



**Citizenship or Denizenship: The Treatment of
Third Country Nationals in the European Union**

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Abstract

This paper concerns itself with the emerging membership structure of the European Union and its implications for the permanently resident Third Country Nationals (TCNs) in the Union. The decisive qualifying factor for European citizenship is set as the acquisition of Member State nationality, which resulted in the exclusion of approximately 12-13 million TCNs from the benefits of European citizenship. As citizenship is the token of belonging in a community, this exclusion has serious repercussions for the membership in Euro-polity. Not only is the current treatment of TCNs legally problematic due to the absence of a Union denizenship clause, but also the political understanding of 'Europeanness' in the Union is incapable of justifying such treatment. It will be proposed that TCNs should be granted Union citizenship, but such a reform should in any case be coupled by the creation of Union denizenship.

**CITIZENSHIP OR DENIZENSHIP:
THE TREATMENT OF THIRD COUNTRY NATIONALS
IN THE EUROPEAN UNION¹**

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As the European integration project has advanced significantly, the European Union (EU) came closer and closer to a state-like entity. The important amount of decisions taken at the supranational level has to be backed up by popular identification since the competences of the Union have considerably increased. Union citizenship was designed with this concern, to bring the Union closer to ordinary people and provide it with the popular legitimacy the post-Maastricht debates confirmed it lacked.² The Treaty on European Union (TEU) of 1993 constitutionalised European citizenship establishing the direct legal relationship between the individuals and the Union. Citizenship, on the socio-economic level symbolises social justice and the guarantee of fair access to the benefits of the modern welfare state; while politically it carries the right to participate fully in the government of society, usually through voting.³ Therefore, Union citizenship sheds light on the essentials of the membership in Euro-polity such as distributional justice and representative democracy.

This paper will not discuss a complete conception of citizenship, and essentially be concerned with the formal aspect focusing primarily on the inclusion/exclusion from the citizenship clause.⁴ The fundamental premise of this work will be that legal rules serve

¹ This paper is based on the dissertation submitted in September 2004 in fulfilment of the requirement for the degree of MA in European Law and Society. I would like to extend my warmest thanks to Professor Malcolm Ross for his assistance, encouragement and helpful comments on earlier drafts; his intellectual input has been invaluable. I remain responsible for any errors.

² R Bellamy, 'The "Right to Have Rights": Citizenship Practice and the Political Constitution of the EU', in R Bellamy and A Warleigh, eds., *Citizenship and Governance in the European Union* (London, Continuum, 2001), p.41.

³ G De Rham, 'Naturalisation: The Politics of Citizenship Acquisition', in Z Layton-Henry, ed., *The Political Rights of Migrant Workers in Western Europe*, (London, Sage Publications, 1990), p.158.

⁴ The formal aspect determines to which individuals and under what conditions the status of citizenship will be awarded. On the other hand, the substantive aspect refers to the rights and duties that follow citizenship

purposes and legal concepts like citizenship and denizenship are juridico-political expressions that reflect the politics of inclusion and exclusion in a polity. Exclusion is inevitable in every definition of citizenship. However, the exclusion is justified by different political principles depending on the history, culture, demographic and immigration figures of the state. Based on this foundation, this paper will attempt to reconsider the legal and political accounts of the citizenship of the EU.

The membership status of the permanently resident Third Country Nationals (TCNs)⁵ in the EU in relation to the Union citizenship clause will form the core theme of this paper. The central question to be answered is why the current body of law governing their treatment is problematic and how it can be reformed. The decisive qualifying factor for European citizenship was set as the acquisition of Member State nationality, which resulted in the exclusion of approximately 12-13 million TCNs from the benefits of European citizenship. The issue is vital as it has considerable implications on the meaning and boundaries of membership in the prospective Euro-polity as well as broader considerations about the role of European citizenship.

The paper will firstly present an introductory chapter to define and critically evaluate the legal concepts of citizenship and denizenship in a nation-state. It will also discuss how these legal expressions mirror, and are justified by the political national self-understandings of states, that is to say politics of inclusion and exclusion. The second chapter, building on this background will analyse the legal and political patterns of the Union citizenship. Conducting a multi-level analysis, it will present how the European identity, the political understanding of 'Europeanness' is being constructed by the Union. The third chapter will attempt to problematise the current legal framework for the treatment of permanently resident TCNs. It will consider whether their treatment is in line

status. See J M Sørensen, *The Exclusive European Citizenship: The Case for Refugees and Immigrants in the European Union*, (Aldershot, Ashgate, 1996), p.3.

⁵ 'Third Country National', will be used to refer only to the permanently resident nationals from non-Member States, unless specified otherwise. Therefore, this paper will concern itself only with denizens, not the other immigrants; and will label them as permanently resident TCNs at the EU level. Accordingly, the detailed definition of the concept of denizenship in the first chapter will also provide the definition of permanently resident TCNs.

with the legal pattern in the Member States and whether the political pattern of inclusion and exclusion, in other words political definition of 'Europeanness' is capable of justifying such treatment. After this discussion, the fourth chapter will attempt to demonstrate how their treatment can be improved, through a critical assessment of the recent developments and the legal alternatives for the inclusion of TCNs in the Union citizenship framework.

The conclusion reached will be that the current body of law for the treatment of permanently resident TCNs in the EU is problematic, laying down the discrepancy between the legal and political accounts of Union citizenship. Thus, it will be proposed that they should be included into the framework of Union citizenship and any reform as such should be accompanied by the creation of Union denizenship, as this would give them the option to stay as denizens and would still confer them rights respecting their free choices.

CITIZENSHIP AND DENIZENSHIP

Citizenship

The concept of citizenship defines an individual's legal status within a nation-state, to be a citizen means to have certain rights and duties which others, non-citizens, do not have.⁶ All sovereign states regulate the movement of people to and from their territory and control their access to the benefits of the modern welfare state, as distributive justice implies the existence of people who are not members and who are therefore excluded.⁷ As a result, exclusion is inevitable in any definition of citizenship. Nonetheless after World War II, Western European states recruited large numbers of foreign citizens to the labour market, followed by their family members. They were expected to be temporary workers who would return to their states of origin after several years however millions have not returned and extended their stay in the host states.⁸ This situation subsequently created a new group, who has gained a secure residence status but not full citizenship, and this new status in practice prevented the theoretical total exclusion from citizenship.

Denizenship

Hammar calls this new group, whose members are not regular foreign citizens anymore but also not naturalised citizens of the host state, '*denizens*'.⁹ The term stands for foreign citizens with a legal and permanent resident status in the host state. Hammar defines three entrance gates to a new state; first gate being the immigration regulation, granting work and residence permits for short periods; second gate being the regulation of residential

⁶ U K Preuss, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in R Bellamy, V Bufacchi and D Castiglione, eds., *Democracy and Constitutional Culture*, (London, Lothian Foundation Press, 1995), p.107.

⁷ Z Layton-Henry, 'The Challenge of Political Rights', in Z Layton-Henry, ed., *The Political Rights of Migrant Workers in Western Europe*, (London, Sage Publications, 1990), p.12.

⁸ T Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*, (Aldershot, Avebury, 1990), p.1.

⁹ *Ibid.*, p.13. He acknowledges that the special term for this category has also been emphasised by Norwegian professor of international law Atle Grahl-Madsen. He also provides the definition of the old English word as: 'an alien to whom the sovereign has by letters of patent under the prerogative granted the status of a British subject but who was not allowed to hold public office or obtain a grant of land from the Crown.'

status, granting permanent work and residence permits without time restrictions; and the third and final gate the naturalisation into full citizenship of the host state.¹⁰ It is only after passing the second gate a foreign citizen can obtain full residential rights as a denizen nevertheless many denizens intentionally remain outside the third gate of naturalisation due to several reasons.¹¹ These can be the restrictive naturalisation policies of the host state that require profound transformation of the applicant that can break the old ties with the home state or restrictions of dual citizenship or intention to turn back to the state of origin.

