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Long-term resident third-country nationals in the European Union: normative expectations and institutional openings

Theodora Kostakopoulou

Abstract *Long-term resident third-country nationals in the European Union are no longer invisible. The Communitarisation of migration-related matters by the Amsterdam Treaty has opened up possibilities for the development of a comprehensive, legally binding and less restrictive framework as regards long-term resident third-country nationals. The Commission's recently proposed directive aims at harmonising national laws governing the acquisition and scope of long-term resident status and granting long-term resident third-country nationals free movement rights within the Union. Although the grant of European denizenship is a welcome development, it should be seen as a first step towards equal membership and full political inclusion.*

KEYWORDS: EUROPEAN MIGRATION POLICY; EUROPEAN CITIZENSHIP; THIRD-COUNTRY NATIONALS; FREE MOVEMENT; MULTICULTURALISM

The non-citizen residents' demands for political inclusion and recognition have traditionally been viewed as a problem by the member states of the European Union (EU) whose citizenship laws remain firmly embedded within national narratives about historical communities with distinctive identities. Differing definitions of political membership and distinct historical experiences have traditionally determined the ways in which states have responded to the presence of ethnic migrant communities (Castles 1995; Castles and Miller 1998; Favell 1998; Parekh 1998, 2000; Safran 1997). The European Union has increased the complexity surrounding the position of non-national residents by accommodating the symbiosis of different regulatory regimes and by gradually assuming competence over migration-related issues. Given that decisions concerning the entry, residence and expulsion of non-nationals have traditionally been the reserve of state sovereignty, the legal status of third-country nationals has been, until recently, regulated by national immigration laws.

Domestic migration regimes exhibit patterns of convergence as well as divergence. In all member states, for example, prolonged residence results in denizenship (Hammar 1990). Whereas there are broad similarities in the national laws of the member states concerning the acquisition of long-term resident status, such as legal residence, sufficient income or stable employment and absence of a criminal record, there is considerable divergence in the length of residence required for the acquisition of long-term resident status. The latter ranges from two and three years (in Finland and Denmark respectively) to ten and fifteen years (in Portugal and Greece respectively).

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Denizenship entails socio-economic rights such as permanent residence status, the right to family reunion, free access to employment (Austria, Ireland and Luxembourg require a work permit), entitlement to social security and social assistance, and access to education. Local electoral rights have also been granted by Denmark, Ireland, the Netherlands, Finland and Sweden after a relatively short period of lawful residence of two to three years (five years in the Netherlands). In Portugal and Spain this right is granted on the basis of reciprocity, whilst the UK grants it to Commonwealth citizens (Groenendijk *et al.* 2000). Third-country nationals (henceforth TCNs) are excluded from local political participation in France, Luxembourg, Germany, Greece and Austria. Similarly, although one notices a convergence over the nationality rights of second-generation migrants, since, with the exception of Austria, Luxembourg and Greece, second-generation migrant children have the right to obtain national citizenship at birth or the age of majority (Hansen 1998; Weil and Hansen 1999), the conditions for the naturalisation of first-generation migrants remain strict. Portugal, Spain, Greece, Luxembourg, Italy and Austria require ten years residence, whereas Germany and Italy require eight and seven years respectively. This patchwork of differentiated rights for long-term resident TCNs contradicts democratic norms, hinders the development of the internal market and results in unequal access to Union citizenship (Bauböck 1994; Geddes 2000; Kostakopoulou 1996, 1998, 2001).

Indeed, whereas barriers to free movement and residence are increasingly removed for Union citizens, possession of member state nationality remains a qualifying criterion for eligibility to the benefits afforded by Community rules in post-Amsterdam Europe. Union citizenship remains conditioned on possession or acquisition of state nationality (Article 17(1) EC). This has resulted in the relegation of long-term resident nationals of third countries to the periphery of the emerging European civil society,[1] despite the fact that they are an integral part of the European Community and contribute to the development and flourishing of European societies.

In post-Maastricht Europe, policy concerning TCNs (i.e. the conditions of entry and residence in the territory of the member states, family reunion, access to employment and the combating of unauthorised immigration) was the subject of intergovernmental cooperation under the Third Pillar of the Treaty on European Union. The Community had assumed competence over the adoption of a list of third countries whose nationals require a visa when crossing the external frontiers of member states,[2] measures relating to the uniform format visa (formerly Article 100c(1) and (3) EC respectively) and the working conditions of legally resident TCNs under Article 137(3) EC. TCNs could, nevertheless, enjoy the protection of Community law either by virtue of their family relationship with a Community national or as employees of a Community-based company providing cross-border services or by being beneficiaries of three generations of 'third-country agreements', i.e. agreements signed between the European Community and third countries, such as the EEC–Turkey Association Agreement, the Maghreb Agreements of 1976 and the 'Europe agreements' signed with ten central European applicant states (see Cremona 1995; Evans 1994; Guild 1999; Guild and Harlow 2001; Peers 1996).

The Communitarisation of matters relating to TCNs at Amsterdam opened up possibilities for the development of a comprehensive, legally binding and less restrictive framework as regards long-term resident TCNs. The Schengen *acquis*

has been integrated into the framework of the Union, and the provisions of the Schengen Agreement regarding the circulation of TCNs within the Schengen territory for short-term stays not exceeding three months have been allocated a legal basis in Article 62(3) EC.[3] Strengthening the legal position of long-term resident TCNs has become a priority on the European policy agenda in post-Amsterdam and post-Nice Europe. In the Tampere special summit in October 1999, the Heads of State and Government expressed their determination to make 'full use of the possibilities offered by the Treaty of Amsterdam' and stressed the need for a common approach to ensure the integration of long-term resident TCNs in the member states (European Council 1999). A vigorous integration policy encompasses the grant of rights and obligations comparable to those of Union citizens and the provision of opportunities for naturalisation in the host member state. In the Commission's opinion, this common thinking on integration policy could culminate in a form of 'civic citizenship', based on the EC Treaty, inspired by the Charter of Fundamental Rights and consisting of a set of rights and duties offered to TCNs (European Commission 2000).

