

"TURKISH IMMIGRATION INTO
GERMANY: THE EU PERSPECTIVE".

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When one investigates what the European Union is most concerned about, the issue of free movement makes a claim to be an important aspect within the confines of European integration. The Rome Treaty which founded the European Economic Community, set forth what have come to be regarded as the "Four Freedoms". Namely the free movement of capital, goods, services and persons. The latter is an issue which is an essential part of the original concept of a European Community. Similarly, in the context of Turkey-EU relations, it is a very important and controversial policy area. Official notification concerning the importance attached to this issue can be seen in the Commission Opinion of 18 December 1989, in response to Turkey's application for full membership in 1987. The Opinion stated that "Access of Turkish labour to the Community labour market gives rise to fears, particularly while unemployment remains at a high level within the Community" [1]. Given that continuing high unemployment trends are still evident within the member-states, this issue has therefore remained a problem area within the general context of Turkey-EU relations.

The Commission Report on the Structure of the Turkish Economy, separate from the Opinion, stated that "in April 1988 some 2.4 million Turkish nationals were living abroad (of whom over one million are workers). They are to be found primarily in the Federal Republic of Germany (1.5 million of which 0.6 million are workers)" [2]. Turks also form the largest national contingent within the 10 million [3] or so of third country nationals resident within the European Union. Due to their presence in such large numbers in Germany, it was and remains the most important member state in lieu of free movement for Turkish workers. It is for this reason alone, that Germany will be analyzed; as it is the country that will be most affected by any development concerning Turkish free movement.

THE ROME TREATY

The articles within the Rome Treaty that relate to the free movement of persons are located under the section entitled "Foundations of the Community". Due to this fact they are rightfully considered a fundamental and necessary element in a common market which had adopted and supports a liberal market economy. The aim of free movement of persons is toward the greatest possible freedom of movement for all the factors within this particular factor of production.

The legal basis for the free movement of workers in the Rome Treaty is to be found in Article 48, which secures the right of workers to move freely throughout the member states, to accept offers of employment actually made, to reside in the member states

where he or she is employed and to remain in the territory after employment has ceased.

The Treaty provisions relating to free movement are directly applicable in the Member States. The scope of these fundamental rights is confined to the movement of persons and services between Member States. Having regard to the fact that it is a fundamental right, the free movement of persons must be liberally interpreted, and the right reserved to Member States to impose restrictions intended to protect public order or public security becomes exceptional in nature.

The granting of these rights to free movement are subject only to limitations justified by considerations of Article 48(3) "public policy, public security or public health" [4]. It appears from the limitations laid down by Article 3, that the Rome Treaty does not aim for complete equality of treatment with respect to nationals. Thus, in practical terms free movement of Community workers not only rests on Community law, but its true extent becomes fully apparent only through the regulations which may be adopted by Member States in the context of the limitations laid down in Article 48(3).

The development of case law relating to such limitations is of particular importance. As Member States are entitled on these grounds to impose limits on freedom of movement, it is useful to analyze the interpretation given to the essential content of the concept of public policy in European law. The Courts of the FRG, experiencing large scale foreign worker immigration, interpreted the concepts of public security and policy on the basis of national law criteria. The European Court of Justice (ECJ) held in the Van Duyn case [5], that these concepts did form a part of European law "and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community".

TREATIES BETWEEN TURKEY AND THE COMMUNITY

The two central articles directly affecting and foreseeing free movement of workers are firstly; Article 12 of the Association Agreement of 1963, which unequivocally states "The contracting parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them" [6].

Article 36 of the Additional Protocol of 1970 contains the most important agreement on this issue. The article reads, "Freedom of movement for workers between member states of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the 12th and the 22nd year after the entry into force of that Agreement" [7]. Therefore, one can see that these two articles provide the cornerstone of the Treaties, and highlight the importance of the Community finalising

full access to the Community labour market by 1st December 1986.

The most important item to bear in mind with reference to this specific article is the fact that it foresees free movement before full membership, ie that social consolidation precedes economic integration. For it to be seen as a unilateral consolidation by the Community would be erroneous, as it concerns mutual concessions towards a free movement for workers of both parties.

The crux of an interpretative difference lies in the phrase "guided by" in the Ankara Agreement. The question is; has there, or has there not, been a definite timescale provided via Article 36? The Turkish side has consistently believed so and stated so [8]. Furthermore, it must be remembered that the economic climate of the early and the late 1960s was and is very different to the economic climate of the mid 1990s. As during 1969-70, when the Additional Protocol was being negotiated, the Community wanted Turkish labour, especially Germany.

When considering the fact that Article 36 has referred to Article 12 of the Ankara Agreement, which, in turn, refers to Article 48 of the Rome Treaty, it must be accepted that the Association Council, when deciding on the stages towards free movement is not completely free, as in some respects the realisation of certain actions are set out by the aforementioned article in the Rome Treaty.

GERMANY

As West Germany was the most dynamic and powerful economy in the late 1950s and 1960s, it was inevitably a magnet for migrant workers from many other countries including Turkey. A number of issues have been particularly significant in the relationship that has developed between Germany and Turkey and its migrant workers: these include the German notion of citizenship, the articles pertaining to free movement in the treaties signed by the EU and Turkey, the decline of the spectacular economic growth that was witnessed in Germany and the change in the domestic German climate with regard to the whole issue of migrant workers and immigration.

The first agreement regarding the acceptance of workers from Turkey was, however, made between the Turkish Foreign Ministry and the Ministry of Labour of Schleswig-Holstein in 1957. In 1961, another agreement with Turkey contained specific provisions governing the recruitment of Turkish workers. All requests for labour were made by the officially recognised host government or employer association representatives to the Turkish Institute of Employment. Such requests were usually made by the German Federal Labour Office and its liaison office in Istanbul. Initially the employment of immigrant workers was regarded by employers, trade unions and the government as a temporary measure. By the beginning of the 1960s domestic labour resources had been absorbed, and by taking on Turkish workers, rapid wage growth was prevented in the unskilled and semi-skilled categories.

By the mid-1960s labour demand was soaring throughout most of the Community. Regulations were relaxed to attract foreign workers

and to increase their mobility. It became easier for a worker to bring dependents into the Federal Republic though the rules were sometimes bent a little, due to children being brought in as tourists to reunite their families.

During this phase of migration some Turks become disillusioned, and returned. As for Turks educated in the Federal Republic without work permits, some also opted for repatriation but others managed to remain illegally or benefit from social welfare, which was not available in Turkey. It became difficult for migrants to return as the changes in the economy and structure of their region of origin which caused immigration also precluded their return, and in addition, the migrants themselves changed through the experience of migration; it is hard to go back to an isolated Anatolian village after life in a large city like Munich or Frankfurt.

When such migrants do stay, a process of social segregation is evident; many of them are highly concentrated in inner city areas, where housing and social facilities are often deficient. It is in such areas that competition with the worst off groups of the indigenous population becomes evident, and according to Castles [9], leads on to racism and conflict. In this situation, the concept of association of migrants with the local population resulting in benefits clearly did not emerge.

