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THE LEGAL STATUS OF LONG-TERM MIGRANTS IN EUROPE

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1. The issue: migrants become settled residents without citizenship

Europe has a long tradition of international migration. Over centuries individuals and families have crossed state borders, either of their own free choice or because they were forced by the authorities of the states concerned. Millions of Europeans left their native country to find a better life elsewhere in Europe or in other continents. Wars, political unrest, the removal or redrawing of state borders, the end of the colonial era and, last but not least, the demand of the economy for more workers and new expertise have prompted millions of people, European and others, to migrate to countries in Europe. Four major migration movements occurred in Europe after 1945.

First, in the direct aftermath of the war, millions of ethnic Germans were collectively expelled from countries in Central and Eastern Europe. Hundreds of thousands of prisoners of war and war volunteers either returned to their home country other settled elsewhere in Europe.[1] Large numbers of citizens of the Soviet Union were forcibly sent back by the democratic Western European governments to the Soviet authorities, until protests and opposition forced the governments to halt this outrageous policy in the winter of 1945. Within the USSR millions of people were forcibly moved from one republic to another, others choose to migrate across the internal borders.

The **second** large migration movement was caused by the need for foreign labour for the rebuilding and expansion of the Western European economies in the fifties, the sixties and the first half of the seventies. The first migrant labourers came from Central Europe (Poland and DDR). After the building of the Berlin Wall the foreign workers were recruited predominantly from Southern Europe (Italy, Spain, Portugal, Yugoslavia, Greece and Turkey) and from Northern Africa (mainly from Morocco and Algeria). Central European governments recruited migrant workers from countries in Africa and Asia (Vietnam, Mozambique and Angola).

The **third** large migration movement was related to the dissolution of the colonial empires of Britain, France and the Netherlands. Immigrants from the former colonies in Africa, Asia and the Caribbean region were either forced to leave those territories or attracted by the opportunities to work and improve standards of living in the former metropolitan countries in Europe.

The **fourth** movement involved refugees: first predominantly from Eastern to Western Europe; as off the early eighties refugees came from South America, Africa and Asia as well.
Each of those four movements sooner or later caused family migration. The migrants were either accompanied by their families at arrival or they sent for by the members of their families after some years in the country of immigration.

With each of these migration movements the governments of the receiving countries had to decide on the issue of the legal status of the immigrants.

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[1] See R. Miles and D. Kay, Refugees or Migrant Workers? The Recruitment of Displaced Persons for British Industry 1946-1951, London 1992, on the European Volunteer Worker scheme in the UK, and F. Caestecker, Vluchtelingenbeleid in de naoorlogse periode, Brussels 1992, p. 27 ff. on the (Russian) prisoners of war employed in Belgium.

The first question was whether the immigrants were treated as citizens of the country or as aliens. If the immigrants are treated as aliens, the second question was: what rights do they have vis-à-vis the public authorities and the rest of the population of the receiving country?
Often governments gave no specific answers to the second questions at first, because the migrants were supposed to stay temporarily only. Often both the receiving countries and the migrants themselves think that they will return soon: after the job has been completed or the (political) situation in the country of origin has improved. In reality a large share of those "temporary" immigrants do stay in the country permanently. Hence these questions have to be confronted later on.

This paper deals with the legal status of migrants with long residence in a country, not having the citizenship of their country of residence. It is concerned primarily with temporary migrants having become permanent immigrants whilst remaining alien (non-citizen). The paper also deals with migrants who lost the citizenship of their country of residence with the secession of that country from another state. The legal status of both categories has many common or similar elements.

The term migrants covers both the first and the second generation (the children of the original migrants). The term citizenship is used as a synonym for nationality, describing the legal relationship between an individual and a state. The term nationality is not used to avoid confusion with the concept of national origin.[2]

The paper does not deal with admission of migrants to the country nor with the regularization of migrants illegally residing in the country.

2. The scope of the issue

Data on the number of long-term migrants are available for certain Council of Europe member states only. The data with regard to three member states may illustrate the scope of the issue.
At the end of 1993 the total alien population of **Germany** amounted to almost 7 million, among them almost 1,9 million Turkish citizens and 1,5 citizens of other EU-member states. Half of the alien population had lived in Germany for more than ten years, 40% for more than fifteen years, and a quarter had more than twenty years residence in Germany.[3]

Migrants from Turkey and Morocco are the two main immigrant groups, not having Netherlands citizenship at arrival in the **Netherlands**. Taken together those two groups make up almost half (45%) of the aliens living in the Netherlands. In 1991 two thirds of the Turkish and Moroccan heads of households had lived for more than ten years in the Netherlands, almost 40% had residence of more than fifteen years.[4]

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2 In the French text the term “nationalité” is used, rather than “citoyenneté”.

3 Bericht der Beauftragten der Bundesregierung für die Belange der Ausländer über die Lage der Ausländer in der Bundesrepublik Deutschland, Bonn 1995, p. 16.

4 J. Veenman, Participatie in perspectief, Houten/Lelystad 1994, p. 23 and 140.

In **Estonia** about one third of the population was excluded from the Estonian citizenship when the country regained its independence in 1991. Most of those who did not acquire the citizenship were migrants, mainly Russian speaking persons, who came to Estonia while is was under Soviet rule or were born there as children of these migrants. The large majority of those migrant by now will have more than ten or even fifteen years residence in Estonia.[5]

In all three countries a considerable part of the migrants has very long residence in the country without acquiring its citizenship. This situation occurs in many other Council of Europe member states as well. Three of the four migration movements mentioned above started several decades ago and no member state grants citizenship to all immigrants upon arrival.

