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EUROPEAN COURT OF HUMAN RIGHTS AND PROTECTION OF INDIVIDUAL RIGHTS AND FREEDOMS IN TURKEY

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CHAPTER 2: EUROPEAN CONVENTION ON HUMAN RIGHTS AND INDIVIDUAL RIGHTS AND FREEDOMS IN FRAME OF EUROPEAN COURT OF HUMAN RIGHTS

ABBREVIATIONS

Abbreviation	Meaning
EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Courts of Human Rights
CJEC	Court of Justice of European Communities
CO	Constitution
BC	Before Christ
UDHR	Universal Declaration of Human Rights
USA	United States of America
UN	United Nations
OSCE	Organization for Security and Co-operation in Europe
CM	Ministers of Commitee
art	Article
p.	Page
i.	Issue
TGNA	Turkish Grand National Assembly
etc.	et cetera

INTRODUCTION

Today, recognizing, protecting and developing the human rights has become universal. The aim of documents of human rights is to put human rights under protection on a supra-national field and specify universal standarts related to them. Although states are seen as a protector of human rights, historical experiences showed that human rights were mostly violated by states, as well. Natural domineer of human rights are national domineers. In protection of human rights, it is only possible for international judgment organization to come into play in second phase when national judges have incapability and deficiency. In the order that European Convention on Human Rights adopted, human rights should be protected in domestic law. So, For people to utilize assurances that international documents provide, firstly, they need to use up domestic law ways.

European Court of Human Right presented that protection mechanism formed by the Convention is a substitute protection mechanism for human rights to be protected by national systems and task of inspection makes the Court show attention to principles defining "a democratic society."

Individual right and freedom is one of the most crucial values of manhood and forms the base of all freedoms; moreover, it has a feature providing all other freedoms to get used. Right of freedom, as a classical definition, means physical freedom of a person(individual freedom). Right of freedom aims at undepriving of freedom of the person arbitrarily. So as to protect the person against arbitrary attacks on this juridical value, many rules have been put in national/international conventions. Therefore, judicial sentences related to protection and providing of individual freedom take parts in firstly in all human rights declarations and conventions and later in constitution.

On the subject of conventions in Turkish law, there are two main rules both in 1961 and 1982 constitutions. These rules are *1.) "International pacts have a force of*

law" and 2.) It is unpronouncable that international pacts are at odds with Constitution."

As it is clearly understood from 90th Article in Constitute recognizing international pacts that were put into force in order as law enforcement, pacts are at code degree and these direclty adjudge in Turkish law order. It's seen there's communion about this affair. But, in teaching and implementation, there's another problem which is a rule saying "nobody can take legal action to Constitutional Court about that pacts are at odds with Constitution." This rule is important in terms of pacts' being in domestic law. According to a view in teaching, while this rule doesn't affect the view saying pacts are equal to codes, pacts are above the law according to another view.

On the other hand, in 90/5 clause in 1982 Constitute, the sentence saying sentences of international pacts will be predicated was included in case of any incompatibility because interlational pacts related to basic right and freedom put into action in order and laws have different sentences in same subject. Therefore, a hierarchical value related to basic rights and freedoms was put in international pacts. For example, in case of a conflict between the rules of European Convention on Human Rights(ECHR) and national law rules, the judge needs to prioritize the rules of Convention and to interpret national rules according to Convention again.

In the international arena, besides European Convention on Human Rights(ECHR) caunted as a law by Constitution, individual right and freedom is put under protection by 19th clause in 1982 Constitution that brings a paralel moderation to 5th clause of Convention. Under which conditions could individual freedom taken granted by Constitution be limited is shown in different codes such as Code of Criminal Procedure, Law of Police Powers, Martial Law, Jurisdiction Procedures Law.

According to High Court(Chancery), *"individual right and freedom" and "private life of person, privacy of family life, immunity of domicile"* put under

protection by ECHR, constitutes and laws are among the basic principles of human rights that are seen as indispensable parts of law order.

In 5th sentence of ECHR, the situations when human freedom can be challenged and its provisions are shown limitingly and it is tried to prevent people's depriving of their freedoms arbitrarily. In order to limit individual freedom, firstly, the action should conform with law. Secondly, Convention has shown the deprival conditions in (a) and (f) subclauses of sentence 5/1 limitingly; no freedom of an individual can be restricted apart from these. It's needed that reasons of this freedom restriction should be interpreted as the benefit for individual himself. Thirdly, the person whose freedom is restricted should benefit from opportunities shown in 5th sentence.

When decisions of European Court of Human Rights are analyzed, it's seen that claim of violation of 5th sentence of Convention is brought forward in individual applications and applicants generally win against the court. 1982 Constitute, although it seems that ECHR adopted the 5th sentence that set human security and freedom, it's seen whether legal regulation is conforms with the precedents of the court when decisions of European Court of Human Rights about violation of 5th sentence by Turkey is analyzed.

CHAPTER 1: INDIVIDUAL RIGHTS AND FREEDOMS

1.1. CONCEPT of INDIVIDUAL RIGHT AND FREEDOM

1.1.1. The Concept of Right and its Definition

The term rights has several meanings.One meaning is "the power or privilege"to which one is justly entitled, "with such examples as property rights, minearl rights, stockholder rights, and film rights.But none of the four examples appears central to what is meant by human rights , and the phrases "power or privilege "and "justly entitled"suggest that a right is acquired by special means rather than possessed from birth by all persons regardless of face, color, creed, gender, and the like.[1]

Lexical meaning of "right" is earning that justice and law provide and give to person. [2] That is, right is a thing belongs to someone and is witholds to him. On the other hand, right in law is an opportunity saved or provided for someone. [3]

The concept of right is defined in many forms in teaching. One side uses "right" as trueness, authority that god and law bestow somebody. [4] Another side agrees "right" as a part of juridical relationship. According to this side, "right" forms the core of juridical relationship. [5]

The word "right" has two main moral and ethic meaning in English –and in all other equal languages- : trueness and authority. In first, it concerns that something is

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[1] Hass, Michael.**İnternational Human Rights A Comprehensive İntroduction**, Oxon Printing, Newyork 2008, p.3.

[2] Yürük, A.Tülin ve Selvi, Kıymet. **İnsan Hakları ve Kamu Özgürlükleri,** Anadolu Üniversitesi Yayını, Eskişehir, 2005, p.8.

[3] Altunkaya, Niyazi. **Citizenship Information for Education Faculties**, Nobel Publication Distribution, Ankara 2003, p.51.

[4] Korkusuz, M. Refik. Basic Rights and Freedoms in Turkish Constitution and International Documents, Özrenk Printing, İstanbul 1998, p.7.

[5] Güriz, Adnan. **Start of Law,** 2.Edition, AÜHF Publication, Ankara 1987, p.44.

true(right) and about a true(right) activity. In second one, it is mentioned that a person has a right. [6]

Rights are freedoms whose borders, areas and usages are expressed and defined by law. There exist many opinions and definitions identifying the concept of right. According to theory of will, right is a power of will provided to people by law order and whether people's using of this power is up to them.

According to hedonistic principle, rights are profits protected by law order. On the other hand, according to another view combining these two sides that depend on will and profit and called as mixed theory, rights are profits protected by law order and whether individual's using it is up to him. [7] According to that, on one hand, right is expressing the profit protected and provided to people by it, on the other hand, it gives the authority of using it to the individual.

Rights can change according to time and society. A right in a society could be removed from constitution by laws or a juridical situation that is not a right could be adopted as a right by laws or constitutions. [8]

There are three different theories related to right in Western Law Systems. According to first theory, right is a executive authority provided by law order. In other words, right is the effect of will on another. According to this theory affected by natural law and 19 century-philosophy, right is defined as domination of will or potency and it is presented the source of that is provided to people by present law order. [9] According to second theory, right is profit recognized by present law. Profit has been used in terms of both earthy and spiritual; and recognizing of this profit stands at the centre of theory. [10] Third theory is combined by concepts in both theories. This theory expresses the

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[6] Donnelly, Jack. **Universal Human Rights in Practice and Theory**, (Translators: Mustafa Erdoğan and Levent Korkut), Yetkin Publication, Ankara 1995, p.19.
[7] Bilge, Necip. **Hukuk Başlangıcı, Hukukun Temel Kavramları**, TurhanYayınevi**,** Ankara 1992, p.28.
[8] Çeçen, Anıl. **İnsan Hakları**, Gündoğan Yayınları, İstanbul 2000, p.12.
[9] Donnelly, 1995, p.19.
[10] Kapani, Münci. **Kamu Hürriyetleri**, 7.Edition, Yetkin Yayınları, Ankara 1993, p.14.

meaning of right and sees presenting of only will or only profit as insufficient. According to it, right is a power of will provided to person to protect the profit he has. [11]

Rights are seperated into two as "private rights" and "public rights." Private rights are ones coming from private law and everybody can benefit from. In order to take advantage of private rights, there's no need to be citizen. They ar efor everybody. On the other hand, public laws are ones that the state provide to its citizens. Only the citizens who have specific qualities can benefit from them. The differences between private and public rights can be presented as: [12]

a) Across the one having private right, there's an obligor as a rule. If right holder wants, the obligor has to obey that. On the other hand, there is not always an obligor forced by law across public rights. The obligor of public rights is sometimes the state itself. The responsibilites of the states are limited to the opportunities it has.

b) With regard to benefitting from private rights, no discrimination between people is made. On the other hand, in benefitting from public rights, there may not be always accurate equality. Public rights are subjected to a number of registration and terms according to level of education and age.

c) Not only citizens but also foreigns can benefit from private rights. But, some parts of public rights are special to only citizens.

It is seen that there's a too sensible relationship between right and loan or homework in public life-especially in law order-. The right provided to specific individual by law order poses juridical responsibility(loan or homework) for another one. Human's having a right means for others to have it, as well. In a society that accepts human rights, no discrimination between people in terms of rights is seen. So

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[11] Bilge, Necip. **Hukuk Başlangıcı, Hukukun Temel Kavramları**, 12.Edition, Turhan Bookstore, Ankara 1997, p.174.

[12] Kepenekçi, Yasemin Kahraman. **Eğitimciler için İnsan Hakları ve Vatandaşlık Bilgisi**, Ekinoks Yayınevi, Ankara 2008, p.35-36.

then, every right brings a homework with itself. This homework is that others should respect same right. In societies in which everybody has right but none of them has the homework, anarchy will be dominant instead of mutual rights and respect.

In addition to concept of right, it can be said that concept of protection of person and personality has the statute of being dominant over basic rights an deven over all constitutional order. Basic rights part and other rules of constitution is in an approach "centering human" (anthropocentrique). Approach of our constitution about protecting our rights is being criticized because it prioritizes protection of state. Main feature of a constitution is directly proportional with protection of human. Protecting human rights should have control over whole constitution. Protecting human rights lives in protecion of human right's pocket. There are basic rules about this subject(CO. cl. 36-40) and core of the protection is hidden inside human rights' "immunity", inalienability" and "indispensability" features. [13]

1.1.2. The Concept of Freedom and its Definition

Lexical meaning of freedom is thinking or behaving without depending on any condition. [14] Freedom in law is having a free hand without giving harm to anybody. [15]

There's no definition of freedom in common point. Reason of this is because freedom is abstract, subjective and sophisticated. The saying "the world hasn't reached any accurate definition of freedom yet" by Abraham Lincoln still survives today. [16]

Those who are interested in concept of freedom has interpreted and defined it differently. Some authors associate freedom with prism that seperates light into colours. Just as everybody looking at this prism says they see different colours, those looking at concept of freedom also say they see different things. While some philosophers saw

[13] Akıllıoğlu, Tekin. **İnsan Hakları, Kavram, Kaynaklar ve Koruma Sistemleri**, AÜSBF İnsan Hakları Merkezi Yayınevi, Ankara 1995, p.37.
[14] Yürük, T. ve Selvi, K. **İnsan Hakları ve Kamu Özgürlükleri,** Anadolu Üniversitesi Yayını, Eskişehir, 2005, p.8.
[15] Altunkaya, 2003, p.51.
[16] Kaptani, Münci. **Kamu Hürriyetleri**, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1981, p.4.

freedom as independence, some define it as being the captain of his soul without any external obligation. Furthermore, according to some, freedom is reflecting a feature, a privacy and it is individual's living in his own little world without any interference. Also, some see freedom as behaving free because he is the manhood itself. [17]

Freedom is defined as behaviors the law doesn't forbid. Laws should be contented with showing people what they can't do, not what they can. Individuals should determine what they can do. So, this is the freedom, area of freedom. [18]

As mentioned in the book, "Civilized Information for Citizen, " by Afet Inan and Recep Peker who received this order from Ataturk for teacher training highschool students, freedom is defined as: "Freedom is doing what individual himself assumes. This definition is the broadest meaning of freedom. People have never had this kind of freedom and they cannot. Because, as it is known, human is the creature of nature. Even nature itself is not free completely; it bounds to rule of universe. So, human bounds to rules, terms, reasons and determinants of the nature. The base view of human rights was formed like that: Origin of every kind of right is individual. Because, it is the individual who is free and responsible in reality." [19]

There can't be any limitless freedom in any country in any time. Limitation of freedom in democratic countries is done with "legislation" by "legislative power." [20]

To mention freedom in real terms, firstly, individual needs to want to behave and not to worry about the results of his behaviour. It is only possible for individual freedoms to mean something in that way. But, the biggest obstacle in front of using freedoms is "individual's feeling himself under pressure."

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[17] Koçoğlu, Erol. "İnsan Hakları ve Demokrasi Kavramlarının İlköğretim Sosyal Bilgiler Müfredatındaki Yeri", **Yayınlanmamış Yüksek Lisans Tezi** 08, p.30.
[18] Gülmez, Mesut. **İnsan Hakları ve Demokrasi Eğitimi: Egemenlik İnsanındır**, TODAİE Yayınları, Ankara 2001, p.7-8.
[19] Ozankaya, Özer. **Cumhuriyet Çınarı**, Ordem Reklam Yayınları, Ankara 1999, p.5-7.
[20] Kepenekçi, 2008, p.40-41.

1.1.3. The Definition and Concept of Individual Right and Freedom

Concept of individual right means the individual knows that the right is special and bound to him and he has rights and freedoms inborn and the state cannot touch these rights because these rights are ones that are bases of the state and moreover state has the responsibility of protecting these rights and freedoms and cannot touch them for any excuse. [21] The rights and liberties put under protection by Constitution and legislations are called as basic rights and freedoms.[22]

In doctrine, "individual rights" called also as "protection rights" forms the first part of human rights in positive law. Protection rights are based on "protection of personality." This principle is also main goal of system of basic rights. In Constitution(cl.17-23), if "individual rights" are arranged in different legislations, they may seperate into 4 main areas: "individual freedom"(cl. 17-23), "intellectual freedom" (cl.24-34), "ownership rights" (cl. 35) and "protection of rights" (cl. 36-40). All these rules are inside of moral and material existence of individual, shortly as personality. [23]

To have personal rights and freedoms, the personality should be gained within rules law order suppose. In our law system, personality starts with alive born (Turkish Civil Code, cl.28/1). So, every individual who had alive and complete born can be the subject of personal rights and freedoms.

In our Constitution, rights called under "rights of the person" title consist of individual freedom assurances considered as "untouchable area."

We also need to add the rights that we are a party to anda re acknowledged by ECHR. In historical development, these rights firstly pop up. In these rights, natural law preponterates. Axis of these rights are individuals. Individual rights and freedoms are the areas that should be protected by state. This protection is mainly thought "against

[21] Arsel, İlhan. **Anayasa Hukuku (Demokrasi)**, 2. Baskı, Sıralar Matbaası, İstanbul 1968, p.248.
[22] Altunkaya, 2003, p.52.
[23] Akıllıoğlu, 1995, p.36-37.

state" not against other individuals. So, these rights are also called as "protective, preventive rights." [24]

Among our Constitutions, the concept of basic rights and freedoms was given place firstly in 10th and 11th clauses of 1961 Constitution. [25] According to 10th clause of 1961 Constitution, "everybody has basic indispensable, untouchable, inalienable rights and liberties that are bound to himself." In 1982 Constitution, the concept of "basic rights and freedoms" was decided and was given place in 5th, 12th, 13th, 14th, 15th, 16th, 40th, 120th, 121th, 122nd and temporary 2nd clauses.

The features of basic rights and freedoms in Constitution of Turkis Republic are: [26]

"Article 12: Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.

The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his or her family, and other individuals

Article 13: Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.

