CHAPTER X
FREEDOM OF MOVEMENT OF PERSONS

A- ECONOMIC, POLITICAL AND SOCIAL ISSUES

Article 48 of the EEC Treaty provides for the freedom of movement of workers without actually defining the term "worker". The term had to be defined by case law. However in the background of this provision is the economic cosideration i.e. the free movement of labour as a factor in production having primarily an economic objective, i.e. a common market in manpower.

Thus the rights enunciated in article 48 are concerned with the mobility of the workforce, i.e. the right to accept offers of employment, to stay in a member state for the purpose of employment and to remain in the territory of a member state after having been employed in that state. In the absence of a specific provision it entails a right to stay unemployed in the host state whilst looking for employment which, however, can be limited to a reasonable period[1].

The provisions of Article 48 do not apply to employment in the public service which has been defined narowly by the ECJ[2].

The political aspects reflect the concept of the "Europe of the Peoples" which entails the removal of all barriers to migration and the promotion of a "Community Citizenship" which so far has resulted only in a Community passport which as from 1 January 1985 can be issued by the national passport authorities in lieu of the national passport. It has a Burgundy red cover and bears in the language(s) of the member state of issue the words "European Community" followed by the name of the state, its emblem and the word "passport".

The Maastricht Treaty further extends the freedom of movement of persons and provides for diplomatic protection of EC citizens in third countries as well as for the right to vote and to be elected in municipal elections and the European Parliamentary elections in the country of residence. However these rights will be subject to implementing legislation.

The social aspects are dealt with partially by Article 51 of the EEC Treaty which envisages the harmonization of the national social security systems to complement the freedom of movement and partially by the Treaty provisions concerning social policy (Articles 117-128).

In a technical sense the body of relevant law can be divided into immigration and social security rules.

B- IMMIGRATION

The right of free movement belongs to the citizens of the member states and to certain categories of stateless persons and refugees as well as the inhabitants of certain dependent territories. Each member state determines, according to its own law, the status of citizen. The right has been extended to the worker's dependent persons.

Since the Treaty provides merely a framework the details had to be laid down in Community legislation[3]. Both the Treaty provisions and the relevant legislation are directly applicable. Moreover the principle of non-discrimination has to be applied. The member states must adjust their laws and administrative practices accordingly.

Freedom of movement comprises the right of entry, residence and exit, freedom of movement within the territory of a host state and access to employment on equal terms with the citizens of the host state. These rights are vested in the individuals by virtue of the Treaty. They cannot be curtailed by the member states except by virtue of derogations expressly stated in Article 48 (3) of the Treaty. These include public policy, public security and public health. However being in the nature of derogations these grounds have to be interpreted strictly and the state concerned must prove the existence of the ground. Economic grounds such as unemployment in the host state are expressly excluded by Directive 64/221 which purported, inter alia, to define public policy.

Several cases involving refusal of entry[4], and expulsion[5] have highlighted the difficulty of defining public policy. One thing is certain i.e. that it is not a matter left to the discretion of the member states and the derogation, being narrowly construed, would be confined to a particularly repulsive behaviour of the individual concerned[6] since the conviction of a crime is not per se a ground of expulsion.

Whilst the member states control the movement of people and enforce their laws criminal sanctions that can be imposed ought to be proportionate to the offence[7] and expulsion cannot be ordered for mere administrative offences such as a failure to apply for renewal of a residence permit[8]. There must be a fair hearing, a right of appeal and the procedure must not be more onerous than the procedure in comparable administrative cases of a domestic nature[9].

In order to move towards a "Europe of Peoples" the Commission made certain proposals to ensure by 1992:

(1) an improvement of the mobility of workers and their families[10].

(2) harmonization of income tax and tax reliefs for non-resident workers;

(3) right of residence for students[11].

(4) security of residence of pensioners whether employed or self-employed[12].

(5) residence rights to nationals of member states who do not have them under the current Community law[13].

(6) employment information[14].

Whilst progress towards a greater cohesion of the peoples of Europe through legislation has to be borne in mind any new member of the Community has to adapt its substantive and procedural laws to the realization of a free movement of persons. In the event of joining the Community Turkish law on immigration and right to work has to be amended.

