Migrants and Minorities

Migrants and Minorities: The European Response

Edited by

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PART I

THE EUROPEANISATION OF IMMIGRATION POLICY?

CHAPTER ONE

INTRODUCTION: REGULATING THE NEW FACE OF EUROPE

ADAM LUEDTKE, CARRIE HUMPHREYS, TERRI E. GIVENS AND RHONDA EVANS CASE

Europe stands on the brink of a new era of diversity and immigration. Although many Europeans would prefer to ignore this fact, the signs are everywhere. Societies and politics are being irrevocably changed by encounters with migrants, both recent and settled. European governments increasingly experiment with a range of policy responses—both restrictive and liberal—from visas for skilled workers to bans on religious garb. But beyond a solemn acknowledgment of the importance of the "problem" (in reality a maze of interrelated problems and opportunities stemming from European encounters with migrants and minorities), analysts of EU immigration must pinpoint specific trends and emerging patterns if we hope to understand what this change means for the future of Europe, and for broader questions such as Islam/West relations, or how democracies deal with diversity. Two decades after the end of the Cold War and the revitalization of European integration, we must go beyond sensationalistic and simplistic accounts of headscarves, riots and radical right-wing parties, so that we can illustrate the everyday interactions and dialogues between European states, societies, migrants and minorities. On the ground level, institutions like schools and local governments have charted unique courses for dealing with diversity. And from above, the institutions of Brussels become ever more important for regulating the big picture. The passage of the Lisbon Treaty means that common EU rules on immigration will now be easier to achieve (and more likely). But what exact role is played by the institutions of the EU in Brussels, and how does this vary across policy areas? How are Europeans on all levels dealing with the sensitive questions raised by Islam, and how are migrants and minorities dealing with the hostility and xenophobia they routinely

encounter? And finally, how have the experiences of different European countries in integrating their immigrants and minorities changed our comparative understanding of race, ethnicity and citizenship? These three sets of issues—EU-level regulations, Islam and xenophobia, and comparative integration policy—are the topics that motivate and structure this book.

This introductory chapter will first illustrate the increasing influence of Brussels in regulating immigration and diversity, but will also show how differences between EU rules on how to coordinate anti-discrimination policy, and EU rules on how to coordinate immigration policy, have led to very different outcomes in these two policy areas. In general, anti-discrimination policy is more "Europeanised" than immigration policy, though the passage of the EU's Lisbon Treaty will lead to more Europeanisation of immigration policy. Also, most EU-level immigration policy has been relatively "restrictive" towards the rights and freedoms of immigrants, while most EU-level anti-discrimination policy has been relatively "liberal", or expansive towards the rights and freedoms of immigrants.

After an analysis of how immigration and anti-discrimination policy are regulated at EU level, we close with a plan of the book and a summary of each individual chapter.

Introduction: New European Faces, Common European Rules?

Immigration has played an important role in the postwar economic development of Europe. Ostensibly "temporary" labourers were integral to the labour force in Europe during periods of strong economic growth in the 1950s and 1960s. Despite the general stop of the mass importation of labour in the early 1970s, immigration continues to play a role in the labour markets and social policies of European countries. Countries are dealing with not only the issues of family reunification, asylum seekers, and illegal immigration, but also with aging populations and declining birthrates, and potentially crippling skilled and/or unskilled labour shortages in some sectors. To prevent future crises, political elites now generally agree that these issues need to be addressed proactively, as opposed to the traditional method of attempting to ignore the problem (Givens 2007, 68; Euractiv 2007a). Immigration has created a new face for Europe, which has had to confront the challenge of incorporating millions

of immigrants from outside the continent, including many Muslims. It is estimated that 680,000 legal immigrants and 500,000 illegal immigrants enter Europe every year (Euractiv 2005; Euractiv 2007b; Vucheva 2007). This influx has led to new difficulties for the receiving countries, most of whom had considered themselves homogenous rather than multi-ethnic states. One example is the Netherlands, which has been steadily moving away from its multicultural policies (Givens 2007; Groenendijk 2004; Ireland 2004) in the climate of fear generated by the murder of Theo van Gogh. Incidents like these, along with the London and Madrid bombings, have led countries to seriously reconsider their immigration and integration policies.

