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Yüksek Lisans Tezi

GÜLCE GÜMÜŞLÜ

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Gülce GÜMÜŞLÜ'nün "AN ANALYSIS ON THE CONSTITUTIONALIZATION OF THE EUROPEAN UNION LEGAL ORDER IN THE LIGHT OF THE EUROPEAN COURT OF JUSTICE CASE LAW" konulu tez çalışması 16 Kasım 2009 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ oyçokluğu ile başarılı bulunmuştur.

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ABSTRACT

European Union law order departs from both the understanding of general meaning of a state and the meaning of international organization. The European Union brought a new concept to the international order through its sui generis character. This has realized by the founding treaties and decisions of the European Court of Justice. Supranational character of the EU, supremacy and direct effect on the one hand, the principle of exclusive competence and *subsidiarity* on the other give the EU nature of constitutional order.

European Union law order creates rights and impose obligation not just only to its Member States and also to individuals differently from an international organization's law order. The ECJ created the supremacy of EU law over Member States' laws. The EU law order has its judicial mechanism to impose sanctions on all Member States and the EU's institutions.

This circumstance conflicting to the national sovereignty of Member States has been disputed before constitutional courts of Member States. It has been observed that there existed a confliction between the ECJ's decisions and decisions of the constitutional courts of Member States on the issue of which laws should be implemented in the event of a contrary between the Union law provisions and national law provisions.

In this thesis, I try to make a detail analysis on the constitutionalization of the EU legal order in the light of the European Court of Justice's case law and on the reactions of Member States composing of the EU to the process of this constitutionalization.

ÖZET

Avrupa Birliği hukuku düzeni kavramı, genel anlamındaki devlet kavramından ve uluslararası kurum anlayışından farklılık göstermektedir. Avrupa Birliği, kuruluş andlaşmalarıyla ve Avrupa Birliği Adalet Divanı kararlarıyla uluslararası alana yeni bir anlayış getirmektedir. Avrupa Birliği'nin ulus üstü ve üstün olma karakteri, Üye Devlet hukuk düzenlerinde Avrupa Birliği kurumlarının tasarruflarının doğrudan uygulanması ile münhasır yetki ve yetkinin en uygun seviyede kullanımı *(subsidiarity)* ilkeleri, Avrupa Birliği'nin anayasal hukuk düzenini göstermektedir.

Avrupa Birliği hukuk düzeni, uluslararası kurumların hukuk düzenlerinden farklı olarak, sadece Üye Devletler için değil bireylerine de haklar yaratıp sorumluluklar yüklemektedir. Adalet Divanı, AB hukuk düzeninin, Üye Devletler hukuk düzenlerinden üstün olduğunu kararlarıyla dile getirmiş ve yerleşik içtihadı ile bu ilkeyi topluluk hukukunun temel ilkeleri arasına almıştır. Böylece Divan, gerek Üye Devletlerin ve gerekse AB kurumlarının AB hukuk düzenine aykırı işlem ve eylemleri üzerinde yargı denetimini yaparak gerekli yaptırımları uygulamaktadır.

Üye Devletlerin ulusal egemenliğine ters düşen bu durum, Üye Devletlerin üst mahkemeleri önünde birçok defa tartışılmıştır. Her ne kadar Adalet Divanı bu konuda son sözü söylese de ulusal hukuk, Birlik hukuk hükümlerine aykırı olduğu durumlarda hangi hukuk düzeninin uygulanacağı konusunda Divan kararları ile Üye Devletlerin üst mahkemelerinin verdiği kararlar arasında çelişki olduğu gözlenmektedir.

Tezimde, Adalet Divanı kararları ışığı altında AB hukuk düzeninin anayasallaşması ve Üye Devletlerin anayasallaşma sürecine reaksiyonları üzerine detaylı analiz yapmaya çalıştım.

TABLE OF ABBREVIATIONS

AC	Appeal Cases
CE	Constitución Española
CEE	Central and Eastern Europe
CFI	Court of First Instance
Colum L.Rev	Columbia Law Review
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
CT	Treaty Establishing a Constitution for Europe (Constitutional Treaty)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Report
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EDC	European Defence Community
EEA	European Economic Area
EEC	European Economic Community
EJIL	European Journal of International Law
ELRev	European Law Review
EPC	European Political Cooperation
EPL	European Public Law
EU	European Union
EUI	European University Institute
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Service
ICJ	International Court of Justice
IGC	Intergovernmental Conference
IJCL	International Journal of Constitutional Law
NATO	North Atlantic Treaty Organization

OUP	Oxford University Press
SEA	Single European Act
TEU	Treaty on European Union (Maastricht Treaty)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
WTO	World Trade Organization

INTRODUCTION

Since the ancient Greek, people have dealt with the problem of how to reconcile the need for order and authority in any society including the individual liberty.[1] Realizing this aim had been continued under the framework of the concept of constitution in following centuries. Especially, in B.C. 4 Century, a famous philosopher, Aristotle emphasized the need of a constitution which serves the common interest of the community; not to serve the personal interest. Aristotle pointed on that "the politicians and law giver is wholly occupied with the city- state, and the constitution is a certain way of organizing those who inhabit the city-state" and Aristotle's constitutional theory is:

> "Constitutions which aim the common advantage are correct and just without qualification, whereas those which aim only at the advantage of the rules are deviant and unjust, because they involve despotic rule which is inappropriate for a community of free persons."[2] The term 'constitution' signifies the same thing as the term 'civic body'. The civic body in every city is the sovereign; and the sovereign must necessarily be either One, or Few, or Many. On this basis we may say that when the One, or the Few, or the Many rule with a view to the common interest, the constitutions under which they do so must necessarily be right constitutions. On the other hand, the constitutions directed to the personal interest of the One, or the Few or the Masses, must necessarily be perversions."[3]

Another philosopher, Thomas Hobbes, in his treatise 'Leviathan' *(1651),* emphasized the need of a constitution namely: "the life of persons in a society without law and without government as 'solitary, poor, nasty, brutish and short' because selfish individuals operating in a 'state of nature' would steal from each other."[4]

In XVIII. Century, in his famous lines from the Federalist, Alexander Hamilton showed how to live in an order, namely; "in framing a government which is to be

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[1] Loren P. Beth, *Politics the Constitution and the Supreme Court,* Row, Peterson & Company, Evanston, Illinois/ Elmsford, New York, USA, 1962, p.1

[2] Fred D. Miller , *Aristotle's Political Theory, Stanford Encyclopaedia of Philosophy*, substantive revision, 2002, third part, par.4, http://plato.stanford.edu/entries/aristotle-politics/, available in October 2008

[3] http://74.125.77.132/search?q=cache:Sx4erYWXLoMJ:edwardscape.com/mredwards/resources/philosophy/Aristotle%2520Quote%2520Analysis.pdf+aristoteles+quotes+about+constitution&hl=tr&ct=clnk&cd=5&gl=tr, available in October 2008

[4] Ernst-Ulrich Petersmann, *National Constitutions, Foreign Trade Policy and European Community Law*, European Journal of International Law, Volume 3, Number 1, Oxford Journals, http://ejil.oxfordjournals.org/cgi/reprint/3/1/1, 1992, p.1, available in December 2008

administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself."

As from the ancient ages, people looked into live in an order and protect common interests; to be succeeding this, they enacted the constitutions. In the light of the ideas on the need of a constitution, who has a constitution?

In 1789 French Declaration of the Rights of Man and of the Citizen, which was adopted to guarantee the liberty of bourgeoisie and its political ascendancy and abolish the feudal rights[5], held the concept of Constitution in article 16: "any society, in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."[6]

So, this article indicates who has a constitution; according to this article, just only a society has constitution, not a State.[7] Some writers defend that just only a State has a constitution while it can be seen that some supranational organizations have constitution so these kinds of organizations are not state. An example for this is the European Union.

Upon all these explanations on the concept of constitution, the main question is "What Does a Constitution Mean?"

The first division on the general concept of constitution is material constitution and formal constitution.

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[5]Bertil Emrah Oder, *Avrupa Birliği'nde Anayasa ve Anayasacılık,* Anahtar Kitaplar Yayınevi, 2004, p.33 and history part of http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html, available in December 2008

[6] The Declaration of human rights was inspired from the American Declaration of Independence of 1776 and also inspired the European Convention on Human Rights of 1950

[7] Mahmut Göçer, *Uluslararası Hukuk Ve Uluslararası Anayasa Kavramı,* Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Volume 57-2, http://www.politics.ankara.edu.tr/dergi/pdf/57/2/1_mahmut_gocer.pdf, p. 4, available in November 2008

a) Material Constitution: is a whole law principle which determines the foundation and the function of the main bodies of a State.[8] Material Constitution determines the organs, the procedure of legislation and the contents of future laws.[9]

b) Formal Constitution: is a whole law principle given a high priority in the hierarchy of norms, unlike laws and both enacting and amending procedure are harder than the procedure of ordinary laws.[10]

Every writer described the meaning of a constitution in different ways. In general, the Constitution means that: a Constitution of a State is the system of laws, customs and conventions[11] which define the main structure, function, organizing of a State and the powers of a State and arrange the relationship between State organs and the relationship with private citizens and include the fundamental rights and freedoms. A constitution shall be in the high priority of the hierarchy of norms and the enacting and amending procedures are more difficult than the enacting and amending procedure of ordinary laws.

In the aspect of the definition of the national constitution in classical meaning, some writers think that just only State has a constitution. According to these writers, a State and a Constitution are close relationship with each other; a State does not exist without a Constitution and a Constitution does not exist without a State.[12] Moreover, it arranges not only the State's life and also the life of out of the State (for instance education, property, etc…).[13]

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[8] Tarık Zafer Tunaya, *Siyasal Kurumlar ve Anayasa Hukuku*, 5.bası, Araştırma, Eğitim, Ekin Yayınları, İstanbul, 1982, p.109; Kemal Gözler, *Anayasa Hukukuna Giriş*, Türk Anayasa Hukuku Sitesi, 15 Mayıs 2004, http://www.anayasa.gen.tr/anayasakavrami.htm, available in December 2008

[9] Hans Kelsen, *General Theory of Law and State*, the Law Book Exchange Ltd. Union, New Jersey, Translated by Anders Wedberg,1999,p.125, http://books.google.com.tr/books?id=D1ERgDXEbkcC&printsec=frontcover&dq=kelsen%27s+constitution+understanding#PPR9,M1, available in December 2008

[10] Tunaya, p.109 and Gözler, par.2

[11] O.Hood Philips, *Constitutional Laws of Great Britain*, the British Empire and Commonwealth, 6. Edition, Sweet:&Maxwell Limited, London, 1946, p. 6

[12] Şeref Gözübüyük, *Anayasa Hukuku*, S Yayınları, Ankara, 1986, p.10

[13] Zafer Gören, *Anayasa Hukukuna Giriş*, First Edition, Barış Yayınları Fakülteler Kitabevi, 1997, p.1

In the light of this explanation about the concept of a Constitution referring to the concept of a State, what does a State mean?

According to the movement in philosophy of the Sophism, there were two different ideas about the birth of state: First group of sophists thought that a state was created as a result of society contract; hence, equality and democracy were based on the society while second group claimed that the basis of a state was power; so powerful people created a state and their rules were valid; equality and democracy were not valid.[14]

Ideal State for Platon was that philosopher or philosophers would command the State as same opinion with Socrates; according to Socrates, minority group composing the intellectual people would command the State; in order to the existence and continuing of a State, Site's public should obey the written and unwritten (code of ethics) acts.[15] Aristotle made the birth of city- state depending on the impetus of conjoining of families to live well.[16] "The common advantage also brings them together insofar as they each attain the noble life. This is all the end for all both in common and separately."[17]

Currently, for the necessity of explaining all functions of a State, my hinge point is the explanation of O. Hood Philips about a State; namely, "a State is an independent political society occupying a defined territory or territories, the members of which are united together for the purpose of resisting external force and the preservation of internal order."[18]

According to international law, the constituent elements for a State are population, territory and sovereignty.[19] The main principle of population is the principle

[14] Mehmet Akad and Bihterin Vural Dinçkol, *Genel Kamu Hukuku*, Genişletilmiş Üçüncü Basım, Der Yayınları, İstanbul, 2004, p. 9
[15] Akad and Dinçkol, p. 11 and 16
[16] Akad and Dinçkol, p. 21
[17] Miller, third part, par.3
[18] Philips, p.1
[19] Gözübüyük, p.13 and Hüseyin Pazarcı, *Uluslararası Hukuk*, Gözden Geçirilmiş 5.Bası, Turhan Yayınevi Yayınları, Ankara, 2007, p. 140

of self-determination of the population as indicated in article 1/ 2 and 55 of the Charter of United Nations. Pazarcı explained the meaning of the principle of self- determination with two aspects. The first point is demos can choose the system of government freely, without any external press; and second one is the right of choice of future status; either becoming a part of any State or establishing its own independent state.[20] The main common point for Population is nationality; demos live on a specific territory permanently and attach each other with moral and material connection irrespective of the number of people.[21] The main principle of territory consisting of three parts, land, air and sea is the principle of territorial integrity as indicated in article 2/ 4 of the Charter of United Nations; namely, "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Sovereignty has political and legal facets. Legal facet includes the freely treatment within the frame of legal orders.[22] Under international law, the sovereign State has its legal independence from other States.[23] Political facet is:

> "Sovereignty has characterized between an effort legally to define and therefore limit, the powers of the person or body who claims to be sovereign and that sovereign's efforts to evade the control exerted by legal rules and procedures, or to change the law according to his interests."[24]

According to Kelsen's approach, a state and a legal order are same concept[25] and "the concept of 'constitution' is a main element of legal order; the constitution of a State is valid, only if the legal order established on the basis of this constitution is, on the whole, efficious."[26] Kelsen described a State as below:

> "A state is the community created by a national legal order. The State as juristic person is a personification of this community or the national legal order constituting this community. State is understood as a legal order." [27]

Every State has the qualifications of Extroverted State and Introverted State; in other words every State has external sovereignty and internal sovereignty.[28] External

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[20] Pazarcı p.141
[21] Pazarcı, p. 141 and Erdoğan Teziç, *Anayasa Hukuku*, Yedinci Bası, İstanbul, 2001, p.115
[22] Pazarcı, p. 148
[23] Bardo Fassbender, "Sovereignty and Constitutionalism in International Law": *in Sovereignty in Transition* edited by Neil Walker, Hart Publishing, Oxford, Portland Oregan, 2003, p.129
[24] Fassbender, p. 115
[25] Göçer, p. 5
[26] Kelsen, p. 121
[27] Kelsen, p. 258

sovereignty means that the State shall have equal rights with other States. This term is related with the concept of independence.[29] Internal sovereignty means the sovereignty of a State within its own territory with having its own peculiar law and with being inalienable.[30] Therefore, States can conclude an agreement about assigning their powers and sovereignty to supranational organizations without detriment to their own sovereignty; thus, these kinds of organizations can act for states' behalf in specific spheres. In the EU legal order, the EU can conclude international agreements with non-Member States in the framework of conferred competence by the treaties. Member States must obey to these agreements. By virtue of that European Community law has direct effect on Member States.

