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MARMARA ÜNİVERSİTESİ

AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

EU CHARTER OF FUNDAMENTAL RIGHTS

YÜKSEK LİSANS TEZİ

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans Programı öğrencisi Ömer Emrullah EGELİĞİ'nin, ***"EU CHARTER OF FUNDAMENTAL RİGHTS"*** konulu tez çalışması..04.07.2013.tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından ~~oybirliği~~ / oyçokluğu ile başarılı / ~~başarısız~~ bulunmuştur.

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ABSTRACT

EU CHARTER OF FUNDAMENTAL RIGHTS

EGELİĞİ, Ömer Emrullah

European Union Law

Thesis Advisor: Assist. Prof. Dr. Gerçek ŞAHİN YÜCEL

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The Union is a peace project based on the economic integration of the Europe. This Union could achieve its goals only through the maintenance of political integration. Political integration requires the integration of states and integration of peoples as well. Integration of peoples is only possible through the achievement of democratic and political legitimacy. Union citizens should be provided with the proper conditions to feel the sense of belonging to the Union in order to achieve political legitimacy. Therefore, the development of human rights by the Union would help increase the sense of belonging for the Union citizens in relation to the constitutional nationalism.

The institutions of the Union did not pursue a human rights-focused policy in its early period. The European Court of Justice made judgments related to the human rights only within the framework of the economic purposes in the early period of its establishment. The legitimacy of the fundamental rights such as the supremacy of the Union law was begun to be questioned in the course of time. Human rights-related reactions of the constitutional courts of the member states helped the Union to realize the importance of the human rights policies. The European Parliament, as the democratic body of the Union, brought the human rights policies to the agenda through its political initiatives, and the European Court of Justice did the same through its judgments.

The need for more clear, transparent and foreseeable rights protected under the Union law emerged in the course of time. Therefore, a fundamental rights catalogue was codified in the Charter of Fundamental Rights of the EU.The legal status of the Charter was made equal with the status of the Treaties under the Lisbon Treaty. Thus, a human rights document to be taken as a basis for the measures of the Union was drawn up.

This thesis discusses the Charter considering its place in the historical and constitutional developments in the EU human rights law. It focuses on the position of the Charter in the general progress of the human rights policy. In addition, the Charter's influence on the relations within the Union and between the Union and member states was analyzed. It was examined whether the Charter resulted in a functional and effective development in favor of the human rights law or not.

Key words: European Union, Human Rights, the Charter of the Fundamental Rights of the European Union.

öz

AVRUPA BİRLİĞİ TEMEL HAKLAR ŞARTI

EGELİĞİ, Ömer Emrullah

Avrupa Birliği Hukuku

Tez Danışmanı: Yard.Doç.Dr. Gerçek ŞAHİN YÜCEL

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Birlik, Avrupa kıtası için ekonomik bütünleşmeye dayanan bir barış projesidir. Ancak siyasal bütünleşme olmaksızın, Birlik amaçlarına ulaşılması mümkün değildir. Siyasal bütünleşme devletlerin birleşmesi kadar halkların da birleşmesini gerektirir. Halkların birleşmesi demokratik ve politik meşruiyetin sağlanması ile mümkündür. Birliğin politik meşruiyetini sağlaması için Birlik vatandaşlarının aidiyet duygusunun arttırılması gerekmektedir. Bu anlamda Birliğin insan hakları politikalarını geliştirmesi, anayasal milliyetçilik kavramı ile bağlantılı olarak Birlik vatandaşlarının aidiyet duygusunu arttıracaktır.

Birlik makamları ilk dönemlerde insan hakları odaklı bir politika yürütmemiştir. Birlik yargı organı olan Avrupa Adalet Divanı da insan hakları yargılamasını, ilk dönem içtihatlarında sadece ekonomik bütünleşme odaklı, gerçekleştirmiştir. Ancak bu durum, zaman içerisinde Birlik hukukunun üstünlüğü gibi temel ilkelerin meşruiyeti sorgulanmasına neden olmuştur. Üye ülke anayasa mahkemelerinin insan hakları odaklı reaksiyonları, Birliğin insan hakları politikalarının öneminin farkına varmasını sağlamıştır. Birliğin demokratik organı olan Avrupa Parlamentosu siyasal girişimlerle, Avrupa Adalet Divanı da içtihatlarıyla Birlik içerisinde insan hakları politikalarını gündeme taşımıştır.

Zamanla Birlik hukukunda korunan hakların daha açık, şeffaf ve öngörülebilir olması ihtiyacı ortaya çıkmıştır. Birlik hukukunda, bir temel haklar katalogu ihtiyacı sonunda "Avrupa Birliği Temel Haklar Şartı" kodifiye edilmiştir.

Şart'ın hukuki statüsü Lizbon antlaşması ile birlikte Kurucu Antlaşmalarla aynı düzeye taşınmıştır. Şart ile Birlik tasarruflarında esas alınması gereken bir insan hakları belgesi meydana getirilmiştir.

Tez, Şart'ı AB insan hakları hukukundaki tarihsel ve anayasal boyutları ile ele almaktadır. Şart'ın, Birlik insan hakları politikası evriminin genel seyrindeki konumu üzerine eğilmiştir. Ayrıca Şart'ın Birlik içerisindeki ve Birlik ile üye devletler arasındaki anayasal ilişkilere etkisini analiz edilmiştir. Şart ile Birlik insan hakları hukuku adına işlevsel ve etkin bir gelişmenin gerçekleşip gerçekleşmediği irdelenmiştir.

Anahtar kelimeler: Avrupa Birliği, İnsan Hakları, Avrupa Birliği Temel Haklar Şartı.

TABLE OF ABBREVIATIONS

Art :	Article
C:	Case
CEPS:	The Center of European Policy Studies
CMLR :	Common Market Law Review
EC:	European Community
EC:	European Council
ECHR:	European Convention on Human Rights
ECJ:	European Court of Justice
ECR :	European Court Reports
ECtHR:	European Court of Human Rights
Ed. :	Editor
Eds:	Editors
EJIL:	European Journal of International Law
EU:	European Union
Ibid:	Ibidem
MJES :	Marmara Journal of European Studies
MÜ :	Marmara University
N:	No
OUP:	Oxford University Press

P.:	page
SBE:	Sosyal Bilimler Enstitüsü
SBF:	Siyasal Bilgiler Fakültesi,
UK:	United Kingdom
UN :	United Nations
V.:	Versus
Vol:	Volume
Y:	Year

INTRODUCTION

Components of a state can be defined as country, society and power. The interaction between the society and power, in particular, firstly led to the emergence of the concept of state and then the developments in the human rights. Country involved in this interaction in the course of time and environmental rights found breeding-ground. European Union is a union of the states. This union of states represents the power, one of the three components of the state, as its definition refers to, through the individual member states or by the institutions and authorities of the EU. With the development of the EU, the concept of "state" has transformed. Provisions of the Union law relating to power and sovereignty paved the way for the transformation of the concept of "state power". Such transformations resulted in some developments in the new human rights arising out of the conflict between society and power.

The idea of a united Europe had been expressed much earlier; however, it was not until the end of wars devastating the European continent that this idea was brought forward more concretely. The project of a union can be considered as a peace project. It was aimed to eliminate the factors that led to the war by taking the economic conflicts that led to the wars under control. In other words, it was aimed to establish peace across the continent through economic integration. It cannot be denied that this was peace project, although it was perceived many times as an economic project due to such initial motivations.

Peace cannot be interpreted as solely consisting of economic peace. Economic motivations of the Union such as common market and freedom of movement were not adequate for reaching to the ultimate goal of a peace project. This fact was understood by the institutions and bodies of the Union, and claims of violation of rights, which resulted from the Union norm were influential in this understanding.

Democracy and human rights were both fundamental human needs and historical gains the Union citizens would not want to lose. Economic welfare alone was not enough to content the society. It is not possible for people to feel at

peace and appreciate economic developments as long as legal security is provided and maintained. However, the Union's goal was not only to unite the states, but also to ensure the integration of the European people. Union citizens' wholehearted participation to the Union project with a sense of belonging was necessary for the realization of this goal.

The Union citizens could develop sense of belonging to the Union only if the Union policies gained democratic legitimacy. The European Parliament, the democratic institutions of the Union, was formed in the light of this goal. The structure and function of the Parliament was a significant development for filling the gap of democratic participation. However, the Union was required to become an organization based on the "human rights" in order to establish democratic legitimacy. Union's human rights policy and human rights-related provisions of the Union law needed to be strengthened and gain more influence.

Developments of the human rights in the Union law were subject to criticisms related to the economic integration in the beginning, however, later on the criticisms started to target at the concerns on the political legitimacy. In fact, when considered the historical course of development of human rights, the reasons of the developments were less significant then the "result". Human rights developments were generally gains achieved through struggle, not mandates. As mentioned above, this struggle underwent transformation today, and such transformation applies to the actors of the struggle, as well. The attitude of the constitutional courts of the member states can be considered as a part of the societal struggle that contributed to the development of the Union's human rights law. Particularly, the judgments of the constitutional courts of member states related to such principles as "the supremacy of EU law" as a reaction based on the human rights were of critical importance. Such judgments led to the questioning of the legitimacy of the Union law and accordingly of the legitimacy of the principle of the supremacy of the EU law. Although the constitutional courts were the reflections of the exercise of the state power as a public force, jurisdiction is a form of the exercise of "the public sovereignty", yet the direct public effect on the selection of members of constitutional courts of

some states was relatively weak. Constitutional courts exercise the judiciary power in the name of the public. In addition, the constitutional court of each member state bears the explicit traces of the social structure in their county as they are affected by the concerns and tendencies of the public. Besides the organic bond that we mentioned, there are also some procedural ways allowing the society to have effect on the judgments of the constitutional courts of member states. In this way, the societies pulse is tested to the extent that the the ways of access to the constitutional court allow democratic pluralism (?). Such remedies as complaint to the constitutional court, which enable the individuals to apply directly to the constitutional court provide individuals with the opportunity of political participation.[1]Public initiative forms the judgments of the constitutional courts of member states in the countries where access to the constitutional jurisdiction is based on democracy and principle of pluralism. In the light of these, it is possible to say that the human rights-related reactions of the constitutional courts of member states, although there exists no direct social movement or struggle, the Union's human rights law was developed within the framework of the conflict between "society and power", as with the earlier examples in the history.

Reactions and requests of the Union citizens and member states were reflected on the judgments of the European Court of Justice, the judicial body of the Union. The European Court of Justice developed a gradual human rights protection through the issues arisen during the implementation of the Union law. Besides the judgments of the European Court of Justice, the European Parliament, the democratic body of the Union, launched important declarations on the human rights. These two institutions were the driving forces of the development of the Union's human rights law.

[1] Tolga Şirin, **Türkiye'de Anayasa Şikayeti (Bireysel Başvuru): İnsan Hakları Avrupa Mahkemesi ve Almanya Uygulaması ile Mukayeseli Bir İnceleme**, On İki Levha Yayıncılık, İstanbul, 2013, p.72-73.

Today, the Union has the constitutional ground to be a party to the ECHR. Following the initiatives in the final period to accede to the ECHR, the most current development is the fact that "Charter of Fundamental Rights of the European Union" became binding. The Charter is also the most up-to-date human rights development in the European continent. Therefore, the Charter is progressive and comprehensive than the other human rights documents. Some gains the ECHR acquired through interpretation were governed under the Charter. The Charter contains next generation rights such as provisions on the genetics law, conscientious objection, and right to good governance.

The process of discussions on a new constitution continues in Turkey though it falls behind the agenda from time to time. Nevertheless, the Charter is not investigated adequately in Turkey as a candidate state within the studies on the new constitution. Irrespective of the Turkey's perspective as a candidate state aiming to become member state, new constitutions should be inspired by the innovative provisions of the Charter as it is one of the latest human rights documents. The new constitution should include provisions related to the potential future needs so that it could meet the needs of the society for long years.

This study examines the Charter of the Fundamental Rights at the postgraduate thesis level. The study focuses on the historical and constitutional position of the Charter in the EU human rights law. Therefore, the first section touches upon the historical development of the human rights. Thus, it is aimed to analyze the historical background of the Charter.

The place of the Charter in the historical course of the EU human rights law is discussed to understand the importance and function of the Charter. The section on the historical development of the EU human rights law aims to indicate the developments the Charter enabled. It is aimed to analyze the conditions which required the drawing up of this Charter.

The main principles of the Union law need to be stated in order to understand the position of the Charter in the Union's integration and the power

balances between the Union and the member states. Therefore, a section of the study is allocated to the main principles of the Union law. This may allow the better understanding of the attribute of the Charter as a Union norm and the judgments which led to the developments of the Union human rights law.

This study focuses on the historical and constitutional position of the charter, not the implementation of the Charter, because some of the rights protected by the Charter were protected by the judgments of the European Court of Justice before the drawing up of the Charter. The Charter also compiles the fundamental rights established by the judgments of the Court of Justice. In this case, the implementation and interpretation of the Charter creates the obligation that the EU human rights law is handled as a whole.

On the other hand, although the study does not make direct criticism, it aims to provide material for the discussions on the contribution of the Charter to the development of the Union's human rights law in real terms. To that end, the study discusses the Charter's function to compile the human rights protection that was already in place in the Union, the process of the Union's accession to the ECHR, and the Union citizenship as a dominant aspect of the Charter. The Charter was drawn up based on the concept of the Union citizenship in terms of certain rights. However, the human rights documents mainly deal with the human rights deserved just due to being human. This nature of the Charter may result in the perception of the Charter as a domestic human rights document, not as a supranational human rights document.

The study takes into account the critical value of the historical developments, and such developments influenced the theme of some sections. In order to eliminate the unfavorable impact of the chronological concerns on the readability of the study, terminological unity was ensured. Although the term Community is partly used in the study, the term "Union" is mostly preferred. With the Maastricht Treaty signed in 1992 the European Community was assigned with new duties and responsibilities, and took the name of the European Union. However, the above mentioned terms are not separated based

on the chronological order. The term Union is also used for the periods when the term Community was in place.

The study includes discussions and data to provide mental ground for further discussions, instead of precise convictions. The essence of thought is without doubt knowledge. This study makes an effort to engage the reader in the thinking process providing the essence, instead of the end product, which is thought.

I. THE EU HUMAN RIGHTS LAW AND THE HISTORICAL and CONSTITUTIONAL POSITION OF THE CHARTER IN THE EU HUMAN RIGHTS LAW

The EU Law is a sui generis law with different features than the international law. One should examine the basic characteristic of the Union law in order to understand the position of the Charter in the Union law.

Main principles of the Union law and the constitutional dimensions of the Charter are of critical importance to understand the position of the Union fundamental rights documents in the Union law. In this section, overview of the Union law and the human rights-related developments in the Union, which led to the Charter will be touched upon.

A. HISTORICAL EVULOTION OF THE CONCEPT OF HUMAN RIGHTS

Most theories of state suggest that power come to being as people transfer their rights and freedoms to an authority which, they believe, will ensure order and peace in the society. Such theories may help us to come to the opinion that expectations of power mostly coincides with the individuals' need for protection against other individuals and societies. History reinforces the argument that the power, possibly called as sovereignty, is respected to the extent that it meets the safety needs.

Bodin, who put forward the theory of sovereignty, defined sovereignty as *"the absolute and perpetual power of a Republic"*.[2] With absoluteness he meant that political power could not be restricted or was not accountable. This "heavenly" immunity Bodin associated with political power was determining the

[2] Julian H. Franklin, (Eds.), **Bodin: On Sovereignty**, Cambridge University PresAs, 1992, p.7.

individual-state relationship. According to Bodin's understanding of sovereignty, individual's duties were definite before the heavenly power of sovereignty. Individual was not entitled to question political power. The reason why society acknowledged such position of political power and "heavenly" nature of sovereignty might be deemed as society's fear and concern of an insecure environment which might take place due to disorder and tumult.

Another example of these theories is Thomas Hobbes's definition of state in his work *Leviathan*. In this work Leviathan was defined as a monster protecting people from other monsters.[3] Hobbes stated that humans were evil and cruel by nature, that they should transfer their rights and freedoms to Leviathan to strenghten Leviathan by this means, and that Leviathan was the one to ensure safety and order. Differently from Bodin, Hobbes explained consensus as the instrument of power's legitimacy. In his work Hobbes explained the reason for the existence of state, and pointed out the expected function of state.

Although not all the theories of state explain the raison d'être of state with the need for safety, historical experience indicated that state was respected to the extent that it met the need for safety. While this was the expectation of society, the expectation of power related more to soldiers and taxes. Power tried to maintain internal and external peace, ensure the favorable environment to make the wealth as the source of tax, and keep society away from politics. State monopolized military and economy.

However, social developments caused the expected function of state to change as well. To express this through the abovementioned theory of Hobbes: People began to question their status against Leviathan which protected them from other monsters.

[3] Jacques Derrida, Geoffrey Bennington, **The Beast and the Sovereign**, Volume I, University of Chicago Press, 2011, p.27.

Such questionings and their answers reshaped the individual-power relationship of today. Protecting people's rights and freedoms has become one of the expected functions of the state. Accordingly, protecting individual against the state and avoiding the sacrifice of individual for the society have gained importance. In other words, the meaning of "the need for safety" has expanded. State has been considered to achieve its mission to the extent that it protects individuals against not only external threats but also its own arbitrary and abusive conducts. Thus, state has been prevented from holding itself exempted and immune. State's unrestricted and unlawful intervention on individuals has been precluded. Human rights[4] which are defined as rights arising from the mere human nature, according to the understanding of natural law, have been excluded from the state's area of intervention or state's intervention in human rights has been restricted. Thus, the implied contract which was assumed to exist between individual, society and state has been implicitly amended to oblige the state to protect rights and freedoms. According to Locke, should state fails to fulfill its obligation of protecting the fundamental rights stipulated under this amended social contract, such social contract is deemed to be infringed.[5] In such a situation, public recovers its natural rights which it transferred to the state through contract.

Social contract-related approaches towards human rights have been criticized during the process. The doctrine of individualism has debouched as a criticism of social contract doctrine which aimed to enlighten the source of the human rights concept.[6] Individualism suggested that human rights should not be explained within the framework of state-human, and that the true source of human rights was the human itself. According to this doctrine, human rights and

[4] Enver BOZKURT, **İnsan Haklarının Korunmasında Uluslararası Hukukun Rolü**, Nobel Yayınları, Ankara 2003, p.19.

[5] İbrahim Kaboğlu, **Anayasa Hukuku Dersleri (Genel Esaslar)**, Legal Yayıncılık, İstanbul, 2012, p.234.

[6] *Ibid*, p.234.

freedoms already existed in human nature and genesis. Development of individualism coincided to the after French Revolution period.[7]

It is possible to encounter human rights concept in history since the ancient times. However, this concept has varied according to the structures of the societies where it came out. The issue of human rights is as old as the history of humanity, however it was not until 17th and 18th century that it gained its current meaning.[8]

Solon, Greek philosopher lived in 6 BC, mentioned about "the state of law" and "the rule of law"[9], and Zenon, 4 BC, uttered about the equality of humankind without racial and sexual discrimination. Despite all these intellectual development, human right phenomenon was a priority from which females, foreigners and slaves could not benefit.

Although we can trace back the philosophical roots of human rights in the ancient times, one of its well-accepted examples was Manga Charta Libertatum, issued by John Lackland in 1215.[10] King John was exiled from England, his homeland, following the First Barons War erupted due to his tortures. During Jonh's exile, Barons offered John to come to the throne on condition that he signed the document they suggested. First executions of that document did not seem to apply to all people. Since the parties to the document were the King, the Church and the Feudal Barons, the document was of limited character in terms of the parties involved. With this document, the King accepted the rule of constitutional law and its superiority than his powers, thus the absolute power of the King was restricted. Document mentioned about the principle of equality,

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[7] *Ibid*, p.234.

[8] *Ibid*, p.233.

[9] John S. Dryzek, **The Oxford Handbook of Political Theory**, Oxford University Press, 2006, p.323.

[10] Walter Kälin and Jörg Künzli, **The Law of International Human Rights Protection**, Oxford University Press, 2009, p.440.

right of property, freedom of religion, which constituted the foundation of today's fundamental rights.[11]

Human rights concept was developed in an environment of conflict of powers between monarchy and feudalism. Human rights were not accepted as rights arising from mere human nature. People who did not have their freedom were not covered by the human rights concept of those times.

The Petition of Rights dated 1628 included provisions regarding fundamental rights. However, this document reflected power relation between parliament and king, excluding those people who did not have their freedom from the scope of the fundamental rights.

Habeas Corpus Act, dated 1679, governed the right to fair trial in independent courts. This document laid down the foundations of the right to fair trial.

Citizens' fundamental rights were listed in the Bill of Rights dated 1689. Bill of Rights set forth that the King was not allowed to intervene such rights without the consent of the Parliament.[12]

Such developments in Europe paved the way for developments in the United States of America. Virginia Declarations of Rights dated 1776 and United States Declaration of Indipendence dated 1778 stated that all men were created equal and endowed with unalienable rights, and mentioned some of those rights. The Constitution of the United States, adopted in 1787 did not include any provision about human rights before it was later amended in 1791 to establish protection of fundamental rights across the nation.[13]

Human rights concept founded place to itself in the Continental Europe in parallel with the developments in the United States. With the French Revolution

[11] Rhona K. M. Smith, **Textbook on: International Human Rights**, Oxford University Press, 2010, p.5.

[12] *İbid*, p.5.

[13] Kaboğlu, p.242.

in 1789 the immunity and universality of human rights became more of an issue. The concept of universality of human rights added a new dimension to the theory of human rights, and forced political powers to dispose about the human rights. Supranational human rights protection systems established through the universality of human rights defined the external borders of sovereignty. It would be another – external – restriction against the power. **Declaration of the Rights of Man and of the Citizen, inspired by the United States Declaration of Independence laid down the philosophical foundation for the Revolution.**[14] Principles of this Declaration have been evolved through history to find their place in constitutions of all the European countries. The Declaration is known as the first document to impose arrangements on the political rights. From the time of the Revolution till 1830 about 70 constitutions were declared. Human rights concept was evolved from being a question of philosophy to become a subject of constitution and legal order.[15] Declaration of the Rights of Man and of the Citizen reflected the relation between human rights and the constitution.[16] Article 16 of the Declaration stated that constitution could not even be a matter of discussion in a society where human rights were not secured, materializing the relation between human rights and the constitution.[17]

It would not be wrong to say that developments of the human rights in 17th and 18th centuries were at the national level. Destructive outcomes of World War II raised the importance of human rights concept. United Nations Universal Declaration of Human Rights was published in 1948. Eleanor Roosevelt, the first Chairperson of the Human Rights Commission defined the declaration as an "international Magna Carta of all men everywhere.[18]

20th century was marked by a number of developments that might be claimed as cornerstones of the establishment of human rights. First

[14] Smith, p.6.

[15] Şeref Ünal, **Temel Hak ve Özgürlükler ve İnsan Hakları Hukuku**, Ankara 1997 ,p.27.

[16] Kaboğlu, p.241.

[17] Kaboğlu, p.241.

[18] Paul Gordon Lauren, **The Evolution of International Human Rights:Visions Seen**, University of Pennsylvania Press, 2011, p.223.

developments in human rights took place in the individual-state relationship as individual's area of freedom expanded. However, human rights concept gained an international dimension through the developments in 20th century. Human rights concept became a subject of international law. Upon any breach of human rights, states were entitled to intervene in the sovereignty of breaching states. In other words, power was restricted by another power. Hugo Grotius, Dutch jurist and philosopher, mentioned the concept of "humanitarian intervention" in his work On the Law of War and Peace published in 1625.[19] Changes in the concept of human rights in 20th century and international developments could be defined as the reflections of Grotius's doctrine on the political platform. However, this doctrine was criticized with the claim that it could be used as a tool for political legitimization of less powerful countries besides providing protection for human rights at international level. From a generalized approach to the issue that human rights protection was proportionate to countries' economical and political power, it can be concluded that this doctrine could most often be a reason for military intervention.

The principle of universality of human rights was both a political and judicial concept; however it is also meaningful in terms of its content. Human rights refer to minimal rights one has just because of being human. Therefore, human rights do not differ by culture, social structure, and different belief systems. As a matter of fact, subjective defense areas such as public order and public morality which have been developed by states to prevent human rights violations in the light of the experiences in the past have been observed to shrink during the process.

Destructive outcomes of the World War II have proved that human rights were not rights only applicable to citizens of a certain state. It has become a general principle of the international law that all human beings should enjoy the

[19] J. L. Holzgrefe, Robert O. Keohane (Eds.), **Humanitarian Intervention: Ethical, Legal and Political Dilemmas**, Cambridge University Press, 2003, p.26.

protection of human rights, whatever their language, religion, race, economic and social status, sex, thought, without discrimination.

With the Charter of the United Nations, signed in 1945, human rights have become a tangible matter of international law. Countries which joined the United Nations later have acceded to the Charter to document their commitment to fundamental human rights, honor and value of human personality, and the equal rights of men and women. The UN described the rights mentioned in the Charter as the prerequisites for the world peace.

The UN Universal Declaration on Human Rights was proclaimed on 10 December 1948 for further clarification of the main principles and goals of the Charter of the UN. The said Declaration was an inspiration for its successive human rights documents, although it was not legally binding or not subject to any political or judicial control mechanism.[20]

European Convention on Human Rights, which was signed 1950 and entered into force in 1953, was the most important step taken for the regional protection of human rights. It stated rights and freedoms in detail including their restrictions, unlike the Charter of the UN which described fundamental rights and freedoms in general without detail. The greatest novelty introduced by the European Convention on Human Rights was "**efficient protection mechanism**". The European Convention on Human Rights has been subject to judicial protection of European Court of Human Rights which is the judicial body of the Council of Europe. Applications by individuals are the most critical aspect of the human rights protection provided by ECtHR. The Court has been authorized to settle claims of individuals as well as applications by states.

In the event of dispute occurred during the interpretation and execution of the Convention, ECtHR has the jurisdiction pursuant to the Article 32 of the Convention.[21]

[20] Kaboğlu, p.273.

[21] *Ibid*, p.283.

Individuals' opportunity to act instead of waiting for the states to take legal action to instigate jurisdiction would accelerate the evolution of human rights concept. Interpretation of the documents on human rights is a part of the creation of sources of human rights process just like drawing up of such documents. Applications by individuals provoke the court during this creation process, and thus individuals act as a catalyst for the enhanced interpretation of the Convention.

American Convention on Human Rights, dated 1969, may also be also regarded as a reflection of the UN's **Universal Declaration on Human Rights** at regional level. This Convention had a commission and court system. In addition, African Charter of Human and Peoples' Rights, dated 1981, embodied personal and political rights.

African Court on Human and Peoples' Rights is another example of protection of human rights at regional level. The Court was established in 2004 when the protocol which set forth judicial review entered into force and delivered its first judgment on 15 December 2009.[22]

Developments in the fundamental rights are not limited to the abovementioned examples, certainly; the major ones are mentioned here. To understand the development of human rights in the European Union, the historical development of human rights should be touched upon. It would not be appropriate to address the Union's human rights law independently from the history of human rights. Developments in human rights took place in parallel with the development of the Union's human rights law. Judicial experiences and the results of the execution of the laws have guided the creation of sources of human rights. In this regard, developments in human rights have rendered individuals influential in the process of determining the norms. These developments have enabled us to identify the general progress of the human

[22] *Ibid*, p.281.

rights development in the Union. The Union's fundamental rights process has been fed from the historical heritage of such developments.

B. MAIN CHARACTERISTICS OF EUROPEAN UNION LAW

Main characteristics of European Union Law have been determined by the European Court of Justice, the institution of the EU authorized to interpret the establishing treaties. A number of main principles which appeared with the relation of powers among member states were introduced through the interpretation of the European Court of Justice, although they were not included in the treaties which are the primary sources of EU Law. The main reason why the European Court of Justice has such a dynamic and leading position in the interpretation by the European Court of Justice may be claimed to be the preliminary ruling procedure. Judgments of the European Court of Justice regarding the review of Union's Acquis Communautarie are of erga omnes nature, that is to say, they have universal influence.[23]

The European Court of Justice has made decisions which constituted the main principles of Union law in a phased manner. The Court of Justice initially proclaimed a principle and enhanced such principle through its subsequent judgments in the next phase.[24] Principles established by the Court of Justice aimed at ensuring efficiency of the Union law. In addition, the principles established by the Court's judgments has enabled the constitutionalisation of the Union law and assured that the rights bestowed by the Union law had influence in national legal orders.[25] Legal system which took shape by the principle

[23] K.P.E LASOK and Dominik LASOK, **Law and Instutions of the European Union**, Butterworths Group, United Kingdom 2001, p. 355, 356.

[24] Sanem Baykal, **Avrupa Birliği Anayasalaşma Sürecinde Adalet Divanı'nın Rolü: Divanın Ulusal Mahkemelerle İlişkileri ve Yorum Yetkisinin Sınırları Bağlamında Bir Analiz**, Ankara Avrupa Çalışmaları Dergisi Cilt:4, No:1 (Güz: 2004), p.126.

[25] *Ibid*, p.126.

judgments of the Court provided for rights and protection mechanisms that individuals might claim before the national judicial bodies.[26]

General principles established through the judgments of the European Court of Justice have added sui generis nature to the European Union Law. This section will touch upon the following principles:

Unity of EU law,

Autonomy of EU law

Direct applicability of EU law

Direct effect of EU law

Supremacy of EU law.