3. The importance of the issue: integration and stability

If certain parts of the population of a country over decades or even generations are singled out by the legislation and the state authorities as a special category, having less rights and more obligations than the rest of the population, this may have serious social consequences. The official unequal legal status will tend to justify unequal treatment of the members of the officially designed groups by other public authorities, by private organisations, employers and fellow-countrymen. Exclusion from certain economic and political activities generally does not promote the integration of the groups concerned in the society. On the contrary is promotes resentment and segregation.

The probability that such processes occur, is enhanced when the groups attributed an inferior legal status are visible minorities, because its members can be easily distinguished by their fellow-countrymen on the basis of physical or cultural traits (colour, language, religion or names). In case the cultural and social dividing lines coincide and are reinforced by a legal dividing line enforced by the state, this may in the long run create serious risks for the social and political stability of the country.

4. Four models of treatment of migrants[6]

The answers given to the two questions concerning the legal status of the resident immigrants in most European countries can be generally grouped into four different categories or models: (1) citizenship, (2) quasi-citizenship, (3) privileged treatment for special categories of immigrants, and (4) denizen status.

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5 In 1959 the ethnic Russians made up 20% and in 1979 28% of the total population of Estonia, G. Smith (ed.), The Nationalities Question in the Soviet Union,London/New York 1990 p. 365.

6 Parts of this and some of the next paragraphs have appeared in: Treatment of long term resident migrants in Europe, in: Report of the Workshop on Citizenship, Statelessness and the Status of Aliens in the CIS and Baltic States, International Oranization for Migration, Moscow 1995, p. 79-89

Hereafter the main features of those four models will be described and some examples of the actual use of each model will be given. Next some of the differences between those models and the role of the Council of Europe and the European Union in the development of those models, will be discussed (par. 8 and 9). The paper further deals with the issue of the reasons for choosing one model rather than the other and, finally, mentions some policy and legislative options for governments and for the Council of Europe (par. 10 and par. 11).

Most of the European examples are from Western European countries. In Central and Eastern Europe large migration movements occurred as well. In the Soviet Union, it was partly forced migration, partly voluntary migration of citizens looking for better job opportunities elsewhere in the union. Since these migrants did not cross state borders, the issue of their legal status did not arise at that time. All migrants remained citizens of the USSR. The migrants might have lost the citizenship of the one republic within the USSR and acquired the citizenship of another republic, but that citizenship had a predominantly political-legal nature and little effects in practice.[7]

4.1 Immediate citizenship

The first model is the immediate citizenship model. The essential element of this model is that the receiving state recognises the immigrants as citizens immediately on their arrival.
Either citizenship has been granted at an earlier time and continues to be recognised after arrival, or citizenship is automatically granted at arrival or within a very short time after arrival, after some simple administrative formalities have been fulfilled.

The immediate citizenship model is practised in Germany with regard to the so-called "Aussiedler": ethnic Germans migrating from Russia, Poland, Romania. Article 116 of the German constitution grants German citizenship to "Vertriebener deutscher Volkszugehörigkeit" and their descendants. Millions of immigrants in Germany have received a German passport shortly after arrival, even if they held the citizenship of another state or did not speak the German language.[8]

A comparable rule in the immigration legislation of Israel grants citizenship to all persons of Jewish religion arriving for settlement in Israel. Another example are the many citizens of Latin American states that by birth acquired a "sleeping" Spanish citizenship, that becomes a real citizenship, once the persons migrates to Spain.

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7 G. Ginsburgs, The citizenship law of the USSR, The Hague 1983, p. 29-29.

8 K.J. Bade, Fremde Deutsche: Republikfluchtige, Übersiedler, Aussiedler, in: K.J. Bade (ed.), Deutsche im Ausland - Fremde in Deutschland, München 1992, p. 401-410.

France, Britain and the Netherlands have used this model when admitting large numbers of immigrants from their former colonies shortly before or after the independence of those colonies.[9] In some cases citizenship had been granted to all inhabitants of the colonies, irrespective of the ethnic origin, and all immigrants from the former colony were admitted up until a certain date. In other cases only descendants or relatives of migrants originating from the motherland were recognised as citizens once they wanted to "return" to Europe.

The Russian Federation allows immigrants from the former republics of the USSR to acquire Russian citizenship by simple registration. This option can be exercised until the end of the year 2000.[10]

The same model was also applied in most cases of state secession in Europe during the last two centuries. In those cases persons born in the one part of the state who had migrated to the other part of the state, that seceded afterwards, were recognised as citizens of the new state on the **basis of their domicile** on the territory of that state. This occurred with the secession of Belgium from the Netherlands in 1838,[11] when Ireland seceded from the UK in 1922,[12] with the division of Czecho-Slovakia in 1992 (with a notable exception for persons without registered residence), and at the establishment of most independent states that were formerly part of the USSR (except for Estonia and Latvia).

Citizenship under international law implies the right to enter and to stay in the country of citizenship.[13] It also implies all rights granted to its citizens by the national legislation of the state concerned. Of course granting equal rights does not preclude differences in actual treatment of the immigrants in practice. Discrimination of immigrant citizens, because of their different ethnic origin or behaviour, their lack of knowledge of the language of the social fabric of the country, however deplorable and unjustified, occurs everywhere in the world. Granting the citizenship status does not suppress that discrimination. However, it offers a strong basis to the immigrants and to the public authorities for fighting against that discrimination.

