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HUMAN RIGHTS AND EUROPEAN INTEGRATION

M.A. Thesis

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PREFACE

This study is about to the human rights in the European Union law. The process of European integration was launched by Robert Schuman fifty years ago as a peace initiative. At first this naturally generated mainly economic concern, but later a social dimension added. The European Union is described today as an area of freedom, security and justice. Fundamental rights and freedoms therefore became a milestone in the European process. Human rights define an ideology including an original and new political entity. The States are not going to prefer to resist this ideology because of the possibility of the danger of the raising any violation of human rights in their system. The European Union noticed this reality in the years when human rights have been violating in former Yugoslavia with the shameful witness of the European Union.

Human rights are a new matter for European Union in comparison to other matters. It is a controversial one amongst authors as well as European Union institutions. It is clear that theoretical work on the governance of the EU to explore any subject by analysing national and sub-national political and legal structures opens up a space for interdisciplinary dialogue. Instead, I try to constitute a mainframe. Therefore, this study in such a special issue can not present a single white print to explain all dimensions of European Union Human Rights Law. It tries to explain some complex and necessary points. At the same time, these points constitute borders of this study in the following order:

- In Part One, concept of human rights, human rights law and democracy, state and human rights, on the one hand, the European Union, law and institutions of European Union and nature of European Union law, on the other hand, shall be scrutinised
- In Part Two, European Union institutions and human rights law ,the case law of the European Court of Justice, human rights provisions in the Treaties and some secondary legislation regarding human rights shall be elaborated
- In Part Three, human rights and European Union's external relations and relations between European Union and Turkey shall be analysed
- In Part Four, future of the European Union Human Rights Law shall be dwelled upon

A study such as that one could not have been produced without the support and contribution of many people. I am grateful to the instructors and professors, who taught me whatever I know so far. But I particularly thank to Aslan Gündüz, who made most important warnings, contributions and advice and corrected my mistakes throughout the study. Responsibility of errors and vices are mine and not his or the others.

The love, guidance and support of my parents and of my wife (who transformed from girlfriend to fiancée to wife during my Master study) are appreciated more than they will ever know.

The law is stated as at 1 February 2001, although references have been made to subsequent development where they have been known to me.

YILDIRAY SAK

İstanbul
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NOTE ON TERMINOLOGY

Until coming into force of Treaty on European Union (TEU) on 1 November 1993, the term 'European Community' was, as a matter of convention, used to describe those 12 Member States that constituted three distinct communities: the European Coal and Steel Community (ECSC); Euratom; and the European Economic Community (EEC). Since that date, these three communities together form part of a broader entity called the 'European Union' (EU). The term 'European Community' has now been invested with a formal meaning to describe what was formerly the EEC.

I used the terms 'European Union' and 'European Community', in order to minimise confusion, according to two principles: first, where talking in a historical context I use 'European Community' in respect of pre-1993 and the 'European Union' in re[illegible]f post-1993 period; secondly, I use 'European Community' in its conventional sense w[illegible] referring to a specific competence that does not extend to the broader 'European Union'.

Other important point is numbering of the Treaty Articles. After Amsterdam Treaty came into force, numbering of the Treaty Articles changed. Accordingly, I used the numbering of consolidated version of the Treaty on European Union and the Treaty establishing the European Community. Where they are necessity, ex article numbers will be pointed separately.

ABBREVIATIONS

APC	African, Caribbean and Pacific countries
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJHA	Cooperation in the Field s of Justice and Home Affairs
CMLR	Common Market Law Review
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
EEC	European Economic Community
ECSC	European Coal and Steel Community
ECHR	European Convention on Human Rights
ECJ/ Court	European Court of Justice
ECR	European Court Report
ELR	European Law Review
EPC	European Political Cooperation
EU	European Union
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

IGC	Intergovernmental Conference
ILO	International Labour Organisation
LIEI	Legal Issues of European Integration
MEDA	Mediterranean Aid
MJES	Marmara Journal of European Studies
MS	Member State
OJ	Official Journal
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty of European Union
UN	United Nations
YEL	Yearbook of European Law

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Part One

INTRODUCTION

1. Human Rights

1. 1. The Concept of Human Rights, International Law and Human Rights Law

The concept of human rights may have different meanings in different communities and at different times and it still needs development in its content. Neither 1789 French Declaration of Rights and Freedom nor 1215 Magna Carta Libertatum had mentioned today's rights and freedoms as they were included in the Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR). In above mentioned early documents rights and freedoms are limited in content since they regulated mainly the rights that are called classical rights. They do not have also a worldwide acceptance because many communities or countries do not accept these rights and freedoms or they are not aware of them. This problem has continued to a certain degree. Hence, a problematic was witnessed with the birth of human rights theory which had two appearances:

i. What should have been the content of human rights list and how this list should have been recognised by international community?

ii. By which disciplines should human rights have been covered, though human being is the direct focus of philosophy and sociology? At the same time, the concept of human rights cannot be considered in isolation of law and politics either.

It has taken a long time to partly answer this problematic. Respecting human dignity and personality had been accepted relatively late. Firstly, Mesopotamians who established nucleus of the State left their impression on the succeeding civilizations with their rule of order. In 2000-2500 BC, equality and freedom concepts had imposed themselves in the Egyptian civilization. Sophists in pre-classic Greece in 400 BC were the first to discuss the problems in detail. They argued that the human being was a master of his own fate, not dependent on the Gods; as it had previously been thought. Later, Stoics developed the notion of a natural law. Secular law, they claimed, was valid only if it corresponded to natural law[1]. Middle age became the dark period in the history of mankind.

[1] Mumcu, A., İnsan Hakları ve Kamu Özgürlükleri, Savaş Yayınları, 1994, p. 27-69

It may be pointed out that human dignity concept in XVII and XVIII centuries was a touchstone in order to explain the human rights. Human dignity appears in various guises, sometimes as the source of human rights, at other times as in itself a species of human right: sometimes defining the subject of human rights, at other times defining the objects to be protected; and sometimes re-inforcing, at other times limiting, rights of individual autonomy and self-determination.

Moral and political philosophers have used the notion of the 'right to dignity' in many senses[2]. However, there is a strong idea that dignity relates to the intrinsic value of persons. This idea finds its classic expression in Kant's opinion. Kant says:

'Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being... but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.'[3]

It seems that there is question so far as to whether human rights are legal or moral character. There is no doubt that today human rights are conceived of as legal rights. But, in the historical evaluation of laws, institutions, measures or actions, these rights were not always identified with norms of positive law. Indeed, such legal rights were created as a result of the recognition of rights which are logically independent of the legal system. It means that human rights have their origin not in the positive legal order but in 'natural law'. This is a normative system that is characterized by the fact that the criterion for the validity of its norms is based not on their enactment or recognition by certain individuals, but on their intrinsic justification. Namely, recognition of human rights emerged as part of the spiritual development of humankind[4].

In this content, the most severe criticism against natural law doctrine of human rights came from Marx and Engels. In the Communist Manifesto, history is described as a continuous struggle between the dominant and the emerging classes, each time ending with a victory of the latter and a formation of new social structures. It was alleged that the working class could not expect much justice from the state which was described as a committee regulating the interest of the bourgeois members. The ideal

[2] Dworkin, R., Life's Dominion,1993, p. 233-237
[3] Kant, I., The Metaphysics of Morals, Cambridge University Press, 1996, p. 209

of humanity was recognized, however, to have softened the harshness of the measures used to maintain control over the working class[5].

Although human rights were described in this closed way, still there was an unclear point of what the content of human rights was and how international community had to ratify it. In order to answer this question, mankind had to wait until XXth century. After World War II, it has understood that the best way of description of rights and freedoms passes through the law inasmuch as principles of philosophy and sociology are not binding for the society; they are representing moral values. In fact, in order to guarantee human rights, they must be protected by the law since only law can restrict tyrannous governments. The 1948 Universal Declaration of Human Rights and European Convention on Human Rights provides a list of human rights and freedoms and many countries have accepted these instruments. Thus, human rights have become an international law matter with these instruments which they bestow human rights law a supranational status. Because the aim is to protect humans against any intervention of the State[6]. These documents have accepted the principle that human dignity and the human person has to be respected as soon as life begins.[7]

The international human rights movement is based on the concept that every state has an obligation to respect the human rights of persons and that every state and the international community have a power and a responsibility to intervene if states do not fulfil their obligation. International law is generally applicable only to states and normally does not create rights directly enforceable by individuals in national courts.

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[4] Nino, C. S., The Ethics of Human Rights, Clarendon Press-Oxford, 1991, p. 10

[5] See. Sosyalizm ve Toplumsal Mücadeleler Ansiklopedisi, İletişim Yayınları, vol 2, p. 114

[6] Soysal, M., Anayasaya Uygunluk Denetimi ve Uluslararası Sözleşmeler, Anayasa Yargısı, Anayasa Mahkemesi Yayınları, Ankara, 1986, no: 5, p. 9

[7] Human rights were defined or described by international convention in best way. However, it was also defined in studies and books. Before international meaning of human rights, a description may be given from a writer, Isaiah Berlin. On this view, he says, it is not enough that liberty 'must not be violated unless someone or the other-the absolute ruler or the popular Assembly or Parliament or judges or some combinations of authorities or the laws themselves- authorises violation. But there must rather be some frontiers of freedom which nobody should be permitted to cross.' Different names or natures may be given to the rules which determine these frontiers. They may be called natural rights, or the Natural Law. But, he says:

what these rules or commandments will have in common is that they are accepted so widely, and are grounded so deeply in the actual nature of men as they have developed through history, as to be, by now, an essential part of what we mean by being a normal human being. (See. I. Berlin, Four Essays on Liberty, Oxford, 1969, p.165)

Without denying the idea that certain rights are fundamentally grounded in human nature, this description allows scope also for the idea that there has been a growth and development of human nature through history which allows us to speak of certain rights as being "by now, an essential part of what we mean by being a normal human being."

International human rights law can be quite effective in domestic law if a state signs an international or regional convention to make it a law in its own domestic law.

International human rights law is derived from a variety of sources and involves many kinds of instruments. The first example of these sources is International Declaration of Human Rights. But this document could not ensure the expected achievement, because this document does not have a control mechanism, and if a legal document is not having binding power, it lacks any sanction for anybody. So, human rights has became a real branch of law thanks to the European Convention for the Protection of Human Rights and Fundamental Freedoms because it contains compulsory rights and freedoms and, at the same time, has established a mechanism which has a court and a system of enforcement. In addition, this mechanism has directly affected national laws.

Indeed, human rights law found its own meaning after the acceptance of international instruments. According to majority of authors, fundamentals rights and freedoms are *rights which are not subject to recognition and protection of any authority, that human beings have them by being human from the birth and regardless of the fact that whether or not States recognise and respect and protect them*[8]. European Convention on Human Rights has gone further by not only defining fundamental rights and freedoms but also enumerating reasons for which they may be restricted. Accordingly, fundamental rights and freedoms are *rights which must not be violated by any action of the public authorities, whether by the legislature and, the executive or the judiciary, unless interference with any right is i) necessitated by the interest of the public, ii) proportional to the objectives pursued iii) not contrary to the substance of the right*[9].

Today, the most important problem regarding human rights in international area is 'politicisation' of the concept. A lot of states used human rights in their own political interest after the World War II. In the two-pole world, East and West manipulated various human rights issues to gain superiority over each other[10]. There is only one thing to prevent this trend in the field of law: the reinforcement of the international human rights enforcement mechanism. There may be means to be taken in the field of politics but the politics remains outside the scope of this study.

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[8] Batum, S., Avrupa İnsan Hakları Mahkemesi ve Türkiye, Kavram Yayınlar, 1996, p. 17

[9] See further Batum, S., Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasal Sistemine Ekileri, İstanbul Üniversitesi Yayınları, Yayın no: 3761, 1993, p. 215

1.2. State, Democracy and Human Rights

Beginning from XV. Century, the trend of rationalism affected law and sociology as well as mathematics and physics. Thus, natural law theory as a source of law and human rights was affected by the consequences of rationalism. The founding fathers of this trend were Hugo Grotius, Thomas Hobbes, John Locke, Montesquieu, Voltaire, and Jean Jacques Rousseau. These writers sought to explain the relationship between state, law and human rights by using natural law theory. They reformulated theories of natural law, defining them as something eternal but not based on or subject to the will of God. Hugo Grotius said that ' the law of nature, again, is unchangeable, even in the sense that it cannot be changed by God'[11]. According to natural law theory, 'humans had a lot of rights and freedoms since they were born and these rights and freedoms are not given by any authorities. Humans had these rights and freedoms naturally[12]'. However, throughout most of human history, the way one government treated its own citizens was considered solely its own affair and not a proper concern of any other nation. From an international legal standpoint, human rights questions were regarded as matters entirely within each state's own domestic jurisdiction and wholly inappropriate for regulation by international law[13].

However, development of democracy and attitudes of states after World War II affected the perceiving of human rights. Particularly, increasing democratic culture has directly affected human rights problem.

Democracy and human rights are dynamic concepts, and they have many different ways. Any attempt to describe this relationship runs the constant risk of focusing on details and losing the overall view. But it should be seen that democracy is not a majority public opinion. Were it, there would be no a perfect correspondence between democracy and human rights, and human rights may have been watered by democracy. On the other hand, the danger to human rights does not come solely from the tyrant or the imposition of dictatorship. It can also exist in a 'peaceful' democracy; it is certain that to defend that human rights may be restricted by

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[10] GÜNDÜZ, A., Security and Human Rights in Europe, The CSCE Process, İstanbul 1994, p.17

[11] Grotius, H., The Law of War and Peace, Butterworth, Book 1, Chapter 1.5

[12] See further Rousseau, Jean. J., Toplum Sözleşmesi, (Translation: Vedat GÜNYOL), Fifth Edition, İstanbul,1982

[13] Bilder, Richard B., 'An Overview of International Human Rights Law' in Hurst Hannum (ed), Guide to International Human Rights Practice, second edition, 1992, University of Pennsylvania Press, Chapter 1, p.3

democracy is unacceptable. On the contrary, I think that fundamental rights and freedoms should be able to restrict majority opinion. In that way, *militant* democracy is not a desired democracy, and human rights, due to their own nature, are ideologically opposed to the state which tends to this kind of democracy.

2. The European Union

This title provides a general overview of the law, legal system and institutions of the EU and a brief historical background in general. The inclusion of this title is necessitated by the fact that many readers may be non-EC people who are unfamiliar with the studying of the EU.

2.1. History of the European Union

The EU is the product of the spirit of European integration which is not new. It has gathered momentum since the end of the Second World War. The Second World War impressed on many people the dire for European unity. Two eminent EC scholars, Lasok and Bridge have written:

'The Second World War demonstrated the futility of conquest and vulnerability of the sovereign state concept. The sovereign state could no longer guarantee the protection of the citizens and so the traditional concept of allegiance based on a *sui generis* contract broke down. Interdependence of states rather than independence became the key to post-war international relations...'[14]

In 1946, Winston Churchill spoke at Zurich University of the need to 'recreate the European family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe'. Integration, in this context, was undertaken so as to achieve both economic growth and political stability while avoiding war and domination by USSR.

On May 1950, Robert Schuman, the French Foreign Minister, stated in Schuman Declaration that a united Europe was essential for world peace. He went on to say that such a united Europe would not come about until there was a coming together of France and Germany. He proposed that the coal and steel production of

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[14] Lasok and Bridge, Law and Institutions of the European Communities, 4.th ed., 1987

those two former adversaries would be pooled under a common authority to avoid the possibility that either state could built up a war industry and secondly, to create economic growth through an enlarged market. Inspiring Schuman Declaration, the ECSC was founded in 1951 and, ECSC Treaty entered into force in 1952. The ECSC had a High Authority, a Council of Ministers, a Assembly and a Court of Justice. The ECSC was a success. If it had been a failure then neither the EEC nor Euratom would ever have been created. The foundation Treaties for both the EEC and Euratom were speedily drafted and later signed on 25 March 1957. The EEC and Euratom Treaties entered into force on 1 January 1958. The aim was to establish a common market in products other than coal and steel as well as services generally. The Merger Treaty, entered into force on 29 June 1967, provided a single parliamentary assembly, a single Commission, single Council of Ministers and a single Court of Justice for all three Communities.

Single European Act, one of the most important steps in EU history, was signed on 17 February 1986. The SEA amends the EEC Treaty quite extensively, particularly in the area of foreign policy and decision making process. Traditionally, the Council of Ministers has to adopt legislation by way of a unanimous vote but the SEA allows for the adoption of many matters by way of a majority vote.

The Treaty on European Union is a cornerstone in the history of European integration. The TEU, signed on 7 February 1992 in Maastricht and entered into force on 1 November 1993, included four key areas in it, citizenship, economic and monetary union, foreign and security policy and justice and home affairs. It was decided that the provision relating to citizenship and to economic and monetary union should be integrated into the EEC Treaty as amended by the TEU. On the other hand, as regards foreign and security policy and justice and home affairs, while wishing to create a framework for more intensive co-operation, Member States were not ready to convey competence to the Community. Thus, the three pillars embraces three distinct spheres of competence, the European Community, the CFSP and co-operation in the field of justice and home affairs[15]. These three pillars of the TEU resemble a new structure, the European Union. The first pillar of the EU brought into EEC Treaty some innovations. First, name of the Community was changed; it called the European Community (EC). Secondly, under the principle of *subsidiarity*[16], the Community

[15] Wyatt & Dashwood, European Community Law, 3rd ed., 1993
[16] See. 2.3.3.3.

may only take action if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. Thirdly, although it has considerable symbolic importance, TEU establishes a Union citizenship. It gives to persons some rights such as moving and residing freely or diplomatic and consular protection. Fourthly, TEU establishes a new economic and monetary policy. Accordingly, economic and monetary union shall complete in three stages. According to Article 4 of the EC Treaty, economic policy includes to coordinate of Member States' economic policies, on the internal market and on the definition of common objectives, in accordance with the principle of open market economy with free competition. This also needs a single currency and the EC shall trace a single currency policy to maintain price stability.

The second pillar of the EU is the Common Foreign and Security Policy . CFSP extends to all areas of foreign and security policy. All questions related to the security of the Union will be covered, including the eventual framing of a common defence policy. According to Article J of the TEU, the Union makes this in two ways, by establishing cooperation between Member States and by implementing joint action in areas where the Member States have important interests in common.