Despite calls for harmonisation of policy at the EU level, the ongoing influx of immigrants and issues of integration have not, for the most part, led to concrete new policies in Brussels (Green 2007; Lavenex 2006; Spongenberg 2007c; Velluti 2007). Immigrants are faced with a broad range of policies depending upon the country in which they reside. Some countries such as France and Britain have made it relatively easy for immigrants to naturalize while others such as Germany and Austria have historically made it more difficult. While Germany has changed its citizenship policy to be more in line with its fellow member states, the EU's new Lisbon Treaty leaves citizenship as a national issue (Green 2007).

European integration has led to a push by certain member states for more harmonisation in the areas of immigration and social policies that affect immigrants (Burnett 2007; Spongenberg 2007a; Spongenberg 2007b). Policy proposals have come in many areas, including asylum policy, illegal immigration, visas and border control, labour recruitment and anti-discrimination policy. We will show below that the first three policy areas have seen a great deal of harmonisation, although this was often due to the restrictive goals of such policies at EU level, emphasizing control over liberalization. However, labour recruitment, particularly for third country nationals[1] (TCNs), is an area in which the EU has been hesitant to make major policy initiatives and where the few successful initiatives are more often restrictive in nature (Lahav 2004; Givens & Luedtke 2004). By contrast, in 2000, the EU adopted the relatively liberal Racial Equality Directive (RED), which applies to (non-TCN) immigrants

[1] A "third country national" is an immigrant residing in one EU member state who is not a citizen of another EU member state.

holding nationality in an EU member state. It obligates member states to enact anti-discrimination laws that protect individuals from discriminatory acts committed by government as well as a range of private entities. The most highly developed anti-discrimination regimes—those of Britain and the Netherlands—served as models for the RED (Geddes 2003; Geddes & Guiraudon 2004). Thus, in this particular policy area, developments more closely approximate a "race to the top" rather than a "race to the bottom."[2] The literature on federalism uses the term "race to the bottom" to indicate that when policy is harmonised, the result is often a lowest common denominator policy, with minimal protections (e.g. in the areas of the environment or human rights). This is because of competition between jurisdictions to attract business, repel immigrants, or whatever the policy goal may be (Tiebout 1956; Oates 1999). However, with anti-discrimination policy, the EU used its institutional advantages to adopt the strongest regime available from the menu of national choices. It will be explained below that key factors explaining this divergence between immigration and anti-discrimination policy were NGOs, in combination with the European Parliament, who were essential to developing the legislation (Lavenex 2006, 1288).

Another area where the EU has taken steps is in policy towards TCNs who are long-term residents. In November 2003, the European Council adopted the Directive on the status of third-country nationals who are long-term residents. This directive, with required transposition into national law by 2006, allows TCNs with five years of residence to have a special secure residence status, equal treatment as nationals in areas of employment and welfare benefits, and perhaps most importantly, the freedom to work and live in other EU member states.[3] However, as Groenendijk notes, "It is a status with rights comparable but not equal to those of Union citizens" (Groenendijk 2004, 121; Lavenex 2006). The directive contains many caveats and national exceptions that restrict TCN rights in practice. At the EU level, both immigration and anti-discrimination policy are determined through largely the same institutional

[2] This is *not* to say that civil society proponents of the RED got everything they wanted. Importantly, protection for TCNs was explicitly rejected by member states and excluded from the Directive in its final form.

[3] Directive 2003/109/EC of 25 November 2003, OJ 2004, L 16/44. As of June 2007, this directive is being amended to extend LTR rights to other beneficiaries of international protection: refugees and beneficiaries of subsidiary protection.

structures, namely the EU's primary legislative body, the Council[4]; yet, we see divergent policy outcomes—generally restrictive immigration policy, and liberal anti-discrimination policy.