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9 A. Dummett and A. Nicol, Subjects, Citizens, Aliens and Others, Nationality and Immigration Law, London 1990; E.J.M. Heijs, 1995, chapters 3 and 4; P. Weil, La France et ses étrangers, L'aventure d'une politique de l'immigration 1938-1991, Paris 1991.

10 Article 18 (d) of the Act on the citizenship of the Russian Federation of 28.11.1991 as amended on 16.2.1995.

11 Heijs 1995.

12 Dummet and Nicol 1990.

13 Article 12(4) ICCPR and article 3 Fourth Protocol ECHR.

4.2 Quasi-citizenship

Under the second model the settled immigrants are granted a status that is almost similar but not completely identical to citizenship. The alien residents are granted the same rights as the citizens of the host state in almost all fields of social life. Only a few rights are exclusively reserved for citizens. It is because the legal status of these alien residents resembles citizenship, that I have called this model **quasi-citizenship**.

Two examples are mentioned here.

In 1951, at the initiative of the Allied Powers, the government of the Federal Republic of Germany adopted a law on the legal status of displaced persons, former prisoners of war and refugees who could not be returned to their home state, mainly as a result of the Cold War.[14] The 1.5 million aliens living in and outside camps in Western Germany were granted the same rights as German citizens in a whole range of areas (civil rights, freedom of movement, education, employment, tax, social security). The aliens concerned were granted residence rights and a strong protection against expulsion.[15] The drafters of the law used the draft of the Refugee Convention, that was to be signed in Geneva a few months later, as a model. However, the status granted to the displaced persons under this German act went far beyond that provided for refugees in the Geneva convention.

The second example is the Act on the status of Moluccan immigrants in the Netherlands. That act was adopted in 1976. It provides a special status for the Moluccans, persons originating from a group of islands in the Indonesian archipelago, who served in the Dutch colonial army. After the independence these Moluccan soldiers were transferred to the Netherlands in 1951 in order to protect them from retaliation by the Indonesian authorities. Twenty years after immigration, most of the Moluccan immigrants and their descendants still cherished the ideal of founding an independent republic on the Moluccan Islands. For this reason they refused to apply for Dutch citizenship. After having lost their Indonesian citizenship, most of the 40.000 Moluccan immigrants became stateless. The Act is a short one. It has only eight articles. The Act provides that, in the implementation of all Dutch legislation, these immigrants are to be treated as Dutch citizens, with two exceptions: the right to participate in elections and the military service are excluded.[16]

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[14] Gesetz über die Rechtsstellung heimatloser Ausländer im Bundesgebiet of 25.4.1951, BGBl. I, p. 269;.

[15] Article 23 of the 1951 Act.

[16] Article 4 of the Act of 9.9.1976, Staatsblad 468.

The aim of the act was to reinforce the legal status of those immigrants in order to assist their integration into Dutch society. Twenty years later this aim appears to have been realised to a large extent. At present, almost all Moluccan immigrants have acquired Dutch citizenship, either through naturalisation or at birth in the Netherlands. This Act grants a permanent right of residence for the immigrants concerned. Deportation is not possible. The Moluccan immigrants are also granted the right to return to the Netherlands, provided their residence abroad does not exceed three years.[17] The German Act granted a similar right to return to the displaced persons have lived outside Germany for less than two years. The right to return to the territory is one of the essential elements of the citizenship a state.

Both the German and the Dutch Act granted the quasi-citizenship to categories of immigrants who for political or humanitarian reasons could not be expelled from the country, and who were most likely to stay in the country of immigration for the rest of their lives. The legal technique of both acts is different. The German Act specifies all the areas where there are the same rights as for German citizens. The Dutch Act contains one general provision on the same rights as Dutch citizens, and specifies the two exceptions to that rule (elections and military service). The result is almost identical: security of residence, equal rights with citizens in almost all aspects of social life and a right to return after a prolonged stay abroad. Participation in elections and military service are excluded from equal treatment both in the German and in the Dutch Act.[18] Both acts appear to have realised the aims their drafters had in mind.

4.3 Privileged status for special categories

Under this third model, the privileged treatment, certain special categories of aliens are granted the right to enter or stay in the country. Their residence rights are protected. The possibilities for expulsion or deportation[19] of those aliens are limited. Moreover, those resident aliens are granted special rights or the same treatment as citizens in several areas.

This third model is often used with regard to the citizens of states participating in close regional co-operation: for example the Benelux, Scandinavian countries in the Nordic Union, the European Communities (EC), and the European Economic Area. Citizens of EC-member states have freedom of movement within all fifteen member states. They have the right to accept any kind of employment or to establish in those countries as a self-employed professional or businessman. The only exceptions are jobs in the public service in the typical core functions of

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17 Article 5(1).

18 In the Netherlands the scope of the two exceptions was reduced afterwards: in 1985 the right to vote in municipal elections was granted to all aliens with five years residence and the conscription for military service was abolished in 1996.

