THE LEGAL RECEPTION AND STATUS OF TURKISH IMMIGRANTS IN THE EU: A COMPARATIVE STUDY OF GERMANY, THE NETHERLANDS AND THE UK

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ABSTRACT

Following recruitment agreements in the 1960s, Turkish workers began to emigrate to Western Europe on a scale never experienced before. Over time, temporary labour recruitment has turned into permanent settlement of whole communities as a result of such factors as recruitment stops, continued immigration and especially family reunification and family formation. More recently, the growth of a second and even third generation of young Turks born and brought up in the receiving countries has raised a number of new legal issues which are now beginning to be studied in depth. Turkish worker migration in Europe has turned out to be a highly complex human phenomenon with a wide range of socio-cultural, psychological, political and legal consequences.

The present study evaluates how the legal reception and status of Turkish migrants is reflected in three different national systems of immigration control in Europe, those of Germany, the Netherlands and the UK. The thesis seeks to test if and to what extent the legal systems of these three countries have differed in their response to the presence of Turkish immigrants, and which variables have been most effective in the legal reception and treatment of Turkish immigrants in these countries.

The thesis first draws a comprehensive picture of Turkish migration to Europe. Secondly, it provides a brief analysis of the legal position of Turkish migrants within the context of EU and international law, having particular regard to the Ankara Association Agreement of 1963 and subsequent developments under EU law.

The second part of the thesis comprises a detailed analysis of the national immigration regimes of the three countries, taking into account the international and EU dimensions. Coverage of the legal reception of Turkish immigrants is followed by discussion of central issues relating to the employment of Turkish migrant workers and the self-employment of Turkish migrants. Further, the legal response of the three countries towards Turkish family migration is discussed, having both regard to family reunification and family formation rights of Turkish residents.

In the conclusion, a comparison of the regulatory framework in Germany, the Netherlands and the UK has been provided. Turkish migrants to European countries clearly experience different legal reactions, from open welcome, albeit as guestworkers, to hostile rejection as the unwanted and alien 'other'. Turks, as immigrants, are targeted everywhere by the immigration systems, but in varying degrees.

The thesis demonstrates that the absolute and relative size of the Turkish immigrant population to the native population and to other immigrant groups in each country, as well as their perception of being a threat for the immigration systems, gives rise to particular responses to Turkish immigrants. The legal reception and status of Turkish immigrants have further been influenced by the cultural distance of Turkish immigrants from the receiving country or other immigrant groups. While this approach has been modified to some extent by the unique development of each national immigration system and the continuing need for immigrant workers, as well as the necessity for international mobility, Turkish immigrants and their descendants in the EU have been allocated legal positions of marginality, despite the protective frameworks of international and EU laws.

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LIST OF ABBREVIATIONS

A-G:	Advocate General
All ER:	All England Law Reports
Az:	Aktenzeichen
B Verw G:	Bundesverwaltungsgericht
B Verf G:	Bundesverfassungsgericht
B Verw GE:	Bundesverwaltungsgericht-Entscheidungen
BWVerwP:	Baden-Württembergische Verwaltungspraxis
CDU:	Christlich Demokratische Union
CEC:	Commission of the European Communities
CERD:	Convention on the Elimination of Racial Discrimination
CFTS:	Centre for Turkish Studies
CIA:	Commonwealth Immigrants Act
CMLR:	Common Market Law Review
CRE:	Commission for Racial Equality
CSU:	Christlich Soziale Union
DSDF:	Demokratik Sosyal Demekler Federasyonu
EC:	European Community
ECHR:	European Convention on Human Rights
ECJ:	European Court of Justice
ECR:	European Community Reports
EEA:	European Economic Area
EHRR:	European Human Rights Review
EJIL:	European Journal of International Law
ELR:	European Law Review
EU:	European Union
FDP:	Freie Demokratische Partei

FRG:	Federal Republic of Germany
GDP:	Gross Domestic Product
HRLJ:	Human Rights Law Journal
IAT:	Immigration Appeal Tribunal
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICLQ:	International Comparative Law Quarterly
ILM:	International Legal Materials
ILO:	International Labour Organisation
ILPA:	Immigration Law Practitioners' Association
Imm AR:	Immigration Appeal Reports
IMR:	International Migration Review
InfAuslR:	Informationsbrief Ausländerrecht
JCWI:	Joint Council for the Welfare of Immigrants
MNS:	Migration News Sheet
NJW:	Neue Juristische Wochenschrift
NVwz:	Neue Zeitschrift für Verwaltungsrecht
OECD:	Organisation for Economic Co-operation and Development
OLS:	Overseas Labour Section
OVG:	Oberverwaltungsgericht
PPR:	the primary purpose rule
SPD:	Sozialdemokratische Partei Deutschlands
UDHR:	Universal Declaration of Human Rights
TMLSS:	Turkish Ministry of Labour and Social Security
TÜSİAD	Türkiye Sanayii ve İş Adamları Derneği
ZAR:	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZfT:	Zentrum für Türkeistudien

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CHAPTER 1

INTRODUCTION

1.1 Turkish migration to Western Europe in a wider context

The nature of international migration has changed considerably in the 20th century, particularly after the Second World War. Many European states have experienced a fundamental change from being an emigration country to a country attracting migrants of different kinds. Spontaneous uncontrolled international migration has lost its momentum, particularly from the European Continent to the Americas, as nation states began to seek more and more control on migration matters, though some lip-service was given to 'laissez faire'. Therefore, states started to select and negotiate international migration according to economic conditions and domestic demands of their countries.

The unequal relationship between the Western European countries, which experienced rapid economic expansion, and the Southern European countries, which were for a long time said to have ineffective socio-economic structures, was one of the main causes of international migration after the Second World War. The new feature in post-war migratory movements from the Southern European countries to Western Europe has been a policy of attracting workers, pursued by most of the receiving countries, not so much the motivation of the migrant workers themselves (Paine 1974: 5).

Prior to the Second World War, it was not that common for Western European countries to import large numbers of foreign workers on a temporary but systematic basis to satisfy a long-term labour shortage. The increasing dependency of some Western European countries on the use of immigrant labour soon forced them to make arrangements to attract foreign workers from countries such as Italy, Portugal, Spain, Greece and what was then Yugoslavia, probably because of geographical proximity and/or cultural closeness. Soon, however, these Western European countries switched

their attention to other countries including Turkey, which was already eager to export its unemployed or under-employed labour force.

While German efforts to recruit 'guest workers' focused on Turkey, France and the Benelux countries have turned mainly to North Africa for new workers. Colonial links played a certain role in this process, as in the UK, which is considerably different from the other European countries regarding migration to Europe. In Britain, migrants were generally admitted as a consequence of the legacy of the dissolving Empire. They came in fairly large numbers from the Caribbean and the Indian subcontinent, thus tended to be British subjects. On the whole, therefore, there was no need for large-scale organised importation of foreign labour in Britain due to the immigration of workers and, later, political refugees from its colonies (Booth 1992: 6; Layton-Henry (ed) 1990: 49-50).

Turkish migration to Western Europe started to become a major element at the beginning of the 1960s with the signing of bilateral labour recruitment agreements with various countries, even though cases of individual migration to Europe had existed preceding these agreements. Most of these individual cases were graduates of Turkish technical schools who went to Germany for additional training.[1] It would thus be difficult to assert that Turkish migration started because of the agreements. Nor were the agreements there because of Turkish migration. In retrospect, it is clear that there was a definite need for such large-scale immigration and that these agreements provided a formal framework and played the role of catalyst in the migration process. The countries with which Turkey concluded recruitment agreements were Germany (1961); Austria, the Netherlands and Belgium (1964); France (1965) and Sweden (1967). There is, however, no agreement in this regard between Turkey and the UK.

[1]Keyder and Aksu-Koç (1988: 14) report that 1,700 Turks were already employed in the Federal Republic of Germany in 1960.

The first agreement between Turkey and the then EEC countries, in a more general sense, was the Ankara Association Agreement of 1963.[2] Moreover, Article 36 of the Additional Protocol of 1970 promised Turkey free movement of Turkish workers in the Community, which would be secured by progressive stages within 12 or 22 years of the entry into force of the Ankara Agreement.[3] It appears that Turkey's willingness to join the EU and the need to respond to the labour demand and to regulate the in-flows of Turkish workers within the EU context resulted in the Ankara Agreement and the other recruitment agreements. The relationship between Turkey and the EU, and the possible full membership of Turkey add a special importance to the legal status of Turkish immigrants in the EU context. Turkey applied, in April 1987, to become a full member of the EU, a common market which, *inter alia*, permits workers from one member state to seek employment in any other member state.[4]

Following the bilateral agreements, Turkish workers began to immigrate to Western Europe on such a large scale as has never been experienced before. Briefly, a number of factors may be put forward in explaining the rationale behind Turkish migration to Western Europe. There are, first of all, 'pull factors' which explain why receiving countries wanted such large numbers of Turkish workers. The literature seems to suggest that the decisive factor was the situation of the labour market in the receiving countries, especially Germany. Growing labour shortages and employers' concern about possible wage demands as well as foreign policy factors also played a certain role. In this context, Turkey's strategic importance to its Western allies is often referred to (De Haan 1976: 348). 'Push factors', on the other hand, were the desire to accumulate wealth, as well as poverty, underdevelopment and unemployment in Turkey at the time. Individual ambitions, such as a desire to buy land or houses, or to acquire vocational training and useful skills, were also among the relevant factors for large-scale migration.

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[2]Agreement Establishing an Association between the EEC and Turkey, signed at Ankara, 12 September 1963, approved on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, (OJ 1973 C 113), see Appendix 1 of this thesis.
[3]Additional Protocol, signed at Brussels, 23 November 1970, (OJ 1973 C 113), see Appendix 2 of this thesis.
[4]Obviously, an important development in the interaction of migration and political goals is the free access of labour provided for in many agreements forming regional economic unions. The extent to which future membership in regional markets will be influenced by these free labour provisions is also a matter of consideration in Turkey's relation with the EU.

Apart from Britain, which began to restrict labour migration already with the Commonwealth Immigrants Act of 1962, most Western European countries experienced large inflows of migrant workers in the 1960s and early 1970s. This applied particularly to Germany. While post-war labour migration to Europe took place mainly in two forms, namely post-colonial migration and recruitment of temporary foreign workers, post-colonial migration was most important for Britain and, to some extent, for the Netherlands. For Western Europe as a whole, recruitment of workers from Southern Europe and Turkey became the most important form of labour migration. The main principle of such guest worker systems was the treatment of the migrants as temporary workers, recruited for limited periods to do specific jobs (Castles and Kosack 1985: 488).

The reactions of the European countries towards Turkish migration have been put into three different categories, in line with changes in the typology of Turkish migration (see Centre for Turkish Studies (CFTS) 1993a: 17 and Layton-Henry (ed) 1990: 96-100):

1) Beginning with the 1960s, Turkish migration was firstly considered to be a temporary phenomenon. It was assumed that most of the Turks would eventually go back to their places of origin. Few, if any, would integrate into the host society, if they wished. The Turkish workers were characterised as young male workers who retained close ties with the homeland, whose main aim was to save enough money and to return home upon achieving that aim.

2) The second phase is the period between 1973/4-1981. This phase started with the recruitment stops in virtually all European countries and was followed by various legal restrictions. Temporary labour recruitment now turned into permanent settlement as a result of such factors as immigration controls, family reunion, and the growth of a second generation born and brought up in the host country. In this phase, migration took the form of family migration rather than recruitment. The main effect of this period has been the creation of a settled Turkish population.

3) Since 1981, a more restrictive immigration policy, coupled with financial incentives for returning workers, has been followed (e.g. the 10.500 DM Law in Germany). The receiving countries have been experiencing, from time to time, rising unemployment and worsening economic conditions. This has led to negative reactions against foreign workers and their families

and takes away some of the incentives for newcomers. However, apart from asylum seekers, Turkish citizens continue to come to European countries, either as family members or in the more recent process of family formation. In addition, there is growing evidence of new forms of temporary migration through such devices as work permit schemes.

A fourth phase can be added to the above stages of Turkish migration. Turkish residents in the EU have now come to possess an intermediary legal position, particularly following the confirmation of their rights by various courts under the Ankara Agreement of 1963 and EU law. This process of consolidating, confirming and enforcing the rights of Turkish residents and at the same time barring those wishing to come to the EU from Turkey is likely to continue for some time to come.

Although it is impossible to assign a single date to the end of one migration and the beginning of another, as there is a degree of overlap (see White 1993: 49), it has become conventional to date the recruitment stops in 1973/74 as the beginning of the family migration period. On the other hand, it is also true that migration of family members was already taking place prior to the stops, though on a limited scale. Since then, migration of family members has become an important phenomenon which has caused receiving states to respond increasingly to this secondary route of migration into Western Europe. Thus, now, the increase in family migration is seen as the biggest challenge to the policy of controlling migration (Hollifield 1986: 120).

Although there has been considerable return movement of Turkish migrants, the Turkish residential populations in Western Europe have continued to increase. According to recent figures, there are now around 2,856,798 Turkish residents in Western Europe, of which 2,014,000 were living in Germany at the end of 1995.[5] Such figures, coupled with other indicators, suggest that most of the Turks living in Western European countries have become permanent settlers. However, most of them lack full legal, civil and political rights. The second-generation of immigrants, despite their safer legal status in relation to residence and work permits and so on, encounters different types of problems such as educational problems, rising unemployment and

[5] See *MNS*, May 1994, p. 8; also see *MNS*, May 1996, p. 14 for the most recent figure for Germany.

discrimination in the labour market. The highly complex human phenomenon of temporary worker migration has, over the past decades, mainly resulted from an unclear 'guest' status and the complexity is increased by different socio-cultural, political, psychological and ethnic backgrounds (Kağıtçıbaşı 1985: 105).

Today, the integration of immigrant populations presents a major issue for both immigrants and receiving countries. The integration of the Turkish minority groups in Europe, as well as other migrant groups, necessitates in the first place the establishment of legal safeguards. As every human being, they need an environment and rights protecting them, so they can feel secure and be protected against the recent nasty events that have been witnessed.

1.2 The scope of the study

Most of the existing studies on Turkish migration are primarily concerned with sociological, economic and cultural aspects of this phenomenon.[6] While there is a wealth of general social science literature, a thorough analysis of the bibliographies concerned with migrant workers in Europe reveals the scarcity of research work in the legal field.[7] This is even more true when it comes to the legal aspects of Turkish migration to the EU. Until recently there has hardly ever been any study devoted to the legal position of Turkish immigrants in Europe.[8] It appears that the legal aspects of Turkish migration to Western Europe have been considered, on the whole, a matter for domestic law. Therefore, one would rarely find discussion of the issues relating to Turkish immigrants, only in passing as part of the legal aspects of a national law, if at all.[9] Partly due to changes in the conception of human rights of immigrants in recent years and mainly due to the influence of important ECJ decisions concerning the application of the Association Agreement

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[6]See, by way of example, Paine 1974, Başgöz and Norman (eds) 1985, Abadan-Unat's works in various years, and various research projects carried out by the Centre for Turkish Studies in Germany. Martin 1991, Şen and Goldberg 1994 provide a recent account of works of this type.
[7]For studies with a legal focus see in particular Thomas 1982; Pauly and Diederich 1983; Frowein and Stein (eds) 1987; Hammar 1992.
[8]For a survey see now Çiçekli 1995.
[9]See for example Franz 1975, Thomas (ed) 1982 and Bendix 1985.

of 1963 and its various components (see Chapter 3), some attention is now being given to the legal protection of Turkish immigrants from an international perspective.[10]

Recent attempts by the immigration departments of the member states of the EU to harmonise rules across the Community on immigration and family migration issues for non-EU nationals have raised concern, particularly because of the danger that the most restrictive provisions in force in each Member State may now be generalised across the Union as the prevailing norm. Therefore, as expressed in a recent report (JCWI 1994: 1), there is an urgent need to know a great deal about the immigration and family migration policies in the Member States of the Union. What are the most restrictive aspects of each national situation and what are those parts which are just and supportive of human rights principles? On the basis of this knowledge, it would be possible, more effectively, to counter further moves in the direction of controls and restrictions, as well as to advocate immigration policies which incorporate and respect fundamental principles of human rights.

Notwithstanding the fact that the present thesis is not so much a study about human rights as about state practice, it would be still useful to discuss the positive impact of international law instruments in protecting the rights of Turkish immigrants and their families. Despite the importance given by states to their perception of self-interest rather than upholding the principles of human rights of immigrants in the field of immigration law, there is also some scope of application of international human rights instruments in establishing minimum standards of treatment for migrant workers and their families.

It must also be emphasised here that this thesis does not cover cases of asylum and political refugees as the main concern, since this would be too wide for the scope of the present study. Refugee law is also a separate area of study and can be distinguished from worker and family migration. In various parts of the thesis, however, asylum seekers and refugees have been

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[10]Particularly worth mentioning are the involvement of the various bodies of the Commission of the European Communities, the Immigration Law Practitioners' Association (ILPA) and the Dutch Centre for Migrants (*Nederlands Centrum Buitenlanders*). Now see Wornham 1994, Gutmann 1996.

discussed, as their presence has in some cases significant repercussions for other migrant workers and their families. Furthermore, racial discrimination is not a main concern of this study, but will inevitably be a relevant issue to consider.

In view of the paucity of material on the legal position of Turks under the national jurisdictions of individual EU countries, the present study attempts to evaluate how the legal reception and status of Turkish migrants is reflected and mirrored in three different national systems of immigration control in Europe, those of Germany, the Netherlands and the UK. The thesis seeks to test if and to what extent the legal systems of these three countries have differed in their response to the presence of Turkish immigrants, and which variables have been most effective in the legal reception and status allocation of Turkish immigrants.

Immigration law is an area of law which has been influenced heavily by socio-economic and political factors and therefore developed rapidly in line with changes in the economy, social life and world politics. The legal aspects of Turkish immigration to Western Europe could not be effectively explored only through a study of purely legal character. Therefore, although my aim is to focus on the legal aspects of the issue, a balanced harmony between the legal and other related aspects, which may not and cannot be separated, has to be provided here; this is necessary to show the interplay between the legal issues and various socio-economic, political and other considerations. In particular, we need to consider the underlying factors behind the development of immigration laws and the legal reactions of the respective countries towards Turkish immigrants.

The thesis shows that, in the three different countries we are concerned with here, there is a variety of responses to Turkish migration. The main premise from which we set off was that the absolute and relative size of the immigrant to the native population would influence social perceptions in the receiving country as to whether the migrant population presents a 'social problem' (Kritz et al. 1983: xxviii), which in return would give rise to particular responses, legal or otherwise, to that particular group. As the thesis progressed, it became clearer that Turks, as immigrants, are in fact

targeted everywhere by the national immigration systems. In addition to the size of the Turkish migrant population in the receiving countries, distance of cultures and the unique development of each national immigration system have proved to be the key factors in assessing the legal reception and status of Turkish immigrants in the EU.

It also became clearer that the need for immigrant workers for certain categories of jobs in these three countries has not really disappeared. These receiving countries are actually trying to satisfy such demands through various work categories which would not, in principle, lead to permanent settlement of these workers, such as project-tide work, seasonal work and training. Accordingly, the respective systems of immigration control seem to be trying to balance the economic benefits of labour migration against the social problems associated with the presence of immigrants from undesirable countries, notably from Turkey.

Migration to Britain has been considerably different from that to the other two countries, to the extent that immigrant workers, as classic aliens, have formed a very small proportion of its migrant workers. Since most of its migrant workers came from Ireland or from former colonies in the Caribbean and the Indian sub-continent, these immigrants differed from the Turkish workers recruited by other European countries in that they had a number of political and other rights based on the former colonial ties (Layton-Henry (ed) 1990: 49-50). Actually Turkish workers had no colonial connections to any of the three countries selected here. Turkish workers are, further, only represented as a tiny minority in Britain, where migration trends were most strongly influenced by colonial ties. More recently, the group of Turkish Cypriots has shown an increased presence, but they are not directly included in our present study because they were often admitted to Britain under a different legal regime with accompanying political and citizenship rights.

In Britain, the strict system of immigration control mainly focused on controlling migration from the former colonies. Although these rules were not made for Turkish migrants, equivalent rules for aliens would be applied to them. Thus, even though Turkish immigrants in Britain are only a tiny minority, they are in fact subject to similarly strict controls. It will be particularly interesting to

see how English law reacts to the relatively few cases of Turkish immigrants. Will they still be seen as constituting a potential threat to the British system of immigration control, or will discretion be exercised in their favour?

As for the Netherlands, the response of the Dutch immigration system is considerably different from that of the British, despite the fact that Holland also had migrant workers and political refugees from its ex-colonies. The existence of a substantial number of Turkish migrants as a result of the recruitment of Turkish workers confirms that the Dutch system has developed not only in reaction to migrants from the colonies, but also to immigrant groups like the Turks.

When it comes to Germany, we find an immigration control system which mainly responded to Turkish migration, as there is such a large number of Turkish people living in Germany, and Turkish immigrants constitute the overwhelming majority among the immigrant groups in Germany. In addition, asylum seekers from Turkey have been one of the largest groups. For Britain, it has been argued that British policies, laws and regulations on immigration appear to have been fine-tuned to exclude mainly South Asians from settling in Britain (Sachdeva 1993: 7). The present thesis examines to what extent German immigration policies have been mainly focused on Turks.

Comparing the legal reception and status of Turkish migrants under each system of immigration control which has experienced a varying number of Turkish immigrants should show the extent to which these legal responses have been influenced by the respective images of flows of Turkish workers. Thus, in addition to the size of the Turkish immigrant population in these three countries, one should also take into account the perception of Turks as a potential threat to these national systems of immigration control.

The legal reactions of these three systems of immigration control appear to range from the German response, which is likely to see Turkish migration as a social problem, to the Dutch reactions to Turks as one of the main immigrant communities, and finally the British perception of Turks as a

member of that large threatening category, 'immigrants'. In any case, we need to look at how the respective legal reactions have developed and, to some extent, how they are being perceived by the respective Turkish migrant group.

1.3 The method and organisation of the study

A variety of social and legal materials have been consulted and used in the process of carrying out the research for this thesis. To begin with, the general social science literature on immigration and post-war immigration to Western Europe in particular has helped to shed light on the general themes of the phenomenon of post-war migration to Western Europe. Further, international works of a comparative nature on matters relating to post-war migration to Europe and Turkish migration to Europe in particular have helped me to pull together the perspectives and issues of the three different national settings. Moreover, social and legal research which has appeared in immigration journals, relating to immigrants generally and Turkish immigrants in these respective countries in particular, has enabled me to understand more specific issues concerning Turkish immigrants.

A significant number of cases, both national and international, concerning Turkish immigrants directly or indirectly, have been referred to. In particular, the case law of the ECJ on matters relating to freedom of movement of immigrants and especially of Turks, and that of the European Court of Human Rights and the Commission, particularly on matters relating to immigrants and the right to family life, have been studied.

Informative publications of the various immigrant organisations have proved very useful in collecting up-to-date material on the developments in the three countries. A number of activities and conferences provided me the opportunity to see and discuss some of the implications of the issues relating to Turkish immigrants. Last but not least, social and legal experts on migration, and especially on Turkish migration in the three countries, have provided me with helpful insight into the issues, answering specific questions relating to the individual legal system and the EU and giving me access to their own materials (see above, p. 3).

The present thesis consists of eight chapters. In the first part of the thesis, that is Chapters 2 and 3, the discussion focuses on such aspects of Turkish migration to Western Europe which have overall applicability for the whole EU. The second part of the thesis, that is Chapters 4-7, assesses the individual aspects of each national immigration system as they relate to the legal situation of Turkish immigrants.

The second chapter attempts to give a comprehensive picture of Turkish migration to Europe. This brief analysis explains the general situation of Turkish migrant workers to illustrate the realities and dynamics of Turkish migration and the circumstances in which it was initiated and has been developed since then. Here it has been possible to refer to the published work of several researchers for their valuable contribution. This chapter starts with assessing more general issues of Turkish migration in the first place. The general policies of the receiving countries towards Turkish migrants and of the different phases of Turkish migration are discussed throughout in some detail. In particular, the development in the nature of Turkish migration to Western Europe and the implications of Turkish migration on the labour market are discussed in some depth. Further, the present sub-chapter considers the impact of the collapse of the guest worker systems and what in Britain has been called 'the myth of return' (Anwar 1979), leading to the eventual settlement process of Turkish migrants in Western Europe.

The following sub-chapter focuses on the factors leading to migratory movements both in the migrant receiving countries (pull factors) in Western Europe and in the sending regions in Turkey (push factors). The relevant pull factors are a combination of economic, demographic and social developments in Western Europe during the post-war period. Push factors include, *inter alia*, socio-political and economic factors, demographic pressures and other elements motivating potential migrants. Finally in this section the economic motivations of labour migration are discussed both from the point of view of employers and of the receiving countries, and of emigrants.

Chapter 2 also investigates the socio-cultural characteristics of Turkish migrant workers prior to emigration. Section 2.3 contains a structural analysis of Turkish migrants concerning their social status, geographical origins, educational levels, qualifications, and the impact of skilled worker emigration on Turkey. Furthermore, a brief analysis of the social and demographical changes of Turkish migrants after migrating to Europe has been carried out, with particular focus on the gender distribution and the age structure of Turkish migrants and their respective implications on the composition of the Turkish EU population.

The final part of Chapter 2 considers the socio-cultural impact of Turkish migration on the member states of the EU. In particular, social and cultural tensions resulting from the existence of Turkish immigrants, including educational problems, integration and discrimination, are discussed to the extent that they are relevant for a consideration of immigration policies.

In chapter 3, our main goal has been to provide a framework of international legal conventions which may amount to an 'umbrella regime' for the individual countries we are concerned with as regards their treatment of Turkish migrants, thus supplementing the protection already available in domestic law. Although this chapter itself could perfectly well be an interesting research topic in its own right, we decided to treat the impact of international law as briefly as possible and to explore only those aspects which seemed most relevant for our discussion.

Accordingly, Chapter 3 begins with a brief analysis of the rights of aliens in international law, with particular attention being given to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and other instruments available under the European system, such as the European Convention on Human Rights (ECHR) of 1950, the European Convention on Establishment of 1955 and the European Social Charter of 1961. Secondly, the assessment of the Ankara Association Agreement of 1963 which gives extra rights to Turkish migrants, points to several important implications. In the latter parts of the chapter, the rights of Turkish migrants under EU Law, supplemented by the European instruments mentioned

above, are considered in detail, having particular regard to the Association Agreement and the case-law of the ECJ on the interpretation of the Association Council decisions.

First of all, what we are concerned with here is the legal position of Turkish workers relating to access to the labour market, followed by a discussion of the various propositions concerning Turkish self-employed or would-be self-employed persons. Further, the legal position of Turkish migrants in respect of the rights to family reunification and family formation, both within the domain of EU law and international law, is analysed. Finally, social security rights of Turkish migrants and their protection against expulsion have also been discussed, particularly with reference to the Association Agreement.

As indicated above, four substantive chapters then discuss the legal aspects of Turkish immigration within the context of the national laws of the three countries we are concerned with, taking into account international and EU law. These chapters together provide a comparative and detailed analysis of the immigration regimes as they relate to the legal reception and status of Turkish immigrants in Europe. Chapters four and five explore the issue of employment-related immigration on a country-by-country basis. These two chapters focus on the categories of 'workers' and 'self-employed persons' respectively. Although most of the migrants may be classified as workers, there has been a very substantial increase in the number of self-employed Turkish people in recent years.

Immigration of workers is virtually not possible any more after the recruitment bans in the 1970s. However, in certain cases immigration is still allowed for certain categories of jobs and workers (see Groenendijk and Hampsink 1994). We also come across special categories of workers who are allowed to be recruited; one can also talk here about 'international skill transfers' (see Salt and Ford 1992). Such examples show how economic concerns may prevail over exclusionary immigration policies in the three receiving countries. Particular efforts of the receiving countries in trying to integrate the existing workers and their children into the labour market have also been considered within the context of immigration policies of the three receiving countries. The chapter

also shows that domestic regulations on residence are of central importance for the migrant workers. In particular, procedures for issuing work and residence permits remain open to prejudice and discretion.

Chapter 5 first discusses the official policy in each of the three countries with respect to self-employed immigrants and Turkish self-employed persons in particular. We find, on the one hand, resident immigrants changing their status from workers to those who open and run their own business (shops, restaurants, factories, etc.). The responses of the individual countries' immigration systems to this increasing self-employment pattern of Turkish resident immigrants have been analysed. On the other hand, new migrants may wish to set up a business in the receiving countries and be admitted under specific business rules. The rules and regulations and practices of the three countries and the difficulties that such applicants experience have been discussed in some depth.

In chapters 6 and 7, we are concerned with family migration of Turks. As pointed out earlier, family migration became increasingly important following the recruitment stops in the 1970s. There is much evidence in the literature that this has become a matter of central concern and that the question of family entry and subsequent residency is most important to migrant workers and has the most significant long-term implications for the receiving societies (Miller and Martin 1982: 73).

Legally, too, there has been a shift of focus from worker recruitment to family migration. Chapter 6 concerns 'family reunification' which means that spouses, children and other relatives apply to join the migrant in the receiving country. This is an ongoing process, probably not completed. This study mainly concentrates on the legal restrictions and conditions which ought to be fulfilled for the entry of dependants. These are age conditions for children, availability of suitable accommodation and support, probation periods, and many other issues. The question here would be whether there is any justification behind such conditions and restrictions. The entry of relatives who qualify as a family member is often perceived as additional costs to the social security system

from the receiving countries' point of view. Considering the strength of such arguments and illustrating the different perspectives of immigrants may help us to achieve a fuller picture.

Chapter 7 is mainly concerned with marriages in the second generation, in other words 'family formation'. This mainly affects the second or even third generation because they will be in a position to decide whether or not to marry someone in the receiving country. This might be more of a problem concerning young Turkish women, if one can go by the experience of Pakistani and Indian women in Britain (see Sachdeva 1993), because in a patrilocal pattern of marriage alliances, Turkish girls growing up in Germany, Holland and Britain would be expected to move to Turkey, joining the husband upon marriage. However, the evidence suggests that young Turkish women in all three countries prefer to call the husband over to Western Europe. This new pattern has raised suspicions of hidden worker migration. The most obvious example of legal reaction to this scenario is the British primary purpose rule (PPR), which has been developed in response to Asian patterns of inter-continental marriages. In addition to the British PPR, the rationales behind the German probation conditions and the Dutch integration test have also been discussed in detail in this chapter. Arising from such scenarios, the present chapter also includes a discussion of the right to family life within the wider context of EU and international law.

In addition to the issues I have just outlined above, I would have wished to include 'temporary migration' of Turks to Germany, the Netherlands and the UK, if it had been possible to fit this within the scope of the present study. This would have meant two extra chapters, one of which would deal with visitors, the other with students. In respect of visitors, there would have been a section on the motives and reasons of people wishing to come to these countries. An analysis of the respective rules for entry clearance and visas would have shown that governments in Europe remain worried about the possible flow of people from Turkey. On the other hand, many individuals may simply wish to exercise their right to family life by visiting relatives, attending wedding ceremonies, or other functions. There have been many cases of prejudice and discriminatory application of the rules and procedures. The possibility of appeal and other remedies available in these countries would therefore also be matters of concern.

As for students, it would have been useful to put economic and other concerns regarding their admission into the wider context of immigration regulations. Clearly Turkish students face many difficulties in terms of immigration rules and practices in the respective countries. Apart from such practical problems one could evaluate how economic concerns affect national policies on immigration and related matters as far as students are concerned. However, it was not possible to include these two chapters without going over the prescribed word limit.

Further issues that might have been explored in a study of this kind are nationality and citizenship issues for Turkish migrants in Western Europe. Almost every single constitution differentiates nationals from non-nationals in that it gives certain rights in terms of voting, public employment and many other matters, only to nationals. Post-war immigration to Europe has created large communities of long-settled Turkish migrants who lack full legal, civil and political rights. In spite of their long residence, a great number of Turkish immigrants remain non-citizens because of the difficult naturalisation process as well as feelings of non-belonging. This is particularly the case in Germany where absence of citizenship gives rise to more or less formal discrimination against Turkish migrants (Bendix 1985: 49). Research on this topic should include, among other things, matters relating to the requirements and procedures for naturalisation, voting rights for the immigrants, dual nationality and denizenship. Particular attention should be given to the interaction between integration policies and the legal means that can facilitate that process.

Further, one could look at the legal aspects of Turkish migration from a different perspective, by concentrating on the effects of Turkish migration to the EU on Turkish law itself. Again, this is an interesting research topic, to which hardly any attention has been given, and which needs to be further explored. The most relevant issues here are the effect of Turkish migration on nationality and immigration law in Turkey, the response of Turkish law to issues like 'dual nationality' and 're-migration' of Turks. Further, the reactions of Turkish family law to marriages and divorces taking place in the receiving countries need to be discussed in much detail. All these are tasks of the future.

The present thesis concludes with a comparison of the regulatory framework that Turkish immigrants have encountered in Germany, the Netherlands and the UK. Turkish migrants to European countries have experienced different legal reactions, from open welcome, albeit as guest workers, to hostile rejection as part of 'the other'. This thesis argues that Turks, as immigrants, are targeted everywhere by the immigration systems in varying degrees. The concluding section also considers whether and to what extent the size of the Turkish immigrant population and its cultural distance give rise to particular responses, legal or otherwise, to Turkish immigrants. It further assesses how this approach has been modified to some extent by the unique development of each national immigration system and the need for new workers for certain categories of jobs.

While it was correct to assume that the German immigration system is much more attuned to Turkish migration than the rule systems of the Netherlands and Britain, also the few Turkish immigrants coming to Britain will encounter immigration controls that are designed to exclude rather than integrate. In the long run, this raises the question whether such exclusionary rules are actually good for what in Britain is called 'race relations'. To the extent that Turkish communities become permanent settlers in Western European countries, the respective immigration laws of these countries need to take account of the long-term presence and particular needs of international families. In this context, various international instruments, such as the 1990 UN International Convention, though not in force yet, appear to have the potential of strengthening the rights of immigrant workers and their families, if implemented. This thesis clearly confirms the important shift from worker migration to family migration among Turks in Europe. Within this context, EU law and in particular Article 8 of the ECHR provide important additional and inalienable rights. The existing difficulties over the flexible implementation of family reunion and family formation policies show that there is still much scope for an improvement of the legal position of Turks in Western Europe.

CHAPTER 2

TURKISH MIGRATION TO EUROPE

Historically, Turkey had never been a region of large-scale emigration until the beginning of the 1960s. During the nineteenth century, the majority of people remained isolated from the developments taking place outside Turkey. This state of isolation was not changed during the early years of the new Turkish republic. However, the inhabitants of Turkey began to consider their economic choices on a wider scale, firstly on a national level in the 1950s and subsequently on an international level within the framework of Europe in the 1960s, parallel to the rising incorporation of Turkey into the world economy and politics (Centre for Turkish Studies (CFTS) 1993a: 3).

Migration is a highly complex phenomenon of far-reaching socio-cultural, economic, political, legal and psychological consequences. Therefore, one may approach the issue from various disciplines. As stated in the first chapter, one of the main aims of this thesis is to evaluate the interaction between socio-economic and political considerations of the receiving countries and the legal reception and status of Turkish immigrants in these countries.

As already stated in the first chapter, immigration law is an area of law that has been influenced heavily by socio-economic and political factors and therefore developed rapidly in line with changes in the economy, social life and world politics. Accordingly, a study of this kind on such a complex topic as the legal aspects of Turkish immigration to Western Europe could not be effectively explored through a study of purely legal character. Thus, the present chapter enables us to consider the socio-economic dynamics of immigration. It also helps us to provide information about the underlying factors behind the development of immigration law and the legal reactions of the respective countries towards Turkish immigrants in particular.

This chapter provides a general overview of Turkish immigrants in the EU, focusing on social, political and economical aspects of Turkish migration to the EU. Our later analysis of the legal reception and status of Turkish immigrants is largely based on our understanding of the issues discussed in the present chapter. Only through such an understanding is it possible to handle the complexities and paradoxes of the legal reactions of the immigration laws of the individual countries.

2.1 Changes in the nature of Turkish migration to Europe

2.1.1 Shift from recruitment to family migration

Immigration of Turks as well as other immigrant groups into Western Europe may be subdivided into four phases of migration in terms of the dominant forms it takes (see Sopemi-Netherlands 1991: 41).

Phase I Labour migration

Phase II Labour migration and family reunification

Phase III Family reunification and family formation

Phase IV Family formation

Studies on family migration[11] rarely make a distinction between 'family reunification'[12] and 'family formation'.[13] Rather, they discuss the issue under the headings of family migration or family reunification, ignoring the above distinction.[14] Until the recruitment stops in the early 1970s, large numbers of Turks migrated to EU countries throughout the 1960s, mainly as recruited migrant labour. After 1973 there was a significant fall in the numbers of Turkish

[11]See Sopemi-Netherlands 1991.

[12]Family reunification: migrants residing in the receiving country reunite with their existing family (spouse, children or other relatives).

[13]Family formation: a new marriage between a migrant (or migrant's child) living in the country of settlement, with a partner in the country of origin, leading to migration of the latter to the country of settlement of the former.

[14]See for example, Dumon 1976, Perruchoud 1989, Thomsen 1987.

workers who were officially recruited by the EU countries, as can be seen from the table below.

Table 1: Annual numbers of Turkish migrants recruited officially between 1961-1993:[15]

Years	Germany	Netherlands	UK
1961-1973	648,029	23,359	2062
1974-1980	9,412	1,836	456
1981-1984	409	42	29
1985	23	5	10
1986	17	12	27
1987	27	18	22
1988	85	19	-
1989	51	21	-
1990	62	31	-
1991	49	22	-
1992	1.685	21	-
1993	1.999	12	-

The above figures clearly indicate that official worker migration almost came to an end following the recruitment stops in 1973/4. There was a very sharp decrease in the number of Turkish people being recruited each year, which shows and confirms the exceptional character of these recruitments today. These are, probably, individuals with high skills and qualifications, who move to the receiving countries by making use of specific exceptions granted to them in the immigration laws and rules of these countries.[16]

The family reunification stage, though it overlaps to a limited degree with the recruitment phase, mainly started following the recruitment stops in 1973/74, and accelerated very rapidly despite the dramatic decrease in the number of recruited workers. Therefore, the aim of cutting the immigrant populations was not achieved. This has been well-known for some time:

[15] Source: Turkish Ministry of Labour and Social Security (TMLSS) 1991: 163 and TMLSS 1994: 5. This table represents Turkish workers sent by the Turkish Employment Service (TES); such data may underestimate actual emigration by 20-40 per cent.

[16] See briefly p. 36 below for international skills transfers and Chapter 4 for the legal implications of this.

> "Just as the Commonwealth Immigrants Act of 1962 had encouraged permanent settlement in Britain, the stopping of labour entries encouraged family reunification and settlement in the other countries." (Castles and Kosack 1985: 490)

The shift of Turkish migration to family reunification, coupled with economic and social developments and political changes in Turkey, has given rise to another huge inflow of Turkish migration to the EU countries. The Turkish population, particularly in Germany, has continued to increase and became more stabilised in the late 1970s. The structure of the migrant population began to change considerably within a short period of time, since the early days of 1970s, which was then a 'workers only society'. In addition to this, many Turkish asylum seekers have come to Western Europe where they have joined the economic migrants of the 1970s, especially just before and after the military coup of 1980.[17]

Family formation, which means that an immigrant is getting married with someone from his or her country, both wishing to settle in the receiving country, has important implications both for the second-generation and the policy makers in the receiving countries.[18] In Britain this possibility has been dramatically cut as a result of changes in immigration rules, particularly for persons originating from the various Asian, African and Afro-Caribbean ethnic minorities (see in detail Sachdeva 1993). This was achieved by "an intricate system of specially designed rules which culminate in the openly arbitrary and degrading system of exclusion of spouses, enforced by the primary purpose rule" (Sachdeva 1993: 9-10). In German and Dutch law, there is no such harsh approach as under the primary purpose rule, but there are various regulatory provisions, such as waiting periods and prohibitions on working, which appear to have the same aim of discouraging new entrants.

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[17]The number of people from Turkey seeking asylum in Germany reached to 77,880 between 1978 and 1981 and showed a steady increase in later years (11,426, 14,873, 20,000, 22,082, 23,877 in 1987, 1988, 1989, 1990, 1991 respectively (Turkish Ministry of Labour and Social Security 1992: 9). On asylum seekers in Germany see Münch 1992, Mühlum 1994, Barwig et al. (eds) 1994.

[18]On this see in detail Chapter 7 below.

On the whole, particularly during the third phase of Turkish migration, certain restrictive measures have been implemented in limiting family reunification and formation such as a two to four year waiting period in Germany for children or spouses, respectively, before employment may be taken up in the host country. Details are discussed in chapters 6 and 7 on family migration below. It needs to be pointed out here that these phases naturally overlap with each other, and therefore the issues we are dealing with cannot be limited to any of the periods.

2.1.2 Implications of Turkish migration on the labour market

Leaving aside details of the various opposing arguments relating to labour market conditions in Western Europe and the place of Turkish immigrants for the time being,[19] it suffices to say that:

> "The Western European Turks, who have passed from the guest worker status to the immigrant status, from the immigrant status to the ethnic minority status, can no longer be defined as factory workers only". (CFTS 1993a: 158)

Turkish migration has undoubtedly provided both upward and downward mobility (see Abadan 1976: 11). Upward mobility is seen in the form of intragenerational mobility from agrarian occupations towards jobs in industry. Downward mobility is represented by a shift from white collar jobs to blue collar jobs, perhaps for reasons of better pay and lack of opportunities for immigrants in white collar jobs - when teachers and civil servants are taking up industrial employment abroad.

The picture of downward mobility has sometimes been painted rather negatively in the literature, often referring to the figures and the results of research conducted. Abadan (1964: 116) indicated, perhaps with some exaggeration, that 40.8 per cent of the Turkish workers in Germany did not use a single tool and another 45.3 per cent did not operate any machine. Nevertheless, migrant workers are often not given full opportunities to gain skills or to be

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[19]These arguments are found in Abadan 1964, 1976, Krane 1973, CFTS 1993a, Şen 1994.

promoted in their job since vocational training programmes do not appear to target them. It has been observed that mobility from unskilled to skilled positions is restricted for the immigrant worker (CFTS 1993a: 31). An earlier study concluded in a similar manner:

> "Socio-economic mobility engendered in Turkish society by cyclical international migration manifests itself primarily in terms of moderately elevated earning power and improved living standards. Occupational mobility in and of itself would appear marginal, for in most instances the educational opportunities essential to substantially augmented skills are not present in the migration cycle." (Krane 1973: 436)

The migration cycle, as such, did not bring about a breakthrough in status terms to Turkish migrants, but nevertheless has resulted in an improvement in living conditions and standards of living. According to the available data, Turks fall predominantly under the income group earning between 1,800 - 2,200 DM in Germany as of 1989 (see CFTS 1991a: 9). This is a figure of at least four times higher than a normal worker would earn in a month in Turkey.

On the other hand, unemployment has become a serious problem in the Western European receiving countries both for the native and the migrant populations in the 1980s and 1990s. It is ironic that although employment was one of the major motivating factors of the original migrants, they are now often faced with greater employment problems because they are still seen and treated as unskilled workers and are often subject to discrimination. There were 147,007 unemployed Turkish workers in Germany in 1993.[20] According to the same source, the unemployment rate of Turks was 19.9 per cent as of December 1993, slightly higher than the unemployment rate for all foreigners, which was 17.5 per cent, and much higher than the general unemployment rate in Germany (9.1 %). The current picture is probably worse.

Since it is not within the ambit of this study to consider the various reasons for the unemployment of Turkish immigrants, it suffices to say that unemployment is one of the consequences of the worsening economic conditions coupled with possible discrimination in

[20]See Turkish Ministry of Labour and Social Security (TMLSS) 1994: 23; also see CFTS 1993a: 32, table 16 for unemployment figures of foreigners in Germany.

the labour market as well as a reluctance on the immigrants' part to work, as they may still be better off unemployed in the receiving country than in Turkey. The unemployment of migrant workers often contributes to the rising tensions between indigenous people and migrants and, more dangerously, becomes a justification for the radical manifestations of protests about the undesirability of immigrants in the receiving country. This, in turn, may result in further restrictions in immigration rules and practices which, in Germany at any rate, may particularly target the Turkish population.

Foreigners make up a large part of the social group that is most affected by negative developments in the economy. Therefore, they face not only the uncertainty of possible changes in unemployment benefits or social aid, depending on their residence status, but also the possibility of being sent out of the country. Not surprisingly, in order to remain in Germany with any certainty under these conditions, the strategy to establish one's own business has become quite prominent (CFTS 1991a: 5). Further, as is rightly pointed out, the desire to become self-employed in Turkey seems to have been substituted by the desire to become self-employed in Europe, perhaps owing more to enforced conditions rather than any actual willingness (CFTS 1993a: 155).

Accordingly, interesting developments have taken place in the self-employment sector. The increasing self-employment patterns, savings, contracts for purchases of houses and other investments in the host countries have resulted in an economic situation in which immigrants are not only factory workers but also employers who create jobs (see Şen 1994: 97-99, CFTS 1991a, 1991b, 1992c).

In order to show the scale of this development, it suffices to quote some of the figures concerning self-employed Turkish migrants. Turkish migrant businessmen have made investments in 55 different sectors in Germany; the total amount of investments amounting to a figure exceeding 5.1 billion DM at the end of 1989 and 7.8 billion DM in 1992; the average annual revenue of all firms was about 28 billion DM in 1992 (see CFTS 1993a: 156). There

are around 10,500 Turkish self-employed persons in the Benelux, in Britain and in France (Şen 1991a: 128). The data show that there has been a strong tendency among Turkish migrants from wage-earning employment towards self-employment. I shall discuss the immigration-related implications of the development in self-employment patterns of Turkish immigrants in Chapter 5 below.

2.1.3 The collapse of the guest worker system or the myth of return

The guest worker system has been traditionally perceived as a temporary solution, adjusted to the needs of the internal labour market. This was so particularly in Germany. One of the general principles of the system was the rotation of workers in order to prevent settlement (see Castles and Kosack 1985: 98). By the beginning of the 1970s, there were already signs that the system of temporary labour recruitment was ceasing to function effectively. The 'rotation' principle, which was one of the general principles behind such government policy, did not work in practice because employers were not happy about too much rotation and the dislocation effects from retraining (see in detail Körner 1990).

We saw that the waning of labour entrants encouraged family reunification on the Continent. Similarly, it gave rise to the same development in Britain following the Commonwealth Immigrants Act of 1962. Apparently, governments could do little to stop this. Any attempt at repatriation of the immigrants would be challenged within the context of EU law and bilateral agreements, as a result of their long stay (see Edye 1987: 30-31). Actually, doing so would have been economically damaging, too.

On the other hand, the 'infiltration' of foreign manpower throughout the whole economic system gave rise to a permanent (structural) need for a continuing immigrant flow, as nationals abandoned low-status jobs for more socially acceptable ones (see Maillat 1987: 50). After immigrants had filled the jobs deserted by nationals, the longest-standing immigrant categories began to fill in more attractive posts. To keep this process running smoothly, a constant supply of manpower, new migrants, for the lowest-paid jobs was needed. Once this process had gone

far enough, some branches of the economy would be unable to survive without the presence of foreign workers, resulting in an interdependence of the jobs held by nationals and the migrants. This so-called 'cumulative process' has made the migrant an indispensable factor for the receiving country (see Maillat 1987: 50). According to Böhning's idea of a self-feeding process of migration:

> "Once the political decision has gone in favour of the foreign worker or *Konjunkturpuffer* approach, the self-feeding process of migration from the chosen labour surplus areas into the labour-shortage jobs commences, and it can not be reversed except by a fundamental political decision". (Böhning 1984: 70)

According to the economics of self-feeding migration,[21] the originally localised recruitment of labour, that is to say, concentration in certain industries, gradually extends to all sectors of the economy and turns into a generalised need for blue-collar workers in unskilled and semi-skilled positions. The need is not as widespread in comparable white-collar jobs since indigenous workers are still entering them regardless of unfavourable wages, and it is difficult for foreigners to work there due to their language and training limitations. The employment of foreigners in originally isolated sectors of low-wage industries soon spreads to socially undesirable jobs in other sectors of the economy, from jobs in hotels and catering to jobs in manufacturing industry. It also encompasses temporary labour needs, often in the agricultural sector (see now Groenendijk and Hampsink 1994).

Nevertheless, this self-feeding process of migration cannot be only limited to unskilled and semi-skilled positions. The literature on international migration also talks about international skills transfers.[22] Therefore, this cumulative process has made not only unskilled or semi-skilled immigrants but also skilled immigrants an indispensable factor for the receiving country. Therefore, the idea of a self-feeding process of migration needs to be seen as covering the whole range of jobs, skilled or unskilled.

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[21] For details see Böhning 1984: 71-79.
[22] See Bhagwati 1979; Salt and Ford 1992; Groenendijk and Hampsink 1994.

2.1.4 Movement towards permanent settlement

Turks in the 1960s and 1970s gave importance to returning home from Germany.[23] However, little by little, owing to the disappointment which many early return migrants experienced from the 1980s onward, Turks began to prefer remaining in the countries they lived in. Although there have been successful individual investments made upon return, news of subsequent failures in efforts to make investments collectively in the form of 'workers' companies' was one of the most important reasons for many Turks' decision to settle permanently in Europe (CFTS 1993a: preface).

During the whole process of Turkish migration to Europe since about 1960, it was obvious that most of the savings brought back or remitted to Turkey by migrant labour have been invested in ways to ensure individual or family welfare. This only indirectly created income or jobs for others in the locality, and therefore did not serve to increase the development of regions and villages. One solution found was the so-called workers' company established in the late 1960s, which was a joint-stock company with a large number of shareholders, none of whom held a disproportionately large share (see CFTS 1993a: 151-155). However, it must be mentioned that in Turkey's economic reality the genuine joint-stock company was a comparative rarity and very premature: most large companies present themselves as such, but in reality they are controlled by a few people (for details see Keyder and Aksu-Koç 1988: 76-77).

The majority of such companies went either bankrupt or closed down, apparently as a result of wrong projects and location choices, bottlenecks in the recruitment of competent management and problems in obtaining credit. The failing experience of the workers' companies coupled with the discontent of most returnees, also because of negative signs of the Turkish economy, such as high inflation, has caused Turkish migrants to remain abroad and keep prolonging their stay there for an indefinite time (CFTS 1993a: 154).

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[23]On return migration see Tuna 1967, Abadan et al. 1976, Azmaz 1980, Tatlıdil 1982.

Family migration has played an important role in this process (see further Chapter 2.4 below). Actually, family reunifications may have been both a result and a cause of prolonged stay. The arrival of wives and family meant more expenses for housing and keeping the family in the receiving countries, such as paying for the journey, furnishing the home and paying rent (Heijke 1987: 184). As a result, it took longer for migrants to reach their economic targets, so that they had to stay longer in the receiving countries. Therefore, family reunion has resulted in lengthening of the stay in the host countries (Heijke 1987: 184). In return, the lengthening of the stay caused migrants to delay or to abandon their decision to return.

Böhning (1984: 79-86), in explaining the sociology of self-feeding migration, maintains that the increasing length of stay and the high degree of family reunion lead to an enlargement of the immigrant population through the appearance of ethnic employers, secular and religious leaders and by means of births in the immigrant population (Böhning 1984: 85). Immigrant workers and families settled in groups and colonies, which gave rise to a demand for ethnic shops, schools, mosques, etc. In particular, married migrants who have their wives and children joining them in the receiving country, and those with a higher pre-migration level of education and skill, tend to adjust to the host society and become permanent settlers. Thus, a significant proportion of Turkish migrants, although they first entered the receiving countries with no intention of remaining for extended periods of time, ended up as permanent settlers. This is the most important change that Turkish migrants have ever witnessed since the beginning of the migration process (see Çiçekli 1996).

The status of migrants can be put into two categories: *de jure* and *de facto*. The former, as defined by their legal position, has been gaining strength based on decisions of the various courts, particularly the decisions of the ECJ, as far as Turkish migrants are concerned (for details see Çiçekli 1995). The *de jure* status of Turkish migrants is discussed in more detail in the following chapters. In relation to the latter, it has been maintained that a demographic approach to the study of migration would be very useful in obtaining an objective answer to

the question of the permanency of the migrants (Booth 1992: 109). The average number of years spent in the receiving country can be a very good indicator of the migrants' intention to settle permanently. In Germany, the balance between Turkish out-migration and in-migration has been positive for dependants, clearly indicating the intentions of Turkish migrants to remain in Germany (Booth 1992: 153). With the exception of the years 1982-1985, there has been positive migration from Turkey to Germany.[24]

Their increasing participation in political, economic, social and educational fields in the European societies is also a sign of the determination among Turks to settle in the countries they have migrated to. According to a survey conducted in 1985, 39.4% of the Turks in Germany had no plans of return to Turkey; 21% considered the possibility of returning in 10 years at the earliest. Thus 60.4% of the Turks living in Germany wanted to remain there for more than 10 years (for details see Şen 1989: 5-6). According to a recent study[25] carried out in 1995 among Turkish, Moroccan and Surinamese nationals in the Netherlands, foreigners are now much more willing to integrate into Dutch society. The trend, as time passes, is likely to rise, in favour of more permanent settlement.

The increasing self-employment patterns, changing consumer trends and savings contracts for purchases of houses in the host countries limit the prospects for investment in Turkey and obviously do not allow the migrants to build an economic interest in Turkey (see now Şen and Goldberg 1994: 28-30). It is evident that most of the migrants, particularly the young generations (second and third) do not see many prospects in a future life in Turkey, therefore tend to direct their investments to and choose the European countries as their place of settlement for themselves and for their children (CFTS 1993a: 155).

On the other hand, European governments, under pressure from international organisations and their own unions, agreed to recognise the settlement of foreign workers implicitly by

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[24]See CFTS 1993a: 47, table 18 for the balance between emigration and immigration.
[25]*MNS*, February 1995, p. 9.

bringing most of them under the protection of national social welfare legislation (Martin 1991: 30-31). Therefore, most foreign workers have become full participants in host country social security programmes, including unemployment benefits and children's allowances. Turkish workers have also paid about 470 million DM within the framework of '*Solidaritätsabgabe*' (money cut from monthly wages for the re-structuring of the former East Germany) in the year 1992 (CFTS 1992c: 3). On the other hand, the FRG and other recruitment countries, since 1973, adopted policies which restricted the recruitment of foreign workers, but which allowed most resident workers to stay if they wished. The often heated debates of 1973-74 over foreign workers, during which a number of restrictive proposals were made and some were implemented, gave rise to 'anti-foreigner' sentiments which undoubtedly persuaded some migrants to leave and discouraged others from migrating to Europe (Martin 1991: 31).

2.2 Factors motivating Turkish migration to Europe

The causes of the migratory movements in post-war Europe are too many and too complex to examine adequately here.[26] However, it is necessary to make a distinction between the so-called 'pull' factors which have drawn migrants to certain Western European countries and 'push' factors which have motivated them to leave their home countries. For the former category it suffices to note certain general features which would appear to be applicable to all post-war migration to Europe. For the latter category, however, it is necessary to indicate in some detail the specific features prevailing in Turkey and promoting Turkish migration to Europe.

2.2.1 Pull factors

The relevant pull factors are a combination of economic, demographic and social developments in Western Europe during the post-war period (Castles and Kosack 1985: 26; Schiller 1976). There was a very rapid and almost continuous economic growth in most countries mainly due to the post-war reconstruction in Europe, partly funded by the United States under the European Recovery Programme and Marshall Aid Plan. This post-war reconstruction rapidly

[26]On general literature see especially Aker 1972, Castles and Kosack 1973, Miller and Çetin 1974, Krane (ed) 1975, Straubhaar 1986, *The future of migration* 1987.

absorbed the returning soldiers and any existing unemployment. There was soon a marked labour shortage in Western Europe. The building of the Berlin Wall in 1961 almost halted the East German labour surplus upon which the post-war Germany had become dependent (Mandel 1993: 279).

Further, the demographic situation was unfavourable to rapid increases in the domestic labour forces. There was some decline in the percentage of the population at work, partly because of the fact that the population tended to grow faster than the labour force. Therefore, each worker had to support a growing number of inactive persons. The reasons for this may be summarised as follows (see Schiller 1976; Castles and Kosack 1985: 26-27):

1) Many men had been killed or incapacitated in the Second World War, leaving gaps in the active population.

2) In Germany about half a million young men were withdrawn from active economic involvement with the building up of the Federal Army (*Bundeswehr*).

3) The increasing length of full-time education postponed the entry of many young people into the labour force.

4) Later, the improvement of working conditions, such as lowering of retirement age and reduction of weekly working hours, made people work less than they used to do.

5) Eventually, with increased life expectancy and falling birth rates, old people began to form an increasing proportion of the population.

6) The growing number of non-productive activities, particularly in public services, caused a need for additional workers.

An important social factor which helped to bring about a need for immigrant workers was one which did not affect the size of the labour force but rather its composition (Castles and Kosack 1985: 26). In a situation of full employment, domestic workers were able to use opportunities to move into better-paying, more pleasant jobs, usually in the white collar or skilled sectors, through better access to vocational training and higher education (Böhning 1984: 68). The result was, therefore, a growing need for labour in areas deserted by indigenous

workers. This forced governments to seek other supplies of cheap and mainly unskilled labour (Booth 1992: 110) since economic expansion could only be sustained by the large-scale import of workers compelled by their social, economic and legal position to take unpleasant jobs (Castles et al. 1984: 3).

Although the jobs to be filled by prospective immigrants were at the lower end of the scale in terms of skills, status and pay, the ready availability of jobs was still a pull factor. A number of reasons can be given for this, the most prominent being the substantial difference in wage levels between the receiving and sending country (see in more detail p. 45 below). Secondly, the status hierarchy of jobs in the sending and receiving regions respectively, in most cases seems to overlap in such a way that jobs at the bottom of the hierarchy in the receiving area lie in the middle or upper reaches of the hierarchy of the sending region (see Piore 1979: 57-59). Menial jobs in manufacturing, or service jobs in urban areas and in rural resort hotels, have higher social status since they are associated with modernity. Therefore, in the eyes of many immigrants, these jobs give a sense of upward mobility (Piore 1979: 58). Furthermore, push factors as well as other pull factors, such as a generous unemployment insurance and welfare system must have been effective in attracting workers to less desirable jobs in the receiving countries. Every period of economic expansion since the war gave way to labour shortages, which have been relieved through the recruitment of immigrant workers. Researchers have identified an interplay between receiving and sending area:

> "Migration of labour occurs if certain socio-economic conditions which have a decisive impact on labour supply and demand prevail in the areas of origin and destination". (Heijke 1987: 171)

Various authors have put forward views which emphasise the importance of pull or push factors. Castles and Kosack (1985: 27) also found that the demands of the Western European labour market may be regarded as a 'dynamic factor' which determined the volume of migratory flows. According to these authors, the push factors form a 'permissive factor' which causes migration once the dynamic factor of labour demand elsewhere becomes known.

Böhning (1984: 64), referring to research which indicated that the variations in the flow of foreign labour were to 96% explained by the variations in German labour demand during the period 1957-1968, has argued that any inflow of foreign workers presupposes a demand for them. Even for the UK, he found that the immigration of West Indian workers under the open policy of the 1950s and 1960s, for example, was predominantly determined by the state of the British economy rather than any external push factors (Böhning 1984: 64). Relying on this, he concluded that:

> "'Push' factors assume no significance unless there is at the same time a specific 'pull'. The former is not sufficient in itself, whereas the latter is the necessary and sufficient factor". (Böhning 1984: 64)

All European countries have set up an immigration system largely or exclusively related to economic considerations. Although, the volume of labour import may largely be determined by the pull factors of the receiving country, particularly by its quantitative and qualitative demand for labour, it is necessary to distinguish government policy and employers' policies (see in detail Körner 1990). Employers played a major role in creating pull-factors throughout post-war labour migration to Western Europe, though in varying degrees in the different phases of the migration process (see White 1993: 52-53).

On the other hand, variations in the nationality composition of the inflow are more likely to be related to the prevailing conditions in the different sending countries rather than to conditions in the receiving country (Böhning 1984: 64). Furthermore, the experience of post-war migration to Europe clearly shows that it is easier to induce immigration than to control or reduce the size of the migrant flow once the initial impact for immigration has been given (Schmidt and Zimmermann 1992: 225). Therefore, although initially the domination of pull factors was apparent and manifest in the direct importation of labour, with the passage of time push factors have also become very decisive. In other words, until the early 1970s, immigration was following the needs of the labour market and was not out of the control of policy makers.

The situation has been more difficult to control since then. This is so, firstly, because employers' considerations do not necessarily match government policy (see Körner 1990). Furthermore, there is now growing recognition in Europe of the fact that it is difficult to regulate the immigration of family members of immigrants already in residence, even when strong measures of immigration control are taken (Schmidt and Zimmermann 1992: 225).

In this context, it may prove useful to highlight the so-called *centre-periphery model* in explaining the factors behind immigration to Europe.[27] Abadan-Unat (1976: 2) rightly maintains that Turkish external migration cannot be discussed effectively without considering "the general framework of an enlarging disparity between the rich and the poor countries as well as a changed conception of the European 'South'".

According to this model, economic growth takes place primarily in some central places, building a dualism of centre and periphery. Manpower and capital move towards the centre, where increasing production and investment stimulate savings and profits. This creates prosperity and optimism in all branches of economic activity. Furthermore, production, income and demand are the most important sources of taxation. Rising taxes enable the government to increase the level of public services, infrastructure and amenities, which may again stimulate further development. The result is a more prosperous centre with a generous welfare system, as compared to the periphery. This becomes an attraction, a pull factor, to potential immigrants.

On the other hand, according to the same model, in the periphery, firms cannot hold up against the competition of the central regions. It is very difficult to find products in which the peripheral regions have comparative cost advantages. One reason is that the periphery has to import a lot of input materials; another that the output goods have to be transported to outside markets (see Schiller 1976). Such centre-periphery links can be utilised at various levels from a single town to the world economy. This model has been used to describe the structural

[27]For details see Amin 1974, Schiller 1976 and Abadan-Unat 1976.

background of labour migration on the national level as well as on an international level (see especially Schiller 1976 and Amin 1974).

Turkish migration to Europe fits into this model. First of all it could be pointed out that the Gross Domestic Product (GDP) was much higher in the receiving countries than in Turkey at the end of the 1960s and the very beginning of the 1970s, when the migration process was in full operation. In 1970, the GDP was $ 3055 in Germany, $ 2429 in the Netherlands and $ 360 in Turkey (Heijke 1987: 171-72).

In addition to the huge gap in prosperity, the indirect wage, which is a range of benefits, protections and rights workers receive indirectly from the state, as well as the direct wage paid by the employer, has crucial consequences for labour migration (see Freeman 1986: 55). Secondly, the wide differences in prosperity are also obvious in the sectoral composition of employment. Heijke (1987: 172) found that the share of agriculture in employment was much larger and that of services much smaller in Turkey than in the receiving countries:

Table 2:[28]

Countries	Agriculture	Industry	Services
Turkey	66.9%	12.0%	21.1%
Germany	8.6%	50.4%	40.9%
Netherlands	7.2%	38.9%	53.9%

Furthermore, there was a significant difference between the average annual population growth. Between 1968-73, the average annual population growth was 0.6% in Germany, 1.1% in the Netherlands and 2.6% in Turkey (Heijke 1987: 172). In general there was a very big gap between the economic situation of the receiving countries and of Turkey. These differences of socio-economic position and development naturally affected the labour market situations of both Turkey and the receiving countries in opposite directions: large labour surpluses built up in the former and considerable labour shortages in the latter. Most importantly, the substantial

[28]Source: Heijke 1987: 172.

differences in the GDP levels were a very good indication of the attractiveness of these countries to Turkish migrants. However, the question why early Turkish migrants came to Europe cannot be answered without considering the push factors.

2.2.2 Push factors

As noted earlier, Castles and Kosack (1985: 27) have argued that the push factors form a 'permissive factor' which causes migration once the 'dynamic factor' of labour demand elsewhere becomes known. In order to understand the background of Turkish migration, it is necessary to consider the relevant economic, social and demographic circumstances prevailing at the time when Turkish migration to Europe first started. This section, therefore, mainly concentrates on the first phase of Turkish migration to Europe, which has had important consequences and implications for the whole process of Turkish migration.

Emigration from the poor sending countries is not a simple move for a higher income, but is rather "an outgrowth of some deep-seated social structural changes and population shifts in these countries" (Kağıtçıbaşı 1985: 111). In the case of Turkey, by 1960, when migration to Europe started, large-scale internal migration had already been in progress for nearly a decade, due to mainly two reasons: Firstly, rapid changes in the traditional agricultural production and secondly rapid population growth (see Kıray 1976). With the introduction of modern technology, many former tenant farmers had to migrate to obtain urban employment. The population explosion of the early 1950s coincided with the large-scale introduction of tractors to Turkish agriculture as part of the US Economic Aid Programmes (Marshall Aid), which led to many redundancies in agricultural work (see Tütengil 1975: 130). The former small landowning farmers could not cope with the requirement of considerable investment and borrowing, which were necessitated to provide for transportation, marketing, cash cropping and modern agricultural technology (Kağıtçıbaşı 1985: 111).

This 'de-peasantation' (Kıray 1976: 211) was further intensified by continuing rapid population growth. Abadan (1976: 5) gives a growth figure of 44 per thousand in 1960. Pro-

natalist government policies, better public services and massive road building programmes after 1950 in Turkey all contributed to pressures on urban centres. A large number of investments in highways and infrastructure resulted in increased mobility, and all these factors contributed to rapid and somewhat premature urbanisation (Kolan 1975: 139). Since urban jobs could not readily absorb all these migrants, many had to get marginal jobs in the so-called informal economies, particularly in the big cities, becoming more mobile to look for better jobs. It is mainly these people who have been attracted by the demand for labour in western European countries (Kağıtçıbaşı 1985: 111). This process of uprooting, followed by greater readiness to emigrate after a few years of urban 'acclimatisation', is a common pattern for many migration cases (King (ed) 1993: 26).

The various causes of internal migration are not the main concern of this study. But it is important to see the role of internal migration as a transition period for migrants on their journey to Europe (Yücel 1982: 25). Abadan (1964: 50) found in a sample survey that although 53.3 % of the Turkish workers in the Federal Republic of Germany indicated that their permanent places of residence were the three big cities (Ankara, İstanbul, İzmir), only 23.6 % of them had actually been born there.

The evidence suggests that the change from an agricultural to an industrial economy in Turkey was slowly taking place during the period of 1945-1975. This can be illustrated by reference to a very notable shift into the service sector:

Table 3: Percentage distribution of the Turkish work force into sectors of employment 1945-1975:[29]

Years	Agriculture	Industry	Services	Unknown
1945	80.3	7.3	12.3	0.1
1955	82.0	9.0	9.0	-
1965	75.0	12.0	13.0	-
1975	60.9	12.3	23.9	0.9

[29]See Yücel 1982: 27. Yücel took this table from Turkish Ministry of Labour 1973: 50.

This table shows the composition of the working population as an indication of the underdeveloped nature of the Turkish economy. The general structure of the labour market was, initially, characterised by predominant agriculture and the very small size of industrial handicraft and the service sector. According to Neuloh (1976: 54), the labour market was dysfunctional, firstly because of the general living standards, influenced by the poverty of the rural people and of the low standard of industry and commerce; secondly because of the high percentage of self-employed and unpaid family workers without sufficient education. The service sector was on the rise, which shows that unskilled workers released from the agricultural sector entered into the service sector, which is not very productive, and was another indication of the underdeveloped nature of the Turkish economy at the time. Furthermore, between 1960-1975, family workers constituted the largest segment of the active population, 45.2 % in 1975 (Yücel 1982: 28). Unemployment was a permanent social situation of a dysfunctional labour market in Turkey (Neuloh 1976: 60-61). Regional differences in education, transport, health services and communications further contributed to the underdeveloped position of Turkey (Yücel 1982: 29).

Turkey's emergence as a significant exporter of labour coincided with the beginning of a new attempt at planned economic development in 1963. Turkey was, at that time, producing some 41 per cent of national income and over 80 per cent of exports from agriculture, which employed three quarters of the civilian active population (see also the table above), which then amounted to 12 million (Paine 1974: 34, table 3). The first two five-year development plans were reasonably successful in achieving their targets, particularly an average annual growth rate of 7 per cent, but were less successful in bringing about basic structural transformation in the economy, or in spreading the gains from development to those most in need (Paine 1974: 29-33). Thus, the official total unemployment index increased from 100 in 1962 to 162 in 1972, and the non-agricultural unemployment index increased from 100 to 319 during the same period, pushing the official unemployment estimate in 1973 to two million out of an economically active population of nearly 16 million (see Paine 1974: 34, table 3).

It is, thus, this continuing underdevelopment of Turkey which explains to a large extent the development of Turkey as a labour reserve economy and which lies behind the decision of many, if not most Turkish workers to escape from the prospect of poverty and unemployment in their region to seek a better standard of living abroad.

On the other hand, exporting workers on a temporary basis became an increasingly attractive policy to the government, especially when it discovered the importance of the inflows of savings and remittances to which labour export led. The role played by labour migration in Turkey's social and economic transformation and the reasons why migration was necessary for that transformation can be best realised by high-lighting the requirements of the then prevailing 'import substituting industrialisation' strategy Turkey was pursuing during the 1960s and 1970s. Turkey, as all other sending countries of the Mediterranean, has heavily depended on agricultural export crops due to its special climatic condition. Especially after the 1950s and 1960s, there has been a decline of trade to the detriment of agricultural products, coupled with the advent of new competitors in the Mediterranean Basin and with the build-up of the common agricultural policy of the EC countries (Körner 1987: 66). Thus, a long-term trend of falling export earnings was unavoidable. To make up for this, Turkey (as well as some other countries) tried to industrialise by means of typical import-substitution policies.

> "Import-substituting strategy (ISI) is a total strategy with implications for every field of economic policy making. Its basic premise is that local industry can develop on the basis of prohibition of imports. Naturally this development starts with the easiest sectors and is supposed to graduate toward more complex and technologically difficult sectors". (Keyder and Aksu-Koç 1988: 3)

The manufacturers are permitted to import all the inputs (raw materials, machinery, etc.) necessary for the production process as long as manufacturing itself is carried out in the country (CFTS 1993a: 7). However, the export potential is undermined in this strategy for several reasons. First of all, exports of agricultural products are discouraged as a result of the overvalued exchange rate, particularly due to the bureaucratic allocation of scarce foreign exchange (Keyder and Aksu-Koç 1988: 4). Secondly, as external competition is non-existent

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and production is directed mainly to a captive internal market, the native entrepreneurs are not concerned with the cost efficiency of their products. Although the volume of production increases, this does not correspond to a simultaneous increase in the export potential (Keyder and Aksu-Koç 1988: 4). For Turkey, the overall balance was not positive:

> "These import-substitution industries generated new import needs in the fields of capital goods and replacements, so that the import bill showed an ever-rising trend, and foreign trade equilibrium was never attained". (Körner 1987: 66)

Thus, the result was a manufacturing sector with a foreign exchange deficit. During the decades of the 1960s and 1970s, this deficit in the balance of payments in Turkey remained the major constraint of economic development. Workers' remittances, therefore, became an increasingly important means to obtain additional foreign exchange. Just as low-wage levels, the prospect of poverty and unemployment constituted push factors in the microeconomics decisions of the emigrants, concern over unemployment levels and, more importantly, the foreign exchange deficit which could be alleviated through workers' remittances, became a major push factor as far as the macroeconomics considerations of the government were concerned.[30] As Miller and Çetin put it (1974: 1):

> "Turkey presented and continues to present a fairly unique situation in which the structural transformation from an agrarian to industrialised economy releases a steady flow of labour and the present rate of industrialisation is unable to absorb the surplus labour. Thus the fact that Turkey presently is able to meet the European demand for labour may be viewed in part as a historical coincidence of the existing differential development levels between Turkey and other western European nations".

However, the outflow of migrant workers was subject to fluctuations as it was primarily determined by host country demand, the dynamic factor identified by Castles and Kosack (see pp. 42 and 46 above). But despite the high risk attached to the adoption of a mass labour export policy, the achievement of Turkey's development plans was made increasingly

[30]A similar list of push factors can also be found now within the context of East-West migration in Europe, suggesting a similar pattern of general applicabilty as far as international migration is concerned: population growth, political instability, civil war, high unemployment, high inflation, favourable exchange rates are cited as among push factors (see Layard 1992: 1).

dependent on labour export (Paine 1974: 36 and Adler 1981). Exporting surplus manpower was also encouraged by governmental agencies (mainly by the Turkish Employment Service) by way of bilateral agreements. At the beginning of 1974, there were 615.827 officially recruited Turkish workers in Germany, 30.091 in the Netherlands and 2011 in Britain.[31] Thus, the beneficial balance of payments effect of workers' remittances developed into the 'Leitmotif' of the official attitude of the governments involved (Körner 1987: 69).

2.2.3 Economic motivations of labour recruitment

Access to foreign labour can be economically advantageous to a country for several reasons. Stahl (1982) discusses the extent of these benefits in considerable detail and points out that labour immigration can decrease shortages in particular occupations, securing a more complete use of industrial capacity and therefore improving profitability. It can enhance the expansion of industrial capacity by ensuring that industries will have a sufficient supply of labour to newly built capacities. It can prevent wage inflation in those countries suffering from labour shortages by augmenting the supply of labour. It can also delay and disburden the costly structural transformation towards more capital-intensive production which the emergence of a labour shortage can propel. This reduces the country's cost of remaining internationally competitive. In so far as the magnitude of the immigrant labour force can be controlled through legislative or administrative measures, the receiving country can accommodate its labour supply to adapt to business cycles, avoiding the need to support larger numbers of unemployed persons from public funds. This gives an opportunity to labour-importing countries to use foreign labour power without having to incur the costs of rearing, educating and training that labour power. Moreover, the receiving countries were, initially, able to employ an extremely flexible labour force without incurring all the social costs which would arise if dependants were admitted, and they could select out of these the most suitable workers to fill vacancies which were expected to be permanent (Paine 1974: 8).

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[31]Source; Turkish Employment Service (İ.İ.B.K.) 1974b, p. 19, Table 1. Compare also the figures in Table 1 at p. 30 above.

However, this view of immigration as a function of labour scarcity raises the question as to why firms and/or governments do not react to labour shortages with strategies other than labour importation (see Stahl 1988: 14; Böhning 1984: 68-70). For example, firms and governments could increase wages in labour-starved industries in an attempt to augment the number of domestic workers willing to work there. Alternatively, firms might replace capital for labour, or the government might let a labour-short industry disintegrate. After all, it is the change in industrial structure from a low-wage, low-productivity industrial base to a high-wage, high-productivity base which is essential for economic process (Stahl 1988: 14). Finally, the government could slow the rate of economic growth, cutting labour demand in general (see Piore 1979: 26-29).

It has been argued, however, that given a reserve pool of migrant labour upon which to draw, it was reasonable for employers to prefer to utilise this pool rather than to adopt alternative policies (see Stahl 1988: 14 and Paine 1974: 9-11). In order to cope with imbalances of labour supply, industrialised countries have taken the easiest option, promoting the inflow of a foreign labour force.[32] First of all, in an industrial economy most firms of the type which would hire immigrant labour are initially of small scale, labour-intensive, highly competitive, of low profitability and find the demand for their products highly price-sensitive. Many are also working under the threat of cheap imports (Stahl 1988: 14). Secondly, the ability of workers to organise to reject capital-intensive modernisation, production speed-ups, and shift work, and to avoid certain categories of tasks altogether, contributed to employers' perceptions of labour scarcity (Freeman 1986: 56). These realities have made it difficult to simply raise wages to attract the necessary supply of indigenous labour or to substitute capital for unavailable labour. Moreover, it is job characteristics other than income that make indigenous workers reluctant to accept some of the jobs that migrants occupy. These characteristics are as follows: a) generally unskilled, though not necessarily low paying, b) on the lower rungs of the social job ladder, c) offering little chance for advancement or skill gain, d) involving hard

[32]This, albeit more on a temporary basis, still continues to be the case. See now Groenendijk and Hampsink 1994.

work usually carried out in an unpleasant working environment, and e) such jobs are surrounded by a substantial degree of uncertainty (see Piore 1979: 17).

One explanation of the continued existence of low-wage, low-productivity firms is also to be found in the fact that they are an integral part of the overall economic structure. This 'secondary' (complementary) sector where generally immigrants are employed, uses a great many inputs from the 'primary' sector where mainly indigenous workers are employed; hence curtailment of firms within the secondary sector could give rise to unemployment among indigenous workers in the primary sector (Stahl 1988: 14; see also Böhning 1984: 68-70). Thus, some branches of the economy in Western Europe would be unable to survive without the presence of foreign workers, resulting in an interdependence of the jobs held by nationals and the migrants.[33]

From the employer's point of view, employment of immigrant labour enabled them to keep their labour force at a figure close to its desired size at any time, without directly incurring any of the extra social infrastructure costs which utilisation of foreign labour might entail, in spite of the recruitment fees imposed (Paine 1974: 11). More importantly, a dynamically expanding economy requires an increasing supply of labour, and the most important impact of the utilisation of immigrant labour has been to assist sustained growth in the receiving countries (Paine 1974: 11). An attempt to cut the demand for migrant workers would presumably necessitate the limitation of the rate of economic expansion to that which could be sustained by the domestic labour force. In the short run, this would undoubtedly result in slower rates of economic growth and quite possibly higher rates of unemployment (see Piore 1979: 28-29).