1. Unity of EU law

The principle of the unity of European Union law means the wholism between the establishing treaties, which constitute the primary sources of the EU law, and the secondary sources, which have been derived from those primary sources. This aspect of the principle may be claimed to resemble to the hierarchy of norms in the Constitutional law. With both of these principles, it was aimed at ensuring the wholism of all the norms. It is required that all the sources of the European Union Law be in harmony and unity.

The principle of unity of the European Union Law also means the uniform implementation of the sources of EU law in each member state. European Union does not have a judicial network across the member states. National courts are the institutions which implement the Union law, and they are instruments of

[26] *Ibid*, p.126.

transfer to the supranational jurisdiction.[27] With this regards, ***preliminary ruling procedure*** plays a major role in the uniform execution of the EU law. This allows the national law and Union law to complement each other.[28]

With principle of the unity of European Union law, it was aimed to ensure implementation of a common law in all the member states. Without legal integration, it is impossible for the economic integration, deemed as the main motivation of the European Union, to take place. The unity of the EU law goes beyond to being a legal concept and reflects the essence of the main motivation of the Union.[29]

2. Autonomy of EU Law

The treaties mentions the autonomy of the Union law, however the jurisdiction of the European Court of Justice has a significant effect on the establishment of this concept.

National laws are comprised of rules set forth by judicial bodies; however international laws are established by international treaties. The European Union law was established through treaties and developed through the activities of supranational authorities. This structural difference together with the difference in the aim of establishment has led to the formation of a unique legal system. The European Union law has been envisaged to be implemented by the national authorities. However, the autonomy of the EU Law has been found necessary for the complete and uniform execution of the EU law in all the member states.

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[27] Mustafa Karayigit, **Gerçek ve Tüzel Kişilerin AB Tasarruflarına Karşı Korunması**, Adalet Yayınları, Ankara 2009, p.76.

[28] Robert Kovar, **"The Relationship Between Community Law and National Law", European Perspectives: Thirty Years of Community Law**, Luxembourg, Office for Official Publications of the European Communities, 1983, p. 109.

[29] R. Barents, **The Autonomy of Community Law (Series European Monographs Volume 45)**, Kluwer Law International, 2004 ,p.214.

The European Union law is implemented by member states independently from the legislative action, except for the cases where related Union norm stipulates arrangement. However, the fact that national courts have been excluded from taking legislative action does not impede the execution of the EU law. Member states are expected to implement the EU law in accordance with the actions of executive and judiciary power. Although national law and EU law are independent laws, these legal systems take action in coordination.

Today the European Union is an international legal entity with legal personality. The system of separation of powers set forth by the Union law renders the EU law autonomous from the international law. The Court of Justice of the EU stated in the Commission's lawsuit against Ireland that a liability stipulated by the EU treaties could not be violated by an international treaty. In the said lawsuit, it was also highlighted that such a violation of Ireland would impair the autonomy of the union law.[30] The European Court of Justice protected the autonomy of the Union law in this lawsuit.

3. Direct Applicability of EU Law

The principle of direct applicability is a reflection of the vertical separation of powers between the Union and the member states. This principle is an outcome of the transfer of power by member states. The notion of direct applicability means that the norms of the EU law apply to the municipal law without any intermediary procedure or adaptation action. Direct applicability principle has enabled the Union's regulations to be directly applied in the member state's sovereignty area. This may be interpreted as the limitation of the member state's sovereignty or the use of the sovereignty of the member state by the union.

[30]Case C-459/03, Commission vs. Ireland, [2006] ECR I-4635, **http://curia.europa.eu** (28.11.2012)

International law has two main approaches towards the effectiveness of international law in the municipal law; dualist approach and monist approach. According to the dualist approach national law and international law are two separate law systems. A norm in one legal system can only apply to another system following a process of adopting.[31] Monist approach developed by Hans Kelsen accepts that there is relation between national law and international law.[32] And it points out that the source of this relation is the supremacy of the international law. Hersch Lauterpacht stated the reason for this supremacy as the concept of human rights. According to Lauterpacht, limitation of the state power for the protection of human rights may only be possible with the supremacy of the international law.[33] Monist approach suggests that international law has effect in municipal law without the process of adoption.[34]

Costa v. Enel case[35] is one of the first examples that indicate the European Court of Justice's preference of monist approach. Case was filed upon the nationalization of the ENEL, Edison Volta Electricity Company with an Italian law. Plaintiff Attorney Costa had owned shares of Edison Volta Electricity Company which was nationalized, and therefore he refused to pay his electricity bill after nationalization of the company.

While the case was continuing at the Italian courts, Mr. Costa argued that the law which allowed the nationalization of the Edison Volta Electricity Company violated the competition provisions of the establishing treaties of the EEC. With regard to this claim of the plaintiff, Italian court requested for a preliminary ruling from the European Court of Justice. European Court of Justice's judgment on the case included the following statements:

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[31] Martin Dixon, **Textbook on International Law**, Oxford University Press, 2007, p.89.

[32] Gideon Boas, **Public International Law: Contemporary Principles and Perspectives**, Edward Elgar Publishing, 2012, p.121.

[33] Dixon, p.88.

[34] Boleslaw Adam Boczek, **International Law: A Dictionary**, Scarecrow Press, 2005, p.6.

[35] C – 6/64, *Flaminio Costa v E.N.E.L,.*[1964] ECR 585 **http://eur-lex.europa.eu** (29.11.2012)

"By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

This judgment highlighted the monist approach of the European Court of Justice. However, it is not possible to sufficiently explain the principle of direct applicability within the scope of the monist-dualist approach. Even so, it can be concluded that the European Court of Justice had made an interpretation which limited the member states' preference between monism and dualism. The principle of direct effect cannot be left to the preference of member states, but a requirement of the EU law system. Therefore, member states' powers have been limited in order to preclude them from adopting a dualist approach which restricts the effect of the Union norms in municipal law. In addition, member states have been held liable for avoiding legislative actions which may impede the implementation of the EU norms. In this regard, it is possible to argue that member states have positive and negative obligations.

Another case where the European Court of Justice ruled in favor of direct applicability was Van Gend en Loos[36] case, which took place before the abovementioned case. Plaintiff Van Gend en Loos company imported chemicals from the Federal Republic of Germany. However, the Netherlands' customs authority requested a high amount of customs charge from the company. The

[36] C – 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, [1963] ECR 1, **http://eur-lex.europa.eu** (29.11.2012)

plaintiff claimed that the said practice violated Article 12 of the establishing treaty of EEC in the lawsuit at the Courts of the Netherlands. With regard to this claim of breach, the Court of the Netherlands requested preliminary ruling from the European Court of Justice. The Court's judgment on this case include the following:

> *"The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals .*
>
> *Independently of the legislatıon of member states, community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage . These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community"*

This decision implies that the Union's law does not only have vertical effect on the states, but also horizontal effect which covers the citizens of the member states.

The European Court of Justice's judgment of the Simmenthal case has been another example where the direct applicability principle was highlighted with more details.

The plaintiff Simmenthal Company imported meat from France to Italy. Italian government has been inspecting imported beef for public health reasons. Imported company was charged with an inspection fee by the Italy government in accordance with the Law entered into force in 1970. However, the relevant Law was in breach of the provisions of the European Economic Community Treaty and other Community laws regarding the "amount restrictions" and the prohibition of "the charges having equivalent effect". Defendant Italian government stated that the law which constituted legal basis for the fee was

enacted after the said sources of Community law. The government argued that the principle which requires that a succeeding rule might abolish the preceding ones prevented the implementation of the Union norms.[37] . The judgment of the European Court of Justice includes the following:

> *"The direct applicability of Community law means that its rules must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. Directly applicable provisions are a direct source of rights and duties for all those affected thereby, whether Member States or individuals; this consequence also concerns any national court whose task it is as an organ of a Member to protect the rights conferred upon individuals by Community law."*

The principle of direct applicability aims to create a common Community law having effect on each and every individual within the borders of the Community. It seems only possible to ensure "the common market", once this aim is achieved.

4. Direct Effect of The EU Law

Direct effect means that an EU rule engenders rights in favor of natural and legal persons, and those right-holders can claim such rights before the national judicial authorities.

For a norm to create rights in favor of natural and legal persons in a member state, the related norm should not necessarily be adopted. Some EU rules address to the member states. Such rules are binding and impose obligations as required by the direct applicability principle. However, directly applicable norms do not always have direct effect. For such Community norms to attain direct effect, member states' governmental bodies should make new decisions to accept them. However, it is not possible for a member state to

[37] This principle is known as ***"Lex posterior derogat priori".***

relieve itself from an obligation by avoiding from carrying out the relevant arrangements in the municipal law. The related EU norm would have effect in the legal relations between the state and the individuals regardless of such related arrangement.

Direct effect is a principle directly created by the European Court of Justice and is not covered by the treaties. The European Court of Justice's Van Gend en Loos decision[38] includes the following:

> *The wording of article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation . Thıs obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law . The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.*

The Court has implied a new law system with this decision which underlined the direct effect of the Community law, and initiated the treaties' constitutionalization process.[39] The principle of direct effect serves as a bridge between the national law and the European Union Law. It extends the scope of the Community law from just being an international law only binding for the states to the citizens of the member states.

Direct effect of the directives comes to being in some different forms of the principle of direct effect. Directives are Community norms binding for the member states together with their outcomes; however the method and procedure of the adaptation of directives remain at the discretion of the member states. A member state cannot relieve itself from the obligations in cases where the directives are not adapted to the municipal law on time or in a proper way.

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[38] C – 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1

[39] Baykal, **Avrupa Birliği Anayasallaşma Sürecinde Adalet Divanı'nın Rolü: Divanın Ulusal Mahkemelerle İlişkileri ve Yorum Yetkisinin Sınırları Bağlamında Bir Analiz**, p.123.

The European Court of Justice underpinned this in its Ratti[40] decision. Case was presented to the European Court of Justice through preliminary ruling procedure. Mr. Ratti stated in his defense before the Italian court of criminal jurisdiction that two directives were implemented regarding the labeling and packaging of some hazardous materials. National court requested advise from the European Court of Justice on whether the relevant articles of the said directives have direct effect or not.

The European Court of Justice adjudged that the precise, clear, unconditional directive provisions and the provisions which did not provide margin of discretion may have direct effect although a national adaptation action has not been taken within the specified period. In its Ratti judgement, the Court of Justice underlined the rule that member states could not evade the obligations on the grounds of their own negligence and failure.[41] It can be concluded from this attitude of the Court that estoppel arguments are not allowed. In the light of this judgement, it can be deducted that directives do not have direct effect during the period given for the adaptation of the directives.[42,43]

However, the fact that the directive's adaptation period still continues does not mean that the directive have no effect[44]. In the Inter-Environment Wallonie case[45], it was stated that a member state had to avoid from taking any regulatory action detracting from the purpose of the directive addressed to it, although the adaptation period did not end..

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[40] C–148/78, *Pubblico Ministero v Ratti* [1979]ECR 1629 **http://eur lex.europa.eu** (01.12.2012)

[41] Paul Craig, Gráinne de Búrca, **EU Law: Text, Cases, and Materials**, Oxford University Press, 2011, p.193.

[42] Chalmers Damian, Davies Gareth, Monti Giorgio, European Union Law: Cases and Materials, Cambridge University Press, 2010, p.288.

[43] Trevor C. Hartley, **The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community**, Oxford University Press, 2007, p.204.

[44] *Ibid*, p.204.

[45] C-129/96, *Inter-Environnement Wallonie ASBL v Région Wallonne,* [1997] ECR I-7411, **http://eur-lex.europa.eu** (01.12.2012)

Implementation of directives does not inhibit individuals from claiming right directly based on a provision in a directive. The Court ruled in the Marks&Spencer case[46] that the directive had to be directly referred to in cases where the directive entered into force properly. In cases where a directive did not enter into force properly, individuals may claim right based on a provision of such directive, although the proper adaptation of the directive to the municipal law has been completed.[47]

With the principle of the direct effect, EU norms not only create rights for natural and legal persons, but also engender obligations. Otherwise, EU rules would be implemented in different ways in different member states. For instance, a service provided by the public institutions in a country may be provided by private law legal person in another country. There would be differences in the application in member states if the direct effect was only applied to the state and its bodies. In this context, the effect of the EU norms on the relationships between individuals has been explained with the concept of "**horizontal direct effect**".

5. Supremacy of EU Law

The principle of supremacy of EU law, also known as the primacy of EU law is the result of the separation of powers between the Community and member states.[48] Supremacy of EU law means that EU law takes precedence in case of incompatibility between the provisions of EU law and national law. EU law prevents the implementation of any conflicting norm of national law. Other two principles of the EU law, direct effect and direct applicability have the same

[46] Case C-446/03, Marks & Spencer plc v David Halsey, [2005], ECR I-10837, **http://eur-lex.europa.eu** (01.12.2012)

[47] Paul Craig, Gráinne de Búrca, **EU Law: Text, Cases, and Materials**, p.194.

[48] Theodore Konstadinides, **Division of Powers in European Union Law: The Delimitation of Internal Competences Between the Eu and the Member States**, Kluwer Law International, 2009, p.88.

purpose and lead to the same result. Supremacy of the EU law is a requirement of the supranational nature of the Union.

The principle of the supremacy of EU law has been established by the European Court of Justice.[49] According to the European Court of Justice, the legitimacy of the Community law cannot be questioned based on a national law norm.[50] Member states showed different reactions to the principle of the supremacy of EU law. Countries such as the Netherlands and Austria can be considered as the countries which acknowledged the supremacy of EU law in terms of the provisions of constitution and judicial decisions.[51] Constitutional courts of Italy, Germany, Denmark and Belgium imposed limitations to the supremacy of the EU law. Such limitations have found place in the decisions related to the fundamental rights. Federal Constitutional Court of Germany has set out the prerequisite that "the structural principles of the constitution" should be protected within the EU law so that it could recognize the supremacy of the EU law.[52] Federal Constitutional Court of Germany's limitation on the structural principles with the *Solange I* judgment was reflected to a positive law arrangement with the amendment made in the Constitution of Sweden. Transfer of power required by and resulted from the principle of the supremacy of EU law has been deemed possible to the extent that it complies with the Constitution and the European Convention on Human Rights, and that it assures fundamental rights and freedoms.[53]

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[49] Paul Craig, Gráinne de Búrca, **EU Law: Text, Cases, and Materials**, p.256.

[50] *Ibid*, p.256

[51] Füsun Arsava, **Birlik Hukuku ve Anayasa Arasındaki İlişki**, Ankara Avrupa Çalışmaları Dergisi Cilt:4, No:1 (Güz: 2004), p.101.

[52] *Ibid*, p.102.

[53] U.Bernitz, **Sweden and the European Union: On Sweden's Implementation and Application of European Law**, CMLRev. 38(2001), p.903**;** Füsun Arsava, Birlik **Hukuku ve Anayasa Arasındaki İlişki**, Ankara Avrupa Çalışmaları Dergisi Cilt:4, No:1 (Güz: 2004), p.103.

The European Court of Justice stated in the Simmenthal case[54] that Union law precluded the adoption of new national laws which conflict with the Community law:

> *"Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions."*

The European Court of Justice ruled in the Costa Enel case[55] that the principle of supremacy applied to all the legislative activities. The Costa Enel case addressed to the incompatibility between a provision of an establishing treaty and a national law enacted subsequent to that establishing treaty. In this judgment the European Court of Justice justified the principle of the supremacy and pointed out the threats that the lack of it may lead to. The Court stated the following in the said case:

> *"By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.*
>
> *By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real*

[54] C–106/77, *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A*. [1978] , ECR 629 **http://www.cvce.eu** (03.12.2012)

[55] C – 6/64, *Flaminio Costa v E.N.E.L.*[1964] ECR 585, **http://www.cvce.eu** (03.12.2012)

powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit wıthin limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system."

The principle of the supremacy of the Community law also applies to the constitutions of the member states.[56] The effect of the Community actions may not be considered invalid due to the incompatibility with the constitutional principles of a member state.[57] Within this context, it can be concluded that the principle of the supremacy of the Community law has effect on the soverignty of the member states.

C. PATH TO THE CHARTER: HUMAN RIGHTS DEVELOPMENTS IN THE EU LAW

The fact that the main motivation of the Union is to ensure peace through economic integration led to a long-continued silence when it comes to the human rights in the sources of the Union. However, the attitude of the constitutional courts of the member states and the dynamism of the judicial body of the Union forced the institution of the Union to bring an end to this silence. These

[56] Margot Horspool**, European Union Law**, Oxford University Press, 2006, p.173.

[57] Kemal Başlar, **Avrupa Birliği'ne Katılım Sürecinde Türk Anayasası'nın Uyumlaştırılması Sorunu**, **http://www.anayasa.gen.tr** (08.01.2013)

developments found their reflections in the establishing treaties in the course of time.

The cycle between the Establishing Treaties, the attitudes of the member states, the judgments of the Court, and the measures of the EU institutions contributed to the multi-dimensional development of the Union's human rights law. Individuals also played role in the establishment of Union's human rights law as individual actions embodied the fundamental rights-related concerns of the member states. Therefore, the developments in the Union's fundamental rights law should be considered as having multiple sources.

1. Human Rights in the Treaties

The founding philosophy of the European Union was to establish peace together with the economic unity on the continent. Traces of this perspective may also be seen in the main motivations. However, initially established as an economic union, the community's evolution into a political union was unavoidable. The political integration in Europe has necessitated some common values for the member states to come together under the Community umbrella. It can be claimed that an economic integration can be the driving force of the creation of some common values even if there is no political integration. Free movement which appeared as a prerequisite for the economic integration would have constituted a common will which necessitated fundamental values including fundamental rights, democracy, social rights and some general legal principles. At least, it can be said that free movement of the workers would lead to the pursuit of common social rights.

The idea of establishing a United Europe goes back a long way, however it was only after the second world war when this idea was materialized. In 1949 six founding states – Belgium, France, Germany, Italy, Luxembourg and the Netherlands – attempted to establish integration for coal and steal, materials of

critical economic value.[58] Those attempts led to the signing the Treaty establishing the European Coal and Steel Community – ECSC on April 18, 1951. 6 years later the Treaty Establishing the European Economic Community and the Treaty Establishing the European Atomic Energy Community were signed. These founding treaties did not touch upon rights and freedoms other than the four fundamental freedoms[59] and equal pay for women and men, which have been the founding motivations of them. Mentioned fundamental rights and principles in the treaty were limited with those required by the economic integration. It can also be concluded from the nature of the said rights that the primary purpose of the establishing treaties was to ensure economic integration. Establishing treaties has not included provisions stimulating general and complete protection of the fundamental rights for a long time.[60] Focused on establishing a common market, the Community approached the individual as an economic object rather than a human rights subject.

Another reason why human rights concept was not included in the establishing treaties was that member states had different perspectives of human rights. Founding states were in the opinion that the protection of human rights had to be limited to the national judicial bodies. Thus, human rights concept, due to its nature, imposes restrictions on those having the power. In this regards, member states avoided possible obligations which may arise from treaties.[61]

The Community was built on the economic motivations, however the process proved that such a structure was not sufficient alone. They realized that

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[58] Stephen Weatherill, **Cases and Materials on EU Law**, Oxford University Press, 2012, p.7.

[59] Free movement of Workers, Free movement of goods, Freemovement of capital, freedom of establish.

[60] Füsun ARSAVA, **"Avrupa Birliği Temel Haklar Şartı"**, Ankara Avrupa Çalışmaları Dergisi, 2003, V:3, N:1, p.3.

[61] Nanette A. Neuwahl, **The Treaty on European Union: A Step Forward in the Protection of Human Rights?** ; Nanette A. Neuwahl, Allan Rosas, **The European Union and Human Rights**, Martinus Nijhoff Publishers, 1995, p.2.

integration was a multi-dimensional process. It was understood that human rights needed more attention for a sound integration process, and setting common human rights standard became a must.

The Community's awareness of human rights did not remain limited to the developments which affect the member states. The Community set the prerequisite of having a developed human rights system to become a member of the Community. The following section will deal with the reflections of the developments related to the human rights law, rather than of the legal and political developments, on the treaties.

a. Treaty of Paris and Treaty of Rome

Treaty of Paris was signed on 18 April 1951 between Germany, France, Belgium, Luxemburg, the Netherlands, and Italy, and came into force on July 25 1952. Prepared based on the "Schuman Plan" of Robert Schuman, then Ministry of Foreign Affairs of France, the Treaty of Paris established the European Coal and Steel Community. Treaty of Paris assigned the bodies formed by the treaty with the management of the coal and steal industry. The following bodies were formed with the treaty:

- High Authority as the executive body

- Council of Ministers consisting of the representatives of member states

- Common Assembly acting as the parliament

- Court governing the measures and actions of the High Authority.[62]

The Treaty generally included provisions related to the purpose of economic cooperation, and the political organization to be performed for this purpose. It did not include any important provision regarding the human rights.[63]

[62] John Peterson, Michael Shackleton, **The Institutions of the European Union**, Oxford University Press, 2012, p.22.

Treaty of Rome was signed on 25 March 1957, establishing the European Economic Community and European Atomic Energy Community (Euratom), which constituted the grounds for the European Union.[64] Treaty of Rome had the purposes of ensuring a common market, economic integration, monetary union and political cooperation.[65] Human rights were accepted as the general principle of the Community, and included in the purposes, duties and activities of the Community.[66]

Following the entry into force of the Treaty of Paris and Treaty of Rome, Merger Treaty was signed on 8 April 1965 to streamline the European institutions. With the Merger Treaty, executive bodies of the European Coal and Steal Community, European Economic Community and European Atomic Energy Community gained a single institutional structure. These three communities shared common institutions. Institutions established with the Treaty which came into effect on 1 June 1967 are as follows:

- Commission,

- Council,

- General Assembly, later Parliament,

- Court of Justice.

Treaties Establishing the European Coal and Steal Community, European Economic Community and European Atomic Energy Community included human rights catalogue. The reason of including the provisions on the freedoms and the principle of equality in the Treaty Establishing the European Economic Community was not the tendency towards human rights, but the states' purpose

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[63] Robert Schütze, **European Constitutional Law**, Cambridge University Press, 2012, p.411.

[64] *Ibid*, p.18.

[65] *Ibid*, p.19.

[66] Paul P. Craig & Gráinne De Búrca, **The Evolution of Eu Law**, Oxford University Press, 2011, p.478.

of ensuring economic integration.[67] At the times when the Treaty was being prepared the general tendency was towards the limitation the protection of human rights with the national courts. Therefore, protection of fundamental rights at the level of a supranational institution as the Community was not deemed necessary. If the Community was to be qualified as a peace project, it could be concluded that economic integration took precedence as the first stage of this staged project. For a more rational and realistic collaboration between the states and the societies, the Community was attempted to be built on economic principles.

Although the establishing treaties did not include provisions related to human rights in real terms, they mentioned the concepts of "rule of law" and "democracy". Rule of law was identified with the Court of Justice and democracy with the Parliament.

The inadequacy of the provisions related to the human rights did not prevent the questioning of human rights within the community. Treaties of the Community stipulated transfer of power between the Community and member states. As a result of this transfer of power, the Community commenced to take actions in many areas which had been under the power of the member states before. Community regulations took precedence even over the national legislation activities.

Trend towards extending the area of power began to unavoidably cover individuals' rights. This situation brought about new, human rights-focused discussions about the power. Although there was not any binding human rights document, this discussion about the human rights began with the judicial activism of the Court of Justice and triggered new developments.

[67] Chalmers, Davies, Monti**, European Union Law: Cases and Materials**, p.12.

b. Single European Act

Single European Act was the first major revision of the establishing treaties based on Article 236 of the Treaty of Rome. It was signed in Luxemburg on 17 February 1986, and in The Hague on 28 February 1986, and came into effect in 1 July 1987.

The preamble of the Single European Act paved the way for significant developments for the evolution process of the human rights in the European Community. The preamble of the Single European Act includes the following:

> *"…Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice,…"*[68]

The preamble with the above given statements was not a part of the main body of the document. However, the European Court of Justice could establish provisions based on these statements. Although it was in the preamble, this reference marked a noteworthy development. The Community did not have a catalogue of rights and freedoms at that time. However, a reference to the European Convention on Human Rights and the European Social Charter indicated a list of rights. This reference was also important and meaningful as it identified the minimum scope of the developments to take place in the following years. The reference to the European Social Charter was of significance for the economic and social rights.[69]

The European Single Act marked an essential progress in terms of democracy. The European Parliament was set forth to be established via

[68]Single European Act, http://ec.europa.eu (10.12.2012)

[69]Philip Alston, J.H.H. Weiler, **An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights**; Ed. Philip Alston, Mara R. Bustelo, **The EU and Human Rights**, Oxford University Press, 1999 ,p.32.

election.[70] This may be deemed as the most notable progress towards the democratization of the Community. The known interaction between the concepts of democracy and human rights may imply that this was an important development in term of the social-political rights.

c. The Maastricht Treaty

One of the objectives of the integration determined in the 1972 Paris Summit was achieving a European Union.[71] Upon the entry into force of the Maastricht Treaty on 1 November 1993, the European Union was created.

The Treaty envisaged collaboration in justice and home affairs, which increased the importance of the protection of fundamental rights, since the activities related to the justice and home affairs were directly relevant to the human rights. Fundamental rights were most likely abused in the activities carried out under these two fields. The fact that issues such as asylum, migration, human trafficking were within the scope of these two fields made the protection of fundamental rights more important.

In the preamble of the Treaty of Maastricht, the attachment to the principles of democracy, liberty, respect for fundamental rights, and freedoms and of the rule of law were re-expressed and confirmed.[72] Paragraph 3 of the preamble of the Treaty underlined the will of the member states regarding the human rights with the following statement:

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[70] Clifford A. Jones, **The Legal and Institutional Framework of the 2009 European Parliament Elections in the Shadow of the Lisbon Treaty**; Ed. Michaela Maier, Jesper Strömbäck, Lynda Lee Kaid, **Political Communication in European Parliamentary Elections**, Ashgate Publishing, Ltd, 2011, p.21.

[71] C.W.A. Timmermans, **General Aspects of European Union and the European Communities**, Ed. Paul Joan George Kapteyn, **The Law of the European Union and the European Communities: With Reference to Changes to be Made by the Lisbon Treaty**, Kluwer Law International, 2008, p.53-54.

[72] Maastrichtt Treaty on European Union, **http://eur-lex.europa.eu** (10.12.2012)

"confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law"

And the same paragraph pointed out a concrete reference to consult to about the social rights as in the following:

"confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,"

The Treaty of Maastricht was the first community treaty which amended an establishing treaty and included the concept of human rights in the main text.

Paragraph 2 of the Article F of the Treaty denoted two significant resources of human rights, which were common constitutional traditions of the member states and the European Convention on Human Rights signed by all the member states.[73] The fact that the Treaty referred to the European Convention on Human Rights as the source of fundamental rights paved the way for the interpretations that the ECHR was officially integrated to the Community law.[74] Despite all these positive developments, the arrangements in the said article were not satisfactory. This article did not take the fundamental rights at the same level as the Community rules.

The Maastricht Treaty brought a novelty with new openings about the human rights law of the Community. With the Treaty the concept of the European Union Citizenship has been developed as an advanced stage of the "People's Europe".[75] The European Union citizenship was an individual-level

[73] Wopera Zsuzsa, **"The General Principles of Law at the Practice of European Court of Justice", Juridical Current**, Volume 12, Issue 1, 2009, p.30.

[74] Robert Schütze, **European Constitutional Law**, Cambridge University Press, 2012, p.416.

[75] Dominik LASOK, **The Maastricht Treaty On European Union**, MJES V:3 N:1-2 (1993/94), p.4.

reflection of the integration Jean Monnet expressed in 1952 saying "we are not forming coalitions of states, we are uniting men".[76] The European Citizenship was not put forward as an alternative to the national citizenship. Citizens of the Union would continue to hold their national citizenships.[77] The European Citizenship was deemed as a concept above the national citizenship, covering and complementing it.[78] The Treaty stated explicitly that the European citizenship would not supersede the national citizenship.[79] The concept of the European citizenship had a psychological dimension along with its legal and political dimension. The aim with this concept was to create a sense of belonging to the Community after the state-level integration was maintained in line with the economic motivations.[80]

Along with the concept of the European citizenship, the rights of the union citizens arising from the union law came to the fore. Articles 8a – 8e of the Treaty of Maastricht addressed the individuals' rights arising from the Union law. Some of the rights arranged in the Article are as in the following:

- Right to freedom of movement and residence within the territories of the member states: This freedom may be restricted by the member state within the framework of the conditions and restrictions set forth by the Treaty. With this statement included in the Treaty, the previous right to free movement for workers and services was expanded to cover all the citizens with the concept of the European citizenship.

- Right to vote and stand in elections in municipal elections and elections to the European Parliament in any EU member state under the same conditions as nationals of that state: To be entitled to exercise this

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[76] Stijn Smismans, **Civil Society And Legitimate European Governance**, Edward Elgar Publishing, 2006, p.243.

[77] Dominik LASOK, **The Maastricht Treaty On European Union**, p.4.

[78] Chalmers, Davies, Monti**, European Union Law: Cases and Materials**, p.444-447.

[79] Willem Maas, **Creating European Citizens**, Rowman & Littlefield, 2007, p.85.