Article 14: None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state

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[24] Akıllıoğlu, 1995, p.141.

[25] Vuraldoğan, Kemal. "2001 Anayasa Değişikliklerinin Işığında 1982 Anayasasında Temel Hak ve Özgürlüklerin Sınırlanması", **Yayınlanmamış Yüksek Lisans Tezi**, Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Ankara 2005, p.1.

[26] T.C. Anayasası, Kanunlar ve Kararlar Müdürlüğü, TBMM Basımevi, Ankara 2010, p.22-23.

with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law.

Article 15: In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, and the integrity of his or her material and spiritual entity shall be inviolable except where death occurs through lawful act of warfare; no one may be compelled to reveal his or her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment.

Article 16: The fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law".

Basic rights and freedoms in Constitution are seperated into three as individual rights and freedoms, social and economic rights and freedoms and political rights and freedoms.

Individual Rights and Freedoms: Individual rights ore ones state cannot go over and cannot touch. Personal rights are ones hiding some personal sides of individual, aiming to develop freely and preventing state to interfere this life area. Kişi hakları, kişinin devlet tarafından aşılamayacak ve dokunulamayacak, özel alanının sınırlarını çizen haklardır. Because these rights give state the homework of not to touch individual, they are also called as "negative status rights." Because they are for protecting individual especially against state they are also called as "protective rights." [27]

Individual rights and Freedoms in Counstitute are:[28]

1. Personal Immunity of Individual, His Moral and Material Presence
2. Prohibition of Forced Labor
3. Individual Freedom and SEcurity
4. Privacy of Private Life and its Protection
    a. Privacy of Private Life
    b. Immunity of Domicile
    c. Communication Freedom
5. Freedom of Residence and Travel
6. Freedom of Thought and Faith
7. Freedom of Thought and Expression
8. Freedom of Telling and Spreading of Thought
9. Freedom of Science and Art
10. Judicial Sentences related to Press and Release
    a. Freedom of Press
    b. Right of Periodic and Indefinite Broadcast
    c. Protection of Press Stuff
        d. Right of Benefitting from non-press Mass Media in Public Corporations

[27] Kepenekçi, 2008, p.47.
[28] T.C. Anayasası, 2010, p.23-37.

e. Right of Correction and Respond

11. Meeting Rights and Freedoms

a. Freedom of Form Association

b. Right of Meetings and Demonstrations

12. Proprietary Right

13. Juridical Sentences Related to Protection of Rights

a. Freedom of Legal Remedies

b. Assurance of Legal Judge

c. Principles Related to Crime and Penalty

14. Right of Proof

15. Protection of Basic Rights and Freedoms

Social and Economic Rights and Freedoms: They are defined by Kepenekci (2008) , n that way: they are the rights about social and economic activities. These rights give person the right to want to serve for himself. Shortly, as a neccesity of "social state", it makes person do a number of service. While state cannot touch person in individual rights, state has the homework of serving person. So, these rights are called as "positive status rights" or "demand rights" meaning demand for service from state. [29]

Social and Economic Rights and Freedom in Constitution are:[30]

1. Protection of Family and Child Rights

2. Right and Homework of Education and Teaching

3. Public Welfare

a. Coast Utilization

b. Landownership

c. Security of people working in agriculture, stockbreeding and such places

d. Sequestration

[29] Kepenekçi, 2008, p.48.

[30] T.C. Anayasası, Kanunlar ve Kararlar Müdürlüğü, TBMM Basımevi, 2010, p.38-48.

e. Nationalization and Privatization

4. Freedom of Working and Contract
5. Sentences related to working
    a. Right and Homework of working
    b. Working terms and Right of Resting
    c. Right of Founding Syndicate
    d. Trade Union Movement
6. Collective Agreement, Right of Strike and Lockout
    a. Collective Agreement and ve Collective Bargaining
    b. Right of Strike and Lockout
7. Providing Justice in Price
8. Health, Environment and Domicile
    a. Health Assistance and Protection of Environment
    b. Right to Housing
9. Youth and Sports
    a. Protection of Youth
    b. Development of Sports
10. Right of Social Security
    a. Right of Social Security
    b. Things that should be specially protected in terms of Social Security
    c. Turkish Citizens working Abroad
11. Protection of Historical, Cultural and Natural Existences
12. Protection of Art and Artist
13. Limitations of State's Social and Economic Homeworks

Political Rights and Freedoms: Political rights are defined by Kepenekci (2008) in that way: They are the rights providing individual to take part in state

government. So these rights are called as “active status rights” or “codetermination rights.” Cotedermination of individual in state government happens in different ways. [31]

Political rights and Freedoms in Constitution are:[32]

1. Turkish Citizenship
2. Right to Elect, to be elected
3. Sentences related to Political Parties
    a. Founding Party, Joining and Leaving Parties
    b. Rules Political Parties will Obey
4. Right to enter Public Service
    a. Entering Service
    b. Declaration of Property
5. National Service
6. Tax Homework
7. Right to Petition, to Get Information

1.2. HISTORICAL DEVELOPMENT OF INDIVIDUAL RIGHTS AND FREEDOMS IN WESTERN WORLD

Revealing of basic idea that individual has inborn rights and freedoms provided by state systematically dates back 18th century. [33]

Born and development of individual rights and freedoms happened in different times and different places. We will try to analyze historical development of this right in England, America and France with regard to its importance.

1.2.1. England

Many of the public lawyers present England as the country where political government was attached to freedom and realized freedom’s ruling the state. [34] Long

[31] Kepenekçi, 2008, p.47.
[32] T.C. Anayasası, 2010, p.49-55.
[33] Kapani, M. **Kamu Hürriyetleri**, 7.Baskı, Yetkin Yayınları., İstanbul 1982, p.30.

before individual rights pop up in minds as an idea or a doctrine, it found its way in practical area in England. English made the considerable step with Magna Carta Libertatum that they pushed their king, John, to pass in 1215 with regard to protection of individual rights. [35]

The concept of freedom has a history dating back to Magna Carta Libertatum (1215) in England. This big liberty rescript having 63 articles was protecting security of English society and regulating taxing. [36]

Although it is seen as a document restricting authority of the king to raise tax and so on, it is not wrong to say it is the first document about individual freedoms and security. In addition to assuring security of life and property, they couldn't be touched without ruling of the court, consequently, no arresting, exile or confiscation of property could be done without the ruling of the court again. [37]

According to Magna Carta document, individual couldn't be arrested, killed, exiled or so on without a judgement given by natural judge

The most important historical document about individual security is "Habeas Corpus Act(1679)." This document meaning "have a body" in Latin is named as "English Liberties Avenue" and some principles such as bringing criminal to trial in a short time, letting his/her neighboring, giving his/her right to want a review his/her condition whether it is true or not. [38]

This document put rights of English citizens under assurance and affected not only England but also other world nations, and, regulations involving precautions such as roundup and arrest were called as "Habeas Corpus Principles" [39]

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[34] Kuzu, Burhan. **Ülkemizde Kişi Özgürlüğü ve Güvenliği**, İstanbul 1997, p.22.
[35] Kapani, 1982, p.41.
[36] Kuzu, 1997, p.22.
[37] Seyithan Güneş, **Teori ve Uygulamada Kişi Özgürlüğü ve Güvencesi**, Kazancı Yayınları , İstanbul 1998, p.16.
[38] Kuzu, 1997, p.24.
[39] Kuzu, 1997, p.26.

Following "Habeas Corpus Principles", "Bill Of Rights" was accepted in 1689 in England. This document did not bring considerable regulation related to individual security; but, stressed that amount of pecuniary guaranty for releasing the apprehended should not be exaggerated. [40]

1.2.2. America

The first document individual rights and freedoms involving in is 16-article "Bill Of Rights" added in Virginia Constitution under date of 12 June 1976 in America. [41]

After declaration, in 4 July 1776, freedom pronouncement was indited. In this pronouncement, base of right and freedoms were expressed. [42]

In 9th section of 1st article of USA Constitution under date of 17 September 1787, we see this statement supporting individual security:

> *"In insurrection and attack situations, privileges provided by 'Habeas Corpus' cannot be suspended without public security. No legislation sentencing one to death can be made.*

This shows that, in 17th century, English people moving to America brought Corpus with them. [43] And American courts adopted and implemented Habeas Corpus strictly. Habeas Corpus put down its roots so much that a high court, during a civil war in USA, did not allow regulations that are against Habeas Corpus despite the legislation having the authority of arrest people who helped insurrection. In such a place, the high court presented that president, army and congress had no right to remove Habeas Corpus rule, judiciary courts were in charge in criminal suits, military positions could not be authorities and could not give any arrest warrant or they would rebel Republic and it released all the prisoners by finding arrest warrant as undue despite judiciary

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[40] Güneş, 1998, p.22.
[41] Janko Musulin, **Hürriyet Bildirgeleri Magna Carta'dan Avrupa İnsan Hakları Sözleşmesine**, (Çev. Necmi Zeka), Belge Yayınları, İstanbul 1983, p.75.
[42] Güneş, 1998, p.27.
[43] Şahbaz, İbrahim. **Anayasada Kişi Özgürlüğü ve Güvenliği**, Ankara 1994, p.28.

sentence saying military positions had authority to arrest in insurrection situations by American government. In this decision that created reactions in public, the following statements are really important in terms of individual freedom and security:

> *"For a long time, while violating human rights, tyrants used real or imaginary threat as an excuse against public welfare. But, today, such an excuse has no value at all. Constitutional rights provided to accused are basic rights even if there are right worries with regard to military invasion. Even for us to allow them to be postponed, there must be factors that would getting these rights accepted about the conflict with public security."*

As it's seen, in terms of individual freedom and security in America, Habeas Corpus has an crucial place. [44]

1.2.3. France

When history of human rights and freedoms is mentioned, one of the first things to come to mind is French "Declaration of Rights of Man and Citizen." Declaration is abstract in terms of covering and optimistic in terms of faith it depends on. It is universal because it expresses the rights of French people in 1789 and gives importance people of other countries. It is abstract because it presents only principles and doesn't give any information about how to implement them. It is optimistic because it exposes that forgetting human rights because it's the only reason of evil means disrespect. [45]

In 4th article of the Declaration, freedom is defined as doing everything that doesn't harm anybody. Moreover, in 5th article the following sentence was put;

> *"A legislation can only forbid that is harmful for society. Nothing that legislations do not forbid cannot be touched; nobody can be forced to do something that a legislation requires."*

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[44] Kuzu, 1997, p.30.
[45] Akın, İlhan. **Kamu Hukuku** İstanbul 1990, p.294.

As a conclusion, when we evaluate English, American and French human rights declarations with the result of their cores, Magna Carta Libertatum is the first to be accepted in 1215 in England with regard to one's not being arrested arbitrarily. Yet, the first declaration regulating individual right and security comprehensively is "Habeas Corpus Act" accepted in 1679 in England. Thanks to French Declaration of Rights of Man and Citizen, individual freedom and security acquired international qualification.

1.3. HISTORICAL DEVELOPMENT IF INDIVIDUAL RIGHTS AND FREEDOMS IN TURKEY

1.3.1. Pre-Republican Periond

To explain historical development and born of human rights and freedoms in Ottoman Empire, we need to present the status of these concepts in Islamic notion. But, such a struggle exceeds our subject. But, it must be known that one of the biggest rights religion rules provide is "the right of personal security." Islamic religion always gives importance to human rights and freedoms, sees people as equal in terms of language, sex, colour, status, richness, nobleness, sees violating of a right and law of a man as "sin" and stresses that if that sin is not forgiven by the man himself, Allah will also not forgive it at all. This religion gives much importance to right of living and sees killing a man unjustly equal to killing the whole manhood. Islamic religion suggested releasing of slaves so it wants man to be free, liberal. It also gives importance to concept of justice and calls state to be fair to society by forbidding unjustice. [46] According to Islam, arresting somebody artbitrarily, taking him under custody or imprisoning him is a "sin" again and the martyr will take his right from one who has violated the rights.

In Ottoman period, first move in terms of western Human Rights is Sened-i Ittifak(1808). With this document that had no time to be implemented, some limitations

[46] Kuzu, 1997, p.55.

were brought to authority of Sultan. But, in this document, no regulation related to human freedom and security can be seen. [47]

First document to talk about human freedom and security is Gülhane Hattı Humayunu(Tanzimat Fermanı) under the date of 1839 in Ottomans. According to this document, a regulation about those who behaved against the laws would be punished without looking his/her status, sake and feelings was anticipated and it was regulated that nobody would be punished without a decision done in a open court by a judge. [48] This document is sometimes called as first "Declaration of Rights" of Turks by some writers. But this declaration is so non-comprehensive about innovations it brought in terms of individual freedom and security when compared to examples in America and Europe. [49]

After this document, no sufficient social, political and juridical innovations was realized and status of non-muslims were not regulated as western countries wanted to be. As a result of these excuses, in 1856, "Declaration of Reform" was announced. With this declaration, rights of non-muslims were enhanced and it was anticipated that courts of muslims and non-muslims would be done in mixed courts and nobody would be tortured arbitrarily. [50] Declaration of Reform showed a base against western countries and continious interferences of Russia and this document was called as "National Freedom Declaration" of christian nations. [51]

It brought insufficient regulations with regard to individual freedom and security, but it has the value in that it is the period when first seeds of principles of our modern law was planted.

Our 1876 dated Constitution (Kanun-i Esasi) has a qualification of offer and "Declarative Constitution" born from one sided operations of Sultan in terms of its

[47] Güneş, 1998, p.33.
[48] Kapani, 1982, p.94.
[49] Kuzu, 1997, p.57.
[50] Kapani, 1982, p.100.
[51] Tanör, Bülent. **Osmanlı-Türk Anayasal Gelişmeleri**, İstanbul 1992, p.73.

juridical angle. Because it wasn't regulated and broughy to referandum by a parliamentary or assembly that represented to the society. [52]

In this Constitute, individual rights and freedoms was ordered between 8th-26th articles acceptable with classical principles and turned into similar forms of western examples. But in this constitution, individual rights and freedoms was not bounded to any assurance, thereby, the first qualification of this constitute became insecurity and lack of sanction. [53]

In 1876 Constitution, we face with following regulations related to individual freedom and security: Everybody has individual freedom and nobody can violate this right (art.9); individual freedom can only touched in a way a legislation determines and a punishment can only be given according to it(art.10); everybody is equal in front of law (art.17); nobody can be forced to go another court from the court which the legislation has determined (art.23) and any torment or cruelty is certainly forbidden (art.26)

Some of the insufficiencies related to individual freedom and security was tried to be removed by 1909 Constitution. With the regulations and changes, authorization of Sultan to exile was removed and individual freedom and security was strenghtened by changing 10th article subject to individual security saying "one having freedom is out of any aggression. Nobody can be arrested or punished arbitrarily without law determines."In this sentence, individual freedom and security became much stronger by putting the word "arrest." [54] Even if changes done in Kanun-i Esasi after II.Constitutionalism announced in 1908 enhanced individual freedom and security a bit, it was not sufficient.

Struggle for founding a new Turkish State instead of Ottoman Empire broke down in I.World War started and Ataturk started and kept National Independence War

[52] Güneş, 1998, p.39.
[53] Kapani, 1982, p.103.
[54] Kuzu, 1997, p.61.

with “National Dominance.” 1921 Constitution (Constitution) declared in these troubled days of the country was quite short and deficient. It did not give any place to regulations related to rights and freedoms and section of judgement. [55] 1921 Constitution did not abated Kanun-i Esasi(1876), thus Turkish Parliament sometimes ascribed 1876 Constitution. But, both these Constitutions was legislated away by 1924 Constitute. [56]

1.3.2. Post-Republican Period

1.3.2.1. 1924 Constitution

In preparation of 1924 Constitution, effects of French Revolution are seen. [57] In this constitution, some regulations related to individual freedom are available. For instance, articles of individual immunity (art.70); life’s, property’s and chasity’s being away of any aggression (art.71); no one’s being arrested and sued without situations law determines (art.72), any torment’s being forbidden (art.73) are regulated. But these insufficient sentences could not be implemented well and in 1924 Constitution individual freedom was not bounded to any assurance. That is, Habeas Corpus assurances are not seen in 1924 Constitution. [58]

1.3.2.2. 1961 Constitution

Until 1961 Constitution there were different regulations about individual freedom, and individual freedom in terms of Habeas Corpus was enhanced with 1961 Constitution. According to 1924 Constitution, 1961 Constitution which is so advanced with regard do basic rights and freedoms was mainly affected by European Convention on Human Rights and especially by documents regulated in United Nations and European Congress. [59]

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[55] Kuzu, 1997, p.62.
[56] Kuzu, 1997, p.63.
[57] Kapani, 1982, p.109.
[58] Rona Aybay, **Avrupa İnsan Hakları Sözleşmesi ve Türk Pozitif Hukuku**, İnsan Hakları Armağanı 30.Yıl, Ankara 1978, p.124.
[59] Ergun Özbudun, **Türk Anayasa Hukuku**, 5.Edition, Yetkin Yayınları, Ankara 1998, p.21-22.

