"INTEGRATING" NON-EU MIGRANTS IN THE EUROPEAN UNION: AMBIVALENT LEGACIES AND MUTATING PARADIGMS

Theodora Kostakopoulou*

One of the most important challenges facing democratic polities concerns the relationship between the constitutional commitment to civic equality, on the one hand, and the public recognition of "difference," on the other. Democratic theory cannot ignore the "politics of recognition" of cultural, national, ethnic, religious, racial, gender, sexual and other identities, even though the latter appears to call into question the traditional conception of democratic society as a bounded polity based on the ideal of universal and "monochrome" citizenship. The non-citizen residents' demands for political inclusion and recognition have been viewed as a problem and/or a threat by the EU Member States[1] whose very constitution relies on a "trinity of unity," that is, a unitary territory, a unitary force and a unitary people.[2] Yet, despite concerns about the long term impact of the politics of recognition on the sense of common belonging and unity, it is generally acknowledged that democracy cannot be enhanced unless political and social institutions and structures become more attentive to, and reflective of, the claims made by minority constituencies for socio-political inclusion and cultural recognition.[3]

In the European Union, barriers to free movement and residence are increasingly removed for Union citizens. Long-term resident third country nationals, however, have been relegated to the periphery of the emerging European civil society. The only EU citizenship rights they enjoy on the same footing as Community nationals are the right to petition the European Parliament and to complain to the European Ombudsman. In post-Amsterdam Europe, possession of Member State nationality remains a qualifying criterion for eligibility to the benefits afforded by Community rules.[4] In addition, only a small percentage of third country nationals can claim derived rights as family members of Union citizens, as employees of Community based providers of services providing services in another Member State, or as beneficiaries of the differential and partial rights entailed by the Association and Co-

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* Senior Lecturer in European Law and European Integration, Manchester School of Law, University of Manchester.

[1] See generally Stephen Castles, How nation-states respond to immigration and ethnic diversity, 21 New Community 3, 293-308 (1995); Steven Castles and Mark J. Miller, The Age Of Migration: International Population Movements in the Modern World (1993).

[2] Thomas Diez, International Ethics and European Integration, 22 Alternatives 287 (1997).

[3] See Bhikhu C. Parekh, Rethinking Multiculturalism (2000); William Connolly, Pluralism, Multiculturalism and the Nation-State: Rethinking the Connections, 1 J. Pol. Ideologies 53 (1996); Jurgen Habermas, Citizenship and National Identity: Some Reflections on the Future of Europe, 12 Praxis Int'l 1-19 (1992); Struggles for Recognition in Constitutional States, 1 Eur. J. Phil. 128, 128-54 (1993); Iris Marion Young, Justice and the Politics of Difference (1990).

[4] "Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship." Treaty Establishing the European Community [TEC], art 17(1). See also the Declaration on Nationality of a Member State which was annexed to the Final Act of the Treaty on European Union.

operation agreements concluded by the European Community and third countries.[5] Kees Groenendijk is, therefore, correct to argue that Community law has unintentionally legitimized the unequal treatment of ethnic minorities.[6] Such treatment is difficult to justify considering that long-term, third country nationals are an integral part of the European community, de facto members of and contributors to the flourishing European societies.

The exclusionary scope of Union citizenship has been criticized[7] and the merits of replacing the "subjective standard of nationality by the objective standard of residence or domicile"[8] have been defended by both academics and NGOs. Although national executives oppose the extension of Union citizenship to long-term resident, third country nationals, the latter are no longer mere objects of policy and vulnerable dependants. A more liberal approach is gradually replacing the Council's favored intergovernmental restraint mode of integrating such persons, owing to a combination of factors, such as European Parliament interventions, intense lobbying by pro-migrant NGOs, academic reaction against the deficiencies of Justice and Home Affairs Co-operation I (the so-called Third Pillar of the Treaty on European Union) and the spill-over effect of the logic of market integration.

The partial Communitarization of the Third Pillar, one of the most important innovations of the Amsterdam Treaty,[9] has unearthed a new dynamic in this area. It marked the beginning of a third phase in the development of a European immigration policy and constitutes a break in the intergovernmental methodology to date.[10] The

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[5] 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 undertaking providing services in another member state, or beneficiaries of the association and co-operation agreements signed by the Community and third countries. For a discussion on the latter, see A. Willy, Free Movement of Non-EC Nationals: A Review of the Case-Law of the Court of Justice, 3 Eur. J. Int'l L. 53 (1992); A. Evans, Third Country Nationals and the Treaty on European Union, 5 Eur. J. of Int'l L 199 (1994); Steve Peers, Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union, 33 C.M.L.Rev. 1, 7-50 (1996); The Legal Framework and Social Consequences of Free Movement of Persons in the European Union (Elspeth Guild ed., 1999); Helen Staples, The Legal Status of Third Country Nationals Resident in the European Union (1999).

[6] See Kees Groenendijk, Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law in Implementing Amsterdam 226 (Elspeth Guild & Carol Harlow eds., 2000).

[7] See David O'Keeffe, Union Citizenship in Legal Issues of the Maastricht Treaty (David O'Keeffe & Patrick Twomey eds., 1994); Theodora Kostakopoulou, European Citizenship and Immigration After Amsterdam: Silences, Openings, Paradoxes, 4 J. Ethnic & Migration Stud. 639-56 (1998); The European Citizenship Menu: Modes and Options, 7 J. Eur. Pub. Pol'y 477, 477-92 (2000); European Citizenship - An Institutional Challenge (Massimo La Torre ed.,1998); Marco Martiniello, European Citizenship, European Identity and Migrants: Towards the Postnational State? in Migration and European Integration: The Politics of Inclusion and Exclusion in Europe 37-52 (R. Miles and Diedrich Thranhardt eds., 1995); Antje Wiener, Citizenship Practice: Building Institutions of a Non-State (1998).

[8] Nationality Laws in the European Union (B. Nascibene ed., 1995); see also Steve Peers, Building Fortress Europe: The Development of EU Migration Law, 35 C.M.L.Rev. 1236, 1268-70 (1998) (noting the absence of political will for such a reform).

[9] The Treaty was signed on October 2, 1997 and entered into force on May 1, 1999.

[10] During the first phase (1985-1991) national governments embarked upon a process of ad hoc and informal intergovernmental co-operation. The second phase (1992-1998), introduced by the Treaty on European Union, introduced a form of "diluted" intergovernmentalism; links were established with the Community institutions, but it accorded leading actor status to national governments.