In this paper, I argue that the post-Amsterdam momentum in developing a common migration policy is likely to lower barriers to more inclusive policies. The Commission has recently proposed a Council Directive on the status of long-term resident TCNs which aims at harmonising national laws governing the acquisition and scope of long-term resident status, and grants long-term resident TCNs mobility rights within the Union (European Commission 2001). This initiative marks the end of a period in which the objectives of ensuring fair treatment for TCNs and creating an inclusive and democratic European *demos* were subordinated to concerns about state sovereignty and the collective identity of national *demoi*. Although these developments are welcome, it is important to remember that they fall short of embracing a participatory model of citizenship that would give TCNs a stake in the European polity. Accordingly, European 'denizenship' should not be seen as the solution to the inequitable exclusion of long-term resident TCNs. Rather, it constitutes an important step towards equal membership and full political inclusion.

Who are the 'Europeans'?

The Treaty of Rome established an embryonic form of European citizenship in so far as it stipulated that free movement rights could be enjoyed by classes of persons throughout the Community. Although the Treaty (Articles 48–51 EEC (39–42 EC on renumbering)) referred simply to workers as the main beneficiaries of the free movement provisions without distinguishing as to whether workers should be nationals of or residents in the territory of the member states, secondary legislation adopted by the Council confined the right to free movement to workers who are nationals of the member states (i.e., the early Regulations 15/61 and 38/64; Reg. 1612/68 and Dir. 68/360). This discursive articulation 'fixed' the scope of economic rights in a way that had not been intended by the Treaty and suppressed other possible juridical options, such as the conditioning of free movement on lawful domicile in the territories of the Union.

As the moment of the original contingency began to fade, the member states' favoured interpretation became sedimented; that is, it became routinised in

ideas, practices and law (Pierson 1996). The sedimentation was so complete that the original dimension of power through which that instituting act took place was far from visible. In addition, national executives could determine unilaterally the scope of freedom of movement of workers via their definition of nationality.[4] The declarations submitted by the UK on the definition of the term 'nationals' for Community law purposes in 1972 and 1981 excluded UK citizens who were inhabitants of overseas dependencies or former dependencies (i.e., non-patrial Commonwealth and Colonial Citizens) or possessed the right of abode under domestic law, while they included non-patrial citizens of the UK from Gibraltar. By controlling the scope and terms of membership in the emerging European Community, the member states thus succeeded in grafting their notions about 'who the Europeans are' onto the emerging institutions.

The Commission was aware of the exclusion of TCNs from the privileges associated with free movement and equal treatment. In background reports it had stated that minority communities are a permanent part of Western political life. But it failed to articulate an agenda for reform that would welcome long-term resident TCNs as equal participants in European political processes (see *Guidelines for a Community Migration Policy* – European Commission 1985; compare also European Commission 1989). Instead, emphasis was put on improvements in working conditions and standard of living for all workers in the Community, vocational training, the social and educational needs of second-generation migrants and migrant women, health education and housing standards. Such measures, however, treated ethnic migrants as vulnerable dependants: the most vulnerable section of the workforce, socially marginalised and the victims of increasing racism, xenophobia and violent intolerance. Protecting the vulnerable, in the sense of attending to their needs, providing educational opportunities, combating racism and promoting awareness in order to assure 'the harmonious co-existence of the indigenous and foreign population', however, falls short of affirming their claims for recognition and equality. After all, vulnerability essentially stems from powerlessness: it is a social construction and condition which is often used to justify the immersion of migrants in power structures which set them apart from nationals or Community nationals. The vulnerability model thus reinforces the hierarchical distinction between members and non-members. It fails to recognise the migrants' claims to equal membership and protection (Bellamy and Warleigh 1998). It is difficult to say whether the Commission adopted the vulnerability model because it lacked a daring vision about community-building in the EU, or because it knew that more radical proposals at that stage could not possibly secure the Council's approval.

A more coherent normative vision concerning the legal status of long-term resident TCNs began to emerge after the entry into force of the Single European Act (1 July 1987). The European Parliament recommended (1989, 1990) that freedom of movement should apply to all resident workers irrespective of nationality, and that non-EC migrants should have the same rights of family unification as EC national workers. It also suggested that non-EC migrants should enjoy protection from discrimination on the same footing as EC nationals, and that they should be granted local electoral rights (European Parliament 1991a, 1991b). The Commission also suggested a Directive granting citizens of non-EC member states, who have been legally resident for five years in the Community, the same rights of free movement of persons and rights of estab-

lishment as Community citizens, in the context of its Programme Relating to the Implementation of the Community Charter of Fundamental Social Rights for Workers – Priorities for 1991/1992. The European Economic and Social Committee (1991), too, stressed the need to give legally resident immigrants a stake in the 'People's Europe'. It proceeded to furnish the foundations for a 'Community statute for migrant workers from third countries' which would: a) harmonise legislative provisions, regulations, instruments and measures for the social integration of migrants in the member states; and b) define the conditions for implementing freedom of movement for migrants from third countries under equal conditions to those of Community citizens. In the Committee's opinion,

> failure to pursue these two aims would not only foster discrimination (with all the moral implications of a Community based on injustice, restricting the rights of some of those contributing to its development), and hinder the proper working of the single market, but would betray the very ideals 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 be kept separate due to the divergence in the treatment of third country workers (1991: 3.4).