In 11th article of 1961 Constitution, it was regulated that basic rights and freedoms was only limited conforming with the words and soul of Constitution. Moreover, second clause of same article says “core of a right or a freedom cannto be touch even if it’s fort he sake of law, main moral, public order, social justice and national security.”

In 2nd article of 1961 Constitution, it shows its giving importance to human rights by saying “State Depending Upon Human Rights.” 1982 Constitution, on the other hand, says “State Respecting Upon Human Rights.”

Law of individual freedom was regulated in 14th and 30th articles of 1961 Constitution. In 14th article titled as individual immunity, it says that everybody has right to live and develop his/her moral and material life, personal immunity and freedom cannot be proven without any legal decision by the court, nobody can be tortured, no punishment incompatible with human virtue can be given.

Furthermore, in 30th article titled as “individual security” among sentences related to protection of basic rights in 1961 Constitution, people whose crimes are so evident can only be arrested by the decision of judge, arrestment progress can only be performed suitable with specified ways and cought and arrested people is instantly notified about reasons in written. Also, period to come to the court for cought and arrested people was announced as 24 hour and it was anticipated that when they come in front of court, their neighbouring was instantly notified about their situations and the state itself pays for in case any encroachment. Liberialistic base of 1961 Constitution harmonical with ECHR was deteriorated by changes in 1971 and 1973. 24-hour custody period and collective crime was enhanced to 48 hours and 7 days by 1971 change; and enhanced to 15 days by 1975 change. However, ECHR interiorized that individual had to be brought to court within 24 hours. And because of Turkey’s regulation which is against this declaration, it was beaten in many trials.

1961 Constitution anticipated two situations as reason to arrest: person's escaping who has many evidence proving he's guilty and their being arrested to prevent removing or changing out the evidences

But, the sentence saying *"or in such situations causing them to be arrested and in other situations commanded by a law"* cannot be interpreted as creating an opportunity to arrest as numereus excuses by the judge: that illuminated the judge. We need to understand situations resembling to two reasons to arrest anticipated by Constitution. [60]

1.3.2.3. 1982 Constitution

Detailed information related to individual rights and freedoms in 1982 Constitution is in third section of the study.

1.4. REGULATION OF INDIVIDUAL RIGHTS AND FREEDOMS IN INTERNATIONAL LAW

1.4.1. Universal Declaration of Human Rights (UDHR)

Universal Declaration of Human Rights was announced in 10 December 1948 by Council of United Nations. In the declaration, in addition to possible rights and freedoms, some sentences that can be thought as platonic today took place in. But we need to say that this document has no qualification to restrict in terms of law and doesn't give any juridical responsibility to countries. [61] In third article of declaration, it is expressed that living, freedom and individual freedom are the rights of every individual, in 9th article, it says that nobody can be arrested or exiled arbitrarily[62]

On the other hand, with the "International Declaration Related to Personal and Political Rights"accepted in 16 December 1966 but enforced in 1976, a control

[60] Faruk Erdem, **Ceza Usulü Hukuku**, 2.Edition, Ankara 1968, p.403.
[61] Münci Kapani, **Kamu Hürriyetleri**, Ankara 1993, s.62-64.
[62] Nur Centel, **Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama**, İstanbul 1992, s.13.

mechanism was formed and opportunity for individuals to applythere in addition to states. However, controls were being done restrictedly and it had no binding. [63]

In 9th article of International Declaration Related to Civil and Political Rights enforced in 1967, it says every individual has right to be free and secure, nobody will be in threat to be arrested and to be under custody arbitrarily, nobody will be deprived of his/her freedom without the decisions of law. [64]

1.4.2. European Convention on Human Rights (ECHR)

We must say that the full name of the ECHR is the Convention for the Protection of Human Rights and Fundamental Freedoms however the convention is commonly mentioned as ECHR including official documents. ECHR differs with its many aspects from other human rights documents. To begin with ECHR is a convention, which provides international mechanism for the protection of human rights. In other words, human rights gained its status as 'rights' through this convention for the first time.[65]

ECHR has a special status in terms of both its extent and protection mechanism that it brings is Turkey's being one side of the convention. It was signed in 1950 and enforced in 3 September 1953. Turkey accepted ECHR in 18 May 1954.

The most important feature of ECHR shows itself in control mechanism for protecting the rights it brings.ECHR has another important place not only for being a catalogue of political and civil rights and freedoms but also for forming the first document with regard to human rights in international arena.

Countries being sides of the convention enters into obligation to pay compensation according to decisions of the court and to make essential changes in national statute by accepting savings of national bodies' being inspected by a supranational court.

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[63] Kapani, 1993, s.66.
[64] Centel, 1992, s.13.
[65] Çağıran, M.Emin, **Uluslararası Alanda İnsan Hakları,** Platin Yayınları, Ankara 2006, s.190.

Two bodies were anticipated for protecting ECHR as a protection and sanction mechanism. In In Old 19th article of the convention, it says:

> *"With the intention of obedience to commitments originated to High Agreement Sides of this Convention: a) European Commission of Human Rights called as Commission below b) European Council of Human rights called as Council below were founded"*

Committee of Ministers which was a decision and executive body of Europe Council used to join this activity executed by these two Convention bodies. [66] European Commission on human rights is an investigation organ that will firstly investigate complaints about violated rights about Convention. It made Strasbourg inspection mechanism single-organ by gathering no.11 Additional Protocol, Committee and Council. According to 19th article of Convention: a "European Court on Human Rights" that will be called as "Court" has been formed in order to provide orientation to sentences accepted by sides in these Convention and its Protocols. [67] European Court on Human Rights consists of judges as many as countries that are members of European Council and is a juridical body resolving ruptures. Committee of Ministers (CM) is a political decision organ and consists of foreign affairs ministers of countries that are members of European Council. [68] In this mechanism, the most important organ in terms of our area of study is European Court on Human Rights. Its status in our country's administrative procedure system will be mentioned later on.

The first text of Convention takes only "civil and his/her political rights" under assurance. These are right to live (art.2), prohibition of torture (art.3), punishment of slavery and forced labor (art.4), individual freedom and security (art. 5), right of fair judgement (art.6), legality of crimes and their penalties (art.7), right to respect of private life and family lif e(art.8), freedom of thought, religion and conscience (art.10), right to

[66] Gölcüklü ve Gözübüyük, 2002, p.24.
[67] Gölcüklü ve Gözübüyük, 2002, p.26.
[68] Kapani, Münci. **Kamu Hürriyetleri**, 7.Edition, Yetkin Yayınları, Ankara 1993, p.71.

congregate (art.11), right to get married and create family (art 12), right to legal remedies (art.13) , prohibition of discrimination (art.14).

With Additional Protocols accepted later, extension of rights taken under assurance was broadened or clauses related to protection mechanism were brought.

Later, no.14 Protocol was included in European Court on Human Rights in 13.05.2004. In this sense, European Court on Human Rights consists of 14 Additional Protocols with main convention. Additional Protocols also had also important changes interms of Convention. For example, no.6 Additional Protocol dated under 1985 is about removing death penalty. [69]

In 90/4th article of our Constitution, it says:

"International pacts enforced in its order have the force of law."

Because our country is a side of this convention, articles of the agreement have the force of law in terms of our law system. Rights and Freedoms taken part in European Court on Human Rights are the ones a democratic state of law should have.

Furthermore, it would be beter to indicate the Convention (European Convention of Human Rights Additional Protocols) related to Protection of Human Rights and Freedoms. Because, some rights regulated for human rights that are not in the convention were regulated by these convention clauses. Turkey signed convention with prejudice saying "2nd article of European Convention of Human Rights Additional Protocols does not violate the clauses of no.430 Law of Unification on Education (3 March 1924)" Then, Additional Protocol accepted by no.6366 Law, became a part of our statute by enforcing in National Newspaper. With this protocol, three new right categories as proprietary, education and free election rights were born.

[69] Erdoğan, Mustafa. **Anayasal Demokrasi**, 3.Edition, Siyasal Yayınevi, Ankara 1996, p.192.

1.4.3. Regulations on Human Rights in European Union

Terms mentioned in conventions such as UN Universal Declaration of Human Rights, UN International Convention on Civil and Political Rights, UN International Convention on Economic, Sociocultural Rights, European Convention of Human Rights and Organization for Security and Cooperation in Europe (OSCE) are the characteristics of EU's approachto human rights.

After EC completed economic integration, it swerved to political integration. The term, community law is dominant on internal law of member countries, was decided by Community Court. Deficiencies in Community law related to basic rights and freedoms interrupted the dominance of Community law and caused German and Italian Courts' tendencies about this affair. Community gives importance to principle of Community law's superiority after forming law of juridical rights and freedoms.

The Court of Justice sees respect to basic rights and freedoms as indispensable obligation for legality of community laws. The definition and source of basic rights and freedoms depend on traditional constitutions of member countries and international pacts that they are side of. [70]

With regard to protection of human rights, during the period until single european act, there were many struggles and enterprises of Community bodies. These efforts and enterprises formed a bas efor this affair to take part in Single European Act. 90s became a beginning of a new era for human rights.

Withing the scope of Conference for Security and Cooperation in Europe, "Paris Clause" signedby presidents of member countries in November, 1990 clearly declared that. With "Maastricht Pact", sentences of superiority of human rights and democracy as prinicples of EU's base were announced and both membership to EU and relationship between EU was bounded to term, respect to human rights. Maastricht Pact having an

[70] Özcan, Mehmet, Ercüment Tezcan and Özlem Yonar, "Avrupa Birliği'nde İnsan Haklarının Gelişimi", **Avrupa Birliği Ortak Politikaları ve Türkiye** (inside), Yayınları, İstanbul 2003, p.396.

important place in periodic revision brought a number of developments with itself. Treaty of Amsterdam signed in October 1997 and enforced in 1 May 1999 blazed a trail and announced that countries violating human rights would be imposed by a number of sanctions. Treaty of Nice signed in 26 Fevruary 2011 brought a preventation procedure in this sense. In Nice Zummit under the date of 7-11 December 2000, a text related to this affair was presented to Heads of Government or State. This text accepted by Summit but it was said that the subject will be handled in Inter-Governmental Conference held in 2004 for the text to be binding. Moreover, in Inter-Governmental Conference held in 2004, it was decided that "Basic Rights Act" in EU Constitution would not be in Conventions and the article related to basic rights regulated in a kind of way that it would specify implementation extension and would give qualification of being binding to Basic Rights Act. [71]

To touch in Basic Rights Act shortly, EU's struggle for pranking itself with catalogue of distinctive basic rights increased, in this sense, European Basic Rights Act brought out. Basic Rights Act became an common interenterprise text be after being signed by Council, Commission and European Parliament in 7 December 2000.

With Basic Rights Act, civil, social, political and economic rights were regulated. In Basic Rights Act, in addition to inviolableness of human virtue, right to live, immunity of body and soul of individual, punishment of torture and humiliating activities, punishment of forced labor and slavery, it is given place that death penalty will not be given and in freedom section, there are regulations such as right of freedom and security, respect to private life and family life, protection of personal information, right to get married, right of thought and religion, freedom of expression, freedom of information, freedom of congregate, freedom of possession, right of sanctuary, punishment of exile, off-limits and discharge, freedom of art and science, right of

[71] Özcan, Tezcan ve Yonar, 2003, p.396.

education, right of working. With Basic Rights Act, documents related to rights and freedoms were gathered in one document. [72]

Finally, II. Title section of European Union Constitution which is thought to be accepted by all EU countries, Basic Rights Act is given place and it is stressed that Basic Rights Act has juridical binding. Moreover, the area of Court of Justice of European Communities(CJEC) to judge in was decided. Many rights and freedoms were announced in these areas. On the other hand, mutual bases of EU Constitution depends upon were stressed. When only these bases are taken into consideration, the approach of genius EU to human rights pops up. These bases are *"human virtue, freedom, democracy, euqality, state of law, rights of human, rights of minorities, community, justice, cooperation, punishment of discrimination, equality of woman and man."*

1.4.4. Other International Regulations

We are in favor of expressing main conventions and proclamations originating from United Nations related to some subjects about different sides of human rights under titles:[73]

- Convention related to Preventing and Punishing Genocide (12 January 1951)
- Convention related to Political Rights of Women (7 July 1954)
- Convention related to Removing Slavery (17 January 1957)
- Announcement of Child Rights (20 November 1959)
- Announcement of Decolonisation of Colonised Countries and Societies (14 December 1960)

[72] Özcan, Tezcan and Yonar, 2003, p.428.
[73] Kapani, 1993, p.73-74.

- Announcement of Removing every kind of Discrimination (20 November 1960)

- Announcement of Preventing Everybody from Torture and Humilitating Penalties and Activities (9 December 1975)

- Minimum Standard Rules of Behaviors to Prisoners (13 May 1977).

CHAPTER 2: EUROPEAN CONVENTION ON HUMAN RIGHTS AND INDIVIDUAL RIGHTS AND FREEDOMS IN FRAME OF EUROPEAN COURT OF HUMAN RIGHTS

2.1. THE GENERAL LOOK ON THE CONCEPT OF HUMAN RIGHTS AND THE HISTORICAL COURSE OF HUMAN RIGHTS CONVENTION

2.1.1. Concept Of Human Rights

It is important to understand how human rights have developed ideally and historically. This point of view would help us to understand, on the one hand, what sort of changes the notion of human rights in, and on the other hand, how human rights have got integrated into the sphere of political struggle as an independent phenomenon. Moreover, as studied in the further chapters of the first section, it would help us to have a better grasp on the process of how human rights have been constitutionalized, internationalized and globalized.[74]

Human rights , is an aspect of human's natural life, is a fact which exists with human so long as human exists.It is possible to link human's all activities from thinking to travelling, from special life to the relations with the other people with the human

[74] Karaosmanoglu, Fatih. **İnsan Hakları**, Seçkin Yayınları, Ankara 2011, s. 69.

rights.Human rights, is a concept which is put from the historical facts and beliefs more than a principle which is invented by a philosopher and scientist.Thus it is not an exaggaration to say that it is possible to describe it with respect to the manpower

It is accepted that the human rights is gained with enormous conflicts in the historical course and became important.The human rights is described as the human's search for freedom in the resulting from the concrete dangers in which he/she is in, also it is described as human's desire to live with dignity and honour. [75] The human rights concept sometimes implies the rights that should be given to the human.In this situation the ''abstract human rights'' comes in to the situation. [76]

Sometimes is used for more than the the rights that should be given to the human but for the rights is used for narrating the rights that are taking on meaning by giving them to the people by the constitution and the laws .Especially in the Land European countries to the opinion that the human rights is based on the natural law perception described as 'described as an authority bouqet which is according to the personality and because of being a social being that has some unchangable abstract and irreversable qualifications. [77]

When the improvements of the human rights in the national and international are taken into consideration, it is easy to see that all the human rights and freedoms are inclined to centre in the headline of ' human rights'.Because of this discrimination ' basic rights', public freedoms, basic rights and incumbencies(duties) are used in the same meaning with human rights.According to this concept, the subject of human rights is "respect and protection of human personality acknowledged by national and international area, and, inspection of rights providing agreement for keeping public safety."

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[75] Şeref Ünal, **Temel Hak ve Özgürlükler ve İnsan Hakları Hukuku**, Yayınları, Ankara 1997, p.22.
[76] A. Feyyaz Gölcüklü and A. Şeref Gözübüyük, **Avrupa İnsan Hakları Sözleşmesi ve Uygulaması**, 3. Edition, Turhan Yayınevi, Ankara 2002, p.3.
[77] Mehmet Akad, **Genel Kamu Hukuku**, Filiz Yayınevi, İstanbul 1993, p.82.