Labour migration from Turkey to the Federal Republic had increased throughout the 1960s and 1970s, until November 1973. At the beginning of the 1970s the relatively labour-intensive expansion of the German economy was at an end. The guestworkers had nonetheless contributed towards the capital accumulation through their participation in pension funds, insurance schemes and employment and income taxes. These coupled with other factors ushered in a new phase of restructuring of the world economy. The policy of the most advanced sectors of capital was increasingly to export capital and jobs to low-wage countries, rather than to import labour. This declining industrial employment in Germany and elsewhere was intensified with the Oil Shock of 1973. Technological changes also played a part, not least the rapid introduction of micro-processors. The reaction throughout Western Europe was to halt the import of labour and to consider implementing repatriation schemes.

In November 1973 the Federal Government suddenly issued an administrative order, the Anwerbestopp, which was a recruitment stop banning all further immigration from non-Community countries. This immigration ban suspended all former recruitment agreements except for the original Rome Treaty concerning free movement of labour. This law, which is still in force today, changed the whole pattern of migration to West Germany; by keeping out new single workers it accelerated the tendency towards family reunification. The friendly embracement of guestworkers now gave way to the not so friendly reminders to the guests to honour their part of the bargain: to go back home and not outstay their welcome. Despite this desire, many workers who would previously have remained a few years and then returned to their country of origin decided to

remain, for the chance of a second migration in case of failure at home, was now blocked. In total contrast to the intended result, therefore, guestworkers became long-term settlers and brought in their dependents. Thus the act made temporary migration permanent without intending to do so.

Another piece of legislation that had an adverse result to what had been originally intended was the tax reform of January 1975 which increased child benefit for all children, including Turkish workers' children, if they were resident in the FRG. The predictable result was that many children who had previously been looked after by grandparents in Turkey were now brought to West Germany to benefit from this reform and led to permanent settlement.

A third measure that was introduced in 1974, the Stichtagregelung, stated that foreign workers' dependents who entered the FRG after the key date of 30 November 1974 were not subsequently to be granted a work permit. According to Castles the idea was obviously to force the children who had been brought in because of the tax reform to leave the country again after they had received compulsory education and became an adult. The logical outcome of this measure was that these children were, rather than incorporated, alienated from German society as legitimate ways of earning a living were denied to them. Thus they were increasingly driven into illegal employment or crime.

Also, in 1975, guestworkers were seen as the premier social problem. In April of that year, provisions were introduced which forbade foreign nationals from moving to towns and cities where they already made up 12% of the population or more. Such a measure reinforced the concept of a magic threshold above which, communities could no longer bear the burden of foreigners. The practice of prohibiting entry into congested urban areas remained in effect between April 1975 and April 1977.

EU DIMENSION: ASSOCIATION COUNCIL OF 1976

Despite such discrimination most Turks remained in Germany, though some did agree to repatriation and returned home, and so it was not surprising that in light of such measures taken by the Federal Government mentioned above, that the Association Council of 20 December 1976 included some extremely tough negotiations. The compromise that was reached provided for a consolidation of the legal position of Turks working or residing in the Federal Republic during the first four-year phase envisaged by the Additional Protocol. Thus, for instance, an unemployed Turkish worker, who after being legally employed for at least three years, could apply for a vacancy in the same position, and after five years he would be granted access to any job of his choosing. Therefore, Turkish workers were accorded "Secondary Priority", meaning that, in case a job could not be filled with a Community worker, they would receive priority over workers from other non-EC countries.

The Bonn government, contrary to the spirit of the Ankara Agreement, introduced visa requirements for Turkish citizens, effective from October 1980 [10]. The measure was taken to stem the unabated influx of Turkish job-seekers, notwithstanding the hiring ban. The free movement issue reached a crucial point when State Secretary Friedhelm Ost distributed a non-paper among German journalists who were accompanying Chancellor Kohl on his visit to Turkey in 1985. The paper stated that in effect the FRG denied the existence of any EC obligations concerning the matter of free movement of Turkish citizens. As in the Demirel case (see below) the paper stated that the parties to the Agreement had agreed to be "guided by" Articles 48, 49 and 50 of the Rome Treaty in gradually bringing about free movement for workers within the EC; thus there was no obligation to establish the type of freedom of movement that existed in the Community. Instead, the term "guided by" provided an open-ended scope concerning the shaping of freedom of movement, because it did not cite Articles 48, 49, 50. What was sought at the time was, in exchange for non-implementation of the free movement of workers, there would be improvement for existing Turkish workers in their working conditions, living conditions, improved access to the job market for those already legally residing in the member states, cementing the "Secondary Priority" and further permits for next of kin to come within the framework of natural legal provisions.

THE 1980s: REPATRIATION CONSIDERED

The growing hostility towards foreigners in the 1980s was not aided by government policies. Rather than trying to integrate foreigners, especially the Turks, the government in effect contributed to the existing hostility. The "Law of promotion of voluntary repatriation of foreigners" labelled the 10,000 DM Law, due to the sum offered for repatriation, implemented between 1983-4 not only created insecurity among Turks, but actually legitimised a repatriation movement. The solution toward foreigners was not sought with attempts to integrate, but rather to separate. Between 1983-5 more than 370,000 Turks returned to Turkey.

Until family reunification Turkish workers had made little demands on housing, education and the health service. Whilst contributing financially towards these, little benefits were demanded from these services until the mid 1970s.

Studies indicate [11] that if migrant workers were to withdraw from the labour market, then each German worker would have to spend about 40% of his/her income on pension contributions alone. Furthermore in 1992, Turkish workers contributed 470 million DM within the framework of the Solidaritätsabgabe, an employee tax collected for reunification [12]. The Turkish workers also employ thousands of people and invest billions of DM into the national economy.

Certain problems pertaining towards Turks in Germany have been

created not by wilful intention but more by systemic evolution and cultural perceptions. One of the major headaches for Turkish parents since the mid 1970s was the pre-school education of their children. The fact that the concept itself did not have a following with the parents and that most of the German nursery schools were run by the Catholic or Protestant Churches meant that Turkish parents did not send their children to German kindergartens to protect them from Christian influence.

Since the mid 1980s the situation changed considerably (for the better) due to improved information and the influence of the better informed second generation. The ratio of Turkish children attending German kindergartens was only 39% in 1982 as opposed to 80% of German children. By the late 1980s the ratio for Turkish children had reached almost 70% [13].

THE 1990s: FAMILY FORMATION

Presently Turkish migration to Germany has reached a new stage. At first it consisted of labour migration and when this was ended continued within the context of family reunification. In the 1990s, Turkish migration is in the form of what Sen [14] has termed family formation. It is separate from reunification as it refers to marriage between a Turkish migrant, or a child of a migrant in Germany and a partner from Turkey, which leads to migration of the partner to Germany.

By the late 1980s and the early 1990s the first item at the top of German officials agenda concerning immigration related to asylum and ethnic Germans. With the collapse of the Berlin Wall and the reunification of Germany, it was hardly surprising that this was the case. Due to this impetus, the immigration policy was reinvestigated and certain changes made. In 1991, a new Foreigner's Law was enacted whereby legal entitlements replaced governmental discretion in key areas as naturalisation and the granting of residence permits and family reunification was eased. For instance, young Turks born or residing at least 8 years in Germany became entitled to naturalise until aged 23, whilst the naturalisation fee was reduced from up to 5,000 DM to only 100 DM. After 8 years of stay Turks, as well as any other foreigners, are entitled to file for a permanent residence permit, with foreign children being allowed to join their parents in Germany until the age of 16, also Turks who had temporarily returned to their home country were granted the right to return to Germany.