In terms of theoretical explanations for immigration's "lag" as an integrated policy area, Givens and Luedtke (2004) have analyzed immigration policy at the EU level, showing that "restrictionist national executives protect de facto national sovereignty over immigration (to maximize political capital), either by blocking supranational harmonisation of immigration policy, or making sure that the harmonisation that *does* occur is weighted in favour of law-and-order and security, and is not subject to the scrutiny of supranational institutions and courts" (Givens & Luedtke 2004, 150). Overall, in terms of immigration policy, the longstanding unanimity voting requirement[5] meant that a single member state could block harmonisation, which in turn often led to no harmonisation, or to a race to the bottom regarding immigrant rights and freedoms (Lavenex 2006, 1285). Another key difference between immigration policy and most other areas of EU policy was that until 2004 the European Commission did not have the sole right of initiative to propose a policy (which it normally does in other policy areas), meaning that until 2005 harmonisation proceeded in a more bottom-up manner, in line with national interests (Geddes 2000; Moravcsik 1998).

Coupled with the unanimity voting requirement on the Council, the lack of sole right of initiative for the Commission meant that it was easier for countries to either block harmonisation of controversial immigration issues, or to propose *restrictive* harmonisation of controversial immigration issues, since the Commission normally proposes extensive and relatively expansive harmonisation of immigration policies (Geddes 2000; Euractiv 2007a). Also, the United Kingdom, Ireland and Denmark have opt-outs from most EU immigration laws, leaving them free to implement restrictive policies if they so choose (Green 2007; Euractiv 2007b).[6]

[4] This area of policy will from unanimity to qualified majority voting (QMV) under the Lisbon Treaty.

[5] The use of unanimity voting changed in 2005 with The Hague Programme. While legal migration issues were still decided by unanimity, illegal migration and asylum moved to QMV. Ultimately, though, Lisbon moves all areas to QMV.

[6] The UK has mainly opted-in to more restrictive measures on asylum and illegal immigration (Givens & Luedtke 2004, Geddes 2003).

The European Parliament, which has been a proponent of rights-expansive harmonisation, has seen its influence minimized in the area of immigration policy through the use of the “consultation” procedure as opposed to the “co-decision” procedure (which applies to most other areas of EU policy). In the more common co-decision procedure, which will apply to immigration and asylum under Lisbon, the Council and Parliament must both give consent for a particular policy, and if they cannot reach agreement then a "conciliation committee" is formed to hammer out a deal. This institutional arrangement gives the European Parliament a great deal of influence in many matters of EU policy (Wallace, Wallace & Pollack 2005). In the weaker consultation procedure, however, which applied to immigration (and other sensitive policy areas like law enforcement), the Council is merely required to “examine” the opinion of the Parliament, which is non-binding and cannot block a decision. This gave the Council, which is made up of national executives, a freer hand in implementing policy away from judicial and democratic constraints, which might require a more expansive harmonisation of immigration policies, protecting immigrant rights and ensuring the free flow of labour in the single market.

Based on the types of policies that have been adopted by the Council, we argue that politics at the national level continue to determine the success of harmonisation proposals, by determining the positions of member states when negotiating in the European Council. However, on certain proposals, as we will show in the case of the RED and some immigration directives, supranational pressures do have an impact on the policies of individual member states. And these pressures will only increase with the passage of the Lisbon Treaty.

This analysis begins by describing policy developments in the EU in the area of immigration and asylum. We then discuss whether the policy initiatives that have been adopted indicate a greater role for the EU in immigration and integration policy. The subsequent section of the chapter will focus on a detailed analysis of the RED, one of the few areas where we have seen the development of rights-expansive policy relating to immigrants. We then close with an outline of the book.

EU-Level Immigration Policy Developments

As mentioned above, it is widely agreed that immigration harmonisation has lagged behind other EU policy areas (Geddes 2000, Guiraudon 2000,

Lahav 2004). In their analysis, Givens and Luedtke (2004, 146) point out that:

> The economic and institutional imperatives of European integration have led to two contradictory political developments: 1) a push by EU institutions . . . to develop a common, "harmonised" EU immigration policy that includes TCNs; and 2) a resistance on the part of some member states to this development.