Immigrant labour, both permanent and temporary, has tended to discharge the same function in the UK as on the continent (Power 1979: 109). It has filled jobs which the indigenous workers were no longer prepared to do, even in times of high unemployment. Nevertheless, it appears

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[33]See Maillat 1987: 50; and already Piore 1979: 35-43 for an explanation of the role of migrants in the labour market and the dual market theory.

that different strategies can be observed while comparing the German and the UK experience in particular. Germany, for example, has traditionally perceived its *Gastarbeiter* as a temporary phenomenon, adjusted to the needs of the internal labour market. Germany has developed the notion of *Konjunkturpuffer*, i.e. the importation of foreign labour when needed during a boom and its re-export during a recession has been the official stand of the government for a long time (Power 1979: 81). In Britain, no such official policy of rotation existed, as far as the Irish and many Commonwealth citizens are concerned; they were earlier given complete freedom to settle permanently.[34] However, a restrictive policy has long been followed concerning immigrants from other countries. Following increasing restrictions of Commonwealth immigration since the CIA 1962 and CIA 1968, in Britain, the Immigration Act, 1971 has finally brought the Commonwealth immigrants' position in line with foreign workers (Castles and Kosack 1985). Thus, access to the British labour market has been more severely restricted than elsewhere in Europe. Interestingly, a number of recent research reports from Germany, in particular, emphasise the positive impact of labour recruitment (see in detail Chapter 4.1). While the literature in Britain continues to focus on the social and political costs of immigrant labour, German economists have calculated the economic benefits of importing labour.[35]

2.2.4 Motivations of emigrants

As far as the motivations of the emigrants are concerned, it is not simply pull or push factors which are determinative of their decisions to emigrate, but a combination of both. Unemployment is clearly a fundamental push factor in connection with migration. Some push factors are also pull factors for certain aims, such as saving to buy land or houses or further vocational training facilities for better work in Turkey (Neuloh 1976: 65). It was found in a survey carried out in 1969 that 21% of the sample gave unemployment and 39.9% money making as their main motivations for external migration (see Neuloh 1976: 66, table 5). According to Yücel's study (1982: 95, table 1.36), 89.1% of the sample gave pure economic reasons for their migration, whereas 6.0% migrated because of better wages and to see Europe.

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[34]This does not mean that private arrangements for rotation did not exist. See Aurora 1967 for early examples.

[35]See Menski 1994a, Spencer (ed) 1994a and 1994b, and now Velling 1995.

According to Aker's study in the early 1970s, the most compelling factor inducing Turks to emigrate was the desire to accumulate greater wealth. Over 75% of his sample emigrated for that reason, whereas only around one out of nine emigrated because of unemployment or job dissatisfaction (Aker 1972: 94). Similar findings were produced in another study:

> "Asset accumulation [however] is by far the most compelling factor for Turks desiring to go abroad; thus, it is largely to this end that they devote their earnings". (Miller and Çetin 1975: 127)

This could be in various forms, such as foreign exchange, goods, consumer durables. Securing a future is also another motivation, which would appear to indicate long-term planning strategies that many migrants may have. In Neuloh's study (1976: 66, table 5), 4.9 per cent of the respondents' motivation was to secure the future. In this context, buying land and houses is often considered the best investment in the eyes of the immigrants, supporting a strategy of long-term planning which is probably family-based rather than individualistic.

In addition to mainly economic reasons, there were other motivations which were effective in individual decisions to migrate. Among these were training opportunities, such as vocational training and learning foreign languages, which were also significant motivations. In Neuloh's study (1976: 66, table 5), 7.4 per cent of the respondents gave vocational training and 5.5 per cent a desire to know foreign languages as their motivations. This makes it clear that not only unemployed people, but also the self-employed, clerks, and small peasants with significant aspirations for advancement were willing to go abroad (Neuloh 1976: 65).

Other pull factors include experience and contacts with previous immigrants (0.6 per cent) and the desire to know foreign countries (12.9 per cent) (see Neuloh 1976: 66, table 5). The same study, therefore, indicates the importance of existing contacts in the receiving countries as a determinant of the migration flow to particular areas. The most significant impact of the so-called *chain migration* was the concentration of the same town-men not only in a particular country but even in a specific town or area in a country (see Wilpert 1992). This is a pattern

not only among Turkish migrants but also among other immigrant groups, such as Afro-Caribbean and South Asian in Britain.[36] In Britain, too, early pioneer immigrants functioned as bridgeheads through which the entry of a whole stream of kinsmen and fellow villagers was facilitated (Ballard 1994: 11).

Social and political factors can also be added as a component determining labour migration. A weak socio-economic structure, an inadequate social security system, political suppression, violence (particularly during the 1970s) and similar factors have constituted valid reasons for people in Turkey to emigrate to an environment where they could hope to feel more secure. Following the military coup of 1980, political suppression of various groups and political activists (rightists or leftists) has led many Turkish citizens to emigrate, often seeking refugee status abroad. As indicated, the present thesis does not cover refugee migration which has, of course, its own economic implications.

2.3 Socio-economic characteristics of Turkish workers prior to emigration

We have seen in the previous sub-chapter that various economic, social and psychological factors need to combine to commit someone to migrate. The age, sex and marital status of individuals, the type of family they live in, the number of dependants, the age composition of the family, place of residence, type of job or skills possessed, assets like land, house, animals, the economic resources available, and having any relatives or friends already working abroad are all significant factors affecting the decision to migrate, or when to migrate and how, and through which channels (Yücel 1982: 111).

Turkish emigrant workers tend to rank higher than their fellow citizens in Turkey in terms of income, industrial skills and education, though the structure of the emigrant workforce became more like that of the population as a whole as emigration gathered pace in the 1960s (Hale 1978: 53). The present sub-section considers a number of important socio-economic

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[36]See Ballard (ed) 1994; also see Shaw 1994 for an account of Pakistani settlement in Oxford, in which only a tiny minority of newcomers arrived in Britain as lone adventurers with no prior contacts.

characteristics of Turkish migrant workers which have had a bearing on the settlement and reception of Turkish migrants in Western Europe. The issues discussed in this sub-section mainly relate to the first phase of Turkish migration, when the worker migration process came into full operation.

2.3.1 Geographical origins

There are contradictory opinions in the literature concerning the correlation between the degree of development and emigration so far as the regions of emigration from Turkey are concerned. On the one hand, there is substantial evidence that the more developed regions have always sent more migrant workers abroad. Paine (1974: 72) states that

> "The richer, more westernised and more conveniently located regions of Thrace and Marmara, and North Central Anatolia have had a dominant share throughout, not just absolutely but also relatively, in the sense that their share in supplying migrants greatly exceeds their share in the total population".[37]

Abadan (1964: 49-51) found that in 1964 over 70% of the Turkish workers in Europe had come from the cities and 53% of those had come from the three most developed cities in Turkey. According to a more recent study, between the years 1963-1979, 33.3% of Turkish workers in Europe came from the Marmara region, 23.1% from the Inner-Anatolia region, 15% from the Aegean region, 12.5% from the Black Sea region, and about 10% came from the least developed regions of Turkey - the Eastern and South-eastern regions (Kemiksiz 1989: 52). The selective demands of the receiving countries may have been a determinant of this, at least in the early days, since the more developed regions of the country are rich in skilled workers (CFTS 1993a: 39).

The above figures, however, should be read with a number of reservations. It should be recalled (see p. 47 above) that the role of internal migration can often be seen as a transition period for migrants on their journey to Europe. Thus, Abadan (1964: 50) found in a sample survey that although 53.3 per cent of the Turkish workers in the Federal Republic of Germany

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[37]For statistical details see Paine 1974: 72-74, tables 7a and 7b.

indicated that their permanent places of residence were the three big cities (Ankara, Istanbul, Izmir), only 23.6 per cent of them had actually been born there. Aker (1972: 26-29) also found that in 1971, 22% of the would-be migrants in his sample had previously migrated to larger towns and cities in Turkey. In Yücel's study, before migration to Germany 35.2 per cent of the workers had been living in a city, 15.7 per cent had been living in a town, and 49.1 per cent had been living in a village, whereas only 15.4 per cent had been born in a city, 19.1 per cent had been born in a town and 65.5 per cent in a village (see Yücel 1982: 60, table 1.6). These results do affirm the conclusion that the general course is to migrate first from villages and towns to the cities, as part of Turkish internal migration, and only then abroad. This leads to a common two-stage process of migration: the first internal and the second external.

2.3.2 Pre-migration qualifications and occupations

Many Turkish workers must have left the country at their most productive ages, particularly in the early stages of Turkish migration, maybe because of the demands of the recruiting countries for young, healthy and better skilled workers, and actual recruitment in line with those demands. Only at later stages of migration did the Turkish government attempt to take measures necessary to slow the outflow of a skilled labour force (Kemiksiz 1989: 25-26).

It has been generally held that the Turkish migrants recruited during the 1960s were more qualified than migrant workers from the other sending countries in the Mediterranean. This is perhaps because of the fact that the Turkish governments acted obediently in accordance with the demands of the recruiting countries for skilled labour since the beginning of the migration. The rate of skilled labour recruited to the FRG was 34.8 per cent among the Turkish workers, whereas the corresponding figure was 20.9 per cent among all the workers from the Mediterranean in 1965 (Kemiksiz 1989: 25). According to Abadan (1976: 11), this could be one of the major reasons for Germany's preference for Turkish workers.

On the other hand, because of the failure of the surveys to distinguish between skilled and semi-skilled workers, the figures cannot be taken for granted as reflecting the exact picture but

may be treated as displaying the general tendency of Turkish migration. Paine (1974: 81) asserts that Turkish sources have tended to aggregate the two categories, whereas skilled workers are defined much more strictly in the German data, where only a small proportion of the Turkish workers have been reported as skilled workers. This, of course, reflects the common experience of destatussing of migrants.

The Turkish Employment Service[38] survey found that the share of workers from the agricultural sector increased to 42.9 per cent in 1971. However, due to the increasing demand of the host countries for skilled and female skilled workers (both more likely to be of urban origin), and partly because of the influence of the quota system on departures, there was a substantial fall in agricultural migrants (Paine 1974: 84). Yücel found in 1973 that 30.7 per cent of his sample had come from agriculture whereas the TES survey found the corresponding figure to be 30.8 per cent.[39]

Nevertheless, migrants from the agricultural sector have been always underrepresented when one considers that 65 per cent of the labour force in Turkey were employed in agriculture and only 11 per cent in industry in 1972 (Paine 1974: 34, table 3). While these people had already migrated within Turkey, many had to get marginal jobs in the so-called informal economies, becoming more mobile to look for better jobs, since urban jobs could not readily absorb all these migrants. Therefore, the workforce released from the agricultural sector mostly entered into the service sector (see already p. 47-48 above). It is largely these people who have been attracted by the demand for labour in Western European countries. It is apparent, though, that precise classification is extremely difficult.

The question of whether or not it has been the unemployed who attempted to migrate from Turkey has been of major interest. Again, before proceeding to look at the data concerning unemployment of Turkish migrants before departure, it should be pointed out that, because of

[38]Cited in Yücel 1982: 76-77, table 1.15.
[39]See Yücel 1982: 76-77, table 1.15, also for the TES survey.

the different definitions of unemployment and the fact that workers may be unemployed at the time of application but not right before departure, the figures cannot be taken as conclusive evidence. Nonetheless, data on unemployment before departure have been treated as particularly useful for assessing the effect of migration on unemployment in Turkey (Paine 1974: 82-83).

Contrary to the conventional belief in the receiving countries, most of the migrants were not unemployed before migration. This is well established by the work of various authors.[40] The highest pre-migration unemployment rate was during the early phases of Turkish migration. But even at that time, Abadan (1964: 67-68) found that the figure was only 14 per cent among the Turkish migrants in Germany in 1963. In the following years, the number of previously unemployed among the new migrants fell even more. Only 4 per cent were unemployed before migration in 1971 (Paine 1974: 195, table A20a). In 1973, only 0.7 per cent of the respondents were unemployed before migrating (Yücel 1982: 74). A TES survey in 1974 found that 5.3 per cent had been unemployed before departure.[41] This would appear to indicate that, especially in the later stages of Turkish migration to Western Europe, Turkish migrants had relatively high levels of skills and experience and were not desperate destitutes in search of any kind of job.

2.3.3 Pre-migration educational attainment

Another significant characteristic of the Turkish migration, though it changed over time, is the relatively high educational level of migrants. Relying on research and surveys carried out in various years, Yücel (1982: 72, table 1.14) calculated that the ratio of illiterate workers increased to about 10% in 1974 from only 3% in 1963. A number of reasons could be given for this: spontaneous recruitment of workers, personal job offers, or increasing number of wives who were allowed to join the husband as workers as well as those who first joined the husband and then took up employment.

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[40]See, for example, Abadan 1964: 67-68; Aker 1972: 43-44; Paine 1974: 82-84 and Yücel 1982: 74.
[41]Cited in Yücel 1982: 76-77, table 1.15.

According to the Turkish census of 1970, 35.9 of the people in the age group of 20-39 had completed elementary school, whereas 63.1% of those who went abroad for employment had completed elementary school (Kemiksiz 1989: 26). Such relatively higher standards in education and job qualifications among Turkish migrants were somewhat diminished in the later stages of the migration process, particularly following family reunifications. The overall educational attainment tended to decline as an increasing proportion of less well-educated migrants from rural areas were recruited to Western Europe. The overall level of educational attainment of Turkish migrants compares most favourably with that of the economically active population in Turkey. In a survey among Turkish immigrants in Germany (see Paine 1974: 80), 64% of the sample had elementary education as compared with 36 % of the economically active Turkish population between the ages of 15-65 in 1970. On the whole, educational levels among Turkish emigrant workers have tended to be significantly higher than the national average of the Turkish population. The table below indicates this clearly.

Table 4: Educational attainments of emigrant workers and total Turkish population:[42]

Educational attainment	Educat. attainment of workers abroad 1974	Educ. attain. of total Turkish population, age 14+, 1975
Illiterate	3.1 %	38.3 %
Literate, but not completed Primary School	14.7 %	7.7 %
Primary School	69.1 %	40.6 %
Academic and Vocational Middle School	9.4 %	6.6 %
High School and Above	1.9 %	6.3 %
Unknown	1.8 %	0.5 %

2.3.4 The impact of skilled worker emigration on Turkey

Although a significant proportion of the emigrants were skilled workers, there is no consensus in the literature on the impact of skilled workers' emigration on Turkey. The policy of allowing so many skilled workers to emigrate was criticised both by Turkish employers and the State Planning Organisation (SPO). Abadan (1986: 361-362) points out that Turkey's need for jobs and remittances meant that Turkey restricted only the emigration of Zonguldak miners,

[42]Source: Hale 1978: 59, table 24.

implying that the outflow of skilled workers did not generally reduce output in farming or manufacturing. Another study concluded that the relatively few complaints about shortages of skilled Turkish workers resulting from the mid-1960 emigration of around one-fifth of Turkey's skilled workers meant that any emigration 'creaming' of the Turkish labour force did not reduce Turkish output and could not have been changed in any event by the bureaucracy (Adler 1981: 47).

On the other hand, other studies take a quite opposite view, arguing that the impacts of skilled labour migration on the Turkish economy are quite significant.[43] Ebiri (1985: 219) reports that it was the Turkish manufacturing industry that was most affected by the out-migration of skilled labour. A more recent study emphasises that an emigration country might lo se long-term growth potential through migrant outflow, even if the migration process eases unemployment level in the short term (Schmidt and Zimmermann 1992: 227). Negative implications of Turkish labour migration on the Turkish economy have further been discussed by other studies, but it is beyond the ambit of the present thesis to give a more detailed discussion than is provided here (see also Abadan 1993 and Gümrükçü 1990).

On the other hand, the benefits of the skills of the emigrants accrue to the receiving countries directly, while Turkey receives indirect benefit in the form of (presumably) higher remittances. According to a 1990 study made by the *Rheinisch-Westfälisches Institut für Wirtschaftsforschung* in Essen, Germany, foreign workers brought about 57 billion DM directly or indirectly into the German economy in the form of taxes and social security payments.[44] On the other hand, the flows of migrants' savings to Turkey have been and still are substantial; they can be considered as an indirect effect of skilled workers' emigration.[45]

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[43]See Ebiri 1985 for an assessment of such arguments relating to the impact of labour migration on the Turkish economy.
[44]See *MNS*, Brussels, December 1991, p. 4. For details see also Spencer (ed) 1994a.
[45]The flow of workers' remittances has never been a problematic issue and therefore it has progressed with less obstacle and less interference of the receiving states. Articles 32 and 47 of the 1990 UN Convention guarantee the rights of immigrant workers to transfer their savings and belongings to their countries of origin or any other state.

For example, the amount of remittances was as high as $ 3,337.0 million in 1990.[46] But, there is no automatic process of transforming the remittances into the kind of development that makes emigration stop within the existing economic systems. In reality only a negligible part of this massive flow has been channelled into direct productive investment in the industrial sector in Turkey (CFTS 1993a: 113).

2.4 Social characteristics of Turkish immigrants and social change upon migration

Turkish migrants in Europe demonstrate highly diversified characteristics in terms of social and cultural back-grounds, geographical origins and work qualifications, as already discussed above. The Turkish population in Western Europe is mainly concentrated in three countries, namely Germany, France and the Netherlands. In Belgium, Denmark and the UK, Turks make up a significant but small proportion of the foreign population. The Turkish population in Germany and other EC countries has risen considerably in recent years. According to statistics available, there are 2,114,000 Turks in Germany, 252,450 in the Netherlands and only 32,910 in the UK.[47] The following sections concentrate on gender distribution, age structure and more general changes in the pattern of Turkish migration.

2.4.1 Gender distribution of Turkish migrants and increasing participation of women

Turkish labour migration to Western Europe has always been dominated by men, like other post-war labour migrations to Western Europe. This also reflects the pattern of traditional family life of Turks, where men tend to be the breadwinners. The proportion of women, though it has risen, never reached that of men during the first stage of migration, which was mainly in the form of labour importation. Statistics confirm this very clearly. Abadan (1976: 9) reports that Turkish migration to Europe was overwhelmingly composed of men: 5,193 men and 430 women came to Germany in 1961. During this phase most male migrant workers left their

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[46]See CFTS 1993a: 114, table 51, with statistics also for previous years.
[47]See Turkish Ministry of Labour and Social Security (TMLSS), 1994: 5 for figures for the Netherlands and the UK at the end of 1993; and see *MNS* May 1996, p. 14 for Germany at the end of 1995.

spouses behind. Only in very few cases were husbands and wives able to migrate together (Wilpert 1988b: 169).

Between 1961-72 there was a large rise in the number of women - from 5 per cent in 1961-62 to 16 per cent in 1970-71 (see Paine 1974: 186, table A11). Between 1961 and 1976, 146.681 female Turkish workers were recruited as compared to 678.702 male workers (Keyder and Aksu-Koç 1988: 20). The most prominent reason for this rise in the number of women recruited can be found in policies of the government of the Federal Republic of Germany (for details see Chapter 6.1.1 at pp. 251-252 below). Under this policy, family members of the migrant worker were permitted to stay if they came to the Federal Republic as 'workers', in which case the conditions relating to family reunification did not apply. As long as the close relatives could be employed as workers, and therefore could be productive to the German economy, they were welcome (Nikolinakos 1971: 82). Hence, female workers, who were married to existing workers, started to come to Germany in increasing numbers, because the simplest way for a couple to stay together was to work together. Consequently, there has been a change in the role of the Turkish women migrants. In the more industrialised Europe, Turkish women have begun to share the role of breadwinner, which was normally men's duty in traditional Turkish life.

Another reason for the increasing participation of women in the migration process can be found in the family reunion strategy of the migrants (see in detail Chapter 6.1.1 at p. 252). The wage scale of women was lower than that of men, particularly in industries like textile, food processing and electronics. Therefore, it was rational for an employer to recruit women rather than men for the above mentioned industries. Further, men on the waiting list of the Turkish Employment Authority (TEA) were encouraging their spouses and even daughters to take up employment abroad in order to secure a legal permit of residence which automatically made them available for employment (see Abadan 1976: 9-10). Many Turkish men found it easier to come to Europe because their wife had already secured a position in the labour market (see

also Wilpert 1991a: 130). As a result, Turkish women migrants began, increasingly, to seek jobs in West European countries, combining this with family reunion.

Not surprisingly, surveys soon found that the proportion of married Turkish male workers living with their spouses in the FRG had risen to 77 per cent in 1980 from 34 per cent in 1968, whereas the ratio of female workers living with their spouses rose to 95 per cent in 1980 from 73 per cent in 1968 (see Heijke 1987: 183). A similar picture appears from the Dutch experience in 1982: 79 per cent of the male Turkish workers were living with a non-Dutch partner (see Heijke 1987: 183). The figures clearly indicate the effects of family reunification on the structure of Turkish migrant families. The increasing number of women joining the migration process following family reunification has resulted in a fall in the proportion of skilled female migrant workers (CFTS 1993a: 23).

The next table displays the labour participation of Turkish female population in the three countries.

Table 5. Turkish female population in the relevant countries in 1993 (in thousands):[48]

Countries	Total Female Population	Female Labour Force
Germany	831,100	196,096
Netherlands	97,322	12,000
UK*	11,000	3,700

The figures above show that the proportion of the female labour force to total female population is about 23.5 % for Germany, 12.3 % for the Netherlands and 33.6 % for the UK. The British ratio is significantly higher, which appears to show that many more Turkish females in that country participate in the labour market. The absence of a recruitment agreement concerning Turkish migration to Britain may have partly played a role explaining this discrepancy. The practice of allowing family members to migrate within the ambit of

[48]See Turkish Ministry of Labour and Social Security (TMLSS) 1994: 51, 56 for the Netherlands; 13, 17 for Germany (total female population figure is for 1992).

*I was unable to find more recent data on the UK (these are 1987 figures), but they are still sufficient to indicate the general trend (see Sopemi 1990, OECD, Paris, 1991: 85).

family reunification in Germany and in the Netherlands has progressed smoothly within the framework of recruitment agreements. Such migration was often not undertaken with a job in mind, whereas Turkish migration to Britain has largely progressed under the more or less strict application of work permits, making sure that whoever comes in has a capacity to participate in the labour market, although family migration has also been occurring in the British context.

Data concerning the labour force participation of Turkish women are not exact since the figures do not include those working in small family businesses and, frequently, those working as house cleaners (CFTS 1993a: 26). But the activity rates of the Turkish women in every age group are below average in the Netherlands and in Germany, except for the age group 60-64 years; and the activity rates of Turkish women are very close to and sometimes higher than those of non-EC women migrants.[49]

At present, the Turkish female population in Europe approaches the size of the Turkish male population. In the Netherlands, for example, there were 97,322 Turkish women migrants as compared to 115,128 Turkish men migrants as of 1.1.1993.[50] In Britain, there were 11,527 Turkish women migrants as compared to 15,070 Turkish men migrants according to 1991 Census.[51] However, there is still much difference between the economically active female population and the male population. In Germany, while there were 441,840 economically active men in 1993 out of a total male population of 1,023,800 in 1992, there were only 196,096 actively working women in 1993 out of a total female population of 831,100 in 1992.[52]

Considering the fact that Turkish migration has, mainly, taken the form of family migration after the recruitment stops in 1973/74, the above figures would appear to display changes in the role of Turkish females, both in the family as breadwinners as well as in their labour role

[49]See CFTS 1993a: 26-27; and *Sopemi-1990*, 1991: 90-91.
[50]See TMLSS 1994: 50.
[51]See ibid: 194.
[52]See ibid: 13, 18.

in an industrialised society. This change should not be underestimated when one considers the traditional role of women in the economic life of Turkey. A number of factors have also been instrumental in this change. The desire to save as much as possible in a short period of time and to attain high living standards have contributed to women's willingness to participate more actively in the labour market.

According to some social scientists, the changing roles of women in the labour market have influenced the position of Turkish women in the family. Kudat (1975) observed, in line with the change of the role of women in the labour market, a shift away from the traditional dominance of patrilocal norms as well as a changing network of household relations. The growing economic independence of women has allowed them to have more say in the day-to-day running of family matters. Thus, the participation of women in wage-earning influenced their self-concept and personal aspirations, as well as introducing new conflicts (Wilpert 1981). However, this has been somewhat limited due to the creation of ethnic enclaves which may support traditional family structures and social controls (Wilpert 1988b: 176). The Islamic family values of the migrants may also be another qualifying factor in identifying the role of family members. For instance, under the Islamic family structure, women are usually given the role of raising the children, while working and earning money are not their responsibility. It remains to be seen whether socio-economic changes in the settled Turkish communities of Western Europe will eventually be influenced by such concerns, or whether the new patterns of female participation in the workforce will continue to be followed.

2.4.2 The age structure of Turkish migrants

The nature of labour migration *per se* implies that young and active people will tend to predominate. Turkish migration to the EU is no exception to this.

> "The demands of the employers, rules and regulations governing the recruitment procedures, and the social and psychological conditions of the migrants both at home and abroad all combine to create a young migrant force in the labour-importing countries". (Yücel 1982: 65)

This was particularly true in the early days of the migration process when it was characterised by young male migrant workers. Abadan found that nearly 98% of the Turkish migrant workers in Germany were under 40 years old in 1962 and 1963. A very big proportion (around 80%) of those young migrant workers (men as well as women) was concentrated between the ages of 26-30 (Abadan 1964: 27, table 9). Yücel's study found that in 1973, nearly 92% of the Turkish migrants in the FRG were under the age of 40 and that the figures for migrants under 40 were displaying an even distribution among the various age groups (Yücel 1982: 27, table 9). A similar result was found in 1972 in another survey which reveals the age distribution of the Turkish migrants in the FRG as follows: 9% under 25, 21% between 25-30, 33% between 30-35, 22% between 35-40 and 10% over 40 years old (see Abadan 1976: 16). These results seem to indicate that those who were between 20-30 years old in 1962/63 were in the next age group in 1972/73. Here, one can see the early beginning of the greying of the Turkish immigrants in Germany as well as the early sign of an ageing problem, which is not yet very significant. Recent studies, particularly in Germany, are beginning to consider various implications of this ageing process.[53]

At present the Turkish population in the EU countries still demonstrates young characteristics, despite the fact that Turkish migrant worker stock has 'aged' slightly while abroad. Although it is obvious that the period following the recruitment stops has been characterised by family reunification, it is difficult to assess its effects in terms of age structure since there are children as well as more elderly people involved in this process of family reunification. However, the fairly young Turkish migrant population, coupled with the rising tendency of family formation with a spouse from the home country will be determining demographic factors in the future (CFTS 1993a: 20). The latest available figures for Germany show large numbers of very young Turkish persons, often born in the FRG.

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[53]See CFTS 1992d and CFTS 1993b.

Table 6: Turkish population in the FRG according to age structure as of 31.12.1992:[54]

Age	Number	%
0-18	623,800	33.6
18-21	142,100	7.6
21-30	407,700	21.9
30-40	226,600	12.2
40-50	229,000	12.3
50-55	118,800	6.4
55-60	66,900	3.6
60-65	27,300	1.4
65+	12,700	0.7

The table reveals that a significant proportion of Turkish residents in Germany (33.6 %) are under 18 years old, which shows the uneven distribution of the various age groups in favour of children and youngsters. This very young characteristic of Turkish immigrants has, *inter alia*, two important implications.[55] The first one is that this is an age group which requires a substantial amount of investment and expenses, such as schooling and child allowances, as far as the receiving country is concerned. It is unlikely that this young characteristic of the Turkish population will change in the future because of the relatively high birth rate of Turkish women. The other important implication is the likely pressure that these youngsters will bring to the labour market in the near future, a trend already noticeable at present. It is the general attitude, though not the norm, that second-generation migrants tend to have higher expectations than their parents had when they first migrated, and tend to refuse the kind of jobs that their parents accepted. The result, especially when coupled with the effects of discrimination, is an increasing unemployment level among young Turks and new social conflicts, which are both emerging concerns for the policy makers in the receiving country.

The specific problem of elderly migrants has begun to attract some attention, particularly in Germany (CFTS 1993a: 21). As of 31.12.1992, there were around 40,000 Turkish immigrants who were 60 years old or older in Germany (see Table 6 above). Although the group above 60

[54]Origin of the source: TMLSS, *1993 Report*, 1994: 12-13.
[55]See ibid: 50 and 195 for similar patterns of age composition of Turkish immigrants in the Netherlands and Britain respectively.

made up only about 2.1 % in the Turkish population in Germany, more recent figures have shown an increase to 5 % (Şen and Goldberg 1994: 27). Therefore, they are a group which will generate problems of their own in terms of pensions and health costs, in particular. Actually, the governments of the receiving countries are concerned about this and it is likely that they will reflect this concern in their policies, particularly in Germany. There were, for example, 47,129 Turkish pensioners in Germany as of 01.01.1991 (CFTS 1993a: 22). Many Turkish migrants who are still employed in the receiving countries will increasingly become pensioners in the near future. They have been contributing to the social security system without gaining much benefit from it so far (Şen and Goldberg 1994: 27). Clearly, the position of older migrants will generate a lot of interest in the future.

2.5 Impact of immigration on the EU countries

2.5.1 Social and cultural tensions

Labour migration of Turks to Western Europe is anything but a simple case of classical immigration, acculturation and assimilation. Turkish immigrants in Europe are in a dilemma. On the one hand, due to the increasing xenophobic feelings and restrictive regulations and policies, many plan to return home (see Şen 1989: 5-6). But, on the other hand, due to various factors, such as structural unemployment, lack of opportunities and political instability in Turkey, they delay return until an unforeseeable future. As a result of being in a society with which they have little in common, coupled with a similarly negative attitude from the host society, Turkish immigrants naturally prefer to live in close contact with their fellow countrymen. For example, according to one study, only 46 per cent of the Turks in Germany had any social contact with Germans.[56] A more recent study conducted by the Foreigners' Office in Berlin, similarly, concludes that 30 per cent of the 1,000 Turks between 16 and 25 years old in the sample claim to come into contact with German youths only very rarely, and 34 per cent have no contact with German youths at all.[57]

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[56]See Friedrich-Ebert Stiftung 1980: 520-521.
[57]See Çağlar 1995: 310, quoting Die Ausländerbeauftragte des Senats (1992) *Pressemitteilung Berliner Jugendliche türkischer Herkunft in Berlin*, p. 14.

The development of immigrant communities with their own social and economic structures in certain areas, such as in industrial areas and in inner cities in Berlin, Frankfurt, Rotterdam or London has encouraged this residential segregation. The housing market has functioned in such a way as to increase the concentration of immigrants in certain types of inner-city housing because of higher rents in other parts of the cities.[58] At the same time, due to racism and isolation in other districts, many prefer to live in these areas, despite the fact that some can afford to live in other districts. Thus, immigrant workers and their families develop an 'intermediate cultural environment' in the receiving country, retaining some values and behaviour patterns of their country of origin and absorbing some values of the new country.[59] This in turn causes further isolation and marginality for the immigrant population, a vicious circle with many difficult implications which cannot be detailed here.[60]

Some studies seem to suggest that the frustration and psychological problems, particularly of young adolescents, may give rise to other problems, such as aggressiveness, juvenile delinquency, drugs and so forth (see already Abadan 1985: 10). A controversial statement made by Prof. F. Bovenkerk, a criminologist, on the high level of criminality among Turks and Moroccans in the Netherlands, claimed that well over 20 per cent of the adult male population of the Moroccan and Turkish communities in Amsterdam was active in criminal organisations dealing with drug.[61] He, nevertheless, later on acknowledged that there were 'uncertain factors' in the police data which he used for his research, and therefore his conclusions were not scientifically well-founded.

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[58]The so-called Turkish enclave in what used to be the West Berlin is a prime example of this.

[59]See Merkens 1991 for an analsis of the influences of biographical and ecological variables on the intermediate cultural environment of Turkish adolescents in West Berlin. For Asians in Britain, the same phenomenon is clearly described by Peach et al. (ed) (1981) in the context of ethnic segregation in cities; see now also Ballard (ed) 1994.

[60]For details see Ostow et al. (eds) 1991.

[61]This statement has provoked strong protest from groups and associations working with immigrants and the Turkish representatives in the Netherlands: the Dutch Ministry of Foreign Affairs clarified that Mr. Bovenkerk's statements were made under his personal responsibility and that the Dutch government does not necessarily agree with them. (see *MNS* October 1995: p. 9).

Further, recent German studies on the criminality of immigrants show, on the basis of detailed statistics, that various factors may be responsible for creating an impression of disproportionate criminality among young foreigners.[62] Evidence of significantly higher percentage of acquittals among immigrants, distorted criminal statistics and a whole set of criminal offences under German law which can only be committed by immigrants contribute to this impression of disproportionate criminality among foreigners (see Schöch and Gebauer 1991: 40-42).

Language is one of the major factors which give rise to a strong identity crisis for Turkish migrants, due to the inability of the migrants to communicate fully with the host community as well as with their own children. According to a survey carried out in 1980, 29.5 per cent of Turkish workers in Germany declared not to possess any knowledge of German, whereas 13.5 per cent among them attended a language course.[63] One of the major reasons for this lack of interest is the ambivalence about returning home because they see their position as a temporary one, and are also seen as guests. Therefore, sometimes they are not given the language education necessary, for obvious policy purposes. For example, Bavaria's approach in teaching is that Turkish children are taught Turkish, and in Turkish, to encourage remigration (see p. 75 below). The linguistic problems of the second generation have more far-reaching effects, particularly for the education and integration of the migrants' children.

Young newcomers realise that linguistic difficulties, the heavy conditions on obtaining a work permit, the preconditions of apprenticeship, and many other restrictions leave them the most undesirable and low-skilled jobs which they have to take up. Also, family fragmentation has been seen as one of the most widespread and serious problems for the sending country as well as the receiving country (Kağıtçıbaşı 1982 and Gitmez 1979). Although family reunion began in the 1970s, a significant number of immigrants are still separated from members of their families. The position of the family members who were left at home has important

[62]For details see Schöch and Gebauer 1991; and Mitteilungen 1993.
[63]See Friedrich-Ebert Stiftung 1980, 489 and 492.

consequences, also as far as family migration laws of the receiving countries are concerned. This will be further discussed in Chapter 6 on family reunification.

The defence mechanisms arising from the psychology of being a minority, facing exclusion and discrimination, and being the subject of hostility in a different culture are factors which help to increase the potential for the attachment of Turkish migrants to their religious beliefs and national cultures. Moreover, the opportunity for women to attend language courses and eventually acquire language proficiency, which is an important requirement for social integration, is very rare. Most of the Turkish women who came to Germany under the family reunification programme had to wait four years before obtaining a work permit. During this period they may have had hardly any contact with Germans. Therefore, recent studies emphasise that social integration presents the largest problems for Turkish women and girls (CFTS 1993a: 179).

It appears that a new form of community living has to be developed in order to secure migrants a higher degree of self-confidence and assertiveness, cultural identity and the possibility to enable them to engage in action related to daily needs. Nevertheless,

> "... the search for new solutions which could secure a healthier, happier and safer way of life for the undesired citizens of Europe and their children no doubt depends largely on the conceptualisation of human rights and democratic rights the governing elites are ready to grant". (Abadan 1985: 19)

Having said that, it is not wise for immigrants to wait for everything from governments. On the contrary, they have been organising themselves to form pressure groups, which could advocate their welfare rightly and improve their economic and social well-being. In turn, this has put governments under some pressure to take appropriate measures. Much is happening in this field, but it is beyond the ambit of the present thesis to consider this in detail.[64]

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[64]On this see Schmitter 1980, Schoeneberg 1985, Jenkins (ed) 1988

2.5.2 Educational issues

With the increase in family migration following the recruitment stops, the educational problems of Turkish families became more severe. In the Netherlands, for example, 115,016 out of a total Turkish population of 203,519 are under the age of 25 in 1990.[65] In Britain, 7,241 out of a total population of 32,910 were under the age of 19 as of 31.12.1993.[66] This young characteristic of the Turkish population in Europe gives rise to particular needs and problems, especially concerning education and vocational training. The children, parents and authorities were not prepared for the rising needs and demands for education, particularly because of the language problem (CFTS 1993a: 34). Educational, social and cultural problems of the second generation are seen by many experts as a 'potential social time bomb'.[67]

Abadan (1985: 8-10) put Turkish children in Germany into three categories:[68]

1) Those born abroad or having joined their family at an early age and being totally familiar with the language of the host country (by means of pre-school education). This group usually acquires a good level of school record, but often faces a sort of cultural split between the two worlds.

2) Those children, despite the fact that they are born abroad or have joined their family at an early age, who did not attend any pre-school education, therefore entered regular schools late with a considerable language problem. An additional problem for these children is often an extremely limited vocabulary in the mother tongue. Moreover, non-attendance and drop-out hinder the development of these youngsters in further professional training and for qualified jobs. Thus, they function inefficiently in both environments.

3) The third group, which is perhaps the most problematic, are those who joined their parents at a later stage. They arrived with high ambitions, but did not possess the necessary knowledge to cope with an unfamiliar style of life. Thus they became 'wanderers between two worlds'

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[65]See Sopemi-Netherlands 1991: 80.
[66]See TMLSS, *1993 Report*, 1994: 198.
[67]Dreesback, Luitz, "Time bomb warning over foreign children", *German Tribune*, 2 September 1979, p. 4.
[68]See also Perotti 1985: 298 on immigrant children experiencing dual process of acculturation and socialisation.

(Abadan 1985: 9-10). Concern over such youth problems is also an important issue in terms of restrictive immigration policies of the receiving countries for children, as we shall see in Chapter 6 on family reunification.

Diverse education policies, which reflect the larger ambivalence about the settlement of Turkish workers abroad, have been proposed and applied in the receiving countries, particularly in Germany. These can not be detailed here as they fall beyond the ambit of the thesis. Education policies ranged from the Berlin model, which emphasised teaching primarily in German to promote integration, to the Bavarian model, which promoted the teaching of migrant children primarily in their native language in special classes to facilitate an eventual return to Turkey (see p. 72 above). However, each option accelerates an identity crisis as a by-product. Children either grow up at home and at school in their own language but are later unable to enter the labour market and follow professional training, or they achieve a successful adjustment to belong to the dominant culture but may then come into conflict with their parents by denying their own roots (see Abadan 1985: 11-12).

In Germany, although equality of educational opportunities has been emphasised, the German school system has traditionally been selective, elitist and rigid, as Rist (1978: 201) observes. Of course, an insufficient knowledge of German language contributed to the difficulties of many Turkish children and worked to their disadvantage. Despite measures to facilitate vocational training, it was reported that only 18% of Turkish youngsters in Germany between the ages of 15 and 21 attended vocational schools in 1979 (TMLSS 1982: 109). According to another survey in 1980, only 0.7% among Turkish youngsters over 15 years age attended a Gymnasium (high school), and 73.1% of all Turkish youngsters left school without a certificate.[69]

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[69]See Friedrich-Ebert Stiftung 1980: 43, 45.

The situation has improved to some extent since then. In 1992, there were 99,203 Turkish youngsters attending vocational schools in Germany.[70] The number of Turkish children attending Gymnasium has steadily increased from 40,052 in 1980 to 76,717 in 1990, and Turkish children made up 1.4% of all students registered in the latter year.[71]

In 1992, there were 458,872 Turkish students in Germany registered in kindergartens, elementary schools, middle schools, high schools and vocational schools. The level of attendance of Turkish students declines at the higher levels of education due to unsatisfactory degrees, dropping out from school, insistence of the parents that the youngsters should start to work at a younger age and the special situation of girls.[72] The number of Turkish students attending German universities has, however, risen from 4,208 in 1975 to 12,816 in 1990 and to 14,500 in 1994.[73] On the other hand, studies indicate that still 60% of the Turkish immigrant youths at the age of 20 in Germany had neither a high school diploma nor a certificate of apprenticeship (Martin 1991: 76).

In the Netherlands, 8,495 out of all 57,119 Turkish students are attending vocational training; the number of Turkish university students being 628.[74] While most of the Turkish students in Germany and the Netherlands tend to be children of resident Turkish immigrants in these countries, Turkish students in Britain display a completely different feature. The majority of the Turkish students in Britain tend to be either post-graduate students with overseas scholarships and/or undergraduate students, or those who come just for language courses.[75]

It was further reported that conflicts between the methods of teaching by two different groups of Turkish teachers, one appointed by the Turkish National Education Ministry and the other recruited by German school authorities have contributed to the education problem (see Abadan

[70]See TMLSS, *1993 report*, 1994: 27.
[71]See CFTS 1992a: 19.
[72]For details on these figures see TMLSS, *1990 report*, 1991: 21-22.
[73]See CFTS 1992a: 25 and Şen and Goldberg 1994: 58-60.
[74]See TMLSS, *1993 Report*, 1994: 61-62.
[75]There were 1054 Turkish students in 1991 only in publicly-financed British educational institutions, for details see Chapter 4.3.5 below, pp. 211-212.

1975: 314-16). Also, confused by the complicated requirements of various schools, and attracted by the quicker possibility of their children earning, many Turkish parents decided to take their children out of school as soon as legally possible.

Abadan (1986: 366) argues that in order to cure the short-comings of the past, one of the most efficient solutions would appear to be well-designed and rationally instituted social legislation in the host as well as home countries, particularly stressing educational policies for the second generation. Nevertheless, this solution seems to be unrealistic unless the receiving countries, particularly Germany, change their conception of *Gastarbeiter* from a temporary phenomenon, in theory, towards a permanent one.

A pluralistic cultural orientation toward immigrants is often said to be needed to provide a balance between both cultures. As Ballard (1994: 31) points out in the context of South Asian immigrants in Britain, "just as individuals can be bilingual, so they can also be multicultural, with the competence to behave appropriately in a number of different arenas, and to switch codes as appropriate." Accordingly, the popular view that young people of immigrant origin will inevitably suffer from culture conflict due to their participation in a number of differently structured worlds can be dismissed, albeit not completely (for details see Ballard 1994: 30-33).

This would all depend on a healthy educational policy for the second generation which should allow for cultural enrichment and diversity, not cultural impoverishment. It should provide for learning from both cultures rather than giving away one of them or not belonging to either of them. It should create "multicultural bilinguals rather than bilingual illiterates" (Kağıtçıbaşı 1985: 119-20), or to term it differently, "skilled cultural navigators" (Ballard 1994: 31).

Both the receiving and the sending countries should realise their responsibilities towards achieving this end, and should advance consistent, clear and stable humanitarian policies which put a greater emphasis on human welfare rather than on economic benefits, though these

will follow in turn if youngsters are well-adjusted and educated. Furthermore, it should be realistically seen that substantial proportions of the foreign populations are going to settle and are a permanent, not a temporary component of the pluralistic society of Europe (Kağıtçıbaşı 1985: 120).

2.5.3 Discrimination and hostility

Turkish immigrants in Western European countries have had to face many forms of discrimination and hostility. The situation of Turkish migrant workers appears to have worsened whenever there were perceptions of economic crisis, particularly in the 1980s and 1990s. The foreign worker with his foreign customs and his apartness provides a ready 'scapegoat' for the Western European receiving countries (Power 1979: 46). Although various laws prohibiting overt discrimination on racial grounds exist in Britain, Holland and Germany, the practices and the attitudes, which may have the same effect, often persist in more subtle and disguised form.

In Germany the justification put forward for limiting the rights of the migrants is their quality of being foreigners; the main instruments are restrictive laws and regulations. On the other hand, in Britain the justification is the immigrants' racial and cultural origin and the instrument used is discrimination.

Growing hostility towards foreigners was witnessed in the 1980s and 1990s in Western Europe.[76] This hostility obstructed efforts to integrate foreigners, often particularly Turks. In Germany, as a result of the foreigners' policy of the time and <u>The Law of Promotion of Voluntary Repatriation for Foreigners</u> (the so-called 10,500 DM Law), a feeling of insecurity had been created, followed by a repatriation movement (see Şen 1989: 10). More than 370,000 Turks returned to Turkey between 1983-85 (Şen 1993c: 5).

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[76]The seriousness of this dangerous trend prompted the European Parliament to initiate a number of activities to combat racism and xenophobia in Member States, which also included the preparation of a 'Report drawn up on behalf of the Committee of Inquiry into Racism and Xenophobia' (see European Parliament of the European Communities 1990).

Various extremist organisations or political parties, for which opposition to the immigrants was either the only or the main issue, have gained some popularity.[77] In Germany, for example, the *Neo-Nazi Nationaldemokratische Partei Deutschlands* (NDP) has as its main issue the opposition to the presence of foreign workers in Germany, accusing the foreign workers of endangering the security of German workers and living on social benefits and unemployment pay.[78] The same report also indicated that the rise in the political significance of such organisations has been paralleled by a rise in the number of violent attracts on foreigners in Germany, particularly on Turks.[79] A series of arson attacks (in Mölln and Solingen, five Turks were killed) signalled a latent serious threat to the well-being of Turks in Germany.

German immigration policy is in fact an economically motivated one and there is no doubt that Germany actually makes huge profits from the existence of immigrants in general and Turkish immigrants in particular (see Martin 1991: 65 and Şen 1993c: 5-10). Since 1988 up till now Germany has allowed one million immigrants each year to enter the country, despite all the negative publicity against foreigners. This unique situation can be seen as a way of keeping the numbers down but never closing the doors to immigrants altogether.

On the other hand, the whole British system opposes immigration. The laws and regulations have been systematically changed step by step to the detriment of immigrants (see Dummett and Nicol 1990 and Sachdeva 1993: 13-41). In the British discourse, race and class have become the main issue, as many immigrants enjoy in fact formal equality, either in the form of residency or citizenship rights. For the most part, a high level of racial harassment and violence is directed at Asian members of the community as well as at Afro-Caribbeans. The growth of the neo-fascist National Front in the 1970s and 1980s and now the British National Party, which also advocates repatriation, was an experience similar to Germany.[80] Recent

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[77]Election breakthroughs of the '*Republikaner*' led by Franz Schönhuber in 1989 at municipal level in West Berlin, Frankfurt, Cologne, Stuttgart and Düsseldorf and other major cities and also in elections to the European Parliament in that year are examples of significant success (see ibid 1990: 16-17).
[78]See ibid: 16-29 for an account of the activities of extreme-right organisations in Germany.
[79]See ibid: 21.
[80]See ibid: 32-35, in some detail, on the activities of such racist organisations in Britain.

events in London's East End and elsewhere show that hostility to immigrants is still a threat present in Britain.

In Holland, the situation may be said to be better. When the government proposed to offer a premium payment to migrants who would leave Holland to relieve unemployment, it had to withdraw it because of strong opposition in Parliament (Power 1979: 52). Extremist right-wing parties have enjoyed a partial revival since 1989.[81] Nevertheless, it was confirmed that compared to countries like Germany, France and the UK, "racism and discrimination take on a less aggressive form and ethnic minorities are victims of institutionalised and subtle forms of racism more than anything else".[82]

Actually, there have always been cases of discrimination and complaints of discrimination over the years against immigrants and minorities in the Netherlands. In 1992 the Minister of Home Affairs organised a 'national debate on minorities' in the Parliament, in which some members of Parliament made statements that often took a discriminatory character, mainly about the Islamic background of some of the minority groups, supposed to be adverse to integration in the context of Western Europe and its liberal and humanitarian traditions (see Sopemi-Netherlands 1992: 52-53). In this negative climate, the discussions about ethnic minorities and their integration came out into the open; as a result, racial discrimination has also come out more openly, although it is of minor importance compared to the UK and Germany. A number of attacks were reported on buildings of immigrant organisations and shops of immigrants in this period.

Hostility towards immigrants is a general phenomenon in Western Europe, and has the same characteristics in all the countries, depending in each country on,

> "a variety of factors, like cultural and geographical distance from the receiving nation, distinguishability of the immigrant group, size of the group, recentness of arrival, social status and economic position." (Castles and Kosack 1985: 445-46)

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[81] See ibid: 29-30 on the activities of such racist organisations in the Netherlands.
[82] Ibid: 64-65.

It is obvious that this could lead to less pull factors and in fact to re-migration. Nevertheless, it would not be appropriate to say that there is a quick solution to this problem. The EU countries should not simply expect efforts of integration from the Turks, but should also participate more actively in this process. There are short-term measures, such as banning and controlling various radical racist groups as well as long-term ones, which can alleviate tensions between the immigrants and the indigenous people, such as providing less biased information on the immigrant population in schools and in the media. Most important of all, the establishment of legal safeguards should be viewed as a prerequisite for the integration of the Turkish minority in Europe. To what extent socio-economic and political considerations are operating in barring governments from acting effectively, and therefore covertly encouraging a selective policy of repatriation is not clear. The role of legal regulations and practices in enabling the integration or repatriation of the immigrants could be a thesis in its own right.

CHAPTER 3

THE RIGHTS OF TURKISH MIGRANTS IN EUROPE UNDER INTERNATIONAL LAW AND EU LAW

According to the established principles of international law, a state has discretion to admit or to expel foreigners. Unless a state voluntarily enters into written agreements, treaties or conventions which limit this discretion, this part of domestic jurisdiction is generally recognised to be the state's own business (Goodwin-Gill 1978: 94; Dummett and Nicol 1990: 260-261). The great migration movements of workers from developing countries to industrialised States could not be dealt with without the mechanism provided, on the one hand, by the law of nationality and, on the other hand, by the law of aliens (Frowein 1987: 2082). Therefore, it is necessary to extract here those parts of international and supra-national law which are applicable in protecting the rights of immigrants in order to supplement the protection already available in domestic jurisdictions.

The main purpose of this chapter is, therefore, to provide a framework of international legal conventions which may amount to an 'umbrella regime' for the individual countries we are concerned with in their response to Turkish migrants. The Ankara Association Agreement of 1963 and its components put Turkish migrants in a more favourable position than most of the other non-EU migrants, hence creating a sort of 'intermediate' regime for them. In order to provide uniform application of this regime to Turkish immigrants in the EU Member States with a view to safeguarding the rights of Turkish immigrants more effectively, one needs to discuss the contents of this legal regime in some detail. This chapter also enables us to see and compare the extent to which the immigration laws of the three countries we are concerned with are responding to such developments at the international and supra-national level.

3.1 The rights of aliens in international law

Today, the international community is witnessing a major change in the way in which the rights of aliens are protected. This is a change from the classic system of diplomatic protection by the alien's state of nationality, invoking the traditional international law governing the treatment of aliens, to the direct protection of the individual alien's rights by means of national and international instruments to enforce a set of reformulated international norms (Lillich 1984: 3).

The present section is not intended to be a comprehensive treatment of the human rights of aliens in international law. The main aim, after reviewing the development of international law relating to aliens in general, is to focus on the European instruments and to give a brief account of these instruments, showing how they can be used to protect the rights of Turkish immigrants in Europe.

One can go back as early as 1899 and 1907 (The Hague Peace Conferences) for the start of the modern era of international law making with a universalist approach beginning seriously to take hold in international law. The most notable codification attempt in this area was undertaken in the late 1920s by the League of Nations to codify the law relating to the treatment of aliens, which was a failure (see Lillich 1984: 31-32). Before 1945, increasingly planned international movement of people took place, mainly in two forms: (1) exchange of entire populations; (2) migration of labour (though on a very limited scale compared to post-war migration).[83]

Traditional international law predating the UN Charter in 1945 was strictly a 'law of nations' rather than a 'law of peoples'. The generally accepted doctrine of the time was, as Oppenheim wrote at the beginning of the 20th century, that the 'so-called rights of man' not only do not but

[83] Population exchanges following the break-up of the great multinational empires at the end of of World War I, particularly the Ottoman Empire; and the signing of bilateral agreements by France for recruitment of labour with Poland in 1919 and with Czechoslovakia in 1920 can be given as examples of the sort of international movement of people; for details see Lillich 1984: 33-34.

cannot enjoy any protection under international law, since that law is concerned solely with the relations between states and cannot confer rights on individuals.[84]

The problem of the human rights of migrant workers and their families is one of the most significant and lively areas today in the law governing the treatment of aliens (Lillich 1984: 34). The common perception and treatment of immigrants as guests who would eventually return home also remains a significant factor for the lack of interest in protecting the human rights of, particularly, long-settled immigrants and their families. Nevertheless, in reality, they have become permanent settlers who demand their new status not as aliens but as a permanent component of a pluralistic European society.

The issue of the rights of aliens is closely linked to the contemporary international human rights law, owing to the fact that it involves a clear test of the relevance and enforceability of the international human rights norms which have developed since World War Two.[85] These norms, derived and developed from the traditional law governing the treatment of aliens, should today be adopted and applied to the situations aliens face in contemporary international life (see Lillich 1984: 2-3).

Governments are subject to various political, economic, social and humanitarian pressures and influences when considering the position of aliens. As far as the general issue of standards of treatment of aliens is concerned, two tendencies have been apparent in the practice of states. The first reflects the desire of many states to see further developments within the field of human rights (Frowein 1987: 2083). The second is the continuing insistence upon the principle of state sovereignty and self-interest (see Dummett and Nicol 1990: 260-282). Governments and nationals will look at foreigners as non-belongers who are subject to the powers of exclusion and expulsion, although certain considerations may have a moderating

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[84]See Robertson 1977: 149, quoting a paragraph from the first edition of Oppenheim's *Treatise on international law*, 1905.

[85]For the use of international conventions in protecting the rights of migrants and ethnic minorities see generally Cator and Niessen (eds) 1994.

influence, such as reciprocity, internationally acknowledged principles of human dignity and rights, political support organised domestically in favour of migrants viewed as weak and suffering or deserving on some other grounds (Böhning 1984: 30-31). This precarious situation, of course, applies to long-term resident Turkish migrants in most Western European countries.

International law is of little use in the field of the treatment of aliens when it comes to the entry of aliens to a foreign territory.[86] The regulation of aliens' entry and residence continues to be governed by the traditional concept of state sovereignty, no matter how it is implemented in practice (see Wolf 1987). Access to the territory and to citizenship is allowed as a privilege or an exception that is extended on its own terms and that can be revoked. Both international law and universal human rights accept that states possess a broad competence concerning the entry and expulsion of foreigners (Böhning 1984: 31). The law of the EU is an example of granting extended rights of entry and free movement of workers within the legal order of comparatively homogeneous States, particularly in view of abolishing the internal borders among member states. European Union provisions with their unique context remain superior and by far the most effective standards compared to other international instruments in protecting the rights of immigrants (Cholewinski 1994: 597). Still, they do not amount to a comprehensive legal protection mechanism for all aliens. There exists an alarming gulf between the position of the so-called third country nationals and the situation of migrants from the EU.

It is apparent that states are looking to their own interests, and to that end will find some people more acceptable than others for economic, social and cultural reasons. As a result of governments' perceptions of their own best interests, in political and economic terms, they opt to encourage or discourage particular types of immigration simply for 'reason of state' (see

[86]Note that even the most recent global human rights instrument dealing with migrant workers and their families directly states that nothing in the present Convention shall affect the right of each state party to establish criteria governing admission of migrant workers and members of their families (Article 79 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (referred to as the 1990 UN Convention on Migrant Workers).

Dummett and Nicol 1990: 266). The state will feel free to decide upon the grounds of exclusion, both for immigrants and non-immigrants, to decide whether these will relate to personal qualities such as criminal record, physical and mental disability, or to more general grounds such as race, religion and colour (Goodwin-Gill 1978: 94). Thus, it is difficult to bring matters of entry and exclusion within the bounds of international law, except in those areas where treaties or peremptory norms operate, such as those on non-discrimination.

Although these are matters essentially within the reserved domain of domestic jurisdiction, states are not completely free to act; they are in fact obliged in some cases to modify their approach towards immigrant workers. In our present context, the existing and future dependency of the receiving countries on immigrant workers has made them an 'indispensable' factor for the receiving society (Maillat 1987: 50). Thus, it is the perceived self-interest of the receiving states more than the desire to uphold human rights of immigrants, which has qualified their approach in the treatment of human rights of immigrants.

The issues we are dealing with here are not only confined to entry and exclusion as far as the rights of aliens in international law are concerned. International law, perhaps much more effectively, provides remedies to protect the *status quo* rights of aliens, particularly of migrants and their families. Actually, the legal position of the spouse and family members in the law related to aliens is a modern question which was ignored by classical international law (see Thomsen 1987: 1947). The states have increasingly become aware of the alien's family situation, perhaps as a result of the developing recognition of human rights in this area, but also because of the facts created through family reunification. The states' powers are therefore, to some extent, limited and confined by established and emergent rules and standards of international law. Such rules, which operate to limit the ambit of the power in question and to direct the manner of its exercise, have their origins in treaty, in the practice of states and in general principles of law (Goodwin-Gill 1978: v).

In this context, the family enjoys widespread protection under universal human rights instruments and declarations. For example, Article 16 of the Universal Declaration of Human Rights proclaims that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[87] Despite the general acceptance of the sanctity of the family in international law and the increasing family migration among foreign populations in Western Europe, the precise definition of the family has been challenged and interpreted differently by the receiving states (for details see Chapter 6 and 7).

Goodwin-Gill (1978: 57) rightly argued that "apart from cases of inter-state treaties, where nations agree to surrender 'sovereign rights' in terms, it will always be difficult to establish legal principles applicable to the reserved domain". The example of the ECHR shows that regional arrangements are best suited to result in any significant developments in protecting the rights of aliens. Through such instruments, states can be persuaded to limit the exercise of their powers, by reference to the goals and objects of a given treaty, and to submit themselves to the jurisdiction of an international tribunal (Goodwin-Gill 1978: 57). Thus bilateral or multilateral treaties are a primary source of obligations, which indicate more exactly the limits to state discretion in matters of entry and exclusion, which also provide safeguards in protecting the rights of long-settled migrants and their families.

There is today a large and complex body of international instruments which deals, directly or indirectly, with the issue of the treatment of immigrants (see Cator and Niessen 1994). These instruments vary from more global ones, i.e. UN Covenants, the UN International Convention on the Elimination of all Forms of Racial Discrimination of 1965, ILO Conventions and the 1990 UN Convention on Migrant Workers to more regional ones, i.e. the European Convention on Human Rights (ECHR). Some of them are of non-binding character, and might be called 'soft law'. For example, various declarations and resolutions constitute guidelines for the states' actions, as well as evidence of state practice. Such human rights declarations, albeit

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[87]See Article 23 of the ICCPR and Article 10 of the ICESCR for almost similar clauses. Also note that the 1990 UN Convention on Migrant Workers recognises the protection of the unity of the families of migrant workers in similar clauses (Article 44).

non-binding documents, have been increasingly used in domestic politics and by non-governmental organisations, and have come to function as political restraints on the sovereign power of the state (Hammar 1985a: 259; see also Martin 1989). At the other end of the spectrum, we have more stringent and solid instruments which are binding to states parties to them, such as the United Nations International Convention on the Elimination of all Forms of Racial Discrimination and the ECHR.

The difficulty that one encounters in relying upon these international documents in protecting the rights of immigrants arises from the fact that they all contain escape clauses which allow states to distinguish between citizens and non-citizens, mainly on grounds of nationality (see Woltjer 1993). Accordingly, states are allowed to maintain restrictive immigration legislation and to limit access to certain functions in public service. For instance, the definition of 'racial discrimination' envisaged by Section 1 of the United Nations International Convention on the Elimination of all Forms of Racial Discrimination is largely restricted by the subsequent sections (2 and 3) of the same Convention, allowing differentiation on grounds of nationality.[88]

It is argued that the instruments dedicated solely to the protection of immigrant workers and their families through the mechanisms of the International Labour Organisation (ILO) and the United Nations (UN) have had little impact in Europe.[89] However, the significance of such international instruments should not be underestimated, particularly in terms of establishing a global perspective for the proposed minimum standards applicable to migrant workers and their families. In particular, the 1990 UN Convention on Migrant Workers with its 93 detailed articles, though not in force yet, provides a standard norm among the major human rights instruments, which specifically deals with migrant workers and their families (see IMR 1991). The overall object of the 1990 Convention is said to reaffirm and establish basic norms in

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[88]On this see in detail Woltjer 1993: 9-18 for the use of UN CERD in protecting the rights of migrants and ethnic minorities.

[89]Cholewinski 1994: 569; also see Lillich 1984: 41-61 and 69-74 for details of development under UN and ILO respectively.

existing human rights instruments and compile them together in a comprehensive instrument which could be applied universally to a group of non-nationals - migrant workers and members of their families (Hune 1994: 82).

The most significant features of the Convention are summarised as follows (for details see Lönnroth 1991: 735-736): The 1990 Convention is the first universal codification of the rights of the migrant workers and their family members in a single document. This grants the rights applicability as international standards beyond national provisions and definitions. The Convention, more importantly, includes a universally accepted definition of the term 'migrant worker', 'project-tied', 'self-employed' and 'special employment' workers, which are not previously covered by existing international instruments.[90] Further, the Convention incorporates the principle of an equal treatment of the migrant with the nationals of the state of employment, rather than a mere 'minimum standards' approach. Last but not least, the Convention affords a three tier enforcement system of a) a regular reporting, b) a states' complaints procedure and c) an optional individual complaints procedure for its implementation.

A number of setbacks can be cited as among the deficiencies of the Convention. In addition to the general problem of the enforcement of such international instruments, small number of ratifications and the tentative language used in some of the provisions of the Convention - pharases such as 'appropriate measures and 'human dignity' - are some but not all (see Ansay 1991: 843).

Relevant European standards for the protection of immigrant workers and their families can be found within three different systems: the Council of Europe, the European Union (see Chapter 3.3) and the Organisation (Conference) on Security and Co-operation in Europe.[91] The latter with its Final Act of the Helsinki Conference constitutes 'soft law' and is not legally binding

[90]See the relevant parts of the thesis below for references to such definitions.
[91]For details see Council of Europe Directorate of Human Rights (1985) ***Human rights of aliens in Europe***; and Cholewinski 1994: 575-586.

(Cholewinski 1994: 580). Thus, it is of a political rather than legal character, which sets standards concerning contacts and regular meetings on the basis of family ties, the reunification of families and marriages between citizens of different states.[92]

Among the human rights instruments concerning immigrants under the framework of the Council of Europe, the ECHR deals with the status and treatment of aliens only incidentally, although the Fourth Protocol and the draft Seventh Protocol address the issue directly.[93] Because of the absence of provisions specifically addressed to the situation of aliens in the ECHR, applicants have tended to base their challenges to national immigration laws or practice on Article 3 (which prohibits inhuman and degrading treatment), Articles 5 and 6 (which protect the liberty of the person and the right to a fair and public hearing), Article 8 (which guarantees respect for private and family life), Article 12 (which deals with the right to marry) and Article 14 (which establishes the principle of non-discrimination).[94]

It could be argued that the ECHR has made it harder for individual states to change policies and laws to the detriment of immigrants, particularly in the field of family reunification. Such international instruments establish "the widespread acceptance of the moral or political proposition that states should facilitate the admission to their territories of members of the families of their own citizens or residents" (Plender 1988: 366). The governments have to find ways and arguments to go around the provisions of the ECHR. The Convention, therefore, has functioned as a kind of brake on the radical changes in the laws governing family reunification in Europe.[95] Turkish migrants in Europe are also covered by these provisions and can rely on them under the mechanism provided by the ECHR (for more details see pp. 126-128 below).

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[92]Plender 1988: 365, see also Groenendijk 1992.
[93]For details see Plender 1988: 227-236; also see Robertson and Merrills 1993: 229-235 for the Fourth and 236-245 for the Seventh Protocol.
[94]See Goodwin-Gill 1978: 160-167; Robertson and Merrills 1993 for an expanded account of the Convention.
[95]This view was confirmed in an interview with Prof. Kees Groenendijk on 28.01.1994.

The limitations imposed by the ECHR are supplemented by further restrictions on national powers imposed by other treaties sponsored by the Council of Europe.[96] The most prominent ones are the Convention on Establishment of 1955, the Social Charter of 1961 and the European Convention on the Legal Status of Migrant Workers of 1977. The latter was the zenith of the Council of Europe's efforts to produce a specific European instrument for the protection of migrant workers and their families, but, despite its promising title, it is said to be of limited importance due to its textual ambiguity and the small number of ratifications (Cholewinski 1994: 576).

The European Convention on Establishment of 1955 regulates practically all of the basic questions concerning an alien who is permanently resident in a European state: entry, residence, expulsion, judicial guarantees, individual rights, taxation, etc.[97] The practical value of the European Convention on Establishment has been significantly reduced since all the states which have ratified it are also parties to the Agreement on the European Economic Area and its regime concerning free movement of persons, with the exception of Turkey (Cholewinski 1994: 578; for more details see pp. 114-115 below).

The European Social Charter (in force since 1965) offers some degree of protection for the migrant workers[98] The Appendix to the Charter states that aliens who are either lawfully resident or working regularly in the territory of a state are entitled to the enumerated rights. In addition to this general provision bringing aliens within the scope of the Charter's coverage, there are two provisions (Arts 18 and 19) which, by their very terms, apply especially to non-nationals (on this see Gülmez 1993). Article 18 provides for the liberal application of existing regulations, the simplification of the formalities and the reduction of charges payable by foreign workers, as well as the liberalising of regulations governing the employment of foreign workers. Article 19 (part II) of the Social Charter deals with the right of migrant workers and their families to protection and assistance, which must be accepted by all parties (for further

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[96]See in detail Oellers-Frahm 1987.
[97]For details see Plender 1988: 236-240, Oellers-Frahm 1987 and Chapter 3.3.2 below.
[98]See Harris 1984; Oellers-Frahm 1987; Plender 1988: 243-48.

details see p. 116 and pp. 119-120 below). Most of the obligations imposed by Article 19 are derived from ILO Convention No. 97 concerning Migration for Employment (Revised) 1949 and are a reflection of the European Convention on Establishment (Plender 1988: 244).

To summarise, the effect of all those instruments of international law has been to support a tendency to give equal treatment to immigrants in labour relations, in social security, in public welfare, in legal aid and other areas. For instance, Article 7 of the 1990 UN Convention on Migrant Workers urges states parties to respect and to ensure to all migrant workers and members of their families the rights provided in the Convention without distinction of any kind such as sex, race, colour, language, religion, ethnic origin, nationality, age, property, birth or other status. Turkish immigrants, like any other immigrants and people, can rely on these instruments of international law, since the instruments do not, principally, make any distinction between nationals and non-nationals. Nevertheless, over the past few years, the Ankara Association Agreement and the decisions of the Association Council have had many practical effects. These are the relevant instruments we shall, largely, be focusing on in the sub-chapters below.

3.2. The Ankara Agreement and its implications

Ever since the inception of the Turkish Republic in 1923, Turkish policy-makers have followed a policy of Westernisation according to which they hoped to reorganise their society and their relations with the outside world (see Ülman and Sander 1972). The division of Europe into two rival blocs, and the position of Turkey as a 'front-line state' in the emerging cold-war atmosphere were among the main factors which facilitated Turkey's close alliance to the West (Eralp 1993: 26). Turkey applied to join almost all the international institutions that were created in the process of forging the Western alliance (the Marshall Plan, the OECD, the Council of Europe and NATO). Seeking closer relations with the European Union (EU) was a logical extension of this approach to foreign policy.[99] Turkish policy makers, therefore, took

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[99] See in detail Balkır and Williams (eds) 1993 for a reassessment of Turkey's relationships with Europe and the EU in particular.

the view that membership of the EU was a logical extension of Turkey's inclusion in the other Western organisations, since the EU was seen as the economic dimension supplementing and cementing the Western alliances. But among the more conjectural factors that served to expedite Turkey's application to the EU were the severe economic and political difficulties experienced at the time by the Turkish government in the post-war period (see Karluk 1995).

Upon Turkey's application of membership to the Community on 31 July 1959, the EC adopted a cautious stand over Turkey's inclusion (see Eralp 1993). As a kind of compromise, Turkey and the EC signed the Ankara Agreement establishing an Association with the Community on 12 September 1963.[100] The Ankara Agreement contained three periods, consisting of a preparatory stage followed by transitional and final stages, through which association between Turkey and the EC would proceed (Article 2(3) of the Agreement). The Agreement envisaged eventual EC membership of Turkey. Article 28 of the Agreement states this clearly:

> "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community".

The Agreement established a Council of Association to act within the powers conferred upon it by the Agreement in order to ensure the implementation and the progressive development of the Association (Article 6 of the Agreement), and laid out the procedure under which it will operate (Articles 22-27). According to Article 12 of the Agreement, the contracting parties agreed *to be guided* by Articles 48, 49 and 50 of the EC Treaty for the purpose of progressively securing freedom of movement for workers between the Community and Turkey. Similar provisions exist in Article 13 of the Agreement concerning Articles 52 to 56 and Article 58 of the EC Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment; and in Article 14 of the Agreement concerning

[100]See Appendix 1 for the provisions of the Ankara Association Agreement of 1963. On the Association Agreement of 1963 and the freedom of movement of Turkish workers in the EU, see Gümrükçü 1991, Ergün 1990, Rhein 1991, Ansay 1987.

Articles 55, 56 and 58 to 65 of the Treaty for the purpose of abolishing restrictions on freedom to provide services between the Community and Turkey.

In 1970, an Additional Protocol was negotiated setting a timetable for the gradual establishment of freedom of movement for Turkish workers, for the dismantling of quantitative restrictions and for the elimination of customs duties starting in 1973, with a view to aligning the Turkish customs tariff to the Common Customs Tariff (CCT) (which was signed at Brussels, 23 November 1970). The Additional Protocol (see Appendix 2), which came into effect on 1 January 1973, lays down in Article 36 that:

> "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 twelfth and the twenty-second year after the entry into force of that Agreement. The Council of Association shall decide on the rules necessary to that end" (italics added).

These texts were interpreted by the Commission in 1986 as follows:[101]

1) Free movement is to be secured by progressive stages between 1 December 1976 (12th year) and 30 November 1986 (22nd year). In other words, Article 12 of the Ankara Agreement is to be implemented in full from 1 December 1986.

2) The actual concept of free movement of workers, as part of the Association Agreement, has still to be defined, the parties being guided by Articles 48, 49 and 50 of the Treaty of Rome.

3) Implementation of free movement is in no way self-executing, as it is for the Council of Association to decide on the rules necessary to achieve it.

The EC countries, on the other hand, had already taken decisions to stop further recruitment of foreign workers, including Turks, as a response to the staggering unemployment problems which were expected to worsen as a result of the energy crisis in the early 1970s. Therefore, the free movement of Turkish workers was too ambitious an aim to achieve as far as the EU

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[101] See CEC 1986, Commision Communication to the Council on the implementation of Article 12 of the Ankara Agreement relating to the free movement of workers.

was concerned. The result was some improvement in the rights of existing Turkish migrant workers under the development of the Association Agreement by the Association Council in 1976 and 1980. The Association Council has to date adopted three important decisions on the rights of Turkish migrant workers, details of which are discussed further below, namely Decisions 2/76[102], 1/80[103] and 3/80.[104]

In 1985, Turkey was arguably allowed to press for freedom of movement for Turkish workers under Article 36 of the Additional Protocol in conjunction with 12 of the Agreement.[105] However, Turkey has made freedom of movement of Turkish workers part of its membership application instead of pursuing freedom of movement as part of the Association Agreement (CFTS 1993a: 85). In fact, concern about the increasing number of Turkish immigrants (notably in Germany) has been an important factor both in the non-implementation of the freedom of movement provisions and in the non-acceptance of Turkey's membership application to the EU.

On the other hand, the Association Council, in its decision on 6 March 1995, fine-tuned and finalised the entry into force of the Full Customs Union with effect from 1 January 1996 between the EU and Turkey. In fact, this has been an ongoing process since the adoption of the Ankara Agreement of 1963 and the Additional Protocol of 1970.[106] The European Parliament held a voting session on 13 December 1995 in order to confirm the entry into force of the Customs Union within the framework of its *avis conforme* procedure in accordance with Article 238 of the Maastricht Treaty.[107]

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[102]Decision of the Association Council No 2/76 on the implementation of Article 12 of the Ankara Agreement (adopted at the 23rd meeting of the Association Council, on 20 December 1976), see Appendix 3.
[103]Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, see Appendix 4.
[104]Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families, see Appendix 5.
[105]See Ansay 1987.
[106]See Türkiye İşveren Sendikaları Konfederasyonu (TİSK) 1995.
[107]The assent procedure was introduced by the Single European Act of 1986 for important matters such as the expansion of Community membership (Art. 237 EEC), and association agreements (Art 238 EEC), as an instrument of foreign policy (see Craig and Burca 1995: 60, 128). However, the issue here is the entry into force of the Customs Union, not that of an association agreement, which was already

Looking at the implications of the Decision of the Association Council on 6 March 1995 on the Customs Union, all that one could find concerning the situation of Turkish immigrants is a single paragraph under the heading 'co-operation on social matters', in the form of a resolution. Section 5 of this resolution states that:

> "A regular dialogue will be set up on the situation of Turkish workers in regular employment in the Community and vice versa. The two parties will explore all possibilities for a better integration of such workers."

This paragraph barely adds anything new and progressive on the situation of Turkish immigrants. It does, however, remind us of Article 15 of Decision 1/80 of the Association Council, which envisages co-operation and exchange of information between the parties on the situation of the labour market in the Community and Turkey. Further, one could perhaps infer, from the wording 'a regular dialogue' envisaged by the paragraph above, the creation of an *ad hoc Working Party*, which was already mentioned in Article 15(2) of Decision 1/80 to assist the Association Committee to implement Article 15.[108]

On the other hand, the entry into force of the Customs Union is likely to create paradoxes and difficulties in practice, particularly in terms of freedom of movement of Turkish citizens and entrepreneurs within the EU. Through Customs Union, barriers to freedom of movement of goods are to be removed, but not of persons. This will inevitably put Turkish citizens and entrepreneurs in jeopardy because of, to say the least, already too strict application of admission requirements in the EU, i.e. visa regulations. This will, of course, have an adverse effect on the full implementation and proper functioning of the Customs Union.

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envisaged and regulated in some detail by various provisions of the Ankara Association Agreement of 1963 (Arts. 2-5, 10). Thus, it is arguable whether it is neccessary to have the European Parliament's consent at all on such an issue which already falls within the ambit of the Association Agreement.

[108]This has been confirmed by Mr. Ahmet Kalpsuz, the head of the EU Coordination Department in the Turkish Ministry of Labour and Social Security, in an interview on 5 December 1995 in Ankara.

The Ankara Agreement, the Additional Protocol and the three decisions of the Association Council (2/76, 1/80 and 3/80)[109] established in accordance with the provisions of the Agreement, provided the legal framework under which various issues concerning the rights of Turkish workers have been discussed. The ECJ has considered the application of various provisions of these instruments in relation to Turkish workers in five cases up to now, namely Demirel,[110] Sevince,[111] Kuş,[112] Eroğlu[113] and Bozkurt.[114] It appears that the already intensive work load of the ECJ will become much heavier through new applications of Turkish migrants living in EU member states. The applications by resident Turkish immigrants proceeding before the ECJ are already Altun-Başer (C-277/94), Recep-Tetik (C-171/95) and Suat-Kol (C-285/95). Increasing importance is now being given in the literature to the legal implications of the Ankara Agreement and its components, confirming that there remain unresolved questions concerning the exact scope of the application of these provisions.[115]

The Association Council decisions give little detail on how the rights afforded to Turkish workers in the Community are to be executed. The full meaning of these Decisions was unknown until the ECJ began to deliver its judgements in the cases mentioned above. This may be partly because of the fact that the decisions of the Association Council were and continue to be unpublished. The Court has begun to interpret the provisions of the Agreement, the Protocol and the Decisions so as to show the interplay between national rules and EU law, by making differentiation between rights which are precise and conditional and those rights which are not directly applicable. Darmon A-G stated in Sevince that the Agreement and the Decisions of the Association Council are a part of the Community legal order and that the provisions of these instruments are directly applicable:

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[109] See Appendices for the provisions of these documents.
[110] Meryem Demirel v. Stadt Schwäbisch Gmünd (case 12/86) [1987] ECR 3719, [1989] 1 CMLR 421.
[111] S.Z. Sevince v. Staatssecretaris Van Justitie (case C-192/89) [1990] ECR 3461, [1992] 2 CMLR 57.
[112] Kâzım Kuş v. Landeshauptstadt Wiesbaden (case C-237/91)[1992] ECR I-6781, [1993] 2 CMLR 887.
[113] Hayriye Eroğlu v. Land-Baden-Württemberg (C-355/93) [1994] ECR I-5113.
[114] Ahmet Bozkurt v. Staatssecretaris van Justitie (C-434/93) [1995] ECR I-1475.
[115] See, for instance, Mallmann 1995, Weber 1995, Kemper 1995, Gutmann 1995a, Gutmann 1996.

> "Regard being had to its wording and the purpose and nature ... the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[116]

Further, the Advocate General reaffirmed in Eroğlu[117] that Turkish workers are no longer in the situation of nationals of third countries; and that they benefit from priority of employment over the latter; and that the host Member State may not refuse the renewal of the work permit except in certain circumstances determined by the Decision. The German literature on the implications of the Association Agreement and subsequent developments seem to suggest that the decisions of the Association Council are an integrating part of the EU law but not necessarily an integral part of the EU law (Kemper 1995: 114, Cremer 1995).

3.3. The rights of Turkish migrants under EU law

This section contains a discussion of the rights that Turkish migrants enjoy under EU law, deriving from the Ankara Agreement, the Protocol and the Decisions of the Association Council, supplemented by the additional remedies available under the European human rights instruments (for example, the ECHR). The purpose of this sub-chapter is to find out how far Turkish migrants can benefit from these various instruments in protecting their rights, and how this protection system could be expanded within the context of EU law. Therefore, it is necessary to consider the specific issues individually in order to provide a clear and uniform discussion. In section 3.3.1, the issues relating to the employment of migrant workers are discussed. This is followed by another section on the self-employment of Turkish migrants. In section 3.3.3, we explore the possibility of extending the application of the Association law and EU law, supplemented by other European instruments in protecting family migration rights of Turkish migrants. Social security rights of Turkish migrants and the protection available against expulsion are further issues to be discussed in sections 3.3.4 and 3.3.5 respectively.

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[116] Sevince, at para 26 of judgement.
[117] Eroğlu, point 23 of the opinion of the Advocate General, p. 5120.