In July 1993 restrictions limiting applications for naturalisation were slightly eased: those aged between 16-23 who had been legally resident for at least 8 years, had attended school in Germany for at least 6 years, and prepared to give up current citizenship and not have a major felony, were entitled to apply for naturalisation. Turks aged over 23 were entitled to apply if they had lived in Germany for 15 years and prepared to give up Turkish citizenship, not been convicted of a major felony and be able to support themselves and their families.

THE EU DIMENSION:

CASE LAW

There have been several important cases highlighting the problem areas concerned with the concept of free movement for workers within the EU. The first case concerned Mrs Demirel, who went with her son to visit her husband in Germany in March 1984 with a tourist visa, but refused to leave when her visa expired. Her husband, also Turkish, had entered Germany in 1979 and was the holder of a permanent residence permit. Mrs. Demirel could not qualify for family reunification because her husband had not lived in Germany for eight years. When the case was considered by the Stuttgart Verwaltungsgericht, the ECJ was asked to clarify if Article 12 of the Association Agreement and Article 36 of the Additional Protocol, in conjunction with Article 7 of the Association Agreement, were directly applicable in the member states, concerning the introduction of further restrictions upon freedom of movement applicable to Turkish workers.

A provision in an agreement concluded by the EC with non-member states must be regarded as being directly applicable when, with regard being had to its wording and the purposes and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

The crucial turning point in EU-Turkish relations concerning free movement in general and in the Demirel case in particular was Article 12 which claims the participants are to be "guided by" Articles 48-50 of the Rome Treaty. As the texts are not cited it is supposedly indicative that the rules governing free movement of workers will not necessarily be exactly the same as those laid down by those articles. Therefore, the references are only a guideline, implying the Federal Republic is not required to permit Turkish workers from benefiting from the rules of free movement applying within the Community. There is wide-ranging opinion concerning the wording of Article 12, especially the meaning of the term "guided by", no doubt perceptions being affected by unemployment considerations and national stances concerning Turkish full membership. Even if this article were to have direct effect, which the ECJ states it has not, member states could halt free movement or residence via the aforementioned "public policy" catch-all clause of Article 48 (3) or Article 60 (2) of the Additional Protocol. A similar view is offered concerning Article 36 giving rise to direct effect would amount to prejudging the decisions of the Association Council and in upsetting the balance of the implementation of the Agreement, which is based on reciprocity.

As the rules of free movement under the Agreement were

modelled on those existing within the Community, a minimum standard must be guaranteed with regard to the reunification of families. The German rules extending the waiting period from three to eight years (in various amendments in 1982 and 1984) for reunifying families in non-EC countries were seen not to jeopardise that minimum standard. Weiler [15] and Alexander [16] have both referred to the Demirel case in terms of human rights and minimum standards. The former states that whilst accepting the relevant articles do not possess direct effect and that, there is nothing to prevent new restrictions being introduced, the issue of fundamental rights being violated must be addressed.

Concerning the new restrictions imposed by Germany, Weiler claims "the absence of positive provisions of Community law defining conditions in which Member States must permit family reunification and requiring implementation, [does not mean] that this field is totally 'outside the scope of Community law'. Nor does it allow that the Member States are totally free under the Agreement, and thus under Community law...to do whatever they want, including the violation of the fundamental rights of migrants from Turkey" [17].

The ECJ declared that it did "not have jurisdiction to determine whether national rules such as those at issue are compatible with the principles enshrined in Article 8 of the European Convention on Human Rights" [18]. To this, Weiler responds by indicating that "implicit in the Agreement is a prohibition on violation of human rights to which one adds, from time to time, specific positive duties setting explicit conditions. Would it not be a strange construction of the Association Agreement and Protocol which forbade the Contracting Parties discrimination in working conditions and pay but allowed violation of the human rights in general? In other words, I think that it is a conservative interpretation of the Association Agreement with Turkey, to claim that whatever protection it gave migrants workers under specific disposition, there is an implicit prohibition on the parties to violate the fundamental rights of migrant workers covered by the Agreement" [19].

With regard to the same case, Alexander puts forward the delicate matter of granting direct effect. Whilst the ECJ, in principle is prepared to grant such a decision, "in practice, however, the Court is reluctant to render a judgement which would deprive the Community of any room for further negotiations with the other contracting partner. It can avoid such a decision by denying direct effect, as it did in the Demirel case" [20]. In his opinion, "the Court could have declared that the obligation to refrain from any measures liable to jeopardize the attainment of the objectives of the Association Agreement is a 'clear and precise obligation which is not subject, in its implementation or its effects, to the adoption of any subsequent measure'. Furthermore, it could have held that the increase from three to eight years of the period during which a foreign worker is required to have resided continuously and lawfully on German territory before being entitled to family reunification constitutes an infringement of

that obligation" [21]. Clearly, Alexander defends the argument that such a drastic increase in the obligations to meet, in order to obtain certain rights is an unfair and undesirable act.

In Turkish policy-makers eyes, this is a travesty of justice when one sees that in order to gain a divorce in the Federal Republic, a couple must live separately for three years in Lander, such as Bayern and Baden Wurtemberg [22]. A non-Community citizen, in order to bring his wife into the Federal Republic, must have legally resided for seven years and must have been married for at least three years. Thus a three year separation rule which can be used as a reason for divorce by German couples is less then half the time foreign couples must be separated for in order to be allowed to get back together again!

As can be seen from the Court's decision on Article 36 (consideration 21), the Association Council is to decide and establish the rules pertaining to the progressive enforcement of free movement of workers "in accordance with political and economic considerations". Without a doubt this statement indicates that the Court was aware of the problematic state of the association relationship at the time. Therefore it may possibly be argued that the Court in deciding, was perhaps unfortunately affected and influenced by the political climate. Once again, Alexander lucidly writes that "The Court appears to have been deeply impressed by the problems which the presence of 1,500,000 Turkish immigrants caused to the Federal republic of Germany. I would be inclined to be more persuaded by the inhumanity of a rule which compels a lawful immigrant to wait eight years before being allowed to resume family life" [23]. Therefore, it may be asserted that the Court should have had the courage to come to a decision, purely on the merits of the case concerned, irrespective of the political situation and pressures.

Referring to the Ankara Agreement, Article 28 in particular, and the aims expressed in the Preamble show the Agreement not to be an ordinary run-of-the-mill third country trade agreement but a forward-looking agreement foreseeing full membership. Furthermore, it is unique in envisaging the development of a system of free movement for workers, pre-membership. One has also been able to witness the evolving and far-reaching nature of the Treaty with regard to Customs Union. The parts relating to intellectual property and patents for example were not foreseen in the early 1960s, but due to current demands, necessities and standards they were also incorporated.

In the Demirel case the ECJ decided that in structure and content the Agreement is characterised by the fact that; in general, it sets out the aims of the association and lays down guidelines for the attainment of those aims without itself establishing the detailed rules for doing so. Furthermore, that Article 12 and Article 36, read in conjunction with Article 7 do not constitute rules of Community Law which are directly applicable in the internal legal order of member states.