Schengen acquis has been incorporated into the Union, and most of the provisions of the acquis concerning the free movement of persons have been allocated a legal base in Title IV of the Treaty Establishing the European Community ("TEC"). Empowered both constitutionally and institutionally,[11] the Commission has taken advantage of the structural shift from the intergovernmental pillar and proposed instruments which are likely to improve the position of long-term resident third country nationals.[12] Although it may be premature to talk about a genuine paradigm shift in the Community's approach to migration, it is certainly the case that addressing the inequitable position of long-term resident, third country nationals has become a priority in the Community's policy agenda. The special meeting of the European Council at Tampere (October 1999) acknowledged that the European Union must ensure the fair treatment of third country nationals who legally reside on its territory and that "a more vigorous integration policy" aimed at "granting them rights and obligations comparable to those of Union citizens" is needed.[13]

But what does a "vigorous integration policy" entail? The Tampere discourse on "fair treatment of third country nationals" stands in sharp contrast to the intergovernmental restraint mode of the Justice and Home Affairs Council's non-binding 1996 Resolution on the integration of long-term resident third country nationals.[14] Similarly, one observes a discursive shift in the Commission's interpretation of the meaning and terms of integration of long-term resident third country nationals in pre-Tampere and post-Tampere initiatives. The latter suggest the possibility of a harmonized national denizenship status for long-term resident third country nationals coupled with the grant of European denizenship.

The purpose of this paper is to critically examine these developments in light of theoretical models of minority incorporation. I argue that existing theoretical models of minority integration offer valuable insights to the problems generated by the exclusion of third country nationals in the European Union by showing how various national-statist arrangements have responded to "difference" in accordance with differing definitions of political membership and specific historical experiences. However, as these models have emerged and developed within national and statist institutional settings, they are not perfectly equipped to capture the complex character of the European arena. European developments prompt a rethinking of the connection between the state, the nation and pluralism in its various forms, and invite us to consider the possibility of transcending these connections. Accordingly, the vocabulary of integration may not be apposite to issues of European membership issues and its replacement with that of democratic equality and inclusion should be

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[11] Emek Ucarer notes the importance of leadership resources and the creation of a new DG-General on Justice and Home-Affairs. Sidekick No More: The Commission's Evolving Role and Agency in Justice and Home Affairs, paper presented at ECSA 7th International Conference, Madison, Wisconsin, May 31-June 2, 2000.

[12] At Tampere the Commission was invited to prepare a scoreboard of progress towards realizing the objectives of creating an 'area of freedom, security and justice'. The scoreboard was presented in March 2000 and has been subsequently updated; COM(2000) 167, 24 March 2000; COM(2000) 782, 30 November 2000. It contains a summary of objectives, the action needed to achieve them, the responsibility for these actions, the likely timetable and the current state of play.

[13] European Council, Tampere Presidency Conclusions, SN 200/99, Brussels, 16 October 1999.

[14] See Council Resolution 96/80/01, 1996 O.J. (C 80) 2 (concerning the status of third country nationals who reside on a long-term basis in the territory of the Member States).

considered.

This argument by no means seeks to underestimate the significance of the Commission's recent initiatives. After more than four decades of European integration long-term resident country nationals are portrayed as rightful participants with equal rights and opportunities in the workplace and society at the national level and are granted free movement rights.[15] This is an important development and one can only hope that the Commission's post-Amsterdam initiatives become legally binding instruments. Yet these initiatives do not fully embrace a participatory model of incorporation that gives third country nationals a stake in the European polity. "Civic citizenship" is an oxymoron and cannot really be a substitute for political membership. In this respect, promoting democratic inclusiveness in the European Union and recognizing the long-term resident third country nationals' claims to inclusion and equality compel keeping discussions about the evolution of Union citizenship on the agenda.

I. TYPOLOGIES OF CIVIC INCORPORATION

Most theorists agree on the merits of a pluralist mode of civic incorporation, although the precise details of the scope and nature of such a model is the subject of much debate. Some argue that the constitutional framework of a democratic Rechtsstaat would guarantee the co-existence of equally legitimate forms of life.[16] Others praise a more dynamic and flexible form of constitutionalism centered on an ethic of listening, a reflective approach to reality and mutual respect for and affirmation of cultural diversity.[17] While Anne Philips is keen to accommodate diversity within the basic structure of liberal democracy,[18] Iris Marion Young's proposed "group-differentiated" citizenship requires more radical reforms.[19] On the other hand, the "enclave"-multiculturalism advocated by Charles Taylor and Will Kymlicka makes it possible to recognize the demands of territorially based constituencies (i.e. national minorities), but it is unresponsive to the case of ethnic migrant groups.[20]

Considerable divergence also exists in state responses to the challenge of diversity. Difference has been traditionally viewed as a nuisance and/or a problem, rather than as a fact. The following table compares various models for minority incorporation suggested by the literature,[21] namely: the exclusionist model, assimilation, integration and cultural pluralism. The exclusionist model denies minority groups civic standing and respectful participation in the polity by perpetuating primordial and ethnonationalist narratives which place emphasis on

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[15] See Council Directive 28/08, 2001 O.J. (C240) 79 (127 final) 2001.

[16] See Jurgen Habermas, The Postnational Constellation (Max Pensky ed., 2001).

[17] See James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995).

[18] See Anne Philips, The Politics of Presence (1995).

[19] Iris Marion Young, Justice and the Politics of Difference (1990); Inclusion and Democracy (2000).

[20] Charles Taylor, Multiculturalism and the Politics of Recognition (Amy Gutman, ed.,1992); Will Kymlicka, Multicultural Citizenship (1995).

[21] See Castles, supra note 1; see also W. Safran, Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community, 18(3) Int'l Pol. Sci. Rev. 313, 313-35 (1997).

blood loyalty, common ethnic origin and a homogeneous culture. Assimilation requires minority communities to renounce their particular ethnic or cultural identity and embrace the culture of the majority community, whereas integration tolerates differences as long as they are confined to the private realm. With regard to the public realm, ethnic communities are expected to embrace the nation's ideals and to identify with the common culture of citizenship, as defined by the majority community. As integration and assimilation models focus upon the individual, they do not facilitate the recognition of group identities. Cultural pluralism, in contrast, does not condition political belonging on cultural conformity, but rather recognizes that disadvantaged groups require public recognition and support in order to flourish. Instead of taking majority and minority cultures as fixed and given, this model recognizes their flexible nature, acknowledges profound elements of difference and contingency within them, and encourages intercultural communication. As such, pluralism sketches out a vision of society in which different communities "by interacting with each other in a spirit of equality and openness create a rich, plural and tolerant collective culture affirmed alike in all areas of life, including and especially the political."[22]

To this typology of minority incorporation, Bhikhu Parekh adds the proceduralist and millet models.[23] The proceduralist model requires a formal, culturally - neutral institutional framework upon which diverse communities minimally agree. As illustrated by the table, the millet model privileges communal membership and views the state as a formal institution designed to ensure that distinct cultural communities are free to pursue their traditional ways of life and their separate development. In so doing, the millet model encourages primordialist belonging in objective cultural collectivities without paying attention to the disciplinary practices required to consolidate the position of ruling elites and their hegemonic definition of what constitutes the "authentic" core of the culture in question.