[80] Catherine Barnard, **The Substantive Law of the EU: The Four Freedoms**, Oxford University Press, 2007, p.447.

right, an individual is required to have resided for six months in a member state and not to have voted in the country of which he/she is a national. The exercise of right to vote is on reciprocal basis. Right to vote and stand in the elections to the European Parliament was ratified by the Council Directive numbered 93/1 09 EC for the elections in 1994.[81]

- Petioning the European Parliament.

- Petioning the Ombudsman assigned by the European Parliament: The EU Ombudsman was established under the Maastricht Treaty. The Ombudsman's role is to ensure the protection of the rights of real and legal persons who reside in the European Union from any violating acts of the institutions of European Union. Ombudsman investigates and conducts inquiries about the complaints on the grounds of discrimination, unfairness, abuse of power, refusal of information or provision of incomplete information. Besides investigating complaints submitted to the court, the Ombudsman also may take initiative to launch an investigation.[82]

The Maastricht Treaty introduced a number of significant developments related to the fundamental rights. These developments may possibly seem to have affected only the states signed the Treaty. However, the Maastricht Treaty laid down provisions regarding the membership applications, and set forth respect for democracy and human rights as an application requirement. Candidate countries were expected and required to develop a policy with respect for human rights.

d. The Amsterdam Treaty

The Amsterdam Treaty, which was signed 2 September 1997 and came into effect on 1 May 1999[83], introduced noteworthy novelties and additions

[81] Dominik LASOK, **The Maastricht Treaty On European Union**, p.4-5.

[82] Patrick Birkinshaw, **European Public Law**, Cambridge University Press, 2003, p.272.

[83] Amsterdam Treaty, **http://www.eurotreaties.com** (12.12.2012)

regarding the human rights law. The Treaty explicitly underlined the Union's sensitivity to the human rights.

With additions and amendments, the emphasis on the human rights in Article F of the Maastricht Treaty was strengthened. Paragraph 1 of Article F has been amended as in the following: *"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."*. It was also stated that the listed principles in the article were common principles across all the member states.

Reference to the European Convention on Human Rights in the Treaty remained unchanged. Any candidate European State was expected to respect human rights. The Union's aim was to create political oppression on the member states with this requirement which was included in the Copenhagen political criteria as well. The provision which set forth this requirement did not only address to the candidate states, but also it was a political message to the member states.

The Amsterdam Treaty provided a posteriori control mechanism over the member states regarding the fundamental rights. In case of serious and persistent breach of the common principles under the Treaty, a political sanction was projected to be implemented.[84] Upon the proposal of the Council – in the shape of heads of state or government - or two thirds of the member states or the Commission, and the approval of the European Parliament, breach of fundamental rights by a member state might be determined. This procedure did not only consist of the determination; the suspension of the membership rights was also possible.[85] Once the breach was determined, the Council might decide to suspend the membership rights of the breaching member state with qualified majority. Rights which could be suspended included right to vote in the Council,

[84]Dominic McGoldrick, **The European Union After Amsterdam: An Organisation with General Human Rights Compenetence?**; David O'Keefe, Patrick M. Twomey (Eds.), **Legal Issues of the Amsterdam Treaty**, Hart Publishing, 1999, p.251.

[85] Craig, De Búrca, **The Evolution of Eu Law**, p.480.

right to structural funds, financial supports, right to participate in science and education programs. If there were positive changes in the situation of the member state after the suspension of the membership rights, the Council could revoke or vary the sanctions with qualified majority. Those obligations of the state whose membership rights suspended, which arose from the Treaty, would remain in effect. Human rights to be used as the baseline in case of serious breach of human rights which initiated this procedure would be determined based on the common rights and freedoms stated in the European Convention on Human Rights, common principles and constitutions of member states.[86]

Since this sanction procedure was carried out by the Council and member states, it gained a political character. The fact that two thirds majority was adequate to initiate this sanction procedure added a new dimension to the sovereignty understanding. With this power relation between the member state and the Union, a supranational organization, the Union's law gained a new dimension. This procedure allowed member states to control and investigate human rights practices in another member state. This sanction procedure complies with the paragraph 2 Article 60 of the Vienna Convention on the Law of Treaties adopted in 1969.[87] According to this Convention, in case of serious breach of the provisions of a treaty by a state party to such treaty, other states that were party to that treaty might wholly or partially suspend or terminate the treaty.

The Amsterdam Treaty provided for an important power definition within the context of the protection mechanism for fundamental rights. The Treaty authorized the European Court of Justice to control the compatibility of the actions of the bodies of the European Union to the fundamental rights.[88] Thus, the Union's human rights law were subject to a positive control mechanism. In

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[86] Aslan Gündüz, **Avrupa Birliği'nde İnsan Haklarının Yeri: Kurumsal Düzenleme ve Bireylerin Hakları**, Marmara Üniversitesi Avrupa Birliği Enstitüsü, Avrupa Araştırmaları Dergisi, V:7, N:1-2, 1999, p.99.

[87] Vienna Convention on the Law of Treaties, **http://untreaty.un.org** (14.12.2012)

[88] Mahmut GÖÇER, **Avrupa Birliği ve Temel Hakların Korunması, Korunması**, Anayasa Yargısı Dergisi,V:17, p. 391

addition, the provisions of the establishing treaties and the European Convention on Human Rights which were referred to within the Union's constitutional law were included in the interpretation area of the European Court of Justice. This power of interpretation led to a dispute; a supranational judicial body, established by a treaty, were proposed to control another treaty while there was another supranational judicial body authorized to control that treaty. The interpretation area of the European Court of Justice, and the limits of its interpretation as authorized by the Amsterdam Treaty, were discussed considering the presence of the European Courts of Human Rights. Another matter of discussion was that to what extend the European Court of Justice had to consider, in its interpretation of the European Convention of Human Rights, the decisions of the European Court of Human Rights as the final interpreter of the European Convention on Human Rights. It would be observed within the process whether the relationship between the two courts would be marked by competition or reciprocity, and whether they would be alternatives to each other or complementary to each other.

The Amsterdam Treaty also has importance in terms of transperancy. The Treaty bestowed the citizens of the Union the right to access the documents in the institutions of the EU.[89] Also, the citizens have been accorded the right to correspond with the bodies of the Union, and right to receive answer from the said bodies.

e. Treaty of Nice

Treaty of Nice was signed on 26 February 2001 and came into effect in 1 February 2003.[90] The Treaty amended the Article 7 of the Amsterdam Treaty, adding provisions to the sanction procedure set forth by that article.

[89] Paul Craig, **EU Administrative Law**, Oxford University Press, 2012, p.358.

[90] Nice Treaty, **http://eur-lex.europa.eu** (14.12.2012)

Previously, the political sanction laid down in the Article 7 of the Treaty was to be initiated in case of serious and persistent breach. The clear provision stated in the related article did not allow the initiation of the sanction procedure in case of any potential breach.

In 2000, a coalition including the racist party came to the power in Austria. It was expressed that the leaders of the EU proved to be insufficient to protect the democratic position within the Union.[91] Although this situation was criticized by the political discourse, the reactions were not found sufficient.[92] Due to this political situation, the Intergovernmental Conference added a paragraph in Article 7 of the Treaty on European Union on 14 February 2000. This paragraph expressed the "presence of a clear risk", with which potential breaches were taken into the scope of the sanction procedure. With the new arrangements made, the procedure would be initiated upon the proposal of the Commission, the European Parliament or one third of the member states. Upon such proposal, the Council might establish the risk of breach following the approval of the European Parliament, and the defense of the related state with the four-fifths majority. The Council might only give advice after establishing the risk of breach. The Council keeps track of the situations that led to the determination of the risk of breach to decide whether such situations continue or not. Should there be any changes in those situations; the Council might refine the decision. A member state which is determined to constitute risk of breach may appeal to the European Court of Justice. However, the member state may not conduct inquiry on the expediency or legality of the decision of the European Court of Justice. The European Court's competence to review measures is restricted to purely

[91] Bahar Yeşim Deniz,**Avrupa Birliği Hukukunda Temel Haklar Ve Avrupa İnsan Hakları Sözleşmesi Sistemi İle Etkileşim,** TBB Dergisi N:97, 2011, p.51.

[92] Craig, De Búrca, **The Evolution of Eu Law**, p.480-484.

procedural stipulations.[93] An early warning system may be identifies related to this procedure.[94]

The Treaty of Nice focused highly on the reformation of the institutions of the union and the relationships between them. The Treaty made a greater emphasis on human rights and developed political mechanisms including early warning system.

f. Treaty Establishing a Constitution for Europe: Birth of the Charter as a Constitutional Document

The 2004 enlargement of the EU was a large enlargement with the accessions of 10 new member states. The enlargement required restructuring to ensure better functioning of the institutions of the Union. A constitution was drawn up to compile the Establishing Treaties and restructure the relationships among the institutions of the Union.[95]

The Constitution draft drawn up by the convention included a number of significant arrangements regarding the human rights. A greater emphasis on human rights was made in this Constitution in the same way as other establishing treaties. Article 9 of the Treaty was arranged as in the following:

> *"1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.*

[93] Finn Laursen, **The Treaty of Nice: Actor Preferences, Bargaining And Institutional Choice**, BRILL, 2006, p.32.

[94] Elena Fierro, **The EU's Approach to Human Rights Conditionality in Practice**, Martinus Nijhoff Publishers, 2003, p.90.

[95] Treaty Establishing a Constitution for Europe, **http://www.unhcr.org** (14.12.2012)

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The most notable change/improvement in this article was the authorization of the Union to accede to the European Convention on Human Rights. With the reference made in the Establishing Treaties, the European Convention on Human Rights became one of the sources of human rights law of the Union. In addition, the European Court of Justice became a supranational judicial power to interpret this source. However, the said article enabled the actions and measures of the bodies of the Union to be subject to the control mechanism of the European Court of Human Rights. Even though the Union did not accede to the European Convention on Human Rights, the criteria and principles laid down by the European Court of Human Rights were considered within the judicial process of the Court of Justice.[96]

Charter of the Fundamental Rights incorporated to the Treaty of Nice constituted the second part of the Treaty Establishing a Constitution for Europe. The incorporation of the Charter of Fundamental Rights into the Treaty evolved it into a binding source from being a declaration.[97] The arrangement of the Charter of Fundamental Rights in an establishing treaty to become a binding union norm also had importance for the member states. The Union's judicial authorities would considers the Charter of Fundamental Rights and the European Convention on Human Rights referred to in the establishing treaties for reviewing the practices related to the human rights. Moreover, national courts which were

[96] Dirk Ehlers, Dr. Ulrich Becker, **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007, p.23.

[97] Arianna Andreangeli, **EU Competition Enforcement And Human Rights**, Edward Elgar Publishing, 2008, p.9.

liable for executing the Union law, would implement the Charter of Fundamental Rights as a European Union norm.

The Constitutional Treaty had a symbolic importance in terms of the political integration. The concept of human rights received high attention for the political integration as an issue of legitimacy and prestige. As a matter of fact, the draft constitution included a catalogue of fundamental rights. The EU Charter of Fundamental Rights was more comprehensive in terms of the rights it included compared to the European Convention on Human Rights, which was considered as the source for the judgement of the Court of Justice. The EU Charter of Fundamental Rights became a more comprehensive text including arrangements related to bio-ethic, personal data, social rights of workers, right to good governance, compared to the European Convention on Human Rights.[98]

The Constitutional Treaty was ratified by the European Parliament, however it had to be approved in the parliaments of the member states or via public referendum, depending on the law systems of the member states to enter into effect. Nevertheless, the Constitution was rejected on the referandums held in France and the Netherlands; therefore it did not enter into force.[99]

54.7% of the public who participated in the referendum rejected the Constitution. According to the researches carried out by the Eurobarometer, the public's reaction was against the European Union itself rather than the constitution.[100] The reasons of rejection of the constitution in the referendum included economic reasons and reservations on the negative effects of such a constitution on the employment.

[98] Deniz Ilgaz, **Avrupa Anayasası ve Yetki Dağılımı**, Marmara Avrupa Araştırmaları Dergisi, 12, 1-2, 2004, p.145.

[99] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, 2011, p.24.

[100] Tülin YANIKDAĞ, **Anayasallaşma Sürecinde Avrupa: Temel Haklar Şartı'ndan Lizbon Antlaşması'na**, Bilge Strateji, V:2, N:3, Güz 2010, p.131.

The main reasons of rejection of the Constitution in the Netherlands were lack of information, and reaction against the national government and some political parties.[101]

g. Treaty of Lisbon: Charter as a Legally Binding Instrument

The fact that the referandums held in France and the Netherlands rejected the Constitution Treaty, which was drawn up on the grounds of the need for restructuring the institutions of the Union, paralyzed the process. This led to a period of reflection which lasted for two years until when Germany took over the EU Presidency and a treaty covering some important arrangements set out in the Constitutional Treaty was accepted. The said treaty was signed under the title of the Treaty of Lisbon during the EU Presidency of Portugal on 13 December 2007 and entered into effect on 1 December 2009.[102]

With the Treaty of Lisbon, important steps were taken towards the Union's human rights law. The Charter of the Fundamental Rights incorporated in the Constitutional Treaty, however it did not become legally binding because the Treaty was not ratified. With the Article 6 of the Treaty of Lisbon the EU Charter of Fundamental Rights gained binding nature.[103] The Charter of the Fundamental Rights achieved the same legal status as the treaties with the arrangements made in the Treaty of Lisbon.[104] The EU approved, for the first time, a Union norm except for the human rights texts issued by other supranational organizations as a reference for human rights.

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[101] *Ibid*, p.132.

[102] The Treaty of Lisbon, **http://www.eutruth.org.uk** (14.12.2012)

[103] P.P.Craig, **The Charter, The ECJ and National Courts**; Diamond Ashiagbor, Nicola Countouris, Ioannis Lianos (Eds.), **The European Union After the Treaty of Lisbon**, Cambridge University Press, 2012, p.83.

[104] Bahadır Yakut, **Post -Lisbon Criminal Law Competency Of The European Union**, Marmara Journal Of European Studies, V:17, N:1- 2,2009, p.19.

As mentioned in the part related to the Constitutional Treaty, the Union's judicial power would use this new document of rights and freedoms in the review of the practices of human rights. Also, the national courts which were liable for executing the union law at the national level, would consider the Charter of Fundamental Rights in addition to internation human rights conventions to which the member state was a party. This would also enable the list of the rights and freedoms of the citizens of member states to extend. Besides the legal protection, the Charter of the Fundamental Rights would have impact on the administrative activities of the bodies of the EU though the inspections of the EU Ombudsman. The EU Ombusdman would ensure, within the power assigned, the institutions and bodies of the EU to comply with the Charter of Fundamental Rights in their actions.[105]

Article 67 of the Treaty states the following: "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." Thus, respect for fundamental rights was considered as one of the main obligations of the Union, and the legally binding nature of the Charter of Fundamental Rights was reinforced within the context of freedoms, security and justice.[106]

The Treaty of Lisbon strenghtened the position of the Parliament and accordingly reinforced the democratic character of the Union. The President of the Commission would be elected by the Parliament with the proposal of the Council.[107]

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[105] Haydar Efe, **Avrupa Ombudsmanı'nın AB İçinde İyi Yönetim, Hukukun Üstünlüğü ve İnsan Haklarını Koruyucu Rolü**, Avrupa Çalışmaları Dergisi, V:19, N:2, 2011, p.21-22.

[106]Carrera, S.,Geyer, F., **The Reform Treaty & Justice and Home Affairs Implications for the common Area of Freedom, Security & Justice**, CEPS Policy Brief, No. 141, **http://www.libertysecurity.org** ; Mustafa T. Karayiğit, **The Area of Freedom, Security and Justice After the Lisbon Treaty**, Marmara Journal Of European Studies, V:16, N:1-2, 2008, p.136.

[107] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.32.

Another democratic innovation set out by the Treaty was the collection of one million signatures. With this practice, it was laid down that a law proposal could be submitted to the Commission, should a petition be signed by one million EU citizens. This enabled the citizens to directly participate in the decision making mechanisms.[108] Thus, the Treaty provided a participation instrument for the citizens as part of a semi-direct democracy. The development of the European Citizens' Initiative improved the democratic character of the Union.[109] These actions enabled the political integration to be scaled down to the citizens, and accordingly the citizens were provided with opportunities to influence the policies of the EU.

Another development in the field of transparency and democracy was that the the Council of Ministers' meetings, during which the discussions and votings on the EU legislation would take place, would be held publicly.[110] It was aimed to ensure a healthier and more active functioning of the participatory democracy tools with transparency. A democratic attitude which was not built on the complete and correct information would not reflect the public's will.

The notion of the European Union Citizenship was included in the Treaty of Lisbon as well. In the arrangement of the notion of the European Citizenship, it was underlined that this was not an alternative to the national citizenship.

Provisions of the other establishing treaties regarding the fundamental principles of the Union were strengthened and gained more dimensions with the Treaty of Lisbon. Article 1, which laid down the fundamental principles of the Union, included the following statements:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human*

[108] Jean-Claude Piris, **The Lisbon Treaty: A Legal and Political Analysis**, Cambridge University Press, 2010, p.133.

[109] Giovanni Moro, **Citizens in Europe: Civic Activism and the Community Democratic Experiment, Springer**, 2011, p.47.

[110] Paul Craig, **The Lisbon Treaty: Law, Politics, and Treaty Reform**, Oxford University Press, 2010, p.40.

rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Another notable political and legal development about human rights was the addition of the expression "minority" to the article in question.[111] The notion of minority took place among the fundamental values of the Union and it signaled that the Union would pay regard to this value in its foreign relations. Also, it can be interpreted that the emphasis on the term "individual" was a reflection of the change in the Union's motivation. Union's human rights law was initially established on the economic reasons and expanded to include the rights of groups, then evolved to give place to the individual's rights with the Treaty of Lisbon.

The Treaty of Lisbon set forth provisions to create a balance for freedom, security and justice through the binding status of the Charter of Fundamental Rights, and judicial power of the Court of Justice.[112]

2. Human Rights in the Secondary Sources

Sources other than establishing treaties, which are the primary sources of the EU Law, also included important provisions on the fundamental rights. Legislations of the bodies of the Community constitute the secondary sources of the EU law. Secondary sources of the Union may be defined as the results of the use of sovereignty which the member states transferred through the founding

[111] Lucia Serena Rossi, **Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and the Member States?**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012, p.91.

[112] Mustafa T. Karayiğit, **The Area of Freedom, Security and Justice After the Lisbon Treaty**, Marmara Journal Of European Studies, V:16, N:1-2, 2008, p.150.

treaties in the legislative activities. Main secondary sources of the Union are regulations, directives, decisions, proposals and opinions.

The establishing treaties empower the bodies of the Union to create the secondary sources of the Union law. In this sense, there is a hierarchy between all the legislative acts with establishing treaties being on the top.[113] Due to this hierarchy secondary norms should comply with the primary norms, that is to say, the Establishing Treaties. This allows the hierarchy of norms, which covers the superiority of the national constitutions, to apply to the Union law.[114] This brings about the requirement for the the secondary norms to be established within the framework drawn by the establishing treaties. The way that the European Court of Justice ensures and controls the hierarchic relationship between the Establishing Treaties and the secondary legislation resembles to that of the national constitutional courts'.

Secondary legislation of the Union may be separated into two as binding norms and non-binding norms. Regulations, directives and decisions are binding norms, while recommendations and opinions are non-binding.[115]

Regulations are binding and directly applicable norms with all their aspects. Typically, for the execution of the regulations member states do not need to take any actions. Direct applicability of the regulations is published on the EU official gazette. Direct applicability of the regulations means that regulations are binding for the member states upon their publishing on the EU official gazette without the requirement of implementation in the member state's law system. In other words, the regulations may engender rights and obligations for the member states and their citizens without being subject to any implementation or action. Once an EU regulation is published on the EU official gazette, a citizen may claim a right set out by that regulations before national court. Due to this character of the regulations, the regulations on the fundamental rights have material impact. Direct effect and direct applicability of

[113] Chalmers, Davies, Monti**, European Union Law: Cases and Materials**, p.100.

[114] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.103

[115] *Ibid*, p.104.

the regulations allow them to function effectively towards the integration of the EU. Regulations have been used to deal with the differences in the national implementations especially in the Union's main areas of motivation. Regulations contributed to a uniform Union law with in-depth integration. Some of the Union regulations regarding the fundamental rights are as follows:

- Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

- Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

-Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

-Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide.

- Regulatıon (EC) No 45/2001 Of The European Parliament And of the Council of 18 December2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

- Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

-Commission Regulation (EU) No 317/2010 of 16 April 2010 adopting the specifications of the 2011 ad hoc module on employment of disabled people for the labour force sample survey provided for by Council Regulation (EC) No 577/98.

- Regulation (EC) No 1049/2001 Of The European Parliament And Of The Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

-Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work.

It is possible to claim that regulations were initially created for integration purposes through the Union motivations. Therefore, fundamental rights approach of that time was focused on free movement of individuals and workers. However, the improvements in the understanding of fundamental rights brought about the establishment of new institutions and arising of new fundamental rights. The notion of European Union citizenship, in particular, would provide more comprehensive fundamental rights for individuals who resided within the borders of the Union. It can be also said that Union's legislative actions adopt an improving understanding of rights. For example, the right to access the documents, part of the right to information, was taken into the scope of fundamental rights protection with the Charter. Principles regarding the exercise of this right were defined through regulations. In this regard, a number of regulations included provisions on many rights which were under the protection as fundamental rights.

Directives, other binding union norms, are not directly applicable.[116] Therefore, directives should be implemented by the member states. Member State is held responsible for amending an existing law or enacting law in line with the purpose of the related directive. Directives provide the member states with opportunity of discretion to some extent in comparison with the regulations. For the directives, the member state is responsible for aligning its own legal system with the EU norm within the the time and in accordance with the conditions specified. This characteristic of the directives may be claimed to force the member states to take legislative actions. The directives address to the member

[116] Robert Schütze, **European Constitutional Law**, Cambridge University Press, 2012, p.323.

states, not to the Union citizens. Therefore, directives are the most used Union norm for the purposes of integration. Although directives address to the states, they mostly bestow rights on the citizens. Therefore, it is possible that directives entitle the citizens to claim right before the courts although they are not adapted to the municipal law. In other words, a member state cannot avoid obligations by not implementing a directive to the municipal law. Due to this character of directives, they can be defined as Union norms having direct effect.[117] Some Union directives on the fundamental rights include:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

-Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

-Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

-Council Directive 64/224/EEC of 25 February 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries

- Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

-Directive 2002/58/EC of the European Parliament And of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[117] *Ibid*, p.323-324.

-Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

- Directive 2012/13/EU of the European Parliament And of the Council of 22 May 2012 on the right to information in criminal proceedings.

- Directive 2012/29/EU Of The European Parliament And Of The Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

-Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

- Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.

-Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

It is possible to observe a progress in the understanding of the fundamental rights set out in the directives of the Union in parallel with the abovementioned progress in the regulations of the Union. Many directives extend individuals' rights within the scope of the perspective provided by the Union, although those extensions are not directly related to fundamental rights at the first glance. Therefore, active status rights, social rights, and Union citizenship rights have been included in the scope of the Directives.

Although the regulations and directives are secondary norms within the hierarchy of the Union law, it is possible to say that they are within the scope of

the supremacy of the Union law in terms of the member states' law system. Thus, it can be suggested that the Union uses its secondary sources of law as a supra-constitutional tool for the integration, relying on the principle of supramecy of the Union law. Also, it was aimed to preclude the differences in the practices of Union law in different member states. Within this framework, these sources may be thought as the normative tools ensuring uniform implementation of the Union law.

Decisions are other binding Union norms and they do not apply to the general, which means that they are only binding for member state, real or legal persons to whom they are addressed. According to Article 249 of the EC Treaty the decisions of the Union do not have direct effect.[118] However, the European Court of Justice ruled in the ***Grad***[119] case that the decisions of the Union would have direct effect under certain conditions. Decisions are issued by the institutions of the Union including Council, Commission or Parliament. Parliament has been the most active body of the Union in the decision-making related to the fundamental rights. The Parliament has reflected and indicated the will of the public of the Union through its reports and observations, drafts, its human rights-oriented calls to the Commission and the Council. Other Union decisions on the fundamental rights include:

- COMMISSION DECISION of 15 February 2007 on reserving the national numbering range beginning with '116' for harmonised numbers for harmonised services of social value (notified under document number C(2007) 249) (Text with EEA relevance) (2007/116/EC)

- 2006/515/EC: Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[118] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.191.

[119] Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 870.

- Council Decision of 19 April 2007 establishing for the period 2007-2013 the specific programme Fundamental rights and citizenship as part of the General programme Fundamental Rights and Justice.

- Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice.

- Council Decision of 22 July 2003 setting up an Advisory Committee on Safety and Health at Work.

-2006/619/EC: Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community.

It is possible to observe that social rights-related arrangements occupy the largest place, when the general areas within the scope of the regulations, directives and decisions, the secondary binding sources of the Union law, are taken into consideration. Legislative actions in the field of social rights concentrate on labor law; which most certainly results from the fact that the free movement of workers and individuals is one of the four main freedoms the Union provides for. Free movement of workers may potentially lead to significant problems for individual labor law together with the principle of equality. These potential problems may pose a risk to the projected integration. The Union has chosen to make arrangements through regulations, directives and decisions on these areas in order to reduce such risks against the integration.

Recommendations and opinions are the other secondary sources of Union law, which contribute to the development of the Union's human rights law. These

norms are not legally binding.[120] However, recommendations and opinions have significant political impacts on the improvement of human rights, although they are not binding.[121] Institutions make recommendations about the issues they found necessary. So, recommendations are among the most important instruments for the bodies of the union to establish policies. Institutions of Union provide opinions on certain issues upon request. Recommendations and opinions are influential in the policies, however the mechanisms appling to them differ. Institutions of the Union are more active in the recommendation, whereas they are relatively less active in the opinion.

These sources have contributed substantially to the improvements in the human rights. In addition, declarations have been another source for the development of human rights in the Union's law.

Declaration issued on 10 February 1977 adopted and signed by the Council and Commission on 5 April 1977 and became a common declaration.[122] Institutions of the Union stated that they would respect fundamental rights arising from the constitutions of the member states and the European Convention on Human Rights, and that they would abide by these rights in their actions. Despite not binding, the first common declaration on fundamental rights has been referenced by the European Court of Justice[123]. This declaration would be taken as criteria in the amendment of the jurisprudence based on the development of the fundemantal rights in the Union law by the Federal Court of Germany.[124]

Declaration issued on 27 April 1979 has been a leading step for the discussions on the accession to the European Convention on Human Rights,

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[120] Chalmers, Davies, Monti**, European Union Law: Cases and Materials**, p.98.

[121] Silvio Marcus-Helmons, **Avrupa Birliği Temel Haklar Şartı: Ortaya Çıkışı ve Sorunlar**; İbrahim Ö. Kaboğlu (Ed.), **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001, p.83.

[122] Craig, De Búrca, **The Evolution of Eu Law**, p.479.

[123] *Ibid*, p.479.

[124] Nanette A. Neuwahl, Allan Rosas, **The European Union and Human Rights**, Martinus Nijhoff Publishers, 1995, p.40.

which plays a major role in the fundamental rights policy of the Community.[125] The said Declaration led to serious long-lasting discussions about whether it was a solution to the problem of fundamental rights or not.

Two reports, dated 14 October 1984 and 14 February 1984, under the same name have been substantially influential in taking the Union fundamental rights policy to the constitutional level. The resolution was named "European Parliament Draft Treaty on a European Union" and it is also known as ***Spinelli report.***[126] This resolution was a draft treaty as understood from its name. Therefore, it had substantial effect. This report also gives clues about the underlying philosophy and approach of the future Europe. The draft treaty included provisions on the fundamental rights in its preamble and article 4.[127] The draft also included provisions on pluralistic democracy, principles of human rights and rule of law, and fundamental rights and freedoms arising from the constitutions of member states and the European Convention on Human Rights. Another important aspect of the report is that it obliged the Union to accede formally to the European Convention on Human Rights, the European Social Charter and Twin Conventions of the United Nations for the Union.

Declaration dated 2 April 1989 appears as the continued part of the declaration made in 1977. Declaration on Fundamental Rights and Freedoms was also named after the rapporteur Karel de Gucht, who drew it up, and called as "de Gucht Report". [128] As an expanded version of the Declaration on 1977, this Declaration was the first fundamental rights catalogue of the Union.[129] This catalogue covered not only the standard rights and freedoms but also the social rights. In addition, this Declaration envisaged target provisions on the right to

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[125] Dirk Ehlers, Dr. Ulrich Becker, **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007, p.14.

[126] Craig, De Búrca, **The Evolution of Eu Law**, p.480.

[127] European Parliament Draft Treaty on a European Union, **http://www.eurotreaties.com** (02.03.2013)

[128] Jörg Monar, **The Institutional Dimension of the European Union's Area of Freedom, Security and Justice**, Peter Lang, 2010, p.126.

[129] Dirk Ehlers, Dr. Ulrich Becker, **European Fundamental Rights And Freedoms**, p.15.

environments which made it both fundamental rights catalogue and a program. Although this document included significant arrangements on the fundamental rights, it remained as an internal action of the Parliament since it was not binding. However, some of those arrangements inspired the developments in the Union's fundamental rights.

Another resolution of the Parliament stated the requests related to another establishing treaty. Resolution on the Constitutional Basis of European Union dated 12 December 1989 included recommendations about changes in the institutional structure of the EU.[130] In addition to the requests on institutional changes, it also included the request on the addition of the fundamental rights catalogue in the Declaration of Fundamental Rights and also provisions to prevent racism and xenophobia to the new establishing treaty. Another important issue in the resolution was that it allowed the case to be referred to the European Court of Justice when the domestic remedies were exhausted in case of a breach of fundamental rights. This paved the way for the individual application to the European Court of Justice. Such recommendations also requested that the Union law provided fundamental rights protection with a judicial control mechanism.