The third pillar of The EU is Justice and Home Affairs. It means that cooperation in the field of justice and home affairs brings together the Ministries of Justice and of Interior, and their departments, of the fifteen Member States. It permits dialogue, mutual assistance, joint effort and cooperation between the police, customs, immigration services and justice departments of the Member States. The Justice and Home Affairs includes aspects of the free movement of persons, the control of the Union's external frontiers and immigration policy, combating drug addiction, judicial cooperation and custom cooperation in accordance with Article K of the TEU.

The Amsterdam Treaty made last amendments in Treaties. The Amsterdam Treaty, signed on 2 October 1997, is the culmination of two years of discussion and negotiation in a conference of Member State government representatives. The aim of the Treaty are to create the political and institutional conditions to enable the European Union to meet the challenges of the future such as the rapid evolution of the international situation, human rights issues, the globalisation of the economy and its impact on jobs, the fight against terrorism, international crime and drug trafficking.

The European Union (EU) is the result of a process of cooperation and integration which began in 1951 between six countries (*Belgium, Germany, France,*

Italy, Luxembourg and *the Netherlands*). After nearly fifty years, with four waves of accessions (1973: *Denmark, Ireland* and *the United Kingdom*; 1981: *Greece*; 1986: *Spain* and *Portugal*; 1995: *Austria, Finland* and *Sweden*), the EU today has fifteen Member States and is preparing for its fifth enlargement, this time towards Eastern and Southern Europe.

2.2. Institutions of the European Union[17]

Union organs are classified under EU law as either 'institutions' which are capable of taking decisions binding on Member States or 'bodies' which are not capable of taking such binding decisions. The institutions that will be mentioned here are the Commission, the Council of Ministers ('the Council'), the European Council, the Parliament and the Court of Justice[18].

2.2.1. The Commission

The Commission is the executive organ of the EU. It sends to the Council of Ministers proposals which may ultimately find their way into Regulations and Directives and so on. The 20 members of the Commission appointed by the common accord of the governments of the Member States on the basis of independence of national interests. The Commission has a President and six Vice-Presidents.

The functions of the Commission fall into three categories: first, the guardian of the Treaties; secondly, the initiator and guardian of EU policy; and thirdly, the EU' executive organ. The Commission ensures that the Treaties and measures taken pursuant to them are complied with all Member States and Union institutions. It formulates recommendations or delivers opinions on matters dealt with in the Treaties. The Commission has its own power of decision and participation in the shaping of measures taken by the Council of Ministers and by the European Parliament and, exercises the powers conferred on it by the Council of Ministers for the implementation of the rules laid down by the latter.

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[17] EC Treaty, Article 4.

[18] See further for Institutions Lasok, D., Law and Institutions of the European Communities, 4.th ed., 1987; Wyatt & Dashwood, European Community Law, Sweet & Maxwell, 3rd ed., 1993; Hartley, T.C., European Community Law, 2nd ed., 1989

The Commission consults widely with interested parties from all sectors when preparing draft legislation. It represents the common interest and embodies, to a large degree, the personality of the Union. Its main concern is to defend the interests of Europe's citizens. The Commission must also ensure that the benefits of integration are balanced between countries and regions, between business and consumers and between different categories of citizens

2.2.2. The European Council

The European Council brings together the Heads of State or Government of the fifteen Member States of the European Union and the President of the European Commission. The European Council is hosted by the Member State holding the Presidency of the Council, and punctuates the political life and development of the European Union by meeting at least twice a year (generally in June and December).

The principal role of the European Council is described as follows in Article 4 of the common provisions of the Treaty on European Union: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof". Unlike the European Parliament, the Council, the Commission, and the Court of Justice, the European Council is not legally an institution of the European Community; it nevertheless plays a vital role in all European Union fields of activity either by giving impetus to the Union or defining general political guidelines, or by arbitrating difficult questions. It has, from its early days, put its stamp on how each enlargement of the European Union was to be achieved. On the subject of enlargement to embrace the countries of Central and Eastern Europe, the Extraordinary European Council held in Dublin in April 1990 focused on German unification and the indirect integration of the former German Democratic Republic into the Communities. The Copenhagen European Council in June 1993 set out the criteria and conditions for membership. The Luxembourg European Council in December 1997 decided that accession negotiations would begin immediately with six candidate States, to be joined in a second wave by five more.

The European Council also has a role to play in coordinating European policies. This role is, for example, particularly important when coordinating foreign policy guidelines under the CFSP and Justice and Home Affairs or guidelines on common commercial or development cooperation policies.

2.2.3. The Council of Ministers, 'the Council'

The Council is composed of one representative at ministerial level from each Member State, who is empowered to commit his Government. Council members are politically accountable to their national parliaments.

Which Ministers attend each Council meeting varies according to the subject discussed, though its institutional unity remains intact. The Ministers for Foreign Affairs attend in the configuration known as the General Affairs Council to deal with external relations and general policy questions, while the Ministers responsible for economic and financial affairs meet as the Economic and Financial Affairs Council, and so on.

The frequency of Council meetings varies according to the urgency of the subjects dealt with. The General Affairs, Economic and Financial Affairs and Agriculture Councils meet once a month, while the Transport, Environment or Industry Councils meet two to four times a year.

The Council is a Community institution exercising the powers conferred upon it by the Treaties. The Council is the Community's legislative body; for a wide range of Community issues, it exercises that legislative power in co-decision with the European Parliament. It coordinates the general economic policies of the Member States. On behalf of the Community, the Council concludes international agreements between the latter and one or more States or international organizations. Along with the European Parliament, the Council constitutes the budgetary authority that adopts the Union's budget.

On the other hand, it has main responsibilities under TEU. Accordingly, first, the Council takes the decisions necessary for defining and implementing the common foreign and security policy, on the basis of general guidelines established by the European Council. Secondly, it coordinates the activities of Member States and adopts measures in the field of police and judicial cooperation in criminal matters.

The Council's work is prepared by the Permanent Representatives Committee (COREPER), consisting of the Permanent Representatives of the Member States in Brussels and of their Deputies, which meets every week. This Committee also oversees and coordinates the work of some 250 committees and working parties made

up of civil servants from the Member States who prepare at the technical level the matters to be discussed by COREPER and the Council[19].

2.2.4. The Parliament

The Parliament consists of 624 members elected in elections held throughout the EU every five years. The members are representatives of the peoples of the Member States. These members are arranged not in national delegations but are gathered in groups according to political outlook. The fact that a person is a member of a national parliament does not mean that the person is ineligible for membership of the Parliament. Since 1979, members of the Parliament have been directly elected by voters throughout the EU on the basis of universal suffrage.

The Parliament elects its own president and officers from amongst its own members. The Parliament has fifteen standing committees. Each of these committees specialize in particular areas of the EU policy. These committees prepare reports which form the bases of debates in the Parliament.

The formal powers of the European Parliament are three kinds: it participates in various ways in the decision making process of the Union; it constitutes the budgetary authority of the Union together with the Council of Ministers; and it exercises political supervision over the performance by the Commission of its task. It does not have an independent right of initiative but brings its influence to bear on the Commission and the Council of Ministers to provoke any action those institutions that it considers necessary[20]. For that purpose, the position of the Parliament was strengthened by the Article 192 of the EC Treaty which provides that it may, acting by a majority of its members, request the Commission to submit any appropriate proposals on matters on which it considered that a Community act is required for the purpose of implementing the Treaties.

The participation of the European Parliament in the law-making process will be discussed in 2.3.2.

2.2.5. The Court of Justice

[19] See further supra, Wyatt & Dashwood, p.24
[20] Ibid, p.31

2.2.5.1. Composition and Function

The Court of Justice ("the Court") consist of 15 judges and is assisted by 9 Advocate General. The judges and advocates general are appointed by common accord of the governments of the Member States and hold office for a renewable term of six years. The advocates general assist the Court in its task. They deliver, in open court and with complete impartiality and independence, opinions on the cases brought before the Court. Their duties should not be confused with those of a prosecutor or similar official - that is the role of the Commission, as guardian of the Community's interests.

The function of the Court is explained in Article 220 (ex Article 164) of the EC Treaty:

"The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."

All processes on European Union Law are under the control of the ECJ. Accordingly it is the Court's task to review all the Community's primary and secondary legislation, as well as treaties of accession or any other treaty with third countries.

2.2.5.2. Procedure[21]

a) Initiation of the proceedings

The action must be brought before the Court by a written application sent to the Registry by a lawyer.

As soon as it is received, the application is entered in the Court register. The Registrar publishes a notice of the action and of the applicant's claims in the *Official Journal of the European Communities*. A Judge-Rapporteur and an Advocate General, whose duty it is to follow closely the progress of the case, are then appointed. The application is also served on the other party, who has one month within which to lodge a defense. The applicant may submit a reply, and the defendant a rejoinder, the time allowed being one month in each case. The time-limits for lodging these documents must be strictly adhered to unless an extension is specifically authorized by the President.

[21] See further the Statute for the Rules of Procedure of the Court in O.J 1991 L 176/7

b) Preparatory inquiries and the Report for the Hearing

Once the written procedure is completed, it is decided, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, whether any preparatory inquiry is necessary and whether the case should be dealt with by a Chamber or by the full Court. After the last pleading has been lodged, or on completion of the preparatory inquiry, if any, the President sets the date for the public hearing. In a Report for the Hearing, the Judge-Rapporteur summarizes the facts alleged and the arguments of the parties and the interveners, if any. The report is made public in the language of the case at the hearing.

c) The public hearing and the Opinion of the Advocate General

The case is then argued at public hearing for the judges and the advocate general to whom the case has been assigned. They may put to the parties any questions they think fit.

Some weeks later, again in open court, the advocate general delivers his Opinion to the Court. He analyses the facts and above all the legal aspects of the case in detail, and proposes his solution to the problem. The oral procedure ends.

d) Deliberation and judgment

Next, the judges deliberate alone on the basis of a draft judgment drawn up by the Judge-Rapporteur. Each of the judges may propose changes. When a final text has been agreed upon, judgment is given in open court.

e) Procedure in preliminary rulings

The national court submits questions concerning the interpretation or validity of a provision of Community law, generally in the form of a judicial decision in accordance with national procedural rules.

The Registrar has that request translated into all the Community languages, then serves it not only on the parties to the original proceedings but also on the Member States, the Commission and, where appropriate, the Council. A notice is published in the Official Journal indicating the names of the parties involved and the tenor of the question.

The parties, the Member States and the Community institutions have two months within which to submit their written observations to the Court. The remainder of the procedure is identical to that followed in direct actions. All those entitled to

submit written observations may present their arguments orally at the hearing. When the advocate general has delivered his Opinion and once the judges have deliberated, the judgment is read in open court and sent by the Registrar to the national court which sought the ruling.

The judgments of the Court of Justice are reached by a majority vote. There are no dissenting opinions, and the judgments are signed by all the judges who took part in the deliberations and read in open court.

The judgments of the Court and the Opinions of the Advocates General are published in the *Reports of Cases before the Court of Justice and* in all the official languages of the Community.

2.2.5.3. Jurisdiction

The jurisdiction may be classified under the following provisions of EC Treaty.

a) Article 226-227 (ex Articles 169-170): Proceedings for failure to fulfil an obligation

Article 226 provides: (the case from the Commission to a Member State)

'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

This provision allows the Commission to fulfil more easily its function as guardian of the Treaty. The Commission sends a letter Member States which must fully set out the case against that State. If response is unsatisfied, the Commission issue a non-binding Opinion. If no response comes from Member State, the Commission may decide to pursue the matter in the Court. If the Court find a failure, Member States has to take measures to comply with the Court's judgement.

If the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose a fixed or a periodic penalty.

Article 227 provides: (case from a Member State to another Member State)

'A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.'

b) Article 230 (ex Article 173): Action for annulment

Article 230 says:

'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis a vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament, by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

Subject to the two months time limit, Member States, the Council of Ministers and the Commission have an unlimited right to initiate the proceeding. On the other hand, natural or legal persons must prove that they have a specific interest (direct and individual concern).

c) Article 232 (ex Article 175): Action for failure to act

Article 232 says:

'Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.'

Under this Article, the Court can declare that the failure of the Community institution to act constitutes a breach of Community law. Unlike an action for annulment, an action for failure may be brought by the European Parliament. Persons may bring proceedings against an institution if they have been the addressee.

d) Article 241 (ex Article 184): Plea of illegality

Article 241 says:

'Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.'

e) Article 234 (ex Article 177): Preliminary rulings

Article 234 says:

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

In order to ensure the effective application of Community law and prevent differences between the rules of interpretation applicable in different national courts from leading to different interpretations of Community law, the Treaties provided for a system of preliminary rulings which, while not setting up any hierarchical relationship, has institutionalized fruitful cooperation between the Court of Justice and the national courts. In cases involving Community law, national courts, if in doubt as to the interpretation or validity of that law, may, and in some cases must, seek a preliminary ruling from the Court of Justice on the relevant questions.

That system ensures that Community law is interpreted and applied uniformly throughout the Community.

It is a procedure which, by ensuring permanent cooperation between national courts and the Court of Justice, clearly demonstrates that national courts too are the guardians of Community law.

A preliminary ruling is also the form of procedure by which any European citizen may seek clarification of the Community rules which concern him.

The national court to which that ruling is addressed must apply the law, as interpreted by the Court of Justice, without modification or distortion, to the dispute before it. A ruling on interpretation by the Court also serves as a guide for other national courts dealing with a substantially similar problem or a question on which a preliminary ruling has already been given.

2.3. The Law of the European Union

2.3.1. Sources of the Union Law

The primary sources of the Union law are the Foundation Treaties. These treaties are the ECSC Treaty, the EURATOM, the EC Treaty, the SEA, the TEU and the Amsterdam Treaty. The Foundation Treaties set out the objectives of the EU. The Foundation Treaties binds all institutions, Member States and persons. They set the constitutional framework of the EU.

In case of *Van Gend en Loos v. Nederlandse Administratie der Belestingen*, the Court held as follows[22]:

'...Community constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights,...Community law is intended to confer rights. These rights arise not only where they are expressly granted by the Treaty , but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and the institutions of the Community.'

Also in Costa v. ENEL, the Court held that EEC Treaty became an integral part of the legal system of the Member States and their courts are bound to apply it[23].

The secondary sources of the union law are Regulations, Directives, Decisions, Opinions and Recommendations. Binding power of secondary sources and their making process set out in Article 249 (ex Article 189) of the EC Treaty:

"In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force."

Regulations are main legislation norms. They have two important features, which are unusual for international law. First, they laid down the same law throughout

[22] Case 26/62 [1963] ECR 12
[23] Case 6/64 [1964] ECR 593

the Union, regardless of Member States borders, and apply in full in Member States. Second, they have direct application ability[24]. All Member States have to apply them completely.

The idea regarding Directives is to remove contradictions between Regulations and national law. Its purpose is to reconcile the dual objective of both protecting the necessary information of Union law and respecting the diversity of national order of the Member States. The difference between Directives and Regulations is that a Directive also is binding on Member States but leaves to the national authorities to decide of type used to attain the objective which Directive has.

The third category of secondary sources is Decisions. They address individuals, firms or Member States. Sometimes Union institutions can require a Member States or an individual or firms to perform some decisions, or can confer rights or impose tasks on them but this will be possible only if they are in position to take measures binding on themselves.

Recommendations and opinions have no binding legal effect. They have political effect and indicate institutions' position on a subject.

The judgements of the Court are binding legal sources for all Member States and their citizens and the Community and its organs[25].

Like all system of law, Community law may have gaps which have to be filled by unwritten rules. General principles of Community law developed by the Court is a source to fill these gaps[26]. One of these principles is proportionality[27]. According to proportionality, the individual should not have his freedom of action limited beyond the degree necessary for public interest[28]. Legal certainty and legitimate expectation is other important principle used by the Court. Simply, it means that nature or legal persons who organize their professional and private lives on the basis of Community law should not be placed in a situation of uncertainty as to their rights and obligations[29]. Principle of equality is also one of the general principles of Community

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[24] See infra 2.3.3.1
[25] See supra 2.2.5.3
[26] See further for General Principles of Law Usher, John A., General Principles of EC Law, European Law Series, Longman, 1998
[27] In the 'Protocol on the application of the Principle of Subsidiarity and Proportionality' added by Treaty of Amsterdam, it stated that in exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with, and that it shall also ensure compliance with the principle of proportionality.
[28] Case 11/70 [1970] ECR 1125-1127; Case 66/82 [1983] ECR 395-404
[29] Case 169/80 [1981] ECR 1931; Case 44/81 [1982] ECR 1855;Case 120/86 [1988] ECR 2321

law. It provides a basis for the judicial review of measures adopted by the Community that any authority must not treat differently and different situations must not be treated in the same way where situations are comparable[30]. If a measure has a justification, the principle does not apply.

International agreements between the Union and third countries are part of Union's legal order. Association Agreements, Economic or Political Cooperation Agreement are examples for international agreement concluded by the Union. Not only provisions of such agreements may be brought before the Court but also they may be invoked before national courts in the Member States.

The Court held that if an international agreement to which the Community was part provided for an international court to settle disputes between the Community and third countries, the decisions of that court would bind the Court when it was called upon the rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement as part of the Community legal order[31].

Agreement between Member States is also source of Union law. When Member States need arrangements on such matter as economic, civil or commercial, Union institutions may have no power. In that time, agreements made by between Member States have binding legal effect.

2.3.2. Legislative Process

Decision making in the Community is quite complex process. It has specific character as some other areas in the Community law. To clarify the process, it may be explained on five main levels: proposal procedure, cooperation procedure, co-decision procedure, assent procedure and simplified procedure.

The proposal procedure in accordance with Article 250 (ex Article 189a) of EC Treaty is applicable where neither the cooperation procedure nor the co-decision procedure is applied. Process begins the Commission's proposal and the Council attains decision. If the Council consider that it must be consulted to other Community organs, proposal comes before the Parliament or Economic and Social Committee depending on the subject of the measure. This is consultation stage. The Parliament or Committee sends its Opinion to the Council though the Opinion is not binding on the

[30] Case 152/81 [1983] ECR 2357-2367; Case 8/82 [1983] ECR 271
[31] Opinion 1/91 on EC-EFTA Agreement, Opinion of December 14, 1991 at para. 39-40.

Council. After consultation, proposal is adopted by the Council with a qualified majority.