In the light of these explanations, we can say that the EU brings the new aspect to the concept of a State. The definition of a Constitution relating to a State and the opinions, about without existing State, there can not be talked about the concept of Constitution, restricts the concept and scope of application of a Constitution.[31]

The second division on the general concept of constitution beside the division of the formal and material constitution is written and unwritten constitution.

> "The theory of constitution does not always require the written document however a written constitution is significance because of its fundamental character; a constitution is an act of the people, not an act of government; in fact it creates a government. Thus creative act of the people has the result of making a constitution a fundamental document that must be observed by the government created by it, and further, of making the constitution itself unalterable by the government."[32]

The difference between written and unwritten constitution is written constitution is created by legislative acts while unwritten constitution is created by custom.[33]

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[28] Kemal Gözler, *Anayasa Hukukuna Giriş, Genel Esaslar ve Türk Anayasa Hukuku*, 14. Bası, Ekin Basın Yayın Dağıtım, 2009, p. 49
[29] Gözler, p. 49 and Erdoğan Teziç, *Anayasa Hukuku*, Yedinci Bası, Beta Basım, 2001, p. 119
[30] Gözler, p. 49
[31] Göçer, p. 3
[32] Beth, p.8
[33] Kelsen, p. 260

Before 1700s, there existed important written documents in history. One of them was Magna Carta by which the American Constitution and France Declaration of the Rights of Man and of the Citizen were inspired.

> "It defends the freedom and rights of the English church; confirms the liberties and customs of London but the real legacy of Magna Carta as a whole is that it limited the king's authority by establishing the crucial principle that the law was a power in its own right to which the king was subject." [34]

The documents before 1770s regarding the main principles and States are not considered as a 'Constitution'. Because, these documents were not in the high priority in the hierarchy norms and their amendment procedure were not harder than the amendment procedure of laws and in these times, there did not exist a constitutionalism understanding.[35]

The first written constitution is the Constitution of United States of America in 1787 and provides all these qualifications said above. It creates federal government and gives rights to individual states. The preamble of the Constitution of United States of America:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

This serves two important points.[36] First, it shows the source of the Constitution: 'the people of US. Secondly, it shows the great objectives of Constitution and the Government: 'national unity, justice, peace at home and abroad liberty and the general welfare.' The features of the Constitution of American Federalism are:[37]

> - "The Constitution grants certain legislative, executive and judicial powers to the national government.

[34] Treasures in Full Magna Carta, British Library website, http://www.bl.uk/treasures/magnacarta/index.html, available in December 2008
[35] Gözler, third part, par. 2
[36] Harold W. Chase and Craig R.Ducat, *The Constitution and What It Means Today*, Princeton University Press, USA. 1974, p. 1
[37] J.W. Peltason, *Basic Features of the Constitution*, Carwin & Peltason's Understanding the Constitution, Seventh Edition, Dryden Press, USA, 1976, p. 18

- It reserves to the states powers not granted to the national government.
- It makes the national government supreme. The Constitution, all laws passed in pursuance thereof, and treaties of the United States are the supreme law of the land. American citizens, whom are also state citizens, owe their primary allegiance to the national government; officers of the state governments owe too.
- The Constitution denies some powers to both national and state governments, some only to the national government and still others only to the state government."
- US Constitution is a rigid constitution;

"It means that this constitution is founded on fundamental written law; a fundamental law affects the framework of the Constitution which can be changed by a special machinery provided by the Constitution for that purpose; its Constitution can be amended on the motion of two-thirds of each House of Congress and the proposed amendment must be ratified by the Legislatures of the three- fourths of the States composing the Union." [38]

Therefore, to say a constitution is a rigid constitution, its amendment procedures should have the special procedure apart from the amendment procedures of ordinary laws.

The second Constitution is 1791 France Constitution[39] (main principles in this Constitution are sovereignty of the people and constitutionality.[40]). The other Constitutions successively:[41] 1809 Swedish Constitution, 1812 Spain Constitution, 1814 Norway Constitution, 1831 Belgium Constitution, 1848 Switzerland Constitution, 1848 Italy Constitution (Statuto Al-bertino), 1848-1850 Prussia Constitution, 1849 Denmark Constitution, 1849 Luxembourg Constitution , 1864 Greece Constitution, 1866 Romania Constitution, 1876 Ottoman Constitution, 1887 Holland Constitution and 1889 Japan Constitution. These are the examples of written constitution. On the contrary, the British Constitution is unwritten constitution; so the characteristics of British Constitution as an unwritten constitution are:[42]

- "The Constitution, though partly written, is regarded as 'unwritten' from the standpoint of constitutional lawyers, inasmuch as it is not codified as a whole in any particular document or body of documents."

[38] Philips, p. 7
[39] The Declaration of the Rights of Man and of the Citizen, adopted August 26, 1789 eventually became the preamble of the constitution adopted in September 3, 1791
[40] http://en.wikipedia.org/wiki/French_Constitution_of_1791, available in December 2008
[41] Gözler, third part, par.1
[42] Philips, p.10- 11-12

- It is flexible. “It means that all laws can be altered by the same procedure and same authority; all unwritten constitutions are flexible constitution”[43]; *“*in UK, Parliament can make and unmake the laws by the same procedure.”[44]
- The rights and in case of right violation, the remedies are determined from the decisions of the Courts; in contrast of this, written Constitutions include the rights but does not include the remedies for the violation of such rights.
- Judges implement the laws defined in the statues, previously judicial decisions and customs and conventions.
- The Legislature and Executive are joined together by a connecting link, namely the Cabinet.
- The doctrine of ‘separation of powers’ is not included in the English constitution; except that the Court is independent of the executive.
- Administrative law and administrative court do not take place in judicial system.
- “The Crown, which for practical purposes means to State, can not be sued in Court and though a Petition of Right may be brought for breach of contract or the recovery of property, judgment can not be enforced against public funds.”

Either written or unwritten, generally, constitutions serve an aim and have functions for state order and authority of state. After defining the meaning of a Constitution, the next question is which aims a Constitution as a general concept serves to and which functions a Constitution has?

According to Tunaya, the document of Constitution has a duty to provide equilibrium between the structural elements of political life; structural elements are facts of political life. Political life is a whole relationship between governing party and opposition party and the relationship between political powers.[45]

[43] However not all written constitutions are rigid, though it tends to be. Philips, p. 8
[44] Philips, p. 7-8-10
[45] Tunaya, p. 111

Prof. Gözübüyük held that the aim of constitution is legal sources of powers composing the state. Anywhere State exists; there should be a constitution in there. [46]

Every Constitution has social, economic and political philosophy; so Constitutions are ideological documents; on the one hand, they form the political actions; on the other hand, they determine the philosophy which they depend on.[47] Every thing and every action are created within the specific form and method drew by this ideology; because of this, the distinctive feature between constitution as a document and the act is 'a Constitution' depends on social- economic conditions, political powers, political opinions and theories directly.[48]

Each constitution has the function complying with the aim of criterion which the Constitutions is based on.[49] Thus,

- When 'Constitution' is based on democratic and liberal content, the functions of constitution are to bind the governing party and to guarantee the democracy standing on demos.
- When 'Constitution' is based on the meaning of 'Politeia'[50], the function of Constitution is to determine the order about organization.[51]

Aristotle's view is that:

> "The most important task for the politician is, in the role of law given, to frame the appropriate constitution for the city-state. This involves enduring laws, customs, and institutions (including a system of moral education) for the citizens. Once the constitution is in place, the politician needs to take the appropriate measures to maintain it, to introduce reforms when he finds them necessary, and to prevent developments which might subvert the political system. [52]

[46] Gözübüyük, p. 4
[47] Tunaya, p.112
[48] Tunaya, p.112
[49] Oder, p.118
[50] I will expain its meaning in Chapter I
[51] Oder, p.118
[52] Miller, second part, par. 1

The Functions of Constitution are:[53]

- To provide the integrity of State.
- To occur the main permanent order for State
- To legitimize the using of sovereignty of State
- To bind the State power in legal aspect and to control the State power
- To guarantee the freedom and equality of citizens.

Oder classified the functions of Constitution in two aspects: one of them is legal function and the other is political function.[54]

a) Legal function of Constitution is to arrange the organization of political power.
b) Political function of Constitution includes six elements:

- First element is founding function. It means the establishment of the law order of a state.
- Second one is to provide the political integrity. This element was put forward by Rudolf Smend. According to him, political integrity was included the fundamental rights as "a system of values and culture"; the preamble part of Constitution[55]; the element of territory; the state structure and national flag.
- Third one is to bind the political power through fundamental rights and freedoms.
- Fourth one is the leading of Constitution that a Constitution includes the provisions about both fundamental social and economic rights and the future objective provisions.
- Fifth one is to ensure the political stability.
- The last one is to provide the legitimization of governing party.

[53] Gören, p. 4
[54] Oder, p. 118 - 123
[55] According to Kelsen, "the preamble of Constitution serves to give the constitution a greated dignity and thus a heightened efficacy." Kelsen, p.261

So, which rules shall a Constitution as a general concept include?[56]

a) The foundation and structure of State (unitary or federation or confederation),

b) The shape of State (Republic or monarchy),

c) The political regime (Democracy or autocracy),

d) The foundation, function, competence and relationship of the High State Bodies,

e) Public freedoms.

The American and European 'constitutionalism' based on this understanding: if two 'central constitutional functions' are not implemented for government powers and social process, these powers can be at risk to be abused:[57]

> - "To constitute government powers to protect individual rights ('protective state') and supply public goods ('productive state'),
> - To limit the exercise of all government powers by constitutional restraints and 'checks and balances' so as to avoid 'government failures' and ensure a 'government of the people, by the people, for the people' (Abraham Lincoln)."

[56] Tunaya, p. 110
[57] Petersmann, p.2

CHAPTER I: CONSTITUTIONALIZATION PROCESS IN THE EUROPEAN UNION

The obligatory of living together and providing the order and authority within the society, humans tried to create fundamental norms which had binding forces. To fulfil these norms, humans needed "an independent political society"[58] this was a 'State'. By virtue of this, the definitions of a constitution relating with the concept of State were appeared. However, nowadays, in an international sphere, constitutional structures and the term of "constitution" have been met. In this chapter, I will begin with the issue on constitutionalization of international law. After that, I will analyze the constitutional process in the European Union.

A. CONSTITUTIONALIZATION OF INTERNATIONAL LAW

Modern State does not implement many imperative duties on his own. States have organized to implement some states' duties. These duties are in the area of security, protection of human rights and economic growth areas,[59] state sovereignty and self- determination. All these subjects constitute the basic concepts of international law.[60] "International law is a process by which peoples of the world clarify and implement their common interest in the shaping and sharing of values."[61]

International law includes the rules for States and international organizations without having a state character and for individuals relating with the areas of interests or sharing value of the whole of the public.[62]

[58] Philips, p. 1
[59] Göçer, p.4
[60] J. H. H. Weiler and Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?,* EJIL, Volume 8, Number 4, http://ejil.oxfordjournals.org/cgi/content/abstract/8/4/545, 1997, p.6, available in December 2008
[61] Weiler and Paulus, p.8
[62] Pazarcı, p.5

International law brings two important principles bounding States' competences:[63]

- Unless an international law rule otherwise provides, a State shall not use its competence outside of its own territory. This principle means territorial jurisdiction of a state.
- A State has single competence over all incidents and all things and all people. However, international law brings the exceptions. If it can be considered necessary, a State shall not use its own competences on some things existed and on people lived on its own territory and it can be possible that a State can use the competences on the other State's territory because of the rule of international law.

Sovereignty is one of the main elements for States introduced by the international law; in international law, many authors use the concept of 'sovereignty' and the concept of 'independence' interchangeable and according to the decision of international arbitrary on the case of *'Island of Palmas'*, these two concepts were not districted.[64] "Sovereignty in the relations between signifies independence."[65] Sovereignty has two complementary and mutually dependent dimensions:[66]

- "Within a state, a sovereign power makes law with the assertion that this law is supreme and ultimate and its validity does not depend on the will of any other or higher authority."
- Other dimension is sovereignty in international law.

The relevant principles for sovereignty in internal law and in international law are:

- The principle of non- intervention: Sovereignty is a legal independence from all foreign powers and every state protects their own territory against all

[63] Sevin Toluner, *Milletlerarası Hukuk Dersleri, Devletin Yetkisi*, Gözden Geçirilmiş Dördüncü Bası, Beta, İstanbul, 1996, p. 1-2-3
[64] Pazarcı, p. 149
[65] Max Hubers's definition of sovereignty in the 'Island of Palmas' arbitral award (1928) in Fassbender, p. 118
[66] Fassebender, p.116

interventions from foreign states.[67] In the arbitration decision in the case of 'Island of Palmas', it was stated that:

> "Sovereignty in the relations between signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."[68]

- The principle of binding effect of international treaties over their Contracting States: States are bound the treaties which they become party in the international arena as indicated by Permanent Court of International Justice in the case of the *S.S. Lotus* that:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." [69]

- The principle of sovereign equality of States: Article 2 (1) of the UN Charter indicated this principle: "The Organization is based on the principle of the sovereign equality of all its Members." So, all members of the international community have the same right irrespective of their economic, social, political or other nature and should take into account the interests of the other members and respect their sovereignty.[70] According to Kelsen's approach about the sovereign equality, "sovereign equality is the legal authority and autonomy of a state as defined and guaranteed by the constitution of the international community."[71]

- The principle of equality of States: It has close meaning with the principle of equality of states and this principle was the expression of two distinct legal principles, 'the principle of equal protection of the law or equality before the law, and that of equality of rights and obligations or simply equality of rights.'[72]

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[67] Fassbender, p.117-118 and Pazarcı, p. 150
[68] Fassbender, p.118
[69] The judgment of Permanent Court of Justice, Judgment No. 9, September 7th, 1927, *The Republic of Turkey v. France*, PCIJ, Ser. A., No. 10, 1927.
Official Publication: Publications of the Permanent Court of International Justice Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927, p.14
[70] Fassbender, p. 119 and 126 and Pazarcı, p. 150
[71] Fassbender, p.131
[72] Fassbender, p.120 and 123

- The principle of permanent sovereignty over natural resources.