Finally, it must be re-emphasised that whatever the court findings, especially in the Demirel case, the Community does deny

the Turkish view of the true intentions of articles 12 and 36 of the Ankara Agreement and the Additional Protocol being free movement for workers by December 1986. Having said this, though, no Employment Minister has, nor will in the future, come out openly and state that the free movement for Turks will be opposed, perhaps the reason is that in international politics, Sovereign States, dislike making comments which can be damaging to their friends and allies, even though it is common knowledge to most.

THE SEVINCE CASE

Proceeding on from the Demirel case, another vital case to be analyzed, which sheds some light on the issue of direct effect, is the Sevince case. Briefly, the case concerns Mr. Sevince, a Turkish citizen who had obtained permission in February 1979 to stay with his Turkish wife in Holland. When he ceased to live with his wife in August 1979, his residential permit was refused an extension due to this separation, on 11 September 1980. Mr. Sevince brought an action against the non-renewal. The action had suspensive effect, so Mr. Sevince continued to live and work in Holland. After nearly six years, in June 1986, his action was finally dismissed by the Dutch Council of State.

On 13 April 1987, Mr. Sevince applied for a residence permit citing the fact that he was employed and his stay was not illegal, thus being eligible for protection under Association Council decisions. Faced with this appeal, the Dutch Council of State asked the ECJ in June 1989 for opinions on three issues, only two of which concern this paper: firstly, whether Article 2(1)(b) of Association Council Decision No: 2/76 which states that

"after five years of legal employment in a Member State of the Community, a Turkish worker shall enjoy free access in that country to any paid employment of his choice".

and, or Article 6(1) of Association Council Decision No: 1/80 whose third indent states that

"a Turkish worker duly registered as belonging to the labour force of a Member State....shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment"

and Article 7 of Association Council Decision No: 2/76 which states that

"the Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their territory"

and Article 13 of Association Council Decision No:1/80 which states that

"the Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their territory"

had direct effect.

Secondly, if yes to the prior question, then, whether the term legal employment be interpreted so as to include employment of a Turkish worker authorised to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he had lodged an appeal, was suspended ?

On the subject of granting direct effect to treaties between the Community and third States, there are mainly two reservations. Firstly, a lack of reciprocity regarding application means that the Community may grant direct effect, whereas the other party may not. Secondly, an absence of a supranational independent judiciary means that each party interprets its own obligations. Which, presumably might force circumstantial evidence to be taken into account when trying to evaluate a specific commitment.

In the Sevince case, one comes across a highly unusual observation, in terms of Article 2 of Decision No: 2/76 and Article 6 of Decision No: 1/80 being unilateral obligations for the Community with no question of reciprocity whatsoever. As international treaty obligations go, this is quite exceptional as, normally obligations are reciprocal.

In terms of the issue of free movement the Sevince case was important up to the point that certain Association Council decisions were accepted to have direct effect by the ECJ.

When one investigates all aspects regarding free movement a very relevant issue that crops up time after time is the issue of residents' permits. In West Germany residency permits are given with regard to the "Interessen des States oder Allgemeinheit" (interests of the State) [24]. The permits must also be in conjunction with paragraphs 2 Nrn 4, 6, 7, Auslvwv para 6, No. 5, para No. 7 Ausluwv [25] which are quite vague and open to varying widespread legal interpretations. These can affect the criteria concerning the granting of residency permits to foreigners as well as determining reasons for expelling them. Still, no Constitutional court nor any local court has given clear meanings to these terms. There is, therefore, a wide range of offenses and rights to choose from when granting permits and expelling people, and these range from traffic offenses to the economic situation and even, under certain circumstances, to suspicion [26]. Such laws being applied to Turks as well as to all other foreigners is clearly contrary to the spirit of the Ankara Agreement (which foresaw possible full membership) if not the actual articles contained within.

Such legislation undermines the so-called "Secondary Priority" Turkish workers were to receive within the Community. No real advantages are accrued via such laws and visa restrictions reflecting that Turks are "third category" persons behind nationals of a member state, then Community nationals, being huddled together with all non-EU citizens. There is clearly no "associate member state citizen" status attached to Turks in the Community and this is considered by many Turks not to be the reward for the Turkish worker who has made himself

indispensable to many sectors of Germany industry, even in the presence of high indigenous unemployment, and help stabilise the economy.

THE KUS CASE

The judgments reached in the Sevince case were expanded and highlighted in the Kus case. This particular case has acquired a special importance within the field of free movement for Turkish workers due to several Member States' opposition to certain legal interpretations. It is primarily due to these factors as well as the legal codification concerning free movement that this case should be analyzed in detail.

Mr. Kazim Kus arrived in Germany in August 1980 to get married to a German citizen; which he duly did in April 1981. After marriage, he was given a residence permit valid until August 1983 and on April 1982 he also received a work permit. He was employed for seven years with the same employer. After Mr. Kus divorced from his wife in April 1984, the Mayor of the city of Wiesbaden refused to extend his residence permit by a decision in August 1984, as he was no longer married, thus, his original reason for remaining had ceased to exist.

On appeal the Wiesbaden Administrative Court provisionally suspended the contested decision in May 1985 and by its judgment of October 1987 ordered the renewal of Mr. Kus's residence permit. The Mayor of Wiesbaden then appealed against this decision to the Higher Administrative Court of Hesse. This Court decided in August 1991, that Mr. Kus was not entitled to a residence permit under German law but referred the matter to the ECJ to give a preliminary ruling as to whether Decision 1/80 was applicable to the hearing. Thus, three questions on the interpretation of Article 6 of Decision 1/80 were referred to the ECJ.

The first questioned whether a Turkish worker meets the conditions of the third indent of Article 6 (1), if under national law his residence is accepted pending completion of a procedure for granting a residence permit, and if on this basis of that right of residence and corresponding work permit he has been employed for over four years.

The second question concerned if the first indent of Article 6 (1) applied to a Turkish citizen who entered Germany to marry a German citizen, subsequently divorced after three years, who had applied for a residence permit to work and was refused when he had already worked for two and a half years for the same employer under a valid work permit.

The final question related to a Turkish worker having a right directly on the basis of the first or third indent of Article 6 (1) to the renewal of not only his residence but also his work permit as well.

As important as these questions were, the German government submitted a written observation to the Court stating it had no jurisdiction to rule on the interpretations of Association

Council decisions? And, this coming from a government which truly heralded the Demirel decision! Therefore, if not the intention, then ultimately the result of this action would be the that the Court would be silenced on this matter.

Due to the fact that such an unusual objection, with regard to what seemed a very clear situation, was put forward, detailed analysis of the reasons supporting the action are vital. The German Government essentially believed the Sevince judgment had to be reconsidered. It claimed that jurisdiction of the Court could not be based on Article 177, as the decisions taken by the Association Council were not acts adopted by an institution of the Community. The Court could only have the right to interpret such acts by a unanimous decision of the Association Council, as provided by Article 25 of the Association Agreement.

Furthermore the German Government put forward Article 2 (2) of the Agreement on the Measures to be Taken and the Procedures to be Followed for Application of the Agreement Establishing an Association between the European Economic Community and Turkey as a defence. This article stated that "in cases where the decision and recommendations of the Association Council come within a sphere which, by the terms of the Treaty establishing the Community, is not within the competence of the Community, the Member States shall take the measures necessary to apply them" [27]. Therefore, the German Government expressed the view that as Decision 1/80 concerned the free movement of workers, the Court had no jurisdiction via Article 177, as this matter was considered to be within their competence. The defence of such a position could only mean not only the repudiation of the right of the Court to have judged the Sevince case, but also of the Demirel case.