Denizens enjoy almost full social, economic and civil citizenship rights whereas they only have limited access to political rights. With the exception of a few states that granted denizens voting rights in local elections, they are excluded from democratic participation and processes.¹² This means that they cannot vote unless they are naturalised, which is a democratic problem due to the growing difference between the actual resident population and the population of citizens. The creation of the denizen status may be seen as a result of the theoretical contradiction for democratic nation-states of permanently disenfranchising large sections of the population,¹³ a contradiction between the economic exploitation of immigrants without representation and the precepts of the liberal democratic state.¹⁴

In post-war Europe, due to the formation of the category of ‘denizen’, the citizen-noncitizen distinction became increasingly blurred. The term denizen symbolises limited membership to a polity and access to the rights and services that membership provides, as opposed to the full membership represented by citizenship. They have *de facto* membership according to Sørensen as they participate in the labour market, pay taxes, bring up families, contribute and receive welfare benefits and involve in the social and cultural life.

¹⁰ *Ibid.*, p.16.

¹¹ *Ibid.*, pp.84-105.

¹² Sørensen, *op.cit.*, p.63.

¹³ S Castles, ‘Democracy and Multicultural Citizenship: Australian Debates and their Relevance for Western Europe’ in R Bauböck, ed., *From Aliens to Citizens: Redefining the Status of Immigrants in Europe*, (Aldershot, Avebury, 1994), p.23.

¹⁴ Layton-Henry, *op.cit.*, p.22.

Politics of Inclusion and Exclusion

The legal pattern of inclusion and exclusion is defined by the politics of a state; and terms such as citizenship, denizenship, and the naturalisation laws are legal expressions of certain political forms. There are different political models of admission of aliens into a state hence the diverging definitions of citizenry embody and express distinctive understandings of nationhood that is to say political national self-understandings.¹⁵

Faist makes an essential distinction between the two models of admission of aliens in Western democracies, the first is the ethno-cultural political exclusion and the second is pluralist political inclusion.¹⁶ In the first one, settled immigrants are members of the community as workers and taxpayers but access to full citizenship via naturalisation is difficult because the dominant definition of the polity is based on a community of descent. This is expressed by the *ius sanguinis* principle, which means that the individual automatically gets the citizenship of the parents. This model is rather exclusive since a high degree of cultural assimilation is required for those who want to naturalise. Even if they naturalise the model is still basically exclusive, as the first generations' descendants born in the state of settlement are not automatically naturalised due to the *ius sanguinis* principle.

The second model is one of pluralist political inclusion, as immigrants are admitted more easily into the political community and legally admitted immigrants are set on the road to citizenship. Permanent residents can become citizens after a certain period of time and the first generation born in the state is automatically naturalised as the basic principle of

¹⁵ W R Brubaker, 'Immigration, Citizenship, and the Nation-State in France and Germany: A Comparative Historical Analysis' in T Bryan and H Peter, eds., *Citizenship: Critical Concepts*, vol.2, (London, Routledge, 1994), p.310.

¹⁶ T Faist, 'Boundaries of Welfare States: Immigrants and Social Rights on the National and Supranational Level' in R Miles and D Thränhardt, eds., *Migration and European Integration: The Dynamics of Inclusion and Exclusion*, (London, Pinter Publishers, 1995), pp. 180-181. Despite being basically accepted, there are variations to this categorisation of politics of inclusion and exclusion in the literature such as; democratic as opposed to nationality principle; liberal as opposed to protectionist; 'open' as opposed to 'closed' conception; and multicultural as opposed to differential exclusionary and the assimilationist models.

admission in this model is *ius soli*, which means that all individuals born within the state's territory are granted citizenship. Thus, this model prevents the possibility of formation of second and third generation immigrants.¹⁷

Therefore, although the term citizen exists in all democracies, the precise meaning of the concept varies from state to state and these models are not results of recent political decisions but go back to historical experiences of nation-state formation,¹⁸ which actually reflects the community's exercise of self-definition.¹⁹ The politics of citizenship vis-à-vis immigrants has been formed by distinctive national-self understandings, deeply rooted in political and cultural geography and powerfully reinforced at particular historical conjunctures.²⁰ Hence, these models are hard to criticise since they depend on the history, economics, culture or political persuasion. The historical and the current relationship between the state and the nation, whether this relationship is a political issue and whether the core interests of the nation are perceived to be threatened by immigration and naturalisation,²¹ are important factors determining the politics of inclusion and exclusion. It is very normal that each Western European state has a different national tradition of citizenship based on a different model since immigration to these states differed significantly due to varying colonial experience, geographic position and economic development of these states since WW2.²²

Nevertheless here the crucial point is that in Western European states, no matter by what political principle the exclusion is justified or which model is employed, in practice the exclusion is not made an all-or-nothing procedure. Rather, exclusion is graded and permanently resident immigrants are not left out with nothing. There is a common differentiation between the temporary residents who are called *aliens* and the permanently resident *denizens* in all European states. Whereas the classical concept of citizenship obeys an 'either-or' logic, denizenship has blurred this boundary, since these

¹⁷ R R Marín, 'Equal Citizenship and the Difference that Residence Makes' in M La Torre, ed., *European Citizenship: An Institutional Challenge*, (The Hague, Kluwer Law International, 1998), p.202.

¹⁸ Castles, *op.cit.*, p.21.

¹⁹ Marín, *op.cit.*, p.204.

²⁰ Brubaker, *op.cit.*, p.310.

²¹ Hammar, *op.cit.*, p.78.

²² *Ibid.*

long-term immigrants are no longer ‘humanly or sociologically foreigners’.²³ Therefore, citizenship is not the sole determinant to rights anymore; the determining criteria became the permanent residence instead, which confers civic and socio-economic rights virtually identical to those of citizens.²⁴ Even if denizens may not wish to become citizens, their permanent stay gradually makes them members of their state of residence and this fact needs recognition.²⁵ Basing on this foundation, the next chapter will discuss the legal formulation of the EU citizenship and the political pattern of inclusion and exclusion behind this legal expression.

CITIZENSHIP AND POLITICS OF INCLUSION AND EXCLUSION IN THE EU

Legal Account of EU Citizenship

Article 17 of the EC Treaty states that:

- 1. Citizenship of the Union is hereby established. 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 Union citizenship.*
- 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

If the previously quoted distinction between the formal and substantive dimensions of citizenship is employed here, it can be seen clearly that the substantive aspect is determined by the EU as the EC Treaty confers rights on EU citizens additional to their national citizenship rights; such as the right of free movement and the right of residence, the rights to vote and stand for election in municipal elections and elections to the European Parliament, the right diplomatic and consular assistance in countries in which a Union citizen’s Member State of nationality is not represented, the right to petition the

²³ H Oger, “‘Residence’ as the New Additional Inclusive Criterion for Citizenship’, in *Web Journal of Current Legal Issues*, no.5, 2003, no pagination. Available at: <http://webjcli.ncl.ac.uk/2003/issue5/oger5.html>

²⁴ Brubaker, *op.cit.*, p.316.

²⁵ Layton-Henry, *op.cit.*, p.194.

European Parliament and to apply to the Ombudsman.²⁶ Nevertheless, in sharp contrast with this substantive aspect, the formal aspect of Union citizenship is fully determined by Member States, by their national legislation on citizenship. The question of who is a Member State national remains for each Member State to decide and as a result of this legal dependence of Union citizenship on the national citizenship laws, no direct link has been created between the Union citizens and the Union.²⁷ Furthermore, the Member States added 'Declaration (no.2) on the Nationality of a Member State' to the TEU; which states that Member States may define, for information, who are to be considered their nationals for Community purposes by way of a Declaration and may amend any such Declaration when necessary.

