THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND TURKISH LABOUR MIGRATION

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ABSTRACT

The right to freedom to move is guaranteed by the Charter of Fundamental Rights of the European Union (EU). The Charter contains the fundamental principles derived from the Treaty of Rome (1957) as the basis of the Community Law. The achievement of this freedom between the member states is expected to enhance the degree of European citizens' satisfaction with the principles of liberty, equality and co-operation as universal values. Yet for all that, the Charter takes a 'non-ideological approach' to the political, economic and social rights of both the EU, and non-EU nationals. Essentially, human rights are characterised as universal and indivisible. If this is the case, a question arises as to how far the EU has promoted and defended actively the principle of free movement when engaging in relations with Turkey. The purpose of this study is to examine the significance of the Charter on the Turkish labour migration.

Keywords: European Union, Fundamental rights, Labour migration, Turkish membership

JEL Classification: J83

AVRUPA BIRLIĞI TEMEL HAKLAR SÖZLESMESI VE TÜRK İSCI GOCU

ÖZ

Seyahat özgürlüğü hakkı Avrupa Birliği (AB) Temel Haklar Sözleşmesi tarafından güvence altına alınmıştır. "Sözleşme" Roma Antlaşması'ndan (1957) alınan Topluluk Hukuku gibi temel ilkeleri içermektedir. Üye ülkeler arasında bu özgürlüğün kazanımı Avrupa Birliği vatandaşlarının evrensel değerler çerçevesinde, özgürlük, eşitlik ve dayanışma ilkelerinden memnuniyetleriyle ilişkili olacağı beklenilmektedir. Her halükarde, "Sözleşme", hem AB vatandaşlarına hem de AB vatandaşı olmayanlara yönelik politik, ekonomik ve sosyal haklar anlamında ideolojik olmayan bir yaklaşım ortaya koymaktadır. Esas olarak, insan hakları evrensel ve bölünemez olarak nitelendirilmektedir. Eğer durum buysa, "AB Türkiye ile ilişkileri geliştirirken, serbest dolaşım hakkını faal olarak nasıl ilerletecek ve koruyacaktır?" sorusu ortaya çıkmaktadır. Bu çalışmanın amacı, Türkiye'den AB'ye işçi göçü konusunda "Sözleşme"nin önemini değerlendirmektir.

Anahtar Sözcükler: Avrupa Birliği, Temel haklar, İşçi göçü ve Türkiye'nin üyeliği

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1. Introduction

For the first part, Turkey's claim to free movement revolved around the legal structure of the EU-Turkey relations. Clearly, movement will not be allowed immediately upon Turkey's full membership. Instead, long transitional arrangements may be applied to Turkey in response to fears about a large scale labour movement from Turkey to some member states. A potentially important question is that whether Turkey as a candidate country will permanently be deprived of the rights to free movement derived from the Ankara Agreement of 1964 and the Additional Protocol f 1973, which entailed a system of movement by progressive steps – and the decisions of Association Council. It is often assumed that withdrawing from this right on a voluntary or obligatory basis will be contradictory to the Charter and, for the most part, the long-standing relations between the EU and Turkey.

2. The Relevance of the Charter

Most observers agree that, while based on the ideas of the Treaty of Rome, the definition and interpretation of the key features of the EU treaties by the European Court of Justice (ECJ) has contributed to the competences, rights, obligations and interests of the member states, although it has a limited success. Some of these rights were incorporated in the concept of Union citizenship by the EU treaties, notably the Maastricht Treaty in 1993 and have subsequently been altered by the ECJ practice concerning its interpretation of the fundamental freedoms of Treaty of Rome, and the rights to non-discrimination based on nationality. These freedoms that were acknowledged by the member states at large are binding since the ECJ – in co-operation with the Commission – is charged with ensuring that the treaties and the EU legislation are respected. This role is closely linked with the Charter of Fundamental Rights of the EU.

As a matter of fact, the most substantive specific rights exist in the framework of the Charter of Fundamental Rights signed by the EU in December 2000, which constitutes the main point of reference. The political agreement on the EU Charter was attached to a declaration of the Nice Treaty. Though the Charter was not incorporated into any of the EU's treaties and is legally non-binding, it is expected to feature in the future Court judgements and eventually to be given treaty incorporation (Nurgent, 2003: 237). Thus, it is sensible to suggest that the prospect of the Turkish workers' movement was made more acute by the Charter banning discrimination on the grounds of national identity.

At the outset, the legal instruments back goes back as far as the 1960s and 1970s placed a strong emphasis on the value of Turkish workers' participation in the European labour markets. In the 1980s, some of the larger social and political questions were intermingled, with establishing legal barriers to movement by the EC, which could not be interpreted as concessionary in nature. And very significantly, the problem has become a special one in recent years, as Turkey was granted a candidate status in 2005.