All EU policy developments in the areas of immigration and anti-discrimination policy are listed in Table 1. Proposals have been broken down into five areas: asylum, legal migration, visas and border control, illegal migration and anti-discrimination policy. As the table indicates, the Council has been selective in its adoption of this legislation. Following Givens and Luedtke (2004), we argue that harmonisation proposals in controversial policy areas are less likely to be successful, and if they are successful they are more likely to be restrictive.

TABLE 1-1: Proposed EU Immigration Policies and Their Outcomes

Policy Area	EU Proposal	Adopted by Council?	If Adopted, Restrictive or Expansive?
Asylum	Common Asylum Procedure (COM(2000)755)	Yes	Restrictive
	Minimum Standards for Conditions for the Reception of Asylum-Seekers (COM(2001)181)	Yes	Restrictive
	Determining the Member State Responsible for Examining an Asylum Application (COM(2001)447)	Yes	Restrictive
	Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.	Yes	Restrictive
	Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted	Yes	Restrictive
	Granting Temporary Protection In Case of Mass Influx (COM(2000)303)	Yes	Restrictive
	Council Regulation No 2725/2000, the Establishment of "Eurodac" for the Comparison of Fingerprints	Yes	Restrictive
	European Refugee Fund (COM(1999)686)	Yes	Neither

Legal migration	Family Reunification (COM(2002)225)	Yes	Restrictive
	Status of Third Country Nationals who are Long Term Residents (COM(2001)127)	Yes	Restrictive
	Coordination of Social Security Benefits (COM(2002)59)	No	
	Conditions of Entry and Residence of TCNs for Paid Employment (COM(2001)386)	No	
	"Blue Card": Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, COM(2007) 637	Yes	Expansive
	Council Regulation (EC) No 2424/2001, Development of Schengen Information System II (fingerprint database)	Yes	Restrictive
	Proposal for a Council Directive on a Single Application Procedure for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third Country Workers Legally Residing in a Member State, COM(2007) 638 final.	No	
	Admission for Scientific Research (COM(2004)178)	Yes	Expansive
	Admission for Study/Training (COM(2002)548)	Yes	Expansive
Visas and border control	Council Regulation Amending Regulation 1683/95 Uniform Format for Visas (2002/C 51 E/03) (COM(2001)577)	Yes	Neither
	Listing Third Countries Whose Nationals Must Possess Visas (COM(2002)679)	Yes	Restrictive
	Proposal for a Regulation of the European Parliament and of the Council amending the Common Consular Instructions on Visas for Diplomatic Missions and Consular Posts in Relation to the Introduction of Biometrics Including Provisions on the Organization of the Reception and Processing of Visa Applications, COM(2006) 269 final.	No	

	Common Border Guard Manual (2001/C 73)	Yes	Restrictive
	Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1.	Yes	Restrictive
	Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 Concerning the Visa Information System (VIS) and the exchange of data between Member States on Short-Stay Visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60; and Council Decision 2008/633/JHA of 23 June 2008 Concerning Access for Consultation of the Visa Information System (VIS) by Designated Authorities of Member States and by Europol for the Purposes of the Prevention, Detection and Investigation of Terrorist Offences and of Other Serious Criminal Offences, OJ L 218, 13.8.2008, p. 129.	Yes	Restrictive
	Council Decision 2008/633/JHA of 23 June 2008 Concerning Access for Consultation of the Visa Information System (VIS) by Designated Authorities of Member States and by Europol for the Purposes of the Prevention, Detection and Investigation of Terrorist Offences and of Other Serious Criminal Offences, OJ L 218, 13.8.2008, p. 129.	Yes	Restrictive
	Travel by Nationals Exempt from the Visa Requirement (2000/C 164)	No	