Single European Act brought cooperation procedure into legislative process in matters relating to the internal market, social policy and economic and social cohesion[32]. The difference from proposal procedure is that the Commission sends proposal both the Council and the Parliament at the same time. After the Parliament's opinion and deliberations, the Council adopts a 'common position' which is sent to the Parliament for its 'second reading'. The Parliament has three months to do one of four alternatives.

- It may accept common position, in which case the Council may adopt the proposal.
- It may have no reaction, in which case it is deemed to have accepted the Council's common position and the Council may adopt it.
- It may reject common position with absolute majority and in this case the Council has to have unanimity vote to adopt the proposal. Only rarely does the Parliament block legislation in this way.
- It may amends to common position absolute majority. If he Commission accept amendments, the Council may adopt proposal with a qualified majority. If the Commission does not accept amendments, the Council has to provide a unanimous vote. Otherwise, proposal is lost.

Decisions relating to taxation, the free movement of workers and their rights must be taken with unanimous vote in the Council.

Until second reading of the Parliament, the process is same as cooperation procedure in co-decision procedure[33]. After the Parliament gets second reading, it has three options in the time limited three months.

- It may accept the Council's common position or have no reaction for it, in which case the Council may adopt proposal with qualified majority.
- If the Parliament makes amendments to common position, a joint Conciliation Committee which consists of member of the Parliament and the Council is gathered. If a compromise is risen, proposal is adopted by the Council with qualified majority if the Commission accepts

[32] Article 252 of EC Treaty (ex Article 189c)
[33] Article 251 of EC Treaty (ex Article 189b)

amendments made by this time. If the Commission does not accept, unanimous vote is required.

If the Conciliation Committee does not reach an agreement, the Council may insist on and confirm its common position by qualified majority. But the Parliament, in its third reading, still may reject common position by absolute majority and thus, proposal is lost.

- Or the Parliament may reject the common position promptly. Then, the Council may call the Committee for an agreement and proposal is sent to the Parliament for third reading. After that, the process is same above sub-paragraph.

According to Article 228 of EC Treaty, the Council can adopt a proposal only with assent of the Parliament relating to matters such as application of membership to the EU, international agreements, rights of free movement, residence of the Union's citizen, objectives or organization of structural funds or powers of the European Central Bank. This calls assent procedure.

Lastly, non-binding instruments as Recommendations or Opinions which they do not require a Commission proposal is enacted by way of simplified procedure. Simplified procedure also applies to measures for the Commission's own powers.

2.3.3. Characteristic of European Union Law

2.3.3.1. Direct Applicability and Direct Effect

In accordance with the doctrine of direct applicability as set out in Article 249 of the EC Treaty[34], Regulations have direct applicability in Member States. Directives or Decisions do not have direct applicability. It means that Regulations do not need to be re-enacted in the legislation process of the Member States.

Although Directives, Decisions and certain articles of the Foundation Treaties[35] are not directly applicability under EC Treaty, the Court held in a series of

[34] Ex Article 189

[35] In the issue of which provisions of the Treaties are directly applicable, the Court has a jurisdiction under the second and third paragraph of the Article 234 of EC Treaty (ex Article 177). Supra 2.2.5.3.(e)

judgements[36] that these measures may have direct effect. Direct effect and direct applicability are completely different concepts.

Direct effect means that a measure creates rights which may be relied upon by persons in litigation before the courts of the Member States and those courts must give effect to these measures. The Court stated that it would be illogical and inconsistent with the binding nature of the EC law system not to allow persons to rely on these kind of measures in so far as they establish *clear and sufficiently precise* rights which are not *unconditional*[37].

Directly effective measures may only be invoked *against* a Member State but nor *by* a Member State. It has only 'vertical effect' (State-Person) but not 'horizontal effect' (person-person). It is generally believed that the Court adopted this reasoning because Member States or Institutions have often failed to adopt laws to implement those measures[38].

2.3.3.2. Supremacy

It is a question that what happens if a Community measure conflicts with national law? The way to explicate this issue is to give Community law primacy over national law. Supremacy of Community law was settle by the Court in Costa v. ENEL[39]. The Court affirmed supremacy of the Community law over national law. It says:

'By contrast with ordinary international agreement, the EEC Treaty has created its own legal system...which became an integral part of the legal systems of the Member States and their courts are bound to apply.

By creating a Community of unlimited duration, having...powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, ..., and have thus created a body of law which binds both their national and themselves.'[40]

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[36] Provisions of the Treaties were held directly effective in the following cases: Case 6/64 [1964] ECR 585; Case 57/65 [1966] ECR 205; Case 127/73 [1974] ECR 51

[37] Case 26/62 [1963] ECR 1; Case 41/74 [1974] ECR 1337

[38] See further supra, Wyatt&Dashwood, p.58-69

[39] As the Court acknowledged in Costa, Article 249 of EC Treaty (ex Article 189) make supremacy of Community law clear saying that 'regulation shall be binding in its entirety and directly applicable in all Member States.

[40] Case 6/64 [1964] ECR 593

Regarding national legislations adopted after the incorporation of relevant Community measures into the national legal order, the Court also held in Simmenthal[41]:

'the relationship between provisions of the Treaty and direct applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but...also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provision. Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.'

2.3.3.3. Subsidiarity

The first emergence of subsidiarity principle in EU was in 1975 in the European Commission's Report[42]. The report advocated an expansion of Community competencies against the danger of the increasing weight of the state, because of getting deeper integration in the EU. The report proposed that the only tasks that the MS can not effectively accomplish should be entrusted to the Union.

The principle was enacted in the Article 5 of the TEC and states that:

'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

Simply, the Union acts on areas not being fell down its exclusive competence, only if Member States cannot be fulfil objective of the action by reason of effect or range of the action.

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[41] Case 106/77 [1978] ECR 643-644

[42] Toth, A.G., The Principle of Subsidiarity in the Maastricht Treaty, CMLR, vol.34, no 3, 1992, p.1088

It is a difficult question that whether or not the principle of subsidiarity is proper. The principle according to definition in the Article is too abstract to be applied in the Court or national courts. For example, when the question of competence will be before the ECJ on interaction with supremacy, the Court enters into a new field which did not have any experience, political sphere. Because, supremacy is a justifiable one which only applies in a conflict between a national law and a Community law, whereas, the subsidiarity is a completely political decision. The Commission or the Council of Ministers may have interpretation faults by putting a legal source. Because subsidiarity entails a political decision to be made by the Council. This may involve the Court in very different and difficult task that it may face on a dilemma between subsidiarity and supremacy[43].

[43] See further Bronitt, S., Burns, F., Principles of European Community Law, the Law Book Company Ltd, 1995

Part Two

EUROPEAN UNION AND HUMAN RIGHTS

1. Judicial Protection of Human Rights in the European Union: Case Law of The European Court of Justice

It can be said that there is no clear and complete provision that the Court shall observe the fundamental rights and freedom in EC. However, the ECJ not only relies on article 164 but also it refers to basic law principles in order to protect fundamental rights and freedoms. Provisions concerning new Treaties and position of Community institutions are scrutinised in the subtitles below. Here, case law, opinion and principles shall be examined.

1.1. General Principles and Case Law

First human rights related case before the Court was Frederich Stork & Co v High Authority of the European Coal and Steel Community[1]. This case was related to right of action of distributive undertakings and Frederich Stork was a coal distribution company. High Authority [2]had taken a decision concerning article 65 and 65/4 of the ECSC Treaty that these articles were prohibiting any agreement or decision adopted by such groups of undertakings and were empowering to the High Authority to determine any agreement or decision against unfair competition. However, the counter idea put forwarded by Stork was that such a restriction had infringed fundamental rights protected by German constitution. In this point, the Court stated that national laws of Member States are not part of Community law. Consequently, the Court held that High Authority should not examine national law when it took a decision in its own area even if such a decision infringed principles of German constitutional law, and it dismissed the application. In this way, first experiment before the ECJ was a failure.

Stauder[3] case was first step in recognising place of human rights within the Community legal system. Asking for preliminary ruling, the Verwaltungsgericht Stutgart Court referred a case to the ECJ. According to a decision made by the European

[1] Case 1/58 [1959] ECR 17
[2] An institution of the ECSC, like the Commission of the EC
[3] Case 29/69 [1969] ECR 419

Commission on the 12th February 1969, certain categories of consumers would be allowed to buy butter at a reduced price and this decision authorised Member States to make butter available at a reduced price to certain categories of consumers who were beneficiaries under a social welfare scheme and whose income was not enabling them to buy butter at normal price. The applicant objected to the fact that he was obliged to present a coupon bearing his name and address in order to obtain the butter. He maintained that it was a humiliation to have to reveal this identity and argued that this constituted a violation of his fundamental rights. He therefore claimed that the Community decision in question was invalid in so far as it contained this requirement. German court also wanted to learn from the ECJ whether or not sale of butter at reduced prices to beneficiaries under certain social welfare schemes, being subject to the condition that the name of beneficiaries whose names are indicated on a coupon shall be revealed to retailers was compatible with the general principles of Community law.

The ECJ in its decision stated that the provision in question must be interpreted as not requiring the identification of beneficiaries by name. It added that such an interpretation for this provision contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court. In this way, the ECJ became first institution in the Community incorporating the fundamental rights and freedoms into the Community legal order and included it into the general principles of the Community law.

There can be only one reason to use ' general principles of law ' in these matters: filling the gap. It is clear that lack of fundamental rights and freedoms in Treaty of Rome is a glaring gap even if Treaty of Rome had been prepared mainly for economic purposes. Filling a gap is a normal method in law and therefore some predatory critiques in this meaning are unjust[4].

Perhaps it can be said that there is no specific provision on the Treaty and general Treaty framework or interpretation competence to develop and apply general principles of law but it must not be forgotten that Community law is ' integration law ' not national or international law. Like every law discipline, Community law also has *sui generis*

[4] For a critique see Coppel J., O'Neil A., The European Court of Justice: Taking Rights Seriously, CMLR, 1992, vol.29, no.4

structure on the some parts of it. Otherwise, the Community could not harmonise legal systems of Member States and the Community law and the Community would remain an ordinary establishment. To understand this it is enough to take a glance at the dump of history.

The earlier decisions of the Court in human rights were primarily concerned with the validity of Community provisions. More recently, however, issue has arisen of the ways in which Community provisions are implemented in law of the Member States. Development is perhaps only a logical progression from the earlier case law, since, as was recognised in the Stauder case, the question may arise whether the Community provision can be interpreted in a way which is consistent with the protection of fundamental rights; so that it is a short step to examine the ways in which the provision is implemented in Member States.

The argument would be that if, as in Stauder, the provision is open to more than one interpretation, but the interpretation which results in an infringement of human rights must be rejected, then a Member State which would be wrongly implementing Community law. Thus, infringement of human rights in the implementation of Community law would be unlawful *as a matter of Community law*[5].

The other landmark on the human rights jurisprudence of the ECJ was to use common constitutional tradition of Member States by the ECJ. The ECJ on two decisions repeated that respect for human rights shall be observed by it. Because of supremacy of Community law, the Court emphasised its monopoly power upon the control of the human rights infringements when a Community action violated human rights. Member States' laws do not have validity with respect to Community's acts but while protection of such rights was ensured in the Community legal system the Court would be inspired by the common constitutional traditions of Member States[6]. Internationale Handelsgessellschaft case concerned the common agricultural policy. In order to control the market in certain agricultural products, a system had been introduced under which exports were permitted only if the exporter first obtained an export licence. When application was made for the licence, the exporter had to deposit a sum of money which

[5] Jacobs, F.G., 'The Protection of Human Rights in the Member States of the European Community' in O' Reilly, j., Human Rights and Constitutional Law, p.5, The Round Hall Press, Dublin, 1992
[6] Case 11/70 [1970] ECR 1134

would be forfeited if he failed to make the export during the period of validity of the licence. The applicants in this case, however, claimed that the whole system was invalid as being contrary to fundamental rights. This is a doctrine of German constitutional law under which public authorities may impose on the citizen only those obligation which are necessary for attaining the public objective in question. This doctrine has actually been adopted by the Court as a general principle in its own right. It was argued in the German *Verwaltungsgericht* (administrative court) where the proceedings commenced that the relevant Community measure was invalid for violating the German constitution; the question of its validity was referred to the Court.

The Court in this case stated that the validity of Community measures cannot be judged in accordance with the rules or concept of national law, in addition, even a violation of the fundamental rights provisions of a Member State's constitution could not impair the validity of a Community provision[7]:

'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent of source of law, cannot because of its very nature be overridden by rules a national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effects within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, while inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community law.'

[7] At p. 1134

What does the Court mean by phrase 'being inspired by common constitutional traditions'? Because of choosing very cautious words in Internationale Handelsgessellschaft case, it was not understood whether there was an obligation for the ECJ to obey these traditions or not. At the same time, the Court stated that fundamental rights and freedoms was an integral part of the general principles of law protected by the Court.

The Court gave an answer for this problem, and at the same time laid down another principle in Nold[8] case. This case was pertained to the rights that applicant put forward referring to previous decisions of the ECJ. The applicant claim that right of property, freedom of economic action for people and principle of proportionality were violated by a company whose practice was based on the decision of the Commission of 21 December 1972. The applicant put forward that these rights are included in national constitutions and were derived into the Community law. Bringing a clear explanation about common constitutional tradition, the ECJ said that ' the Court is bound to draw inspiration from common constitutionals traditions of Member States, it cannot therefore uphold measures which are incompatible with fundamentals rights recognized and protected by the constitutions of those States[9].' And the ECJ took a more important step in its jurispredence and stated that international treaties for the protection of human rights which were accepted by Member States should be considered within the framework of the Community law. Furthermore, the ECJ mentioned first time limitations and substance of rights in part of the case in order to realise Community objectives.

After the Nold case, three important points were revealed in the jurisprudence of the ECJ. Fisrt, common constitutional traditions became a source for the ECJ. It means that protection of fundamentals rights and freedoms shall be actively maintained as far as thay are maintained in the Member States. Second, international treaties regarding human rights are also a source in examining human rights violations. For instance, the Court referred to the UN Convention on Civil and Political Rights in some cases[10]. This point is a controversial one. Since the Community is not a party to such a treaty, I think, its provisions must not be referred to the Court, because, the relation sovereignty between

[8] Case 4/73 [1974-4] ECR 491
[9] Nold, p. 507
[10] Case 374/87 [1989] ECR 3283

Community and Member States does not give any power to the Community in order to base on such these treaties before Community is party of one of them. In addition, there is no provision in the founding treaties specifically incorporating international human rights except for Maastricht Treaty. Thirdly, the ECJ mentioned firstly 'untouchable core of rights' pointing out human rights should be subject to certain limits justified by the overall objectives pursued by the Community.

In another case[11], the ECJ emphasised an important function of the European Parliament, which concerned representation of humans at Community level. It stated that consultation procedure of the Parliament allows the Parliament to take a important role in the legislative process of the Community. This marks a fundamental democratic principle that means that the people should take part in the exercise of power through the intermediary of a representative assembly.

The issue again was the compatibility of the Community provisions with the requirements of the protection of fundamental rights, but the Court held that those requirements are also binding on the Member States when they implement Community rules. The point in Wachauf [12]was that if the Community legislation was implemented in a Member State in such a way that the holder of a milk quota was deprived of his quota without being able to realise its economic value, then that might give rise to the issue, not whether the Community legislation itself was invalid, but whether the adoption by a Member State of such a mode of implementation was consistent with the principle of protection of the right of property. Thus, the holder of the quota might in such circumstances be entitled, as a matter of Community law, to receive compensation[13].

Towards last 1970s, the ECJ started to use some glaring criteria used by European Court of Human Rights when the complicated cases were before it. As such the criterion untouchable core of rights used by ECJ was an old criterion in jurisprudence of human rights, but then ECJ gradually emphasised more current criteria in cases. When examining the 'discretion power' on limitations of free movement of persons and the

[11] Case 138/79 [1980-7] ECR 3333
[12] Case 5/88 [1989] ECR 2633
[13] For others decisions of the Court on the protection of fundamental rights and freedom, see. Case 85/87 [1989-9] ECR 3137, Case 49/88 [1991] ECR 3187, Case 5/88 [1989] ECR 2633, Case 136/79 [1980] ECR 2033, Case 63/83 [1984] ECR 2689, Case 374/87 [1989] ECR 3283

Union rights in Rutili[14] case, the ECJ not only referred firstly to the European Convention on Human Rights but it also indicated the boundaries of discretion of Member States in restricting rights of citizens. The ECJ showed an obvious approach about 'the limit of limitations' when the using the freedoms, and it used terminology of classical human rights law and stated that, referring to European Convention on Human Rights:

'no restrictions in the interests of national security or public safety shall be placed on the rights secured by the article 8, 9, 10 and 11 of the Convention other than such as are necessary for the protection of those interests 'in a democratic society.'[15]

In a case regarding right of property, the Hauer case[16], the ECJ emphasised another restriction criteria to limit a right. Taking into account the common constitutional traditions of Member States and Article 1 of the First Protocol to the ECHR, the ECJ pointed out that restrictions on the right of property laid down by a Community institute cannot be interpreted in principle as being incompatible with observance of the right to property. However, if those restrictions comply with objectives of general interests pursued by the Community and if those restrictions do not intervene disproportionately and intolerably with the right of the owner omitting the aim pursued, such measures are acceptable.

The ECJ not only referred to ECHR as a general human rights agreement but also it used in its judgements ECHR's specific provisions which do not constitute a part of Community treaties. For instance, the ECJ applied Article 6 of the ECHR without regard to national law. In that case[17], the applicant claimed that national law was preventing the right to fair trial and added that EC Directive 76/207 was requiring the Member States to ensure that their national courts exercise effective control over compliance with the provisions of the directive and national legislation intended. The ECJ justified the applicant and added that judicial control principle is also laid down in articles 6 and 13 of the ECHR. According to the ECJ, such principles must be taken into consideration in Community law. In another case[18], the ECJ carefully emphasised importance of article 10 of the ECHR with respect to exclusive rights in the matter of radio and television

[14] Case 36/75 [1975-7] ECR 1219
[15] Rutili, 1232
[16] Case 44/79 [1979-10] ECR 3727
[17] Case 222/84 [1986-5] ECR 1651
[18] Case 260/89 [1991-6] ECR 2925

broadcasting and freedom to provide service. The ECJ stated that if Member States will put restrictions on free movement of goods or free movement of service on the grounds of public health, public safety and public order they must take into consideration Article 10 of the ECHR. Therefore, I think, Member States must take into consideration reasons of restrictions of the article 10 of ECHR which are 'necessity in a democratic society', 'prescribed by law', 'proportional to the objectives pursued' and 'not contrary to the substance of the right' while they put Community law into national law or adapt a measure in pursuance of Community law. Otherwise, the ECJ has power to examine whether Member States obey ECHR or not in the light of this case when the Community law is in question.