3. Persisting Significance of the Charter

By far the most important effect is to be found in Article 45 of the Charter, establishing the right of workers to move freely and reside within the Community. This means that nationals of the member states have the right to move to another member state and to live there. This is a pre-requisite to the right to access the job market in the host member state (Steiner and Woods, 2003: 297). In the event of membership, this provision, having the most immediate economic effect – the right to exercise an economic activity – should not only be understood as a source of the rights extending to the EU nationals, but also to Turkish workers. The EU member states can decide at any time to remove the restrictions. This is despite the fact that the EU applies 'transitional arrangements', which allow the member states to restrict labour movement from the new accession countries. Indeed full freedom of movement has proved to be difficult to apply throughout the EU. The total acceptance of the *acquis Communautaire*, which contains the principle of movement, depends upon the particular national situation (e.g., the degree of restructuring and the balance of socio-economic circumstances). Generally, many provisions come under severe pressure concerning the convergence criteria. This may be extremely crucial for not only the third-countries, but also for the EU nationals.

From a strictly legal point of view, the free movement provisions in the Charter are far-reaching. These provisions ban any national discrimination in equality treatment, prolongation of employment as well as treatment of accompanying families of workers. Regarding equality, the tendency of the EU member states towards discrimination is found in the debate over Article 21 (1). It provides: 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

To elaborate further, the major emphasis in Article 21 was placed on the definition of freedom of movement and discrimination based on national identity is forbidden as 'one of the fundamental rights'. The Article goes against Europe's so called geographical and historical integrity, which could have serious knock-on effects, not least for Turkey, Croatia and Macedonia, which are concerned that the gates of Europe could close in their face just as they had managed to pry it open an inch or two to start membership negotiations (Watson, 2006; 2). In spite of long standing efforts by most Western European governments to fight xenophobia, there is a growing concern in Western Europe about the scale of current immigration. While some of these worries are based on ignorance of the role of immigrants in the society, other fears are real, such as concerns about the strains placed on health, education and transport services (Wagstyl, 2004: 1). For Turkish case, the argument is by no means definite. Even if casual observers may clearly detect marked differences between European and, for instance, Turkish linguistic norms; this demand laid down in more detailed form in Article 21 (1), states otherwise.

A similar observation is true with regard to the debate on alienation of the Turks from the European labour markets, which should be viewed as inconsistent with Article 21 (1). This view point rests on the assumption that the Turks are a culturally different people, who promote the 'Islamisation of the society'. In particular, recently scepticism has grown as to whether granting the right to labour movement would bring a huge Muslim population into the EU, and whether this would harm the European identity. This claim has not certainly been advocated by Turkish commentators, who attempt to produce a counter-argument. As Laçiner (2005) pointed out, Turkey's EU membership would be a major contribution. Turkish Islam, very similar in essence to European Islam, can lead European Muslims and serve as an answer to their questions. With Turkey's full membership, the population of Muslims within the EU is going to exceed 100 million. It will be understood that the EU is not a mere Christian club, but transcendence into the common denominators beyond religious values, enabling European Muslims to internalize the EU and the countries in which they live (Laçiner, 2005: 21). This conception has successfully been used to mobilise Turkish workers in defence of their exemption.

In a similar vein, Article 21 (2) specifies that 'within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on the grounds of nationality shall be prohibited'. It is, then, possible to end all segregations, merging each candidate country into the greater whole and ensuring that everything is subordinated to the European purpose. The nature of the Turkish case (which is very different from, for example, Poland or Romania) requires the EU to be more circumspect.

It can easily be demonstrated that the exclusion of Turkish workers on religious or cultural grounds is disputable and it will send a disastrous signal to the Muslim citizens of the Central Eastern and European countries, at the very least. Regardless of Turkey's identity, which may pose a threat to European homogeneity, the Turks may at last enjoy their legal right to free movement in Europe according to the timetable established in the Additional Protocol of 1973. Thus, the community spirit may automatically confer on Turkish workers in terms of the full ambit of free movement rights that may be foreseen.

In itself, of course, in cultural terms, Austrian government policies (so-called liberal immigration legislation) have played a key role for Turkish workers in taking the decision to move. Of greater significance to this is that the multicultural nature of Austria's society has been enhanced in order to develop socially and culturally appropriate settlement policies. In August 1997, a new legislation came into effect to better regulate the residence and employment rights of immigrants from outside the EU. The prime objective was to facilitate the labour-market integration of family members of foreign workers who have resided in Austria for some time. The first notable effects were registered in 1999 and 2000 as a significant foreign inflow into employment was observed. The number of employment permits to Turkish immi-

grants has increased since 1998 (OECD, 2001: 130), mainly as a result of the efforts to integrate migrants. This process was strengthened by the implementation of the policy initiatives of 1999-2000.