Michael Walzer shares the above mentioned criticisms of the millet model. By comparing and contrasting various political arrangements and their treatment of cultural difference, such as multinational empires, associations and nation-states, Walzer defends a fourth model, that of the immigrant society.[24] In the immigrant society, the state is not hegemonized by a specific group and is proactive in encouraging mutual respect of differences. However, in this model political belonging is conceived only in terms of individuals and is based on the dissolution and/or dispersion of group membership. Bearing in mind that the challenge facing democratic politics is to affirm diversity and devise mechanisms that increase citizens' participation both as individuals and as members of groups, Walzer's model of the immigrant society is less attractive than the pluralist model of integration.

Notwithstanding their important insights, it is doubtful whether the above-mentioned typologies of minority incorporation can be applied to the European

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[22] Bhikhu C. Parekh, Integrating Minorities in a Multicultural Society in European Citizenship, Multiculturalism, and the State (U. Preuss & F. Requezo eds., 1998); Rethinking Multiculturalism: Cultural Diversity and Political Theory (2000).

[23] See id.

[24] See Michael Walzer, The Politics of Difference: Statehood and Toleration in a Multicultural World, 10(2) Ratio Juris 165, 165-76 (1997).

Union. Unlike national-statist communities, the European Union has been built upon the affirmation of Europe's deep diversity. Lacking a shared conception of "Europe's destiny" or a cohesive identity in a communitarian sense, the EU constitutes a "community of concern and engagement" - that is, a community where belonging is conceived in terms of being together in a common adventure and having equal co-responsibility for institutional design.[25] Otherwise put, what binds this community's various constituent units together is their commitment to the (open-ended) future of the Union, in the sense of working together towards creating institutions which accommodate differences and respond to common needs, and solving problems while preserving and respecting the distinctive identities of the constituent units. At the same time, however, the intergovernmentalist dynamics of European integration has confined the ethos of pluralization within the boundaries of state collectivities. Subnational, ethnic, cultural and other collectivities strive for recognition and inclusion in the framing and shaping of European public life.

The pluralist model of minority incorporation provides important insights for extension of the politics of pluralization and, generally speaking, for elaborating a model of pluralism appropriate to the EU. However, this model also needs to be revised to take into account the specificity of the process of European unification. After all, the European Union is neither an extension, nor the mirror image of national jurisdictions. Accordingly, its model of pluralism does not have to resemble national models of pluralism. An important difference between the European Community and national publics, for example, is that the former is a community of multifarious minorities entangled in a project that exerts a profound impact upon their nature and organization. The "integration" of minority communities within such a community therefore cannot have the same meaning as in national-statist jurisdictions. In addition, the involvement of the constituent units in the European integrative project prompts them to appreciate both their dependence on important differences and the contestability and relativity of their own positions, assumptions and beliefs. This, in turn, induces them to realize the indispensability of their involvement in the European enterprise as well as the contestability and fragility of the enterprise itself. It is perhaps for this reason as well that European institutions tend to display a remarkable degree of reflexivity: they recognize their cognitive and coercive limits; they seek to accommodate multiple and often contending visions even within a single provision or legislative instrument; and their output is open to review and renegotiation. However, the process of collective collaboration of diverse communities thrown together in a historically contingent pattern of relations of interdependence and strife needs further pluralization.[26] It must become more inclusive in the sense of welcoming other minority constituencies as participants enjoying equal status and protection.

The vocabulary of integration seems in this respect inappropriate to a polity in which there is: i) a plurality of cultures and sub-cultures, ii) no shared definition of the terms of a "common life" and iii) multiple definitions belonging to political and

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[25] Theodora Kostakopoulou, Citizenship, Identity and Immigration in the European Union: Between Past and Future (2001); Towards a theory of Constructive Citizenship in Europe, 4(4) J. Pol. Phil. 337, 337-58 (1996).

[26] See Connolly, supra note 3, at 66.

communal "homes" formed at national, subnational and supranational levels of governance. The demands of long-term resident third country nationals should not be seen as demands for better integration, but rather for their recognition as legitimate recipients of justice and democratic equality. Realizing the latter requires subjecting the member states' definition of "who makes up the European people" to a normative test and mustering the political will to give all settled residents a stake in the success of the project of its "post-national" democracy.[27] Such efforts would entail the grant of Union citizenship to long-term resident third country nationals. Considering Member States' resistance to such advancements, the grant of European denizenship appears an attractive alternative. European denizenship entails mobility rights within the Union, but does not extend to political participation and diplomatic protection abroad. Although European denizenship may be a just policy option for new arrivals, it does not bring about equal membership for long-term resident third country nationals. In this respect, European denizenship should not be seen as a solution to the inequitable position of long-term resident third country nationals; it is, instead, an important and welcome step towards full membership and political inclusion.

Table 1. A typology of minority incorporation

	Exclusion	Assimilation	Integration	Millet	Liberal	Pluralism
Goal	To preserve the bounded community of culture or ethnicity/ The purity of the national body	Conformity to shared culture and shared values/ Homogeneity	Fusion/ Cohesion/ Political Unity	To combine central authority with communal self-determination	To promote a liberal democratic public sphere/ Constitutional patriotism	Equal and Mutual Recognition
Subjects	Individuals/ Groups	Individuals	Individuals	Groups	Individuals/ Cautious recognition of groups	Groups/ Individuals
Differences	Suppressed	Threat or a problem, to be reduced or absorbed	Tolerated in the private sphere	Accommodated (but could be suppressed within minority constituencies)	Arrested development	Valued and promoted
Rights	Minimal; no security of residence	Socioeconomic rights, associational participation	Socio-economic rights, associational participation. Municipal participation possible	Socio-economic and political rights	Socio-economic rights, associational, municipal participation	Socio-economic and political rights. Collective rights
Prospect for Citizenship	No	Low to Medium	Low to Medium	Medium	Medium	High/ encouraging citizenship
Ideology	Primordialism or strong ethnic nationalism	National communitarianism	Civic nationalism	Plurinational empire	Civic nationalism	Pluralistic Democracy
Migrant Identity	Isolated or Defiant	Mobilized/ Defiant	Differential	Assertive	Differential	Assertive Belonging
Community relations	Hostility, conflict	Suspicion, discontent, discrimination	Sensitive equilibrium, hierchization	Weak	Sensitive equilibrium, discrimination	Connectedness, mutual symbiosis, agonistic contestations

[26] See Connolly, supra note 3, at 66.