19 The words “expulsion” and “deportation” are used as synonyms and not in the technical meaning of the legislation of some member states.

a state: police, courts, military and diplomatic service. The EC Treaty prohibits any discrimination on grounds of citizenship within the scope of application of the Treaty.[20] This implies that governments are obliged to grant equal rights and equal treatment to EC-citizens in all main areas of social life. A similar privileged treatment had been granted by the Benelux-countries to its citizens in 1956 and by the Nordic countries to its citizens in the sixties.
Another privileged status is granted to special categories of aliens on the basis of certain international treaties. The rights granted under the Geneva Convention relating to the Status of Refugees (1951) to refugees lawfully staying in a state party to that convention are a good example of this model: security of residence, national treatment on some issues and privileged rights in other areas. The same applies to stateless persons entitled to the protection of the Convention relating to the Status of Stateless Persons (1954). A comparable example of this model is the privileged treatment granted to Palestinian refugees living in Arab states under the Casablanca Protocol, adopted by the summit of the Arab League in 1965.[21] A last example of such privileged treatment are the rules on Turkish workers and their family members based on the 1963 Association Treaty between the EEC and Turkey, discussed in par. 9.

This privileged treatment is always based on multilateral treaties, either regional treaties or world-wide treaties, like the Refugee Convention and the Convention of Stateless Persons. Often the privileged treatment is conferred on the aliens concerned as soon as they are admitted to the country and have received a residence permit. In certain cases the number of rights granted is extended and the residence status reinforced when the alien immigrant has stayed in the country for several years.

4.4 Denizen status for aliens with long residence

The fourth model is called the "denizen status" or semi-citizen status.

In the legislation of several Western European countries during the last decades a special status was gradually created for alien immigrants with long residence. These aliens receive almost full residence rights (expulsion being limited to exceptional cases). Equal treatment with citizens is granted in most areas of public life (access to all jobs, equal rights to housing, education and social security) and sometimes even in political life. The Swedish political scientist Thomas Hammar has coined the term "denizen" for these immigrants to stress that their position is somewhere halfway between aliens and citizens. Denizens are permanently resident aliens entitled to most of the rights of citizens but are not yet granted citizenship.[22]

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[20] Article 6(1) of the EC Treaty as amended by the Treaty of Maastricht (old article 7).

[21] The Protocol was adopted on 11 September 1965 in Casablanca; see A.Takkenberg, The status of Palestinian refugees in international law (forthcomming) and A.F. Shiblak, In Search of a Durable Solution: Residency Status and Civil Rights of Palestinians in Host Arab States, paper Los Angelos 1993.

[22] T. Hammar, Democracy and the Nation State, Research in Ethnic Relations Series, Aldershot 1990. The term “denizen” was used before by John Locke, see R.Bauböck, Transnational Citizenship: Membership and Rights in International Migration, Aldershot 1994.

In many European countries the permanent residence right (settlement permit, Aufenthaltsberechtigung, carte de résident, vestigingsvergunning), an essential element of this status, is granted when the alien has resided in the country for five years (Austria, Belgium, Denmark, Netherlands and Spain). Some countries are more liberal, granting this status after two years (Finland and Sweden), three years (Estonia, France and Italy) or four years (United Kingdom). The German legislation is less liberal: eight years. In some countries longer residence requirements are applied: ten years in Switzerland and twenty years in Portugal.[23]
In several countries this status is also granted to aliens who have been born in the country or entered at a very early age and lived there ever since[24]. Expulsion or deportation of long term resident aliens is also restricted by the obligations of states under human rights and other treaties concluded within the Council of Europe (see par. 8).

In most countries in Western Europe the equal treatment of aliens holding denizen-status relates to the basic areas of social life (employment, housing, education and social security). In a small but growing number of countries the equal treatment with citizens is extended to political rights as well (voting rights in local elections and access to employment in the government service). Such extensions occurred in Sweden, Denmark, the Netherlands and Finland.

Moreover, in some countries the equal treatment of resident aliens is not restricted to rights in the public or social areas. It is extended to relations between private individuals and between aliens and private organisations. Equal treatment or anti-discrimination legislation in Britain and the Netherlands prohibits the use of citizenship as a ground for discrimination or exclusion in labour relations, rent, insurance, banking, consumer transactions, the membership of associations and other civil law relations.[25]

5. Differences between the four models

These four models have been developed gradually during the second half of this century. Not all models have been used in all European countries. The exact content of the rights included in each model may differ slightly from country to country. However, the four models can be clearly distinguished. The main differences between the four models are clear, if one regards the two central elements of each model: (a) the security of residence, the right of the immigrant to stay and live in the country, and (b) rights relating to the different areas of social and public life.

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[23] Beauftragte der Bundesregierung für die Belange der Ausländer, Ausländerinnen und Ausländer in europäischen Staaten, Bonn 1994, p. 15-21 and N. Guimezanes, La circulation et l'activité économique des étrangers dans la communauté européenne, Paris 1990, p. 81-90.

[24] See for instance article 25 of the French Ordonnance relative aux conditions d'entrée et de séjour des étrangers en France of 2 November 1945 as amended afterwards, and the articles 6, 10, 16-18, and 22 of the Act on the legal status of foreigners in the Republic of Lithuania of 4 September 1991.

[25] Article 1(1)(b)(ii) of the UK Race Relations Act 1976 and article 1(b) of the Dutch General Equal Treatment Act (Algemene wet gelijke behandeling) of 3 March 1994, Staatsblad nr. 230.

For both elements a whole range of positions are possible in theory. The security of residence may vary between two extremes: no security at all (illegal aliens) and full residence rights (citizens). The rights of an alien to participate in social life may range from the one extreme minimum, the human rights granted to each human being, even to illegal immigrants or tourists; the other extreme being the complete set of social and political rights granted to citizens of the state concerned. The positions of our four models on theses two scales are represented in the following table.