In direct opposition to this, the European Commission also, in a written observation, defended the Sevince judgment and reiterated the right of this Court to deliver a preliminary ruling on decisions adopted by the Association Council.

As for the questions put to the Court, the German Government, notwithstanding its prior declaration of the Court not possessing the jurisdiction to rule, still made more written observations concerning these matters. In the first of these, the German Government suggested a negative response. The reasons brought forward arose from the Sevince judgment; a judgment that the German Government had stated should definitely be reconsidered [28]. Nevertheless, taking into account the decision of legal employment not covering any period of time which derived from a suspensory effect concerning a pending appeal, the Government advocated that Mr. Kus could not benefit from Article 6 (1).

For the same question the Commission was once again at odds with the German government, declaring that the factual situation of the Kus case and the Sevince case were significantly different. Primarily, the plaintiff had already worked for two and a half years prior to proceedings being initiated. The second and more interesting point referred to the suspensory effects of appeal. The Netherlands Statute automatically conferred

suspensory effect on an appeal, whereas, the German Statute left it to the courts to decide if the effects of a decision of refusal were to be suspended. In this case, the Wiesbaden Administrative Court by its judgment of October 1987 had not only annulled the decision taken against Mr. Kus, but had conclusively confirmed his right to obtain a residence permit. The Commission concluded that the answer to the question, should accept, that a Turkish worker could benefit from Article 6 (1), if part of the four years spent employed included a judgment in favour by a court ruling at first instance.

Concerning the second question, the German Government attached great importance to the purpose for which the residence permit was granted. The logical result could only be that the divorced Mr. Kus could not benefit: due to the fact that he only obtained his residence permit and subsequently his work permit because he married a German citizen.

Once again, the Commission took an opposing stance declaring the right to work and reside were very closely linked. Mr. Kus had already worked for over two years with a valid residence permit and thus, should have his work permit renewed on the basis of the first indent of Article 6 (1). He should not lose his rights; obtained by virtue of being employed for these years solely because he had originally entered Germany for another purpose.

The Commission further speculated, that if the German authorities had renewed his residence permit under this provision, Mr. Kus would have qualified from 1986 onwards for the third indent of Article 6 (3). Thus the Commission accepted the application of the first indent of Article 6 (1).

Concerning the final question, the German Government stated its rejection of the Sevince judgment [29], whereas concerning the first question it had used it in its defence: whereby access to any paid employment necessarily implied a right of residence. It seems virtually impossible to imagine a Turk working in a large metropolis such as Frankfurt or Dusseldorf and not residing not only in the city where he/she works, but being forced to live abroad! The German government defended the hard-to-believe notion that not having a residence permit would not necessarily deprive a right of access to the German labour market. Mention was made of Article 48 of the Rome Treaty dividing free movement for workers into two parts: the unlimited right of access to the labour market and the right to remain. When examining Article 48 closely, one sees that even this argument put forward, is not factually correct. As Article 48 (d) refers to this right, only insofar as the individual wishes to reside, "after having been employed" [30]. In terms of residence and work permits it is not even an argument that can be put forward: it is either a misreading or purposeful misdirection.

The German government further elaborated on the incomplete nature of Decision 1/80 as a whole, not containing comprehensive rules; culminating in the declaration that only the Association Council itself and not an interpretation of 1/80 can alter the

legal situation vis-a-vis the rights of residence for Turkish workers.

The Commission considered that the first and third indents of Article 6 (1) could be applied to acquire the dual renewal of residence and work permits. The Commission further elaborated on the Sevince judgment, whereby Article 6 (3) granting Member States the right to adopt procedures to apply the previous two paragraphs only clarified their obligations. Such obligations evidently did not give the right to restrict such applications.

Even though Germany had not adopted specific measures to implement this aspect of Decision 1/80, it could only regulate entry, the first employment contract and access to certain occupations and not go so far as to prevent, by use of measures concerning the right of residence, the acquisition of rights as foreseen by the third indent of Article 6 (1).

At the oral observations stage of the hearing, the Netherlands Government stated its acceptance of the German Government's position with regard to the issue of the granting of the rights of residence under national law. In the absence of lawful residence, employment could not be lawful. The Dutch Government also supported the German view of the original intent of entry to be taken into consideration. According to Dutch law, there is a distinction drawn between and "autonomous" and a "dependent" right to residence. The former refers to a worker receiving a permit in his/her own right and the latter, dependent on their family situation. Therefore, a Turkish worker who does not have a permit to reside in Holland must after divorcing the Dutch citizen apply for a new work permit. Due to this difference in national law, the Dutch Government agreed with the German stance.

The United Kingdom Government also proposed at this stage that all the questions should be answered with the interpretation of a Turkish worker being one who originally arrived with the intention to work. Therefore, any Turk arriving in order to get married and then to be regarded as a lawful resident and worker should be deprived of the effects of Article 6 (1).

A month before the judgment of the Court, the Advocate-General delivered his opinion. Within the opinion, some very important points were raised. The unique nature of the Association Agreement, being the only external agreement which regulates the free movement of non-member-state nationals within the Community was expressed from the outset [31].

The Advocate-General, in responding to the German Government's statement of the Court not having jurisdiction cites the Haegemann judgment [32] whereby agreements concluded under Article 237 of the Rome Treaty were accepted as an act of the Community. Furthermore, the Athens Agreement was also accepted as far back as in 1963, the year of the Ankara Agreement, that it formed an integral part of Community law and the Court had jurisdiction concerning the interpretation of the Agreement. The same argument had prevailed in the Sevince case. The Advocate-General concluded, that, in effect "the German Government asks the Court to reverse that case law. It argues, in the first

place, that the Court cannot interpret the decisions of the Council of Association, which is not a Community institution but an authority of the Association. The Court has already refuted that argument in paragraph 10 of the Sevince judgment" [33].

He further refuted the argument of Community competence with regard to free movement with which Article 6 of Decision 1/80 is concerned, referring to the Demirel judgment, which had stated that free movement did fall under Community competence. Due to the fact that member-states could decide and implement the required rules did not mean, the Decision could be removed from the Community legal order. He reiterated his opinion in the Sevince case that Article 6 (1) is not "outside the Community legal order. Nor does it mean that the Court has no jurisdiction to interpret it" [34].

The Advocate-General responded to the German suggestion of invoking Article 25 of the Ankara Agreement allowing the Association Council to settle disputes by repeating his opinion in the Demirel case, whereby, the particular article in question could only be invoked when the issue concerned could not be brought before the Court. Quite obviously this was not the case in this instance. It is interesting to note that the representative of the German Government, Ernst Roder, who had put this point forward as a legal argument to prove to the Court it did not have jurisdiction decided not to argue the point at the hearing. One would have expected an expansive defence for such a reason which determined the absence of jurisdiction. There could be no expansive defence as the reason given was indefensible. The Advocate-General went on to declare, in response to the German Government's written observation that, "The Court therefore clearly does have jurisdiction" [35].

From the above arguments put forth by the German Government concerning the Court's jurisdiction, it is clear to see, even for non-legal scholars, that these agreements could not be defended with genuine sincerity. It is quite remarkable for the German Government to reject wholesale the right of the Court to judge without at least bringing forth defence or dissenting opinions against case law.