[27] On the theme of postnationalism see Josephine Shaw, The Emergence of Postnational Constitutionalism in the European Union, 6 J. Eur. Pub. Pol'y 579, 579-97 (1999); see also Damian Chalmers, Postnationalism and the Quest for Constitutional Substitutes, 27 J. L. & Soc'y 178, 178-217 (2000).

II. CONTENDING LIBERAL AND INTERGOVERNMENTAL VISIONS OF INTEGRATION AT THE COMMUNITY LEVEL

In post-Maastricht Europe, matters related to long-term resident third country nationals were dealt with via the means provided for by the third pillar of the Treaty on European Union.[28] The intergovernmental character of this co-operation, coupled with the absence of democratic control and judicial scrutiny, ensured the continuation of the long tradition that had accustomed national elites to see cultural difference as a problem for social integration. Difference was perceived as undermining social cohesion and as leading to the weakening of the fabric of society. Integration of long-term resident third country nationals was to be achieved by introducing stricter rules and instilling greater conformism.

According to the Council's 1996 Resolution on the Status of Third-country Nationals who Reside on a Long-term Basis in the Territory of the Member States, integration was to be promoted because it "contributes to greater security and stability, both in daily life and in work, and to social peace in the various Member States" - and not because it was required by principles such as fairness, democracy and respect for cultural diversity.[29] The Resolution provided that third country nationals (refugees under the Geneva Convention were excluded) could be recognized as long-term residents after lawful and uninterrupted residence of ten years in the territory of the member state concerned. In considering an application for residency status, which could be valid for a ten year or unlimited period, national authorities could take into account "the level and stability of the means of existence which the applicant demonstrates, in particular whether (s) he had health insurance, and the conditions for exercising an occupation."[30] This provision gave national authorities discretion to refuse residence authorization to those with an interrupted employment record, without examining whether the interruptions had been voluntary or involuntary. Member states could refuse to renew the residence authorization on the grounds of prolonged absence (which could be no less than six consecutive months), expulsion or fraudulent possession of the residence authorization.[31] Under

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[28] For a critique, see David O'Keeffe, Recasting the Third Pillar, 32 C.M.L.Rev. 893, 893-920 (1995); Justice and Home Affairs in the European Union: The Development of the Third Pillar (R. Beiber & J. Monar eds., 1995).

[29] Council Resolution 96/80/01, supra note 14.

[30] Id. at title IV (2).

[31] The provisions concerning cancellation or non-renewal of residence authorizations resemble the provisions entailed by Council Directive 64/221 on the Co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security or public health. In line with Articles 2, 3 (1) of Directive 64/221, Title VI of the Resolution stated that the expulsion measure shall be based exclusively on the personal conduct of the individual concerned. This means that previous criminal convictions shall not in themselves constitute grounds for the taking of such measures, and that the applicant's criminal behavior or activities must be sufficiently harmful in order to pose a genuine and sufficiently serious threat to the requirements of public policy

the Resolution, 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. They "should be able to obtain authorization to engage in gainful activities"; but would not have unfettered access to all occupations, except where expressly permitted by Community law.[32] Hence, third country nationals 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 centers.[33] The resolution treated long-term resident third country nationals as a subject class, that is, as objects of governmental policy. The model of integration underpinning it was one of qualified membership in the civil society and hierarchization. This framework was ultimately sustained as an instrument of state sovereignty.

The Commission's approach during this period was cautious. It did not hesitate to pinpoint the deficiencies of the third pillar, but at the same time it refrained from asserting long-term resident third country nationals as democratic subjects. Following the commencement of legal proceedings by the European Parliament (EP) under Article 175 EC (now Article 232 EC) for failing to present the necessary proposals for legislation as required by Article 7a EC (Article 14 EC),[34] the Commission proposed a draft directive which granted lawfully resident third country nationals the right of visa-free travel for short stays not exceeding three months.[35] This proposal drew on Article 21 of the 1990 Schengen Implementing Convention which provided for a similar right.[36] The exercise of the right to intra-EU travel would depend 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 the resident's return to the MS of departure or a third state. Indeed, the requirement of self-sufficiency was rather excessive given that economically non-active EU citizens are required to be self-sufficient in order to exercise their right of

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affecting one of the fundamental interests of society. See R v. Bouchereau, Case 30/77, 1977 E.C.R. 1999; Clean Car, Case 350/96, 1998 E.C.R. I-2521. In any case, the requirement of personal conduct can never justify deportation as a general preventive measure. See Bonsignore v. Oberstadtdirektor der Stadt Köln Case, Case 67/74, 1975 E.C.R. 297. But the Resolution makes no reference to procedural rights and safeguards, such as those afforded to Community nationals under Articles 6, 7, 8, and 9 of Directive 64/221.

[32] Council Resolution 96/80/01, supra note 14, at title VII.

[33] Compare the generous provisions of Council Regulation 1612/68. Council Regulation 19/10/EEC, 1968 O.J. (L 257) 2.

[34] See European Parliament v. Commission, Case 445/93, 1994 E.C.R. C1/24.

[35] The Commission adopted three proposals with the view to attaining the objective set out in Article 14 (ex. Art. 7a) of the TEC: first, Council Directive amending Directive 68/360/EEC and Directive 73/148/EEC (concerning the abolition of restrictions on movement and residence within the Community for Community workers and for professionals and service providers respectively COM(95) 0348-C4-0357/95-95/0202(COD)); second, Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers COM(95)0347-C4-0468/95-95/0201(CNS); and third, Proposal for a Council Directive on the right of third country nationals to travel in the Community COM(95) 0346-C4-04420/95-95/0199(CNS), the amended proposal which was adopted by the Commission on March 17, 1997, O.J. (C 139), 6.5.97; COM(97) 106.

[36] Schengen Implementing Convention 1990, 30 I.L.M. 84 (1991).

residence only, not their right to travel.[37] Although the draft directive did not secure the member states' approval, it nevertheless provided an important resource, which was utilized at Amsterdam and found its way into Article 62(3) of the TEC. The latter article grants nationals of third countries the right of free circulation within the Union for short stays not exceeding three months.