Model		**Rights**
	residence	social and public life
Citizenship	full residence rights no expulsion	all rights of citizens
Quasi-citizenship	full residence rights no expulsion in practice	equal treatment with citizens except voting and public service
Privileged treatment	protected residence expulsion exceptional and specific rights; in the EC:	equal treatment in employment local voting rights + public service
Denizen status	protected residence restricted expulsion	equal treatment in most areas in some states: local voting rights, public service or private relations

As to the **residence rights** there is a clear difference between the first and second model (citizenship and quasi-citizenship), both granting full residence rights, whilst in the two other models expulsion of the alien immigrant is still possible. In those two models the powers of the government to expel an immigrant is severely restricted. For example, under EC law an EC citizen may only be expelled in case of voluntary unemployment, absence of income or after a long prison sentence for a serious crime. The importance of security of residence as a condition for integration can hardly be overestimated. If immigrants are not sure whether they can stay and will be treated fairly in the country of residence, they keep their orientation towards their country of origin alive. The main difference between the third and the fourth model is, that the privileged treatment is often granted at entry or shortly after the immigrant has arrived in the country. The denizen status is acquired by the immigrant only after a prolonged residence in the country. We observed above that the required period of residence varies from two years in some Scandinavian countries to twenty years in Portugal.

As to the other element, the **social and political rights** granted to immigrants, the main difference is between the first model and the other three models. Only immigrants with citizenship of the country of residence acquire the full set of social and political rights. The extent to which equal social rights as citizens are granted to immigrants varies between the three other models. If in those three models political rights are granted to immigrants, these rights are limited to the right to participate in elections on the local or the regional level and the access to certain jobs in the public service. In most European countries the right to vote in

national elections and the access to jobs in the central organs of state power (police, courts, military and diplomatic service) are granted to citizens only. This holds true even within the EC. The status of an EC citizen living in another EC member states comes near to the citizenship of that country. The introduction on the citizenship of the European Union in the Treaty of Maastricht in 1992 is a clear indication for that development.[26] However, the voting rights of the citizens of the union are restricted to municipal elections and European Parliament elections,[27] and the access to the public service does not include the typical central institutions of the state.[28]

6. Reasons for reinforcement of the status of resident aliens

Why did those four models develop? Why are governments of European countries interested in reinforcing the status of long term resident aliens? Basically, three reasons have influenced decision making: an utilitarian, a moral and a practical reason.

The **utilitarian** reason is that governments want to obtain the same treatment for "their" citizens living and working abroad. The idea of reciprocity being in the common advantage of all participants forms the basis of the European Communities and the other systems of regional co-operation between neighbouring states in Europe.

The **moral** reason is related to the principle of equality of all human beings, whatever their ethnic origin, playing an important role in modern democracies. All European states have become multi-ethnic. Some European state had a multi-ethnic population for a long time. Other states due to large scale immigration recently experienced a change in the composition of its population. If a government wants to promote equal treatment, it should give a good example itself. The legislation and the behaviour of public authorities should not support the idea that differences in treatment on the basis ethnic origin are justified. Often the immigration legislation provides justifications for such differences in treatment.

The **practical** reasons for reinforcing the status of long term resident aliens are that it enlarges the opportunities for the immigrants to integrate in the society of the receiving country and to contribute to that society. It enhances social and political stability of the country and diminishes the chance of ethnic conflicts.

In the political and legal discussions generally four grounds for **not** reinforcing the status of long-term migrants or for making exceptions for certain categories are mentioned:

- the fear that the migrant may become a burden on the social security system or the public funds of the host country;

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[26] The articles 8 - 8e of the EC Treaty on the citizenship of the Union were introduced by the Treaty of Maastricht signed on 7 February 1992.

[27] Article 8b of the EC Treaty

[28] See the case law of the EC Court of Justice on the exception in article 48(4) of the EC Treaty.

- the wish to have the option of expulsion if the migrant commits a serious crime or becomes a risk to the national security;
- the expectation that the insecure status will induce the migrants to leave the country on their own free will, and
- the (opposite) expectation that the insecure legal status may induce the migrant to integrate and to apply for citizenship of the host country.

Each of those four grounds has been countered with empirical or moral arguments. Those who use the financial argument tend to forget that most migrants by paying taxes and premiums have contributed for many years to the public and the social security funds. In reality the option of expulsion on public order grounds is used only exceptionally with regard to residents with very long residence in the country. In those few exceptional cases expulsion often raises strong protests (double punishment; excessive harm; violation of human rights). In some European countries this resulted in a ban on expulsion of aliens with 15 or 20 years of legal residence.[29] Empirical data indicate that the departure rates go down sharply once migrants have resided for more than two or three years in a country. Finally, the naturalisation practice in France, the Netherlands, Sweden and the United Kingdom indicates that a strong legal status rather enhances than diminishes the inclination of long-term migrants to apply for citizenship of the host country.[30]

In the end the policy choices depend on the value attributed to the integration of immigrants in the society as against the potential financial and security risks. The price of keeping all options open could be high both for the migrants and the host countries.

7. Choice or coexistence of the models

The four models are not mutually exclusive, but rather complementary. In several European states different models are used for different migrant groups. Why did some states choose to introduce one rather than another of those models?