EU law provides a sophisticated protection mechanism for migrants from other member states as well as immigrants from non-member states. As far as Community migrants from other Member States are concerned, an important step in the way of equality of treatment was achieved by the adoption of Regulation No. 1612 in 1968, which provided the basis for the free movement of workers.[118] However, the rights deriving from this regulation and from other Community legislation in this area apply only to Community nationals, so that the foreign population of each Member State has effectively been divided into a group of privileged Community migrants, on the one hand, and the group of so-called 'third country nationals', on the other (Duyssens 1977: 513).

Under the EU law, the rights of non-EU nationals (including Turkish nationals) to entry, residence, work, social security benefits, education and other social and tax advantages are based either on their relationship with EU nationals or firms (derivative rights) or on their status as a national of a country with which the Community has concluded an international agreement (direct rights) (see Weiler 1992: 71-72). The attitude of the ECJ varies widely depending on which of these grounds is invoked due to the fact that the former ground is related to the freedom of movement within the Community, while the latter ground concerns the Community's external relations (Alexander 1992: 63). Because of the fundamental nature of this distinction, we are not dealing with the rights and benefits that a Turkish national may derive from his/her relationship with an EU national or from a work for a firm. In fact a large number of regulations and directives grant certain rights to members of the family of EU nationals irrespective of their own nationality (see Alexander 1992: 54-57). For example, in Gül,[119] the ECJ affirmed that:

[118]On this see Craig and Burca 1995: 689-699.
[119]Emir Gül v. Regierungspräsident Düsseldorf (case 131/85) [1986] ECR 1573; [1987] 1 CMLR 501 para 30 of the judgement; This case concerned a Turkish national married to an EU citizen.

> "The spouse of a worker who is a national of a member-state to whom Article 11 of Regulation 1612/68 applies is entitled to be treated in the same way as a national of the host member-state with regard to access, as an employed person, to the medical profession and the practice of that profession whether his qualifications are recognised under the legislation of the host-member state alone or pursuant to Directive 75/363".

The EU law differs from other instruments of international law in that decisions, agreements and acts of the institutions of the Community are directly applicable in the Member States. Of course, not all provisions of directly applicable international law are capable of direct effect.[120] When a provision of EU law is directly effective, domestic courts are under an obligation not only to apply it, but to do so in priority over any conflicting provisions of national law according to the principle of primacy of EU law.[121] Therefore, EU law has priority over national laws in the areas in which they apply. Under the EU law, where a right deriving from an agreement is found to be directly enforceable by the ECJ (direct effect), it is part of the *acquis communautaire* and must be applied by the Community's national courts.

The case law of the ECJ provides that the agreements and acts adopted for their implementation are, so far as the Community law is concerned, an act of one of its institutions within the context of Article 177 (1) (b) of the Treaty and that their provisions form an integral part of the Community law from their coming into force.[122] Therefore, it has accepted jurisdiction to give preliminary rulings regarding the interpretation of such provisions.[123] Furthermore, if it appears to a national court that a national provision does not comply with community law, the court is under an obligation to apply Community law and if necessary grant interim relief while the opinion of the ECJ is being asked.[124]

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[120] On this see Steiner 1992: 24-41; now Craig and Burca 1995: 151-199.

[121] On this see Steiner 1992: 42-53; now Craig and Burca 1995: 240-282.

[122] See Steiner, 1992: 285-305 and now Craig and Burca 1995: 398-446 for the preliminary ruling procedure.

[123] See Demirel (C-12/86) para 7 of the judgement for agreements; and Sevince (C-192/89) para 10 of the judgement for implementing acts; also Haegeman v. Belgium [1974] ECR 449; [1975] 1 CMLR 515.

[124] Marleasing SA v. La Commercial Internacional de Alimentación SA (case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305; Factortame v. Secretary of State for Transport [1989] 2 All ER 692, 3 CMLR 1; on this see Craig and Burca 1995: 395-397.

A provision in such an agreement or in an Act adopted for its implementation must be regarded as being directly applicable when, regard being had to its wording and the purpose 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.[125] It has been argued that neither the provisions of the EC treaties nor their interpretation by the ECJ have provided for an unambiguous foundation of a coherent Community policy on third country nationals (Ketelsen 1992: 44-45). Although, the jurisprudence of the ECJ, particularly regarding the interpretation of Articles 118 and 238 of the EEC Treaty, as well as that pertaining to the question of direct applicability of provisions of bilateral Agreements between the Community and third countries, could be regarded as having advanced the issue in at least some aspects, the main issue of a comprehensive and perhaps exclusive Community competence in this area remains unresolved.

A dichotomy was developed over the years by the member states, by explicitly recognising, on the one hand, "the requirement of much closer consultation and co-operation at Community level in the implementation of national migration policies vis-à-vis third countries" (Ketelsen 1992: 44). On the other hand, they always underlined that:

> "Matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States and ... nothing shall affect their right to take such measures as they consider necessary to control immigration from third countries." (Ketelsen 1992: 44)

As non-EC citizens, Turkish immigrants therefore remain subject to strict immigration control regimes, whose harsh effects are somewhat tempered by bilateral agreements.

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[125] See Demirel (12/86) para 14 of the judgement for agreements; Sevince (case C-192/89) para 10 of the judgement for implementing Acts; and see Haegeman v. Belgium. On this see Craig and Burca 1995: 169-174.

3.3.1. Migration for employment

Here, we are mainly concerned with the legal position of Turkish immigrant workers[126] regarding their access to the territory and labour market of the EU. The implications of having admission into the EU labour market for Turkish workers are further discussed in some detail. There is no right of free movement (initial admission) to the EU countries as far as Turkish workers are concerned, unlike for migrant workers from member states. Actually in Community law the right of entry and residence does not exist independently: it is rather a necessary consequence of the pursuit of an economic activity. One can speak of rights of residence and continued employment only when a Turkish worker is already lawfully present and employed in a Member State. The access to the territory and to the labour market of a member state is governed by the national rules so far as the nationals of non-member countries are concerned.[127]

Already in the early 1970s, the view had been expressed that the Treaty would be best advanced by permitting free movement of labour regardless of nationality (Böhning 1973: 81). Nevertheless, Article 1(1) of Regulation 1612/68 makes it clear that only nationals of Member States "shall be entitled to take up and carry on a wage paid occupation in the territory of another Member State". In the Commission's view,[128] where it appears that job vacancies cannot be filled by workers of Community origin, job applications from Turkish workers legally resident in one Member State and wishing to work in another Member state could be processed, on the same footing as those of Community workers, through the European System for the international clearing of vacancies and applications for employment (SEDOC). Further, the European Commission expressed, on many occasions, its wish to extend the EU single

[126]The term 'migrant worker' has been defined as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national (Article 2(1) of the 1990 UN Convention on Migrant Workers).
[127]The entry and residence of nationals of member states and their families are regulated by two separate Directives, 68/360/EC (for workers) and 73/148/EC (for the self-employed).
[128]See CEC 1986, Commission Communication, pp. 7-8.

market to give genuine free movement for all legal residents to cross national boundaries to seek work.[129]

The current position of Turkish workers regarding employment and free movement is stated in Article 6(1) of Association Council Decision 1/80 which provides that:

> "Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:
> - shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
> - shall be entitled in that Member State, after three years of legal employment and subject to the priority given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that Member State, for the same occupation;
> - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment".

It must be emphasised at this point that Article 6(1) of Decision 1/80 falls short of providing the right to remain for Turkish workers, after having been employed in a member state in the absence of any express provision. In Bozkurt,[130] the ECJ has supported the arguments of the governments involved that the results of any permanent incapacity of Turkish workers for work are governed exclusively by the national law of the member state concerned, as far as their right of residence is concerned.[131] This appears to prove the importance given to the concept of employment, which is inherent in the Decisions of the Association Council and the Agreement.

The procedures for applying Article 6(1) "shall be those established under national rules" (Article 6(3) of Decision 1/80). As is clear from this wording, the paragraph confers no

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[129]See *The Guardian*, 26 July 1994.

[130]Bozkurt, para 35 of the judgement

[131]In contrast, Article 48(3)(d) of the Treaty and Commission Regulation (EEC) No 1251/70 of 29 June 1970 regulate the rights of EU workers to remain in the territory of a member state after having been employed in that state. It has not yet been found necessary for Turkish workers to adopt rules corresponding to the above mentioned documents on the right to remain resident in the territory of a member state (see para 32 of the opinion of the A-G Elmer in Bozkurt).

discretion as to whether or not to apply the rights. Rather it imposes a positive obligation to establish national rules to ensure that Article 6 rights are enjoyed by Turkish workers within a Member State. A worker with a secure and stable position in the labour force also has a right to extension of his work and residence permit in the circumstances described above (Article 6(1)).

3.3.1.1 Definition of a 'Turkish worker'

In the absence of a definition of a Turkish national in the relevant instruments, it is reasonable to assume that a person having a Turkish passport properly issued to him/her must be considered a Turkish national. If the person, on the other hand, is not a Turkish passport holder and therefore s/he cannot satisfy the relevant authorities, his/her nationality will presumably be a matter for the Turkish government to confirm.

No definition of a 'Turkish worker' is provided either in the instruments of the Association Agreement or in the case law of the ECJ. Nevertheless, it may well be argued that the definition of a Turkish worker must follow the Community definition in order to secure uniform application of law, taking into account the implications of the Agreement, the Protocol, the Decisions of the Association Council and the jurisprudence of the ECJ on Turkish workers. Furthermore, we can rely on established ECJ case law under the situation arising from Article 6(1) of Decision 1/80 as Article 6 rights are held to be directly applicable (see the remaining pages of this section below).

Article 12 of the Agreement makes reference to Articles 48, 49 and 50 of the Treaty of Rome, although this has been held to be 'in the nature of a guideline',[132] not being directly applicable. One should not, however, forget that the Agreement was founded on the desire to facilitate the accession of Turkey to the Community (Article 28 of the Agreement), a point which was also taken on board by the ECJ.[133] Article 10(1) of Decision 1/80 further reminds us that Turkish workers should be treated the same as EC workers:

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[132] Demirel, at p. 423.
[133] Ibid. at p. 429.

> "The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish Workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and community workers".[134]

However, Turkish workers do not fully fall to be treated in just the same way as Community workers:[135] the requirements governing their entry into a Member State are determined by national law alone, not being affected by the Decision. Their right of residence is restricted to the Member State in which they work. The right to renewal of their work permits and to free access to any paid employment is strictly subject to a number of conditions, particularly concerning periods of time (see in detail Kemper 1995).

Further, the ECJ appears to be making a differentiation between the right to employment and the right to remain in a member state, in terms of seeking guidance for the meaning and scope of the term 'worker' from Community law. On the one hand, the ECJ finds it essential to transpose, so far as possible, the principles enshrined in Articles 48, 49 and 50 of the Treaty to Turkish workers in order to ensure compliance with the objective of the Decision 1/80, namely moving towards securing freedom of movement for Turkish workers.[136] On the other hand, the Court is of the view that the rules applicable to Community workers under Article 48 cannot simply be transposed to Turkish workers, as far as the right to remain is concerned.[137]

With respect to the definition of workers within the context of Article 48 of the Treaty of Rome, the ECJ has held that it is a matter for Community law and not for national law in order to "avoid as far as possible variations between member-states".[138] This definition of workers includes workers who are only employed part-time and whose remuneration may therefore be below the guaranteed minimum wage level for that sector or below the nationally recognised

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[134] Articles 25, 55 and 70 of the 1990 UN Convention on Migrant Workers provide equal treatment to migrant workers and their family members with nationals of the state of employment in respect of remuneration and other conditions of work and terms of employment.
[135] See Eroğlu, point 24 of the opinion of the Advocate General.
[136] See Bozkurt, paras 19-20 of the judgement.
[137] See Bozkurt, para 41 of the judgement.
[138] See D.M. Levin v. Staatssecretaris van Justitie (case 53/81) [1982] ECR 1035; [1982] 2 CMLR 454.

minimum subsistence level.[139] The important criterion is that the work must be genuine, whatever the motive is, and not so minimal that it does not constitute an economic activity at all.[140]

In Lawrie-Blum,[141] the definition of worker is provided in accordance with the objective criteria which distinguish the employment relationship by reference to the rights and duties of the worker. According to the criteria, the essential feature of an employment relationship is regarded to be that a person performs services for and under the direction of another in return for which he receives remuneration for a certain period of time.[142] The definition of worker, here, is extended to apply to trainees and apprentices if they perform work for an employer for pay, even though they are under supervision and the work is preparation for a qualifying exam.

This interpretation has been reaffirmed by the Advocate General in the recent case of Eroğlu, concerning a Turkish graduate of a German university. He stated that in the absence of anything to indicate a restrictive interpretation, the concept of worker within the meaning of the Agreement cannot be interpreted very differently from the Community meaning of workers,[143] quoting the ruling in Le Manoir (C-27/91), which declares that,

> "The concept of worker, within the meaning of Article 48 of the Treaty... has a Community meaning...Any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a worker."[144]

Here, too, the definition of the notion of worker would not exclude from its scope of application a worker who is undergoing an apprenticeship or another kind of training.[145] Thus, Ms Eroğlu satisfied the criteria of being a 'worker' when she was a trainee.

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[139]See Levin, id. and R.H. Kempf v. Staatssecretaris Van Justitie (case 139/85) [1986] ECR 1741; [1987] 1 CMLR 764.
[140]Levin, pts 16-18 and 21-23.
[141]Deborah Lawrie-Blum v. Land Baden-Württemberg (case 66/85) [1986] ECR 2121; [1987] 3 CMLR 389, para 17.
[142]Id; also see now La Manoir, (C-27/91) [1991] ECR I-5531, para 7.
[143]Eroğlu, point 30 of the opinion of the Advocate General, p. 5121.
[144]La Manoir, para 7.
[145]Eroğlu, points 28 and 32, see Lüdke 1995 for a contrasting view.

3.3.1.2 'Legal Employment'

As Article 6(1) of Decision 1/80 reiterates 'legal employment' a number of times and makes this a condition to the rights it confers on Turkish workers, it is necessary to discuss the various implications of 'legal employment'. Nothing in the Agreement or in Article 6 or in the case law differentiates between different methods of the initial acquisition of lawful access to the labour market. The original reason for admission to an EU country should not affect the position of a Turkish national who is legally resident and employed in an EC country. The legality of employment must be determined in the light of the legislation of the receiving state governing the conditions under which the Turkish worker entered the national territory and is employed there.[146]

In Bozkurt, the ECJ held that, in order to ascertain whether a Turkish worker employed as an international lorry-driver belongs to the legitimate labour force of a member state for the purpose of Article 6(1) of Decision 1/80,

> "It is for the national court to determine whether the applicant's employment relationship retained a sufficiently close link with the territory of the Member State, and, in so doing, to take account, in particular, of the place where he was hired, the territory on which the paid employment is based and the applicable national legislation in the field of employment and social security law."[147]

The Court, here, applied the same criteria as it applied in case of a worker of a member state, who is permanently employed on board a ship flying the flag of another member state in deciding whether the legal relationship of employment could be located within the territory of the Community or retained a sufficiently close link with that territory, for the purposes of the application of Council Regulation (EEC) No 1612/68.[148]

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[146]Bozkurt, para 27 of the judgement.
[147]Bozkurt, the first paragraph of the ruling of the ECJ.
[148]See Lopes da Veiga v. Staatsecretaris van Justitie, (case 9/88) [1989] ECR 2989, para 17, see also Kemper 1995: 115.

In Sevince, the expression 'legal employment' did not cover the period in which Mr. Sevince was able to remain employed in the Netherlands merely by virtue of the suspensive effect of his appeal against the refusal to renew his work permit. Within the meaning of Article 2(1)(b) of Decision No 2/76 and Article 6(1), third indent, of Decision 1/80, the term 'legal employment' does not include the situation 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 has made an appeal which has been dismissed, is suspended.[149]

The ECJ in Kuş, being concerned with the effect of divorce on Mr. Kuş' right to renewal of his work permit, found that Mr Kuş was entitled to rely directly on Article 6(1) to obtain an extension of his permit to work for the same employer after one year's legal employment, notwithstanding the fact that he had first been given entry to Germany by virtue of his marriage, which had been dissolved by the time the decision on his renewal application was made.[150] Thus, the original purpose here would not be relevant (see Nachbaur 1995). Although Mr. Kuş was found to have acquired an entitlement under the first indent of Article 6 based on working for the same employer for more than one year, the Court also held that he had not gained entitlement under the third indent of Article 6(1) because the four year qualifying period could not include a period

> "where he engaged in that employment on the basis of a right of residence which was recognised only by virtue of national rules authorising residence in the host country pending the procedure for the grant of a residence permit".[151]

In both Sevince and Kuş, "the legality of employment, within the meaning of the third indent of Article 6(1) of Decision 1/80, presupposes a 'stable and secure situation as a member of the labour force'".[152] As a consequent result of this reasoning, some categories of Turkish asylum seeker cannot benefit from Article 6 rights during periods of lawful employment pending the determination of their asylum claims (see Guedalla 1994). On the other hand, Advocate

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[149] Sevince, paras 30-33 of the judgement.
[150] Kuş, the second paragraph of the ruling of the ECJ.
[151] Kuş, the first paragraph of the ruling of the ECJ.
[152] Sevince, at para 30; and Kuş, at para 12.

General Darmon held in Eroğlu that "a stable and secure situation on the labour market does not exclude temporary or provisional employment so long as it is legal".[153] Accordingly, temporary or provisional employment should not be considered as lying outside the scope of 'a stable and secure' situation, which naturally includes a trainee, as in Eroğlu (see above, p. 106).

It appears that, for the time being, it is a matter of jurisprudential speculation how the period of legal employment is calculated (see Wornham 1994: 12-13, Kemper 1995: 116-117). It has been suggested that the period of a year may start at any time, even including an illegal stay, but that the worker must have a stable and secure position in the labour force on the final day. Periods of employment accumulated while an appeal is pending will not be counted towards the period of legal employment unless the appeal is successful.[154]

It should also be noted that "annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment" (Article 6(2) of Decision 1/80). This is evident from Article 6(2) of Decision 1/80[155]:

> "Periods of involuntary unemployment[156] duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment".

Voluntary unemployment is therefore not addressed in the relevant instruments. However, in Bozkurt,[157] the ECJ has upheld the argument that Article 6(2) of Decision 1/80 refers only to temporary absences which would not as a rule affect the worker's subsequent participation in

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[153]Eroğlu, point 40.
[154]Kuş, para 16 of the judgement.
[155]See Mallmann 1995 on the implications of Article 6(2) of Decision 1/80.
[156]The interpretation of the phrase 'involuntary unemployment' has caused some confusion in Germany, due to a mistake in the German translation. The translated phrase in German means 'unemployment resulting from one's own fault', not 'involuntary unemployment'. Therefore, the majority takes the view that imprisonment is a break from unemployment and jeopardises the prior period of employment, see Kemper 1995: 115, Gutmann 1995. Thus, there exists an uncertainty about the meaning of 'involuntary unemployment'.
[157]See Bozkurt, para 36-37 of the judgement.

working life. Thus, where there is a break in employment, the right of residence can subsist only if that break is of limited duration.[158] On the other hand, if a worker becomes involuntarily or voluntarily unemployed before completing one year's lawful employment, he may not be entitled to renewal of his work permit (see Wornham 1994: 14).

In Bozkurt, the ECJ has clarified the meaning of 'belonging to the legitimate labour force' and 'legal employment', stipulating what sort of absences from work will not be counted as periods of legal employment. The ECJ, unlike the European Commission, does not support the claim of Mr. Bozkurt that a period of permanent incapacity for work, resulting from an accident at work, must be treated in the same way as permanent legal employment, which implies the existence of a right of residence for the person concerned.[159]

According to the ECJ, Article 6 of Decision 1/80 only covers the situation of Turkish workers who are working or are temporarily incapacitated for work.[160] It, therefore, does not cover the situation of a Turkish worker who has definitely ceased to belong to the labour market force of a Member State because he has reached retirement age or has become totally or permanently incapacitated for work.[161]

The ECJ further ruled that the existence of 'legal employment' within the meaning of Article 6(1) of Decision 1/80 can be established in the case of a Turkish worker even if he is not required under the national legislation concerned to hold a work permit or a residence permit granted by the authorities in the receiving state to carry out his work.[162]

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[158]Bozkurt, para 36 of the judgement.
[159]See para 33 and 34 of the judgement for the views of the Commission and Mr. Bozkurt.
[160]Bozkurt, para 39 of the judgement, see also Kemper 1995: 115.
[161]Bozkurt, para 39.
[162]Bozkurt, the second paragraph of the ruling of the ECJ.

3.3.1.3 Renewing residence permits and employment

The various rights of Turkish nationals deriving from the provisions contained in Article 6(1) of Decision 1/80 should be accepted as the most important rights gained so far under the Ankara Agreement. This is firmly affirmed by the landmark decision of Kuş, which held with certainty that Turkish nationals working in EU member states have rights under Community law to an extension of their leave to remain and permission to take up employment.

The first indent of Article 6(1) provides for renewal of the Turkish worker's work permit after one year's legal employment for the same employer 'if a job is available'. The first question directed in Eroğlu by the national court is whether the first indent of Article 6(1) of Decision 1/80 would apply to a Turkish worker who was legally employed for one year by one employer and then worked for another employer and is now seeking the renewal of his permit to take up paid employment with the first employer. The Advocate General pointed out that applying for the renewal of Ms Eroğlu's work permit to continue a job for her former employer did not constitute an extension of the same employment and therefore was not covered by the first indent of Article 6(1).[163] This was rather a change of employment which was subject to stricter conditions in accordance with the second indent of Article 6(1) of Decision 1/80: three years of legal employment and subject to the priority to be given to workers of the Member States of the Community.[164] Accordingly, the ECJ ruled that Ms Eroğlu was unable to benefit from the right stemming from the first indent of Article 6(1) (see the first paragraph of the ruling of the ECJ).

It is arguable whether Turkish nationals would necessarily have to continue in the 'same employment'. The second indent of Article 6(1) of Decision 1/80 provides that the Turkish national may apply for a position in 'the same occupation' with a different employer after three years of lawful employment, subject to priority being given to EC nationals. The third indent of Article 6(1) provides that after four years of legal employment the Turkish worker "shall

[163] See Eroğlu, points 43-48 of the opinion of the A-G.
[164] Ibid, point 46.

enjoy free access in that Member State to any paid employment". Free access to the labour market, as provided here, must be applied through national rules (Article 6(3) of Decision 1/80).

Only in the second indent of Article 6(1), the condition that employment priority is to be given to EC nationals is made concerning the right of Turkish workers to take employment with an employer of their own choice and in the same occupation after three years of legal employment. Therefore, it does not appear to be the case that:

> "The right to renewal of a work permit with the same employer after one year's legal employment, or the right to take paid employment of own choice after four years' legal employment are impaired in any way by this proviso which is specific to the second indent of Article 6(1)." (Wornham 1994: 16)

It is further suggested that change of employer in contravention of the provisions of Decision 1/80 does not constitute legal employment within the meaning of that Decision (Kemper 1995:116).

Decision 1/80 is confined to regulating the right of access to employment of the Turkish worker, without mentioning the right of residence. Nevertheless, the ECJ held that these two aspects of a situation are so closely interrelated that, by recognising the right of a Turkish worker to free access to any employment of his/her choice, after a certain period of legal employment in that member state, these provisions necessarily imply the existence, at least as from that moment, of a right of residence for that person, "otherwise the right granted ... to the Turkish worker would be deprived of any effect."[165] The ECJ has recently reconfirmed this point of view, stating that "the existence of such employment necessarily implies the recognition of a right of residence for the person concerned".[166] Similarly, Article 49 of the 1990 UN Convention on Migrant Workers envisages for immigrant workers authorisation of

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[165] Sevince, paras 28-29 of the judgement.
[166] Bozkurt, para 28 of the judgement.

residence for at least the same period of time as their authorisation to engage in remunerated activity.

3.3.1.4 Standstill clauses

Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80, which are also of direct effect,[167] contain a standstill clause for new restrictions on the access to employment on behalf of workers having legal right of residence and employment within the territory of the contracting states (see Alexander 1992: 61). Article 7 of Decision 2/76 clearly provides 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".

Article 13 of Decision 1/80 extends this provision to "members of (the workers') families legally resident and employed in their respective territories." This extension of the standstill clause to family members is rather important for the conditions of access to the employment of family members as far as family migration is concerned (see Chapter 3.3.3 below on family migration). Darmon A-G observed in Sevince that Article 7 of Decision 2/76 and Article 13 of Decision 1/80,

> "appear unequivocally to impose a standstill clause on the member-States and Turkey regarding the conditions of access to the employment of workers legally resident and employed in their territories."[168]

The conditions under which Turkish workers lawfully resident and working in an EU Member State can get a work permit, can not be made more difficult than was the case on 20th October 1976 when Decision 2/76 came into force in accordance with Article 7 of Decision No. 2/76. Therefore, the rules which applied in 1976 are the rules which should apply now in respect of work permits to Turkish workers lawfully working in the EU Member States. This rule of direct effect was not affected either by the fact that the decisions envisaged the adoption of

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[167] Sevince, at para 26.
[168] Ibid. at p. 68.

implementing measures, nor the non-publication of these decisions, nor certain narrow safeguard clauses.[169]

In any case, Turkish nationals should be given priority over other non-EU nationals (after EU nationals) in regard to eligibility for employment in EU Member States. This is clearly provided in Article 8 of Decision 1/80.

3.3.2 Turkish self-employed persons

The Treaty of Rome distinguishes between wage and salary earning workers and the self-employed. Almost all immigration laws confer rights and lay down restrictions according to whether one is a worker or a self-employed person.[170] We are dealing here with the rights of Turkish self-employed persons within the context of EU law and various European conventions that respective states have ratified. For our present purpose, this would be a Turkish national already legally settled and employed, or a would-be immigrant desiring to establish his/her own business in an EU country.

The European Convention on Establishment of 1955 (in force since 1965) attempted to facilitate the freedom of establishment for the nationals of the Contracting Parties in the territory of the other Parties to the Convention.[171] Although the Convention purports to be a complete charter of the rights and duties of states in their relationship with the nationals of other contracting parties, the problems of entry and residence are treated with excessive caution - the obligation envisaged is merely to 'facilitate' these ends, the criteria being and remaining national. Under Article 10 of this Convention, aliens from Council of Europe member states have the same basic rights as nationals of the host state to take up some form of gainful employment (both employed and self-employed). This is also extended to family

[169] Ibid. paras 16-26 of the judgement.
[170] The 1990 UN Convention on Migrant Workers uses the term 'self-employed worker' which refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognised as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements (Article 2(2)(h) of the 1990 Convention).
[171] For details see Goodwin-Gill 1978: 168-97 and Oellers-Frahm 1987.

members, spouses and dependent children legally resident in the host country (section V (6), Protocol to the Convention). Nevertheless, all of this is applicable only in the absence of a significant restriction contained in Article 10 (in the absence of a 'cogent economic and social reason'). Under the Protocol to this Convention each State has the right to interpret the terms of the Convention according to its requirements (section I (a)(1) and (2)).

Much more important at the moment are the procedural rights guaranteed under the European Convention on Establishment. As Turkey ratified the Convention with effect from 1st January 1994, exceptions have to be made for Turkish immigrants if the national rules provide less legal protection than the Convention provides in the field of, for example, appeal rights. Under the Convention on Establishment there exists the possibility of legal protection at least for aliens who have resided in a host state for longer than two years. Article 3(2) provides that such persons should be guaranteed the right to state any reasons which argue against deportation as well as a right to appeal to the responsible authority with a corresponding right to legal representation. Further, access to the host State's authorities and Courts by aliens from member States is basically guaranteed under the same conditions as those obtaining for the host State's own nationals (see Oellers-Frahm 1987). Article 8 guarantees free legal assistance and Article 9 provides for the equal treatment of aliens in relation to court bonds and securities and the execution of judgements in relation to costs.

The analogous provisions of the Treaty of Rome offer a more advanced alternative, particularly in relation to its provisions as to the right of establishment (Arts. 48-56).[172] However, it was never clear to what extent workers from third countries might enjoy the benefits which accrue to the EU migrant workers.

Article 13 of the Association Agreement of 1963 makes reference to the provisions of the EC treaty for the freedom of establishment for self-employed people by providing that:

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[172]For details see Goodwin-Gill 1978: 169 and Steiner 1992: 177-276.

> "The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them".

The position of the Turkish self-employed is less clear than that of workers, since the ECJ has not defined the meaning of 'self-employed'. Nevertheless, it can be argued that new restrictions cannot be applied to Turkish self-employed persons after the entry into force of the Additional Protocol (1. 1. 1973), as Article 41(1) of the Protocol provides that "the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

Although no reference has been made to the ECJ on the direct applicability of Article 41 of the Protocol as yet, there are very convincing arguments that this Article should be directly applicable. Darmon A-G was of the view that the Agreement and Protocol can be implemented without the prior adoption of supplementary measures,[173] provided that the provisions are clear, unambiguous and within the ethos of the treaty (see also Wornham 1994: 23). This is clearly so as far as Article 41 of the Protocol is concerned.

On the other hand, Article 19(10) of the Social Charter extends the protection and assistance provided in Article 19 to self-employed migrants 'in so far as such measures apply'. Most of the paragraphs of Article 19 appear to be capable of being applied equally to the employed and the self-employed, except paragraph 4, which provides for equality of treatment concerning remuneration and trade union rights and paragraph 5, which deals with taxation with respect to employment (Plender 1988: 247).

All in all, nevertheless, the legal position of the self-employed remains subject to regulation by the respective state, even though some limitations can be imposed on the respective states deriving from the standstill clauses and the conventions which are ratified by the respective

[173] Sevince, at p. 75.

states. It appears likely that no fundamental change of policy and law is expected as economic considerations will continue to prevail as far self-employed migrants are concerned.

The mainly positive consequences of the Customs Union, which entered into force from 1 January 1996 between the EU and Turkey, is now felt by entrepreneurs wishing to open business from both sides. One should be aware, perhaps, that a Customs Union has to do with free circulation of goods, but not freedom of establishment or freedom to provide services. Despite this, the Customs Union removes various restrictions and obstacles impairing foreign investments in the Member States of the EU as well as Turkey. However, a serious obstacle threatens to hit Turkish self-employed persons, in particular due to the restrictive admission requirements of the Member States of the Union and their possible arbitrary applications. As already noted in Chapter 3.2 (see p. 96 above), this may have an adverse effect on the functioning and progressive development of the Customs Union.

3.3.3 Family migration

We saw in Chapter 2 that a major feature of post-war migration to Western Europe was the intention of governments to import large numbers of foreign workers on a temporary but systematic basis to satisfy a long-term labour shortage. The Western European countries wanted only man-hours, not the families with it. However, the recruitment stops in the early 1970s actually encouraged family migration, either in the form of family reunification or family formation, partly due to the fact that family migration was then, on the whole, a simpler way to get admission to Western Europe. Increasing diversity in family migration (first family reunification and now more family formation) has brought with it various issues and concerns on the side of the governments to regulate this area of immigration. Therefore, it is necessary to discuss the legal position of Turkish migrants in respect of the rights to family reunification and family formation within the domain of EU law and of international law.

The Ankara Agreement and the Decisions of the Council are of little help with respect to the family migration rights of Turkish migrants. Turkish workers and their families cannot rely on

the Agreement to gain entry to the EU labour market or that of any Member State. However, it does provide certain rights within a Member State to those Turkish workers and their families who have been admitted under national regulations to live and work in that state.

Article 7 of Decision 1/80 lays down general rules relating to the Turkish worker's family members and states that:

> "The members of the family of a Turkish worker duly registered as belonging to the labour force of a member state, who have been authorised to join him:
> - shall be entitled - subject to priority to be given to workers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State;
> - shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.
>
> Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years".

It must be argued at this point that when it is possible to rely on both Article 6 and 7 of Decision 1/80, the provisions of these articles should be applied cumulatively (Kemper 1995: 115).

3.3.3.1 Family members and children

Having generally considered the legal position of Turkish immigrants and their family members as far as family migration is concerned, we now need to discuss in some detail who is to benefit from the provisions of the Agreement and its components and other international conventions. No definition of family members is provided in any of the relevant instruments. Therefore guidance should be sought from Article 10 of Regulation 1612/68, which defines the family members of a worker as:

> (a) his spouse and their descendants who are under the age of 21 years or are dependants;
> (b) dependent relatives in the ascending line of the worker and his spouse.

Further, the European Charter speaks, explicitly, of the reunion of the family of a foreign worker (for details see Gülmez 1993: 165-168). Therefore, reference should be made to Article 19(6) of the European Charter which obliges member states "to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory". For the purpose of this provision, the term 'family of a foreign worker' is understood to mean at least his wife and dependent children under the age of 21 years according to the Appendix to the Social Charter (see Gülmez 1993: 167). The admission of the family is to be permitted only when the worker has been "permitted to establish himself in the territory" as noted in Article 19(6) of the Social Charter.

In addition to the definitions of family available under the European instruments, one can also mention the definition of the family provided under the 1990 UN Convention on Migrant Workers. Under Article 4 of the Convention, the term members of the family includes persons married to migrant workers as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the states concerned.

Further, Article 44 of the 1990 Convention urges states parties to take appropriate measures within their competence to facilitate the reunification of migrant workers with their spouse or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. Clearly, the scope of the definition of the family under the 1990 Convention is more restrictive than those afforded under the above-mentioned European instruments as far as Turkish migrants are concerned, as the age of majority in the three countries we are concerned with is less than 21 years of age (18 years).

Various definitions of family found in such international standards are actually nothing more than further restrictions on the right to family migration, as migrant workers cannot determine for themselves the persons who constitute the family. An examination of state practice,

however, reveals that even the age limit of youngsters found in such international instruments has been disregarded by the three countries (see Chapter 6 below for further details), even though this is contrary to international law obligations.

The Committee of Experts of the European Social Chapter has found that not all contracting parties conform to the age requirement, particularly if the age of majority in the state party is lower (for details see Cholewinski 1994: 582-583). The age requirement of 16 for family reunification and the waiting period of 8 years for family formation of second generation immigrants in Germany, as well as the age requirement of British immigration rules (18 years) gave rise to negative conclusions from the Committee.[174]

Thus, the national laws have prevailed despite the more favourable international standards on the definition of family. This appears to be a sign of weakness of international instruments in protecting the rights of immigrants and their families, not necessarily because of the lack of substantial remedies but mainly due to weakness of enforcement mechanisms of international law.[175] Nevertheless, the fact remains that, as a matter of law, the definition of family members of Article 10 of Regulation 1612/68 and Article 19 of the Social Charter should allow Turkish migrants to benefit from the protection of Decision 1/80.[176]

In addition to the provisions concerning children of Turkish workers referred to earlier in the last paragraph of Article 7 of Decision 1/80 (see above, p. 118), Article 9 of Decision 1/80 further provides that:

> "Turkish children residing legally with their parents, who are or have been legally employed in a Member State of the Community, will be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of the Member

[174]See Council of Europe, Committee of Experts of the European Social Charter, *Conclusions X-2*, (1988), p. 151; *Conclusions XII-1*, (1988-89) (1992), p. 240.
[175]See Cholewinski 1994 for an examination of the relevant international and supranational standards existing in Europe for the protection of the right to family migration, and a consideration of the effectiveness of these norms in restricting state discretion.
[176]Note that France, actually, does allow the entry of children up to the age of 21 years for nationals of countries signatory to the Council of Europe's Social Charter, see CEC 1992: 20.

> States. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area".

By virtue of Article 6(1) of Decision 1/80, a child who has worked for a year may be entitled to his or her own work and residence permit. If this criterion is not fulfilled due to a change in law after 1980, he or she can rely on the standstill clause in Article 13 of Decision 1/80.

In Eroğlu, concerning the rights of a Turkish graduate of a German university, one of the two questions being directed by the German Administrative Court to the ECJ was whether a Turkish national satisfying the conditions of Article 7(2) can demand the renewal of her residence permit.[177] The A-G maintained that Ms. Eroğlu, as the daughter of a Turkish worker duly registered as belonging to the regular workforce of a member state since 1976, and having accomplished vocational training in a certain field in a member state, had the right, under the terms of Article 7, second paragraph of Decision 1/80, to "respond to any offer of employment in the same Member State" and to obtain the extension of her residence permit.[178]

As a matter of fact, her residence permit was issued for the purpose of being able to follow a university course, and not within the framework of family reunification. The ECJ asserted that the right to respond to any offer of employment within the bounds of Article 7(2) of Decision 1/80 for children of Turkish workers who have completed a course of vocational training in the host country is not subject to any condition concerning the ground on which a right to enter and to stay was originally granted.[179] The fact that that right had not been granted within the framework of family reunification but on educational grounds, does not deprive the child of a Turkish worker who satisfies the requirements of Article 7(2) of the enjoyment of the rights conferred thereunder.[180] This decision is of particular importance to Turkish youngsters not eligible for family reunification who have completed university or vocational training in the member states of the Community. Such Turkish youngsters satisfying the requirements of

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[177] Eroğlu, p. 5139.
[178] Ibid, p. 5130.
[179] Ibid, para 22 of the judgement.
[180] Id.

Article 7(2) of Decision 1/80 can now rely on this decision of the ECJ in responding to any offer of employment.

3.3.3.2 'Elements of law'

At the very beginning of this sub-section, it was already underlined that there is a limited scope of application of the provisions relating to family migration rights of Turkish immigrants. This was blatantly confirmed by the ECJ in Demirel. The main question put forward by the German Administrative Court was whether the expression 'freedom of movement' in the Ankara Association Agreement of 1963 was to be understood as giving Turkish workers the right to bring children and spouses to live with them. The ECJ, without directly responding to the question, declared that Article 12 of the Agreement and Article 36 of the Protocol "essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers".[181] The ECJ further stated that:

> "There is at present no provision of Community law defining the conditions in which member states must permit the family reunification of Turkish workers lawfully settled in the Community."[182]

The ECJ held that Decision 1/80 of 19 September 1980 prohibits any further restrictions on the conditions governing access to employment with regard to Turkish workers who are duly integrated in the labour force of a member-state.[183] Therefore, it is not possible, the Court said, to infer from Article 7 of the Agreement a prohibition on the introduction of further restrictions on family reunification as no decision of that kind was adopted in the sphere of family reunification.[184] With respect to who has been 'authorised' to join the Turkish worker, Darmon A-G has maintained that this "makes the residence of members of the family conditional upon authorisation from the competent authorities of the Contracting States."[185]

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[181] Demirel, para 23 of the judgement.
[182] Ibid. para 28.
[183] Ibid. para 22.
[184] Ibid. paras 22, 24.
[185] Ibid. at p. 434.

The stance of the ECJ in Demirel has been criticised by Weiler (1992: 80) as an abandonment of responsibility to protect human rights. He contended that the mere fact that the Member States are given a margin of action due to the absence of positive Community norms, is not necessarily to be taken to mean that this area is totally outside the scope of Community law for the purpose of review by the Court.

Weiler further states, referring to the existence of the Association Agreement, the Additional Protocol of 1970 and the Council's Decisions, which constitute sufficient 'elements of law', that even in the absence of a positive Community measure, the Commission, which is not subject to the requirements of direct effect that are incumbent on individuals, could bring a suit if a member state was found to be violating the fundamental human rights of Turkish migrants (Weiler 1992: 84). The Court might have given a different reply on the substance, if the Commission rather than an individual had brought an action against Germany in Demirel. In Fisheries,[186] if an individual had brought an action rather than the Commission, the Court would have held that the relevant provisions of Community law did not produce a direct effect. In the latter case, the Court had to go into the merits and actually found against the UK since it was an action by the Commission. Nevertheless, in Demirel the Court did not answer the second question on the substance, since it found that none of the articles referred to was directly applicable.

Further, the Community law principle of proportionality - like situations must be treated in a like manner - should also be taken into account. Therefore, a Turkish worker, whether he/she happened to be working lawfully in an EU country, should theoretically not be treated differently for family reunion purposes from those who gained such rights under a work permit (see Wornham 1994: 22-23).

Guedalla argues (1994: 122) that Article 37 of the Protocol could be made use of for the Turkish workers and their families, if it was to be established that family unity is relevant to

[186] Fisheries (case 804/79), Commission v. UK [1981] ECR 1045.

'conditions of work and remuneration'. A Turkish worker who is denied family unity necessarily has worse conditions of work than an EU national who has the option of family unity, not least because the Turkish worker must maintain two households. However, the direct applicability of the non-discrimination provision of Article 37 of the Protocol has not been tested yet.

It is argued by Guild (1992a: 7) that it is difficult to see how the Court could come to a different conclusion on the issue of direct effect of Article 37 of the Protocol from that reached in Kziber[187] regarding Article 40 of the Morocco Agreement, owing to the fact that the wording of Article 37 of the Protocol is almost identical to the wording of the non-discrimination articles in the Maghreb Co-operation Agreements. Further, Article 10 of Association Council Decision 1/80 prohibits discrimination 'as regards working conditions and remuneration'. Therefore, the arguments in favour of protection of Co-operation Agreement workers also apply to Turkish workers, who have more clearly defined rights under the Association Council Decisions.

3.3.3.3 Right to family life as a human right

When considering the rights of Turkish immigrants under international law and EU law, one would also need to discuss the issue of family migration in terms of its human rights dimension. As already indicated (see Chapter 3.1), states' powers in relation to the legal position of the spouse and other family members appear to be limited and confined by established and emergent rules and standards of international law. In particular, such guarantees concerning family migration rights of Turks can be found in the Community law and ECHR as well as other instruments of international law, albeit to a certain extent.

The treaty on European Union provides that the ECHR forms part of the general principles of Community law. Article F(2) of the Treaty (under common provisions) states that:

[187]Onem v. Kziber, (case C-18/90) [1991] ECR I-199.

> "The Union shall respect fundamental rights as guaranteed by the [ECHR] and Fundamental Freedoms as they result from the constitutional traditions common to Member States as general principles of Community law".

Therefore, it is clear that the courts of all the Member States of the Community must comply with the ECHR insofar as it relates to Community law upon ratification of the Treaty. The extent and scope of the obligation of incorporating the ECHR into EU law has, nevertheless, proved to be too limited. As already pointed out, the ECJ ruled that there was no provision of Community law defining the conditions by which member states must permit the family reunification of Turkish workers lawfully settled in the Community (see p. 122 above). In Demirel, the ECJ ruled that Article 8 of the ECHR, which protects right to family life, has no effect on the reply to the question of direct applicability of Article 12 and 36 of the Protocol, read in conjunction with Article 7.[188] Thus, under the circumstances of the case in question, the ECJ held that the Court does not have jurisdiction to determine whether the national rules at issue on family reunification are compatible with the principles enshrined in Article 8 of the ECHR.[189]

The Court, referring to the joined cases of Cinétheque v Fédération Nationale des Cinémas Français,[190] further declared that:

> "Although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of Human Rights of national legislation lying outside the scope of Community law."[191]

The leading case of the ECJ concerning the application of the ECHR to Community law is case C-260/89, Eliniki Radiophonia,[192] in which the Court set out the circumstances in which the ECHR is applicable to Community law. It was held at para 42 that "the Court cannot

[188] Demirel, paras 25 and 28 of the judgement.
[189] Demirel, para 28 of the judgement.
[190] Cinétheque v Fédération Nationale des Cinémas Français (cases 60-61/84) [1985] ECR 2605; [1986] 1 CMLR 365.
[191] Demirel, para 28 of the judgement.
[192] Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Kouvelos [1991] ECR I-2925; [1994] 4 CMLR 540.

consider in respect of the ECHR a national provision which is not based in the field of operation of Community law". One can infer from the opposite meaning of the above explanations that the Court must provide to the national court all necessary guidance as soon as such a national provision can be deemed to have entered into the field of application of Community law, as to whether it conforms with the fundamental rights which the court has responsibility to preserve, including those rights contained in the ECHR (Guild 1992b: 75).

Thus, it is important to establish a 'Community law connection' in terms of protecting the rights of Turkish migrants as well as other migrants from the viewpoint of the ECHR in Community law. This is understandable, since if the Court held otherwise, it would clearly be taking over the jurisdiction of the European Court of Human Rights which is responsible for determining whether the national legislation of signatory states conforms with the ECHR.[193]

Several of the multilateral legal instruments governing the protection of human rights place emphasis on the sanctity and unity of the family. These are, *inter alia*, Art. 16 of the Universal Declaration of Human Rights (UDHR) of 1948, Art. 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, Art. 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) of 1966, Art. 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (see Plender 1988: 365-92) and Art. 44 of the 1990 UN Convention on Migrant Workers.

The ECHR does not, in the main body of its provisions, protect a right of entry for aliens, as was pointed out in an early decision of the European Commission of Human Rights, in which the Commission states that unless another right or freedom guaranteed by the Convention is at issue, a complaint by a foreigner on the basis of a refusal of entry by a contracting state is inadmissible.[194] However, the foreigner denied admission may be able to rely on various provisions of the Convention.

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[193] See Guild 1992b for the application of ECHR to Community law.
[194] Application No. 238/56 1 Ybk 205.

More importantly, the ECHR has the potential of providing remedies under certain circumstances within the context of a right to family life. The Commission seems to have adopted the view employed by the drafters of the Universal Declaration of Human Rights, in upholding the opinion that the expulsion of an individual or a decision refusing to admit that individual to a state's territory works against Article 8 of the Convention if it results in the 'arbitrary' separation of members of a family.[195]

However, this right has been interpreted very narrowly by the Commission as far as family formation is concerned. The Commission held, in a case before it concerning Article 8, that there were, first of all, no obstacles to the family effectively establishing their life in the husband's home state and, secondly, that a decision by the wife to remain in the UK, did not thereby mean that there had been an interference by the authorities with the applicant's family life within the meaning of Article 8(1) of the Convention.[196] The Commission, therefore, has adopted the German concept of *Lebensgemeinschaft* which envisages that Article 8 is not infringed if the family can reside together elsewhere.[197]

More recently, however, the European Court of Human Rights held that the expulsion of a 'second generation' Moroccan immigrant on account of his alleged offences violated the right to respect for his family life under Article 8 of the ECHR.[198] In Moustaquim, the Court maintained that a proper balance was not achieved between the interests involved (public order versus family life), and that the means employed (expulsion) was therefore disproportionate to the legitimate aim pursued.[199] In Beldjoudi, the Court came to the same conclusion, holding

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[195] Application No. 434/50, X v. Sweden, II Ybk (1959) 354.
[196] Application 5269/71, Papayianni v. UK, Decision of the European Commision on Admissibility, 8 February 1972, reported at [1974] Imm. A.R. 7; see also later Applications 9214/80, 9473/81 and 9474/81, Abdulaziz, Balkandali and Cabales v United Kingdom, 7 EHRR (1985) 471.
[197] Plender 1988: 369; also see, inter alia, Turkish National, Decision of Senate dated 18 September 1984, 70 B. Verw. G. 127 (NO. 21).
[198] Moustaquim v. Belgium, 13 EHRR 802. In this particular case, the applicant made several complaints about the respective deportation under Articles 3, 7, 8 and 14 of the ECHR. We are only concerned with the right to family life under Article 8.
[199] Ibid, para 46, at p. 815.

that the decision to deport the applicant, if put into effect, would not be proportionate to the legitimate aim pursued (maintenance of public order and prevention of crime) and would therefore violate Article 8.[200] The Court, in Berrehab, further clarified what family life is within the context of the ECHR, stating that cohabitation is not a *sine qua non* of family life between parents and minor children.[201] And so, the fact that he saw his daughter four times a week for several hours proved that there exists between him and his parents a bond amounting to family life.[202]

Even if all these instruments are taken together, they do not amount to evidence of a right to family formation and reunification in general international law. As Plender (1988: 366) notes, nevertheless, they establish,

> "The widespread acceptance of the moral or political proposition that states should facilitate the admission to their territories of members of the families of their own citizens or residents, at least it would be unreasonable to expect the family to be reunited elsewhere. Thereby, they influence the content of bilateral agreements and domestic law."

The provisions in various international instruments concerning family migration were never considered to be self-executing. On the other hand, the standstill clause in Article 13 of Decision 1/80 provides a far better protection against new restrictions on the conditions of access to employment of workers' families legally resident and employed in their respective territories. The effect of all these international instruments mentioned has been limited to make it difficult, politically speaking, to make things worse for the respective governments. Yet, the admission of the family members of Turkish migrants remains, largely, within the domain of the national jurisdictions of the respective countries.

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[200]Beldjoudi v. France, 14 EHRR 801, para 79, at p. 834. This case has also other aspects rather than the righ to family life under Article 8. Allegations were also made under Articles 3, 9, 12 and 14 of the ECHR.
[201]Berrehab v. the Netherlands, 11 EHRR 322, para 21, at p. 329. This case, too, concerned the application of Article 3, in addition to Article 8 of the ECHR.
[202]Id.

3.3.4 Social security and social benefits

Although this is not a study in the social security rights of Turkish immigrants in Europe, it may still be desirable to consider some aspects of their social security situation under the EU law in particular. It is indeed so not only for the sake of completeness of this section but also because social security rights are often considered to be a very significant complementary of the rights of immigrants as well as an attraction for immigrants.

The welfare state in open economies has had very extensive implications concerning employers' perceptions of labour scarcity in Western Europe as well as the advantages that immigrants have, which may keep them abroad even in hard times (see Freeman 1986). Of course, Western European governments have also benefited from the existence of the immigrants, in particular as far as the social security contributions of immigrants are concerned as well as some other benefits (see Menski 1994a; Spencer (ed) 1994a and 1994b). Most foreign workers, including Turks, therefore, have become full participants in the new country's social security programmes, including unemployment benefits and children's allowances.

Article 39 of the Additional Protocol of 1970 envisaged that the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community, as well as for their families residing in the Community. The second paragraph of the same Article further provided that periods of insurance or employment completed in individual Member States, but not in Turkey, in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community, shall be aggregated. In pursuance of and in order to implement Article 39 of the Protocol, the Association Council has adopted Decision 3/80 which provides Turkish immigrants in the Member States of the Community with a framework regulation as far as their social security rights are concerned.

Decision 3/80 of the Association Council secures concrete rights in respect of social security benefits for Turkish workers, often by making specific references to its EU counterpart Regulations 1408/71 and 574/72. The Decision applies to Turkish workers who are or have been subject to the legislation of one or more Member States, members of their families resident in the Community and the survivors of such workers (Article 2).

Article 3 of Decision 3/80 implements Article 39 of the Additional Protocol by guaranteeing equal treatment for Turkish workers and their families. The Article provides that Turkish immigrants should be subject to the same obligations and enjoy the same benefits as nationals of that member state concerning certain social security benefits.[203] Accordingly, Article 4 of Decision 3/80 provides that the following benefits must be available to Turkish workers and their families: sickness and maternity benefits, invalidity benefits, old-age benefit, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits.

This list of benefits is identical to that of Regulation 1408/71, in fact, as each benefit set out in the Decision is defined by reference to 1408/71. The Decision must give rise to rights directly enforceable in each Member State by Turkish workers; they must also be interpreted in the same way as the Community Regulation. Thus a Turkish worker must have equal access to these benefits as Community nationals.

It should also be noted that Article 21 of Decision 3/80 provides some relief by exempting any documents required to be produced for the purpose of this Decision from authentication by diplomatic and consular authorities.

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[203]Article 27 of the 1990 UN Convention on Migrant Workers provides with respect to social security that migrant workers and members of their families shall enjoy in the state of employment the same treatment granted to ***nationals*** in so far as they fulfill the requirements provided for by the applicable legislation of that state and the applicable bilateral and multilateral treaties.

Article 5 of Decision 3/80 regulates the relationship between the Decision and other social security conventions binding two or more Member States exclusively, by declaring that this decision, as regards the persons and matters which it covers, replaces the provisions of any social security convention, exclusively binding two or more Member States, save for such provisions of Part A of Annex II to Regulation (EEC) No 1408/71 as are not laid down in Part B of that Annex.

3.3.5 Appeal rights and safeguards against expulsion

Turkish workers who are refused leave to remain to carry on with their employment after one year's lawful employment can appeal against the refusal. However, such a person will not be regarded 'legally resident' until after the successful outcome of the appeal.[204]

Appeal rights therefore have a suspensive effect so far as accumulating a period of qualifying employment is concerned. The appellant is allowed to 'reside and work on an essentially *provisional* basis' while an appeal is pending.[205] This suspensive effect ensures that Turkish nationals cannot obtain work or residence rights merely by virtue of the length of the member-state's appeal process. The aim, as explained in Kuş,

> "was to prevent a Turkish worker from contriving to fulfil that condition and consequently from being recognised as possessing the right of residence inherent in the freedom of access to any paid employment, as provided for by the third indent of Article 6(1) of Decision 1/80, during a period when he had only a provisional right of residence pending the outcome of the dispute".[206]

On the other hand, as pointed out earlier (see p. 86 above), states remain free to decide upon the grounds of exclusion, except in those areas where treaties or peremptory norms operate. What we are concerned with here is how far states' powers of expulsion, which are normally considered to be inalienable, can be limited in relation to Turkish migrants in EU Member States.

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[204] Sevince, at p. 85.
[205] Kuş, p. 897.
[206] Ibid, para 15 of the judgement.

Article 14 of Decision 1/80, whose wording is the same as in respect of the expulsion of EC workers exercising free movement rights in another member state (Art 48(3) EC), limits the expulsion of Turkish workers to grounds of 'public policy, public security and public health'. The ECJ has interpreted the power to expel on these grounds extremely narrowly for EU workers. According to the case law of the ECJ, there must be "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society" in order to expel on grounds of public policy.[207]

It is rightly argued that the same interpretation may apply to the expulsion of Turkish workers as the same wording appears in Article 14 of 1/80 and Article 48(3) EC (Guild, 1992a: 9-10, Cremer 1995). Nevertheless, the existence of identical wording in Community provisions and an agreement does not mean that they must necessarily be interpreted in the same way in accordance with the jurisprudence of the ECJ.[208] Therefore, regard must also be had to the purpose and intention of the Agreement.

As we saw, the ultimate purpose of the Agreement is to achieve the accession of Turkey to the Community through preparatory, transitional and final stages. Although neither this ultimate purpose nor freedom of movement for Turkish workers in the Community has been achieved as envisaged by Article 36 of the Additional Protocol, the purpose of the Agreement is still to lead to accession. Accordingly, the interpretation of identical provisions cannot be differentiated on the basis of purpose. Thus, the fact that political will has been lacking cannot be a reason for the court to comply with the interpretation of that Agreement in accordance with its stated purpose (Guild 1992a: 10).

Therefore, while the admission of Turkish workers to the respective territory is regulated by the national laws of Member States, once they are admitted to a member state and have gained

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[207]See R v. Bouchereau (case 30/77) [1977] ECR 1999; [1977] 2 CMLR 800.

[208]Re the Draft Treaty on a European Economic Area, Opinion 1/91 [1991] ECR 6079, [1992] 1 CMLR 245.

lawful employment, the provisions of the Agreement and its subsidiary legislation apply and must be interpreted by the courts in accordance with the objects of the Agreement. The German Land Court of Nordrhein-Westfalen has recently held that public policy, public health and national security must be interpreted in the same way for Turkish workers as EU nationals.[209] Therefore, a Turkish worker working lawfully in an EU state cannot be expelled any more easily than an EU worker exercising freedom of movement, according to the German Land Court.

The ECJ has interpreted the public policy exception narrowly. Therefore, the failure of EU workers to complete national legal formalities concerning, *inter alia*, residence cannot constitute an infringement of public order or public security and does not of itself justify expulsion.[210] Guild (1992a: 10) argues that if this reasoning can be applied to the Association Agreement, then, where a Turkish worker has been lawfully resident and had lawful access to the labour market but fails to take steps to renew or extend that permission, expulsion could not be justified for that reason alone, as "expiry of a residence permit of a Community national only has the effect of depriving the holder of written proof of his right of residence, which in fact continues to exist unaltered, because the person concerned may require this document of proof to be extended or renewed."[211] However, this does not apply where a Turkish worker has never had lawful access to the territory and labour market, as the conditions for freedom of movement have not been achieved.

Further, as Turkish workers are eligible for the benefits detailed in Article 4 of Decision 3/80 (see p. 130 above), renewal of their leave to remain cannot be refused on the ground that they claimed these benefits and hence failed to maintain and accommodate themselves without recourse to public funds (Wornham 1994: 26).

[209]Re a Turkish Drugs Pedlar (case 18 B 4386/92) [1993] 3 CMLR 276.
[210]Prowreur du Roi v. Royer, (case 48/75) [1976] ECR 497; [1976] 2 CMLR 619.
[211]Kuş, at para 901.

In addition to the protection provided by Article 14 of Decision 1/80, the ECHR and the European Social Charter provide a similar guarantee against the expulsion of migrant workers, which can also be relied on by Turkish migrants lawfully resident within their territories. Under certain circumstances in accordance with Article 8 of the ECHR, expulsion of immigrants can be challenged on the ground that this constitutes a violation of the applicant's right to respect for his family life (see pp. 127-128 above). Article 19(8) of the Social Charter secures that migrant workers lawfully residing within the territories of the contracting states are not expelled unless they endanger national security or offend against public interest or morality. Further, Article 22 and 56 of the UN Convention on Migrant Workers provide procedural rights and other safeguards to migrant workers and members of their families in cases of expulsion.

On the whole, the countries we are concerned with have been rather slow to incorporate and implement the additional rights and legal safeguards resulting from various instruments mentioned above in their national laws, particularly the UK and Germany. In addition to this, it is also often argued that national law provides a better guarantee in respect of various rights, particularly in the field of family migration; hence there is no need to apply the instruments mentioned above, as is often argued for the Netherlands. To what extent these international and supra-national instruments are implemented in practice is further discussed in the following chapters in relation to the three countries.

CHAPTER 4

THE LEGAL RECEPTION AND STATUS OF TURKISH WORKERS IN THE EU

Western European States, despite their similar socio-economic structures, have developed their own set of laws, policies and organisational structures that define the boundaries of the relationship between the 'host' and 'guest' populations and the status of foreigners vis-à-vis the host state. In Chapter 2, we have already discussed some aspects of the *de facto* status of Turkish immigrants in Western Europe. What follows, from now on, is mainly a discussion of the *de jure* status of Turkish immigrants in the respective countries and the response of the individual legal systems to the immigration of Turkish citizens under various categories and headings.

Different variables have been made use of in order to account for the differing practices of Western European countries, as far as responses to immigration are concerned. For example, conventional economic and political variables, such as demographic factors, the labour requirements of industry, the interests of the capitalist classes, and the ideologies of political parties, have been referred to as determinants of immigration politics and policies.[212]

Hammar et al. (1985) present a more recent comprehensive review of European state policies on immigration and immigrants in a comparative perspective. The authors use various historical factors, such as previous immigration experiences, post-colonial commitments, and homogeneity of nation and language, state structures and cultures as explanatory variables, though not in a systematic way. A still more recent study attempts to give "collective cultural and organisational variables an overarching status as an explanatory framework to account for the European 'incorporation' regimes", emphasising the effect of transnational discourses and structures on the normative framework of 'incorporation' regimes (Nuhoğlu-Soysal 1991: 44, 45).

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[212]See, for example, Castles and Kosack 1985, Krane 1975, Kubat 1993, and Freeman 1986.

The task that we address in this and the following chapters is two-fold. Building up from the above accounted variables, we attempt to evaluate the legal reactions of German, Dutch and UK policies to Turkish migration with particular reference to employment-related migration and family migration. Discussion of the legal reactions of the laws of these countries to the presence of immigrants from a general perspective is soon followed by the specific issues relating to the legal reception and status of Turkish immigrants in these countries. Here, we are not only concerned with sole employment/work related issues but also social issues within the context of integration of Turkish immigrants. Thus, the legal reactions of these three countries have also been analysed in terms of their response to the integration of such immigrants.

4.1 Germany

As pointed out in a recent conference by a prominent expert on German law, the notion of 'immigration law' is, in fact, unknown to German law.[213] Immigrants are treated as 'foreigners' or 'aliens' unless or until they have acquired German nationality. The relevant legal provisions regarding the entrance to and the right of residence in the territory of Germany are contained by the *Ausländergesetz*. This is closely linked to the idea that Germany is no immigration country, which seems to be much more a dogma than the result of a serious analysis of the social reality.[214]

4.1.1 The German system of immigration

As we already pointed out, one needs to consider a variety of factors in order to provide a fuller picture of the development of the law and policy to determine the legal reactions of the receiving states to the presence of Turkish immigrants. As Bendix (1985: 25) puts it, "rights provide a canvas on which to paint a rather broad picture of the interaction between history, economics, law and politics as it pertains to foreign workers."

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[213]Hagen Lichtenberg, ***Seminar on immigration, minorities, foreigners: problem-solving in Britain and Germany***, held at the Goethe-Institut, London, 3-4 September 1993.
[214]Id.

The policy makers in Germany have found it difficult to grasp the difference between the past experience of foreign workers and the recent situation, and to act accordingly. The peculiar orientation of German immigration policy derives from two historical factors. Germany had virtually no colonial tradition comparable to that of the UK and the Netherlands. Thus, it experienced no influx of such immigrant workers from which the labour shortages could be satisfied during the post-war period. Secondly, all attempts to develop more than a merely economic and utilitarian relationship with immigrants have failed because of "the burden of having employed *Fremdarbeiter* under National Socialism" (Esser and Korte 1985: 179). Thus, "historical experience with massive emigration as well as with heavy influx of foreign workers is still reflected in current policies and attitudes toward international migration in the FRG" (Wander 1990: 51).

Germany has a long tradition of importing foreign workers. For example, Poles worked in the Ruhr coal industry at the turn of the 19th century (see Kulczycki 1993). In addition to this, wartime forced labour, although not directly comparable to peacetime voluntary labour, has had important consequences so far as the psychological impact of this phenomenon on the attitudes of the indigenous population is concerned (Bendix 1985: 28).

> "However much the German population has repressed its experiences under Hitler since the war, the attitudes and behaviour developed then must have some effect in shaping prejudices in modern Western Europe." (Rist 1978: 60)

Until the building of the Berlin Wall in 1961, Germany was able to meet its manpower requirements by employing workers from East Germany. Soon after this, Germany concluded recruitment agreements with most of the Mediterranean countries including Turkey to satisfy its labour demand. Workers were recruited as 'Gastarbeiter' with the explicit intention of not instituting permanent immigration (Esser and Korte 1985: 179). This presumption has recently been viewed "as a way to bridge the gap between policy statements and reality" (Groenendijk and Hampsink 1994: 29).

The original guest worker concept of rotation was a good example of setting boundaries and restricting foreign entry purely in accordance with manpower needs. This may be a factor which contributed to the greater attractiveness of Turkish as well as Yugoslav labour power, and would help to explain their high recruitment in the 1960s and early 1970s. It could also be the fact that simply not many workers from Italy did come to Germany as migrant workers.[215]

In contrast to workers from the member states, notably from Italy, the uncertain legal status of Turkish workers and the stricter controls on their stay contributed to continued temporary status and the maintenance of a flexible reserve without a legitimate claim to permanent employment (Wilpert 1983: 137). Such strict controls, however, could not be imposed of course on workers from Italy as they have freedom of movement under the Community law. Thus, it suited German policy-makers to go for aliens who had restricted rights.

Further, even after the building of the Berlin Wall in August 1961 until the end of 1988, around 616,000 people made their way from East to West Germany (Mehrländer 1994: 6).The influx from the East became more prominent during the period 1989 and June 1990, making it a total figure of 580,000 (Mehrländer 1994: 6).

In recent years, the continuing influx of ethnic Germans (*Aussiedler*) from Eastern Europe and Russia has had considerable impact on Germany, particularly for the well-being of the settled minorities.[216] Article 116 of the 1949 German Constitution allows ethnic Germans and their descendants, who were forced to leave Germany at some point in the past, to settle in Germany and to obtain German nationality.[217] Despite the liberal positions on citizenship law for such people, there is a growing awareness that this group has an ambiguous status in Germany today in terms of ethnicity. Many of these immigrants of German origin can hardly speak

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[215]Note that Spain and Portugal were not yet members of the EC at that stage.
[216]See Wilpert 1991 for an examination of the significance of German unification and the emigration of ethnic Germans from Eastern Europe for the lives of the settled minorities, mainly Turks and Yugoslavs, the former guestworkers and their descendants.
[217]Note that 377,000 ethnic Germans in 1989 and 397,000 in 1990 have immigrated to Germany (Kemper 1992: 198). Since then, the figure has fluctuated between 200,000 and 250,000 (Mehrländer 1994: 7).

German and know little about life in Germany. On the other hand, the 'Aussiedler' can easily acquire German citizenship because they are 'German'[218], whereas the citizenship and even a legal right to residence of the second and even the third generation of Turkish immigrants are tied to strict conditions (Kemper 1992: 199).

On the other hand, the attitude of the German population to the 'others' seems to have worsened, partly due to the growing problems associated with the employment and housing situation (see Mehrländer 1994: 7-8). In fact, Turks, as well as other immigrants, have been blamed and used as 'scapegoats' for some of the socio-economic problems of Germany (for details see Chapter 4.1.5 below).

4.1.2 Pre-1973 developments in labour migration

At a time when the labour necessary for sustained economic growth was no longer available in the domestic market, the demands of the employers for the importation of cheap and flexible labour were supported by the state through a *laissez faire* admission policy combined with regulations facilitating the rotation of the foreign work force (Leitner 1987: 73).

Increasing numbers of Turkish workers entered West Germany in the late 1960s and early 1970s. By 1972 Turks were the largest immigrant group in the FRG (see Korte 1985: 32-33, table 2-1). Their presence in the FRG is neither the result of random events nor the outcome of strictly private decisions but rather the product of policies advanced by officials at the highest level (Mushaben 1985: 127). In Hans-Jochen Vogel's (SPD) statement,

> "One must always reiterate to our countrymen why these people are here...They did not come here illegally...and we didn't bring them here out of solidarity or pity for their poor standard of living in Anatolia."[219]

[218]Note that this puzzling situation derives also from the rules for citizenship as Germany applies the principle of *ius sanguinis*.
[219]Bendix 1985: 37, quoting Die Neue Gesellschaft (1982), p. 512.

As the volume of labour migration was determined by the requirements of the labour market in the receiving countries, policy was reduced to organising recruitment, transport and social care, and to establishing minimum housing standards (Schiller 1975: 335).

An examination of the recruitment procedure in operation between 1961-1973 in Germany helps to explain the central role played by the Federal Labour Department (*Bundesanstalt für Arbeit*) and various priorities of the labour market (see Hōnekopp and Ullman 1982: 121-122). The Federal Labour Department with the local employment offices is responsible for the administration of all labour-related matters in Germany. This federal department was in charge of the 'German Commissions', such as the one established in Istanbul, who served as intermediaries for the local administrative authorities who assumed the major responsibility for recruiting manpower under bilateral agreements.

The prospective German employer initiated the recruitment procedure by notifying the competent employment office of his intention to recruit foreign labour, specifying his requirements with respect to the number of workers, level of qualification and nationality (anonymous recruitment) (Abadan 1986: 331). The employers' requests would then be passed on to the Turkish Employment Service, which would then choose a sufficient number of applications from the waiting list. Another method was known as 'nominated recruitment' under which an employer in Germany would file an application for a specific worker who would then be recruited regardless of him having been in the waiting list (Abadan 1986: 331). The operation of the recruitment procedure shows that the hiring of foreign workers depended entirely on economic policy decisions taken by employers (Hōnekopp and Ullman 1982: 122).

Although, in principle, immigrant workers to Germany were required to get a labour permit and visa before their arrival, in practice this condition was not strictly applied during periods of severe labour shortage. Thus, many Turkish immigrants entered Germany until 1972 on tourist passports and subsequently obtained a work permit after they had found a job (Paine 1974: 69; Miller 1982: 53).

The Recruitment Agreement between the FRG and Turkey in 1961 only laid down rules for the process of recruitment; it was not drafted primarily in recognition of the interests of the Turkish workers in West Germany (Ansay 1991: 834). Another bilateral agreement in 1964 was mainly concerned with the practical issues of retirement and social security benefits for those who had worked in both countries and would retire in Germany or return to the home country.

The German Federal Republic has retained the right to renew or refuse to renew the residence permit of foreigners. For example, according to Clause 10 of the Agreement with Turkey of 30 October 1961, as amended in 1964, Turkey is supposed to accept their workers back at any time. As a result, the German government had the opportunity to send back foreign worker when it did not need them any more due to possible deteriorating market conditions (Nikolinakos 1971: 81).

The Foreigners Act (*Ausländergesetz*) of 1965[220] was not a comprehensive codification of the rights and duties of the aliens. It regulated basically the right of entry, sojourn, deportation and some political rights. In fact, the Foreigners Act of 1965 did not give foreigners a right to residence, merely stating that 'a residence permit may be granted, if it does not harm the interest of the German Federal Republic'. The official guidelines on how to implement the law stated that:

> "Foreigners enjoy all basic rights, except the basic rights of freedom of assembly, freedom of association, freedom of movement and free choice of occupation, place of work and place of education, and protection from extradition abroad".[221]

In addition to this, the Act had to be completed by rules and regulations or circulars issued by the administrative organs at the Federal level as well as at the state level (Ansay 1991: 835).

[220]Replaced now by a new Foreigners Act of 1990 in force since 1991.
[221]See Castles 1985: 522, quoting Allgemeine Verwaltungsvorschrift zur Ausführung des Ausländergesetzes, para. 6.

Some of these circulars were known neither to the public nor even to lawyers (Hailbronner 1989: 35). Further the Foreigners Act of 1965, promulgated in conjunction with the Promotion of Labour Act (*Arbeitsförderungsgesetz*) of 1969, offered ground rules, but no definition of guestworkers' formal legal status (Mushaben 1985: 127).

Considerable discretion is given to the administrative authorities in granting and renewing work and residence permits. While foreign workers have equal rights *de jure* under the labour and social security laws, this does not necessarily imply *de facto* equality since they can be denied renewal of their work and residence permit for reasons that can appear to be *ad hoc* or arbitrary (Leitner 1987: 77). According to section 2 of the Foreigners Act of 1965, the officials can only grant or extend the residence permit if the foreigner's presence does not injure the interests of the Federal Republic of Germany. When an alternative law was proposed in 1970 in order to change the *Ausländergesetz*, Hans Dietrich Genscher, then the Minister of the Interior, refused it on the grounds that it was too favourable to foreigners, because in his view "it is not only the right but the duty of the German Parliament to first serve its own people" (Stange 1973: 3).

The determination of what those interests include and what that prejudice means remains solely at the decision of the individual executive (O'Brien 1988: 116; Bendix 1985: 37). If a foreign worker referred expressly to the entitlement to residence in pursuit of Para 8 of the Foreigners Act of 1965, he was usually informed that this entitlement was subject to the limitation that the interests of the state will not be jeopardised (Franz 1975: 54). Accordingly, when a Turkish worker wished to remain another six years after nine years residence in order to complete the minimum social insurance contribution period, such jeopardy was deemed to exist.[222] It should be noted, nevertheless that

> "While relatively few migrants seem to have directly lost work and residency authorisation because permits were not renewed, the threat of non-renewal weighed heavily on short-term workers, and the resulting uncertainty contributed

[222]Bundesverwaltungsgericht (BVerwG), Case I B 51. 72 (20 August 1972).

to decisions by many such workers to return to their country of origin" (Miller and Martin 1982: 26).

The return movement of Turkish workers prior to 1973 has perhaps been influenced by such uncertainty as well as the dissatisfaction of some returnees concerning their expectations from life in Germany.

4.1.3 The recruitment stop

Groups advocating immigration to the Federal Republic began to put pressure on the government's policy, though on a limited scale.[223] As early as 1970, most of these groups acquired direct representation before the government through the establishment in the Ministry of Labour of a Co-ordination Committee for Foreign Workers (O'Brien 1988: 122). The Committee drafted a document titled 'Principles and measures for the incorporation of foreign workers'.[224] This document, recognising migration as a long-term process in Germany, called for new measures to integrate foreigners into the mainstream of German society. The following year, the Committee presented its Action Programme for the Recruitment and Employment of Aliens with a view to consolidating the employment of foreigners, recognising a safer legal status for those with longer residence.[225]

On the other hand, the foreign worker 'problem' has, in the minds of many Germans, become a Turkish problem (Wilpert 1983: 138). Turks are considered particularly visible due to their high concentration in certain regions and urban areas, their large numbers of children and their more easily identifiable behaviour and attitude. These cultural differences contributed to the logic of continued boundary maintenance and are frequently referred to in a variety of domains.

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[223]The churches, the unions, segments of the Social and Free and Democratic Parties, the Workers Welfare Centre, the League of Cities, the German Lawyers Association and other organisations either commenced or expanded their activities on behalf of foreigners.

[224]Bundesministerium für Arbeit und Sozialordnung (1972) *Grundsätze zur Eingliederung Ausländischer Arbeitnehmer*. Bonn.

[225]See Bundesanstalt für Arbeit und Sozialordnung (1973) *Aktionsprogramm für Ausländer-beschäftigung*, Bonn.

> "The Turks' efforts to demarcate an ethnic boundary can at least in part be interpreted as a reaction to open discrimination and to the widespread belief that the Turkish and German cultures are too different to allow successful integration" (Esser and Korte 1985: 201).

Thus, it is the rationale of this gap which enforces policies to be directed especially at certain groups, Turks in this case. Further,

> "Their increased number made them a more visible minority, and also gave them a good opportunity to organise themselves as an ethnic group, which led to the misperception that they were against integration on principle" (Esser and Korte 1985: 201).

This is true indeed when one looks at the incidents which happened in 1973 (see Miller 1981: 107-111): some 500 mainly Turkish employees of the Ford plant in Cologne had discovered that they had been fired after coming back from the 1973 summer vacation period. The protest soon turned into a huge wildcat strike supported by most of the 12,000 Turkish employees, who demanded that their colleagues be reinstated and given an increased wage.[226] There was so much publicity over the Ford-Cologne strike, which was the high point of the wave of *Ausländerstreiks* in August and September of 1973 and catalysed many other strikes, named as the 'Turkish revolt' (Miller 1981: 108-109).

Many Germans felt that their society was under threat from a foreign element. This renewed fear of non-Germans was expressed in the title of an article in *Der Spiegel* in 1973 as 'The Turkish invasion' (O'Brien 1988: 118). Despite the fact that these strikes resulted in some immediate improvements in wages and working conditions as well as long-term effects that tended to increase foreign worker representation in Germany (Miller 1981: 110-111), what had happened was a strong incentive for the government of the Federal Republic to reconsider recruitment of foreign workers in the aftermath of these incidents. Consequently, fear of disorder - more than the rise in energy costs - led the government in the autumn of 1973 to take harsh measures designed to cut the inflow of immigrants (Mehrländer 1979: 151).

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[226]The identification of the strike with the extreme left (German as well as Turkish) was a setback for success and led to the withdrawal of the original support for the strike among Turkish workers.

In fact, a restrictive policy had already been underway prior to the recruitment ban in 1973. The Federal Republic, first, attempted to control the inflow of foreign workers by means of market-oriented policy measures (see Schiller 1975: 340-344). As a first step towards restricting further immigration, the employer's option to recruit foreign workers privately was eliminated in November 1972, compelling them to use official recruitment channels (Hollifield 1986: 117). Further, the recruitment fee was raised in the summer of 1973 from DM 300 to DM 1,000 except in the case of EC nationals for whom it remained DM 60, coupled with a special employment tax on foreigners (*Wirtschaftsabgabe, Infrastrukturabgabe*) suggested in the action programme adopted by the Federal government in June 1973 (see Schiller 1975: 340-342).

4.1.4 Developments after the recruitment stop

An *interventionist* strategy, as opposed to a *laissez faire* approach, was adopted by the state. It consisted of "a heterogeneous conglomerate of individual bundles of measures", starting with a ban on further recruitment of non-EC workers in November 1973 (Leitner 1987: 73). The restrictive individual measures in the years 1973-76 did not stem from independent political ideas but were a direct response to economic and labour market pressure (Weidacher 1983: 464), as well as social considerations. Whether the migration process could be effectively influenced by indirect means (application of the price mechanism, general economic policy) remained doubtful (see Schiller 1975: 340-349). Actually, it was, officially, asserted that the process of foreign worker recruitment could not be left solely to the demands and conditions of the labour market, but it was necessary to monitor this process according to the degree of receptivity and absorption of the social infrastructure.[227]

The recruitment stop in 1973 and subsequent developments point to the fact that, in decisions about worker migration, not only economic but also social factors played an important role. Accordingly, social concerns over migration have had a restrictive impact on the further

[227]From the Chanceller's speech, cited in De Haan 1976: 355.

expansion of migration, particularly for labour migration from Turkey (see p. 30, Table 1 above). Further, efforts to modify the immigration policy are often seen as efforts to modify the ethnic composition of the current immigration population (Motomura 1995: 541-542). Thus, the restrictive response of the German system to the existence of Turkish immigrants has mainly evolved as a consequence of such concerns over the ethnic composition of Turks among other immigrant groups. However, such restrictive approaches to the existence of an immigrant group would not necessarily reverse the present ethno-demographic trends.

Unlike what happened during the recession of 1967-68, the volume of Turkish worker employment did not go down substantially despite the recruitment ban in 1973, but the ban affected the migratory flow deeply. While in 1973, 103,753 new workers came from Turkey to West Germany, in 1975 this figure went down to 640 (Rist 1978: 113). The main reason for the unwillingness to return may have been the recruitment stop itself (Schiller 1975: 336), as even unemployed immigrants were far more reluctant to return because they knew that they would be unable to re-enter the FR later.[228] Actually, increased length of stay increased the migrant's knowledge of the advantages of the German social system (Korte 1985: 47), which in turn encouraged many migrants to postpone their decisions to return.

Such restrictive measures also gave rise to a sudden increase in the level of illegal migrants, mostly as 'tourists', hence forcing people into illegality. The Ministry of Labour launched a campaign in 1974 against illegal employment, labelling the action especially urgent, because illegally employed aliens block jobs for Germans.[229] Moreover, both Ministries of Labour and the Interior wanted to have those foreigners deported who possessed work and residence permits but who were unemployed or dependent on social welfare.[230]

> "The apparent broadening of policy from merely economic aims towards more 'social' aims, beginning in the 1970s, was basically just an adaptation of the original aims to different conditions. Immigrants had become indispensable in

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[228]Note that parallel developments took place when restrictions were introduced in Britain in 1962 and 1968; see Korte 1985: 47 and Chapter 2 above.
[229]O'Brien 1988: 118, quoting Dohse 1981: 318.
[230]Id., quoting Dohse 1981: 336-341.