The Amsterdam Treaty also ended the uncertainty as to whether the requirement of the abolition of border controls (Article 14 of the TEC) applies to third country nationals: Article 62(1) of the TEC 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. More importantly, according to the Action Plan of the Council and the Commission, 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 of procedures for Member State issuance of long term visas and residence permits, including those for the family reunion.[38] Measures defining the rights and conditions under which long-term resident third country nationals 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.[39]

The creation of a Community law competence (albeit not an exclusive one) in matters relating to third country nationals is a welcome development, if only because it opens up the possibility for a qualitative shift in the basic orientation of the member states' migration policy.[40] The Commission manifested its policy entrepreneurialism early. Before the Treaty of Amsterdam was ratified, the Commission proposed a Convention on the Rules for the Admission of Third Country nationals to the Member States of the Union, using as a legal base Articles K1(3)(a) and (b) and K3(2)(C) of the TEU.[41] The draft Convention marked an attempt to regulate the entry of third country nationals to the Member States of the Union for long stays (i.e., for periods exceeding three months) and to improve the position of long-term resident

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[37] See Council Directive 90/364, 1990 O.J. (L 180) 26 (on the right of residence); Council Directive 90/365, 1990 O.J. (L 180) 28 (on the rights of residence for employees and self-employed persons who have ceased their occupational activity); Council Directive 93/96, 1993 O.J. (L 317) 59 (on the right of residence for students). See also Luisi and Carbone v. Ministero del Tesoro, Joined Cases 286/82 and 26/83, 1984 E.C.R. 377, [1985] 3 CMLR 52.

[38] See Joint Action Plan on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, 19/01, 1999 O.J. (C 019) 1, 9; see also TEC art. 63(2)(a).

[39] See TEC art. 64(4).

[40] See Kostakopoulou, supra note 7. The Schengen acquis has been incorporated into the Union. Its provisions and decisions concerning the abolition of controls at the internal borders, free movement of persons, long and short-term visa, the crossing of external borders, TCNs, and carriers sanctions have been allocated a legal base in the first pillar. See Council Decision 1999/435/EC, 1999 O.J. (L 176) 1. The acquis is not binding on the UK and Ireland, but the UK has agreed to participate in aspects of the Schengen acquis and of Title IV of the TEC which do not conflict with the British frontier control policy. Denmark has opted out from Title IV if the TEC and therefore those Schengen provisions integrated into the first pillar will have the status of pubic international law.

[41] See Commission Proposal for a Decision on Establishing a Convention on Rules for the Admission of Third Country Nationals to the Member States of the European Union 07/11, 1997 O.J. (C 337) 9.

third country nationals in the EU. The explanatory memorandum stated that integration of long-term resident third country nationals is an imperative dictated by the democratic and humanitarian tradition of the MS, thereby echoing the pro-migrant agenda suggested by NGOs.[42] To this end, long-term resident status should be granted to those third country nationals (including refugees under the Geneva Convention) who have lived legally in a MS for at least five years and have the right to residence for another five years.[43] Recognition of long-term resident status results in the following rights: the right to free movement in the state of residence; increased protection against expulsion; authorization 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.[44] Long-term resident third country nationals could apply for employment in another MS in response to a vacancy, and, if they obtain a work contract, will be entitled to move there - assuming that the post cannot be filled by EC nationals or legally resident third country nationals who are part of the labor market of that member state.[45] After two years of residence there, third country nationals will be recognized as long-term residents in that state and lose their status in the previous state.[46] The consequences of the possible loss of resident status in the original state of residence - where third country nationals have family ties and property - were not fully addressed by the Commission, which, in its effort to appease governmental sensitivities, continued to treat resident migrants as the "property" of the original state of residence or the host member state.

More favorable terms for third country nationals were contained in Title VII of the Convention dealing with family reunification.[47] The provisions of the Title made no differentiation between long-term resident third country nationals and first admissions: third country nationals who are legally resident in a Member State for at least a year upon the date of submitting the application for family reunion have the right to family reunion.[48] Notwithstanding the draft convention's favorable terms, however, its provisions on family reunion did not institutionalize parity between

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[42] See Explanatory Memorandum, p. II.

[43] See Commission Proposal 07/11, supra note 41, art. 32.

[44] See id. at art. 34.

[45] See id. at art. 35(1).

[46] See id. at arts. 35(2), 35(3).

[47] Earlier initiatives include the 1993 Resolution on the harmonization of national policies on family reunification (2828/1/93 WGI 1497 REV I) and the 1997 Resolution on measures to combat marriages of convenience, 16/12, 1997 O.J. (C 382) 1.

[48] See Commission Proposal, supra note 41, art. 24. Family members of Union citizens, who have or have not exercised the right to free movement, would also be entitled to family reunification under Article 10 of Council Regulation 1612/68, 1969 O.J. (L 257) 2. This solved 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 favorable Community provisions on family reunion against their state of origin. Notably, 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 which are recognized as spouses under the legislation of the host MS. 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; Commission Proposal 98/0394, 1998 O.J. (C 344) 9.

Union citizens and third country nationals: the requirements for admission of family members entitled to be reunited were more restrictive and the category of family members included only spouses and children below the age of majority;[49] spouses and children could not engage in economic activities for the first six months of residence; and spouses and children were to be excluded if it was assessed that the sole purpose of the marriage or adoption was entry to the state. [50]

A few months before the Amsterdam Treaty entered into force, the Commission proposed two Directives on Extending the Freedom to Provide Cross-border Services to Third Country Nationals established within the Community and on the Posting of Workers who are Third Country Nationals for the Provision of Cross-border Services.[51] It also recommended the amendment of 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.[52]

A. The Tampere discourse

The Commission's liberal initiatives coupled with sustained lobbying by pro-migrant NGOs and calls for a more positive approach to migration flows by academics affected the process of framing of migration issues. The special meeting of the European Council at Tampere, in October 1999, which was dedicated to the elaboration of principles underpinning the establishment of an Area of Freedom, Security and Justice, signaled the twelve member states' willingness to develop common policies on asylum and immigration, including the integration of long-term resident third country nationals. 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."[53] Approximation of the legal status of long-term resident third country nationals 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."[54]

The application of rights-based approach to issues concerning long-term resident third country nationals is seen to signal that the EU has realized that "...long-term

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[49] See id. at art. 24.

[50] See id. at art. 28.

[51] See Commission Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community, COM (1999) 3 final (March 1999), amended by Doc 500PC0271 (02) (February 2001). The UK believes that the proposal should have been based on provisions of Title IV - and not on Article 59 of the TEC that requires qualified majority voting and co-decision, and it accuses the Commission of undermining its opt-out from Tile IV of the TEC. See also Commission Proposal on the posting of workers who are third-country nationals for the provision of cross-border services, COM (1999) 3 final (March 1999), amended by COM(2000) 271, (May 2001).

[52] See Council Regulation 1408/71, 1998 O.J. (C 6).

[53] Tampere Presidency Conclusions, supra note 13.

[54] Id. at 5.

resident third country nationals, irrespective of their nationality should not be treated as second class citizens, but are entitled to equal treatment, secure residence rights and the option of full citizenship."[55] The absence of any reference to rights of mobility within the Union in the Tampere Presidency Conclusions, coupled with the statement that "long-term resident third country nationals should be offered the opportunity to obtain the nationality of the Member State in which they are resident," however, seems to suggest that national executives maintained the view that ethnic and cultural diversity was to be contained within self-enclosed "authentic" national communities and regulated by national jurisdictions in accordance with some minimum set of principles and rights designed to keep civil societies going.