C- RIGHT OF ESTABLISHMENT: THE PROFESSIONS

a-Immigration And Social Security

Whilst workers are entitled to a free movement within the EC self-employed persons are entitled to a right of establishment (EEC arts. 52-58). There is no Treaty definition of the group of persons who are the beneficiaries of this right but it is common ground that they include persons who, as members of the liberal professions, pursue activities as self-employed providers of services or set up and manage under takings within the meaning of article 58 of the Treaty. As a rule such persons belong to professions whose status and membership are regulated by law. Hence the need to facilitate their mobility within the common market and to harmonize national rules

and regulations regarding their status.

In the absence of a definition certain fringe professions, such as sportsmen, may also claim the right of establishment provided their activities have an economic objective[15].

As regards immigration and social security the rules applicable to workers and their families have been, by analogy, extended to self-employed persons and their families. Thus the right of entry, residence and leave is governed by Council Directive 73/148[16]; the right to remain after having exercised an activity in a self-employed capacity by Directive 75/34[17] and Directive 75/35[18] extends Directive 64/211 governing derogations from the free movement of persons to self-employed ones.

Regulation 1390/81[19] amended by Regulation 2000/83[20] and Regulation 2001/83[21] extend the principles of Regulation 1408/71 governing social security to self-employed persons.

Thus,by and large, the different treatment of workers and selfemployed persons, as far as their mobility and social security protection are concerned, has been obliterated.

b-Non-discrimination

The principle of non-discrimination on the ground of nationality was established by case law[22] and extended to overrule discrimination on the ground of residence[23] and restrictive practices imposed by a professional organization[24].

c-Harmonizing Legislation

Without establishing common rules for the professions and for the recognition of professional qualifications the exercise of the right of establishment would be available only to those who wish to qualify or re-qualify in the host state. Therefore the Community has embarked on a process of harmonization identifying at first a host of professional activities[25] and attempting to harmonize piecemeal the various sectoral activities i.e. agriculture, fisheries, film industry, mining and quarrying, electricity, gas and sanitary services, food and beverages, manufacturing and processing in-

dustries, commerce (wholesale and retail trade), real estate and business, and personal services (i.e. restaurants and the like). In this process the harmonizing measures attempted to deal with both professional activities and services[26].

Next came the various liberal professions, the harmonization of the medical professions[27] being the model to follow. On that pattern Directives have been enacted to harmonize the nursing[28] dental[29] midwives[30] , and veterinary[31] professions and the exercise of the profession of architect [32]and pharmacist [33].The services of the legal professions were only partially harmonized by Directive 77/249[34]but since January 1989 the legal professions are subject to the general system.

The piecemeal legislation approach has been abandoned in favour of a global scheme by virtue of Directive 89/48[35] "On a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years'duration". It applies to professions regulated by national laws, including the legal professions, except those (i.e.the medical professions and others listed above) already governed by Community legislation.

Directive 89/48 has introduced a general system unrelated as hitherto to any specific profession relying on the equivalence of University and such like courses. It imposes upon the member states a duty of recognising qualifications necessary for the exercise of the right of establishment obtained within the EC but leaves to the states the details of implementation. The member states may choose whether to insist on an adaptation under the guidance of their own professions or an aptitude test but cannot impose both cumulatively. This will ensure that formal qualifications are complemented by practical experience. The Directive also provides for the documentation and proof of good character or good repute and reserves to the member states the right to regulate and to ensure respect of the rules of personal conduct and etiquette of the members of the professions.

Where the professions require a lower educational standard Directive 92/51[36], in analogy to Directive 89/48,provides for a harmonization system based on diplomas of secondary and post-secondary education.

D- ALIENS' RIGHT TO WORK IN TURKEY[36a]

I.Formal Requirements

An alien wishing to work in Turkey has to apply to the Turkish Embassy in the place where he is present in order to be issued with a work-permit. If he does not do so he

shall not be granted the right of entry to Turkey. For the work-permit to be issued, the foreigner has to indicate in his application form at which branch of industry he would like to work[37].

The Ministry of Interior Affairs is informed as to the request of the foreigner concerned through the Ministry of Foreign Affairs. Should the Ministry of Interior Affairs confirm the eligibility of the alien for available employment in Turkey, the Turkish Embassy in foreign country will give the work visa to the applicant.

There are certain limitations on the entry, residence and movement of aliens wanting to work in Turkey. The Act Concerning the Residence and Travel of Aliens within Turkey[38] provides that:

"Aliens can carry out solely the work and services which are not exclusively reserved to Turkish citizens(Article 15)."