> many segments of the economy and employers were increasingly interested in stabilising their foreign labour force; the integration of immigrants into the social system of the FRG had become inevitable... (Thus) economic objectives could no longer stand alone and had to be complemented with 'social' aims, although the latter were nonetheless still closely oriented towards the goals of national interest and growth". (Esser and Korte 1985: 180)

The increasing family reunification of Turkish workers was perhaps initiated under such integrationist considerations (for details see Chapter 6 below). It is suggested that family ties yield unseen but important economic benefits by providing the social and economic networks that are necessary for effective integration into the society and economy of the receiving country (Motomura 1995: 539). Thus, the aim of this approach is to get the best out of immigrants, by using social aims such as integration for the realisation of economic objectives of the country.

Further, the reactive and *ad hoc* nature of state intervention created the preconditions for a new crisis necessitating, in turn, new forms of intervention (e.g. the issue of child allowances below):

> "The conception behind the various initiatives is that of a temporary integration, which attempts to reduce the potential for conflict by facilitating the adjustment of the foreigners to the receiving society without encouraging them to stay permanently". (Leitner 1987: 75)

Temporary integration basically endeavours to reduce the potential for social problems without fundamentally changing the insecure residence status and the inferior economic and political position of Turkish workers. Nevertheless, as Hönekopp and Ullman put it,

> "'Temporary integration' may be nothing more than a political catchword, but it does underscore the provisional nature of all policies concerning foreigners: the desire to remedy short-term difficulties is the primary consideration and all the measures taken are in the nature of *ad hoc* solutions to social problems which have gradually taken on a political dimension" (1982: 116).

The recommendations of the Commission of the Federal Republic and Länder in 1977, which became the official basis of state policy with respect to aliens,

> "have as their precept the continuation of the immigrant stop or the restriction of alien employment on the one hand, and the improvement of the conditions leading to social integration (with however the implicit condition of a time limit to residence or the absence of a concept for permanent residence) on the other" (Weidacher 1983: 464).

The basic principles of policy regarding aliens, which were more strongly drafted towards restriction of immigrants and reduction of the number of aliens, particularly targeted the invalidity of the free movement of labour regulation with respect to Turkey (Weidacher 1983: 465).

Residence regulations were amended in 1978 by the Federal government with a view to introducing the consolidation (*Verfestigungsregel*) to confer on foreign residents a clearer legal status through a change in the Implementation Decree of the Foreigners Act of 1978 (see Esser and Korte 1985: 185; Castles 1985: 526-527). However, the connection between the residence and work permits and the restrictive application of these permits to short durations allows authorities to check regularly whether a permit holder's residence is still in the interest of Germany (Esser and Korte 1985: 185). As a result, immigration authorities and labour officials have kept a strong control over the length and scope of labour migration, particularly for recently arrived immigrants who have no secure residence entitlements. The intended effect of this is to discourage worker migration and to reduce the worker population, especially when the employment of immigrant workers is not viewed to be in the interest of Germany.

In 1978, the Office of the Ombudsman for Foreign Workers was established to represent their needs to the government. In September 1979, the Federal Commissioner for the Integration of Foreigners, Heinz Kühn, submitted a 'Memorandum on the Present and Future Integration of Foreign Workers and Their Families in the FRG' which declared that government policy was "clearly too influenced by the priority of...perspectives of the labour market" and further called for "the elimination of all segregating measures" and "the marked intensification of integrative

measures".[231] Thus, the concept of entrenchment (*Verwurzelung*) was developed by the scholars and courts. It meant that the longer the migrant worker remains, the stronger his/her residence status should be and the greater the restrictions on administrative discretion (Ansay 1991: 836).

However, a tighter aliens policy began operating from 1981, as a result of rising unemployment, urban problems, combined with the statements of leading politicians and some of the media which particularly portrayed asylum seekers as a 'flood' of refugees from third world countries (see Castles 1985: 525 and Şen 1989: 10). Asylum seekers from Turkey increased to 57,913 in 1980 from 1,168 in 1977 and 13,246 in 1979, mainly as a result of the increasing political violence prior to the September 1980 military take-over.[232] This development has partly contributed to the repatriation policies of the German government in the early 1980s which particularly targeted Turkish immigrants.

Further, as a result of the increase in family migration, the structure of the immigrant population has changed drastically. The Turkish immigrant population became more visible as families joined migrants workers (see chapter 2). They also began to demand better housing and became competitors in the labour market and required schooling and other services. Although various programs were supported by the government to the extent that 'integration' now represents an important part of aliens policy in West Germany, a renewal of harsh measures was witnessed with the rise to power of a conservative government in the 1980s (see Castles 1985: 527-533).

In 1982, when the CDU-CSU came to power (in a coalition with the FDP) the discussion of repatriation policies received high priority. A commission was set up by the right-wing minister of the interior, Zimmermann (CSU), linking the federal, state and local levels of government to work out policies towards foreigners. The Commissioner reported on 1 March

[231]O'Brien 1988: 29-30, quoting Kühn 1980.
[232]See TMLSS 1991: 8-9.

1983 and made more than 80 detailed recommendations for changes in the legal status of foreign residents.[233] The essence of the approach of the specific recommendations was to make regulations much more concrete and more clearly binding than they had been in the 1965 Ausländergesetz.

Further, the government passed the Law for Encouraging Foreigners to Return Home of 1983, which paid DM 10,500 to certain unemployed foreigners and DM 1,500 per child willing to leave Germany permanently. One journalist commented that the CDU/CSU dreams of mass repatriation of the Turks seemed to have found its confirmation under the Kohl government's law, which seeks to encourage unemployed foreign workers to return home by providing financial premiums.[234] Therefore, this so-called law of DM 10,500 in 1983, which was implemented between the period 31 October 1983 and 30 June 1984, temporarily led to mass returns during this period. But, only around 14,000 out of the 221,000 who permanently returned to Turkey in this period actually received DM 10,500 (Şen 1989: 11).

These return movements were also influenced by the growing hostility to foreigners, particularly Turks. The Turks were considered to be the most difficult to integrate in public discussion for such reasons as (a) they come from a non-European culture group, (b) they are Muslims, and (c) their numbers continue to grow despite the recruitment ban (see Şen 1989: 10-11).

From an economic viewpoint, empirical studies clearly show that immigration has been and is also likely to be beneficial for the receiving countries, as long as it is under control (Spencer 1994a). Nevertheless, there seems to be an immense political pressure against immigration which may influence policy-makers to give more attention to political rather than economic rationality to balance the public's 'loss of control' feeling (Zimmermann 1994: 41).

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[233]Bundesminister des Innern (1983) *Konzeption des BMI für das neue Ausländergesetz*. Bonn: Bundesminister des Innern. The report was seen by the Federal government as a blueprint for a new Ausländergesetz.

[234]Grünenberg, Nina (1982) "Was tun mit den Türken?", *Die Zeit*, 6:12 February.

4.1.5 Perspectives on internal migration

The government of the Federal Republic developed the concept of *Plafondierung* in an effort to tackle the problems created (supposedly) by the concentration of great numbers of immigrant workers in certain regions, and particularly the excessive strain placed on the social structure of such areas; and applied it from April 1975 to April 1977 (see Hönekopp and Ullman 1982: 123; Schiller 1975: 351-354). The idea behind this policy was to adjust the number of foreign workers admitted into certain regions to the absorption capacity of their social structures. A proportion of 12 per cent of the population was adopted as a limit. More than 55 cities declared themselves as congested areas, some of which also declared certain districts within their boundaries as areas overcrowded with foreigners (such as Berlin and Munich) (Leitner 1987: 80). Both types of restrictions were suspected to be violating the 4th Protocol of the ECHR of 1963 (signed by the FRG) that everybody legally present in a country has the right to freely choose his or her place of residence (Leitner 1987: 80).

Also, it is difficult to see how it came to be established that this particular percentage represented a strain on the social structure (Hönekopp and Ullman 1982: 123). On the other hand, it was suspected that references to such issues were simply made to camouflage other problems, one of which may be an area's general reception capacity (Schiller 1975: 351). In the FRG, about half the country's population is concentrated in seven per cent of its territory and the foreign population is even more concentrated, about 2/3 in the same seven per cent. Relying on this, Schiller (1975: 352) rightly argues that one certainly cannot conclude from the various figures which show the regional differences in the social infrastructure, that it is the foreigners who cause these deficiencies. Thus, once again foreign workers were the target of scapegoating for the problems which showed no particular correlation to their presence in the receiving country.

In particular, the causes of the strain on regional housing markets are often overlooked; they should not be attributed exclusively to the newcomers (see now Gieseck et al. 1994: 28-29). In

addition to other factors, the shift in the 1980s in housing policy, and the significant increase in the number of one-person households ('singles') are important reasons for the present strain on the housing market (Gieseck et al 1994: 28).

These restrictions were not applicable to Community nationals nor to foreign workers holding a residence permit and a work permit of unlimited duration and some other categories of foreigners. Further it could no longer be applied to Turkish workers - by virtue of the Association Agreement - nor to Greek, Spanish and Portuguese workers - by virtue of the bilateral agreements concluded by their countries with the FRG (Hönekopp and Ullman 1982: 123). Therefore, the *Plafondierung* procedure was discontinued on 1 April 1977. Such restrictions on the right to liberty of movement of migrant workers and members of their families and their freedom to choose their residence in the territory of the state of employment are now clearly prohibited by Article 39 of the 1990 UN Convention on Migrant Workers.

4.1.6 The German system of recruitment of workers

Originally, the presence of foreign workers in Germany rested on the twin principles of residence and work: no alien has the right to reside in the country without a residence permit, and workers who are not German nationals must have a work permit (see Hönekopp and Ullman 1982: 116-9). Residence permits may be of limited duration and potentially renewable, or of unlimited duration. Therefore, a distinction is made between the 'permission to reside' (*Aufenthaltserlaubnis*) which may be granted before arrival, and the 'right to reside' (*Aufenthaltsberechtigung*) which may be granted after five years residency in accordance with the Foreigners Act of 1965.

Work permits follow this distinction in residency permit: a general work permit is restricted to two or three years, valid for one job for one employer in one place, and is given in light of the situation and trends of the labour market.[235] A 'special' permit may be issued to foreign workers having been employed in the Federal Republic for five years without interruption, to

[235] Arbeitsförderungsgesetz (Act to Promote Employment) of 1969, Article 19.

refugees and to aliens with six years of residence in the country: it is free of the restrictions of the 'general' work permit.[236] Special labour permits are granted irrespective of the labour market situation.[237]

During the pre-1973 period, under the labour contract both the general work permit and the permission to reside were automatically granted to Turkish workers, as they were regarded to be temporary and could be readily granted renewable work and residence permits. Nevertheless, structural problems were already becoming apparent even prior to the *Arbeitsstopp*, perhaps due to the fact that work and residency permits, although rested on different principles, were interdependent, particularly when one looks at the special work permit and the right to reside (Bendix 1985: 31). The former cannot be obtained unless one has been continuously employed for five years; and residence permits of unlimited duration can only be issued if the applicant holds a special work permit (Bendix 1985: 31).

Further, work and residency are explicitly dependent upon the economic and social policies of the Federal Government and changes of policy at this level (such as the recruitment stop) alter the nature and extent of local administrative decisions.[238] Therefore, work permits were automatic, or nearly so, prior to 1973 for those Turkish workers who come under the labour contracts, followed by residence permits after arrival; thereafter the situation was reversed and a work permit was issued to a foreigner only if he was legally resident (Hönekopp and Ullman 1982: 121). The result was increased demand for unlimited residence permits; limited residence permits and the automatic general work permit disappeared (Bendix 1985: 31).

The current stance of the German government and public institutions is such that they, on the one hand, tolerate and promote a more legal status for those who have already lived in Germany for a long period of time. The new Foreigners Act of 1990 has actually helped to

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[236]See Hönekopp and Ullman 1982: 119-120, and Groenendijk and Hampsink 1994: 31.
[237]Article 2 of the Arbeitserlaubnisverordnung (Work Permit Directive) of 1980.
[238]Bendix 1985: 31, quoting Schuman (ed) (1982).

stabilise the status of those long established immigrants. On the other hand, the Act has closed the doors for those who want to come to Germany, to some extent.

Further, the Act was said to codify the ban on recruitment (Groenendijk and Hampsink 1994: 30). Nevertheless, the legislation on the employment of foreign labour was also amended allowing for a range of exceptions to that ban. The relevant decrees[239] can be read as a list of all the new forms of the temporary employment of foreign labour actually used during the 1980s.

The current German foreigners law is covered by several statutes, directives and regulations.[240] According to section 19 of the Law to Promote Employment (*Arbeitsförderungsgesetz*) of 25 June 1969 as amended in 1991, every foreign national who wants to work in Germany needs a work permit which will be granted depending on the legal framework, the situation of the labour market and the particular circumstances of each individual case. The legal framework for taking up employment in Germany is very different for the various groups. *Übersiedler* and *Aussiedler* have no limitations in this regard; nor have foreigners from the countries of the EU (Gieseck et al. 1994: 19). All other groups need a work permit (a general work permit), which is limited to those cases where no Germans or foreign workers with the same status are available for the job.

The Work Permit Directive (*Arbeitserlaubnisverordnung*) of 1980 as amended in 1990 was enacted in order to advise the competent authorities on how to apply the vague language of section 19 of the Law to Promote Employment (Arbeitsförderungsgesetz) of 1969 as amended

[239] Recruitment Ban Exception Decree (*Anwerbestoppausnahmeverordnung*) of 21 December 1990, *Bundesgesetzblatt* (*BGB1*) I, p. 3012. See also the corresponding decree on residence permits for foreign workers: Arbeitsaufenthalteverordnung of 18 December 1990, *BGBl.* 1990 I, p. 2994.

[240] The Foreigners Act (*Ausländergesetz*) of 9 July 1990 with its Directive (*Verordnung zur Durchführung des Ausländergesetz*) of 18 December 1990 is the most important statute. EC nationals are regulated separately by the EC Residency Act (*Aufenthaltsgesetz/EWG*) of 31 January 1980, as amended in 1981 and 1990. Work permits are dealt with by section 19 of the Law to Promote Employment (*Arbeitsförderungsgesetz*) of 25 June 1969 as amended in 1991 and the Work Permit Directive (*Arbeitserlaubnisverordnung*) of 12 September 1980 as amended in 1990. See Gulbenkian and Badoux 1993 chapter 5 for Germany.

in 1991. A residence permit needs to be applied for before an application for a work permit can be made. According to section 5 of the Work Permit Directive, a work permit will only be granted to foreign nationals legally residing in Germany. Therefore, in principle, a work permit will be issued only if a residence permit has previously been granted. No work permit is required when the right of residence has been granted, which is usually the case only after eight years of employment (Gieseck et al. 1994: 20).

In practice, there exist some obstacles restricting practical access to work to a certain extent by administrative action, as part of the policy of the German government and particularly of the Ministry of Labour. Especially in those sectors where Turkish workers are likely to be recruited, the procedure for getting a work permit takes longer than it does usually. The administrative authorities tend to inquire more vigorously whether or not certain requirements are fulfilled in the case of a Turkish applicant, such as whether there are German or other EU workers for the vacant position.[241] Therefore the process may take much longer, which may result in the Turkish applicant abandoning his decision.

4.1.7 Recent developments: a need for immigrant workers?

Why is it that Germany, on the one hand, has been aiming at restrictions on the number of new entrants using the argument, familiar in Britain, that a further influx would have negative social and economic consequences, and on the other hand, millions of newcomers have been absorbed and even perceived as an economic asset by Germany?[242]

It should be first noted that there is a certain degree of movement of labour in the 'global village of today' like the movement of capital across the countries, whatever immigration restrictions are imposed by states (Menski 1994a: 9). Further, even subsequent to the recruitment ban in 1973, exceptions were made in November 1974 for jobs in the mining and food industry, and in hotels and restaurants (Groenendijk and Hampsink 1994: 29). Moreover, many of the asylum seekers in the 1970s and even in the 1980s were regarded as cheap and

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[241] This has been confirmed by Prof H. Lichtenberg in an interview on 03.02.1994 in Bremen.
[242] This question was raised in a recent conference, see Menski 1994a: 2.

flexible labour force until the change in asylum law in 1991. In fact, a substantial part of the newcomers were ethnic Germans whose rights of entry into Germany are guaranteed by the German Federal Constitution. There are, of course, also many immigrants coming under family migration (see Chapters 6 and 7 below).

Although the unemployment rate in Germany has increased in recent years, this is of a structural character, which is particularly true for certain sectors. For example, it is not likely that a German of 45-50 years will be willing to work in the construction sector which will tend to look for young, strong immigrant workers. The building industry is viewed as rather unattractive because of its heavy, dangerous and insecure jobs. Thus, it is not surprising that a project-tied migration system has been used predominantly in the building industry (Groenendijk and Hampsink 1994: 37).

Further, the economic situation between 1988 and 1992 has been very favourable for the immigrants' employment chances. According to the relevant figures,[243] the number of employed has risen by almost 2.2 million to 29.5 million in 1992. The number of unemployed fell between 1988 and 1991 by about 550,000 to slightly under 1.7 million, but during 1992 it has risen again markedly, as has the number of persons working short-time.[244] In fact, according to the figures of the Federal Employment Office, Germany will need 250-300,000 new workers annually in order to keep its economy developed. These places cannot be filled by the German population because of demographical reasons.[245] Ulrich (1994: 85) also predicts that a continued net immigration of 200,000 persons per year could slow the ageing of the foreign population, but cannot stop it, let alone make up for the ageing of the German population.

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[243] See Gieseck et al. 1994: 20-21, table 2.
[244] Id.
[245] See Zimmermann 1994, and Johnson and Zimmermann 1993 for a detailed account of the population ageing in Europe and its implication for the labour market.

At the other side of the spectrum, nevertheless, one could see Germany's persistent long ignorance of its immigrant population, often under the banner of 'Germany is no immigration country'. Germany's unchanged stance (politically) has differing implications for Turkish immigrants and other categories of immigrants. As a result of the decisions of various courts (ECJ and various German courts) within the context of the Ankara Agreement and the subsequent developments, Germany is aware that Turkish immigrants have a legal right to stay and work in Germany under the Community law, which cannot be changed, despite the fact that in practice various barriers exist in the form of law or arbitrary practice. Therefore, Germany is reluctant to admit new workers from Turkey, because it is aware that it is almost impossible to send Turkish workers back legally after one year of legal employment under Article 6(1) of Decision 1/80 (see Chapter 3, p. 103). The 1990 Foreigners Act, while recognising the right of long settled immigrants to stay in Germany, has made it more difficult for short-staying workers to acquire the same right.

Agreements on seasonal labour have been concluded in recent years with the employment services of Croatia, Poland, Romania, Slovakia, the Czech Republic and Bulgaria. It is reported that in 1990 around three quarters of such immigrant workers came from Central European countries, predominantly from Poland (Muus 1993: 65). Looking at the increase in the number of seasonal workers from particularly Poland and other Eastern European countries, one could easily see the re-emergence or continuation of a *Konjunkterpuffer* approach or a rotation principle.[246] Gieseck et al. (1994: 20), not surprisingly though, conclude that immigrants acted as a 'cyclical buffer', protecting Germans from unemployment. Gieseck et al. (1994: 31) further notes that unemployment would have been 0.2 per cent higher in 1992 *without* immigration.

[246]On the basis of bilateral agreements, 128,668 seasonal workers were employed in Germany in 1991; 212,442 in 1992; and 175,821 in 1993 as of the end of October (see Groenendijk and Hampsink 1994: 33).

There are other categories of exceptions under which recruitment of foreign workers is carried out, which are intended to be of temporary character.[247] An Act of 1985 made it possible to employ foreign workers for 18 months, if they have not worked in Germany before or have just completed their vocational training.[248] By concluding bilateral agreements, Germany has introduced a programme for 'the training and short-term employment of workers originating from developing countries or countries of Central and Eastern Europe'.[249] The main advantage of this scheme to Germany is that the German labour market is taking advantage of additional potential in the form of workers who are available immediately and may also be placed in a very specific manner[250]. Under these bilateral agreements, 2,200 young workers had been recruited in 1991; 5,000 in 1992; and 5,700 in 1993 (see Groenendijk and Hampsink 1994: 39). This is of considerable importance for German industry, particularly those sectors which have a permanent shortage of qualified workers (building industry and assembly work).

Project-tied migration[251] is today becoming more common in Western Europe. Germany had already employed 20,000-30,000 central and eastern Europeans annually under such schemes in the 1980s; and a maximum quota of 100,000 was envisaged for the early 1990s (Böhning 1991a: 456). Since 1989, Germany has further concluded agreements with several countries in Central and Eastern Europe concerning the employment of project-tied workers (*Werkvertragsarbeitnehmer*).[252] In fact, the 1990 legislation concerning labour permits explicitly envisages this kind of employment of immigrant labour, for which permits are granted irrespective of the situation on the labour market.[253]

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[247] Article 2(g) of the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families uses the term 'specified-employment worker' which refers to a migrant worker being employed for a restricted and defined period of time and whose job is of a transitory or brief nature, and who is required to depart from the state of employment after completion of his/her work or his/her authorised stay.
[248] Beschäftigungsförderungsgesetz of 4 April 1985, *Bundesgesetzblatt* I, p. 710.
[249] See Groenendijk and Hampsink 1994: 38-39; Werner 1994.
[250] See Hofler 1992: 3, cited in Collinson 1993: 135.
[251] The term 'project-tied worker' refers to a migrant worker admitted to a State of employment to undertake a specific assignment or duty (Article 2(2)(f) of the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families).
[252] Such agreements provide the possibility for German employers to conclude a contract with an employer in a foreign country who agrees to perform a certain task or temporary project with his own workers. The workers should leave Germany once the project is over (for details see Werner 1994 and Groenendijk and Hampsink 1994: 34-38.
[253] Article 3 of the Arbeitsaufenthaltsverordnung.

Retaining the same approach for Turkish immigrants is a remote option as far as Germany is concerned. In accordance with Article 8 of Decision 1/80, priority shall be given to Turkish workers, should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the member states. Hence, a similar bilateral agreement with Turkey has been concluded, perhaps a bit reluctantly. Subsequently, a yearly quota of 6.480 for *Werkvertragsarbeitnehmer* was agreed upon with Turkey in August 1993.[254] Strangely enough, the quota was only used partly: only 1.600 Turkish workers have been employed under that agreement at any given time. This unwillingness of German authorities to recruit Turkish workers further supports the conclusion that German policy aims at reducing the dominance of one group (the Turks) over other immigrant groups. As we shall see, such concerns are mirrored in other countries, too, including the Netherlands and UK.

Further, the co-operation agreements concluded between the Community and other Eastern European Countries reveal that provisions comparable to the ones in the Ankara Association Agreement do not exist for workers from these countries. This may prove that the EU seems to have learnt much from the experience of the existence of Turkish workers in the EU over 35 years, which will not, however, change the fact that the economy still needs workers.

A variety of settings for employment of students and employment for educational purposes was allowed under the 1990 legislation for immigrants (*Ausbildung und Weiterbildung*) (see Groenendijk and Hampsink 1994: 39). Further, foreigners under 25 years, including Turks of course, can be employed as au pairs in German speaking families for a maximum of one year.[255] I did not find any figures about this category of immigrants; presumably there is not a large category of immigrants under this category.

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[254]See Groenendijk and Hampsink 1994: 35 for the list of quotas agreed upon with each of the countries concerned.
[255]Article 2 Arbeitsaufenthalteverordnung and Article 2 Anwerbestoppausnahmeverordnung.

4.1.8 Impact of developments in the Community law

Germany's allies significantly shaped its domestic policy after the Second World War. Therefore, a mass repatriation of Turks would not be allowed by NATO, as this would likely destabilise one of NATO's most strategically important nations. Furthermore, this would not be possible due to economic and humanitarian reasons. Most importantly, the Association Agreement of 1963 began to make its effect felt, particularly following the Council Decisions 2/76, 1/80 and 3/80, all of which do not allow the legal status of Turks resident in the EC countries to deteriorate.

German policy in the 1980s became increasingly concerned with the 'problems' emanating from both the existence of a large Turkish population and the possible inflow of more Turkish workers and persons from Turkey. The main components of the German policy regarding the free movement of Turkish workers was summarised in a document called a 'Non-Paper' which was released to the Press prior to a visit by the German Prime Minister to Turkey in 1985 (see Gümrükçü 1993). According to this 'Non-Paper', the provisions of the agreements relating to free movement of labour between Turkey and the EC do not provide any precise obligations on Germany and do not confer any precise rights for Turkish workers. In the view of the German government, freedom of movement and entrance of Turkish workers without control into Germany was out of the question. Further access to employment in the FRG would not automatically bring with it a right of residence for Turkish workers, since granting of work permits would depend on the situation of the German labour market.

In parallel to German foreigners policy of the time, German courts, too,

> "... underwent a new restrictive tendency in the early 1980s when German public opinion was no longer favourable toward foreign workers, which more or less coincided with the rise of anti-foreigner slogans of the smaller political parties" (Ansay 1991: 838).

Both the Federal Administrative Court and the Federal Social Court passed judgements to the effect that Decisions 2/76 and 1/80 were no more than mere documents of good will.

Article 6 of the Council Decision 1/80 was first interpreted by a decision of the Federal Social Court, in which the Court, relying on the interpretation of the Federal Labour Office, stated that Article 6 of Decision 1/80 provided only some relief but not more.[256] In a decision of 1986, the Federal Social Court refused the work permit application of a Turkish worker without considering the development and situation of the labour market.[257] In its view, the Decisions 2/76 and 1/80 of the Association Council were not the same as the Community regulations and directives; and it was necessary for these decisions to be implemented by Germany or the Community.[258] Therefore, the Decisions of the Association Council were held not to be directly applicable.

The Federal Administrative Court, too, adopted a restrictive interpretation of the Decisions of the Association Council. According to the Administrative Court, Article 6 of Decision 1/80 did not guarantee a right of residence for Turkish workers in Germany.[259] The Court further maintained that the provisions of the Aliens Law relating to right of residence were in principle applicable to Turkish workers.[260] The Administrative Court also upheld the view that Association Council Decisions were not directly applicable; and these decisions should be implemented in domestic law before they could have any effect.[261]

The reluctance of the German courts in implementing the Decisions 2/76 and 1/80 is meaningful, when one considers that three quarters of the Turkish population in Europe has been living in Germany for some time. One could suspect that the German courts have tried to maintain the official view that Germany is no immigration country by refusing to grant the right of residence to Turkish workers. Therefore, it is not a coincidence that the first application to the European Court of Justice (ECJ) regarding the application of Association

[256]Decision of 23 July 1982, RAr 106/81, *InfAuslR*, [1983] 7.
[257]Decision of 9 September 1986, Case 7 RAr 67/85 p. 24 of the judgement.
[258]Ibid. p. 24 of the judgement.
[259]Decision of 27 October 1987, the Federal Administrative Court, 1C 19.85 p. 12 of the judgement.
[260]Ibid. p. 14 of the judgement.
[261]Ibid. p. 13 of the judgement.

Council Decisions came not from Germany but from the Netherlands (the case of Sevince, of 20 September 1990).

The first noticeable response to Sevince came after some time in an official letter written to the Länder by the Federal Government in July 1991.[262] It was noted in this letter that some of the provisions of the Association Council Decisions 2/76 and 1/80 were directly applicable in regulating the access of Turkish workers into the German labour market, without giving any detailed and precise guidelines on how to implement these decisions in practice.

Following Kuş, the Federal Minister of the Interior, Rudolf Seiters, sent a directive to the Interior Ministries in the Länder, in which it was stated that the decision of the ECJ should not be binding; and in any case the decision is applicable only to those Turkish workers who have been married to a German but divorced and therefore lost their residence permit.[263] Actually, during the period between 16.12.1993 and 10.2.1993 (the date of the directive above), some Länder (such as Hamburg, Baden Württemberg and Nordrhein-Westfalen) had taken a liberal stance in implementing the decision of the ECJ in Kuş.

In fact, some of the courts did not follow the line of argument that the Federal Ministry of the Interior urged the Länder to follow. The High Administrative Court of Schleswig-Holstein found in a decision of 9 March 1993 that nursing of grandchildren by their grandfathers or grandmothers was a form of legal employment within the meaning of Article 6(1) of Decision 1/80.[264] Therefore, because of the work performed by the grandmother whose expenses relating to accommodation, food and health insurance were paid by the parents of the children, she was regarded as part of a stable labour force; and consequently could rely on the decision in Kuş.[265]

[262]11 July 1991, No. V II 2 - 125 722/2.
[263]See *Hürriyet*, Turkish daily newspaper, 2 March 1993. Der Spiegel announced this as follows: 'German government does not intend to recognise the decision of the ECJ on the right of Turkish workers to stay in Europe', 1 March 1993, *Der Spiegel*, p. 16.
[264]Decision of 9.3.1993, The High Administrative Court of Schleswig-Holstein, 3 L 175/92.
[265]See *Zaman*, 25.10.1993.

Up to recent years, expulsion had been regarded as a question of domestic law and therefore a Turkish worker could be expelled according to the requirements of the Foreigners Act, if his presence was against public order, national security and other interests of Germany. This situation has been reversed by a recent German court decision. The Administrative Court of Appeal of North Rhine-Westphalia held that the rules laid down by the ECJ for nationals of member states should also be applicable to Turkish nationals in cases of expulsion.[266]

It was a case where a Turkish national asked for a preliminary hearing from the Court when he was threatened with expulsion by the administrative authorities, as he was sentenced in September 1991 to a suspended term of 18 months imprisonment for drug peddling. An administrative order for his deportation was made in June 1992, against which he appealed. Then, he applied for interim suspension of the deportation order, which was refused.

On his appeal against the refusal of interim relief, the Court stated that as a result of the judgement of the ECJ in Kuş, it must reverse its previous case law. Accordingly, as far as the Turkish worker concerned was entitled to a residence permit under Article 6 of Decision 1/80, the legality of the deportation order had to be judged in the light of Community law.[267] In Sevince and Kuş, the ECJ had stated that this right was based on Community law entirely, and did not depend on any of the provisions of the member states. The German Court went on to say that the deportation of that worker would no longer be justifiable on general preventive grounds but only on special preventive grounds, by allowing him to remain in Germany and reversing the refusal of suspension.[268]

Right to renewal of work permits under Article 6 and 7 of Decision 1/80 has now been firmly upheld by the Federal Administrative Court (see Kemper 1995: 114). However, it must be

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[266]Decision of the Administrative Court of Appeal, Case 18 B 4386/92; see also Re A Turkish Drugs Pedlar [1993] 3 CMLR 276.
[267]Ibid, p. 277.
[268]Id.

pointed out that the guarantees against expulsion and other extra-legal rights would all depend on whether the conditions under Article 6 and 7 of Decision 1/80 are fulfilled. Otherwise, there can be no mention of a safe legal right to stay in Germany; therefore Turkish workers might be deprived of the protection of the Community law. In view of the long naturalisation process and long residence requirement for a permanent residence entitlement, Community action provides more effective relief for Turkish immigrant workers in Germany.

The German experience clearly shows us that the German economy has been dependent on the existence of immigrant workers, a large number of whom are Turkish immigrants. Further, the dependency of the German economy on immigrant workers is not likely to change in the near future. The German policy seems to be trying to reduce the social costs of immigration on the one hand, and to benefit from the advantages of employing foreign workers for certain industries, on the other. When doing this, Germany is again seeking to employ its old-fashioned disliked device of rotation principle, i.e. *Konjunkturpuffer*. Overall, as far as new labour migration from Turkey is concerned, more emphasis is now being given by the German system of immigration control to the social costs of worker migration rather than its beneficial side. In other words, Germany continues to take more workers but does so more reluctantly than before.

4.2 The Netherlands

A major characteristic of post-war immigration to the Netherlands has been its heterogeneity compared to other countries in Europe. Immigration from the colonies and former colonies of the Netherlands has occupied a significant place in the history of migration into the Netherlands along with immigrants of foreign nationals for economic (migrant workers) and humanitarian reasons (refugees and asylum seekers). Turks constitute an important part of the labour migration process from the Mediterranean along with immigrants from North Africa, notably the Moroccans.

4.2.1 The Dutch system of immigration

Historically, the Netherlands have always been a country of immigration as well as emigration.[269] It became a refuge for many prosecuted and displaced people, such as Jews from all over Europe, Roman Catholics from Germany and Huguenots from France in the past as well as a country of immigration for temporary and permanent workers from nearby countries (Entzinger 1985: 50). On the other hand, many Dutch people have settled abroad and large numbers moved to the US and to the former Netherlands East Indies during the nineteenth century. In addition to this, since the Second World War, and particularly during the 1950s, around half a million people have left for the 'New World' (Canada, Australia and New Zealand) (see Entzinger 1985: 50-51).

Emigration was encouraged in the Netherlands by the official government policy as a natural solution to imminent overpopulation with generous premiums on departure (Bovenkerk 1979: 118). However, in the 1960s, when the increasing demand for labour by the expanding industry began to be felt, the interest in emigration declined. While still actively pursuing a policy of emigration, the country was, at the same time, receiving immigrants in substantial numbers. The total number of immigrants during this period was almost equal to the number of emigrants (Vellinga 1989: 149).

For decades (until the mid-1960s) political, social and cultural life in the Netherlands was described by the term 'pillarisation' (*verzuiling*), according to which,

> "A 'pillar' consists of a conglomerate of sections of the population, who are united in a complex of organisations and institutions in society which are rooted in the same religion or ideology" (Grünfeld 1991: 27).

Presumably, mainly as a result of this approach, new immigrant populations in the Netherlands are defined on the basis of their collective identity, and policies are organised around ethnic

[269]On Dutch immigration policies and laws, generally see Sopemi Reports (various years), Bovenkerk 1979, Entzinger 1985, Swart 1987, Nuhoğlu-Soysal 1991, Kuijer and Woltjer 1991, Köppinger 1992, Muus et al. 1992, Gulbenkian and Badoux 1993.

minority groups rather than individuals. In fact, the Netherlands is exemplified as a corporatist polity, according to which,

> "Individuals gain legitimacy and access to various rights by subscribing to the wider collective groups through which they participate in different arenas of the social order" (Nuhoğlu-Soysal 1991: 46-47).

Accordingly, the historically pluralist feature of Dutch society, consisting of various social and cultural groups mainly determined by their religious affiliation (mainly Roman Catholic, Humanist and Protestant) have naturally influenced the Dutch reaction (see Entzinger 1985: 61-62) but not caused the new immigrants being defined as 'pillars'. It should be pointed out that since the mid-1960s 'depillarisation' has had important effects on the social and political life of the country.[270] Thus, the reason why the new groups have not been defined as pillars can partly be explained as one of the consequences of the 'depillarization' process. As the old social ties loosened and many young people created their own sub-culture, the traditional pillars have lost their significance (see Grünfeld 1991). Secondly, immigrant workers were initially viewed as temporary workers who would eventually return. Mainly because of this reason, it was first considered appropriate to provide sufficient opportunities for the migrants to retain their own 'cultural identity' outside the pillar structure (Entzinger 1987: 9). During the 1970s a variety of institutions was created with government support which catered exclusively for the different immigrant groups.[271] Once it was realised that these immigrants were here to stay, these institutions were now expected to provide a shelter which would help the migrants integrate within Dutch society, rather than preparing the migrants for their eventual return (Entzinger 1987: 10).

Whereas nearly all immigrants from the former colonies possessed Dutch citizenship (from Indonesia, Surinam and the Dutch Antilles) or a form of quasi-citizenship (the Moluccans), the admission and continued stay of immigrants recruited for work was regulated by the

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[270]See Grünfeld 1991 for the effect of 'pillarisation' and 'depillarisation' on the social and political life of the Netherlands and compromise politics.

[271]Examples include social work agencies, facilities for mother-tongue teaching, special housing projects, consultative councils, voluntary associations and mosques.

immigration legislation, as these immigrants did not possess Dutch nationality (Groenendijk 1990b: 2). The former group of immigrants, which consists of people coming from the former colonies of the Netherlands mainly as a result of the independence of these territories after the Second World War, are 'Eurasians' from Indonesia, Moluccans, Surinamese, and Netherlands Antilians (see Bovenkerk 1979: 118-126 and Entzinger 1985: 52-55). Therefore, the earlier debate on immigration and minority status in the Netherlands was now strongly influenced by the more recent experiences with immigrant groups from the colonies. Many of these immigrants have obtained a safe legal status as a result of the legacy of the colonial relationship with the Netherlands.[272] For example, more than 100,000 Surinamese used their formal rights as Dutch citizens to move to the Netherlands until the actual proclamation of independence of Surinam in November 1975 (Vellinga 1989: 150).

A second category of immigrants are those coming from the Mediterranean, a majority of which are Turkish immigrants followed in terms of number by Moroccans, who mainly arrived in the 1960s and 1970s as immigrant workers. The earlier immigrants into the Netherlands,

> "... can be seen as part of the post-war population movement from colonies or former colonies to the mother countries, Mediterraneans are part of the global labour migration from Southern Europe and North Africa to the richer countries of northern and north-western Europe." (Bovenkerk 1979: 126)

The presence of immigrants (particularly Eurasians) from the colonies, and rapid population growth resulting from high birth rates, which guaranteed a satisfactory domestic labour supply, was one of the main reasons for the Netherlands' late start in importing workers from outside. Recruitment agreements were concluded with a number of countries and Turkey (1964) primarily to regulate and control the situation of individual companies recruiting workers abroad (Vellinga 1989: 149). Thus, the aim of concluding recruitment agreements was not only to fill jobs for which no indigenous workers were available, but also with a view to eliminating the undesirable consequences of uncontrolled immigration, according to which

[272]For an extensive discussion of the regulation of immigration from the Dutch colonies and their nationality status, see Heijs 1991.

priority was to be given to the recruitment of workers belonging to the 'recruitment countries' (Smolders 1982: 85).

On the other hand, Mediterranean workers have never constituted more than three per cent of the Dutch labour force and their distribution over the major branches of industry is relatively well-balanced (Entzinger 1985: 59). Therefore, unlike Germany, the Netherlands is not a typical labour importing country. Nor is there a dominance of any one immigrant group over others in terms of numbers. As of 1 January 1993, there were 212,450 Turkish and 165,138 Moroccan nationals in the Netherlands.[273]

4.2.2 Early policies on worker migration

The Turkish population in the Netherlands found employment in various branches of industry that required great quantities of unskilled labour, such as textiles, shipbuilding or car manufacturing with the intention of staying only for a short period. It is a typical feature of worker migration that most workers, initially, did not have the intention to stay permanently (see chapter 2). On the other hand, whereas workers may have had the initial intention of staying temporarily, employers did not necessarily have conscious plans towards the future but wanted to satisfy immediate needs.

In the 1960s, the importation of migrant workers was hardly a topic of concern in the Netherlands; it was perceived as a temporary phenomenon by the receiving country. The first significant government response on migrant labour came in 1970 with the Note on Foreign Employees.[274] Three important points were made: (1) the admission quota for foreign workers would have to be linked even more closely to economic needs, (2) measures should be taken to encourage return migration, (3) the formulation of social policy concerning 'guest workers' was officially delegated to subsidised organisations specifically founded for this purpose.

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[273]See *Maandstatistek da Bevolking*, Niet-Nederlanders per gemeente, 1 Januari 1993, 41(1993)10, (okt), pp. 23-30.
[274]Nota buitenlandse werknemers of 1970; for details see Bovenkerk 1979: 128.

The most important policy change came about as a result of the developments that took place in 1972 and 1973, leading almost to a halt of labour migration from Turkey and other recruitment countries in 1974, following the oil crisis of 1973. The Dutch Economic Planning Office calculated in 1973 that the employment of foreign workers was not as beneficial for the Dutch economy in the long run as had been generally assumed. This conclusion was to be one of the main starting points in the second important policy paper issued by the government in 1974, Memorandum in Reply to the Law on Foreign Workers.[275]

This paper envisaged that all foreign workers, including Turks, who would agree to return home after two years of maximum duration of stay, were given the possibility of receiving a bonus of 5,000 Dutch guilders on departure. According to this model, by reintroducing the 'rotation' principle, the permanent need for manpower could be filled without having to devise any policy for permanent migration. This proposal met with massive resistance in Dutch society by employers and numerous action groups. Employers found it to their benefit to oppose the proposal, calculating that the costs for new recruitment every two years would be higher, and therefore threatened to wreck the plan by offering individual workers a bonus of 6,000 guilders to stay (see Bovenkerk 1979: 129-130). Thus, the proposed government policy was not supported by a majority and was withdrawn in 1974 by the Minister for Social Affairs, albeit reluctantly.

However, after the end of official recruitment of Mediterranean workers, the need for foreign labour did not disappear. As a matter of fact, unlike other Western European countries, no official recruitment ban was announced in the Netherlands. The need for foreign labour was mainly met by the Surinamese immigrants before and after the independence of Surinam (1975) and by Turkish and Moroccan immigrants admitted under family migration (Groenendijk and Hampsink 1994: 63).

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[275] Memorie van antwoord op de wet buitlandse arbeiders of 1974; for details see Bovenkerk 1979: 129-131.

The use of the term 'ethnic minorities' rather than 'immigrants' in the Netherlands reflects a basic element of the political philosophy that prevails concerning migration (Entzinger 1985: 57-58). It also enables the Dutch to include various categories of non-indigenous people living in the Netherlands within a wider terminology, implying that a few more groups have been added to the already existing multicultural but originally European structure of the Dutch society. In fact, the term 'foreigners', used in Germany and other continental countries, would not be adequate in the Dutch context, because many of these people had already possessed Dutch citizenship upon arrival. In the UK, too, the term 'ethnic minority' or 'ethnic minority community' is the outcome of similar considerations.

The use of the term 'immigrant', by the same token, implies a sense of temporariness, although most of these people have become permanent settlers in the respective countries. Still more contradictory is the use of the bizarre term 'second generation immigrants', which clearly signifies lack of integration.

The term 'minorities policy' implies that ethnic minorities in the sociological sense are a target group of this policy. Nevertheless, in actual fact, one might speculate that minorities policy has been devised in order to prevent the formation of ethnic minorities (Sopemi-Netherlands 1991: 51). In line with the process of depillarisation in the Netherlands, this appears to be an intended policy outcome.

Immigrant groups whose position in society was not viewed as difficult, either by themselves or by Dutch society, are no longer subject to a specific immigration policy. While the Eurasians, the 'Europeans' and even the Chinese are not considered problematic, the social position of all other groups (Turks, Moroccans, Moluccans, Surinamese, Antilleans, refugees and gypsies) is considered problematic and therefore they are subject to a formal immigration policy referred to as 'ethnic minorities policy' (Entzinger 1985: 57). These groups have been focused on in later policy developments.

4.2.3 Post-1974 developments in worker migration

Since the early 1970s, the immigration of Surinamese, Turks and Moroccans has been regarded as important in the sense of having wider consequences, and has given rise to a considerable political debate. In 1975, the government declared that it wanted to minimise further immigration from Turkey and Morocco and that it would stimulate the return migration to Surinam, having considered the population projections foreseen by the Central Bureau of Statistics (CBS) (Amersfoort and Surie 1987: 174).

The Dutch admission policy was then based on the persistent but mistaken presumption that all major groups of immigrants would be staying only temporarily, except perhaps for the Eurasian 'repatriates' of the 1950s. At the end of the 1970s, this idea was implicitly dropped and since then admission regulation has become stricter, as the government considered this a necessary condition for developing a co-ordinated immigration policy (Entzinger 1985: 57).

The Netherlands did not consider itself a country of immigration until the end of the 1970s. The government had been of the view that in the long term permanent settlement did not serve the interests of the home countries or the migrants themselves and was not in the interest of Dutch society.[276] Therefore, all categories of immigrants entering the country since the Second World War were supposed to have done so on a temporary basis, except certain refugees and the Eurasians who were not considered immigrants but rather 'repatriates' (Entzinger 1985: 63). The Dutch government did not explicitly state until November 1983 that the 'minorities' were here to stay. In *Minderhedennota* of 1983, the government recognised that the immigrants would remain living in the Netherlands, emphasising the importance of their fuller participation in Dutch society (Amersfoort 1985: 148).

It is interesting to note that in many countries the most sweeping changes in immigration policy came in the aftermath of riots or other incidents with an ethnic connotation (see for example chapter 4.1.3 above for Germany). In the Netherlands, the launching of an 'ethnic

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[276] See Amersfoort and Surie 1987: 179, quoting Memorie van Antwoord of 1974: 3.

minorities policy' also took place in the aftermath of violent events (Entzinger 1987: 7). Further, the argument that immigrants sponged off the welfare state and cost the state money became prominent:

> "A perception of immigrants' rather heavy reliance on the social security system, where their rights are generally equal to those of non-immigrants, has intensified anti-immigrant feelings among the Dutch" (Entzinger 1985: 60).

On the other hand, the Memorandum on Aliens Policy (*Notitie Vreemdelingenbeleid*) of 1979 had already expressed the need for an even more restrictive policy. This was now extended to all foreigners much more strongly. The Memorandum stated that admission should be "as restrictive as possible within the limits set by international obligations and humanitarian considerations, even if an upswing occurred in the economy", referring to the often used argument of high population density (see Entzinger 1985: 64). It was further argued that "the Dutch tradition of hospitality should no longer be reflected by admitting larger 'quantities' of foreigners", but rather "by setting up an immigration policy of good 'quality' for those who were in the country already" (Entzinger 1985: 64).

As a result, migration policies of successive Dutch governments were based on two opposing tendencies. The first trend was to work towards a restrictive policy on the entry and admission of new immigrants, particularly from the main immigrant communities including Turkey, with the exception of the admission of refugees and admission in the context of family reunification (see chapters below). The second was a minority and anti-discrimination policy, with the aim of granting immigrants who are admitted a legal position similar to that of Dutch nationals (Kuijer 1993: 37). Those aliens who were not yet in the Netherlands were now subject to stricter exclusion, as it was made increasingly difficult for them to take up legal residence. On the other hand, those already in the country who have residence status were subject to inclusion. Recently, various measures have been taken to facilitate the integration of Turkish and Moroccan immigrants into Dutch society, such as the introduction of legislation securing

equal treatment and equal employment opportunities for resident aliens and Dutch nationals (see Chapter 4.2.6 below).

One cannot state with a degree of certainty that there is a particular government policy directed towards Turkish immigrants in the Netherlands. Rather, one must distinguish between two categories of immigrants. Immigrants from the Member States and EFTA countries have almost unlimited access to the Dutch territory and labour market. For immigrants from other countries and Turkey, it is now the policy of the government to build new barriers on entry, visas and family migration, leaving them an extremely limited right of admission into the Dutch labour market.

4.2.4 The Dutch system of recruitment of workers

The responsibility for operating the necessary control system is vested in the Ministry of Justice. Originally, the relevant regulations were based on the Aliens Act (*Vreemdelingenwet*) of 1965 and the related Implementary Decree (*Vreemdelingenbesluit*) of 1966 which amplifies its provisions, taking into account the international agreements concluded in this field. As the Aliens Act is inclined to view the matter as mainly one of policy, administrative regulations concerning the admission and residence of aliens are extremely important (Swart 1987: 873). Thus, the Circular on Aliens (*Vreemdelingercirculari*e) defines the procedures for applying these rules. It has been published since 1982 and can be cited in any appeal proceedings instituted against a decision of the administrative authorities (Smolders 1982: 88).

While the great majority of foreign nationals and members of ethnic minorities living in the Netherlands have safe residence permits or are even Dutch citizens, a restrictive approach is applied on entry. Under Section 11 of the Aliens Act of 1965, residence permits are to be issued only under certain conditions connected with the purpose for which residence has been permitted. Generally, foreign nationals who want to stay for a longer period of time can apply for a one-year residence permit referring to a specific purpose (work, family reunion, studies etc.). If the residence purpose continues to exist, the residence permit may be extended for

another year, eventually leading to an unrestricted residence permit after five years (Köppinger 1992: 183). Nevertheless, if an alien no longer meets the requirement, he may in principle be deprived of his residence permit. For example, an employee may lose his permit if he becomes unemployed.

The main rules on the employment of foreigners are found in the Foreign Workers Employment Act of 1978 which came into force in 1979.[277] According to this law, which applies to all foreign workers legally resident in the Netherlands for less than three years, no employer would be allowed to hire more than 20 Mediterranean labourers in order to restrict the new entries of migrant workers (see in some detail Bovenkerk 1979: 130-131).

The employment of foreign workers was linked to a license given to the employer, not to the employee. The Foreign Workers Employment Act of 1978 requires an employer to procure for an alien an employment permit before any contract of employment can be made. This linked the employers directly to the system of immigration control. This is quite different from the UK and Germany, where the employment of foreign workers is first of all linked to work permits given to them.

Work permits are issued by the Department of Social Affairs and Employment on the basis of the Foreign Workers Employment Act of 1978. The permit will describe the sort of work, and the establishment in which this work is to be pursued; the permit is limited to this, so that, if the type of work or the establishment is changed, a new permit has to be obtained (Betten 1992: 143-144).

All Turkish nationals and other non-EU nationals, and persons who intend to take employment in the Netherlands, must obtain a residence permit and a work permit. Workers having received a so-called 'declaration' issued after three years of legal employment are

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[277] *Wet arbeid buitlandse werknemers* of 9 November 1978, Staatsblad 1978, No. 737, replacing the Act on Labour Permits for Aliens of 20 February 1964, Staatsblad 1964, No. 72.

exempt from the labour permit requirement (see Gulbenkian and Badoux 1993: 121). Further, family members admitted for family migration and de facto refugees are also granted a 'declaration' and therefore are free to enter any employment without a permit (see further Chapter 4.2.5 below).

Applications for a work permit can be made either by the worker or by his employer with the local employment office.[278] If it is the worker who applies, then the employer must support his application, giving details of the job (see Smolders 1982: 89-91). Upon submitting a work permit application, an employer may very well be required to demonstrate that the vacancy was advertised, not only by means of the regional employment bureau but also by means of other appropriate channels (Gulbenkian and Badoux 1993: 120-121).

According to a new Bill proposed by the Dutch government to the Dutch Parliament, employers are now required to notify their intention to recruit non-EC workers to the Employment Service five weeks before they actually apply for work permits for the prospective workers.[279] It is evident that the main purpose of this new proposal is to force employers to consider filling vacancies with either Dutch or EU workers rather than non-EU workers. Of course, the issuing of permits for non-EU workers is subject to various conditions and not an easy process, as the present conditions and the future prospects of the labour market, adequate housing, age limits etc. have to be considered (see Smolders 1982: 90 and Plender 1988: 318).

It can be argued that an extremely limited policy is in operation in the field of admission of Turkish workers and other non-EU workers. The main criterion for granting a work permit is that the prospective employment by a foreigner will not injure the 'interests of the Dutch labour market' (Gulbenkian and Badoux 1993: 120). Further, the company concerned may not exceed a limited number of aliens' work permits allotted to it.[280] A permit will be refused if the

[278]Article 5(1) of the Foreign Workers Employment Act of 1978.
[279]See *Hizmet*, Jaar: 8, Nummer: 100, Januari 1994, p. 1.
[280]Article 7(1) (a) of the Foreign Workers Employment Act of 1978.

alien does not possess a residence permit. It will also be refused if the alien possesses a residence permit which has been granted for a purpose other than to take up employment.[281]

Article 8 of the Foreign Workers Employment Act of 1978 confers on the Minister discretionary powers to refuse a work permit. The most important basis for refusal on the basis of this provision will be that the Minister adjudges the supply of workers in the national or European Community labour market to be sufficient, or that it may be expected to be sufficient (see Betten 1992: 144).

When it comes to the renewal of permits, an alien may expect his residence permit to be renewed, as long as he continues to fulfil any conditions imposed, is not without means of support, does not infringe public order or presents a danger to national security and does not undertake work contrary to the provisions of the Foreign Workers Employment Act of 1978 (Swart 1987: 877). As in Germany, the Aliens Act of 1965 is based on the notion that the longer the alien has lived in the Netherlands, the less likely it is that his permit will be withdrawn, which is clearly expressed in the differences between withdrawal of a residence permit and withdrawal of an establishment permit (Swart 1987: 888).

4.2.5 Recent developments: a need for immigrant workers?

A fundamental shift in Dutch government policy has begun to appear since the early 1990s, and has given rise to a more restrictive trend in the legal field. As a result, immigration regulations have been brought under close scrutiny, resulting in a much lower standard than existed before, also with negative effects on the position of immigrants who had already resided in the Netherlands for a long time. In particular, the rather liberal policy in the field of family migration was changed substantially, especially after a statement made public in January 1993 by the Secretary of State, which substantially strengthened the regulations in that field (see also Chapters 6.2 and 7.2 below).

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[281] Article 5(3) of the Foreign Workers Employment Act of 1978, together with Aliens Circular, Part B 11, para 4.1.

It has been observed that the government is now extra careful and more strict in handling the applications of Turkish nationals for work and residence permits[282], because it is aware that once a Turkish worker has legally worked for one year in the Netherlands, this will generally lead to permanent settlement in the country as a result of Article 6 of Decision 1/80 (see Chapter 3, p. 103 above).

There are now two categories of work permits: 'temporary work permits' and 'declarations' (see Sopemi-Netherlands 1992: 31-33 and Smolders 1982: 91). 'Temporary work permits' (*Tewerkstellingsvergunningen*) are given for those who are recruited for vacant positions in industry (primary labour migration). 'Declaration' (*Verklaring*) mainly concerns children or partners of legal residents with establishment permits as starters on the labour market. Such persons have no need for a work permit. The relation between the number of temporary stay permits and declarations shows that between 1983 and 1991, the number of declarations increased considerably, while the numbers of new temporary work permits increased only slightly.[283]

A further analysis of the data reveals that the majority of declarations concerns Turks, Moroccans and Surinamese. These three immigrant groups have only a minor share in new 'work permits' (10 %),[284] showing the extent of the strictness of the admission policy for new workers from Turkey and the other two countries. New work permits are rather issued to foreign workers from affluent countries, or from poor countries with no major immigrant community in the Netherlands. Thus it has been observed that the labour market needs, the existence of important immigrant communities (Surinamese, Moroccan and Turkish), migration and labour market policy in the Netherlands and the arrival of asylum seekers, are the main factors which influence greatly the volume of immigration of aliens into the Netherlands (Sopemi-Netherlands 1992: 32).

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[282]This was confirmed in an interview with Mr. Aldo Kuijer on 25.01.1994, Amsterdam.
[283]See Sopemi-Netherlands 1992: 31.
[284]See ibid: 32.

The general admission policy is often expressed as 'we do not want immigrants any more', the high level of unemployment and overpopulation of the country being the regular arguments. Is it really true that the Netherlands do not need immigrants any more? The answer to this question would depend on to whom the question is directed. Many politicians would say that we do not need any foreign workers because we have already a high level of unemployment. In fact, like in Britain, no politician would be prepared to say publicly that he/she is in favour of allowing new immigrants into the Netherlands due to the perception that this would be unwise politically. To the contrary, this policy carries a hidden message to the native Dutch population that special controls on migrants are actively carried out by the government, as has been rightly observed by Professor Kees Groenendijk (1990b: 15) and is also argued in the UK (Spencer (ed) 1994b).

Nevertheless, in reality, the demand for foreign labour has not disappeared, particularly in the area of less attractive jobs, in seasonal jobs and in the hotel and catering business. The Dutch Ministry of Social Affairs reluctantly agreed upon the recruitment of limited numbers of foreign workers for the metallurgical industries, including shipbuilding and seasonal labour in the bulb-growing industry (see Sopemi 1990: 46). A few months before the unification of Germany, East-German passport holders were allowed to work in the Dutch labour market in addition to seasonal Polish workers. Nearly 10,000 labour permits and over 30,000 declarations were issued in the years 1992 and 1993 respectively.[285]

It is evident that the labour market position has dictated immigration policy, as has been the case in some other Western European countries, notably Germany. In addition to this, the obligations under international treaties and the acceptance of family reunion, and also the free access of all the family members to the labour market, have provided some support to non-EU migrant families.[286]

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[285]See in detail Groenendijk and Hampsink 1994: 54, table 7 also for figures of previous years.
[286]From an interview with Prof Kees Groenendijk on 28.01.1994, Nijmegen.

In the case of non-Dutch nationals who come to the Netherlands for employment purposes, it is noted that a strict examination should be made upon each application for an employment permit, as to whether that work could be performed by Community residents, if necessary after retraining or further training and/or re-location (Reports to the Government 1990: 66). It was further considered that employment permits should no longer be issued for work of an unskilled or semi-skilled nature, as these labour requirements might be met from the existing pool of unemployed persons in Holland (Reports to the Government 1990: 66).

Nevertheless, the Dutch social security system will not allow this to happen. According to my personal observation, an unemployed worker would be working at a wage level of *f*l,700 for an unskilled job, which is the minimum national wage level at any rate. However, this unemployed worker is not encouraged to work because he will get the same amount of money through unemployment benefits anyway. It is perhaps precisely for this reason that the only form of temporary employment of immigrant workers actively supported by the government was the secondment of Yugoslav workers from the 1960s until 1991 (see Groenendijk and Hampsink 1994: 57-61). It was attractive to the government because of the non-commitment of any social security protection to such workers. The secondment of Yugoslav workers was almost totally excluded from the Dutch social security system as a result of bilateral agreements between the Netherlands and the former Yugoslavia (for details see id.)

When individuals have been admitted on other grounds, such as acquisition of a residence permit as a result of family reunification or family formation, they are also, in principle, allowed to work (see chapters 6 and 7 below). There is a direct connection between the residence permit and work permit, despite the fact that these are formally separate.[287] Unless workers have got admission on other grounds, as pointed out above, it is now almost impossible to get a work permit for a Turkish worker, except perhaps for those people who have extremely specialist qualifications. From the government's point of view, in principle, it would be only permissible to recruit specialised personnel in short supply from outside the

[287]This was confirmed in an interview with Mr Aldo Kuijer on 25.01.1994, Amsterdam.

Community, despite the fact that there would of course be instances in which importing workers from outside the Community would clearly be in the country's interest. As a result, senior managers or personnel with technical skills which are rare in the Netherlands, will have no difficulty in obtaining a work permit, irrespective of the country they come from.

It was recently observed (see Groenendijk and Hampsink 1994: 55-57) that a gradual liberalisation of the admission of foreign workers in seasonal jobs has occurred since 1980. For example, the instructions to the local aliens police were amended in order to allow foreigners with a tourist visa to be employed in seasonal work during the validity of their visa.[288] The insistence of agricultural employers for foreign workers instead of long-term unemployed Dutchmen and abolishing the visa obligation for citizens of Poland, Hungary and Czechoslovakia in 1991 as a result of the Schengen Agreement of 1985 have greatly influenced this policy development.[289] Thus, one can observe that a similar line of policy has been developed in the Netherlands as in Germany concerning the temporary employment of foreign workers, particularly of European origin.

It can be argued that the reality of migration is an unsettling, lasting and self-sustaining one. It is thus safe to assume that immigration will continue for the present and the level of the non-indigenous communities in the total population will continue to increase. There are a number of reasons for this reality, which need not be detailed here.[290] It suffices to say that the classical push and pull factors are in operation, stimulated by greater familarity in the Third World with the West, and better and cheaper transport. Further the presence of migrant population has led to the creation of more or less permanent migration 'bridges' by means of family reunification and formation (see chapters 6 and 7 below).

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[288] Vreemdelingencirculaire B11, 6.7.
[289] See Groenendijk and Hampsink 1994: 55-57; see in particular p.56, table 8 for the number of labour permits for seasonal labour in the Netherlands for the years 1987-1993.
[290] See Reports to the Government 1990: 57-60. One can also refer to the arguments detailed in Chapter 2 above.

The Scientific Council for Government Policy in Holland, therefore, considers it unrealistic, rightly, to assume that the migratory pressures can be fully resisted, looking at the experiences over the years and considering the increasing interdependence around the World. The Council, therefore, concludes that it is "more realistic to examine how immigration might be regulated than how it might be stopped" (Reports to the Government 1990: 57). Once it has been accepted that immigration is set to continue, it is a logical conclusion that every effort should be made in order to channel its effects positively, both for the individual migrant and his family and for society in general. The Council further emphasises, moving from the consideration of social justice for the primary legitimation of its approach, that immigrants represent potential human resources, the development of which is in society's interests (for details see Reports to the Government 1990: 58).

Actually, the problem is not really to do with immigration as such since it has been stabilised in recent years. Rather, the issue of immigrants and minorities in the Netherlands has been very much influenced by the increasing number of asylum seekers and the problems resulting from their existence, which is really a separate problem, having separate causes.[291] However, these various forms of migration are all considered to be one single issue in the opinion of many people and even of many politicians. Nevertheless, there is much uneasiness, particularly in the older part of the big cities, about immigration, especially pressures from the asylum seekers on the housing market. Many Dutch people now appear to have a feeling that foreigners take away their homes, although this has also something to do with the general situation of the housing market and inadequate policies of the governments, local as well as national.

A topic of much concern in the Netherlands has been 'illegal' employment. An employer who 'illegally' employs aliens commits an offence punishable with a prison sentence and a maximum fine of *ƒ* 10,000 (Gulbenkian and Badoux 1993: 122). Nevertheless, in practice, active supervision is given a low priority by the police in order to avoid discriminatory

[291]This has been confirmed in an interview with Aldo Kuijer on 25.01.94, Amsterdam.

searches on examining the legal status of foreigners (Kuijer and Woltjer 1991: 11). On the other hand, the estimated high number of so-called 'tourists' (as they call themselves) reflects the reality that the Dutch labour market still needs a workforce for those kinds of jobs that few people are inclined to take up because of low pay or low status. Therefore, 'illegal' immigration does not necessarily imply a damaging factor on the receiving economy, as many enterprises, particularly those in certain labour-sensitive service sectors, depend on irregular labour for their survival (see Collinson 1993b: 14-15). Thus, 'illegal' immigration does not necessarily displace indigenous workers. As pointed out earlier, 'legal workers' are not inclined to work in these low pay or low status jobs, because they will get the same amount of money from unemployment benefits. Thus, employers will be tempted to employ those 'tourists' as replacement labour for low pay and low status jobs.

4.2.6 Integration of workers into the labour market

Due to the stabilisation of the immigrant populations by means of permanent residence and now increasingly by means of citizenship, and also due to the more restrictive admission policy both in the fields of recruiting workers and of family migration (see chapters 6 and 7), the debate in the field of employment-related migration has switched to issues such as integration of immigrants into the labour market and social life, equality of treatment and non-discrimination of immigrants.[292] Thus, various integration policies have been developed which also aim at the integration of Turkish immigrants into the labour market and their equal treatment.

In the Netherlands, the principle of equal treatment was embedded in the new constitution of 1983. Further, the Second Chamber of Parliament approved the Equal Treatment Act in June 1993.[293] Article 1 of the Act prohibits discrimination in private as well as in public life on the basis of race, religion, political conviction, civil status, gender, sexual orientation and *nationality*, unless expressly permitted by a law approved by Parliament. Persons or

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[292]See, for example, Dieleman 1992, De Jong and Verkuyten 1992, Council of Europe 1984, Böcker 1991, Entzinger 1987, Sopemi 1990, 1991 and 1992.
[293]Wet Gelijke Behandeling, *Kamerstukken* II, 1992-1993, 22 014.

organisations representing individuals or groups can lodge a complaint with the Equal Treatment Commission, when they feel that they have been discriminated against on one of the grounds mentioned in the Equal Treatment Act (Kuijer 1993: 50). The decision of the Equal Treatment Commission is binding on the parties concerned and can be enforced by law after approval of a court of justice.

Government policies in the Netherlands directed towards the migrant community fall into three categories (Reports to the Government 1990: 62-63): (1) aliens policy; concerned with the admission, residential status and expulsion of aliens; (2) integration policy; concerned with improving immigrant participation in vital social sectors and institutions; (3) cultural policy reflecting the multi-cultural nature of Dutch society, which, in principle, is concerned with all immigrant groups wishing to give expression to their own culture and identity. As far as Turkish immigrants are concerned, they fall into all of these three categories at certain times.

Since 1983 with the publication of the *Minderhedennota* (Note on Ethnic Minorities) by the Minister of Interior, the focus of the policy shifted from a predominantly culturalist approach to one which was primarily structuralist (see Entzinger 1987: 11-12). The culturalist approach considers the differences in race, culture or ethnicity as the major determinants of lacking interaction and integration (Entzinger 1987: 5). In the structuralist approach, however, a society's class structure and the unequal distribution of the means of production are seen as a major reason why most immigrants have remained at the bottom of the social hierarchy (Entzinger 1987: 6).

The government's minority policy has been criticised as being fundamentally ambiguous, in that the criteria for identifying target groups tend to be arbitrary and prompted more by historical than by social considerations. In the government's blanket group-oriented approach, often expressed as 'the Netherlands as a multi-ethnic society',

> "... ethnic origin tends to be linked over-readily and broadly with social deprivation, while insufficient account is taken of the inherent dynamics of the integration process" (Reports to the Government 1990: 55).

It is further suggested in the same source that in order to combat deprivation, "what is required is a fine-meshed approach focusing on individual integration, in which allowance is made for the differences between and within the immigrant groups."

A contradictory and somewhat paternalistic assumption of Dutch policy, both in its culturalist and structuralist version is that emancipation and overcoming deprivation would fade out ethnic divergence (see Entzinger 1987: 14). A revival of 'neo-ethnicity' has been observed both in the Western world and elsewhere, at the expense of other cleavages like class in particular, which has had numerous implications at all levels.[294] It should also be pointed out that upward social mobility of members of ethnic minorities no longer implies that these people almost automatically 'assimilate' to the dominant culture. What needs to be done in these integration efforts is to strive for greater equity in all areas of life. These discussions mirror a re-assessment of our understanding of ethnic minorities, away from assimilationist assumptions to a more plural approach.[295]

One can easily infer from the ongoing discussion that there exists now a growing concern over integration efforts for ethnic minorities, of course including Turks. Employers' self-interest and the government's concern about the integration of members of ethnic minorities into the labour market were the primary reason for the change in minority policy in the second half of the 1980s. This was caused by the finding that qualifications and employment market integration were the most important pre-conditions for the integration of ethnic minorities. Migrants and members of ethnic minorities are now viewed as real alternatives by companies and sectors with medium-term or long-term shortages of workforce to the recruitment of workers from other countries (Köppinger 1992: 192). These companies are particularly favourable towards the qualification of migrants and their integration into the employment

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[294] See e.g. Glazer 1983 and Smith, A.D. 1981.

[295] For Asians in Britain see, in this regard, powerfully Ballard (ed) 1994.

market. This perception has been very influential in shaping the policy and the regulations concerning immigrants and minorities, and Turkish residents in the Netherlands in particular. Concern over integration of Turkish immigrants clearly focuses particularly on the second generation and on children, due to their potential as prospective entrants to the labour market.

A permanent improvement in the employment prospects of the unemployed labour force is considered to be highly important. It would lead to greater mobility in the labour market and could help reduce the selectivity or discrimination that minorities are often experiencing at present (Reports to the Government 1990: 73). A system of shared responsibility on the part of the employers and the employees could also have the effect of creating more employment opportunities in the private sector.

Accordingly, employers' organisations and trade unions agreed upon a programme in order to combat the unemployment among the target groups of this new ethnic minority policy. In the agreement called 'More work for Minorities' (14 November 1990), it is stipulated that an extra 60,000 jobs for members of ethnic minority groups will have to be created in the following five years in order to reduce the unemployment level among ethnic minorities to the national level (see Sopemi-Netherlands 1991: 53).

In addition to this, the central government and an increasing number of local governments have started an experimental initial phase of a reception policy for new immigrants of 18 years and over (*'Opvang Nieuwkomers'*) such as language courses, vocational training etc. (see Sopemi 1991: 53-54). Moreover, small-scale projects started in Tilburg and The Hague, in which assistance in finding vocational training and language classes is given. Further, a special policy is designed for migrant children in the age group of 4-6 years (pre-school education). The project seeks to improve the language ability and the development of the child by the daily participation of the mother in the project.[296]

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[296]Such reception facilities and special policies designed for immigrant workers and members of their families are in line with the proposed undertakings envisaged by Article 64 and 65 of the 1990 UN

The Ministry of Social Affairs and Employment sent a draft proposal on return migration to Parliament on April 1991, which did not contain any real changes in the return migration policy of the past five years. "The central statement is that intensification of a policy to promote integration cannot lead to intensification of return migration policy" (Sopemi-Netherlands 1991: 55). In the view of the government, return migration has to be based on a voluntary, personal and well-founded decision, which implies a limit in the handling of the Dutch government in return migration.

When the new Constitution came into force in 1983, Article 3 contained no restriction on the appointment of aliens in the public sector, neither at the national level nor at the local and provincial level. Nevertheless, the constitutional guarantee of equal access to the public service is only afforded to Dutch nationals (Groenendijk 1988: 2). Traditionally, there have been few legal restrictions on the access of aliens to employment in the public services in the Netherlands:

> "The justification of the traditional link between nationality and the execution of certain public functions diminishes once it is realised that the loyalty or other capacities supposed to be guaranteed by the possession of a certain nationality, are not the only value to be weighed when making decisions about employment in civil service" (Groenendijk 1988: 26).

Despite several efforts to improve the situation of minorities on the labour market, the level of unemployment among ethnic minorities remains much higher than among Dutch people (see de Jong and Verkuyten 1992: 592, table 1). In addition to other factors causing the over-representation of minorities in the unemployment figures, indirect and direct discrimination by employers is seen as a major cause for the high unemployment level. The Canadian model of an Employment Equity Act was proposed by the Scientific Council for Government Policy as an original and adequate instrument in order to tackle the problematic labour market position

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Convention on Migrant Workers for promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

of ethnic minorities (Reports to the Government 1990). This Employment Equity Act, which inspired 'the Act on Equal Employment Opportunities', envisages that legal measures involving positive action for ethnic minorities are based on consensus and agreement in principle by employers (see de Jong and Verkuyten 1992: 593).

The Act on Equal Employment Opportunities places public and private employers employing 35 people or more under an obligation to register the name and the country of birth of every employee, as well as the country of birth of the employee's parents (Article 4) so that it can be determined whether an employee belongs to a minority group named in a specific government decree. The employer is under an obligation to issue a written report on the representation of persons from the designated minority groups within his company (Article 5). There are other obligations which have to be fulfilled in order to improve the representation of members of minorities within the workforce of the company concerned, which cannot be detailed here (see Kuijer 1993: 51-52).

Nevertheless, it is far from certain whether or when the Act will be put into effect, since there have been many objections from various bodies, such as the associations of employers, the Official Chamber of Registration and NGOs concerned with privacy protection. Further, it has been doubted whether the measures proposed in the Act are sufficiently stringent to solve the problems in the Netherlands, as the Canadian Employment Equity Act is not considered to be appropriate to the Dutch situation (de Jong and Verkuyten 1992: 600). There are also similar objections to such ethnic monitoring in the UK (see Banton 1984: 282). The British emphasis has been on the promotion of equal opportunities through enforceable anti-discrimination legislation rather than on the creation of positive programmes to benefit ethnic minorities (Collinson 1993b: 91).

4.2.7 Dual nationality

In order to give a better view of the Dutch legal system in immigration matters, it is necessary to touch on the issue of citizenship and dual nationality for the settled immigrants. One must point out beforehand that the only part of the regulations concerning immigrants which has not been deteriorating but has been improving is the one relating to citizenship, particularly dual citizenship. The Dutch government, during its presidency of the European Community, sought the support of other member states in gradually conferring equal rights to third country nationals residing within the EU in 1991 (Kuijer 1993: 54). As the Prime Minister of the time made a personal commitment to achieve this, it became obvious that the only way by which legally residing third country nationals in the Netherlands could benefit from a uniting Europe was by extension of the possibilities to obtain Dutch nationality. This is because of the fact that the EC process of harmonisation of provisions has remained tedious, particularly as far as the legal situation of third-country nationals is concerned. Thus national action provides more effective relief.

The conditions for obtaining Dutch nationality have been rather strict for first generation immigrants: (1) five years residence, (2) knowledge of the Dutch language, (3) having no criminal record, (4) paying a small fee, and (5) renouncing the original nationality (if that can be done under the home country's legal system). This fifth condition was not required of the Moroccans, because Moroccan law does not allow the renunciation of citizenship and many Moroccans had acquired Dutch nationality even prior to the recent amendments. On the other hand, Turkish migrants were required to get rid of their original nationality, as this was possible under Turkish law. This inconsistency and differential rule system have brought about a situation in which many Moroccans have applied for and acquired Dutch nationality, but very few Turks have done so until recently.

As a result of the amendments in 1992 to the Dutch Nationality Act of 1985, the fifth condition has gone for all potential applicants. Therefore, aliens who wish to obtain Dutch

nationality are no longer required to give up their original nationality.[297] The change was particularly important for the large Turkish community in the Netherlands, because according to Turkish law[298] the renounciation of their original Turkish nationality meant the loss of all their rights to own real estate in Turkey (Kuijer 1993: 54). Organisations of immigrants welcomed the new policy of accepting dual nationality and encouraged Turkish immigrants by means of publication and various campaigns to apply for Dutch nationality as a means of participating and integrating in the Netherlands and in the Community.[299] While only 10,545 Turkish nationals had acquired Dutch nationality during the ten year period between 1979 and 1989, as many as 11,535 Turkish nationals acquired Dutch nationality in 1992 alone, clearly as a result of this policy change.[300] It is obvious that the improvements in the regulations relating to nationality will have a more profound effect than the protection available under EU law in the Netherlands.

4.2.8 Impact of developments in Community law

Under the Dutch Constitution of 1983, provisions of international treaties and decisions of international organisations can be applied directly in the Netherlands' legal order[301], although the legislator may decide that national legislation is needed to implement provisions of international law (Kuijer and Woltjer 1991: 1). As to the issue of the primacy of international law over national statute law, it is provided in the Constitution (Article 94) that national legal rules which are not compatible with directly effective rules of treaties or decisions of international bodies cannot be applied.

Under Article 93 of the Constitution, decisions of international organisations may have direct effect, and therefore have the status of domestic law, when the judiciary can apply them without any implementation or execution by an international or national authority. Direct

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[297]For an extensive account of the amendmends to the Act on Dutch nationality, see De Groot 1993.
[298]This has now changed. According to a new law, entered into force on 12 June 1995, Turks who lose their nationality as a result of becoming a citizen of another country will now be able to preserve their claims to property and inheritance in Turkey, see *MNS*, June 1995.
[299]See, for example, Demokratik Sosyal Dernekler Federasyonu (DSDF) (1993) *Çifte Vatandaşlık-Dubbele Nationaliteit*, Rotterdam: DSDF.
[300]Ibid, p. 9.
[301]For details see Vervaele 1992.

applicability of EU law is, in the end, a matter for the ECJ to decide, taking into account the priority of community law over national law of the member states. In this respect, various provisions of the Association Agreement and its components are held to be directly applicable, as explained in Chapter 3 above.

Following the decision of the ECJ in Kuş (see p. 108 above), the Dutch authorities and courts have invoked this decision in various proceedings. In particular, Decision 1/80 is now embodied in immigration regulations, which can be relied on by Turkish nationals.

Article 7 of Decision 2/76 does not allow the introduction of new barriers to the labour market for immigrants who have already established themselves by way of a 'standstill clause'. Therefore, the rules which applied in 1976 are the rules which should apply now in respect of work permits to Turkish workers lawfully working in the Netherlands (see p. 113 above). Article 13 of Decision 1/80 extends this protection to members of the workers' families legally resident in the Netherlands (see Chapters 6 and 7 below on family migration).

Finally, as far as the question of expulsion is concerned, we must refer to what has already been established in the context of the German legal system discussed above and the jurisprudence of EC law (see chapter 3). Therefore, the legality of a deportation order has to be judged in the light of Community law, as long as the Turkish worker concerned is entitled to a residence permit under Article 6 of Decision 1/80.

4.3 The UK

Studies on the European migration system often do not include Britain, as its system is seen as very different from the so-called 'European style' of regulating immigration (see Thomas 1986: 43). Nevertheless, the British experience in recruiting migrant workers from neighbouring countries such as Ireland and from colonial and post-colonial countries in the Caribbean, Africa and the Indian sub-continent has not been unique by any means. Despite the different migration histories of Western European countries, they share a similar experience of processes of labour recruitment and immigration.

However, contrary to most post-war immigration to other Western European countries, immigration from the Third World to Britain started earlier. This may be partly because of the considerable amount of intra-European migration and partly because of the relatively longer post-war recovery process of the shattered economies of mainland Europe (Layton-Henry 1992: 215). The main reason for it is probably Britain's link with the Commonwealth and the ongoing decolonisation process. It should also be noted that rights of free movement within the Commonwealth remained undisturbed for citizens of the Commonwealth countries until the early 1960s.

From a historical point of view, Britain has always been a country of emigration as well as immigration. By the turn of the 19th century migration had become a conscious part of British imperial policy, in pursuit of which encouraging emigration from Britain to the Commonwealth would help the economic development of Dominion territories, strengthen the ties with Britain, and increase the power of the Empire (see Smith 1981). Despite a change in the balance of migration and emigration in favour of an inward flow during the depression between the wars, after the second World War emigration resumed at a high level, particularly to Australia (Smith 1981: 11-49).

4.3.1 The British system of immigration

In the development of British immigration law and policy, a number of factors have been instrumental. As argued rightly by Neal (1992: 130), it is not possible to speak only of labour market-related immigration policies, without viewing such measures against the broader nationality, citizenship, and migration contexts within which they have been developed. Further,

> "The pattern of international migration involving the UK has to be seen in the light of an evolving legislative framework governing entry, nationality, and right of abode" (Salt and Ford 1990: 325).