But this view did not coincide with the Commission's vision of integration. Believing that family reunification is a necessary means of successful integration, 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.[56] The legal basis of the Directive is Article 63(3)(a) of the TEC. The draft directive sought to harmonize national legislations in this area by granting the right to family reunification[57] to all third country nationals - including refugees under the Geneva Convention of 1951 and persons enjoying temporary protection, who reside lawfully in a Member State and hold a residence permit for at least a year regardless of the purpose of their residence. It also covers Union citizens who have not exercised their right to free movement and whose situation had hitherto been subject solely to national rules. 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, 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.[58] The right to family reunification is subject to conditions such as: the availability of adequate accommodation, sickness insurance, and stable and sufficient resources. Public policy, domestic security and public health considerations are permissible bases for refusing entry or residence. Member states also have discretion to set a qualifying period of up to one year before the applicant may exercise the right to family reunification.[59] All family members will enjoy access to education, but the nuclear family (i.e., spouses and children) has access to employment, self-employed activities and to all forms of vocational training.[60] Access to social and tax advantages is excluded from the scope of the directive. An autonomous right of residence is given to members of the nuclear family after four years of residence, although there is a possibility for early application upon separation, divorce or death. After one year of 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. As regards remedies, Article 16 provides for a right to

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[55] See Groenendijk, supra note 6, at 234.

[56] See COM(1999) 638 final, amended by COM(00) 624 final.

[57] In this respect, it differs from the 1993 Resolution, supra, note 47.

[58] See id. at art. 5.

[59] See id. at art. 10.

[60] See id. at art. 12.

appeal if family reunification is rejected or a residence permit is withdrawn or not renewed.

Although the draft directive on family reunification entails more favorable provisions for third country nationals, it does not grant them equality of treatment with EU citizens, and it could also lead to the reduction of more favorable existing national provisions.[61] The answer to the issue of integration is sought in adopting a piecemeal approach that improves the terms of integration but which does not introduce norms nor transform institutions to create the institutional preconditions for democratic inclusion.[62]

B. The Commission's Communication on a Community Immigration policy: A paradigm shift?

In line with the Tampere mandate and in an attempt to go beyond the piecemeal approach to the legislative program set out in Article 63 of the TEC, the Commission issued a Communication on a Community Immigration Policy in November 2000.[63] In this Communication, the Commission embarks upon a fresh assessment of migration flows and sets out a comprehensive, flexible and more liberal framework for the regulation of migration. The Commission adopts a positive approach to migration, acknowledging its economic benefits and appreciating the value of pluralism and cultural diversity. The EU is described as "by its very nature a pluralistic society," but with "fundamental shared principles and values: respect for human rights and human dignity, appreciation of the value of pluralism and the recognition that membership of society is based on a series of rights but brings with it a number of responsibilities for all of its members be they nationals or migrants."[64] The Commission justifies the need for a "new approach to immigration" and the corresponding shift in policy orientation on the basis of: i) the new constitutional framework of the Migration Title and the centrality of these policies to the internal market; ii) the changing economic context of the Union and the existence of labor and skill shortages in the Member states; and iii) demographic concerns about low fertility rates and the aging European population. The impact of sustained lobbying by pro-migrant NGOs and the input of academics can be also be detected in the text.[65]

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[61] See Gisbert Brinkmann, Family Reunion: Third Country Nationals and the Community's New Powers in Implementing Amsterdam, supra note 6, at 241-66.

[62] See also Council Directive 19/07, 2000 O.J. (L 180), implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 02/12/EC, 2000 O.J. (L 303). It is interesting to note that Directive 2000/43 reflects the Commission's view that successful integration of third country nationals requires action against racism and xenophobia, but it does not cover discrimination on the basis of nationality, despite the calls for its inclusion made by the European Parliament and NGOs. The directive is also without prejudice to provisions concerning the entry and residence of third country nationals and their access to employment and occupation (Art.3(2)).

[63] See Commission Communication to the Council and the European Parliament on Community Immigration Policy, COM(2000) 757 final (November 22, 2000).

[64] Id. at 20.

[65] For example, it is stated that "such a proactive immigration policy should be 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." Id. at 13. On page 15, the Commission notes that "the underlying principle of an EU immigration policy must be for different

The Commission's suggested framework for a common migration policy focuses on such areas as: admission to the EU for humanitarian reasons and the development of a European asylum system; admission of economic migrants; integration of legally resident third country nationals; coordinated action against illegal migration and the development and implementation of migration policy in partnership with the countries of origin and transit. The principles underpinning the common legal framework for admission are transparency and rationality, differentiated rights according to the length of stay, clarity and simplicity of application and assessment procedures, and the availability of information to potential migrants. With regard to admission, the Commission has proposed a flexible scheme, whereby the Member States will set out indicative admission targets in line with projected labor shortages, changing economic conditions, and the impact of existing policies on domestic arenas. In compiling their reports for the Commission, the Member States would have to involve the social partners, regional and local authorities as well as all other actors involved in the integration of migrants. The Commission would produce a synthesis of the national reports. On the basis of the Commission's report, the Council would lay down the principles of the common approach to be implemented in the next period. The Communication also proposes the establishment of a European information point, a website containing full information on admission policies and contact details for national authorities, information on employment opportunities, and conditions of entry and residence. The main concerns arising from the proposed linkage between admission and employment policy are that indicative targets could easily become quotas distinguishing desirable from undesirable migration and restrictive trends could easily slip into the framework.

The Communication also states that a "hard" definitive core of rights should be available to migrants on arrival, with this core of rights possibly extending with the length of stay - ultimately culminating in long-term resident status. Long-term resident status would include security of residence and the right of abode in another Member State. In this respect, the Communication uses the EU Charter of Fundamental Rights as a reference point for the creation of "civic citizenship" and the possibility of granting free movement rights to long-term resident third country nationals. "Enabling migrants to acquire such [civic] citizenship after a minimum period of years might be a sufficient guarantee for many migrants to settle successfully into society or be a first step in the process of acquiring the nationality of the Member state concerned."[66]

While integration issues fall within the competence of the Member States, the Communication opens up the possibility for the involvement of civil society in line with the principle of partnership among all actors involved and of co-ordination of action at the national and local level. The EU could assist the process by developing a "pedagogical strategy," promoting the exchange of information and good practice, and the development of guidelines or common standards for integration measures.

Notwithstanding the progressive nature of the Communication, the issue of

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purposes that persons admitted should enjoy broadly the same rights and responsibilities as EU nationals, but that these may be incremental and related to the length of stay provided for in their entry conditions." See also id. at 6-7, 9-11 and 22.