Despite all the descriptions it is understood that the human rights concept is not yet satisfactorily defined with its true meaning.With the definition made from the positive jusrisprudence human rights is illustrated from the angle of it's topic.According to that understanding the topic of human rights is; the protection of respect and protection of human personality acknowledged by national and international area and the investigation of the rigths that ensures the compromise of the public order.In this definition there it is an emphasised on 3 dimensions of human rights : The first one is, it is two sided as national and internatiol.The second one is it is relative because it is variable to the nation to nation in the process of history up to the status of civilization.Thirdly, the border of human rights is denominated.This border is ' public order'. [78]

The other point of view which describes the human rights from the point of attributes and its content belongs to the Ord. Profesör Sulhi Dönmezer.As things stand some of this priviliges can be used when the government and the competence are failed to act, but it is accepted that this rights can be asked from the government and this rights can be taken. [79]

It is not possible to limit the districts of human rights. However, the common feature in all the descriptions; the three constituent are the distinctive constituents. The third one is the used device ' custody' problem. [80]

2.1.2. The History of Human Rights and the General View on Human Rights

The human rights are both constitution and and universal law concept. In fact , the human rights is the search for freedom causing from the concrete dangers that the people lives and it is a motion a desire for a peopleto live in dignity honour and

[78] Ö. İbrahim Kaboğlu, **Kollektif Özgürlükler**, DEÜ Hukuk Fakültesi Yayınları, No.8, Diyarbakır 1989, p.18.

[79] Sulhi Dönmezer, "İnsan Haklarının Tarihsel Gelişimi, Dünyadaki ve Türkiye'deki Durumu", **İnsan Hakları ve Yargı (Sorunlar ve Çözümler) Semineri**, Adalet Bakanlığı Eğitim Dairesi Başkanlığı Yayınları, Haziran 1988, p.12.

[80] Kaboğlu, 1989, p.20.

freedom.The observation of human rights problem from the angle of history and ideology presents that these rights are a search for a fair deceit appropriate for the human dignity.The human rights which has religious, moral, judiciary dimensions constitutes the politics grounds and draws the lines of it. [81]

These rights' and freedoms' that are important in human rights and freedoms getting out of speculative area and getting into practical area is a uniting to an effective assurance system. [82]

Man is always in struggle for enlarging the freedom in his/her life and his/her relationship with the government. Neverthless, this effort is not enough for providing the human rights on its own.Protecting man against associationed and judicically binding typed arbitrary power is the base of the law. [83]

The foundation of Zenan – one of the most important schools in the Old Greek thought- (bc 336-270) defended the idea that humanity is a whole by denying the schism of humanities to the various groups.With respect to the natural law understanding of Zenan, it is implied that the rational man are absolute so they are equal and they have the same rights.

İn the old Greek The natural law of Stoans couldn't be practiced and it remained as an philosophical dictum(opinion). Nonetheless, the equality understanding of Stoans, constituted the classic natural law dictum concept's base. [84]

In the middle ages, in consequence of the treaties made by the kings and seigniors, acted directive roles in the preceding improvements of the human rights, and the rights won by the treaties underlied the preceding fundamental rights and freedoms.

[81] Şeref Ünal, **Avrupa İnsan Hakları Sözleşmesi**, Ankara 1999, p.64.
[82] Gölcüklü ve Gözübüyük, 2002, p.2.
[83] Ünal, **Avrupa İnsan Hakları Sözleşmesi**, 1999, p.64-65.
[84] Ünal, 1999, p.66-67.

In arguably, The most important one of this treaties is the Magna Carta Libertium (1215). [85]

Accompanied to the human rights problem is the major topic in agenda at the new age, man has innately non-assignable rights no longer thought(seen) as only a topic which concerns the political thought history in this era, entered the political conflict concerning government's constitutional and legal order. In this age, absolute dominant government understanding weakened, and the instability between the man and the classes tried to remove and the human rights entered the positive law area by becoming constitutional rights [86]

Men confronted with several pejorative incidents in the last century. They made to be slaves, they took and sold like commerce goods, and slave and woman trade was done. The President of Usa Roosevelt and the President of England Churchill declared that they had a desire that they want to see a peace which brings to the people to live without fear and need in the 14 august 1941 Atlantic statement's 6th clause ' Two countries Nazi' 's absolute destroy. Thus, this was the first time that there is a connection a link between Men's right and freedoms between peaces. [87]

By saying human rights it is understood that they are the rights ; they are the rights which belongs to the human by just being a human and which is not up to any protecting, in other words that rights which continues their existence even though the competence or the government respects it nor not. Those are The rights that don't lose their features causing(coming) from the human nature and apart from respecting the government and not interrupting it, it can be understood that they are the rights which requires the responsibilities to make them real.

Human rights are accepted as the rights which a man must have because man is born as human.The rights which forbids , hogties, government by this way which

[85] Ünal, 1999, p.68.
[86] Ünal, 1999, p.69.
[87] Bilge A. Suat, "İnsan Hakları Evrensel Beyannamesi", **Ankara Barosu Dergisi**, No.2, 1994, p.307.

secures man against the government alongside the responsibilities brings some obligations to the government to do somethnig fort he men are in the covering of human rights. [88]

In this sense, 20th century is the century in which human rights became international in place for national. In this era human rights gained a political meaning and content and became more than just a moral responsibility.

After World War 2 the approach of governments to the human rights problem changed from the roots. Human rights became no longer a topic which just concerns the individual countries but the Human rights' transgression caused the other countries interventions. [89]

2.1.3. Catholicization of human rights by gaining international character

All along the history, Human rights concept showed some difference both from the development and the content and the extent in different counties. Different things understood when the human rights uttered in different countries, and some different ideas emerged in the topic of what are human (man) have rights. Even in the same countries with the changing of the era, what people understand from human rights changed. [90]

Until the beginning of 20th century, nations tried to get their freedoms without the international society's help. They tried to get it with their own efforts. Because of the belief that the international law just organizes the relationships between countries as a principle; and it doesn't have any right and authority to interfere with the government and its citizen. [91]

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[88] Batum Süheyl, **Avrupa İnsan Hakları Mahkemesi ve Türkiye**, İstanbul 1996, p.17-18.
[89] Ünal, 1999, p.74-75.
[90] Batum, 1996, p.17.
[91] Edip Çelik, "AİHS Üzerine Bir İnceleme", **İdare Hukuku ve İlimler Dergisi**, No.1-3, 1998, p.47.

Human rights characterized as universal in the international documents.This means, human rights are practised too all humanity without taking care about the geography, politicial idealogic, social economic, cultural and the other differences. [92]

As is seni the human rights concept is not a limited to certaing European countries, territories, or establishments.On the contrary, ıf we look at it from the angle of its improvements we can see that it is not limited to just one country and it carries a general universal content.

From the beginning of era a radical change is seen and international law is directing to the true man.The protection of human rights in international area problem, gained importance after the United Nation's Organization's foundations. [93]

Alongside The standarts in universal declaration of human rights is accepted universally, their becoming real and their orfer of importance is bound to the country's feasibility. Identically, it is not possible to practise the universal standarts to the people who has different cultures religion, life philosophy in a humdrum manner. [94] Relatively though the fist documenh which organizes the legal order dated from 10 december 1947 called as United nations human rights universal manifesto which is aimed at to realize this goals. [95]

Approximately, in the Human Rights Universal Manifesto declared by the United Nations General Assembly at 10 December 1948 ' all people born free, with dignity and from the angle of rights.It is said that they have reasoning and conscience and they should act eachother in a friendly manner. The Manifesto is not a law which is practiced directly it involves the principles that show the way. That's why the manifesto is called as humanity torch. [96]

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[92] Ünal, 1999, p.75.
[93] Çelik, 1998, p.47.
[94] Ünal, 1999, p.75.
[95] Batum, 1996, p.19.
[96] Bilge A. S, 1994, p.308-309.

As to be practiced as a rule of law, it doesn't have enforcement power to link the governments, the obligatory openness, accurate law of rule that can be practiced. [97]

2.2. EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS GENERAL BREAKDOWN

2.2.1. The General Features of Convention

European convention on human rights, is no only a contract that is protecting the human rights, it is a contract that objectifies the western democracy. Convention's importance comes from its setting up a judicatory supervision mechanism based upon common assurance system and its imposing sanction of the assurance that is given to the person.

European Convention of Human Rights is the convention that accepted by the European Commission in 1950. It protects the first generation rights that are civil and political rights.[98]

In this way convention enabled the protection of human rights from national level to international level and it made the person holder of right from the angle of protecting his/her freedoms. [99]

Apart from rights and freedoms that it anticipates, the thing is that it has founded a mechanism which implements them.[100] It is beyond doubt that European Conventions of Human Rights is an international contract. [101]. On the contrary of the other contracts , the implementation of the European Convention of human rights citizenship is not

[97] Batum, 1996, p.20.
[98] Çağlar Selda, **Disiplinlerarası Yaklaşımla İnsan Hakları**, Beta Basım, İstanbul 2010, s. 283.
[99] Batum, 1996, p.4.
[100] Bilge A. S, 1994, p.309.
[101] Çelik, 1998, p.48.

important.The convention will be implemented to the all people no matter they are the citizen or not or they are contracted countries. [102]

In European Convention some of the rights and freedoms are absolute, but the other category is restricted. In the European Conventions of Human Rights there is no general restriction judgment but it is showed that the boundaries can be possible if the standards is limited. From the angle of practicing Human rights Convention the reciprocity didn't play any role. [103]

In traditional and international conventions, mutualness is the basis like its mutual commitments' being including agreements. In terms of implementing ECHR, the principle of mutualness has no role.[104]

If the rights list on the Erupean convention of human rights and the additional engagements compared with the list in the universal manifesto, 2 important difference can be seen.Firstly the list in convention kept short compared with the universal manifesto.In here the the personal rights and political rights called as classic rights found a place to themselves, but social and economical rights could not.

In european convention, the explanation of rights and freedoms in general formulas thought insufficient, and description of them extended and absolute is done.[105]

The countries(governments) who signed the European Convention of Human righs became responsible for taking the basic rigths and freedoms to their national law. [106]

The application between governments (24) and the 25th clause covering individual applications are the two applications that can mobilize the inspection mechanism. Conventions 17th clause prevented the misuse of basic rights and freedoms.

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[102] Ünal, 1999, p.392.
[103] Ünal, 1999, p.393.
[104] Ünal, 1999, p.393.
[105] Münci Kapani, **İnsan Haklarının Uluslararası Boyutları**, Ankara 1982, p.35.
[106] Münci Kapani, "İnsan Haklarının Bölgesel Düzeyde Korunması", **İzmir Barosu Dergisi**, Year.6, Number.3, 1987, p.3.

17th article of Convention prevented abusing basic rights and freedoms. According to this sentence: [107]

> *"None of the sentences of Convention cannot be interpreted as providing broader activity and enterprise to violate the rights and freedoms provided to state, society, community or individual."*

To fill the gaps and overcome the deficiencies, the most common procedure followed by ECHR is to make protocols. Some protocols, for example, allow making extensions by recognizing new rights that are not present at ECHR. Other protocols foresee procedural changes or additions in order to activate the convention organs. [108]

As a result, European Contract draft for human rights made by European Movement supporter of European Union, the rights that should be given to the each man said in the 1st clause as sub clause by all the countries in the Convention. [109]

2.2.2. The Preparation and Approval of Convention

When the studies in the United nations is continuing for the securing of human rights in the international level, the countries in the European Council decided to prepare a convention that is done by them without waiting for the other.

As in the status of Council, they hold the idea that each real democracy is based upon the freedom of man, the political freedom and the superiority of law and everybody should benefit from the human rights and basic freedoms. [110]

As soon as European Council was founded, it prioritized protecting and developing human rights and helped ECHR to be formed. [111]

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[107] Ünal, 1999, p.394.
[108] Gemalmaz, 1997a, p.265.
[109] Necmi Yüzbaşıoğlu, "Avrupa İnsan Hakları Sözleşmesinin Hazırlanışı", **İnsan Hakları Merkezi Dergisi**, Cilt.2, Number.1, May 1994, p.26.
[110] Kapani, 1987, p.41.
[111] A. Şeref Gözübüyük, **AİHS ve Bireysel Başvuru**, İnsan Hakları Yıllığı, 1994, p.4.

This document forming "European Law on Human Rights supranationalist quality" at a level of Europe is called as "Document of European Constitution" and "European Constitution Court" in European Court of Human Right that comes under responsibility of implementing and interpreting that document. [112]

ECHR was signed in 4 November 1950 by foreign affair ministers of member council states and after confirming of 10 states, it was enforced in 3 September 1953. In Turkey accepted that document in 10 March 1954 with a legislation. [113]

This document in terms of states being a side of the convention, in accordance with ECHR art. 66/3, was enforced with storing confirmation document by Secretary Office of European Council. Turkey stored "confirmation document" that comprises subject of no. 6366 legislation in 18.05.1954. [114]

Turkey assumed the obligation that is obeying the rules of all rights and freedoms in convention both by its own citizens and by all foreigns in the state. Turkey accepted obeying the decisions of convention organs and international assurance mechanism like all other countries.

With ECHR, assured rights were virtually assured by both 1961 and 1982 Constitutions. For Turkey, respecting human rights means both Constitution's command and international responsibility

The place of ECHR in Turkish internal law was specified in no.90 article of Constitution. According to last sublcause of sentence mentioned, international treaties enforced in order have the force of law. Nobody shall litigate to Court of Constitution about their repugnance against Constitution.

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[112] Batum, 1996, p.20.
[113] Kapani, 1987, p.42.
[114] M. Semih Gemalmaz, **AİHK Önünde Türkiye-1, Kabul Edilebilirlik Kararları**, İstanbul 1997b, p.14.

2.2.3. Including Drawbacks in Convention

According to international law, while a country accepting a treaty, it can include some drawbacks in agreement. It means that it can bind accepting the treaty to a new term that limits implementation and makes change to an extent.

64th article of ECHR brought the following sentence:

> *"During signing and presenting confirmation document, every states can include a drawback about a sentence of convention on the extent that an operative legislation in its country does not accord with this juridical sentence. This article doesn't let including drawbacks general qualified. "*

States can include drawbacks but there are two prior conditions before that. The drawback can only pertain to specified article. Moreover, it can be included provided that the operative legislation in the country mustn't accord with the convention.

In general qualification, convention doesn't allow putting a drawback. [115] In other words, drawback can pertain to specified number of article(s) of convention. Drawback can be included provided that a national legislation does not accord with the convention. Rules of legislation, subject of drawback, should be well clarified. [116]

In practice, states are bound to additional protocols and conventions and announced notifications under name of drawback according to 64th article. In Belilosu Swirtzerland happening, European Court on Human Rights evaluated ambiguous and broadly concepted drawbacks as "general qualified" drawbacks that were forbidden by 64th article.

In adjugment, it was explained that the importance of the notification was important. The Court made solving of this problem by decision of court depended upon 49th and 19th article in case the Court was authorized or not in this case with 45th

[115] Kapani, 1982, p.41.
[116] Gölcüklü ve Gözübüyük, 2002, p.16.

article that was saying the the authority to decide validity of drawbacks comprehends all subjects related to interpretation of convention and its implementation.

Like Commission, Court is also entrusted with getting member states to obey responsibilities of Convention and it adopts the concept that 64th article which limits these responsibilities is subject to control of these states.

The necessity of drawbacks' suitable with 64th article prevents invalid drawbacks to result in legal result, and, the state is accepted with the convention without looking the drawbacks.

In spite of the fact that it has limited qualification, this drawback Formula that provides opportunities for member states to partly get rid of responsibility of collective assurance was singled out for criticism. Because, it's likely for this Formula to harm all convention mechanism.

For example, in this frame, while Turkey was signing Convention, it included the drawback, "the right of parents to want education for their children according to their religional and philosophic believes" in 2th article of Protocol, and then expressed the law on Unification on Education didn't violate this right. Moreover, France, Portugal, Austria, Spain included drawbacks in 5th article while signing. [117]

2.2.4. Application and Coverage Are of Convention

The most important clause among goals of European Council is *"protection and development of human rights."*

Since being founded, European Council has been in duty for preparing Convention on Human Rights. This document prepared by European Council is more comprehensive than Universal Declaration of Human Rights that it is inspired from, and it's a convention providing new development paths for international law. ECHR is based on the faith: basic freedoms forming "main base of peace and justice in world, "

[117] Batum, 1996, p.28.

political regime that is really democratic and "mutual concept of human rights and its respect." [118]

When ECHR is analysed, it's seen that this document gives direct rights to people apart from binding side countries in terms of its rules, context or subject. [119] Apart from Convention, more 11 protocols were formed, so, catalogue of human rights was expanded and application was more activated.