Reports, non-binding secondary sources of the Union law, have indicated the Union's position on the human rights. Since the Maastricht Treaty entered into force, the Parliament have prepared Human Rights in the European Union report annually.[131]

The Council has also made decisions related to human rights, although limited compared to those made by the Parliament. The Coulcil's decisions are mostly explanatory.

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[130] Paul R. Beaumont, Carole Lyons, Neil Walker, **Convergence and Divergence in European Public Law**, Hart Publishing, 2002, p.55

[131] **http://www.europarl.europa.eu** (03.03.2013)

The Council highlighted that the Member States should also adopt and respect human rights and democracy in the Council Declaration on Democracy dated 8 April 1977.[132]

Stuttgart Declaration dated 19 June 1983 further underlined the human rights referring to the European Convention on Human Rights and the European Social Charter.[133] Statements in the Stuttgart Declaration were reflected in the preamble of the Single European Act.[134]

Commission has also taken actions related to fundamental rights exclusively or collaboratively with other bodies. The Commission adopted an attitude in favor of accession to the ECHR on the memorandum on 4 April 1979.[135] The Commission claimed in this memorandum that accession to ECHR was possible without making any amendments to the establishing treaties, stating that a mixed treaty would allow the accession to the ECHR.

The EU's accession to the ECHR came to the agenda again with the declaration on 19 November 1990.[136] This Declaration stipulated that the ECtHR, the control body of the European Council, should be responsible for the protection of fundamental rights until a fundamental rights catalogue would be prepared. If this was not the case, The Commission also provided for the maintenance of the principles of fundamental rights and democracy through the Organization for Security and Co-operation in Europe.

Declarations having recommended the Union's accession to the European Convention on Human Rights yielded results with the Decision numbered 2/94 of

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[132] Simon Halliday, **Judicial Review and Compliance With Administrative Law**, Hart Publishing, 2004, p.5.

[133] Dieter Mahncke, Alicia Ambos, Christopher Reynolds, **European Foreign Policy: From Rhetoric To Reality?**, Peter Lang, 2004, p.129.

[134] *Ibid*, p.129.

[135] Neuwahl, Rosas, **The European Union and Human Rights**, p.204.

[136]Giacomo Di Federico, **Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty**; Di Federico Giacomo (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011, p.19.

the European Court of Justice. The opinion, mentioned in the following sections, stated that the amendment in the establishing treaty was necessary for the Union to accede to the ECHR.[137]

Community Charter of Fundamental Rights of Workers was another non-binding document related to the fundamental rights. Although it was non-binding, this document included significant goals and had political influence. The Charter was approved at the Strasbourg Summit on 9 December 1989.[138] The Charter included arrangements on the social rights within the scope of the integration of the Union. And the Charter had provisions similar to those in the European Social Charter.

A general review of the developments in the Community's secondary law reveals that there had been a chronologically parallel progress between the establishing treaties, judgments of the European Court of Justice and sources of secondary law. The decisions of the bodies of the Union may be said to have will to shape the establishing treaties as providing solutions and answers to the questions of the European Court of Justice. Therefore, it is apparent that although decisions and recommendations are not binding, they were reflected on the binding norms. The relation and cycle between the judgments of the Court of Justice, non-binding decisions of the bodies of the Union and binding Union norms have created the Union's legislation regarding the fundamental rights. Secondary sources govern particularly the social rights. The secondary sources include provisions related to the exercise of rights that were secured by the Charter although those provisions did not seem to be related to the fundamental rights at the first glance. Therefore it can be observed that sources of secondary law added new rights to the fundamental rights in the classical meaning.

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[137] Giorgio Gaja, **Accession to the ECHR**; Andrea Biondi, Piet Eeckhout, Stefanie Ripley (Eds.), **EU Law After Lisbon,** Oxford University Press, 2012, p.180-181.

[138] Stephen J. Curzon, **Internal Market Derogations in Light of the Newly Binding Character of the EU Charter of Fundamental Rights**; Di Federico Giacomo, **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011, p.148.

D. HUMAN RIGHTS IN THE JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE: JURISPRUDENCE THAT AFFECTS THE CHARACTER OF THE CHARTER

Established under the Treaty of Paris, the European Court of Justice has undertaken the role of ensuring the application and interpretation of the European Union norms.[139] Courts of First Instance have been established by the Single European Act to ease the burden of the European Court of Justice. The jurisdiction of the European Court of Justice is limited to the Union law; it is not within the Court's area of jurisdiction to interpret the national laws. The jurisdiction of the European Court of Justice is a compulsory jurisdiction, which differentiates it from the general international law.[140] National laws are obliged to apply to the Court of Justice in the cases where the interpretation of the Community law is required.

The European Court of Justice has constitutional jurisdiction, which means that it controls the compatibility of the activities of the EU institutions with the establishing treaties. Constitutional jurisdiction at the national level has a similar function. In this regards, the ECJ has been handled and discussed as a constitutional court.[141] The cases that have been brought before the ECJ include actions for annulment, negligence lawsuits, infringement cases, actions for

[139] Margot Horspool, **European Union Law**, Oxford University Press, 2006, p.59.

[140] *Ibid*, p.102.

[141] Lukas Bauer, **The European Court of Justice as a Constitutional Court ; International Constitutional Law Journal**, V:3, N:4/2009, p.268, Accessible on : **http://www.internationalconstitutionallaw.net** (14.12.2012)

compensation and personnel-related cases. The Court applies written – oral jurisdiction procedures based on the case type.[142]

As mentioned in the fundamental principles of the European Union Law, the European Court of Justice has been the driving force for the creation of the Union law. Constitutional arrangements are mainly targeted to establish norms from the provisions set forth by the jurisdictions of the Court of Justice. The Court also acted as the driving force of the human rights law. The Court has employed legal aggresiveness on the cases of human rights in accordance with the understanding of natural law. However, the ECJ remained silent before 1970, on the first years of the Union. At that time, the Court was more passive on the human rights due to the general opinion that the activities of an organization which was established with the aim of economic integration would not breach human rights.

The European Court of Justice has interpreted the national law of the member states. However, the Court has established the supremacy of the Union law. Since the Union law did not provided as a strong human rights protection as the laws of member states, some member states did not recognize the supremacy of the Union law in terms of the human rights. And the principle of the supremacy of the Union law could not be completely implemented because of the concerns on the human rights protection. Such developments led to the questioning of political and legal legitimacy of the principle of the supremacy of Union law. Another point of view suggests that fundamental rights protection was a legitimate instrument that enabled the Union law to be broken. As the supremacy of Union law was under threat and concern about the the political legitimacy of Union raised, the European Court of Justice has began to form a human rights jurisdiction along with the Union norms. However, before handling the European Court of Justice's jurisdiction related to the fundamental rights, it

[142] Trevor C. Hartley, **The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community,** Oxford University Press, 2007, p.61.

would be useful to touch upon the judgments of the member states' Constitutional Courts, which led to the establishment of such jurisdiction.

1. Position of the Constitutional Courts of Member States: Reactions in the Name of Human Rights

Improvements in the fundamental rights have been achieved through the individuals' struggle against the power, to which they transferred their rights under the contract of society, and with the power's consent to be restricted. It is possible to say that the developments in the area of the fundamental rights in the EU law took place as a result of the member states' efforts to determine the boundaries of the EU law. However, even though the constitutional courts of the member states played a key role in the restriction of the powers of the Union, the citizens of the EU has been pulled into this effort with the European Union's quests for democracy.

Upon the transfer of power as set out by the establishing treaties and as a result of the extensive legislative actions of the Union, the Union law began to apply to a number of areas which had been governed by the national law norms beforehand. The law system which governed the individuals' rights and lives changed especially in those areas which were included within the scope of Union law. This created the need for determining the individuals' position in this new law system so that a better human rights law could be ensured. Especially in certain areas, some European citizens including the real and legal persons who were subject to national law systems where rights and freedoms were protected at the constitutional level have been transferred to the Union law system which did not include a list of rights and freedoms. The Union considered arrangements in the Union human rights in line with these developments and with the purpose of extending the scope of the political integration. While the Union citizens were included within the scope of the Union law, the constitutions of the member states and instruments the European Convention on Human Right, to which the member states acceded, provided the human rights protection for the citizens.

Under these conditions, any infringement of rights of Union's citizens, which may possibly arise from the constitution of the member state, by any action of an institution of the Union may cause a conflict. The reason for the conflict between the Union law and member state's law was the principles of the unity and the supremacy of the European Union law. Most member states have employed judicial activities in compliance with the principles of the supremacy and primacy of the Union law.[143] However, within the framework of protection of the fundamental rights, the courts of some member states have questioned the supremacy of the union law. Constitutional courts of member states gave the impression that they would not recognize the supremacy of the Union law as long as the Union law provided human rights protection at the same level as afforded by the constitutions of the member states and the international treaties.[144] The fact that the constitutional courts of the member states questioned the supremacy of the Union law in terms of the protection of fundamental rights posed a threat against the uniform application of the Union law and accordingly against the integration within the EU. This perceived threat paved the way for the beginning of the developments in the fundamental rights law of the Union. Therefore, the judgments of the constitutional courts of the member states have proved to be substantially important for the protection of the fundamental rights in the Union. The fact that the constitutional courts of member states claimed judicial power in these areas, stating that the required judicial protection of fundamental rights was not sufficiently afforded by the Union law posed potential threats against the unity of the Union law and the powers and competencies of the European Court of Justice, as well.[145]

In the Internationale Handelsgesellschaft judgment of the German Constitutional Court is among the typical samples of the resistance of the national constitutional courts against the principle of the supremacy of the Union

[143] Füsun ARSAVA, **Birlik Hukuku ve Anayasa Arasındaki İlişki**, Ankara Avrupa Çalışmaları Dergisi, V:4, N:1, 2004, p.101.

[144]Samantha Besson, **The European Union and Human Rights: Towards A Post-National Human Rights Institution?,** Human Rights Law Review, 6:2, 2006, p.343.

[145] Karayigit, **Gerçek ve Tüzel Kişilerin AB Tasarruflarına Karşı Korunması**, p.184.

law. The case has been one of the most significant and known conflicts between constitutional courts of member states and the European Court of Justice related to the principle of the supremacy of the member states.[146] The event which was the subject of the judgment had an economic dimension in parallel with the integration philosophy of the Union law. The subject of the case was the exportation license fees that Internationale Handelsgesellshaft, a company exporting agricultural products, paid.[147] *Internationale Handelsgesellschaft* obtained exportation license from the relevant national authority pursuant to the Regulation numbered 120/67 EEC Of The Council Of 13 June 1967 On The Common Organization Of The Market In Cereals. The said regulation stipulated an exportation license for the exportation of the agricultural products stated in the regulation with the aim of controlling the movements of the agricultural products in the market. Companies were required to pay a certain amount of deposit to obtain exportation license. However, the regulation also stated that the deposit paid would not be returned in case that no exportation was made during the license validity period. Internationale Hadelsgesellschaft paid the deposit set forth by the regulation to the relevant national authority. The company requested the return of the deposit it paid after the end of the license period, and the national authority returned the deposit proportionate to the amount of the exportation the company made during the license period. Therefore, the company opened a case before the Administrative Court of Frankfurt to take the deposit back, and the company claimed that the related regulation of the European Community was in breach of the fundamental rights protection provided by the constitution of the member state. The plaintiff suggested that the "proportionality", one of the main principles of the Federal Constitution of Germany, and economic freedom were violated.[148]

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[146] Schütze, **European Constitutional Law**, p.358.

[147] Christopher Harding, Uta Kohl, Naomi Salmon, **Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors**, Ashgate Publishing, 2008, p.91.

[148] Jeremy John Richardson**, European Union: Power And Policy-making**, Routledge, 2006, p.174.

The national court referred to the preliminary ruling, and referred the plaintiff's claim regarding the Community regulation to the European Court of Justice.[149] The European Court of Justice stated that general principles of community law included the fundamental rights, as the Court did in the **Stauder**[150] case which will be mentioned in the following sections.[151] The Court indicated that it apted to reserve its power of jurisdiction on the fundamental rights. The Court noted that the protection of fundamental rights was based on the common constitutional traditions of the member states, however limited this protection to the community structure and purposes.[152]The Court remarked that it would not be compatible with the principles of the supremacy and autonomy of the Union law to use the national norms in order to control the Union's sources of law. The Court also stated that national norms could not be used as control instruments over the Union law, even if it was the constitution of the member state. In other words, the Court ruled that the fundamental right protection could be fulfilled pursuant to the Union criteria not to the national criteria. The Court's judgment included the following:

> *"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as*

[149] C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, http://curia.europa.eu (24.02.2013)

[150] Case 29/69, *Stauder v City of Ulm* [1969] ECR 419 http://www.cvce.eu (22.02.2013)

[151] Neuwahl, Rosas, **The European Union and Human Rights**, p.7.

[152] *Ibid*, p.7.

formulated by the constitution of that State or the principles of a national constitutional structure."

The Court underlined that the fundamental rights were an integral part of the EU law, however it did not detect any violation in the event that was subject to the case.[153] The Court declared that the Union law criteria, but not the constitution of the member state would apply for the review of the reconciliation with the fundamental rights. The Court ruled that the supremacy of the Union law could not be overridden by the provisions of the constitutions. It is possible to conclude from this judgment that the court considered the fundamental rights as the ram to invade into the supremacy of the Union law.

Following the judgment of the Court of Justice through preliminary ruling procedure, the Administrative Court of Frankfurt referred the case to the Federal Constitutional Court claiming that it was incompatible with the constitution. The judgment of the German Constitutional Court was called as ***Solange (I)*** judgment.[154] German Constitutional Court ruled that the regulation which was subject to the case did not include any provision breaching the Constitution of Germany. Constitution of Germany stated that it could judge the compatibility of the EU regulations to the Constitution since the EU regulations were norms implemented by the German administrative bodies. The expanding interpretation of the Federal Constitutional Court has led to the establishment of a constitutional jurisdiction that covered the Union norms.[155]

Constitutitonal Court of Germany pointed out that the provisions regarding the transfer of power should be interpreted within the framework of fundamental

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[153] Chalmers, Davies, Monti, **European Union Law: Cases and Materials,** p.234.

[154] *Internationale Handelsgesellschaft, mbH v Einfuhr-und Vorratstelle für Getreide und Futtermittel* (Solange I), Bundesverfassunggericht, 29 May 1974, [1974] 2 CMLRep. 540.

[155] Bertil Oder, **Avrupa Birliği'nde Çokmerkezli Anayasacılığın Yapısal Sorunları : Yetki Çatışmaları ve İkincillik İlkesi Işığında Türkiye İçin Karşılaştırmalı Gözlemler**, Anayasa Yargısı Dergisi, V: 22, 2005, p.183.

rights protection system stipulated by the Constitution of Bonn.[156] Federal Constitutional Court laid stress on the weak protection of the fundamental rights and the lack of a fundamental rights catalogue in the Union law to which the power was transferred.[157]

Federal Constitutional Court stated that the supremacy of the Union law could be recognized only when the fundamental rights protection in the Union law was enhanced. Federal Constitutional Court's judgment included the following:[158]

> *"As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law."*

The phrase "Solange" which means "as long as" used by the constitutional court is a key term indicating the main idea of the judgment, thus the judgment is commonly known as the ***Solange (I)*** judgment. The judgment mentioned the lack of the democratic legitimacy particularly lack of a parliament which was described as the "public sovereignty".[159] It was stated that the supremacy of the Union law would not be recognized as long as such deficiencies continued to exist

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[156] Trevor C. Hartley, **European Union Law in a Global Context: Text, Cases and Materials**, Cambridge University Press, 2004, p.307-308.

[157] Chalmers, Davies, Monti, **European Union Law: Cases and Materials,** p.234.

[158]English Translation of the Judgment is accessible on: **http://www.utexas.edu** (23.02.2013)

[159] Richard Münch, **Constructing a European Society by Jurisdiction**, European Law Journal, Vol. 14, No. 5, 2008, p.527.

and the fundamental rights protection was not enhanced in the cases where the Union law conflicted with the fundamental rights secured by the Constitution.[160] In addition, it was also remarked that the Union's efforts focused more on ensuring the economic integration and that the provisions concerning the fundamental rights set forth by the establishing treaties were inadequate. The Federal Court clearly expressed that the supremacy of the Union law in the area of fundamental rights would not be applicable so far as the Union law did not settle fundamental rights protection equivalent to the fundamental rights protection secured by the member states.

Solange judgment allowed the questioning of the democratic legitimacy of the supremacy of the Union law.[161] The political validity of the implementation of the supremacy of the Union law began to be questioned; considering that the Union law was developed with economic motivation, and therefore it lacked the adequate protection of fundamental rights. The institutions of the EU ensured that the fundamental rights, especially those matters expressed and pointed out in the Solange I judgment, were taken to the agenda of the Union law. This awareness raised within the Union was reflected in the judgments of the European Court of Justice through the ***Nold Judgment*** to be discussed in the following sections.[162]

Another example of the resistance to the supremacy of the EU law in terms of the fundamental rights was the ***Frontini*** judgment made by the Italian Constitutional Court.[163] Italian Constitutional Court showed a hesitative attitude towards the principle of the supremacy of the Union law in the areas related to human rights. Italian Constitutional Court ***(Corte Costituzionale)*** stated in the Frontini judgment that the normative power transferred to the EU institutions was of economic nature and there were not a normative structure in place in the

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[160] Giuseppe Martinico, **The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe**, Routledge, 2012, p.111.

[161] Wojciech Sadurski, **Constitutionalism and the Enlargement of Europe**, Oxford University Press, 2012, p.99.

[162] Neuwahl, Rosas, **The European Union and Human Rights**, p.5.

[163] C- 183/73, *Frontini v. Ministero Delle Finanze*, [1974] 2.

area of human rights. Italian Constitutional Court remarked that fundamental principles of human rights and constitutional values restricted the supremacy of the Union law.[164] In this regards, the judgment included the following:

> *"The EEC Treaty Ratification Act 1957, whereby the Italian Parliament gave full and complete execution to the Treaty instituting the EEC, has a sure basis of validity in Article 11 of the Constitution whereby Italy "consents, on condition of reciprocity with other states, to limitations of sovereignty necessary for an arrangement which may ensure peace and justice between the nations" and then "promotes and favors the international organizations directed to such an aim".*[165]

Thus it was aimed with the judgment at creating an argument within the framework of the principle of the "***pacta sund servanda"*** in the international law by reminding the conditions of the transfer of power. Italian Constitutional Court recognized the supremacy of the Union law in this judgment; however it also stated the limits of the supremacy of the Union law.[166] The limits of the principle of the supremacy of Union law were expressed as the provisions of the Article 1 of the Italian Constitution, fundamental principles of the constitutional law and fundamental rights.[167] In addition, it is possible to claim that the attitude of the Italian Constitutional Court posed a serious threat against the supremacy of the Union law, considering the Court's a hesitative attitude in the ***Granital***[168] judgment made by the Italian Constitutional Court again in terms of the human rights.[169] Italian constitutional Court displayed its reservations on the implementation of the principle of the supremacy of European law in terms of the fundamental rights, so as the German Constitutional Court did with the Solange I

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[164] Craig, De Búrca, **The Evolution of Eu Law**, p.353.

[165] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.283.

[166] Marise Cremona, **Compliance and the Enforcement of EU Law**, Oxford University Press, 2012, p.139.

[167] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.284.

[168] C- 170/84, *Spa Granital v. Amministrazione delle Finanze dello Stato*, Italy, Constitutional Court, 8 June 1984.

[169] Craig, de Búrca, **EU Law: Text, Cases, and Materials,** p.284.

judgment. It can be concluded that both of the courts aimed to reduce the possible influences of the Union law on their own constitutional orders through these judgments.

In the ***Fragd***[170] case, the Italian Constitutional Court provided for a model for the constitutional review which it stated in the Frontini judgment before. The Court ruled in the Fragd case that the supremacy of the EU law was not absolute.[171] Italian Constitutional Court stated that the unity of the EU law could not be implemented as long as the fundamental rights-related provisions of the EU law conflicted with those in the Italian Constitution.[172] Fragd case recommended a solution method in case of such conflict, which included the preliminary ruling of the European Court of Justice. According to this recommended solution, in case any potential breach of the fundamental rights in the Union norm, the national law would bring such a claim to the European Court of Justice through preliminary ruling procedure.[173] Italian Constitutional Court would implement the judgment of the European Court of Justice provided that the Court's jurisdiction and the interpretation made in such jurisdiction regarding the application of the preliminary ruling did not conflict with the fundamental principles of the Italian Constitution. In case of conflict between the interpretation of the Court of Justice and the fundamental principles of the Italian Constitution, the Italian Constitutional Court reserved its right to review such judgments. Had the Italian Constitutional Court detected that the measure of the Union law was incompatible with the principles of Italian Constitution in such a review, that measure would not be implemented.

Another noteworthy aspect of the judgment was that the application to the Court of Justice for the preliminary ruling was considered as a prerequisite for the Constitutional review rather than a solution method. The Constitutional Court

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[170] *Spa Fragd v. Amministrazione della Finanze*, n. 232, Italy, Constitutional Court, 21 April 1989, 72 RD.

[171] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.353.

[172] Henry G. Shermers, Denis F. Waelbroeck, **Judicial Protection in the European Union**, Kluwer Law International, 2001, p.172.

[173] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.284.

attributed to the preliminary ruling a procedural mission within the municipal law. Thus, the Italian Constitutional Court materialized the attitude it displayed in the Fragd case with the ***Foro Italiano*** case, stating that it could not carry out a review without taking the opinion of the Court of Justice through preliminary ruling procedure.[174] The Italian Constitutional Court did not only provide constitutional limitations regarding the supremacy of the EU laws in the area of fundamental rights, but also reserved its power to review the judgment of the Court of Justice in the Fragd case. This judgment of the Italian Constitutional Court did not comply with the provisions of the Treaty concerning the powers of the Court of Justice and the effects of its judgments. Italian Constitutional Court placed itself to the position of an appealing authority to review the judgments of the Court of Justice in the preliminary ruling. In addition, the preliminary ruling procedure became admissibility prerequisite, paving the way for it to become a procedure of municipal law, which should be exhausted. Review of the judgments of the judicial body of a supranational organization by a national court posed serious threats against the motivations of the organization. As a matter of fact, the procedure set out in the Fragd judgment entails risks for the power of the European Court of Justice, uniform implementation of the Union Law and the supremacy of the Union law.

Upon these judgments, the Union institutions approached the fundamental rights with more sensitivity and reflected this attitude on their discourse. Following the judgments of constitutional courts of member states, which showed reservations of the member states regarding the supremacy of the Union law, the European Court of Justice, the judicial body of the Union, exhibited a more protective attitude in its judgments related to the fundamental rights. The developments in the Court's judgments related to the fundamental rights had influence on the stance of the constitutional courts of the member states. The reservations of the constitutional courts of the member states regarding the supremacy of the Union law moderated.

[174] Giuseppe Martinico, Oreste Pollicino, **The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws**, Edward Elgar Publishing, 2012, p.91.

12 years after the Solange case, the Constitutional Court of Germany showed with a decision that he was not indifferent to the developments within the Union. The case which would be called as ***Solange II***[175] later was opened for the review of the compatibility of the EU regulations on the banana market with the provisions of the German Constitution.[176] However, the Constitutional Court of Germany refused to hear the case, accordingly to review the Union's acts, stating that the constitutional review of the Union norms was subject to certain conditions.[177] Federal Constitutional Court remarked that the protection of fundamental rights reached to an acceptable level through the judgments of the Union law, though a fundamental rights catalogue did not exist.[178] The Court also noted that could not challende the judgments of the European Court of Justice as an appealing authority. According to this decision, the principles and criteria developed in relation to the human rights in the the Union law did not have to reconcile exactly with the Bonn Constitution. The Union should have provided fundamenal rights protection which covered the Union's sovereignty area, reviewed its measures and was coherent in it. Once the Union law provided for the protection of fundamental rights in general terms, the Constitution of Bonn would consider it as equilavant with the protection of fundamental rights afforded by the Constitution of Bonn.[179] In this regards, it can be observed from the judgment of Solange II that the Union human rights law developed enough to be found adequate by the Federal Constitutional Court. The Constitutional Court of Germany suspended its reservations stated in the judgment of Solange I on the grounds that the protection of fundamental rights in the Union law was enhanced.

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[175] Solange II (*Re Wuensche Handelsgesellschaft*), Bundesvrfassunggericht decision of 22 October 1986, [1987] 3 CMLR 225, 265.

[176] Miriam Aziz, **The Impact of European Rights on National Legal Cultures**, Hart Publishing, 2004, p.48.

[177] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.275.

[178] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.235.

[179] Bertil Oder, **Avrupa Birliği'nde Çokmerkezli Anayasacılığın Yapısal Sorunları : Yetki Çatışmaları ve İkincillik İlkesi Işığında Türkiye İçin Karşılaştırmalı Gözlemler**, p.183.

Though the Federal Constitutional Court recognized the supremacy of the Union law, the Court also stated in its decision that the supremacy of the Union law would be legitimate on conditions that the Union law continued to provide adequate protection of human rights. The Constitutional Court reserved its power to exercise constitutional review. The Constitutional Court of Germany recognized that judicial power of the European Court of Justice on the fundamental rights in line with its own constitutional principles. With the judgment of Solange II, a national court has provided the European Court of Justice with the judicial power despite the existence of the establishing treaties having the nature of international documents.

The Maastrict Decision[180] of the Federal Constitutional Court of Germany included significant points regarding the issue of Kompetenz-Kompetenz.[181] It can be inferred from the Solange II and Maastrict decisions that the Constitutional Court of Germany did not relinquish from its power of constitutional review on the Union law. The Constitutional Court of Germany conferred no power on the European Union to extend its powers, stating that the Constitutional Court of Germany had the power to determine the powers, and that Germany has the power to review the use of the power transferred to the Union. The Federal Constitutional Court of Germany also used expressions to relieve the concerns and hesitations of the citizens of Germany in the Solange II and Maastricht decisions. The Federal Constitutional Court of Germany built a brigde between the Union and the citizens by stating that it would protect the citizens' fundamental rights from the measures of the Union. To express it with a moderate metaphor, the Court acted as a guarantor of the powers transferred to the European Union to relieve the concerns of the citizens of Germany. In this regards, it can be said that the Constitutional Court of Germany made critical decisions in terms of the public's perception of the democratic legitimacy.

[180] *Brunner v. The European Union Treaty*, Bundesverfassunggericht, 12 October 1993 [1994] I CMLRep. 57.

[181] Hartley, **European Union Law in a Global Context: Text, Cases and Materials**, p.159.

The fact that the constitutional courts of member states expressed their reservations regarding the supremacy of the Union law, stating their sensitivity on the protection of fundamental rights played a key role on the enhancement of the human rights law of the Union. This fundamental rights-focused threat against the supremacy of the Union law, posed by the constitutional courts of the member states forced the institutions of the European Union to act more efficiently and dynamically to enhance the fundamental rights. The chronological assessment of the evolution of the attitude of the constitutional courts of member states provides important clues on the evolution of the Union's fundamental rights law. The interaction between the constitutional courts of member states and the European Court of Justice, the judicial body of the Union fostered the development process of the EU human rights law. In this regards, it would not be wrong to say that the attitude of the constitutional courts of member states was in parallel with the fundamental rights-related judgments of the European Court of Justice. It is of critical importance that the fundamental rights-related judgments of the European Court of Justice were examined as a reason for the changes in the attitudes of the constitutional courts of member states.

2. Judgments of the European Court of Justice Concerning the Fundamental Rights: Reference Sources from General Principles of Law to the Charter

The first judgment of the European Court of Justice on the human rights was ***Stork vs. High Authority*** case in 1959.[182] The case was brought before the Court of Justice upon the claim that a decision of the High Authority was in breach of the Federal Constitution of Germany. The Court stated that the constitutional rights in the member states were not binding for the institutions of

[182] Case–1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, [1959], ECR 17, **http://curia.europa.eu** (15.12.2012)

the Union.[183] The Court of Justice remarked that the High Authority was entitled to implement the Community law and that it would not control the compatibility of the Community law with the municipal law.

The European Court of Justice maintained its stance in the Nold I case in 1960.[184] The plaintiff Nold Company claimed before the European Court of Justice that a measure of the High Authority was in breach of the right to property governed by the Article 14 of the Constitution of Federal Germany. The European Court of the Justice rejected the interpretation of the Union law based on the constitutional provisions of any member state. The European Court of Justice stated that it was not responsible for ensuring the constitutional provisions of member states to be respected even if those provisions were related to the fundamental rights.

It would not be wrong to say that the Union approached to the area of fundamental rights with hesitations during this period. As a matter of fact, the concerns of the member states about the Union's protection of human rights can be claimed to have stemmed from this silence of the Union. Member States transferred their sovereignty to the Union particularly in the areas where the integration was completed, however the issue of the fundamental rights constituted a problem in this integration. National sovereignty gained through the struggles of human rights for hundreds of years were replaced by the supranational sovereignty. This change of sovereignty meant for the society and individuals a change in the addressee of their struggle. However, this new sovereignty that came to being through the member states' transfer of sovereignty was exempt from the human rights protection and related restrictions in the member states.