Besides this provision it is stated in Article 7 that an alien who wants to pursue any activity reserved only to Turkish nationals will be not issued with a residence permit. According to Article 15/2 of the Act Concerning the Residence and Travel of Aliens within Turkey:

"When an alien starts to work in Turkey he has to apply to a police station within 15 days from the first day of the employment in order to have his work permit registered together with his residence certificate."

Similarly, Article 16 of this Act provides that:

"The persons or entities who have employed an alien in domestic service or in the places of their business administration have to forward information to the nearest police station as to the name, surname, nationality, occupation, salary and residence of the foreigner concerned within 15 days from the first day of the employment."

The same Act obliges the foreigner wanting to work in Turkey to request residence permit before starting to work even if he has a working visa. Article 3/II provides that:

"Aliens have to request residence certificate within one month since their arrival in Turkey."

In addition to the above provisions, Article 8 of the Passport Act[39] provides that:

"Aliens seeking work or services reserved to Turkish nationals are not allowed to enter Turkey."

The Articles specified in previous paragraphs are not compatible with Article 48 of the EEC Treaty and the provisions of the EC Regulations and Directives under which restrictions cannot be imposed on the right of a national of any member state to enter the territory of another member state, to stay there and to move within it. For this reason Turkey has to ensure that restrictions laid down in Turkish Acts concerning the free movement of persons and residence in Turkey are not applicable to the European Community nationals.

II- Major Acts Restricting the Right of Aliens to Work

1-Trading in Turkish Waters

According to the Act on Cabotage within Turkish Territorial Waters and to Exercise the Right of Trade within Turkish Territorial Waters and Ports[40] the right of carriage of passengers and cargos; pilotage within Turkish territorial waters or in the Turkish harbours belongs exclusively to the vessels flying the Turkish flag. However, foreign vessels are allowed to sail from the Turkish ports to foreign ports (Article 1).

The right to trade in Turkish territorial waters, rivers and lakes with various sea-going vessels is reserved to Turkish nationals (Article 2). Certain activities, such as fishing, removing wreckage, diving, pilotage etc., within Turkish territorial waters are also reserved to Turkish citizens (Article 3). Foreign rescue ships can be allowed by the Turkish Government to perform rescue services in Turkish territorial waters. At the same time a foreign captain along with skilled crew can be permitted by the Turkish Government to work on board of Turkish vessels (Article 4).

The work and services envisaged in the Act at issue are reserved to Turkish citizens because of the economic situation in Turkey. From the EC point of view these restrictions have to be abolished.

2-Mining

According to the Mining Code[41] the right of mineral exploration is to be granted to the nationals of the Republic of Turkey possessing full legal capacity, or legal entities which have been established under Turkish law and whose statutes allow them to do mining, or to the state foundations which have power as to mining (Article 6). Workers in the field of mining have to be Turkish citizens. But engineers, science staff, foremen and skilled workers can be foreigners (Article 145).

Limitations for foreign labour employment in the Mining Code are brought to protect the financial interest of Turkish nationals and to provide Turkish labour with opportunities to be employed as un-skilled workers without restriction.

The Turkish Mining Code has to be adjusted because due to economic grounds to accord priority treatment to its own nationals by a Member State of the EC is expressly forbidden by Directive 64/221 which purports to define public policy. If Turkey becomes a Member of the Community the Act will have to be amended.

3- Administration of Justice

The professions which are governed by the Code of Judges and Public Prosecutors[42], Code of Notaries[43], the Code of Lawyers[44] cannot be exercised by aliens (Article 7/1-1 of the Code of Notaries; Article 3/1-a of the Code of Lawyers). The judge, prosecutor and notary are public officers invested with authority in the Turkish legal system and these professions belong to the public service. In respect of the provisions of these codes nothing needs to be done in Turkish law because, bearing in mind the concept of employment in public exercise or public authority, the Community law concerning the free movement of persons within the Member States does not apply to employment in the public service. On the other hand, so far as the Membership of Turkey is concerned prohibition on the right of foreigners to work as lawyers in Turkey outside the public service has to be repealed in order harmonise Turkish law with the EC law.

4- Medical Professions

According to the Act on the Manner of Performance of the Professions of Doctor and X-ray Specialist[45], one of the requirement for the profession of a doctor is to be a Turiksh national. However, Health Service Act[46] brings some exceptions to the Act mentioned above. The latter Act provides that foreign specialists and experts can be employed at public or private foundations under a contract. At the same time, by reason of health service of foreign hospitals within Turkey, the Turkish Government has allowed these hospitals to take in doctors of foreign nationality.