Rights and Freedoms regulated in Convention are ones that should be in every constitution. Innovation and superiority that the convention brought is assured by international mechanism founded by rights and freedoms. [120]

In beginning part , having five main sections, in ECHR having 66 articles, rights and freedoms are related to "first generation rights" and "classic rights." On the other hand, other protocols are ones regulating the performance of protection mechanism anticipated by ECHR. [121]

It's seen that llist of rights in ECHR mostly corresponds with some of the rights in UN Universal Declaration. It's plain that how the list of rights is limited. As a consequence, these gaps in ECHR are tried to be fulled by a number of protocols above and specificconventions regulated later on. [122]

To sum up basic and general qualifications of protocols added to it by ECHR, provided basic rights are limited. Only a number of rights organizes the main subject of conventionand protocols. On the other hand, it did not regulated kinds of rights they anticipated with convention.

Furthermore, apart from encumbering homework of respect to human rights to agreement states, ECHR anticipated two organs for providing respect to these rights,

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[118] Ünal, 1999, p.90.
[119] Yüzbaşıoğlu, 1994, p.26.
[120] Aslan Gündüz, **Milletlerarası Hukuk ve Milletlerarası Teşkilatlar Hakkındaki Temel Metinler**, İstanbul 2000, p.213.
[121] Gündüz, 2000, p.214.
[122] Gemalmaz, 1997b, p.28.

Commission of Human Rights, one of which, operated until it was removed and Court of Human rights, the other one, still operates on the scope of ECHR.

On contrary of other conventions, citizenship is not the poing in terms of ECHR's implementation. Convention is applied for foreigns or all people in member countries. All agreement countries have the responsibility of providing all rights to its people.

2.2.5. Features of Convention

2.2.5.1. Its being in Secondary Quality

According to our internal law, because treaties that were "enforced in order" have the force of law (art.90/last), human rights in conventions that we are a side of can be applied like a legal articles. In this sense, it has the qualification as other law rules have. But, fort hem to benefit from international protection mechanism, there must be no "solving way of internal law left." Indeed, international organization is secondary compared to internal law. [123]

This control system is not a system that is over "available solving ways in internal law or have the priority to decide, " on contrary, it is in secondary quality and European Council also announced that while the Council is inspecting, authorized national departments won't do their parts. [124]

As an obligatory result of convention's being in secondary quality, the reason of convention bodies' decisions not being a decision of internal law bodies is its not being able to make reverse effect on internal law decisions.Internal law bodies should take necessary precautions aiming to apply decisions according with their internal law rules. Another result is that it should claim its right by depending on the rights and by notifying internal law bodies about the law of convention. Or, the protection of law of

[123] Tekin Akıllıoğlu, **İnsan Hakları Kavramı-2**, AÜSBF İnsan Hakları Merkezi Yayınları, Ankara 1995, p.326.

[124] Ömer Madra, **Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı**, Ankara Üniversitesi Publishings, Ankara 1981, p.55.

convention will not be wanted. Rules of convention cannot be predicated on contractionary interpretation in terms of law of side country. [125]

Protection bodies anticipated by convention are not the organizations that inspect juridical bodies of states whether they are applying law correctly. In other words, convention organsa re not second respondent places over national foundations. Their responsibilities are to detect whether rules of convention are violated or not. [126]

2.2.5.2. Associative Assurance, State Application

One of the basic features of Convention is the state application mechanism by associative assurance. Rights and Freedoms assured by convention is the responsibility of each agreement state. Each agreement state has responsibility to inspect the other state. This responsibility is not only for protection of its own citizens or its benefit but also for respect to rights of both everybody under convention roof and convention itself. [127]

Each of the states will supervise the community to behave accordingly to this ideology and control it. Thus, the assurance of the convention does not depend on nominative rights of states or principles of mutualness, but becomes a associative assurance. In Pfunders event, Commission stressed a principle. Some standarts for inter-state application by leaving responsibility of classical state. [128]

The status of juridical order is that so and states in practice choose this path so as to protect their benefits or nationalities indirectly or as a force tool. In general, state applications have the feature of political aim. [129]

In accordance with collective security system mentioned (art.24), a state can apply to commission in the event that it believes an other agreement state violates the

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[125] Akıllıoğlu, 1995, p.165.
[126] Gölcüklü ve Gözübüyük, 2002, p.28.
[127] Gölcüklü ve Gözübüyük, 2002, p.12.
[128] Madra, 1981, p.56-57.
[129] A. Şeref Gözübüyük, **AİHS ve Bireysel Başvuru Hakkı**, İnsan Hakları Yıllığı, Cilt.9, 1987, p.13.

convention articles. Even if a state or its citizens don't suffer from a violation, it can apply Commission. For example, the application can be done for humanist aims.

It's enough for extreme case of the convention to happen in jurisdiction of state talked against. Despite that, application among states are done generally when there's a political discrimination between states. Consequently this example is used for a kind of "way" in political Discrimination of Human rights in this event. [130]

2.2.5.3. Direct Application

ECHR has adifferent qualification in terms of its goals and subject. Convention is a body of rules that can be presented in front of courts and has a direct application in internal law systems.

The 1st article of the convention says:

> *"High Agreement sides provide the rights taking part in 1st part in this convention to all people who are in their jurisdiction area."*

Another factor determining direct application of convention results from subjects of rules it comprises. Sentences in question, especially rules in 1st part, are ones that acknowledges subjective rights in favor of direct people.

As a consequence, in this frame, "practical meaning of direct application" can be directly used in front of courts in internal laws, in other words, they can use convention as legislation in cases without any juridical activity. [131]

2.2.5.4. Inessentialness of Nationality

According to 1st article of ECHR, agreeement states provide all rights in convention to its people. Here, the state announced the notification of acknowledge instead of going under the responsibility of acknowledg. [132]

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[130] Madra, 1981, p.58-59.
[131] Batum, 1996, p.22.

In general, subject of international conventions is the regulation between international law bodies . In other words, they aim at regulating "outside" area. The ones related to human rights are about "inner area's" or "internal law's" regulation. It's clear that this changes the principle of other states "not to interfere with internal affairs" and that states bring limitations to freedom principles. [133]

As expressed in 1st article of ECHR, state must provide all rights and freedoms anticipated in convention to all citizens. According to this regulation, bond of citizenship is not a prior condition to protect rights. [134]

In past, states used to discriminate its own citizens from foreign living in states and resisted about not to provide right of their citizenship to foreigns. So, protection of its own citizens living abroad always became a problem. Juridical status of foreigns showed important development in terms of today's international law and discrimination between natives and foreigns descended gradually. Complaints became generally about unfair offlimit of person and violation of fair judgement. [135]

Tos um up, law problems being an internal affair once upon a time were taken under inspection related to human rights by taking it from immunity area. [136] However, all these regulations doesn't mean the rights of foreigns were absolute.

Meeting held in 11th article accepts providing these rights to citizens because the sentence assuring right to found an association or syndicate regulates the political attendance in liberal democratic regime. In this situation, these rights of foreigns can be limited in frame of agreement states. Contrary, other sentences of convention are applied to everybody in agreement countries without discrimination of foreign. [137]

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[132] A. Şeref Gözübüyük, "İnsan Hakları Kurallarının İç Hukukta Uygulanması", **Hukuksal Kollokyum**, (13-14 September), Ankara 1990, p.245-25.
[133] Akıllıoğlu, 1995, p.156.
[134] Gölcüklü ve Gözübüyük, 2002, p.14.
[135] Ünal, 1999, p.99-100.
[136] Tekin Akıllıoğlu, "Uluslararası Koruma Sistemleri", **Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi**, Volume.16, Number.3-4, 1987, p.157.
[137] Ünal, 1999, p.99-100.

2.2.5.5. Individual Application Right

Individuals can take their cases against states to the European Court of Human Rights if the state in question is party to the European Convention of Human Rights. In this case individuals would claim that the state in question harmed their basic rights and freedoms, which were granted them by the European Convention of Human Rights and its protocols. According to the European Convention of Human Rights, the term 'individual' consists of a) real persons b) non- governmental organizations c) social groups. States are obliged not to prevent the use of this right. Individual's application to the European Convention of Human Rights does not require whether or not state in question accepts the individual application to European Court of Human Rights jurisdiction.[138]

According to twenty fifth clause of agreement, all real persons, all non-governmental organizations and all human communities can consult individually to committee as aggrieved.

The period of European court of human right, the authority of committee should be explained by contracting state. Turkey affirmed the contract in the year of 1954, but the authority of committee was legitimatized in 1987. [139] In 1998 with come into operation of eleventh protocol, the persons can consult to the European court of human rights without the permission of government. [140]

According to contract, a government can complain to another government. The most common compliment styles are made to the detriment of governments by persons and groups. Individual application right is the most important part of custody system. [141]

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[138] Karaosmanoğlu, 2011, p. 171
[139] A. Şefik Güngör, "AİHK'nuna Bireysel Başvuru Hakkının Kabulü", **İzmir Barosu Dergisi**, Year.6, number.3, 1987, p.14.
[140] Safa Reisoğlu, **Uluslararası Boyutuyla İnsan Hakları**, Beta Publishig, İstanbul 2001, p.165.
[141] Ünal, 1999, p.398.

The second custody way is government application. The government doesn't need to legitimize of authority of committee. [142] The right which is in the contract, postulate the existence of solid aggression in application.

According to the court the twenty fifth of clause, persons give the legal right of submission when they are in danger of effecting from law. [143]

The concept of indirect victim in justice opinion of committee and council is defined. If they suffer from aggression they will file an application.

Some suspicions against to individual application provide to take some precautions. Precautions enter in the clause of contract. According to the contract any clause of contract can be interpreted. The second precaution enters twenty seventh clause of contract. To consider an application; the right of application should not be abused. The third precaution enters in fifteenth clause of contract in anger of war and a serious threat to the national unity. The contractor ion governments take some contrary precautions from the right of national law.

The fourth precaution is recognizing of individual application right whether not recognizing of individual application right related to the power of government. In question of this contract is given as an optional right to the governments. But this precaution lost its significance after accepting the protocol. With assurance of human right the person is protected against government. [144]

In front of the international judicial body, the person is given the case right. The party governments of contract enter into obligation. [145] They never disrupt the usage of the right. The possibility of individual application is a unique type of defense right. The

[142] Gözübüyük, 1994, p.13.
[143] Akıllıoğlu, **İnsan Hakları Kavramı-2** 1995, p.347-348.
[144] Gölcüklü ve Gözübüyük, 2002, p.39-40.
[145] Gölcüklü ve Gözübüyük, 2002, p.38.

European court of human rights gives rise to the individual application. This is an important assurance for defense of basic rights and liberties. [146]

2.3. PROTECTION MECHANISM ANTICIPATED by EUROPEAN CONVENTION ON HUMAN RIGHTS

ECHR organize the first international judicial review and assurance system. With the nineteenth clause of contract, the obligations of contract are fulfilled. European commission of human rights and European court of human right be established. In addition to two institutions, committee of ministers of the council of Europe which is judgment and enforcement body of council is added.

This committee has some responsibilities such as; defense of basic rights, guarantee rights. The bodies which set up with contract step in only when all judicial ways and internal judicial ways are wasted. [147]

2.3.1. European Commission of Human Rights

European commission of human rights has a special position among custody bodies. The committee was quasi-judicial body. [148] The contraption continues its existence nearly fifty years. The committee was the most important part of assurance system. The period of custody starts with application to committee. The committee takes decisions about acceptance or non-acceptance of application. Council and ministers committee is the second and third body of custody system. A committee begins its active duty with the acceptance of application and submits of report.

When the committee regards application as non-acceptable, the procedure leaves off. The committee prepares a report about the essence of the matter. The committee expresses an opinion about the clause of contract. The clause of contract is disobeyed by

[146] Güngör, 1987, p.15.
[147] Batum, 1996, p.28-29.
[148] Gemalmaz, 1997b, p.20.

government. The non-obligatory reports are sent to minister's council. According to obligatory decision, the reports are received by minister's council or council. [149]

Two bodies are directly important to elect the members of council. The members are not the representative of governments. But they are self-employed.to provide independence and impartiality of members of council, the members of committee can't work for their own government. Their self-employed statue is arranged in the twenty third clause of the contract.

The European commission of human rights which accepted with protocol no 11 makes big changes in custody system.

2.3.2. European Court of Human Right

The European human rights system has the oldest human rights court ans is highly respected around the globe for its well developed case law.under the Europen Convention , the European Court of Human Rights is comprised"of a number of judges equal to that of the High Contractin Parties"108 Under the Protocol No.14 of 2004, judges will be elected for non-renewable term of nine years by the Parlimentary Assembly of the Council Of Europe.They must retire at age seventy.Each Member state is allowed to nominate three persons for consideration by the Assembly .The judges are ordinarily-although not necessarily –nationals of the member states of the Council.They serve full-time during their term.Both the Council and the Courst sit in Strasbourg, France.[150]

The court is trial body of assurance system. Nobody directly consult to the court to open a case. To open a case firstly, there should be application to council. The council can decide the acceptance of application and prepares report about the matter. The council should send report to the ministers of council.

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[149] Gölcüklü ve Gözübüyük, 2002, p.47.

[150] Weissbrodt, David. Connie de la Vega, **International Human Rights Law An İntorduction,** Pennsylvania 2007, p. 313.

After this instance, it is possible to open a case with the demand of party governments. When the protocol no 11 become effective, it is possible to consult the court. [151] The court means in general European court of human right.

The court which consists of numbers of party governments is seen as voluntary authority. [152] The party governments should legitimize judge authority of court with separate declaration. The adjudicators are elected for six years by majority of votes by council of Europe parliamentary assembly. The adjudicators can be elected again.

Every three year the elections are made for the half of adjudicators. Relevant judgments about court presidency, vice presidency, chamber, chief of department and vice –presidents are arranged in detail in the court internal regulation.

The committee consists of three major members and one adjudicator. After the acceptance of no 11 protocol the term of office of adjudicator is calculated from the date of election. General assembly of court selects chief judge, two vice presidency, chief of department for a stage of there year. [153]

Chief Judge handles the working and control of court. Vice presidents of court help to chief judge. Chief of department moderates the department or chamber sessions. [154] The candidates should be shown among the legist and the person who have wise-character.[155]

The general expression of assembly of court means as sit in a plenary session European court of human rights. The term of great circle means that the great circle consisted of seven adjudicators. [156]

The deparment means that a circle creating by the general assembly of court.The chamber means that a chomber consist of seven adjudicators.The comitee means that a

[151] Gölcüklü ve Gözübüyük, 2002, p.29-30.
[152] Gemalmaz, 1997a, p.340-341.
[153] Gemalmaz, 1997b, p.22.
[154] Gemalmaz, 1997a, p.343-344.
[155] Ünal, 1999, p.350.
[156] Gemalmaz, 1997a, p.346.

comitee consist of three adjudicators.To defence independense of adjudicators against litigants and the governments which is the memeber of European council, they have some prerogotives and immunity. [157]

The trial method of court is arranged by a guide line.The official language of court is French and English.The court allow the usage of another language.The courts make open-trial.The decisions should be justifiable.The decisions of court are irrebuttable.

2.3.3. Commitee of Ministers

Commitee of ministers is one of the politicial bodies of council of europe.The structure, organization, duty and authority of ministers is arranged by the status of council of europe.According to defence the human rights, the council of europe acknowledge some duties to commitee of ministers.But the commitee of ministers has some ultravires authority.İf the complainant go to court about the report of commitee in three months.The commitee of ministers make a decision on violation and non-violation. [158]

2.4. DELIMINATION OF INDIVIDUAL RIGHTS AND FREEDOMS IN EUROPEAN CONVENTION ON HUMAN RIGHTS

The rights which are limited in contract and appendix.The orders and items of rights are arranged in detail.The contract contain the port of civil rights or individual and politician rights.Also the contract contain a part of individual right and politician rights according to our organic law.

Some fundamental rights and freedoms in european convention of human rights:

– Right to live (article 7)

– Cruel and unusual punishment or procedure ban (article 3)

[157] Gölcüklü ve Gözübüyük, 2002, p.31.
[158] Gölcüklü ve Gözübüyük, 2002, p.33.