These issues point to the excessive power given to the Member States in the definition of the formal aspect of EU citizenship. This in turn has significant impacts on the substantive meaning of the Union citizenship. As mentioned at the very beginning, Union citizenship clause was designed to form the basis of the relationship between the individual and the integration process. By addressing genuine deficiencies in the Union's constitutional architecture, it provided an acknowledgement that the processes of democratic accountability were insufficiently developed to support the Union's law making processes. An ambitious project as such does not reach its full potential since granting citizenship is still a nation-state privilege, blocking the formation of a true 'Union citizen'. Also, the legal design of the Union citizenship is widely criticised that it becomes relevant only when a person lives in another Member State of the Union or in a third country.²⁸ Bauböck warns that for the great majority of citizens residing permanently in their states of origin, Union citizenship will remain quite irrelevant as long as the European Parliament does not have substantive legislative powers.²⁹

²⁶ There are other rights for the citizen concerning consumers' rights, culture, education and vocational training, working conditions, public health and environment, social rights; however, they are found elsewhere in the Treaty, not as part of the citizenship package as such.

²⁷ S O'Leary, *European Union Citizenship: The Options for Reform*, (London, IPPR, 1996), p.3.

²⁸ R Bauböck, 'Citizenship and National Identities in the European Union', *Jean Monnet Working Papers*, Harvard Law School, 4/1997, no pagination. Available at: <http://www.jeanmonnetprogram.org/papers/97/97-04-.html>

²⁹ *Ibid.*

As this work is essentially concerned with the formal aspect of the EU citizenship, the point to be emphasized here is that there is no specific law in the EC Treaty that determines the legal pattern of acquisition and loss of EU citizenship, such as *ius soli* or *ius sanguinis*. Instead, Member States have exclusive competence to define who the Union citizens are by their individual national citizenship laws, as long as they respect Community law. The Union citizenship does not create a new political subject of its own,³⁰ only the citizens of the Member States can be EU citizens and there is no other legal classification concerning the permanently resident TCNs such as a secondary category of Union denizenship. This means that, in contrast with the national systems of the Member States, citizenship is an all-or-nothing category in the EU,³¹ since the access to citizenship is not graded.

Politics of Inclusion and Exclusion in the EU

The legal rules on citizenship acquisition reflect the politics of inclusion and exclusion of a state, in other words the political national self-definition, which is deeply rooted in its political and cultural geography. This section will attempt to examine the political pattern of inclusion and exclusion, the understanding of nationhood, ‘Europeanness’, in the Union.

Firstly on the conceptual level, an analysis of ethnic versus civic conceptions of citizenship will be conducted by using Delanty’s models. In his theorisation of citizenship Delanty argues that citizenship is internally defined by rights, duties, participation and identity.³² Civic citizenship in general is based on a strong sense of the rights of citizenship and also entails a degree of participation by citizens in the polity; while the ethnic conception, on the other hand, is founded more on an emphasis of identity and duties.³³ When the current status of the European citizenship is examined,

³⁰ D O’Keefe, ‘Union Citizenship’ in D O’Keefe and P Twomey, eds., *Legal Issues of the Maastricht Treaty*, (Chichester, Wiley Chancery Law, 1994), p.91.

³¹ Sørensen, *op.cit.*, p.121.

³² G Delanty, ‘Models of Citizenship: Defining European Identity and Citizenship’ in *Citizenship Studies*, vol.1, no.3, 1997, p.288.

³³ *Ibid.*

one can easily see that it is based more on rights and participation when compared to the duties and identity. The legal provisions on EU citizenship confer rights on the citizens; moreover there is participation to a certain degree as the citizens vote in the municipal and European Parliament elections. However, although Article 17(2) of the EC Treaty states that Union citizens shall be subject to the duties imposed by ‘this Treaty’, it does not specify any such duties and there is lack of a common European identity and popular legitimisation.³⁴ The lack of organised party system, European associations, citizens movements, European media, European wide discourse on key issues are seen as shortcomings of a European public space.³⁵ Therefore, following Delanty’s conception, one can say that European citizenship, as it is currently codified and exercised, appears to be a civic rather than an ethnic citizenship as it is essentially based on rights and to a certain degree participation rather than duties and identity.

On another level, the assessment of political national self-definition requires analysis of the sense of membership and identity. The key question is: Who is European? Despite the existence of ethnically specific characteristics such as the Greek heritage, Renaissance and Christianity; the political leaders of the EU are conscious of the dangers of culturally specific definitions of ‘Europe’ and ‘European’.³⁶ While the EU speaks of a shared cultural heritage, it is vague as to what this term means; and it prefers instead to proclaim universal concepts such as tolerance, the rule of law, and respect for human rights as the basis of a modern European identity. Therefore, the EU is careful not to offend elements of its membership by creating a European identity that is not sufficiently all embracing.³⁷ Consequently, the EU is founded upon a ‘thin’ postnationalist collective identity defined

³⁴ This identity problem is often referred to in debates concerning the democratic deficit of the Union; and it is argued that a democratic Europe is impossible because there is not a European people which is prior and independent of the process of its political constitution. This view is commonly called the ‘non-demos’ thesis, in support of this position see D Grimm, ‘Does Europe Need a Constitution?’ in *European Law Journal*, vol. 1, 1995. On the other hand, critiques point out that European demos will be the product, and not the precondition of European democracy, see J Habermas, ‘Does Europe Need a Constitution? Response to Dieter Grimm’ in C Cronin, P De Greiff, eds., *The Inclusion of the Other: Studies in Political Theory* (Cambridge, The Massachusetts Institute of Technology Press, 1998). Regardless of what each side argues, there is an important fact this discussion points at: There is lack of popular legitimacy in the Union.

³⁵ C Closa, ‘Requirements of a European Public Sphere’ in K Eder, B Giesen, eds., *European Citizenship between National Legacies and Postnational Projects*, (New York, Oxford University Press, 2001), p.189.

³⁶ D Dunkerley, L Hodgson, S Konopacki, T Spybey, A Thompson, eds., *Changing Europe: Identities, Nations and Citizens*, (London, Routledge, 2002), p.124.

³⁷ *Ibid.*

by liberal values and it grants membership to those states that share its liberal values and adhere to its liberal norms.³⁸ This liberal collective identity is sufficiently thin to be compatible with various ethnic or cultural identities, a pluralistic authority structure and different varieties of democratic political systems and market economies.³⁹ To illustrate this, several examples can be given from different spheres.

To start with the intergovernmental structures; according to the TEU, states that are democratic and European can be members of the Union. However, the Copenhagen European Council in June 1993 decided to accept the eventual membership of the candidate countries only conditionally. Accordingly, they need to have stable institutions guaranteeing democracy, rule of law, human rights and minority rights; functioning market economy and capacity to cope with competitive pressures inside the EC; and ability to adopt the *acquis communautaire*, accepted aims of political, economic and monetary union. Thus for the potential Member States, 'Europeanness' serves as a test of their compatibility for convergence, and stipulates measures as inscribed in the question 'who belongs?'.⁴⁰ These conditions correspond to liberal values of the Union and the countries selected for accession talks distinguish themselves from other non-members with regard to their adherence to these liberal norms.⁴¹ The criteria for accession are essential, indicating 'how the EU operationalises European identity in practice'.⁴²

Other key documents are also indicators of this pattern. The preamble and the Article 6 of the TEU refers to rule of freedom, democracy, recognition of human rights, as well as to rule of law. Moreover in the preamble of the Charter of Fundamental Rights proclaimed at the Nice Summit of December 2000; it is claimed that the Union, taking inspiration from its moral and spiritual heritage, is built on the indivisible, universal principles of human dignity, freedom, equality and solidarity, and its foundation consists of the rule of

³⁸ F Schimmelfennig, 'Liberal Identity and Postnationalist Inclusion: The Eastern Enlargement of the European Union' in L E Cederman, ed., *Constructing Europe's Identity*, (London, Lynne Rienner Publishers, 2001), p.172.