As a conclusion, States enact their Constitutions depending on their sovereignty within their territories.

In modern times, to create a constitution, does a state have to be? If the answer of this question negatively, this situation undermines the classical understanding of a constitution referring to a state.

The concept of a constitution has gained its meaning within the national law order; nevertheless in international law, the concept of a constitution is used to determine the founding treaties of international organization and the main principles of international community.[73] The concept of constitution is used to determine both the rules of national constitution and the whole constitutional principles of international community.[74]

That is a controversial issue. Some authors believe that just only a state must create its own constitution; but on the other hand, for example United Nations has its constitution for several areas. The examples are the Constitution of the Food and Agricultural Organization of the United Nations (16 October 1946) and the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO, 16 November 1945). This complies with the Aristotle's '*Politeia*'. Aristotle describes the true and good constitution; and form of government in three groups: one of them is monarchy which is the rule by one; second is aristocracy which is the rule by few and the third one is '*politeia*' which is the ruled by many and also including democracy.[75]

What does *politeia* mean?

[73] Göçer, p.1
[74] Göçer, p.2
[75] Oder, p.29 and http://en.wikipedia.org/wiki/Politeia, available in January 2009

That concept has two meanings; one is narrow meaning and other is broader sense. Narrow mean is constitutional government which is one of the polities of polis[76] and the broader mean is, a constitution; this meaning departs from the today's familiar meaning as a formal and written document prescribing the structure of government; thus, the constitutions of ancient Greek city-states were generally unwritten.[77] Aristotle creates a new ideal polity which is combined with the principle of restricted ownership of oligarchy which is the degenerated version of aristocracy and the principle of the political attendance of democracy; in his new polity, the people on a middle social scale are in a majority.[78]

In the preamble of the draft of Treaty Establishing a Constitution for Europe, it said that: "Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number." That contributes the '*politeia*' of Aristotle.

In the light of Aristotle's '*politeia*', the founding treaties of any association or the founding treaties of international organizations are formal treaties and they involve the aim of organization and the rules of their competences and their functions. Due to this, these treaties can be evaluated within the concept of a 'material constitution'. In that aspect, the UN Charter is a constitution.[79] Thus, to say the possibility of a constitution in an international arena, the concept of 'constitution' must be separated from the concept of 'state'. After showing this possibility, the concept of 'constitution' can exist in the international arena as a legal truth.[80]

However, the formal constitution is thought not to be in international constitution because any rule in international law is not gained a high priority in the hierarchy of norms but this situation does not preclude the existence of the constitutional law as fundamental principles in the international law.[81]

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[76] Oder, p.29
[77] Thomas R. Martin, with Neel Smith & Jennifer F.Stuart, *Democracy in the Politics of Aristotle*, http://www.stoa.org/projects/demos/article_aristotle_democracy?page=3&greekEncoding=UnicodeC, 2003, p.3, available in December 2008
[78] Oder, p. 30
[79] Oder, p. 32
[80] Göçer, p. 3
[81] Göçer, p.9

To classify a rule as a constitutional principle, two criteria must be existed:[82]

- This rule must be respected as a material constitutional principle.
- This rule must have a binding force.

In the light of the understanding of the '*politeia*' of Aristotle, the founding treaties of an international organization should be deemed as a Constitution. Incidentally, according to some authors, international organization means that international organization is a States' organization established by a treaty and having bodies, constitution and legal personality differing from founding states.[83] Vienna Convention on the Law of Treaties held the meaning of international organization in article 2: "International organization means an intergovernmental organization."

The idea of the constitutionalization of international law can not deemed to be a threat for state sovereignty due to protecting autonomy of states against unlawful interventions.[84]

International organizations have supranational aspects so decisions made by the organization as a whole, are binding on Member States that disagree.[85] It means that supranational authority created by founding treaties enact the rules unilaterally or Member States of organization enact the rules together through founding treaties within the frame of the supranational character of legal order.[86] The example of the supranational organization is the European Union.

The three elements of supranational organization are:[87]

- "Making of significant decisions by a body that is not made of national representatives and that does not receive instructions from national governments.

[82] Göçer, p.9
[83] "Opinion of Nguyen Qucc Dinh, Patrick Daillller, Alain Pellet," in Göçer, p. 12
[84] Lucas Lixinski, *Book Review- the Quest for a Founding Norm: Constitutionalization of International Law Revisited,* 9 German Law Journal No.12, 2008, p.3, www.germanlawjournal.com/article.php?id=1068, available in February 2009
[85] http://en.wikipedia.org/wiki/Supranational_aspects_of_international_organizations, available in December 2008
[86] Pazarcı, p.2
[87] Etzioni, Amitai, *Political Unification Revisited: On Building Supranational Communities*, Lanham: Lexington Books in http://en.wikipedia.org/wiki/Supranational_aspects_of_international_organizations, 2001, available in December 2008

- The subjects or participants (national governments or individuals) are legally obligated to comply with the decisions of the body.
- Individuals or other private parties may interact directly with the body and/or have legal obligations."

The differences between international organization and supranational organization are:[88]

- In international legal order, the rules are created by states and rarely together with the international organizations while in European Union legal order the rules are enacted by founding treaties (Treaty establishing the European Economic Community (1957),Treaty establishing the European Atomic Energy Community (1957), Treaty establishing the European Coal and Steel Community (1951) and consolidated versions (1981 European Single Act, 1992 Treaty of Maastricht, 1997 Treaty of Amsterdam, 2003 Treaty of Nice) and by the acts of European Union bodies.
- International law, as a rule, shall be binding in international personality, just as states and international organizations while European Union law shall be binding states, individuals and internal law persons directly.
- International law order does not have the central order which includes the mandatory judicial mechanism and mechanism to implement the sanctions. However, European Union law has the judicial mechanism which is the European Court of Justice (ECJ); so European Union bodies and Member States have the obligation to obey the decisions of the ECJ.

The concept of 'constitution' is used to illustrate legal order of supranational organization. The qualifications of supranational organization are:[89]

- Supranational organization has the large sovereign spheres alienating to organization.
- Supranational organization has the autonomous legal order against national and international law.

[88] Pazarcı, p. 11
[89] Oder, p.113

- Supranational organization protects the legal order through specific and comprehensive judicial activities.
- Supranational organization has the direct applicability and direct effect before national authorities.
- Supranational organization has the economic autonomous.
- The decisions of supranational organization shall take in majority and shall bind all Member States.
- Member State's leaving from organization and terminating the organization depends on the unanimity of Member States and the approval of the bodies of organization.

In the aspect of founding treaties, the International Court of Justice explained the meaning of "founding treaties" in the case of *Legality of the Use by a State of Nuclear Weapons in Armed Conflict.*[90]

> "…[T]he constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. But they are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals."

There are three different meanings of the concept of the constitution depending on there different spheres: "empirical sociology, legal documents and political theory":[91]

- First sphere is relating with ensuring an organizational concept:

> "Constitution is synonymous with the founding treaties of any association: A Constitution is a set of rules that enables an association to act as a body and it defines the purpose of the association, its bodies and their interaction. Organizational term includes without any distinction the basic organizational rules of communities and the state, of the UN and European Union, of private associations and limited companies. [92]

- In the aspect of legal document, a Constitution means the highest legal standard of an autonomous legal system, its first and most supreme law and the

[90] International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports, 1996, p.75
[91] Stefan Haack, "The European Constitution in its Third Dimension": in Francesca Astengo and Nanette Neuwahl (ed.) with Charles Louis de Chanta, *A Constitution for Europe? Governance and Policy- making in the European Union*, l, Volume 1, Chaine Jean Monnet, Universite de Montreal, 2004, p.1
[92] Haack, p.1

constitutional act can only be amended through the specific procedures. "Indications of a constitution in the legal context are its supremacy and validity as binding law; so the European Union has a constitution in form of its fundamental treaties and their interpretation by the courts." [93] The ECJ declared the constitutional character of Community and its supremacy in the decisions of the Van Gend & Loos[94] and Costa & Enel.[95]

- In the aspect of political theory:

> "A Constitution is synonymous with the idea of a basic political bond of the community that delimits a specific geographic area based on a specific idea and molds it into an internally and externally independent political entity. So, the emergence of a European constitution is closely linked with the third political sense."[96]

The founding treaties depends on Constitutional law in the aspects of founding and entering into force; moreover, founding treaties include the aim, competences, members, formation and external relationships of organization and the functions of bodies; also this kind of treaties does not have time limitation and have supremacy qualification; hence, although the founding treaties are international treaties in the aspect of formal meaning, they are considered as a constitution in material meaning.[97]

It should be mentioned that constitutional structures have existed in other international areas; not just only belong to the Community law and also belong to other international areas, for instance the UN and the WTO. They have the necessity to commit to the highest norm.

First one is the UN Charter. As I mentioned above, beside the UN Charter, some treaties of UN was qualified with the word of constitution: the Constitution of the Food and Agricultural Organization of the United Nations (16 October 1946) and the Constitution of the United Nations Educational, Scientific and Cultural Organization

[93] Haack, p. 1 and 2
[94] Case C- 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I
[95] Case C- 6/64 *Costa v. Enel* [1964] ECR 585 at 593
[96] Haack, p.2
[97] Göçer, p.14

(UNESCO, 16 November 1945). Bardo Fassbender cited about the UN Charter "as a central for the project of constitutionalization*"* in international law and Nigel D. White cited that "the UN creates the closest possible thing to a world constitution" by virtue of article 103 of the UN Charter.[98] Article 103 of the UN Charter provided the primacy of the UN and said that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The international constitutional law is silent how the normative principles can be used and prefers less contestable and '*more value-neutral'* while the European constitutional law is affected from the main constitutional traditions of Member States and international law and creates normative norms.[99] Tsagourias compared the ICJ with the ECJ and concluded that the ECJ has a constitutional role and a driver of European integration while the ICJ has not a constitutional role because "international sphere is a compendium of parallel orders—an "acentric system" with no legal place for an authoritative adjudication body."[100]

Second is the WTO system; this system has constitutional structures in the economic areas.

Through 1994 Uruguay Round on the dispute settlement mechanism under the WTO, the constitutional structures have developed effectively within the international trade law including the enforcing rules of the WTO dispute settlement and the reconciling rules with the members' interests; "the limits of the reach of the dispute settlement mechanism are the limits of the constitutionalization of this organization."[101]

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[98] Lixinski, p. 5
[99] Lixinski, p.6
[100] Amaya Alvez, *Book Review Transnational Constitutionalism: International And European Perspectives,* edited by Nicholas Tsagourias, Osgoode Hall Law Journal, 2008, p.660, http://www.ohlj.ca/documents/657Alvez.pdf, available in March 2009
[101]Hannes L. Schloemann and Stefan Ohlhoff, *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence,* The American Journal of International Law, Vol. 93, No. 2, 1999 Published by: American Society of International Law, http://www.jstor.org/stable/2997999, p.424, available on 04/11/2008

So, the constitutional working does not only belong to the European Union order but the European Union order differs from the international order. The qualifications of European Union law as a sui generis character:[102]

- European Union has the huge areas of community competences and duties.
- Union depends on the fundamental political values.
- Community and Union have the autonomous character in the area of enacting law and using this competence as intensity.
- The acts of Community create rights and obligations for individuals and can effect directly before national authorities.
- Community has the autonomous character for composing and functions of bodies and Community can take binding decisions by majority.
- Community has economic autonomous.
- Union has the effective judicial protection system which Member States, the bodies of Community and individuals can apply.
- Community and Union does not have time limitation.

Because of these qualifications, founding treaties of European Community and Treaty of Maastricht are constitutional documents and they constitute the basis of the Constitutional Treaty.[103]

The European Court of Justice verified the constitutional character of Community in Opinion 1/91:[104]

> "The context in which the objective of the agreement is situated also differs from that in which the Community aims are pursued. The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been

[102] Oder, p.115
[103] Göçer, p. 15
[104] *Opinion 1/91 on the Draft EEA Agreement [*1991] ECR I-6079, par.3

established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions."

In ECJ decisions, the ECJ stressed that Community treaties limited the Member States' sovereignty and the Community law is supreme over the law of the Member States:

> "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 national."[105]

So, the Community/the Union law is a new legal order. This law has the autonomous character apart from international law.[106]

To achieve this, the European integration has passed specific stages of development. That is "a time- bound project because it has been achieved only step by step and emerging from deadline to deadline."[107] As I mentioned above, the founding treaties are constitutions in material meaning. Firstly, I would like to explain the background of the founding treaties.