Illegal Immigration	Transit Assistance for Removal by Air (2003/C 4)	No	
	Mutual Recognition of Expulsion Orders (2000/C 243)	Yes	Restrictive
	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ L 348, 24.12.2008, p. 98.	Yes	Restrictive
	2004/191/EC: Council Decision of 23 February 2004 Setting out the Criteria and Practical Arrangements for the Compensation of the Financial Imbalances Resulting from the Application of Directive 2001/40/EC on the Mutual Recognition of Decisions on the Expulsion of Third-Country Nationals	Yes	Restrictive
	Council Directive 2004/81/EC on the Residence Permit Issued to Non-EU Member Country Nationals Who are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities.	Yes	Mixed
	Penalties for Carriers of Illegal Immigrants (2000/C 269)	Yes	Restrictive
	Council Directive 2004/82/EC of 29 April 2004 on the Obligation of Carriers to Communicate Passenger Data.	Yes	Restrictive
	Proposal for a Directive of the European Parliament and of the Council Providing for Sanctions Against Employers of Illegally Staying Third-Country Nationals, COM(2007) 249 final.	No	
	Combating Human Trafficking (COM(2000)854)	Yes	Restrictive
	Strengthening of Penal Framework (2000/C 253)	Yes	Restrictive

Anti-discrimination	Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals - Methodology for Systematic and Rigorous Monitoring, COM(2005) 172 final.	Yes	Expansive
	Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1.	Yes	Expansive
	Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55.	Yes	Expansive
	Racial Equality Directive (COM(1999)566)	Yes	Expansive
	Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of Third Country Nationals for the Period 2007 to 2013 as Part of the General Program Solidarity and Management of Migration Flows, OJ L 168, 28.6.2007, p. 18.	Yes	Expansive
	Community Action Program to Combat Discrimination (COM(1999)649)	Yes	Expansive
	Common Basic Principles, Council document 14615/04, p. 15; A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union, COM(2005) 389 final.	Yes	Mixed

As the table indicates, with the exception of anti-discrimination policy, only three of the policies that have been adopted by the Council are expansive towards immigrant rights and freedoms. These are the directives on the admission of students, researchers, and highly-skilled workers (the "Blue Card") who obviously trigger less public alarm than other categories of immigrants. As already mentioned, some harmonisation *restricts* immigrant rights, by standardizing policy at the lowest common denominator. These policies allow member states to lower their standards for the protection of immigrant rights and do not provide judicial remedies. Other harmonisation obligates members to raise their standards and is *expansive* towards immigrant rights. The main example in this area is the RED (Lavenex 2006). While this directive does not protect all immigrants (since it is based on race and not nationality), it does provide judicial remedies for ethnic minority immigrants, and obligates all member states (including those who previously had no racial discrimination legislation) to implement the RED into national law (Niessen 2001).

One of the main concerns of NGOs that work in the area of immigration and integration is that policy-making at the EU level will become a "race to the bottom" meaning that policy will match the level of those member states with the most restrictive policies. This has proven particularly true in the areas of asylum policy and illegal immigration. Several examples illustrate this point**.**

First, in looking at asylum, as shown in Table 1, policies adopted under the Amsterdam process related to asylum seekers include: determining the member state responsible for an asylum application, the EURODAC fingerprinting system, temporary protection, minimum standards for the reception of asylum seekers and the establishment of a European Refugee Fund (ERF) (Lindstrom 2005, 598-600). In addition, a directive on creating uniform procedural standards in the examination of asylum claims, and access to law and a fair trial, was finally adopted in December 2005 after a series of delays (Lavenex 2006, 1295). While a step towards harmonised asylum standards would seem like a positive development, it has actually been treated by the European Parliament (EP) and international organizations like the United Nations as a breach of international refugee law. The EP, in decrying the downgrading of established standards in many countries, challenged this directive before the ECJ in 2006. With the exception of the ERF, these measures have allowed member states to lower their standards of refugee protection (van der Klaauw 2004).