³⁹ *Ibid.*, p.174.

⁴⁰ Y N Soysal, 'Locating Europe' in *European Societies*, vol. 4, no. 3, 2002, p.266.

⁴¹ Schimmelfennig, *op.cit.*, p.175.

⁴² I B Neumann, 'European Identity, EU Expansion, and the Integration/Exclusion Nexus' in L E Cederman, ed., *Constructing Europe's Identity*, (London, Lynne Rienner Publishers, 2001), p.152.

democracy and law.⁴³ The Charter as a constitutional document, the bill of rights of the Community legal order, directly addresses the relationship between the Union and the individuals therefore the emphasis on these values indicates that the European identity is increasingly developed in this direction. Another important unit of analysis, the Draft Constitutional Treaty⁴⁴ does not give any reference to God or Christianity as a result of heated discussions in the Brussels Intergovernmental Conference in June 2004.

In addition to these, symbolic markers imply a normative definition of inclusion and exclusion.⁴⁵ Ordinary Europeans were seen as lacking consciousness of their European heritage and identity, therefore the Commission intended to remedy this deficit by recommending various 'symbolic measures' as symbols play a key role in consciousness-raising.⁴⁶ Among these were the emblem, the European day (9 May), the flag, a harmonised European passport, driving licence, car number-plates and an anthem. The significance of the issue is that there is no reference to religion or ethnicity in these symbolisms either.

Education, a rather hidden level, should also be analysed. Soysal, reflecting on her project on the emerging European identity as it is built and exercised in educational spheres, argues that European identity is a loose collection of civic ideals and principles such as democracy, equality and human rights.⁴⁷ She emphasises the importance of the field of education in constructing European identity, as the textbooks and curricula reflect the codified versions of Europe and are products of the work of an effective network of actors, through whose activities Europe is revisited, revised and re-mapped.⁴⁸ She mentions that in the educational spheres European identity is not an exclusive one, with a

⁴³ *Charter of Fundamental Rights of the European Union*, OJ 2000 C364/01.

⁴⁴ *Draft Treaty Establishing a Constitution for Europe*, the European Convention, CONV 850/03, 18 July 2003. Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

⁴⁵ K Eder, 'Integration Through Culture? The Paradox of the Search for a European Identity' in K Eder, B Giesen, eds., *European Citizenship between National Legacies and Postnational Projects*, (New York, Oxford University Press, 2001), p.223.

⁴⁶ C Shore, *Building Europe: The Cultural Politics of European Integration*, (London, Routledge, 2000), p.47.

⁴⁷ Soysal, *op.cit.*, p.274. She reaches this conclusion by using examples from schoolbooks and curricula in four European countries (Germany, France, Britain and Turkey) at three-time points- the 1950s, 1970s and 1990s - when major educational reforms took place.

⁴⁸ *Ibid.*, p.269.

definition that everyone can be European, as long as they adhere to the principles.⁴⁹ She acknowledges that history textbooks glorify Europe's Roman, Christian and even Greek origins; but she also points out to the fact that these origins are treated less and less in ethnic or religious narratives, and increasingly more in terms of universalistic principles they contain.⁵⁰ A European identity, which transcends Europe and legitimated by claims to universality rather than particularisms is constructed thus Europe does not exist against its 'others'.⁵¹ As an example, Soysal illustrates how Islam cannot be considered as a potential 'other'; mentioning the careful efforts made by European leaders in the aftermath of September 11th to differentiate their 'war against terrorism' from a 'war against Islam', and also referring to the war in Balkans when Europe in collaboration with non-Europeans defended and still defends Muslim Kosovo and Bosnia against a non-democratic Yugoslavian state.⁵² Therefore, Europe as conceptualised in educational spheres hosts multiple geographies, cultural references, and it cannot afford to develop discriminating particularisms as it derives its legitimacy from universalistic principles.⁵³

What can be observed from this discussion is that European identity does not arise as an ethnically defined and exclusionary notion, either conceptually or practically on any of the different levels analysed. It should be accepted that identities are fluid and ever in need of reinscription, and that there cannot be such a thing as a European identity in the singular but only a plurality of European identities that will clash and reconstruct one another in the process that is identity politics.⁵⁴ That is why the analysis has focused on more than one level. How 'Europe' is presented in official EU discourses is crucial, demonstrating how the Union identity is operationalised.⁵⁵ The official rhetoric proclaims universal concepts such as tolerance, rule of law, and respect for human rights as the basis of a modern European identity. Therefore, Union citizenship as it is currently codified, does not define its 'other' ethnically. Concepts of democracy, rule of law and

⁴⁹ *Ibid.*, p.274.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*, p.275. She also discusses the attempts to symbolically define America as the 'other' in several aspects.

⁵³ *Ibid.*, p.278.

⁵⁴ Neumann, *op.cit.*, p.160.

⁵⁵ Shore, *op.cit.*, p.21.

human rights, as explained above, occupy such a central position in the European integration project that the ‘other’ becomes Second World War or the holocaust.⁵⁶ The founders of the European Economic Community attempted to foster a distinctive European identity to replace the former warring identities.⁵⁷

In light of this analysis the political pattern of inclusion and exclusion, the understanding of nationhood, ‘Europeanness’, in the Union seems to be pluralist political inclusion, instead of an ethno-cultural exclusion. There is neither the ethnically defined ‘other’ nor a traditionally assimilationist understanding of nationhood. There is no aim of cultural assimilation in the EU; but instead given the Copenhagen political criteria, it may well be argued that there is imposition of European values such as democracy, rule of law and respect for human rights on the new entrants.

THE TREATMENT OF THIRD COUNTRY NATIONALS IN THE EU

If citizenship is centrally concerned with defining the relationship between the individual and the state, immigrants form the test case of citizenship as new comers to a polity.⁵⁸ Given the fact that the EU is a post-war formation, built on a considerable population of denizens in the Member States, their treatment becomes a key issue in considering the legal and political patterns of Union citizenship. This chapter will problematise the existing legal framework for their treatment and will attempt to indicate how difficult it is to justify their current treatment given the political pattern of inclusion and exclusion, in other words political understanding of ‘Europeanness’ in the Union.

Automatic Exclusion of the Permanently Resident TCNs

The exclusion of TCNs from citizenship can be the consequence of either exclusion at the state level through discouraging policies, or self-exclusion at the individual level. In the

⁵⁶ Y N Soysal, ‘Locating Europe’, paper presented at the *Sussex European Institute Research in Progress Seminar*, Brighton, 18 May 2004.

⁵⁷ S Douglas-Scott, *Constitutional Law of the European Union*, (Essex, Pearson Education Limited, 2002), p.481.

⁵⁸ Delanty, *op.cit.*, p.288.

Union, the status of TCNs is determined unilaterally by the Member States via their definition of nationality, consequently they are automatically excluded from EU citizenship rights without any option of naturalisation at the Union level. This means that at the EU level, the reason for the exclusion of TCNs from the Union citizenship is exclusion, not self-exclusion given the absence of any Euro-naturalisation process.