Thus, it would appear that, since the Second World War, patterns of migration and settlement in the UK have been shaped by a combination of two main groups of influences. The first group of factors is a combination of social and economic developments in Britain. The second group of factors comprises mainly those developments that were taking place as a result of the decolonisation process in the British colonies.

The growth of the British economy during the post-war period was more sluggish than in most other European post-war economies in the 1950s and 1960s, when most of the immigration occurred. The expansion of certain industries was followed by the development of major labour shortages in others. Post-war immigration in Britain has been a phenomenon that was willed in the early stages and tolerated for its economic benefits in the initial stages of migration from coloured Commonwealth countries, but later rejected (Rees 1989: 105).

The work permit scheme did not originally apply to citizens of the British Commonwealth, who were allowed to enter Britain freely, to find work, to settle and to bring their families under the British Nationality Act of 1948. Under the work permit scheme, this preferential status of immigrants from Commonwealth countries was gradually whittled away in a succession of administrative measures (Rees 1989: 96-97).

According to a recent study, the emphasis in post-war Britain has always been mainly on stopping further settlement rather than regulating it in a way which is beneficial to the economy and the country in general.

> "Curtailing new settlement rather than controlling labour movement has been the dominant theme, so that moves for employment purposes have responded to settlement legislation and controls-in contrast to many other Western European countries, where the reverse has been the case" (Salt and Ford 1990: 327).

Britain has not effectively discussed the economic role of migration but has mainly focused on social issues and race implications of migration. One reason for the unwillingness of discussion of economic implications of migration would appear to rest with the self-processed nature of migration from the colonies, the involvement of the government being minimal unlike in Germany. Further, the Government, with minor exceptions, has not encouraged any form of immigration for economic reasons, even, in some instances, sacrificing economic self-interest to racial exclusiveness, particularly in the 1960s (see Dummett 1994: 142). Despite British familiarity with people from overseas and the consequent result of initial openness to the possibility of permanent migration of such immigrants from its ex-colonies (like the Netherlands), the colonial experience was also likely to have strengthened ideas of racial or cultural superiority over colonised populations rather than fostered cultural and racial tolerance (Collinson 1993b: 107).

The labour shortage which existed after the War was first intended to be filled by migration from elsewhere in Europe (see Miles 1989). The European Volunteer Worker (EVW) scheme was the largest of these migrant labour schemes, under whose terms European refugees living in camps in Germany and Austria were offered the possibility of paid work in certain occupations in Britain. Another wave of refugee population came when 120,000 Polish ex-combatants and their families, who fought in the War as members of the allied forces, settled

in Britain by means of the Polish Resettlement Act of 1947 (for details see Miles and Cleary 1992: 127-128).

On the other hand, the continued emigration of Britons to the Commonwealth and other countries made the labour shortage in Britain more acute. However, when the faster growing Western European countries were beginning to recruit labour from Southern Europe, the British economy had less recourse to European labour (except Ireland) after the absorption of the Polish and European volunteer workers[302] (Layton-Henry 1985: 98). Britain could also have recruited Southern Europeans, and actually did so for certain industries, such as Italians recruited to work in the brick making industry around Bedford. But this did not develop into a full policy, as happened in Germany, the Netherlands and elsewhere on the Continent. The relatively slow development of the British economy and the possibility of having recourse to immigrant workers from the Commonwealth and Ireland are the most important factors which discouraged Britain from developing such a policy.

Successive British governments and British employers over the years have always regarded Ireland as a valuable source of additional workers, and to this end freedom of movement between the two countries has always been sustained. Thus, since the Second World War, the Irish workers have continued to be the main category of immigrants, especially in the building industry (see Kirwin and Nairn 1983).

The major part of immigration into Britain and the greatest public concern which dominated the thinking and actions of policy makers have resulted from the 'New Commonwealth' immigration (see in some detail Dummett and Nicol 1990). In 1948, a largely spontaneous movement of people from the Caribbean to Britain had already begun, together with immigration from the Indian subcontinent. It should be noted, in contrast to post-war migration to other Western European countries such as West Germany, that this migration was

[302]Over 100,000 'voluntered', most notably Lithuanians, Ukranians, Latvians and Yugoslavs. Under this scheme they entered Britain for work in hospitals, agriculture, coal mining, textiles and construction, see Tannahill 1958.

relatively unorganised and voluntary: the immigrants set off themselves and paid their own costs.

Britain did not, at first, react in a restrictive fashion:

> "The importance to British policy makers of a peaceful process of decolonization, as far as this was possible, and of maintaining Britain's position in the World through leadership of a Commonwealth of independent nations increasingly composed of 'Third World' countries was a crucial factor constraining British politicians from introducing immigration controls before 1962." (Layton-Henry 1985: 96)

Traditionally, any subject of the British Empire was also considered to be a citizen of the mother country and had an automatic right, as a British subject, to enter the UK with full citizenship rights. This was actually reaffirmed by the British Nationality Act of 1948 (Studlar 1979: 89). Under this legal framework, which attempted to maintain British international leadership, many immigrants from the West Indies, India and Pakistan arrived in the UK during the 1950s in search of employment and higher wages which could be transferred back home.

This migration was mainly regulated by the job market rather than by active official involvement in the recruitment process throughout much of the 1950s, with perhaps two exceptions. During the 1950s, workers from Barbados were recruited under a direct recruitment scheme introduced by the British Hotels and Restaurants Association. Further, the London Transport Executive began recruitment from Barbados in order to employ bus and underground train drivers and conductors (see in some detail Miles and Cleary 1992: 129-130 and Rose et al. 1969: 67-68). The dominant regulator of West Indian migration to Britain up to the time of the first Commonwealth Immigrants Act of 1962 was the demand for labour in Britain, even though the formal arrangements widened into much greater informal movement of people from the Caribbean in the following years (see Peach 1986: 67-68).

Britain was also a destination for migrants from many other Commonwealth countries such as Malta, South East Asia (people of Chinese origin) and, later, from Cyprus. Immigration from Cyprus is particularly interesting for our consideration since it involves also Turkish Cypriots. The island was handed over to the British Empire by the Ottomans at the end of the 1870s after a rule of three hundred years.[303] There were, therefore, Turkish Cypriots as well as Greek Cypriots among the people who later migrated to Britain. The existence of these Turkish Cypriots was instrumental in establishing the link with other Turks living in Turkey. I was informed that some of the early Turkish immigrants to Britain in the 1960s and 1970s were recruited as workers and chefs in restaurant businesses through the efforts of these already established Turkish Cypriots. This was natural because some of the Turkish Cypriots had and still have relatives and close contacts with Turks in Turkey.

Turkey's late start of sending migrant labourers to Europe is an important determinant for the non-dominant pattern of Turkish migration in Britain in terms of the numbers involved. When Turkish labour migration to Europe began in greater numbers during the 1960s, British immigration policy was already concerned with the curtailment of immigrants from the coloured Commonwealth countries, starting with the introduction of the Commonwealth Immigrants Act of 1962.

On the other hand, the signing of recruitment agreements, rather than geographical factors, between Turkey and other Western European countries has been very influential in the attraction of these countries rather than Britain. This is also so because both sending and receiving countries have been involved actively in the recruitment process and thereafter in providing various provisions and help to immigrants.

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[303] See in detail Panteli 1984 on the history of the island.

4.3.2 Perspectives and policies on worker migration

There is no uniform view of the role of immigrant workers for the British economy and the UK in general (see Spencer (ed) 1994b). On the one hand, in a period of rapid withdrawal from imperial commitments and a realisation by British leaders and people of their declining world status, immigration was often perceived as an added burden, not as a valuable asset - a view mainly put forward by politicians (see further below). In contrast to Germany and the Netherlands, 'coloured' immigrants are clearly seen as a social burden. The British debate, thus, has emphasised social costs over economic benefits.

On the other hand, immigrants have also been regarded as a net benefit to Britain economically by various studies (see Findlay 1994, Menski 1994a). Immigration was, in fact, initially considered to be desirable from the British point of view, because the British economy was in need of labour, and the new immigrants were immediately employed in less attractive jobs, hence functioning as a replacement labour force (see Rose et. al. 1969: 1-90 and also chapter 2 above). Secondly, they tended to be young and single, and made fewer demands on the social services than the native population (see, for example, Jones and Smith 1970).

Nevertheless, the prevailing view devalued the beneficial aspect of labour migration to Britain. This related specifically to immigrants from the Indian subcontinent:

> "The perception was that of an already overcrowded island with limited resources facing a potentially limitless stream of immigrants from the Indian subcontinent, rather than that of a dynamic and growing economy being held back by a lack of young fit workers." (Layton-Henry 1985: 98)

The reluctance of the governments towards colonial immigration can partly be explained by fears among the politicians and trade union leaders that the boost in employment caused by post-war reconstruction and economic recovery might be short-lived, as happened after the First World War (Layton-Henry 1992: 30). However, racial prejudice was also a powerful

factor underlying this negative attitude and in the government's consideration of more immigration controls.

> "If the immigrants had been of 'pure European descent' they would have been welcomed as a positive asset, contributing to economic growth, rectifying the labour shortage and compensating for post-war emigration" (Layton-Henry 1992: 31).

The presence of people of non-European origin has generated social factions that have become increasingly politicised since the 1950s (see Dummet and Nicol 1990). Therefore, Britain has not only an immigration 'problem' but also a race 'problem'. The two are closely intertwined:

> "A comparison of the course of British immigration practices and policies with those of other European States reveals that the other countries have only recently had immigration develop into a social and political issue, something that occurred in Britain in the early 1960s" (Studlar 1979: 95).

In Britain, anti-immigrant attitudes manifested themselves by the early 1960s, and have persisted with insignificant variation ever since, as an influential factor. This widespread popular hostility towards immigrants (the so-called 'coloured immigrants') has shadowed the economic arguments for a continued liberal immigration policy and led the British government to impose the first immigration controls in 1962 (Studlar 1979: 97) and further restrictions afterwards.

> "Clearly, a demand for migrant labour continued, but political and ideological factors required that the demand be met from sources other than the Caribbean and the Indian sub-continent" (Miles and Cleary 1992: 134).

British agenda appear to be entirely dominated by the perception of social costs arising from immigration, which has marginalised any interest of the impact of immigrants on the British economy. Therefore, as a recent study argues, knowledge of factors which influence the successful settlement of migrants as well as the extent and nature of the country's demand for labour is not reflected well in the entry and resettlement policies of the British government (Menski 1994a: ii).

On the other hand, Professor Klaus Zimmermann, in line with many other German authors, is of the opinion that immigration has been beneficial for European countries and can continue to be a positive economic factor if it is controlled and guided, although it may have some selective negative effects (see Spencer (ed) 1994a). In the context of migration to Britain, Findlay (1994 : 200) suggests that the labour market benefits for Britain could arise from encouraging selective immigration. He further criticises that government immigration policy has no adequate information to justify its economic objections to higher levels of immigration (Findlay 1994: 201).

On the other hand, the government has promulgated a series of Race Relations Acts (1965, 1968, 1976) which aimed at prohibiting discrimination particularly in the labour and housing market. In particular, the 1976 Race Relations Act advanced the previous legislation considerably. The new Act extended the definition of discrimination so as to include not only direct discrimination but also indirect discrimination where unjustifiable practices and procedures applicable to everyone have the effect of putting certain racial groups at a disadvantage (Layton-Henry 1985: 118).

Despite the existence of strong anti-discrimination laws, there is still evidence of exclusion from opportunities in the labour market for ethnic minority young people.[304] In Britain, as both direct and indirect discrimination are illegal and because the Commission for Racial Equality (CRE) has the power to undertake formal investigations of employers under the 1976 Race Relations Act, racism and discrimination have gone 'underground' and are not easily open to scrutiny. Nevertheless, both 'discrimination testing' and 'qualitative research', reveal much detail about the often subtle, complex and invisible processes of exclusion of young ethnic minority persons from the employment and training opportunities for which they are qualified.[305] Moreover, a recent report on the implementation of the legislation concluded that

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[304]Wrench 1993b.
[305]Id.

discrimination remained at a high level and called for greater powers for the CRE and for the law and its implementation to be tightened.[306]

An interesting case was reported concerning a woman constable of Turkish origin who had suffered sexual and racial harassment at work.[307] WPC Sarah Locker, from Essex, married to a policeman, claimed that she was repeatedly passed over for promotion to CID because of her sex and colour, and also that pornographic magazines and a racially abusive note had been left on her desk. In an out-of-court settlement of her case alleging discrimination, she was awarded more than £32,000 and was also promoted to the rank of detective constable, in addition to a personal apology from the Metropolitan police and the officers involved. This case is important in two aspects. First of all, it shows the extent of possible discrimination, even in the Metropolitan police. Secondly, WPC Locker's claim was backed by the Equal Opportunities Commission and the Commission for Racial Equality, which clearly shows the likely influence of the race relations legislation.

This kind of case also demonstrates that Turkish residents in Europe, even upon acquiring formal equality by means of citizenship and voting rights, may still face various problems in the form of discrimination, racial harassment and racial attacks.

4.3.3 Post-1962 developments in labour recruitment

The Commonwealth Immigrants Act (CIA) of 1962 imposed controls on the entry into Britain of Commonwealth citizens, which applied neither to British subjects in the remaining British colonies, nor to aliens. Work permits, on the other hand, were issued only for aliens and were for a specific post with a specific employer. In accordance with the CIA of 1962, s. 2(3), Commonwealth immigrants now had to obtain a work voucher before setting off for the UK. This officially rationalised the entry of Commonwealth citizens by reference to labour demand in the British economy (see Miles and Cleary 1992: 133).

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[306] Commission for Racial Equality (1992) *Annual Report 1991*, London.
[307] *The Times*, 8 December 1993, p. 5.

Unlike work permits, however, a voucher was not necessarily for a specific job. The 'work voucher system' differentiated between three different categories: those with a specific job to come to, those with special skills in high demand, and those classified as semi- and unskilled workers (see Smith 1981: 101-102). Accordingly, category 'A' vouchers were issued for people who had been offered definite jobs, category 'B' for those with certain defined skills, and category 'C' (which was dropped in 1964) for unskilled workers with no defined job to go to (Macdonald 1969: 230). Hence, apart from alien workers, the number of Commonwealth citizens admitted annually for work purposes was also determined by the state from 1962 onwards.[308]

Further, following the 1962 Act, a progressive tightening up on the number of vouchers issued was witnessed with a huge reduction from 8,500 to 2,700 around the time when the 1971 Act was passing through Parliament.[309] Thus, at a time when Germany expanded its intake of workers, by entering into labour recruitment arrangements, access to the UK was restricted more severely. In particular, when Germany was actively involved with the recruitment of Turkish workers (see Chapter 4.1 above), the migration of Turks to Britain remained only a very small proportion of an already limited labour recruitment scheme for aliens. The focus in English law has been on restrictions for Commonwealth citizens, however.

Following the promise of the Conservative Party during the general election of 1970 to increase strict immigration control, the 1971 Immigration Act was passed, and came into force on 1.1.1973 (Miles and Cleary 1992: 135 and Smith 1981: 119). Under the terms of the 1971 Act, the 'right of abode', and therefore freedom from immigration control, was granted only to persons defined as 'patrials', non-patrials having become subject to immigration control.[310]

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[308]Although the Act, seemingly, was not discriminating, the effect of the Act was greatest upon those migrating from the Caribbean and the Indian subcontinent who were providing the semi- and unskilled labour. Also, it must be emphasised that Irish citizens were exempt from the main provisions of the Act and therefore they continued to provide semi- and unskilled labour to the British economy (see Smith 1981: 101-105; Miles and Cleary 1992: 133).
[309]For details from official documents, see Macdonald 1987: 193.
[310]Note that 'patrials' are people who had been born in Britain, or who had a parent or a grandparent born in Britain, or who had been normally resident in Britain for five years.

This does not, however, affect movement within what is known as the 'common travel area', made up of the Republic of Ireland, together with the Channel Islands and the Isle of Man, by virtue of s.1 (3) of the Immigration Act 1971.

With the introduction of the 1971 Act, the work permit system was extended to Commonwealth immigrants (for details see Salt and Kitching 1990). Immigration officers were now able to scrutinise the circumstances in which a permit was issued at the port of entry (Macdonald 1987: 193). Work permits were now applied for by the employer, and were issued for a specific job with a specific employer.

The work permit scheme under the 1971 Act had a number of aims, the most important of which was to phase out and eventually stop the immigration of so-called unskilled labour. A brief examination of the work permit scheme after the 1971 Act reveals that, on the one hand, it allows certain categories of skilled persons performing defined specialist functions to enter into the labour market, provided that suitable local workers cannot be found.[311] On the other hand, it imposes quotas and special conditions for hotel and catering workers and resident domestics and hospital auxiliaries, which may be considered to be unskilled or semi-skilled workers.

According to a study carried out in the mid-1970s, immigrants in the UK mainly tended to be concentrated in jobs to which it was difficult to attract indigenous workers. Employers had often been faced with manpower shortages in the semiskilled and unskilled occupations in which immigrant workers were mainly employed (see Department of Employment 1977). The work permit scheme was tightened up over the years to protect the local market to the effect that the employer must have made adequate efforts to find a suitable worker among the resident labour force and even among EEA nationals now (see now Devine 1995: 24-25).

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[311]For details see Macdonald 1987: 193-194.

Throughout the 1970s, a quota system was kept in operation for the above defined unskilled and semi-skilled categories. This was revised from time to time in accordance with the perceived labour need justified by the government. Even this quota system was phased out on 31 December 1979, mainly because of a downward trend in the economy.[312] Although the 1971 Act was primarily focused on family migration, its impact on worker migration, particularly on unskilled and semi-skilled workers was significant.

On the other hand, since 1 January 1980, work permits were issued only for employment requiring workers with special skills.[313] Looking at the employment categories for which permits were issued, one would certainly realise that permits for semi- and unskilled jobs were difficult to receive. 'Highly qualified', 'highly skilled', 'senior posts' etc. all imply that the Work Permit Scheme does not much take into account the demand for unskilled workers any more. This is, to some extent, in contrast to the old Work Permit Scheme in which the need for unskilled workers was reflected, although not fully.[314]

Despite this, the conditions under which work permits will be issued for the employment of workers having special skills or qualifications or some other attributes were strictly controlled (for details see Macdonald 1987: 194-197). For example, a suitable age, advertisement of the post and non-availability of a suitable resident and EC labour were among the requirements imposed.

It appears that the inflow of professional and managerial workers into the UK increased from 43,700 in 1982 to 80,500 in 1991, even though this has been balanced by outflows.[315] There are many indications that in the 1980s, long term work permits, particularly for those coming in to work but not necessarily to settle, have gone to the highly skilled: 85 per cent to managers and professionals (Salt and Ford 1990: 336).

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[312]Department of Employment Press Notice, 31 December 1979.
[313]See Department of Employment Leaflet OW 5 (1982), *Employment of overseas workers in the United Kingdom*, para 7.
[314]See Seymour 1993 for an outline of changes in the UK work permit scheme.
[315]Office of Population Censuses and Surveys 1993: xi.

The official justification for the ever more strict immigration control policies has always been that they will enable the immigrants already in Britain to integrate more smoothly by dissipating the fears of the native-born (Rose et al. 1969: 229-230). Thus, restrictive immigration policies have been followed by race relations legislation designed to combat discrimination. For example, the government published a White Paper in August 1965 on immigration from the Commonwealth, which included both contradictory new immigration controls and 'integration' proposals (see Dummett and Nicol 1990: 192-196). It was assumed that smaller numbers would reduce competition for housing, jobs and social services so that immigrant's 'visibility' would decline and resentment against them would be reduced. However, such assumptions were never justified through empirical and scientific research.[316] The government does not have data available either on the positive contribution of immigrants to the economy or on the negative impact of immigrants on public services and resources (Spencer 1994: 308). Thus, there are inherent contradictions between the two policies (see also Parekh 1994: 109).

An overview of the developments in the field of labour migration in Britain, thus, reveals that immigration control systems have progressed mainly in reaction to pressures from Commonwealth immigration. Despite the fact that ever increasing strict admission of immigrant workers must have influenced the number of Turkish workers being recruited as a by-product, no particular legal reaction towards the immigration of Turkish workers can be located. In fact, the legal reaction of British immigration law towards Turkish labour migration must be viewed within the general context of labour migration to Britain.

The movement towards a free internal market for labour, goods and services in the EU has encouraged moves towards stricter external immigration controls throughout Europe. The European Commission stated in 1991 that better control of migration flows is the prerequisite

[316]See Spencer 1994: 307-321 for a refutation of the assertions of successive governments that the current system of immigration control is good for race relations.

for any harmonious integration (CEC 1991: 9). This has been the common policy not only of the Commission but also of the major Western European countries including Britain (see Collinson 1993a: 46).

The dramatic rise in applications for political asylum since the early 1980s has had a similar effect as the upheavals in Eastern Europe.[317] Both have made Western European countries worry about a possible large-scale Russian, Romanian, Polish and Yugoslavian immigration (Layton-Henry 1992: 219). The increasing number of asylum seekers from various other countries has been an influential factor for the Europe-wide decision to enlarge the list of visa countries in an attempt to cut the number of asylum seekers. Turkey's inclusion in the visa countries in 1989, that is to say, imposing obligatory visas on Turkish nationals, and the inclusion of other countries have happened largely under these considerations.[318]

It can be observed, so far, that the main British response towards Turkish migration has come in the form of imposing visa obligations and a strict application of this requirement for those categories of people who are either seeking regular employment or are feared to seek asylum or to become illegal by overstaying in the country. Britain, like other European countries, has adopted more control and enforcement measures to prevent the arrival and settlement of unwanted immigrants: border controls, stricter visa regulations, employer and carrier sanctions, heavy penalties for traffickers, etc. This restrictive approach coexists uneasily with the special legal position of Turkish citizens in Europe.

For example, immigration officials arrested 31 Turkish illegal immigrants in Dover on 19 October 1994, who were found in the back of a lorry arriving from Calais; another 17 Turks were discovered in another lorry in Calais; they had paid between £1,500 and 3,000 each for

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[317] Note that the number of asylum applications to Britain has risen sharply (mainly Somalis, Ugandans and Turkish Kurds) from 1,563 in 1979 to 5,263 in 1988 and 15,153 in 1989.

[318] See Devine 1995, Appendix II for countries whose nationals require visas for the UK. The most recent set of Immigration Rules (HC 329 now) of April 1996, adds a few more countries, mainly from the Middle East.

their fare to the UK.[319] In another instant, a group of nine Turks, who had been hidden in the back of a Dutch lorry and smuggled into the country, was discovered by officials conducting a combined surveillance operation at the M1 Toddington Service station.[320]

The UK, like Germany, introduced legislation with the effect of sanctioning carriers for transporting passengers without valid entry visas or travel documents or forged passports under the Carrier's Liability Act of 1987.[321] The fines for carriers who transport people without valid papers under the Act have been doubled to £2,000 in 1991, which shows the response of the government to the same sorts of consideration as well as the restrictive attitude of immigration policy (Martin 1992: 242; see in detail Cruz 1995).

4.3.4 The British system of recruitment of workers

There are no recruitment agreements between the UK and any other country as there existed between the West Germany and Turkey, and between the Netherlands and Turkey. This has led scholars to argue that worker migration to Britain has been rather unplanned:

> "One interesting contrast between Britain and the other major recruiting countries like France and Germany has been lack of government planning and involvement in the recruitment process." (Layton-Henry 1992: 216)

Britain also has never developed a rotation policy for immigrants despite the demands of Enoch Powell, and unlike some other European countries, which have officially temporary workers but actually permanent ones (Studlar 1979: 99).

In fact, employment, regardless of needing a work permit or being permit-free, can lead to permanent residential status after four years.[322] An application for permanent settlement will be considered in the light of all relevant circumstances including the worker's character,

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[319] *MNS*, November 1994, p. 12.
[320] ***Luton/Bedfordshire on Sunday***, 6 November 1994, p. 7.
[321] In fact, the 1990 Schengen Agreement obliges state parties to impose sanctions on carriers bringing inadmissible passengers into the Schengen territory. See Cruz 1991 and now Cruz 1995 for an assessment of the compatibility of these sanctions with international treaty obligations and the obligation imposed on airline staff to act as international immigration officers.
[322] See JCWI 1995: 119, and Macdonald and Blake 1995: 271.

conduct and associations, ability to accommodate and maintain himself and any dependants without recourse to public funds, and whether or not the employer intends to continue to employ him.[323]

Prior to the 1971 Act, work permits were only issued to aliens, whereas Commonwealth citizens received employment vouchers, which gave them a right to immediate settlement (Macdonald and Blake 1995: 288). Now, a non-EU national needs a work permit as well as a visa in many cases in order to enter and remain in the UK for employment purposes.

Work permits are issued by the Overseas Labour Section (OLS) of the Department of Employment with a limited number awarded according to the market's needs (see Devine 1995: 20-23). It has been observed that, over the last two decades, the number of labour permits issued largely correlates with the rate of unemployment: with rising unemployment, the number of work permits decreases; when the rate of unemployment goes down, the number of permits increases (Salt and Singleton 1993: 4, 5).

The application for a work permit has to be made by the employer for a particular person (known by name) and a particular job and must be sent to the OLS of the Department of Employment (Devine 1995: 24).The prospective employee should be living abroad when the employer files the application, as the Home Office does not allow the overseas national to switch to become work permit holders leading to settlement, where his/her immigration status in the UK is a temporary one not leading to settlement (Gulbenkian and Badoux 1993: 185; Devine 1995: 22).

Generally speaking, the employer has to prove, first, that he did not succeed in finding a suitable person living in Britain or in the EEA for the vacancy in spite of his efforts. To satisfy this requirement, most jobs must be advertised to reflect a genuine attempt to test the EEA

[323] Immigration Act 1971, S. 3(5) and (6); the relevant Immigration Rules are now HC 395, paras 128-135.

labour market to fill any vacancy before offering the job to an overseas national (Devine 1995: 24-25).

Possession of a work permit is not *per se* a guarantee of admission to the UK. Under the Immigration Rules, immigration officers have a wide discretion to refuse entry (for details see Macdonald and Blake 1995: 295-296). It appears that both in the case of Commonwealth citizens and visa nationals a more rigorous control regime is imposed by enquiring into the employee's credentials and into his suitability for the work (see Macdonald and Blake 1991: 222-223).

The OLS issues a work permit for a named employee for a specific job with a specific employer (Devine 1995: 35). Department of Employment approval is required in case of a change of employer and is normally given if the new job is within the same occupation skill category of the original work permit (Devine 1995: 36).

There is now in operation a two-tier system as a result of proposals made by the Employment Department in a Consultation Paper,[324] in order to streamline the application of the work permit scheme to make it easier for transnational companies and large employers to transfer workers (JCWI 1995: 114-115). According to this new two-tier system[325], applications which clearly merit approval and satisfy the existing occupational skills criteria are handled under a simplified procedure in 'tier one'. Part I includes transfers within international companies, board level posts, posts involving substantial investments in the UK and occupations being considered in acute short supply by the industry and various professions, both nationally and EEA-wide (JCWI 1995: 115; Macdonald and Blake 1995: 290). There would apparently be no need to advertise the post in national and local newspapers or trade journals for employees who fall under this category. However, it may still be necessary to provide some evidence to show that the job could not be done by a resident labour in the EEA (JCWI 1995: 115).

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[324]*Review of the Work Permit Scheme*, Consultation Paper, Employment Department, May 1989.
[325]See in detail Devine 1995: 28-41; JCWI 1995: 114-120, Macdonald and Blake 1995: 288-298.

The 'second tier' covers all other applicants who do not qualify for the 'first tier' (Devine 1995: 32), despite the fact that there may me some grey areas where it is difficult to decide whether the post is a Part 1 post or Part 2 (see Macdonald and Blake 1995: 290). For Part 2 posts, it would be necessary for the employer to provide evidence in order to satisfy the rule that there must be positive benefit arising from the overseas worker's presence in the UK, for example, as a 'key worker' (Devine 1995: 33; Macdonald and Blake 1995: 291-292). Workers included in the 'second tier' may be overseas nationals with technical or specialised skills or those who are using language or cultural skills not readily available in the UK or the EU (Gulbenkian and Badoux 1993: 185-186; Macdonald and Blake 1995: 291).

For key workers, work permits are issued for limited periods, normally up to a maximum of 3 years. The aim of this is said to prevent key workers being able to qualify for indefinite leave to remain as a result of four year employment in the UK (Macdonald and Blake 1995: 294). However, it is unlikely that this objective will be achieved with respect to Turkish immigrants under work permits. Under Article 6 of Decision 1/80, Turkish workers, after having worked one year lawfully in a Member State, will have a right to an extension of their work permit if the employer wishes to employ them. After three years of legal employment, subject to the priority of workers from member states, they may respond to another offer of employment with an employer of their choice.

The operation of the work permit scheme has been criticised for a variety of reasons.[326] It has been argued that the operation of the scheme works to the benefit of large industrial enterprises, as preference is clearly given to known applicants, or 'repeat players' (Menski 1994a: 15). The Department of Employment stresses that it is particularly important for a company to show that it is already providing goods or services or is contractually committed to doing so (Macdonald and Blake 1995: 293). Thus, much depends on whether the employer is known, with the consequent result of smaller firms often finding the scheme too restrictive. It

[326] See Menski 1994a: 15.

was also pointed out that there is no legal avenue to challenge negative decisions (see Macdonald and Blake 1995: 296-297; Devine 1995: 37). Further, although in principle employers could have as many employees under this scheme as they could justify, the Department holds a list of occupations that might or might not qualify and has exercised quite restrictive control (JCWI 1995: 115).

In practice, a major concern is the number of immigrants and worries that permit holders will try to acquire permanent settlement rights in Britain, although only 14 per cent actually acquire such rights (Menski 1994a: 15). As the UK has a relatively easy process of acquiring permanent settlement rights, the result is, therefore, a rather restrictive approach to the issuing of work permits in the first place. Further high unemployment and the recent recession have supported the impression (which is not a new one) that Britain has plenty of people, either skilled or capable of becoming skilled, but for whom employment is simply not available.

Under the new Immigration Rules, work permit holders for a period of 12 months or less must now intend to leave the UK at the conclusion of that period.[327] The aim, thus, appears to be not to allow such work permit holders permanent settlement. Nevertheless, pursuant to paragraph 131(ii) of HC 395, it is not impossible to extend such a permit as long as the Department of Employment agrees (see also Macdonald and Blake 1995: 295). It is confirmed that the requirement that a holder of a short-term work permit must not intend to stay beyond the validity of his permit aims at visa nationals, with a view to preventing any abuse of the entry clearance system (Andonian 1995: 17). Again, as pointed out earlier, under Article 6 of Decision 1/80, Turkish workers will have a right to an extension of their work permit if the employer wishes to employ them, after one year of legal employment. This may well be an additional factor for British authorities for being extra cautious about Turkish applicants in order not to institute permanent settlement for Turkish immigrants.

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[327]See HC 395, para 128(vi).

4.3.5 Temporary migration

It should be pointed out that the British immigration law employs a rigid distinction between persons admitted for 'temporary purposes', such as students, visitors and those admitted for temporary employment, and persons admitted for 'settlement' or in a category leading to permanent settlement, such as spouses, dependants (see Chapters 6.3 and 7.3 below) and persons admitted under the work permit scheme. British policy has been considerably different for those admitted for 'temporary' purposes, such as students, 'au pairs', seasonal workers, and trainees.

In British educational institutions, overseas students have come to be viewed as an important source of income, and even as 'cheap postgraduate labour' (Williams et al 1987: 9). Leaving aside the discussion of various economic, educational and foreign policy benefits that overseas students provide,[328] it is very interesting to note that overseas students, particularly in technical and scientific fields, constitute a double financial benefit for the British institutions: firstly, by means of the high level of fees they pay (£7000-£12000) per annum, and secondly, by providing cheap post-graduate labour for research carried out by the universities. This can be interpreted as an extension of the general importance given to the highly skilled immigrant workers rather than unskilled workers.

However, what is more important from the viewpoint of labour migration and control is that Britain seems to have succeeded where most European states have failed. For overseas students, it is very difficult to switch to employment, business, self-employment, or independent means from student status.[329] Changes to employment for visa nationals are not permitted by the Home Office, unless their application is for post-graduate medical or dental training.[330] Thus, the UK appears to have succeeded in introducing a sort of 'rotation' principle

[328]See, e.g. Chandler 1989, Williams et al. 1987.
[329]The relevant Immigration Rules are HC 395, paras 57-62.
[330]HC 395, para 73, also see Macdonald and Blake 1995: 262.

for overseas students, in contrast to Germany's attempted application of the same principle to immigrant workers.

The situation of Turkish post-graduate students can be assessed within the general context of British overseas student policy. According to the latest available data, 1054 Turkish students were studying in publicly-financed institutions in 1991.[331] 76 per cent of the Turkish students in publicly financed British educational institutions are post-graduate students.[332] It must be noted, however, that these figures do not cover overseas students in private sector colleges which we think are almost equal to the numbers of overseas students in publicly-financed institutions. The total number of Turkish students has increased in the meantime, particularly as a result of extensive scholarship programmes provided by the Higher Education Council (YÖK) of Turkey for research assistants recruited for newly established universities.[333] Turkey clearly expects these students to come back and the UK does not want them to stay on.

As far as 'au pairs'[334] are concerned, a similar line of arguments can be developed. According to the current Immigration Rules, an 'au pair' is a young person (female or male now) who comes to the UK to learn English, lives for a time as a member of an English speaking family with opportunities for study, and helps with the housework for a maximum of five hours a day in return for a reasonable pocket money and two free days a week.[335]

Rules and practice concerning 'au pairs' seem to suggest that the 'au pair' arrangement would be used to bring in those denied work permits as resident domestics, many of whom would come from outside Europe (Macdonald and Blake 1995: 266). It may also be argued that the 'au pair' arrangement is an exception to the general policy of not allowing the importation of cheap labour - an official form of cheap domestic labour.

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[331] See *Statistical Bulletin*, 1993, Tables 1 and 6.
[332] Ibid, Table 6, calculated from the figures of 1991.
[333] Some 2,000 research assistants were sent abroad under this programme in 1993 and 1994. According to my personal observation, one third of these post-graduate students must have come to the UK, hence significantly increasing the total number of Turkish students further.
[334] The new rules on the 'au pair' employment are in HC 395, para. 88-94.
[335] HC 395, para 88.

An entry clearance as an 'au pair' is also available to Turkish nationals.[336] According to my personal observations, many Turkish girls have come and will continue to come to Britain under this category, as this is often viewed the cheapest way of learning the English language. It is not yet known whether Turkish boys are willing to use this route, or will actually be allowed to come as 'au pairs' by the official policy.

There are also seasonal workers at agricultural camps under approved schemes, for which immigrant workers cannot be allowed to remain more than six months or beyond 30 November of any year.[337] Further, under the Training and Work Experience Scheme (TWES),[338] a person seeking training or work experience must hold a valid work permit from the Department of Employment to qualify as a trainee under the Immigration Rules.[339] The maximum period of stay is two years in the case of work experience; and up to three years for training purposes with a possibility of a further three years extension in suitable cases for the latter category (Macdonald and Blake 1995: 274).

Following the verdict of the ECJ in Eroğlu (see Chapter 3 above), it is clear that working as a trainee is not excluded from the scope of legal employment within the context of the rights of Turkish workers arising from Article 6 of Decision 1/80. Thus, a Turkish worker, having worked for a year under such schemes, have a right to an extension of his job if the employer still wants to employ him. However, should this route to the UK labour market be overused, applications from Turkish nationals may well be processed with more caution.

[336] HC 395, para 89(v).
[337] HC 395, paras 104-109, also see Macdonald and Blake 1995: 272.
[338] HC 395, paras 116-121, also see Devine 1995: 44-54.
[339] HC 395, para 116(i)-(vi).

4.3.6 Impact of developments in Community law

The UK has not yet transferred the decisions of the Association Council into the domestic law, which the ECJ has held to be of direct effect. The Immigration Rules do not make any reference to the Ankara Association Agreement and its components (Macdonald and Blake 1995: 231). Thus, so far Turkish workers have been treated, in practice, exactly the same way as any other foreign workers who are aliens.

Direct applicability of Article 12 of the Association Agreement in conjunction with Article 36 of the Additional Protocol have been rejected both by the English High Court and the English Court of Appeal in 1990.[340] Article 36 of the Additional Protocol envisaged that freedom of movement for workers between Member States of the Community and Turkey would be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement, at the latest, on November 1986. Relying on this, the applicant in Narin challenged the deportation order of the British authorities on the ground that as a Turkish worker he had a right to free movement within the EEC under Article 12 of the Association Agreement and Article 36 of the Additional Protocol of 1970, analogous to Article 48 EEC rights.

The Court of Appeal held eventually that the non-implementation of these stages towards closer union provided for in the Agreement deprived that article of direct effect, and that Article 36 was not intended to be interpreted as equivalent to Article 48 EEC.[341] The Court, relying on the decision of the European Court in Demirel (see p. 122 above) further held that:

> "The fact that the time limit for implementing free movement under the Association Agreement had expired after Demirel did not alter the force of the ruling in that case, *that* therefore the applicant had no right to stay deriving from the Association Agreement".[342]

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[340] Regina v. Secretary of State for the Home Department *ex parte* Unal Narin, before the English High Court, Queen's Bench Division, [1990] 1 CMLR 682; Regina v. Secretary of State for the Home Department *ex parte* Unal Narin, before the English Court of Appeal, [1990] 2 CMLR 233.
[341] Ibid, p. 233.
[342] Id.

The applicant in this case had based his argument on the issue of freedom of movement of workers, for which, it was held, no clear, precise and unconditional obligation existed. In fact, the Decisions of the Association Council accord rights, which are precise and unconditional, to Turkish workers who are "duly registered as belonging to the labour force of one of the member states of the Community", particularly under Article 6 of Decision 1/80 (for details see Chapter 3.3.1). But in this particular instant, the applicant did not base his argument on Article 6 of Decision 1/80, but on Article 12 of the Association Agreement, which was held to envisage free movement rights for Turkish nationals.

In British immigration law, there is a strict dividing line between persons admitted for 'temporary purposes', such as visitors and students, and persons admitted for 'settlement' or in a category leading to permanent settlement, such as spouses, dependants and persons admitted under the work permit scheme. A stable and secure position as a member of the labour force is a prerequisite of the legality of employment of Turkish immigrants and consequent rights resulting from such legal employments under Article 6(1) of Decision 1/80, as held by the ECJ (see p. 109 above). The above differentiation in British law may constitute the division between 'a stable and secure position' in the labour market. Thus, the latter category leads to acquiring rights under Article 6(1) of Decision 1/80.

In the UK, Turkish nationals may gain lawful access to the territory in a number of different ways. In the Kuş scenario (see p. 108 above), after the initial one year period, in which the Turkish national married to a British national is allowed to work immediately following entry, he can apply soon after for an independent permanent residence right called 'indefinite leave to remain' (see Guild 1993a: 4-5). Then, if the marriage is still valid and the couple do not rely on public funds, the Turkish national will normally get indefinite leave to remain and therefore is unlikely ever to rely on rights acquired under the Association Agreement unless a question of expulsion arises. Where an expulsion is in question for Turkish immigrants who satisfy the criteria of being legally employed in a member state, the term 'public policy, public security or

public health' must have the same meaning in Article 14 of Decision 1/80 as Article 48(3) EEC (for details see Chapter 3.3.5).

According to the second indent of Article 6(1) of Decision 1/80, after three years lawful employment, a Turkish national may apply for a position in the 'same occupation' with a different employer, subject to priority being given to EU nationals. Such a change of employer should not require the approval of the Department of Employment, unless the Turkish national is subject to a restriction on employment (Wornham 1994: 15).

The standstill clauses of Council Decisions 2/76 and 1/80, which were affirmed to have direct effect by the finding of the ECJ in Sevince are also relevant in the UK. The conditions applicable to obtaining a work permit have become more restrictive since 20 December 1976, the date of Decision 2/76 (see pp. 202-203 above). Accordingly, the requirements to be applied in order to obtain work permits and extension of residence are the more generous 1976 rules in accordance with Article 7 of Decision 2/76. The 1976 work permit scheme was considerably less stringent than the present scheme, not only in advertising requirements, but also with respect to the categories of persons who may be employed under a work permit (see Wornham 1994: 17-19). Therefore, apart from work permits being issued to persons with professional qualifications, skills or experience under the 1976 Work Permit Scheme, work permits may also be issued to employers who wish, inter alia, to employ Turkish workers in commercial or retail distribution with special experience or qualifications relevant to the post offered. Further, Turkish workers should certainly not lose rights of appeal relating to employment due to restrictions brought in by the Asylum and Immigration Appeals Act of 1993 (Macdonald and Blake 1995: 229).

In order for Turkish workers to rely on the standstill clauses of the Decisions, they should become beneficiaries of the Agreement through legal employment. Accordingly, they are eligible to have their work permit applications considered under the 1976 Work Permit

Scheme, when they become workers legally resident and employed in the United Kingdom in pursuance of Article 7 of Decision 2/76.

In any case, the rights deriving from the Agreement and its components do not lead to a right to enter or obtain a work permit, and therefore are different from the rights of EEA nationals to seek and obtain work. First and foremost, Turkish nationals must have legally entered a member state and taken up lawful employment there. This leaves a considerable amount of discretion, in terms of immigration control, about whether to admit Turkish nationals or not in the first place.

CHAPTER 5

THE LEGAL POSITION AND TREATMENT OF TURKISH SELF-EMPLOYED PERSONS IN THE EU

In order to better understand whom we are concerned with here, it would be necessary to make a distinction between two categories of people. Those resident Turkish immigrants who have already lived in the respective country for some time and have a secure legal status, can usually open a business as any other citizen of the country subject to the same conditions.

The second category of people are those Turkish nationals from Turkey wishing to open a new business in the Community. They are subject to the requirements of visas and residence permits arising from the immigration laws of the respective countries concerned.

Ethnic entrepreneurship in Europe is the result of huge immigration processes accompanying the enlargement of labour markets during the economic boom of the 1950s and 1960s. The new mushrooming of small businesses in Western European countries is said to be closely associated with an increase in unemployment associated with a new form of economic development, described as the coming of 'post-industrial society' or the 'microelectronic revolution' (Waldinger et al. 1990: 80).[343] There is also an 'ethnic minority' element here, which must be located in explaining why increasing number of immigrants are now entering into self-employment.

Many small firms in Europe, not necessarily of ethnic minority origin, act as subcontractors or franchises under the continuing control of large companies. Some others are responding to the change in consumer preferences to more specialised products, differentiated goods and services, where the low volume of sales places smaller firms in a strong competitive position (Waldinger et al. 1990: 80). The increase in the number of self-employed immigrants,

[343]This has been termed as 'post-Fordism' by some other writers, as opposed to 'Fordism', which is an industrial era whose secret is to be found in the mass production systems pioneered by Henry Ford. See on this Murray 1990.

particularly of Turkish immigrants in Germany, therefore, should also be viewed within the context of a wider European phenomenon. For example, shops and firms supplying ethnically distinctive goods and services are just one category within the growing small business sector.

The Turkish workers who came to Western Europe with the initial intention to stay only a few years, later realised that the period of their stay would have to be longer than planned because the level of financial accumulation necessary to guaranteeing their lives in Turkey could not be attained in a short period of time (see above, pp. 37-38). The failing experience of many investments made in Turkey, coupled with the discontent of returnees, reinforced by negative signs of the Turkish economy, has caused Turkish migrants to remain abroad and keep prolonging their stay there for an indefinite time (CFTS 1993a: 154).

As the migration process matured, Turkish workers began to invest more and buy properties in the receiving countries. Further, the increasing length of stay and the high degree of family reunion led to an enlargement of the immigrant population through the appearance of ethnic employers, ethnic shops, etc. As pointed out in chapter 2 above, there has been a strong tendency among Turkish immigrants from wage earning employment to self-employment.

This development has also significant financial and economic repercussions in different contexts. The economic activity of the self-employed Turkish businessmen in Europe not only increases Turkey's export earnings, but also enables free movement of Turkish capital within the Community despite Turkey's not being a member of the EU (CFTS 1993a: 157). With the entry into force of the Customs Union between the Community and Turkey as of January 1996, various initiatives and investments of businessmen on both sides are likely to cause further impetus in economic and financial terms both in the Community and Turkey.

There appears to be a setback, however, for Turkish nationals not resident in the Community wishing to open a new business in a member state. Subsequent to the entry into force of the Customs Union, employers' associations in Turkey have raised their concern over the issue of

visa applications to Turkish businessmen. The president of the Ankara Chamber of Industry was reported to be viewing the visa application for Turkish businessmen as an unacceptable approach for an association on equal terms, and 'a technical barrier to trade and a factor of unfair competition'.[344]

Self-employment of immigrants should be viewed as part of a general framework of employment-related migration. Therefore, many of the issues we have already discussed in Chapter 4 above are also applicable to this chapter on self-employment. Here, the discussion has been limited only to the peculiarities of self-employment of Turkish immigrants in order to avoid unnecessary repetition.

Further, this is a developing specialised area of immigration law to which not much academic attention has been given so far. Moreover, various aspects of rules and regulations concerning ethnic entrepreneurs are scattered around the national laws of these countries, which are also applicable to their own nationals. Thus, the scope and extent of the present chapter is much less voluminous than the previous chapter on workers.

5.1 Germany

As a result of a history of some 35 years of Turkish migration, the Turkish population in Germany as well as other Western European countries has "been through a social and cultural transformation and acquired a heterogeneous structure with diversified needs" (Şen 1993c: 4). Although Turkish immigrants were, in the early days of migration, mainly characterised as young male labourers (see p. 31 above), their employment structure has significantly changed over time.

5.1.1 Self-employment among Turkish immigrants in Germany

Various models have been developed, in the literature, in an effort to explain the transformation of an immigrant population from almost completely employee status into self-

[344]See *Zaman*, 25 January 1996, p. 6.

employment (see CFTS 1991a: 3-6). It has been observed that, as German producers have not met the consumption patterns characteristic of Turks who have migrated to the FRG, Turks have been motivated to establish specific ethnic businesses in a variety of sectors (CFTS 1991a: 2). These economic activities, which may be termed 'niche-economies', as they target the specific needs of a particular sector, played a role in many Turkish immigrants' entrepreneurial initiatives and in the establishment of their own business (CFTS 1991a: 3-4).

The explanation of Turkish ethnic self-employment only within the context of niche-economies would not be adequate. This explanation does not account for other external factors, which also influenced the development of Turkish self-employment, such as the legal framework and the labour market opportunities for Turks. In fact, Turks who had particularly begun to establish their own businesses since 1980, have now made investments also in areas which, until recently, other groups of foreigners had never or scarcely entered into (Şen 1991a: 126). A 1988 study reveals that the Turkish employers in the Federal Republic of Germany have made investments into 55 different sectors.[345] That is a sign of business strategies targeting not only the Turkish community but the whole population.

According to the 'culture model', which only emphasises the cultural factors, the culture, values and norms of an immigrant population determine the independent economic activities and methods of business operation of immigrant entrepreneurs. Therefore, it has been argued that it is very difficult to break out of small-scale, ethnic-specific businesses and make a transition from this ethnically oriented economy (to the so-called *bazaar* mentality) to the wider market economy (Aldrich et al. 1981: 188). Nevertheless, as observed in Germany, many Turkish self-employed persons seem to be breaking the circle of an 'ethnic market' by seeking contact to the open market and its resources (Şen 1991a: 126).

Against the 'culture-model' and the 'niche-economics-model', the 'reaction-model' examines the external factors which play a role in the foreigner's establishment of a business. According to

[345] CFTS-TÜSİAD (eds) 1988: 23.

this model, foreigners constitute the social group that is most affected by negative developments in the economy. Moreover, the vulnerable legal status of Turks in Germany did not provide enough guarantees against refusal of residence permit in case of unemployment, at least in some cases. Accordingly, in some instances, establishment of a business was seen as a secure option in order to remain in the Federal Republic with any certainty (CFTS 1991a: 5). Thus, establishment in self-employment status strengthened the legal position of Turkish immigrants as well as their socio-economic status.

Whatever the line of argument or any composition of the above arguments adopted, one should take into account that, as every population in the world, the Turkish migrant population in Germany does not constitute a homogeneous group but a heterogeneous one. Thus, it is not surprising at all that some of the Turkish population in Germany are self-employed, so that a new middle class among the migrant population is gradually establishing itself within a settled community (Şen 1991a: 128).

The increasing pattern of self-employment in Germany can also be assessed in terms of the range of Turkish-German international trade relations. According to a study made in 1988, 25 per cent of these enterprises were maintaining international trade relations for obtaining goods.[346] About 75 per cent of these were importing goods from Turkey, ranging from food to textile.

The original intention of many Turkish immigrants to accumulate the greatest amount of savings possible and to set up businesses in Turkey on their own underwent a change, particularly in the 1980s (Şen 1991b: 19). This has now been transformed, for some Turkish immigrants, into satisfying the same aspirations by establishing businesses in Europe.

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[346]See CFTS-TÜSİAD 1988: 39.

5.1.2 Turkish immigrants switching to self-employment from within Germany

Throughout the history of labour migration to the Federal Republic, the emphasis has been on the importation of foreign labour for industries which experienced manpower shortage. Migration of foreigners has been permitted due to the demand for cheap labour. Therefore, the transition to self-employment has been mainly determined by economic factors from within the migrant group and labour market conditions, the effect of change of policy on migration being minimal.

No special programmes had been developed until the late 1980s for the ethnic minority business sector or rather 'guest worker' business sector, presumably because of the continuing perception of immigration as a temporary and 'guest worker' phenomenon. Therefore, there was no formal recognition of the significance of an ethnic business sector. Nevertheless, the German government has increasingly taken account of the participation of ethnic minority entrepreneurs in planning its programmes and regulates their participation by special provisions (Waldinger et al. 1990: 186-187).

Following research carried out on the significance of the ethnic minority business,[347] particularly of Turkish immigrants, the official policy has moved into an active encouragement of these activities. Various initiatives have been made by the Federal state and particularly by some of the Länder with a view to promoting the business activities of Turkish residents in Germany. For example, a Consultation Office for Foreigner Business Initiatives set up in the Turkish Studies Centre is now in operation.[348] This project, supported by the Ministry of Economics and Technology of North Rhine-Westphalia, is an indication of the enthusiasms of the official bodies giving support to these economic activities, which will eventually create jobs and contribute to the development of the economy generally. Thus, there is a growing realisation that ex-workers turned entrepreneurs now provide jobs not only for immigrants but also for the indigenous population.

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[347] See, among others, CFTS 1991a, CFTS 1991b, Şen 1993c, CFTS 1993a, etc.
[348] See CFTS 1993c (Booklet).

Where the admission of a foreigner is restricted or tied to a specific purpose, for example, to an employment relationship, any modifications will only be made, "on grounds of higher economic interests or in view of particular local needs" (CFTS 1991b: 38). However, Turkish immigrants who want to establish their own business in the FRG can do so if they the right of residence. Since 1984, foreigners who have a permanent residence permit do not need approval of the chambers any more for setting up businesses in many Länder of the Federal Republic (Şen 1991a: 125). Obtaining the right to open a business consists mainly of formalities. 76.7 per cent of the Turkish entrepreneurs included within the survey of the Zentrum für Turkeistudien (CFTS 1991a: 23) indicated that they met with no obstacle in receiving the right to open a business upon their application to formal German offices.

On the other hand, some occupations, such as craftsmanship, are tied to certain conditions. For example, a master qualification (*Meisterbrief*) is a prerequisite for operating an independent artisan business (CFTS 1991b: 40). Although the conditions relating to qualifications apply to everybody, in practice this often causes hardship for Turkish immigrants. According to a detailed survey, the diplomas of only 52.7 per cent of the Turkish entrepreneurs who received occupational training in Turkey have been accepted in the FRG (CFTS 1991a: 15). Further there are often complaints arising from excessively bureaucratic procedures.

In cases where qualifications are required to secure a licence to trade, if the owner does not have the necessary qualifications, it may be sufficient to take an employee who does craft-based businesses in Germany (Ward 1987: 94). For instance, immigrant entrepreneurs may employ a 'Meister' in such circumstances. However, there is evidence from Germany of a relaxation of such regulations with the result that in many cases there is no longer a need to use a kind of 'straw man' to act as owner of, or on behalf of, a firm set up by immigrants (Ward 1987: 95). Further, exceptions from such qualifications required in the FRG are permitted in certain circumstances, when the applicant can prove that he possesses the knowledge and

skills required for carrying out this profession and when the passing of a professional test would be an unreasonable burden (CFTS 1991b: 40).

For this category of self-employed, we have also the 'standstill clause' in the Additional Protocol to the Ankara Agreement, which may provide some degree of protection (see chapter 3). Article 41(1) of the Protocol, read in conjunction with Article 13 of the Association Agreement, makes it clear, after the entry into force of the Protocol (1.1.1973), that "the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services".

Although no reference has been made to the ECJ on the direct applicability of Article 41 of the Protocol as yet, there are very convincing arguments that this Article should be directly applicable. Therefore, a Turkish immigrant in Germany should be able to rely on this provision against the restrictions brought about after the entry into force of the Protocol.

German rules relating to opening a business in the field of the medical profession have become more restrictive in recent years in general, as a result of a series of measures which aimed at a reduction in health costs. Prof. H. Lichtenberg argues that these restrictions are not applicable to Turkish immigrants by virtue of the 'standstill clause' as well as other EU migrants under the Community law.[349] Thus they have, in some cases, a preferential position over German nationals.[350] It must be admitted, nevertheless, that not much is known about the actual implementation of the law to Turkish immigrants in such cases.

In addition to this, Turkish self-employed persons can rely on the guarantees arising from the Association Agreement and its components, which have been considered extensively in Chapter 3 and also Chapter 4.1 on workers. Much of what has been established in Chapter 4.1

[349]From an interview with Prof. H. Lichtenberg on 03.02.1994, Bremen.
[350]The phrase 'discrimination against own nationals' is a well-known phenomenon, particularly in the field of the operation of the EU law and domestic law, see Gutmann 1995 for a recent identification of the same phenomenon in the German context.

concerning Turkish migrant workers is also applicable to Turkish self-employed persons in Germany.

5.1.3 Turkish nationals applying from Turkey to become self-employed in Germany

As a result of the emphasis on the need of the German economy for manpower, Germany has not developed a legal framework comparable to that of the UK regarding the self-employment of foreigners. Therefore, German government policy regarding the ethnic minority business sector is subsumed under the general laws governing the admittance requirements for self-employment (see Chapter 4.1).

Thus, the issue of immigration/residence status is of significant importance for the admission of self-employed persons. According to the General Administrative Rules for the Application of the Professional Regulations Law to Foreigners cited by the CFTS (1991b: 37-38), a residence permit (*Aufenthaltserlaubnis*) is necessary in order to run a business, unless the respective foreigner does not require one. The same law further provides that the Foreigners' Office need not sanction the running of self-employment (CFTS 1991b: 38).

In the early days, there were more shops owned by foreigners than were officially registered, as more than half of the applications from foreigners were denied prior to 1980 (Gitmez and Wilpert 1987: 99). Therefore, many of the first businesses were initiated without the necessary residence permit, usually a German national being paid to be the nominal 'straw boss'. This was also the case for the first wholesalers who also obtained the necessary permits through German 'straw bosses' and later paid off the German who lent his name to the venture (Gitmez and Wilpert 1987: 103).

All Turkish nationals from Turkey intent on doing business in Germany must first apply for a residence permit but not a work permit, as self-employed people are not required to obtain this. The relevant Foreigners' Office is permitted the exercise of considerable discretion in the

grant or denial of a residence permit (s 7 I of Foreigners Act of 1990), because self-employed people are not included in the category, for which respective authorities have no discretion in deciding whether to grant the permit or not (s 6 I). Thus, it is suggested that predicting when a residence permit may be granted in such circumstances is extremely difficult, since the availability of a residence permit depends upon the specific circumstances of each individual case (Gulbenkian and Badoux 1993: 59).

On the other hand, the legal regulations on self-employment apply in modified form to those foreigners whose country of origin has entered into bilateral agreements with the FRG. According to an agreement of reciprocity in 1930 between Turkey and Germany, nationals of both countries have a reciprocal right to open business in both countries.[351] According to this, Turkish citizens have to be treated like Germans and with reciprocity in opening a business in Germany, although some professions are excluded from these arrangements, such as betting shops, chimney sweeps and the travel trade (CFTS 1991b: 38). Moreover, under the notion of capital transfer from Turkey to the EC, it is possible to set up a business either directly or in co-operation with other companies in Germany. Actually, there are more than 100 firms operating as a result of this, varying from textile industry to banking.[352]

Because of the standstill clause of Article 41 of the Additional Protocol, German and Turkish governments could arguably not impose new restrictions on freedom of establishment from the entry into force of the Additional Protocol. However, the restrictions on freedom of establishment do not appear to cause much problem and the policy relating to admission of Turkish businessmen appears to be lenient, perhaps as a result of the reciprocal rights of German citizens in Turkey. Further, the entry into force of the Full Customs Union between Turkey and the EU since 1 January 1996 is likely to result in further developments on both sides, which will probably bring a more liberal approach to the German admission policy.

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[351] I am grateful to Prof F. Şen for giving me this information in an interview on 7.2.1994, Essen.
[352] Id.

5.2 The Netherlands

Although the majority of the Turks in the Netherlands are employed as workers, other economic activities are also being increasingly taken up by the Turkish population. According to a study of 1991, there is now an increase of self-employed Turks in the Netherlands, figuring around 2500 (Şen 1991c: 4).

5.2.1. Self-employment among Turkish immigrants in the Netherlands

In the Netherlands, too, as in Germany, this development of a self-employment pattern has been explained by two major factors. Firstly, immigrants, who are often faced with exclusion from new job opportunities in the restructuring urban economy, try to make a niche for themselves as entrepreneurs of a small business (Waldinger et al 1990). Secondly, such businesses serve the particular needs of an 'ethnic' market. Coffee shops, halal butchers and kebab houses are common examples of this tendency among the Turks in the Netherlands. After a while, such businesses may also cater for the Dutch population and other communities.

It seems as if the extent to which Turkish immigrants have established businesses is much lower than among other immigrant groups in the Netherlands. Whereas more than 15 per cent of the immigrant groups from Egypt, Algeria, Israel, Pakistan, India, China and Hong Kong are entrepreneurs, only 1.3 per cent of the Turks and 0.8 of the Moroccans earn a living in this way (Dijst and Van Kempen 1991). This may, partly, be explained due to the fact that Turks, on the whole, were recruited as workers for industries which suffered labour shortage and came, like the Moroccans, mainly through official recruitment channels. Once such people were in stable employment, they would be unlikely to switch to self-employment. Nevertheless, the above ratios are calculated from whole immigrant populations. Considering that the Turkish population, like the Moroccans, is a very young one, the Turkish working population constitutes a relatively smaller part of its whole population. Therefore, these figures cannot be taken as a reliable indicator. In fact, a 1983 study shows that the rate of self-employment among the Turkish 'working' population was approximately 5-6 per cent (Waldinger et al. 1990: 93).

5.2.2 Turkish immigrants switching to self-employment from within the Netherlands

The promotion of entrepreneurship on the part of non-indigenous persons has been acknowledged by the government as of major importance for Dutch society. It is noted in a government policy document on the entrepreneurship of members of ethnic minorities that:

> "The Dutch economy stands to benefit from the further commercial success of immigrant entrepreneurs and from the proper utilisation of the entrepreneurial potential among ethnic minorities".[353]

This clearly implies that benefit is expected from those who are already residing in the country but not so much from those who wish to set up businesses in the Netherlands (see below). However, the Dutch policy on the self-employment of immigrants already residing in the Netherlands is not so simple. In fact, it can be argued that the promotion of ethnic self-employment has been acknowledged by the government as of major importance not only because of the contribution it will make to the Dutch economy but also because of other benefits that will be gained. In particular, ethnic self-employment is now being viewed as a remedy to the increasing unemployment problem among the ethnic minorities, particularly Turks and Moroccans. Hence, they will become less of a burden on the Dutch social security system, if they are given more chances to open their own businesses.

A number of changes have been reported to be taking place in the government's general policies towards small and medium-sized business that are of relevance for immigrant entrepreneurship (Reports to the Government 1990: 77). The specific facilities for immigrant businessmen in the fields of information, advice, support and entrepreneurial training are considered both by the government and other influential bodies[354] essential for lowering the barriers to entrepreneurship by immigrants. This is in contrast to official British policies on ethnic minority entrepreneurship, according to which positive action in favour of ethnic

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[353]Quoted from *Reports to the government* 1990: 77.
[354]For example, the Netherlands Scientific Council for Government Policy.

minorities is not envisaged (see 5.3 below for UK). Rather, general policies on self-employment and programmes concerning inner-city areas are thought to have also an influence on the development of ethnic minority businesses.

On the whole, Turkish residents in the Netherlands can open a business as any other Dutch citizen can do. Nevertheless, statistics show that the proportion of businessmen among the ethnic minorities in the Netherlands is significantly smaller than the proportion of businessmen among the native Dutch people, even though some foreigners are more inclined to opening new businesses than the Dutch people (Köppinger 1992: 190). This is partly due to the fact that the Dutch authorities are also not flexible when it comes to the acknowledgement of qualifications and school diplomas. Similar obstacles have been reported to exist in Germany (see 5.1 above).

What is worse is that migrants and members of ethnic minorities have to overcome various problems, which may be new to them, such as opening an account, technical language problems, bookkeeping, statistics and other obligations, and ignorance about public support programmes. Further economic factors such as lack of finance and reluctance to use financial credits are also significant barriers to self-employment. Instead, immigrants rely more on social networks and family support to gather the finance necessary. Again this is familiar from the development of Asian businesses in Britain.

On the other hand, a significant barrier to entrepreneurship in the field of small and medium-sized business is caused by the regulations on establishment, which lay down requirements with respect to professional expertise, commercial knowledge and credit-worthiness. The Beverage, Hotel and Catering Act of 1964, the Retail Establishment Act of 1971, and the Business Establishment Act of 1974 form a dense network of rules governing the establishment of a business. Regulations applicable to all entrepreneurs include the following: (1) registration with a Chamber of Commerce and the Register of Commerce; (2) compliance with regulations of the line of business, as established by the respective agency; and (3)

granting of licences only to entrepreneurs possessing the required diplomas, although a license can be procured if an entrepreneur employs someone with a license.[355]

Exceptions can be requested at the Chamber of Commerce with respect to the trade knowledge and expertise provisions, which can be granted on the basis of similar training, local consumer needs and 'special cases' (Waldinger et al. 1990: 186). Nevertheless, in practice it is difficult for ethnic minority entrepreneurs who possess the required diplomas to obtain licences. Ethnic entrepreneurs have to overcome a highly structured set of barriers to operation from professional associations, semi-governmental inspection services, controllers and the government (Waldinger et al. 1990: 186). All these obstacles seek to maintain the status quo for firms already in the field, which have not yet been overcome by the ethnic minority business sector.

On the other hand, in the sectors which are dominated by the operation of free market forces, the conditions for entry should be the same for all regardless of the characteristics of certain groups. Nevertheless, such differentiation takes place in relation to immigrants from other EC member states wishing to provide commercial services in the Netherlands (Reports to the Government 1990: 77-78). These people are allowed to set up business in the Netherlands if they have satisfied the requirements of the establishment regulations in the home country or, in the absence of such regulations, have been operating in the industry in question as an entrepreneur in the country of origin for a certain period.

The Netherlands Scientific Council for Government Policy indicates that some work has been done towards the simplification of the establishment regulations in the Netherlands in recent years (see Reports to the Government 1990: 78). For example, the Council reports that the government is carrying out a survey into three possibilities: the simplification, maintenance and abolition of the legislation on business establishment; in addition to a Bill submitted to the Lower House which proposed getting rid of the credit-worthiness requirement. Taking into

[355] Adopted from Waldinger et al. 1990: 185.

account the particular characteristics of minority groups in the Netherlands, and of the Turks in particular, as the Council rightly concluded, a system according to which entry into self-employment depended solely on the quality of the business plan would be fair to immigrant would-be entrepreneurs who had practical knowledge but lacked any form of business diploma (see Reports to the Government 1990: 78).

Turkish self-employed persons can also rely on the guarantees arising from the Association Agreement and its components which have been discussed in chapter 3 and chapter 4 on workers. As far as Turkish residents wishing to set up a business are concerned, as pointed out earlier for Germany, states shall not lay down any new restrictions on the freedom of establishment and the freedom to provide services.

As far as young Turks who grow up in the Netherlands are concerned, it is now much easier for them to acquire Dutch citizenship (by means of registration). Access to self-employment is easier for them compared to the first generation. However, this is not necessarily a consequence of acquiring Dutch citizenship. Rather, as they grow up in the country, they tend to know the language well, are familiar with the system and have Dutch qualifications; many also have higher expectations and ambitions.

5.2.3 Turkish nationals from Turkey applying to open a business in the Netherlands

Generally speaking, the same sort of restrictions which apply to workers, are applicable to self-employed immigrants (see already Chapter 4.2 above). The position of this category of people is nevertheless more complicated than that of workers because there is no legislation containing general regulations concerning self-employed aliens. The Aliens Act of 1965 makes the regulation of self-employment by aliens possible through conditional residence permits. In principle, an alien may be deprived of his residence permit if he no longer meets the requirements.[356] Aliens admitted to stay in the Netherlands as an employee may not establish

[356] Article 63 of the 1990 UN Convention on Migrant Workers, in co-operation with Articles 52 and 79 of the same Convention, implies that the termination of the economic activity of the self-employed workers may result in the withdrawal of the authorisation for them or for the members of their families to stay or

themselves as self-employed unless the conditions under which the residence permit was issued have been changed (Swart 1987: 898).

The policies of the Dutch government on the admission of business persons are neither extensive nor detailed (see Gulbenkian and Badoux 1993: 122-123). The key requirement is that the proposed activities of the applicant in the Netherlands should 'serve essential Dutch economic interests', the other requirement being that the applicant will earn a sufficient income in this way. It is almost impossible to say which activities may be 'essential' in this context and which may not. Among the related factors which may be relevant are the qualifications, expertise and experience of the applicant, the expected profit, the number of Dutch nationals and/or foreigners to be employed, the amount of the investment, and the extent of the competition with settled business in the Netherlands. The only exception to this requirement are applications from foreign seamen who have been working on Dutch ships or drilling platforms for seven years consecutively. They are exempt from the 'Dutch essential interests' requirement if they have a good record and are under 60 years of age (for details see Gulbenkian and Badoux 1993: 122-123).

Turkish nationals wishing to set up a business, but not yet residing in the Netherlands, must first apply for a residence permit. Under Section 11 of the Aliens Act of 1965, residence permits are to be issued under certain conditions. Whether and in which cases any conditions are imposed is at the discretion of the authorities responsible for the implementation of the Aliens Act as a matter of policy (Swart 1987: 876). The significance of such conditions is that they link the foreigner's stay to a specific purpose.

An application for self-employment in the Netherlands is first transferred to the Ministry of Economic Affairs. Then it is essential that the Ministry of Economic Affairs gives advice to the Ministry of Justice that the granting of a residence permit will serve the Dutch economic

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to engage in a remunerated activity, where the authorisation of residence is expressly dependent upon the specific renumerated activity for which they were admitted.

interests (Swart 1987: 876). Applications for a provisional stay or a residence permit must be accompanied by satisfactory evidence giving details of the expected future profit and by an explanation why it would be necessary for the applicant to reside in the Netherlands to carry out his business or professional activities (Gulbenkian and Badoux 1993: 122).

In practice, a positive advice is only given to the Ministry of Justice by the Ministry of Economic Affairs if the company planning to establish itself has: (1) an 'innovative' character and (2) there is substantial evidence that the kind of service or the kind of product cannot be supplied by a Dutch company or an entrepreneur.[357] There is no precise legal framework, as it exists under British immigration law, which makes it possible to get admission on the condition that the self-employed person concerned must make a minimum amount of investment.

Because of these subjective conditions which have been difficult to fulfil, many Turks appear to have tried to adopt an alternative way in their attempt to circumvent the authorities. They have first bought companies in the Netherlands in order to receive a residence permit to stay in the country. Nevertheless, I have been informed that such efforts are in vain as these cases are always refused both by the Ministry and the courts.[358]

The purchase of real estate, making investments or buying shares in domestic companies, is not *per se* a ground for granting a residence permit, the only exception being the conduct of business by US citizens, as mentioned in Article II of the American-Dutch Friendship Treaty of 27 March 1956 (Gulbenkian and Badoux 1993: 123). Taking up residence on the basis of investments is again restricted by the 'Dutch essential interests' requirement. In each case an applicant would have to show that some essential Dutch interest would require him to stay in the Netherlands for a longer period than would be possible on the basis of a visitor's or business visa, which may be particularly difficult for investors who could only wish to be

[357] This information is based on an interview with Mr. Aldo Kuijer on 25.01.1994, Amsterdam.
[358] Id.

involved financially and would act through an agent. There is a specific visa called 'business visa' for those who need to visit the Netherlands frequently for business purposes, which grants multiple entry for a stay of up to a total of 30 days within a 6 or 12 month period (Gulbenkian and Badoux 1993: 127), but it does not provide for continuous settlement.

Under the standstill clause of Article 41(1) of the Additional Protocol of 1970, with effect from 01.01.1973 (the date of entry into force of the Protocol) both the Dutch and Turkish governments could arguably not impose new restrictions on freedom of establishment. Therefore, the 1973 Immigration Rules should be applied to those seeking to enter or remain in the Netherlands as self-employed persons and businessmen.

Thus, in principle, any of the restrictive changes which may have taken place on the conditions of entry into the Netherlands as a self-employed person, should not be applicable to Turkish nationals wishing to set up a business or to join a business in the Netherlands. Further, the implications of Article 41 of the Protocol appear not to be restricted to in-country applications. Thus, Turkish would-be immigrants should be able to rely on the standstill clause in their applications from Turkey.

The Netherlands do not appear to be taking into account the potential for overseas business development, except for particular countries, notably the US and of course EU countries. Only US citizens are exempt from certain conditions in the conduct of their businesses (see above). Thus, for Turkish nationals wishing to become self-employed in the Netherlands, acquiring settlement rights through working in the Netherlands seems to be a better route.

5.3 The UK

In the UK, the development of Asian ethnic minority business has attracted much attention, but not that of Turkish immigrant business, except perhaps the Turkish Cypriots (see Ladbury 1984). Despite this, there are more than 3500 Turkish self-employed people in Britain, according to a study carried out in 1991 (Şen 1991c: 4). This indicates a high proportion of self-employment among the Turkish immigrants in the UK.

5.3.1 Self-employment of ethnic minorities in Britain

In contrast to some continental countries that have relied heavily on 'guest workers' to fill the vacancies which existed, much of the immigration to the UK was of Commonwealth citizens who exercised their right to immigrate, until this was curtailed with the introduction of the Commonwealth Immigrants Act of 1962 (see Chapter 4.3). Under this legal framework, immigrants arrived in the UK from a wider range of socio-economic backgrounds than was typical on the Continent. Doctors and shopkeepers, for instance, arrived as well as unskilled workers and small farmers (for details see Desai 1963), particularly East African Asians. Also their terms of entry conferred on many immigrants the right to start up businesses under the same conditions as the local population.

Waldinger et al. (1990: 84) affirms that there is a strong correlation between the movement of ethnic minorities into businesses and the relative availability and attractiveness of jobs in areas of settlement. While the proportion of Asians in businesses was very low in areas where relatively well-paid jobs were still available, the rapid expansion of Asian businesses during the late 1970s and early 1980s, took place when unemployment was increasing dramatically (see Waldinger 1990: 83-84).

On the other hand, there are significant differences between various immigrant groups, which shows that the effect of the labour market is not exclusive. The most likely groups to be self-

employed are the Chinese, of whom 19 per cent were reported to have been self-employed,[359] compared to 9 per cent of the white population of working age.[360] People of Indian and African Asian ethnic origin also have higher proportions of self-employment than the whites, 13 and 14 per cent respectively.[361] Pakistanis have a similar likelihood to whites of being self-employed, and Bangladeshis a slightly lower one (7 per cent).[362] On the other hand, Afro-Caribbean and African people have the lowest probability of being self-employed, with 6 and 4 per cent of their respective populations in this category.[363]

When it comes to Turkish entrepreneurship in Britain, it displays, by and large, a unique character compared to other immigrant groups in Britain and other Turkish immigrant entrepreneurs on the Continent. It differs from Turkish entrepreneurship on the Continent, as the move towards self-employment there is, mainly, a subsequent and consequent result of the migration process, notwithstanding the fact that some Turkish workers in Britain, too, have moved into self-employment in later stages.

Turkish entrepreneurship in Britain also differs from other ethnic entrepreneurships in Britain for a number of reasons. First of all, Turkish migration to Britain is different from that of other immigrant groups, inter alia, for historical reasons, such as the non-existence of a colonial relationship. More specifically, the features of Turkish entrepreneurship in Britain do not fit in well with the theories that have been developed for Asian ethnic minority business.

In terms of entrepreneurial strategies that ethnic minorities pursue in Britain, two major and competing explanations have been identified: the middleman minority and ethnic niche/enclave models of entrepreneurship (see, for example, Rafiq 1992).

> "The ethnic niche model merely postulates the strategy of dependence upon the ethnic market whereas the ethnic enclave model postulates a diverse set of ethnic

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[359] See Jones 1993, p. 65 and p. 92, table 4.4.
[360] Ibid, p. 65, 92.
[361] Id.
[362] Id.
[363] Id.

> businesses providing work for a considerable proportion of the ethnic population" (Rafiq 1992: 44).

The middleman minority group, on the other hand, is likely to be engaged largely in providing goods and services to the general market. Aldrich et al. (1986) appear to have rejected the middleman theory as being inapplicable to the Asian businesses in the UK. They have also put forward the residential succession model as an explanation of Asian entrepreneurship. According to this model, the establishment of businesses in an ethnic enclave has allowed ethnic business owners, mainly retail and service shopkeepers, to have access to a large protected market of co-ethnics (Aldrich et al. 1986: 62). Thus, such protected markets enable ethnic entrepreneurs to form a business elite within the ethnic community.

The ethnic niche model might seem to explain the development of Turkish businesses, to some extent, as these are likely to be engaged in providing goods and services to the ethnic Turkish community. However, these Turkish entrepreneurs, particularly in retailing, also serve other ethnic minority people or the population at large. On the other hand, in textile and take-away shops and restaurants, Turkish businesses are highly likely to be engaged in providing goods and services to the general market.

Compared to the size of the Turkish immigrant population in Britain, the high proportion of Turkish self-employed person in the UK constitutes a similar ratio to that of the Chinese self-employed (see above, p. 237). Turkish self-employed persons are mainly concentrated in sectors such as textile, restaurant and retailer businesses. In particular, some of those who came as chefs and workers in the restaurants in the 1970s, upon being made redundant, have opened their own take-away shops and kebab houses all over Britain.

5.3.2 British policy regarding ethnic self-employment

From the end of the Second World War until the late 1960s, successive British governments encouraged large businesses in order to take advantage of economies of scale, as large firms were more able to operate and compete in international markets. It appears that the number of

small firms in Britain declined during this period. Since then, although governments have adopted a wide range of assistance programmes for small businesses, there has been no legislation that formalises these efforts or provides a legal framework for the support of small businesses (Waldinger et al. 1990: 182).

The 1979 Conservative Election Manifesto emphasised the success of smaller businesses in creating new jobs, and the encouragement of such enterprises has become a central feature of Conservative Government policy (Rubery et al. 1993: 131).

While it is generally agreed that equal access to employment in the labour market should be provided for all, regardless of racial or ethnic distinctions, the view that members of minority communities should be encouraged to go into business has been less widely appreciated (see Ward 1983).

As pointed out in Chapter 4.3 above, British policy has always been concerned overwhelmingly with social considerations when it comes to the issue of immigrants and ethnic minorities. Ethnic business development is no exception to this. Concern with business development among British 'black' minorities arose in the aftermath of widespread civil unrest in 1981. The lack of black business opportunities was pointed out among the causes of unrest in predominantly black areas, hinting at a casual link between dissatisfaction with the social and economic conditions and the role of development of ethnic entrepreneurship (Scarman 1981). This conclusion was soon followed and confirmed by the findings of a report undertaken by the Home Office on the state of West Indian businesses and by a number of research projects (see Waldinger et al. 1990: 182-183).

The idea of ethnic business as a policy instrument to tackle socio-economic problems associated with the presence of ethnic minority populations, such as unemployment and unrest in inner city areas was particularly significant (Rubery et al. 1993: 131). Thus, ethnic self-

employment was viewed by the official policy to be a solution to such problems for ethnic minorities:

> "The development of businesses run by members of ethnic minority groups is a vital element in tackling racial disadvantage in inner areas. They stimulate the creation of local jobs, the acquisition and extension of skills, and the promotion of new products. The potential for future growth thus offered helps increase the confidence and prosperity necessary for sustained improvement."[364]

Despite the changes in the official attitudes towards under-representation of black minorities and their problems in business, no formal statement of policy toward ethnic minority business, except that towards small business in general, has been made. The prevailing view remains that the problems facing ethnic minority businesses are not any different from those of other firms.

The implementation of public policy toward ethnic minority business can, therefore, take place at two levels. The first is policies concerning small businesses in general, as ethnic minority businesses tend to be small, although some of the largest British businesses are foreigner-owned. The second is policies aiming at inner cities in particular, where most ethnic minorities live. Despite a substantial initiative of the central government in 1986 aimed at providing advice and other business development services in London, Birmingham and Manchester, the largest volume of resources devoted to ethnic minority business development in Britain has come from local government (Waldinger et al. 1990: 184).

Yet it is government that benefits most from the ethnic business sector, not necessarily because of the contribution they make to the economy, but also for some other reasons. For example, the establishment of enterprises and the engagement of labour, particularly among ethnic minorities, decreases the burden of social security payments, enhances social stability and offers the possibility of wealth creation, all of which contribute to the development of the economy (Ward 1983: 8). Therefore, this is an area which government should have a strong interest in for providing support programmes in government policies.