The Treaty on European Union established the institution of Union citizenship, but membership of the emerging European polity has been confined to nationals of the member states. The project of the construction of an artificial community beyond the nation-state that would transform aliens into associates in a collective venture became reducible to codes of nationality (Geddes 2000; Kostakopoulou 1997; La Torre 1998). The juridical option of conditioning European citizenship on domicile was filtered out by the past orthodoxy. As a result, the only citizenship rights that TCNs enjoy on the same footing as Community nationals are the right to petition the European Parliament and to complain to the European Ombudsman. This differentiation is difficult to justify given that the principal determinant for citizenship capacity in the EU is whether a person has actually left his/her state of origin and entered the territory of another member state – and not the social fact of his/her attachment. True, it may be objected here that one does not become a citizen by simply inhabiting a place (Schnapper 1997), but it is equally true that a community of citizens does not arise through people having feelings for one another. It arises, instead, through their being in mutual relations with one another, and through their engagement in reflexive forms of community cooperation (Honneth 1998; Kostakopoulou 1996; 2001).

A rare opportunity was missed for subjecting the member states' definition of 'who makes up the European people' to a normative test and for building an inclusive democratic polity which respects the Other and gives all its residents a stake in the success of the project of its 'post-national' democracy. Instead of designing a pluralistic and heterogeneous political community that would then prompt national constituencies to redefine themselves in a pluralistic way, European citizenship made national citizenship more valuable. The implications of this for the values underpinning the EU and its legitimacy were not considered.

In its 1994 Communication, the Commission expressed the view that TCNs should enjoy rights of entry (the right to free circulation on presentation of a residence permit for short-stay periods), residence (i.e. security of permanent residence status via the creation of a permanent residence entitlement; independent rights of residence for family members of third-country nationals after a

qualifying period) and qualified access to the labour market, whereby priority should be given to them if job vacancies could not be filled by workers who are Union citizens or TCNs legally resident in that member state. And in July 1995, the Commission adopted three proposals with a view to attaining the objective set out in Article 7a EC (Article 14 EC). One of these concerned the right of TCNs who are lawfully in the territory of a member state to travel in the Community (European Commission 1995). Drawing on Article 21 of the 1990 Schengen Implementing Convention that provided for a right to free circulation for TCNs, the draft directive conferred on them the right to intra-EU travel for short stays not exceeding three months. Longer stays and access to employment or self-employment were excluded from the scope of the directive. The exercise of the right to intra-EU travel depended on the possession of a valid residence permit and travel document, and of sufficient means of subsistence both to cover the period of the intended stay or transit and his/her return to the member state of departure or a third state. The directive did not secure the member states' approval, but it nevertheless provided an important resource for future developments, such as the insertion of Article 62(3) EC in the Amsterdam Treaty.

The Council's *Resolution on the Status of Third-Country Nationals who Reside on a Long-term Basis in the Territory of the Member States* (Council of the European Union 1996) treated TCNs as a subject class. The Resolution provided that TCNs (refugees under the Geneva Convention are excluded) could be recognised as long-term residents after lawful and uninterrupted residence of ten years in the territory of the member state concerned. National authorities should grant, subject to public policy or public security considerations, either a residence authorisation for at least ten years or an unlimited one. Long-term residents would enjoy unlimited travel in the territory of that member state and the same rights as nationals of the host state with regard to working conditions, trade union membership, housing, social security, emergency health care and compulsory schooling. But they would not enjoy free movement rights and would have no protection against discrimination as regards access to employment, enjoyment of the same social and tax advantages as national workers, and access to training in vocational schools and retraining centres. The integration resolution not only added very little to the rights that TCNs already enjoyed in the member states of residence, but it also encouraged 'a race to the bottom' toward stricter residence requirements for acquisition of national denizenship.

Policy initiatives and policy-making after the Treaty of Amsterdam

The Communitarisation of matters pertaining to resident TCNs by the Amsterdam Treaty (1 May 1999) will produce binding Community rules. Title IV set out a five-year transitional period from the entry of the Amsterdam Treaty into force, during which the Council will take decisions by unanimity and the Commission will share the right of initiative with the member states, before a possible decision at the end of that period to move to qualified majority voting and co-decision with the European Parliament (Article 67 EC).

The Amsterdam Treaty also ended the uncertainty as to whether the requirement of the abolition of border controls (Article 14 EC) applies to TCNs.[5] Article 62(1) EC imposed a clear obligation on the Council to adopt within a five-year

period the necessary measures for the removal of 'any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders'. This covers both long-term residents and newly admitted persons. Within the same period, the Council shall adopt measures setting out the conditions under which nationals of third countries shall have the right of intra-EU movement for short stays (Article 62(3) EC). According to the Council and European Commission's (1998) Action Plan, within a period of five years from the entry into force of the Treaty, the Council has to adopt measures concerning the conditions of entry and residence, and standards on procedures for the issue by member states of long-term visas and residence permits, including those for family reunion (Article 63(3)(a)). Measures defining the rights and conditions under which long-term resident TCNs may reside in other member states will be adopted by the Council acting unanimously on a proposal from the Commission or on the initiative of a member state (Article 63(4) EC).

The creation of a Community law competence (albeit not exclusive) in matters relating to third-country nationals is a welcome development (the Community previously had competence over the working conditions of legally resident TCNs under Article 137(3) EC). In Tampere, the member states stressed the need for a common migration and asylum policy and for a common approach to ensure the integration of long-term resident TCNs. According to the Tampere Presidency Conclusions, 'a more vigorous approach should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia' (European Council 1999: 5). Approximation of the legal status of long-term resident TCNs to that of EC nationals would entail the grant of 'a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g., the right to reside, receive education and work as an employee or self-employed person as well as the principle of non-discrimination *vis-à-vis* the citizens of the state of residence' (European Council 1999: 5).