B. BACKGROUND OF THE INTEGRATION TOWARD THE CONSTITUTIONALIZATION- TREATIES AS A CONSTITUTION

> "The model of a Europe brought together not by military conquest, but in common pursuit of higher goals of peace, prosperity and stability has attracted the attention of thinkers since the Middle Ages."[108]

European integration began in 1950s afterward the Second World War. The first step toward European integration is Schuman Declaration on 9 May 1950 which led to

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[105] Case C- 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I, para.3

[106] Pazarcı, p.29

[107] Jürgen Bast and Philipp Dann, "European Ungleichzeitigkeit: Introductory Remarks on a Binational Discussion about Unity in the European Union": edited by Philipp Dann and Michal Rynkowski, , *The Unity of the European Constitution,* Germany: Springer, 2006, p. 2

[108] J.H.H. Weiler and Martian Kocjan *European Community System: The Historical Perspective And The Basics Of Economic Integration*, the Law of European Union Teaching Material, Unit 1-1, New York University School of Law, 2004/ 05, http://www.jeanmonnetprogram.org/eu/Units/documents/UNIT1-1-EU-2004-05.pdf, p.87, available in December 2008

create the European Coal and Steel Community (ECSC). In this declaration, French Foreign Minister Robert Schuman proposed the creation of supranational European Institutions and the establishing of the common economic system. The ECSC was established on 18 April 1951 under the Treaty of Paris among France, the Federal Republic of Germany, Italy, Belgium, Luxembourg and the Netherlands. This Treaty entered into force on 14 July 1952 with limited period for 50 years. The ECSC Treaty provided the abolition of internal custom duties and quantitive restrictions on imports and exports. By this Treaty, four institutions were set: the High Authority taking decisions and making recommendations and delivering opinions, the Assembly exercising the supervisory powers, the Council which consults together with the High Authority and the ECJ. The difference for the balance of power between the High Authority and the Council under the ECSC Treaty and under the Treaty of European Economic Community is ECSC Treaty has a stronger supranational element and a weaker intergovernmental element.[109] According to article 9 of the ECSC Treaty, the independence character of the High Authority was emphasized the compatibility with the supranational character of High Authority's functions. Many supporters of European integration defined themselves as a federalist and they thought that a supranational political entity was created with constitutionally transferred powers from Member States while Jean Monnet defined himself as a functionalist and thought that "European integration was to proceed sector by sector and favoured elite supranational institutions over more political bodies such as the Assembly or the Council."[110]

The Member of the ECSC signed the Treaty establishing the European Defence Community (EDC) on 27 May 1952 in Paris to provide with a common budget and a plan for a federal to control the European army; a structure would be placed under the supreme command of the NATO.[111] There was experienced a shock for European integration that this could not enter into force because the French Parliament rejected the EDC Treaty in August 1954. After the failure of EDC, on 25 March 1957, the

[109] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials*, Third Edition: Oxford University Press, 2003, p. 9
[110] Craig and De Burca, p. 9
[111] European Navigator Digital Library, *Plans for the EDC*, Etienne Deschamps, Translated by the CVCE, 2004-2009, http://www.ena.lu/plans_for_the_edc-020100199.html, available in December 2008

Treaties of Rome, European Economic Community (EEC) and European Atomic Energy Community was signed; they entered into force 1 January 1958. All these treaties had economic aim to create a common market, - but these were needed to ensure the political union- establish customs unions, and abolish the quatos and customs duties between Member States and atomic energy community.

Political integration started in 1970s; the endeavours of changing the economic community into political European Union were realized at the Paris Summit in October 1972; "the most significant source of progress towards political union between 1970 and 1985 was the gradual increase in the intensity of intergovernmental cooperation in the foreign policy field and its subsequent institutionalization as European Political Cooperation (EPC) in Part III of the Single European Act."[112]

During 1970s and early 1980s, the Community focused two dimensions; these are substantive and constitutional:[113]

- In the area of substantive competences: In the light of article 235 of the EEC (article 308 of the EC), the Community developed actions in the field of environment, regional, social and industrial policies.[114]

  > "Article 235: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

- In the area of constitutional development process, 1970s, the most significant doctrines were created by decisions of the ECJ: Supremacy and direct effect of EC law[115] and in the area of external relationship, the Court implemented the theory of implied power to extend the EC's competence[116] and for the relationship between institutions, if the Council shall not consult the European

[112] Weiler and Kocjan, p. 94
[113] Weiler and Kocjan, p.95
[114] Activities of European Union, Summaries of Legislation, Treaty Establishing the European Economic Community, *The Development of Common Policies*, http://europa.eu/scadplus/treaties/eec_en.htm, para.1, available in December 2008
[115] Case C- 106/77 *Amministrazione dele Finanze dello Stato v. Simmenthal (Simmenthal II*) [1978] ECR 629 and Case C- 41/74 *Van Duyn v. Home Office* [1974] ECR 1337
[116] Case C- 22/70 *Commission v. Council (ERTA)* ([1971] ECR 263

Parliament to adopt the legislation where it was required to do so, this legislation would be annulled.[117]

In 1985 the Commission issued the 'White Paper' about the completion of the internal market. The Single European Act (SEA), made the first amendment the EEC, signed on 17 February 1986 and entered into force on 1 July 1987. The goal of this Act is to complete the single market by 1992 and single act is defined in article 8A; namely, "the Single Market is defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

The SEA brought the recognition of the Council and a new legislative 'cooperation' procedure and new areas of Community competence (economic and monetary union, social policy, economic and social cohesion, research and technological development and environment policy); the SEA created the Court of First Instance to assist the ECJ and the SEA was a legal basis for the EPC.[118] The Council can take decisions by qualified majority voting instead of unanimity for the establishment of the internal market.

As a result of the collapse of communism in Eastern Europe and the reunification of Germany, to reinforce the Community's international position and the Member States wanted to complete the progress envisaged by the SEA,[119] The Treaty on European Union (TEU/ the Treaty of Maastricht) was signed on 7 February 1992 and was entered into force on 1 November 1993. "The Treaty of Maastricht was a turning point in the development of European integration within the framework of what was about to become the European Union."[120] The goals of the TEU, explained in the Preamble and article 2, are: to improve the democratic legitimacy and efficient functioning of the institutions; to confirm the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law; to deepen the

[117] Case C- 138/79 *Roquette Frères v. Council* [1980] ECR 3333
[118] Craig and De Burca, p. 19
[119] http://europa.eu/scadplus/treaties/maastricht_en.htm, "Part of Birth", par.1, available December 2008
[120] Weiler and Kocjan, p. 102

solidarity between States; to establish economic and monetary union including a single and stable currency; to establish the common citizenship; to implement a common foreign and security policy and to safeguard the '*acquis communautaire*'. The TEU includes three pillars: the European Communities, Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters. Moreover, the TEU established the principle of '*subsidiarity*' as a general rule; it was first applied to environmental policy in the SEA. If the proposed action which shall not fall within the exclusive powers of Community can not be sufficiently achieved by the Member States and can be better achieved by the Community, the Community shall take the action.

The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999 and signed for the amendments of Treaty on European Union and the Treaty establishing the European Community. With the Treaty of Amsterdam, the Community powers was tried to gain the effectiveness.[121] This Treaty supplied the need for respecting the fundamental rights as a basic principle of European Union. Article F held that "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."

Article B added new objectives; these are to promote a high level of employment with the promotion of economic and social progress through the creation of an area without internal frontiers; to maintain and develop the Union as an area of freedom, security and justice.

The Treaty of Nice agreed by the Heads of State or Government at the Nice European Council on 11 December 2000 and signed on 26 February 2001 and it entered into force on 1 February 2003 for realizing the institutional implications of enlargement which was failure in the Treaty of Amsterdam. Preamble of the Treaty of Nice cited that: "Desiring to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union."

[121] Graig and De Burca, p.29

The important political achievements of the Treaty of Nice were, settling the weighting of votes in the Council, the composition of the Commission, the Economic and Social Committee and the Committee of Regions and the distribution of seats in the European Parliament; the important legal changes were the extension of the co-decision procedure and of qualified majority voting and enhanced co-operation.[122]

By the 2000 Inter- governmental Conference started the preparations for establishing a new reforming treaty; in Laeken in 2001, the question of making a constitution was engaged explicitly on the political agenda and the European Council established the European Convention for preparing the reform and this Convention was debated from February 2002 to July 2003 by the representatives of Member States, the European Parliament, national parliaments and the Commission to make the Union more effective, more transparent, more comprehensible and closer to European citizens; the IGC took place between October 2003 – June 2004, at this meeting, it was decided to create the Treaty establishing a Constitution for Europe.[123] The four important issues were decided in the 2004 IGC: "the delimitation of powers between the EU and Member States, the status of the Charter of Fundamental Rights, simplification of the Treaties and the role of European Parliaments."[124] The Constitution would come into force after the ratification process of Member States either national parliamentary ratification or referendum; but it was rejected by France and the Netherlands. After the failure of the Constitution, at the European Council on 21 and 22 June 2007, the European leaders agreed to convene a new IGC to adopt a reform treaty for the European Union, not a Constitution. The final text of the treaty, drawn up by the IGC, was approved at the informal European Council in Lisbon on 18 and 19 October. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed by the Member States on 13 December 2007 at Lisbon.

[122] Graig and De Burca, p. 45 and the part of objectives of treaty of Europa, http://europa.eu/scadplus/nice_treaty/introduction_en.htm, para.1,available in December 2008
[123] A Constitution for Europe, in the website of Europa, http://europa.eu/scadplus/constitution/introduction_en.htm, available in December 2008
[124] Graig and De Burca, p. 51

C. CONSTITUTIONALIZATION OF THE LEGAL ORDER BY ECJ'S DECISIONS

'Constitutionalization of the treaty system' changed the system of traditional, state- centric and international system; created the supranational elements of the EC and has showed how individuals to defend their rights, "how judges resolve the disputes and how policy is made at both the national and supranational levels of government." [125] Hence, this system undermined the intergovernmental system.[126]

Setting the constitutional "rule of law", the Community is a participatory process and involves the constitutional dialogues between supranational court (the ECJ) and national courts.[127]

The ECJ declared that the European Community is a new legal order apart from international law. Nowadays, the ECJ becomes "the most effective supranational judicial body in the history of the world, comparing with the most powerful constitutional court anywhere." [128]

Through the constitutionalization process, the ECJ created the constitutive principles of the Community legal order. The ECJ's decisions about the supremacy of Community law, the principles of direct effect and uniform applicability constitute touchstones for the constitutionalization process in the EU and the preliminary ruling procedure led Member States to apply the ECJ for the interpretation of the EC Treaty, the validity and the interpretation of the acts of the institutions. Moreover, the Community has exclusive competence within the legal framework of legitimacy. These

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[125] Alec Stone Sweet, *The Judicial Construction of Europe*, First Published, New York: OUP, 2004, p.1, in google books, http://books.google.com/books?id=r5WjB7WQoyUC&dq=judicial+construction+of+europe,+alec+stone+sweet&printsec=frontcover&source=bn&hl=tr&ei=hcwnS42-EZGu4QbtjfG5DQ&sa=X&oi=book_result&ct=result&resnum=4&ved=0CB8Q6AEwAw#v=onepage&q=&f=false

[126] Sweet, p. 1

[127] Alec Stone Sweet, " Constitutional Dialogues in the European Community": edited by Alec Stone Sweet, Joseph H H Weiler, *The European Courts & National Courts Doctrine and Jurisprudence, Legal Change in its Social Context*, Oxford, Hart Publishing, 1998, p.305

[128] Sweet, *The Judicial Construction of Europe*, p.1

principles contribute to the foundation of effectiveness of Community legal order and play the role for the European Constitution.[129]

Constitutionalization of the EU depends on the political culture including the improvement of the rule of law ("to prevent the abuse of power, to protect human rights, to support democratic procedures and policy-making") and the common European future consisting of political, legal, social and economic aims.[130]

1. Methodology of European Constitutional Law

European Community law is composed by treaties and case-law. Therefore, we can see that methods of interpretation, systematization and comparison are main elements of methodology of European Constitutional law.[131] The ECJ, especially, relies on the 'teleological method of interpretation'. This method led the judges of the ECJ huge discretion to justify their decisions in the light of reaching the treaty goals and common interests of the members.[132] Thus, ECJ's court actions and case-law are important source for European constitutional law.[133] Beside the teleological interpretation, if the Constitutional Treaty had entered into force, historical interpretation would have been used; namely, "historical interpretation by recourse to the myriad documents of the Convention would have played a significant role in the future."[134]

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[129] Roman Kwiecien, "The Primacy of European Union Law over National Law under the Constitution Treaty": edited by Philipp Dann and Michal Rynkowski, *The Unity of the European Constitution*, Germany,: Springer, 2006, p.67

[130] Michael Longo, *Constitutionalising Europe Processes and Practices*, Ashgate Publishing Limited, Great Britain, 2006, p.77

[131] Philipp Dann, " Thoughts on a Methodology of European Constitutional Law": edited by Philipp Dann and Michal Rynkowski, *The Unity of the European Constitution*, Germany,: Springer, 2006, p. 46-47

[132] Peter L. Lindseth, "Democratic, Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community", 1999 Colum L.Rev. p. 628: in Anjum Rosha (ed.), *The Teleological Approach of the European Court of Justice*, Research Paper fort he European Union Law, National Law School of India University: 2005- 2006, p. 2

[133] Philipp Dann, *" Thoughts on a Methodology of European Constitutional Law*", p. 39

[134] Dann, *Thoughts on a Methodology of European Constitutional Law*, p.48

Moreover, the method of systematization is used to analyze the constitutional theory and doctrines while the method of comparative of European Constitutional Law has three approaches for the understanding of different national texts:[135]

- "The substantive openness of European constitutional law calls for a "valuing comparative law, such as in fundamental rights (article 6 (2) EU) and state liability (article 288 (2) EC)": Dann qualified this approach as a beneficial and mandatory one. His ground for this is that the ECJ has internalized this method not for simple transferring of national rules to the European Union law but it has internalized in order to improve the common European standards. To achieve this, certain rules are chosen depending on answering the highest possible level of protection of the aims and functions of the Union law.
- "The special dynamic of European integration is motive for a "dynamic or diachronic comparative law", juxtaposing European constitutional law to other inherently dynamic systems of law": this approach suggests the way for improvement of the Union constitutional law is the comparison with other legal orders or individual legal doctrines.
- "The European Union's specific evolution from an organization for market integration into a political union: 'transdisciplinary comparative approach'": vary viewpoints of other academic branches, such as private law, public law put forward varying conceptions for evolution of the Union from economic union into a political union; so, the European constitutional law is effected the viewpoints of other academic branches.

The methodological description of the legal system is related with the primary or derivative legal system.[136] The primary legal system determines its own rules while the existence of the derivative legal system depends on other external sources.

[135] Dann, *Thoughts on a Methodology of European Constitutional Law*", p. 52- 53
[136] Artur Kozlowski, "Comment on Philipp Dann: Some Remarks on the Methodology of the "Constitutional Law' of the European Union": edited by Philipp Dann and Michal Rynkowski, *The Unity of the European Constitution*, Germany,: Springer, 2006, p.62

The ECJ declares in its decisions that the feature of the EU's legal system has sovereignty depending on the criterion of effectiveness and the EU's legal system is autonomous. In the Costa &Enel case, the ECJ held that:[137]

> "It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question."