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[364] Department of the Environment (1983), cited in Rubery et al. 1993: 131.

On the other hand, those Turkish immigrants who have permanent residence, which can be obtained after four years of legal employment or five years of legal residence in the UK, can set up their own business or join a business. In Britain, those wishing to set up their own businesses can do so like any other British national (see Cooke and Borer 1986).

5.3.3 Turkish nationals from Turkey applying to open a business in Britain

Government policy regarding foreign businesses is reflected highly extensively in the immigration rules. When it comes to the admission of foreign self-employed persons, the UK, perhaps, has the most elaborate and institutionalised system of immigration law in Western Europe. This has resulted partly from the deliberate policies of the British government to encourage foreign investment and to keep Britain as an attractive place for world-wide business. In fact, London has been known, for long, as a world centre of commerce and trade.

The rules concerning foreign business and self-employment have undergone many amendments since 1973. Earlier, there was a broad discretion given to the authorities to admit persons to start or join a business or to permit visitors or others on a temporary stay in the UK to move on to the self-employment category (see Macdonald and Blake 1991: 228). There was no minimum investment requirement and an application which could be made in-country, was to be assessed on its merit and 'in the round'.[365]

The Rules have become much more restrictive since 1980. A whole list of specific new requirements which the business applicant must comply with has been introduced into the old list, and the old formula that applications should be 'considered on merit' has disappeared (see Macdonald and Blake 1991: 228). One consequent result of this is that increasing numbers of applicants are avoiding the business rules altogether, trying to achieve the same result through the work permit scheme or sole representation (Macdonald and Blake 1995: 299).

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[365] *R v Immigration Appeal Tribunal, ex parte John Maxwell Clarke Joseph* [1977] Imm AR 70 at p. 72

The new Rules have a long list of conditions which must be satisfied by anyone wishing to set up a business in the UK. Under para 201 of the Immigration Rules (HC 395), the main requirements that an applicant would need to satisfy in order to obtain entry clearance are, in essence, that:[366]

- He has £200,000 of his own money to invest in a UK business. The money must be under his control and must be disposable in the UK, held in his own name and not by trust or another investment vehicle.
- He will have sufficient additional funds to maintain and accommodate himself and any dependants without recourse to public funds or other employment until the business provides him with an income.
- He will be actively involved full-time in trading, providing services on his own account, in partnership, or as a company director.
- His level of financial investment will be proportional to his interest in the business.
- He will have a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment.
- He will be able to bear his share of any liabilities.
- There is a genuine need for his investment and services in the UK.
- His share of the profits of the business will be sufficient to maintain and accommodate himself and any dependants without recourse to public funds or other employment.
- He does not intend to supplement his activities by taking other employment in the UK.

In addition to meeting the common requirements, where the business is new, an applicant must also produce evidence that he will be bringing into the country sufficient funds of his own to establish a business, and that there will be additional employment for at least two persons already settled in the UK.[367]

The new Rules (para 200 of HC 395) have defined a business as either a sole trader, a partnership, or a company registered in the UK. The new Rules on business persons do not constitute major changes to the former Rules, but have clarified what was the Home Office policy or practice in the past. For example, under the former Rules it was Home Office policy that the business person had to employ full-time at least two persons settled in the UK. The New Rules now state explicitly that this is a requirement.[368]

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[366]For details see Macdonald and Blake 1995: 301, Devine 1995: 92-93.
[367]HC 395, para 203.
[368]HC 395, paras 202(iii) and 203(ii).

Once entry clearance has been granted, admission is allowed usually for a period of 12 months with a condition restricting the person's freedom to take employment. Applications for extensions by persons established in business will only be granted if the applicant continues to fulfil the requirements mentioned to obtain entry.[369] The Home Office will be concerned to see how far the business plan has been carried out, and to what extent the capital has been invested, in addition to an investigation of new employment created by the investment and profitability of the business (see Macdonald and Blake 1995: 307-308). If an application is successful, the applicant's stay will be extended for a period of three years with a further condition restricting freedom to take employment.[370]

Whereas one may be admitted into the UK as a visitor to 'conduct' or 'transact' business, such admission will usually be limited to a period of six months and subject to the restrictions which apply to visitors. Business visitors have now been placed into the general category of visitors under the new Immigration Rules.[371] Paragraph 40 (HC 395) defines a visitor as including "a person living and working outside the UK who comes to the UK to transact business such as attending meetings and briefings, fact finding, negotiating or making contracts with UK businesses to buy or sell goods or services". Such activities that business visitors are allowed to do in the Rules are not exhaustive.

The Rules prohibits a visitor to take employment in the UK, to intend to produce goods or provide services within the UK, including the selling of goods or services direct to members of the public.[372] Devine (1995: 14) cites a Home Office policy which operates to allow visitors to:

> "sign cheques, make purchases or enter into contracts ... but ... not deal with members of the public in furtherance of ... employment abroad. In addition visitors may attend trade fairs, conferences, short classroom training courses and

[369]HC 395, para 206.
[370]HC 395, para 207.
[371]HC 395, paras 40-46.
[372]HC 395, para 41.

> meetings provided such activities are essentially for fact finding purposes as recipients of services or briefings by UK businesses ... and undertake fact-finding missions in order to check details or examine goods as a service to the overseas business involved with a UK business."

The Home Office also permit the entry to the UK of overseas visitors in certain circumstances as a matter of administrative policy, including those delivering goods and passengers from abroad, guest speakers at conferences or seminars, representatives of foreign manufacturers, and so on (for details see Devine 1995: 15).

The new set of Rules, effective from 1 October 1994, also made major changes in business related immigration for non-EU nationals.[373] There exists now a new category of people called 'investors'.[374] This is a split-off from the category of persons of independent means. Under the former Rules (HC 251) people who had a close connection with the UK and a freely transferable minimum capital of £200,000 could get entry clearance.

Now, a foreign investor should have reached the minimum age of 60 prior to applying for entry clearance, in the first place (for details see Andonian 1995: 14-15). Further, he must have under his control and disposable in the UK not less than £1,000,000; intend to invest not less than £750,000 of his capital in the UK; intend to make the UK his main home; and not intend to take employment other than self-employment.[375]

The old category of independent means has now been narrowed down to prevent younger people making use of what was a relatively easy route leading to settlement. Yet, many wealthy foreign investors will not be able to qualify for independent means status for they are now classified as youngsters by the Home Office (see Andonian 1995: 14). The minimum capital requirement of £1,000,000 and the intention to invest at least three quarters of assets in the UK is also another setback and may well deter applicants from the outset.[376] It is also pointed

[373]See HC 395, particularly Articles 200-276.
[374]See HC 395, paras 224-231.
[375]See HC 395, para 224.
[376]See Andonian 1995: 14-15 for a critical assessment of the new 'investor' category.

out that the numbers who will take advantage of this will be lower, as the minimum amount of investment is set at a high level (Macdonald and Blake 1995: 309).

The UK became a member of the EC on 1 January 1973, and since then both the UK and Turkish governments could arguably not impose new restrictions on freedom of establishment, as a result of Article 41(1) of the Additional Protocol of 1970 (see already pp. 112-113 above). The UK only became bound by the 'standstill' clause in 1973. This could mean that Turkish businessmen seeking entry clearance, or indeed variation to leave to remain for the purpose of running a business as self-employed persons and businessmen, can rely on the more favourable provisions of the 1973 rules rather than the very restrictive regime which came into effect afterwards. It is said that the relevant Immigration Rules in force in January 1973 were HC 80 (Wornham 1994: 24).

Thus, in principle, any of the changes roughly listed above should not be applicable to Turkish nationals wishing to set up a business or to join a business in Britain. For example, a minimum investment of £200,000 should not be required from a Turkish applicant; and a Turkish national should be able to move on to the self-employment category from a visitor or student status while in the UK. Further, the implications of Article 41 of the Protocol appear not to be restricted to in-country applications.

In practice, however, the standstill clause of Article 41 does not appear to be taken into account by the Home Office for the time being. This can be easily deduced from the omission in the New Immigration Rules of the special position of Turkish self-employed persons. The Immigration Rules (HC 1995) now contain special provisions for nationals of Hungary and Poland who intend to establish themselves in business in the UK under the provisions of the EC Association Agreements with those countries.[377] These East European nationals are not required to meet the economic requirements of the business rules which apply to non-EEA

[377]See HC 395, paras 211-223, this has now been extended, in April 1996, to Bulgaria, the Czech Republic, Romania, Slovakia and Slovenia (see HC 329, paras 5 and 6).

nationals. They do not, for example, have to invest a minimum amount of £200,000 or have to show that they will be in a position to create full-time employment for at least two persons settled in the UK.

In contrast to these association agreements with East European countries, which came into force on 1 February 1994, earlier association agreements concluded with Turkey and other countries (for instance Algeria, Morocco and Tunisia) do not receive any mention in the Immigration Rules. The omission of the special position of Turkish nationals who intend to establish themselves in the UK appears to be reflecting a deliberate British policy concerning Turkish self-employed persons. It seems that the Home Office is unwilling to accept a more liberal and less restrictive legal regime for Turkish self-employed persons, which has become much restrictive in general since 1970s anyway, perhaps for fear of the immigration rules being abused by Turkish applicants.

There is no test case as yet concerning the operation of the standstill clause of Article 41 of the Additional Protocol for Turkish nationals who intend to establish themselves in business in the UK. It appears that Turkish applicants are, for the time being, avoiding to get into conflict with immigration authorities on this issue, or they are unsure about the application of the discretionary powers that immigration authorities already hold. This may discourage small and middle-scale Turkish entrepreneurs from applying to set up business in the UK.

On the other hand, under sole representation rules, representatives of overseas firms having no branch, subsidiary or other representative in the UK can come without a work permit, if the head quarters and principal place of the business is outside the UK, and if certain other requirements are met.[378] A sole representative must, thus, have been recruited and taken on as an employee outside the UK; is a senior employee with full authority to take operational decisions and can set up and operate a registered branch or wholly-owned subsidiary; will be in full-time employment as a sole representative; does not intend to take employment outside

[378]HC 395, para 144, see also Macdonald and Blake 1995: 278-280.

the limits of sole representation; is not a majority shareholder in the overseas firm; and can satisfy the maintenance and accommodation provisions of the Immigration Rules.[379]

Entry as a sole representative is more attractive as there exists no requirement of a £200,000 investment, despite the fact that the business must be registered as a branch or wholly owned subsidiary of the overseas firm (Devine 1995: 88). Turkish entrepreneurs, thus, may well use sole representation rules, which prove to be an easier alternative compared to rules on establishing business, to provide contacts in order to carry out work for the company in the UK. Once an individual coming under the sole representative rules is established in the UK, he can proceed to establish a branch or subsidiary, which is now seen as the principal purpose of coming as sole representative (Macdonald and Blake 1995: 280).

Thus, although Turks do not have a high profile in British immigration law and practice, it is apparent that Turks continue to enter Britain as businessmen. To assess the size of this movement and its finer details would be a study in its own right.

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[379]HC 395, para 144.

CHAPTER 6

THE LEGAL RESPONSES TOWARDS FAMILY REUNIFICATION OF TURKISH IMMIGRANTS

Issues resulting from family reunification, when migrants send for their family members to join them, are of an enduring nature: they will always remain and need to be resolved as long as all members of a family unit do not move at the same time (Perruchoud 1989: 509). Dumon (1976: 58) distinguishes two different sets of approaches in relation to legal regulations on family migration (both family reunification and family formation). The first one can be characterised as being based on humanitarian law, meaning that the right to family reunification and family formation is based on fundamental principles and even on a fundamental structure of society. The second approach is characterised by a focus on positive legislation, i.e. an overview of the actual rules governing the status and position of migrants.

Accordingly, two trends can be identified in considering family migration in legal terms: the first is linked to the principle of family unity, the second to that of the free movement of persons (for details see Perruchoud 1989: 510-512). The following two chapters make use of a combination of these approaches.

As soon as migrants from a certain country have settled in receiving countries, chain migration of direct family members and (future) spouses is likely to develop (see chapter 2). Thus, the internal dynamics of each immigrant population lead to a migration flow which is more or less unrelated to direct labour market needs (Sopemi-Netherlands 1991: 41).

However, it must also be admitted that the process of family reunification as well as family formation has blurred the fine lines between 'primary' and 'secondary migration' in terms of assessing the underlying motives of such cases of family reunification. There is obviously a link between family migration and its implications on the labour market, as most of the new

entrants under family migration are prospective labourers in the receiving country's labour market.

It has often been maintained that family migration, by dramatically changing the socio-demographic structure of the immigrant population, contributes to the immigrant population's becoming or tending to become a net drain on many welfare state programmes, such as education, medical care, housing, family allowances, and unemployment (Freeman 1986: 60). Welfare state benefits are often associated in the public mind with a visible and subordinate minority, and the welfare state is seen as something for 'them' paid for by 'us'.

However, such statements do not quite reflect the reality. Nor are they based on scientific proof. On the contrary, recent empirical research on the economic impact of immigration shows that it would be mistaken to underestimate the positive impact which immigration has had and continues to have (see Spencer (ed) 1994a, Velling 1995).

Even if we accepted the conclusion that immigration is a net drain on welfare state programmes, a central question would be to what extent family reunification might occur if laws and practices were liberalised for third-country nationals - if they were as liberal for them as they already are for EU citizens.[380] The empirical information from Germany sheds light on what has been called the 'theoretical maximum extent of unsatisfied reunification' that could occur under a liberal admissions policy (see Böhning and Werquin 1990: 18-23).

This cited study indicates that the proportions of what has been called 'unsatisfied demand' for family reunification in respect of spouses and children, and the perceived economic burden of family reunification are no longer a significant issue today.[381] This is due to the fact, first,

[380]Böhning and Werquin (1990: 17, para 40) suggest that "third country nationals should, subject only to reasonable formalities, be free to have their spouse, their children under the age of 21 years or dependent on them, as well as dependent relatives in the ascending line, join them in the EC member state in which they lawfully reside". This specifies reunification for the same categories of family members as benefit from it under EU regulations.

[381]For details of figures and tables, see ibid, pp: 19-23.

that today a relatively small number of spouses and children remain separated abroad; and second that by no means all of those who might theoretically be entitled to enter an EU state would actually immigrate, even if a liberal family reunification regime became the rule (Böhning and Werquin 1990: 19). This may well be so, very simply, because family members of immigrants may have other plans and expectations from life and feel better off living in the country of origin, perhaps relying on remittances.

It has also been confirmed that family reunification for Turks has been practically (in Germany) or nearly (in the Netherlands) completed by the late 1980s (Sopemi-Netherlands 1991: 46). The Turkish population in Germany did not increase much between 1980 and 1987, whereas in the same period the Turkish population in the Netherlands went up from 119,000 to 160,600 (Sopemi-Netherlands 1991: 45). In Germany also, in comparison with the Netherlands, a larger selective return migration has taken place on account of a limited access to the welfare services and (temporarily) explicit return migration policies for certain categories of migrants. This will have automatically resulted in a diminished potential for chain migration of family members and spouses.

On the other hand, the phase of family reunification will not come to a total close, as long as various forms of primary migration are still continuing. In particular, family members of those immigrant workers who come on work permits and those of asylum seekers are new sources of family reunification, albeit to a limited extent so far as Turkish immigrants are concerned. Thus, the continued entry of such immigrants ensures that family reunification will remain an issue of some significance.

This chapter analyses the development of the three legal systems with reference to the immigration of existing family members of Turkish workers, as reflected in the laws and practices of these countries. This process of family members joining earlier migrants may also be called 'secondary migration' as opposed to the 'primary migration' of workers. An important prerequisite of family reunification as well as family formation is the existence of the earlier

migrant workers. An central aspect for our analysis is to what extent the three different immigration systems of Germany, the Netherlands and the UK have reacted differently to the pressures of Turkish migration through family reunification, and why this has been so.

6.1 Germany

The laws and regulations governing both family reunification and family formation of migrant workers in Western Europe are inspired by a mixture of economic, social and humanitarian considerations. The principles and guidelines of family reunification are usually laid down in administrative regulations, special rules or merely internal circulars, but rarely in statutes. Germany is no exception to this (see Hailbronner 1987: 352). The Foreigners Act of 1965 did not contain any provisions on family reunification because the issue simply had not been considered (JCWI 1994: 2). This law regulated immigration policy only in terms of the recruitment of migrant workers for the German economic success, which shows and confirms the underdeveloped nature of law in relation to migration of family members.

6.1.1 Pre-1973 policies

In the early days of Turkish migration to Germany, family reunification of Turkish immigrants was not really a concern for the Federal Republic. Instead, it was sometimes viewed as a policy tool (see Chapter 2.4.1 at pp. 64-65 above). Although family reunification was subject to relatively strict conditions, application of these conditions often depended on the labour market situation. This shows, from the start, an awareness that family members are also potential workers and that they certainly play economic roles.

Shortly after the 1965 law came into force, a decision by the conference of the German Ministers of the Interior, taken on 3/4 June 1965, considered the circumstances in which family reunification could take place. Thus, foreign workers could bring their families under the following conditions: a) they must have been living in Germany for at least three years, b) intend to work in Germany for a further length of time, and c) have adequate housing that must

be comparable with the 'normal' conditions under which a German worker would live (see Nikolinakos 1971: 81-82).

However, exceptions were always allowed and there was much space for the authorities to make arbitrary decisions. Already after a worker had stayed in Germany, and when it was expected that the worker and his family would adapt themselves to German conditions without undue difficulties, they could be exempted from the above conditions (Nikolinakos 1971: 82). Most importantly, members of the family were permitted to stay if they came to the Federal Republic as 'workers' in which case the above conditions did not apply (see above, p. 64). As long as the close relatives can be employed as workers, and therefore can be productive to the German economy, they were welcome (Nikolinakos 1971: 82). Therefore, as some recent research emphasises, family migrants in Germany have indeed been viewed as potential workers (Menski 1994b: 112).

Economic factors, thus, seem to have played a large role in this context. The wage scale of women was lower than that of men, particularly in industries like textile, food processing and electronics. Therefore, it was rational for many employers to recruit women rather than men. Further, men who are on the waiting list of the Turkish Employment Service (TES) were encouraging their spouses and even daughters to take up employment abroad in order to secure a legal permit of residence which automatically makes them available for employment (see Abadan 1976: 9-10 and above, p. 65).

6.1.2 Post-1973 developments in family reunification

German policy has maintained a sharp division between residence and work permits for family members. This distinction became increasingly important in light of the rise in family reunification as well as family formation after 1973. The legislation concerning work residence permits and entrance of family members has been piecemeal in nature and has changed frequently, sometimes as a result of pressure from various groups supporting

immigrants, but often in line with changes in the labour market (see Mushaben 1985: 127-128).

The upward trend in the immigration of families after the early 1970s, particularly by means of family reunification, can also be due to the fact that migrants were afraid of a possible hardening of the regulations and were therefore hurrying to bring their families to the Federal Republic (Hönekopp and Ullman 1982: 139).

The Ministry of Labour ordered, in a decree of November 1974, the Federal Institute of Labour to deny work permits to all non-EC citizens who had entered Germany after 30 November 1974.[382] Under political pressure, this so-called 'deadline date', which allowed work permits only for those family members resident prior to 1974 had to be changed. As a result, a retroactive provision was passed in 1976 concerning work permits for family members of foreign workers, which extended to include those who arrived until December 1976 (Bendix 1985: 35).

Nevertheless, shortly after this extension was adopted, this so-called deadline date was replaced in April 1979 by a new rule named 'individual residence requirement' (see Esser and Korte 1985: 186; Bendix 1985: 35). Subject to the priority of German workers and regardless of the date of entry, spouses were granted a work permit after four years and children after two years of residency. Economic and political considerations have subsequently led to modifications in this waiting period. Children could be exempted from this residence requirement if they had taken part in vocational training for at least six months (Esser and Korte 1985: 186; Mehrländer 1985: 176).

Considerations of an economic nature help to explain why German employers later on recommended that the children of immigrant workers be given the opportunity to follow

[382]The so-called *Stichtagsregelung* ('deadline date') is a regulation based on the date of arrival of foreigners in the FRG, for details see O'Brien: 118-119 and Mehrländer 1985: 176.

vocational training courses, implying concern about the predicted shortage of skilled workers in the years ahead (Hönekopp and Ullman 1982: 124). Now, the family members of foreign workers holding a temporary residence permit may, in principle, obtain a work permit after one year, regard being had to the situation and development of the labour market and the individual circumstances of each case (CEC 1992: 35). Even this one year waiting period was waived for family members who hold an unlimited residence permit (CEC 1992: 35). This clearly shows again that economic factors played a much more important role than humanitarian or social values in the shaping of German policy concerning family migration.

The trend towards increasing family reunification was further reinforced by legislation in the FRG, presumably without a deliberate intention to do so (see Korte 1985: 36-37 and Abadan-Unat 1986: 337-338). As a result of exceptions for migrants from the EC and Turkey, these migrants were eligible to receive child benefit (*Kindergeld*) for children living in their native country. Until the end of 1974, Turkish workers, like others, could obtain children's allowances irrespective of the place of residence of the dependants.[383] Differential rates came into effect, on 1 January 1975, as part of a tax reform, which also considerably raised *Kindergeld* for children living in West Germany (see Abadan-Unat 1976: 34 and Korte 1985: 37).

On the other hand, for children of foreign workers from the recruitment countries, including Turkey, who remained separate from their parents, lower rates applied. This meant that Turkish families received less money if their children remained in Turkey (see Korte 1985: 36-37). Not surprisingly, therefore, more and more Turkish workers began to bring their children to the FRG. This is one of the main reasons why fewer families have sent back their children to their native countries since 1975, and increasingly more children have been brought to Germany.

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[383]In Germany, financial aid for children, as well as other social benefits (social insurance, unemployment insurance) is dependent on the principle of territoriality, which is based on the idea of granting any legal rights to everybody, citizen or foreigner, residing in the territory of a given state (see Abadan-Unat 1976 and Korte 1985: 36).

Incidentally, the modification of Article 33 of the Turkish-German Social Security Agreement of 1964 in 1975 represented an open violation of the principle of equal treatment of migrant workers' children, as it is formulated in bi- and multilateral agreements.[384] What concerns us here, though, is the fact that a particular domestic policy, designed partly to encourage German families to have more children, led to considerable immigration consequences which were probably not foreseen at the time.

6.1.3 Definition of family

Since the second half of the 1970s, almost all member states of the EU attempted to limit the number of migrants entering for family reunification within the legal provisions by defining more tightly, among other things, the term 'family'. This new definition of 'family' was supposed to support the intended control of the number of immigrants in the respective country which had already begun by the recruitment stop, as well as an aggravated visa policy (Migration in Europe 1992: 268).

The migration of family members of Turkish immigrants to Germany remained by and large within the domains of national law, as in other Western European states, conferring on governments considerable discretion in this area (Chlowinski 1994: 569). However, the point must be made that, as a matter of law, any definition of family and any restriction to the right to family life must take into account the Community law and other international instruments, notably the ECHR.

In 1978, the Government reduced the maximum age at which children of foreigners could enter Germany from 20 to 16.[385] In line with the restrictive alien policy of the CDU/FDP government, the new Minister of the Interior proposed lowering the age at which foreign

[384] The Turkey-Germany Social Security Agreement of 1964 is based upon the recognition of the principle of absolutely equal treatment of workers of both countries in matters of social security, including children's allowances (see Abadan-Unat 1976: 32). Further note Article 25 of the UDHR, Article 4 and 6 of the ILO Social Convention of 1962 and Article 51 of the EC.
[385] See O'Brien 1988: 119, quoting Bundesministerium für Arbeit und Sozialordnung 1977.

children could be joined with their parents in West Germany from 16 to 6 in the early 1980s (O'Brien 1988: 125).

This was said to be in the interest of the integration of children of migrant workers, as it would allow them to benefit from German schooling. It should be noted that similar developments and arguments began to appear in the late 1980s in the Netherlands concerning the issue of integration of immigrants' children (see Chapter 6.2.3 below). This has led eventually to further restrictions in the scope of the definition of 'family' and various conditions attached to family reunification rights.

Nevertheless, a strict definition of the term 'family' and the obstruction of the right of family reunification have, in some cases, problematic consequences, seriously damaging the integration of migrants who live in the receiving country. It has been stated that:

> "The continual slippage between the pronouncements of a concern for integration and well-being of the foreign workers [and their children] and the realities of policies that tend to produce opposite outcomes can only reflect the deeper ambivalence of the Federal Republic toward the foreign workers" (Rist 1978: 88).

The ambivalent character of the measures taken in order to promote the integration of immigrants' children is not only a specific issue for Germany but is for all the countries we are concerned with. One would argue that such integrationist approaches are often nothing more than a policy of stabilisation. If early entry and therefore integration of Turkish children is really the target, one can easily find other ways of achieving this through encouragement of various kinds.

It has been admitted that the effort to stem the flow of non-German cultural influences by repatriating the second generation or by lowering the age for entry is "a pseudo-solution to a pseudo-problem" and "makes no positive contribution to current integration efforts".[386]

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[386]From an interview with Barbara John, 23.9.1983, quoted in Mushaben 1985: 146-147.

A decree of 2 December 1981 has excluded the following individuals from resettling with their families in Germany:[387] minors of over sixteen,[388] foreign children if only one parent is living in Germany (except half-orphans and children of divorced or unmarried parents) and relatives of aliens whose residence in Germany has been permitted only with respect to their intention to study or for job training purposes (see also Chapter 7.1).

In practice, because of such restrictions, Turkish students as well as other foreign students are encountering hardships in bringing their spouses and other dependants into Germany. It is even difficult for those possessing a government (Turkish) scholarship. I know from my personal contacts that in many of these cases, post-graduate students are actually employees working in a university or a public body in Turkey.

On the other hand, as established in Chapter 3 (see pp. 118-120 above), the definition of the family members of a worker must cover his spouse and descendants who are under the age of 21 years or are dependants; and even dependent relatives in the ascending line of the worker and his spouse.[389] Thus, one could argue that there is a conflict between German law and Community law, and that the age limit of 16 for the admission of dependants of workers cannot be applied to Turkish immigrants (see p. 120 above).

Children can obtain a residence permit in their own right after having been resident in Germany for five years or if they are living in Germany and reach the age of 18, regardless of the parents' status, or if the residence permits of the parents are changed to unlimited status (JCWI 1994: 2). The admission of other relatives outside the nuclear family is entirely at the discretion of the authorities and a residence permit can be issued at the discretion of the authorities.[390] In each individual case, the financial and accommodation situation of the family

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[387]See Quaas 1982: 39; Castles 1985: 526 and JCWI 1994: 2.
[388]The states of Bremen and Hessen raised the age of entry for children to eighteen in 1984 (Thränhardt 1984: 125).
[389]Article 10 of Regulation 1612/68 and Appendix to the Social Charter.
[390]Section 22 of the Foreigners Act of 1990, see Motomura 1995: 516.

members settled in Germany will be considered and the entry of other relatives will only be permitted to avoid 'undue hardship' (JCWI 1994: 2).

There is no difference in the treatment of adopted children. Adoption of a child and admission under family reunification rules is allowed if it is done in accordance with the German rules of adoption. A German court upheld the decision of the Foreigners Police, in which a Turkish child adopted by a Turkish woman was refused a residence permit, on the ground that the adoption decision taken by a foreign court was not in accordance with the procedure laid down in German law.[391]

For the definition of family members, one should take into account the cultural differences in what constitutes family life. It has been argued that Article 6 of the German Basic Law is based on Christian/occidental ideas which cannot be taken as the exclusive model for granting family benefits (Thomsen 1987: 1956). On the other hand, the term 'family' should not be interpreted as meaning that the member of the family must live under the same roof permanently as the worker. It was held by the ECJ in Diatta that "the members of a migrant worker's family, as defined in Article 10 of Regulation 1612/68, are not necessarily required to live permanently with him in order to qualify for a right of residence."[392] It was also concluded by the ECJ (ibid, para 20) that a marital relationship is not considered to be dissolved merely because the spouses live separately, even with the intention to divorce at a later date, and so long as it has not been terminated by the competent authority, a marriage subsists legally.

More recently, in Berrehab,[393] the European Court of Human Rights in Strasbourg has ruled that the relation of a divorced Moroccan father and his daughter, who were in contact with each other four times for a couple of hours a week, constitutes family life despite the fact that they were not actually living together as members of one family.

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[391]Decision of Hessen High Administration Court, AZ: 12 UE 2361/92, see *Hürriyet*, 12/7/1993.
[392]See Aissatou Diatta v. Land Berlin (Case 267/83) [1986] 2 CMLR 164, at p. 176.
[393]See Berrehab [1988] 11 EHRR 322.

6.1.4 Legal provisions concerning family reunification

According to the Foreigners Act Directive of 1990, certain categories of foreign nationals are exempt from the requirement of a residence permit. Children under 16 of EU or EFTA countries, or from (the former territory of) Yugoslavia, Morocco, Turkey or Tunisia if they meet certain other requirements, are exempt from the requirement of a residence permit.[394] Further, certain classes of individuals are entitled to receive a *residence permit* (right of residence) and the competent authorities have no discretion in deciding whether to grant the permit or not, under the Foreigners Act of 1990. Foreign nationals over the age of 15 but under the age of 21 are one of these categories, provided they grew up in Germany and meet certain minimum residency and financial support requirements (s 6 I Foreigners Act of 1990).

Under Article 7 of Decision 1/80 (para 1, first indent) (see Appendix 4), the members of the family of a Turkish worker in Germany, who have been authorised to join him, shall be entitled to employment after three years of legal residency, subject to priority of workers of member states. After five years, they will enjoy free access to any paid employment, under the second indent of the same document. Further, under the second paragraph of Article 7 of Decision 1/80, upon completing a course of vocational training, no length of residency is required for a young person, provided one of the parents has been legally employed in Germany for at least three years. This constitutes an encouragement to the second or third generation to take up vocational training. This is in line with general German economic and educational policies.

It has recently become clearer that this provision is subject to no condition of the age of the child or of the grounds for granting the child leave to enter the host member state. In particular, the ECJ maintained in Eroğlu that the fact that Ms Eroğlu was not given leave to enter Germany within the framework of family reunification has no relevance.[395] Ms Eroğlu, having accomplished vocational training in a certain field in a Member State, was held to have

[394] See, particularly, sections 2-8 of the Foreigners Act Directive of 1990.
[395] Eroğlu, para 22 of the judgement.

the right, under the terms of Article 7, second paragraph of Decision 1/80, to 'respond to any offer of employment in the same Member State'.[396]

Article 13 of Decision 1/80 prohibits new restrictions on the conditions of access to employment applicable to members of the workers' families legally resident and employed in the respective territories. This article falls short of providing a legal remedy against the conditions of access to the Germany territory, as it explicitly makes it a condition to be already "legally resident and employed".

For people who hold an indefinite residence permit, family migration is a right, subject only to the availability of accommodation and adequate income, whereas for others, family migration will be considered by the authorities on a discretionary basis (JCWI 1994: 3). Indefinite residence permits are issued in the following circumstances:

• when the workers have lived in Germany for five years on a 'not restricted' permit basis, are able to speak adequate German, and there is no reason for their expulsion;
• when the workers have lived in Germany for eight years on a restricted permit; have an adequate standard of living from employment; have paid at least 60 monthly contributions to a pension fund; and are otherwise of good character (see JCWI 1994: 3).

The resident worker should be financially independent, which means an approximate monthly income of DM 1,500 for a married couple and DM 2,200 for a couple with two children (JCWI 1994: 3).

Housing is a condition that is almost universally regarded as a requisite for family reunification, as well as family formation. For example, paragraph 13(2) of the ILO Migrant Workers' Recommendation of 1975 lays down the prerequisite that the worker should have

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[396]Id.

"for his family appropriate accommodation which meets the standard normally applicable to the nationals of the country of employment".[397]

According to German regulations, housing standards must meet the standards of housing for German families. The accommodation requirements of German policy prior to granting entrance visas to family members were intended to guarantee the welfare of dependants. According to guidelines for foreign workers' housing in Germany in 1973, such housing had to provide 8 m^2 for each household.[398] In Bavaria, this figure was as high as 12 m^2, and all members are counted, including those living in the home country (Leitner 1987: 78). There should now be 12 m^2 for each person older than six in the household and 10 m^2 for every child over the age of two (JCWI 1994: 3). This indicates that the basic requirements have become much stricter over time.

With the introduction of the new Foreigners Act of 1990, the requirement of 'adequate' housing is now not imposed on certain categories of dependants and in some cases.[399] The housing requirement is not imposed in cases of children of less than two years of age and of those children born in Germany. Further, children of workers who do not rely on state benefits are exempt from the requirement of proving that availability of adequate housing.

6.1.5 Right to family life

The express purpose of family migration under section 17 of the Foreigners Act of 1990 is stated to foster protection of the family under Article 6 of the German Constitution (Motomura 1995: 517). The first three paragraphs of the Article provide as follows:

> (1) Marriage and family shall enjoy the special protection of the state;
> (2) The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect;

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[397]Note also that the EC Regulation No. 1612, Article 10(3) and many bilateral treaties set the same or similar condition of housing.

[398]Richtlinien für die Unterkünfte ausländischer Arbeitnehmer in der BRD, April 1973.

[399]See Bündnis Türkischer Einwanderer (Türkiye Göçmenler Birliği (TGB)), Hamburg, Press Release on the new Foreigners Law, 14 May 1990, p. 3.

> (3) Children may not be separated from their families against the will of the persons entitled to bring them up, except pursuant to a law, if those so entitled fail or the children are otherwise threatened with neglect.

Article 6 is also applicable to Turkish immigrants, as the article does not make any differentiation between Germans and non-Germans like many other provisions of the Constitution. The Constitutional Court has, actually, extended the application of these general provisions to immigration cases. The Court found in 1987 that Article 6 applies to family relationships between aliens already residing in Germany and aliens seeking to reside in Germany.[400] The Court held that any regulation of entry must satisfy the general constitutional requirement of proportionality, i.e., the need for regulation must be balanced against the impairment of family unity as protected by Article 6 (see also Chapter 7.1 below).

The courts in Germany have extended those guarantees to an obligation of the State to minimise inconveniences and obstacles to family life and have required appropriate justification whenever decisions are inconsistent with these duties (Hailbronner 1987: 350). However, further rights of alien family members, i.e. a right to enter or to stay or to be protected against expulsion measures, have generally not been recognised (Id).

There is evidence that in cases where one of the family members is German, the right to family has been interpreted rather more generously. In a recent case, the Federal Constitutional Court (BVG) has ruled that the Turkish father of a German child in Hamburg may not be expelled, even though he is not married to the child's German mother.[401] According to the decision, even an unmarried father of foreign nationality is entitled to the right to live as a family as guaranteed under Article 6 of the Constitution.[402] This ruling of the Constitutional Court has quashed the earlier decision by the High Administrative Court (OVG) of Hamburg, in which the Court had only ordered the authorities to suspend the deportation order against the Turkish father.

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[400] Judgement of May 12, 1987, 76 *BVerfGE* 1.
[401] Az: 2 BvR 1542/94.
[402] See also *MNS*, September 1994, p. 3.

Thus, the Constitutional Court has established that when family life between a foreigner and his German child is possible only in Germany, the German state is obliged to protect the family and to give this matter priority over the interests of immigration policy. Further, the Länder have been called upon by the Federal Government not to permit the deportation of foreign minors as well as spouses, particularly in case of expulsion, the death or marriage breakdown of the worker (CEC 1992: 30).

Foreign dependants have sometimes been viewed as an economic liability, as well as probable competitors in the labour market. The tenet that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State"[403], has been put into practice for migrant workers with conditions attached to it (Böhning and Werquin 1990: 18-19). In the German case, although Germany is officially not an immigration country, the rules about family reunification appear to take account of the economic potential that young family members constitute and thus work in favour of the immigrants.

Family reunification is said to be a bone of contention between third-country nationals, particularly Turks in this case, and the authorities of the state in which they reside, in respect of both the actual restrictive principles governing it and the prevailing practice of admitting people. A change of laws and practices on the lines of those postulated for families from EU member states would, no doubt, have influence in terms of clearing the air between migrants and authorities, which will also make their successful integration more possible (Böhning and Werquin 1990: 23-24).

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[403]Article 23(1) of the International Covenant on Civil and Political Rights of 1966. A provision in similar language appears in Article 10(1) of the International Covenant on Economic, Social and Cultural Rights of 1966.

6.2 The Netherlands

As we repeatedly pointed out, the Turkish immigrant population in the Netherlands is one of the main immigrant communities, along with the Moroccans and Surinamese, which has been the target of the official ethnic minorities policy. Accordingly, the development of the Dutch law and practice regarding family reunification has had similar implications for Turkish immigrant families as for other main immigrant communities.

6.2.1 Early developments in family reunification

The first signs of a change in the perception of immigrants in the receiving society appeared when family migration started to gain momentum (see already p. 30-31, Chapter 2). Most members of the indigenous population were not in a situation where they had contacts with the immigrants, nor were these immigrants seen as competitors for scarce goods and benefits, particularly at the initial phases of migration, for instance in the field of housing and education (Entzinger 1984: 7).

The Dutch law concerning family reunification in the 1970s made it possible to bring over the family when the husband (usually) had worked one year in the Netherlands and had a job for at least another year, provided that he was able to find adequate housing (Amersfoort and Surie: 1987: 175). However, in practice, these regulations never proved to be very restrictive, as they were interpreted very loosely both by policy makers and the courts.

Increasing family reunification among Mediterranean migrants caused a rapid growth in the social needs of immigrants. In particular, Turkish immigrants along with Moroccans in the Netherlands became much more 'visible', as they sought access to many more sectors of society than before, such as schools, housing, and health care. According to a study published by the Dutch Justice Ministry, 42,000 foreigners reunited with their families and future spouses in

the Netherlands in 1989, which presented 70 per cent of all immigrants who settled in the country in that year.[404]

Following the recruitment stop in 1974, family reunification was the main migration type of Turks migrating to the Netherlands (see Sopemi-Netherlands-1991: 43). During the period between 1980 and 1989, at least three types of migration could be discerned: family reunification, family formation and asylum seekers. It has been estimated that 39-44 per cent of Turkish immigration in 1989 was family reunification, 31-44 per cent family formation, and at least 18 per cent could not be defined (see Sopemi-Netherlands 1991: 43).

In the Netherlands, family formation and family reunification constitute a separate ground for admission. If we set aside the regulations concerning the members of a family of a migrant worker in a member state, which fall within the scope of EC Directive 1612/68, members of a family of an alien, legally residing in the Netherlands or of a Dutch national, encounter special regulations.

We already saw (Chapter 4.2 above, p. 169) that, as early as in 1973, the employment of migrant workers was calculated by the Dutch Economic Planning Office not to be as beneficial for the Dutch economy as had been generally assumed. This reasoning was probably used to justify the recruitment stop. Similarly, the costs of family reunification particularly of migrant workers from the Mediterranean, including Turks of course, were predicted to be high in the long run (Bovenkerk 1979: 129). Turkish and Moroccan immigrants were becoming the main target of a restrictive immigration policy, particularly in the field of family migration.

With the increase in unemployment, particularly among the immigrant population, the concept of the welfare state has come under severe pressure. Although, in many instances the immigrants were among the first to suffer from unemployment resulting from the worsening economic situation, a tendency has become manifest in the receiving societies to put the blame

[404] See *MNS*, February 1992, p. 3.

for that very crisis on them (see already Entzinger 1984: 7). Consequently, the increase in unemployment levels in the 1980s greatly diminished the chances for young Turks and Moroccans to find a job.[405]

In 1979, for the first time, a set of rules concerning the residence rights of second generation migrants was drafted.[406] This was mainly done due to the recognition that it was unfair to deport children that had been admitted long ago for family reunion the moment they reached the age of majority. These rules, nevertheless, did not provide an unambiguous ground of application (see Groenendijk 1990b: 4). The rules, on the one hand, granted young migrants who had lived for five years in the country at their 21st birthday the right to a settlement permit. On the other hand, young migrants who had committed criminal offences did not receive such a permit. Instead, they were either deported or received a simple residence permit for a new probationary period.

In the coming years, the immigration rules concerning the second generation came under attack, both from immigration organisations and from MP's of the small left-wing parties (Groenendijk 1990b: 5). The government announced in 1983 a new policy concerning children of immigrants which contained a mixed message. Children who had lived with their parents for a year would no longer be deported if they happened to be unemployed when they left home or came of age (Groenendijk 1990b: 5).

The Dutch authorities consider that it is not possible to allow members of an immigrant's family to enter the Netherlands and yet deny them the right to work (Smolders 1982: 94-95). This point of view is expressed in legal terms in the Act on the Employment of Migrant Workers (Articles 3 and 8). Therefore, children of resident immigrants, who come on family reunification grounds, do not need a work permit. Instead, they are given a declaration

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[405]In 1981, one third of all Turks and Moroccans under 25 were registered as unemployed, whereas the corresponding figure was 18 per cent among young Dutch people. See Groenendijk 1990: 5, quoting Brassé et al 1983.
[406]Notitie Vreemdelingenbeleid 1979.

(*Verklaring*), which is different from temporary work permits (*Tewerkstellingsvergunningen*).[407] The Dutch policy in this respect appears to be in contrast with the FRG policy where waiting periods have been imposed on access to the labour market of children of immigrant workers who come under family reunification.

On the other hand, a fundamental shift appeared in the Dutch official policy relating to the admission of family members in the early 1990s (see further below). Controlling migratory flows is re-confirmed as a main priority of the Dutch authorities, but it now forms part of a comprehensive approach, combining prevention and more efficient management of arrivals of new migrants. The government assumes that this new 'integrated policy' for regulating migratory flows should help to assure the integration of ethnic minorities (CEC 1993: 36). This is similar to the policies applied in Britain over the years, which have aimed at controlling further immigration, whatever form it takes, and integrating those already in the country.

6.2.2 Definition of the family

There is no direct right in law allowing the entry and settlement of family members in the Netherlands. Instead, such issues of family reunification as well as family formation are regulated in accordance with the policies set out in the Ministerial Circular on Aliens (*Vreemdelingencirculaire*)[408] (JCWI 1994: 4). Similar to Germany, a negative development has been observed in Dutch immigration law regulating family reunification, particularly in the form of a restrictive definition of the family. This was apparently in response to increasing family reunification of immigrants, particularly from Turkey, Morocco and Surinam.

Definition of the family includes the spouse of a legally resident alien or a Dutch national, children under age (18 years), either born out of this marriage or being the child of one of the spouses, when they are actually a part of the family, and other members of the family that

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[407]See Sopemi-Netherlands-1992: 31 and also see Chapter 4.2.5, p. 177.

[408]The Ministrial Circular on Aliens (*Vreemdelingencirculaire*) No. B 19 of 9/9/1993 (referred to as the Circular B 19 from now on) on family reunification and family formation of aliens, see Jordens-Cotran 1993 for the text of the new circular and accompanying explanation in Dutch.

cannot be left behind in the country of origin as this would be unreasonable harshness, such as in the case of grand parents.[409] Children ought to be an actual part of the family residing in the Netherlands; the existence of the family relationship needs to be supported with official documents.[410]

On 1 January 1988, the maximum age in the rules on the status of dependent family members for children was reduced to 18 years (see Groenendijk 1990b: 7). A side effect of this change would be that children between 18 and 21 still awaiting permission to enter the country would lose their right to family reunification. Upon protest from immigrant organisations, the ministry added a transitional provision allowing this group to retain their previous rights. Nevertheless, as a result of this legislative change, all non-Dutch children of 18 to 21 years already living in the Netherlands automatically lost their residence status and had to report to the aliens' police and apply for a new residence permit or a settlement permit.[411] About 15,000 young Turks and Moroccans in this age group were afflicted and were checked by the police as to whether their behaviour (criminal offence, unemployment or not living with their parents) was still in conformity with the general immigration rules (Groenendijk 1990b: 7).

On the other hand, needless to say, as established in Chapter 3, the stipulated new age limit in the above definition of the family should not be applicable to Turkish immigrants. Accordingly, the definition of the family members of a Turkish worker must cover 'his spouse and descendants who are under the age of 21 years or are dependants; and even dependent relatives in the ascending line of the worker and his spouse.[412] Thus, it can be argued that the age limit of 18 for the admission of children of workers cannot be applied to Turkish immigrants (see the same argument for Germany, above, p. 257).

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[409]Circular B 19, section 2.1.2 and also see Kuijer and Woltjer 1991: 23.
[410]Circular B 19, section 2.1.2.2.
[411]Article III Royal Decree of 9/12/1987.
[412]Article 10 of Regulation 1612/68 and Appendix to the Social Charter.

When the family ties are broken, for instance as a result of divorce, children living with the other partner are no longer considered to be part of the family of the partner residing in the Netherlands.[413] Thus, in cases of only one parent living in the Netherlands, difficulties may arise in establishing whether children are dependent on that parent living in the Netherlands. In one of the unreported cases, the three children of a Turkish father, who were living with their mother upon divorce, became dependent on their father residing in the Netherlands, after the marriage of the mother with another person in Turkey.[414] After bringing the children back from Turkey, the father applied to the Ministry of Justice for the children's residence permit. The ministry refused the application and stated that the children were to be deported.

Taking a foreign foster-child and/or adoption of a foreign child can also be considered within the bounds of family reunification.[415] The Aliens Circular of 1993 defines a foreign foster-child as a minor of not more than 18 years of age, not possessing Dutch nationality, who is brought up and cared for in the Netherlands in a family other than his own, under which circumstances the person taking care of him or her has taken the place of the actual parents (see Swart 1987: 884). In this case, it would be necessary to show that the person taken care of is a next of kin and that the actual parents are unable to care for the child or children (see Gulbenkian and Badoux 1993:126). This works against the adoption in the wider family.

On the other hand, foreign children can be adopted according to the rules and procedures of Dutch family law. Children not possessing Dutch nationality can be adopted only when the child has not yet reached the age of 6 years, but exceptions can be granted by the Ministry of Justice on a written request (Kuijer and Woltjer 1991: 22). Adopted children will be admitted to live with their adoptive parents if the adoption has been at least provisionally approved by the Dutch Ministry of Justice under the Civil Code (JCWI 1994: 4). Even if the adoptive parents are not Dutch citizens, the children will be admitted if the adoption is in accordance

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[413]Circular B 19, section 2.1.2.2.

[414]*Zaman*, 15.9.1993, p. 10.

[415]These phenomenas can equally be considered within the domains of family formation, when one interprets the concept of family formation literally, see for example Gulbenkian and Badoux 1993: 124.

with the law in the country where it took place and is recognised as a 'full adoption' under Dutch law (JCWI 1994: 4).

Extended family reunification concerns members of the family other than spouses and children. In November 1991, the rules governing the admission of elderly parents were modified. Authorisation is no longer granted unless at least two of the children (instead of one) residing in the Netherlands can support the parent independently and the parent has a place to stay in their neighbourhood (CEC 1993: 49). The other existing conditions remain unchanged, i.e. the parents must take out health insurance, admission is granted on the basis of 'manifest humanitarian grounds', all the parent's children must in practice reside in the Netherlands, and the parent must not be a threat to national security.[416] The Dutch Aliens Circular mentions in this respect needy parents and unmarried daughters of age; jurisprudence has also allowed divorced women who are socially isolated to join their former family in cases of severe hardship (Gulbenkian and Badoux 1993: 125).

Partial family reunification, with the spouse and/or some of the children, is possible provided that all requirements for reunification of the whole family have been met (see Gulbenkian and Badoux 1993: 125). However, the risk exists for those who may come later, as the Department of Justice may take the view that actual family ties have ceased to exist in the meantime. Arriving later because of military service in the homeland will be accepted, if the applicant was under 18 at the time the other family members arrived, and applies to enter the Netherlands within six months of termination of his service.[417]

Considering that Turkish youngsters are usually expected to do military service after 18 years of age, it would be extremely difficult to see such a case in practice. Nevertheless, the same term applies for the re admission of those who have to leave their family to perform military services in the homeland. This gives relief for Turkish youngsters who come under family

[416] See Commission of the European Communities (CEC) 1993: 49, footnote 108.
[417] Circular B 19, section 2.1.2.3.

reunification enabling them to perform their military service without losing their right of residence in the Netherlands.

6.2.3 Legal regulations concerning family reunification

There was a rather liberal policy in the field of family reunification and, even when people were unemployed and had to rely on social security, they were still allowed to be joined by their partners from Turkey after small restrictions. Nevertheless, there has been pressure in the Netherlands from different quarters to restrict family reunification as well as family formation. Even within the government, the Christian-Democrats proposed that immigrants should have to be resident in the Netherlands for at least one year before becoming entitled to apply to bring in their children or parents.[418]

Following a statement, which was made public on 11 January 1993 by the State Secretary of Justice, Mr A. Kosto, responsible for the enforcement of the Aliens Act, the regulations were strengthened substantially in that field. Although the proposals were seriously questioned in Parliament, the amended immigration rules were put into force on 17 September 1993.[419]

In particular, the legal position of immigrants is expected to be affected seriously by the introduction of the so-called 'reversed waiting period' (Kuijer 1993: 47). According to the new rules, it is mandatory for aliens who legally reside in the Netherlands to transfer their spouse and/or children within three years after the conditions for family reunification have been met (sufficient means of subsistence and adequate housing).[420] Otherwise, it would be very difficult to meet the criteria and they would not normally be allowed to enter the country under family reunification after three years. We would argue that the aim of this probation period is, apparently, to stimulate the early entry of children in particular so as to enable them to integrate more smoothly into Dutch society.

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[418]See CEC 1993: 49, footnote 107.
[419]Circular to the Local Heads of Police, 9 September 1993, 338974/93/DVZ (TBV 87-1).
[420]Circular, B 19, section 2.2.5.

Holders of a residence permit intending to be joined by their spouse and children are required to have sufficient and durable financial means and adequate housing (Gulbenkian and Badoux 1993: 124). Housing should be adequate in the eyes of the municipal housing authorities, which will be decided on the basis of the *Model-bouwverordening* (General Building Directive) (see JCWI 1994: 5). The directive lists the minimum space and amenities required for adequate housing. It should be acceptable for Dutch families in similar circumstances.[421] It is feared that, despite very liberal practice in the past, as a result of the recent changes, 'adequate housing' will be interpreted more restrictively (JCWI 1994: 5).

Quite often, in practice, foreign workers may only register for council houses after their families have arrived, but family reunification is only allowed if adequate housing is available (Entzinger 1985: 76). This vicious circle forced many immigrants to buy or rent expensive accommodation of poor quality in the private sector, mostly in declining urban districts.

It may happen that one of the children reaches the age of 18 while the head of the family is still awaiting adequate housing (see Gulbenkian 1993: 124-125). In this case, this child will nevertheless qualify for entry as a family member if s/he is under 20, not married, is part of the family in the homeland, is dependent on the head of the family and has arrived with the other members of the family whilst the head of the family was registered with the local Housing Department as a house seeker by the time this child became 15.[422]

The most controversial part of the new immigration rules is the stricter financial requirement for family reunification. 'Durable income' can be taken to mean an income that will be earned for at least another year (Gulbenkian and Badoux 1993: 124). Already, under the then existing immigration rules the person residing in the Netherlands had to satisfy the Aliens Police and/or the Ministry of Justice that he or she had 'sufficient means of subsistence' for

[421]Circular B 19, section 2.2.3.
[422]Circular B 19, section 2.1.2.3(1).

him/herself and his/her spouse and/or children, with whom s/he wanted to reunite (see Kuijer 1993: 47).

In practice, the application of this requirement has been relaxed for certain categories (Dutch citizens, holders of permanent residence permits and convention refugees) for whom social support benefits have also been accepted as 'sufficient means'. Admission of relatives was only rejected if it had been proved that the persons dependent on these benefits could be blamed for this dependency, for example due to refusal of an offer of employment (Kuijer 1993: 48).

According to the State Secretary of Justice, the requirement of sufficient means of subsistence has become 'an empty shell', because it has become almost impossible for the Aliens Police to determine whether people can be blamed for their dependency on public funds or not. Thus, he and the Minister of Home Affairs responsible for the co-ordination of minorities policy have proposed the following gradual elaboration of the concept of 'sufficient means of subsistence':[423]

1. The requirement of sufficient means of subsistence will apply to every person (Dutch national or alien) who requests family reunification. In this context 'sufficient' means an independent income at least at the level of the social minimum for married couples, at this moment that is *f* 1.800,00 per month.

2. An income from participation in a labour market activating scheme and income-replacing benefits, for which the beneficiary paid premiums himself, will also be accepted as sufficient income. Unemployment benefits will only be accepted as 'sufficient income' if the beneficiary can prove to the authorities that s/he worked at least three years of the past five years of his/her legal residence in the Netherlands.

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[423]This has become the main body of the Circular B 19 section 2.4.1.1; see also Kuijer 1993: 48.

3. If Dutch citizens, holders of permanent residence permits and refugees do not have sufficient means of subsistence as defined above, family reunification will nevertheless be granted if they have an income of at least 70 % of the social minimum for married couples. If the person concerned is dependent on social security benefits (such as income support), it will be required that s/he worked for at least three fifths of their legal residence in the Netherlands.

For people under the age of 23 an income on the level of the official minimum wages for young employees will be accepted as sufficient income. The same applies if they acquire an income from activities under an official labour market activation scheme.

Moreover, for some categories, no independent income will be required for the admission of their family members. These are: unemployed persons of 57.5 years and older, heads of single parent families with young children, persons with a full disablement pension, old-age pensioners, and convention refugees who wish to transfer a close family member from their country of origin (Kuijer 1993: 48).

Clearly, the official policy now has mixed admission and integration considerations. In particular, a subjective integration test has recently been inserted into the Dutch immigration law, in addition to the above mentioned stricter requirements that need to be fulfilled.[424] According to this, before an immigrant resident in the Netherlands can be joined by his partners and/or children, he is supposed to show, *inter alia*, that he is willing to be integrated with the Dutch society.[425]

The seriousness of the integration requirement is that new elements have been introduced into the Dutch immigration system, which are not objective in character. Here, one should differentiate between two forms of integration: economic and social integration. While it is

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[424] This has been observed by Mr Aldo Kuijer in an interview on 25.1.1994, Amsterdam.

[425] I have seen a copy of the contracts relating to an immigrant's participation in an integration programme, which must be signed by the newcomer and the relevant municipality. The integration programme, which includes language courses and job orientation, aims at the integration of the newcomer into Dutch society and the improvement of employment prospects.

possible to prove objectively whether a Turkish immigrant has a house or substantial means of subsistence (economic integration), it is much more complex to prove, objectively, the social integration of a Turkish immigrant with the society.[426]

For the time being, it is too early to say whether the application of the integration test has been misused. Nevertheless, it can always potentially involve a hidden or sometimes explicit discrimination. Further, an integration test would automatically mean that this kind of test will never be applied to Dutch citizens who want to bring their parents or their children to the Netherlands, because they, being Dutch, are 'integrated'.

Considering the nature of the conditions, it may seem that Dutch policy is still based on the notion that, in principle, family reunification should be facilitated. This is not to say that the requirements are always easily fulfilled, particularly for those pertaining to suitable housing and those pertaining to sufficient means of subsistence (see Swart 1987: 885). The policy of admission concerning family members (under both family reunification and increasingly now under family formation) is, thus, less generous in practice than it would appear on paper. This is particularly true for immigrants from the main immigrant communities (including Turks), as the Dutch policy on migration is more concerned about the integration of such young immigrants, particularly into the labour market in view of high level of unemployment among these groups.[427]

Another restrictive measure has recently been introduced as a result of changes in the application of issuing residence permits for family members (both family reunification and family formation).[428] Before these changes, family members who come under family reunification and family formation, used to receive a 'blue card' which entitled holders of this

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[426]We do not intend to evaluate here the philosophical discussions behind the meaning of the word 'integration'.

[427]Sopemi-Netherlands (1992: 30-31) reports the high unemployment figures of Turks (28 %), Moroccans (22 %), Surinamese (19 %) and Antilleans (16 %) in comparison with 'autochthonous Dutch' (4 %), highlighting a slow fall since 1988 in the unemployment level among the above mentioned ethnic groups.

[428]*Hizmet*, No. 100, January 1994, p. 1, 3.

card automatically after five years to be entitled to a 'yellow card' of permanent residency. From this change on, they only receive a permit for one year, which has to be renewed every year till they get permanent residency at the end of five years. If the newcomer does something that justifies the refusal of the application for renewal, the authorities may push him into a situation in which he faces deportation by not renewing the residence permit.

In particular, according to a new rule announced by the State Secretary of Justice, Mr Kosto, foreign children and spouses may have to leave the country if the family head becomes jobless within five and ten years respectively.[429] The aliens police will now examine every year the situation of a family head whose children and spouse were allowed into the country as to the requirements of housing and income. Now, once again, the Dutch response to family reunification has been shaped by worries over the burden that unemployed immigrants will bring on the welfare state. Nevertheless, this provision is reported to be in conflict with the principle of respect for family life contained in several international agreements, and is likely to be in violation as well of the Association Agreement of 1963 between the EEC and Turkey.[430]

6.2.4 Right to family life

Dutch case law is guided entirely by decisions of the European Court and Commission of Human Rights in decisions pertaining to the question whether refusing to admit a family member is in accordance with human rights (Swart 1987: 885). In accordance with the jurisprudence of the ECHR, whether the alien resident in the Netherlands can be expected to follow his family to another state and whether this can justifiably be required of him are decisive points (see Chapter 3 above, p. 127). The Dutch jurisprudence has made Article 8 of the ECHR a cornerstone of Dutch aliens law. The elements of this clause are frequently made use of by the Department of Justice for refusing family life applications and turning down petitions for administrative review (Gulbenkian and Badoux 1993: 123). Thus, the refusal to

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[429]See *MNS*, February 1994, p. 9.
[430]Id.

allow family members to enter has never been found to contravene Article 8 of the ECHR in Dutch case law.[431]

The status of family members is a dependent one. It is obtained through the existence of a family tie with another person and consequently it is lost if that tie is no longer in existence. "The status is obtained and lost *ipso jure* and does not, therefore, depend on administrative action" (Swart 1987: 890). After one year of legal residence in the country the children and the spouse of an immigrant possessing a settlement permit receive the privileged status of 'dependent family member' (Groenendijk 1990b: 3).

This status gives protection against deportation. In order to obtain and keep the status of family member, the person concerned must actually belong to the family. As pointed out already (see briefly p. 258 above), the European Court of Human Rights in Strasbourg has accepted some instances within the bounds of family life, despite the fact that certain family members were not actually living together as members of one family (Berrehab).[432] The Court decided in 1988 that the rights of a Dutch child to respect for her private and family life (guaranteed by Article 8 of the ECHR) were breached when the Dutch government deported her Moroccan father who had been living in the Netherlands.[433]

In Taşpınar,[434] the applicant was awarded his son's guardianship by a decision of a Turkish court in 1978 upon divorcing his wife, and the son was immediately put in the actual care of the applicant's natural mother in Turkey until her death in 1984. Meanwhile the applicant, who was providing financially for both his own mother and his son in Turkey, remarried in the Netherlands and had two children born of the new marriage. The applicant's request for a residence permit for his son was refused by the Dutch authorities on the ground that his son could not be considered to have formed part of the applicant's family since the end of 1978,

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[431]For example, Supreme Court, 15/1/1982, R V 1982, 20; Council of State, 1/7/1982, R V 1982, 25.
[432]Berrehab, [1988] 11 EHRR 322.
[433]Id.
[434]Taşpınar v. Netherlands, Application No. 11026/84, 8 EHRR 45.

when he was put in the care of the applicant's mother. The European Commission of Human Rights held the complaints admissible under Article 3, 8 and 12 of the ECHR.[435]

The criterion appears to be that the alien involved is keeping actual family ties rather than family ties in strict terms of family law. Among the factors that are taken into account in Dutch jurisprudence are: the age of the child(ren), the frequency, duration and character of the contacts, whether these contacts have been judicially endorsed, whether the foreign parent supports his child(ren) financially and if so, to what demonstrable extent (see Gulbenkian and Badoux 1993: 124).

There is no interference with family life as long as the family members in the Netherlands can reasonably be expected to accompany the alien abroad, a view similar to that established by the jurisprudence of the ECHR (see chapter 3). The reply to the question of whether an infringement of family life is justifiable results from an assessment of both the public interest and the interest of the persons involved in maintaining and continuing their life in the Netherlands (Gulbenkian and Badoux 1993: 124). Generally speaking, in cases of first admission, the national interests of the state will prevail at the expense of the economic and social well-being of the individual interests.

The family member status may be lost for various reasons, such as through the death of the person from whom it was derived, or through that person leaving the Netherlands permanently or through children's losing the status of family member on reaching majority, or through divorce (see also chapter 7.2).

When a minor immigrant comes of age, his admission on grounds of family reunification ceases to exist. The consequences of this may vary for each individual case in practice (see Swart 1987: 885-886): If he has resided in the Netherlands for five years or more at the time he reaches the age of 18 (previously 21), he becomes eligible for an establishment permit. This

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[435] Id.

can only be refused if the alien presents a serious danger to national security, or has been convicted of a serious offence. The permit is, nevertheless, not refused when the alien does not have sufficient means of subsistence. If the alien has lived in the Netherlands for more than one year but for less than five when he comes of age, he will instead receive a residence permit, provided he does not present a danger to national security or has not been finally and conclusively convicted of a serious offence. If the alien has been resident in the Netherlands for less than one year, he falls under the general policy concerning the issue of permits.

There has been an increasing concern in the Netherlands over the issue of integration of children of Turkish immigrants, which has substantially been reflected in the immigration rules and practices adopted in recent years. This policy appears to have been justified on the ground of evidence which shows a lack of integration into the labour market and high unemployment among Turkish and Moroccan youngsters. But such seemingly integrationist rules and practices also have potentially restrictive effects. In the Netherlands, thus, the looming conflicts between rights to family life and the perceived national interest remain to some extent unresolved.

6.3 The UK

Turks constitute a tiny minority in Britain, compared to other ethnic minority groups, such as immigrant communities from South Asia.[436] This leads one to conclude that the main sources of family migration to Britain came from these countries rather than Turkey. An analysis of the relevant figures shows that large-scale family migration took place from Pakistan and India during the period 1965-74, and from Bangladesh during the years 1975-84.[437]

We have already seen that British immigration law has mainly evolved in response to other sources of migration, such as Commonwealth immigration (see chapter 4.3 above), rather than Turkish migration. Therefore, our discussion of the various issues regarding family

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[436]Compare the figures for Turks with those of other ethnic minorities in Britain, see Chapter 2.4 above, p. 64 and Ballard and Kalra 1993: 5-6.
[437]Banton 1988: 90.

reunification here must remain mainly of a general nature. Nevertheless, a search for the legal position of Turkish families is carried out within the already restrictive immigration rules and practice.

6.3.1 Overview of the British system of family migration

In line with the judgement of the ECJ in Demirel (see above, p. 122), it is apparent that, on the whole, the national laws at present govern family reunification and family formation of Turkish immigrants. As explained in detail in Chapter 3, while the Ankara Agreement and its components do provide certain rights within a member state to those Turkish workers and their families who have been admitted under national regulations, they cannot be relied on by Turkish workers and families to gain entry to the Community and its labour market.

Anyone wishing to be admitted into the UK in order to settle with a family member is required to obtain a prior entry clearance before doing so,[438] unless a right of abode is claimed, which now means that they must have a full British citizen's passport or a certificate of entitlement.[439] Even family members of EEA nationals who are not EEA nationals need 'an EEA family permit' to enter the UK if they are visa nationals or are coming to install themselves with the qualifying person.[440] In the absence of any specification in the EAA Order of 1994 as to how the family permit visa can be obtained, under British Immigration Rules, visas can only be obtained outside the UK in designated posts.[441] One reason behind this requirement of family permits for visa nationals would be to keep control over the admission of family members of EEA nationals, who will be in many cases third-country nationals resident in Europe. Thus, a family member of an EAA national, who is a Turkish national, must also obtain a family permit visa before setting off for Britain.

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[438] HC 395, paras 24-30.

[439] Immigration Act 1971, s 3(9) as amended by Immigration Act 1988, s 3; and HC 395, para 12, see Macdonald and Blake 1995: 319.

[440] EAA Order 1994, Article 3(3), see Macdonald and Blake 1995: 209-210.

[441] HC 395, para 28. It has been noted that in the context of family members of EU nationals, such a requirement is not compatible with the right of admission granted under Community law (see Macdonald and Blake 1995: 210).

The Immigration Rules on who might be qualifying as family members are quite strict and only make provision for a limited number of relationships. The term 'family' includes, *a priori*, spouses, fiancé(e)s (see Chapter 7.3 below) and children as well as, in some cases, parents and grandparents, adult sons and daughters, aunts, uncles, sisters and brothers, as long as certain other conditions are met (see Chapter 6.3.2 below).

Three main sets of circumstances in which children may come to join their parents, or other guardian, in the UK can be identified as follows (see JCWI 1995: 38):

• Children coming to join parents who are British or settled in the country;
• Children who are accompanying, or coming to join, parents who are in the UK for temporary purposes, for instance students or work permit holders;
• Children who are already in the UK for a temporary purpose, for example, visitors, while in the UK, applying to remain in the UK with their parents or guardians.

Macdonald and Blake (1995: 351) observe two contrary tendencies in the Rules and practice dealing with the admission of children: The first is the need to maintain family unity and to recognise the initial splitting up of the family followed by a reunification. The opposite tendency is to cut and restrict all secondary coloured immigration. What follows is a continuous oscillation between those two opposing tendencies in the immigration rules and practice regarding children. The conflicting tendencies mentioned tend to be mainly in the first category of relatives arriving on a permanent basis to settle in the UK with the rest of their family.

The developments following the 1962 CIA have shifted the focus of British immigration control from primary migration to secondary migration, i.e. the entry of family members. In fact, it was pointed out that the 1962 Act and later the Immigration Act of 1971 explicitly protected the rights of Commonwealth citizens to enter as the wife and child of a Commonwealth citizen who was ordinarily resident in the UK (Sachdeva 1993: 21). Since

then, however, there has been continuous pressure on the government to slow down and curb the immigration of dependants, particularly from South Asia.[442] The importance given to controlling and eventually halting the flow of dependants is obvious from the various measures taken by the government. For example, keeping a Register of Dependants with care and at the highest level is just one sign of this (see now Macdonald and Blake 1995: 351).

Generally children, save those who have the right of abode and were born in the UK, must be under 18 at the date of application, unmarried, dependant on a parent or parents in the UK, and supported and accommodated without recourse to public funds to qualify for admission.[443] Further, the word 'parent', in addition to natural parents, includes the stepfather of a child whose father is dead; the stepmother of a child whose mother is dead; and the parents of a non-marital child as well as an adoptive parent (JCWI 1995: 40-41 and Macdonald and Blake 1995: 347).

The legal position of family members (children) of Turkish immigrants in Britain might be considered in various categories, notably under settled persons,[444] work permit category or business rules. Turkish immigrants in the UK, for example those admitted under the work permit scheme or under business rules, are authorised to be joined only by their spouses and minor children at any time provided that they can be supported and accommodated without recourse to public funds.[445] Children and spouses are free to take any employment without any need for Home Office or Department of Employment approval (Macdonald and Blake 1995: 297).

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[442]See in detail Sachdeva 1993: 13-41, and Bevan 1986.
[443]Ahmed (Mostakh) v. Secretary of State for the Home Department [1994] Imm AR 14, CA; HC 395, para 297(ii) to (v); see Macdonald and Blake 1995: 351.
[444]Settled person refers to those who are ordinarily resident in the UK without being subject to any restrictions on stay under the immigration laws; Immigration Act 1971, s 33(2A), as amended, and HC 395, para 6.
[445]HC 395, paras 194-199 for work permit holders; HC 395, paras 240-245 and paras 271-276 under business rules; see Macdonald and Blake 1995: 297, 314.

6.3.2 Definition of family

For immigration purposes, the definition of the family is not only based on marriage but on a Western nuclear model (Bhabha and Shutter 1994: 129). Extended family relationships, such as step-children, children over 18 or those who have led an independent life, often by working, or elderly aunts, are not included within this definition of the nuclear family. Paragraphs 296-309 of HC 395 deal with children living in a conventional nuclear family, where the parents are living together as a married couple. The actual underlying principle and effect of the Rules is that, when the children come, so should the parents, hence preventing one parent from settling in the UK (see Macdonald and Blake 1991: 271-272).

Since 1962, the immigration rules concerning admission of children have been under constant tightening (for details see Bhabha and Shutter 1994: 130-131 and Mole 1987: 45-57). Until 1980 children under 21 could come to join their parents provided that the children were not married and the whole family was coming together (Bhabha and Shutter 1994: 138). In the case of sons over 18 but under 21, they had to be still financially dependent. Apparently, it was assumed that daughters would always be financially dependent on their parents until they were married.

Under the old Rules (HC 251), there was a slight distinction between over-age daughters and sons. For fully dependent and unmarried daughters over 18 and under 21 who formed part of the family unit overseas and had no other close relatives in their own country to turn to, exceptions could relatively easily be made.[446] Children over 18 (other than fully dependent unmarried daughters under 21) had to qualify in their own right unless they lived in the most exceptional compassionate circumstances. If such children were living alone in the most exceptional compassionate circumstances and mainly dependent on a parent settled in the UK, they could still be admitted as distressed relatives under HC 251, paragraph 56.

[446] Paragraph 55 HC 251.

The new Rules of 1994 do not retain this distinction any more. The concession for unmarried daughters between the ages of 18-21 under HC 251 was simply abolished by the new rules.[447] Now both sons and daughters have to be aged under 18, unmarried, not leading an independent life and not having formed an independent family unity.[448] Whereas sons and daughters over the age of 18 living alone outside the UK fall into the category of 'other dependent relatives'. In order to qualify, they have to be living in the most exceptional compassionate circumstances and financially dependent on relatives settled in the UK with no relatives back at home to turn to for financial support.[449]

As argued in the previous parts of this chapter and the earlier chapters, Turkish children up to the age of 21 should be regarded as, and admitted as, family members for any of the categories above. In fact, the authorities are reported to be claiming that they admit the entry and settlement of children from the Social Charter countries up to the age of 21 (JCWI 1994: 7).

The Rules (HC 395) provide for unmarried children under 18 to be allowed into the UK either for an initial 12 month period to accord with such a limited leave given to a parent or for settlement, if both parents are settled in the UK, or if both parents are on the same occasion being admitted for settlement.[450] If both parents are not settled in the UK, or if both parents are not on the same occasion being admitted for settlement, it would be necessary to fulfil the requirements pertaining to 'the sole responsibility' rule in order to qualify for admission.[451] This rule was originally designed to prevent Pakistani boys from joining their fathers, but in practice mainly affected single women from the Caribbean, and more recently from the Philippines, wishing to bring their children to join them.[452] But there is no evidence that neither the development of the rule nor its application has taken into account the low number of Turks.

[447]HC 395, para 297, see Menski 1994b.
[448]HC 395, para 297(iii).
[449]HC 395, paras 317-319.
[450]HC 395, paras 297-303.
[451]For details see Macdonald and Blake 1995: 352-356; and Bhabha and Shutter 1994: 141-148.
[452]See Bhabha and Shutter 1994: 142, citing Select Committee on Race Relations and Immigration 1977, p. 573. For details see now Orland 1996.

According to the 'sole responsibility' rule, younger children can join a lone parent only if she or he has had the sole responsibility for their upbringing or if there are 'serious and compelling family or other considerations' making their exclusion undesirable and suitable arrangements have been made for the child's care.[453] An example of a situation making exclusion undesirable is when the other parent is physically or mentally incapable of looking after the child. The sole responsibility rule still remains in place supplemented with the new 'exclusivity rule' about accommodation in paragraphs 297(iv), 298(iv) and 301(iv) of HC 395 (see Menski 1994b).

The circumstances in which parents and grandparents of children settled in the UK are admitted to join them were already strictly limited by the old Immigration Rules (for details see Macdonald and Blake 1991: 282-285 and Mole 1987: 67-77). Under the old Rules, widowed mothers, fathers who are widowers aged 65 or over, parents travelling together of whom at least one is 65 or over, step-parents seeking admission with a natural parent and grandparents were given the opportunity to join their children.[454]

Under the new Rules, the minimum qualifying age for both male and female parents applying in their own right has now been raised to 65 years under the excuse of implementing gender equality.[455] This creates particular difficulties mainly for women who are widowed early and may be allowed to live with their children or grandchildren in the UK only in the most exceptional circumstances (Menski 1994b: 119). On the other hand, it appears from the new Rules that a woman below 65 years who is married to a man above the age of 65 would still be able to join her husband as a dependent of a child or grandchild in the UK, provided the other conditions are met.[456]

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[453]See HC 395, paras 297-300 for indefinite leave to enter or remain, and paras 301-303 for limited leave to enter or remain.
[454]Paragraphs 56 and 57 HC 251; for details see Macdonald and Blake 1991: 282.
[455]HC 395, para 317(i)(a) and (b), see Menski 1994b: 119.
[456]HC 395, para 317(i)(c).

In order to qualify for an entry certificate or settlement the following requirements must be fulfilled:[457] The parents and grandparents concerned must be financially wholly or mainly dependent on the relative present and settled in the UK and can, and will, be maintained and accommodated adequately together with any dependants without recourse to public funds in accommodation which the sponsor owns or occupies exclusively. They must also be without any close relatives at home to turn to for financial support.

Apart from the above categories of parents and grandparents who can qualify for admission under family reunification rules, there is another category called 'other relatives'.[458] Under the current rules, these are older sons and daughters, sisters, brothers and uncles and aunts. Much stricter conditions were already imposed for these categories to satisfy the Rules (see Macdonald and Blake 1991: 285-286). The new Rules now state not only for children but for other relatives, too, that there must be adequate accommodation which is owned or occupied exclusively.[459] It is anticipated that "the fine tuning of the 'granny rules' will adversely affect the Caribbean tradition of older female relatives caring for their grandchildren while the mother goes out to work" (Menski 1994b: 119). In this context, nothing has been written about Turks. This implies that there is no concern in Britain over a large-scale immigration from Turkey under this category.

Adoption becomes relevant in British immigration law in a number of different circumstances and may lead to British citizenship, right of abode and settlement in certain circumstances, depending on the type of adoption.[460] In certain circumstances adopted children are treated as if they are natural children under the Immigration Rules.[461] Similarly, the same conditions which applied to children were also applicable to adopted children. Under the Immigration Rules, the adopted child's links with his or her birth parents must have been lost or broken,

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[457] HC 395, para 317.
[458] See HC 395, para 317(i)(f).
[459] HC 395, para 317(iv), see Menski 1994b: 115.
[460] For details see Mortimore 1994, Macdonald and Blake 1995: 356-364.
[461] HC 395, paras 310-316.

thus going against modern adoption practice.[462] This makes relative adoptions almost impossible under the Rules, which particularly hit Asian family adoption practices severely (see in detail Mortimore 1994).

The adoption ought to be in accordance with a decision taken by the competent administrative authority or court in the country of origin or the country in which the applicant is resident.[463] Previously, the means of deciding which foreign country's adoption order should be recognised was mainly based on the inclusion of the child's home country on a list of 'designated countries'. Turkey was listed among the countries designated under the Adoptions (Designation of Overseas Adoptions) Order 1973.[464] The new Rules now provide for an adoption in accordance with a decision taken by the Competent Administrative Authority (CAA) or court in the child's country of origin.[465] The inclusion of Turkey in the above list shows that Britain perceived no risk of large-scale immigration from Turkey under this heading. In contrast, the South Asian countries have been excluded, quite obviously to counter immigration pressures in this category.

6.3.3 Legal regulations concerning family reunification

A short analysis of the developments of legal regulations and the requirements of family reunification in Britain reflects general concern over the social and economic costs of migration. The old Rules required that all parents, before bringing their children to Britain, had to prove that they can support and accommodate them in accommodation of their own and which they occupy themselves.[466] The support and accommodation requirement were extended by the 1988 Immigration Act to all families coming to settle in the UK, regardless of the length of time the sponsor had been settled (Bhabha and Shutter 1994: 131).

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[462] HC 395, paras 310 and 314, particularly para 310(f)(ix); also see Bhabha and Shutter 1994: 150.
[463] HC 395, paras 310 and 314.
[464] See Macdonald and Blake 1995: 357, footnote 4 for the list of the countries listed under the 1973 Order.
[465] HC 395, para 310 (f)(v), see Mortimore 1994: 124-125.
[466] Paragraph 46 HC 251 as amended, also see Gillespie 1992 for a much higher profile of the maintenance and accommodation rules than previously in the administration of immigration control.

For family settlement, a sponsor is required, who is present and settled in the UK, except in cases where all the relevant members of the family will be allowed in at the same time.[467] The Rules do not say where the sponsor should be at the time of the application for settlement. It now suffices for the sponsor to be ordinarily resident with a right to return rather than physically present at the time of the application, on the condition that the physical presence will be satisfied at the time of admission of the relative sponsored.[468]

The accommodation does not have to be available at the time of application or decision. But it must be available when the immigrant arrives in the UK.[469] The quality of the accommodation is not relevant as long as it is statutorily fit and not overcrowded.[470] In some cases, catch-22 type situations might arise due to the priorities of different authorities. In one case, a mother had been told by her local council that larger accommodation would be given when her children joined her, as her flat would then be statutorily considered overcrowded.[471] On the other hand, her children overseas were not allowed to come until she could prove that she had 'adequate' accommodation for them.