[66] See Commission Communication, supra note 63, at 19-20.

political inclusion is not addressed. The proposed harmonization of national denizenship rules does not include local electoral rights (which are available in the Netherlands, Sweden, Ireland, Denmark, Finland and in Spain and Portugal on the basis of reciprocity). National denizenship and the possibility of a European denizenship widen the circle of "belongers" to the civil society, but do not reduce political exclusion. Long-term resident third country nationals are denied full membership and equal participation in the European and national polities.

C. The Nice settlement and the "civic citizenship" approach

The importance of ensuring the fairer treatment of third country nationals was underlined by the 2000 IGC. Although the Treaty of Nice extended the scope of qualified majority voting into twenty seven areas,[67] including free movement of Union citizens under Article 18 of the TEC, judicial co-operation in civil proceedings (with the exception of aspects relating to family law) is the only area of Title IV of the TEC to which qualified majority voting will apply.[68] A partial and deferred switch to qualified majority voting was agreed to at Nice. 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, but only after the Council has unanimously adopted legislation defining the common rules and main principles in the matter.[69] A Protocol was also annexed to the Treaty whereby the partners agreed that as of May 1, 2004, measures in the field of administrative co-operation would be adopted by qualified majority voting and consultation with the European Parliament.[70] In addition, the MS issued a declaration on Article 67 of the TEC, stating that measures setting out the conditions for the free circulation of third country nationals for short visits, illegal immigration and illegal residence will be adopted by qualified majority voting and co-decision from May 1, 2004 onwards.[71] 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.[72] Finally, the political declaration confirmed the member states' intention to apply QMV to the other areas of the Title or parts of them as of May 1, 2004, or as soon as possible thereafter.

The European Council at Nice also took note of the progress on all aspects of the policy formulated at Tampere and approved the European Social Agenda, which emphasizes the need to promote social integration.[73] According to Paragraph 23 of Annex I, legally resident third country nationals should be "integrated satisfactorily."

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[67] See Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 10/03, 2001 O.J. (C 80), available at http://europa.eu.int/igc2000. The Treaty was officially signed on February 26, 2001.

[68] See TEC art. 65.

[69] See TEC arts. 63(1), 63(2)(a); see also Treaty of Nice, art. 2(4).

[70] See Protocol on Article 67 of the Treaty Establishing the European Community, 10/03, 2001 O.J. (C 80) at 69.

[71] See Declaration on Article 67 of the EC Treaty, 10/03, 2001 O.J. (C 80) at 77-78.

[72] See TEC art. 62(2)(a).

[73] See Nice European Council: Presidency Conclusions, Press Release: Brussels (8/12/2000) Nr 400/1/00. Available at http://europa.eu.int/council/off/conclu/index.htm.

"Satisfactory integration" is to be achieved by granting third country nationals rights and obligations comparable to those of Union citizens, implementing effective Community legislation combating all types of discrimination, and developing exchanges of experience and good practice on national integration policies and anti-discrimination policies. At Nice, the Council, the Commission and the Parliament also jointly proclaimed the European Union Charter of Fundamental Rights.[74] The Charter does not redress the inequitable position of long-term resident third country nationals. Apart form universal human rights, third country nationals enjoy the rights to good administration (Article 41), access to documents (Article 42), and non judicial means of redress through complaints to the Ombudsman (Article 43) and petitions to the European Parliament (Article 44). The Charter also recognizes the right of migrant workers, authorized to work in the MS, to work conditions equivalent to those of union citizens (Art. 15 (3)) and protection against unjustified dismissal. Yet it also reaffirms the prevailing 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 MS."[75] Although it could be argued that the inclusion of Article 45 is symbolically significant in that it demonstrates that a consensus is beginning to emerge with regards to the possibility of extending mobility rights to long-term resident third country nationals, the Charter itself is not distinguished by "a morality of aspiration" which would include expanded rights for long-term resident third country nationals.

D. Revisiting the status of long-term resident third country nationals: The Commission's proposed Directive

Using the Charter as a point of orientation and an additional source of inspiration, the Commission proposed a Council Directive on the Status of Third Country Nationals who are Long-Term Residents in March 2001.[76] The legal bases of the directive are Articles 63(3)(a) and 63(4) EC.[77] The directive is designed to harmonize national laws governing the conditions for the acquisition and the scope of long-term resident status, and to grant long-term resident third country nationals the right of residence in the other Member States. Harmonization is justified on both normative (i.e., to ensure equality of treatment with Union citizens) and pragmatic grounds. The latter include considerations of the needs of the employment market, the effective attainment of the internal market, and the enhancement of economic and

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[74] See Charter of Fundamental Rights of the European Union 18/12, 2000 O.J. (C 264). Although several states wished to amend Article 6 of the TEU at Nice so that a reference could be included to the Charter of Fundamental Rights, the IGC decide not to incorporate the Charter into the Treaty. According to the Declaration on the future of the Union, which is annexed to the Treaty of Nice, this issue will be on the agenda of the 2004 IGC.

[75] European Social Agenda, art. 45.

[76] See Council Directive 28/08, supra note 15.

[77] Considering that the directive can only be adopted by unanimity, Member States might react and argue that the Community's acquis concerning Article 63(4) is thin, particularly since the Amsterdam negotiations excluded legislation on access to the labor market.

social cohesion (Articles 2 and 3(1)(k) of the TEC) by ensuring the integration of third country nationals.

Harmonization of national legislation involves the establishment of common Community rules governing the status of long-term resident third country nationals throughout the Community. However, the Commission makes it clear that it follows the "minimum harmonization" approach. This means that the Directive will act as "a floor" thereby allowing the Member States to put in place more favorable conditions for the acquisition of permanent status and expanded rights.[78] In addition, the directive will not affect more favorable provisions entailed by the Community or mixed agreements concluded with third countries.[79] The proposal is also without prejudice to favorable provisions contained in the European Convention on Establishment, the European Social Charter and the European Convention on the Legal Status of Migrant Workers.