Respect for human rights cannot be required, as a matter of Community law, in all areas to which Community law might be relevant. In the Cinetheque[19] case the Court had to consider the compatibility with the EEC Treaty of a French law which restricted the issue in video cassette form for a certain period of films released for the cinema. Having examined the compatibility of that measure with the Treaty provisions on free movement of goods, the court referred to an argument raised in the proceedings to the effect that the French restrictions were in breach of the principle of freedom of expression recognised by the Article 10 of the ECHR and were therefore incompatible with Community law. No doubt if the situation in Cinetheque case had been one in which the distribution of video cassette was regulated by the Community law itself, the Court would have considered it whether the Community provisions were compatible with respect for fundamental rights guaranteed by the ECHR.

In Grogan[20] case, it was indicated that jurisprudence of the ECJ only covers Community law, acquis Communauitaire, therefore applications stemming from Member States' national law which remain out of Community law are rejected by the ECJ. Clearly, the ECJ does not examine whether human rights infringements comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms if there is no relation with the Community law. In that case ECJ rejected the application due to the fact that it concerned solely with the freedom of expression not the Community law

[19] Case 60/84&61/84 [1985] ECR 2605
[20] Case 159/90 [1991-8/1] ECR 4733

at all. Applicants had distributed booklets, which contained addresses and telephones of abortion clinics, and Ireland law had prohibited abortion. Ireland High Court held that to give information regarding abortion is forbidden. When the case came before the ECJ by means of preliminary ruling, it stated that the problem concerned the limitation of freedom of expression only, and it had no relation to free movement of services. The ECJ therefore did not examine whether there is a violation of freedom of expression or not. Because, according to the ECJ, Community law does not protect freedom of expression as it is protected by ECHR. In the Grogan case, the Court had stated that in order to protect rights stemming from the ECHR in the Community, these rights must be related to a Community provision in some way. But, according to above-mentioned Elliniki Radiophonia Tileorassi case, when putting the restrictions, Member States, in any case, shall observe article 10 of the ECHR[21].

Many authors pointed out and criticised to the ECJ in Grogan case that there had been a considerable relationship to protect freedom of expression by way of interaction between Article 59 and Article 10 of ECHR[22].

[21] Supra. 18

[22] Phelan, D.R., The European Court of Justice and the Normative Shaping of the European Union, 1992, 55 MLR, p. 670; Coppel, J.&O'Neill, A., The European Court of Justice: Taking Rights Seriously?, 29 CMLR, 1992, p.669

1.2. Application Procedures to the ECJ

A human rights case can be come before the Court under one of four procedures[23]:

i) Preliminary ruling according to article 177 of Treaty of Rome, this procedure is the common one[24],
ii) Action for annulment according to article 173 of Treaty of Rome; if a measure infringes applicant's rights or affects directly and individually to the applicant,
iii) As plea in a case before a court;
iv) Complaint; complainant informs the Commission regarding a infringement committed by Member State

2. Human Rights Provisions in the Treaties

When the founding Treaties of the Community were arranged, European authorities avoided referring to matters of fundamental rights and freedoms in general. But this tendency started to change slowly as Community went toward a political union. Emphasis should be put on the fact that the process of constitutionalisation and integration, including the developments in fundamental rights and freedoms, has reached a level which was certainly not foreseen by the founding fathers of the European Communities. Because every political union inevitably needs a mainframe, part of which is human rights law, which ought to protect individual rights.

The Treaties of EEC and ECSC are designed primarily as instruments of economic integration, and probably for this reason, but perhaps also on account of the restricted powers accorded to the Community institutions, do not include a Community catalogue of fundamental rights and freedoms. Although Treaty of Rome had some restricted provisions in the area of fundamental rights and freedoms, these provisions are

[23] Gündüz, A., Avrupa Birliğinde İnsan Haklarının Yeri; Kurumsal Düzenleme ve Bireylerin Hakları, MJES, 1999, volume 7, no:1-2, p. 93

not well developed. Single European Act brought new visions in its preamble and started the 'European Political Cooperation'. But the starting point of the most important step on human rights law was Treaty of European Union, signed in Maastricht and entered into force in 1993. The Treaty of European Union made the Union's position clear on human rights matters. The last development is The Amsterdam Treaty; it goes forward to protect fundamental rights and freedoms.

Which provisions were inserted in European Union about fundamental rights and freedoms law by above-mentioned Treaty?

2.1. Treaty of Rome

Essentially, the European Community was established upon the basis of economic integration. Economic *perestroika* was the most important issue to Europe which had been destroyed in World War II. European intellectuals, therefore, focused on the solution of economic issues instead of other fields of this formation. Naturally, the Community could void some critical and developed matters even if Treaty of Rome had a few valuable points on fundamental rights and freedoms. Although these provisions are insufficient, these provisions can be seen as a first nucleus in human rights law for the Community. We can sum it up in two titles: preamble of the treaty and articles of the Treaty relevant to fundamental rights and freedoms.

2.1.1. Preamble of the Treaty

There is a reference regarding peace and liberty in preamble of Treaty of Rome but it is not sufficiently precise because of not having mentioned pure human rights. But still it has a meaningful content.

As known, *preamble* of any international treaty is included in point of its content[25]. Accordingly, preambles are binding as any article of treaties. For this reason,

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[24] See further for this procedure Arsava, Ayşe F., Roma Anlaşmasında Ön Karar Prosedürü ve Bu Prosedür Çerçevesinde Doğan Sorunlar, Ankara Üniversitesi Avrupa Topluluğu Araştırma ve Uygulama Merkezi, 1999

[25] The Vienna Convention on the Law of Treaties, Article 31

preambles of founding Treaties of European Community, just like treaty articles, are binding in the Community law.

In preamble of the Treaty of Rome it was pointed out that 'Community shall preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts'. In this way, Community explained its position only with 'to preserve and strengthen peace and liberty' regarding rights and freedoms but it did not bring into Community order any detailed provisions regarding human rights.

2.1.2. Treaty Articles[26]

These articles also can be classified in the following way: prohibition of discrimination, free movement of workers and free movement to provide services.

2.1.2.1. Free Movement of Workers

Free movement in the European Community has been governed by the articles from 48 to 51. Right of free movement is one of the fundamental freedoms guaranteed in the Treaty of Rome. Accordingly, all limitations affecting free movement shall be removed and discriminations based on nationality shall be ceased[27].

Article 48 of Treaty of Rome regulates free movement of workers with following elements[28]:

- application to free jobs
- free movement within the Member States for applications to free jobs
- for realisation of employment, to be a resident in that State in compliance with its rules and regulations
- to continue residing in that State either after end of job or retirement

[26] Treaty of Rome numbering
[27] Treaty of Rome, Part 1, Principles, Article 7
[28] See further Council Regulation, 1251/70, 29 July 1970

Thanks to the relevant articles of Treaty of Rome, free movement applied in all Member States in short time. However, there were three limitations on free movement:

- workers of the Member States are allowed to benefit from free movement only if there is a sincere ' supply of job ' in that Member State or States
- free movement can be restricted any time by the Member States on the grounds of ' public order, security, health '
- rules for free movement can not be applied to ' open jobs in the public administrations '

We can mention, at the same time, a social right provision in scope of Article 51, that is, Council, by recommendation of the Commission, shall, especially for the benefits of refugees, take precautions in the field of social security. The Council, for this purpose, shall unite all working conditions determined by different national rules.

The Council, in order to apply this article, issued regulations on the various subjects, which included illness, accidents, and elderliness. These social rights can also be utilised by the relatives who are dependent on the workers of the Member States.

2.1.2.2. Prohibition of Discrimination

Community law had two articles, one is general, and the other is specific, on grounds of prohibition of discrimination.

a) Article 7

The basic principle on prohibition of discrimination is Article 7 of Treaty of Rome. Accordingly:

' Any discriminatory treatment which comes from nationality shall be prohibited within the scope of application of this Treaty '.

In order to realise this aim, the Council had adopted, by qualified majority and together with a proposal by the Commission and participating the European Parliament and in accordance with Article 189 of the Treaty of Rome, rules designed to prohibit such discriminations.

Article 7 prohibits discrimination on grounds of nationality. But, the European Court of Justice has, however, gone beyond these specific provisions by holding that there is a general principle of non-discrimination in Community law[29]. This does not mean that Community institutions must treat everyone alike, but that there must be no arbitrary distinctions between different groups within the Community[30]. Two important cases came before the European Court of Justice regarding Article 7. In one of these cases, *Sabbatini v. European Parliament*, the Court established sex equality as a general principle of law. This case concerned a female Community official who was denied a certain allowance because she was not the ' head of the family '.

The relevant provision, however, defined this concept in such a way as to make it possible for a woman to be regarded as head of the family only in very exceptional circumstances, for example if her husband was incapacitated by illness. Therefore, this provision was discriminatory and the court held that it could not stand[31]. The other case is *Prais v. Council* case. This concerned a woman of Jewish faith who wished to obtain a post as a Community official. In her application she did not mention her religion. However, when she was informed that she would have to sit a competitive examination on a particular day, she told the Council that the day in question was a Jewish festival and she would be unable to attend. She asked the Council to allow her to sit on an alternative date but this was refused on the ground that it was essential for all candidates to sit the examination on the same date. The examination was duly held and Mrs Prais did not attend. Another candidate was appointed. She then brought proceedings in the Court to annul the decision to hold the examination on a Jewish festival; she also asked for damages. She based her case on Article 27 of the *Staff Regulations*, which provides that official must be selected without reference to race, creed or sex, and partly on what she claimed was a general principle of Community law prohibiting religious discrimination.

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[29] Case 8/57 [1958] ECR 245 - 256, Case 11/74, [1974] ECR 877
[30] Hartley, T.C., European Community Law, Second Edition, 1988
[31] Case 20/71, [1972] ECR

It should be noted that the authority had not been guilty of religious discrimination in the ordinary meaning of the term; there was no evidence that they knew the day in question was a Jewish festival when they scheduled the examination and they certainly had no wish to create difficulties for the applicant. Against this, she argued that subjective intention was not the only matter, if procedures were in fact adopted which put any candidate at a disadvantage by reason of her religion, her religious freedom had been violated. The Court held that the authority was not under an obligation to avoid holding an examination on a religious holiday if it had not been informed of the fact before the date was fixed. For this reason, Mrs Prais lost her case. However, it went to on the state that, if the authority is informed in advance, it should take the religious difficulties of candidates into account and endeavour to avoid holding the examination on that date[32].

b) Article 119

The other important article is Article 119 that means that Member States would ensure during the first stage and maintain subsequently principle that men and women would receive ' equal pay for equal work '. According to this Article, ' pay ' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer and ' equal pay ' shall not be based on sex that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and pay for work at time rates shall be the same for the same job. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex[33]. Although in sight it is unfortunate that Article 119 did not declare that women should be treated equally as to all aspects of employment, the Court has broadly interpreted the equal pay principle. But, this part of study will be related to Council's Directives, when it is necessary, to be attributed the Court's judgements.

[32] Case 130/75, [1976] ECR 1589
[33] Council Directive, 10 February 1975, OJ 1975 L 45/19

The Council's first equal rights measure was 'equal pay' Directive[34]. The directive was adopted before *Defrenne*[35], when it was generally believed that Article 119 did not have direct effect, the directive was intended to implement Article 119. Even after *Defrenne*, the directive remains important, because it defines more precisely the concept of equal work and because it creates procedures for enforcing the right. Article 1 of this directive created a ' comparable word ' standard who expands Article 119's reference to ' equal work ' by adding ' work to which equal value is attributed '.

The other directive is related to equal treatment for men and women and establishes the principle of equal treatment in hiring, promotion, all working conditions, and vocational training. Article 2 paragraph 1 prohibits not only direct discrimination on basis of sex, but also indirect discrimination by reference to 'marital or family status'[36]. At the same time, this article permits protective treatment 'as regards pregnancy and maternity' and 'measures to promote equal opportunity by removing existing inequalities'[37].

It must be noted that, essentially, Article 119 had been prepared to join women into market in order to increase capacity of production. Then, together with development of fundamental rights and freedoms, Community gave needed emphasis to conflict against sex discrimination by means of Council directives and Commission proposals.

2.1.2.3. Freedom to Provide Service

Articles 59 of EC Treaty guarantees a national of a Member States the right to provide services in another Member States. It provides that 'restrictions on freedom to provide services within the Community shall be progressively abolish during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.' Article 60 defines 'services' as such when they are 'normally provided for remuneration.'

[34] Council Directive 75/117, O.J. L 45/19, 19 February 1975
[35] Case 80/70 [1971] ECR 445
[36] Council Directive 76/207, 9 February 1976, O.J. L 39/40 (FEB. 14, 1976) supplement document
[37] This directive was supplemented by Directive 86/613 O.J. L 359/56 (DEC. 19, 1986), extending the principle of equal treatment to those self- employed, notably those engaged in business, farming and the professions.

From the point of view of fundamental rights, Grogan case[38] provoked many debates and incurred some critics[39]. The Society for the Protection of Unborn Children ('SPUC') sought to prevent student association officers from providing free information about clinics in the United Kingdom where abortions were carried out. Article 40(3) of the Irish Constitution protected the rights of unborn children. The High Irish court referred the issue to the Court. In its first question, the national court seeks to establish whether medical termination of pregnancy, performed in accordance with the law of the State where it is carried out constitutes a service within the meaning of Article 60 of EC Treaty. The Court held that medical termination of pregnancy constitutes a service within the meaning of Article 60 of EC Treaty saying that it is a professional medical activity which is provided for remuneration. Second question related to whether it is contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit student association from disturbing information about clinics in another Member States where termination of pregnancy is lawful and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of said information. According to the Court, there was no vigorous and clear relationship between the activity of the student associations of which defendants are officers and medical terminations of pregnancies carried out in clinics in another Member States for the prohibition on the distribution of information to be capable of being regarded as a restriction of Article 59 of EC Treaty. The Court also pointed out that the provision of information is not distributed on behalf of an economic operator established in another Member States. A prohibition on the distribution of information cannot be regarded as a restriction within the meaning of Article 59 of EC Treaty[40].

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[38] Case 159/90 ECR [1991] 1-4685
[39] For freedom of expression point of view supra. 1.1.
[40] The Court adopted an apparently similar position in Case 260/89 ECR Supra. 1.1

2.2. Single European Act

Single European Act (SEA) was signed at Luxembourg on 17 February and at the Hague on 28 February 1986, and it entered into force on 1 July 1987. SEA did not make any significant contribution to human rights sphere of Community as the title ' Single ' of SEA may suggest. The Act was designated as ' single ' because it combines two different instruments: the first one provides for modifications to the three European Treaties and the second constitutes an agreement between the Member States to jointly formulate and implement a European foreign policy. In addition, The SEA's objective is the completion of the so-called ' internal market ' defined as ' an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. At that time, SEA makes reference to a treaty on Economic and Monetary Union and to co-operation in the sphere of Foreign Policy.

However, as in the Treaty of Rome , the preamble of the SEA mentions in stronger terms about fundamental rights and freedoms in a paragraph[41]. According to this paragraph, Community would adopted ' to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice '. The Act is the first among founding treaties of the Community to refer to European Convention for the Protection of Human Rights and Fundamental Freedoms. It has to be also added that European Political Cooperation, designed by SEA, is not related to directly human rights law of the Community, when it read together with Preamble may have some

[41] The ECJ made reference to the preamble of the SEA : Discussion subject was article 10 of Council Regulation 1612/68 which provide the right to install themselves with a worker who is national of one of Member State and who is employed in the territory of another Member State. Germany authority claimed that that right on the part of members of workers' families is a secondary right of a lesser degree arising under subordinate legislation in comparison to Article 48 of the Treaty of Rome which grants even no direct rights to members of the family of migrant workers. In the end of the case, while the Court decided to the Germany has failed to fulfil its obligations under Article 10/3 of Regulation 1612/68, it stated that ' Regulation must also be interpreted in the light of the requirement of respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of the fundamental rights which, according to the settled case law, restated in the preamble to the Single European Act, are recognised by Community law. ' See. Case 249/86, 18.5.1989

positive effects on human rights policy of the Community[42], although it may not be legally binding.

2.3. Treaty of European Union

Treaty of European Union (TEU), which was signed in Maastricht on 7 February 1992 and came into force on 1 November 1993, is a landmark in the evaluation the European Union. In order to provide a European Union, Treaty sets out its objectives in Title I, which are the establishment of an economic and monetary union ultimately including a single money, a common foreign and security policy including the eventual framing of a common defence policy, the introduction of a citizenship of the Union, co-operation on justice and home affairs, maintenance of the Union acquis and respect for the principle of subsidiarity. It also strengthens the European Council, by' institutionalising '. The Council shall provide the necessary impetus and define the general political guidelines, and it indicates that to be a member of the Union, a State's government must be founded on the principles of democracy, while the fundamental rights are considered to be general principles of Union law[43].

TEU can be examined under three topics related to fundamental rights and freedoms: preamble of the Treaty, article F (2), Article G.

2.3.1. Preamble of the Treaty

In the preamble of the Treaty, Member States confirmed the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of the law. This expression is the clearest one in comparison to the other Treaties so far. Then it refers to fundamental rights and freedoms became a basic principle on the European Union law. The Treaty goes one step further to put a specific article into the Treaty with direct effect in the matters of fundamental rights and freedoms, that is Article F (2), which we will analyse a bit more.

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[42] See. Part Three
[43] See. Title I of the TEU

2.3.2. Article F (2)

Article F (2) blazed a trail in Union's human rights law. Fundamental rights and freedoms have become, for the first time, a part of primary law of the Union, as seen below:

'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1952 and as they result from the constitutional traditions common to Member States, as General principles of Community law.'

Hence, human rights protection in the Union is based on three criteria: first, the European Convention for the Protection of Human Rights and Fundamental Freedoms which the Commission and the Parliament have considered as necassary for protection of human rights in Community or Union. Second is common constitutional traditions which are refereed by the Court. Third is principles of Community law are recognized by the Court.