Under the new Rules, the requirements of maintenance and accommodation have been tightened up for both temporary and permanent immigration, and are more explicitly reworded in every category, putting more emphasis on applicants and their families, friends and contacts in Britain (for details see Menski 1994b). The new Rules state that children joining ought to be "maintained and accommodated adequately without recourse to public funds in accommodation which the parent, parents or relative own or occupy *exclusively*" (emphasis added).[472] Accommodation and maintenance requirements imposed on parents, grandparents and other dependent relatives, who are joining, are also the same.[473]

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[467]HC 395, para 281.
[468]See Macdonald and Blake 1995: 320-321, citing Makbul Bibi (4954) IAT unreported; and Raheen (2949), unreported.
[469]See Macdonald and Blake 1995: 323, citing Munir Jan (1517); Sultan Begum (3155); and Kazmi (5866).
[470]See Maccdonald and Blake 1995: 323, citing Syeda Begum (3811) unreported.
[471]Quoted in Bhabha and Shutter 1994: 140.
[472]HC 395, paras 297-298, see JCWI 1995: 162-186, Chapter 10 for details on benefits and public funds.
[473]HC 395, para 317.

The recession and the fall in council accommodation have given rise to a substantial number of families being refused in recent years. The Annual Report of the JCWI highlighted a growing number of refusals, particularly in Pakistan, under the support and accommodation requirements already in 1990-1991.[474]

Menski (1994b: 113-114) identifies at least four reasons for tightening up the maintenance and accommodation requirements and the public funds rules generally. First, increasing impoverishment of the welfare system and the state generally and consequent attempts to curb the growing bills for all kinds of services cause the state to use the targeting of immigrants to create the impression that something useful is being done to save expenditure. Secondly, governments have relied on the latent xenophobia of the public and the short-sighted approach that immigrants cost money for the public purse. Thirdly, the primary purpose rule being so discredited, the state appears to aim at restricting, at least maintaining the restrictive effect of immigration policy, by supplementing the PPR with accommodation and maintenance requirements (see also Gillespie 1992). Fourthly, focusing on financial requirements, the Government is also targeting EU migration, particularly third country nationals rather than the average 'white' European Union citizen.

In determining whether parties or sponsors are able to support themselves and their dependants, their normal income and regular commitments are taken into account to see whether the money available will be sufficient to support the dependants concerned. Generally, evidence of an ability to maintain the immigrant from the sponsor's own earnings and savings is required; but evidence of support to be given by others could also satisfy the rule if accepted.[475]

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[474] *JCWI Annual Report 1990-1991* (1991), at p. 5.
[475] Macdonald and Blake 1995: 322, citing Azad (5993), Khan (6283) and Modi (9714).

Public funds for immigration purposes were defined under the old Rules as meaning income support, family credit, housing benefit and homeless persons' accommodation provided by local councils.[476] The new Rules have now extended this definition of public funds so as to include council tax benefit and more recently all forms of disability allowance.[477] The definition, nevertheless, excludes recourse to the national health service or state education as public funds (see JCWI 1995: 180-184 and Gillespie 1992: 97-98).

As indicated, the new Immigration Rules (HC 395) give greater prominence to the role of public funds.[478] The effect on an application for settlement of any existing reliance upon public funds by the sponsor has given rise to considerable debate and contradictory decisions over the extent of the definition of public funds.[479] In particular, the notion of indirect recourse to public funds has further complicated this already complex area. In one of such cases, it was held by the Divisional Court that if the savings made by the sponsoring father out of money received from the supplementary benefit were used to maintain the children, this would amount to recourse to public funds.[480] Under the new Rules, in accordance with the Social Security Administration Act 1992, the Department of Social Security may seek to recover from the person giving an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given.[481]

On the other hand, it is rightly submitted that, not only as a matter of logic, but as a matter of fairness and natural justice, an applicant should be allowed to settle in Britain provided that no extra burden on the taxpayer will be caused thereby (McKee 1995: 30). Accordingly, the fact that the sponsor is having recourse to public funds in itself should be immaterial in determining the reliance on public funds. Despite this, the notion of indirect recourse to

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[476]HC 251, para 1.
[477]HC 395, para 6, as amended by HC 329 of 1996.
[478]See McKee 1995 for an assessment of the recent developments in the role of 'public funds' in British immigration law.
[479]See ibid for details on the recent decisions of various tribunals.
[480]R v Immigration Appeal Tribunal ex parte Chinderpal Singh [1989] Imm AR 69.
[481]HC 395, para 35.

public funds remains to be "a subtle and pernicious device to render even harder the achievement of family reunion" (McKee 1995: 30).

6.3.4 Response of British law towards Turkish immigrants

As in Germany and the Netherlands, there has been a trend towards the imposition of a visa requirement on citizens of countries from which the British government seeks to restrict migration. The government's position on this was very clearly put forward in the Home Office explanation to the Commission for Racial Equality in May 1981, which blatantly stated that:

> "A visa requirement is broadly the more appropriate the greater the pressure of immigration from the country concerned. It becomes the less appropriate the higher the proportion of genuine tourists and other short term visitors to would-be long term immigrants".[482]

Turkey, following some other countries such as India, Pakistan, Bangladesh, Sri Lanka, Ghana, Nigeria and Uganda in various years, was added to the visa country list in 1989. But this was, unlike in some other countries, not due to pressure resulting from the migration of family members, but mainly as a result of the increase in the number of asylum seekers from Turkey.

When it comes to restrictions concerning access of family members to the labour market, British Immigration Rules appear to be more generous than the Association Council Decisions. The relevant section of paragraph 46 of the old set of Rules (HC 251) stated that:

> "The freedom of the spouse and children to take employment should not be restricted unless the person admitted under paragraphs 34 to 45 is prohibited from taking employment, in which case the prohibition should extend to the spouse and children".

This paragraph is clearly more favourable than Article 7 of Decision 1/80 (see Appendix 4) which envisages a three to five years period of residency before access of family members into the labour market, or completion of a course of vocational training for children. Of course,

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[482]CRE, *Immigration control procedures: report of a formal investigation*, 1985, p. 72.

there is nothing in the Decisions to stop EU member states from giving more favourable treatment to Turkish family members.

The new Rules (HC 395) do not contain a similar provision. Therefore, in the absence of a restriction imposed on family members, it must be assumed that none exists. However, the new Rules clearly state, in respect of a person seeking leave to enter or remain in the UK as the child of a student, that employment is to be prohibited except where the period of leave being granted is 12 months or more.[483]

Non-discrimination provisions of the Decisions (see Appendices) on education and social security provide consequential safeguards for qualifying nationals and their families (see Chapter 3 above). It seems unlikely that the provisions of these decisions will accord more favourable treatment to family members of Turkish nationals than UK immigration law, although they may have significance where a child seeks to remain in education, training or employment after the parent has left.[484]

At the start of the present chapter, we already underlined that a limited scope of application exists for the migration of existing family members in the three countries. This goes even more so for the migration of family members of Turkish immigrants, as the number involved would not cause any concern, compared to other main immigrant communities that exist in Britain, such as ethnic minorities from South Asia and the Caribbean.

Strictness of the rules on family reunification must also have had an impact on the relatively few cases of family reunification of Turkish immigrants, particularly in terms of satisfying the general requirements of an objective nature. However, one cannot observe any particular response of the British system towards Turkish family reunification, particularly when the application of the relevant rules involves a subjective assessment of individual circumstances.

[483] HC 395, para 80.

[484] Macdonald and Blake 1995: 231, citing the case of Lubor Gaal (C-7/92) (4 May 1995, unreported, the ECJ) and Gal v. Secretary of State (10620), IAT, (26 January 1994, unreported).

In this case, so the general pattern, discretion will be exercised more restrictively towards ethnic minority communities from which a substantial number of family reunifications might take place. In this context, Turks remain almost completely invisible, thus confirming our hypothesis that numbers are a crucial variable.

CHAPTER 7

THE LEGAL REACTIONS TOWARDS FAMILY FORMATION OF TURKISH IMMIGRANTS

The issue of family formation as well as family reunification is closely linked to the emigration and immigration policies of the countries concerned at the macro level. At the micro level of analysis, it may well be that potential migrants who have no possibilities to be admitted as labour migrants after 1973, might perceive marriage with a settled migrant in Europe as a suitable way to be admitted legally to a European country and its labour market (Sopemi-Netherlands 1991: 42).

Marriage with a partner from the home country, followed by migration of the foreign spouse to the receiving country is what we call family formation, and it is the movement of Turkish partners from Turkey to the three receiving countries which is the cornerstone of our present discussion.

It has been argued that the more recent phenomenon of 'family formation' has, to some extent, "blurred the fine lines between 'primary' and 'secondary migration'" (Menski 1994b: 112). This may be true in terms of assessing the underlying motives of such cases of family formations. Nevertheless, in terms of its structural characteristics, the phenomenon may still be considered within the bounds of 'secondary migration' in that it requires the existence of someone already living in the receiving country.

The underlying assumption becomes, thus, that these mainly male immigrants have purposefully entered into marriages of convenience that will allow them the opportunity to obtain a safe entry into what is considered to be the 'honey pot', as opposed to the alleged endemic poverty of 'Third World' countries (Sachdeva 1993: 7). This scenario could, of course, be applicable to many countries in Europe and elsewhere, and to Turkish migrants and others, especially South Asians in Britain.

Nevertheless "such facile assumptions conveniently overlook many economic and social realities" (Sachdeva 1993: 7-8). The leading British study on the primary purpose rule (PPR) emphasises that marriage arrangements tend to be made for a variety of purposes, not with a single object in mind (Sachdeva 1993: 8).

Within the context of British experience, Newdick (1985: 817) elaborated on the difficulties of proving that one's primary purpose was not that of entry. He concludes, commenting on the Home Office guidelines to immigration officers, that:

> "In reality, the discovery of the motives that lie behind a person's course of action are vastly more difficult to determine than either the Immigration Rules or the Home Office guidelines indicate. Whilst a marriage of convenience, as a sham, may be identified relatively easily, the bona fide marriage, entered into primarily for immigration purposes, is very difficult to pin-point with any degree of certainty. There are no objective criteria by which a person's motives for action can be arranged in order of priority. The judgement of the entry clearance officer under the primary purpose rule is, therefore, wholly dependent on the impression he forms of the facts of the case before him".

On the other hand, the assumption that marriage should be the result of a freely made decision by two individuals romantically attached to each other is, in any case, an idealised Eurocentric notion. It has been rightly questioned that:

> "How many people, wherever they are from, do not in fact take into account factors like the place of residence of their future spouse or their employment prospects when considering whom to marry?" (Bhabha and Shutter 1994: 81).

Therefore, immigration is likely to be one of many potential factors that would seem to play a role in choosing a particular spouse. Among the other determinants of choosing a marriage partner are straightforward love between two people, ancestral family links, or wanting to start a new life away from home. Thus, there will be many other motivations for contracting a marriage with a particular person, rather than simply the desire to live in a particular place.

In the traditional Turkish way of life, wives followed their husbands (patri-locality) to the location of their household in Turkey. In recent years, part of migration by family formation to Western Europe has concerned husbands who migrate and are going to live with their wives. This is sometimes considered to be a break with tradition which may be explained as substitution of labour migration by other types of legal migration.[485]

However, the issue of what the tradition in Turkey is, need further clarification. First of all, the concept of a man living with his wife's family, 'iç-güveyilik', is an occurrence even in the traditional rural life of Turkey. According to this pattern, husbands rather than wives follow their partners (matri-locality) to the location of their household. Further, particularly since the beginning of the internal migration in the 1950s (see Chapter 2), the location of the household has increasingly been determined by social and economic considerations and neo-local patterns have developed. Therefore, family formation overseas is not a break with tradition but an adaptation of the same tradition to different socio-economic conditions, which was first employed to the internal situation and then to an international one.

The main purpose of the present chapter is to show how the emphasis has shifted to controlling family formation of settled immigrants and their descendants in the three countries we study. The concern of the countries over the 'self-multiplying' effect of family formation through the chain migration process seems to work against immigrants' right to family life.[486]

Further, as we noted already (see Chapter 4.1.4, p. 146 above) efforts to modify the role of family formation as well as family reunification are often viewed as efforts to modify the ethnic composition of the current immigrant population (Motomura 1995: 541-542). This is particularly so when the qualifying numbers would be regarded as constituting a threat to the national systems of immigration control. Thus, an important search to be made is to what

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[485]See Sopemi-Netherlands-1991: 44-45 for substitution of a certain type of migration by other remaining legal types of migration.

[486]Here, it is taken granted that chain migration occurs when each immigrant sends for his or her qualifying relatives, each of whom petitions for their relatives in turn, see Motomura 1995: 521-522.

extent the reactions of the three receiving countries are different depending on the 'visibility' and differing cultural characteristics of Turkish immigrants and their being a 'threat' to the receiving countries, real or perceived.

7.1 Germany

As explained before in various chapters (especially in Chapter 4.1 above), since the 1973 recruitment stop, German law and policy have been increasingly concerned with restricting secondary migration of families for various considerations. Further, it has become clear that family reunification has greatly lost its prominence in the late 1980s, as a result of near completion of that process (see the introduction to Chapter 6, p. 250 above). Thus, as in Britain and the Netherlands, apart from asylum law, family formation has become one of the major focal points within the German system of immigration regulation and control.

On the other hand, family formation of Turks has always been taking place between couples in Germany and Turkey. This was hardly of any concern to the German government during the 'honeymoon' period of Turkish migration. Although there were conditions of residence and adequate accommodation, as we saw in Chapter 6.1, they were not strictly applied, and exceptions were always possible.

7.1.1 Restrictions on access to the labour market

As more second-generation Turkish migrants began to marry, often finding their spouses in their home countries, they have encountered some obstacles to establishing their new families in Germany. Once it was becoming clear that a substantial part of the Turkish population in Germany would stay for good and that the rotation principle did not work in practice, this became an inevitable corollary.

Following the recruitment stop in 1973, restrictions on access to the labour market had been imposed before any restrictions on admission into Germany were enforced.[487] This reflects the fact that German immigration control was not immigration control as such, but was focused on the needs of the labour market. As mentioned before (see p. 253 above), work permits to all non-EU citizens were denied by the Ministry of Labour in 1974, to persons who had entered Germany after 30 November 1974. This regulation had to be amended first and was later rescinded.

Under section 19 of the Employment Promotion Act of 1969, the applicant had a right to the grant of a work permit if, taking into account the situation and development of the labour market, the job in question could not be filled by German workers or foreign workers to whom priority must be given.

The wording of this provision was changed by the Sixth Act amending the Employment Promotion Act (Waiting Periods Act) which came into force on 14 August 1981. With this change, it became possible to impose a prior period of residence in order to issue a permit for first employment. Further, the Work Permits Order (6th Amendment) was adopted on 24 September 1981, with effect from 1 October 1981, to implement section 19(1), sentence 3, of the Employment Promotion Act. Under section 1(2) of the Sixth Amendment Order, a work permit would be issued for the first employment of spouses of foreign workers, if they had resided in Germany for four years, unless there was a serious shortage of workers in a particular sector, in which case the qualifying period might be reduced to two years. This was of course subject to the priority of German workers and regardless of the date of entry of spouses. In addition, a work permit could be granted when there was an acute shortage of labour in some sector of activity, such as hotel or restaurant services (Hönekopp and Ullman 1982: 124). It has been confirmed that, in practice, these waiting period restrictions were never

[487]Note that even Article 52 of the 1990 UN Convention on Migrant Workers envisages legal residence requirements, before migrant workers and members of their families are granted the right freely to choose their remunerated activity.

strictly applied by the administrative authorities.[488] Further, it was not very difficult to find a job in the informal economy, once admission to Germany had been granted on family formation grounds.

It would appear that these waiting periods during which a prohibition on employment was imposed had been viewed by the policy makers as deterrence and discouragement for those people whose main motive of contracting marriage was to acquire admission into Germany. Further, through these measures, the German government has sought to regulate an important channel of migration, particularly from Turkey, which was already gaining momentum mainly because of the existence of an already established Turkish community in Germany.

However, keeping young people unoccupied for several years is clearly an invitation for social and financial problems. In fact, this is not economically rational from the state's point of view. Further, a ban on entry to, or arbitrary withdrawal from, the labour market is bound to create illicit employment (OECD 1983: 50). Now, the spouses of foreign workers who hold a temporary residence permit may, in principle, obtain a work permit for a first job after one year, subject to the situation and development of the labour market and the individual circumstances of each case; those who hold an unlimited residence permit are not subject to even this qualification (CEC 1992: 35).

7.1.2 Control on admission of spouses into Germany

Various perceptions and images regarding immigrants appear to have been used, to some extent, in Germany in order to control the migration of family members, as similar labels were used in the UK to reduce the number of new entrants under family migration, particularly from Britain's 'coloured' population (see Sachdeva 1993). Examples of such labelling include people's fear of numbers, and of 'being swamped', the need to preserve the British character from dilution and corruption and the linkage of immigration control with good race relations (Sachdeva 1993: 33-34).

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[488]This has been confirmed in an interview with Prof. H. Lichtenberg on 3.2.1994, Bremen.

In Germany, the cultural differences of Turkish immigrants are often used to explain the logic of continued boundary maintenance and are referred to in a variety of opinion-forming domains as barriers towards integration (see Wilpert 1983: 138-140). Such assumptions received wide resonance during the debate in the early 1980s about the limitation of the right of Turkish residents in Germany to bring newly-wed spouses into the country. As one social worker expressed it:

> "As soon as a young Turkish girl reaches puberty her father locks her up in the house. He has a great fear of the loss of her virginity: this could either lower the bride price or no marriage may be arranged for her. These children then sit at home - without schooling, without training, without a youth group, or peers - until the marriage arrangement has been perfected".[489]

Such arguments and the images projected by social workers and in the daily press have provided legitimacy for restricting the right of Turkish residents to family formation with a spouse from Turkey. In December 1981, the Federal Government introduced rules which restricted the admission of spouses into the Republic.[490] It must be underlined that the introduction of these rules came just after the imposition of a prior period of residence for spouses in order to receive a work permit (see p. 298 above). Thus, the official policy is now increasingly moving towards imposing control both in terms of restricting spouses' access to the labour market and in terms of exercising control on residence permits. The perception of immigrants not only as an economic issue but also increasingly as a social issue has influenced the restrictive development of the German system of immigration control, particularly towards Turkish migration.[491]

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[489]This interview was originally published in an article in *Die Zeit*, 29/1/1982, pp: 3-4, by Nina Grünenberg, with the characteristic title 'Was tun mit den Türken?' ('What shall we do with the Turks'), see also Wilpert 1983: 138-139.

[490]Beschlüsse der Bundesregierung, December 1981.

[491]See Chapter 4.1.4 above to see how immigration was increasingly becoming a social issue for Germany.

Thus, the following categories of spouses were excluded as a result of changes in December 1981:[492] spouses of foreigners who had entered Germany as the children of foreigners, or who had been born in Germany, but had not stayed for at least eight years without interruption at the time they wanted to marry; and all family members of foreigners residing in Germany for study or job training purposes. The purpose of such regulations is said to be an attempt to prevent entry into Germany from being granted through those who themselves have not clearly established their centre of life in Germany (Frowein 1987: 2085). Such restrictions were intended to target new marriages and to make it difficult to use family formation as a means of getting admission into the Federal Republic.

Also some Länder, notably Baden Württemberg and Bavaria, went as far as to declare that foreigners must first be married three years before they may bring their spouses to Germany (O'Brien 1988: 125). The Constitutional Court rescinded this waiting period rule which was then in effect in the Land of Baden-Württemberg, requiring the marriage to have been in existence for at least three years before the spouse could come.[493] The Court, applying the proportionality test, upheld the one-year spousal waiting periods that were required in the rest of Germany.[494]

Further, the financial support of the spouse must be ensured either through the foreigner's employment or by other financial resources of the foreigner or his family, in addition to 'sufficient' accommodation which must be provided by immigrant workers for the entire family.[495] Very stringent requirements are placed on resident workers (see Chapter 6.1.4), which could mean in some cases that they would have to rent a flat or a house, usually by paying high rents in order to fulfil the legal requirement.

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[492]See Quaas 1982: 39; Castles 1985: 526 and JCWI 1994: 2.
[493]See Motomura 1995: 518, citing Judgement of May 12, 1987, 76 *BVerfGE* 1 (2d Sen. 1987).
[494]Id.
[495]Section 17(2) of the Foreigners Act of 1990, see Motomura 1995: 515, and also Chapter 6.1.4.

Under the 1990 Foreigners Act, the right to a residence permit is given to the spouses of second-generation immigrants who have legally resided in Germany eight years, and who have an indefinite residence permit (*Aufenthaltserlaubnis*) or a right of unlimited residence (*Aufenthaltsberechtigung*).[496] This clearly implies a continuing concern over the possible misuse of family formation rules and an enduring effort to indirectly encourage particularly the second-generation Turkish youngsters to find a spouse in Germany (see also p. 307 below for the Netherlands).

Ashkenasi (1990: 306) argues that a basic problem of the Turkish community in Germany is not one of size, but one of cultural difference and the apparently inevitable conflict, excluding significant change in one or the other cultures or both. Although, admittedly, culture difference is an important factor in the treatment of one group by another, what is more important perhaps is the number of a particular group, combined with perceived cultural differences, as far as the legal reactions to the presence of Turkish immigrants are concerned.

7.1.3 'Bogus' marriages and residence rights

States are interested in limiting abuse of migrants' liberty to form a family in case of marriages being contracted for the primary purpose of gaining resident status. Nevertheless, in Germany as in other countries, a marriage contracted exclusively for the purpose of gaining an entitlement to reside on the territory between a couple who do not live together, is not invalid (Plender 1988: 381). However, such a marriage does not enjoy a privileged status (Hailbronner 1987: 357).

On the other hand, it was held in a court decision that such a marriage is not protected by Article 6 of the Basic Law.[497] As it is considered that the public interest in preventing sham marriages is a priority of the Republic, the aliens authority, in the exercise of its discretion, may refuse to permit the alien party to the marriage entry into the territory (Plender 1988:

[496]Section 18(1) of the Foreigners Act of 1990, see Motomura 1995: 516.
[497]See Turkish National, decision of 18 September 1984, 70 *BVerwG* 127 (No. 21).

381). Permission may also be withdrawn, if the real purpose of the marriage is discovered after the grant of permission to reside.[498]

On the other hand, it is questionably suggested that marriage of convenience works against the rights stemming from Article 6(1) of Decision 1/80.[499] This would mean that the employment of the spouse whose marriage is one of convenience may not be considered as legal employment. Therefore, s/he may not rely on the periods of employment carried out during his/her legal residence to the enumerated rights, i.e. to a renewal of his/her work permit under Article 6(1).

However, German practice is nothing like the primary purpose rule of the British immigration law, which effectively goes as far as assessing the intention of the parties to the marriage as to whether the primary purpose of the marriage was that of entry (see Chapter 7.3.4 below). The main objective of the German immigration control system appears to be to stop 'sham' marriages being used as a means of entry. The main aim of the above-mentioned waiting period (see p. 295) appears to be to deter people from using marriage as a vehicle to gain admission into Germany, making it less attractive, economically, to come to Germany.

Particular problems might arise for immigrants whose status is derived from that of a spouse, who come to Germany on family formation grounds.[500] In the event of termination of the marriage, the spouse's right to remain becomes independent of the former spouse, provided that the marriage ended by reason of the death of the spouse, or the marriage had lasted for not less than four years while in Germany (Weis 1992: 116). Thus, the first four years of a spouse's residence are a kind of probationary period, during which the right of residence may be jeopardised if the marriage comes to an end. The authorities enjoy discretion to give an

[498]See Yugoslav National, *BVerwG*, 23 March 1982; also in *NJW* 1982, 1956; see Hailbronner 1987: 357.
[499]See Lüdke 1995; see also *ZAR-Referatedienst*, 3/1995, p. 142.
[500]In the case of death of a migrant worker or dissolution of marriage, Article 50 of the 1990 UN Convention on Migrant Workers urges the state of employment to consider favourably granting family members of that migrant worker residing in that state on the basis of family formation an authorisation to stay; the state of employment shall take into account the length of time they have already resided in that state.

indefinite residence permit after three years of marriage where it is necessary to prevent hardship; i.e. in cases of domestic violence or a partner's death (JCWI 1994: 3).

On the other hand, in cases of breakdown of the marital relationship, where a marriage has not been dissolved officially, one can, arguably, rely on the jurisprudence of the ECJ. As noted earlier (see p. 258), the ECJ held in Diatta that a marital relationship is not considered to be dissolved merely because the spouses live separately, even where there is an intention to divorce at a later date, and so long as it has not been terminated by the competent authority. The migrant worker concerned in Diatta was an EU national exercising his freedom of movement in another member state. Despite this, it can be argued that the same interpretation should be extended to the Turkish spouse in case of severance of marital relationship.

Otherwise, a spouse who becomes divorced from his wife or her husband must appeal to humanitarian considerations in order to be able to stay in Germany. Under Article 7(1)(1) of Decision 1/80, family members of Turkish workers will be entitled to respond to any offer of employment after three years residency, if a more favourable treatment does not exist in the domestic law. This makes it harder for family members to rely on the guarantees of Article 6 of Decision 1/80, for which they must be legally employed at least for one year (see Chapter 3.3.1, p. 103). Considering that the rights guaranteed under Article 6 are subject to actual legal employment, it takes much longer for the spouse (also due to possible breaks in employment) to have an independent right under Article 6 of Decision 1/80 in case of a divorce.

It was reported that on 25 November 1994, the majority of the Länder in the Bundesrat supported a legislative amendment proposed by Nordrhein-Westfalen on an independent right of residence for foreign wives.[501] The proposal aims at abolishing the three year waiting period of living, which is necessary before receiving an independent right of residence, even in cases of hardship for foreign women who are beaten up by their husbands. During this period, such wives risk deportation if they leave the household. According to a new Bill which would be

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[501] See *MNS*, November 1994, p. 10.

presented in June 1996, wives of non-EU foreigners admitted in Germany would receive their own residence permit after one year, instead of three years as at present.[502]

The High Administrative Court (OVG) of Koblenz ruled in a case in 1992 that marriage to a Turkish resident and being in possession of a permanent right of residence were not sufficient grounds to annul the expulsion order, even if the applicant's wife were a German national.[503] The Court further added that deterring future heroin dealers is more important than upholding the protection of marriage and family life guaranteed under the constitution.[504] This appears to be a case where concerns of public order and public health override other considerations.

It may seem contradictory that, despite the restrictive tune of the German system of immigration control on new spouses of second-generation immigrants, who will be in many cases prospective labourers, Germany has received over the past years hundreds of thousands of refugees, ethnic Germans and temporary workers of all sorts (see in detail Chapter 4.1.7 above). Such contradictory stances are not only confined to the German system alone.

We also saw, particularly in Chapter 4.1, that the German economy still needs immigrant workers, and that the re-emergence or continuation of a *Konjunkterpuffer* approach are viewed by the official policy as best suited towards satisfying this demand for new workers. Under these circumstances, the restrictive controls on family formation, particularly of Turks, are viewed as justified in order to put the ethnic composition of the immigrant population in Germany under some kind of control. In other words, it appears as though the large number of additional immigrants through family formation does have a bearing on the legal control system.

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[502]See *MNS*, May 1996, p. 3.
[503]See *MNS*, March 1992; for a similar decision at an earlier date see also Judgement of July 18, 1979, 51 *BVerfGE* 386.
[504]See *MNS*, March 1992.

7.2 The Netherlands

A new stage in the process of family migration is now evolving in the Netherlands too: young adults, both men and women, are bringing over marriage partners from the original home countries. The prominence of family formation over family reunification can also be discerned in the Netherlands both in terms of the numbers involved and of the public profile of this phenomenon.

In 1989, 40 per cent of the Turkish and 30 per cent of the Moroccan arrivals in Holland settled on family formation grounds (Dieleman 1992: 121). This amounted to a figure of 9,300 Turks, mainly of the second-generation, who requested entry for a future spouse in that year. A recent report, presented on 15 February 1995 by the Centre for Scientific Study and Documentation shows that family formation is still increasing, whereas family reunification is decreasing.[505] The study was aimed at the largest groups of foreigners in the Netherlands: Moroccans, Turks and Surinamese. The report points out that the majority of first generation immigrants still choose a partner from their home country, whereas there is a growing tendency among those of the second and third generations to marry someone of their own community in the Netherlands, or to have a mixed marriage.[506]

There was already concern in the Netherlands over the issue of marriages of immigrants with a spouse from the country of origin in the early 1980s. The requirement of guaranteed employment was then imposed on the immigration of marriage partners (Amersfoort and Surie 1987: 176-177). In particular, this restricted the possibility of women residing in the Netherlands from bringing their husband from Turkey and Morocco. This rule particularly hit poorer people.

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[505] See *MNS*, March 1995, p. 2.
[506] Id.

In 1983, in contrast to the improvements in favour of young immigrants who come to the Netherlands on family reunification grounds (see Chapter 6.2), immigrants were no longer easily allowed to marry a person in their country of origin and to bring their wife or husband to the Netherlands (see Groenendijk 1990b: 5-6). The income requirement for the family formation of the second-generation was set at such a level that it was practically impossible for persons under 25 years to comply with this rule.[507]

When the recruitment of immigrants had virtually been halted in the mid-1970s, the integration of already existing workers had been aimed at through the measures allowing family members of migrant workers to join them. The above mixed policy of improving the rights of those children residing in the Netherlands and, at the same time, making it more difficult for the same group of immigrants to marry in the country of origin can be viewed as a continuation of the same policy of stabilisation. Thus, the official policy objective is to encourage people to marry each other in the Netherlands (see p. 302 above for Germany). This would enable the authorities to limit further immigration within the form of family formation from 'undesirable' countries, particularly from Morocco, Surinam and Turkey. These immigrant communities constitute the majority of the immigrant population, and are young populations with the potential of entering many such marriages.

This above policy of stabilisation came about shortly after the adoption of the official Minority Policy in 1983, promising equal treatment of immigrants, and after the wave of anti-immigration sentiments. Partly due to intense opposition of various bodies, ranging from migrant youth organisations to young Dutch politicians, the controversial part of the rules was withdrawn in 1985 after a prolonged debate in Parliament (see Groenendijk 1990b: 5-6). As Groenendijk explains, there were other factors which have contributed to this policy change. There was research evidence that the rules would postpone rather than prevent family formation, because of the nature of the conditions imposed (i.e. financial requirements) and stimulate illegal migration. Further research evidence also suggested that family formation

[507]*Notitie Gezinshereniging en verblijfsrechtelijke positie van kinderen van migranten* 1983.

would bring mainly female partners to Holland due to the uneven sex-ratio of unmarried young immigrants, while the authorities were mainly said to be concerned about the immigration of young men (Groenendijk 1990b: 6).

There was a change in the case-law of the European Commission of Human Rights in Strasbourg. In two separate cases, the Commission for the first time judged the legality of the Dutch rules on family migration and found them to be in conflict with the right to family life guaranteed in the ECHR.[508] As a result of these judgements, the Ministry of Justice became less secure about its claims that the immigration rules on migrant youth did not violate human rights conventions (Groenendijk 1990b: 6).

7.2.1 Scope of marriage and family life

In cases of marriage with the holder of a residence permit, criteria for admission are the same as for regular family reunification. The marriage should be valid according to the rules of Dutch international family law, regardless of whether the spouses may have been married abroad or in the Netherlands (Gulbenkian and Badoux 1993: 126). The existence and validity of marriage should be supported with official documents, and the Dutch Ministry of Justice should be consulted in case of a doubt in the validity of a marriage contracted abroad.[509]

Further, new criteria have been introduced concerning the minimum age of the spouses. Spouses will only be admitted if both partners have attained the age of 18.[510] Accordingly, marriages entered into abroad while one of the partners has not yet reached the age of 18, will not be recognised as valid under Dutch aliens law and consequently no residence permit will be issued to the partner.

The Aliens Circular deals separately with heterosexual relationship outside of marriage and with homosexual relationships. Such partners are, in principle eligible for admission into the

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[508] Taşpınar, 3/12/1984, RV 1985, 106 and Berrehab, 5/3/1985, RV 1985, 107; for details see Chapter 6.2.4, p. 272 above.
[509] The Aliens Circular B 19 (see footnote 408), section 2.1.1.
[510] Circular B 19, section 2.2.6(b); also Kuijer 1993: 49.

Netherlands (see Swart 1987: 884). However, if a marriage has been concluded solely for the purpose of obtaining a residence permit in the Netherlands, then that permit will be refused (see Swart 1987: 884). However, the onus of proof lies on the immigration authorities, unlike in Britain (see chapter 7.2). The same rule applies to partners outside of marriage and to foster-children.

Marriages of convenience are considered to be an abusive way of circumventing the residence laws, and therefore have been under close scrutiny in the Netherlands as well as other EU member states. The new Dutch law, with effect from August 1993, allows for scrutiny of the motives of the marriage (see CEC 1993: 50 and JCWI 1994: 5). It includes the power to refuse applications if the immigration authorities consider that the *only* purpose of the marriage is to obtain entry into the Netherlands. It further requires marriage officials to check the foreign spouse's residence permit and requiring the latter to furnish a police certificate proving that he or she possesses a residence permit or has at least applied for one or has no wish to stay in the Netherlands after the wedding.

In an attempt to prevent so-called 'marriages of convenience', new instructions have been sent to the Registry offices.[511] According to these instructions, aliens coming from non-EU countries can now be asked to have their documents concerning their civil status legalised by the authorities and the Dutch embassy in their country of origin, such as birth and marriage certificates. This requirement of legalised documents causes serious hardship to many aliens who wish to marry in the Netherlands (for details see Kuijer 1993: 49). The result is that providing the necessary documents often takes considerable effort and time. When it is established that a marriage is definitely a 'bogus' one, application for a residence permit will be refused.[512]

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[511] Circular of the Minister of Justice, 7 July 1992, published in *Migrantenrecht*, 1992, No. 9, p. 200.
[512] Circular B 19, section 2.1.1.

It has been argued that this policy of discouraging marriages between Dutch citizens and aliens by means of bureaucratic requirements raises questions under Article 12 of the ECHR, which guarantees every person the right to marry (Kuijer 1993: 49). Accordingly, it can be expected that the courts will have to decide in individual cases whether the requirement of legalised documents interferes with the right to marry as guaranteed in Article 12 of the ECHR.

The breaking of family ties will lead, in principle, to loss of the title for residence, if the residence permit was granted under the condition of family formation (see Swart 1987: 886). There is a minimum three-year period of cohabitation and dependency before family members acquire an independent right (JCWI 1994: 5). If, however, spouses have been married for three years and have spent at least one of the three years in the Netherlands, they will usually be granted their own permit independently (Köppinger 1992: 185).

7.2.2 Admission requirements of spouses

The new immigration rules concerning family reunification and family formation were put into force on 17 September 1993 (see p. 271 above). The Circular stipulates that the spouse of a legally residing alien who himself/herself has been admitted on the ground of family reunification, will only be admitted when the latter has legally resided in the Netherlands for a period of at least three years.[513] As in Germany, there seems to be concern over the legal position of the sponsor who himself came to the Netherlands under family migration rules.

Logically, this three year waiting period would not be applicable to those coming, for example, under work permits. In practice, only the position of those Turkish second-generation immigrants who have entered the Netherlands shortly before their 18th birthday will be affected (Kuijer 1993: 47). Hence, the number of Turkish immigrants affected by this new measure will be limited.

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[513]Circular B 19, section 2.2.6(a); see also Kuijer 1993: 47.

More importantly, there is also now a strange 'reverse probation' period, which is also applicable to family formation (see Chapter 6.2.3, p. 271 above). According to the new rules, it is mandatory for aliens who legally reside in the Netherlands to transfer their spouse and/or children within three years after the conditions for family reunification and/or family formation have been met (these releta to sufficient means of subsistence and adequate housing).[514] This means that, upon marriage when people meet the criteria, the spouse residing in the Netherlands must be joined by the other spouse within three years.

It seems that one of the purposes of this 'reverse probation' period, particularly if the coming spouse is the wife, is to stimulate the early entry of spouses, who otherwise might stay abroad, so as to enable her smooth entry into the society. Further, entry into an unfamiliar society at an early age may help the respective spouse to learn the peculiarities of daily life and language more rapidly, and gain the skill necessary for his/her job by taking a vocational course. More important is the concern to have any children in the Netherlands from the start.

The person intending to marry and bring a spouse over to the Netherlands must provide appropriate housing for the coming spouse, with conditions similar to those applicable for family reunification (see above, pp. 271-272). The accommodation ought to be viewed as appropriate in the eyes of the municipal housing authorities, in comparison with housing conditions of Dutch families.[515] The adequacy of housing is to be decided by the municipal housing authorities on the basis of the *Model-bouwverordening* (General Building Directive), which lists the minimum space and amenities required (JCWI 1994: 5). This accommodation requirement cannot be imposed on Dutch nationals, Convention refugees and asylum seekers.[516] This seems to indicate that such requirements of housing are specifically targeted at family migration of settled immigrant communities, notably Turks, Moroccans and Surinamese.

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[514]Circular B 19, section 2.2.5; see also Kuijer 1993: 47.
[515]Circular B 19, section 2.2.3.
[516]Circular B 19, section 2.4.1.2.

It is a common pattern, particularly for sons of Turkish families, to live with the parents after marriage. Many Turkish immigrants are under the impression that certain rules are much more tailored to the looser relations within Dutch families than to the tighter Turkish family relations. A man who was living with his parents, his wife and children, said, for instance:

> "Here they do not allow you to live in with your parents. In Turkey you can live wherever you want, government puts no control on that. Many sons go on living with their parents when they are married. No one will say something about that. If a son goes to live separately, it is taken for granted that he has had a row with his father".[517]

The reasoning of this man was not illogical. His bride had been allowed to come to the Netherlands only after he had provided 'separate' housing, as the house of the man's parents was found too small by the local housing authorities. They rented separate accommodation to meet the Dutch rules, even though they themselves subsequently made no use of the accommodation. The requirement of 'appropriate accommodation' under Dutch Aliens legislation has usually meant separate housing, which has not only entailed extra expenses, but also all kinds of practical complications (see Böcker and Minderhoud 1991: 13).

The partner of the applicant who intends to join on family formation grounds should have sufficient means to take full responsibility for the cost of living and eventual return of the applicant to the homeland.[518] As pointed out in the previous chapter, and mirrored in the accommodation rules, the application of the requirement of 'sufficient means of subsistence' has been relaxed for Dutch citizens, holders of permanent residence permits and Convention refugees. For these categories of people, social support benefits and other reduced forms of earnings have also been accepted as 'sufficient means'.[519]

The requirement of a minimum income constitutes particular obstacles to the admission of partners of the Turkish second generation. This group of Turkish residents have particular

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[517]From an interview with the respondent of a survey quoted in Böcker and Minderhoud 1991: 13.
[518]See Chapter 6.2.3 for details of financial requirements which are also applicable to family formation.
[519]Circular B 19, section 2.4.1.1; for details also see Chapter 6.2.2.

difficulties with regard to the requirement of a minimum income, as unemployment among this group is high (see p. 275 above for the relevant figures). However, it is said that if there is a lack of sufficient income, a guarantee from friends or relatives may also be acceptable (Gulbenkian and Badoux 1993: 126).

In cases of non-fulfilment of one or more of the conditions for family formation, a residence permit may be granted under humanitarian considerations.[520] In reaching its decision, the Ministry of Justice takes into account an assessment of the standard of living of the person living in the Netherlands and the financial situation of his family members living abroad (spouse).[521]

On the other hand, the subjective integration test discussed in the previous chapter on family reunification may also have consequences for Turkish youngsters intending to marry somebody living in Turkey. They, too, have to satisfy the immigration authorities that they are willing to be integrated with the Dutch society (see pp. 274-275 above).

In principle, foreign nationals in the Netherlands are granted the same legal admission to the employment market as the Dutch, if their residence permits are not explicitly restricted to a special purpose, e.g. education, training, university studies or medical treatment (Köppinger 1992: 185). Accordingly, family members who have been admitted to the Netherlands have full and immediate access to the labour market. They are given a special card (the so-called white card) which proves to employers that no work permit is required for them (JCWI 1994: 5). On the other hand, those family members admitted to join people with limited rights of residence, such as students or people with temporary work permits will not be allowed to work until they have spent at least one year in the Netherlands (JCWI 1994: 5).

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[520] Circular B 19, section 2.5.
[521] Id.

In the Dutch discourse, the concern over the integration of long-settled immigrant communities again seems to be the dominant factor behind the legal reactions of the Dutch system of immigration control towards family formation of Turks. Yet, this may often include explicit discriminatory provisions, such as those with respect to housing requirements which discriminate against non-Dutch resident immigrants (see also p. 311 above). In fact, Dutch concern over integration of family members appears like a stabilisation policy in order to put the number of family formations under control, particularly those from the main settled immigrant communities.

7.3 The UK

Our main hypothesis was that immigration law restrictions on family life tend to target large migrant communities. The main reason for this is to restrict and also discourage the flow of immigrants and to put them into queues overseas (see Menski 1996). From the receiving states' point of view, it is a logical tactic to target these 'visible' communities for numerous reasons. First of all, family migration is now often the only means possible to obtain admission into the country. Moreover, only migration of people from these communities is of concern to authorities and politicians, whereas migration of other people from, for instance EU countries, goes unnoticed. The aim here, as it was in Chapter 6.3, is to provide a general discussion on issues concerning family formation in the UK, and to comment on the legal position of Turkish immigrants whereever possible.

7.3.1 Overview of the rules on the admission of spouses and fiancé(e)s

This is certainly not a place to give a full account of the immigration rules concerning family formation in Britain, nor is this intended.[522] The aim here is to provide a general background to the British system of immigration control concerning family formation.

It must be noted, in the first place, that difficulties might arise in establishing to the satisfaction of the entry certificate officer that the relationship of husband and wife is as

[522]For the most recent publication on British immigration law, see Macdonald and Blake 1995, JCWI 1995, Devine 1995. Jackson 1996 has appeared while this thesis was being completed.

claimed. This mainly concerns applicants from India, Bangladesh, Pakistan and Sri Lanka (see Mole 1987: 39-44). The onus of proof is on the parties to demonstrate the relationship as claimed, save in circumstances where evidence of a marriage certificate and post nuptial correspondence may shift the burden to the Home Office to disprove the marriage.[523]

Marriages that have been formally registered according to the civil law of the country are not likely to cause any hardship unless a question of the credibility of the parties arises (Mole 1987: 39). Therefore, it is likely that establishing the relationship of wife and husband as claimed should not create any difficulties for Turkish immigrants upon producing the documents necessary, such as passports and marriage certificates. Nevertheless, in case of a question of the credibility of the parties, the authenticity of documents may cause some problems (Macdonald and Blake 1995: 331).

The Rules regarding the age at which a person can contract a valid marriage have required, since 1986, that both parties to a marriage be aged 16 on arrival in the UK before an entry clearance or leave to enter or remain is granted. This rule now applies to all marriages.[524] Further, paragraph 177 of HC 395 makes it clear that the date by which 16 years of age will be calculated, will be the date of arrival in the UK or the date of application for the leave to remain or variation of leave.

The general rule in English law is that a marriage will not be invalid simply because it is entered for a purpose other than mutual cohabitation (Macdonald and Blake 1995: 334). In a series of cases concerning white men who had married foreign white women, the English courts recognised the validity of marriages, even where they had been contracted with the explicit purpose of evading immigration control.[525] But the policy of British immigration law

[523] See Macdonald and Blake 1995: 331, citing Visa Officer, Islamabad v Channo Bi [1978] Imm AR 182; Inayat Begum v Visa Officer, Islamabad [1978] Imm AR 174; Hanison (5366) unreported and Aida Perez (9636) unreported (1993).
[524] HC 395, para 277.
[525] See Macdonald and Blake 1995: 335, footnote 1 of para 11.51 for such cases.

is in principle only to allow admission as a spouse for the purpose of matrimonial cohabitation.[526]

Since August 1985 the Rules for the admission and settlement of husbands and wives and fiancé(e)s have been the same. Men and women are officially treated alike. All spouses and fiancé(e)s, except EU nationals, have to satisfy strict conditions before they can expect to be granted entry clearance (see further below). Further, in all cases admission will only be granted if the other spouse is present and settled in the UK or is on the same occasion being admitted for settlement.[527]

In order to obtain entry clearance, spouses must now satisfy the entry clearance officer that:[528]

> (a) the marriage was not entered into primarily to obtain admission to the UK;
> (c) the parties to the marriage have met;
> (b) spouses have the intention of living permanently with the other as his or her spouse and the marriage is subsisting;
> (d) there will be adequate accommodation for the parties and their dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
> (e) that the parties will be able to maintain themselves and their dependants adequately without recourse to public funds.

For a spouse who satisfies these conditions and obtains entry clearance, leave to enter for an initial period not exceeding 12 months may be given under HC 395, para 282. An application can be made for settlement or indefinite leave to remain which should normally be granted after one year as long as the accommodation and maintenance requirements are still met and the parties intend to live permanently with each other.[529]

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[526]See Macdonald and Blake 1995: 335, citing Yunus Patel v IAT [1989] Imm AR 416, CA.
[527]Except members of HM forces based in the UK but serving overseas, who should be regarded for this purpose as being settled in the UK (HC 395, para 281).
[528]See HC 395, para 281; para 290 contains similar requirements for fiancé(e)s; also see further below the PPR and the desperate attempt to control numbers.
[529]Under HC 395, para 287, there is no discretion to grant leave to remain in the case of marriage breakdown, see Macdonald and Blake 1995: 346, citing Patel v Secretary of State for the Home Department [1986] Imm AR 440.

Under the old Rules (HC 251, para 132), at the end of the 12-month period, a spouse could apply for settlement, if the marriage had not been terminated and parties had the intention of living permanently as spouses. Under the new Rules (HC 395, paras 284-289), it appears that a spouse may be given an extension of stay for 12 months in the first instance or indefinite leave to remain upon completion of a period of 12 months as the spouse of a person present and settled here. In fact, this has been interpreted by the Tribunal to mean that the Rule allows the Secretary of State to impose a second probationary period rather than grant settlement.[530]

If a marriage breaks down during the first year, the partners from abroad have no longer any claim under the immigration rules because of the marriage. In fact, there have been many deportations resulting from marriage breakdown under the above one-year rule (see JCWI 1995: 29-31). It appears that the possibility exists for the Home Office to extend the one-year rule by imposing a second probationary period so that it can still assess if the parties intend to live as wife and husband, which might in some cases result in further deportations.

The requirement that spouses have the intention of living permanently with the other as his or her spouse and the marriage is subsisting will in some cases not be applicable to spouses, where the application of Community law is concerned, following Diatta.[531] In Büyükyılmaz,[532] a Turkish citizen had been granted limited leave on the basis of marriage to an Irish-British dual national and applied for indefinite leave to remain. The Secretary of State for the Home Department, not being satisfied that the parties were living together as man and wife, nor that they had the intention of doing so, refused the application for variation of leave. The Tribunal, nevertheless, allowed the appeal, holding that although the marriage had now ended in divorce and although, on the material date, the parties to the marriage were not living together, following Diatta, that in itself did not remove the right of the Turkish citizen to rely on Community law.[533]

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[530] See Macdonald and Blake 1995: 345-346, citing Tanweer (3490).
[531] Diatta, [1986] 2 CMLR 164.
[532] See Mehmet Mert Büyükyılmaz v Secretary of State for the Home Department, (unreported), Appeal no: TH/193/94 (11769), date of determination: 19 January 1995.
[533] Id.

Since August 1985, female fiancées, too, who wish to come to the UK to get married and then settle here have been required to obtain entry clearance before coming.[534] This puts them on an equal footing with male fiancés. In either case the sponsor, in addition to the conditions applicable to spouses just mentioned above, must be able to satisfy the entry clearance officer under para 290, HC 395 that adequate maintenance and accommodation without recourse to public funds will be available for the applicant until the date of the marriage. It has long been noted that rejection rates for fiancé(e)s are much higher than for spouses (Menski 1994b: 118).

This negative approach to family formation of immigrants makes the applicant financially more dependent on the UK partner. In view of the anticipated stricter financial tests, it will probably become still less attractive for applicants to apply as fiancé(e)s (Menski 1994b: 118). The prohibition on employment for fiancé(e)s remains in place. Under para 291 of the new Rules (HC 395), fiancé(é)s may be admitted, with a prohibition on employment, for a period not exceeding 6 months to enable the marriage to take place.

7.3.2 Maintenance and accommodation rules

The British maintenance and accommodation rules are rapidly acquiring a much higher profile than previously in the administration of immigration control, particularly concerning the admission of fiancé(e)s and spouses. This can be inferred from the number of refusals of entry clearance on the grounds of failure to meet the maintenance and accommodation requirements, from the emphasis of these requirements by the Immigration Appeal Tribunal, and the restrictive interpretation of the public funds requirement by some recent Tribunal decisions.[535]

The issue of indirect reliance on public funds is one area which would potentially restrict the admission of spouses and fiancé(e)s. Indirect reliance on public funds arises where neither an applicant will be claiming public funds, nor the sponsor will be making any claim on behalf of

[534]Previously HC 251, para 47; and now HC 395, para 282.
[535]See Gillespie 1992: 97, citing Ahmed (8106), Akhtar (7837) and Hussain (7785).

the applicant, but nevertheless the applicant in some sense benefits from money paid out of public funds (Gillespie 1992: 98). As pointed out earlier (see Chapter 6.3 at p. 285 above), it was held in ex parte Singh by the Divisional Court that if the savings made by the sponsoring father out of money received as supplementary benefit were used to maintain the children, this would amount to recourse to public funds.[536]

In Azem (7863) the Tribunal explained the effect of the ruling as follows: "Ex parte Singh is in our opinion authority for the proposition that the maintenance rule covers indirect as well as direct reliance on public funds" (Gillespie 1992: 98). The case concerned the refusal of an entry clearance application by a fiancé to join the sponsor, a woman settled in the UK. It was proposed that the couple could be accommodated by living rent-free in the house of the sponsor's father, who was reliant on income support. The Tribunal stated that "we conclude without hesitation that if a couple live in the house of a person on income support and do not pay rent or for board and lodging, they are indirectly relying on public funds".

Another area of importance which may potentially restrict the admission of a spouse is the issue of maintenance by third parties, whereby other family members provide financial or other support until the couple are able to earn sufficient funds to support themselves by their own efforts. Different views have been adopted by the Immigration Appeal Tribunal in different cases on whether or not maintenance by third parties is accepted.[537]

It can be suggested that there should be no distinction in principle between income generated by a couple's own efforts and funds provided by a third party. The main question to be considered should be whether the evidence establishes that the income is sufficiently secure to make it possible for the couple not to have recourse to public funds for the foreseeable future (Gillespie 1992: 99).

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[536] R v Immigration Appeal Tribunal ex parte Chinderpal Singh [1989] Imm AR 69.
[537] See Gillespie 1992: 99, quoting contrasting cases like Jabeen (7431), Akthar (7837) and Mahmood (8402).

The question of what level of maintenance should be considered adequate within the meaning of the rule was considered in the case of Azem cited above. The Tribunal admitted that it was not possible to give any precise answer to this question, but "a figure somewhat higher than the weekly rate for a couple on income support would be necessary, on a balance of probabilities, to conclude that a couple would not be likely to be obliged to have recourse to public funds" (Gillespie 1992: 99).

The old Rules required a couple to prove that they will be able to accommodate themselves in accommodation of their own or which they occupy themselves.[538] In Ahmet (8260), the Tribunal held that the only sensible yardstick for assessing the adequacy of accommodation was the criterion of overcrowding, and therefore it was not necessary to provide separate accommodation.[539] However, in Kausar (8025), exclusive occupation in the strictest sense of the word was required. The accommodation proposed by the couple was, therefore, not considered to be satisfactory by the Tribunal. Gillespie (1992: 100) argued that:

> "The imposition of such a requirement would provide no additional protection for public funds, and would inevitably mean that the rule would not be satisfied in the case of many Asian couples who may remain living in the parental home at least for a period after marriage".

The practice followed under the old Rules was summed up in an *obiter* statement by Lord Prosser in a recent case.[540] The ruling held, however, that if a young couple had a room of their own, in a house belonging to parents or parents-in-law who had undertaken to provide the couple with accommodation, this would seem to fulfil the requirements of the rule.[541]

There is here a similar pattern as that existing for Turkish couples in Germany and the Netherlands upon marriage with a partner from Turkey. Living in the parental home for a period after marriage, either as a matter of cultural or economic necessity, is a common

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[538]HC 251, para 50(f).
[539]See Gillesspie 1992: 100, and also contrast this with Kausar (8025) immediately below.
[540]Raja Zafar Zia v Secretary of State for the Home Department [1993] *Imm AR* 404.
[541]Ibid, at p. 412.

practice for both Turkish families and Asian families in Europe. However, the legal reactions of immigration laws do not seem to take into account such cultural values and practices of immigrants.

Despite the recent more liberal interpretation of the accommodation requirement by the Immigration Appeal Tribunal, the new Rules now require for almost all categories that there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively.[542]

7.3.3 Respect for family life

In Abdulaziz, Balkandali and Cabales,[543] three women complained that the British government was in breach of Articles 3, 8, 13 and 14 of the European Convention on Human Rights by discriminating on the grounds of race and sex and interfering with family life. After the Commission had ruled that these cases were admissible, which meant that there was a case for the British government to answer in May 1982, the government felt under pressure to liberalise the Immigration Rules (for details see Sachdeva 1993: 91-94, Macdonald and Blake 1995: 445, 446).

In response to the charge of sex discrimination, the government admitted that the Rules discriminated between men and women, but resorted to the assertion that women do not work. The government further argued that banning husbands and fiancés from entering was justified to protect the labour market of the indigenous and settled population, but that wives do not present the same problem because:

> "Women are not necessarily bound to compete for employment and are unlikely to be breadwinners. Women as breadwinners are unusual, for society still expects the man to go out to work and the woman to stay at home. This is a fact of life, a common pattern. The majority of women do not threaten the labour market, particularly women from the Indian sub-continent".[544]

[542]HC 395, paras 281(v) and 284(viii) for spouses and 290(vi) for fiancé(e)s.
[543]Case of Abdulaziz, Balkandali and Cabales, European Court of Human Rights, (15/1983/71/107-109), [1985] 7 EHRR 471.
[544]European Commission of Human Rights, Document E 56.486.06.2; quoted in Bhabha and Shutter 1994: 73.

Once again the British government apparently had recourse to the argument of protection of the labour market in a rather different context. This statement does not contradict the long-established policy of not taking sufficient account of the potential of employing foreign workers. Nevertheless, one should not conclude straightaway from this that entry of women has been so smooth. Black women abroad attempting to join husbands in this country have faced numerous obstacles, too (see Bhabha and Shutter 1994: Ch. 4). All of these must be considered part of the process of keeping certain types of immigration to a minimum.

The European Court of Human Rights in May 1985 found the British government guilty of violating Article 8 of the ECHR which protects the right to family life, as well as of violating Article 13 of the Convention which provides a remedy against sex discrimination.[545] Nevertheless, the government, instead of giving women who intended to be joined by their husbands the same right as men already enjoyed, opted for drastic changes to reduce the rights of all family members to a lower level of equality. Thus, the framers of the Immigration Rules, instead of taking the opportunity for achieving higher standards of humanity for spouses, have chosen to level downwards (Macdonald and Blake 1991: 244).

The respect for family life appears to be not a concern for the British government. It was concerned, and still is, to restrict further the number of immigrants from undesirable countries, whether it be primary immigrants or families of settled immigrants. One would have to include Turkey among the undesirable countries at least for reason of its inclusion in the visa national list alone. Since 1989, Turkey has been on the list of the countries whose nationals require visas for the UK, with other countries mainly from Asia and Africa.[546]

On the other hand, the existence of a substantial number of immigrants is a major concern for the receiving country as far as family formation is concerned. The relatively small number of

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[545] Abdulaziz, Balkandali and Cabales, [1985] 7 EHRR 471.
[546] For the most recent list of visa nationals, see Statement of Changes (HC 329) of 4 April 1996, London: HMSO, p. 3-4.

Turkish immigrants in Britain is, it appears, an important element for the absence of a particular response towards them in terms of restrictive regulations on family migration.

On the other hand, the English legal system has ignored the needs, expectations, and ultimately human rights of British Asian women and their families, by focusing on attempts to identify the 'primary purpose' of male applicants for settlement in Britain (see in detail Sachdeva 1993).

David Waddington, then Minister at the Home Office, using the arguments about employment discredited by the Court and attacking Asian marriages, stated that:

> "It would be absurd if, having tightened up the work permit system to prevent young men coming here and going on to the labour market, we were to allow these same young men to come here by using marriage as a device.... The country would be immensely surprised if, having willed a firm and fair immigration control, we now took the view that anybody who enters into a marriage, irrespective of whether that marriage is entered into for immigration purposes, should be able to come here".[547]

According to the Home Office figures,[548] the overall refusal rate of applicants from husbands and fiancés in the Indian subcontinent was 47 per cent in both 1982 and 1983. On the other hand, the very same figures reveal a dramatic increase in the proportion of applications turned down partly or wholly on the grounds that the 'primary purpose' of the marriage was immigration to Britain - from 18 per cent in 1982 to 73 per cent in 1983; the figure consistently remained high: 89 per cent in 1991 and 84 per cent in 1992.

Two European cases, one from the European Court of Human Rights (Berrehab)[549] and another from the ECJ (Surinder Singh),[550] have had some influence on the British government's policy concerning the admission of family members and the operation of the

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[547]Hansard, 6 June 1985, col. 431; quoted in Bhabha and Shutter 1994: 77-78.

[548]Home Office, *Control of Immigration: Statistics*, London: HMSO, see also Bhabha and Shutter 1994: 79-80.

[549]Berrehab, [1988] 11 EHRR 322.

[550]R. v. Immigration Appeal Tribunal and Surinder Singh ex parte Home Secretary (C-370/90) [1992] 3 All ER 798, [1992] ECR I-4265, [1992] 3 CMLR 358; also see Sacdeva 1993: 166-169.

PPR. The question raised in Surinder Singh was whether Community law granted a right of residence to a national of a non-member country, or third country national, who was the spouse of an EU national returning to work in his or her own country after having worked in another member state.[551] The answer was positive. The Court held that Community nationals exercising free movement rights and returning to their own country acquired Community rights, including that of family reunion, and that in the case concerned the Home Office had wrongfully applied English law.

Under the Association Agreement, Turkish nationals appear to have rights of residence and in some isolated cases, under family formation or reunification within the Community, which put them in a far better position than other third country nationals. In one case referred to by Bhabha and Shutter (1994: 226), Fatma, a young Turkish woman as the spouse of a person on limited leave, worked as a shop assistant while her Pakistani husband Mustafa studied engineering for four years. As a student, the Pakistani husband would have no independent right to remain in Britain at the end of his studies. But because of the Association Agreement, Fatma was entitled to continue with her job and therefore to reside with her husband in Britain. If she had been Pakistani, too, the couple would have had to leave the UK.

What would the result be, then, if the Turkish wife of a Turkish student worked during the period of the husband's study in Britain? We would argue that this is no different a scenario from the one mentioned above, provided that he has no restriction on his right to work. Therefore, the spouse who is not a student, should be able to carry on with the job and so to reside with the other spouse in Britain.

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[551]The facts of the case are as follows: An Indian Sikh man had married a British Sikh woman in 1982, who had both worked in Germany between 1983 and 1985 and had both returned to the UK at the end of 1985 to open a business. The husband had been granted limited leave to remain as the husband of a British national in 1986. Nevertheless, after the couple's marriage broke up, the husband found it impossible to obtain indefinite leave to remain in the UK and was subject to a deportation order in December 1988.

7.3.4 The primary purpose rule

Clearly, this is not a place to give a full account of the unique primary purpose rule, nor is this intended.[552] On the other hand, the PPR has been a major legal tool in the hands of British policy makers in immigration matters and has explicitly targeted family formation. This raises the question whether it is useful as a model for other countries.

As the category of spouses began to constitute one of the most numerous categories of new applicants, it is not surprising that attempts at reducing the number of entrants have focused so clearly on the immigration rules for fiancé(é)s and spouses. It is quite clear that English law could not defend a basic rule that one cannot marry a foreigner who would then ask for entry to Britain (see already Bevan 1986: 253). Therefore, strong mechanisms of discouragement or deterrence, including the PPR, have been developed to achieve precisely the same effect.

Further, in that situation, Asian girls in Britain are expected to marry men overseas and to stay there with them. Sachdeva (1993: 115), rightly, views this as an implied repatriation policy affecting mainly young women of a particular group, which he also considers to be a clear case of indirect institutional discrimination. The Rules have also been strictly applied against men who were told they could not remain in the UK before they married. The implication of this policy was that if a woman married a man who had at any time been in breach of the Rules, she might never be able to reside with him in this country.

In one such case,[553] Selim Ajir, a Turkish national, was subject to a deportation order in 1981 unknowingly because he had overstayed. The following year, he met his future wife Irma, born and brought up in Britain. They lived together for two years and got married after Irma's divorce from her first husband and then applied for Selim to stay permanently, but the Home Office refused to lift the deportation order, arguing that the marriage was for immigration purposes only. After interrogation separately by the Home Office, Irma was informed that her

[552] The only detailed study is Sachdeva 1993 with a full bibliography; see also Justice 1993.
[553] Reported in Bhabha and Shutter 1994: 85.

husband had been arrested and was being deported back to Turkey. This case highlights the fact that although the PPR primarily targets spouses from the Indian subcontinent, Turkish nationals as well as other nationals can also be caught up by this rule.

In the early 1990s, the PPR, which had applied to all women seeking to join their husbands since 1988, began to be used more frequently against women abroad applying to join British husbands, mainly from Thailand and the Philippines (see Bhabha and Shutter 1994: 108-109). This clearly shows that the PPR, which proved to be an efficient device in curtailing migration of spouses, can potentially be directed to any immigrant group, and women as well as men, when an increase in numbers is conceived to be a threat by the government. Obviously, EU nationals would not be hit by this rule.

Mainly as a result of the pressure of these cases and expecting to lose the Surinder Singh case, the Home Office announced new guidelines on 30 June 1992. Their effect is that:

> "An application from a spouse for an entry clearance or for leave to remain should be allowed when it is expected that the marriage is genuine and subsisting and either the couple have been married for at least five years or one or more children of the marriage have the right of abode in the United Kingdom" (Cotran et al. 1991: D 49).

It has been suspected that this policy change could also be 'a pre-emptive strategy' to avoid a further case under EU law (Sachdeva 1993: 168). The new technique amounts probably to a new quota system, as the JCWI argues:

> "As the rule is used primarily against applicants from the Indian subcontinent and other South Asian countries, we fear that there will be now an unofficial five-year waiting period for couples in these areas, operating as a disguised quota system to regulate migration" (JCWI 1992: 8).

On the other hand, an application might still be refused, especially where the applicant's criminal record necessitates his exclusion or where the sponsor in the UK is unable to satisfy the maintenance and accommodation requirements of the Immigration Rules (Cotran et al.

1991: D49). Explicit reference to the maintenance and accommodation requirements points to a definite strengthening of the economic considerations (Sachdeva 1993: 168).

Further, in January 1993, it was revealed that the Home Office issued secret internal instructions to officers dealing with applications for settlement based on marriage where the person remained illegally in the UK before the wedding (Bhabha and Shutter 1994: 87). These suggested that deportation should not be carried out, where there were children involved, or where the relationship had lasted for more than two years.

After Surinder Singh, it became quite clear what a couple separated by the primary purpuse rule in Britain would have to do (see Sachdeva 1993: 166-167). The British spouse would have to move to a member state, exercising the right to freedom of movement. Then s/he could be joined by the overseas spouse, in pursuance of the laws of that member state, which in most cases allowed family reunion under EU law.

In recent years, the British system of immigration control has developed in reaction to the family migration, and particularly family formation of certain immigrant communities. So, the rule system of British immigration law has become much stringent over the years, by often employing subjective devices and vague language, such as the PPR, to curtail the number of spouses admitted under this category.

Thus, the already restrictive system of law is also applicable to Turkish family formation, particularly when it involves plain rules and regulations. Further, the possibility of applying the rules subjectively on an *ad hoc* basis implies that not only the main immigrant communities suffer, such as immigrant communities from India and Pakistan. Other cases of family formation, not necessarily of Turks, may also be brought up by the British system of immigration control.

CHAPTER 8

CONCLUDING ANALYSIS

Turkish migration to Western Europe has a history of over 35 years. Within this period, not only has the Turkish population in Europe experienced considerable social and cultural transformation and acquired a heterogeneous structure with diversified needs, but also the polities and legal systems of the receiving countries have adjusted and responded to the presence of immigrants in varying forms and extents.

Migration of Turks to Western Europe has posed a new and in many respects unprecedented challenge to the national immigration control systems of these countries. Turks have, on the one hand, an intermediary legal position which provides them with far better legal safeguards, compared to other third-country nationals. On the other hand, they have increasingly become the target of the immigration systems of the respective countries because of the size of the immigrant population.

Thus, the present thesis has sought to test if and to what extent the legal systems of the three receiving countries have differed in their response to the presence of Turkish immigrants, and which variables have been most effective in the legal reception and status of Turkish immigrants in these countries.

This concluding chapter pulls together a number of important findings that have been discussed in some detail in the previous chapters and culminates in an analysis of the key variables. The size of the respective Turkish population in the three countries studied, distance of cultures and the unique development of each national immigration system, as well as the continuing need for immigrant workers, are shown to be the key factors in determining the varying response of these national legal systems to the presence of Turkish immigrants.

8.1 Summary of the findings

Chapter 2 provided a brief analysis of the development of Turkish migration to Western Europe as well as an assessment of the socio-economic situation of Turkish immigrants in Europe. This analysis has helped us to have an understanding of the underlying socio-economic factors behind the development of immigration laws and the legal reactions of the respective countries towards Turkish immigrants.

The Turkish population in Europe has undergone a complex process of social and legal transformation in various ways. This change was mainly due to the recruitment stops in the mid-1970s and the progression from a 'workers only society' to the migration of family members, resulting in an increase in the immigrant population of Turkish women. More recently, the family formation of Turks has taken a much more prominent role than family reunification, despite the fact that the family reunification stage is not complete yet, mainly due to a limited number of immigrant workers who are still recruited and asylum seekers. The present thesis does not cover asylum seekers or refugees. Nevertheless, the growth in the number of asylum cases of Turkish nationals has led the receiving countries increasingly to target Turkish nationals, in particular, limiting their terms of entry, for instance in the form of imposing visas.

The migration cycle has resulted in an improvement in living conditions and standards of living of Turkish immigrants. The data also show that there has been a strong tendency among Turkish migrants to move from wage-earning employment to self-employment, which was analysed in detail in Chapter 5. The so-called cumulative process, often expressed in terms of a structural need for continuing immigrant flows, has made the migrant an indispensable factor for the receiving country. The legal reactions of the three countries examined, mainly through immigration controls, have reflected such socio-economic facts, as discussed in the major chapters of this thesis.

Despite the myth of return, a significant proportion of Turkish migrants, although they first entered the receiving countries with no intention of remaining for extended periods of time, ended up as permanent settlers. This is perhaps the most important change that Turkish migrants have witnessed since the beginning of the migration process. The idea of a self-feeding process of migration, developed by Böhning (1984), has proved to be applicable to the permanent settlement of Turkish immigrant populations in Western Europe in this regard.

Chapter 2 further discussed various non-legal factors leading to migratory movements as well as economic motivations of the receiving countries and individual aspirations of Turkish immigrants. Such excursions into the non-legal field have enabled us to analyse the socio-legal dynamics of Turkish migration. Although Turkey continues to present a situation in which the domestic economy is unable to absorb surplus labour, the European demand for labour, particularly for Turkish workers, appears to have shrunk over the years. This is clearly reflected in the legal developments.

The fairly young characteristics of the Turkish migrant population, coupled with the rising tendency of family formation with a spouse from the home country, is beginning to raise concern for the receiving countries over the integration of such people, particularly into the labour market. The unemployment of migrant workers contributes to the rising tension between indigenous people and migrants, as they come to be seen as a burden on the welfare state and, more dangerously, this becomes a justification for the radical manifestations of violence against immigrants in the receiving country. Increasing importance is now given by the receiving countries, particularly the Netherlands, to the labour-market integration of immigrants and their descendants with a view to countering the huge unemployment problem that exists among Turkish youngsters.

Hostility towards immigrants is a general phenomenon in Western Europe, and has the same characteristics in all countries, depending in each case on a variety of factors. It is obvious that this could lead to less pull factors and in fact to re-migration. Taking appropriate action fast

and efficiently might be considered by some sections of the society as concession to immigrants. Therefore governments are sometimes precluded from taking the appropriate actions because of fear of losing popularity. Nevertheless, in the current discussion of the integration of long-settled immigrant communities in Europe, the establishment of legal safeguards should be viewed as a prerequisite for any integration effort having some degree of success.

In Chapter 3, we have considered the contents of an 'umbrella regime' consisting of a framework of international legal conventions applicable to Turkish immigrants in protecting their rights, which at the same time supplements the protection already available in the three domestic jurisdictions we are concerned with.

A general discussion of the rights of aliens in international law from a historical perspective yields the conclusion that the most significant developments in this field are to be expected from bilateral or multilateral treaties, which indicate more clearly the limits to state discretion in matters of entry and exclusion. Such international instruments, in particular the ECHR and the Social Charter, provide some safeguards in protecting the rights of long-settled migrants and their families but fall short of providing remedies in the initial admission stage.

We have further found in Chapter 3 that, over the years, particularly the Ankara Association Agreement and its components have had great practical effect in protecting the rights of Turkish immigrants in Europe. Emphasising the importance of the Agreement and its various implications for Turkey and Turkish residents in the EU, we have focused our research on how far Turkish migrants can benefit from these various instruments in protecting their rights, and how this protection could be expanded within the context of EU law.

We have found that, in the first place, a provision in such an agreement or in an Act adopted for its implementation (within the context of Article 177(1)(b) of the EC Treaty) must be regarded as being directly applicable when the provision contains a clear and precise

obligation which is not subject to the adoption of any subsequent measure. This was clearly so for some of the Articles of the Association Council Decisions, particularly Article 6 and 7 of Decision 1/80.

Moreover, Article 6 of Decision 1/80 provides a Turkish worker entitlement to the renewal of his work permit for the same employer upon a minimum period of one year's legal employment, and free access in that member state to any paid employment of his choice after four years of legal employment. It must also be noted in the light of the ECJ decisions in Kuş and in Eroğlu that the original reason for admission to EU countries should not affect the position of a Turkish national who is legally resident and employed in an EU country.

Article 7 of Decision 2/76, Article 13 of Decision 1/80 and Article 41 of the Protocol further provide safeguards by way of a standstill clause. These provisions prohibit, in principle, any restrictions on the rights of Turkish workers and their families and on the freedom of establishment and services. However, the precise meaning of these provisions still remains unresolved, as most of the rights under these documents are subject to the legality of the employment and residence of Turkish immigrants, the exact scope of which is not yet clear.

With respect to the rights of Turkish immigrants under family migration, it is unfortunate that Turkish workers cannot directly rely on the Association Agreement to gain entry to the Community labour market or that of any member state. However, under Article 10 of Regulation 1612/68 and the Appendix to the Social Chapter, the term 'family of a foreign worker' should be understood to mean at least his wife and dependent children under the age of 21 years, and even dependent relatives in the ascending line of the worker and his spouse.

On the other hand, the Agreement and its components provide certain rights within a member state to those Turkish workers and their families who have been admitted under national regulations (Article 7 of Decision 1/80). The rights deriving from this Article have been further extended in Eroğlu. This provision confers a right on children of Turkish workers who have

completed a course of vocational training in the receiving country to respond to any offer of employment there, provided that one of their parents has been legally employed in the member state for at least three years.

The effects of international instruments concerning family migration have, on the whole, been limited. The ECHR has provided some safeguards, where the right to family life is jeopardised or where the expulsion of the immigrant is an issue. Nevertheless, the admission of family members of Turkish migrants remains largely within the domain of the national jurisdictions of the respective countries.

In accordance with Article 14 of Decision 1/80, Turkish workers can only be expelled on grounds of 'public policy, public security and public health'. We saw that the ECJ has interpreted the public policy exception narrowly. A German Land Court held (in 1993) and legal academics agree that public policy, public health and national security must be interpreted in the same way for Turkish immigrants as EU nationals under Article 48(3) EC.

In Chapters 4-7, we have considered if and to what extent the legal systems of the three countries studied here have responded differently to the presence of Turkish immigrants and which parameters have been most effective in the legal reception and treatment of Turkish immigrants by these countries. The extent to which the size of the Turkish immigrant population in the receiving countries has influenced the legal reactions towards Turks has been discussed as well as the perception of Turkish immigrants as a potential threat for the immigration control mechanisms.

The difference in the socio-cultural and socio-economic background of the Turkish immigrant population from the receiving society and other immigrant populations turned out to be a relevant factor in determining the legal reception and status of Turkish immigrants. The unique development of each national immigration system and the continuing need of Western

European economies for immigrant workers have also proved to be important determinants for immigration control, which we have discussed at some depth.

While the development of the law and practice in connection with Turkish migration was not difficult to follow in Germany and the Netherlands, the comparison of the British legal reactions to Turks was not an easy task, as the British legal system of immigration control has mainly developed in reaction to other sources of migration, notably from South Asia and the Caribbean. Thus, our discussion on UK law and practice has tended to be more general, while at the same time considerable effort has been made to show the implications of such developments on the legal reception and status of Turkish immigrants in Britain.

Chapter 4 discussed the general divergence of the immigration control systems of the three countries. In Germany, immigrants are treated as 'foreigners' or 'alien' unless or until they have acquired German nationality. A bizarre outcome of this is that while 'ethnic Germans' simply acquire German citizenship because they are 'German' under the Constitution, citizenship and even the legal right to residence of the second and even the third generation of migrant workers are tied to strict conditions. In the Netherlands, however, the historical conception of 'pillarisation' and existence of various social and cultural groups mainly determined by their religious affiliation caused new immigrant populations to be defined on the basis of their collective identity; consequently policies are organised around ethnic minority groups rather than individuals. Nevertheless, these approaches have been somewhat modified due to such factors as 'depillarisation' and recruitment of workers from the Mediterranean countries. In Britain, on the other hand, many immigrants, particularly from the Commonwealth, entered the country with full citizenship rights or with other political rights; this has created relatively less obstacles in the formal equality of long-settled migrants.

After discussing the general policies of these three countries on worker migration, Chapter 4 focused on the more specific legal reactions of these three countries to labour migration from Turkey. Despite the early liberal policies in recruitment of foreign workers, which was largely

influenced by German employers, administrative action has been by far the most common method in regulating migration, particularly since the recruitment stop in 1973. It came to be seen that the process of foreign worker recruitment could not be left solely to the demands and conditions of the labour market, but it was necessary to monitor this process according to the 'degree of receptivity and absorption of the social infrastructure'.

While Germany continues to see the economic benefits of immigration rather than its social costs, the Netherlands, after an initial lenient period of regulating recruitment of foreign workers, came to the conclusion that the employment of foreign workers was not entirely beneficial for the country. This has influenced the government's perception of immigration, as reflected in a Memorandum which envisaged reintroducing the rotation principle. With the realisation that these immigrant workers were here to stay, these new ethnic minorities became the target groups of 'minorities policies'.

At a time when Germany greatly expanded its intake of workers, the UK imposed controls, from 1962 onwards, on the entry of Commonwealth citizens as workers. However, subsequently, curtailing new settlement rather than controlling labour movement has become the dominant theme in the British context.

In Germany, the concept of *Verwurzelung* (entrenchment) was developed by scholars and applied by the courts. It means that the longer the migrant worker remains, the stronger his/her residence status should be and the greater the restrictions on administrative discretion. In the Netherlands, the migration policies of successive Dutch governments have been based on two opposing tendencies. The first trend was to work towards a restrictive policy on the entry and admission of new immigrants, with the exception of the admission of refugees and admission in the context of family reunification. The second was a minority and anti-discrimination policy, with the aim of granting settled immigrants a legal position similar to that of Dutch nationals. This approach, explicitly and positively, recognises officially the permanence of

ethnic minorities in the Netherlands. In this respect, British policy has been similar to that in the Netherlands.

The 1990 Aliens Act in Germany, while recognising the right of long settled immigrants to stay in Germany, has made it more difficult for short-staying workers to acquire the same right. Admission of new Turkish workers is not considered to be desirable by the German policy because, under Article 6(1) of Decision 1/80, it is almost impossible to send away Turkish workers legally after one year of legal employment. In the Netherlands, the policy of the government is one of restriction, leaving now only an extremely limited right of admission into the Dutch labour market, probably for the same reason. Within the already strict application of the Work Permit schemes in Britain, applications of Turkish nationals for work permits do not appear to give rise to any noticeable response. Most probably this is because of the low numbers involved.

A revival or continuation of the rotation principle can easily be deduced from the recent practice of allowing short-term labour migration in various forms and categories in all the three countries. In particular, looking at the increase in the number of seasonal workers, job training programmes, au pairs, other temporary work categories, particularly from Eastern European countries, one can see the re-emergence or continuation of a *Konjunkturpuffer* approach or a rotation principle. There are other categories of exceptions under which recruitment of foreign workers is carried out; most of these are intended to be of temporary character. This reflects economic concerns which have caused the national legal systems to keep avenues open in the legal regulations to satisfy labour demands.

Immigrants are often used as scapegoats for numerous domestic problems. For example, the concept of *Plafondierung* was developed in an effort to tackle the problems created (supposedly) by the concentration of great numbers of immigrant workers in certain regions, and particularly the excessive strain placed on local social structures. This dispersal policy was applied in Germany from April 1975 to April 1977 but was then abandoned. Similar

problems exist in the Netherlands, too, in respect of lack of social structure, such as housing and education, even though this has something to do with the general situation of the infrastructure. None of the three countries, it appears, has been able to regulate the spatial distribution of immigrant populations.

Empirical studies clearly show that immigration has been, and is also likely to be further beneficial for the receiving countries, as long as it is under control. However, there seems to be immense political pressure against immigration which may influence policy-makers to give more attention to political rather than economic rationality. On the other hand, wider attempts have been made regarding the integration of minorities into the labour market and social life, as this was perceived as being both in the employers' and the government's interests, particularly in the Netherlands.