The emergent rights-based approach to issues concerning long-term resident TCNs is attested by important initiatives taken by the Commission. In February 1999, the European Commission (1999a and b) proposed two Directives on *Extending the Freedom to Provide Cross-Border Services to Third-Country Nationals Established Within the Community* under Article 59(2) EC (49 EC on renumbering) – an extension provided for by the EC Treaty since 1957 – and on the *Posting of Workers who are Third-Country Nationals for the Provision of Cross-Border Services* respectively. On the production of a document known as an 'EC service provision card', the service provider or posted worker will be able to enter freely and reside in a member state in order to provide services or engage in paid employment. The European Commission (1998) has also proposed a Council Regulation amending Regulation 1408/71 (EEC), thereby extending Community co-ordination of social security schemes to employed and self-employed persons who are insured in a member state and who are not Community nationals.

Perhaps the most comprehensive initiative in this area is the European Commission's (1997) proposal for a Convention regulating the first admission of TCNs to the member states of the Union for long stays (i.e. for periods exceeding three months) and improving the rights of long-term resident TCNs in the EU.

The proposal was made shortly after the political agreement on the Amsterdam Treaty. According to Chapter VIII, long-term resident status should be granted to those TCNs (including refugees under the Geneva Convention) who have lived legally in a member state for at least five years and have the right to residence for another five years (Article 30). Recognition of long-term resident status shall be endorsed on the residence permit and would result in the following rights: the right to free movement in the state of residence; increased protection against expulsion; authorisation to reside there for all purposes set out in Titles VI and VII and to engage in all economic activities covered by the Convention; and the right to enjoy the same treatment as Union citizens with regard to access to employment or self-employment, training, trade union rights, the right of association, access to housing and schooling (Article 32). Long-term resident TCNs could apply for employment in another member state in response to a vacancy, and assuming that the post cannot be filled by EC nationals or legally resident TCNs who are part of the labour market of that member state and that they obtain a work contract, they will be entitled to move there. After two years of residence there, TCNs will be recognised as long-term residents in that state and lose their status in the previous state. Although possible loss of resident status in the original state of residence where TCNs have family ties and property would be a disincentive to movement, this provision shows the big gap that exists between the rhetoric of equity and the real persistence of inequality and subjecthood. Resident migrants continue to be treated as the 'property' of the member states.

More favourable terms for TCNs were contained in Title VII of the Convention dealing with family reunification (Peers 2000). The provisions of the Title made no differentiation between long-term resident TCNs and first admissions: TCNs who are legally resident in a member state at least for a year and have a right of residence for at least one year on the date when their application for family reunion is submitted, have the right to family reunion (Article 23). Family members of Union citizens, who have or have not exercised the right to free movement, will be entitled to be joined by their spouse, children and dependent relatives in the ascending and descending line of any nationality under Article 10 of Council Regulation 1612/68. This solves the problem of 'purely internal situations', that is, of the state of affairs where Community nationals who have not exercised their free movement rights cannot invoke the more favourable Community provisions on family reunion against their state of origin. Notwithstanding the favourable terms, however, the draft convention's provisions on family reunion do not institutionalise equity between Union citizens and TCNs: the requirements for admission of family members entitled to be reunited are more restrictive and the category of family members refers to spouses and children below the age of majority (Article 24); spouses and children are to be excluded if it is (subjectively) assessed that the sole purpose of the marriage or adoption is entry to the state; and family members will not be permitted to engage in economic activities for the first six months of residence.

Drawing on the Convention's provisions and following the Council and European Commission's *Action Plan* (1998) and the Tampere *Presidency Conclusions* (European Council 1999), the Commission took the first initiative in the field of migration since the entry into force of the Treaty of Amsterdam by proposing a Directive on family reunification (European Commission 1999c). In

so doing, it confirmed Hailbronner's (1995: 199) observation that achieving consensus on certain common standards on family reunion seems to be easier than reaching agreement on other aspects of migration and asylum policy. The legal basis of the Directive is Article 63(3)(a) EC. Ireland and the UK do not participate in the adoption of the Directive and for Denmark the permanent exception applies. The proposed directive does not differentiate among the categories of TCNs; it establishes a right to family reunification for TCNs (including refugees under the Geneva Convention of 1951) who reside lawfully in a member state and hold a residence permit for at least a year for the purposes of employment, self-employment, activity and study.[6] It also covers Union citizens who have not exercised their right to free movement and whose situation has hitherto been subject solely to national rules (Articles 1 and 3). The family members who are eligible for family reunification are the applicant's spouse or cohabitee (who may be of the same sex), their children and the children of just one of the spouses or partners under her/his actual custody and responsibility, and relatives on the ascending line and children of full age who have no family support in the country of origin and are dependent on the applicant (Article 5). The right to family reunification is subject to public policy, domestic security and public health considerations, and availability of adequate accommodation, sickness insurance and resources. The member states may also set a qualifying period before the applicant exercises the right to family reunification. All family members will enjoy access to education and spouses and children have access to employment and self-employed activity and to all forms of vocational training (Article 12). An autonomous right of residence is given to members of the nuclear family after four years' residence, but there is the possibility of an early application on separation, divorce or death. After one year's residence, if the applicant is in a particularly difficult situation, the member states are obliged to issue an autonomous residence permit. For other family members dependent on the applicant, the member states retain the possibility of granting autonomous status.