When the **citizenship** model is used with regard to new immigrants entering the country, the model is chosen either in order to stress the ethnic ties with the immigrants, or to honour acquired rights or earlier policy decisions about granting citizenship to (part of) the population of the former colonies, or to provide the immigrants with optimal conditions for integration in the society. Using this model with regard to long term resident aliens often follows after the recognition that an immigrant group is to stay, that the second or even third generation is born in the country, and that it is detrimental to the social stability of the country to have immigrants groups being singled out for over generations by second class treatment, inherent in the other models.

[29] For instance in France and the Netherlands. For an analysis of the policy and legislation in several European countries see: K. Barwig a.o. (ed.), Ausweisung im demokratischen Rechtsstaat, Baden-Baden 1996.

[30] The main exception are migrants from neighbouring EC member states showing a tendency to keep their first citizenship and postpone naturalization.

The **quasi-citizenship** model is used as an alternative, in cases where the citizenship model can not be applied either for internal or external political reasons or because the immigrants themselves do not want to receive the citizenship of the country of residence (e.g. the Moluccans in the Netherlands).

The **privileged treatment** model is either chosen to honour international obligations with regard to specific groups of immigrants (refugees, stateless persons) or stress the close cultural and political ties with other states in the region and reciprocal advantages of regional co-operation.

The **denizen** status is chosen with regard to immigrant groups that originally were admitted for a temporary stay only (e.g. migrant workers). This status is an attractive option, once it has become clear that most members of the group, nevertheless, are going to stay, that both collective or individual expulsion of the immigrants for political, legal or moral reasons is not feasible and that it is difficult to exclude the immigrants from the collective rights and benefits provided by the welfare state. The model is also applied with regard to first generation immigrants for whom naturalisation, if it implies the loss of their first citizenship, is unacceptable for emotional and financial reasons.

8. The Council of Europe and long-term migrants

Shortly after its foundation the Council of Europe has taken a concrete step to reinforce the legal status of long-term migrants in Europe. In 1955 the **European Convention on Establishment** was signed. This convention grants to citizens of other member states having ratified the convention, equal treatment as nationals of the country of residence on a whole range of issues. In article 3 the convention provides some protection against a sudden expulsion after two years residence and more protection after ten years residence. The practical effect of the convention was reduced with the gradual extension of the membership of the EC. The community legislation grants migrants from EC countries a considerably stronger legal status. After the establishment of the European Economic Area, the convention on Establishment mainly reinforces the status of the 2,5 million Turkish citizens living in Western European countries.

Both the **European Social Charter** (1961) and the **European Convention on the Legal Status of Migrant Workers** (1977) grant equal treatment and some protection against expulsion. However, the scope of both treaties is limited to migrant workers and the members of their families. Moreover, neither treaty provides special rights for migrants with long residence in a country which citizenship they have not acquired.

Recently two more relevant agreements have been adopted: the 1992 **Convention on the Participation of Foreigners in Public Life at Local Level** and the 1993 **Protocol to the European Convention on the Reduction of Cases of Multiple Nationality**. An important aspect of the first one is, that the rights under that convention are no longer restricted to citizens of other state parties, but rather granted to all persons "who are not nationals of the State and who are lawfully resident of its territory", irrespective of their citizenship. Moreover, the convention is a clear sign that participation of migrants in the public and political life of the host country is seen as conducive to their integration and to the stability of the country, rather

than as a threat to country. The 1993 Protocol explicitly allows for dual citizenship with regard to the second generation born in the host country, spouses in mixed marriages and the children born in mixed marriages. The Protocol in its preamble refers to "the large number of migrants who have settled permanently in the member States of the Council of Europe and the need to complete their integration (...) in the host State, through the acquisition of the nationality of that State." The draft of a modern convention on multiple nationality, intended to replace the outdated convention of 1963, has been prepared by a working party in 1995.

An important reinforcement of the legal status of long-term migrants resulted from the interpretation of the **European Convention of Human Rights** (ECHR) by the European Court of Human Rights. The Court has recognised that article 8 of the European Convention on Human Rights restricts the power of the State Parties to expel aliens. The Court repeatedly stated that strong connections with the state of residence such as the presence of close family members or the length of residence since infancy or birth in that state may have the effect of prohibiting expulsion. In the case of a Moroccan man, Mr Moustaquim, who was less than two years old when he arrived in Belgium, who lived there twenty years with his family, who had been in Morocco only twice for holidays and received his schooling in Belgium, the Court held that deportation by Belgium was a violation of the right to family life guaranteed in article 8 ECHR. Belgium could not expel the man from its territory, even after he was convicted several times for criminal offences and had become of age.[31] A similar judgments were given by the Court in two cases of Algerian men, the one was born in France and the other had arrived with his parents when he was young. Both men had lived in France ever since.[32]

In his concurring opinion in the latter case Judge Pettiti points to the fact that the Court probably will have to specify the criteria concerning (non-)deportation and family reunification for immigrants with long residence, if the member states of the Council of Europe do not harmonise their policies in this field. He urges the member states to appoint a committee of experts to study the relevant legislation and judicial and administrative practices in order to avoid inconsistencies from country to country and guarantee the observances of the ECHR in these areas (see **Annexe A).**

From a recent judgment of the European Court of Human Rights concerning the family reunification of a Turkish asylum seeker who had lived in Switzerland for more than ten years, it appears that the possession of a settlement permit (Niederlassungs-bewilligung) rather than a normal residence permit, is relevant for the scope of right to family reunification and the protection of family life under Article 8 ECHR.[33] In their dissenting opinion in this case the judges Martens and Russo argue that there are good reasons to suppose that migrants after a period of three to five years are rooted in the country of residence.