So, the EU legal system is not a derivative legal system. In the EU legal system, every normative actions depends on the approving of Member States; by virtue of that, according to Kozlowski, it can not be said that the EU legal system is a primitive legal system. Hence, the EU legal system and its methodology is completely new, "internally specified normative order" and the methodological character of EU law is *'sui generis'*; hence the place of the international law and national law of the intended state entity can not be determined easily in that system.[138] Also, the ECJ stated that the EC has a *'sui generis'* character. Moreover, the EC law was autonomous; not derivative that Member States had voluntarily chosen to transfer their sovereignty.[139]

National Constitutional Law was set up by the political order, procedures and fundamental values whereas European Constitutional Law is different from the natural constitutional law with its supremacy character; the characteristics of European Constitutional Law are:[140]

> - "First one is European Constitutional Law describes a legal order that is not a state, but uses the terminology of state law such as constitution, democracy or law.
> - Second is European Constitutional Law describes a legal order beyond the national and conceptual unity; deals with the heterogeneity based on sectoral and territorial differentiation.
> - Third is European Constitutional Law is not containing a single, discrete text; rather it is to be found in diverse sources and in diverse languages such as in the founding treaties of the Community and the Union, protocols and even the European Constitutional Treaty.
> - Fourth is European Constitutional Law has openness characterizes. It means that national legal orders and European legal order take part in

[137] Case 6/64, *Flaminio Costa v E.N.E.L* [1964] ECR 585
[138] Kozlowski, p. 65
[139] Graig and De Burca, p. 275
[140] Philipp Dann, *Thoughts on a Methodology of European Constitutional Law*, p. 42-43-44

defining Union constitutional law, in particular, as regards fundamental rights and the supremacy of European Constitutional Law.
- Finally is European Constitutional Law is set apart by its own unique dynamic, resulting not only from the teleological orientation of the treaties but also from the political dynamic of treaty revisions in the past twenty years."

2. Constitutional Principles

Constitutionalization is set by the process by the EC Treaties which bind the sovereign states "into a vertically-integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the EC territory."[141] Respectively, I explained the ECJ's decisions about the constitutional character of the EC and the EU. Firstly, I mentioned the principle of supremacy and then, the principle of direct effect. These are not based in the Treaty and are created by the decisions of the ECJ. After, I continued with the principle of conferral competence which is based on treaties.

a. The Principle of Supremacy

Bruno De Witte defined "supremacy denotes the capacity of that norm of Community law to overrule inconsistent norms of national law in domestic court proceedings."[142] Member States shall implement the Community legislation, complying with institutions' decisions and judgments of the European Court of Justice to give effectiveness of the independence of Community law and to adopt the supremacy of the Community law.[143]

I will explain the ECJ's decisions about supremacy of EU law over national laws.

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[141] Sweet, *Constitutional Dialogues in the EC*, p.306
[142] Bruno De Witte, "Direct Effect, Supremacy and the Nature of the Legal Order, `Direct Effect, Supremacy and the Nature of the Legal Order' ": in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Oxford, 1999,p. 177
[143] Josephine Steiner & Lorna Woods, *Textbook on EC Law*, 8. th Edition, Oxford University Press, 2003, p. 577 and Lawrence Collins, *European Community Law in U.K.*, Second Edition, Butterworths, London, 1980, p. 1

One of the famous cases is *Van Gend En Loos*[144]. This case's parties were N.V. Algemene transport - en Expeditie Onderneming Van Gend & Loos and the Netherlands Inland Revenue Administration. This case was concerned with the preliminary ruling to interpret the Treaty. The Netherlands enacted the customs measures with an import duty higher than that with which it was charged on 1 January 1958 when the EEC entered into force. Article 12 relating with the prohibition of customs duties and charges having equivalent effect brought a negative obligation to Member States that Member States shall not enact the legislative intervention to this rule under national law. Customs duties or charges having equivalent effect were increased in contrary to the prohibition included in article 12 of the EC Treaty.

The Court stressed that the EC Treaty has been more than an agreement because the Community constitutes a new legal order of international law that limits the sovereignty of Member States within the limited fields. Community law has an authority which can be invoked by their nationals before those courts and tribunals to ensure the uniform interpretation of the Treaty.

Another most important case for supremacy is *Costa & Enel* case[145]. The allegation in that case was the Italian Law No 1643 of 6 December 1962 and the presidential decrees issued for execution of that Law infringed the compatibility to the relevant articles of the EEC Treaty; thereupon the Italian Court - the Giudice Conciliatore of Milan- applied to the ECJ for preliminary ruling. In that case, the ECJ stated an important point in the aspect of the constitutional qualification of the EC law. The Court created a Community with its own institutions, its own personality, its own legal capacity and the capacity of representation of the Community in international arena and States should bring the limitation of their sovereignty albeit within limited fields and should transfer their powers to the Community which their nationals and themselves should obey.

[144] Case C- 26/ 62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1
[145] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585

Hence the ECJ created a new supranational organization and stressed the supremacy of Community and the national measure should not be incompatible with the Community legal order to provide the uniformity so the enforcement of Community legal system should not differ from Member States to another Member States:

> "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… The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions."[146]

These two cases are outstanding touchstone cases in order to create and underpin the supremacy of Community law. These cases emphasized the EC having an autonomy character as a supranational organization different from the ordinary treaty by virtue of having its own powers and transferring the sovereign powers from Member States to the Community in specific fields. These cases show that the Community law shall become the integral part of Member States' law orders and it shall be forbidden that the national measures shall not be incompatible with the Community law. Hence, in these aspects, these cases contribute to the constitutional principles of Community law.

In *Simmenthal Case*[147]*,* veterinary and public health fees levied on imports of beef and veal under the Italian veterinary and health laws were incompatible to Community law. The ECJ held that in accordance with the principle of precedence of Community law, any provisions of current national law contrary to the Treaty law and directly applicable measures of the institutions were inapplicable automatically and the provisions of Community law were an integral part of and took precedence in the national legal order and Community provisions avoided to enact a new legislation which would be contrary to the Community law. The ECJ cited that:

> "In the event of conflict between a provision of Community law and subsequent national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary."[148]

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[146] "Costa v.Enel*"*, par.3
[147] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629
[148] "Simmenthal", par. 23

The important point of Simmental case is that Community law prevails over national law even subsequently national law and the ECJ overburdens to national authorities not to enact a new legislation which is incompatible with the Community law. If there has been a conflict between the national law and the Community law before a national court; this court shall give the effect to Community law without referring to the national Constitutional Court.[149]

Walt Hilmelm Case[150] was about the efficacy and uniform application of Community law. German national court applied to the ECJ for preliminary ruling on cartel in the action pending before the national court between Walt Wilhelm, Director Of Farbenfabriken Bayer Ag, Hans Goelz, Director Of Cassella-Farbwerke Mainkur Ag, Hans Ulrich Fintelmann, Sales Manager Of Farbwerke Hoechst Ag, Badische Anilin -und Soda-Fabrik Ag,Farbenfabriken Bayer Ag,Farbwerke Hoechst Ag, Formerly Meister Lucius und Bruening, Cassella Farbwerke Mainkur Ag and Bundeskartellamt, Berlin. Community and national law arranged the rules on cartel differently. The national system was only allowed if it would not jeopardize the uniform application throughout the common market of the community rules on cartels and of the full effect of the measures adopted in implementation of those rules. In that case, the ECJ ruled that:

> "The treaty's primary object is to eliminate the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole community, in accordance with article 2 of the treaty. Article 87(2/e), in conferring on a community institution the power to determine the relationship between national laws and the community rules on competition, confirm the supremacy of community law."[151]

This case's contribution to the constitutional principle is if national law is contrary to Community law in the matters of cartel, the Community law takes precedence over national law.

[149] Craig and De Burca, p. 282
[150] Case C- 14/68 *Walt Hilmelm and others v Bundeskartellamt* [1969] ECR 1
[151] "Walt Hilmelm Case", par.4

In *Comet* Case, the National Court applied to the ECJ for preliminary ruling in the action pending before the national court between Comet Bv, Sassenheim and Produktschap Voor Siergewassen. This case was about the interpretation of the Community provisions for the movement of goods. The plaintiff claimed that the decision of national body was incompatible to the Community law. By virtue of the principle of supremacy of Community law, the national rules shall be compatible with the Community rules. The ECJ cited that:

> "Consequently, in the absence of any relevant community rules, it is for the national legal order of each member state to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of community law." [152]

Humblet Case was occurred between Jean-E. Humblet, an official of the ECSC and Belgian State and was about the interpretation of article 11(b) of the protocol on the privileges and immunities of the ECSC. In that case, the defendant claimed that the ECJ did not have jurisdiction to rule on any dispute relating to the interpretation or application of that protocol. The ECJ stated that the ECJ had jurisdiction to interpret that protocol. However, the Court had no jurisdiction to annul legislative or administrative measures of one of the Member States. The ECSC Treaty was based on the principle of a strict separation of the powers of the Community institutions and those of the authorities of the Member States. Community law did not grant to the institutions of the Community the right to annul legislative or administrative measures adopted by a Member State.

> "If the court finds that a legislative or administrative measure adopted by the authorities of a member state is contrary to community law, that state is obliged by virtue of article 86 of the ECSC Treaty to rescind the measure in question and to make reparation for any unlawful consequences thereof." [153]

There exist two cases to declare Constitutions of the Member States can not prejudice the supremacy of Community law: First one is Internationale Handelsgesellschaft 11/70 and Foto-Frost 314/85.

[152] Case 45,/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, par.13
[153] Case 6/60 *Jean-E. Humblet v Belgian State* [1960] ECR 559, p. 569

In *Internationale Handelsgesellschaft Case,* the German Court referred to the ECJ for preliminary ruling about the validity of relevant article of regulation No. 120/67/EEC of the Council about the market in cereals and Regulation No 473/67/EEC of the Commission on import and export licenses for cereals and processed cereal products, rice, broken rice and processed rice products for the case between Internationale Handelsgesellschaft Mbh And Einfuhr - und Vorratsstelle Fuer Getreide und Futtermittel. The defendant claimed that:

> "The system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of community law, with the result that the primacy of supranational law must yield before the principles of the German basic law." [154]

The issue of license on import and export and the deposit caused the intervention of the freedom of disposition in trade. The ECJ ruled that:

> "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. 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 formulated by the constitution of that state or the principles of a national constitutional structure."[155]

In *Foto- Frost Case*, the Finance Court in Germany applied to the ECJ for preliminary ruling about whether or not the lower courts in Member States had a duty to review the validity of the Community measures and how the rules about the post-clearance recovery of import duties in respect of goods had to be interpreted in the light of the Protocol on German internal trade annexed to the EEC Treaty. The Finance Court suspended the case before it between the German company Foto-Frost and the Hauptzollamt Lübeck- Ost (Principal Customs Office) concerning the import duties for photographic products manufactured in the German Democratic Republic and purchased by an undertaking established in the Federal Republic of Germany from companies established in other Member States.

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[154] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, par. 2

[155] "Internationale Handelsgesellschaft Case", par.3

The Foto- Frost company sold, invoiced and dispatched the goods depending on the procedure of the external Community transit (Articles 12 et seq. of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, Official Journal 1977, L 38, p. 1) under which goods coming from a non-member country which were not in free circulation in a Member State might be transported within the Community without renewed customs formalities when the goods crossed from one Member State to another. The Foto-Frost Company requested for the exemption the relevant photographic products from the free-circulation and import duties in accordance with the German internal trade because the goods manufactured in German Democratic Republic took the advantages of the exemption. However, the Principal Customs Office rejected the request of the Foto-Frost Company to benefit from the exemption. The Court ruled that:

> "National courts against whose decisions there is a judicial remedy under national law may consider the validity of a community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts, whether or not a judicial remedy exists against their decisions under national law, themselves have no jurisdiction to declare that acts of "community institutions are invalid. That conclusion is dictated, in the first place, by the requirement for community law to be applied uniformly. Divergences between courts in the member states as to the validity of community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty. Secondly, it is dictated by the necessary coherence of the system of judicial protection established by the treaty."[156]

To sum up, the Court has exclusive jurisdiction to review the legality of the Community institutions and declare void an act of Community institutions however the national courts have not jurisdiction to declare that acts of Community institutions are invalid.

Through these two cases, the ECJ reinforces the supremacy of Community law. It can not be alleged that the Community measure will be contrary to the constitutional fundamental rights and national constitutional structure. Community measures have precedence to ensure the Community law to be applied uniformly.

[156] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, par.1

Les Vert Case was about the application to the ECJ to declare that the decisions of the European Parliament – one of them was concerning the allocation of the appropriations entered under item 3708 of the general budget of the European Communities and other one included rules governing the use of the appropriations for reimbursement of expenditure incurred by the political groupings having taken part in the 1984 European elections- would be void. This case's parties were Parti Ecologiste Les Vert which was the non- profit – making association v. European Parliament.
The Court held that:

> "It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty. The treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions." [157]

However, the principle of supremacy of EC law does not emerge from the autonomous character of Community law; it emerged from its international, moreover supranational origins; in the light of *the principle of pacta sund servanda*, the principle of supremacy does find in the international agreement, even implicitly[158]. Article 103 of Charter of United Nations held the principle of supremacy of the United Nations; namely, it said that: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

In the Community law, the principle of supremacy of Union law shows that not only the European Union law is supreme; but also Union law arranges the confliction of norms that European Union law is prevail over national law which is incompatible to the Union law. So, this shows the constitutionalization of Union law. Les Vert case reinforces this understanding. The ECJ emphasized that the national measures shall be compatible with the basic constitutional charter- the treaty-. Member States can not review the legality of the measures enacted by the Community institutions; this duty of review just only belongs to the ECJ.

[157] Case 294/83 *Parti Ecologiste Les Vert v. European Parliament* [1986] ECR 1339, par. 23
[158] Kweicien, p. 74

The ECJ created the principle of supremacy of Union law by its decisions and cited that:

> "The legal status of a conflicting national measure was not relevant to the question whether Community law should take precedence. Conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence." [159]

Other case example is *Factortame*[160], in that case, the ECJ stressed that: "in accordance with the principle of the precedence of Community law, provisions of Community law… by their entry into force render automatically inapplicable any conflicting provisions… of current national law." One of the national court's decision confirmed that "the Community law must be given primacy by national courts over any incompatible national law."[161]

To sum up, Factortame case reinforces the supremacy of Community law that when the provisions of Community law enforces, any conflicting national provisions can not be applied per se.