Another important initiative constituted the Commission's proposal for Directive 2000/43 prohibiting discrimination on the grounds of racial or ethnic origin. The proposal was part of a series of measures, which included an Action Plan to combat discrimination for the period 2001–06 and a proposed directive to combat all forms of discrimination mentioned in Article 13 EC in the field of employment (OJ 2000 C116/12 C116/7). The objectives of Directive 2000/43 (European Council 2000a) were first, to ensure respect for fundamental rights and for the democratic principles underpinning the Union and to contribute to the realisation of the Community's objectives, such as attaining a high level of employment and of social protection, the raising of the standard of living and quality of life and the development of the EU into an area of Freedom, Security and Justice. The directive prohibits direct discrimination (including an instruction to discriminate against persons on grounds of racial or ethnic origin), indirect discrimination and harassment, and its material scope extends well beyond access to employed and self-employed activities. More specifically, its wide scope covers areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services. In order to ensure equality of treatment, the Directive establishes a multi-faceted machinery which combines legal remedies and judicial enforcement with dissemination of information (Art. 10),

the involvement of the two sides of the industry (Art. 11), the encouragement of dialogue with non-governmental organisations devoted to combating racial or ethnic discrimination (Art. 12) and the establishment of bodies for the promotion of equal treatment akin to the Commission for Racial Equality in the UK (Art. 13). The Directive's judicial framework is designed to facilitate access to justice by individuals. It does so by partially reversing the burden of proof in cases other than criminal procedures and those where the court has investigative powers (Article 8(1)) as well as by requiring the member states to provide adequate means of legal protection (7(1)) and to empower associations or legal entities to engage in individual litigation (Article 7(2)). Finally, Article 5 of the Directive encapsulates the multiculturalist vision of the directive by stating that the prohibition of discrimination should be without prejudice to the maintenance or adoption of measures of positive action by the member states.

Notwithstanding the importance of the above provisions, the fact that the Directive follows the minimum harmonisation approach, that is, merely establishes minimum standards, is a cause for concern. Chalmers (2001: 213–24) has also observed that many of the conflicts and tensions within the Directive are left unresolved: debates about an anti-racism or a multiculturalist strategy; the value of affirmative action; the independence of the administrative enforcement agencies; the best manner to secure the most effective implementation of the Directive and so on. The most important limitation of the Directive, however, is that it does not cover discrimination on the basis of nationality, and is without prejudice to provisions concerning the entry and residence of TCNs and their access to employment and occupation (Art. 3(2)). In this respect, the member states' prerogative in deciding the above matters is left intact.

The preceding policy initiatives indicate that time seems ripe for the formulation and adoption of instruments addressing the position of long-term resident TCNs with a view to promoting integration. It has taken almost 40 years for European policy-makers to realise that the objective of creating a fairer, prosperous and principled community for citizens and residents alike requires settlement of the position of long-term resident TCNs.

The emergent idea of civic citizenship and the Nice settlement

Long-term resident TCNs in the European Union are no longer invisible. A rights-based approach to matters concerning TCNs resident in the EU has replaced the intergovernmental restraint model that predominated in the period 1986–96. Although this is a source of optimism, it is important to remember that the shift from subjecthood to actorhood has yet to be achieved. Undoubtedly, a domicile-based paradigm of European citizenship would free the emerging European *demos* from the grip of state nationality and ensure the formal inclusion of long-term resident TCNs in the European political process. But the political will for such a model is absent. Instead, European policy-makers are favourably disposed towards the development of the idea of 'civic citizenship'.

Civic citizenship entails a framework of (mainly civic and social) rights and obligations for TCNs resident in the Union, such as security of residence in the host member state, right to family reunification, right to reside in another

member state and the rest of the rights mentioned in the Charter on Fundamental Rights (see below). Developing comprehensive integration programmes through partnerships involving national, regional and local authorities and civil society as well as a common legal framework for integration features centrally in the Commission's *Communication on a Community Immigration Policy* (European Commission 2000). In this document, the Commission inaugurates a new approach to immigration by situating it within the changing economic and demographic context of the Union and the Community's evolving *acquis communautaire* in this area. The Commission acknowledges that the present Communication represents a discursive shift from its 1994 Communication on the same subject in that it stresses the need for a 'proactive immigration policy based on the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin' (European Commission 2000: 13). The new approach to immigration should take into account the changing nature of migration itself, build partnerships with the countries of origin, develop a common European Asylum System, manage efficiently migration flows, ensure the fair treatment of TCNs and the promotion of diversity.

At Nice, the European Council took note of the progress on all aspects of the policy formulated at Tampere: namely, partnership with the countries of origin, integration of TCNs and control of migration flows. In addition, it approved the European Social Agenda that defined specific priorities for action for the next five years in order to ensure the realisation of strategic guidelines in all social policy areas. Strengthening social cohesion and promoting social integration feature centrally in the European Social Agenda. Paragraph 23 of Annex I of the Agenda states that legally resident TCNs should be integrated satisfactorily. 'Satisfactory integration' is to be achieved by granting TCNs rights and obligations comparable to those of Union citizens, implementing effectively Community legislation on combating all types of discrimination, and developing exchanges of experience and good practice on national integration and anti-discrimination policies.