The principles of Community law are derived from the general principles of law, the Court's judgements and Treaties. The Court refers mostly itself judgements to general principles of law such as equality, which contains equal act, and equity, proportionality, legality which can be classified in three sections as the follows; natural judge, non-retroactivity of penal provisions[44] and due process of law[45]. Establishing Treaties also comprise principles for Community law. For instance, Article 173 and 215/2 point out the significance of ' rule of law' and articles 6, 40/3, 119 prohibit ' discrimination' and also Article G of TEU abolish all discriminations based on nationality.

Article F (2) mentions ' common constitutional tradition ' to attribute significance to Member States' arrangements because, as it is well known, if Member States have

[44] Case 63/83 ECR [1984] 2689. " The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in article 7of the European Convention for the Protection of Fundamental Rights and Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice." Further knowledge para. 20-22

[45] Case 100-103/80 ECR [1984]1825. " that during the the administrative procedure before the Commission, the Commission is bound to observe the procedural safeguards provided for the by Community law." See further p. 1880-86 and Council Regulation No 170/83, Article 6

more advance legislations in any field, Union law does not act on this field[46]. For instance, in a specific case, the substance of Union fundamental rights is determined by national systems, which provide the highest level of protection. The Court has acknowledged with jurisprudence on human rights.

Different from the standard phrase in the Court's fundamental rights case law, Article F (2) refers to the Convention but not to other relevant human rights treaties. This might be intended as a warning signal against an over active Court. Question is: 'Was the Court limited by TEU? '. However, the Court did not need Article F (2) by means of Article 164 of the Treaty of Rome. But still it can be said that the Court's activities towards this way could be intended to block. I think that the Court can not use, after Article F (2), international treaties on human rights as source, namely ILO Convention[47], International Covenant of Civil and Political Rights[48] and the others. In any case, Union institutions have to respect fundamental rights and freedoms recognised by the Convention.

2.3.3. Article G

According to Article G of TEU:

'Every person holding the nationality of a Member State shall be a citizen of the Union.'

The concept of European Citizenship as formally introduced by the TEU could be regarded as a historical step the object of which is to 'encourage a feeling of involvement in European integration. '[49] The major part of the catalogue of rights incorporated within the TEU already existed under Treaty of Rome; the inclusion within the TEU is mainly formalising 'pre-existing rights'[50] while including few new rights. These rights respectively are:

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[46] For Principle of Subsidiarity, Bernard, N., The Future of EC law in the light of the Principle of Subsidiarity, CMLR., 1996, Vol. 33, No. 4

[47] Supra. Defrenne case.
[48] Case 374/87 [1989] E.C.R 3283
[49] Commission Opinion of 21 October 1990, Supplement 2/91, Bulletin ,EC

[50] Welsh, J., 'A People 's Europe? European citizenship and European Identity' in European University Institute Working Paper, ECS No. 93/25.

- freedom of movement and residence, Article G.1
- voting rights in the country of residence in local and European Parliament elections, Article G.2
- entitlement to diplomatic protection in certain areas, Article G.3
- the right to petition and the right to appeal to the Union Ombudsman, Article G.4

After having concluded that European demos exists upon which European Citizenship should be solely based, it would be necessary to develop a Community concept of techniques for the awarding of this Citizenship. This concept will be necessarily related to a minimum set of criteria common to systems of awarding Citizenship in the Member States of the Union. The majority of the Member States, like Germany or Austria, apply a mixed concept based on the *ius sanguinis*[51] principle, by awarding Citizenship automatically to every descendant of a Citizen, but also by granting Citizenship through naturalisation or declaration. The application of the *ius sanguinis* principle could perhaps serve as the lowest common denominator among the systems of the Member States as it is more restrictive than the *ius soli*[52] principle under which every individual born on the territory of a state would become a citizen. As the application of merely one of the principles has strange and perhaps unwilling consequences, it would suggest applying a mixed concept based on the *ius sanguinis* principle, with further possibilities for naturalisation.

Present European Citizens who acquired this status under the present 'nationality linked' concept could serve as a starting point for the application of the proposed 2 mixed principle'. This would permit a prolongation of the present system and a sort of transitional period as the circle of beneficiaries of a European Citizenship would be primarily the descendants of present citizens. Only after European Citizenship has been

[51] *Ius sanguinis* shows, in the citizen of law, the citizenship relationship between citizen and State that base on himself/herself generation.
[52] *Ius soli* shows, in the citizen of law, the citizenship relationship between citizen and State that base on himself/herself place of birth.

awarded under the additional criteria of the mixed system would the next generation be affected[53].

2.4. The Amsterdam Treaty

The Amsterdam Treaty envisages four main objectives:

- to arrange employment and human rights
- to abolish the last remaining obstacles to freedom of movement and the strengthen security
- to give Europe a stronger voice in world affairs
- to make the Union's institutional structure more efficient with a view to enlarging the Union

The Amsterdam Treaty represents a new step in the ongoing European integration and also represents an attempt to bring the European Union closer to its citizens and provides most important approach in the level of fundamental freedoms and rights.

The Amsterdam Treaty is constitutional nature more than TEU and therefore its article F, an amended version of article F of the TEU, has significant value with respect to European Union human rights law. New article F reads as follows:

'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

There is an important point in this provision. It strongly expresses that Union, from now on, shall be based on human rights and fundamental freedoms whereas TEU had expressed 'shall respect fundamental rights' in the past[54]. Now, the European Court of Justice has to act like the European Court of Human Rights if any Union institution infringes any provision of European Human Rights Convention recognised by article F paragraph 2 of the TEU.

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[53] Neussl, P., 'European Citizenship and Human Rights: An Interactive European Concept' in Legal Issues of European Integration, Volume 24, Issue no.2, 1997/2, p.53-54

The most critical article of The Amsterdam Treaty is article F.1 of the Amsterdam Treaty. This article is a cornerstone regarding attitude of the European Union. In this article, an important power is given to the European Council. In doing so, the European Union has shown that it would go toward a political union.

Article F.1 reads:

'The Council, meeting in the composition of the Heads of State or Government and acting by unanimity[55] on a proposal by one third of the Member States or by the Commission[56] and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in article F, after inviting the government of the Member State in question to submit its observations.

Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving form the application of this Treaty to the Member State in question, including the voting rights of the representative of the Government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member States in question under this Treaty shall in any case continue to be binding on that State.

The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their adoption.

For the purpose of this article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in article 205 (2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2.

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[54] See further the difference between 'respect for fundamental rights and freedom' and ' based on fundamental rights and freedom' Soysal, M., 100 Soruda Anayasa, Bilgi Yaınevi, 1993, p.76

[55] Treaty of Nice, signed on 11 December 2000, amended that establishment of a breach of fundamental rights in a Member States needs four-fifths of majority of Member States.

[56] Treaty of Nice added institutions the Parliament may take the initiative in charging a Member State by a two-thirds majority of the votes.

For the purposes of this article, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its members.'

In order to initiate this article, firstly, Commission or one third of the Member States must make a proposal to the Council[57], and then it must be assented by the European Parliament. The Council may determine, by unanimity, the existence of a serious and persistent breach about fundamental rights and freedom. Then, some rights of Member States concerned, including the voting rights in the Council, may be suspended by the Council, by a qualified majority although the obligations of that Member State shall continue to be binding on it.

This machinery can be seen as the most advanced arrangement in the protection of fundamental rights and freedoms for the Union. As a norm, it is right. But I have two reservations about machinery. One of them is that the article is not clear about which rights are to be suspended, whether[58] the suspension of " certain rights deriving from this Treaty " includes the rights arising only from the provisions affecting the Union or also the provisions affecting the Community, bearing in mind that the Treaty affects both. The other is more important than previous one. Judicial power was given to the Council to decide whether there is a breach or not. I think that the Court has to have monopoly power in the determination of any breach of fundamental rights and freedoms, especially in such a critic evaluation, which is to determine a breach whether it is serious and persistent or not. It is true that the Council has or may have some judicial powers but these are related to the others Union affairs not fundamental rights and freedoms.

Lastly, it must be pointed out that, by means of Article L of the Amsterdam Treaty which in turn refers to article F (2) of The Amsterdam Treaty, the Court has jurisdiction in the action of the institutions regarding fundamental rights and freedoms. If any institution and Member States violate fundamental rights and freedoms recognised by the ECHR, the Court can control breach both by citizens and by States when there is an appropriate application. Even under today's arrangements violation by Member States of fundamental rights and freedoms can only be brought before national court.

[57] The Council of Heads of State or Government.

3. Institutional Instruments for the Protection of Human Rights

After the collapse of Soviet Union and Eastern Europe regimes, significant changes had taken place in the human rights issues preoccupying the international community. The collapse had been accompanied by a dramatic expansion of democratic freedoms. The European Union, which had a claim to be a political union, has reacted in various ways. It, however, has behaved sometimes reluctantly. But still, it has played an important role in human rights issues of the world through its institutions. Actually, a number of instruments on human rights have been issued by the institutions but they are not legally binding as a source of law.

The European Union has increasingly monitored individual cases of violations of human rights which can not be considered as interference in the internal affairs of accused states, whether Member State or not. Since 1990, the institutions of European Union have issued more than one hundred declarations and statements. Such declarations and statements have served to raise public awareness of human rights concerns and to put pressure on governments to improve their behaviour. It is not possible to examine all of them in the context of this study. Therefore, we shall deal only with some well known documents.

3.1. Joint Declaration

1977 Joint Declaration[59] is a single document prepared together by the European Parliament, the Council and the Commission on the subject of human rights. Expression of the Document had been effected from the principle of the law, on which the Community is based, 'case law of the Court of Justice, the constitutional law of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This declaration is very short; therefore, it will be quoted in full:

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[58] Lasok, D., 'The Treaty of Amsterdam' in Marmara Journal of European Studies, vol 6, no 2, 1988
[59] OJ C 103 05.04.1977

" The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamentals rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights. "

3.2. The European Parliament

The European Parliament has concerned more than the other institutions in the subject of human rights. Only between 1979 – 1984, it made more than twenty decisions. The most important of these are annual resolutions on human rights throughout the world and the Union's human rights policy which shall be mentioned some of them in here, 1989 Fundamental Rights and Freedom Catalogue and 1994 resolution on the Constitution of the European Union. In passing we have to recall that none of these resolution of the European Parliament is accepted as a binding source of law in the Union legal system.

3.2.1. Declaration of Fundamental Rights and Freedoms of 12 April 1989[60]

The Parliament passed this resolution by 183 votes in favour and nine against. The other Community institutions and the Member States were invited to associate themselves formally with the declaration, as it applies to all Community nationals. This declaration constitutes an important step in the process initiated in 1969, when the Court ruled that fundamental human rights were enshrined in the general principles of law which it was its duty to uphold[61]. At this stage, such a declaration has a merely symbolic value, representing the fullest compendium of the values and traditions from which the Community should draw inspiration and guidance. The rights listed in 28 articles of the Declaration derive from the Treaties establishing the European Communities, the

[60] OJ C 120, 16.5.1989.
[61] Case 26/69 ECR [1969] 419.

Constitutions of the Member States, the case-law of the Court of Justice, the European Convention for the Protection of Human Rights and Fundamental Freedoms and international instruments in force. These rights include:

- inviolability of human dignity
- right to life
- equality before the Community law
- freedom of expression
- freedom of opinion and information
- privacy
- protection of family
- freedom of movement
- right of ownership
- freedom of assembly
- freedom of association
- freedom to choose an occupation
- working conditions
- collective social rights
- social welfare
- right to education
- principle of democracy
- right of access to information
- access to the courts
- non bis in idem
- non retroactivity
- death penalty
- right to petition to the European Parliament
- environment and consumer protection.

3.2.2. Resolution on Human Rights in the World and Community Human Rights Policy for the years 1991/1992[62]

In this resolution, the Parliament explained its opinions about human rights in the Community and in the world. It said that attention must be paid to the three groups of human rights: individual political rights; civil rights; and economic, cultural and social rights. It emphasised that Community's actions to promote democracy and human rights in third countries would have a major impact if a high degree of democracy were guaranteed within the Community itself.

It can be considered in this resolution that Parliament should further strengthen its action in the field of human rights in line with the evolving ' conditionality ' policy, with the evolution of human rights policy as a constituent part of the treaties, Parliament's power under the Single European Act to withhold its ' assent ' under Article 238 of the EC Treaty of Rome.

3.2.3. Draft Constitution of the European Union[63]

On the 10 February 1994, the Parliament issued a constitution model, albeit it was not binding, to set on a basis for discussion while the Union proceed further deepness cohesion. In the part of human rights of this model, there were important points. First, it adds to 1989 Declaration two new approaches about political parties and limits of rights in its title VIII:

- citizens have the right to form political parties
- no derogation from the requirement to respect the rights and freedoms guaranteed by this constitutions shall be granted, save under the terms of a law consistent with their substance, within reasonable limits vital to the safeguard of a democratic society.

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[62] OJ C 115, 26.4.1993
[63] OJ C 61, 10.2.1994

Second, according to Article 38 of the title IV, the Court of Justice would have a competence to rule on any action brought by an individual application when the Union has violated a human right guaranteed by the Constitution. And third, any European State, in order to enter the Union, would have to respect fundamental rights in accordance with Article 45 of the title VI.

3.2.4. Resolution on Human Rights throughout the World in 1995/96 and on the Union's Human Rights Policy[64]

By this Resolution the Parliament attract attention to some matters for improving the system of protection of human rights by the European Union. It stressed the dangers, for human rights and the Union, arising from declarations being made in support of human rights and not being followed by practical measures. It expressed for a number of concepts which have frequently given rise to divergent interpretations within international organisations, to be clearly defined:

- the scope of the principles of universality and indivisibility
- the respective places of civil and political rights, economic and social rights, cultural rights, the rights of people belonging to minority groups, in particular national minorities, the rights of refuges, women's rights, children rights, the right to healthy environment, etc.,
- the links between democracy and human rights,
- the relationship between humanitarian action and law, and human rights,

The Parliament also insisted that Union institutions and Member States must adopt a common and coherent approach to human rights and called for their statements and actions in this field to be coordinated, since the highlighting of recent developments regarding human rights was often a better indicator of the policy to be followed than the level achieved at a particular juncture when compared abstractly with the requirements of

[64] OJ C 20 20.01.1997

the Universal Declarations. The Parliament, in particular, called for closer coordination between human rights initiatives of the Council, the Commission and the European Parliament and for the greatest possible account to be taken of the views expressed by Parliament, which necessitated an appropriate follow-up mechanism.

Lastly, the European Parliament stated that the Council Presidency must define its priorities in the field of human rights, and take account of the European Parliament's recommendations.

3.2.5. Parliament Resolution on respect for Human Rights in the European Union in 1997[65]

In that resolution, the Parliament stressed the need for the Member States to adopt or strengthen the provisions required to guarantee the effective protection of the fundamental rights of individuals in the European Union, and emphasised the importance of such provisions from the point of view of the credibility and consistency of European Union external action in this sphere. The Parliament considered, moreover, that access to health care should be granted to all individuals, irrespective of their situation, state of health, age, sex, race, ethnic origin, religion or belief. In addition, the Parliament considered the right to safety as vitally important for persons resident in the European Union.

On the question of judicial procedures, the Parliament called on the Member States to take all possible measures to restore the balance between the prosecution and defence in court proceedings, and to ensure that means of action available to both parties are equal in range or quality. It reaffirmed that, freedom of opinion and expression, freedom of thought, conscience and religion, and freedom of association are among the basic rights of European Union citizens.

The Parliament welcomed the fact that the Amsterdam Treaty brings into Union provisions for combating all forms of discriminations based on race, sex, ethnic origin, nationality, age, religion or belief, or sexual orientation.

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[65] Adopted on 17 December 1998

The Parliament furthermore pointed, for the first time to the fact that cases in the European Union can occur of torture, rape and inhuman cruel and degrading treatment inflicted by the police or prison personnel on persons under arrest or held in custody, particularly when they are being held under ' 48-hour arrest '.

3.3. The Council of Ministers 'the Council'

The Council is the Union's real legislature. The Council's opaqueness is a major cause of the Union's democratic deficit. By reason of its structure, it is not usual to speak human rights matters in the Council. The founding Treaties already do not give any authority to the Council to legislate on human rights affairs. But still, the Council has been able to issue some opinions in subjects of human rights. During the presidency of United Kingdom, Foreign Ministers declaration of 21st July 1986[66] was one of such statements. The Ministers explained the principles of the human rights policy of the European Community. They reaffirmed that respect for human rights was one of the cornerstones of European cooperation. They also reaffirmed their commitment to promote and protect human rights and fundamental freedoms and emphasised the importance in this context of the principles of parliamentary democracy and the rule of law. The Council explained clearly that human rights violations could not be considered interference in the domestic affairs of a state and pointed out that Community shall seek universal observance of human rights.

The Council Presidency, dealing with a oral question in the Parliament[67], stated that the Council, on the behalf of Union, would continue to take account of the human right position of the Union when drawing up and implementing their various development programmes and respect for human rights was a precondition for the implementation for the development programs supported by the Union. In addition, the Council pointed out that it had a limited authority on the subject of human rights by means of the CFSP.

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[66] European Political Cooperation Bulletin, Vol 2, 1986, p.236
[67] European Political Cooperation Bulletin, Vol 10, 1994, p.144

After the 1991 Luxembourg European Council, the Council accepted a Declaration[68], not regulation or directive, in the wake of the European Council. The objective of the resolution is to formulate concrete guidelines, procedures and lines of action in the area of human rights. The Council's opinion may be summarised as follows:

- human rights and democracy form part of a larger set of requirement in order to achieve balanced and sustainable development
- the Union will explicitly introduce the consideration of human rights as an element its relations with developing countries; human rights clauses will be inserted in future cooperation agreements[69].
- A meeting will be held annually by representative of the Commission and Member States to consider policies and specific lines of action to further enhance respect for human rights and establishment of representative democratic rule

I think that the Council should be given more power with respect to improve the human rights protection. Today, the national systems continue to hold the legislative power with respect to human rights issues, mainly because of the importance of the subject matter. Major part of legislative task of the European Union belongs to the Council albeit the Parliament and the Commission have certain powers in legislative process. The Council, therefore, has to have much more legislative power on the human rights matters if the human rights are to be protected effectively in the European Union.