In order to work as a dentist (Article 31), midwife (Article 47), hospital attendant and nurse (Article 63) a person has to have a Turkish nationality. Similarly, aliens cannot work as pharmacist or veterinarian in Turkey. These restrictions have to be removed in the event of Turkey joining the EC.

5-Banking

According to the Banks Act[47] a foreign bank can set up a branch in Turkey under certain conditions specified in Article 6. One of these conditions is that the director of the administration centre or the director of a branch or the assistants of these persons must be Turkish nationals or domiciled in Turkey (Article 6/3).

The two preconditions: Nationalty and domicile, in Article 6/e, are not compatible with the EC law and they have to be abolished.

6- Work and Services Reserved to Turkish Citizens

a-Barriers Under Act 2007

Article 1 of the Act on Work and Services Reserved to Turkish Citizens (Act No:2007, Official Gazette June 6, 1932, N.2126) states what kind of work and services have to be carried out only by Turkish nationals. Article 2 prescribes a special recruitment procedure for foreign nationals under the permission of the Turkish Government. Moreover Article 3 provides that aliens can be prohibited by the Turkish Government to perform even those works and services which are excluded from the scope of Act 2007.

According to Article 1 of Act 2007 work and services indicated below may be carried out exclusively by Turkish citizens within the Republic of Turkey. People who are not Turkish nationals are forbidden to engage in these works and services. Namely an alien cannot work as: street seller; musician; photographer; hairdresser; typesetter; broker;manufacturer of dress or shoes or hats; stock-exchange middleman; seller of state monopoly goods; tourist guide or translator; worker in steel and wood industry; driver, assistant of driver; doorman, doorkeeper of an apartment or a company or a hotel etc; waiter, waitress; dancer or singer at the entertainment places; veterinary surgeon and chemist.

The Act 2007 forbids aliens to open shops outside the city centres and administrative district (Article 8). On the other hand this Act provides that aliens can work by permission of Government as aircraft mechanics or pilots or water installation servicemen in the institutions belonging to the Turkish State.

Work and services enumerated in this Act are connected with lesser qualifications and skills. As far as Turkish citizens are concerned it is easy for them to carry out the kinds of work in question. A statement in the Minutes of the Turkish Grand National Assembly indicates that this Act was brought into force due to economic and social reasons. It is clear that the priority has been given to the Turkish national labour market. In addition, in the official explanatory note to this Act it was stated that certain works and services are reserved to Turkish citizens because of public policy and public security. On the other hand it is hard to make a connection between these concepts and the works and services accounted in the official explanatory note such as driver, door-keeper, street seller. It should be accepted that in the past, economic and social conditions in Turkey played a very important role for reserving this work and services to Turkish nationals.

It is clear that the provisions of the Act 2007 are based upon discrimination on the ground of nationality and will have to be amended.

b- Exceptions to Act 2007

i. The Act on the Encouragement of Foreign Capital [48]:

This Act regulates the entry of foreign capital into Turkey and the rights and obligations of the companies which are based on foreign capital. Under title of employment of aliens Article 7 provides that:

"During the period of survey, foundation and operation of a business founded in accordance with the present law, the conditions and prohibitions set forth by law 2007 shall not apply to aliens investing in such a concern, to alien representatives of such investors, to alien experts, foremen and other skilled personnel, for a period deemed necessary by the Committee for the efficient establishment, expansion or operation of the concern or for its being put again into activity."

The above provision shall also apply to alien experts, foreman and other skilled personnel to be employed by local concerns that are certified by the Committee as meeting the conditions laid down by Article 1 of this Act.

ii. The Act on the Encouragement of Tourism[49]:

Article 18 of this Act provides that prohibitions for aliens to work in Turkey shall not be applied under certain conditions to persons who wish to work in the tourism sector.

According to this Act:

"The conditions and prohibitions set forth by Act 2007 shall not be applied to foreign qualified and skilled personnel wishing to work in the tourism sector. The number of foreign employees shall not be more than 10 % of total number of the personnel. This percentage can be increased up to 20 % by the Ministry concerned."

iii- The Free Trade Zones Act[50]:

The employment of foreign managers and specialists is permitted for entities operating within the free trade zones. Article 10 of the Free Trade Zones Act provides that:

"Foreign managers and qualified personnel can be employed by firms operating in the free trade zones. Relevant principles are specified by the governing statutes. The provisions at the social security regulations of the Republic of Turkey are applied in the free trade zones."