In *Kreil Case*, the Administrative Court applied to the ECJ for a preliminary ruling on the interpretation of the Council Directive about implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The national case was between Tanja Kreil and Germany; Kreil brought an action before the Administrative Court of Germany; claimed that she was rejected to work in the maintenance branch of weapon electronic in the armed service by virtue of being a woman and this discrimination was contrary to the Community law. German constitutional rule prohibited women from performing armed service and government defended that Community law did not govern the matters of defence and this area was in the field of common foreign and security which remained within the field of Member States'

[159] Case C- 473/93 *Commission v. Luxembourg* [1996] ECR 3207, par.38
[160] Case C- 213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd & others* [1990] ECR I- 2433, par. 18
[161] *The Belgian Cour de Cassation in Minister for Economic Affairs v. SA Fromageria Franco- Suisse 'Le Ski'* [1972] 2 CMLR 330.

sovereignty. The Court stated that Member States had to take appropriate measure to ensure the internal and external security however,

> "Such decisions are bound to fall entirely outside the scope of Community law. To recognize the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application." [162]

So, the ECJ emphasized that Member States shall not take any decisions which jeopardize the supreme character of Community law; otherwise this circumstance damages the binding nature and uniform application of Community law.

In *Schmidberger Case*[163], the Innsbruck Higher Regional Court referred to the ECJ on the interpretation of relevant articles of the ECT concerning about conditions for liability of a Member State for damage caused to individuals by a breach of Community law. Schmidberger was an international transport company sued the Austrian government that the government gave the permission to the environmental group to organize the demonstration on the motorway which was closed to traffic for almost 30 hours. Schmidberger claimed that permission for closing the road to traffic caused to failure to make the transportation the goods from Germany to Italy because this motorway was used as a transit route; so this constituted the restriction of the free movement of goods. The Government defended itself that if this permission had not been given, this would have been constituted a breach of fundamental rights –freedoms of expression-. The national government gave the precedence to the fundamental rights guaranteed by the ECHR and the national constitution by restricting the fundamental freedom of the Community. The question was whether the fundamental freedom of the Community – free movement of goods- had precedence over the fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'); namely, whether Member State had the right to bring a derogation depending on article 30 of the EC Treaty restring the free movement of goods guaranteed by the Community law by giving precedence to the freedom of expression guaranteed by the ECHR and the Austrian Constitution.

[162] Case C-285/98 *Kreil v. Germany* [2000] ECR I-69, paragraphs 15 and 16
[163] Case C-112/00 *Eugen Schmidberger v. The Republic of Austria* [2003] ECR I- 5659

Advocate General Jacobs delivered an opinion on 11 July 2002 and stressed the supremacy of Community: "national authorities are in any event required to act in accordance with the rules of the EC Treaty; by virtue of the principle of supremacy of Community law, they prevail over any conflicting national law" and confirmed article 6(2)of TEU that Union law must respect the fundamental rights because fundamental rights are an integral part of the general principles of law and the ECJ is influenced from the constitutional traditions common to the Member States.

The ECJ held that:[164]

> "Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.
>
> The fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.
>
> It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR."

The ECJ emphasized that the derogations should be justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued to the public interest. To conclude, the ECJ found the Member State used its discretion so wide and the legitimate aim of that demonstration could not be achieved by restricting the intra-Community trade and also the measure taken by the Member State was not compatible with the Articles 30 and 34 of the Treaty, read together with Article 5.

To sum up, Community law brings derogation to the main fundamental freedom in specific aspects; namely, on the grounds of public morality, public policy, public security; the protection of health and life on humans, animals and plants; the protection

[164] "Schmidberger", paragraphs 59, 64 and 75

of national treasure; the protection of industrial and commercial property. This case's contribution to the constitutionalization of EC law is that discretion power on implementing the derogations to the free movement of goods belongs to the ECJ; not belong to the Member States.

Allonby Case was about the equal pay for men and women; the equality principle was protected by the Community legal order and the provisions about this could be directly effective. Moreover, the relevant national implementation was contrary to the Community law and by virtue of the supremacy of Community law; the relevant implementation would not be applied.[165]

Larsy Case was about the interpretation of the Council's Resolutions about the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and the conditions governing a Member State's liability for damage caused to individuals by breaches of Community law. In that case, the ECJ ruled the principle of supremacy that "that principle of the primacy of Community law means that not only the lower courts but all the courts of the Member State are under a duty to give full effect to Community law."[166]

Article I-6 of the Constitutional Treaty arranged the supremacy of the Union Law: "the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." The existence of principle of supremacy in the Constitutional Treaty justified the supremacy of the Union law and the recognition by the Member States.[167]

[165] Case C- 256/01 *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services and Secretary of State for Education and Employment* [2004] ECR I-873, par.77
[166] Case C- 118/00 *Gervais Larsy and Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [2001] ECR I- 5063, par.52
[167] Kweicien, p. 73

Overall all decisions show that:[168]

> - "Municipal legislation can not prevail over Community law, whichever is first in time;
> - The efficacy of Community law can not vary from one Member State to another;
> - Member States can not take or maintain in force measures which are liable to impair the useful effect of the Treaty;
> - Member States can not give authoritative rulings (by legislation or otherwise) on the interpretation of Community regulations;
> - Community law can not be tested in municipal courts for compliance with the constitutions of member states;
> - Member States can not excuse their non- performance of treaty obligations by relying on their domestic constitutions."

The principle of supremacy gives obligations to Member States:[169]

- National agencies shall not challenge the validity of Community law.
- National provisions which are contrary to Community law shall not be implemented.
- The provisions which are contrary to Community law shall not be enacted.
- National legislation which is contrary to Community law shall be annulled.

As seen above, European Union law gives a duty to national judges not to implement their national provisions in the event of a conflict between Union law and national law different from other international organizations. Thus, the principle of supremacy makes EU law as a constitutional order.

b. The Principle of Direct Effect

Craig and De Burca explained direct effect in broader and narrower definition. According to them, the broader (objective) meaning of this is, "the capacity of a provision of EC law to be invoked before a national court"; the narrower (subjective) meaning is "the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts."[170] So, there exist two requirements to be said any provisions have direct effect. First one is the national courts must accept the

[168] Collins, p.8
[169] Kwiecien, p. 71
[170] Craig and De Burca, p. 180

provision legally valid and the second requirement is, the concerned provision must be appropriate to grant rights on individuals; the last one is decided by the jurisdiction of the ECJ while the former one is decided by the national courts. [171]

In the decision of *Van Gend En Loos*, the ECJ ruled the principle of direct effect and cited that the relevant provision of EC Treaty has direct effect and creates individual rights which national court must protect.

> "Independently of the legislation 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*;* the granting of the enforceable rights of individuals was what the direct effect of Community law was all about."[172]

The ECJ determined the conditions for direct effect of Treaty provision in the case of *Van Gend En Loos.*

> "The wording of article 12 (now article 25 about customs duties) contains a clear and unconditional prohibition which is not a positive but a negative obligation. This 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."[173]

In its decision, the ECJ created that a provision is essentially self- executive; so in the lights of this case, the conditions for the direct effect of treaty provision:[174]

- A Treaty provision should have clear and sufficiently precise definition; means has to be unequivocal.
- A Treaty provision should have unconditional obligations; means that need no further steps to implement the provision and no need to judgment or discretion of Member States and Community institutions.[175]
- This obligation is unqualified for reservation by Member State.
- Direct effect measure does not depend on any implementation by Member States.

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[171] T.C. Hartley, *The Foundation of European Community Law*, Third Edition, Clarendon Law Series, Oxford, 1994, p. 196- 197
[172] Tuomas Ojanen, *The Changing Concept of Direct Effect of European Community Law*, EPL, 2000, p. 1256
[173] "Van Gend En Loos", part B, par.5
[174] Craig and De Burca, p. 185
[175] Hartley, p.202

As ruled in the *Costa & Enel* judgment, a Member State's obligation under the EEC Treaty is to protect the individuals' rights which are created by direct effect. The ECJ explained that:

> "Such an obligation becomes an integral part of the legal system of the member states, and thus forms part of their own law, and directly concerns their nationals in whose favour it has created individual rights which national courts must protect."[176]

These two cases are touchstones cases due to create the principle of direct effect; this principle provides individuals to defend their rights. Thus, European Union law involves not just only Member States but also their nationals and Member States have an obligation to protect their nationals' rights.

Weiler characterizes the principles of supremacy and direct effect into the higher of the land, not into the law of the land.[177]

In *Comet Case*[178], the plaintiff defended his right by relying on the direct effect that the relevant provision of the EC Treaty and the relevant regulation affect directly to individuals; by virtue of this principle, national courts have to protect the individuals' rights. By the way, the ECJ uses the words of direct effect and direct applicability interchangeable.

Reyners Case[179] was about the interpretation of relevant articles of the EEC Treaty relating to the right of establishment in relation to the practice of the profession of advocat. Reyners was a Dutch national and terminated his education in Belgium; however, his admission was refused by the Belgian Bar by virtue of lacking Belgian nationality. The relevant article (article 43/ ex article 52) prohibited the restriction of the right of establishment of nationals of a Member State in the territory of another Member

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[176] Costa v. Enel, par.7
[177] J.H.H. Weiler, *The Constitution of Europe " Do the New Clothes Have an Emperor?" and Other Essays on European Integration,* Cambridge University Press, 1999, p.22 in google books, http://books.google.com.tr/books?id=jqvLqYTLWjQC&dq=the+constitution+of+europe+weiler&printsec=frontcover&source=bn&hl=tr&ei=SPf2SZ_SKZm8_AaRxN3mCQ&sa=X&oi=book_result&ct=result&resnum=4, available in February 2009
[178] Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043
[179] Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR I- 631

State; however, Belgium refused the direct effect of the relevant Treaty provision. The Court stated that:

> "The rule on equal treatment with nationals is one of the fundamental legal provisions of the community. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other member states."[180]

Hence, the Court ruled that in the spheres of the free movement and establishment of self- employed persons, the Treaty provisions shall be applied directly effective to individuals regardless of the nationality of individuals.

Every provision of Treaty does not have direct effect. Examples for directly effective provisions are the prohibition of discrimination on grounds of nationality, the free movement of persons, goods and services, the prohibition of customs duties, the right of establishment and the competition rules...[181] Examples for the provisions having no direct effect are the movement for capital, the State aid, the rates of exchange....[182]

In *the Banks v. British Coal Case,*[183] the Banks was a company dealing with the coal production under the license for its extraction issued by the British Coal. However, Article 60 of the Treaty could not apply to licenses to extract coal. The relevant article could implement just only the event of unfair and discriminatory product pricing practices. The relevant provisions constituted the legal framework for the examination of licenses to extract unworked coal and of their royalty and payment terms. The question was about whether or not the relevant articles were clear and unconditional provisions which conferred directly on individuals rights which the national courts had to protect. Articles 4(d), 65 and 66(7) did not confer rights which were directly enforceable by private parties in proceedings before the national courts.

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[180] "Reyners", paragraphs 24 and 25
[181] Margot Horspool, *European Union Law*, Third Edition, Lexis Nexis Butterworths, Butterworths Core Text Series, London, 2003, p. 156 and B. Emrah Çetinkaya, *The Direct Effect of the Community Law as Interpreted and Applied by the European Court of Justice*, Marmara University, European Community Institute, 1991, p. 36
[182] Çetinkaya, p. 42
[183] Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-1209

In *the Banks v. The Coal Authority Case,* the National Court referred the question that whether or not the relevant article (article 4) of ECSC Treaty and the relevant decision establishing Community rules for State aid to the coal industry had direct effect. The Court reminded that:

> "In order to determine whether a provision of the ECSC Treaty is directly effective and directly produces rights in favour of individuals which the national courts must protect, it is necessary to ascertain whether that provision is clear and unconditional. If a provision of Article 4 of the ECSC Treaty is not independently applicable, it cannot have direct effect." [184]

Since 1965, the Commission has accepted the decisions, called aid codes, that: "authorizing, under certain conditions and in specifically listed cases, the granting of subsidies or aid by Member States to the coal industry, which is therefore regarded as Community aid compatible with the proper functioning of the common market."[185] So, the ECJ concluded that:

> "Article 4(c) of the ECSC Treaty, in so far as it concerns the compatibility of subsidies or aid with the common market, is implemented by Decision No 3632/93, so that, to that extent, that provision has no independent application and therefore no direct effect."[186]

On the other hand the relevant article of this Decision is directly effective and produces rights for individuals.

Defrenne Case[187] was about the principle of equal pay for men and women for equal work which was guaranteed by article 119 of the EEC Treaty.

This principle is one of the foundations of the Community. Every Member State has a duty to provide and implement this principle. To ensure the implementation of this principle, all appropriate measures must be taken at both Community and national level. The Court held that: "the principle of equal pay contained in article 119 may be relied

[184] Case C- 390/98 *H.J.Banks&Co. Ltd. v. the Coal Authority and the Secretary of State for Trade and Industry* [2001] ECR I – 6117, paragraphs 58 and 59
[185] "Banks v. Coal Authority", par. 65
[186] "Banks v. Coal Authority", par.67
[187] Case C- 43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR I- 455

upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals."[188]

Consequently, the concerned article is directly effective and gives the individual rights which the Courts must protect and the Court cited that "article 119 has become applicable in the internal law of the member states by virtue of measures adopted by the authorities of the European Economic Community."[189] However, the direct effect of this article can not be relied on the claims of this relevant case.

Petrie v. ALLS I/CDFL Case was about the concerned articles of the EC Treaty about the right to access to the European Parliament, the Council and the Commission documents. The CFI referred to the ECJ's decision of Van Gend en Loos about the conditions for direct effect of the treaty.

> "The criteria for deciding whether a Treaty provision is directly applicable are that the rule should be clear and unconditional, in the sense that its implementation must not be subject to any substantive condition, and that its implementation must not depend on the adoption of subsequent measures which either the Community institutions or the Member States may take in the exercise of a discretionary power of assessment." [190]

The CFI's decision for article of 255 is not directly effective; because this article can be implemented depending on the adoption of the subsequent measures; so this article is not unconditional.