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31 European Court of Human Rights, 18.2.1991, Series A, Vol. 193, Moustaquim/Belgium.

32 European Court of Human Rights, 26.3.1992, Series A, Vol. 234-A, Beldjoudi/France and European Court of Human Rights 13.7.1995, Series A, Vol. 320-B, Nashri/France.

33 European Court of Human Rights 19.2.1996, Gül/Switserland, not yet published.

In another case decided by the Court in 1996, concerning a Tunisian migrant, who had lived together with his family for twenty years in France, but had retained links with Tunisia that went beyond the mere fact of his Tunisian citizenship, the Court held that his deportation by the French authorities did not violate the ECHR, because he had been sentenced to a total of almost four years non-suspended imprisonment.[34]

It should be noted that the protection of the European Convention on Human Rights is not restricted to the citizens of Council of Europe member states. The convention protects all human beings under the jurisdiction of the member states. Hence it covers immigrant irrespective of their citizenship.

9. The European Union and the status of third-country nationals

The community law on free movement and establishment covers primarily EC citizens and their family members, irrespective of their citizenship. The Commission of the European Communities since its Action Program for Migrant Workers and their Families of 1974 repeatedly has drawn the attention of the EC member states to the issue of the legal status of third country nationals living in the EC, most recently in the 1994 Commission's Communication on Immigration and its White Paper on Social Policy.

The governments of the EC member states traditionally have resisted the extension of the EC's competence to the admission and the rights of citizens from countries outside the EC (third country nationals).[35] In the Maastricht Treaty these issues were defined as matters for intergovernmental co-operation in the so-called Third Pillar, the co-operation in Justice and Home Affairs.[36] So far, the focus of this co-operation has been primarily on restriction the immigration from outside the EC.

However, in March 1996 the Council of Ministers of the European Union has adopted a **Resolution on the status of third country nationals residing on a long-term basis in the territory of the Member States (see Annex)**.[37] The draft for this resolution was proposed during the French presidency. According to the preamble the resolution intends to facilitate the integration of the settled migrants into the host society and to contribute to the security and stability both in daily life and work and to the social peace in the member states. Member states should recognise as long term residents third country nationals having lawfully resided without interruption in the territory of the state for a specified period not to exceed ten years (Article III). If a member states grants a permanent residence status after two, three or five years, the shorter period prevails.

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34 European Court of Human Rights 24.4.1996, Boughanemi/France, not yet published.

35 See S. Peers, Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union, Common Market Law Review (Vol. 33) 1996, p. 7-50.

36 See Title VI of the Treaty on European Union.

37 EC Official Jounal C 80 of 18.3.1996, p. 2.

Once this status is granted the residence permit should be valid permanently, for ten years or for the maximum period provided in the national legislation. The settled migrants and their family members are entitled to equal treatment with the nationals of the host country as regards: working conditions, membership of treat unions, public housing, social security, emergency health care and compulsory schooling. The status can be refused on grounds of public policy and lack of stable income. The resolution provides limited protection against expulsion. Cancellation and non-renewal are possible in four instances. Expulsion on grounds of public order should be based on the personal behaviour of the settled migrant involving sufficiently serious threat to the public order or to national security (Articles IV and VI). This is a weakened form of the protection against expulsion given to EC citizens under community law. It is questionable whether this provision meets the requirements of the protection of family life granted by Article 8 ECHR.[38] The scope of the equal treatment provision in the resolution is meagre: in two of the six fields (emergency health care and compulsory schooling) it has to be granted anyway either under human rights treaties or under national legislation.

The resolution is not legally binding. The member states are only requested to take the principles of this resolution into account for their policy on integration of immigrants (article I). They are requested to report on those policies to the Council before 1997 (article VII).

Both in the **Europe Agreements** concluded between the European Union and ten member states of the Council of Europe in Central and Eastern Europe and in the **Partnership and Co-operation Agreements** concluded between the European Union and the Russian Federation and five other states formerly in the USSR, there are some provisions granting equal treatment to citizens of the one state legally residing in another state party to the agreement. However, the equal treatment is restricted mainly to labour relations and, in some agreements, social security.[39] Establishment as a self-employed person will be allowed only under the Europe Agreements and sometimes only after lengthy transitional periods.

Of far greater practical importance is the privileged status of Turkish citizens legally residing in an EC-country laid down in rules under the 1963 **Association Treaty between the EEC and Turkey**. Those rules grant Turkish workers legally employed in an EC-country after four years: free access to all employment in that country, security of residence in case of temporary unemployment, illness or disablement, non-discrimination in labour relations, access to education and protection against expulsion in case of criminal offences. Similar rights are

38 E. Guild, Third Pillar Measures, ILPA European Update May 1996.

39 See Peers 1996.

granted to the family members who have been admitted to the country. The legal status of those Turkish workers approximates the status of EC migrant workers. A stand-still clause prohibits the EC member states to introduce more restrictive legislation or policies concerning the access to employment and the residence of Turkish workers and their family members.[40] These association rules are part of the community law. They can be enforced in the national courts. The EC Court of Justice has in a series of judgments after 1986 gradually turned these rules into a major elements of a secure legal status for Turkish citizens in the EC. The practical effect of this status is illustrated by the fact that the Turkish immigrants account for 20% of all third-county nationals living in the EC. Turkish citizens are by far the largest immigrant group both in the EC and in the Council of Europe.