Illegal immigration, like asylum, has yet to encounter an expansive European-wide policy, but instead focuses on restrictions (Lindstrom 2005). For example, there is a push to crack down on companies that hire illegal immigrants. Member states have been required to increase the number of companies that are annually inspected for the employment of illegal immigrants from 2% to 10% (Euractiv 2007c). In addition they have committed themselves to conducting spot checks and any companies in violation could face criminal charges. Overall, EU-level policy has aided national politicians in enacting stringent measures to deal with illegal immigrants (Velluti 2007).

As Lavenex sums it up, "The metaphor of 'fortress of Europe' expresses well this emphasis which has so far consisted more in downgrading existing domestic rights, for example, through limiting access to territory and full asylum procedures, than in creating common European standards" (2006, 1292).

Visas and border control is another area in which several measures have been adopted but initial successes in harmonisation actually resulted from intergovernmental agreements. Major agreements like the Schengen and the Dublin Conventions helped create a uniform format for visas, and a common border guard manual to assist agents at border crossings to determine the status of an immigrant, whether they are coming legally for work, illegally, or as an asylum seeker. These requirements are being expanded to new member states from Central and Eastern Europe. Border checks were scheduled to stop at the end of 2007 and airport checks in early 2008 (Kubosova 2007). With the Lisbon Treaty and movement away from a solely intergovernmental approach, there have also been newer developments such as directives that require the listing of third countries whose nationals must possess visas, and common Consular instructions for examining visa applications. This change also impacts several categories of immigrants, and requiring Schengen visas may push more immigrants to seek asylum or to enter a country illegally.

In the area of legal migration, the Commission has provided numerous proposals. Most recently, there were a series of proposals from former EU Justice and Home Affairs Commissioner Franco Frattini that focused on economic migrants. The central component is the blue card. As Mahony explains, "The blue card – the blue comes from the EU flag – would allow skilled workers to work in an EU member state for an initial two-year period. They would then be able to move to another EU country" (2007a).

This proposal was an attempt to proactively deal with looming labour shortages and had the support of the EP (*Economist* 2007, 54; Euractiv 2007a). Even with this support, the proposal was been highly contested and does not necessarily create clear European standards.

In summary, despite the large number of Commission proposals, few have been adopted, and those few pieces of legislation that are tend to be highly restrictive, harmonise only weakly, and leave many options to national discretion[1] (Mahony 2007b). All of the measures in the four areas described above indicate that the main emphasis of the European Council up to this point has been to provide member states with restrictive measures, while avoiding regulations that would limit a country's sovereignty in the area of immigration. It is the area of anti-discrimination policy where we see some cracks in this position.

EU-Level Anti-Discrimination Policy

As in the area of immigration, anti-discrimination policy also demonstrates the importance of national political concerns in the push for harmonisation of policy related to Europe's changing demographic profile. Here, however, the resultant policy, the RED, constitutes a dramatic change in the way that at least some countries approach anti-discrimination policy. This is curious because, as with citizenship and immigration policy, the Council dominates the policymaking process in this area. Indeed, the process through which the RED was achieved was even more onerous than standard modes of EU policymaking because it entailed amending the Treaty of Amsterdam in order to empower the EU to act in this area. In this section, we discuss the developments that led up to the RED, the preferences of nongovernmental organizations (NGOs) supporting the directive, and the specific terms of RED in its final form.

An Institutional History of the Racial Equality Directive (RED)

Beginning in 1985, the European Parliament played a key role in putting and keeping the issue of racism on the European agenda.[2] The

[1] Even though legal migration moves to QMV under Lisbon, national governments still have significant discretion, like determining the volume/quantity of immigrants that are allowed to enter their countries.

[2] That year, a Committee of Inquiry produced the so-called "Evrigenis report" that documented the growing problem of xenophobia among Member States.

following year, after a series of dramatic electoral gains by extreme right parties, most notably in France, the European Commission, the Council and the Parliament signed the *Joint Declaration against racism and xenophobia*.[3] Over the ensuing years, however, the Council refused to enact anti-discrimination legislation covering racial discrimination, despite repeated requests by the European Parliament. Although there was consensus that racism and xenophobia presented serious problems requiring redress, within the Council there was disagreement as to the appropriate form of that redress and the legal competence of European institutions to deliver it.