Treaties have "self-executive" character; it means that Treaties become an integral part of Member States automatically and are applied directly by national courts and creates individuals rights which they invoke before national courts and there is no need for 'implementation legislation' to give effect within the national legal order.[191]

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[188] "Defrenne", par.40
[189] "Defrenne", par.41
[190] Case T-191/99, *David Petrie, Victoria Jane Primhak and David Verzoni v. Associazione lettori di lingua straniera in Italia, incorporating Committee for the Defence of Foreign Lecturers* (ALLS I/CDFL), judgment of the Court of First Instance on 11 December 2001, paragraphs 34 and 35
[191] John Tillotson, *European Union Law: Texts, Cases and Materials*, Third Edition, Cavendish Publication, 2000, p.70 in google books, http://books.google.com.tr/books?id=aeVtgjOZPO0C&pg=RA1-PA70&lpg=RA1-PA70&dq=self-executing+treaty+of+eu&source=bl&ots=EqjMDoSaf-&sig=XgVXccItDOyv8pFtewGCrPcMmeI&hl=tr&ei=VxuRSo7eGqGgngPNrvCmAQ&sa=X&oi=book_result&ct=result&resnum=8#v=onepage&q=&f=false, available in June 2009

"The Treaty took its self-executive character from its legislative form and its constitutional design."[192]

The principle of direct effect of EC law not just only includes EC Treaty; and also, includes secondary legislation and international agreements[193]; the precedence of Community law is confirmed by article 249. According to this article:

> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
> A decision shall be binding in its entirety upon those to whom it is addressed.
> Recommendations and opinions shall have no binding force."

This provision is significant in the aspect of the hierarchy of norms and in the aspect of legal framework. It gives an effect to a regulation as having direct applicability in all Member States.

In *Simmenthal Case,* the ECJ defined the meaning of direct applicability that "the rules of Community law must be fully and uniformly applied in all Member States from the date of their entry into force" and in *Variola Case*[194], the ECJ defined that the "direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law." In *Politi Case*[195], the Court held that, "by reason of their nature and their function in the system of the sources of the Community law, regulations have direct effect and are, as such, capable of creating individual rights which national courts must protect."

As seen above, the ECJ uses the terms of direct applicability and direct effect interchangeable. Some authors interpret these two terms in the same meaning while

[192] Tillotson, p. 70
[193] Graig and De Burca, p. 178 and Ojanen, p. 1256
[194] Case C-34/73, *Fratelli Variola S.P.A v. Administrazione Italiana delle Finanze* [1973] ECR 981, par.10
[195] Case C- 43/71 *Politi v. Italian Ministry of Finance* [1971] ECR 1039, par.9

others interpret these two terms differently.[196] According a theory firstly alleged by J.A.Winter: If one interprets 'directly applicable' to mean the same thing as 'directly effective', it would seem to follow that only regulations can be directly effective; on the other hand, one interprets the two terms differently, one has to find a suitable meaning for 'directly applicable' a meaning that refers to some quality possessed by regulations but not by other instruments of Community law.[197] If a provision of EEC law is directly effective, domestic courts must not only apply it, following the principle of primacy of EEC law, must give priority to EEC law over any conflicting provisions of national law.[198] Regulation has direct applicable as stated in article 249 to take immediate effect without the need for further implementation; although regulations produce direct effect by their nature, its direct effect are not automatic; there may be cases where a provision in a regulation firstly must be unconditional and sufficiently precise and secondly, it is required future implementation before it can take full legal effect but since a regulation is of 'direct application', where the criteria for direct effect are satisfied, it may be invoked vertically and horizontally[199] like Treaty.[200] Generally, cases on the direct applicability of regulations are about the establishment of common agricultural market regimes.[201]

Variola Case was about the direct application of the regulations which were about the gradual establishment of a common organization of the market in cereals. The Court stated that:

> "By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in Regulations and other rules of Community law. Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of Community Regulations throughout the Community.
>
> More particularly, Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to

[196] Hartley, p. 207
[197] Hartley, p.206
[198] Josephine Steiner , *Textbook on EEC Law*, Third Edition, Blackstone Press, London, 1992, p. 25
[199] Vertical one is the direct effect of provision put forward from individuals to Member State and horizontal one is from individual to individual.
[200] Steiner, p. 28
[201] Jean- Victor Louis, *The Community Legal Order,* Third and Completely Revised Edition, European Commission, European Perspectives Series, Brussels, 1993, p. 144

pronounce on any question involving the interpretation of community law or the validity of an act of the institutions of the community…"[202]

In the *Leonesio Judgment*[203], the Court cited that:

"The second paragraph of article 189 of the Treaty provides that a regulation shall have direct application and shall be directly applicable in all Member States. Therefore, because of its nature and its purpose within the system of sources of Community law, it has direct effect and is capable of creating individual rights which national courts must protect."

Commission v. Italy Case was about the failure of obligation of Italian Government about introducing a system of premiums for slaughtering cows and for withholding milk products from the market. The ECJ said that[204]:

"Regulations are directly applicable in all Member States and come into force by virtue of their publication in the Official of the Communities, as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty.

Consequently, all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community.

The default of the Italian Republic has thus been established by reason not only by of the delay in putting the system into effect but also of the manner of giving effect to it provided by the decree."

By virtue of direct applicability, the regulations create individuals' rights against other individuals and Member States and also regulations are implemented for the general objective and purpose against national legal provisions; this pre-emptive quality of regulations generally occur in the context of common agricultural policy in case of incompatibility of national legislation with the legal regime established by a Community regulation.[205]

Amsterdam Bulb Bv. v. Ornamental Plant Authority Case was about the interpretation of the Regulations which were concerned about the system of minimum prices for exports of flowering corms, bulbs and tubers to third countries. The concern

[202] Case C- 34/73 *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze* [1973] ECR 981, paragraphs 10 and 11
[203] Case C-93/71,*Orsolina Leonesio v. Ministero dell'agricoltura e foresto (Italian Ministry of Agricultural and Foresty*) [1972] ECR 287, par. 5 (2)
[204] Case C- 39/72, *Commission v. Italy [*1973] ECR 101, paragraphs 17 and 18
[205] Wyatt and Dashwood, p.36

regulation prohibited the export to third countries at a price lower than the minimum price. The Court ruled that: [206]

> "The direct application of a Community regulations means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.
>
> By virtue of the obligations arising from the Treaty, the Member States are under a duty not to obstruct the direct effect of Community law.
>
> A common organization of the market in a specific sector the Member States are under a duty not to take any measure which might create exemptions from them and affect them adversely.
>
> In the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals, the Member States are component to adopt such sanctions as appear to them to be appropriate."

On the other hand, it sometimes could be possible to be adopted measures by the Member States. In the *Azienda Agricola Monte Arcosu Srl Case,* the ECJ stressed this point: [207]

> *"*Although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States."

In *Antonio Muñoz Case,* the plaintiff submitted a question about the direct applicability of regulation. The plaintiff claimed that it was necessary and sufficient for a Community provision which gave the rights to individuals this provision should be clear and unconditional; for the benefit of individuals, there should not need to "prove that the intent of the Community legislature was to benefit any particular class of the public or to confer subjective rights." On the contrary of this, the Commission asked the question that:

> "Whether the relevant provisions confer the right on an individual to bring an action to compel another individual to comply with the obligations imposed on him by the Community legislation must be determined in the light of the regulations in question and of the general principles of the common agricultural policy, of which they form part." [208]

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[206] Case C-50/76 *Amsterdam Bulb BV. v. Ornamental Plant Authority* [1977] ECR 137, paragraphs 4, 5, 8, 33

[207]Case C-403/98 *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna, Organismo Comprensoriale No 24 della Sardegna, Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)* [2001] ECR I- 013, par.26

[208] Case C- 253/00 *Antonio Muñoz y Cia SA, Superior Fruiticola SA and Frumar Ltd., Redbridge Produce Marketing Ltd.* [2002] ECR I- 7289, par.26

The Advocate General[209] issued an opinion and indicated that "a directly applicable provision of Community law normally has effect as between citizens." As the Commission correctly stated in its written observations for distinguishing between provisions of regulations that:

> "...It does not mean that every provision of a regulation confers on individuals rights on which they can rely before the national courts…
> There must be a link between the interest on which the person concerned is relying and the protection afforded by a provision of a regulation."

The relevant article of regulation was unconditional and sufficiently precise; formed part of the national legal order and had effect between citizens.

Consequently, the ECJ stressed the direct applicability of regulations in all Member States as determined in the article of 249. Because of their nature and their place in the system of sources of Community law, regulations confer the rights on individuals which the national courts must protect and give the full effect.

The outstanding points for regulation are:

- Direct effect is not exceptional and creates the connection between individuals and the Community.[210]
- Regulations are mandatory with all elements and direct applicability in all Member States.
- Regulations are taken to be part of the national legal systems automatically-given immediately force of law in all Member States without the need for separating national legal measures; Member States may need to modify their own law in order to comply with a regulation.[211]
- The Court has held that regulations are abstract normative measures, which are not directed towards a particular person or persons; while this reinforces the sense that regulations are analogous to domestic legislation.[212]

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[209] Opinion Advocate General Geelhoed *Case C- 253/00 Antonio Muñoz y Cia SA, Superior Fruiticola SA and Frumar Ltd., Redbridge Produce Marketing Ltd*., 13 December 2001, paragraphs 46 and 47
[210] Çetinkaya, p. 68
[211] Craig and De Burca, p. 113 and Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC*, First Edition, Sweet & Maxwell, London, 1980, p.26 and Stephen Weatherill, *Cases & Materials on EEC Law*, Blackstone Press, London, 1992, p. 49
[212] Craig and De Burca, p.113

- Regulations have the pre-emptive quality over the national legislation.

Article 249, subparagraph 3 indicates that a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

In the light of ECJ's judgment[213], the criteria of directives for direct effect are:

- A directive provision should have sufficiently precise meaning
- A directive provision should be unconditional provision
- Member State fails to fulfil the directive in national law until the end of the time period
- Member State fails to discretion

Every case, it shall be examined whether or not the directive is capable of having direct effect on the relations between Member States and individuals. In *Van Duyn Case*, the Court added the 'estoppel' reason that a Member State refused binding effect of the directive because of its own failure.[214] In *Ratti Case*[215], a directive enacted to address Italy but Italy did not implement its own duty within the specific period; at the end of this period, the directive gained direct effect automatically. An individual could rely on decision directly but not before this period; after that date, a Member State failed to fulfil and was estopped from relying on conflicting provision against individual.[216] At the end of this period, directives just only had vertical direct effect; so, an individual just only brought a case against Member State not against individuals.[217]

The ECJ ruled about the conditions for direct effect of directives in the Case 236/92: [218]

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[213] Case C- 41/ 74 *Van Duyn v. Home Office* [1974] ECR 1337; Case C- 148/ 78 *Pubblico Ministre v. Tullio Rutti* [1979] ECR 1629; Case C- 152/ 84 *Marshall v. Southampton and South West Hampshire Area Health Authority* [1986] ECR 723

[214] Craig and De Burca, p. 204

[215] Case C- 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629

[216] Craig and De Burca, p. 205

[217] Craig and De Burca, p. 206; Hartley, p. 216

[218] Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia and* others [1994] ECR I- 183, paragraphs 8 and 10

> "The provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly. A provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms."

Commission v. Germany[219] was about the failure of Germany to implement its obligation under the EC Treaty and the Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. *Sürül* case is a similar case of that case.

Commission v. Italy[220] was about the failure of the Italian Government to implement its obligations under the EC Treaty and the relevant articles of Directive 75/442 on waste disposal. This Directive required Member States to adopt certain measures to protect human health and the environment.

The ECJ reached the same conclusion for these two cases about the direct effect. The question whether or not a sufficiently clear and precise obligations were imposed by a Community provisions – in these case, directives were in subject- was separate from the question whether or not the relevant directives create specific rights for individuals. The ECJ held this point that: [221]

> "The case-law of the Court of Justice recognizes the direct effect of the provisions of a directive only where they confer specific rights on individuals. The unconditional and sufficiently clear and precise provisions of an unimplemented directive may be relied upon directly by individuals as against the State. The relevant articles of the directive, however, do not confer such rights. Since the Commission itself does not argue that the contested decision granting development consent failed to take account of the legal position of individuals protected by the directive, the latter' s provisions cannot have direct effect irrespective of whether they are unconditional and sufficiently precise."

In *Case Muñoz and Superior Fruiticola,* the Advocate General Geelhoed issued an opinion on directive and pointed out in the light of Article 249 EC, a directive could

[219] Case C- 431/92, *Commission of the European Communities v Federal Republic of Germany* [1995] ECR I- 2189
[220] Case C- 365/97, *Commission of the European Communities v. Italian Republic* [1999] ECR I- 7773
[221] "Commission v. Germany", par. 26 and "Commission v. Italy", par. 63

cause to claims against public authorities but not against other persons. He said that: [222] "the Court's case-law is intended to prevent a Member State from taking advantage of its own failure to comply with Community law and prevent to deprive individuals of the benefits of rights."

To sum up, a directive can not itself give obligations to individual contrary to a regulation; a directive needs to be given immediate effect.

Article 249, subparagraph 4 determined that a decision shall be binding in its entirety upon those to whom it is addressed. A decision can be addressed either Member States or individuals.[223] The Council and the Commission can take decisions as an alternative of the directives about insurance, agriculture, energy, monetary and financial matters, transport, external trade, customs legislation and production methods and characteristics of marketed products.[224] In *Grad Case*[225], the ECJ stressed that decisions can be effective directly.

In *Sevince Case*[226] and in *Sürül Case*[227], the ECJ stressed the same point about the same conditions that the provisions of a decision of the EEC-Turkey Association Council had the direct effect. The Court held that this decision had a precise and unconditional principle and was implemented before national court by individuals.

The issue of whether or not international agreements have direct effect has not determined in article 249 EC. The direct effect of agreements means that the capacity of them can be directly referred and enforced in the Member States' courts and the ECJ.[228]

[222] Opinion of Advocate General Geelhoed delivered in 13 December 2001,par. 40
[223] Çetinkaya, p.126 and Hartley, p. 228
[224] A.G. Toth, *Legal Protection of Individuals in the European Community*, Oxford, 1978, p. 65
[225] Case C- 9/ 70, *Franz Grad v Finanzamt Traunstein* [1970] ECR 825
[226] Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461, paragraphs 14 and 15
[227] C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, para.74
[228] Craig and De Burca, p. 193

In *International Fruit Company Case*[229], the Court held on this issue that:

> "It is also necessary to examine whether the provision of the General Agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure.
>
> For this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered."

Sürül Case was about the interpretation of the relevant decision of the Association Council under an association agreement on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families. The Social Court refused to pay the plaintiff's family allowances. The Court ruled about the direct effect of agreements that:[230]

> "An agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."