- Serfdom and forced labor ban (article 4)
- Right of self freedom and security (article 5)
- Fair trail right (article 6)
- Setrospectivity in punishment and crime (article 7)
- Respect to life or proper family (article 8)
- Opinion, conscience and religion liberty (article 9)
- Liberty of declaration (article 10)
- Liberty of grouping and organizing (article 11)
- Morriage right (article 12)
- Effective legal application ways (article 13)
- Prerogative ban (article 14)
- Inequality in urgency case (article 15)
- Qualification of foreigner's politicial activities (article 16)
- Ban of right manipulation (article 17)
- Delimination of usage on right qualification (article 18)

Protocol No-1

- Defency of property (article 1)
- Education right (article 2)
- Free election right (article 3)

Protocol No-4

- Ban of imprisonment because of dept (article 1)
- Travelling freedom (article 2)
- Deportation of citizens ban (article 3)
- Deportation of foreigners collectively ban (article 4)

Protocol No-6

- Death sentence abolition (article 1)
- Death sentence in war time (article 2)
- Inequality ban (article 3)

Protocol No-7

- Lexs and assurances about deportation of foreigners (article 1)
- Right of respondent in criminal case (article 2)
- Compensation for unfair sentence (article 3)
- Right of second time non bis in idem org et away (article 4)
- Right of equality between peers (article 5)

Protocol No-12

This protocol ban all kinds of discrimination: this protocol havent yet gone into operation. [159] The projected protocols of european convention of human rights organize operation of defence mechaniscm. [160]

We can't say that all right and freedoms are not restricted by authorities. There is not a delimitation decision in European court of human rights. It is possible that some right can be restricted. [161]

The European court of human right and additional protocols arrange only the first generation of right and freedoms. [162]

There is no decision about second and third generation of right and freedoms. The European court of human rights mentions only traditional right and freedoms. The rights and freedoms which can be confinable in European court of human rights and protocols. These rights and freedoms can be only restricted according to suitable criteria's. [163]

Some delimination criteria's in ECHR and protocols are public order, public utility regulatory, policies art, natural security, unity and territorial integrity of state, protection of health, protection of morality, protection of special life, advantage of children, necessity of justice neutrality and authority of judge, economic welfare of country protection of others' rights and freedoms protection of celebrity, prevention of crime, prevention of disorder, prevention of appearance of secret information.

These delimination criteria's are suitable for the system of European court of human rights. It is not possible that other delimination criteria can't restrict the rights and freedoms. There are some similarities between legal system of government and the protocols of European court of human rights. Some right and freedoms are in command both in the legal system of governments and protocols. The government can judge

[159] Gölcüklü ve Gözübüyük, 2002, p.10.
[160] Gemalmaz, 1997b, p.179.
[161] Gemalmaz, 1997b, p.183.
[162] Gemalmaz, 1997a, p.260.
[163] İlhan Akın, **Kamu Hukuku**, İstanbul 1993, p.378.

according to criteria's of delimination in protocols. Otherwise this situation is contrary to contract. [164]

2.4.1. Circumstances of Limitation

Considering the fact that convention cannot use freedom limitlessly that it assured, it put some criterias related with the regulations of rights and freedoms within its scope. According to that, basic rights and freedoms can be limited providing national security, economic benefits of country, public health, basic ethics, rights and freedoms of others or public order, punishing criminality (goal), its having a base (means) and its being a obligatory precaution in a democratic society (measurement).

Public order, public law, national security, protecting health, protecting ethics, protecting private life, benefits of children, integrity of state, requirement of justice, follow-up of authority and objectivity of jurisdiction, economic welfare of state, protecting rights and freedoms of others, protection of reputation, preventing criminality, prevention of inorder, prevention of disclosure of secret information, assurance of tax or other participation fee payment.

Restriction criterias given okay by European Court of Human Rights are those listed above. It's out of question that rights and freedoms could be limited by any criteria except these. The meaning of this in practice is: for the rights regulated in protocols of ECHR, only restriction criterias listed above can be used in rights and freedoms provided in the law order of agreement state of convention. If different restriction criterias are anticipated, this will be against the convention. [165]

Convention regulates with its rules that why some of rights that it regulated can be limited, which standards the limitation is done in accordance with. [166]

[164] Gemalmaz, 1997b, p.28.
[165] Gemalmaz, 1997b, p.17.
[166] Batum, 1996, p.25.

The Court uses two different techniques in limitation of rights and freedoms in normalcy; it limits the reason of limitation that would clearly specify norm or protection area of a right and freedom as a consumer, or, it regulates general qualified limitation reasons in 2nd paragraphs of certain articles.

Besides, 18th article of convention is a general regulation that limits the limitations brought by states faithful to rights and freedoms. And according to this; accordingly with articles of this convention, mentioned limitations to rights and freedoms can only be used for anticipated goal. Article 18 gives the juridical opportunity of supervising the suitability of goal to convention and the relationship between goal and limitation to convention organs both in normalcies and extraordinaries.

The condition of limitation anticipated by a law is related not only with an existence of a law in internal law but also with the content of this law, and, even if unclear rules enabling arbitrary practices of executive are seen as legal in internal law, interference with rights by following these rules will result in violation of convention. To explain terms and techniques of existent limitations systematically, it's possible to summarize them as limitation in accordance with view of court, (European Court of Human Rights art. 6/1) existent law "in accordance with general principles of international law, " lastly, limitation "when needed" (Protocol no.1, art.1). [167]

2.4.2. Boundary of Limitation

Another matter that should be clarified in terms of limitation regime is that a boundary is anticipated within the system. That is called as boundary of limitation. In democratic law order, because "freedom is rule, limitation is exception, " a frame was formed about, firstly, likely limitation, then, a number of criterias, statuaries and lawfulness. [168]

[167] Gemalmaz, 1997b, p.22.
[168] Gemalmaz, 1997a, p.261.

The criteria of limitation regulated in ECHR and its protocols are suitability to democratic society needs. Court tried to clarify what it had understood from concept of democratic society. According to court, freedom of expressing thoughts is also founding standards of a democratic society and provided that 2nd subclause of 10th article of convention is reserved, this freedom is valid in thoughts that are against rights and freedoms which are not assailant or seem unimportant or greeted with love as well as thoughts that are against the state or a certain part of society.

Multiplism, tolerance and broadmindedness that form determinants of democratic society require that. In the democratic society defined in frame of multiplism, tolerance and broadmindedness principles, minority is protected over against majority.

In the decision practice of agreement organs for the boundary of limitation, apart from suitability to democratic society requirements, they used a number of measurements they produced such as "not to touch the core of rights", "Except for consistency to requirements of democratic society for the border of limitation of convention organs, it used a number of principles that it produced such as "not touching the core of rights", "proportionality", "temperance", "being anticipated", "clear enough", "legitimate goal", "being necessary of limitations in a democratic society", etc. [169]

In all agreement countries of ECHR, they are responsible by the convention for making their internal law, especially juridical regimes related to basic rights and freedoms suitable with standards and interpretations related to decisions of European Court of Human Rights. On the condition that agreement states and state organs do not obey these standards, it will cause "disagreement situation" and agreement authorities to inspect them. [170]

[169] Gemalmaz, 1997a, p.261.
[170] Batum, 1996, p.27.

2.4.3. Limitation in Normalcies

A part (such as right to live, prohibition of torture) of basic rights and freedoms provided in ECHR are absolute qualified. These rights valid in everywhere every situation and every time are not within the scope of limitation.

In addition there's no limitation clause in terms of normalcies in ECHR, some limitation criteria in terms of other inabsolute basic rights and freedoms are assumed and a limitation is presented.[171] Limitations specifying the scope of freedom are inspected in the direction of basic rights and freedoms regulated exclusively in each article- especially in 17 article-. 17 article was regulated in this way;

> *"Right of privacy, freedom of thought and faith, right of meeting and demonstrations, freedom of travelling and accommodation, in a democratic society; national security, public safety, territorial integrity of the state, protection of crime and disorder, protection of health or morality, protection of other's right and reputation, prevention of explaining secret information, protection of authority and objectiveness of court, the government can restrict the basic right and freedoms if a problem occur."*

Rights and freedoms such as privateness of private life, freedom of religion and conscience, right to tell thoughts, right to travel can be limited with a juridical legislation provided that national security, public safety, prevention of inorder and criminalities, protection of health or ethics, protection of reputation and rights of others, prevention of inobjectivity and authority of court house.

It's announced that rights and freedoms defined as principles can be limited with these limitations taking part in every each article of ECHR regulating basic rights and freedoms when needed. This authorization of states to limit is subjected to strict rules and criterias in terms of both article and consistence.

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[171] Döner, Ayhan. **İnsan Haklarının Uluslararası Alanda Korunması ve Avrupa Sistemi**, Seçkin Yayınları Ankara, 2003, p.86.

Firstly, limiting prevention or punishment should be in group of reason to limit regulated in ECHR. The fact reasons and types of limitation is regulated in ECHR provides legitimacy of limitation. Limitation should be in direction of legitimate goal.[172]

Legitimate limitation reasons taking part in related articles consist of criteria such as public benefit, public safety, general health, protection of ethics, protection of rights of others, prevention of criminality. Besides, the rulet hat limitation should be done with a law in accordance with requirements of a democratic society order.

There are two decisions in art.17 in ECHR. One is prohibiting taking advantage of rights and freedoms in convention, expressing no try shall be done for removing them; the other is specifying that states that will do limitation can do it within the terms in convention. For example, European Commission of Human Rights found the application of German Communist Political Party shut down by Germany Federal Constitutional Court as inacceptable. Moreover, European Council of Human Rights, in "Lawless/Ireland" case, expressed rights provided by convention cannot be used for removing these rights upon deciding in same way. In this decision, by stressing the importance of individual and expressing claims of applicant to it European Council of Human Rights, accepted it as an interpreter of its complaints. Besides, it expressed that its decision about art.5 of ECHR is in conformity with protection aim of individual for arbitrary arrests of him/her.

ECHR art.17 has two sides. On one hand, one says it shall not be interpreted as removing any decision of convention, on the other hand the other while limiting the rights, states can only limit within the allowance of the convention[173]

In order to evaluate whether basic rights' and freedoms' in ECHR being interfered by national laws is a violation of basic rights and freedoms, firstly, the interference is evaluated whether it's subjected to limited goals defined in the article

[172] Gözlügöl, S.Vakkas, **Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuza Etkisi**, 2.Baskı, Yetkin Yayınları, Ankara 2002, p.248.
[173] Döner, 2003. p.88.

that the freedom is regulated. The limitation should be specified in legislation and shouldn't be against democratic society as a requirement of superiority of law. The limitation made should be proportional with the goal if it's made for a goal. This situation is announced in 18th article of ECHR for showing that the limitations to rights and freedoms mentioned can only be used for anticipated goals. 18th article brings responsibility agreement states to use their limitation authorization about rights and freedoms anticipated in convention within goodwill principle. [174]

Any law recording was affirmed in terms of non-anticipated rights and freedoms within "general limitation thesis" and this idea was agreed by Constitutional Court. [175]

Limitation is possible in ECHR because of protection of private and family life (art.8), freedom of thought, conscious and religion (art.9), right to found association and meeting (art.11), national security, public order, public safety, protection of general health or ethics and protection of rights of others. These limitation reasons are repeated in all second sublcauses from article 8 to 11 and set bounded in frame of democratic society. With the situation formed with these regulations, Standard of European democratic law state is aimed at. [176] The concept of democratic society in ECHR is existent not only in introduction section in ECHR, but also in limitation of secured rights and freedoms as an assurance. It assumes that freedoms related to 2nd subclauses of articles can be limited for public safety, national security or rights of others but these must be anticipated by legislations and be obligatory in democratic community.

2.4.4. Limitation in Extraordinary Situations

Furthermore, convention provides states to suspend a portion of responsibilities coming from convention on condition of wars or extraordinary situations threatening the

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[174] Gölcüklü ve Gözübüyük, 2002, p.18.

[175] Mehmet Sağlam, Ekim 2001 Tarihinde Yapılan Anayasa Değişiklikleri Sonrasında Düzenledikleri Maddede Hiçbir Sınırlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Sınırı Sorunu, http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/anyarg19/msaglam.pdf; Karaosmanoğ-lu, 2011, p. 92-94.

[176] Grabenwarter, C. **Yargılama Güvenceleri, Adil Yargılanma Hakkı**, (Çev. O. Can) Prof. Dr. Nurullah Kunter' e Armağan, Seçkin Yayınları, Ankara 2004, p.223.

existence of the nation (art.15).[177] Shortly, this situation known as “obliquity regime” is quite “exceptional, so, it is “valid. Also, situations that <<allow passing to exceptional regime are counted limitedly and in two main groups as “war situation” and “public jeopardy situations threatening national life.”

Savings of national authorized bodies’ such as enforcing regime or prolonging time lapse are brought under inspection in terms of their suitability and what it renews.[178] But, even in exceptional situations, rights that are not subjected to transverse precaution-rights called as “in transferable rights” or “hard seed of the rights”- are assured by convention. [179]

No matter what peril and jeopardy degree of exceptional conditions that will cause obliquity regime is, absolute-qualified rights and freedoms that the system anticipates keeps their feature of “nonrecordableness.” These kinds of rights –rights cannot be subjected to transverse precaution even in exceptional situations- are called as “untouchable rights” or “hard seed of rights.”

In accordance with ECHR (art.15/2), except for deaths as a result of suitable activities in war law, none of the (art.2 right to live), also (art.3 prohibition of slavery), (art.4/1) prohibition of slavery and servitude and (art.7) cannot be declinated, that is, no precaution against these decisions can be taken. Even if an agreement state announces an exceptional regime in frame of extraordinary situation or war situation by depending upon rebellion, revolt or war, not only it will never violate right to live, prohibition of slavery but also it won’t enforce the precaution or recording, which have limitation qualified. [180]

[177] Gözübüyük, 1987, p.14.
[178] Gemalmaz, 1997b, p.19.
[179] Gemalmaz, 1997a, p.261.
[180] Gemalmaz, 1997b, p.20.

2.5. LIMITATION OF INDIVIDUAL RIGHTS AND FREEDOMS IN TURKISH LAW SYSTEM

2.5.1. Limitation in Normalcies

According to the thirteenth clause of basic law:

> *"The basic right and freedoms can only be limited with these situations. If the national safety, public morality, the unity of public and government can be in danger, this clause can bring a general delimitation. This clause cannot practice to freedom of opinion and thought."*

With this article, Constitution brought a general limitation system. Some writers think that it cannot be implemented on article 25 in Constitution, "freedom of thought and opinion, " as a requirement of limitation system. With this article, Constitution was put against 11th article that is argumentation subject in 1961 Constitution. 11th article of 1961 Constitution regulated that;

> *"Not touching core of a right even for law, public benefit, general ethics, public order, social justice and national security."*

In this period, it was argued whether it was a limitation article or an assurance saying no touch to these rights even in these situations. 1982 Constitution ended this arguments and clearly expressed this limitation decision is for all articles. Even if reasons in this article were not expressed in related article, it was determined they would be limited fort he reasons in 13th article. With this article, there were likely no rights and freedoms that wouldn't be limited anymore; limitation reasons were uncertain and general as number of concepts. This condition increased arbitrariness as well as it beclouded inspection.

In addition to general limitation reasons, Constitution not only showed the border of the right but also it showed the limitation of the right being used and how to use this right in articles where the right was regulated. The basic feature of this Constitution is that it's possible to qualify original content of limitation of rights

directly by Constitution as constitutional intervention. Majority of these limitations are related to collective freedoms. Constitution preferred detailed and casuistic regulation by making its own border instead leaving limitations to law.

According to article 11/2 of 1961 Constitution, rights formed a reason to limit as long as saying;

> *"Human rights and freedoms cannot be used for removing government of the state and indivisible unity of nation and state and republic written in constitution "*

Fundamentally, these kinds of regulations are existent in modern democracies. These limitations are requirements of the nature of belongings. 1982 Constitution also brought more comprehensive decision in parallel with this decision. In 14th article of Constitution formed a reason to limit as long as saying;

> *"None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.No provision of this Constitution shall be interpreted in a manner that enables the State orindividuals to destroy the fundamental rights and freedoms embodied in the Constitutionor to stage an activity with the aim of restricting them more extensively than stated in the Constitution."*
>
> *The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law.*

except for this article, in some private articles regulating some rights, some prohibition of private exploitation were brought. For example:

– When the thing political parties are assigned as a focus of activities determined in CO art.68/4 by Constitutional Court happened, they can be shut down (CO art.69)

– Nobody can exploit take advantage of religious or religion senses or things seen as holy (CO art 24/5)

– Right to lockout and strike cannot be used against good purpose rules and national wealth (CO art.54/2)

Expressions in 14th article of Constitution are ones such as damaging, destroying, putting in danger, providing and founding. So, they are limitation of basic rights. When these kinds of freedoms meaning directly limiting of norm areas of rights are only used for realizing the rights in this article, in other words, when there are clear casualty correlates between using freedom and activities in the article, they must be seen as taking advantage of/exploiting rights and freedoms.[181] For example, Constitutional Court specified a distinctive kind of exploitation by doing a limitation of thought and opinion freedom; [182]

That is, freedom mentioned is existent in objective borders. In terms of CO art.14, when there's clear and close causalty between the usage of freedoms and activities in this article, it must be counted that the rights are being taken advantage of.