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[183]Aida Torres Pérez , **Conflicts of Rights in the European Union: A Theory of Supranational Adjudication**, Oxford University Press, 2009, p.81.

[184]C-40/59, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community,* [1960] ECR 423, **http://eur-lex.europa.eu** (03.03.2013).

State Powers in the Member states which transferred their sovereignty to the Union were managed to be restricted after long-lasting struggles. As the main motivation of the Union was of economic nature, the Union remained silence during the early period of the Union. The fact that individuals and societies were subjected to a sovereignty which did not provide adequate protection of fundamental rights meant that the acquisitions of fundamental rights at the national level were bypassed.

The new power that came to being as a result of the transfer of sovereignty would develop sensitivity towards the fundamental rights when faced the reactions of the constitutional courts of member states. Reservations of the constitutional courts of member states and the question of democratic legitimacy would force the EU institutions to adopt a more active policy regarding the human rights. At the same period, the European Court of Justice became more sensitive to the fundamental rights.

Decisions of the Constitutional Courts of Germany and Italy, which questioned the democratic legitimacy of the supremacy of the Union law entailed risk against the integration of the Union. Therefore, it has a significant importance that the constitutional courts of member states showed reactions related to the fundamental rights and accordingly questioned the supremacy of the Union law, which was one of the most critical dynamics of the integration. The fact that the institutions of the EU understood this threat against the supremacy of the EU law accelerated the development of the fundamental rights by the EU. The judgments of the European Court of Justice included improvements related to the human rights. Certain rights began to be mentioned in the judgments of the Court of Justice within the scope of the general principles of the law.

Stauder case was a milestone in regards to the human rights in the judgments of the European Court of Justice.[185] The case in 1969 was referred to the European Court of Justice with the preliminary ruling request of the

[185] Case 29/69, *Stauder v City of Ulm* [1969] ECR 419 http://www.cvce.eu (22.02.2013).

Administrative Court of Stuttgart. The event that constituted the subject of the case was that the recipients of welfare benefits were obliged to submit a document to buy cheap butter.[186] And this obligation was stipulated by a Union norm. The Union norm called as the Commission decision designed to EU butter stocks allowed the sales of butter to some disadvantageous groups at a lower price.[187] The plaintiff Erich Stauder remarked before the Administrative Court of Germany that this obligation was incompatible with the principles of "human dignity" stated in Article 1 and "equality" stated in Article 3 of the Constitution of Germany. The plaintiff also stated that the said Union norm infringed the principle of confidentiality.[188] Considering that the said practice resulted from a Union norm, the national court referred the case to the European Court of Justice for preliminary ruling. The European Court of Justice stated, as a response, that the relevant norm did not include a provision which set forth an obligation to show identity card. However, the Court also noted that such an obligation did not violate fundamental rights. The Court stated in its judgment that "fundamental rights are enshrined in the general principles of Community law and protected by the court".[189]

The European Court of Justice implied that it would consider the fundamental rights as a part of the general principles and make judgments accordingly. The Court stated that it was not possible to oblige any positive source of law for the protection of fundamental rights. In the light of this judgment, one can claim that the Court was inclined to make judgments in favor of the fundamental rights.

Internationale Handelsgesellschaft [190] in 1970 was another important case in relation to fundamental rights. This case resulted in the Solange

[186] Chalmers, Davies, Monti, **European Union Law: Cases and Materials,** p.233.

[187] *Ibid*, p.233.

[188] *Ibid*, p.233.

[189] Nanette A. Neuwahl, **The Treaty on European Union: A Step Forward in the Protection of Human Rights?** ; Neuwahl, Rosas**, The European Union and Human Rights**, p.7.

[190] C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125, **http://eur-lex.europa.eu** (04.03.2013)

judgment, which was one of the most tragic samples of the reactions showed by the constitutional courts of the member states. The case was opened with the claim that the regulation called *EEC Of The Council Of 13 June 1967 On The Common Organization Of The Market In Cereals* was violating the related articles of the Constitution of Germany before the Administrative Court of Frankfurt, and was referred to the European Court of Justice for preliminary ruling. The plaintiff company claimed that this regulation was breaching the principle of proportionality that was stipulated by the Constitution of Bonn. In this case, the European Court of Justice highlighted its previous position which it showed in the Stauder case[191]. The Court stated that the fundamental rights constituted an integral part of the general principles of the Union law.[192]

Despite this judgment, the Constitutional Court of Germany did not find the level of protection of fundamental rights afforded by the Union law adequate and put its signature under the Solange I decision. This decision of the Federal Constitutional Court became a symbol of the interaction between member states' constitutional courts and the ECJ. The Union stated that it would provide fundamental rights protection which the European Court of Justice approved to be stemmed from the general principles of the law, although not included in the positive norms of the Union. This approach of the Union relieved the concerns of the constitutional courts of the member states and changed the direction of the judgments. As a matter of fact, as the judgments of the European Court of Justice developed in terms of the fundamental rights, the stance of the constitutional courts of member states changed concordantly.

Another important stage of the developments of fundamental rights in the Union law was the establishment of links between the international conventions on human rights and the general principles of the Union law. The judgment of Nold II on 14 May 1974 was the most important judgment in this regards.[193] The European Court of Justice stated in the judgment of Nold II that international

[191] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.365.

[192] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.233.

[193] Case-4/73, Nold v Commission, [1974] ECR 575, **http://eur-lex.europa.eu** (05.03.2013)

conventions on human rights were among the sources to be evaluated for the Union's fundamental rights protection.[194] By doing so, the European Court of Justice mentioned another source of the concept of general principles of law along with the common constitutional traditions. This judgment made an implicit reference to ECHR. This was an important judgment in terms of the discussions between the Union and the ECHR. The European Court of Justice mentioned about the sources of the right to property as in the following:

> *"In this way, the decision is sad to violate, in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the* ***Grundgesetz*** *of the Federal Republic of Germany and by the constitutions of other member states and various international treaties, including in particular the convention for the protection of human rights and fundamental freedoms of 4 November 1950 and the protocol to that convention of 20 march 1952."*

The European Court of Justice made its first direct reference to the ECHR in the Rutili judgment[195] in 1975. The related case was opened by Mr. Rutili, an Italian citizen born in France and married to a French citizen.[196] The plaintiff worked for the Audun-Le-Tiche company and carried out union-related and political activities.[197] The Ministry of Interior of France granted him residence permit of limited duration and on condition that he would not reside in the Lorrains region.[198] The Ministry of Interior stated that this decision was made for national security purposes. That is to say, Mr. Rutili's right was restricted for the sake of the national security. Upon this decision, Mr. Rutili opened a case before the Administrative Court of Paris claiming the cancellation of the Ministry's decision.

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[194] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.235.

[195] C-36/75, *Roland Rutili v Ministre de l'intérieur*,[1975] ECR 1219, **http://eur-lex.europa.eu** (05.03.2013)

[196] Horspool**, European Union Law**, p.458.

[197] Elspeth Berry, Sylvia Hargreaves, **European Union Law**, Oxford University Press, 2007, p.230.

[198] Horspool, **European Union Law**, p.458.

The case was referred to the European Court of Justice. The Court assessed the case primarily based on the values set forth by the sources of the Union law. The Court stated, considering the Directive 62/221 that such a restriction should be implemented based on the individual situations, not on the general conditions. Article 8 of the said Directive was governing the union-related activities and the principle of equality for the exercise of this right. This judgment was especially important for the evolution of the Union fundamental rights law due to the reference made to the ECHR. The Court of Justice used the ECHR as a reference for the restriction of the fundamental rights which it based upon the general principles of the law. The European Court of Justice mentioned the criteria of "the necessity of being at the level acceptable by the society" which governed the concept of "public order and security", the reason for the restriction, stated in Article 8, 9, 10, 11 of the ECHR and Article 2 of the Additional Protocol No. 4. Thus, the European Court of Justice used the ECHR as reference to implement the regime of fundamental rights restriction.

Another case the ECHR was used as a reference was the **Prais** case.[199] The judgment of Prais was related to the freedom of religion and faith. The plaintiff was a Jewish who could not enter the personnel recruitment exam which was held on a religious holiday. Mr. Vivien Prais could not apply to the vacancy of translator since the exam was held on a religious holiday and requested the cancellation of the exam. The European Court of Justice recognized the freedom of religion as a right guaranteed under the ECHR, stating that the request of the plaintiff would be considered within this scope.[200] The Court ruled that there was not any breach, since the plaintiff should have notified the related authorities of the situation well in advance. And the Court added that the exam date should have been rearranged if the plaintiff had notified this situation beforehand.

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[199] Case-130/75, *Vivien Prais v Council of the European Communities* [1976] ECR 1589, **http://eur-lex.europa.eu** (06.03.2013)

[200] Aslan Gündüz, **Avrupa Birliği'nde İnsan Haklarının Yeri: Kurumsal Düzenleme ve Bireylerin Hakları**, Marmara Üniversitesi Avrupa Birliği Enstitüsü, Avrupa Araştırmaları Dergisi, Cilt 7, Sayı 1-2, 1999, p.103.

Another judgment of the European Court of Justice related to the fundamental rights was made in the Defrenne Case in 1976.[201] The subject of the case was a dispute between a flight attendant and the airline company she worked for concerning her salary payment.[202] The local court transferred the case to the European Court of Justice asking whether there was any violation against the Union law norms regarding the right to equal treatment on the grounds of gender. The European Court of Justice was asked whether the provisions of the establishing treaties had effect on the interpersonal relations. The European Court of Justice stated in its answer that the provisions of the treaties might provide rights for individuals although those provisions addressed to the member states. The Court underlined the direct effect of the Union law in its judgment.[203]

Moreover, the Court referred to the European Social Charter as an international convention on human rights in its judgment for the Defrenne Case, which was another important part of this judgment.[204]

Judgment of the Court in the **Hauer[205]** Case in 1979 may be considered as a deviation from the usual line of progression. This case was opened against the Council decision on the prohibition of new plantings of vine with the aim of organizing the wine market.[206] Upon this decision, the case was opened in the German local administrative court (Verwaltungsgericht) and the court brought the case to the European Court of Justice for preliminary ruling.

The Court of Justice stated that the right to property is an integral part of the ECHR and constitutional traditions of member states.[207] However, the Court

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[201] Case-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, [1978] ECR 1365 **http://eur-lex.europa.eu** (06.03.2013)

[202] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.548.

[203] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.188.

[204] Neuwahl, **The Treaty on European Union: A Step Forward in the Protection of Human Rights?** ; Neuwahl, Rosas, **The European Union and Human Rights,** p.8.

[205] Case-44/79, *Liselotte Hauer v Land Rheinland-Pfalz*, [1979] ECR 3227, **http://eur-lex.europa.eu** (07.03.2013)

[206] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.529.

[207] *Ibid*, p.369.

also remarked that the right to property was determined to be subject to restrictions in the constitutions of the member states and in the ECHR. The Court stated that such restrictions might apply based on the public interest. The Court noted, in its judgment, that the right to public might be restricted in the public interest, and that the restrictions provided for in the arrangement of the Council was not in violation of these principles.

The Court benefitted from the judgments of ECHR and ECtHR as reference in the Hauer judgment. However, the fact that the Court interpreted the approach of ECtHR as a restriction of a right can be claimed as a deviation from its previous interpretations which were in favour of the right. The Judgment also included a reference to the joint declaration of the Council and the Commission of 5 April 1977.[208]

The Court ruled that a member state employed discrimination between its own citizens and citizens of another member state regarding the freedom of settlement in the Fearon judgment on 6 November 1984[209]. The judgment was related to one of the four fundamental freedoms which constituted the main motivations of the Union. Another important issue was the interpretation of the principle of "equality" by the member states. The said judgment provides clues about the Union's human rights law.

The **Kadı** Case indicated that the Union's integration did not cease. The European Court of Justice used a new term to refer to the source of the fundamental rights.[210] The Court stated that the fundamental rights arose out of the EU's constitutional principles.[211] The Court expressed the Union's constitutional principles with reference to the constitutional principles of the

[208] *Ibid*, p.370.

[209] Case-182/83, *Robert Fearon & Company Limited v Irish Land Commission*, [1984] ECR 3677, **http://eur-lex.europa.eu** (07.03.2013)

[210] Case-402/05, *Kadi and Al Barakaat International Foundation v Council and Commission*, **http://curia.europa.eu** (11.03.2013)

[211] Craig, De Búrca, **The Evolution of EU Law,** p.226.

treaties.[212] Different interpretations of this judgment are possible within the context of the integration of the Union. The Court, which is the driver of the dynamics in the Union law, might have called for a new Constitution or might have accepted the primary sources of Union law as the constitutional documents. No doubt that the latter interpretation assumes the Charter as a catalogue of the constitutional values. The Court's tendency to accept the primary sources of law as constitutional documents may possibly lead to new discussions on the structure of the Union.

The Charter of the Fundamental Rights of the European Union is one of the most important sources of fundamental rights used by the Court of Justice. The Charter of Fundamental Rights was referred to in the judgments of the Court as a catalogue of the fundamental rights. In the **TNT Traco case**, Alber and Tizzano, the advocate generals, requested the implementation of the rights set forth by the Charter.[213] However, the Court did not mention about the Charter in the said judgment.[214]

The European Court of Justice referred to the Charter of Fundamental Rights in the European Parliament vs. Council case[215] for the first time.[216] The Parliament opened a case claiming that the Direction no 2003/86 on Family Reunification was violating the fundamental rights.[217] In the said case, a review of the fundamental rights secured by the Charter was carried out. This case may be resembled to the review of constitutional compatibility carried out by the

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[212] Juliane Kokott and Christoph Sobotta, **The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?**, EJIL (2012), Vol. 23 No. 4, p.1017.

[213] C-340/99, *TNT Traco SpA v Poste Italiane SpA and Others*, [2001] ECR I-4109 **http://curia.europa.eu** (12.03.2013)

[214] Füsun Arsava, **AB'nin Anayasallaşma Sürecinde Temel Haklar Şartı,** Ankara Avrupa Çalışmaları Dergisi, Volume:3, No:2,2004, p.8.

[215] Case-540/03 *European Parliament v Council of the European Union,*[2006] ECR I-5769 **http://eur-lex.europa.eu** (12.03.2013)

[216] Alina Kaczorowska, **European Union Law**, Routledge, 2008, p.240.

[217] David Anderson, Cian C. Murphy**, The Charter of Fundamental Rights,** Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012, p.172.

national constitutional courts. Thus, the legislative actions of the Union gained a framework of fundamental rights.

3. Opinion 2/94

Due to the lack of a fundamental rights catalogue, human rights could not be protected by the Union law effectively. Therefore, the Union's accession to the European Convention on Human Rights was brought to the agenda from time to time to ensure foreseeable protection of fundamental rights. The European Court of Justice referred to the European Convention on Human Rights in decisions. However, the European Court of Justice regarded the European Convention on Human Rights as an international convention acceded by all the member states, providing rights for Union citizens.

Once the idea of Union's accession to the European Convention on Human Rights materialized, the issue of compatibility with the establishing treaties came to the fore. In this regards, the Council of the European Union asked the opinion of the Euroepan Court of Justice on the compatibility of the accession to the European Convention on Human Rights with the establishing treaties.[218] Article 300 of the Establishing Treaty stipulated that the Parliament, Council, Commission or member state may ask the opinion of the European Court of Justice before signing of an international treaty.[219]

In the judgment of Opinion 2/94 the European Court of Justice stated that the Union had no power to enact rules on human rights.[220] The Court of Justice's opinion included the following statements:

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[218] Silvio Marcus-Helmons, **Avrupa Birliği Temel Haklar Şartı: Ortaya Çıkışı ve Sorunlar**; İbrahim Ö. Kaboğlu (Ed.), **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001, p.84.

[219] G. De Baere, **Constitutional Principles of Eu External Relations**, Oxford University Press, 2008, p.93.

[220] Opinion of the Court of 28 March 1996, **http://eur-lex.europa.eu** (12.03.2013)

"No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field."

The European Court of Justice discussed whether the Article 235 allowed the accession to the ECHR.[221] However, the Court came to the conclusion that the objectives and powers of the Union did not provide any grounds for the accession to the ECHR. It also noted that such an accession would cause the scope of the Article 235 to be exceeded. The European Court of Justice remarked that the establishing treaties should be amended so that the accession to the ECHR could be enabled. The Court of Justice explained this as in the following:

"Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty."

This judgment of the European Court of Justice provided for the continuation of the status quo of the Union in terms of the protection of the human rights. The Court of Justice judged that the Union's accession to the ECHR would constitute breach of the establishing treaties, the primary sources of Union law. Thus, the Court of Justice assessed the compatibility of a measure of the Union upon recommendation.

There exist different opinions on the Union's accession to the ECHR. The following section will describe those opinions. Opinions on the legal outcomes of the accession to the ECHR played role in the creation of the Opinion 2/94 along with the the issue of compatibility with the establishing treaties.

[221] Craig, de Búrca, **EU Law: Text, Cases, and Materials**, p.224.

II. CHARTER OF FUNDAMENTAL RIGHTS

The previous section handled the development of the Union human rights law and political and legal developments that led to the draw-up of the Charter. In this section, the conditions and reasons paving way for the draw-up of the Charter will be analyzed. The content of the Charter, and the codification process and the constitutional dimensions of the Charter will be examined. Addressing only to the legal developments that led to the draw-up of the Charter, while ignoring other related conditions would result in an inefficient analysis of the reasons and needs that required the draw-up of the Charter. Therefore, legal, political and administrative developments that required the draw-up of the Charter and that occurred during the process of draw-up will be examined together.

A. FACTORS THAT REQUIRED DRAWING UP THE CHARTER OF FUNDAMENTAL RIGHTS

Integration has always been a subject of the treaties from Rome to Lisbon. It can be observed from the treaties that integration got deeper and developed at the institutional level looking through the evolution of the treaties. Provisions of the EU treaties identified the new institutional structure of the power and took critical steps towards political integration. However, the EU remained silent and avoided from taking action about the human rights. Nevertheless, a power domain that did not include fundamental rights area is a controversial fact. Thus, the abovementioned decisions of the constitutional courts of member states contributed to the discussions with their judgments .

Paris and Roma Treaties did not include any direct reference to human rights; but the realization of the Union’s motivations required certain important freedoms to be arranged. The said rights focused on social rights such as

freedom of movement and accordingly rights stipulating antidiscrimination.[222] Founding Treaties mentioned human rights and democratic values. However, fundamental right protection is necessary for the political integration and constitutional attachment to be effective in a broad area. Cases related to fundamental rights were brought before the European Court of Justice. Citizens of the EU indicated their implicit requests that the EU law should protect their rights and freedoms. These requests would require the treaties, the constitutional documents of the EU, to provide protection of rights and freedoms.

Human rights have been developed with the struggles of the societies against the power. In this regards, it is possible to say that human rights documents and advanced human rights protection mechanisms are gained throughout the history. If the EU citizens had been deprived of these gains because the member states transferred their sovereignty to a supranational organization, this would have damaged their sense of belonging to that supranational organization.

There had been a number of events that would affect this sense o belonging. The EU sought out a constitutional document besides such historical sovereignty symbols as flag, money and national anthem. The most important aspect of the constitutional documents for the societies is that they restrict the power with the rights of individuals. Jurgen Habermas stated that the European integration was a requirement of the constitution and conveyed the concept of "constitutional nationalism" to the European integration.[223] Habermas noted that universal values stated in the constitutions were the reflections of the society's value mechanism. Habermas also stated that the constitution covering such values should integrate such discrepancies. Herta Däubler-Gmelin, Minister of Justice of the Federal Republic of Germany stated that fundamental rights protection provided through constitutional claim developed a kind of

[222] Silvana Sciarra, **From Strasbourh to Amsterdam: Prospects for the Convergence of European Social Rights Policy**; Philip Alston, Mara R. Bustelo, James Heenan (Eds.), **The EU and Human Rights**, Oxford University Press, 1999, p.474.

[223] Jurgen Habermas, **Why Europe Needs a Constitution**; Ralf Rogowski, Charles Turner (Eds.), **The Shape of the New Europe**, Cambridge University Press, 2006, p.26.

constitutional nationalism.[224] Therefore, fundamental rights protection came to the agenda as a key factor in the development of the concept of constitutional nationalism, and constitutional nationalism was mentioned as an important element of establishment of a European society.

The need for a legal document as a basis of the fundamental rights protection provided by the judgments of the Court of Justice could not be neglected. The Court of Justice has made significant judgments related to many fundamental rights. However, fundamental rights protection provided through the judgments without relying on any document was lacking some important aspects such as openness and predictability which constitutional state stipulated as a character of its norms. Union citizens could not be expected to make research about all fundamental rights-related judgments of the Court of Justice. Therefore, a more clear, predictable and transparent fundamental rights catalogue was necessary. This would allow the compilation of the fundamental rights mentioned in the judgments of the Court and the sources of the Union law.

A catalogue similar to the charter of fundamental rights would precisely list the rights protected by the Union law.[225] Thus, the boundaries of the Union sovereignty would become clear through a constitutional document related to the fundamental rights. This would be a legal document that the Court of Justice could rely on as a benchmark for the judgments related to the fundamental rights.

Before the charter of fundamental rights, the Union citizens were under the protection of the provisions of the national constitutions on the human rights,

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[224] Herta Däubler-Gmelin, **Die Europäische Charta der Grundrechte - Beitrag zur Gemeinsamen Identität**, EuZW 2000, p.1; Arsava, Füsun, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005, p.2.

[225] Eriksen, Erik Oddvar, **"Why a Charter of Fundamental Rights in the EU?",** Arena Working Papers, 02/36, 2002, 17-18, **http://onlinelibrary.wiley.com** (10.05.2013) ; Goldsmith, Lord, **"A Charter of Rights, Freedoms and Principles"**, Common Market Law Review, Volume 38, 2001, p. 1201-1216.

the ECHR and other human rights documents, besides the human rights-related provisions of the sources of the Court of Justice and Union law. However, the adequacy of these protection mechanisms was controversial in terms of the measures and sovereignty of the Union.

The European Court of Justice takes the ECHR and ECtHR, the interpreter of the EHCR, which are referred to in the sources of EU law. In other words, it can be concluded that a common European protection mechanism was developed through the implicit collaboration between the two Courts.

The Union has used the ECHR as reference for the fundamental rights protection as of the Rutili case in 1957.

The European Court of Justice has made a judgment related to the fundamental rights in the **Italy v. Watson and Belmann Case**[226]both in terms of the sources of Union law and the ECHR perspective. Then Italian laws used to envisage that foreigners notify their place of residence and Italian. If anyone could not fulfill the obligations set forth by the law, certain sanctions were to be imposed. In the said event, Italian citizens Watson and Belmann were imposed sanctions since they failed to fulfill the relevant obligations. Watson and Belman objected to this sanction before the local court. The local Court asked the European Court of Justice whether the subject of the case was of concern for the Union law.

The Court of Justice stated that the procedure stipulated by the Italian law was not incompatible with the right of "free movement" bestowed by the Union law. Advocate General Trabucci presented opinion regarding the ECHR's Article 8 on "Right to Respect for Private and Family Life" and Article 14on "Prohibition of Discrimination".[227]The Court stated that the European Court of Justice could not review a measure of the member state as long as it did not preclude the right of

[226] Case C-118/75, *Italy v. Watson and Belmann* [1976] ECR 1185.

[227] Frank Schorkoph, **Human Dignity, Fundamental Rights of Personality and Communication**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007, p.410.

"free movement" stipulated by the Union law. The Court required, with this judgment, that the subject of the case to be within the scope of the Union law so that the Court could execute ECHR. The Court of Justice approached more cautiously in this judgment than the Rutili judgment.[228]

In the **Prais v. Council Case** the plaintiff asserted that the Article 9 on "Right to Freedom of Thought, Conscience, and Religion" was violated. The Court accepted that the right afforded by the ECHR should be protected, however ruled that there was not such a violation. The Court of Justice did not implement the ECHR as an absolute source of protection in this judgment.

The European Court of Justice ruled in the **Wachauf v. Germany Case**[229]that a national law norm was incompatible with the prohibition of discrimination afforded by the ECHR.[230]The Court expended the review of fundamental rights beyond the community sovereignty area with this judgment. The compatibility of a national measure with the Union law was implicitly reviewed through the ECHR.

In the ERT v. DEP Case[231]Dimotiki Etairia Pliroforissis (DEP), a private broadcasting organization, wanted to broadcast in spite of the fact that Eleniki Radiophonia Tileorasi (ERT) was granted with broadcasting monopoly by the Greek law. ERT opened a case in the national court as DEP started broadcasting. However, DEP claimed that monopoly was in breach of the Union's establishing treaties and Article 10 of the ECHR which set forth the right to freedom of expression.[232]Therefore, the national courts referred the conflict to the European Court of Justice. The Court stated that the restrictions on the freedom of expressions should be imposed within the scope of the Article 10 of the ECHR.

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[228] Darey S. Binder, **"The European Court of Justice and teh Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Actions"**, Jean Monnet Working Paper, No. 4, 1995, **http://centers.law.nyu.edu/jeanmonnet/papers**/ (12.05.2013)

[229] Case C-5/88, *Wachauf v.Germany* [1989] ECR 2609.

[230] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.252.

[231] Case C-260/89*, ERT v. DEP* [1991] ECR I-2925

[232] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.252.

The Court stated that it did not have the power to review the measures of the national courts for the compatibility with the ECHR, however it added that national measures that concerned the community law should comply with the fundamental rights.

As is seen from the examples, the European Court of Justice referred to the ECHR as a fundamental rights catalogue in many cases. The Court of Justice was criticized for using the ECHR as a basis for legitimacy. However, it is not possible to use the ECHR as a direct instrument of review. The compulsion of compatibility of the Union's measures to the ECHR would cause the Union to enter into a baseless obligation.

In addition to the cases before the Court of Justice, the cases before the ECtHR contributed to the interaction between the two systems.

In the Matthews case[233]seen before the ECtHR, the plaintiff who was an English citizen living in Gibraltar, a British Overseas Territory applied to the register of electors to vote in the European Parliament elections. However, the plaintiff was notified that he could not vote in the elections according to a provision of the Union law. The plaintiff applied to the ECtHR. The ECtHR stated that it did not have the power to review the Union's measures since the Union did not accede to the ECHR. However, the Court remarked that the states that acceded to the ECHR would not be able to relieve themselves from obligations arising out of the powers when the states transferred their powers to the Union.[234] It can be observed that the Union law was subject to a supranational review even if it was an indirect review. A member state cannot release itself from an obligation arising from the ECHR when implementing a measure of the

[233] ECtHR Ap.No: 24833/94, *Matthews v. UK* [1999] 28 EHRR 361

[234]Christian Walter, **History and Development of European Fundamental Rights and Fundamental Freedoms**; Ehlers, Becker (Eds.), **European Fundamental Rights And Freedoms**, p.8.

Union.[235] ECHR conducted a review considering the fact that the Union's measures were executed by the national authorities.

In the light of these events, discussions on efficient fundamental rights protection mechanism developed around 3 important arguments.[236]First argument claims that the then practice of the Court of Justice provides more flexible protection. According to the supporters of this argument, a written fundamental rights catalogue would cause clumsiness upon new developments.

According to the second argument, the Union should accede to the ECHR.As a result of these discussions, the Court of Justice was asked for opinion, but the Court of Justice stated that accession to the ECHR would not take place until amendments are made in the establishing treaties. Following this opinion, the necessary amendment was made in the establishing treaties. Article 35 of the ECHR stipulates that the municipal law should be exhausted before applying to the ECtHR. This situation makes it possible that the exhaustion of the legal remedies of the Union law, in other words the application to a judicial body of the Union will be laid down as a condition for a conflict to be brought before the ECtHR.[237]Thus, this means that the Union's judicial bodies become municipal legal remedies which should be exhausted.

The third argument reflects the European tradition.[238]According to this opinion, a written fundamental right catalogue was necessary for the legal

[235]Di Federico, **Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty**; Di Federico, **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, p.26.

[236] Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, Ankara Üniversitesi SBF Dergisi, Volume:57, No:4, 2002, p.38.

[237] Tobias Lock, **Accession of the EU to the ECHR**, Diamond Ashiagbor, Nicola Countouris, Ioannis Lianos (Eds.), **The European Union After the Treaty of Lisbon**, Cambridge University Press, 2012, p.124.

[238] Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, p39.

predictability and transparency.[239] It was argued that this method was more efficient when considered together with the Court's power of creating legislation.

Need for a charter of fundamental rights has many dimensions with political and legal reasons. As the European Court of Justice used to make judgments referring to the shared constitutional traditions and the ECHR, the charter of fundamental rights would constitute an important legal basis. In addition, the fact that rights afforded in the constitutions of some member states were listed in this fundamental rights catalogue would expand the "gene pool" of the fundamental rights. Such a gene pool in a constitutional document would eliminate the prerequisite of the availability of a common constitutional tradition or a right afforded under the ECHR for the protection of such a right. The fundamental rights protection means the restriction of the power, and arrangement of fundamental rights is also an indicator of power. The arrangement of the fundamental rights in the Union legislation can be resembled to a manifestation on the exercise of sovereignty with this aspect.

B. DRAWING UP THE CHARTER OF FUNDAMENTAL RIGHTS

As we mentioned about reasons of the need for a fundamental rights catalogue in the Union law, we explained that the fundamental rights protection provided by the ECtHR and national courts was not enough due to the technical reasons.Even though national courts and the ECtHR provided protection for the rights of the Union's citizens, it was not possible to say that all the rights arising from the EU citizenship were guaranteed.When preparing the charter of fundamental rights, it was aimed to create a text meeting these needs.It was not possible to guarantee all the social and economical rights afforded by the Union through the current protection systems.