This can be considered a legal problem as the key decision on who is to be granted EU citizenship is left to Member States however the system does not follow the pattern of exclusion in Member States. While national systems follow Hammar's three-gates model, the Union citizenship is rather an all-or-nothing category. There is neither a differentiation between the temporary and permanent TCNs,⁵⁹ nor a possibility of naturalisation at the EU level. There is no legal correspondence for denizenship at the EU level, therefore settled immigrants with a secure residence status still tend to be denizens on the national level and aliens on the European level.⁶⁰

Moreover, the issue of dual citizenship is overlooked despite the fact that it is forbidden in many states' citizenship laws. The opponents of dual citizenship argue that state membership is unique and exhaustive and individuals should belong to only one state. Thus, this norm should be realised in a world of states, each of which claims a fraction of the human population as its own and for which it has special responsibility.⁶¹ Besides this theoretical aspect, it generates some practical problems such as legal pluralism, lack of protection, free riding by cumulating benefits or evading duties of citizenship.⁶² However, in a world in which human mobility is considerably increasing, a key demand is for the right to dual citizenship. This as a legal matter also causes exclusion of TCNs from the Union citizenship. Recently many Member States became lenient towards dual citizenship, for instance Germany who had a strict policy has made it relatively easier to obtain. Nevertheless, even though dual citizenship was allowed in all Member States, it would not be a solution for those denizens who wish to stay as non-citizens.

⁵⁹ The recent developments appear to differentiate between them to a certain extent; which will be analysed in the following chapter.

⁶⁰ Faist, *op.cit.*, p.193.

⁶¹ Brubaker, *op.cit.*, p.312.

⁶² Bauböck, *op.cit.*

Besides these legal discrepancies, the current system is problematic politically as well. The nation-states seek to reproduce themselves through naturalisation procedures.⁶³ Although the politics of inclusion and exclusion in the Union does not include the objective of ethnic assimilation, the current system confirms certain Member States' citizenship laws in their chosen mode of ethnic conception of citizenship.⁶⁴ While 'no taxation without representation' counts for citizenship, 'no representation without naturalisation' counts for non-citizens.⁶⁵ Given the fact that there will always be some denizens, if their individual choices to stay as non-citizens are not respected, this renders the Union policy assimilationist, even though it is not meant to be so.

Differences between the Union Citizens and the Permanently Resident TCNs

It should be acknowledged from the beginning that there must be differences between these two groups' treatments, so what this section will discuss is; whether the permanently resident TCNs can rightly be subjected to such a discrepancy in their treatment given their position in their states of residence socially and legally, and whether the degree of the existing differential treatment can be justified by the Union's political understanding of 'Europeanness'.

Firstly as *de facto* members, TCNs economic activities contribute to the economic success of the Union, they pay taxes and contribute to the social security systems of the Member States in the same way as Member States nationals, moreover their cultural contributions enrich the societies they live in.⁶⁶ They experience Community interference in their lives just like the Union citizens.⁶⁷ Hence they constitute a permanent presence in the Union, they are not 'guests' anymore but their integration, as explained above, may

⁶³ Sørensen, *op.cit.*, p.71.

⁶⁴ Shore, *op.cit.*, p.79.

⁶⁵ Sørensen, *op.cit.*, p.62.

⁶⁶ O'Keefe, *op.cit.*, p.104.

⁶⁷ H Staples, *The Legal Status of Third Country Nationals Resident in the European Union*, (The Hague, Kluwer Law International, 1999), p.314.

be hindered by numerous factors including restrictive naturalisation laws.⁶⁸ Nevertheless in return, they only have right of petition the European Parliament and right of appeal to European Ombudsman like the Union citizens.⁶⁹ The problem is that these rights are not substantive but rather procedural in the sense that they allow TCNs only to seek protection and promotion of their substantive rights.⁷⁰

Moreover, the current legal framework creates two *de facto* categories of non-citizens in Member States:⁷¹ First group is the citizens from the non-Member States, that is to say TCNs who enjoy membership status according to national law, and the host Member State sovereignly determines their access to the national territory and the privileges of their membership. The second group, on the other hand, is the migrant Union citizens in other Member States who enjoy rights and duties according to both national law and European law, the latter being superior if the two legal systems are in conflict. The consequence of this situation is that in a Member State, denizens are being further marginalised when compared to both citizens of that state, and to migrant Union residents there. Furthermore, if the current system is to be preserved, as more and more issues are transferred from national jurisdiction to European jurisdiction and legislation, legally resident non-EU citizens will experience an absolute marginalisation in their states of residence.⁷² Therefore, denizens are pushed to a third-class citizenship status in their host states.

Another contentious issue concerns the voting rights. At the EU level there is a category of European residents who, despite paying taxes, benefiting from welfare services, forming associations, cannot participate in political decisions either at local or European levels. The inclusiveness of the *demos* is an essential criterion of the democratic process

⁶⁸ O'Keefe, *op.cit.*, p.104.

⁶⁹ The Charter of Fundamental Rights, which will be discussed in the next section, grants TCNs the right to good administration under Article 41 and the right of any natural or legal person to access documents held by the European Parliament, Council and Commission under Article 46 explicitly, which were already existent in the EC Treaty.

⁷⁰ Á C Oliveira, 'The Position of Resident Third Country Nationals: Is it too Early to Grant them Union Citizenship?' in M La Torre, ed., *European Citizenship: An Institutional Challenge*, (The Hague, Kluwer Law International, 1998), p.187.

⁷¹ Sørensen, *op.cit.*, p.156.

⁷² *Ibid.*, p.157.

hence this civic inclusiveness deficit questions the democracy and citizenship of the Union.⁷³ The expression of their specific cultural, social, economic and political interests in the representative government and parliamentary process is prevented.⁷⁴ As opposed to national systems, the extra parliamentary ways of voicing political views are also limited due to the poor development of European civil society. This move away from a liberal democratic model of inclusion, is especially problematic considering how central the notion of democracy is in the Union's construction of 'Europeanness'.

Differences among the Permanently Resident TCNs

The differential treatment concerning the TCNs is not limited to the differences between them and Union citizens but also there are serious differences in their treatment among themselves. The differences between the citizenship laws of the Member States are reflected directly in the citizenship of the Union in the first place. This diversity generates unequal access to Union citizenship,⁷⁵ and consequently inequality of opportunity and rights for groups of identical origins and periods of settlement.⁷⁶

Secondly, there is no coherent set of rights for TCNs in EU law, instead there is a potpourri of actual and potential rights that may be gathered from international agreements and indirectly from the rights granted to Union citizens.⁷⁷ They come under the scope of EC Treaty not in their capacity as TCNs but as workers, disabled, young or poor people, family members, social assistance beneficiaries, students, or researchers.⁷⁸

⁷³ T Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, (Manchester, Manchester University Press, 2001), p.10.

⁷⁴ Sørensen, *op.cit.*, p.62.

⁷⁵ M J Garot, 'A New Basis for European Citizenship: Residence?' in M La Torre, ed., *European Citizenship: An Institutional Challenge*, (The Hague, Kluwer Law International, 1998), p.233.

⁷⁶ Bauböck, *op.cit.*

⁷⁷ For a detailed discussion of TCNs rights concerning rights of entry; right to establishment and supply services; rights of access to legal employment; right to equality of treatment in matters of employment and social security; public policy, health and security see S Peers, 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union' in *Common Market Law Review*, vol.33, 1996 and M Cremona, 'Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union' in *Legal Issues of European Integration*, 1995.

⁷⁸ Oliveira, *op.cit.*, p.192. For a through analysis of the rights of TCNs as family members, see G Barrett, 'Family Matters: European Community Law and Third Country Family Members' in *Common Market Law Review*, vol.40, 2003.

These rights are referred to as ‘derived’ rights. The problematic side of this is that these rights are not permanent, lasting as long as the relationship exists, and they cease when the family bond or contractual relationship with the company is deemed to have terminated.⁷⁹

Thirdly, the EC Treaty confers free movement only on Union citizens however through association agreements and secondary legislation certain TCNs and family members of Union citizens have obtained free movement right in the EU.⁸⁰ The essential reason for this incoherency is the existence of many international agreements concluded with non-Member States, all affecting TCNs’ legal status in varying degrees.⁸¹ Therefore, the status and rights of a TCN is dependent on the existence of an agreement between the Union and the state of origin.