The actual Treaty articles quoted are either very much misinformed and incredibly extrapolated or simply irrelevant. When considering the whole stance portrayed by the German government it is very difficult to believe or understand the position taken. Such actions, it seems, could not have been taken primarily due to legal interpretations. As evidenced, from the outset, they were so predictable that other explanations seem more apt in this instance. As Burrows [36] states, "The judgment was given at a time when the governments of the Member States had proved to be too cowardly to confront the issues head on" [37]. Such Member States were reluctant to seek solutions for free movement of Turkish workers; thus, it is quite plausible to infer that a non-legal reason, a political factor did play a much more decisive role in the decision to object to the Court's jurisdiction. Looking at the evidence, it is very hard to dispute

this.

Furthermore, incongruities and inconsistencies are abound: whereas, in one matter, the Sevince judgment is defended and advocated, in another, it is totally dismissed as in the original argument for the Court lacking jurisdiction. This makes a fallacy of the credibility of the arguments submitted. Either a judgment is accepted as valid, or contested. Within the same case, both sides cannot be defended, depending on whichever stance suits the party's position best.

Having mentioned the political influence created by the Kus case one must turn now to its substantive legal effects. The Court decided in response to the German Governments insistence to reconsider its jurisdiction "that nothing has emerged from the observations submitted in this case which might cause it to depart from what it held in that respect in its judgment in Sevince" [38]. This was a double blow for the German Government's position. Not only was the Sevince judgment still valid, it gave effect to the Kus case being brought before the Court.

As for the first question, the Court held that, as in Sevince, if a part of the period of residence was due to pending an outcome of a final decision as to the status, then that would not be considered a stable and secure position. Thus, the answer would have to be negative.

As for the second question, the original intent behind entry into a member-state did not disqualify any Turk from rights granted by virtue of working for more than a year for the same employer with a valid work permit to have it renewed. National law covered the conditions of entry. Once a Turkish worker fulfilled the required criteria, then there had to be a right to an extension of a work permit.

Concerning the final question of the linkage between residence and work permit renewals being undertaken together, the Court referred to its Sevince judgment that member-states could not via Article 6 (3) restrict the rights of Turkish workers. The Court went onto state that "In the observations which it submitted to the Court, the German Government expressly challenged the view that there was necessarily a link between the right of access to the employment market and the right of residence. Even as regards freedom of movement for workers within the Community, it claimed that situations might arise where the two aspects did not necessarily coincide" [39] The German Government had given two instances which illustrated the case put. The Court answered by stating "Neither of those examples is relevant. Far from demonstrating that an individual may enjoy a right to the employment market without a right of access to the employment market without a right of residence, they underline the fact that the right of residence is indispensable to access to and engagement in paid employment". [40] Such a response was similar to the rejection of the proposal for the lack of jurisdiction: there was no relevance whatsoever with the examples given with the argument advocated. The Court decided where a Turkish worker could renew his/her work permit, the residence permit would also

quite logically be renewed. Thus, both the first and third indents of Article 6 (1) had direct effect on the renewal of the residence permit as well as the work permit renewal.

THE EROGLU CASE

Pursuing the path of extending and clarifying certain provisions of Association Council decisions having direct effect, which began with the Sevince and Kus cases, the Eroglu case also deserves due attention. Mrs. Eroglu joined her working father in Germany in April 1980. She enrolled as a student at Hamburg University, graduating in 1987. She then began to study for her PhD. In October 1989, Mrs. Eroglu moved to Hardheim and from March 1990 to April 1991 worked for Company "A" on a hotel project, then undertook practical training with the same company. From April 1991 until May 1992, she worked as a trainee with Company "B". Concerning her residence permit she was issued with limited permits allowing for her to continue her studies and then to work for Company A and then Company B. As regards her work permits, she was given specific permits granting her to work first as a trainee, then as a marketing assistant.

In February 1992, Mrs. Eroglu applied to the Neckar-Odenwald-Kreis Rural District Central Administrative Office for an extension of her residence permit to allow her to continue working for Company B. After rejection, she appealed to the Chief Executive's Office of Karlsruhe District. Upon rejection at the hands of that court, Mrs. Eroglu then appealed to the Karlsruhe Administrative Court, claiming rights granted to her by virtue of Decision 1/80. The Court found the refusal to renew the residence permit to be in accordance with German law, though asked the ECJ to give a ruling concerning two questions.

The first related to the first indent of Article 6 (1): whether it gave the right for a renewed work permit for returning to work with a first employer of a Turkish citizen who is a university graduate and been working for more than a year for her first employer and some ten months for another employer.

The second matter revolved around the possibility of a Turkish citizen as a graduate of a German University satisfying the conditions of the second paragraph of Article 7 of Decision 1/80 being allowed to respond to any offer of employment could by the same basis extending her residence permit.

The Court decided in response to the first query that the answer would have to be negative. The reason for such a result arose from the fact that the first indent of Article 6 (1) clearly specified that a Turkish worker after working for a year with one employer was entitled to the renewal of the work permit; but only for the same employer. In this case, Mrs. Eroglu had changed her employer and sought the extension of her work permit to allow her to return to her original employer and not for

continuing with her original employer. Whilst the end result is the same, it could not be permitted on account of the very thin line between the first and second indent of Article 6 (1). A positive response to the question would effectively mean Turkish workers could change employers under the first indent, before the expiry of the three years required under the second indent. The second indent would be rendered ineffective. Furthermore, such a decision would erode the rights of member-state workers, as their priority would then be negated. Due to these arguments, the Court declared Article 6 (1) did not give Mrs. Eroglu any direct rights due to her particular employment record. Considering the decision made, it is quite understandable that the Court arrived at such a verdict as any other verdict would, in effect, have reduced the plausibility of the second indent of Article 6 (1).

As regards the second question, this covered new ground: for the Court had never been asked to consider the direct applicability of Article 7. Reiterating its judgment in the Sevince case, the Court declared the close correlation that exists between work and residence permits and referred to its Kus judgment as it had already followed this reasoning in its deliberations concerning that particular case.

The Court decided that Article 7, Similar to Article 6, necessarily implied the recognition of a renewal of a residence permit when a work permit was renewed. Thus, any Turks fulfilling the conditions set out in Article 7 could rely on that provision to extend their residence permit.

The Court within its judgment also referred to the objections made by the German Government: "Contrary to the assertions of the German Government, the right to respond to any offer of employment, conferred by the second paragraph of Article 7...is not subject to any condition concerning the ground on which a right to enter and to stay was originally granted" [41]. The German Government had proposed that the original intention behind entry was a factor to consider when arriving at a decision. What was obvious behind this stance concerned the children of Turkish workers were permitted solely to study and the intention was not for family reunification or long term settlement. The Court in response, further stated that "The fact that right was not given them with a view to reuniting the family but, for example, for the purposes of study does not, therefore, deprive the child...who satisfies the conditions...of the enjoyment of the rights conferred" [42]. The Court had once again totally repudiated the German argument.

One can see from the case law concerning the free movement of Turkish workers that the German government is an active participant. The German government has found itself supporting decisions by the ECJ which restrict the rights of Turks with regard to free movement and oppose measures granting direct effect. Quite obviously, the nature of potential domestic implications which may arise from such results has played a part in the German government's stances. Given that so many Turks

reside in Germany, this is not surprising. In the final analysis, it is evident that there is a clash between German national considerations and rights granted to Turkish workers by the European Community. It is the European dimension of this issue that has forced the German government to pay so much attention towards the rights of Turkish migrants.