The principle underpinning this directive is that domicile generates entitlements both in the forms of equalization of the treatment of third country nationals with nationals of the host Member state in socio-economic life and enhanced protection against expulsion as well as rights of mobility within the Union. This is reflected in the personal scope of the Directive, which covers all long-term and legally resident third country nationals including Geneva refugees and family members of Union citizens, thereby empowering them to exercise individually the right to reside in another Member State.[80]

After five years of continuous legal residence a Member State is obliged to grant long-term resident status to third country nationals who have stable and adequate resources to meet their own subsistence needs and those of their family members, and are covered by sickness insurance.[81] Refugees and third country nationals born in the territory of a Member State are exempt from the test for resources and sickness insurance.[82] Absences from the territory of the Member State for less than six consecutive months or owing to important and specific reasons (military service, secondments for work purposes, serious illness, maternity, research or studies) will not be regarded as interrupting the period of residence. Apart from the derogation provided for in Article 7 for public policy and domestic security considerations along the lines of Council Dir. 64/221, the Member State must grant long-term resident status automatically where the acquisition criteria are met.[83] This status can only be withdrawn on certain grounds set out in the Directive; namely, absence from the territory for more than two years, fraudulent acquisition of status, public security and public policy grounds, and acquisition of long-term resident status in a second Member State.[84] Procedural guarantees against the withdrawal of status are provided for by Article 11. As proof of the right of residence, a long-term EC residence permit will be issued, valid for ten years and renewable automatically. This practice will be

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[78] See Council Directive 28/08, supra note 15, at arts. 14, 12(2).
[79] See id. at art. 3(4).
[80] See id. at art. 3.
[81] See id. at arts. 5, 6.
[82] See id. at art. 6(2).
[83] See id. at art. 8(3).
[84] See id. at art. 10.

uniform throughout the Community.[85] As the permit is not constitutive of the right of residence, its expiry can never constitute a ground for deportation.[86]

Long-term resident third country nationals will enjoy enhanced protection against expulsion and are entitled to equal treatment as regards access to employment and self-employed activity, conditions of employment and working conditions, education and vocational training, including study grants, recognition of qualifications, social security and health care, social assistance, social and tax advantages, access to goods and services including public and private sector housing and freedom of association and union membership. Although this list seems impressive, in reality it confirms the existing core of socio-economic rights granted by the Member States to permanent settlers as well as to EU and EEA nationals. Civic involvement and participation, however, does not extend to the political field: electoral rights are excluded from the material scope of the Directive.

Chapter III of the Directive outlines the conditions for the exercise of the right of residence in the other Member States, thereby implementing Article 63(4) of the TEC. Long-term resident third country nationals, who are not service providers or posted workers,[87] have the right to reside in a second 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.[88] By analogy with EC law in the field of free movement of workers, temporary incapacity for work as a result of illness or accident, involuntary unemployment and entitlement to unemployment benefits in case of unemployment, do not constitute grounds for the loss of worker status.[89] In cases of voluntary unemployment in order to embark on vocational training, the ECJ's ruling in Lair applies; that is, there must be a link between the previous employment activity and the training to be pursued.[90]

When the application for a residence permit is lodged, the authorities in the second Member State may require documentary evidence. An exhaustive list of the items of documentary evidence is contained in paragraphs two to four of Article 17, thereby limiting the national authorities' discretionary power. The right to enter the territory of another and to reside there presumably applies to workseekers, by analogy to Antonnisen.[91] The family members of the long-term resident may accompany him/her to the second Member State or join him there on the condition that they already formed a family in the first Member State. If the family was not constituted in the first Member State, the Council Directive on family reunification will apply.[92]

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[85] This will be in accordance with the specifications laid down by the Council Regulation proposed by the Commission on March 23, 2001, 2001/0082 (CNS), COM(2001) 157 final.

[86] See Royer, Case 48/75, 1976 E.C.R. 497, [1976] 2 C.M.L.R. 619; Stanislaus Pieck, Case 175/79, 1980 E.C.R. 2171, [1980] 3 C.M.L.R. 220.

[87] Their legal status is governed by the relevant Commission proposals. See Council Directive 28/08, supra note 15, at art. 15(3).

[88] See id. at arts. 15, 16(1).

[89] See Council Directive 68/360, 1968 O.J. (L 257) art. 7(1).

[90] See Council Directive 28/08, supra note 15, at art. 16(2); Lair v. Universität Hannover, Case 39/86, 1988 E.C.R. 3161, [1989] 3 C.M.L.R. 545.

[91] See R v. Immigration Appeals Tribunal, ex parte Antonissen, Case 292/89, 1991 E.C.R. I-745.

[92] See Commission Proposal 07/11, supra note 44.

A Member State may refuse applications for residence on the grounds of public policy, domestic security or public health. The proposal also provides for a series of procedural guarantees, such as a statutory period for examining applications for residence permits, arrangements for notifying interested parties, redress procedures and 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.[93] 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 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. The first Member State will be obliged to readmit, together with their family members, long-term residents whose residence permits have been withdrawn by the second Member State.

Evidently, the draft directive regards integration as dependent upon the maintenance of existing and the creation of new social and economic spaces for personal projects at both the national and European levels. National denizenship goes hand in hand with European denizenship (see the table below). The grant of the latter represents a major step towards inclusion. Asserting the freedom of long-standing residents and enhancing their security, however, takes precedence over creating the institutional preconditions for their participation in political life. In the eyes of the drafters, national denizenship is likely to lead to national citizenship and, thus, to European citizenship. At the same time, however, the grant of European denizenship leaves open the possibility of potential future extension of European citizenship to long-term resident third country nationals.

Table 2: Actual and Potential Pathways to Political Inclusion

National Denizenship	$\rightarrow$	National Citizenship
$\downarrow$		$\downarrow$
European Denizenship	($f\rightarrow$)	European Citizenship

III. CONCLUSION

The European Union is an experimental polity; it has neither a fixed structure nor a determinate telos. Rather, it is the product of history, imaginative design, conflict and compromise. As such, it brings with it the presence of the past with all its intellectual baggage - be it in the form of ideas, concepts, presumptions, policy tools and organizing principles, and a burden of expectation. By the latter I mean the expectation to transform statism and nationalism, to reconfigure the identities of its constituent units and to turn aliens and old enemies into associates. And yet the

[93] See Council Directive 28/08, supra note 15, at art. 24.

borrowing of concepts (e.g. integration) and policies (e.g. the fields of citizenship and migration) from the national-statist context limits the capacity to talk about new developments and to make advances on democratic governance at the European level. Nationality has commonly been taken as a proxy for defining the political community and the transplantation of this principle to the European level has resulted in the exclusion of Europe's long-standing residents of migrant origin. However, the situation is changing. EU institutions have realized that the solution to the issue of long-term resident third country nationals lies in the recognition of their ethical standing and the refusal to treat them as mere objects to be dealt with according to whim. The post-Tampere developments and the Commission's proposals for Council Directives recognize long-term resident third country nationals as rights holders to be treated equally in the workplace and society. Although the vocabulary of integration still dominates this discussion, the preceding discussion has shown the merits of replacing it with a pluralistic mode of incorporation that is guided by the dialectic of recognition, inclusion and respect for differences. But embracing the latter would also require efforts to incorporate long-term resident third country nationals politically and to recognize them as full members and equal participants in democratic governance.