The Treaty of Nice (European Council 2000b) extended the scope of qualified majority voting into 27 areas. Among these are measures designed to facilitate freedom of movement of the citizens of the Union (Article 18 EC) and, with respect to the provisions of Title IV EC, judicial cooperation in civil proceedings (with the exception of aspects relating to family law) (Article 65 EC). Although the opt-outs negotiated by the UK, Ireland and Denmark are maintained, the 2000 Intergovernmental Commission agreed on a partial and deferred switch to qualified majority voting. An amendment to Article 67 EC provides that co-decision and qualified majority voting will apply to measures laying down common rules on asylum policy (Articles 63(1) and 63(2)(a)) but only after the Council has adopted legislation defining the common rules and main principles in the matter by unanimity (new paragraph 5 inserted into Article 67 EC). A Protocol was also annexed to the Treaty whereby the partners agreed that from 1 May 2004 measures in the field of administrative cooperation would be adopted by qualified majority voting and consultation with the European Parliament. In addition, the member states issued a declaration on Article 67 EC whereby they agreed that measures setting out the conditions for the free circulation of TCNs (visa-free travel within the territory of the member states) for short visits and on illegal immigration and illegal residence will

be adopted by qualified majority voting and co-decision from 1 May 2004 onwards. The same procedure may apply to measures and procedures concerning the carrying out of checks on persons crossing the external borders of the member states, provided that agreement has been reached on the field of application of these measures (62(2)(a) EC). Finally, the political declaration confirmed the member states' intention to apply qualified majority voting to the other areas of the Title or parts of them from 1 May 2004 or as soon as possible thereafter.

At Nice, the Council, the Commission and the Parliament also jointly proclaimed the European Union Charter of Fundamental Rights.[7] Although the rationale behind this initiative is to strengthen the EU's social legitimacy by consolidating existing rights and 'making their overriding importance and relevance more visible to the Union's citizens' and crucial issues such as the status of the Charter, its enforceability and the jurisdiction of the Court will be on the agenda of the 2004 Intergovernmental Commission,[8] the Charter does not remedy the civic inclusiveness deficit in the scope and practice of citizenship. In addition to universal human rights, TCNs enjoy the following rights: to good administration (Article 41); of access to documents (Article 42); to complain to the Ombudsman (Article 43); to petition the European Parliament (Article 44). The Charter also recognises the right of migrant workers who are authorised to work in the member states to working conditions equivalent to those pertaining to Union citizens (Art. 15 (3)) and to be protected against unjustified dismissal. But it also reaffirms the existing confinement of a core of civic and political rights to Union nationals, notwithstanding the fact that Article 45 states that 'freedom of movement may be granted, in accordance with the Treaty establishing the EC, to nationals of third countries legally resident in the territory of a member state'. In this respect, it can be argued that the Charter constitutes another missed opportunity for the fashioning of a democratic and inclusive European public sphere and for promoting equal opportunities and an anti-discrimination culture in European Union.

What the future might hold

At the turn of the millennium, long-term resident third-country nationals in the European Union are no longer invisible. The Council's long-held position of relegating long-term resident TCNs to the periphery of European civil society and of refusing to be involved in migration and race relations policies is changing. Due to interventions by the European Parliament, pro-migrant NGOs and academics, it has become apparent that the Union will not be in a position to command the peoples' allegiance to an exclusionary European polity which replicates, instead of dispensing with, the inherited failures of national states. A rights-based approach centred on the principle of equal treatment with nationals of the host member state and EU nationals and the granting of free movement rights has begun to emerge. The Communitarisation of migration-related areas has given impetus for the articulation of a common migration policy and for policy developments aimed at improving the legal status of long-term resident TCNs with a view to promoting their integration. The changing economic context of the Union and the existence of labour shortages coupled with demographic concerns about low fertility rates and the

ageing European population have also contributed to the emergence of a more positive approach to the position of long-term resident TCNs.

The Commission has recently taken the initiative of proposing a Council Directive on the status of TCNs who are long-term residents (European Commission 2001). The principle underpinning this directive is that domicile generates entitlements: equality of treatment of long-term resident TCNs with nationals of the host state in the socio-economic sphere and enhanced protection against expulsion as well as rights of mobility within the Union. After five years of legal residence, a member state is obliged to grant long-term resident status to TCNs who have stable and adequate resources to meet their subsistence needs and those of their family members and are covered by sickness insurance (Articles 5 and 6). This status can only be withdrawn on certain grounds set out in the directive: absence from the territory of the host member state for more than two years; fraudulent acquisition of the status; on public security and public policy grounds; and due to acquisition of long-term resident status in a second member state. Long-term resident status entails enhanced protection against expulsion and access to a wide range of socio-economic rights (political rights are excluded from the material scope of the directive). In particular, long-term residents are entitled to equal treatment as regards access to employment and self-employed activity, conditions of employment and working conditions, education and vocational training, recognition of qualifications, social security and health care, social assistance, social and tax advantages, access to goods and services including housing, freedom of association and trade union membership. More importantly, they have the right to reside in another member state for long stays in order to pursue an economic activity as employed or self-employed persons, for study or vocational training purposes or for all other purposes provided that they are self-sufficient and have sickness insurance. Member states may refuse applications for residence on the grounds of public policy and domestic security or public health and the proposal provides for a series of procedural guarantees, such as a statutory period for examining applications for residence permits, the arrangements for notifying interested parties, redress procedures and the conditions governing expulsion. As soon as they enter the second member state, long-term residents will enjoy all the benefits which they enjoyed in the first member state under the same conditions as nationals, with the exception of social assistance and maintenance grants for study (Article 24). Family members are entitled to the rights conferred by Article 12 of the proposed Council Directive for family reunification; that is, access to education, to employment or self-employment and vocational training. Long-term residents living in the second member state will retain their status in the first member state until they have acquired the same status in the second member state. If they so wish, they may, after being legally resident in the second member state for five years, apply to be considered as long-term residents in that member state.

Although the proposed directive does not grant long-term resident TCNs full and equal membership in the European polity, its importance should not be underestimated. European denizenship is an important step towards full political inclusion. Since unanimity is required for the adoption of the directive, however, one can only hope that the member states will proceed to end the injustice inherent in Community law itself and will not dogmatically assert that the Community's *acquis* in this area is very thin.