TREATY ON EUROPEAN UNION

The rights of Turks became affected, not by another ECJ judgment concerning free movement but, as implied, by the Treaty on European Union signed in Maastricht in 1992. Although the Treaty made no specific mention of any measure or extension of any rights concerning association agreements with third states, it nonetheless altered the status quo. Turkish workers, working and residing in the EU, like other non-EU nationals were affected by the introduction of EU citizenship for citizens of the Member States. As the Treaty did not mention an extension of free movement or associate citizenship status for persons granted a preferential status in the Association Agreement and Association Council decisions, the result has been the further erosion of the status and rights of Turks in the European Union.

The Treaty grants various rights to Union citizens. The most important and noteworthy of these are:

- 1- The right to move and reside freely within the EU
- 2- The right to vote and stand as a candidate at municipal, regional and European Parliament elections in the Member State in which the Union citizen resides
- 3- The right to benefit from diplomatic protection in the territory of a third country
- 4- The right to petition the European Parliament
- 5- The right to complain to the Ombudsman

Turks, alongwith other third country nationals, are neither granted Union citizenship, since they are not nationals of a Member State, nor do they enjoy the rights of Union membership except one: all third country nationals may also petition the EP. It is only this right granted to Union citizens that is not exclusive.

The definition of Union citizenship used inevitably excludes Turks and any other long term resident from a third country, regardless of how long they have lived in a Member State. Some individuals have lived and contributed socially and fiscally to these member-states even before the conception of the EEC. This

method of defining Union citizenship not only damages Turkish workers exclusivity vis-a-vis other third country nationals, but is also needlessly divisive and contradicts the Community's commitment to integrate and further the social cohesion of Turks within the Community. In sum, the creation of Union citizenship has had a negative impact on Turkish workers and persons living in the Community.

The Member States were so concerned about the inclusionary nature of Union citizenship that they annexed a declaration on nationality to the Treaty which stated that, for the purposes of the Treaty, nationality is to be determined according to the domestic law of each Member State. Because of this, over nine million third country nationals are relegated into a further category; that of non-union citizens and so deprived of the rights that follow on from this. Therefore, Turks in Europe face a double blow: firstly, being considered as no different than all the other third country groups and secondly, the detrimental status of this latter group due to the Treaty.

By the exclusion of Turkish nationals governed by the Association Agreement and the Additional Protocol from the application of the Treaty, the Member States have made clear that one of the characteristics of the Union is an inability or perhaps the failure in coming to terms with its multicultural identity and a tendency to exclude all others whom it does not consider as belonging, as "we", as "us" from the benefits of European integration. In so far as their position is affected by Community law, Turkish workers have no political rights to influence how Community law is shaped.

Due to the fact that certain Member States, most notably Germany, do not fit in with the norm of citizenship accepted in the majority of other Member States, those Turks living and working in such states are, in effect, penalised by the Treaty. As with all nation-states, the national identity of each particular state is found in response to the question of who may belong and who may not belong to it, essentially a response to inclusion against exclusion.

The German state in defining its own national identity bases its arguments on a volkisch, or ethnic character. The basic notion that is emphasised is the unity of Volk and State, whereby all peoples have the right to their own existence as a sovereign state. The conclusion reached via this ideological basis is that nations can only be composed of one Volk.

The Basic Law, or the temporary constitution of the Federal Republic of Germany when it was founded in 1949 retained an ethnic concept of citizenship, based on the Reich citizenship law of 1913. In effect it was seen as the legal expression of a basic political commitment to German national unity. It refused to accept the loss of former German territories east of the Oder-Neisse Line, and it sustained a jus sanguinis notion, essentially a "blood-right" acceptance, of German citizenship. The Basic Law referred to Germans and not to German citizens. Using the word "Germans" indicated a more inclusive notion, whereby all German

citizens as well as certain categories of ethnic German refugees and expellees and their spouses and dependents were included. This approach towards citizenship created major obstacles to integrate immigrants into the body politic.

Therefore, within the parameters of the ideology of such a volkisch nation, ethnic minorities can be regarded as a threat to national unity and to the purity of the ethnic national culture. Thus, an ethnic nation-state cannot be open to the immigration of foreigners, nor can it become an immigration country [43].

Leskien [44] gives several examples of discrimination based on citizenship. Firstly, the Federal Constitutional Court has declared that different treatment, based on citizenship is constitutional; if there is a reasonable basis for it and that it is not a totally arbitrary decision. To highlight this accepted anomaly, Leskien refers to a case brought before the Federal Administrative Court, whereby an administrative district council had decided to charge foreign publicans selling alcohol higher taxes than their German counterparts. The Court held this discrimination to be constitutional, since the foreign publicans were not as strongly tied into the legal and social order of Germany, needing to be more frequently inspected than the German publicans; which in the Court's view justified the higher tax.

The second example concerning discrimination based on citizenship concerns the Gaststättengesetz law, which regulates the licensing of restaurants. In many places throughout Germany there are signs outside bars and discotheques, reminiscent of the US and UK in the 1950s, saying "Turks not allowed". The abovementioned law states that the persons operating these establishments who are not reliable or who disturb the peace can be refused a license or have it withdrawn. Due to this, the public licensing agency could implement this provision in cases of discrimination on the basis of race, colour or origin. All prior attempts to pursue this path have ended in failure as the owners have needed only to demonstrate that allowing Turks to enter would create conflict between the Germans and them and so lead to disturbances. This argument so far has been enough to exempt the owner from accepting clients of all backgrounds.

Therefore, when investigating the German legal system and how it operates, one sees that the legal remedies potentially available cannot be easily interpreted from the law itself. Furthermore, there is no public institution with the mission to communicate this to the discriminated.

Furthermore, there is no special law in Germany which has the specific goal of preventing racial discrimination. A frequent misunderstanding concerns laws that forbid acts of racist violence. It must be remembered that discrimination and violence are not the same: only the latter is criminal and may be prosecuted. Taking a legal perspective, one notices a clear distinction between racial discrimination and discrimination against foreigners. The Basic Law, for example, outlaws all racial discrimination, though permits discrimination against foreigners. The distinction in the German Constitution between

human rights, which are for everyone and certain civil rights of citizens which are only for Germans, can be regarded as discriminatory.

An investigation of the actual terms that the Germans came to use to describe foreigners also provides a useful insight into the indication of their status and of the length of time foreigners are expected to stay. At first, they were called "guestworkers". By using the term "guest" the temporary nature of their employment was emphasised. With the advent of time, they were called "foreign workers" and with family reunification referred to as the "foreign resident population". Such labels indicate clearly that there is no intention towards integration, nor measures towards creating a multi-cultural society.