[68] The Council of Ministers Declaration of 11 May 1992.
[69] See further infra Part Three.

3.4. The European Council

We can distinguish the European Council's role in the European Union into two parts: Before and after the TEU. Indeed, after the TEU, the European Council got tremendous competences on many fields. Before the TEU, its meetings and decisions were political directives rather than having a legal meaning[70]. The Treaty of European Union vested the European Council many powers in many fields, including human rights, in order to reinforce its role on vital matters for Union. The European Council got also a kind of constitutional competence to lead legislative process. It shall lay down the general political guidelines for the development of the European Union, and the details are to be worked out by the Council of Ministers.

There are three important announcements issued by the European Council[71] before the TEU. One of them is the Paris European Council Announcement of 20 October 1972 through which the Member States declared the position of the Community toward democracy and freedom of thought. Member States affirmed that improvement the Community should be based on participation of people by means of democracy, freedom of thought, free movement of persons and thoughts and free election of representatives. Secondly, Heads of State and of Government of nine Member States convened at Copenhagen on 14 December 1973 and accepted a European identity. As for this, the European identity means representative democracy, rule of law, social equity and respect for human rights, which shall be defended strongly by Community.

Lastly, I must point out that a relationship between respect for representative democracy and for human rights and full membership in the Community was established by the Copenhagen Democracy Announcement on 8 April 1978. At this meeting, Member States declared that respect for democracy and human rights is a *sine qua non* of membership to the Community.

Before the TEU was signed, the European Council had already indicated its determination to take an effective initiative on the matters of human rights in the Union. It issued a Declaration on Human Rights on 28-29 June 1991 at the Luxembourg

[70] Dinan, D., Ever Closer Union, The European Union Series, Lynne Reinner Publishers, 1994, p.229
[71] Before TEU, it called Heads of State or Government of the Member States. Legal basis of the European Council was provided by Article 2 of the S.E.A.

European Council which included evaluations about human rights in and out of Europe. Here, the European Council recalled the indivisible character of human rights. The promotion of economic, social and cultural rights, as of civil and political rights, and respect for religious freedom and freedom of worship, is of fundamental importance for the full realisation of human dignity and of the legitimate aspirations of every individual. Democracy, pluralism, respect for human rights, institutions working within a constitutional framework, and responsible governments appointed following periodic, fair elections, as well as the recognition of the legitimate importance of the individual in a society, are essential prerequisites of sustained social and economic development[72]. At the same time, European Council stressed that promoting and safeguarding human rights was a corner stone of cooperation between Member States. In response to this Declaration, the Council explained its opinion to promoting and safeguarding human rights[73].

Social dimension of human rights was considered at the Strasbourg European Council in December 1989 and Maastricht European Council in February 1992. A Social Charter was accepted at Strasbourg by Member States except for U.K, which had not any new provision or enforcement system. Many of the sections of the Charter state employee rights and interests which have already been attained, or are the subject of an on-going program, such as, the sections proclaiming the right to free movement of workers. Nonetheless, several sections of the Charter contained novel and new rights in the sense that all employment shall be fairly remunerated, and workers shall be assured of an equitable wage[74]. They also referred to 'the improvement of living and working conditions that refers to right to a weekly rest period and to annual paid leave, the duration of which must be harmonised'[75].

Second initiative about social rights took place at Maastricht European Council in 1992. Member States, except U.K, ratified a Social Protocol and a Social Agreement added TEU. The UK's opt-out from these arrangements has caused a 'two tier' Community social policy. Essentially, the Community Social Charter and Social

[72] 1991 Luxembourg European Council, Conclusion of the Presidency
[73] Above. Section 3.2. para 3
[74] Article 4,5 and 6 of Community Social Charter
[75] Article 7, 8 and 9 of Community Social Charter

Agreement are similar text for the rights and freedoms point of view[76]. But still, the Social Agreement puts a stronger emphasis on working conditions, information and consultation of workers, representation and collective defence and co-determination than the Social Charter does[77].

3.5. The Commission

The Commission, as the initiator and co-ordinator of policy, expresses the interests of the Union; in this role we see it as the conscience of the Union. The Member States despite their acceptance of the obligations of membership are apt to be deflected by national interests. Thus it is for the independent Commission constantly to remind both the Union and the Member States of fundamental objectives and to seek the achievement of those objectives to the fullest extent. The President of the Commission expressed in a statement to European Parliament in September 1970: " The Commission is, at one and at the same time, the guardian of the Treaties and the motive force of integration, capable of accepting with courage the dialectic consequences which go with its twofold task - exercising the vigilance that is needed to preserve us from risk run by the venturesome and acting to correct any excess of vigilance which would inevitable lead to stagnation." Today, when the Union strikes out for a single human rights law, the Commission makes significant contributions for that.

There are various attempts made by the Commission but these are completely related to two main problems which are different from the ones mentioned above. I can describe them as two distinct problems, one of them is European Union and ECHR, and the other is human rights and foreign affairs of the Union. I examine these two topics under separate titles, and they, therefore, will be mentioned under the relevant Parts below[78].

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[76] The essential difference is that the Social Protocol provides a qualified majority voting in the Council.
[77] Article 1,2,3,4 and 5 of Social Agreement.
[78] Part Three and Part Four

Part Three

THE EUROPEAN UNION AND THE EXTERNAL ASPECT OF HUMAN RIGHTS POLICY AND TURKEY

1. General

Today, the international community is increasingly becoming aware of the impact of human rights on international and regional peace and security, political stability, social and economic development and general situation of any country. This awarness goes hand in hand with a greater interest in the preventive aspects of measures taken to promote respect for human rights and demeocratic principles. At the same time, as a result of the commitment to intervention at the earliest possible stage, measures supporting and accompanying the transition to democracy have been stepped up.

It is interesting to observe the role of the Union in human rights internationally. The European Union has been very active in the promotion and protection of human rights around the world. In particular, the European Parliament has monitored human rights internationally by way of receiving reports on human rights situations around the world. When the Union goes towards a single structure, the role played by the Union in protecting and promoting fundamental rights reflects not only the political will expressed in the TEU, but also the positions taken by the institutions and the expectations of public opinion. This role has taken shape in the first joint actions launched under the common foreign and security policy, and in the general strategy that has been built up for the Union's development cooperation policy.

The European Union actions to defend and promote respect for human rights in international area were effected by its political integration trend and international human rights concept after the end of the Cold War. Since 1990s, trade agreements, cooperation and association agreements, aid and eventually, membership in the European Union have been made conditional on respect for human rights and democratic principles by the European Union's partners. The European Union's aim is to play a highly normative role, using its economic and diplomatic instruments to foster the spread of norms on human rights and democracy. At this point the question is to what extent does the European Union actually function this way? But here, we will examine how the European Union functions in this respect and which elements it uses.

The European Union development cooperation policy is centred on human beings and their needs; it is closely linked to the enjoyment of fundamental rights and freedoms and the recognition and application of democratic principles, the consolidation of the rule of law and good governance. The institutions of the European Union play an important role on the external relations on human rights. These organs state that it is one of the main objectives of foreign policy to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. Meanwhile, European Union development cooperation policy shall contribute to the general objective of developing and consolidating democracy and rule of law, and respect for human rights and fundamental freedoms.

By way of example, the Luxembourg European Council indicated its commitment in this field by adopting a declaration on human rights that established the principles and the main features of a political platform actively promoting human rights and democratic principles[1]. The Luxembourg Council reiterated the commitment of the Union and its Member States to support and promote, in regional and international bodies, respect for human rights and fundamental freedoms without which peace and lasting security cannot be established. In 11th paragraph of this declaration, the Council stated that through their policy of cooperation and by including clauses on human rights in economic and cooperation agreements with third countries, the Union and its Member States should actively promote human rights and the participation, without discrimination, of all individuals or groups in the life of society. A few months later, on 28 November, the Council and the representatives of the Member States meeting within the Council adopted a resolution on human rights, democracy and development laying down the guidelines, procedures and priorities for improving the consistency and cohesion of the whole range of development initiatives.

First initiative in relation to third countries was taken in 1978 Copenhagen European Council. It adopted a declaration on democracy. Respect for human rights was accepted as a principle in relations with third countries about economic and cooperation agreements[2].

[1] EC Bulletin, no 6, vol 24, 1991, p.16
[2] EC Bulletin no 8, 1978, p. 20

After 1993, the Union began to use human rights clauses for membership. According to the Copenhagen European Council conclusion, membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union[3].

The European Parliament has also played an important role in this process, having contributed, through a number of initiatives, including an annual resolution on the world human rights situation, to the incorporation of a ' human dimension' in the Union's external relations[4]. The European Parliament pointed out that wherever human rights were violated, the Union should take action, in the form of both sanctions and reconstruction measures.

The Commission prepared more proposals in this subject than the other institutions did. For example, the Commission has proposed general lines of conduct concerning the relationship between development cooperation policies, respect for and promotion of human rights, and support for democratic processes in the developing countries[5]. The most important one of these initiatives is a communication respecting the European Union's human rights policy[6]. According to this communication, the Union had some instruments in relation to third countries. These are cooperation and development agreements and financial aid.

The Commission stated that the European Union's contractual external relations should be based on the human rights situation in the countries concerned. In response to the European Parliament's request and in the light of discussion in the Council, on 23 May 1995 the Commission adopted a communication[7] 'on the inclusion of respect for democratic principles and human rights in agreements between the Union and third countries'. This text points to the basic references to human rights underpinning the Union's approach, and highlights the development that has taken place since 1992, with a clause defining human rights as an 'essential

[3] EC Bulletin no 6, vol 26, 1993, p.13
[4] Resolution on Human Rights throughout the world in 1995/1996 and the Union's Human Rights Policy, OJ 20/161, 20.01.1997
[5] EC Bulletin no 3, vol 24, 1991, p.64
[6] COM (95) 567 Final, 22.11.1995

element' of the Union's contractual relations, included as a matter of course in agreements. The conclusions of this communication provided for an extension of the legal scope of the wording intended to be included in all future draft negotiating directives for the Union agreements with non-member countries. This was an 'essential element' clause supplemented by an article regarding non-execution and, two interpretative declarations followed it. The conclusions were designed to improve the consistency, transparency and impact of the Union policy, while at the same time allowing for the sensitivity of the countries concerned and respecting the principle of non-discrimination. The proposed system would promote positive action, with human rights and democratic principles included as an 'essential element' of the agreements, a subject of shared interest and an integral part of the dialogue between the parties.

Conclusions of the Union's approach can be found in the Association Agreements with Eastern and Central Europe countries, Europe Agreements. Europe Agreements had human rights clause and mechanism as described in Commission proposal. For example, Europe Agreements between Union and Republic of Bulgaria, Union and Slovak Republic and Union and Czech Republic put same provisions regarding human rights. They had an article in their title of general provisions saying that respect for human rights is essential element of this agreement. Also they regulated a suspension mechanism in the Declaration added to the agreement against any party has failed to respect for human rights. This mechanism has had some conciliation procedures and alternatives solution before suspension[8]. Accordingly, each party can take appropriate measures in case of violation of human rights[9].

The corollary to this approach is the option of taking appropriate measures in response to serious and persistent violations of human rights or interruptions of the democratic process. The range of measures available is sufficiently broad to allow for a graduated response in line with the gravity of the situation, from confidential or public approaches to interventions in international forum and participation in international and regional enquires. Where contractual relations are concerned, the Union can also postpone the conclusion of an agreement, change the content of cooperation programs and even, where international law allows, suspend the

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[7] COM (95) 216 Final, 23.05.1995

[8] Agreements with Baltic countries, on the other hand, had a provision called 'Baltic Provision', and this provision regulates an instant suspension mechanism without any negotiations.

[9] Decision of the Council of 19 December 1994 on the Europe Agreement with Republic of Bulgaria, Slovak Republic and Czech Republic, OJ L 358, 31 December 1994.

agreement. When adopting such measures, the Union is careful not to penalise the population for the behaviour of its government, channelling its contributions through civil organisations.

The same innovative approach is reflected in the more recent Regulations defining the framework for technical assistance and financial cooperation. Although they are unilateral measures, they contain explicit references to respect for human rights and democratic principles as an essential element of cooperation. They provide for the possibility of taking appropriate action, including suspension of cooperation, particularly where human rights and democratic principles are seriously violated[10]. The system agreed between the ACP countries and the European Union for the mid-term review of Lome IV is particularly elaborate. It provides not only for the inclusion of respect for human rights and democratic principles as an 'essential element' of relations between the parties, but also for a 'suspension' clause and a very detailed consultation mechanism based on parity between the parties. In line with the conclusions of the communication of 23 May 1995, this mechanism puts the emphasis on dialogue as the means of finding a solution before any negative steps are taken, except in cases of special urgency. The suspension of cooperation is seen only as a last resort.

The reassessment process does not end there; the Union institutions and the international forums are also debating the inclusion of respect for and promotion of fundamental social rights in contractual relations with third countries. The aim here is to help stamp out the exploitation of children and various kinds of forced labour, and to promote the freedom to form unions and the right to collective bargaining, in line with the relevant ILO conventions. The debate is still open, as the developing countries have expressed reservations, fearing a form of disguised protectionism designed to deprive them of the competitive advantage they gain from low wages.

The other instrument used by the Union on the subject of human rights is financial resource. On the initiative of the European Parliament, a constantly increasing part of those resources allocated to the Chapter entitled 'European initiative for human rights and democratisation', earmarked for the promotion of human rights and democracy and covering a number of themes and geographical

[10] This formula was used in Regulation 443/92 of 25 February 1992 (Asia and Latin America), the Tacis Regulation (former Soviet Union and Mongolia) and the proposed MEDA Regulation (non-member Mediterranean countries).

areas. The various Commission departments involved will consult each other to set joint guidelines, identify common project selection criteria and references, and harmonise procedures for the use of these resources.

Other resources taken from financial and technical assistance and cooperation appropriations are used to serve the same objectives. These resources – notably appropriations linked financial regulations in which human rights are specifically mentioned – were initially used to promote economic, social and cultural rights, but are now increasingly frequently allocated to projects promoting the rule of law and the protection of vulnerable groups.

As for the founding treaties, first reference to human rights for foreign policy was made by TEU. The Treaty stated that it is one of the main objectives of the common foreign and security policy to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms[11]. In the same way, European Community development cooperation policy shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms[12]. Thus, for the first time, human rights entered into to the Union law with a foreign policy dimension.

Amsterdam Treaty put human rights clause into TEU[13]. It stated that any European State which respect the principles set out article 6 (1) may apply to become a member of the Union. In other words, if a state does not respect human rights, that state can not become a member of the Union even if it fulfils all other conditions for membership. This is because the Union is founded basically on the principle of respect for human rights.

To conclude, it can be said that the challenge facing the Union is of considerable magnitude. Girded with a political commitment built on universal and regional text, and with a wide range of instruments and substantial resources at its disposal, the Union is under the obligation to focus its efforts on defining and implementing a strategy guaranteeing the consistency, impact and efficiency of its activities in this field, and the openness and transparency of its dealings. The Union is capable of honouring its commitments, achieving its objectives and using its instruments in a transparent, non-discriminatory manner will be revealed in the short-

[11] Article 11 (Ex Article J.1)
[12] Article 177 (Ex Article130u)
[13] Article 49 (Ex Article O)

term. However, personally I think, the Union used human rights as a political conditionality against Turkey from time to time. When the human rights are used as a political means, we can not talk about 'law'; we talk about 'discrimination'.

2. Turkey and European Union's Human Rights Policy

The European Union's sensitivity for human rights has increased over the years. It is natural because the European Union is a supra national body. Therefore, in relation with third countries and especially candidate countries, the European Union put forward human rights as a condition. That applies to Turkey as well.

Established an association between two sides, relations between Turkey and European Community began in 1963 with the Ankara Agreement. The agreement included cooperation in economics and custom union. A Financial Protocol accompanied this agreement in 1973. A second and third Financial Protocol was signed 1970 and 1977 respectively. The Ankara Agreement also set up an Association Council that meets regularly and discusses and implements the work of the association. In this term, human rights were not on the agenda between parties and Turkey took a few financial aids until 1980.

But, the Community suspended relations for a long time due to 12 September 1980 military coup in Turkey. Financial aids were suspended[14]. The Council and the Commission stated that human rights should be respected by Turkey and democratic mechanisms should be set again and the Parliament ceased to participate in the Joint Parliamentary Council[15]. Between 1980 and 1986 Association Council meetings were not held.

Upon Turkey's membership application on 14 April 1987, the Commission issued its unfavourable opinion by mentioning human rights problem in Turkey[16]. It stated that human rights developments in Turkey are below the level in the European Union. So, it concluded that it would not be useful to open accession negotiations with Turkey straight away. Also the Parliament took many unfavourable decision with respect to in Turkey's human rights situation between 1989-1996. Most of these

[14] The Community blocked 4th Financial Protocol and The Council has not so far approved the 4th Financial Protocol.

[15] Relations between European Community and Turkey, Commission of the European Communities, Brussels, December, 1989; COM (1998) 147 Final; COM (1998) 124 Final

decisions were about human rights problems such as police custody and expression of freedom[17].

On 6 March 1995 the European Community-Turkey Association Council decided to move onto the final stage of the custom union and resume financial cooperation. But, the Parliamentary resolution of 19 September 1996[18] asked for the Commission, to block, with immediate effect, all appropriations set aside under Meda program for project in Turkey, except those concerning the promotion of democracy, human rights and civil society. This resolution was primarily motivated by the human rights situation in Turkey. Following the meeting of the summit on 28 November 1996, a specific procedure was adopted by which the Parliament gave its opinion on the projects that the Commission wished to finance under the Meda program[19]. Despite this procedure, ECU 103 million has not been given to Turkey so far.

In the Luxembourg European Council on December 12-13, 1997, the European Council confirmed Turkey's eligibility for accession to the European Union. Turkey was judged on the basis of some criteria. While the political and economic conditions allowing accession negotiations to be envisaged were not satisfied, the European Union considered that it was nevertheless important for a strategy to be drawn up to prepare Turkey for accession by bringing it closer to the Union in every field, European Strategy for Turkey. But meanwhile, although some of others countries' positions got worse, the Union treated them with more tolerance. It seems to be like discrimination. A European strategy for Turkey consisted of development of Ankara Agreement, intensification of custom union, implementation of cooperation, approximation of laws, participation programs and in certain agencies.