Consequently, there is a privileged group of TCNs, a category in between the Union citizens and ordinary TCNs.⁸² It can be seen that the exclusion of TCNs is not governed by a uniform principle that is in coherence with the politics of inclusion/exclusion, political understanding of ‘Europeanness’. The healthy criterion would be the social attachment with the state of residence instead of external economic relations of the Union, which renders their exclusion very inconsistent.

In light of the assessment under these three titles, it becomes clear that the current treatment of TCNs is far from being uniform and comprehensive, as there is no coherent body of EU law, no corpus of substantive rules setting out the rights and status pertaining to TCNs.⁸³ As a consequence, there appears to be contradiction between the

⁷⁹ M Hedemann-Robinson, ‘An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident within the EU: With Particular Reference to Case Law of ECJ’ in *Common Market Law Review*, vol.38, 2001, p.584.

⁸⁰ U Bernitz and H L Bernitz, ‘Human Rights and European Identity: The Debate about European Citizenship’ in P Alston, M Bustelo, J Heenan, eds., *The EU and Human Rights*, (New York, Oxford, 1999), p.518.

⁸¹ Due to political and economic factors, the agreements have varied significantly in terms of the extent to which TCN resident interests are addressed. For a detailed list of the international agreements with non-Member States see Hedemann-Robinson, *op.cit.*

⁸² Bernitz and Bernitz, *op.cit.*, p.519.

⁸³ Hedemann-Robinson, *op.cit.*, p.525.

Community's commitment to values such as democracy, protection of human rights and equality of treatment on the one hand; and the exclusion and inequality in practice on the other.⁸⁴ Hence, the treatment of TCNs questions the universality of EU values, causing discrepancy between the legal account and the political pattern behind the Union citizenship.

HOW CAN THE CURRENT FRAMEWORK FOR THE TREATMENT OF TCNs IN THE UNION BE IMPROVED?

The Recent Developments

In light of the previous discussion, it is clear that the treatment of TCNs is a Union-wide issue in need of a Union response. Despite the efforts of the Commission and the Parliament; the orthodox position consistently followed by the Council, viewed TCN residence in the context of its external trade relations with third countries,⁸⁵ rather than in terms of fundamental rights and democracy in the Union.

Some recent developments can be deemed as key steps. Firstly the Communitarisation of visa, asylum and immigration matters pertaining to resident TCNs by the Treaty of Amsterdam (ToA) under the new Title IV of the EC Treaty should be regarded as a big step. The five-year transitional period starting from the entry into force of ToA in 1999,⁸⁶ which contained many intergovernmental features, came to an end. The primary reason for the incoherent treatment of TCNs was the reluctance of the Member States to transfer powers in this policy area to the Union, and hence legislation on TCNs lied uneasily between the first and third pillars.⁸⁷ Therefore, communitarisation should be welcomed as an improvement which can elaborate a principled and coherent legal framework for the treatment of TCNs. However, as now the Community institutions will legislate over a

⁸⁴ T Kostakopoulou, 'Invisible Citizens? Long-Term Resident Third Country Nationals in the EU and their Struggle for Recognition' in R Bellamy and A Warleigh, eds., *Citizenship and Governance in the European Union*, (London, Continuum, 2001), p.188.

⁸⁵ Hedemann-Robinson, *op.cit.*, p.526.

⁸⁶ See Title IV to the EC Treaty on Asylum, Immigration and Other Policies Related to the Free Movement of Persons, Arts. 61–69 EC.

⁸⁷ Cremona, *op.cit.*, p.89.

wider range of issues concerning the TCNs, the Community interference into their daily lives will increase significantly. Staples warns that these powers have not been counterbalanced by enabling TCNs to voice their views on decision-making at the European level, thus the Union may adopt legislative measures addressing matters of concern to them without their consent.⁸⁸ This would further problematise the concept of democracy in the Union, which already is subject to criticism.

Secondly, the Charter of the Fundamental Rights, proclaimed at the Nice Summit of December 2000⁸⁹ also contributed to the legal status of TCNs. Article 45(2) states that freedom of movement and residence rights ‘*may be granted*’, in accordance with the EC Treaty, to TCNs legally resident in the territory of the Member States. With this provision, the issue is formally carried to the agenda of fundamental human rights discourse at Union level, which can be an important source of rights and equality for denizens in the future.⁹⁰ However, Davis suggests that the word ‘*may*’ actually means that the EC Treaty may be amended in future, or that the Union may make other legislative provisions governing the free movement and residence of TCNs.⁹¹ Above all, the Charter is not formally incorporated into the Treaties yet, which risks its legal enforceability.

Third and most important development is the post-Tampere achievements. At the Tampere European Council of 1999, the Member States declared their intention to create an area of freedom, security and justice.⁹² In fulfilment of this commitment, the Council on 25 November 2003 adopted Directive 2003/109/EC; which approximates the grant of long-term resident status by a Member State to TCNs legally residing in its territory.⁹³ This directive explicitly recognises their integration in the Member States as a key

⁸⁸ Staples, *op.cit.*, p.341.

⁸⁹ Charter of Fundamental Rights of the European Union, OJ 2000 C364/01.

⁹⁰ Oger, *op.cit.*

⁹¹ R W Davis, ‘Citizenship of the Union...Rights for All?’ in *European Law Review*, vol.27, no.2, 2002, p.132.

⁹² *European Council Presidency Conclusions Tampere 15 and 16 October 1999*, SN 200/99, Brussels, 16 October 1999.

⁹³ The Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-Country Nationals Who are Long-Term Residents, see also the Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification.

element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty. The main criterion for acquiring long-term resident status is established as five years of residence in the territory of a Member State, in order to show that the person has '*put down roots in the country*'. This acknowledges the increasing importance of residence as a criterion for the attainment of certain rights, paralleling the national systems. The core idea of the directive is to approximate the grant of long-term resident status in Member States, thus TCNs are granted the possibility of acquiring such status in a second Member State under comparable conditions to those in the first Member State. Besides these positive aspects, a few issues need careful examination. Firstly, 'long-term resident's EC residence permit' mentioned in the directive does not imply that once this 'EC residence permit' is acquired, the TCN becomes a long-term resident of the Union and can settle wherever he/she wants. If the TCN acquires long-term residence permit in a second Member State, he/she is not entitled to maintain his/her long-term residence status in the first Member State anymore. This directive approximates the acquisition of long-term residence solely at national level. Therefore, referring to Hammar's three-gate model, the second gate to denizenship is approximated at the national level nonetheless this does not signify the creation of a Union denizenship clause. Secondly to acquire long-term resident status, there is a key condition among others that Member States may require TCNs to comply with '*integration conditions*', in accordance with national law. The implications of this supplementary proviso remain to be seen as it provides the Member States room to bring in different requirements depending on their own national self-understanding as discussed in first chapter. Oger warns that the term 'integration' is too vague as it grants full discretion to the Member States, which is dangerous for denizens due to its exclusionary character.⁹⁴ Thirdly, the directive applies without prejudice to more favourable provisions of the international agreements with non-EU states, and Member States may restrict equal treatment of TCNs with nationals where these activities are reserved to nationals, EU or European Economic Area (EEA) citizens. This renders the EEA citizens still more privileged than the others among the TCNs. Therefore, the existence of such a proviso implies that this directive is not aimed at a genuine harmonisation and formulation of a

⁹⁴ Oger, *op.cit.*

coherent treatment for the TCNs, but rather Member States still want to maintain power on the issue.

Another important development undertaken as part of Tampere agenda is Council Regulation 859/2003, extending the provisions of Regulation 1408/71 to TCNs.⁹⁵ This regulation is created to deal with the differences in the social security laws of Member States when cross-border employment causes problems, so it basically aims to protect the social security rights of persons moving within the Union. Therefore, extended Regulations will apply only where a TCN is employed in two or more Member States, however the TCNs do not have the right of free movement, which forms the core of the issue. Thus, to truly benefit from the regulation, they need to ‘move’, the right, which they are not granted.