The concept of the core of basic rights entered in our Law literature firstly by 1961 Constitution. They were regulated by changes done with adjustment law in 1982 Constitution. It brings a minimum immunity and core area to subject of basic right in terms of core assurance. This concept assumes there is a core and essence in basic right. That a core of the right cannot be touched means counting it within certain content. Each basic right couldn't be protected in same dense within its own norm area. The decision that clearly prohibits or indirectly ruins or complicates and prevents achieving

[181] Özbudun, 2003, p.110.
[182] AYMKD. 1963/ 25E; 1963/87 Sayılı, 8.4.1963 Tarihli Kararı, Sayı.1, 1963, s.227.

the goal of usage of a right or a freedom interferes with the core of that right or freedom.

Constitutional Court, in one of its decisions, it decided the core of the right or a freedom is interfered on condition that it is subjected to recordings complicating or ruining the achievement of a right or a freedom. [183] In 1961 Constitution period, the concept of core was explained by Constitutional Court and an important decision was developed about this issue. On the other hand, 1982 Constitution, gave up the concept of core in regulation of basic rights protection, instead, it brought the requirements of democratic society. But, with the last regulation, it acknowledged the concept of core to some extent by bringing the concept of spirit of constitution. In modern democracies, interfering and removing the core of a right and a freedom is not acceptable. So, within the scope of "requirements of democratic society order, " there's "prohibition of touching core." These two principles are actually two appearances of one principle. In some juridical decisions, Constitutional Court expressed the rights and freedoms cannot be touched in limitations. In decision of no.E. 1985/8, no.K.1986/27 by CO Court under the date of 26.11.1986, "in addition to "requirements of democratic society order, " "its core assurance" was given place by saying;

> *"Classical democracies are regimes where basic rights and freedoms are provided and assured expandedly. Limitations touching and damaging the use of the core of untouchable, intransferable and undeniable rights of the individuals cannot be seen as suitable with requirements of democratic society order. In addition to standing by libertarian, being a state of law and prioritizng individual are elements of same regime. In this sense, not only to what extent the freedoms are limited, but also the terms, reasons, technique, legal ways against limitation of limitation are counted within democratic society order. Freedoms can only be limited exceptionally and for the lastingness of democratic society order. "*

[183] AYMKD, 1964/ 228.

2.5.2. Limitation in Extraordinary Situations

According to our Constitution, there are two kinds of extraordinary situations as "extraordinary situation" and "martial law." According to 15th article of constitute, in war, mobilization, marital rule or extraordinary situations, usage of basic rights and freedoms can be suspended partly or completely or transverse precautions can be made with anticipated assurances in Constitution for them. In war, mobilization, marital rule or extraordinary situations, usage of basic rights and freedoms can be suspended partly or completely or transverse precautions can be made with anticipated assurances in Constitution for them provided that no responsibility coming from international law is violated.

In situations defined in first subclause, without death penalties and deaths resulting from activities suitable with law of war, individual's right to live and his/her moral and material wholeness can't be touched; nobody can be forced to Express his/her thought, religion, conscience; crimes and punishments cannot be depended on past; nobody can be founded guilty until the decision of court. As it's seen, according to 15th article of Constitution, under prescribed conditions, "usage of basic rights and freedoms can be suspended partly or completely." Before seeing the terms anticipated in 15th article, we need to dwell on the concepts of "limitation" and "suspension."

Suspension is over limitation in terms of basic rights and freedoms. During and after "limitation, " basic right and freedom usually don't vanish completely and some usage opportunities of basic rights and freedom keeps going on. On condition of suspension of basic rights and freedoms, right and freedom that is suspended cannot be benefitted from. Suspension of basic rights and freedoms is regulated in art.15 in Constitution. According to it;

> *"In war, mobilisation, marital rule or extraordinary situations, usage of basic rights and freedoms can be suspended partly or completely or transverse precautions can be made with anticipated assurances in Constitution for them.*

In situations defined in first subclause, without death penalties and deaths resulting from activities suitable with law of war, individual's right to live and his/her moral and material wholeness can't be touched; nobody can be forced to Express his/her thought, religion, conscience; crimes and punishments cannot be depended on past; nobody can be founded guilty until the decision of court. As it is understoon from this regulation, there are two principles for implementing 15th article.

These are:

- An existence of war, marital law, mobilisation,
- Nonviolation of responsibilities coming from international law, ,
- Keeping on the right sight of principal of proportionality
- Not touching to core area consisting of right and principles assumed in art 15/2 in CO

According to art. 15/2; In war, mobilisation, marital rule or extraordinary situations, usage of basic rights and freedoms can be suspended partly or completely. But, to do this, responsibilities coming from international law shouldn't be violated and core rights shouldn't be touched. The responsibilities coming from international law involves firstly general principles of international law and then responsibilities coming from conventions that the state is its side. Another requirement for 15th article to be implemented is principal of proportionality. That is, while the rights are being limited, in extraordinary situations, basic rights and freedoms can only be limited in the scope of "the situation requires." Fort he limitation to comply with the principle of proportionality, the means should be suitable for realizing limitation goal; this means should be requirement (obligatory) in terms of limitation goal; the means and the goal shouldn't be inmeasured.[184] Principle of proportionality means convenience of

[184] Değer, Ozan. "**Avrupa İnsan Hakları Sözleşmesi' nin 10. Maddesi Çerçevesinde Şiddet Unsuru İçeren İfade: Güneydoğu Davalarından Örnekler**", Ankara Üniversitesi SBF Dergisi, Sayı.62(1), 2008, http://www.politics.ankara.edu.tr/dergi/pdf/62/1/Deger_Ozan.pdf, (Erişim Tarihi: 11.08.2012).

limitation tool to realizing; qualification of requirement of this tool in terms of limitation goal, and, being the goal in unmeasured proportion. The principle of state of law and principle of proportionality a natural extension of justice idea in our Constitution. Principle of proportionality divided into three principles. These are convenience, requirement and proportionality.

The principle of convenience involves the thing that for legal precaution forming the limitation to be counted as convenient in terms of goal of limitation, it should bring a benefit in realizing the goal. But, this convenience requires sufficiency for achieving the goal, not certainty. Limitations that are not convenient to achieving the goal are at odds with principle of convenience. [185]

On the other hand, in principle of requirement, proportion of relationship between goal and means is important. According to this principle, in order to achieve goal that the limitation is based on, means adopted for limitation should be necessary in terms of achieving goal of limitation. This principle express that the softest means should be chosen in terms of related basic right. If there more than one means that are qualified for achieving the goal, the precaution that limits the basic right and freedom least. Whichever precaution limits the basic rights and freedom less is evaluated one by one in every concrete case. [186]

In principle of proportionality, the relationship between limitation goal and means is important. According to this principle, there should be a logical proportion between goal and means. There shouldn't be unmeasured proportion between goal and means. In principle of requirement, while the point is relationship between one goal and more than one means, in principle of proportionality, the point is mutual qualification relationship between goal and means. [187]

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[185] Kılıçoğlu Mustafa ve Şenocak Kemal, **İş Güvencesinde Ölçülülük İlkesinin İçeriği ve Ultima Ratio Presibinin Ölçülülük İlkesi İçerindeki Konumu**, p. 185-186.
[186] Kılıçoğlu ve Kemal, **İş Güvencesinde Ölçülülük İlkesinin İçeriği ve Ultima Ratio Presibinin Ölçülülük İlkesi İçerindeki Konumu**, s. 197.
[187] Değer, 2008.

According to 15th article of our Constitution, 1982 Constitution prevents violation of responsibilities coming from international law even in war, mobilization, martial law situations. Except for extraordinary situations, when the subject is about limitation of rights, which has softer effect than suspending usage of rights, it's plain that violating international convention responsibilities is impossible. What involves in international responsibilities is specified by Constitutional Court. According to that, the responsibilities of international law, firstly, involve general principles of international law, then, responsibilities coming from conventions that State is its side. [188] In short, in terms of basic rights and freedoms in Turkish law system, nonviolation of international responsibilities is anticipated by Constitution itself. Thus, we need to handle 90th article of 1982 Constitution with 15th article. So, 15th article of Constitution has a special decision against 90th article.

The principle of "lex specialis derogat legi"-"replacement of private life instead general norm and being only implemented"- between 15th article and 90th article of Constitution. When we look in this view, general status of conventions in Turkish law system are equal with legislations, and, international conventions within the scope of 15th article has a clear status over legislations. Regulation over legislation in our Law system is Constitution. In front of a hierarchical foundation, as well as inferring international conventions anticipating international responsibilities in 15th article is in constitutional norm qualification, it's clear that it results in the obligation of implementing them before internal law decisions. [189]

2.6. THE POSITION OF ECHR IN TURKISH LAW SYSTEM WITHIN THE SCOPE OF INDIVIDUAL RIGHTS AND FREEDOMS

As it's known, there are two sights called as "dualist opinion" and "monist opinion" in terms of the positions of conventions in law order.

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[188] AYMKD, 1991/1E Sayılı Kararı, Sayı.27, c. 1, 1991, p. 65, 96-98.
[189] Kılıç, H. "Fazilet Partisi Kapatma Davası Karşı Oy Yazısı", http://www.belgenet.com/dava/fpdava_g24.html , (Erişim Tarihi: 11.08.2012).

According to second sight, international law and internal law different from each other and are two seperate independent law orders. Public relations that each law regulates are different from each other. Internal law, especially regulates relationships between individuals or juridical people whereas international law mostly regulates relationships between states. For one law order to be valid in other, a clear dispatch or transfer is needed. This second sight is also called as "dualist order". The Notion of dualist order is adopted in agreement states such as Denmark, Iceland, Malta, Norway and England. In these countries that adopted dualist order, in addition that the convention forms a part of internal law, the state takes precautions to realize rights and freedoms assured by convention.

On the other hand, in monistorder, there is only one law order. International law and internal law are parts of the whole. The rule created in international law area takes its place in national rules and is performed according to its place. The point is the question that which one of these is superior to the other. In this area, general tendency is international law is superior to internal law. [190]

Penetration of ECHR into internal law would be realized by the decisions of agreement organs apart from its value in internal law. This situation makes it insufficient in comprehending convention in internal law.

"Sui Generis" qualification of ECHR especially results from agreement states' recognizing rights and freedoms in convention in accordance with 1st article; responsibility to obey convention law can be inspected by convention organs even if convention is not adopted in internal law.

Upon acknowledging ECHR, states are bounded each other by a new kind of law aiming at founding a mutual European public order based on human rights and superiority of law that does not depend on reciprocity principle.

[190] Gölcüklü ve Gözübüyük, 2002, p.17-18.

Therefore, in addition that states that haven't adopted ECHR in their internal law yet are within the action area of Agreement Law, accepting obligatory juridical authorization of court finally founds the superiority of convention law against internal law in terms of states determining the value of ECHR with different formulas. [191]

According to no.1980/11 decision of Constitutional Court; [192]

> *"....in addition to being an individual of nation that he lives in, individual's being a member of humanity took the human rights and freedoms out of only being a national problem and gave a universal meaning to it. In this sense, in accordance with beginning of Constitution and 2th article, there's no possibility to ignore evaluating the complaint rules of Universal Declaration of Human rights and ECHR."*

The most important responsibility of the states that accepted European Convention of Human Rights is to give citizens right to apply against responsible governments on condition of violation of basic rights and freedoms provided to them. [193]

In terms of position of conventions in Turkish law, both 1961 Constitution and 1982 Constitution put two main rules. One of them is "international conventions are in the power of legislation, " the other is "inconsistency of international law against Constitution cannot be brought forward.

As it is understood from 90th article of Constitution saying;

"International conventions put in order are in the power of legislation"

Conventions in law order are in power of legislation and directly adjudges. There's no disagreement in this subject. The rule that is the disagreement is in the same article saying;

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[191] Çavuşoğlu, N. **AİHM'ne Başvuru Koşulları**, AÜSBF İnsan Hakları Merkezi Yayınları, Ankara 1995, p.22-23.
[192] AYMKD, 1987/18 Karar Sayılı Anayasa Mahkemesi Kararı, Sayı.23, 1989, p.305-306.
[193] Ünal Ş, 1999, p.96.

"no application to Constitutional Court can be done with the claim of inconsistencies of conventions"

According to some writers, this rule doesn't affect the idea that is equal to legislation whereas some say it shows conventions are over legislations. [194]

As a requirement of 90th article of Constitution, acknowledging ECHR as legislation by Turkish judge can be interpreted as a base in solving cases. But, in terms of material law, decisions that ECHR bring are not more free that Turkish Constitution decisions.

In excuses of Turkish judges, their application to international human rights documents is rare activity. Opinions formed by the decisions of European Council and Commission of Human Rights being closely followed by Turkish legists would be certainly beneficial for understanding of concept of freedom better and bringing in new dimensions to these freedoms.

Constitutional Court use ECHR not for the way of expanding freedoms but as a proof for making the limitations come true. One of the decisions of Constitutional Court, while expressing juridical decision that prohibited people working in certain public organs to use their right of syndicate was not against Constitution, it also applied ECHR as an additional proof (appended proof). [195]

What would it be if convention was in conflict with our same legislations in same matter? There's no other clearness about superiority of convention – about hierarchy of rules -. It is just written that no apply to Constitutional Court for cancellation of conventions can be done. According to this text, if an transverse convention to Constitution is approved Grand National Assembly, the convention will be implemented in spite of its inconsistency to Turkish Law Order.

[194] Gölcüklü ve Gözübüyük, 2002, p.18.
[195] Aybay, 1978, p.129-130.

A transverse convention to our Constitution –if approved by Grand National Assembly – it will be in conflict with a legislation suitable to our Constitution and be implemented in spite of existent legislation. Such a result is seen in 4th sublcause of 90th article. According to this subclause, conventions changing existent legislations can only be enforced after approved by Grand National Assembly.

Parliament makes a new kind of legislation with this activity. Therefore, it's possible to change an existent legislation with a new agreement. [196]

In this situation, in accordance with conventions in hierarchy of rules in Turkish law , generally in teaching, the rule saying;

> *"Conventions put in order are in the power of legislation. No apply to Constitutional Court about their inconsistency to Constitution can be done"*

is being assumed. The thought conventions are in power of legislations is the rightest one. Inasmuch as, the nonanticipation that conventions in 1982 Constitution are against Constitution cannot be interpreted as conventions are over legislations. Yet, it's the requirement of logic that anticipating conventions are over legislations, not that conventions are in the power of legislations. [197]

In Turkish Constitution, there exists an expanded catalogue of basic rights and freedoms.Thus, all of the decisions anticipated in convention already exists in Turkish Constitution. Besides, some other basic rights that haven't been assured by convention yet are given place. But, any research about to what extent convention decisions comport especially with Constitution and our other basic legislations and whether there's any conflict between them haven't been made yet. [198]

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[196] Bilge, A.S. "Uluslararası Sözleşmelerin İç Hukuka Etkisi", **Ankara Barosu Dergisi**, Sayı.2, 1994, p.312.
[197] Yüzbaşıoğlu, 1994, p.32-33.
[198] Ünal, 1999, p.97.

In decision of 5th Department of Turkish Council of State under date of 22 May 1991 about the position of ECHR in Turkish Law, it tried to bring comments from two different sides. Firstly, the decision explains;

> *"it's indisputable that individual is brought into a political status of international law by decisions in international documents related to human rights, and, states come under the responsibility of making people of other countries benefi from the rights in these documents."*

Later, in accordance with 90th article of Constitution, it was underlined that international conventions have the force of law, no apply to Constitutional Court about the their inconsistency to Constitution could be done.