However, the European Union put forward many pre-condition for the Turkey's candidacy, which it had not mentioned for the other countries. While it wanted to the other countries to obey Copenhagen criteria for membership, it asked Turkey to fulfil these criteria for candidacy. The European Union emphasised that strengthening Turkey's links with the European Union depends on the country's pursuit of the political reforms on which it has embarked, including alignment of human rights standards and practices with those in force in the European Union.

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[16] Commission Opinion on Turkey's Request for Accession to the Community, Commission of the European Communities, 18 December 1989, SEC (89) 2290 final/2

[17] OJ 305 31.10.1994, OJ C 44 14.2.1994; OJ C 268 4.10.1993; EC Bulletin no 3 1994; no 3 1997; no 5 1997.

[18] OJ C 319 28.10.1996

Then, Turkey registered and reacted the result of the European Council, considering that it had received discriminatory treatment compared with the other applicant countries. Turkey did not participate in the European Conference which was convened by the European Council to discuss issues of general concern, and that it suspended political dialogue including human rights.

However, the Union continued to take actions to correct the declining relations with Turkey. In that sense, The Commission started to issue Regular reports for Turkey. Three Regular reports were issued about Turkey's eligibility. The Commission said in 1998 Regular report that human rights violations were continuing in Turkey and measures taken by the Turkish Government were not adequate, especially in practice. In 1999 Regular report, The Commission stated that there are serious shortcomings in terms of human rights since 1988 last Regular report. It drew some positive and negative development in human right situation. Negative points of the Commission were torture, disappearances in detention, extra-judicial execution, and freedom of expression, freedom of press and freedom of association and freedom of assembly. It said that torture is not systematic but still widespread. Disappearances and extra-judicial execution are processed. Violations in freedom of expression, like a circular regarding forbidding the use of some terminology in relation to Kurdish issue in press releases, and publications by public institutions and organisations, still are continuing. The Commission reported about freedom of association that several branches of the Turkish Human Rights Association have been closed by the authorities. On the other hand, there were some positive points in human rights situation. First, Constitutional Court has annulled a legal provision which gave security officers authorisation to fire directly and without hesitation at persons who do not stop when warned. Second, 'Regulation on Apprehension, Detention and Release Procedure' provided some considerable steps in practice. Moreover, Parliament adopted a law against practice of torture amending Articles 243, 245 and 354 of Penal Code. Third, offences, except those committed by persons who are member of illegal organisations, committed through press and broadcasting have been postponed by a law adopted by the Parliament.

After the European Council in Helsinki on 10-11 December 1999 certified that Turkey is a candidate country for the European Union, the Commission with

[19] It was 375 million ECU for Turkey over the period 1996-1999.

approving of the Council of Ministers issued an Accession Partnership on 8 December 2000 which identifies short and medium term priorities to prepare Turkey for membership. Along with this document, it also delivered 2000 Regular report. In evaluating together these two important documents, almost all political priorities in short and medium term are related to human rights violations in Turkey. These are can be read as follow:

- Strengthen legal and constitutional guarantees for the right to freedom of expression, freedom of association and freedom of assembly.
- Strengthen legal provisions and undertake all necessary measures to reinforce fight against torture practices.
- Align legal procedures concerning pre-trial detention with the provisions of the European Convention on Human Rights.
- Strengthen opportunities for legal redress against all violations of human rights.
- Intensify training for law enforcement officials in mutual cooperation with individual countries and international organisations.
- Improve functioning and efficiency of judiciary and strengthen training of judges and prosecutors including in the field of human rights.
- Maintain de facto moratorium on capital punishment.

To conclude, I can say that there is nothing called ' internal affairs ' for any state when human rights law is concerned. On the other hand, if human rights completely use as a political weapon, they lose their effect in law. There are two questions connected each other on the relations between Turkey and European Union. Does the European Union attain its objective of encouraging respect for human rights by using human rights as a condition?[20] If this pressure continues in its predatory and inconsiderate form, I am afraid, domestic actors may manipulate a lot of negative factors created by pressure in question. The other question, maybe more important, is to what extent the European Union applies human rights condition against Turkey. In other words, is there any state which became democratic or respectful human rights in result of the European Union's pressure? Moreover, even the European Union did not prove its own commitment with respect to human rights. It has not stable human rights law, and some attempts are very new so that we can not be able to mention a European Union human rights law.

[20] For a poll, see. Annex 1

All those facts show that Turkey faces to a complex and discriminatory situation. This situation will not provide any contribution to relations between Turkey and European Union.

Part Four

FUTURE OF THE EUROPEAN UNION HUMAN RIGHTS LAW

1. Why does European Union need a Human Rights Protection System?

The shortcomings of the human rights protection in the European Union are obvious. Apart from the fact that the superiority of these rights and freedoms in the hierarchy of norms is not clearly established, as they are partly considered as being on the same level as the economic freedoms under the Treaty of Rome, the framework established by the jurisprudence cannot be complete as it depends on the cases coming before the Court. The Court's case law has played an important role for a long time. The Court declared that it could not accept measures incompatible with fundamental rights recognised and protected by Member States. This case law of the Court, through which a whole series of fundamental rights and general principles of law have been subsequently recognised as essential elements of the Union legal order, has been highly praised throughout the Union. The other institutions of the Union supported it and have repeatedly stressed the prime importance. Nonetheless, satisfactory and worthy of approval the method developed by the Court cannot eliminate at least one of the shortcomings affecting the legal order of the Union through the lack of a written catalogue of fundamentals rights: the impossibility of knowing rights and freedoms in advance that may not be infringed by the Union institutions under any circumstances. The European citizen has a legitimate interest in having his rights *vis-à-vis* the Community laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria[1].

Despite all positive developments thanks to the ECJ, other institutions and some Treaty articles, the European Union has no adequate capacity to protect and to maintain human rights in its system. In particular, there are glaring deficits regarding relations with the ECHR and workable system for the protection of human rights. Of course, the European Union had a lot of experience and it has proceeded in this respect but the recent level of human rights law in the European Union needs more advanced initiatives.

The ECJ referred regularly to the ECHR in its case law and the ECHR has been formally integrated in the TEU. However, individuals have presently no possibility of

[1] Commission Memorandum, Accession of the Communities to the European Convention on Human Rights, EC Bulletin, Supplement 2/79, 6-7

invoking a violation of these rights before the ECJ[2]. This accession has to be accompanied by a system of effective legal remedies in the Community legal system.

Article F of TEU is significantly distinct from preceding initiatives, especially the 1977 Joint Declaration and the SEA, since it has an explicit legal nature. First of all, it clearly stated that 'the Union shall respect fundamental rights, ...as they result from the constitutional traditions common to Member States'. It is difficult to say how the Court understood the status of national constitutional provisions in the Union legal order. Direct confrontations with German and Italian law was skilfully avoided; the opposition to EU supremacy remained a threat rather than a rebellion. There is no reason to believe that Article F (2) is intended to change the status quo reached by the Court through its case law, that is to impose upon the Court an obligation to observe constitutional maximum standards. There can be little doubt that if such a substantial change of course had been the intention of the drafters, it would have been reflected unambiguously in the text. A more likely understanding of the article in respect to the use of national constitutional provisions is to see it as recognition of the Court's activities. This can be substantiated by the fact that Article F (2) leaves it to the Court to determine how fundamental rights 'result from the constitutional traditions' of the Member States[3].

On the other hand, 'the Union shall respect for fundamental rights and freedoms, ...as general principles of Community law'. In my opinion when this provision is evaluated together with 'the constitutional traditions common to Member States', an unclear situation occurs. General principles may remain so surface to review fundamental rights and freedoms cases because general principles may not have necessary details whereas fundamental rights and freedoms are needed to a precise groundwork.

The root of the problem is the fact that the fundamental rights involved in the European Union are not directly protected as such, but only indirectly as unwritten general principles. One cannot expect any court to be able to grant rights and freedoms on the basis of general principles. The most conspicuous disadvantage with principles is their relative vagueness and uncertain scope. Rights, on the other hand, should be very precisely defined. It is true that certain fundamental rights, though

[2] Listing the fields of jurisdiction of the ECJ, TEU does not include article F and, the new article L of the Amsterdam Treaty only includes ' article F(2) with regard to action of institutions '

codified, have a less definite in some countries than others, especially when a court is confronted with difficult or pathological cases. This may blur the sharp edges of distinction between general principles and specific norms. But one should not confuse the generality of norms with the inherent vagueness of principles, especially in the present context where these principles result from processing well-defined norms into principles through the intermediate category of the 'common constitutional traditions of the Member States'.[4] For instance, some Member States may have more detail regulations regarding human rights, and Union's standards may fall short. In this case, protection should be provided by the Member State's common constitutional traditions.

Protecting human rights with general principles of law which are derived from a pool of fundamental rights codified elsewhere is quite difficult. They necessitate forms of interpretation which are not permissible in some Member States. For instance, the Court has needed to create three criteria in Nold for determining whether a restriction imposed on a fundamental right is justified: the restriction must be justified in the light of the objectives of general interest pursued by the Community; it must be proportional; and it must not infringe the substance of the fundamental right involved. The result of this type of review may be quite different from what would be allowed by a national court. In view of the last criterion, most states in the European Union abolished this kind of criteria, the core substance of a fundamental right, which must be left untouched. Moreover, restrictions and criterion regarding fundamental rights should be regulated by act of parliament, especially with a law, but there is no measure in the Union law regarding restrictions or criterion.

Another important provision of Article F (2) is 'the Union shall respect fundamental rights, ...as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

As known, the ECHR represents a collective guarantee at a European level of number of principles set out in the Universal Declaration of Human Rights, supported by international judicial machinery making decisions which must be respected by the contracting States. This collective and international guarantee is not a substitute for national guarantees of fundamental rights, but is supplementary to them. Proceeding

[3] Krogsgaard, L. Bondo., Fundamental Rights in the European Community after Maastricht, Legal Issues of European Integration, 1993/1, p.99

under the ECHR, there are three bodies: the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe. Since 1974, all the Member States of the European Community have been contracting parties to the ECHR, which has led the ECJ to derive guidelines for the constitutional traditions common to the Member States from the fundamental rights embodied in the ECHR. In other words to use the ECHR indirectly is an indicator of the standard existing at Community level in the field of fundamental rights. In addition, the ECHR represents a minimum standard of the 'general principles of law' protected by the Court of Justice.

The above-mentioned provision of Article F (2) as a reference to the ECHR is a codification of the Court's application of the ECHR as a source of fundamental rights. The Member States' constitutions have, to some extent, overtaken the ECHR that they provide a higher degree of protection for their citizens. Indeed, the European Union system does often itself provide a more up to date protection. Therefore, the main function of the reference in the TEU to the ECHR seems to be that the steps already taken by the Court have been made irreversible.

The protection of fundamental rights and freedoms in the European Union, even after Article F (2), is unsatisfactory and it can be criticised.

i. It should be accepted that Article F (2) of TEU provided a legal basis for the protection of fundamental rights in the European Union. However, Article F (2), together with other provisions referring human rights in the context of the second and third pillars[5], is explicitly excluded from the Court's jurisdiction[6]. There is already case law indicating that the Court will not entertain a preliminary reference or an action based on Articles A-F of TEU[7]. Thus, the this situation leads to totally inconsistent results: an individual can bring alleged human rights violations before the Court on the basis of vague and unwritten 'general principles of law', but cannot do so by relying on the written provisions of a Treaty which is supposed to be the Union's constitution. This shows that the above provisions are nothing and they have no legal effect. I think this is unacceptable, because there are no written, binding and enforceable rules on human rights in TEU other than these references to international

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[4] Besselink, F.M. Leonard., Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union, CMLR, vol 35, no 3, 1998, p.633
[5] Article J.1(2) and Article K.2(1)
[6] Article L
[7] Case 167/94, [1995] ECR I-1023, para. 6.

instruments which they are applicable only for a part of the Union law. It is clear that at the end of he 20th century the citizen has right to expect a Union based on the rule of law. He wants to see his fundamental rights in a well defined situation so that he can use them in a court.

ii. The protection of individuals against human rights violations committed by the European Union institutions is incomplete and in adequate in spite of Article F (2). Individuals cannot bring their complaints against the European Union before the European Commission and Court of Human Rights, because the European Union is not a party to the ECHR. Therefore, individuals must only rely on the system of remedies available before the Court of Justice. However, in direct actions they are not sufficiently protected by the Court of Justice either, because their right of action against Union acts, and in particular regulations, is severely restricted under Article 173 EC Treaty by the requirement of having to prove 'direct and individual concern'. But they may always use indirect protection through the preliminary ruling procedure where a Union act has been implemented at the national level.

iii. Judicial ability of Member States has more advance level than the European Union has[8]. The first problem raises the Court's interpretation competence. In a case[9], the Court stated that it must provide all the criteria of interpretation regarding fundamental rights and freedoms. But in order to provide all the criteria of interpretation, the Court must interpret the ECHR. However, article 177 of the Treaty of Rome gives a competence to the Court to be able to interpret the Treaties and acts of institutions, but the Court has no jurisdiction to interpret international agreements concluded by Member States.

iv. The most confusing problem is that the European Union law does not comprise all rights regulated by the ECHR. If a right is not granted by founding Treaties, the European Union law does not protect it. All rights recognised by the ECHR can not protected by Union law even though the ECHR has been indirectly incorporated into the Treaty of European Union. Because the other articles of this Treaty prevents such a judiciary power[10]. Suppose that a Member State interferes its

[8] Besselink, 650-659

[9] Case 260/89, [1991] ECR I-2925

[10] According to Article L paragraph d, power of the Court comprise only actions of institution against nationals and the Court has only jurisdiction under the Treaties establishing the European Communities and under Treaty of Amsterdam. Thus, the Court has no jurisdiction regarding the protection of individuals against human rights violations committed by Member States. At the same time, the Court

citizen to restrict his freedom of expression or his private and family life or his freedom of association. The Union law can not be with this person. Because, the European Human Rights Court uses and interprets the ECHR according to Convention's objectives, on the other side, the Court of Justice can only base on the ECHR to realise the Union's objectives. The ECHR's aim is to protect the individual as a human being, while the Union's aim is to further economic and social integration. Therefore, the expression of Article F (2) is inadequate to protect human rights on the Union law. It is compulsory condition that provisions concerning human rights should be sufficiently precise and should be well defined. They should be regulated clearly and they should be listed in a special article so that individuals can apply to the Court by using these clear provisions. This kind of provisions may only be located in a regulation or directive. A general treaty does not provide this kind of precise. To refer the ECHR in a Treaty gives no power for a human rights case.

All evaluations above shows that status quo should be ended. Protecting human rights by way of 'general principles of law' and 'constitutional traditions common to Member States' are not possible any more. There were a few alternatives for the European Union to promote human rights and to form human rights law.

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has jurisdiction under the establishing Treaties, including Treaty of European Union, which do not comprise many rights regulated ECHR.

2. Discussions before the Charter of Fundamental Rights of the EU

At present the most effective system for the international enforcement of human rights is found in Western Europe under the ECHR. This convention provides a bill of rights, a Human Rights Commission to investigate complaints, and a Human Rights Court.

The aim of the European Convention system is to supplement, when necessary, the human rights protection afforded in the domestic legal system of each of signatory States. As the Strasbourg Court has repeatedly observed since its judgement of 23 July 1968 Belgian Linguistic case, the machinery set up by the Convention is of a subsidiary nature. In other words, it falls in the first place to the national authorities, and in the last resort the national courts, to ensure that fundamentals rights and freedoms of the individual are properly safeguarded. Consequently, it is essential to anchor the Convention standards and values as deeply as possible in the legal system of the signatory countries. In this respect the Convention system purposes a kind of cooperation between the national courts and the European Court of Human Rights, which can be especially effective in countries where the national courts themselves have to apply the Convention as a result of its incorporation into domestic law[11].

There was a discussion to create an appropriate protection system of human rights, as effective as European Convention system, in European Union sphere. Discussions carried through some alternatives which they have some advantages and disadvantages.

Accession to the ECHR has been a considerable one in the European Union institutions and by authors for a long time. Lastly the ECJ put an end to discussion by stating that the Union has no competence to accede to the ECHR if the founding treaties are not amended[12]. An Article could be put into the Treaties stating that the Community shall has all necessary arrangements of cooperation with the Council of Europe.

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[11] Ryssdal, R., 'Brian Walsh and the European Court of Human Rights' in O'Reilly, J., Human Rights and Constitutional Law, p.5, The Round Hall Press, Dublin, 1992

[12] Opinion 2/94 [1996] ECR 1790

Accession would be benefit in many positive ways. The European Union would be placed under the same control as its Member States and it would have a written catalogue of human rights, already interpreted in many important details by a tremendous case law. Arguments in favour of accession can be explained as follows[13].

First, Accession would make a substantial contribution to the strengthening of democratic beliefs and freedom within and beyond the free world. Even more than the Joint Declaration by the three political institutions of 5 April 1977 on the protection of fundamental rights, it would make clear to the whole world that the European Union does not merely make political declarations of intent but is determined to improve in real terms the protection of human rights by binding itself to a written catalogue of fundamental freedoms. The Accession of the Union to the ECHR is completely in line with the declaration made by the European Council on democracy on 8 April 1978; in this declaration it has been solemnly stated 'that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Union'. If respect for human rights is an essential condition of membership of the Union for a State, then it is only logical to bind the Union itself to respect such rights.

Second, Accession of the Union to the ECHR would clarify the position of its legal acts in relation to the ECHR and give them a satisfactory status. It is more logical to enable a complaint for violation of fundamental rights to be made directly against such acts under the conditions laid down in the ECHR rather than merely by means of an attack upon the relevant implementing measures taken by the Member States. Accession to the ECHR would moreover restore the legal position in which the nationals of Member States found themselves before the transfer of certain powers to the Union.

Accession would at least partly satisfy the demand, voiced for some time, that a written catalogue of fundamental rights, binding on the Union, should be established. It is true that the rights contained in the Convention and in the additional Protocols do not cover all the fundamental rights which might possibly be pertinent to the activities of the Union. The majority of these rights are nevertheless important for the Union also. These rights will be guaranteed by a written legal act providing clear criteria known beforehand by individuals and institutions.

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[13] Commission Memorandum, 11-13

Third, Accession to the ECHR would enable the Union, when confronted with criticism concerning the gaps which exist as regards fundamental rights, to point not only to the very progressive case law of the ECJ, but also to its formal commitments within the ECHR. The Union would show its willingness to meet all objections calling into question the compatibility of its act with fundamental rights.