10. Policy and legislative options for governments

(a) **grant security of residence**: after long term lawful residence no more expulsion or deportation;

(b) **introduce permanent resident status, denizen status or quasi-citizenship in national legislation;**

(c) **introduce equal rights legislation prohibiting discrimination on the ground of citizenship** (nationality) both in the public and the civil domain with regard to aliens legally resident in the country;

(d) **extend privileged status accorded to one migrant group** (e.g. convention refugees or Turkish citizens under the Association-rules) **to all migrants with long lawful residence or a permanent residence status**;

(e) **ratification of the European Convention on Establishment**: this reinforces the status of citizens of other state parties to the convention with long residence in the country; moreover, it reinforces the status of nationals living in other European states; this convention grants more social and economic rights to individuals than the Europe Agreements and the Co-operation Agreements concluded by Central and Eastern European states with the European Union; the ratification by Turkey of the European Convention on Establishment in 1990 and of the European Convention of the Status of Migrant Workers in 1983 has strengthened the legal status of Turkish citizens living in several Western European states;

(f) **facilitate acquisition of citizenship**: for the first generation by allowing dual citizenship and for the second generation (children of migrants) right to opt for citizenship if born in the country or with long residence at time they become of age (18 or 21 years old).

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[40] See Decision nr. 1/80 of the Association Council EEC-Turkey of 19 September 1980, the judgments of the EC Court of Justice in the cases Sevince(1990), Kus (1992),Eroglu (1994) and Bozkurt (1995); Peers 1996; C.A. Groenendijk,Die Bedeutung der Assoziation EWG-Turkei für türkische Arbeitnehmer in den Niederlanden: Wie 'soft law' zu hartem Gesetz gemacht wird, in: H. Lichtenberg u.a. (Hrsg.) Gastarbeiter - Einwanderer - Bürger?, Baden-Baden 1996 (Nomos Verlag), p. 101-132; T. Wornham and E. Guild, The immigration lawyer's guide to the Turkey-EG Association Agreement, London 1994 (ILPA publication); E. Guild, Protecting migrants rights: Application of EG Agreements with Third Countries, CCME Briefing Paper no 10, Brussels 1993.

11. Possibilities for action by the Council of Europe

(a) make a **report** on the national legislation and policies of Council of Europe member states concerning long term migrants, including a detailed description of several policy options;

(b) make a **study and analysis of the jurisprudence of the European Court of Human Rights** with regard to the protection provided by the European Convention on Human Rights in cases of deportation and family reunification of long-term migrants and the implementation of this jurisprudence in the internal law of the member states; the member states could be asked to provide the relevant information in the light of Article 57 of the ECHR;

(c) issue **recommendations** covering the main elements of a model for the legal status of long term resident migrant;

(d) draft a new **Convention** providing for security of residence and equal rights in social, economic (and political) matters for long term resident migrants;

(e) add a **Protocol to the European Convention on Establishment** extending the rights granted to individuals under the convention to all aliens (non-citizens) with five years of lawful residence in the country;

(d) urge governments of (recent) member states of the Council of Europe to consider **ratification of the European Convention on Establishment**, the **European Convention on the Legal Status of Migrant Workers,** and the 1993 **Second Protocol to the European Convention on the Reduction of Cases of Multiple Nationality.**

ANNEXE A

Opinion of Judge Pettiti in the case Nashri/France (ECHR judgment of 13.7.1995)

I voted with my colleagues in the Chamber to find that there would be a violation of Article 8 in the event of expulsion because of the accumulation of circumstances (see paragraph 46 of the judgement).

However, I consider that the reasoning in relation t that accumulation of circumstances could have included two additional considerations. In the first place there is the fact that the conviction for gang rape on which the deportation was based dated back to 1986 (15 May); this period during which the applicant remained on French territory altered the consequences of a deportation which was to be executed at a time when the circumstances had changed (this is not forgetting the fact that the French Government agreed to stay the measure at the Commission's request once an application had been lodged with the latter). The second consideration which merits attention is the way in which social conditions in relation to Mr Nasri's physical handicap and general conditions existing in the two countries concerned evolved between 1983 and 1995.

The European Court now has pending before it several cases concerning the departure of aliens who have been convicted of offences and who are habitual re-offenders. The European Convention excluded from its substantive law the deportation of aliens by States (except collective deportations). However, when Article 8 and, in circumstances of exceptional gravity, Article 3 are invoked, the Court may examine individual cases without overstepping the limits of what is laid down in Article 8 concerning the notion of private life. But this line of decisions does not provide a solution to the general problem, which is a matter for the member States of the Council of Europe, if they have the will to harmonise their policies in this field and co-operate, so as to take account of immigration flows and differences in the conditions applied with regard to integration and family reunion by certain States with a view to strengthening the protection of families, rules that have not been adopted by others.

At this stage it is also necessary to harmonise criminal policy involving questions of deportation and double punishment on the basis of the different existing judicial traditions.

The European Court will in the future probably have to specify the criteria which it intends to adopt: the threshold level of convictions and re-offending, physical and linguistic handicaps taken into account, the nature of offences, the substance of family life and definition of the family community to be protected under Article 8, definition of European public order in this context. To this end a study of comparative law should be undertaken by the member States by appointing an ad hoc committee of experts to examine the legislation and judicial and administrative practices of the member States in these areas so as to avoid divergences from country to country, which would not be compatible with the common undertaking of member States to guarantee together the protection of the rights enshrined in the European Convention on Human Rights.