In order to illustrate the penalisation of Turkish citizens in Germany, by the Treaty, one hypothetical example will suffice: In the case of second or third generation Turks benefitting from the principle of free movement, the country of birth naturally becomes paramount. If one is born in a country where the jus soli principle governs citizenship as in France accession to citizenship is fairly straightforward. If the country accepts the jus sanguinis principle, as in Germany it is very different. Thus for all non-EU citizens, their birthplace is crucial for the possibility of his or her future accession to citizenship of the Union. Considering an example of two Turkish brothers, one being born in Germany the other in France. The latter gains EU and French citizenship rights after coming to age, but the brother born in Germany is still subject to general naturalisation principles and will remain a non-EU citizen. If the French-born Turk was to work and reside in Germany, he could vote in municipal as well as EP elections, whereas, the German-born brother who had lived and worked all his life would be exempt from such rights. Both are Turks, both born in EU member states, but only one is a Citizen of the Union!

In a nutshell, Union citizenship should not be artificially constrained and bounded by the historic notion of a nationality based characteristic of citizenship. If the EU is striving to move beyond and transcend the established model of an international organisation, and it is, due to the ECJ judgement in the Van Gend en Loos case, then it must necessarily seek ways to improve on ancient and impractical restrictions. Upon this, it must act upon: if only to remain faithful to the original founding fathers and the spirit of the Rome Treaty and to the notion of an "ever closer union of peoples". Furthermore it is against the fundamental principles embodied in the notion of the Single Market. The Commission on several occasions referred to the natural extension of including third country nationals permanently resident in the member-states to have access to the benefits of free movement rights in order to have a genuinely complete internal market.

Winn [45] stresses the fact that Turks do not possess the right to free movement nor "do the European Community laws on family union apply....Under Community law, a third country

national is a second class citizen" [46]. According to the European Union's Migrants' Forum "it is unjust and wrong that they should be excluded from both the economic benefits of free movement rights in the Union and the political rights conferred on citizens of the Union, specifically the right to vote in municipal and European Parliament elections" [47]. The Commission White Paper on Social Policy went onto propose "improving the situation of third country nationals legally resident within the Union by taking steps which will go further towards strengthening their rights relative to those of citizens of the Member States" [48].

With particular reference to Turks, it seems an idiosyncrasy to have unprecedented rights and obligations in the realm of free movement for workers and in the domain of economic integration as witnessed by the Customs Union, for them to be left totally out in the cold. Having been an associate member of the Community since 1963 and applied for full membership ten years ago, successfully completed the Customs Union two years ago, it does seem odd that the European Union continues to prevaricate with regard to the rights of free movement and Turkish migrants. This is perhaps not surprising, given the fact the within the whole context of the Turkey-EU relationship there does not seem to be at present, the zeal that was evident on the part of the Community in the 1960s and early 1970s. As for Germany, the problematic nature of its citizenship laws and obstinant position towards accepting immigration, integration and the finality of a multi-cultural society does not give rise to much hope. The Turks present in Germany and in other Member States have seen their right to secondary priority eroded with the Treaty of European Union and ECJ decisions. The erosion, non-acceptance and non-implementation of Turkish rights is, unfortunately, not a new phenomenon, and looks set to continue until there is a change in primarily the economic and political climate within the EU.

FOOTNOTES:

1. Commission of the European Communities., Commission Opinion on Turkey's Request for Accession to the Community. Brussels, 18 December 1989. p.7
2. Commission of the European Communities., The Turkish Economy: Structure and Developments. SEC (89) 2290 Final. Brussels, 18 December 1989. p.39
3. In 1996 there were 10 million third country nationals within the EU, according to Winn, B. David., "Third Country Nationals In The European Union Towards The Intergovernmental Conference 1996: The Right To Equal Treatment, Immigration Law Practitioners' Association, London, 1995.
4. In the Paris Treaty, which established the ECSC, only public health and public policy was mentioned. Public security, as such was omitted.
5. See Case 41/74 [1974] ECR 1337.
6. Official Journal of the European Communities 1973, No. C113/4
7. State Planning Organisation., Additional Protocol Financial Protocol. Ankara, 1987. p.10
8. For the Turkish sides attitudes and opinions see: Birand, M.A., Turkiye'nin Ortak Pazar Macerasi. Milliyet Yayinlari. Istanbul, 1985. and Saracoglu, T., Turkiye Avrupa Ekonomik Toplulugu Ortakligi Anlasmalar. Akbank Ekonomi Yayinlari. Istanbul, 1992.
9. Castles, S., Migrant Workers and the Transformation of Western Societies. Cornell, Western Societies Papers, No: 22, Cornell University, 1989.
10. October 1980 was only one month after Turkish democracy was suspended by a military intervention.
11. Migration News Sheet, Brussels, December 1991
12. Zentrum Fur Turkeistudien., Konsumgewohnheiten und Wirtschaftliche Situation der Turkischen Bevolkerung in der Bundesrepublik Deutschland. Essen, September 1992. p.3

13. Sen, F., Problems and Integration Constraints of Turkish Migrants in the Federal Republic of Germany. ILO, Geneva, 1989. p.25
14. Sen, F., The Economic, Social and Political Impact of Turkish Migration. Chapter 5 of Spencer, S., (ed) Immigration As An Economic Asset. Trentham Books, London, 1994.
15. Weiler, H. H. Joseph., "Thou Shalt Not Oppress a Stranger: On the Rights of Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", European Journal of International Law, Vol: 3, 1992, pp.65-91.
16. Alexander, Willy., "Free Movement of Non-EC Nationals: A Review of the Case Law of the Court of Justice", European Journal of International Law, Vol: 3, 1992, pp.53-64.
17. Weiler., p.79.
18. *ibid.*
19. Weiler., p.83.
20. Alexander., p.64.
21. *ibid.*
22. Genc, M., Turkiye ve Avrupa Toplulugu: Serbest Dolasim. Chapter 4 of Cam, E., (ed) Turk Dis Politikasinda Sorunlar. Istanbul, 1989. p.201
23. Alexander., p.64.
24. Genc, M., Turkiye ve Avrupa Toplulugu: Serbest Dolasim. Chapter 4 of Cam, E., (ed) Turk Dis Politikasinda Sorunlar. Istanbul, 1989. p.199
25. *ibid*
26. *ibid*
27. Kazim Kus v. Landeshauptstadt Wiesbaden, Case C-237/91, [1992] Euroepan Court Review, I-6786.
28. *ibid*
29. Kus., I-6790.
30. Treaties Establishing The European Communities, Office for Official Publications Of The European Communities, Luxembourg, 1987, p.167.

31. Kus., I-6795
32. Kus., I-6797
33. *ibid.*
34. Kus., I-6798
35. *ibid.*
36. Burrows, Noreen., "The Rights of Turkish Workers in the Member States", *European Law Review*, Vol: 19, 1994, pp.305-308.
37. Burrows., p.308.
38. Kus., I-6811
39. Kus., I-6817
40. *ibid.*
41. Case-355/93, Eroglu, [1994] *European Court Review*, I-5141.
42. *ibid.*
43. By Article 116 in the Basic Law, the Federal Republic does consider allegiance to the reunification of the Germans. It is a renewed allegiance to the notion of a community based on ethnic descent.
44. Layton-Henry, Z., & Wilpert, C., *Discrimination, Racism and Citizenship: Inclusion and Exclusion in Britain and Germany*. Chameleon Press, London, 1994. p.19
45. Winn., pp.4-14.
46. Winn., p.8.
47. The European Union's Migrants' Forum, "Proposals for the Revision of the Treaty on European Union at the Intergovernmental Conference of 1996", May 1995, section 1, p.6.
48. White Paper on Social Policy (COM (94) 33 of 27 July 1994).