As a new decade dawned, the European Parliament redoubled its efforts and was joined by a coalition of NGOs. Foremost among these was the Starting Line Group (SLG), formed by the British Commission for Racial Equality (CRE), the Dutch National Bureau against Racism, and the Churches Commission for Migrants in Europe (CCME).[4] It promptly organized a group of legal experts from across member states to draft a directive targeting racial discrimination, and by 1993, its draft was endorsed by more than 200 NGOs and submitted to the European Parliament, which explicitly approved it in two separate resolutions.[5] The original measure proposed by SLG relied upon Article 308 (formerly Article 235) as its legal basis. That Article empowers the European Community (EC) to take actions not explicitly authorized in the EC Treaty

[3] Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June 1986 (OJ C 158, 25.6.1986).

[4] The SLG's activities are discussed in Isabelle Chopin, "The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment," *European Journal of Migration and Law* 1: 1999. Founded in 1964, the CCME is an organization of churches and ecumenical councils from Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Romania Switzerland, Spain, Sweden, the United Kingdom and Ireland. There are contacts with the Ecumenical Patriarchate (Brussels/Istanbul) and with church partners in Denmark, and Russia. The General Assembly of CCME, October 1999 in Järvenpää/Finland, decided in conjunction with the Conference of European Churches and the World Council of Churches to expand its mandate to cover the whole area of migration and integration, refugees and asylum, and racism and xenophobia. The General Assembly welcomed four new members from the above listed countries. CCME holds official observer status with the Council of Europe in Strasbourg http://www.coe.int/T/E/Social_Cohesion/Migration/ and observes the Committee on Migration of the Council of Ministers.

[5] 1993 resolution, OJ 1993 C 342/19, 20.12.93; 1994 resolution, para. 0, OJ 1994 C 323/154, 20.11.94.

if such action is proven "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community." When it became clear in 1993 that there was insufficient political will to use Article 308, the SLG shifted its strategy and sought an amendment to the EC Treaty that would provide clear authority for a directive on racial discrimination.

To that pressure, the Council of Ministers initially responded with a series of symbolic gestures rather than substantive legislative proposals.[6] In 1994, however, more consequential action was taken by the Council with the establishment of the Consultative Commission on Racism and Xenophobia, or "Kahn Commission" as it came to be known after its chair, Jean Kahn, President of the European Jewish Congress. In its final report, the Kahn Commission issued a number of recommendations, three of which are of particular importance here. First, it recommended that the EC Treaty be amended to authorize the EC to fight racial discrimination, thereby resolving uncertainties concerning the EC's legal competence.[7] Second, borrowing largely from the EC's sex equality legislation, the Commission recommended a policy model based upon the use of directives.[8] And third, the Kahn Commission concluded that the effective implementation of new anti-discrimination policy would require record keeping and monitoring.[9] The last of these recommendations proved quite controversial among several countries, most notably France, which argued that such record keeping would actually reinforce difference.

Both the Parliament and Commission subsequently endorsed the first two recommendations, and at the 1996 intergovernmental conference,

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[6] Resolution on the Fight against Racism and Xenophobia in the fields of Employment and Social Affairs (OJ 1995 C 296/13); Resolution on the Response of Educational Systems to the Problems of Racism and Xenophobia (OJ 1995 C 312/1); and, Declaration by the Council and the Representatives of the Governments of the Member States, meeting within the Council of 24 November 1997 on the fight against racism, xenophobia and anti-Semitism in the youth field, OJC 368/1, 5.12.97.

[7] European Council Consultative Commission on Racism and Xenophobia, "Final Report" Ref. 6906/1/95 Rev 1 Limite RAXEN 24 Brussels: General Secretariat of the Council of the European Union (1995).

[8] European Council Consultative Commission on Racism and Xenophobia (1995) "Final Report" Ref. 6906/1/95 Rev 1 Limite RAXEN 24, at p. 39.