Exemptions to the Act 2007 are not adequate to make Turkish law compatible with the EC law because the exemptions cover only foreign qualified and skilled personnel willing to work in specific fields.

III- Conclusions

In the event of joining the Community, Turkish Acts restricting the right of aliens to work in Turkey, have to be amended substantially. Even if Turkey does not become a member of the EC it has to adjust or abolish the provisions of relevant Acts specified in previous pages to secure compliance with the rules laid down in Article 9 of the Ankara Association Agreement of September 1963 and Articles 36 to 40 of the Additional Protocol of 1973.

Moreover Article 12 of the Ankara Agreement refers to Articles 48, 49 and 50 of the Rome Treaty as a guide for the purpose of progressively securing the freedom of movement for workers between the Community and Turkey.

The Association Agreement provided for progressive lowering of migration barriers by Turkey and the EC countries leading to free movement of workers by 1986[51]. Unfortunately, neither Turkey has amended its legal system nor the Community has accepted the free access of Turkish workers to the EC labour market as scheduled in the Agreement.

Limitations in the Turkish Aliens Law are based on discrimination on the ground of nationality. These limitations are contrary not only to the Rome Treaty but also to the Ankara Association Agreement and the Additional Protocol. Turkey has to ensure that no discrimination based on nationality of workers as regards to employment, remuneration and other conditions of work is applied to EC nationals.

The same principle applies to the member states of the Community as they have to abolish their restrictions on Turkish workers if Turkey joins the Community.

It is clear that the obligation to eliminate the provisions of Turkish law restricting aliens right to entry and work would benefit the EC nationals only because, in principle, only the citizens of the member states are entitled to move freely within the Community.

For the citizens of non-member states these restrictions may remain in force. However, like any other member state, Turkey would be able to safeguard its interests by appliying derogations under Article 48(3) of the EEC Treaty when dealing with undesirable aliens. When the provisions of the Maastricht Treaty on the Citizenship of the Union come into force further adjustments of Turkish law, notably to extend the

workers freedom of movement to all EC citizens and to grant them electoral rights in municipal elections, would be necessary.

E- SOCIAL SECURITY IN THE EC

Social security provisions are complementary to immigration rules. However there is at present no uniformity in this field among the member states and, therefore, the Community can do no more than co-ordinate the national rules and to ensure non-discrimination on the ground of nationalty. Thus the principal legislation[52] merely co-ordinates national systems according to certain general principles.

A distinction is made between social welfare benefits which are granted within the discretion of the national authorities and in accordance with the needs of the beneficiary and social security benefits which are granted out of right by virtue of contributions to a national insurance or private insurance affiliated to the national scheme. Since there is no uniformity in this respect, each member state has to make a declaration as to the nature of the benefits that can be obtained. Although the declaration has to be accepted as a guiding rule, it is not conclusive since these two categories of benefits may overlap. Moreover, certain social advantages may not fit exactly into either category. In such cases the ECJ tends to find for the claimant thus advancing the principle of non-discrimination[53]. Under Regulation 1408/71 the following can be claimed as of right:

Sickness and maternity benefits (arts.18-36); Invalidity benefits (arts.37-43 and arts 35-59); Old age and survivors benefits (arts. 44-51 and arts 35-59); Compensation for accidents and occupational diseases (arts 52-63 and arts.60-77); Death grants (arts.64-66 and arts.78-79); Unemployment benefits (arts. 67-71 and arts. 80-84); Family benefits (arts. 72-76 and arts.85-89); Benefits for dependent children and orphans (arts. 77-79 and arts. 90-92).

The list is not exhaustive but reflects only the lowest common denominator. It has to be interpreted in the light of case law.

The Regulation replaces social security conventions between the member states though certain conventions relevant in this field (e.g. the Labour Conference and the European Interim Agreement on Social Security of 1953 concluded within the Council of Europe) remain effective. Member states may also conclude implementing conventions within the framework of the Regulation.

Since the Regulation merely co-ordinates the application of the national systems it has to designate the law governing a particular stituation. The laws of the workplace and of residence provide the principal connecting factors. There are exceptions in favour of the law of the flag for persons employed on board ships and in fovour of the national law for military and civil service personnel. Special provisions apply to frontier and seasonal workers.