Table 1. *The European Union's evolving policy towards long-term resident third-country nationals*

	Main characteristic	Policy mode/ principle	Actors	Instruments
1961–85 Invisibility	Hierarchisation/ exclusion	Informal and ad-hoc intergovernmental cooperation outside the ambit of the Community/ Upholding state sovereignty	The Council	Secondary legislation designed to implement the right to free movement confines its scope to workers who are nationals of the member states. Mainly non-binding Resolutions: Council Resolution of 21 January 1974 concerning a social action programme OJ 1974 C13/1; Council Resolution of 9 February 1976 on an action programme for migrant workers and their families OJ 1976 C34/2; Council Resolution of 27 June 1980 on guidelines for a Community labour market policy OJ1980 C168/1; Council Resolution of 16 July 1985 on guidelines for a Community policy on Migration OJ 1985 C186/3; Aid towards courses of specialised teaching for children of migrant workers was envisaged by Council Regulation 1761/74 OJ 1974 L 185/1 and Council Decision 77/703 OJ 1977 L 337/12. But the Commission's 1975 Social Action Programme did include TCNs. The Economic and Social Committee also delivered two opinions which called for the recognition of the right of migrant workers to remain in the host state irrespective of their final employment situation: See ESC opinion of 1 July 1982 OJ 1982 C 252/39 and opinion of 25 October 1984 on a common policy on the resident status of third-country nationals OJ 1984 C 343/28
1986–93 Awareness	Migrants as vulnerable dependants Tensions between the logic of the internal market and the inter-	Increased intergovernmental cooperation outside the Community and formalised intergovernmental cooperation within the context	Justice and Home Affairs Ministers negotiating agreements prepared by the Ad hoc Group on Immigration and the Schengen Group and the Council. Increased interventions by the European Parliament	Draft External Frontiers Convention, Schengen Implementing Agreement EP Resolution of 9 May 1985, OJ 1985 C141/462 (called for the gradual extension of the rights enjoyed by Community workers to non-EC workers) EP Resolution on discrimination against women and female migrant workers in legislation and regulations in the Community OJ 1987 C305/70, 16.11. 87 (called for the extension of free movement to all workers from third countries and their spouses who have been resident in the Community for five years or more) EP Resolution on the Declaration of Fundamental Rights, Doc A2–3/89 (Article

governmental mode of control and discrimination	of the Union established by the Treaty on European Union	The Commission was hesitant. In its 1991 Communication on Immigration, it stated that non-EC nationals not legally resident in a Member State (MS) should not have the freedom to settle in another MS. In addition, see the answer given to written question 82/91 by Mr Bangemann on behalf of the Commission, OJ 1992 C55/5: 'The Commission is not at present considering any initiatives to grant non-Community nationals residing lawfully in a MS the right to permanent residence and access to employment and self-employed activities through out the Community. However, a part of the process of establishing the area without frontiers provided for in Article 8a of the EEC Treaty, it calls for such nationals to be able to move freely in the Community without a visa. Such provision is contained in the draft Convention on the Crossing of External Frontiers. Should this Convention fail to be adopted, the Commission would come up with its own proposal on this matter'.	25 stated that 'whereas certain rights are set aside for Community citizens it may be decided to extend all or part of the benefit of these rights to other persons) EP Resolution on the Commission's Programme relating to the implementation of the Community Charter of Fundamental Social Rights for Workers, A3–175/90, OJ 1990 C 260 (called for a directive granting the same rights of free movement and establishment to long-term resident (i.e., for five years) TCNs. EP Resolution of 14 June 1990 on Migrant Workers from Third Countries OJ 1990 C 175/180 (called for the gradual extension of rights to non-EC migrant workers) EP Resolution proposing the extension of the scope of application of council Regulation 1612/68 to second generation migrants from non-EC countries as well as to refugees and stateless persons, OJ 1990 C68/88–93 EP Resolution recommending the extension of the scope of the Residence Directives to political refugees, stateless persons and to non-Community nationals who have lived in a regular basis in a MS since before the age of 6, OJ 1990 C175/84 and 90 EP Resolution on Union citizenship, OJ 1991 C183, 15.7.1991 (all citizens and all persons legally resident in the Community should enjoy free movement rights) EP Resolution on Union Citizenship A3–0300/91 OJ 1991 C326/205, 21.10.91 (legally resident aliens must be granted socio-economic rights. EP Resolution on the Free Movement of Persons and Security in the European Community) A3–0199/91 OJ 1991 C 267/197 (proposals on the free movement of persons should ensure that non-EC nationals legally resident in the EC should suffer no discrimination) EP Resolution A3–0284/92 on the abolition of controls at internal borders and free movement of persons within the EC; OJ 1992 C337/211, 19.11.1992 EP Resolution on European Immigration Policy, A3–0280/92, OJ C337/94 EP Resolution on Freedom of Movement of Persons of 11 February 1993, B-0162, 0169, 0235,0264 and 0269/93, OJ 1993 C72/136 (called for the extension of free movement to TCNs) EP Resolution of 11 April 1993 OJ 1993 C150/127 (called for the grant of citizenship to all children born in the Union and the adoption of a Residents' statute for non-EC nationals) Compare the ESC's opinion of 24 April 1991, OJ 1991 C159/12; EC Commission Decision to set up a prior communication and cooperation procedure on