[9] European Council Consultative Commission on Racism and Xenophobia (1995) "Final Report" Ref. 6906/1/95 Rev 1 Limite RAXEN 24, at p. 40.

member states took the important step of amending the EC Treaty.[10] As a result, in 1997, the Treaty of Amsterdam was amended to provide for a new Article 6a (subsequently known as Article 13).[11] Article 13, which took effect in 1999, provides:

> 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.[12]

Although it did not fulfil all of the activists' wishes, this reform does represent "a turning point" in EU anti-discrimination policy (Bell 1997, 49). The SLG had hoped that the new Article would possess direct effect as does Article 119, which requires equal pay between women and men,[13] for that would have enabled individuals to invoke the Article in national legal proceedings and ultimately to appeal to the European Court of Justice. Instead, Article 13 "simply provides a discretionary power to the Council to adopt measures as they see fit."[14] Given the past reluctance of the Council to make policy in the area of racial discrimination, the SLG's disappointment in this regard was understandable. Yet, only thirteen months after the Treaty of Amsterdam was ratified – record speed for the EU – the European Council unanimously adopted the RED[15] in June of 2000.

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[10] See Jan Niessen, "The Amsterdam Treaty and NGO responses," *European Journal of Migration and Law* 2: 2000; and, Isabelle Chopin, "Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals," *European Journal of Migration and Law* 1: 2001.

[11] Importantly, the Treaty of Amsterdam also provides for the renumbering of the articles of the Treaty. Consequently, Article 6a became Article 13 and shall be referred to as such throughout the remainder of this article.

[12] The Treaty entered into force in May 1999.

[13] Isabelle Chopin, *Campaigning against racism and xenophobia: from a legislative perspective at European level* (ENAR, November 1999), p. 3.

[14] Mark Bell, EU *Antidiscrimination Policy: from equal opportunities between women and men to combating racism* (Brussels: European Parliament Directorate General for Research, 1997), p. 12.

[15] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal (OJ) L 180/22, 19 July 2000.

During the negotiations that preceded the directive's adoption, an array of NGOs played a key role in shaping the terms of debate (Lavenex 2006). Members of the SLG, including the European Roma Rights Centre (ERRC), the Migration Policy Group, and Interights played especially important roles in the RED negotiations. They published comprehensive analyses of the domestic anti-discrimination legislation in twenty-six countries. The ERRC co-organized three transnational workshops on legal standards, legal advocacy, and litigation strategies that brought national and EU level stakeholders together. The ERRC "made campaigning for comprehensive anti-discrimination law a cornerstone of its advocacy at international fora."[16]

Although each country had various types of anti-discrimination measures on their law books, in most instances, very few cases challenging racial discrimination ever made it into the courts. Most existing national laws were therefore deemed deficient by interested observers, who characterized them as "dead letters." The NGOs thus pursued three main types of reforms, inspired by the experience of other countries, especially that of Great Britain, with more elaborate anti-discrimination legal regimes. First, they sought a specific set of legal innovations. These included a shift in the burden of proof that would favour complainants[17] and liberalization of the requirements for *locus standi*, "legal standing," i.e. the right to pursue a case in court. Typically, only aggrieved *individuals* can pursue legal action. Members of the SLG, as well as other commentators (Bell 1997, 30; Forbes & Mead 1992, 24), believed it was critical to provide NGOs with legal standing so that such organizations might directly support or represent victims of discrimination, particularly in the more costly and expensive cases involving institutional discrimination. Prior to the RED, this issue of standing was a national rather than a Community issue.

Second, NGOs sought additional policies that would facilitate what Charles Epp has called "support structures for legal mobilization" (1998, 3). These support structures include "rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing" (Epp 1998: 3). Based upon the experience of particular

[16] *ERRC Biannual Report 2001-2002*, p. 11 accessed at http://www.errc.org/Biannual_index.php on 18 July 2004.

[17] In 1997, a Directive was issued that reversed the burden of proof in cases of sex discrimination.