The principle of aggregation applies to certain benefits, viz.sickness and maternity, invalidity, old age and death and unemployment benefits. This means that, when computing these benefits, the paying authority must take into consideration rights earned in another member state. However overlapping is not permitted. This means that several benefits of the same kind for one and the same period of insurance are not granted though exception is made in case of short-term benefits in respect of invalidity, old age, death and occupational disease. However the rule against overlapping does not prevent the "topping up" of the benefit[54].

Corollary to the principle of aggregation is the principle of reimbursement between the member states whereby the paying state can recoup itself from the other state involved pro rata, i.e. in proportion to the relevant period of insurance completed in each state. Should the liability result from a wrongful act the paying state would be subrogated to the rihgts of the beneficiary and, therefore, may pursue its rigth of recovery in accordance with the lex loci injuriae[55].

The duty of member states to migrant workers and their families imposes upon them an obligation to bring their social security laws up to the minimum Community standard, i.e. the provisions of Regulation 1408/71 as subsequently amended.

F-SOCIAL POLICY IN THE EC

The framework of EC social policy, linked to the common market, is comprised in articles 117-128 of the EEC Treaty. Article 117 records an agreement between the member states upon the need to promote improved working conditions and an improved standard of living for workers". Article 118 lists certain matters on wihch the EC Commission ought to ensure co-operation between the member states and which are to lead to Community legislation. These include: Employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, the right of

association and collective bargaining between employers and workers.

Article 119 enjoins the member states to "ensure and maintain the principle that men and women shall receive equal pay for equal work". Article 120 purports to maintain the existing equivalence between paid holiday schemes and Articles 121 and 122 are concerned with studies and reports on social developments, and the implementation of Community measures in this field.

The Treaty sets up a European Social Fund (Articles 123-128) to provide financial assistance for schemes to improve employment opportunities, vocational training and to deal with unemployment generally.

These provisions represent a programme, the proposed implementation of which is reflected in the Draft Charter of Social Rights[56]adopted by the European Council in Madrid in 1989 and embodied in the Maastricht Treaty. A spate of legislation is expected to follow. However, by a Special Protocol, the United Kingdom negotiated derogations from the Social Charter which means that it will not apply to the UK unless expressly accepted by the British Parliament. However the greatest impact has been made by case law arising from the interpretation of Article 119 since the right to equal pay within the national systems[57] has provided an opportunity for broadening up national rules not only in the field of employment but also in the field of social rights generally.

The following adjustments will have to be made to the Turkish social laws:

G- SOCIAL POLICY IN TURKEY[58]

Sex Equality:

There is no single Act in the Turkish systems whichs regulates equality between men and women in a general sense. There are separate provisions in various fields of law.

The Constitution of 1982 (Article 70) provides for equal access to public employment and for equality in the field of labour law (Article 10). The latter imposes upon employers an obligation of treating their employees equally. Article 55/II providing for "justice in wages" is fundamental to the Turkish workplace since justice in wages inevitably entails equality[59]. Article 26/IV of Labour Law expressly provides for "equal pay for equal work" and stipulates that collective labour agreements and contracts of employment may not comprise conditions contravening this principle. Moreover ar-

ticle 2 of the bye law concerning the minimum wages prohibits discrimination on the ground of sex in the determination of the amount due.

Harmonization of Turkish labour law with the EC rules cannot be confined within the scope of Labour Act 1475. Indeed the Law of Obligations, Marine Labour and Press Labour Laws which do not provide for equal pay for equal work would have to be considered too. Since Turkey has ratified the ILO Convention No.100 on the equal wages for equal work as between men and women the provisions of the Convention are applicable to all workers irrespective of their sex and irrespective of whether they are subject to the Law of Obligations or Labour Law.

Since there is, in Turkish law no equivalent to EC Directive 76/207[60] requiring equal treatment between the sexes new legislation may be necessary. In this respect the judgment of the Constitutional Court repealing article 159 of the Civil Code which made married women's access to work conditional upon her husband's consent must be regarded as a positive development. On the other hand the UN Convention on the Elimination of Discrimination against Woman (1979), which was ratified by Turkey, comprises all the principles inherent in EC law. Nevertheless it would be necessary to introduce new legislation in order to eliminate doubts and to maintain harmony with Community law.