Table 1. Continued

	Main characteristic	Policy mode/ principle	Actors	Instruments
				migration policies in relation to non-member states (85/381, OJ 1985 L217/25); EC Commission's Guidelines for a Community Policy on Migration, COM(85) 48 final, 1.3.85; Commission Report on the Social Integration of third-country migrants residing on a permanent and lawful basis in the Member States, SEC(89) 924 Final 22
1994– Rights-based Approach	Fairer treatment/ Equal treatment	Intergovernmental Cooperation in JHA Transfer of migration-related areas to the Community pillar by the Treaty of Amsterdam (1 May 1999)	Commission: A cautious approach in post-Maastricht Europe and a pro-active approach in Amsterdam Europe The EP continues its principled interventions The Council continues the logic of control and hierachisation (see the Integration Resolution of 4 March 1996). But shift of approach after Amsterdam (see the Conclusions of the Tampere European Council, 15–16 October 1999)	EC Commission Communication on immigration and asylum COM(94)23 Final, Bull. EU 1/2–1994: 'The Commission feels that steps should be taken to align the rights of such [legal] immigrants more closely to those of nationals of the Member States and that measures are needed in the fields of employment, education and information and to combat racial discrimination and all forms of racism and xenophobia'. The Commission proposed: security of permanent resident status, free movement on the basis of a residence permit for the purpose of engaging in economic activities, free circulation for short stays. EP Resolution on the Commission Communication on immigration and asylum policies, A4–0169/95 (free movement must apply to all persons legally resident in the MS, irrespective of their origin, nationality, religion or colour of skin) Commission proposal for a Council Directive on the right of TCNs to travel in the Community COM(95) 0346-C4–04420/95–95/0199(CNS) (it covers short stays not exceeding three months) Commission proposal for a Convention, under Articles K1(3)(a) and (b) and K3(2)(c) TEU Commission proposal for a Council Regulation amending Regulation No 1408/71, OJ C6, 10.1.1998 Commission proposal for a Directive extending the freedom to provide cross-border services to TCNs established within the Community, OJ C67, 10.3.99, amended proposal, OJ C311, 31.10.2000

Commission Proposal for a Directive on the posting of workers who are TCNs for the provision of cross-border services, OJ C 67, 10.3.1999, amended proposal OJ C 311 E, 31.10.2000
Commission proposal for a Directive on Family reunification, COM(1999) 638 final, 1.12.99, final and amended version COM(2000)624
Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin
and the general non-discrimination Directive 2000/78/EC
Commission Communication on a Community immigration policy, COM(1999) 757 final, 22.11.2000
Commission proposal for a Council Directive concerning the status of TCNs who are long-term residents COM(2001) 127
Commission proposal for a Council Regulation laying down a uniform format for residence permits for TCNs, COM(2001) 157 final, 2001/0082 (CNS)

Notes

1 The discussion focuses on the process of political incorporation of long-term non-citizen residents who do not derive rights from Community law. The paper does not address the position of third-country nationals who enjoy Community law rights as family members of Union citizens, employees of undertakings providing services in another member state, or beneficiaries of the association and cooperation agreements signed by the Community and third countries.

2 See Regulation (EC) No 2317/95, 25 September 1995, OJ [1995] L234 which was annulled and replaced by Regulation No. 574/99 OJ [1999] L 72. The regulation determines the countries whose citizens had to have visas to cross the external borders of the member states.

3 See Protocol No. 2 on integrating the Schengen *acquis* into the Framework of the Union annexed to the Treaty of European Union and the EC Treaty and the Council Decisions of 20 May 1999 in OJ [1999] L 176. Notably, the integration of the Schengen *acquis* is not applicable to the United Kingdom and Ireland, which have, nevertheless, reserved the right to participate in any of the provisions of the *acquis* should they so wish. As regards Denmark, the Schengen obligations integrated into the First Pillar have the status of public international law obligations.

4 In *Michelletti*, the European Court of Justice (ECJ) confirmed that determination of nationality falls within the exclusive competence of the member states, but it went on to add that this competence must be exercised with due regard to the requirements of Community law; Case C-369/90 *M. V. Michelletti and others v Delegacion del Gobierno en Catanbria* [1992] ECR I-4329. D'Oliveira thought that the ECJ may be finally prepared to assert a degree of Community competence in this area: see his note on *Michelletti* in *Common Market Law Review*, Vol. 30, (1993) 623–37.

5 In *Wijsenbeek*, the ECJ ruled that Article 14 EC (formerly 7a EC) does not create a directly effective right not to be subject to border checks which is enforceable before national courts; Case C-378/97, Judgement of the Court of 21 September 1999. The Court of Appeal has also ruled that Article 14 EC does not impose a clear and precise obligation on the member states and is contingent upon discretionary measures to be adopted by the institutions and dependent upon the agreement of the member states; *R. V Secretary of State for the Home Department, ex parte Donald Walter Flynn* [1997] 3 CMLR 888.

6 In its proposal for a European Parliament and Council Regulation amending Council Regulation No 1612/68, the Commission has broadened the definition of spouse so as to include cohabitees who are recognised as spouses under the legislation of the host member state. Additionally, in the event of dissolution of marriage with a Community national, family members who are TCNs would not lose their right of residence in the host member state provided that they have lived there for three consecutive years; COM (1998) 394 Final – 98/0229 (COD) OJ 1998, C 344/9.

7 See Draft Charter of fundamental rights of the EU (1999) <http://db.consilium.eu.int/DF/intro.asp?lang=en>; also *Charter of Fundamental Rights of the European Union* (2000) OJ C 364/1, 18.12.2000.

8 The Heads of State and Government accepted the draft EU Charter at the informal European Council Meeting at Biarritz (Saturday 14 October 2000). The text was announced as a milestone since it set out values and principles that go beyond the European Commission for Human Rights (ECHR) in the areas of social rights, bio-ethics, environmental protection and data protection. At Nice, although several states wished to amend Article 6 TEU so that a reference could be included to the Charter of Fundamental Rights, the Inter-Governmental Council (IGC) decided not to incorporate the Charter into the Treaty.

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