⁹⁵ The Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to Nationals of Third Countries who are not already covered by those provisions solely on the ground of their nationality.

Alternatives for the Future Inclusion of TCNs in the Framework of EU Citizenship

Harmonisation of National Citizenship Laws

This first option aims to make adjustments at the national level by harmonising the Member States' laws on citizenship. This would mean that obtaining the citizenship of all Member States would be the same in terms of requirements. Nevertheless as discussed previously, legal rules on citizenship reflect the political self-understanding and there are very different national traditions of citizenship in Europe. Thus, this option implies not only harmonising the legislation on citizenship, but also the distinctive understandings of nationhood. According to Nascimbene, despite the existence of common profiles or minimum standards to form the basis of a harmonisation as such, it would at present be politically impossible.⁹⁶ In the long term, as the European integration project advances to its final stages, harmonisation of legislation on citizenship would be inescapable; yet bearing in mind how jealously the Member States guard their exclusive competence in the determination of nationality, it is not very surprising to see the absence of political will at this stage. Moreover legally, even though this option would bring the unequal access to Union citizenship to an end; this would still leave out the denizens who opt to stay as non-citizens, since the system would still demand the acquisition of citizenship of the host Member State.

Residence as the New Criterion for the Acquisition of Union Citizenship

The second option is calling for EU citizenship to be based on residence in a Member State,⁹⁷ to include permanently resident TCNs automatically in the personal scope of EU citizenship. Garot argues that this alternative is legally viable since a Community notion

⁹⁶ B Nascimbene, *Nationality Laws in the European Union*, (London, Butterworths, 1996), p.11.

⁹⁷ Some scholars use the terms residence, abode and domicile interchangeably, however, they may have different connotations. Here the term residence will be used to mean the place where the person lives, the place where he/she is connected by personal and occupational links. For a careful distinction between the terms 'residence' and 'domicile', see Garot, *op.cit.*, pp.236-239.

of residence already exists,⁹⁸ which is even enhanced further with the recent Directive 2003/109/EC. As for the advantages of such a reform; firstly, this would remedy the absence of the Union from the determination process of its citizens, hence the Union would define both the formal and substantive aspects of its citizenship. Secondly, it would end the unequal access to Union citizenship among the permanently resident TCNs. Furthermore, politically it would remedy the civic inclusiveness deficit.

Despite the fact that this legal option appears to be the most appropriate option that manifests the Union's political understanding of 'Europeanness'; it does not go without disadvantages either. Bauböck argues that this reform would cause Union citizenship to be seriously devalued in the eyes of citizens of the Member States by reducing it to a generalized denizenship, disconnected from the notion of consensual membership in a political community.⁹⁹ Furthermore, the proposal would relieve Member States from any European pressure to reform and harmonise their rules for determining national citizenship; turning native-born children of immigrants into foreigners by *ius sanguinis* or prohibitions of dual citizenship.¹⁰⁰ Another important point is that the conferral of Union citizenship on TCNs may still create problems as their states of origin may object to the acquisition of Union citizenship or the right of external diplomatic and consular assistance may give rise to particular inconveniences.¹⁰¹

Creation of Union Denizenship

The third option of bringing TCNs into the framework of Union citizenship is different from the first two; as it envisages a second-class citizenship through creation of Union denizenship that would supplement, rather than replace Union citizenship. Just like national denizenship defined in the first chapter, it would signify partial membership through enjoyment of only certain citizenship rights. While certain core rights of voting and diplomatic protection would only apply to Union citizens, many others would apply

⁹⁸ For a detailed evaluation of the existence of a Community concept of residence, see Garot, *op.cit.*, pp.235-248.

⁹⁹ Bauböck, *op.cit.*

¹⁰⁰ *Ibid.*

¹⁰¹ O'Keefe, *op.cit.*, p.106.

to permanent residents as well, including particularly the right to free movement and settlement in other Member States.¹⁰²

The core of such a proposal is granting them free movement right, since it is the fundamental right of the Union. Permanently resident TCNs are already denizens of their host Member States; consequently, the right that would make them denizens of the Union, not only of the Member State, is free movement. The irony of Union citizenship is that although its rights relate primarily to migrants, it excludes the great majority of migrants residing in the EU.¹⁰³ The case for extending the rights of free movement and residence to TCNs is very strong since some TCNs are already granted such rights under the previously discussed international agreements. This would also remedy the further marginalisation of denizens in the host states when compared to both citizens of that state, and to migrant Union citizens there, which renders them not second but third-class citizens.

The recent legislations concerning the long-term residence and social security rights of TCNs are developments establishing the basis of Union denizenship. However, these legislations make arrangements only at national level and fall short of giving them free movement right. At the national level free movement right is a given; and the Union, aiming to become one single unit, is essentially concerned with protecting the rights of a migrant moving within the Union. That is why in the Union, everything depends on 'moving'. As discussed above, especially Regulation 859/2003 that extends the social security rights to TCNs is considerably limited in its effect given the fact that it aims to protect the social security rights of persons moving within the Union and is not applicable in a situation, which is confined in all respects within a single Member State. Therefore, the recent legislations passed under the Tampere programme will be truly effective and create genuine Union denizenship once they are accompanied by free movement rights for the permanently resident TCNs.

¹⁰² S Peers, 'Building Fortress Europe: The Development of EU Migration Law' in *Common Market Law Review*, vol.35, 1998, p.1272.

¹⁰³ Bauböck, *op.cit.*

Firstly analysed from the legal perspective, the creation of Union denizenship would differentiate between the temporary and permanently resident TCNs, which is crucial as it follows the graded pattern of exclusion in the Member States, reflecting Hammar's three entry gates to a state. Establishment of Union denizenship would create correspondence for the denizens at the EU level; hence they would not be ordinary non-citizens anymore. A coherent title, denizen, would make easier the future grant of other rights as well, as there would already be the box to put the rights in. Furthermore, the exclusion of TCNs would be consistent and more importantly politically justifiable as the main determinant would be the period of residence and the societal membership instead of the current scattered legal framework based on Union's external economic relations.

The important point that is neglected by the advocates of the first two legal options is the fact that there will always be denizens due to both legal and personal factors. After the creation of Union denizenship, naturalisation would only express a desire for full political integration into European polity since it would make access to Union citizenship optional rather than automatic.¹⁰⁴ Denizenship would also remove the present perverse incentives for naturalisation as an escape route from discriminatory laws against foreigners,¹⁰⁵ which is politically more appropriate for the Union given its political understanding of 'Europeanness' that does not include ethnic assimilation as an objective.

Besides free movement right as it forms the essence of such a status, Union denizens can also be granted local voting rights. The reflection of this at the European level would be that while the denizens would not be given the right to vote at the EP elections, they would participate at the local elections. The granting of local voting rights to TCNs, despite remedying, would still fall short of bringing the civic inclusiveness deficit to an end. Thus, the perfect solution would be a reform establishing the base of Union citizenship as residence, coupled by a Union denizenship clause. This would distinct societal membership from political membership, making voting in the EP elections optional, depending on the consent of the individuals.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

Opponents of Union denizenship argue that there should be a status of full membership and no other; supporting a unitary, undifferentiated, and egalitarian conception of state membership against a plural, differentiated, essentially inegalitarian one.¹⁰⁶ It is also feared that limited inclusion would limit democracy itself.¹⁰⁷ They fear that *ad hoc* enlargements of migrants' rights may obstruct the path to full membership; trapping large numbers of migrants in an intermediate status.¹⁰⁸ This brings one to the key issue of the time of residence in a host state. For those who have been legally admitted and resident for a long time, a stronger norm applies: 'They must be set on the road to citizenship'.¹⁰⁹ Partiality of membership, in other words denizenship, is only legitimate if it is a way station on the road to full citizenship therefore there should be upward mobility in the long term.¹¹⁰ Nonetheless, once the admission to Union citizenship is determined by the Union itself, the criteria will not be restrictive, Euro naturalisation procedures will be based on liberal conditions rather than ethnic ones. This would render naturalisation more and more attractive for the denizens, however if they still wish so, they should still be allowed to be the denizens of the Union, not only of the host Member States.