According to Eren (2005), if a right envisaged by the treaty is breached this will mean the violation of Article 21 (2) or a different form of membership (a second-class nature) with the aim of a 'permanent curve' on the Turkish labour migration that might seriously be inconsistent with the EU's legal system. Turkey can not be forced to an *a la carte* type membership, since this has never been considered for any other candidate country before (Eren, 2005: 26). Furthermore, the Turkish government has accepted that there would be restrictions on the movement of the Turks to the EU on a strictly temporary basis after it joins, but any attempts to impose a permanent curb would be a breach of the EU's pledge not to treat Turkey's membership in a different way from that of other candidate countries (Hope *et al*, 2004: 1).

While the fear of a second-class membership is probably well grounded, the significance of the Charter should not be underestimated in terms of the establishment of equality before the Community Law, in particular. To this end, Article 52 (1) of the Charter permits no discrimination, but such discrimination may be possible through legal instruments. This practice should not have a negative impact on the very nature of the rights and liberties as envisaged by the Community Law. This is especially evident in the implicit statement inserted into Article 52 (2) that 'rights recognised by the Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties'.

Although unphrased in the absolute terms, Article 52 reinforces the idea of non-discrimination as a fundamental principle. This will surely encourage Turkish workers to fully integrate into the European labour markets. By doing so, they will likely make efforts to enhance their socio-economic conditions. More generally, the existence of the Charter is crucial with regards to the establishment of the legal order. It means equal treatment of workers, especially for those who are permanently settled in the EU member states. This is because an enforceable legal framework provides the basic setting to guarantee the inclusion of the fundamental rights and liberties on progressive stages within the EU legal system.

Given all these provisions, there appears little chance that obstacles to mobility of Turkish workers will persist for a long time. Improvement of the judicial and social status of the Turks living abroad, particularly in Europe, almost 40 years have elapsed since the first large scale emigration movement and today there are second and third generations of Turks who are permanently settled in the host countries (Ministry of Foreign Affairs, 2002: 2). This relationship has not been coincidental or temporary. As for the most effective policy instruments adopted by the EU, there may be an increasing tendency to offer full membership to Turkey. However, the EU creates circumstances in which workers are excluded from its labour markets.

In any event, such a policy will be in contrast with the Charter in parallel with the Community rules and regulations. In fact, Turkish commentators often point to 'membership deficit', implying that the EU violates the right to free movement as one of the four basic freedoms specified in the Charter. To this end, there is an immediate prospect of the ECJ's judgements that has been increased in recent years in line with Turkey's claim to freeing its labour force. Turkish workers, who are genuinely deprived of the right to move freely, sought to rely on the ECJ decisions.

Accordingly, three decisions of the Association Council (2/76, 1/80 and 3/80) provided the legal framework concerning the rights of Turkish workers and their family members envisaged by the provisions of the Agreement (Çiçekli, 1999: 310). The family members were granted access to the labour market, to housing and education (Articles 9–12 of the EEC-Regulation 1612/68). The Court consistently took the same position with regard to the Decision 1/80 of the Association Council EEC-Turkey. In a series of judgments, the Court has recalled that the aim of this Decision is the gradual integration of Turkish workers and their family members in the host member state. The Court did so again in the Abatay judgment on the standstill clauses in the rules of the Association EEC-Turkey (ECJ 21 October 2003 C-317/01 and 369/01 (Abatay), par. 90) (Groenendijk, 2004: 115). These rulings demonstrate that the judgements of the ECJ, mostly, end up in favour of Turkish workers. Apparently, the role of the Chapter in such decision should not be underestimated.

4. Conclusion

As the analysis demonstrated, the importance of the form and content of the Charter of Fundamental Rights should be viewed in the context of Turkish workers' rights and individual liberties. Historically, any changes in the magnitude of Turkish migration were dependent on the legal instruments pointing to the Ankara Association Agreement and the Additional Protocol. As the analysis has also shown, such changes are now partly concerned with enforcing the Charter for future migration flows. Essentially, Turkish labour mobility has to be recognised and, then, viewed on its merits as far as its essence and goal was envisaged by virtue of Community Law. From this perspective, the Charter is impressive, since it has guaranteed individual rights and liberties in a single document in the EU legal framework. Certainly, the Charter has given a sign of a change in already-established migration patterns of Turkish workers. If Turkey joins the EU, the Charter might prevent the old EU member states from hampering labour mobility. This remains to be seen.

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