To conclude, Accession would reduce the risk of national courts using the absence of a written catalogue of fundamental rights formally binding upon the Union as justification for reviewing acts of the Council or the Commission by reference to their national constitutions, and possibly declaring them inapplicable in the light of those constitutions, thus violating the principle of the uniformity of Union law.

As against this, there were also a number of objections and unclarified questions in the accession alternative. These are concerned with judiciary power of the ECJ and the European Human Rights Court's interpretation for Union law, exhaustion of domestic remedies and, effects of Accession Member States point of view.

Firstly, regarding the requirement of the exhaustion of domestic remedies, in cases where the complaint is directed against the Union, individuals would have to be obliged to bring a direct action before the Court of First Instance, followed by an appeal to the Court of Justice, before they could submit an application to the European Court of Human Rights. On the other hand, where a complaint is against a Member State, or the validity of a Union act is in question in national proceedings, the exhaustion of domestic remedies would involve a preliminary reference to the ECJ under Article 177. Consequently, accession from this aspect would have the negative effect on the protection of individuals.

Secondly, the ECJ would subject to the Convention mechanism and the jurisdiction of the European Court of Human Rights. But, according to Article 164 of the Treaty of Rome, the ECJ ensures that 'in the interpretation and application of this Treaty the law is observed'. So, both of the Courts would have a competence regarding Union law and therefore, monopoly power of the ECJ in the Union law could be lost. However, the ECJ accepted that an international agreement submitting the European Union, including the ECJ itself, to the binding decisions of another Court created by that agreement is compatible with Union law inasmuch as that other Court imply interprets and applies the agreement and does not threaten the autonomy

of the Union legal order[14]. But, the European Court of Human Rights would not remain such a weak point, moreover, to interpret and judge as to the compatibility of the Union law to the ECHR would be its most important judicial function. The European Court of Human Rights would interpret Union law in accordance with the aims of the ECHR not the objectives of the European Union law. This would be a clear interference the power of the ECJ. However, it can be considered that the European Court of Human rights may take into consideration the ECJ's jurisprudence and interpretations when a case comes before it regarding Union law. In this situation, the Court of Human Rights would interpret Union law so as to achieve both the objectives of the ECHR and Union law.

Lastly, the problem is that, outside the effect of the ECHR in Union law, whether Member States legal order will be affected from Accession of the ECHR into the Union law. The Article 228 (7) states that if an agreement concluded between Community and one or more states or international organisation, this agreement shall bind on the institutions of the Union and Member States. In despite of that clear provision, the Commission stated that ' it should also be pointed out that accession to the ECHR does not imply any extension of the powers of the Community with regard to the protection of fundamental rights, and that it is no way the intention of this memorandum to advocate the extension of the powers of the Community *vis a vis* the Member States to cover fundamental rights which are not within the scope of the Community'. But there is no value this idea in comparison to Article 228 (7) of the Treaty of Rome. Moreover, the ECJ explained clearly its opinion in this subject[15]:

'international agreements concluded by means of the procedure set out in Article 228 of the Treaty are binding on the institutions of the Community and its Member States. As the Court of Justice has consistently held, the provisions of such agreements and the measures adopted by institutions set up by such agreements become an integral part of the Community legal order when they enter into force.

In this connection, it must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation. It also has jurisdiction to rule on the

[14] Opinion 1/91, [1991] ECR I-6079
[15] Opinion 1/91, [1991] ECR I-6080

agreement in the event that Member States of the Community fail to fulfil their obligations under the agreement.

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decision of this court will be binding on the Community institutions, including the court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order'.

As understood from this Opinion, the Accession to ECHR would be affecting not only the Community institutions but also to the Member States. Responsibilities of the Member States to comply with the ECHR would arise not only in relation to the other Contracting Parties but also in relation to the Union. Since the ECJ would have jurisdiction to rule on the compliance with the Convention by the Member States, then, it would have power to examine the compatibility with the ECHR of national legislative or practices irrespective of whether they fall within or outside the scope of Union law. This latter is a very new matter and it can be cause so complex problems because Union law can not intervene to the national law if they do not fall within the Union law.

The other discussed alternative was a Fundamental Rights Catalogue for the European Union. Needless to say, the effective drafting of such a catalogue would trigger fundamental questions as to the distribution of competencies between Member States and federal institutions at Union level. However, such a catalogue, EU Charter of Fundamental Rights, has been ratified. Therefore, I placed discussions on this alternative into the 'the Charter of Fundamental Rights of the EU' title below.

3. The Charter of Fundamental Rights of the EU

At the European Council held in Cologne on 3 and 4 June 1999, it was decided to draw up a Charter of Fundamental Rights of the EU. In its conclusion, the Council justified this by need 'to make their overriding importance and relevance more visible to the Union's citizens'.

According to the European Council of Cologne, this Charter should:

- contain the fundamental rights and freedoms, as well as the basic procedural rights guaranteed by the European Convention on Human Rights,
- also include the fundamental rights that pertain only to the Union citizens
- account on economic and social rights as contained European Social Charter and the Community Charter of the Fundamental Social Rights of Workers insofar as they do not merely establish objectives for action by the Union.

The European Council also decided that Charter should be drawn up a body composed of representatives of Heads of State and Government and of the President of the Commission as well as members of the European Parliament and national parliaments, 'Convention'.

The European Council in Tampere held on 15 and 16 October 1999 laid down the definitive composition of the Convention and its working methods. It called for the working methods to be based on the principle of consensus, authorising the chairman to submit the draft to the European Council only on condition that the draft Charter can be eventually be subscribed to by all the parties. Mandates of Cologne and Tampere defined the tasks of the Convention. Accordingly,

- The Convention is not an intergovernmental conference within the meaning of TEU.
- It is not authorised to change the remit of the European Union.
- Its task is to draw up a Charter of Fundamental Rights of the EU within the terms of reference of the Union. When drawing up the Charter it must therefore bear in mind that it will be applied both in the framework of the TEU and in the framework of the Treaties establishing the European Communities.
- The Charter of Fundamental Rights of the EU thus addressed to the institutions of the EU and not to the Member States in the context of their own power.

In preparation stage of the Charter, the Convention consulted civil society organisations to involve a greater extent of European citizens.

Finally, the Convention forwarded a draft Charter of Fundamental Rights of the EU to the European Council of Nice which convened on 7-11 December 2000.

As far as the content is concerned, the Charter of Fundamental Rights of the EU includes all rights and freedoms involved by European Convention of Human Rights. However, in the meaning that civil and political rights, on the one hand, and fundamental social, economic and cultural rights, on the other hand, cannot be dealt with in isolation from each other, the Charter of Fundamental Rights of the EU involves economic, social and cultural rights as well. As for overall content of the Charter of Fundamental Rights of the EU, it is divided into seven sections: dignity, freedoms, equality, solidarity, citizenship, justice and general provisions[16].

The Nice European Council made some amendments on TEU and Treaty of European Community. Actually, the European Council called for it as Treaty of Nice. However, the Charter of Fundamental Rights of the EU had not been incorporated into the Treaty of Nice because of the insistence of the British with the connivance of others. As the Charter has not been integrated into Treaties, clearly, it had same fate as the others that were only announcements; that means that they are nothing legally binding point of view.

It is clear that, although a lot of time has been wasted by the European Union for this alternative, still there are many points are unclear.

First of them is that the Union has no competence to be able to make such a Charter. No treaty provision confers on the Union institutions any general power to enact rules or to conclude international convention in this field[17]. Therefore, to insert an article to the Treaties needs unanimously vote in the European Council and such amendments in the Treaties shall enter into force after being ratified by all Member States in accordance with their respective constitutional requirements[18].

[16] See. Annex II
[17] Opinion 2/94, [1996] ECR I-1759, para.17
[18] Article N of the TEU

Latter point of view, the history of the European Union witnessed a lot of times that it is almost impossible to provide unanimous vote and, ratifying of Member States takes long time by talking about this kind of attempt. It needs a major conciliation in many subjects between Member States and Union's organs.

Secondly, in order to provide, in the course of this operation, single human rights protection in the European Union, the Member States of the European Union must withdraw from the ECHR. Otherwise, the simultaneous application of the two enforcement procedures could lead to conflicting decisions since they would operate independently of one another. Therefore, withdrawal from the Convention would be necessary to bring the protection of human rights in the European Union and its Member States within a single system of enforcement under the final authority of a single Court.

Thirdly, this solution would cause divergent standards, like the European Union system and Convention system, in the subject of human rights protection in Europe. Probably, this situation may create confusing procedures and results for individuals. Citizens of States, which are contracting parties of the ECHR, will face to different protection before the European Court of Human Rights, while Union citizens are on before the ECJ; especially if the Charter has different content than ECHR has. On the other hand, in the case of the Charter includes all rights regulated by ECHR, human rights jurisprudence of the ECJ remains short in comparison to the European Court of Human Rights.

4. A Proposal and Last Remarks

Since the Charter of Fundamental Rights of the EU had been a disappointed attempt, there is a long road to reach an effective human rights protection system for the EU. The EU owes its glaring achievement to a substantial principle from outlet: *proceed step by step*. It should get same approach in the human rights subject by stepping into reasonable range.

Any attempt to make a blue print in this issue may not so easy as it may appear, because there are a lot of equally valid arguments which make it difficult to point a definitive one. However, the data we have so far may allow to make one.

Deficiencies of status quo have been mentioned previous subdivision[19]. In order to be able to explain the solution proposed we should summarise adverse sides of previous two alternatives. First, Accession to the ECHR arises issues for the monopoly power of the ECJ regarding the Union law in so far as the European Court of Human Rights has jurisdiction on it. On the other hand, the ECJ will have power to examine the compatibility with the ECHR of national legislation or practices irrespective of whether they fall within or outside the scope of the Union law. Second, making own fundamental rights catalogue also invites some problems coming from the well-known difficulties of EU decision making or Treaty making process. Even if these difficulties leave over for a while, such a catalogue probably will cause a diverging standard by facing to Convention system with Union system and by creating confusing procedures and results for individuals.

First pillar of this proposal is that ECHR must be incorporated into the Treaty as a separate title. This is different point than the Accession to the ECHR, because it does not entail the EU enter into the Council of Europe. It is only needs that some fundamental provisions should be inserted in the Treaty. These can be Articles 1- 18. The incorporation would create a clearer situation. Transferred articles of ECHR would be directly integrated into the Union legal order. Thus, fundamental rights and freedoms integrated the Treaty would have constitutional meaning.

Secondly, and perhaps the poor side of this proposal, diverging standards for the protection of fundamental rights and freedoms may remain as a problem for certain time. But, this problem may be overcome in a short period. At this time,

[19] Supra, page. 78-81

majority of Contracting States of the Convention is members of the European Union, that is 15 States, and it is expected that eleven States would become members of the European Union in first wave of enlargement. Thus, a big majority would be provided towards a single European human rights system.

Thirdly, in order to be able to operate this proposal the Member States would withdraw to the Convention system in accordance with Article 65 of the ECHR. Thus, all members and potential members of the European Union and the European Union itself would be bound by the same human rights provision.

Risk of having a divergent jurisprudence of the two Courts could be reduced to an absolute minimum by enabling the ECJ to rely on the past and future case law of the European Court of Human Rights by inserting an article in the Treaty as follow:

'...in interpreting and applying the human rights provisions the ECJ and the Court of First Instance may have regard to any relevant decision of the European Court of Human Rights'.

Annex 1: WHAT DO TURKISH PEOPLE THINK ABOUT HUMAN RIGHTS IN RELATION BETWEEN TURKEY AND EU?

	TRUE	NO IDEA	FALSE
1. Is it a true claim that there are human rights violations in Turkey?	% 100	-	-
2. Is it a true idea that Turkey should take the EU's suggestions for the solution of human rights problems into consideration?	% 72	% 1	% 27
3. The EU puts forward human rights as a condition to the EU membership. Is it a true policy?	% 50		% 50
4. Is it a true claim that the EU uses human rights as a political pressure against Turkey?	% 75	-	% 25
5. Is it a true idea that intervention by the EU in domestic politics of Turkey makes Turkey more democratic and more respectful to the human rights?	% 31		% 69
6. Even if Turkey complies with all of the criteria of the EU membership, human rights violations will still be an obstacle for Turkey's membership to the EU. Is that idea true?	% 39	% 2	% 59

- This poll was made with 320 persons who are chosen randomly.
- Occupations of persons are as follow:
  - % 41 workers and officer (Group 1)
  - %31 teacher and University stuff (Group 2)
  - % 18 student (Group 3)
  - % 8 businessman (Group 4)
  - % 2 other (unemployment, housewife, etc.) (Group 5)
- For the second question, Group 2 and Group 3 say 'true' all; for the fifth question, Group 1 says 'false' in proportion to % 99

Annex II: The Charter of Fundamental Rights of the EU

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2000/C 364/01)

PROCLAMACIÓN SOLEMNE

HØJTIDELIG PROKLAMATION

FEIERLICHE PROKLAMATION

ΠΑΝΗΓΥΡΙΚΗ ΔΙΑΚΗΡΥΞΗ

SOLEMN PROCLAMATION

PROCLAMATION SOLENNELLE

FORÓGRA SOLLÚNTA

PROCLAMAZIONE SOLENNE

PLECHTIGE AFKONDIGING

PROCLAMAÇÃO SOLENE

JUHLALLINEN JULISTUS

HÖGTIDLIG PROKLAMATION

El Parlamento Europeo, el Consejo y la Comisión proclaman solemnemente en tanto que Carta de los Derechos Fundamentales de la Unión Europea el texto que figura a continuación.

Europa-Parlamentet, Rådet og Kommissionen proklamerer højtideligt den tekst, der følger nedenfor, som Den Europæiske Unions charter om grundlæggende rettigheder.

Das Europäische Parlament, der Rat und die Kommission proklamieren feierlich den nachstehenden Text als Charta der Grundrechte der Europäischen Union.

Το Ευρωπαϊκό Κοινοβούλιο, το Συμβούλιο και η Επιτροπή διακηρύσσουν πανηγυρικά, ως Χάρτη Θεμελιωδών Δικαιωμάτων της Ευρωπαϊκής Ένωσης, το κείμενο που ακολουθεί.

The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of fundamental rights of the European Union.

Le Parlement européen, le Conseil et la Commission proclament solennellement en tant que Charte des droits fondamentaux de l'Union européenne le texte repris ci-après.

Forógraíonn Parlaimint na hEorpa, an Chomhairle agus an Coimisiún go sollúnta an téacs thíos mar an Chairt um Chearta Bunúsacha den Aontas Eorpach.

Il Parlamento europeo, il Consiglio e la Commissione proclamano solennemente quale Carta dei diritti fondamentali dell'Unione europea il testo riportato in appresso.

Het Europees Parlement, de Raad en de Commissie kondigen plechtig als Handvest van de grondrechten van de Europese Unie de hierna opgenomen tekst af.

O Parlamento Europeu, o Conselho e a Comissão proclamam solenemente, enquanto Carta dos Direitos Fundamentais da União Europeia, o texto a seguir transcrito.

Euroopan parlamentti, neuvosto ja komissio juhlallisesti julistavat jäljempänä esitetyn tekstin Euroopan unionin perusoikeuskirjaksi.

Europaparlamentet, rådet och kommissionen tillkännager högtidligt denna text såsom stadga om de grundläggande rättigheterna i Europeiska unionen.

Hecho en Niza, el siete de diciembre del año dos mil.

Udfærdiget i Nice den syvende december to tusind.

Geschehen zu Nizza am siebten Dezember zweitausend.

Έγινε στη Νίκαια, στις επτά Δεκεμβρίου δύο χιλιάδες.

Done at Nice on the seventh day of December in the year two thousand.

Fait à Nice, le sept décembre deux mille.

Arna dhéanamh i Nice, an seachtú lá de Nollaig sa bhliain dhá mhíle.

Fatto a Nizza, addì sette dicembre duemila.

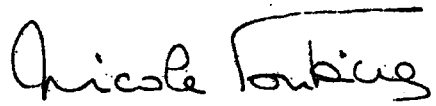
Gedaan te Nice, de zevende december tweeduizend.

Feito em Nice, em sete de Dezembro de dois mil.

Tehty Nizzassa seitsemäntenä päivänä joulukuuta vuonna kaksituhatta.

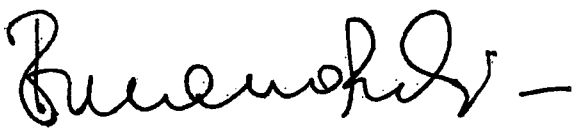
Som skedde i Nice den sjunde december tjugohundra.

Por el Parlamento Europeo
For Europa-Parlamentet
Für das Europäische Parlament
Για το Ευρωπαϊκό Κοινοβούλιο
For the European Parliament
Pour le Parlement européen
Thar ceann Pharlaimint na hEorpa
Per il Parlamento europeo
Voor het Europees Parlement
Pelo Parlamento Europeu
Euroopan parlamentin puolesta
För Europaparlamentet



Por el Consejo de la Unión Europea
For Rådet for Den Europæiske Union
Für den Rat der Europäischen Union
Για το Συμβούλιο της Ευρωπαϊκής Ένωσης
For the Council of the European Union
Pour le Conseil de l'Union européenne
Thar ceann Chomhairle an Aontais Eorpaigh
Per il Consiglio dell'Unione europea
Voor de Raad van de Europese Unie
Pelo Conselho da União Europeia
Euroopan unionin neuvoston puolesta
För Europeiska unionens råd

Por la Comisión Europea
For Europa-kommissionen
Für die Europäische Kommission
Για την Ευρωπαϊκή Επιτροπή
For the European Commission
Pour la Commission européenne
Thar ceann an Choimisiúin Eorpaigh
Per la Commissione europea
Voor de Europese Commissie
Pela Comissão Europeia
Euroopan komission puolesta
För Europeiska kommissionen



PREAMBLE

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

CHAPTER I

DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

— the free and informed consent of the person concerned, according to the procedures laid down by law,

— the prohibition of eugenic practices, in particular those aiming at the selection of persons,

— the prohibition on making the human body and its parts as such a source of financial gain,

— the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.

CHAPTER II

FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. 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.

2. 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 grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV

SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V

CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

— the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

— the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

— the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43

Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI

JUSTICE

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII

GENERAL PROVISIONS

Article 51

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this 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.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

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