[239] Silvio Marcus-Helmons, **Avrupa Birliği Temel Haklar Şartı: Ortaya Çıkışı ve Sorunlar**; İbrahim Ö. Kaboğlu (Ed.), **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001, p.83.

When considered the calls for the fundamental rights protection before the EU, it is possible to observe that the political and historical roots of the process of the formation of Charter of Fundamental Rights go earlier in the history. However, the most concrete development related to this issue was the Cologne Summit of the European Council on 3-4 June 1999.[240]Recommendation on the Charter of Fundamental Rights was made by Germany during its Presidency of the European Council.[241]Expectations from the Charter of Fundamental Rights can be summarized as follows:

-The charter would consolidate the fundamental rights and freedoms protected by the Unin law in a single text.The Union would gain the nature of "community of values" with this text.

-It was found appropriate that the charter be composed in an open, transparent way with the broad participation of the EY citizens in accordance with the concept of collective struggle, which is a historical tradition of fundamental rights.

- The Charter should provide the EU citizens with the rights they can claim before the legal authorities.Thus, transparency of the integration will gain legitimacy.[242]

When considered that a majority of the fundamental rights protected by the EU was established/registered through the Court's actions to create legislation, it can be said that the purpose indicated in Article 3 was realized through the purpose stated in Article 1.

Joschka Fischer,Minister of Foreign Affairs of Germany gave hints of the charter of fundamental rights in her speech at the European Parliament in January 1999 during the Presidency of Germany:

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[240] Cristian Callies, **The Charter of Fundamental Rights of the EU**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, p.520.

[241] John van Oudenaren, **Uniting Europe: An Introduction To The European Union**, Rowman & Littlefield, 2005, p.246.

[242] Füsun ARSAVA, **Avrupa Birliği Temel Haklar Şartı**, p. 2

In order to increase the citizen's rights, Germany is proposing the long-term development of a European Charter of Basic Rights. … For us, it is a question of consolidating the legitimacy and identity of the EU. The European Parliament which has already provided the groundwork with its 1994 draft should be involved in the drawing up of a Charter of Basic Rights, as well as national parliaments and as many social groups as possible.[243]

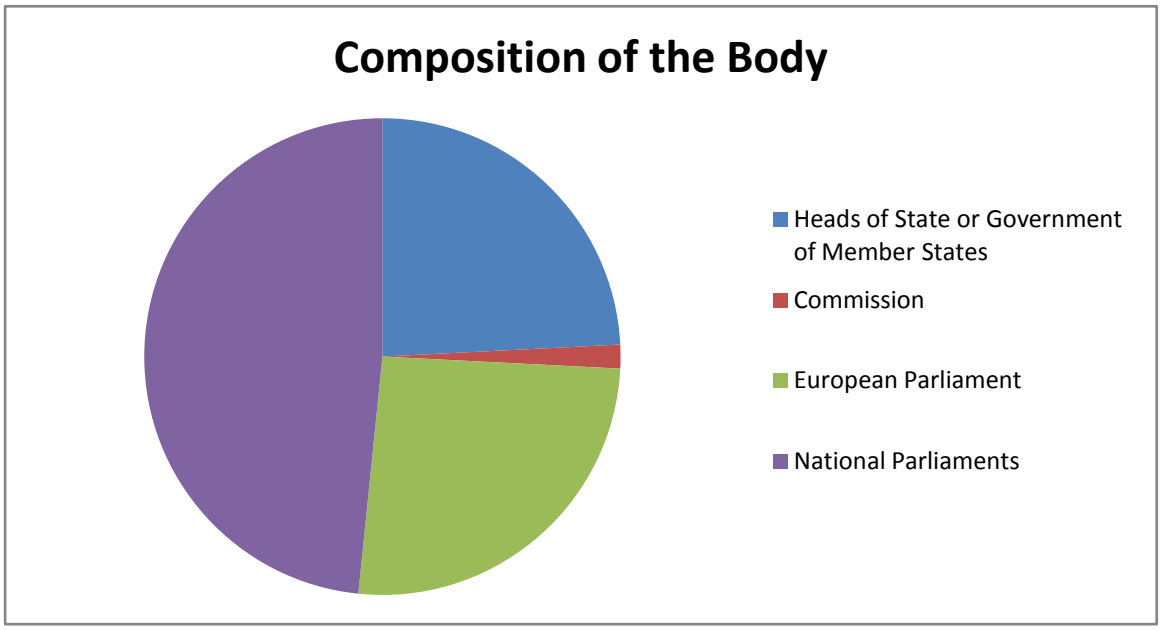
In the Cologne Summit held on 3-4 June, it was decided to establish an ad hoc working group for the preparation of charter of fundamental rights.

This group's working procedure and principles were identified in the Tampere Summit of the European Council convened on 15-16 October 1999 during the Presidency of Finland.[244]The Final Declaration of the Tampere Summit set forth a convention of 62 members.[245]The Convention was composed of 15 Representatives of Heads of State or Government of Member States, 16 representatives of European Parliament, 30 National Parliament Member two from each, and 1 Representative from the Commission. The chart below shows the ratio of the institutions in the composition of the convention:

[243] Speech by the President of the Council of the European Union Joschka Fischer, Federal Minister for Foreign Affairs, in the European Parliament in Strasbourg on 12 January 1999, **http://ec.europa.eu** (15.052013)

[244] Wojciech Sadurski, **Constitutionalism and the Enlargement of Europe**, Oxford University Press, 2012, p.64.

[245] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, **http://www.europarl.europa.eu** (17.5.2013)



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In addition to these members, 2 representatives from the European Court of Justice, one of which from the ECtHR, and the one from the Council of Europe were assigned to participate the convention as observer.

All the stakeholders had the equal rights in the studies of the Convention. It can be said that this was a working principle different than the Union traditions. A working principle based on equality did not take place in the intergovernmental conferences held regarding the establishing treaties.[247]It is an important step that this kind of a working principle was preferred in the composition stage of a fundamental rights catalogue prepared with legitimacy and democracy concerns. Democracy-oriented criticisms made regarding the preparation of the document would possibly overshadow the legitimacy of the document.

It was envisaged that a Presidency consisting of 1 president and 3 vice presidents would be established. The president was to be elected by the

[246] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, **http://www.europarl.europa.eu** (17.5.2013)

[247] Füsun Arsava, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005, p.5.

members and it was decided that the vice presidents would be elected by the European Parliament and National Parliaments, one for each, and the Chairperson of the Summit – provided that s/he was not selected as the President – would be the third vice president.[248]General Secretariat of the Council was assigned to the carry out the secretariat-related tasks of this new organization. Regional Committee, Economic and Social Committee, and Ombudsman were indicated as the authorities whose opinions would be asked.[249]

This new body, assigned with the preparation of the chart, organized its first meeting on 17 December 1999.[250] In the first meeting Antonio Vitorino, the representative of the Commission underlined that, the charter of the fundamental rights would not prevent or render unnecessary the Union's accession to the ECHR.[251]

In the same meeting Roman Herzog, former President of the Constitutional Court and former President of the Federal Republic of Germany was elected as the President of the Convention. Inigo Mendez de Vigo in the name of the European Parliament and Inigo Mendez de Vigo, Gunnar Jansson in the name of the national parliaments and Petro Bacelar, the President of the Summit were assigned as the vice presidents.[252]The body assigned with the preparation of the Charter was named as "Convention" in the meeting on 1-2 February 2000.[253]The body preferred this name as it was an *ad hoc* organization.

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[248] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, **http://www.europarl.europa.eu** (17.5.2013)

[249] *Ibid*.

[250] Hans Christian Krüger, **The European Union Charter and the European Convention on Human Rights: An Overview;** Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004, p.xxii.

[251] *Ibid*.

[252] The Convention Responsible For Drafting The Charter Of Fundamental Rights, **http://www.europarl.europa.eu** (17.5.2013)

[253] Record of the second meeting of the Convention to draw up a draft Charter of Fundamental Rights of the European Union, The Convention Responsible For Drafting The Charter Of Fundamental Rights, **http://www.europarl.europa.eu** (17.5.2013)

In order to strengthen democratic value of the Charter at the preparation stage, the stakeholders of the Convention were chosen mostly among the parliament members who were elected in the democratic elections. The process was also aimed to be transparent and open to the participation of the democratic actors.[254] All stages of the processes were made public via the Internet, which highly contributed to the democratic legitimacy. The Convention meetings were decided to be held open to public.[255]

The draft charter to be prepared by the Presidency of the Convention would be discussed at the general assembly of the convention. Convention's task was to draw up a draft. A certain vote rate or decision-making procedure was not determined for the submission of the draft to the Summit by the Convention. Convention's agreement on the draft was found sufficient.

Convention was envisaged to convene bi-monthly in principle, however additional meetings were held due to the busy agenda.[256]Convention agreed on the draft of the Charter on 2 October 2000 after 18 sessions.[257]Convention fulfilled its task in a relatively short time. Tettinger resembled this short time to "the time necessary for the birth of a baby" using a witty language.[258]

The Convention, established at the Tampere Summit, submitted the draft at the Biarritz Summit held on 13 – 14 October 2000.[259]The Council conveyed the draft to the European Commission and the European Parliament. The Parliament

[254]ARSAVA Füsun, **Avrupa Birliği Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, 2003, C. 3, S. 1, p.7.

[255]*Ibid*, p.7.

[256] Arsava, Füsun, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005, p.5.

[257] Dominik McGoldrick, **The Charter and UN Human Rights Treaties**; Peers, Ward (Eds.), **The European Union Charter of Fundamental Rights**, Hart Publishing,2004, p.90.

[258] Tettinger, Peter J, **Die Charta der Grundrechte der Europäischen Union**, NJW 2001, p.1011; Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, p.43.

[259] Bruno de Witte, **Treaty Revision Procedures after Lisbon**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012, p.112.

accepted the draft with majority on 14 November 2000.The Commission approved the draft on 6 December 2000.

The document ratified by the Council, Commission and the Parliament was announced as a Declaration at the Nice Summit on 7-10 December.[260]Since an agreement on the legal status of the Charter was not reached, the Charter was announced as a non-binding Declaration. There could not be reached to an agreement on the legal status of the Charter at the Laeken Summit held on 14 – 15 December 2001.[261]

The Charter was envisaged to be incorporated to the next treaty so that it would be binding at Convention on the Future of the Europe held on 2003.[262]As a matter of fact, the Charter was incorporated into the draft of the Constitutional Treaty as the second part of it. However, as we mentioned above the Constitutional Treaty could not enter into effect as it was not ratified in some countries. The Charter of the Fundamental Rights became binding under the Lisbon Treaty. The Charter's legal status was identified in the treaty, as a binding source which has the same effect with the founding treaties.

C. CONTENT OF THE CHARTER OF FUNDAMENTAL RIGHTS

With the Charter of Fundamental Rights, both an effective and transparent fundamental rights protection and a predictable recognition margin for the fundamental rights protection.[263]In this regards, the charter of fundamental rights was required to cover the rights afforded by the Union law. The document was compiled considering this need and goals.

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[260] European Council – Nice 7-10 December 2000 Conclusions of the Presidency, **http://www.europarl.europa.eu** (17.5.2013)

[261] Presidency Conclusions European Council Meeting in Laeken 14 And 15 December 2001, **http://www.europarl.europa.eu** (18.5.2013)

[262] The Treaty of Nice and the Convention on The Future of Europe, **http://www.europarl.europa.eu** (18.5.2013)

[263] Arsava, Füsun**, Temel Haklar Şartı**, p.8.

This document is one of the most up-to-date fundamental rights catalogues. Thus, it mentions the current human rights issues and includes new concepts. It adheres to the unity of rights and freedoms since it cover some provisions related to the human rights that fall beyond the Union's power area. At the same time, these rights were included as measures against the potential legal issues which may fall in the sovereignty area of the Union.

1. Sources Considered When Drawing Up the Charter

Human rights sources in Europe and across the world were to be considered when drawing up Charter. In line with this necessity, certain provisions to take advantage of these sources were set forth at the Cologne Summit. It was envisaged that the Charter would be drawn up considering the ECHR, European Social Charter, *Community Charter of the Fundamental Social Rights of Workers,* and common constitutional traditions of the member states.[264]Thus, the preamble of the Charter refers to this interaction. In addition to the rights mentioned in the Cologne Summit, the preamble of the Charter also mentioned the judgments of the European Court of Justice and the ECtHR. Taking these sources into account in the interpretation of the Charter based is particularly of significance in terms of "historical interpretation". The preamble of the Charter states the following:

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

[264] Presidency Conclusions Cologne European Council 3 And 4 June 1999, **http://www.europarl.europa.eu** (20.5.2013)

case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."[265]

It can be concluded from these expressions in the preamble of the Charter that the Charter did not only codified the then available fundamental rights by the EU, but also it compiled the rights secured by other international sources. With this preamble, it was aimed to create a Charter with strong democratic legitimacy taking advantage of the historical knowledge of human rights. In addition, the protection area of certain fundamental rights was expanded through the common constitutional traditions of member states. As all the sources mentioned above were considered when drawing up the Charter, a more effective protection mechanism could be ensured through a "gene" transfer.

2. Rights and Freedoms in the Charter

The Charter of Fundamental consists of 54 Articles and the following sections[266]:

- Preamble
- Dignity (Art. 1-5)
- Freedoms (Art. 6-19)
- Equality (Art. 20-26)
- Solidarity (Art. 27-38)
- Citizens' Rights (Art. 39-46)
- Justice (Art.47-50)
- General Provisions (Art. 51-54)

[265] Charter Of Fundamental Rights Of The European Union, Presidency Conclusions Cologne European Council 3 And 4 June 1999, **http://www.europarl.europa.eu** (20.5.2013)

[266] Charter Of Fundamental Rights Of The European Union, Presidency Conclusions Cologne European Council 3 And 4 June 1999, **http://www.europarl.europa.eu** (20.5.2013)

Sources and codifying types of some rights governed in the Charter will be explained. The title of "civic rights" is one of the most outstanding aspects in the categorization of fundamental rights. It can be observed that the criticism that classical fundamental rights documents could not provide adequate protection in the Union was reflected to the text of the Charter without examining the provisions of the Charter. The rights were arranged using a writing technique in parallel with the universal principles of law. The following section will touch upon the content of the Charters with the sources of inspiration, primarily the ECHR making comparisons.

a. Dignity

Dignity reflects the human rights philosophy of the Charter. In the last centuries dignity has been considered as a fundamental ethic and legal value in all the religions, by powers and international bodies.[267]The notion of "dignity" was codified from the constitutions of 157 countries, which amounts to almost %81 of the world constitutions.[268]The notion of dignity provides people with the right to claim the protection of their material and moral integrity, the enhancement of their civic and social status. It can be claimed that this notion constitutes the base of all the fundamental rights with this feature. The notion of "dignity" reflects the human rights approach of the fundamental rights document where it was codified. It gives important hints about the regime restricting the fundamental rights and freedoms. Where dignity confronts with the dignity of another individual it would be subject to restriction.[269]In this respects, it can be concluded that the fundamental rights cannot be exercised violating another individual's dignity.

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[267] Yechiel Michael Barilan, **Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw**, MIT Press, 2012, p.2.

[268] *Ibid*, p.2.

[269] Matthias Mahlmann, **Human Dignity and Autonomy in Modern Constitutional Orders; Michel Rosenfeld**, András Sajó (Eds.), **The Oxford Handbook of Comparative Constitutional Law**, Oxford University Press, 2012, p.387.

In this section of Charter dignity was arranged as the first article of the charter and the title. The title governs right to life, right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labor. According to the chronological order, the first generation rights were arranged in this section. When considered the content of the article, it is possible to observe that a codification compliant with the technology and world conditions. For example, article 3 on the right to the integrity of the person includes provisions on human cloning and genetic studies.[270]

The Union did not have the power of issuing norm regarding punishment law due to the period when the charter was drawn up. However, the title of "dignity" included death punishment, prohibition of slavery and forced labor, and prohibition of torture. These provisions cannot be restricted to their nature and according to the Charter provisions. With this regard, it needs to be discussed whether the Union's power area constitutes the boundaries of this absolute rights. However, it would not be reasonable for the sake of integrity of human rights that the Union restricted the rights to be protected with its own power area. It is also possible to say that the power area of the Union was not fixed, that it was a formation process. Therefore, a codification as comprehensive as possible was realized.

b. Freedoms

This title governs right to liberty and security, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a

[270] Luisa Ficchi, **Candidate Countries Facing a Bindig Charter of Fundamental Rights: What's New**; Di Federico Giacomo (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011, p.119.

business, right to property, right to asylum, protection in the event of removal, expulsion or extradition.

Some of the articles of this section were arranged in the additional protocols, not in the main ECHR text. For example, there could not be reached am agreement on the right to property and right to education while the ECHR was drawn up, therefore these rights were arranged through additional protocols.[271]The Charter, however, included these rights since an agreement was reached. The political conjuncture dominant at the time of the Charter's formation was influential in this.

Article 10 of the charter regarding freedom of thought, conscience and religion also contained arrangements on freedom of religious conversion, individual and collective worshiping parallel with the arrangement in the ECHR. This article has importance in terms of the political position of the Union. This is an important norm for the political legitimacy of the Union which is endangered with the descriptions of "Christian community". Moreover, "prohibition of discrimination" under the article 21 prohibited religious discrimination. The explicit boundaries of the Article 10 can possibly be identified by assessing these two articles together.[272]

Although highly influenced by the ECHR, the Charter differentiates from the ECHR in some provisions in terms of the protection system they provided. Article 8 on the right to respect for private and family life of the EHCR uses the term "correspondence", while Article 7 on the respect for private and family uses the term "communications". [273]The fact that Charter preferred this word indicates that the technological developments were taken into account while the Charter

[271] Ed Bates, **The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights**, Oxford University Press, 2010, p.163.

[272] Ronan McCrea, **Religion and the Public Order of the European Union**, Oxford University Press, 2010, p.108.

[273] Frank Schorkoph, **Human Dignity, Fundamental Rights of Personality and Communication,** p.410.

was being drawn up.[274]With this change, it was aimed to prevent the interpretation of the related rights to be open to the persons and institutions.

Article 14 of the Charter governs the right to education. However, education policies in Germany were within the power area of the states in Germany due to the federal structure.[275]The influence of the provision regarding the right to education would be observed in time.

Article 12 of the ECHR on the right to marry explicitly expressed the powers of the acceding states on the marriage using the expression of "according to the national laws". Article 9 of the Charter on the right to marry and right to found a family" showed respect to the member states' power to make arrangements about the marriage using the expression "guaranteed in accordance with the national laws", and set forth a positive obligation to ensure and protect this freedom. It can be concluded from this mode of codification preferred in the Charter that the issue of same-sex marriages remained within the power areas of the member states.[276]

Article 10 of the Charter on freedom of thought, conscience and religion accepted the "conscientious objection" as a manifestation of this freedom. With this provision right to conscientious objection was included in an international legal text.[277]When assessed together with the article governing the prohibition of discrimination the "conscientious objectors" were guaranteed not to be discriminated under the Charter.

The judgments of the European Court of Justice and the ECtHR were taken into account while drawing up the Charter. In addition, as mentioned before, the Charter was aiming to enable the transparency and visibility of the right protected by the Union. Article 15 on the freedom to choose an occupation and

[274]*Ibid*, p.410.

[275] Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, p.52.

[276] Jackie Jones, **Taking "Sex" out of Marriage in the European Union**; Jackie Jones, Anna Grear, Rachel Anne Fenton, Kim Stevenson (Eds.), **Gender, Sexualities and Law,** Taylor & Francis, 2011, p.299.

[277] Ronan McCrea, **Religion and the Public Order of the European Union** p.119.

right to engage in work, and Article 16 on the freedom to conduct a business are two examples of this aim.[278]The European Court of Justice made reference to these rights in the **Nold judgment[279]and Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU) Judgment.[280]**Therefore, it is possible to say that Article 15 and 16 are Union citizen rights. One of the most important elements of the Union integration "freedom of movement" was guaranteed with these articles under the Charter. Directive on the recognition of the diplomas dated 21 December 1998[281]can be an example of the Union measures for the exercise of this right.

Article 18 of the Charter of Fundamental Rights on the right to asylum is one of the biggest steps for the right to aylum at the international scale.[282]However, it does not stipulate absolute obligation on the member states for providing right to asylum.The Charter made reference to the Geneva Convention[283] on 28 July 1951 and the Establishing Treaty in the Article 18.[284]The Charter has made a codification in compliance with the obligations set forth under the Geneva Convention.

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[278]Hermann-Josef Blanke, **The Economic Constitution of the European Union**, Hermann-Josef Blanke (Eds.), **The European Union After Lisbon: Constitutional Basis, Economic Order and External Action**, Springer, 2012, p.393.

[279]Case-4/73, *Nold v Commission*, [1974] ECR 575, **http://eur-lex.europa.eu** (05.03.2013)

[280] C-240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531

[281]Council Directive 89/48/EEC of 21 December 1988 on a *General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration*, **http://www.europarl.europa.eu** (20.5.2013)

[282] H. Battjes, **European Asylum Law And International Law**, Martinus Nijhoff Publishers, 2006, p.113.

[283] Convention relating to the Status of Refugees of 28 July 1951, **http://www.unhcr.org** (20.05.2013)

[284] Steve Peers, İmmigration**, Asylum and the European Union Charter of Fundamental Rights**; Elspeth Guild, Paul Minderhoud (Eds.), **The First Decade of EU Migration and Asylum Law**, Martinus Nijhoff Publishers, 2011, p.463.

c. Equality

Equality means that the individuals under the same conditions are treated in the same way.[285]Individuals are provided with the right to claim equal treatment, while the power is obliged to treat equally. However, private persons may have this obligation under certain conditions.

Equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities are the rights governed under the Equality title of the Charter.

The principle of equality is one of the deepest rooted rights secured by the Union law. Article 199 of the Treaty of Rome governs the equality between men and women. However, the understanding of equality was related to the labor law as part of the "free movement of workers". Therefore, equality principle in the Article aims to guarantee equality between men and women in the labor law.[286]It is possible to claim that the prohibition of discrimination / principle of equality were developed in relation to the labor law result from the Union's integration goals and the policy of creating a common market of competition.[287]A lot of regulations and directives were issued in the Union law related to this subject. Some of the firectives issued to prohibit discrimination were mentioned in the sections related to the human rights of the secondary sources of Union law.

Article 23 of the Charter on the equality between men and women includes an expression allowing space for positive discrimination. However, the Charter used the term "under-represented sex" instead of women to point out as the adressee of the positive discrimination. It is possible to explain this with the purpose of enabling the Charter to meet not only the conjuncture, but also all the

[285] Johan Rabe**, Equality, Affirmative Action, and Justice**, Books on Demand, 2001, p.39.

[286] Brian Bercusson**, European Labor Law**, Cambridge University Press, 2009, p.337.

[287] Catherina Barnard, **Gender Equality in the EU**, Philip Alston, Mara R. Bustelo (Eds.), **The EU and Human Rights**, Oxford University Press, 1999 ,p.217.

possibilities in a broad time period, and with the fact that the notion of dignity has become a part of the human rights philosophy of the Charter.

Another novelty of the Charter was that it covered the rights of the child, elderly and persons with disabilities. It was stated that the rights of the child was codified based on the New York Convention dated 20 November 1989, the rights of the elderly was codified based on the Article 23 of the European Social Charter, and the rights of the persons with disabilities was codified by the Article 15 of the European Social Charter.[288]

d. Solidarity

The rights arranged under this section are workers' right to information and consultation within the undertaking, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labor and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection.

This section of the Charter includes important arrangement related to the social rights. Some of the rights governed under this section of the Charter were arranged under the Community Charter of the Fundamental Social Rights of Workers in 1989, as well. The protection of these rights by the Union law is significant in terms of the economic and social integration. This section of the Charter reflects the European Social Charter.[289]

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[288] Jeff Kenner, **Economic and Social Rights in the EU Legal Order**; Tamara K.. Hervey, Jeff Kenne (Eds.), **Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective**, Hart Publishing, 2003, p.17.

[289] McGoldrick, **The Charter and UN Human Rights Treaties**, p.85.

Article 28 of the Charter governs the right of collective bargaining and action. The subject of this rights was defined as the "workers and employers, or their respective organizations". The said article poses a condition for the right of collective bargaining by using the expression of "in cases of conflicts of interest". However, the article does not make it clear if the "conflict" mentioned here should occur during the collective bargaining negotiations or not.

The Charter does not include arrangements on the right of housing, however Article 34 governs housing allowance. Article 35 of the Charter is related to the right of heath care. But this Article does not clearly define the framework of the state's obligations regarding the right of health care.

Article 37 of the Charter brings another novelty with the "right of environment". The title of this Article is "Environmental protection". This title and the language of the article stipulate positive obligations for the public authorities. The said article states the following:

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

The Article obliges the Union to develop a policy of environment. This articles aims to affect the Union policies. The article underlines the relation between the economy and environment with the expression of "sustainable development". Right of environment relates to the "territorial dimension of constitution". The importance of the "territorial dimension of human rights" place by the constitutional and international sources increases day by day.[290]The Charter proved that it follows the constitutional developments by including this arrangement..

[290] Kaboğlu, p.75.

e. Citizens' Rights

This section of the Charter governs the rights afforded by the establishing treaties and the rights the EU citizens gained through integration. This section of the Charter includes the right to vote and to stand as a candidate at elections to the European Parliament, right to vote and to stand as a candidate at municipal elections, right to good administration, right of access to documents, ombudsman, right to petition, freedom of movement and of residence, diplomatic and consular protection.

The EU citizenship is a notion governed under the Maastricht Treaty on 7 February 1992.The EU citizenship was established in addition to the national citizenship, and it does not replace the national citizenship.[291]

The aim of the EU citizenship is to enable the participation of the EU citizens to the Union policy. The rights secured under this title are to ensure political and democratic participation of the Union citizens.[292]

The Charter includes innovations on the democratic rights. It is possible to observe that conditions for voting and being elected were expanded within the time. Exercise of sovereignty has been evaluated at the Union.

Article 39 of the Charter on the Right to vote and to stand as a candidate at elections to the European Parliament stipulated that the condition for being elected would be based on the place of residence, but the citizenship. However, in addition to the place of residence, being a Union citizen is another condition for being elected.

Article 39 of the Charter is related to a democratic institution of the Union. However, Article 40, which governs the right to vote and to stand as a candidate at municipal elections, has a provision beyond the citizenship criteria of the national democratic bodies. When considered from constitutional aspect, the fact

[291] Willem Maas, **Creating European Citizens**, Rowman & Littlefield, 2007, p.45.

[292] Giovanni Moro, **Citizens in Europe**, Springer, 2012, p.196.

that the right to vote and be elected was governed at the local elections scale is a strong reflection of the exercise of Union sovereignty.[293]Thus, the Charter provided the Union citizens who reside in a member state, but not a citizen of that state with the equal rights in terms of the local elections.

Another innovative aspect of the Charter was that it governs the right to good administration. This Article aims to ensure a fair, rational and effective relationship between the Union citizens and the administration. The Charter includes provisions relating to the administration's accountability for its actions and operations. It also contains provisions on the right to access to information provising right to access the files related to the Charter itself. Also, the Charter stipulates that the decisions taken by the administration should be based on facts and be justifiable. One of the most important paragraphs of this Article sets forth that the official correspondence should be made in one of the official languages of the Union, even if that language is not the official language of the member state:

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

The above expression indicates that this right is accorded to everyone, not only to the Union citizens.[294]However, this Article does not comply with the linguistic rights. The number of people speaking Catalan, Basque and Turkish is more than some of the Union citizens speaking some languages of the Treaties.[295]Further, some of these languages are confirmed as the official languages in the constitutions of the member states, even if they are not among the languages of the Treaties. For example, Article 3 of the Constitution of the Republic of Cyprus

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[293] Stefan Kadelbach, **European Citizinship Rights**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, p.556.

[294] Bruno deWitte, **The Protection of Linguistic Diversity Through Provisions; Edit. X. Arzoz, Respecting linguistic diversity in the European Union**, John Benjamins Publishing, 2008, p.177.

[295] *Ibid*, p.178.

dated 16 August 1960 acknowledges Turkish language as an official language of the island.[296] However, the exercise of the right of good administration was restricted with the languages of Treaties in a fundamental rights catalogue in which the right of good administration is included as a fundamental right. Therefore, the fact that the right of good administration does not comply with the linguistic rights creates a conflict in terms of the principle of the integrity of rights. Human rights and financial resources were influential in the language regime during the codification of the Article.

Article 42 of the Charter governs the right of access to documents. Right to information is one of the complementary rights of the right of good administration, which also enables the exercise of the right of good administration.[297]This right has also importance in terms of the exercise of freedom of thought. One should have access to information, which is the raw material of the thought in order to generate thought and reach to a personal conviction.[298]To ensure the exercise of this right, the principles of access to documentation of the Parliament, Commission and the Council were governed under the Regulation no. 1049/2001.[299]

Another complementary right for the right of good administration and democratic participation is the right to reach an Ombudsman, which is governed under the Article 43.[300] Ombudsman is an administrative body established to enhance the accountability of the institutions of the Union and protect human rights at the supranational scale.[301]Effective exercise of this right is of great

[296] Cyprus Constitution of 1960, **http://www.servat.unibe.ch** (22.05.2013)

[297] Peter Nedergaard**, European Union Administration: Legitimacy and Efficiency**, Martinus Nijhoff Publishers, 2007, p.136.