Therefore, for both legal and political reasons, the creation of Union denizenship should complement any reform concerning the inclusion of TCNs into the Union citizenship. In all of the Member States there is a distinction between societal membership based on residence and the political community conceived as a self-governing *demos*,¹¹¹ which should be respected, especially in a system that gave its Member States full power to determine who its own citizens should be.

¹⁰⁶ Brubaker, *op.cit.*, p.311.

¹⁰⁷ Kostakopoulou, *op.cit.*, in note 84, p.181.

¹⁰⁸ Brubaker, *op.cit.*, p.313.

¹⁰⁹ M Walzer, *Spheres of Justice: Defence of Pluralism and Equality*, (New York, Basic Books, 1983), p.60.

¹¹⁰ Sørensen, *op.cit.*, p.77.

¹¹¹ Bauböck, *op.cit.*

CONCLUSION

The creation of Union citizenship is a vital development mostly because of the promise it holds for the future to construct a heterogeneous, de-nationalised democratic community in Europe.¹¹² This ‘promise’ tempts one to question if the legal account of Union citizenship actually realises the political objectives assigned to it. The treatment of TCNs constitutes a key element, a test case in this sense to assess the formal aspect of Union citizenship, in other words the inclusiveness of the concept.

An evaluation of the national concepts of citizenship and denizenship reveals that the post-war immigration to Europe transformed the traditional conception of citizenship, rendering the access to rights and privileges graded through the creation of a status as denizen. Citizenship is not an all-or-nothing category anymore since residence gained more and more importance as a determinant for the attainment of many citizenship rights. Legal rules serve purposes and are manifestations of political aims behind them. This political pattern is dependent on national political self-understanding, which is deeply rooted in history, culture, traditions, state formation, demographic and immigration figures. As a result of these factors, citizenship policy can be based on either ethno-cultural exclusion or pluralist political inclusion; which are materialised by different laws on citizenship.

When the Union citizenship is considered from these lenses; legally, it is seen that only nationals of the Member States are entitled to be Union citizens, which automatically leaves out permanently resident TCNs. This appears to be problematic legally, because although the key decision on who is to be granted citizenship is left to Member States; the system deviates from national systems since there is no second gate of entry at the Union level. Due to the absence of Union denizenship, citizenship becomes an all-or-nothing category rendering the denizens of the Member States ordinary aliens at the European level. On the other hand, when looked at the politics of inclusion and exclusion of the Union that is meant to justify the legal account of EU citizenship; basing on the analysis

¹¹² T Kostakopoulou, ‘European Citizenship and Immigration after Amsterdam: Openings, Silences, Paradoxes’ in *Journal of Ethnic and Migration Studies*, vol. 24, no. 4, 1998, p.640.

presented in the second chapter, it can be observed that the political understanding of ‘Europeanness’ is civic as opposed to ethnic. European identity is being constructed on civic ideals such as democracy, rule of law and protection of human rights without any aim of cultural assimilation however this political pattern is incapable of justifying the current treatment of TCNs. On the one hand, their automatic exclusion renders the Union citizenship policy to be assimilationist since TCNs need to acquire nationality of one of the Member States of the Union, accepting the prospect of naturalisation in accordance with the individual nationality laws of the Member States. On the other hand, there is differential treatment both among themselves and between the Union citizens and them, which is not based on a uniform and coherent principle, raising issues on discrimination and civic inclusiveness deficit.

The recent developments; the partial communitarisation of the third pillar, the adoption of the Charter of Fundamental Rights and the achievements under the Tampere programme should be regarded as important steps that enhance the rights and status of TCNs. When Hammar’s three-entry gates model is applied to the EU; it can be said that the communitarisation, transferring competence to the Union on issues of immigration visa and asylum, implies the harmonisation of the first gate. Once the Union coherently decides on who is to be allowed in and under what conditions, it could be easier to harmonise the second gate of denizenship. Communitarisation of first gate may help the Union to answer if it will define itself as an ‘immigration society’, or aim for control and expulsion without integration treating even legal migrants as ‘guests’ who fundamentally do not belong to Europe.¹¹³ Although it should not be expected in the short term, it can be proposed that at the European level, harmonisation of the first gate may prompt the harmonisation of the second gate of denizenship, which may in turn set off the eventual harmonisation of the third gate, the national citizenship laws.

There are already indicators of the launch of harmonisation of the second gate with the Directive 2003/109/EC. Despite forming a minimum legislative floor for grant of permanent residence permits; it falls short of creating genuine Union denizenship since it

¹¹³ Peers, *op.cit.*, in note 102, p.1235.

is limited to national level and not complemented by free movement rights. Free movement right is crucial; since it is the right that would render a permanently resident TCN the denizen of the Union, not only of the Member State. Therefore, it remains to be seen if it will truly harmonise the second gate of admission at the national level, or if it will only operate within the limits of the host Member State jurisdictions.

When other legal options are considered, the political will to actualise harmonisation of citizenship laws and basing EU citizenship on residence does not seem to exist at this stage. However above all; these options, even if they are achieved, do not provide a coherent and principled treatment for the TCNs who wish to stay as denizens. The states of origin may still object to the acquisition of Union citizenship by their nationals; an important indicator of such an attitude being the withdrawal of the notion of dual citizenship from the European constitution.¹¹⁴ Therefore, any legal reform that would admit TCNs into the Union citizenship should be complemented by the creation of Union denizenship; as citizenship should be available only on the demand of the applicant.

On the question raised at the beginning, if the legal account of Union citizenship actually realises the objectives assigned to it; the answer seems to be negative as it does not create direct relationship between a European citizen and the Union, a condition at the heart of the idea of Union citizenship.¹¹⁵ Especially, in a construction which motivates people to 'move', exclusion of the majority of migrants residing in the EU is paradoxical. By adopting nationality as the base of Union citizenship, and making the enjoyment of the core rights dependent upon 'moving', the EU pushes the denizens to be third class citizens falling behind the immigrant Union citizens in their host states. Therefore EU citizenship, aimed at strengthening the integration process, seems to have disintegrating effects at the level of Member State societies.¹¹⁶ This creates discrepancies between the legal and political accounts of Union denizenship. The solution proposed by this paper is that; while basing Union citizenship on *ius soli* would prevent the formation of second or

¹¹⁴ Oger, *op.cit.*

¹¹⁵ Dunkerley *et.al.*, *op.cit.*, p.22.

¹¹⁶ N Prentoulis, 'On the Technology of Collective Identity: Normative Reconstructions of the Concept of EU Citizenship' in *European Law Journal*, vol.7, no.2, 2001, p.198.

third generation denizens, the creation of Union denizenship would provide them the option to stay as non-citizens. Whether an individual starts to conceive of the state of residence as the relevant framework in which to measure his/her status of political equality will depend on his/her perception of the state of residence as a new social and cultural space.¹¹⁷

EU citizenship is a recent formation and the time element is important to see the real implications of the concept. However, it should be underlined that European identity, as it is currently constructed, does not justify the legal pattern of exclusion, the body of law governing the treatment of permanently resident TCNs. Considering that they form a substantial portion of population, this truly novel form of citizenship remains severely underdeveloped and caught in a national framework that constrains its dynamic potential,¹¹⁸ which is inherent in its political self-understanding, ‘Europeanness’.

¹¹⁷ Marín, *op.cit.*, p.209.

¹¹⁸ Bauböck, *op.cit.*

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