According to 5th Department, decision mentioned (CO article 90) says that international conventions directly causing juridical results clearly proves that its qualification mentioned above and nonapplieableness to Constitutional Court, thus, making the way of deactivating national regulations made later on closed has the binding qualification for legislation organs and it proves these conventions are over legislations in internal law. [199] All in all, under these sights, it can be said that:

- Convention is a part of internal law; it has a distinctive position.
- Convention is implemented by on its own; there's no need for an extra legislation.
- That convention is against Constitution cannot be claimed. Natural result of this is implemented even if the convention is against Constitution.
- The fact convention cannot be implemented because it's against Constitution contradicts with the system that Constitution forms. Constitution that is enforced after convention cannot change the convention, because it would

[199] Çavuşoğlu, 1995, p.25.

be conflicting approach to accept a legislation enforced after convention has the power to change the it.

– Telling conventions has the power of legislation doesn't mean the convention is a code(legislation). Convention keeps having features to legislation. In terms of international convention, it is a convention that binds Turkey. So, convention cannot be changed in this direction.

On condition that there's a conflict between convention rules and national law rules, the judge should superioritize convention rules and should interpret international rules suitably with convention. [200]

Finally, it can be said that firstly making Constitution suitable with convention, secondly implementing the decision of convention by ignoring constitutional decision of Constitutional Court is putting clear disagreement rule, ECHR is over Constitution, as in Holland Constitution. [201]

That Conventions on Human Rights should be different from general regime is an obligation. For example, there are affirmative rules in 1982 Constitution. Besides, necessary internal law regulations should be made by following the decisions of commission and court decisions closely.

[200] Gölcüklü ve Gözübüyük, 2002, p.21.
[201] Yüzbaşıoğlu, 1994, p.35.

CONCLUSION AND SUGGESTIONS

No matter what its deficiencies and shortcomings are, ECHR is the biggest step in international area till today. Since its effective day, it can be said that convention has made remarkable effects in terms of Protection of Human Rights.

It can be concluded that basic freedoms of ECHR is the base of justice and peace and the protection of them depends on both real democratic political regime and a mutual belief about Human Rights and mutual respect, and, political ideas and traditions, respect to freedom, superiority of law form a "joint estate".

European Council Parliament takes decision that develops respect to human being and shapes freedoms. With these decisions, big steps in the way of European Law Order is realized.

On the other hand, our internal law institutions can't make these updates simultaneously. Turkey has a significant share with former iron curtain countries about ECHR's intensity of applications and complaints. In fact, ECHR's reports shows that mismatch and gives important information about Turkey's human rights reality. According to these reports, Turkey is the third most complained country, second in number of arrest files, first in number of violations. Turkey should immediately analyses the essences of the problems, take permanent measures to eliminate that situation which compromises Turkey's reputation and dignity. Majority of the decisions of violations against Turkey as follows:

- The length of the proceedings,
- The lack of an independent and impartial courts,
- Expropriation contrary to the general principles of international law,
- Overlong periods of detention,

• The destruction of evidence of the alleged offense was committed by the security, forces,

• To torture and ill-treatment in police custody,

• As a restriction of the freedom of speech against democracy,

These reports are prepared by the ECHR shows clearly, most of the convictions against Turkey due to judicial institutions. Although Judiciary is obliged to protect human rights and freedoms, it's remarkable that performs the opposite function in Turkey. To eliminate this conflict about function of judiciary; constitutional, legislative and administrative arrangements should be made urgently.

Usually, our country treated unfairly. Even domestic remedies hadn't finished, commission accepted and referred to the Court majority of complaints in the past few years from Eastern and Southeastern Anatolia, suggests a reason for this as follows: According to the contract, although finishing domestic remedies necessary to apply to the ECHR, the Court brings an exception to this rule: If the domestic law is not practical, not handled effectively, does not give a concrete result, causes non-acceptable delays, the application is considered.

Not to face with conflicts between ECHR and Constitution, we need to synchronize Constitution with convention; secondly, we need to put a clear conflict in Constitution saying ECHR is over Constitution as in Holland Constitution by ignoring juridical decision of Constitutional Court about Constitution law. In this sense, even if present conflict between ECHR and our Constitution directly contradicts with Constitution, it's tried to be clearly included in our Constitution by making regulations providing implementation of convention clauses.

In our study, the subject we want to clarify is about how and our internal law ways are wore out and when they are not wore out as a result of Turkish judges about incompatible arrest, custody, humiliating activities during custody, incompatible activities against convention clauses. We also want to clarify that it is also about penalty

fines against Turkey related to violation of convention articles has brought economical expense for Turkey that got headache for violating human rights in international arena.

As a result of violations mentioned, no matter whoever caused violation, they must be responsible for financial punishments, so that authorized bodies can understand that polices and judges should do their jobs in frame of convention clauses. Also, the most important thing is that we must show maximum effort to include the ideology that proper conduct to convention clauses is a problem of human rights in authorities that must obey and apply convention sentences.

In this point, the responsibility of our national authorities is to make fast necessary regulations not to make this conflict to national juridical authorities, to held education seminars about the content of these conventions, to reduce violations to minimum degree by expanding operation where the sentences are mostly violated. Our national juridical and administrative authorities legally facing with a different mechanism often experience this conflict. As long as this conflict is not solved and necessary regulations are not made, conflict between constitutional and national law authorities and supra-national law rules will go on.

REFERENCES

AKAD, M. **Genel Kamu Hukuku**, Filiz Kitabevi, İstanbul 1993.

AKILLIOĞLU, T. "Uluslararası Koruma Sistemleri", **Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi**, Cilt.16, Sayı.3-4, 1987, S. 157.

AKILLIOĞLU, T. **İnsan Hakları Kavramı-I, Kaynaklar ve Koruma Sistemleri**, AÜSBF İnsan Hakları Merkezi Yayınları, Ankara 1995.

AKIN, İ. **Kamu Hukuku**, İstanbul 1993.

ALTUNKAYA, N. **Eğitim Fakülteleri için Vatandaşlık Bilgisi**, Nobel Yayın Dağıtım, Ankara 2003.

ARSEL, İ. **Anayasa Hukuku (Demokrasi)**, 2.Baskı, Sıralar Matbaası, İstanbul 1968.

AYBAY, R. **Avrupa İnsan Hakları Sözleşmesi ve Türk Pozitif Hukuku**, İnsan Hakları Armağanı 30.Yıl, Birleşmiş Milletler Türk Derneği, Ankara 1978.

AYMKD. 1963/ 25E; 1963/87 Sayılı, 8.4.1963 Tarihli Kararı, Sayı.1, 1963.

AYMKD. 1987/18 Sayılı Kararı, Sayı.23, 1989.

AYMKD. 1991/1E Sayılı Kararı, Sayı.27, C.1, 1991.

BATUM, S. **Avrupa İnsan Hakları Mahlemesi ve Türkiye**, İstanbul 1996.

BEŞE, E. **Avrupa Birliği'nde İnsan Hakları; Hukuki ve Siyasal Perspektifler, Tüm Yönleriyle Türkiye AB İlişkileri**, Elif Kitabevi Yayınları, İstanbul 2002.

BİLGE, A.S. "İnsan Hakları Evrensel Beyannamesi", **Ankara Barosu Dergisi**, Sayı.2, 1994.

BİLGE, A.S. "Uluslararası Sözleşmelerin İç Hukuka Etkisi", **Ankara Barosu Dergisi**, Sayı.2, 1994.

BİLGE, N. **Hukuk Başlangıcı, Hukukun Temel İlkeleri**, Turhan Kitapevi**,** Ankara 1992.

BİLGE, N. **Hukuk Başlangıcı-Hukukun Temel Kavramları ve Kurumları**, 12.Baskı, Turhan Kitabevi, Ankara 1997.

CENTEL, N. **Ceza Muhakemesi Hukukunda Tutuklama ve Yakalama**, İstanbul 1992.

ÇAVUŞOĞLU, N. **AİHM'ne Başvuru Koşulları**, AÜSBF İnsan Hakları Merkezi Yayınları, Ankara 1995.

ÇAĞIRAN, M.E. , **Uluslararası Alanda İnsan Hakları,** Platin Yayınları, Ankara 2006.

ÇAĞLAR S, **Disiplinlerarası Yaklaşımla İnsan Hakları**, Beta Basım, İstanbul 2010.

ÇEÇEN, A. **İnsan Hakları**, Gündoğan Yayınları, İstanbul 2000.

ÇELİK, E. "AİHS Üzerine Bir İnceleme", **İdare Hukuku ve İlimler Dergisi**, Sayı.1-3, 1998, S. 47.

DEĞER, O. "AİHS' nin 10. Maddesi Çerçevesinde Şiddet Unsuru İçeren İfade: Güneydoğu Davalarından Örnekler", **Ankara Üniversitesi SBF Dergisi**, Sayı.62(1), 2008, http://www.politics.ankara.edu.tr/dergi/pdf/62/1/Deger_Ozan.pdf, (Erişim Tarihi: 11.08.2012).

DONNELLY, J. **Teoride ve Uygulamada Evrensel İnsan Hakları**, (Çev. Mustafa Erdoğan ve Levent Korkut), Yetkin Yayınları, Ankara 1995.

DÖNER, A. **İnsan Haklarının Uluslar arası Alanda Korunması ve Avrupa Sistemi**, Seçkin Yayınları Ankara, 2003.

DÖNMEZER, S. "İnsan Haklarının Tarihsel Gelişimi, Dünyadaki ve Türkiye'deki Durumu", **İnsan Hakları ve Yargı (Sorunlar ve Çözümler) Semineri**, Adalet Bakanlığı Eğitim Dairesi Başkanlığı Yayınları, Haziran 1988.

ERDEM, F. **Ceza Usulü Hukuku**, 2.Baskı, Ankara 1968.

ERDOĞAN, M. **Anayasal Demokrasi**, 3.Baskı, Siyasal Kitabevi, Ankara 1996.

GEMALMAZ, M.S. **Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş**, Beta Kitapevi, İstanbul 1997a.

GEMALMAZ, M.S. **AİHK Önünde Türkiye-1, Kabul Edilebilirlik Kararları**, Beta Kitapevi, İstanbul 1997b.

GÖLCÜKLÜ, A.F. ve Gözübüyük, A.Ş. **Avrupa İnsan Hakları Sözleşmesi ve Uygulaması**, 3. Baskı, Turhan Kitabevi, Ankara 2002.

GÖZLÜGÖL, S.V. **Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuza Etkisi**, 2.Baskı, Yetkin Yayınları, Ankara 2002.

GÖZÜBÜYÜK, A.Ş. "İnsan Hakları Kurallarının İç Hukukta Uygulanması", **Hukuksal Kollokyum**, (13-14 Eylül), Ankara 1990.

GÖZÜBÜYÜK, A.Ş. **AİHS ve Bireysel Başvuru Hakkı**, İnsan Hakları Yıllığı, Cilt.9, 1987.

GÖZÜBÜYÜK, A.Ş. **AİHS ve Bireysel Başvuru**, İnsan Hakları Yıllığı, 1994.

GRABENWARTER, C. **Yargılama Güvenceleri, Adil Yargılanma Hakkı**, (Çev. O. Can) Prof. Dr. Nurullah Kunter'e Armağan, Seçkin Yayınları, Ankara 2004, S. 223 .

GÜLMEZ, M. **İnsan Hakları ve Demokrasi Eğitimi: Egemenlik İnsanındır**, TODAİE Yayınları, Ankara 2001.

GÜNDÜZ, A. **Milletlerarası Hukuk ve Milletlerarası Teşkilatlar Hakkındaki Temel Metinler**, İstanbul 2000.

GÜNGÖR, A.Ş. "AİHK'nuna Bireysel Başvuru Hakkının Kabulü", **İzmir Barosu Dergisi**, Yıl.6, Sayı.3, 1987.

GÜRİZ, A. **Hukuk Başlangıcı,** 2.Baskı, AÜHF Yayınları, Ankara 1987.

HASS, M. **International Human Rights A Comprehensive İntroduction**, Oxon Printing, Newyork 2008.

JANKO, M. **Hürriyet Bildirgeleri Magna Carta'dan Avrupa İnsan Hakları Sözleşmesine**, (Çev. N. Zeka), Belge Yayınları, İstanbul 1983.

KABOĞLU, Ö.İ. **Kollektif Özgürlükler**, DEÜ Hukuk Fakültesi Yayınları No.8, Diyarbakır 1989.

KAPANİ, M. "İnsan Haklarının Bölgesel Düzeyde Korunması", **İzmir Barosu Dergisi**, Yıl.6, Sayı.3, 1987.

KAPANİ, M. **İnsan Haklarının Uluslararası Boyutları**, Ankara 1982.

KAPANİ, M. **Kamu Hürriyetleri**, 7.Baskı, Yetkin Yayınları, Ankara 1993.

KAPTANİ, M. **Kamu Hürriyetleri**, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara 1981.

KARAOSMANOĞLU, F. **İnsan Hakları**, Seçkin Yayınları, Ankara 2011.

KEPENEKÇİ, Y.K. **Eğitimciler İçin İnsan Hakları ve Vatandaşlık**, Ekinoks Yayınevi, Ankara 2008.

KILIÇ, H. "Fazilet Partisi Kapatma Davası Karşı Oy Yazısı", http://www.belgenet.com/dava/fpdava_g24.html , (Erişim Tarihi: 11.08.2012).

KILIÇOĞLU, M. - ŞENOCAK, K. İş Güvencesinde Ölçülülük İlkesinin İçeriği ve Ultima Ratio Presibinin Ölçülülük İlkesi İçerindeki Konumu, http://www.kamu-is.org.tr/pdf/ogc7.pdf

KOÇOĞLU, E. "İnsan Hakları ve Demokrasi Kavramlarının İlköğretim Sosyal Bilgiler Müfredatındaki Yeri", **Yayınlanmamış Yüksek Lisans Tezi**, Fırat Üniversitesi Sosyal Bilimler Enstitüsü, Elazığ 2008.

KORKUSUZ, M.R. **Uluslararası Belgelerde ve Türk Anayasasında Temel Hak ve Özgürlükler**, Özrenk Matbaacılık, İstanbul 1998.

KUZU, B. **Ülkemizde Kişi Özgürlüğü ve Güvenliği**, Filiz Kitabevi, İstanbul 1997.

MADRA, Ö. **Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı**, Ankara Üniversitesi Yayınları, Ankara 1981.

OZANKAYA, Ö. **Cumhuriyet Çınarı**, Ordem Reklam Yayınları, Ankara 1999.

ÖZBUDUN, E. **Türk Anayasa Hukuku**, 7.Baskı, Yetkin Yayınları, Ankara 2003.

ÖZCAN, M., Tezcan, E. ve Yonar, Ö. "Avrupa Birliği'nde İnsan Haklarının Gelişimi", **Avrupa Birliği Ortak Politikaları ve Türkiye** (içinde), Beta Yayınevi, İstanbul 2003.

REİSOĞLU, S. **Uluslararası Boyutuyla İnsan Hakları**, Beta Yayınları, İstanbul 2001.

SAĞLAM, M. **Ekim 2001 Tarihinde Yapılan Anayasa Değişiklikleri Sonrasında Düzenledikleri Maddede Hiçbir Sınırlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Sınırı Sorunu,** s.14-28.

http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/anyarg19/msaglam.pdf

SEYİTHAN G. **Teori ve Uygulamada Kişi Özgürlüğü ve Güvencesi**, Kazancı Yayınları, İstanbul 1998.

ŞAHBAZ, İ. **Anayasada Kişi Özgürlüğü ve Güvenliği**, Ankara 1994.

T.C. ANAYASASI. Kanunlar ve Kararlar Müdürlüğü, TBMM Basımevi, Ankara 2010.

TANÖR, B. **Osmanlı-Türk Anayasal Gelişmeleri**, İstanbul 1992.

ÜNAL, Ş. **Avrupa İnsan Hakları Sözleşmesi**, Ankara 1999.

ÜNAL, Ş. **Temel Hak ve Özgürlükler ve İnsan Hakları Hukuku**, Yetkin Yayınları, Ankara 1997.

VURALDOĞAN, K. "2001 Anayasa Değişikliklerinin Işığında 1982 Anayasasında Temel Hak ve Özgürlüklerin Sınırlanması", **Yayınlanmamış Yüksek Lisans Tezi**, Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Ankara 2005.

YÜRÜK, T. ve SELVİ, K. **İnsan Hakları ve Kamu Özgürlükleri**, Anadolu Üniversitesi Yayını, Eskişehir, 2005.

YÜZBAŞIOĞLU, N. "Avrupa İnsan Hakları Sözleşmesinin Hazırlanışı", **İnsan Hakları Merkezi Dergisi**, Cilt.2, Sayı.1, Mayıs 1994, S. 26.

WEİSSBRODHT, David. Connie de la Vega, **International Human Rights Law An Introduction,** Pennsylvania 2007.