[298] Kaboğlu, p.295.

[299] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, **http://www.europarl.europa.eu** (22.5.2013)

[300] Craig, Búrca, **EU Law: Text, Cases, and Materials**, p.56.

[301] L. C. Reif, **The Ombudsman, Good Governance, and the International Human Rights System,** Martinus Nijhoff Publishers, 2004, p.391.

importance for the right of good administration and participation to the protection of fundamental rights.

Article 46 of the Charter governs the diplomatic and consular protection in order to strengthen the concept of the Union citizenship and the citizens' sense of belonging to the Union. Article stipulates that the Union citizens should have the equal right of diplomatic protection with the citizens of a third country where the state of their citizenship does not obtain any diplomatic mission.

The section regarding the citizens' rights appears as a result of the inclusion of the rights of Union citizens within the scope of the fundamental rights protection.The rights set forth in this section and the democratic instruments envisaged by these rights enable the Union citizens to effectively contribute to the integration process later on.

f. Justice

This Section of the Charter refers to procedural rights, in general. This Section governs the right to an effective remedy and to a fair trial, presumption of innocence and right of defense, principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same criminal offence. Rights governed under this Section are the universal principles of law. This Section ensures protection for the rights of the individuals governed under this Charter.

Article 47 of the Charter, which governs the right to an effective remedy and to a fair trial, was codified based on Article 6 of the ECHR.[302]

[302] Giangiuseppe Sanna, **Article 47 of EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation on Civil and Commercial Matters**; Di Federico Giacomo (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011, p.164.

Rights touched upon under this Section are not limited to the citizens of the Union. The term "everyone" is used in the articles as the subject of rights. When right to better management and procedural rights are taken as a whole, they would constitute the instruments necessary for the implementation of the Charter.

3. General Provisions

The last Section of the Charter includes general provisions and important references to the status of the Charter. The last Section also stands out in terms of the principles of limitation of the rights under the Charter. It also offers a frame for use and abuse of the rights under the Charter, while containing noteworthy provisions relating to the constitutional dimensions of the Charter.

This Section includes scope, scope of guaranteed rights, level of protection, and prohibition of abuse of rights.

a. Article 51: Scope

Article 51 of the Charter states that, the Charter addresses to Members States and Union Law. Liabilities of Members States, however, do not apply to all the powers of the Member State. Member States' tasks arising from this Charter shall only apply to the implementations with regards to Union law.[303]The Article also refers to the principle of "subsidiarity", outlining the Charter's approach toward the concept of power.

[303]Alina Kaczorowska, **European Union Law**, Routledge, 2013, p.214.

The second paragraph of the Article states that the Charter does not enlarge powers for the Union.[304]Therefore, it is emphasized that the Charter does not modify the balance of power within the Union. The Charter shall not establish a new power or task for the Union.[305]The Article is a reflection of the judicial opinions of the Court of Justice laying down that any change of powers and tasks can only be made by Treaties. The Court of Justice delivered the following remarks with regards to the Grant Case[306]:

> *"However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I-1759, paragraphs 34 and 35)."*

One significant aspect of this judgment is the reference made to the Opinion no. 2/94.[307]The opinion addressed in the above excerpt conditioned a change in Treaties for the Union to be a Party to ECHR. The provision of Article 51 in the Charter shows that a condition of change in Treaties shall not be rendered invalid through the Charter.

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[304] Samantha Besson, **The Human Rights Competence in the EU The State of the Question after Lisbon**; Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone (Eds.), **Human Rights and Taxation in Europe and the World**, IBFD, 2011, p.40.

[305] Christian Calliess, **The Charter of Fundamental Rights of the European Union**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007, p.530.

[306] C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd, [1989] ECR I-621 **http://www.europarl.europa.eu** (24.5.2013)

[307] Samantha Besson, **The Human Rights Competence in the EU The State of the Question after Lisbon**; Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone (Eds.), **Human Rights and Taxation in Europe and the World**, IBFD, 2011, p.46.

The article is a reflection of the Court of Justice opinions. European Court of Justice has always adopted a cautious approach relating thereto, since its first opinions on fundamental rights. It has generally based such an approach on its argument that protection of fundamental rights could be ensured within the Union's jurisdiction. National institutions and authorities, as the implementers of the Union law, are supposed to comply with the Charter of Fundamental Rights while implementing the Union law. In this regard, violations should be prevented that might arise from national norms contradicting Union's protection of fundamental rights. Therefore, the possibility arises that Union norms might impose superiority, during the implementation of Union law, over national norms outside the Union's jurisdiction, in case of a contradiction against Union's protection of fundamental rights. The European Court of Justice stated the following in its judgment relating to Wachauf Case[308]:

> *"Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order . Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."*

Members States are considered as an agent of the Union while implementing the Union law. This leads to an indirect requirement. Member States' responsibilities arising from the Charters, while implementing the Union law, mean that the responsibility of the Union is shared by the Member States.

[308] C-5/88, Wachauf v. Bundesamt für Ernahrung und Forstwirtschaft, [1989] ECR 2609, **http://www.europarl.europa.eu** (24.5.2013)

Article 6 of Lisbon Treaty governs this issue at a constitutional level. Article 51 of the Charter is confirmed by Article 6 of Lisbon Treaty.[309]

Although it is guaranteed that the Charter will not lead to an extension in power, Union's passing regulations outside Union's jurisdiction serves the purpose of its text, which is an instrument that covers possible future changes in power.

b. Article 52: Scope of guaranteed rights

Article 52, in the light of the ECHR and the opinions of the European Court of Justice, governs the regime of limitations of the rights covered under the Charter.[310]Laying down the general principles of limitations under the Article in question, Paragraph 1 of the same Article is as follows:

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

Four limitation criteria stand out in this Article, which are given as follows:

-The principle of necessity

-Necessity of general interest recognized by the Union and the need to protect the rights and freedoms of others

-Prohibition of intervening into the essence

-The principle of lawfulness.

[309] Alina Kaczorowska, **European Union Law,** p.214.

[310] Craig, de Búrca, **EU Law: Text, Cases, and Materials** p.397

Limitation system provided for by the Charter is different than that of the ECHR. The Charter prefers general provisions of limitation whereas the ECHR provide for specific provisions of limitation.[311]Whether limitation principles set out by Article 52 of the Charter could be recognized as a reason of a general limitation for the rights covered by the Charter, should be discussed. Specific reasons for limitation under the ECHR are covered under the relevant Article which sets out the rights. In the Charter, however, no specific reasons for limitation are included.Although it is governed together with the specific reasons for limitation in the Charter, it is not possible to limit some rights that constitute a tenet for human rights. Opinions of the Court of Justice also recognize that tenet of the rights and confirm that some rights cannot be limited. In its **Schmidberger Judgment[312]**the Court of Justicestated that some rights, such as the right to live and prohibition of torture, are recognized by the ECHR as absolute rights.[313]Those rights, which are not to be limited, might be said to not be subject to the general provisions of limitation under the Charter. However, the last paragraph of Article 52 in the Charter is as follows:

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

The last paragraph of this Article makes a direct link between the rights covered under the Charter and those under ECHR. According to this paragraph, the rights under the Charter, which are also covered by ECHR, are the same as those governed under ECHR. One argues that, in this case, the limitation of those rights governed under the Charter must take the provisions of ECHR as a

[311] Paul Craig, **The Lisbon Treaty: Law, Politics, and Treaty Reform,** p.223.

[312] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659, **http://www.europarl.europa.eu** (25.5.2013)

[313] Paul Craig, **The Lisbon Treaty: Law, Politics, and Treaty Reform**, p.225.

basis.[314]Such a comment also complies with current Member States' responsibility arising from their position as Contracting Parties to ECHR. Implementing the Union's law, a Member State should observe the benchmarks set out by the opinions of ECHR and ECtHR, while limiting a right.

However, one other opinion argues that Article 52 comprises unique limitation criteria of the Charter and the limitation benchmarks covered under ECHR are not binding. Paragraph 3 of Article 52 in the Charter stipulates that ECHR shall not prevent the Charter from providing extensive protection. In this case, any limitation under ECHR, as long as it does not constitute an obstacle against protection of fundamental rights provided by Union law, may be referred to as an exception of the limitation. Article 17 of ECHR is also related to non-extension of the limitation criteria in the Convention. Paragraph 3 of Article 21 in the Charter contains a provision in compliance with this article of ECHR.

Of the limitation principles in Article 52, the general interest of the Union and the rights of the others are combined via the conjunction "or". General interest of the Union may also be taken into consideration as an additional criterion of limitation. As in the case of ERT judgment[315]which was mentioned in previous chapters, the Court of Justice stated that the exceptions to be made to free movement, which is among the Union's general purposes, should be in compliance with the fundamental rights set out by the Court of Justice.[316]

Another judgment, where the Union's purpose was referred to as a limitation principle, is **Familiapress judgment**[317].Laura magazine, published in Germany and also distributed to Austria, has a complementary issue which is a prize puzzle. The value of the price, which is to be given as a result of the puzzle,

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[314] Steve Peers, **Taking Right Away? Limitations and Derogations**, Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004, p.170.

[315] C-260/89, *Elliniki Radiofonia Tileorasi - Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Pliroforissis*, [1991]-6 ECR I-2925.

[316] Aslı Bilgin, **Divan'ın İkilemi: Temel Haklar ve Temel Özgürlükler Arasında Denge?;** Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Volume:13, No:1: Y: 2011, p.62.

[317] C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Henrich Bauer Verlag*, [1997] ECR 1-3689, **http://www.europarl.europa.eu** (25.5.2013)

is too high, which could lead to unfair competition for other publishing houses in Austria. For the purposes of protection of diversity and pluralism, a lawsuit was filed, with the claim of stopping the publication of the Magazine.[318]The Court delivered its judgment that such a national power should be in compliance with the principle of proportionality, for it to be recognized as a limitation under Article 10 of ECHR.[319]According to the Court, such a precaution was not proportionate. The court also explained that such a national precaution might lead to consequences contradicting inter-union trade. With this judgment, Union's general interest was used as a criterion of limitation. Such an approach by the Court might be shown as an example of the collectivity of opinions behind the codification of Article 52.

The address made at the regulations under ECHR in Paragraph 3 of Article 52 aims to ensure that, the Member States, as the contracting parties to ECHR, are not subject to a dual supervision. This Article's overall approach to the limitation of fundamental rights, when analyzed, may be observed to recognize the limitation benchmarks to be at minimum level.[320]

c. Article 53: Level of protection

Article 53 of the Charter provides for minimum fundamental rights and freedoms criteria, with regards to the interpretation of the Charter. The article refers to protection of fundamental rights provided for by, as the minimum level, international law, ECHR, international agreements signed by the Union and all its Member States. While interpreting the Charter, the level of protection of fundamental rights shall not be lower than those which are ensured by any one

[318] Mike Feintuck&Mike Varney, **Regulatin Media Market**; Patrick J. Birkinshaw, Mike Varney (Eds.), **European Union Legal Order After Lisbon**, Kluwer Law International, 2010, p.163.

[319] *Ibid*, p.163.

[320] Lock, Tobias, **"The ECJ and the ECtHR: The Future Relationship between the Two European Courts"**, The Law and Practice of International Courts and Tribunals, V. 8, 2009, p. 382, **http://papers.ssrn.com** (25.05.2013)

of those sources indicated in this Article. By taking those sources as a basis, Article imposes a ban on restrictive review in interpretation of the Charter.

Provisions similar to those of Article 53 are included in many human rights declarations and constitutions. Human rights is an evolving arena which is ever-shaped by the needs of the era. As the result of such a historic evolution, there are provisions in human rights instruments which state that the protection provided for by that instrument corresponds to the minimum standards.

A provision similar to the non-regression clause in the Charter also finds its place in Article 53 of ECHR.[321]The protection contractually ensured by ECHR is not allowed to be interpreted in a way to reduce the responsibilities arising from regulations of domestic law; and from international treaties to which Member States are parties.

This article is important for the determination of the Charter's legal status. It outlines the Charter's superiority, as the source of Union's law, within domestic law. There have also been allegations that Article 53 could pose a threat to the principle of the rule of EU Law.[322]Accordingly, level of protection of human rights is not a concept that could be measured. The difference between levels of the sources referred to by that Article and that provided for by the Charter is not clear.

Article 53 must be evaluated individually for each specific case. The instrument offering the highest level of protection must be implemented for the right subject of dispute. For this reason, Court of Justice, as in its previous opinions, must render judgments, by taking into account the general principles of law and the constitutional traditions of the Member States.[323]This is how the legitimate purpose, aimed by the Charter, could be achieved, through the

[321]Craig, de Búrca, **EU Law: Text, Cases, and Materials,** p.398.

[322] Hakan Taşdemir, Fatma Akkan Güngör, **Avrupa Birliği Temel Haklar Şartı'nın 53.maddesi'nin Topluluk Hukukunun Üstünlüğüne Etkisi,** Gazi Üniversitesi Hukuk Fakültesi Dergisi, V.XII, Y.2008, No:1-2, p.1081.

[323] *Ibid*, p.1083.

judgments of Court of Justice. Interpretation by the Court of Justice of the Charter would prevent the Member States, which are also Contracting Parties to ECHR, from being subject to dual supranational supervision of fundamental rights. The Article also touches on the agreements, to which the Union and Community are party, along with the international agreements to which Members States are party. It is through this Article that the differences in interpretation and protection, which might result from being a party to EHRC that is on the agenda of the Union, could be overcome.

d. Article 54: Prohibition of abuse of rights

The last Article of the Charter stipulates that nothing in the Charter shall be interpreted as restricting or adversely affecting a right. Article 53 provides for a minimum limit whereas Article 54 aims to prohibit abuse of Charter's provisions by the Union or Member States' authorities. Article 54, when analyzed together with Article 53, determines the outlines of the limitation regime under the Charter.[324]

In the codification of Article 54, Article 17 of ECHR was used as a model.[325]In the descriptions by Article 54, it was also stated that Article 17 of ECHR was an inspiration.[326]European Court of Human Rights is the interpreting agent of ECHR. In this respect, ECtHR opinions must be taken into account while touching upon Article 54 of the Charter. Human Rights instruments were written down with an aim to limit the power. They force the power to comply with human rights, within a domain of power. Interpretation of the provisions in human rights instruments in a way to be eliminating or unnecessarily restricting human rights, contradicts the philosophy behind the birth of those instruments. For this reason, many human rights instruments and constitutions include provisions similar to

[324] Alina Kaczorowska, **European Union Law**, p.224.

[325] Craig, de Búrca, **EU Law: Text, Cases, and Materials,** p.399.

[326] Giuliano Amato, **The European Constitution: Cases and Materials in EU and Member States' Law**, Edward Elgar Publishing, 2007, p.130.

those of Article 54. Article 17 of ECHR and Article 30 of the Universal Declaration of Human Rights aim to prohibit abuse of such rights.[327]

D. STATUS OF THE CHARTER OF FUNDAMENTAL RIGHTS

In legal literature, the concept of Charter refers to constitutional declarations with more of a political tendency than legal. Practiced as a declaration by rulers to secure some issues, it is sometimes also employed to refer to international treaties such as the Charter of United Nations or European Social Charter. In this respect, a "Charter" is not a concept that determines the legal status of an instrument. Whether an instrument is legally binding or not may not be clarified with grammatical interpretation of the word "Charter". The Charter was declared under "interinstitutional agreements", on 7 December 2000, undersigned by the Parliament, Council and Commission.[328] The instrument, in its current form, is a declaration of intent which is ethically binding for the undersigning institutions.

Appointed for preparing the draft Charter, the Convention completed this task within a period of time that could be considered short. Members States apply varying human rights policies and traditions. It is challenging to transform such differences into harmonization through a document. The achievement of the Convention was that determination of the Charter's legal status was postponed.[329] In the 1999 Cologne Summit, it was decided that the Charter's legal status be discussed in the upcoming Nice Summit in 2000.[330]Suspending

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[327] Alastair Mowbray, **The European Convention on Human Rights; Mashood A. Baderin, Manisuli Ssenyonjo, International Human Rights Law:Six Decades After the Udhr and Beyond,** Ashgate Publishing, 2010, p.271.

[328] Paolo Carozza, **The Member States**; Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004, p.49.

[329] Chalmers, Davies, Monti, **European Union Law: Cases and Materials**, p.238.

[330] Grainne de Burca, Jo Beatrix Aschenbrenner, **European Constitutionalism and the Charter**; Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004, p.20.

determination of the Charter's legal status also enabled the Charter to be a comprehensive and forward-looking catalogue of rights. Therefore, the Charter's content was prevented from being overshadowed by discussions on its legal status and by the power balances within the Union.

Expectations from the Charter were touched upon under Drawing Up The Charter of Fundamental Rights that could be summarized as follows:

-Bringing together the fundamental rights and freedoms protected by Union Law

-Creation of the Charter in an open, transparent and democratic way

-Provision of rights for EU citizens that can be referred to before judicial authorities.[331]

The last item expects the Charter to be efficient as a human rights instrument and to provide substantial protection for individuals. However, achieving this expectation is directly related to the Charter's legal status. As long as the Charter is not binding, it would not go beyond being a political text nor provide rights for citizens to be referred to before Union's authorities.

Since the declaration of the Charter's legal status, it has been amended from time to time due to Member States' varying approaches. As the Union is a party to ECHR, Charter's legal status and discussions thereto are of critical nature in terms of human rights policies within the Union.

1. Arguments on the Charter's Legal Status

Different arguments were put forward as to whether the Charter was binding or not that can be summarized under the following:

[331]Füsun ARSAVA, **Avrupa Birliği Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, C:3, No:1, 2003, p. 2.

-The European Court of Justice may impose on the Union to stick to one instrument while interpreting the Charter, in which case the Charter would lead to a power-absorbing effect.

-Some rights are protected in a more efficient way under national constitutions. A binding Charter would result in weaker interpretation of a right in question.

-Union's approval of ECHR would be enough for the protection of human rights. A different protection of fundamental rights that might be implemented within the Union would weaken the protection provided by the Council of Europe.[332]

Those arguments were also surrounded by opinions that this Charter should be binding. Arguments supporting a binding nature for the Charter were expressed within the following network:

-The sense of belonging would be enhanced through a binding Charter's provision of demandable rights.

-Discrepancy of fundamental rights between EU law and national law would be avoided.

-Many democratic elements/stakeholders had part in the creation of the Charter. Majority of those democratic stakeholders expressed their intent for a binding Charter. Therefore, a non-binding Charter would be problematic in terms of democratic legitimacy.[333]

In this context, determination or discussion of the Charter's legal status, during the preparation period, could have negatively affected the content of the Charter. If such discussion on powers had insisted, some rights in the Charter would not have been governed under the Charter and it would not have been qualified as an innovative catalogue for fundamental rights.

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[332] Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı,** p.55.

[333] *Ibid*, p.56.

Whether the Charter is binding might impose new obligations on Union's authorities and Member States. This is valid for the innovative rights governed under the Charter. However, some of those rights are already protected under Union law. The Charter is not an instrument that brings innovations; however, it is more like a codification. In other words, a non-binding Charter of Fundamental Rights does not mean that the rights it contains are not binding.[334]

2. Developments Regarding Charter's Legal Status

A binding Charter of Fundamental Rights would also mean limitation of the opinions of the European Court of Justice.[335]European Court of Justice ensured protection of fundamental rights, taking the general principles of law as a basis. However, it would now need to enjoy jurisdiction in accordance with the fundamental rights catalogue of the Union.

The Charter has an effect that of a political pressure mechanism. As mentioned above, it also involves some elements that are binding for the opinions of European Court of Justice. However, an end to the discussions on the Charter's legal status came after a long period. How the status would be realized was also another topic of discussion, in addition to whether it could be binding.

Varying formulae were suggested for the Charter to have a binding place in Union's law as the primary source of law. Such formulae covered inclusion of Charter's provisions in the Convention text; inclusion of the Charter as an annex to the Convention; and turning the Charter into a first-degree legal text, with a

[334] Arsava, Füsun, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005, p.10.

[335] Agustin José MENÉNDÉZ, **Chartering Europe:The Charter of Fundamental Rights of the European Union**, ARENA Working Papers, WP 01/13, **http://www.sv.uio.no** (28.05.2013)

provision to be added in the Convention.[336] All such alternatives required an amendment in the Convention.

During the Laeken Summit on 14-15 December 2001[337], it was discussed whether the Charter should be included in the Constitutional Convention. It was decided in Laeken Summit that a convention be gathered for drawing up a constitutional convention that was called "Convention on the Future of the Europe". Valéry Giscard d'Estaing was willing to chair the convention, and German and French governments supported d'Estaing. Supports from five member states were enough for Valéry Giscard d'Estaing's position as a chair.[338]Again during the Laeken Summit, it was agreed that discussions on Charter's legal status be postponed until the intergovernmental conference to be held in 2004.[339] The Convention would study on the Charter's legal status and position in the Constitutional Convention.

The Convention proposed the draft of Constitutional Treaty in the **Thessaloniki Summit on19-20 December, 2003**.[340]There, the Charter of Fundamental Rights was included in the Draft Treaty and stipulated to be binding. However, some articles of the Charter were amended, when it was included in the Constitutional Treaty.[341]

Article 51 of the Charter corresponds to Article II-111 of the Treaty. Differently from the original Article 51 of the Charter, two paragraphs of Article emphasize that the Charter is not an instrument extending powers. Paragraph 1

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[336] Kimmo Kiljunen, **The European Union Constitution: A Fin at the Convention**, Publications of the Parliamentary Office, 2004, p.68.

[337] Presidency Conclusıons European Council Meeting in Laeken 14 And 15 December 2001, **http://ec.europa.eu** (28.05.2013)

[338]Kimmo Kiljunen, **The European Constitution in the Making**, CEPS, 2004, p.34.

[339]Bruno de Witte, **Treaty Revision Procedures after Lisbon**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012, p.112.

[340] Ingolf Pernice, **Institutional Settlements for en Enlarged European Union**; George A.. Bermann, Katharina Pistor(Eds.), **Law And Governance In An Enlarged European Union,** Hart Publishing, 2004, p.6.

[341]Treaty establishing a Constitution for Europe, **http://eur-lex.europa.eu** (28.05.2013)

of Article 51 was added the following term: "respecting the limitsof the powers of the Union as conferred on it in the other Parts of the Constitution". And paragraph 2 continued: "or modify powers and tasks defined in the other Parts of the Constitution". These amendments aimed to relieve the Member States that the Charter is not an instrument that would extend the powers of Union.[342] Article 52 was set forth under the title "Scope and interpretation of rights and principles" in the Constitutional Treaty.New paragraphs were added during when the article was drawn up.

An increased emphasis in the Constitutional Treaty that the Charter would not extend any powers might be aiming to not risk the approval by Member States of the Treaty. The human rights provisions under a constitutional document, however, may contradict the philosophy behind fundamental rights if those human rights are governed under a reservation of competences. Constitutions are instruments guiding use of power, while also providing for how the power would protect those fundamental rights.

Although the Draft Treaty of Constitution was declared on the **Thessaloniki Summit on 19-20 June 2003,** the intergovernmental conference could only be finalized on 18 June 2004.[343] As mentioned in previous chapters, negotiations on a Constitutional Treaty was finalized on 18 June 2004 and signed in Rome on 29 October 2004.[344] However, entry into force was realized on 1 December 2006.Unsuccessful results from referendums on approval of the Treaty in the Netherlands and France and that only 15 Member States approved it by June 2006 led to new pursuits.

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[342]Olha O. Cherednychenko, **Fundamental Rights, Contract Law and the Protection of the Weaker Party:A Comparative Analysis of the Constitutionalisation of Contract Law, With Emphasis on Risky Financial Transactions**, Sellier European Law Publ., 2007, p.205.

[343] Grainne de Burca, Jo Beatrix Aschenbrenner, **European Constitutionalism and the Charter**; Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004, p.4.

[344] Clive Church, David Phinnemore, **The Rise and Fall of the Constitutional Treaty**; Michelle Cini, **European Union Politics**, Oxford University Press, 2007, p.47.

During the Summit on **21-22 June 2007**, it was accepted that the Constitutional Treaty did not achieve its goal. A lingering period of Treaty approval also decreased the public support and attention for the Treaty. Drawing up of a new Treaty was agreed, on 27 July 2007, led by the presidency of Portugal. Upon this decision, failure of the Treaty was also recognized at Union level.

The Constitutional Treaty was significant in that it referred to a political project in terminological terms. Its failure, however, led to a search for a different alternative for Union's structural issues. While drawing up the Treaty, the Charter's status and its determination were also discussed.

Lisbon Treaty earned the Charter a legally binding nature. According to Article 6 of Lisbon Treaty, the Charter of Fundamental Rights has the same legal value as founding Treaties.[345]As opposed to the Constitutional Treaty, the Lisbon Treaty did not include the Charter. Instead, an address to the Charter in Article 6 in Lisbon Treaty ensured a binding nature for the Charter.[346]Article 6 also ensured that the Charter shall not extend Union's competences as follows:

> *"The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."*[347]

Discussions on the Charter's legal status can be said to have shaped in a limited way, with the framework of "balances of power". Members States have a concern that the Charter could extend Union's competencies.[348]One noteworthy legal discussion about the Charter was managed in a way to alleviate Member States' concerns about competencies, which was reflected in the Lisbon treaty with this

[345] Jean-Claude Piris, **The Lisbon Treaty:A Legal and Political Analysis**, Cambridge University Press, 2010, p.158.

[346] *Ibid*, p.148.

[347] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, **http://eur-lex.europa.eu** (29.05.2013)

[348] Piris, **The Lisbon Treaty:A Legal and Political Analysis**, p.158.

provision: The Charter shall not result in an amendment of the provisions of the Lisbon Treaty.[349]

With all those in hand, it could be said that the Charter is not completely legally binding. Its legally binding nature shall be limited to Union's competence.[350] However, with the opinions of the Court of Justice, important decisions were made relating to fundamental rights, to be applied to the areas within Union's jurisdiction. In this respect, Union law might be said to already protect majority of the Charter's content that was envisaged by the Lisbon Treaty to be binding. Yet one could also argue that such a binding nature, limited to this perspective, does not achieve the Charter's final goal.

Protection of fundamental rights requires an integrative protection. Non-protection of a right in some cases may prevent use of another right. In this case, unless the Union benefits from "implied competence", it would be impossible to mention an efficient protection. Human rights policy necessitates a dynamic process. Such dynamic developments should not be overshadowed by discussions on competence. Otherwise, protection level provided for by the "general principles of law", which are also referred to by the Court of Justice, might decrease.

[349] *Ibid*, p.158.

[350] Kimmo Kiljunen, **The European Union Constitution: A Fin at the Convention**, p.69.

CONCLUSION

The Union could not have achieved the economic integration if it did not meet the needs for "justice, human rights, and democracy". Other than that, it was impossible for a formation, which did not respond to the justice and human rights needs, to achieve economic integration. Such motivations as the freedom of movement and common market could have been successful just to some extent, if the principles of justice and equality could not be secured sufficiently.

When the integration process of the Union is examined, it is possible to see that the Union gradually realized the need for a political integration as well as the economic integration in parallel with the institutionalization of the Union. Democratic legitimacy and the Union citizens' sense of belonging were the main requirements of the political integration. Therefore, the Union took steps to meet such requirements in time.

In the early period, the Union realized such requirement as the supremacy of the Union law begun to be questioned. It is no doubt that the constitutional courts of the member states played a major role in this realization. The attitude of the constitutional courts of the member states both alleviated the Union citizens' concerns that they could be deprived of their democratic rights with the increased powers of the Union, and forced the Union to follow an effective human rights policy.

Each member state is party to the ECHR. Accordingly, the Union citizens are under the supranational human rights protection provided by the ECHR. On the other hand, the member states are responsible for the enforcement of the Union law.However, they cannot release themselves from their obligations arising from the ECHR claiming that they enforce the Union law. Therefore, the Union citizens can enjoy the ECHR protection applying to the ECtHR in case of violations occurred due to the enforcement of the Union law. In other words, the Union citizens are provided with human rights protection against the measures of

the member states although the Union did not develop a human rights protection mechanism. Nevertheless, it is possible to observe the lack of a human rights protection mechanism in early periods against the measures of the institutions of the Union.

The resources of the Union law had already included certain fundamental rights and freedoms, although it was rightly criticized that the human rights protection in the Union law was largely focused on the economic integration, and such resources enabled important developments to take place.

As the judicial body of the Union, the European Court of Justice remained aloof from the area of human rights in its early judgments. However, later on the Court made significant judgments related to the human rights with the effect of the judgments of the constitutional courts of member states. The Charter's most important aspect is that it compiles the rights provided by the judgments of the Court of Justice.

The Court of Justice grounded its judicial power related to the human rights not on a positive norm but on the "general principles of the law". Although this approach of the Court of Justice has some drawbacks in terms of the predictability and transparency, it provided the Court of Justice with increased flexibility and effectiveness for the human rights protection.

The Charter contracted the margin that occurred as the Court of Justice grounded its power on the "general principles of law". However, the Charter provided more transparent, clear and predictable fundamental rights protection for the Union citizens. The Union law attained a concrete fundamental rights catalogue. The Charter included provisions highlighting that the Charter would not change the Union's power balances. The Treaty contained provisions indicating that the Charter would not provide any new power to the Union. These provisions of the Charter and the Treaty might have caused the Court of Justice to remain aloof from the judgment of the fundamental rights.