Security of Employment and Income:

a) Collective redundancies

Collective redundancies are subject to article 24 of the labour law which provides that in the event of 10 or more workers being declared redundant the employes shall inform the Public Employment Agency detailing their names and professional qualifications at least one month before their dismissal in order to place them on the job market. This provision considerably differs from the EC Directive 75/129 in this matter. Article 24 is now subject to a draft law prepared by the Ministry of Labour.

b) Transfer of the ownership of the Undertaking

There is no provision in Labour Law 1475 corresponding to EC Directive 77/187 which provides for the security of employment in the event of a transfer of the ownership of an undertaking or in case of merger of undertakings. However judgments of the Court of Appeal (Cassation) and the doctrine hold that workers shall retain their

jobs where the ownership in the undertaking in whichs they are employed has been transferred[61].

Thus a provision in line with Directive 77/187 shall inevitably be added to the Labour Act 1475 for the sake of harmonization. On the other hand the Law of Collective Labour Agreement Strikes and Lock-outs is in harmony with the Directive since, according to Article 8 of the Law, "the collective labour agreements shall not be terminated when the employer changes in an undertaking to which the agreement applies". Article 19 of the Marine Labour Act is also in harmony with the Directive.

c) Income Guarantee in Case of Employer's Insolvency

According to Article 140 and 206 of the Execution and Bankruptcy law workers' wages enjoy the position of priviledged debts. There is, however, no independent guarantee institution in line with the EC Directive of 1980[62] which provides for the establishment of such institution independent of the employer and financed by the State and employers.

Since Article 29/IV of the Labour Act provides a guarantee only within the limits of the employer's assets it does not meet the requirements of the EC norms. New regulations are necessary.

d) Impending EC Legislation

Draft Community legislation also ought to be taken into consideration:

Regulation 1612/68 governing the free movement of workers is to be amended by providing for equality among workers employed by sub-contractors. Regulation 1408/71 is to provide for the payment of family allowances in respect of workers' children who are domiciled outside the country in which the undertaking in situated.

The procedure for collective redundancies in groups of enterprises operating at a European Level is to be regulated by a directive.

There will be a consolidation of directives dealing with atypical work, e.g. part time work, labour contracts of a definite duration.

Annual leave with pay to be extended to four weeks. Paternity leave corresponding to mabernity leave. Since these matters were not included in Turkish Law at present they ought to be considered de lege ferenda in order to keep pace with the developments in the Community.

H- SOCIAL SECURITY IN TURKEY

The Turkish social security system is in harmony with EC norms since it is based on social insurance techniques, Social security for workers has been established by the Social Insurance Act[63], whilst Act 1479 provides for social security for self-employed. Civil servants are covered by the Retirement Fund Act 5434[64]. There are special laws Nos. 2929 and 2926 for other professions (mainly those engaged in Agriculture). Within this system, which is basically obligatory, there exist also Voluntary schemes. E.g. social security of banking and insurance personnel is privately funded[65].

Article 60 of the Turkish Constitution of 1982 provides that "everyone has the right to social security" Some argue that this provision applies to foreign nationals[66]. But others[67] suggest that, in order to avoid uncertainly, the article should be amended.

On the other hand Article 16 of the Constitution provides that "fundamental rights in respect of aliens may be limited in compliance with international law. "This means that, in the field of social security, aliens may be subject to a different regime. This appears to be incompatible with Article 7 of the EEC Treaty but, in the event of Turkey joining the EC, the expression "in compliance with international law" would confer supremacy of the Treaty when in conflict with Turkish Law[68]. Besides Act 506, which governs workers' rights to social security does not, exclude aliens. On the contrary, it contains provisions enabling aliens to be included.

An alien who was sent to Turkey by his employer on a temporary basis remains subject to his national law. If he is insured at home he cannot be covered by Act 506[69].

If an alien finds a job in Turkey of his own volition article 3/II. a provides that he shall be covered for disablement, old age and death provides he has applied to the Social Insurance Institution. However, if he works under a labour contract in Turkey he is

obliged, like any Turkish citizen, to be insured against accidents at work, occupational disseases, sickness and (in case of women) maternity. He is able to benefit, if he so wishes,from long-term insurance covering disablement, old age and death. Since the EC Regulation 1408/71 designates the law of the place to be the governing law, article 3/II A of the Social Insurance Act must be amended accordingly[70]. However, there is no discrimination based on nationality under the "collective insurance provision of article 86[71].