German policy in the 1980s became increasingly concerned with the 'problems' emanating from both the existence of a growing Turkish population and the possible inflow of Turkish workers from Turkey. One of the main objectives was the invalidation of the freedom of movement rights of Turkish workers as promised under the Association Agreement. Despite the earlier reluctance of the German courts in the 1980s to implement Decisions 2/76 and 1/80, they are now beginning to implement the decisions of the Association Council. Recent legal literature, as we saw, seems to be taking much interest in the legal implications of these developments under the Association Agreement.

In the Netherlands, Decision 1/80 is now firmly embodied in immigration regulations, while in the UK, the decisions of the Association Council have not been transferred into the domestic law. In principle, Turkish immigrants are able to rely on the rights guaranteed under the Decisions which can be cited in any proceedings. The relatively low number of Turkish immigrants reflects the lack of interest on the part of the Home Office in particular, despite the emphasis of some recent legal writing in Britain on the implications of the Association Agreement.

Chapter 5 discussed the responses of the three legal systems to the development of Turkish self-employment in these countries, making a clear distinction between the position of those switching to self-employment from within the receiving country and those applying from abroad. It was generally noted that the increase in the number of self-employed Turkish immigrants should also be viewed within the context of a wider European phenomenon, hence shops and firms supplying ethnically distinctive goods and services are in fact just one category within the growing small firm sector.

In Germany, the transition to self-employment has been mainly determined by economic factors and labour market conditions, even though some early obstacles existed in the form of refusal of necessary permits and the high costs of starting self-employment. For Turkish residents in Germany, obtaining the right to open a business consists of many formalities, such as complying with educational or occupational qualification criteria. Predicting when a residence permit may be granted for a would-be self-employed person is difficult; it always depends on the specific characteristics of each individual case. In practice, there are many businesses either established by Turks directly or in co-operation with other companies in Germany. While it may have been correct, initially, to focus on an 'ethnic niche' of Turkish self-employment, more recent evidence clearly shows Turkish self-employment spreading throughout the economy.

In the Netherlands, the entrepreneurship of members of ethnic minorities has been acknowledged as of major importance for Dutch society, but not necessarily of those people outside the Netherlands wishing to open a business in the Netherlands. For the latter category, it is essential that the proposed activities of the applicant should serve 'essential Dutch interests'. No precise legal framework exists for determining what this means. In practice, a positive decision may be made if the company has an innovative character and the service it provides cannot be supplied by a Dutch company. Positive action has been proposed and

implemented by the government within the context of recent programmes to promote ethnic entrepreneurship.

In Britain, the pattern of Turkish self-employment among the Turkish resident population is much more prominent than in the other two countries in terms of the ratio of self-employed Turkish immigrants to the whole Turkish immigrant population. No noticeable response exists towards self-employment of already settled ethnic minorities. Nevertheless, the UK has the most elaborate and institutionalised system of immigration law in Europe for the admission of foreign self-employed persons. Having said that, as the Rules have become much more restrictive since 1980, many applicants are trying to use the work permit scheme or sole representation rules, hence avoiding the stringent business rules altogether.

Various obstacles are reported, from all three countries, about acknowledging overseas qualifications and school diplomas. In particular, the regulations on establishment, which lay down requirements with respect to professional expertise, commercial knowledge and credit-worthiness, pose a significant barrier to ethnic entrepreneurship. Generally, a system according to which entry into self-employment depended solely on the quality of the business plan would be fair to Turkish entrepreneurs and others who had practical knowledge but lacked any form of business diploma.

Article 41(1) of the Protocol of 1970, read in conjunction with Article 13 of the Association Agreement, provides (after the entry into force of the Protocol of 1.1.1973) that the Contracting Parties shall not lay down any new restrictions on the freedom of establishment and the freedom to provide services. Since then, both EU governments and the Turkish government could arguably not impose new restrictions on freedom of establishment. We found that there is either ignorance or considerable reluctance in taking account of this protective framework.

Chapters 6 and 7 focused on family migration. In light of the Demirel dicta, we have departed from the notion that at the present time national laws govern family reunification and family formation of Turkish immigrants. Family unity remains one of the basic pillars of Western societies, and states continue to permit the arrival of other members of the original immigrant's family. Nevertheless, this concept is not interpreted in a uniform manner and its scope is being challenged by a number of states, through various restrictions and conditions attached to it, such as minimum age requirements, waiting periods, and now increasingly accommodation and maintenance requirements.

In Chapter 6, it became clear that following the stop of recruitment in 1973/4, family reunification of Turkish immigrants became an important element in the continuation of the migration flow into Germany and the Netherlands, whereas Turkish migration to Britain does not really create points of comparison in this respect.

In all the countries we are concerned with, the pronouncements of a concern for integration of the foreign workers and their children, which quite often does not mean more than a strict definition of the family, damage, ironically, the integration of immigrants living in that country. For instance, imposition of a maximum age requirement of 16 years for family reunification of children of immigrants leaves families separated, which does not really contribute to better integration of immigrants. This shows that the immigration agenda have remained state-focused rather than becoming family-centred. In particular, a reversed waiting period of three years has now been imposed in the Netherlands, during which family members have to be transferred to the Netherlands upon satisfying a number of other conditions. The main aim of this probation period is, apparently, to stimulate the early entry of spouses and children, in particular, so as to enable them to integrate more smoothly into Dutch society.

In all three countries, there is conflict between the definition of family members in domestic law and the definition under EU law and international law. The definition of the family for Turks must also cover descendants who are under the age of 21 years or are dependants; and

even dependent relatives in the ascending line of the worker and his spouse. To this extent we saw again that the Association Agreement and its follow-up have given a special legal position to Turkish immigrants and their descendants in Europe.

It was further concluded that the proportion of what has been called unsatisfied demand for family reunification, and the perceived economic burden of family reunification are not significant, as this process is now nearly over. However, later arrivals have been hit by stricter immigration regulations. In particular, accommodation and maintenance requirements continue to be imposed in all the countries, though to a varying extent. For example, in Germany, an adequate accommodation requirement is now not imposed on children of Turkish immigrants, who are either born in Germany or are less than two years old. In the Netherlands, as a result of recent discussions in relation to the application of this requirement, a stricter set of financial requirements has been formulated, notwithstanding the fact that the application of the requirement of 'sufficient means of subsistence' has been relaxed for holders of permanent residence permits. In Britain, there has similarly been much concern over the issue of maintenance and accommodation without recourse to public funds, as immigrants are perceived to be costing the state money. This has been reflected very extensively now in the new set of Immigration Rules (HC 395 of 1994 and HC 329 of 1996), the latter of which even included any form of invalidity benefits among 'public funds'.

Attention has also been drawn to the application of the new subjective integration test requirement in the Netherlands, where children of immigrant workers do not need a work permit; they receive 'declarations' instead. The Dutch policy, in contrast to German policy, considers it illogical to allow members of an immigrant's family to enter the Netherlands and yet deny them the right to work. British immigration law appears to be imposing few restrictions for access of family members into the labour market.

Chapter 7 focused on family formation, which has become one of the major focal points within all three national systems of immigration regulation and control examined here. The tendency

towards neo-local settlement pattern was first witnessed within Turkey in the context of Turkish internal migration and then in the family formation patterns of Turkish immigrants in Europe. However, the tendency among Turkish immigrants, particularly in Germany, is towards marrying a partner within the country of residence. This is perhaps an outcome of growing up and living in the receiving country for a long time, rather than a result of legal interference.

In Germany, restrictions in the form of a waiting period for access to the labour market have long posed serious obstacles, particularly for Turkish families, because many of the rights conferred on Turkish immigrants are linked to periods of legal employment for a certain period under the provisions of Decision 1/80. This does not cause much concern in the Netherlands, nor in the UK, as no restriction of this kind exists. In Britain, nevertheless, working prohibitions are imposed on fiancé(e)s.

We found that some of the requirements of family formation are in conflict with, and not sensitive to, the culture of immigrants, such as housing requirements. Such requirements often do not impose more than formal hardship and extra expenses, rather than guaranteeing the welfare of the family. In some cases, immigrants satisfy the housing requirements, but they do not actually live in this accommodation.

In the Netherlands, as in Germany, recent measures have been taken in an attempt to prevent 'marriages of convenience'. English law has gone far beyond the worries of marriages of convenience to impose on applicants an onerous burden of proof that settlement in Britain is not their primary purpose. The PPR has been developed, in addition to other mechanisms of discouragement or deterrence, to reduce the number of new entrants into Britain.

In all the three countries, the case law of the ECHR has begun to have a positive impact, particularly on issues effecting family life, even though it often does not produce the expected

result, for example in the Abdulaziz, Balkandali and Cabales[554] cases in Britain. It is unfortunate, however, that the European Court of Human Rights has never recognised the right of a family who have never lived together in one country to do so in that particular country, especially if they can exercise their family unity rights in the country of emigration.

The legal reception and status of Turkish immigrants are clearly reflected in the immigration systems of the respective countries, though in varying forms and extents. Despite the protective framework of supra-national and international instruments, the legal position of Turkish immigrants varies in the respective countries, depending on a number of socio-economic factors which have influenced and shaped the legal reactions of the respective countries towards Turkish immigrants.

8.2 Analysis of major factors affecting Turkish migration to Europe

The main premise from which we set off was that the absolute and relative size of the immigrant to the native population, and to other immigrant populations, influences social perceptions in the receiving country as to whether a migrant population presents 'social problems', and thus influences the way in which immigration regulations are constructed. In particular, the systems of immigration control largely develop in reaction to immigrant groups which are seen as problems, real or potential.

Having said that, the role played by 'numbers' is not conclusive, even though its major influence is inescapable. Abstract evaluation of the size of the Turkish immigrant population as a conclusive factor in determining the legal reception and status of Turkish immigrants would not be adequate at all on a number of grounds. The simplest is the fact that all immigrant communities are groups of human beings, and not just material commodities, with socio-cultural, economic and legal implications. In the migration process, migrants play both

[554]Despite the decision of the European Court of Human Rights, which found a violation of Article 8 (right to family life) and 13 (remedy against sex discrimination), the British government subsequently changed the law, reducing the rights of family members to a lower level of equality.

an active and passive role; their presence as 'the other' give rise to specific legal responses and they are also affected by these legal reactions.

Even in the context of internal migration within a relatively homogenous society, newcomers with their unfamiliar way of life and conduct may be subject to negative responses from resident people. The specific cultural and socio-economic background of Turkish immigrant populations is, therefore, an *a priori* factor determining their legal position. As a related factor in combination with the size of immigrant population, it greatly influences social perceptions as to whether a migrant population is regarded as a social problem in terms of 'distance of cultures'.

As far as Turkish immigrants in the respective countries are concerned, culture appears to play a key role as a determinant of the legal reception and status of Turkish immigrants in Europe. In fact, the 'culture factor' would have constituted a more significant element if a comparative study of various immigrant groups within a single receiving country had been made. Given the constraints of the present study, this kind of investigation must be left to a future project.

Assessment of the size of Turkish immigrant population with perceived cultural differences would not be adequate on its own in determining the legal reactions of the respective countries towards Turkish immigrants. First of all, these three countries have received other immigrant communities in varying numbers and status. Thus, the legal reactions of these receiving countries cannot be reduced only to Turks, even in Germany; they have also responded to other immigrant communities.

Further, each national immigration system has its unique background of factors which influences the legal treatment of immigrant communities. Thus, a complex factor which greatly influences and shapes the legal reactions of the respective countries is the peculiar development of each national immigration system. The development of the interaction between history, economics, politics and law in each country and in Europe at large, as it pertains to

immigrants, and Turkish immigrants in particular, is an important factor, which this study has taken into account in considerable depth.

The peculiar development of each national immigration system has clearly shown that the respective receiving countries have developed their own set of laws and frameworks in first initiating, later regulating, and then restricting the migration process. A corollary to this unique development of each national system of immigration control is the ever-lasting and continuing need of these three countries for new immigrant workers, albeit for certain categories of jobs and for temporary periods. This has resulted in a situation where the respective states have to decide either to pay attention to social costs or economic benefits of migration.

In this regard, there are important differences between the three countries, as our study showed in detail. While German policy-making within the context of the guest worker model earlier focused only on the economic aspects and benefits of immigration, there is now more attention given to the social costs. In Holland, we found a more ambivalent evaluation throughout, tilting towards the negative, while Britain has throughout emphasised the social costs of immigration and appears unwilling to consider the economic benefits of migration.

There is also a continued need not only for new immigrant workers to satisfy the labour demands of the receiving countries but also for international mobility. This necessity arises not only from human rights considerations, such as the right to family life, but it is also justified on socio-economic and political grounds. Thus, the total exclusion of Turkish nationals from entering the receiving countries would neither be politically wise nor practically possible. Thus, there is a certain movement of people across the international borders for a variety of purposes which cannot be resisted.

These major factors have constituted the socio-political and economic background against which our analysis of the legal reception and status of Turkish immigrants has been carried

out. Reflecting upon these relevant themes, it can indeed be argued that the size of the Turkish immigrant population to the native population and to other immigrant groups in each country, in combination with its cultural distance from that of the host country or any other immigrant communities, gives rise to a particular response to them, legal or otherwise. The perception of Turkish immigrants as a potential threat for the national systems of immigration control due to a possible inflow of Turkish immigrants has negatively influenced the legal reception and status of the Turkish immigrants in the three receiving countries.

The immigrants gave rise to an immigration system of a particular type. Thus, the German system focused on worker migration and its control, later on family migration for workers, while the UK, in particular, developed its immigration law system in reaction to post-colonial events, now culminating in restrictions on family formation, as international diaspora communities continue to produce a need for multiple cross-border movements. The legal reactions of these three countries to Turkish immigrants have been modified due to the unique character of each national system of immigration control, rather than Turkish immigrants as such, although for Germany there is a strong correlation between these two factors.

In Germany, Turks are considered particularly visible not only because of their high concentration in certain regions, but also because of the cultural gap between Turks and Germans and other European immigrants (e.g. Italians or Greeks). Thus, the existence of a very high number of Turkish immigrants in Germany has caused policy makers to be concerned with the possible inflow of more Turkish workers from Turkey. For this reason, Germany has always opposed the free movement of Turkish workers. The existence of such a high number is often thought to be an additional 'pull' factor to Germany and would constitute an encouragement for those wishing to emigrate, particularly if free movement of Turkish workers was endorsed. Turkish residents in Germany would act as 'bridges' for further migration in the same way as earlier migrants performed the same function, particularly in the 1960s and 1970s.

The Netherlands has a mixed system of post-colonial and worker migration. Consequently, the Dutch response to Turkish immigrants has evolved differently, particularly at the early stages. Initially, a fairly relaxed system existed under which Turkish workers were recruited, starting with the recruitment agreement in 1964. However, the growing number of Turkish immigrants as well as other main immigrant communities in the 1970s and their increasing visibility has resulted in restrictions. These have first targeted labour migration (the recruitment stop in 1974), and then focused on controlling the migration of family members in later years.

With the realisation of the permanency of immigrant workers, Turks, Moroccans and the Surinamese are usually considered to fall into the same category of immigrants, and have been the target of specific ethnic minorities policies as well as restrictive immigration policies. They are also the most visible and largest immigrant communities in the Netherlands. Further, they are distinct communities from the native population in terms of their cultural differences, being non-Christian, and their socio-economic features are similar. In addition, we have clearly seen that the integration of resident members of these ethnic minorities into the labour market is viewed to be of utmost importance both by employers and the government in the Netherlands today, particularly in view of the high unemployment ratio among these ethnic minorities. This focus appears to have some negative implications for Turkish immigration, which continues to be viewed with considerable ambivalence.

As far as Turkish labour migration to Britain is concerned, Britain's unwillingness to recruit new workers from outside its former colonies and Ireland and the restrictive immigration policies since 1962 appear to explain the poor representation of Turkish immigrant workers in Britain. Also, in the 1960s and 1970s, continental countries were more attractive than Britain for Turkish workers, initially because of the official encouragement and reception services provided, then later because of the existence of Turkish immigrants, friends and relatives who functioned, as we saw, as 'bridges' between these countries and Turkey. In this regard, it can be argued that the existence of a relatively significant number of Turkish Cypriots in Britain

performed a similar function, albeit limited in numbers and modified by the fact of Commonwealth linkage.

Despite the fact that the number of Turkish immigrants living in Britain is very low, a possible inflow of Turkish nationals has always been seen as a potential threat to the system of immigration control. This also reflects the perception of Turks as culturally different, as they are Muslims. External immigration control has been given priority, not only for Turks, of course, which mainly took the form of visas or imposition of fines for airline companies for transporting passengers not having proper documents.

The view that the size of the immigrant population and its cultural differences from the host population have far reaching implications and consequently give rise to a particular response for that group, has much validity, especially as far as migration of family members is concerned. In the development of German law and practice, one can see how such ambivalent perceptions have been effective in shaping the German response: a continuing slippage between the positive role, associated with further immigration for the economy and the worries about non-German cultural influences, associated particularly with further immigration of Turks. The restrictive or rather protectionist tune, however, has been the dominant form.

The integrationist approaches that we saw in the three respective countries are often nothing more than a policy of stabilisation. The regulations with such integrationist aims have particularly hit those immigrant communities from which there exists a potential of family migration (Turks in the Netherlands and Germany, and South Asians in Britain). Any enlargement of the right to family migration might be conceived as a concession to an alien culture by some part of the society.

Since Turkish family migration is now predominantly in the form of family formation rather than family reunification, this may well result in the immigration control system targeting this channel of migration, particularly if there are large young immigrant communities, who look to

their country of origin for marriage. Thus, the self-multiplying effect of family migration through the chain migration process has had a restrictive impact on the family formation of those main immigrant communities in the receiving countries. It would be useful to research this in more depth than was possible here.

Thus, in Germany, waiting periods during which employment is prohibited, have been imposed as deterrence and discouragement, particularly for those Turks whose main motive of contracting marriage is acquiring admission into Germany. Further, restrictions on admission of spouses are imposed for those who themselves came to Germany under family migration rules. Although the aim of such regulations was claimed to be an attempt to prevent entry being granted through those who themselves have not clearly established their centre of life in Germany, it is obvious that the main purpose is to stop people from using family formation as a legal vehicle for further settlement.

The arguments of various kinds relating to the cultural differences of Turkish immigrants have also been employed as justification for restricting the right of immigrant residents to family formation, since both the restriction and improvement of this right would involve large numbers who might exploit the opportunity. Thus, the high number of Turkish immigrants with perceived cultural differences proves again to be an important factor in their treatment by the host country.

The relatively small size of the Turkish population in Britain is significant for the absence of a particular response towards them. Thus, in practice, the PPR does not hit family formation of Turks, but it has the potential of doing so. In Britain, even though Turkish immigrants are only a tiny minority, they are still subject to strict controls. These were not made for them, but are applied to them.

Thus, as already noted, British immigration law has mainly evolved in response to other sources of immigration, rather than Turkish migration. In particular, the immigration system

has developed to curtail and stop family formation of immigrants mainly from South Asia and the Caribbean, but also hit other immigrant populations such as those from Thailand and the Philippines, as they looked threatening in terms of the number involved. Although no particular response toward family reunification of Turkish children can be said to exist, they, too, are subject to the same increasingly strict conditions for admission, such as the new 'exclusivity rule'. Few cases of Turkish family reunification are unlikely to result in any negative response, mainly due to the very low numbers involved.

The present thesis has shown that in all the three countries studied, there is a continuing need for immigrant labour. It also became clearer that the receiving countries are seeking to employ strategies which would not lead to the permanent settlement of such immigrant workers. Despite the fact that economies do and still will need immigrant workers to make up for the ageing population and to keep its economy developed, they have been looking for other sources of migrant workers rather than main immigrant communities. It appears that Germany seeks to keep the number of Turks at its present level and wishes to decrease their dominant role among the immigrant groups in numerical terms. Efforts to modify the ethnic composition of immigrant population through legal devices and practices are a general pattern which can also be seen in the Dutch and British context and much more clearly in other migrant-receiving countries, such as Canada.

As far as Turkish self-employment is concerned, German policy, initially, seemed to be not aware of the business potential of Turkish immigrants. Accordingly, the transition to self-employment has been mainly determined by economic factors and labour market conditions and has been fed by a drive towards self-employment from within the Turkish community. Soon after, however, the significance of the ethnic businesses, particularly those of Turkish immigrants, has moved the official policy to an active encouragement of business activities of immigrants.

Ethnic businesses are typically small businesses and therefore it has been argued that the benefits the economy will acquire through these businesses is limited. However, one should not ignore the cumulative outputs of the high number of Turkish businessmen in Germany. Further, as more explicitly spelt out in the Dutch context, encouraging ethnic businesses can also be used as a labour market strategy. Thus, the development of Turkish self-employment alleviates the unemployment problem and also encourages other family members, particularly women, to work in family businesses. Actually, such considerations have proved to be an important rationale for some individual Länder in Germany to put forward various initiatives to explore this potential further.

Although Germany does not have a special set of rules regulating the admission of entrepreneurs, as it exists in Britain, the practice of allowing foreign businesses seems to have not been so restrictive. Under the reciprocal rights which businesses (German and Turkish) enjoy, nationals of both countries can open businesses with relatively few obstacles.

In the Netherlands, as part of an 'ethnic minorities policy' for which Turks are one of the main targets, the promotion of self-employment has been acknowledged as of major importance. The aim expressed was the proper utilisation of the entrepreneurial potential among ethnic minorities. However looking at the requirement that the proposed activities of the applicant must serve essential Dutch interests and its strict application, one would have to say that these benefits are expected from those within the country but not from those outside the country.

In fact, it seems that the promotion of ethnic self-employment has been viewed as a labour market strategy and a remedy to a high level of unemployment among Turks, Moroccans and Surinamese. This encouragement is therefore motivated not necessarily by a positive consideration of the immigrants' entrepreneurial potential but perhaps from the expected outcome that ethnic self-employment will save the welfare state from paying extra money, such as unemployment benefits.

In Britain, the view that members of ethnic minority communities should be encouraged to go into business has been less widely appreciated, despite the fact that this was said at least by some to be in the interest of the economy (less burden on social security and creation of wealth). This may be because of the fact that Asians, in particular, are already so dominant in businesses, particularly in retailing. The existence of a number of Turkish entrepreneurs does not seem to have caused any measurable response in a country which does not take enough notice of its ethnic self-employment potential anyway. As we saw, there is research evidence on the increasing number of ethnic businesses owned by Turkish Cypriots in Britain.

In relation to the admission of self-employed persons, British law now appears to be more concerned with stopping the business rules from being used as a legal means to enter the country. With the increase in the minimum investment requirement for applicant businessmen, Britain is now seeking to catch the 'big fish', and is less concerned with the contribution of small businesses.

The elaboration of the major factors determining the legal reception and status of Turkish immigrants points to the fact that these factors appear to have differing implications for various categories of Turkish immigrants. But, the fact remains that Turks as immigrants are targeted by the legal system everywhere, and on a number of quite different grounds.

8.3 Looking to the future

The size of the Turkish migrant population with its cultural differences, and the unique development of the national systems as well as the continuing need for immigrant workers and international mobility have determined the legal reception and status of Turkish immigrants in the three receiving countries. These determining factors have both inclusionary (integrationist) and exclusionary (protectionist) effects on the legal position of Turkish immigrants, even though the latter may precede the former.

The driving force behind the current efforts to secure the integration of immigrant minority groups in Western Europe appears to be the same force as that which has underpinned the development of every nation-state in Western Europe, namely the desire to secure a fully integrated population which is unified in its membership of, identification with and allegiance to the state. As pointed out by Collinson (1993b: 108), however, these same desires might result in the failure of these efforts, if founded too firmly on ideas of a shared cultural, religious, linguistic or racial identity. In other words, in all the three countries, assimilationist policies will need to combine with measures to take account of various pluralities. It is obviously not within the ambit of the present thesis to focus on such policies. What concerns us here is the particular position of Turks as a legal entity between 'alien' and full 'EU citizen'.

The underlying philosophy of the immigration policies of the EU member states and the community in general has been, up to now, that third-country nationals are a category of people that can not expect (or do not deserve) the same treatment as EU-citizens and cannot be treated as fellow country-men (see above, pp. 99, 101). Accordingly, the member states have been rather slow to incorporate and implement the additional rights and legal safeguards resulting from various instruments concerning Turkish migrants in the EU.

In the three countries we are concerned with, citizenship laws discriminate and impose conditions to a greater or lesser extent against the naturalisation of immigrants and/or their children. In Britain and the Netherlands, a higher proportion of immigrants or members of immigrant minority groups already have rights to free movement in the EU because they are full EU nationals. However, in particular in Germany, where citizenship laws appear to discriminate to a greater extent against 'foreigners' and/or their offspring, a far smaller proportion of immigrants enjoy the same rights (see pp. 138-139 above). We have already seen that Turks occupy an awkward intermediary position between EU nationals and non-EU nationals (for details see Chapter 3).

The way out of this ambivalent intermediary position for the resident Turkish population in Europe needs to be debated further. A number of possible ways for the legal integration of Turkish immigrants in the EU can be put forward.[555] First of all, each EU member state could introduce national legislation granting permanently resident aliens the same rights as its own nationals or, if this would go too far, the same rights as EU-citizens. In fact, this is similar to what may be termed as the citizen/denizen models that have been developed in the international law literature by various authors.[556]

A second alternative could be that the community legislation is changed in order to extend the right to work and live in other EU countries, to be granted also to third country nationals who have permanently settled in one EU country. In particular, the EC Commission is moving closer to this idea of extending the application of the community law to third country nationals. The European Commission and other influential bodies, such as the Ad Hoc Group on Immigration, on many occasions, have called for an examination of the possibility of granting third-country nationals certain rights or possibilities,[557] particularly in terms of granting them access to employment in another member state.[558] Nevertheless, this has not so far been adopted, nor put forward in a detailed proposal.

The third alternative would be to offer settled aliens the nationality of the country of residence in a more liberal way, i.e. with the possibility to retain the original nationality. This is a useful strategy because the present evidence appears to be that many aliens refuse to adopt a new nationality status if this means giving up their old one. It is now known that this is much more than a sentimental issue. In fact, Holland appears to have adopted this third road, as it has recently amended its citizenship law so as to allow long settled immigrants to acquire Dutch nationality without renouncing their own nationality (see Chapter 4.2.7 above).

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[555]See Groenendijk 1990a: 6-7.
[556]See, for example, Hammar 1986 and 1990, Layton-Henry 1990.
[557]Ad Hoc Group on Immigration 1991: 6.
[558]CEC 1991: 17, see also *the Guardian*, 26 July 1994 for the EC White Paper on a proposal granting third country nationals permanently and legally resident priority when job vacancies cannot be filled by EU nationals.

Another alternative could be to give the international human rights instruments a more effective role in protecting the rights of migrant workers and members of their families. In particular, the 1990 UN Convention on Migrant Workers provides a universal set of human rights norms applicable to migrant workers and members of their families, which constitutes a consistent conceptual base which would greatly enhance a further progress in the protection of migrants' rights at the regional as well as at international level (Lönnroth: 1991: 733). Thus, the entry into force and the effective implementation of this Convention, as well as the development of more precise international legal instruments must be seen as an important aspect of an international migration agenda, as far as the protection of the rights of migrant workers and members of their families is concerned. It must also be noted that these alternatives do not exclude the other ones, each option being supplemented by the others.

Layton-Henry (1992: 238), referring to the British experience, nevertheless concludes rightly that "the granting of 'de jure' rights does not necessarily result in 'de facto' equality of treatment". This demonstrates the fact that Turkish residents in Europe, even upon acquiring formal equality by means of citizenship and voting rights or action at the community level, may still face various problems in the form of discrimination, racial harassment and racial attacks. Thus, the above outlined options, however important they may be in providing formal equality for the settled Turkish community, are not enough by any means, and should only be considered as an important first step. In this respect, therefore, Turks in Europe will remain marginalised in various forms, at least for a considerable period of time. It appears that, for individuals and whole communities, this is a part of the price one pays for venturing abroad. Various strategies to overcome this could be the subject of another research project.

As to the question of freedom of movement for Turkish citizens from Turkey to the EU, it is clear that the political will to facilitate such freedom lacks, to the detriment of full membership of Turkey in the EU. The application of Turkey in 1987 for full membership of the EU was turned down, even though not literally refused, despite the fact that full

membership appeared to be envisaged and was actually desired by the Ankara Association Agreement of 1963 (for details see Chapter 3.2).

Further, Article 36 of the Additional Protocol in accordance with Article 12 of the Ankara Agreement have not been implemented. These provisions were not considered to be self-executing by the EU (see pp. 93-94 above). Under these provisions, greater freedom of movement of Turkish nationals is envisaged and in fact promised. The latest development in Turkish-EU relations came with the entry into force of the Full Customs Union in January 1996. This has basically removed all barriers to trade between the EU and Turkey, enhancing the free movement of goods, and obliges Turkey to adopt similar international trade policies as the EU. But, significantly, it does not include freedom of movement for persons (see pp. 95-96 above).

The absence of further developments on the issue of full Turkish EU membership and the tardy implementation of freedom of movement provisions for Turkish nationals in the EU, without doubt, points to a clearly negative political reaction by the member states of the EU. This political response, however, has had far-reaching legal consequences for the resident Turkish immigrants in the EU as well as for Turkish nationals resident in Turkey who might wish to come to the EU for a variety of purposes. Thus, the absence of positive response in the political field can also be considered as a significant legal reaction. It certainly underpins a variety of restrictive immigration control measures which either target Turks explicitly or have the effect of doing so. In fact, the absence of developments in the political field has not necessarily worsened the legal position of Turkish immigrants in the EU, but it has certainly not much improved their legal status either.

Within this framework of reference, it does not seem to be likely that the reluctance of the EU countries towards Turkey's full membership, and therefore freedom of movement of Turkish workers, will disappear for a long time to come. It is abundantly clear that the fear of a possible inflow of Turkish workers to the EU continues to be influential in this context. Thus,

as the basic working hypothesis of this thesis has indicated from the very start, the issue of numbers continues to be a dominant theme, not only in Germany and the Netherlands, but for the EU as a whole.

However, there are other important factors which contribute to the continued limbo position of Turks in Europe. As this thesis has shown in detail, Turks are perceived as culturally alien and as a distant 'other' which could be difficult to integrate. Current political developments in Turkey and their assessment in Europe confirm the fact that Turkey itself struggles with its hybrid identity and does not quite know where it belongs. Even if secular, pro-European forces retain an upper hand in Turkey itself, the cultural distance issue will not go away and will continue to work against relaxation of Turkish entry to Europe.

However, there are also powerful forces working in favour of increased and easier access of Turkish individuals to Europe. The present thesis has identified two major factors in this regard. Firstly, the national immigration control systems of the three countries examined here contain a large variety of rules which take account of existing links between Turks in Europe and those in Turkey. Especially in the area of family reunification and family formation, respect for basic human rights will work in favour of the claims of immigrants. Even though, the right to family life guaranteed under Article 8 of the ECHR does not appear to be treated as an absolute right, the national prerogative to control entry and exit from a state's territory is not absolute, either (see pp. 126-128 above). Here, too, a continuing dialectic relationship can be seen in operation.

It is very likely that this kind of dialectic struggle will continue to be influenced by hard economic realities, even if this is not openly acknowledged. The present thesis confirms evidence from other studies that European countries, whether they admit this or not, actually need additional labour. It is not politically feasible for any national government in Europe to admit this, but the development of the legal framework for Turkish migration to Europe in the

past few decades shows very clearly that economic realisms continue to override social reservations about the strange and threatening 'other'.

The fallout of this scenario, in legal terms, has been a largely unpublicised but economically very effective strategy: a plethora of legal rules facilitates the entry of Turks to Europe in various categories (see Chapter 4 in detail). There is no reason to assume that this ongoing process can be stopped by legal regulation, in fact it appears that the law will continue to be aware of economic and social realities.

Turks in Europe are here to stay, and the challenge of the future appears to make this stay as conflict-free as possible. The European countries might keep a blind eye on people outside but cannot do so on those inside. Within the limited scope given to the human rights dimension of the issue in this thesis, it appears that various international human rights instruments have the potential of providing further improvements in the field of human rights of migrant workers and members of their families, if the respective states are willing to make a more positive contribution for their implementation. In this context, it would be interesting to research the relevance of international human rights instruments to safeguard the human rights of migrant workers and members of their families in more detail than was possible here.

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APPENDICES

APPENDIX 1

ANKARA ASSOCIATION AGREEMENT

establishing an Association between the European Economic Community and Turkey

(signed at Ankara, 12 September 1963)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS,

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY,

THE PRESIDENT OF THE FRENCH REPUBLIC,

THE PRESIDENT OF THE ITALIAN REPUBLIC,

HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG,

HER MAJESTY THE QUEEN OF THE NETHERLANDS,

and

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

of the one part, and

THE PRESIDENT OF THE REPUBLIC OF TURKEY,

of the other part,

DETERMINED to establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community;

RESOLVED to ensure a continuous improvement in living conditions in Turkey and in the European Economic Community through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community;

MINDFUL both of the special problems presented by the development of the Turkish economy and of the need to grant economic aid to Turkey during a given period;

RECOGNISING that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date;

RESOLVED to preserve and strengthen peace and liberty by joint pursuit of ideals underlying the Treaty establishing the European Economic Community;

HAVE DECIDED to conclude an Agreement establishing an Association between the European Economic Community and Turkey in accordance with Article 238 of the Treaty establishing the European Economic Community, and to this end have designated as their Plenipotentiaries:

HIS MAJESTY THE KING OF THE BELGIANS:
Mr Paul-Henri SPAAK,
Deputy Prime Minister and Minister for Foreign Affairs;

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:
Dr. Gerhard SCHRÖDER,
Minister for Foreign Affairs;

THE PRESIDENT OF THE FRENCH REPUBLIC:
Mr Maurice COUVE DE MURVILLE,
Minister for Foreign Affairs;

THE PRESIDENT OF THE ITALIAN REPUBLIC:
Mr Emilio COLOMBO,
Minister for the Treasury;

HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG:
Mr Eugene SCHAUS,
Vice-President of the Government and Minister for Foreign Affairs;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:
Mr Joseph M. A. H. LUNS,
Minister for Foreign Affairs;

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY:
Mr Joseph M. A. H. LUNS,
President in Office of the Council of the European Economic Community and Minister for Foreign Affairs in the Netherlands;

THE PRESIDENT OF THE REPUBLIC OF TURKEY:
Mr Feridun Cemal ERKIN,
Minister for Foreign Affairs;

WHO, having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

TITLE I

PRINCIPLES

Article 1

By this Agreement an Association is established between the European Economic Community and Turkey.

Article 2

1. The aim of this Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the conditions of the Turkish people.

2. In order to attain the objectives set out in paragraph 1, a customs union shall be progressively established in accordance with Article 3, 4 and 5.

3. Association shall comprise:

(a) a preparatory stage;

(b) a transitional stage;

(c) a final stage.

Article 3

1. During the preparatory stage Turkey shall, with aid from the Community, strengthen its economy so as to enable it to fulfil the obligations which will devolve upon it during the transitional and final stages.

The detailed rules for this preparatory stage, in particular those for aid from the Community, are set out in the Provisional Protocol and in the Financial Protocol to this Agreement.

2. The preparatory stage shall last five years, unless it should be extended in accordance with the conditions laid down in the Provisional Protocol.

The change-over to the transitional stage shall be effected in accordance with Article 1 of the Provisional Protocol.

Article 4

1. During the transitional stage the Contracting Parties shall, on the basis of mutual and balanced obligations:

—establish progressively a customs union between Turkey and the Community;

--align the economic policies of Turkey and the Community more closely in order to ensure the proper functioning of the Association and the progress of the joint measures which this requires.

2. This stage shall last not more than twelve years, subject to such exceptions as may be made by mutual agreement. The exceptions must not impede the final establishment of the customs union within a reasonable period.

Article 5

The final stage shall be based on the customs union and shall entail closer co-ordination of the economic policies of the Contracting Parties.

Article 6

To ensure the implementation and the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred upon it by this Agreement.

Article 7

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement.

They shall refrain from any measures liable to jeopardise the attainment of the objectives of this Agreement.

Article 8

In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the Provisional Protocol, determine the conditions, rules and timetables for the implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.

Article 9

The Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community.

Article 10

1. The customs union provided for in Article 2 (2) of this Agreement shall cover all trade in goods.

2. The customs union shall involve:

- the prohibition between Member States of the Community and Turkey of customs duties on imports and exports and of all charges having equivalent effects, quantitative restrictions and all

other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement;

- the adoption by Turkey of the Common Customs Tariff of the Community in its trade with third countries and an approximation to the other Community rules on external trade.

Chapter 2

Agriculture

Article 11

1. The Association shall likewise extend to agriculture and trade in agricultural products in accordance with special rules which shall take into account the common agricultural policy of the Community.

2. 'Agricultural products' means the products listed in Annex II to the Treaty establishing the Community, as at present supplemented in accordance with Article 38 (3) of that Treaty.

Chapter 3

Other economic provisions

Article 12

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.

Article 13

The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.

Article 14

The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them.

Article 15

The rules and conditions for extension to Turkey of the transport provisions contained in the Treaty establishing the Community, and measures adopted in implementation of those provisions shall be laid down with due regard to the geographical situation of Turkey.

Article 16

The Contracting Parties recognise that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable in their relations within the Association.

Article 17

Each State party to this Agreement shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a continuous balanced growth of its economy in conjunction with stable prices.

Each State party to this agreement shall pursue a conjectural policy, in particular a financial and monetary policy, which furthers these objectives.

Article 18

Each State party to this agreement shall pursue a policy with regard to rates of exchange which ensures that the objectives of the Association can be attained.

Article 19

The member States of the Community and Turkey undertake to authorise, in the currency of the country in which the creditor or the beneficiary resides, any payments or transfers connected with the movement of goods, services or capital, and any transfers of capital or earnings, to the extent that the movement of goods, services, capital and persons between them has been liberalised pursuant to this agreement.

Article 20

The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the Community and Turkey which will further the objectives of the Agreement.

They shall actively seek all means of promoting the investment in Turkey of capital from countries of the Community which can contribute to Turkish economic development.

With respect to arrangements for foreign capital residents of all Member States shall be entitled to all the advantages, in particular as regards currency and taxation which Turkey accords to any other Member State or to a third country.

Article 21

The Contracting parties hereby agree to work out a consultation procedure in order to ensure co-ordination of their commercial policies towards third countries and mutual respect for their interests in this field, *inter alia* in the event of subsequent accession to or association with the Community by third countries.

TITLE III

GENERAL AND FINAL PROVISIONS

Article 22

1. In order to attain the objectives of this agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken. The Council of Association may also make appropriate recommendations.

2. The Council of Association shall periodically review the functioning of the Association in the light of the objectives of this Agreement. During the preparatory stage, however, such reviews shall be limited to an exchange of views.

3. Once the transitional stage has been embarked on, the Council of Association shall adopt appropriate decisions where, in the course of implementation of the Association arrangements, attainment of an objective of this Agreement calls for joint action by the Contracting Parties but the requisite powers are not granted in this agreement.

Article 23

The Council of Association shall consist of members of the Governments of the Member States and members of the Council and of the Commission of the Community on the one hand and of members of the Turkish government on the other.

The members of the Council of association may arrange to be represented in accordance with its rules of procedure.

The Council of Association shall act unanimously.

Article 24

The office of President of the Council of Association shall be held for a term of six months by a representative of the Community and a representative of Turkey alternately. The term of office of the first President may be shortened by a decision of the Council of Association.

The Council of Association shall adopt its rules of procedure.

The Council of Association may decide to set up committees to assist in the performance of its tasks and in particular a committee to ensure the continuing co-operation necessary for the proper functioning of this Agreement.

The Council of Association shall lay down the terms of reference of these committees.

Article 25

1. The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey.

2. The Council of Association may settle the dispute by decision; it may also decide to submit the dispute to the Court of Justice of the European Communities or to any other existing court or tribunal.

3. Each Party shall be required to take the measures necessary to comply with such decisions.

4. Where the dispute cannot be settled in accordance with paragraphs 2 of this Article, the Council of Association shall determine in accordance with Article 8 of this Agreement, the detailed rules for arbitration or for any other judicial procedure to which the Contracting Parties may resort during the transitional and final stages of this Agreement.

Article 26

This agreement shall not apply to products within the province of the European Coal and Steel Community.

Article 27

The Council of Association shall take all appropriate steps to promote the necessary co-operation and contacts between the European Parliament, the Economic and Social Committee and other organs of the Community on the one hand and the Turkish Parliament and the corresponding organs in Turkey on the other.

During the preparatory state, however, such contacts shall be limited to relations between the European Parliament and the Turkish Parliament.

Article 28

As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.

Article 29

1. This Agreement shall apply to the European territories of the Kingdom of Belgium, of the Federal Republic of Germany, of the French Republic, of the Italian Republic, of the Grand Duchy of Luxembourg and of the Kingdom of the Netherlands on the one hand and to the territory of the Turkish Republic on the other.

2. The Agreement shall so apply to the French overseas departments so far as concerns those of the fields covered by it which are listed in the first subparagraph of Article 227 (2) of the Treaty establishing the Community.

The conditions for applying to those territories the provisions of this agreement relating to other fields shall be decided at a later date by agreement between the Contracting Parties.

Article 30

The Protocols annexed to this agreement by common accord of the Contracting Parties shall form an integral part thereof.

Article 31

This agreement shall be ratified by the Signatory States in accordance with their respective constitutional requirements, and shall become binding on the Community by a decision of the Council taken in accordance with the treaty establishing the Community and notified to the Parties to this Agreement.

The instruments of ratification and the notifications of conclusion shall be exchanged at Brussels.

Article 32

This Agreement shall enter into force on the first day of the second month following the date of exchange of the instruments of ratification and the notification referred to in Article 31.

Article 33

This agreement is drawn up in two copies in the Dutch, French, German, Italian and Turkish languages, each of these texts being equally authentic.

APPENDIX 2

ADDITIONAL PROTOCOL-FINANCIAL PROTOCOL
(signed at Brussels, 23 November 1970)

TITLE II
MOVEMENT OF PERSONS AND SERVICES

Chapter I-Workers

Article 36

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 twelfth and the twenty-second year after the entry into force of that Agreement.

The Council of Association shall decide on the rules necessary to that end.

Article 37

As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community.

Article 38

While freedom of movement for workers between Member States of the Community and Turkey is being brought about by progressive stages, the Council of Association may review all questions arising in connection with the geographical and occupational mobility of workers of Turkish nationality, in particular the extension of work and residence permits, in order to facilitate the employment of those workers in each Member State

To that end, the Council of Association may make recommendations to Member States.

Article 39

1. Before the end of the first year after the entry into force of this Protocol the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community and for their families residing in the Community.

2. These provisions must enable workers of Turkish nationality, in accordance with arrangements to be laid down, to aggregate periods of insurance or employment completed in individual Member States in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community. These measures shall create no obligation on Member States to take into account periods completed in Turkey.

3. The above mentioned measures must ensure that family allowances are paid if a worker's family resides in the Community.

4. It must be possible to transfer to Turkey old-age pensions, death benefits and invalidity pensions obtained under the measures adopted pursuant to paragraph 2.

5. The measures provided for in this Article shall not affect the rights and obligations arising from bilateral agreements between Turkey and Member States of the Community, in so far as these agreements provide more favourable arrangements for Turkish nationals.

Article 40

The Council of Association may make recommendations to Member States and Turkey for encouraging the exchange of young workers; the Council of Association shall be guided in the matter by the measures adopted by Member States in implementation of Article 50 of the Treaty establishing the Community.

Chapter II

Right of Establishment, Services and Transport

Article 41

1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.

Article 42

1. The Council of Association shall extend to Turkey, in accordance with the rules which it shall determine, the transport provisions of the Treaty establishing the Community with due regard to the geographical situation of Turkey. In the same way it may extend to Turkey measures taken by the Community in applying those provisions in respect of transport by rail, road and inland waterway.

2. If provisions for sea and air transport are laid down by the Community, pursuant to Article 84(2) of the Treaty establishing the Community, the Council of Association shall decide whether, to what extent and by what procedure provisions may be laid down for Turkish sea and air transport.

APPENDIX 3

DECISION OF THE ASSOCIATION COUNCIL NO 2/76

on the implementation of Article 12 of the Ankara Agreement (adopted at the 23rd meeting of the Association Council, on 20 December 1976)

THE ASSOCIATION COUNCIL,

Having regard to the Agreement establishing an Association between the European Economic Community and Turkey,

Having regard to the Additional Protocol referred to in Article 1(1) of the Provisional Protocol annexed to the said Agreement, and in particular Article 36 thereof,

Whereas the Contracting Parties agreed pursuant to Article 12 of the Ankara Agreement to be guided by Articles 48, 49 and 50 of the Treaty establishing the European Economic Community in gradually introducing freedom of movement for workers between their countries; whereas Article 36 of the Additional Protocol provides that this freedom of movement shall be secured by progressive stages between the end of the twelfth and of the twenty-second year after entry into force of the Association Agreement;

Whereas the Articles referred to above imply that the Member States of the Community and Turkey shall accord each other priority as regards access by their workers to their respective employment markets; whereas this principle must be given effect under conditions that exclude any serious danger to the standard of living and the level of employment in the various regions and branches of activity in the Member States of the Community and Turkey, and without prejudice to the application between Member States of the Community of Community provisions governing the freedom of movement of workers or to any international undertakings by either Party on the subject under consideration;

Whereas the content of a first stage should be laid down, the Association Council having to decide on the content of the subsequent stages at a later date,

HAS DECIDED AS FOLLOWS:

Article 1

1. This Decision establishes for a first stage the detailed rules for the implementation of Article 36 of the Additional Protocol.

2. This first stage shall last four years, as from 1 December 1976.

Article 2

1 (a) After three years of legal employment in a Member State of the Community, a Turkish worker shall be entitled, subject to the priority to be given to workers of Member States of the Community, to respond to an offer of employment, made under normal conditions and registered with the employment services of that State, for the same occupation, branch of activity and region.

(b) 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.

(c) Annual holidays and short absences for reasons of sickness, maternity or an accident at work shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.

2. The procedures for applying paragraph 1 shall be those established under national rules.

Article 3

Turkish children who are residing legally with their parents in a Member State of the Community shall be granted access in that country to courses of general education.

They may also be entitled to enjoy in that country the advantages provided for in this connection under national laws.

Article 4

Nationals of the Member States who are in paid employment in Turkey, and their children, shall enjoy in that country the rights and advantages referred to in Articles 2 and 3 if they meet the conditions laid down in these Articles.

Article 5

Should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative action, decide to authorise a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish workers.

Article 6

Where a Member State of the Community or Turkey experiences or is threatened with disturbances on its employment market which might seriously jeopardise the standard of living or level of employment in a particular region, branch of activity or occupation, the State concerned may refrain from automatically applying Article 2(1)(a) and (b).

The State concerned shall inform the Association Council of any such temporary restriction.

Article 7

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.

Article 8

This Decision shall not affect any rights or obligations arising from national laws or bilateral agreements existing between Turkey and the Member States of the Community where these provide for more favourable treatment for their nationals.

Article 9

The provisions of this Decision shall be applied subject to limitations justified on grounds of public policy, public security or public health.

Article 10

So as to be in a position to ensure the harmonious application of the provisions of this Decision and determine that they are applied in such a way as to exclude the danger of disturbance of the employment markets, the Association Council shall be informed of the employment situation in the Member States of the Community and in Turkey.

Article 11

One year before the end of the first stage and in the light of the results achieved during it, the Association Council shall commence discussions to determine the content of the subsequent stage and to ensure that the Decision on that stage is enforced as from the date of expiry of the first stage. The provisions of this Decision shall continue to apply until the beginning of the subsequent stage.

Article 12

The Contracting Parties shall each take the measures necessary to implement this Decision.

Article 13

This Decisions shall enter into force on 20 December 1976.

APPENDIX 4

DECISION NO 1/80 OF THE ASSOCIATION COUNCIL OF 19 SEPTEMBER 1980

on the development of the Association

THE ASSOCIATION COUNCIL,

Having regard to the Agreement establishing an Association between the European Economic Community and Turkey,

WHEREAS the revitalisation and development of the Association must, as agreed on 5 February 1980, cover the entire range of current Association problems; whereas the search for solutions to these problems must take account of the specific nature of the Association links between the Community and Turkey;

WHEREAS in the agricultural sector, the elimination of customs duties applicable to Turkish products imported into the Community will make for the achievement of the desired result and for the alleviation of Turkey's concern as to the effects of the enlargement of the Community; whereas, moreover, Article 33 of the Additional Protocol should be implemented as a prior condition for the introduction of free movement of agricultural products; whereas the arrangements provided for must be implemented with due regard for the principles and mechanisms of the common agricultural policy;

WHEREAS, in the social field, and within the framework of the international commitments of each of the Parties, the above considerations make it necessary to improve the treatment accorded workers and members of their families in relation to the arrangements introduced by Decision No 2/76 of the Association Council; whereas, furthermore, the provisions relating to social security should be implemented as should those relating to the exchange of young workers;

WHEREAS development of the Association justifies the establishment of such economic, technical and financial co-operation as will help to attain the objectives of the Association Agreement, in particular by means of a Community contribution to the economic development of Turkey in various sectors,

HAS DECIDED AS FOLLOWS:

Article 1

The measures for the revitalisation and development of the Association between the Community and Turkey in each of the areas referred to by the Association Council on 5 February 1980 and specified in the following Chapters.

CHAPTER II

Social provisions

SECTION 1: Questions relating to employment and the free movement of workers

Article 6

1. Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

- shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

- shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

- shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

2. Annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as the result of the preceding period of employment.

3. The procedures for applying paragraphs 1 and 2 shall be those established under national rules.

Article 7

The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:

- shall be entitled - subject to the priority to be given to workers of Member States of the Community - to respond to any offer of employment after they have been legally resident for at least three years in that Member State;

- shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.

Article 8

1. Should it not be possible in the Community to meet an offer of employment by calling on the labour available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative action, decide to authorise a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish workers.

2. The employment services of the Member State shall endeavour to fill vacant positions which they have registered and which the duly registered Community labour force has not been able to fill with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State.

Article 9

Turkish children residing legally with their parents, who are or have been legally employed in a Member State of the Community, will be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of the Member States. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area.

Article 10

1. The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers.

2. Subject to the application of Articles 6 and 7, the Turkish workers referred to in paragraph 1 and members their families shall be entitled, on the same footing Community workers, to assistance from the employment services in their search for employment.

Article 11

Nationals of the Member States duly registered as belonging t the labour force in Turkey, and members of their family living with them, shall enjoy in that country the rights and advantages referred to in Articles 6, 7, 9 and 10 if they met the conditions laid down in those Articles.

Article 12

Where a Member State of the Community or Turkey experiences o is threatened with disturbances on its employment market which might seriously jeopardise the standard of living or level o employment in a particular region, branch of activity o occupation, the State concerned may refrain from automatically applying Articles 6 and 7. The State concerned shall inform the Association Council of any such temporary restriction.

Article 13

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 family legally resident and employed in their respective territories.

Article 14

1. The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health.

2. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals.

Article 15

1. So as to be in a position to ensure the harmonious application of the provisions of this section and determine that they are applied in such a way as to exclude the danger of disturbance of the employment markets, the Association Committee shall periodically exchange information in order to improve mutual knowledge of the economic and social situation, including the state of and outlook for the labour market in the Community and in Turkey.

It shall each year present a report on its activities to the Association Council.

2. The Association Committee shall be authorised to enlist the assistance of an ad hoc Working Party in order to implement paragraph 1.

Article 16

1. The provisions of this section shall apply from 1 December 1980.

2. From 1 June 1983, the Association Council shall, particularly in the light of the reports on activities referred to in Article 15, examine the results of application of the provisions of this section with a view to preparing solutions which might apply as from 1 December 1983.

<u>SECTION 2: Social and cultural advancement and the exchange of young workers</u>

Article 17

The Member States and Turkey shall co-operate, in accordance with their domestic situations and their legal systems, in appropriate schemes to promote the social and cultural advancement of Turkish workers and the members of their family, in particular literacy campaigns and courses in the language of the host country, activities to maintain links with Turkish culture and access to vocational training.

Article 18

The Association Committee shall prepare a recommendation to be forwarded by the Association Council to the Member States of the Community and Turkey with a view to the implementation of

any action that may enable young workers who have received their basic training in their own country to complement their vocational training by participating in in-service training, under the conditions set out in Article 40 of the Additional Protocol.

It shall monitor the actual implementation of this provision.

CHAPTER III

Economic and technical co-operation

Article 19

Co-operation shall be established between the Contracting Parties in order to contribute to the development of Turkey by complementing the country', own efforts to strengthen the economic ties between Turkey and the Community on as broad a basis as possible and to the mutual benefit of the Parties.

Article 20

1. The co-operation shall cover, in particular, activities preparatory and complementary to investment projects devised by Turkey, especially operations under the Financial Protocol.

2. Co-operation shall relate to the fields of industry, energy, agriculture and training in particular. It shall also cover technical assistance in the preparation of investment projects in Turkey.

3. The Association Council may specify other fields for co-operation.

Article 21

In implementing co-operation particular regard shall be had to the aims and priorities set out in Turkey's development plans and programmes.

Article 26

Co-operation between Turkey and the Community in the labour field shall in particular be aimed at:

- promoting training schemes in Turkey in those sectors which are most important to the Turkish economy, account being taken of the guidelines and priorities set out in Turkey's development plans, especially through the establishment of a pilot multi-disciplinary training centre;

- providing highly specialised training for Turkish researchers in the Community's scientific establishments;

- promoting all activities conducive to the exchange and training of young workers.

Article 27

1. In order to attain the objectives of co-operation the Association Committee shall periodically examine the results achieved. It shall report to the Association Council, which shall define the general direction of co-operation.

2. The Association Committee shall seek ways and means of implementing co-operation in the fields defined by the above Articles.

Article 28

1. The Community shall participate in the financing of projects contributing to the development of Turkey which are in line with the objectives set out in this Chapter.

2. Once the 4th Financial Protocol has entered into force, participation in the financing referred to in the previous paragraph shall be effected in the framework of, and under the conditions indicated in, the said Protocol.

Article 29

The Contracting Parties shall, each for its own part, take any measures required for the purposes of implementing the provisions of this Decision.

Article 30

This Decision shall enter into force on 1 July 1980.

1. Council statement concerning the 3rd recital and Article 8 of Decision No 1/80 of the EEC-Turkey Association Council

"The Council states that the 1954 Nordic Labour Market Agreement is an international commitment such as is mentioned in the 3rd recital to the Association Council Decision. The Council notes that Article 8 of the Decision does not affect Denmark's obligations under the Nordic Labour Market Agreement."

3. Council statement on Article 16(2) of Decision No 1/80 of the EEC-Turkey Association Council

"With reference to Article 16(2) of Decision No 1/80 of the EEC-Turkey Association Council, the Council agrees to examine within a year the relevant contractual provisions concerning migrant workers with the associated countries and third countries in the light of the existing situation. Depending on the outcome of this examination, the Council will take any decisions on revision which prove necessary and will make every effort to ensure that those decisions are implemented. In the course of this examination, particular importance will be given to the subsequent consolidation of the position of Turkish workers in the Member State in which they are already legally employed."

Statement by the Association Council

"With regard to Article 16(2), the Association Council notes that the approval given to this provision does not mean that existing agreements have been rendered null and void."

APPENDIX 5

DECISION NO 3/80 OF THE ASSOCIATION COUNCIL

of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families

THE COUNCIL OF ASSOCIATION,

Having regard to the Agreement establishing an Association between the European Economic Community and Turkey,

Having regard to the Additional Protocol, and in particular Article 39 thereof,

HAS DECIDED AS FOLLOWS:

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Decision:

(a) the terms "frontier worker", "seasonal worker", "member of family", "survivor", "residence", "stay", "competent State", "insurance periods", "periods of employment", "periods of residence", "benefits", "pensions", "family benefits", "family allowances" and "death grants" have the meanings assigned to them in Article 1 of Counsel Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, hereinafter referred to as "Regulation (EEC) No 1408/71";

(b) "worker" means:

(i) subject to the restrictions set out in Annex V, A. BELGIUM (1), to Regulation (EEC) No 1408/71, any person who is insured, compulsory or on an optional continued basis, against one or more of the contingencies covered by the branches of a social security scheme for employed persons,

(ii) any person who is compulsorily insured against one or more of the contingencies covered by the branches of social security dealt with in this Decision, under a social security scheme for all residents or for the whole working population, if such a person:

- can be identified as an employed person by virtue of the manner in which that scheme is administered or financed, or

- failing such criteria, is insured against some other contingency specified in the Annex under a scheme for employed persons, either compulsorily or on an optional continued basis;

(c) "legislation" means all the laws, regulations and other statutory provisions and all other implementing measures, present or future, of each Member State relating to the branches and schemes of social security covered by Article 4(1) and (2).

This term excludes the provisions of existing or future industrial agreements, whether or not the public authorities have taken a decision rendering them compulsory or extending their scope;

(d) "social security convention" means any bilateral of multilateral instrument which binds or will bind either two or more Member States exclusively, or one Member State and Turkey in the field of social security, for all or part of the branches and schemes set out in Article 4(1) and (2), together with agreement, of whatever kind, concluded pursuant to the said instruments:

(e) "competent authority" means, in respect of each Member State and of Turkey, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout, or in any part of, the territory of the State in question;

(f) "institution" means, in respect of each Member State or of Turkey, the Minister, the body or authority responsible for administering all or part of the legislation:
competent institution" means:

(g) "competent institution" means:

(i) the institution of the Member State with which the person concerned is insured at the time of the application for benefits, or

(ii) the institution from which the person concerned is entitled or would be entitled to receive benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated, or

(iii)the institution designated by the competent authority of the Member State concerned, or

(iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1), either the employer or the insurer involved or, failing these, a body or authority designated by the competent authority of the Member State concerned;

(h) "institution of the place of residence" and "institution of the place of stay" mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the State in question.

Article 2

Persons covered

This Decision shall apply:

- to workers who are, or have been, subject to the legislation of one or more Member States and who are Turkish nationals,

- to the members of the families of these workers, resident in the territory of one of the Member States,

- to the survivors of these workers.

Article 3

Equality of treatment

1. Subject to the special provisions of this Decision, persons resident in the territory of one of the Member States to whom this Decision applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

2. The provisions of paragraph 1 shall apply to the right to elect members of the organs of social security institutions or to participate in their nomination, but shall not affect the legislative provisions of any Member State relating to eligibility or methods of nomination of persons concerned to those organs.

Article 4

Matters covered

1. This Decision shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Decision shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.

3. The provisions of Title III shall not, however, affect the legislative provisions of any Member State concerning a ship owner's liability.

4. This Decision shall not apply to social and medical assistance or to benefit schemes for victims of war and its consequences.

Article 5

Relationship between this Decision and social security conventions binding two or more Member States exclusively

This Decision shall, as regards the persons and matters which it covers, replace the provisions of any social security convention, exclusively binding two or more Member States, save for such provisions of Part A of Annex II to Regulation (EEC) No 1408/71 as are not laid down in Part B of that Annex.

Article 6

Waiving of residence clause - Effect of compulsory insurance on reimbursement of contributions

1. Save as otherwise provided in this Decision, invalidity, old-age or survivors' cash benefits and pensions for accidents at work or occupational diseases, acquired under the legislation of one or more Member States, shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in Turkey or in the territory of a Member State other than that in which the institution responsible for payment is situated.

The provisions of the first subparagraph shall also apply to lump-sum benefits granted in the case of the remarriage of a surviving spouse who was entitled to a survivor's pension.

2. Where under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject as a worker to compulsory insurance under the legislation of another Member State.

Article 7

Rules for re valorisation provided by the legislation of a Member State shall apply to benefits due under that legislation subject to the provisions of this Decision.

Article 8

Prevention of overlapping of benefits

1. This Decision can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, or death (pensions) which are awarded by the institutions of two or more Member States, in accordance with the provisions of Title III.

2. The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked against the beneficiary, even if the right to such benefits was acquired under the legislation of another Member State or of Turkey or the income was obtained in the territory of another Member State or of Turkey. However, this provision shall not apply when the person concerned receives

benefits of the same kind in respect of invalidity, old age or death (pensions) which are awarded by the institutions of two or more Member States in accordance with Title III or by a Turkish institution pursuant to the provisions of a bilateral social security convention.

3. The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefits in the case of a person in receipt of invalidity benefits on anticipatory old-age benefits pursuing a professional or trade activity may be invoked against such person even though he is pursuing his activity in the territory of another Member State or of Turkey.

4. For the purposes of paragraphs 2 and 3, the institutions concerned shall, on request, exchange all appropriate information.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 9

The legislation applicable to Turkish workers employed in the Community shall be determined in accordance with the rules laid down by Article 13(1) and (2)(a) and (b), Articles 14, 15 and 17 of Regulation (EEC) No 1408/71.

TITLE III

SPECIAL PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness and maternity

Article 10

For the purposes of acquisition, retention or recovery of the right to benefits, Article 18 of Regulation (EEC) No 1408/71 shall apply.

Article 11

For the purposes of the granting of benefits and reimbursements between institutions of the Member States, Articles 19 to 24, Article 25(3) and Articles 26 to 36 of Regulation (EEC) No 1408/71 shall apply.

Moreover, Article 19 of Regulation (EEC) No 1408/71 shall apply to wholly unemployed frontier workers who satisfy the conditions specified by the legislation of the competent State for entitlement to sickness benefits.

CHAPTER 2

Invalidity

Article 12

The rights to benefits of a worker who has successively or alternately been subject to the legislation of two or more Member States shall be established in accordance with Article 37(1), first sentence, and (2), Articles 38 to 40, Article 41(1)(a), (b), (c) and (e) and (2), and Articles 42 and 43 of Regulation (EEC) No 1408/71.

However:

(a) for the purpose of applying Article 39(4) of Regulation (EEC) No 1408/71, all the members of the family, including children, residing in the Community or in Turkey, shall be taken into account;

(b) the reference in Article 40(1) of this Regulation to the provisions of Title III, Chapter 3, of Regulation (EEC) No 1408/71 shall be replaced by a reference to the provisions of Title III, Chapter 3 of this Decision.

CHAPTER 3

Old age and death (pensions)

Article 13

The rights to benefits of a worker who has been subject to the legislation of two or more Member States, or of his survivors, shall be established in accordance with Article 44(2), first sentence, Articles 45, 46(2), Articles 47, 48, 49 and 51 of Regulation (EEC) No 1408/71.

However:

(a) Article 46(2) of Regulation (EEC) No 1408/71 shall apply even if the conditions for acquiring entitlement to benefits are satisfied without the need to have recourse to Article 45 of the said Regulation;

(b) for the purposes of applying Article 47(3) of Regulation (EEC) No 1408/71, all the members of the family, including children, residing in the Community or in Turkey shall be taken into account;

(c) for the purposes of applying Article 49(1)(a) and (2) and Article 51 of Regulation (EEC) No 1408/71, the reference to Article 46 shall be replaced by a reference to Article 46(2).

Article 14

1. The benefit due under the legislation of a Member State, which is bound to Turkey by a bilateral social security convention, shall be awarded in accordance with the provisions of that convention.

Where a worker has been subject to the legislation of two or more Member States, a supplement shall be added, where appropriate, equal to the difference between the amount of the said benefit and the amount of the benefit obtained pursuant to Article 12 or Article 13, as the case may be.

2. Where a supplement is due pursuant to the second subparagraph of paragraph 1, Article 51 of Regulation (EEC) No 1408/71 shall apply to the whole amount of the benefit owed by the Member State concerned.

CHAPTER 4

Accidents at work and occupational diseases

Article 15

For the granting of benefits and for reimbursements between Member States' institutions, Articles 52 to 63 inclusive of Regulation (EEC) No 1408/71 shall apply.

CHAPTER 5

Death grants

Article 16

For the acquisition, retention or recovery of the right to benefits, the provisions of Article 64 of Regulation (EEC) No 1408/71 shall apply.

Article 17

Where the death occurs in the territory of a Member State other than the competent State, or the person entitled resides in such State, the death grants shall be awarded in accordance with Articles 65 and 66 of Regulation (EEC) No 1408/71.

CHAPTER 6

Family benefits and family allowances

Article 18

For the acquisition of the right to benefits, Article 72 of Regulation (EEC) No 1408/72 shall apply.

Article 19

1. Pensioners and their dependent children residing in the territory of a Member State shall be entitled to family allowances in accordance with Article 77(2) and Article 79(1)(a), (2) and (3) of Regulation (EEC) No 1408/71.

2. The natural or legal person responsible for an orphan and residing with him in the territory of a Member State shall be entitled to family allowances and, where appropriate, to supplementary or

special allowances for orphans under the rules laid down in Article 78(2) and Article 79(1)(a), (2) and (3) of Regulation (EEC) No 1408/71.

TITLE IV

MISCELLANEOUS PROVISIONS

Article 20

1. The competent authorities of the Member States and of Turkey shall communicate to each other all information regarding measures taken to implement this Decision.

2. For the purposes of implementing this Decision, the authorities and institutions of the Member States and of Turkey shall lend their good offices and act as though implementing their own legislation. The administrative assistance furnished by the said authorities and institutions shall, as a rule, be free of charge. However, the competent authorities of these States may agree to certain expenses being reimbursed.

3. The authorities and institutions of the Member States and of Turkey may for the purposes of implementing this Decision, communicate directly with one another and with the persons concerned or their representatives.

4. The authorities, institutions and courts or tribunals of a Member State may not reject claims or other documents submitted to them on the grounds that they are written in an official language of another Member State or in the Turkish language.

Article 21

1. Any exemption from or reduction of taxes, stamp duty, notarial or registration fees provided for in the legislation of a Member State or of Turkey in respect of certificates or documents required to be produced for the purposes of the legislation of that State shall be extended to similar documents required to be produced for the purposes of the legislation of another Member State or of Turkey, or of this Decision.

2. All statements, documents and certificates of any kind whatsoever required to be produced for the purposes of this Decision shall be exempt from authentication by diplomatic and consular authorities.

Article 22

Any claim, declaration or appeal which, in order to comply with the legislation of a Member State, should have been submitted within a specified period to an authority, institution or court or tribunal of that State shall be admissible if it is submitted within the same period to a corresponding authority, institution or court or tribunal of another Member State or of Turkey. In such a case the authority, institution or court or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or court or tribunal of the former State either directly or through the competent authorities of the States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or court or tribunal of another Member State or of Turkey shall be considered as the date of their submission to the competent authority, institution or court or tribunal.

Article 23

1. Medical examinations provided for by the legislation of one Member State may be carried out, at the request of the competent institution, in the territory of another Member State or of Turkey, by the institution of the place of stay or residence of the person entitled to benefits, under conditions agreed between the competent authorities of the States concerned.

2. Medical examinations carried out under the conditions laid down in paragraph 1 shall be considered as having been carried out in the territory of the competent State.

Article 24

1. Money transfers effected in accordance with this Decision shall be made in accordance with the relevant agreements in force at the time of the transfer between the Member States concerned.

In the case where no such agreements are in force between two States, the competent authorities in those States or the authorities responsible for international payment shall, by common accord, adopt the measures required to make these transfers.

2. Money transfers effected in accordance with this Decision shall be made in accordance with the relevant agreements in force at the time of the transfer between the Member State concerned and Turkey. In the case where no such agreements are in force between Turkey and a Member State, the competent authorities in both States, or the authorities responsible for international payment shall, by common accord, adopt the measures required to make these transfers.

Article 25

1. For the purposes of implementing this Decision, Annexes I, III and IV to Regulation (EEC) No 1408/71 shall be applicable.

2. For the purposes of implementing this Decision, Annex II to Regulation (EEC) No 1408/71 shall be applicable to the extent laid down in Article 5.

3. For the purposes of implementing this Decision, Annex V to Regulation (EEC) No 1408/71 shall be applicable to the extent laid down in Part I of the Annex hereto.

Other special procedures for applying the laws of certain Member States are laid down in Part II of the Annex hereto.

Article 26

1. The competent authorities may designate liaison bodies which may communicate directly with each other.

2. Any institution of a Member State or of Turkey, and any person residing or staying in the territory of a Member State or of Turkey, may make application to the institution of another Member State or of Turkey, either directly or through the liaison bodies.

Article 27

(a) Claims for invalidity, old-age and survivors benefits (including orphans' pensions) shall be submitted in accordance with Articles 35(1) and (2), 36(1), (2) and (4), first clause, 37(a), (b) and (c) and 38 of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, hereinafter called "Regulation (EEC) No 574/72".

(b) However:

(i) if the person concerned resides in Turkey, he shall submit his claim to the competent institution of that Member State to whose legislation the worker was subject, where appropriate through the institution of the place of residence,

(ii) Article 38 of Regulation (EEC) No 574/72 shall apply to all members of the family of the claimant who reside in the territory of the Community or in Turkey.

Article 28

Administrative checks and medical examinations shall be effected in accordance with the provisions of Articles 51 and 52 of Regulation (EEC) No 574/72. These provisions shall apply if the recipient is resident in Turkey.

Article 29

1. In order to draw a pension or supplementary allowance in respect of an accident at work or an occupational disease under the legislation of a Member State, a worker or his survivors residing in Turkey shall make a claim either to the competent institution, or to the institution of the place of residence, which shall forward such claim to the competent institution. The submission of the claim shall be subject to the following rules:

(a) the claim must be accompanied by the required supporting documents and made out on the forms provided for by the legislation administered by the competent institution;

(b) the accuracy of the information given by the claimant must be established by official documents attached to the claim form, or confirmed by the competent bodies of Turkey.

2. The competent institution shall notify the claimant of its decision directly or through the liaison body of the competent State; it shall send a copy of that decision to the liaison body of Turkey.

3. Administrative checks and medical examinations provided for in the event of pensions being reviewed shall be carried out at the request of the competent institution by the Turkish institution in accordance with the procedure laid down by the legislation administered by the latter institution. The competent institution shall, however, retain the right to have the person entitled to benefits examined by a doctor of its own choice.

4. Any person drawing a pension for himself or for an orphan shall inform the institution responsible for payment of any change in his situation or in that of the orphan which is likely to modify the pension.

5. Pensions due from the institution of a Member State to claimants resident in Turkey shall be made in accordance with the procedure laid down in Article 30.

Article 30

Benefits shall be paid in accordance with Articles 53 to 59 of Regulation (EEC) No 574/72. Where the recipient is resident in Turkey, payment shall be direct save as otherwise provided in the convention binding the Member State concerned and Turkey.

TITLE V

FINAL PROVISIONS

Article 31

Two or more Member States, or Turkey and one or more Member States, or the competent authorities of those States may, where necessary, conclude agreements designed to supplement the administrative procedures for implementing this Decision.

Article 32

Turkey and the Community shall, each to the extent to which they are concerned, take the necessary steps to implement this Decision.

Done at Brussels 19 September 1980.

ANNEX

Special procedures for applying the laws of certain Member States referred to in Article 25(3) of this Decision

I. Special procedures for applying the laws of certain Member States provided for in Annex V to Regulation (EEC) No 1408/71 and applicable for the purposes of this Decision.

Annex V to Regulation (EEC) No 1408/71 shall apply for the purposes of this Decision except for the following provisions:

1. Point B DENMARK
Paragraphs 1, 2, 3, 4, 5, 7, 8 and 11.

2. Point C GERMANY
Paragraphs 1, 4, 8 and 9.

3. Point D FRANCE
Paragraphs l(a), (b) and paragraph 3.

4. Point E IRELAND
Paragraphs 1, 2, 3, 4, 6, 7 and 9.

5. Point H NETHERLANDS
Paragraph l(a).

6. Point I UNITED KINGDOM
Paragraphs 1, 4, 6, 7, 8 and 11.

II. Other special procedures for applying the laws of certain Member States

A. BELGIUM

This Decision shall not apply to the guaranteed income for retired people, nor to the allowances paid to handicapped persons.

B. DENMARK

1. Any person who, by pursuing an activity as an employed person, is subject to legislation on accidents at work and occupational diseases shall be considered a worker within the meaning of Article l(b)(ii) of the Decision.

2. Workers and pensioners and members of their families referred to in Articles 19, 22(1) and (3), 25(3), 26(1) and Articles 28a, 29 and 31 of Regulation (EEC) No 1408/71, resident or staying in Denmark, shall be entitled to benefits in kind on the same terms as those laid down by Danish legislation for persons whose income does not exceed the level indicated in Article 3 of Law No 311 of 9 June 1971 concerning the Public Health Service, where the cost of the said benefits is payable by the institution of a Member State other than Denmark.

3. Article 1(1), No 2, of the Law on old-age pensions, Article 1(1), No 2, of the Law on disability pensions and Article 2(1), No 2, of the Law on widows' pensions and allowances shall not be applicable to workers or their survivors whose residence is in the territory of a Member State other than Denmark or in Turkey.

4. The terms of this Decision shall be without prejudice to the transitional rules under the Danish Laws of 7 June 1972 on the pension rights of Danish nationals having their effective residence in Denmark for a specified period immediately preceding the date of the application.

5. The periods during which a frontier worker, residing within the territory of a Member State other than Denmark, has worked in Denmark are to be considered as periods of residence for the purposes of Danish legislation. The same shall apply to those periods during which such a worker is posted to the territory of a Member State other than Denmark.

6. For the purposes of applying Article 8(2) of this Decision to Danish legislation, disability, old-age and widows' pensions shall be considered as benefits of the same kind.

7. When a Turkish worker to whom this Decision applies has been subject to Danish legislation and to the legislation of one or more other Member States, and fulfils the requirements for a disability pension under Danish legislation, his entitlement to such pension shall be subject to the condition that he has been resident in Denmark for a period of at least one year and during that period has been capable, physically and mentally, of carrying out a normal occupation.

8. The following provisions shall apply until the entry into force of a bilateral social security convention between Denmark and Turkey.

When a Turkish worker to whom this Decision applies has been subject to Danish legislation and not to the legislation of another Member State, his entitlement and that of his survivors to old-age, disability and death benefits (pensions) shall be determined in accordance with the following provisions:

(a) Turkish nationals resident in Denmark shall be entitled to an old-age pension granted in accordance with Danish legislation if, between the age of 18 and the minimum age for entitlement to an old-age pension, they have been resident in Denmark for at least 15 years, at least five of which immediately preceded the date of the application for a pension;

(b) Turkish nationals resident in Denmark shall be entitled to a disability pension granted in accordance with Danish legislation if they have been resident in Denmark for at least five years immediately preceding the date of the application for a pension and during that period have been capable, physically and mentally, of carrying out a normal occupation;

(c) Turkish nationals resident in Denmark shall be entitled to a widow's pension granted in accordance with Danish legislation:

- if the deceased spouse had been resident in Denmark after the age of 18 for at least five years immediately preceding the date of death, or

- if the widow had been resident in Denmark for at least five years immediately preceding the date of the application for a pension.

C. GERMANY

1. Article 6 of this Decision shall not affect the provisions under which accidents (and occupational diseases) occurring outside the territory of the Federal Republic of Germany, and periods completed outside that territory, do not give rise to payment of benefits, or only give rise to payment of benefits under certain conditions, when those entitled to them reside outside the territory of the Federal Republic of Germany.

2. Article 1233 of the insurance code (RVO) and Article 10 of the clerical staff insurance law (AVG), as amended by the pension reform law of 16 October 1972, which govern voluntary insurance under German pension insurance schemes, shall apply to Turkish nationals who fulfil the general conditions:

(a) if the person concerned has his permanent address or residence in the territory of the Federal Republic of Germany;

(b) if the person concerned has his permanent address or residence in the territory of another Member State and at any time previously contributed compulsorily or voluntarily to a German pension insurance scheme.

D. FRANCE

The Decision shall not apply to the supplementary allowance of the National Mutual Aid Fund.

E. IRELAND

1. Any person who is compulsorily or voluntarily insured pursuant to the provisions of Section 4 of the Social Welfare Act 1952 shall be considered a worker within the meaning of Article 1(b)(ii) of this Decision.

2. Workers and pensioners, together with members of their families referred to in Articles 19, 22(1) and (3), 25(3), 26(1) and Articles 28a, 29 and 31 of Regulation (EEC) No 1408/71, resident or staying in Ireland, shall be entitled, free of charge, to any such form of medical treatment as is provided for by Irish legislation, where the cost of this treatment is payable by the institution of a Member State other than Ireland.

3. For the purposes of applying Article 8(2) of this Decision to Irish legislation, invalidity, old age and widows pensions shall be considered as benefits of the same kind.

4. For the purpose of calculating earnings for the award of earnings-related benefit payable with sickness and maternity benefits under Irish legislation, a worker shall, in derogation from Article 23(1) of Regulation (EEC) No 1408/71 be credited for each week of employment completed under the legislation of another Member State during the relevant income tax year with an amount equivalent to the average weekly earnings in that year of male and female workers respectively.

F. ITALY

None.

G. LUXEMBOURG

The supplement to make up the minimum pension, as well as the children's supplement in Luxembourg pensions, shall be granted in the same proportion as the fixed part.

H. NETHERLANDS

A person receiving an old-age pension under Netherlands legislation and a pension under the legislation of another Member State shall, for the purposes of Article 27 and/or Article 28 of Regulation (EEC) No 1408/71, be considered to be entitled to benefits in kind if he satisfies the conditions required for entitlement to voluntary sickness insurance for elderly persons.

I. UNITED KINGDOM

1. All persons who are "employed earners" within the meaning of the legislation of Great Britain or of the legislation of Northern Ireland, and all persons in respect of whom contributions are payable as "employed persons" in accordance with the legislation of Gibraltar, shall be regarded as "workers" for the purposes of Article 1(b)(ii) of this Decision.

2. This Decision shall not apply to those provisions of United Kingdom legislation implementing a social security agreement between the United Kingdom and a third State other than Turkey.

3. Wherever required by United Kingdom legislation for the purposes of determining entitlement to benefits, Turkish nationals born in a State other than a Member State or Turkey are to be treated as nationals of the United Kingdom born in such other State.

4. For the purposes of applying Article 8(2) of this Decision to the legislation of the United Kingdom, disability, old-age and widows' pensions shall be considered as benefits of the same kind.