The fact that Union obtained the power to accede to the ECHR under the Lisbon treaty was another significant development in the Union human rights

law. The Union has not become a party to the ECHR, yet, however the initiatives on the accession still continue. The protocols the Union will sign will be determined s a result of these initiatives. A direct international fundamental rights review will be enabled when the Union becomes a party to the ECHR. Following the accession process to the ECHR, the Court of Justice will ensure the review of the fundamental rights set forth in the Charter as a municipal law and those fundamental rights governed under the Union law and the ECHR. With the completion of the Union's accession process to the ECHR, the Court of Justice will have a unique position. Then, the Court will be an international court for the member states and a domestic remedy for the ECtHR. Judgment of ECtHR will be an external reviewer of the Union's human rights policies.

The Union's accession to the ECHR will not render the Charter ineffective. The Charter includes some rights which are not governed under the ECHR, additional protocols and the constitutions of the member states. The protection to be provided by the ECJ will enable the rights to be paid attention to, although application to the ECtHR is not allowed. Especially, the protection of new rights included in the Charter making it an innovative document will enhance the fundamental rights standard of the Union citizens. The Charter is a human rights document more up-to-date than the ECHR. Therefore, it transformed some of the gains acquires through the judgment of the ECtHR into positive law norms. In this context, the Charter, as a binding legal document, has the potential to compensate for the clunky and obsolete aspects of the ECHR.

The final legal status of the Charter has determined under the Lisbon Treaty. The Charter has the same legal value as the Treaty. As mentioned above, although the Charter contracted the flexible judgment margin of the ECJ, it provided the measures of the institutions and authorities of the Union with a fundamental rights standard. The binding nature of the Charter was brought to conclusion with the Constitutional Treaty. The Charter was integrated into the Constitutional Treaty, which has a critical meaning: The constitutions are documents that determine the rules of functioning of states, restrict the power and guarantee the fundamental rights. With the Charter's incorporation to the

Constitutional Treaty, the Treaty will gain the value of a constitutional document. Nevertheless, since the Constitutional Treaty was not ratified, the Charter gained its binding nature with the Lisbon Treaty.

The Charter, although it emphasizes protection of power balances in its content, has exceeded this limit in regulating the rights. It set forth provisions in the areas going beyond the power relation between the Union and Member States. In the case of federal Member States, there were also provisions in the Charter that concerned the areas left to the federal states. For example, the right to education is within the jurisdiction of federal states in Federal Republic of Germany. The Charter, however, contains provisions regarding the right to education.

Limitation of the Charter's content with a concern of power balances would without a doubt result in non-realization of a holistic and permanent protection perspective. Due to the period in which the Charter was drawn up, it does not have the power to govern the penal code. The Charter contains a prohibition regarding capital punishments, though. If it did not contain a provision with regards to capital punishments due to a concern of power balances, its character as a human rights document could be shaken. Therefore, it is answerable that the Charter sets forth provisions beyond power concerns and includes general provisions concerning powers.

In terms of the Union's power relations, regulations in the areas which have not been sufficiently tackled are important in that it covers possible developments in the future. For example, provisions regarding the genetics law might be considered beforetime given existing technological conditions. However, the Charter was codified taking into consideration possible future disputes and needs. The Charter also aims to prevent disputes that might arise from absence of norms in this area. Societies' value judgments may also change in the face of an advancing technology. However, not governing some critical areas in order to monitor societal changes may lead to greater disputes in the long term.

One may find more criticisms against the Union's human rights policies and the Charter. It can also be claimed that the Union, in drawing up the Charter, was concerned with political legitimacy rather than protection of fundamental rights. As in the discussions above, the need for the Charter can be said to have decreased given the already-existing protection of fundamental rights before the Charter and the Union's position as a Contracting Party to ECHR. However the Charter is an important human rights instrument not only applicable in the Union, but also in the European continent. The Charter is contemporary and provides new rights, which makes it an inspirational instrument for all constitutional movements and developments on human rights in the world. The Charter also contributed Union citizens' awareness of human rights.

Turkey is a candidate country for the European Union. Moreover, the accession period has had an encouraging effect on the Turkish democracy and human rights policies. The Charter of fundamental rights should also be an inspiration for discussions regarding the preparation of a new constitution in Turkey. Indeed, one of the most important sources of Turkey's human rights situation is the EU progress report. Once they are published, progress reports bring with them a series of discussions. Additionally, even if the accession period and EU relations are controversial, many critical human rights and democracy reforms have been achieved throughout the accession period. Although the perspective for accession seems to have been lost recently, there are inspirational provisions of the Charter. During the preparation of a new constitution, innovative rights in the Charter, such as genetic rights, right to conscientious objection and right to good governance, should be discussed. The right to good governance, in particular, is a significant achievement on the path of obtaining the most contemporary version of democracy. It helps creation of a democracy for citizens which is also valid during the periods between ballot boxes. Therefore, Turkey should consider such constitutional period as a chance and adopt the most contemporary version in the world. Those interested in information technologies would also agree that no matter how strong the hardware is, one always lags behind without an updated software program.

Guarantee of stability derives from democracy and human rights as much as it does from security policies.

The Charter has not received the attention it deserves during human rights and constitutional discussions in Turkey. However, it would be beneficial to continue such discussions by being equipped from various sources. As the gene pool enlarges, the immunity system gets stronger and more developed. Accordingly, as the gene pool enlarges in terms of ongoing discussions in Turkey, human rights and democracy sources will be more efficient and stronger. In this respect, my study aims to serve as an alternative gene pool for the Charter-related human rights and democracy studies, and to draw attention as an alternative inspirational source during discussions. This Study is therefore expected to be beneficial for those studying in this area and/or those who take on responsibilities in democratic and political processes – at least those who feel responsible–.

BIBLIOGRAPHY

Alston Philip, Weiler J.H.H., **An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights**; Ed. Philip Alston, Mara R. Bustelo, **The EU and Human Rights**, Oxford University Press, 1999.

Alston, Philip, Mara R. Bustelo (Eds.), **The EU and Human Rights**, Oxford University Press, 1999.

Anderson David, Murphy Cian C.**, The Charter of Fundamental Rights,** Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012.

Andreangeli Arianna, **EU Competition Enforcement And Human Rights**, Edward Elgar Publishing, 2008.

Arsava Füsun, **"Avrupa Birliği Temel Haklar Şartı"**, Ankara Avrupa Çalışmaları Dergisi, 2003, V:3, N:1.

Arsava Füsun, **AB'nin Anayasallaşma Sürecinde Temel Haklar Şartı,** Ankara Avrupa Çalışmaları Dergisi, Volume:3, No:2,2004.

Arsava Füsun, **Birlik Hukuku ve Anayasa Arasındaki İlişki**, Ankara Avrupa Çalışmaları Dergisi Cilt:4, No:1 (Güz: 2004).

Arsava Füsun, **Birlik Hukuku ve Anayasa Arasındaki İlişki**, Ankara Avrupa Çalışmaları Dergisi, V:4, N:1, 2004.

Arsava Füsun, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005.

Aziz Miriam, **The Impact of European Rights on National Legal Cultures**, Hart Publishing, 2004.

Barents R., **The Autonomy of Community Law (Series European Monographs Volume 45)**, Kluwer Law International, 2004.

Barilan Yechiel Michael, **Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw**, MIT Press, 2012.

Barnard Catherine, **The Substantive Law of the EU: The Four Freedoms**, Oxford University Press, 2007.

Barnard, Catherina, **Gender Equality in the EU**, Philip Alston, Mara R. Bustelo (Eds.), **The EU and Human Rights**, Oxford University Press, 1999.

Başlar Kemal, **Avrupa Birliği'ne Katılım Sürecinde Türk Anayasası'nın Uyumlaştırılması Sorunu**, **http://www.anayasa.gen.tr** (08.01.2013)

Bates Ed, **The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights**, Oxford University Press, 2010.

Battjes, H., **European Asylum Law And International Law**, Martinus Nijhoff Publishers, 2006.

Bauer Lukas, **The European Court of Justice as a Constitutional Court ; International Constitutional Law Journal**, V:3, N:4/2009, Accessible on : **http://www.internationalconstitutionallaw.net** (14.12.2012)

Baykal Sanem, **Avrupa Birliği Anayasalaşma Sürecinde Adalet Divanı'nın Rolü: Divanın Ulusal Mahkemelerle İlişkileri ve Yorum Yetkisinin Sınırları Bağlamında Bir Analiz**, Ankara Avrupa Çalışmaları Dergisi Cilt:4, No:1 (Güz: 2004).

Beaumont Paul R., Lyons Carole, Walker Neil, **Convergence and Divergence in European Public Law**, Hart Publishing, 2002.

Bercusson, Brian**, European Labor Law**, Cambridge University Press, 2009.

Bernitz U., **Sweden and the European Union: On Sweden's Implementation and Application of European Law**, CMLRev. 38(2001).

Berry Elspeth, Hargreaves Sylvia, **European Union Law**, Oxford University Press, 2007.

Besson Samantha, **The European Union and Human Rights: Towards A Post-National Human Rights Institution?,** Human Rights Law Review, 6:2, 2006.

Besson, Samantha, **The Human Rights Competence in the EU The State of the Question after Lisbon**; Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone (Eds.), **Human Rights and Taxation in Europe and the World**, IBFD, 2011.

Bilgin, Aslı, **Divan'ın İkilemi: Temel Haklar ve Temel Özgürlükler Arasında Denge?;** Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Volume:13, No:1: Y: 2011.

Binder Darey S., **"The European Court of Justice and teh Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Actions"**, Jean Monnet Working Paper, No. 4, 1995, **http://centers.law.nyu.edu/jeanmonnet/papers**/ (12.05.2013)

Birkinshaw Patrick, **European Public Law**, Cambridge University Press, 2003.

Boas Gideon, **Public International Law: Contemporary Principles and Perspectives**, Edward Elgar Publishing, 2012.

Boczek Boleslaw Adam, **International Law: A Dictionary**, Scarecrow Press, 2005.

Bozkurt Enver, **İnsan Haklarının Korunmasında Uluslararası Hukukun Rolü**, Nobel Yayınları, Ankara 2003.

Callies Cristian, **The Charter of Fundamental Rights of the EU**; Ehlers Dirk, Becker Ulrich (Eds.), **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007.

Carozza, Paolo, **The Member States**; Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004.

Carrera, S.,Geyer, F., **The Reform Treaty & Justice and Home Affairs Implications for the common Area of Freedom, Security & Justice**, CEPS Policy Brief, No. 141, **http://www.libertysecurity.org**. (20.05.2013).

Chalmers Damian, Davies Gareth, Monti Giorgio**, European Union Law: Cases and Materials**, Cambridge University Press, 2010.

Cherednychenko, Olha O., **Fundamental Rights, Contract Law and the Protection of the Weaker Party:A Comparative Analysis of the Constitutionalisation of Contract Law, With Emphasis on Risky Financial Transactions**, Sellier European Law Publ., 2007.

Church, Clive, David Phinnemore, **The Rise and Fall of the Constitutional Treaty**; Michelle Cini, **European Union Politics**, Oxford University Press, 2007.

Courts", The Law and Practice of International Courts and Tribunals, V. 8, 2009, p. 382, **http://papers.ssrn.com** (25.05.2013)

Craig P.P., **The Charter, The ECJ and National Courts**; Diamond Ashiagbor, Nicola Countouris, Ioannis Lianos (Eds.), **The European Union After the Treaty of Lisbon**, Cambridge University Press, 2012.

Craig Paul P., De Búrca Gráinne, **The Evolution of Eu Law**, Oxford University Press, 2011.

Craig Paul, **EU Administrative Law**, Oxford University Press, 2012.

Craig Paul, de Búrca Gráinne, **EU Law: Text, Cases, and Materials**, Oxford University Press, 2011.

Craig Paul, **The Lisbon Treaty: Law, Politics, and Treaty Reform**, Oxford University Press, 2010.

Cremona Marise, **Compliance and the Enforcement of EU Law**, Oxford University Press, 2012.

Curzon Stephen J., **Internal Market Derogations in Light of the Newly Binding Character of the EU Charter of Fundamental Rights**; Di Federico Giacomo, **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011.

Däubler-Gmelin Herta, **Die Europäische Charta der Grundrechte - Beitrag zur Gemeinsamen Identität**, EuZW 2000; Arsava Füsun, **Temel Haklar Şartı**, Ankara Avrupa Çalışmaları Dergisi, Volume:5, No:1, 2005.

De Baere G., **Constitutional Principles of Eu External Relations**, Oxford University Press, 2008.

De Burca, Grainne, Jo Beatrix Aschenbrenner, **European Constitutionalism and the Charter**; Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004.

De Witte Bruno, **Treaty Revision Procedures after Lisbon**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012.

De Witte, Bruno, **The Protection of Linguistic Diversity Through Provisions; Edit. X. Arzoz, Respecting linguistic diversity in the European Union**, John Benjamins Publishing, 2008.

De Witte, Bruno, **Treaty Revision Procedures after Lisbon**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012.

Deniz Bahar Yeşim, **Avrupa Birliği Hukukunda Temel Haklar Ve Avrupa İnsan Hakları Sözleşmesi Sistemi İle Etkileşim,** TBB Dergisi N:97, 2011.

Derrida Jacques, Bennington Geoffrey, **The Beast and the Sovereign**, Volume I, University of Chicago Press, 2011.

Di Federico Giacomo, **Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty**; Di Federico Giacomo (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011.

Dixon Martin, **Textbook on International Law**, Oxford University Press, 2007.

Dryzek John S., **The Oxford Handbook of Political Theory**, Oxford University Press, 2006.

Efe Haydar, **Avrupa Ombudsmanı'nın AB İçinde İyi Yönetim, Hukukun Üstünlüğü ve İnsan Haklarını Koruyucu Rolü**, Avrupa Çalışmaları Dergisi, V:19, N:2, 2011.

Ehlers, Dirk, Becker Ulrich, **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007.

Eriksen Erik Oddvar, **"Why a Charter of Fundamental Rights in the EU?",** Arena Working Papers, 02/36, 2002, 17-18, **http://onlinelibrary.wiley.com** (10.05.2013) ; Goldsmith, Lord, **"A Charter of Rights, Freedoms and Principles"**, Common Market Law Review, Volume 38, 2001, **European Union**, ARENA Working Papers, WP 01/13, **http://www.sv.uio.no** (28.05.2013)

Feintuck, Mike, Mike Varney, **Regulatin Media Market**; Patrick J. Birkinshaw, Mike Varney (Eds.), **European Union Legal Order After Lisbon**, Kluwer Law International, 2010.

Ficchi Luisa, **Candidate Countries Facing a Bindig Charter of Fundamental Rights: What's New**; Di Federico (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011.

Fierro Elena, **The EU's Approach to Human Rights Conditionality in Practice**, Martinus Nijhoff Publishers, 2003.

Franklin Julian H., (eds.), **Bodin: On Sovereignty**, Cambridge University PresAs, 1992.

G Amato, Juliano, **The European Constitution: Cases and Materials in EU and Member States' Law**, Edward Elgar Publishing, 2007.

Gaja Giorgio, **Accession to the ECHR**; Andrea Biondi, Piet Eeckhout, Stefanie Ripley (Eds.), **EU Law After Lisbon,** Oxford University Press, 2012.

Göçer Mahmut, **Avrupa Birliği ve Temel Hakların Korunması, Korunması**, Anayasa Yargısı Dergisi,V:17.

Gündüz, Aslan, **Avrupa Birliği'nde İnsan Haklarının Yeri: Kurumsal Düzenleme ve Bireylerin Hakları**, Marmara Üniversitesi Avrupa Birliği Enstitüsü, Avrupa Araştırmaları Dergisi, V:7, N:1-2, 1999.

Habermas, Jurgen, **Why Europe Needs a Constitution**; Ralf Rogowski, Charles Turner (Eds.), **The Shape of the New Europe**, Cambridge University Press, 2006.

Halliday Simon, **Judicial Review and Compliance With Administrative Law**, Hart Publishing, 2004.

Harding Christopher, Kohl Uta, Salmon Naomi, **Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors**, Ashgate Publishing, 2008.

Hartley Trevor C., **European Union Law in a Global Context: Text, Cases and Materials**, Cambridge University Press, 2004.

Hartley Trevor C., **The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community**, Oxford University Press, 2007.

Helmons, Silvio Marcus, **Avrupa Birliği Temel Haklar Şartı: Ortaya Çıkışı ve Sorunlar**; İbrahim Ö. Kaboğlu (Ed.), **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001.

Hermann-Josef Blanke, **The Economic Constitution of the European Union**; Hermann-Josef Blanke (Eds.), **The European Union After Lisbon: Constitutional Basis, Economic Order and External Action**, Springer, 2012.

Holzgrefe J. L., Keohane Robert O. (Eds.), **Humanitarian Intervention: Ethical, Legal and Political Dilemmas**, Cambridge University Press, 2003.

Horspool Margot**, European Union Law**, Oxford University Press, 2006.

Ilgaz Deniz, **Avrupa Anayasası ve Yetki Dağılımı**, Marmara Avrupa Araştırmaları Dergisi, 12, 1-2, 2004.

Jones, Clifford A., **The Legal and Institutional Framework of the 2009 European Parliament Elections in the Shadow of the Lisbon Treaty**; Ed. Michaela Maier, Jesper Strömbäck, Lynda Jones Jackie, **Taking "Sex" out of Marriage in the European Union**; Jackie Jones, Anna Grear, Rachel Anne Fenton, Kim Stevenson (Eds.), **Gender, Sexualities and Law,** Taylor & Francis, 2011.

Kaboğlu, İbrahim, **Anayasa Hukuku Dersleri (Genel Esaslar)**, Legal Yayıncılık, İstanbul, 2012.

Kaboğlu, İbrahim (Ed.) , **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001.

Kaczorowska Alina, **European Union Law**, Routledge, 2008.

Kaczorowska, Alina**, European Union Law**, Routledge, 2013.

Kadelbach, Stefan, **European Citizinship Rights**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007.

Kaid Lee, **Political Communication in European Parliamentary Elections**, Ashgate Publishing, Ltd, 2011.

Kälin Walter, Künzli Jörg, **The Law of International Human Rights Protection**, Oxford University Press, 2009.

Karayiğit Mustafa T., **The Area of Freedom, Security and Justice After the Lisbon Treaty**, Marmara Journal Of European Studies, V:16, N:1-2, 2008.

Karayiğit Mustafa, **Gerçek ve Tüzel Kişilerin AB Tasarruflarına Karşı Korunması**, Adalet Yayınları, Ankara, 2009.

Kenner, Jeff, **Economic and Social Rights in the EU Legal Order**; Tamara K.. Hervey, Jeff Kenne (Eds.), **Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective**, Hart Publishing, 2003.
Kiljunen, Kimmo, **The European Constitution in the Making**, CEPS, 2004.

Kiljunen, Kimmo, **The European Union Constitution: A Fin at the Convention**, Publications of the Parliamentary Office, 2004.

Kokott Juliane, Sobotta Christoph , **The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?**, EJIL (2012), Vol. 23 No. 4.

Konstadinides Theodore, **Division of Powers in European Union Law: The Delimitation of Internal Competences Between the Eu and the Member States**, Kluwer Law International, 2009.

Kovar Robert, **"The Relationship Between Community Law and National Law", European Perspectives: Thirty Years of Community Law**, Luxembourg, Office for Official Publications of the European Communities, 1983.

Krüger Hans Christian, **The European Union Charter and the European Convention on Human Rights: An Overview;** Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004.

Lasok Dominik, **The Maastricht Treaty On European Union**, MJES Cilt:3 Sayı:1-2 (1993/94).

Lasok K.P.E, Lasok Dominik, **Law and Instutions of the European Union**, Butterworths Group, United Kingdom 2001.

Lauren Paul Gordon, **The Evolution of International Human Rights:Visions Seen**, University of Pennsylvania Press, 2011.

Laursen Finn, **The Treaty of Nice: Actor Preferences, Bargaining And Institutional Choice**, BRILL, 2006.

Lock Tobias, **Accession of the EU to the ECHR**, Ashiagbor Diamond, Countouris Nicola, Lianos Ioannis (Eds.), **The European Union After the Treaty of Lisbon**, Cambridge University Press, 2012.

Lock, Tobias, **The ECJ and the ECtHR: The Future Relationship between the Two European,** The Law and Practice of International Courts and Tribunals, Vol. 8, 2009, **http://papers.ssrn.com** (20.05.2013)

Maas Willem, **Creating European Citizens**, Rowman & Littlefield, 2007.

Mahlmann Matthias, **Human Dignity and Autonomy in Modern Constitutional Orders; Michel Rosenfeld**, András Sajó (Eds.), **The Oxford Handbook of Comparative Constitutional Law**, Oxford University Press, 2012.

Mahncke Dieter, Ambos Alicia, Reynolds Christopher, **European Foreign Policy: From Rhetoric To Reality?**, Peter Lang, 2004.

Martinico Giuseppe, Pollicino Oreste, **The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws**, Edward Elgar Publishing, 2012.

Martinico Giuseppe, **The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe**, Routledge, 2012.

McCrea Ronan, **Religion and the Public Order of the European Union**, Oxford University Press, 2010.

McGoldrick Dominic, **The European Union After Amsterdam: An Organisation with General Human Rights Compenetence?**; David O'Keefe, Patrick M. Twomey (Eds.), **Legal Issues of the Amsterdam Treaty**, Hart Publishing, 1999.

McGoldrick Dominik, **The Charter and UN Human Rights Treaties**; Steven Peers, Angela Ward (Eds.), **The European Union Charter of Fundamental Rights**, Hart Publishing, 2004.

MENÉNDÉZ, Agustin José, **Chartering Europe:The Charter of Fundamental Rights of the European Union,** ARENA Working Papers, WP 01/13.

Metin Yüksel, **Avrupa Birliği Temel Haklar Şartı**, Ankara Üniversitesi SBF Dergisi, Volume:57, No:4, 2002.

Monar, Jörg, **The Institutional Dimension of the European Union's Area of Freedom, Security and Justice**, Peter Lang, 2010.

Moro, Giovanni, **Citizens in Europe: Civic Activism and the Community Democratic Experiment, Springer**, 2011.

Mowbray, Alastair, **The European Convention on Human Rights; Mashood A. Baderin, Manisuli Ssenyonjo, International Human Rights Law:Six Decades After the Udhr and Beyond,** Ashgate Publishing, 2010.

Münch Richard, **Constructing a European Society by Jurisdiction**, European Law Journal, Vol. 14, No. 5, 2008.

Nedergaard, Peter**, European Union Administration: Legitimacy and Efficiency**, Martinus

Neuwahl Nanette A., **The Treaty on European Union: A Step Forward in the Protection of Human Rights?** ; Nanette A. Neuwahl, Allan Rosas, **The European Union and Human Rights, Martinus Nijhoff Publishers**, 1995.

Peter Nedergaard, **European Union Administration: Legitimacy and Efficiency**, Martinus Nijhoff Publishers, 2007.

Oder Bertil, **Avrupa Birliği'nde Çokmerkezli Anayasacılığın Yapısal Sorunları : Yetki Çatışmaları ve İkincillik İlkesi Işığında Türkiye İçin Karşılaştırmalı Gözlemler**, Anayasa Yargısı Dergisi, V: 22, 2005.

Peers, Steve, İmmigration**, Asylum and the European Union Charter of Fundamental Rights**; Elspeth Guild, Paul Minderhoud (Eds.), **The First Decade of EU Migration and Asylum Law**, Martinus Nijhoff Publishers, 2011.

Peers, Steve, **Taking Right Away? Limitations and Derogations**, Steven Peers, Angela Ward (Eds.),**The European Union Charter of Fundamental Rights**, Hart Publishing, 2004.

Pérez Aida Torres, **Conflicts of Rights in the European Union: A Theory of Supranational Adjudication**, Oxford University Press, 2009.

Pernice, Ingolf, **Institutional Settlements for en Enlarged European Union**; George A. Bermann, Katharina Pistor(Eds.), **Law And Governance In An Enlarged European Union,** Hart Publishing, 2004.

Peterson John, Shackleton Michael, **The Institutions of the European Union**, Oxford University Press, 2012.

Piris Jean-Claude, **The Lisbon Treaty: A Legal and Political Analysis**, Cambridge University Press, 2010.

Rabe, Johan**, Equality, Affirmative Action, and Justice**, Books on Demand, 2001.

Reif, L. C., **The Ombudsman, Good Governance, and the International Human Rights System,** Martinus Nijhoff Publishers, 2004.

Richardson Jeremy John**, European Union: Power And Policy-making**, Routledge, 2006.

Rogowski Ralf, Turner Charles (Eds.), **The Shape of the New Europe**, Cambridge University Press, 2006.

Rosenfeld Michel, Sajó András (Eds.), **The Oxford Handbook of Comparative Constitutional Law**, Oxford University Press, 2012.

Rossi Lucia Serena, **Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and the Member States?**; Andrea Biondi, Piet Eeckhout (Eds.), **EU Law after Lisbon**, Oxford University Press, 2012.

Sadurski Wojciech, **Constitutionalism and the Enlargement of Europe**, Oxford University Press, 2012.

Samantha Besson, **The Human Rights Competence in the EU The State of the Question after Lisbon**; Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone (Eds.), **Human Rights and Taxation in Europe and the World**, IBFD, 2011.

Sanna, Giangiuseppe, **Article 47 of EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation on Civil and Commercial Matters**; Di Federico Giacomo (Eds.), **The EU Charter of Fundamental Rights: From Declaration to Binding Instrument**, Springer, 2011.

Schorkoph Frank, **Human Dignity, Fundamental Rights of Personality and Communication**; Ehlers Dirk, Becker Ulrich, **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007.

Schütze Robert, **European Constitutional Law**, Cambridge University Press, 2012.

Sciarra Silvana, **From Strasbourh to Amsterdam: Prospects for the Convergence of European Social Rights Policy**; Alston Philip, Bustelo Mara R., Heenan James (Eds.), **The EU and Human Rights**, Oxford University Press, 1999.

Shermers Henry G., Waelbroeck Denis F., **Judicial Protection in the European Union**, Kluwer Law International, 2001.

Şirin Tolga, **Türkiye'de Anayasa Şikayeti (Bireysel Başvuru): İnsan Hakları Avrupa Mahkemesi ve Almanya Uygulaması ile Mukayeseli Bir İnceleme**, On İki Levha Yayıncılık, İstanbul, 2013.

Smismans Stijn, **Civil Society And Legitimate European Governance**, Edward Elgar Publishing, 2006.

Smith Rhona K. M., **Textbook on: International Human Rights**, Oxford University Press, 2010.

Stein, Torsten**, Avrupa Birliği Temel Haklar Şartı**; İbrahim Ö. Kaboğlu (Ed.) **Kopenhag Kriterleri: Avrupa Konseyi ve Avrupa Birliği'nin Ortak Paydası mı?**, İstanbul Barosu İnsan Hakları Merkezi, 2001.

Taşdemir, Hakan, Fatma Akkan Güngör, **Avrupa Birliği Temel Haklar Şartı'nın 53.maddesi'nin Topluluk Hukukunun Üstünlüğüne Etkisi,** Gazi Üniversitesi Hukuk Fakültesi Dergisi, V.XII, No:1-2, Y.2008.

Tettinger Peter J, **Die Charta der Grundrechte der Europäischen Union**, NJW 2001, p.1011; Yüksel Metin, **Avrupa Birliği Temel Haklar Şartı**, Ankara Üniversitesi SBF Dergisi, Volume:57, No:4, 2002.

Timmermans C.W.A., **General Aspects of European Union and the European Communities**, Ed. Paul George Kapteyn, **The Law of the European Union and the European Communities: With Reference to Changes to be Made by the Lisbon Treaty**, Kluwer Law International, 2008.

Ünal Şeref, **Temel Hak ve Özgürlükler ve İnsan Hakları Hukuku**, Ankara 1997.

Van Oudenaren John, **Uniting Europe: An Introduction To The European Union**, Rowman & Littlefield, 2005.

Walter Christian, **History and Development of European Fundamental Rights and Fundamental Freedoms**; Dirk Ehlers, Ulrich Becker (Eds.), **European Fundamental Rights And Freedoms**, Walter de Gruyter, 2007.

Weatherill Stephen, **Cases and Materials on EU Law**, Oxford University Press, 2012.

Yakut, Bahadır, **Post -Lisbon Criminal Law Competency Of The European Union**, Marmara Journal Of European Studies, V:17, N:1- 2,2009.

Yanıkdağ, Tülin, **Anayasallaşma Sürecinde Avrupa: Temel Haklar Şartı'ndan Lizbon Antlaşması'na**, Bilge Strateji, V:2, N:3, Güz 2010.

Zsuzsa, Wopera, **"The General Principles of Law at the Practice of European Court of Justice", Juridical Current**, Volume 12, Issue 1, 2009.

WEB PAGES

http://www.internationalconstitutionallaw.net

http://centers.law.nyu.edu/jeanmonnet/papers/

http://www.libertysecurity.org.

http://papers.ssrn.com

http://www.sv.uio.no

http://untreaty.un.org

http://www.eurotreaties.com

http://www.eutruth.org.uk

http://www.unhcr.org

http://www.utexas.edu

http://eur-lex.europa.eu

http://curia.europa.eu

http://www.eurotreaties.com

http://www.cvce.eu

http://www.europarl.europa.eu

http://www.unhcr.org

http://www.servat.unibe.ch

http://ec.europa.eu