Act 1479 which governs social security of self employed excludes aliens as regards both compulsory and voluntary insurance. Being incompatible with Regulation 1408/71 it would have to be amended. The same is true of Act 2926 applicable to self-employed in Agriculture. Moreover the Act which provides for benefits to disabled and destitute Turkish citizens aged more than 65 years excludes aliens. This discrimination would have to be removed[72].

There is also a difference between the EC scheme and Turkish system as regards the coverage since the latter does not provide for unemployment and family benefits. Both are among the basic elements of developed social security systems[73].

Severance payments, up to a point, compensate for the lack of unemployment benefit and various family aids can be found in different laws. But these cannot be regarded as guarantees against the risks covered by the EC Regulation. To comply with it unemployment benefit would have to be included[74].

The Turkish law differs from that of the EC member states where almost the whole population is covered whereas in Turkey some 69 % are included. However there should be no problem of adaptation if the necessary amendments are made.

NOTES

1 See Case 191/89: R v Immigration Appeal Tribunal, ex parte Antonissen (1991) 2CMLR 373

2 See Case 149/79:EC Commission v Belgium (No.1)(1980)ECR.388; (No.2) (1982) ECR 1845.

3 Regulation 1612/68, OJ.1968,L.257/2;Directive 64/221, OJ 1952-66 Sp.Ed.p.117; Directive 68/360, OJ 1968, L.257/13

4 E.g.Case 41/74:Van Duyn v Home Office (1974)ECR 1337.

5 E.g.Case 67/74:Bonsignore v Oberstatdirektor der Stadt Köln(1975)ECR 297

6 See e.g.Case 131/79:R v Secretary of State, ex parte Santillo (1980)2CMLR 308

7 Case (1977) ECR. 1495

8 Case 157/79:R v Pieck (1980) ECR.2171

9 Case 98/79: Pecastaing v Belgium (1980) ECR.691

10 COM(88) 815/1 (final) OJ.1989, C100

11 Dir.90/366, OJ.1990, L.180

12 Dir. 90/365, OJ.1990 L.180

13 Dir. 90/364, OJ. 1990, L.180

14 Reg.2434/92, OJ.1992, L.245

15 Case 36/74: Walrave and Koch v Association Union Cycliste Internationale (1974) ECR 1405: Case 222/86: Union National des Entraineurs du Football v Heylens (1989) 1CMLR 901.

16 OJ 1973. L.172/14.

17 OJ.1974, L.14/10

18 OJ.1974, L.14/14

19 OJ.1981, L.134/1

20 OJ.1983, L.230

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22 Case 2/74: Reyners v Belgium (1974) ECR 631.

23 Case 33/74: Van Binsbergen v Bestuur van de Bedrijfsvereniging woor de Meta alnijverheid (1974) ECR 1299

24 Case 107/83:Ordre des Avocats au Barreau de Paris v Klopp(1984)ECR 2971

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26 For details see D.Lasok, The Professions and Services in the European Economic Community, 1986, p.105 et seq.

27 Council Directives 75/362, OJ 1975, L.167/1 (recognition of qualifications); 75/363, OJ 1975, L.167/14 (medical training); 75/364, OJ 1975, L.167/19 (advisory committee of senior public health officials); Directive 86/457, OJ 1986, L.267 (special training for general medical pactitioners)

28 Dir.77/452 and 77/453, OJ 1977, L.176/1 and L.176/9

29 Dir.78/686 and 78/687, OJ 1978, L.233/1 and L.233/10

30 Dir.80/154; 80/155, OJ 1980, L.33/1 and L.33/8; Decisions 80/156,80/157, OJ.1980, L.33/13, L.33/15

31 Dir.78/1026;78/1027 and 78/1028; OJ.1978, L.362/1;L.362/7 and L.362/10

32 Dir.85/384, OJ.1985, L.223/15

33 Dir.85/432;85/433; and Dec.85/434; OJ.1985, L.253

34 OJ.1977, L.78/17

35 OJ. 1989, L.19/16

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41 Act. No.3213, Official Gazette June 15, 1985, N.18785

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43 Act. No: 1512 Official Gazette February 2, 1972, N.14090

44 Act. No. 1136, Official Gazette March 19, 1969, N.11364

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54 See Case 153/84:Ferraioil v Deutsche Bundespost (1986)ECR 1401.

55 See Cade 72/76:Landesversicherungsanstalt Rheinland-Pfalz v Töpfer (1977)ECR 271

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