) 73.

117 With regard to the combined operation of the principle of the right to respect for family life in Article 8 of the European Convention on Human Rights and the provisions of Regulation 1612/68, Case 249/86, *EC Commission v. Germany* [1989] ECR 1263.

118 (1964) European Treaty Series 46.

119 See, for example, Applic. No. 8244/78 *Uppal Singh* (17 Decisions and Reports of the European Commission of Human Rights (1980) 149).

120 First Report of the Home Affairs Sub-Committee on Race Relations and Immigration: *Proposed New Immigration Rules and the European Convention on Human Rights* (1979-1980) House of Commons Paper 434, memorandum by F. Jacobs, para. 4.

121 Article 1(3) of the International Convention on the Elimination of all Forms of Racial Discrimination (G.A. Res. 2106A(XX)) prohibits discrimination against a particular nationality.

122 The European Court has ruled that it was not contrary to the prohibition of discrimination between nationals of different ACP countries in the Lomé Convention for a Member State to reserve more favourable treatment to nationals of one ACP State, provided that such treatment resulted from the provisions of an international agreement comprising reciprocal rights and obligations. See Case 65/77, *Jean Razanatsimba* [1977] ECR 2229, 2238-2239. However, fundamental rights issues were not put to the Court.

Commonwealth citizenship or the special treatment accorded Irish nationals in the United Kingdom, could always provide an objective justification for such differentiation.[123]

The need for a more liberal approach may be rendered all the more pressing by the European Economic Area Agreement. This Agreement provides for extension of freedom of movement and the prohibition of discrimination to benefit nationals of EFTA States.[124] Thus persons lacking the nationality of a Member State of the Community will enjoy the protection of the very principles which lie at the heart of the Community Citizenship envisaged in Article 8 of the EC Treaty. It therefore becomes increasingly implausible to treat rights which could be treated as fundamental rights and protected as such by Community law as dependent on possession of EC nationality or, perhaps, EEA nationality.

V. Conclusion

Neither the incrementalism of endogenous integration nor the intergovernmental bargaining of exogenous integration has made a serious impact on the separate treatment of EC nationals and TC nationals. Such separation renders availability of fundamental rights dependent on (impractically conceived) integration requirements rather than *vice versa*. Family reunification, for example, is treated by Community law as 'a necessary element in giving effect to the freedom of movement of workers [and] does not become a right until the freedom which it presupposes has taken effect'.[125]

Adverse consequences may not necessarily be limited to TC nationals. It is recognized in the European Parliament that although EC nationals are not subject to immigration control, they may suffer bureaucratic oppression and discrimination. Moreover, the restrictions which form part of national immigration policies help to foster fear and distrust or even hatred of foreigners generally, which may ultimately lead to threats to democracy in Europe.[126] In other words, lack of a real fundamental rights dimension to the integration process may be detrimental to the process itself and, more particularly, to the rights which are supposed to be entailed for EC nationals.

123 However, this may be attractive to national authorities. The status of British Dependent Territories Citizens from Gibraltar as United Kingdom nationals for Community law purposes was used in section 5 of the British Nationality Act 1981 to indicate the beneficiaries of the right of registration as British Citizens under this provision.

124 See, generally, Article 4 of the EEA Agreement and A. Evans, *EC/EEA Law* (forthcoming) (1994) Chapter 9.

125 Advocate General Darmon in Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, 3745. According to the Court itself, such a right would depend on a Community provision defining the conditions in which family reunification must be permitted (ibid., at 3754).

126 Report drawn up on behalf of the Committee on Social Affairs and Employment of the European Parliament, EP Doc. A2-4/85, 16-17.