The same decision was held in *Gloszcuk Case;* namely; [231]

> "A provision in an association agreement concluded by the Community with no-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.
>
> That Agreement is a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals."

Hence, by the direct effect of the provisions of that agreement, other nationals who live in a host Member State, can rely on the right to apply to the courts of the host Member State; beside this, the authorities of host State have the competence to apply to those nationals their own national laws concerning the entry, staying and establishment.

Other cases are *Kondova Case*[232], *Barkoci and Malik Case*[233] and *Jany Case*[234]. To say the direct effect of certain provisions of agreement, the ECJ stressed the

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[229] Case C-21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraphs 19 and 20

[230] Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, par.60

[231] Case C- 63/99, *The Queen and Secretary of State for the Home Department v. Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2000] ECR I- not yet reported, paragraphs 30 and 38

qualifications that the provisions shall have clear, precise, unconditional terms, a prohibition preventing Member States from discriminating on grounds of nationality. If certain provisions carry on these qualifications, foreign individuals have the right to invoke before the courts of host Member States.

Hartley explained why the Court accepted direct effect of agreements between Community and non-Member States; Community has an obligation to provide and carry out the agreement with non-Member State; the implementation of the agreement for Community depends on the Member State; "if the Member States failed to give effect to the agreement, the Community embarrassed in its relations with the non-Member State."[235]

However, the GATT intended to bind Community law, the provisions were insufficiently precise and unconditional.[236] (The Court held that "it wasn't capable of conferring on citizens of the Community rights which they can invoke before the courts."). In *Polydor Case*,[237] the ECJ said that the provision about free movement of goods did not have direct effect because of the lack of create single market; in *Kupferberg Case*[238], another provision was found to have direct effect.[239] The Free Trade Agreement with Portugal, some provisions were found to have direct effect, some provisions were not. In Portugal v. Council case[240], Portugal claimed that the concerned Council decision was in breach of WTO rules and including GATT rules.[241] The Court held that:

> "Some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party don't recognize such direct application is not itself such as to constitute a lack of reciprocity in the implementation of the agreement.

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[232] Case C- 235/99 *The Queen and Secretary of State for the Home Department v. Eleanora Ivanova Kondova* [2001] ECR I- not yet reported, para.33
[233] Case C- 257/99 *The Queen and Secretary of State for the Home Department Julius Barkoci and Marcel Malik*, [2001]ECR I- 6557, para.31
[234] Case C- 268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I- 8615
[235] Hartley, p. 229
[236] Craig and De Burca, p. 194 and Horspool, p. 157
[237] Case C- 270/80 *Polydor Ltd & RSO Records Inc. v. Harlequin Record Shops Ltd. & Simons Records Ltd.* [1982] ECR I- 2519
[238] Case C-104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641
[239] Craig and De Burca, p. 195 and Horspool, p.157
[240] Case C- 149/ 96, *Portugal v. Council* [1996] ECR I- 8395, paragraphs 44 and 45
[241] Horspool, p. 157

> …WTO agreements which are based on `reciprocal and mutually advantageous arrangements…"

As a result, certain international agreements whether or not has direct effect depend on the two conditions. First one is, they should be unconditional and sufficiently precise; and the second condition is, although the provisions are unconditional and sufficiently precise, they can not be implemented if they have a lack of reciprocity. If they are reciprocity, they have direct effect to being satisfied both national law and the EC law. If an international agreement which Community is party is about to either air law or space law or intellectual property, these agreements do not have the direct effect.

To sum up, Ojanen indicates the modern understanding of the concept of direct effect:[242]

> - "The conferring of rights on individuals by Community law
> - The right of the individual to invoke before a national court, but only for the purpose of protecting one's individual right under Community law but also for the purpose of challenging the compliance of a Member State measure with Community law.
> -The duty of a national court to protect effectively the rights of individuals under Community law.
> -The duty of a national court to take into account or consideration Community law as a standard of judicial review of national law"

Consequently, the principle of direct effect constitutes an important step within the constitutional process of Union law to create the individuals' rights against the Member State if this Member State shall not implement the Community law in national legal orders. When treaties entry into force, they do not need to further implementation and they automatically effect directly and create individual rights. It shows the 'self-executing' qualification. 'Self-executing' character of Treaties serves the aim of constitutionalization. Hence, Community law enforces Member States to change their laws. Through the principle of direct effect, the provisions of Community law can apply directly effective within the national legal orders.

Moreover, the principles of direct effect and direct applicability have infracted of the hierarchy of norms; by virtue of that, there is no hierarchy between the provisions of

[242] Ojanen, p. 1264- 1265

regulations, directives and decisions. Hence, individuals are protected by the hierarchical norms. By providing the constitutional relationship with individuals, the principle of direct effect creates an opportunity for individuals to become a subject of EC law and to become a European demos. "So, the principle of direct effect is the result of democratic ideal and modern constitutional order."[243]

c. The Principle of Conferral Competence

Since 1950s, Community's powers and the relationship between its powers and its component Member States have been the legitimate issue; in the Nice Summit, the need of a more precise delimitation of competences between the EU and the Member States was put forward.[244] The Declaration on the Future of the European Union, Annex IV to the Treaty of Nice, SN 533/00 " how to establish and monitor a more precise of delimitation of competences between the European Union and the Member States, reflecting the principle of *subsidiarity.* " However, making the Kompetenz- Kompetenz (means that who is the final arbiter for competence) was not suggested in the text of the Nice Declaration; the reason for this is the majority of policy fields fall within the shared competence between the Member States and the EU; hence, "this reality seems to defeat one of the purposes of the Kompetenz- Kompetenz, which would be to prevent the encroachment by one of the level of government on the protected powers of the other."[245]

To achieve the European integration, transferring of competence from the national level to the European level should be needed and the competence issue is involved into the agenda of constitutional policy.[246]

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[243] P.Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law", 1983 in Craig and De Burca, p. 184

[244] Grainne De Burca, *Setting Constitutional Limits to EU Competence*, Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2001/02, Faculdade de Direito da Universidade Nova de Lisboa, p.1

[245] Grainne De Burca and Bruno De Witte, *the Delimitation of Powers between the EU and the Member States*, EUI, Robert Schuman Centre of Advanced Studies, Florence, 2001, p.8 http://www.eui.eu/RSCAS/e-texts/CR200103.pdf, available in March 2009

[246] Arthur Benz and Christina Zimmer, *The EU's Competences: The 'Vertical' Perspective on the Multilevel System, Living Reviews in European Governance*, Volume 3, No.3, Published by Connecting Excellence on European Governance (CONNEX) and New Modes of Governance (NEWGOV), 2008, p.5, http://www.astrid-online.it/rassegna/14-07-2008/studi--ric/BENZ_ZIMMER_LivRev_30_06_08.pdf:, available in March 2009

The ECJ has never attracted special attention to determine a complete doctrine of the division of powers between the EC and Member States; however, in the fields of European constitutional law, such as the enforcement of EU law and the protection of human rights, the ECJ cited the duties of Member States. By virtue of that the ECJ "has contented itself with incidental interventions*"*; such as in the case of tobacco advertising and recently, the ECJ deals with the competence issue.[247] Moreover, "the allocation of competence would not only depend on constitutional rules but also on Member States' decisions on "enhanced cooperation"; however the Member States can not decide which competence belongs to the EU and which competence belongs to the Member States.[248] The competence of the Community should base upon Treaty articles.[249]

To be used the competence by the Union, it should be envisaged and arranged by the founding treaties; the using of the competence granted by the founding treaties means 'conferring competence principle' and this principle is based on positive constitutional validity principle.[250] Also, this principle is clearly accepted by the ECJ; the ECJ held that:

> "The European Economic Community is a community, based on the rule of law inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty."[251]

The important point for transferring of competence is Member States transfer their competence and part of national sovereignty to the supranational power.[252] In the aspect of constitutionalization, Member States transfer their competences to the European Union; not delegate their competence. Hence, Member States have no possibility to take the conferral competence back. Competences of Member States in the EU become limited. Moreover, the ECJ emphasized "the constitutional ladder that

[247] De Burca and De Witte, p.2
[248] Benz and Zimmer, p. 6
[249] Craig and De Burca, EU Law, p.122
[250] Armin Von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform,* CMLRev, Volume 39, Number 2, 2002, p. 230- 232
[251] Case 294/83 *Parti Ecologiste Les Vert v. European Parliament* [1986] ECR 1339, par.23
[252] Benz and Zimmer, p. 11

power would be implied in favour of the Community where they were necessary to serve legitimate ends pursued by it."[253]

Article 5 of the EC Treaty arranges the fundamental principle of legality of the Community and this article is the establishing exclusive norm. Article 5 is about the conferral competences in regard with the first pillar; while there is no article about the Union competence in the EU Treaty; Alan Dashwood explained this difference like that:

> "These are fields in which the limitation of Member States' autonomy has not gone very far, so it is less important, in order to preserve the constitutional balance, for the powers exercisable through the institutions of the Union to be clearly demarcated."[254]

According to article 5, paragraph 1 of the EC Treaty, the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it. Article 5 of the ECT (ex article 3b) involved three principles; these are the exclusive and non-exclusive competence, *subsidiarity* and proportionality. Article 5, paragraphs 2 and 3:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of *subsidiarity,* only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

When the exclusive competence is in the case, only the EU has the power to enact and the Member States have no power to enact. "The exclusive EU competencies initiate pre-emptive norms that exclude Member State legislative competency."[255]

Article 5 mentioned about the exclusive and non- exclusive competence. The detailed arrangement in which area Community has exclusive competence or in which area Member States have competence or in which area, both of them have competences

[253] J.H.H.Weiler, *The Transformation of Europe*, The Yale Law Journal, Vol.100, No.8, Symposium: International Law, June 1991, p.2416, http://www.jstor.org/stable/796898, accessed on 31/03/2009
[254] Alan Dashwood, *States in the European Union*, 23 ELRev. 201, 210, 1998 in De Burca and De Witte, p.2
[255] Orebech, p. 126

are found in the articles of EC Treaty. Notwithstanding it is so difficult to undertake all competences of the European Union or the European Communities into the legal text.[256]

Nowadays, the EU has exclusive authority on the issue of the common policies.

> "The instrument for unification and approximation is acquis communataire, the common EU law; by virtue of that the unification is more comprehensive and compulsory. EU legislation has pre-emptive — and not only lex superior — force which forecloses Member States from any form of legislation."[257]

The contrary of the construction of American dual federalism, the competence rules of European Union are only the functions of legitimate and judicial functions which mean the controlling of the competence rules.[258] Competency consists of the legislative, executive, and dispute settlement power; Orebech defined the EU as a de facto federation because the EU has competence in the spheres of common monetary policy, foreign and security policy, an upcoming defence policy, and common market policies of trade, customs, transportation, and agriculture.[259]

The articles granting the exclusive competence to the EU are:

- One of them is article 26 about the Customs Union.

Article 23 arranges the prohibition the customs duties on imports and exports, all charges having equivalent between Member States and the adoption a common customs tariff for the relationship with third countries. Article 26 determines that Council has the exclusive competence to fix the Common Customs Tariff acting by a qualified majority on a proposal from the Commission.

- Next is article 106 of the EC Treaty about the field of monetary policy.

According to this article:

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[256] From the Secretariat to the European Convention, Contribution by Elmar Blok, Member of the Convention, *The Competences of the European Union*, Conv. 541/03 — Contrib. 234, Brussels, February 6, 2003, p. 3, http://register.consilium.eu.int/pdf/en/03/cv00/cv00541en03.pdf, available in April 2009

[257] Orebech, p.102

[258] Ingolf Pernice, *Rethinking the Methods of Dividing and Controlling the Competencies of the Union*, The Great Debate, the announcement offered to the Conference arranged by the Commission and the contribution of J.H.H Weiler and Michel Petite, Brussel; 15-18 October, 2001, p. 3

[259] Orebech, p. 102, 107

"1. The ECB shall have the exclusive right to authorize the issue of banknotes within the Community. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community.

2. Member States may issue coins subject to approval by the ECB of the volume of the issue. The Council may, acting in accordance with the procedure referred to in Article 252 and after consulting the ECB, adopt measures to harmonize the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Community."

- Another one is article 133 of the EC Treaty.

"Article 133: 1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.
The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules."

Besides having the express external competence, the EU has the exclusive competence in the field of the common commercial policy.

In *Opinion 1/94,* the Commission asked whether or not Community had competence to conclude the several international agreements in the light of article 133; such as General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs).

Article 133 provides that Community has competence to conclude an external agreement of a general nature; so, Member States do not have any competence on the common commercial policy.

The Agreement on Agriculture annexed to the Agreement establishing the World Trade Organization in order to ensure basis, a fair and market-oriented agricultural trading system and the Agreement on the Application of Sanitary and Phytosanitary Measures in order to minimize their negative effects on trade; so these agreements are concluded on the basis of article 133.

The Agreement on Technical Barriers to Trade annexed to the Agreement establishing the World Trade Organization provides the technical standards and procedures to international trade; by virtue of that this agreement falls within the area of common commercial policy on the basis of article 133. The ECJ ruled about the GATS that: "it follows that the modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy" [260].

The ECJ ruled about the TRIPS that this agreement includes the measure for the enforcement of intellectual property rights and has the provisions for the measures relating with the counterpart to forbid the release for free circulation of counterfeit goods; these measures are adopted by the Community in matters of commercial policy on the basis of article 133.

[260] *Opinion 1/94 on the WTO Agreement, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-5267, par.47

The EC Treaty does not contain express articles concerning the competence in the area of the right of establishment and the freedom to provide services; because of this, the ECJ emphasized that it can not be deduced from the articles; namely,

> "The Community has exclusive competence to conclude an agreement with non-member countries to liberalize first establishment and access to service markets, other than those which are the subject of cross-border supplies within the meaning of the General Agreement on Trade in Services (GATS), which are covered by Article 113 of the Treaty."[261]

The scope of the common commercial policy which the Community has competence includes all trade in goods, cross-frontier services with regard to GATS and counterfeit with regard to the TRIPS.

The ECJ ruled that:

> "Agreement on Agriculture annexed to the Agreement establishing the World Trade Organization and Agreement on the Application of Sanitary and Phytosanitary Measures can be concluded by the Community on the basis of Article 113 of the Treaty alone.
>
> …Community has sole competence pursuant to Article 113 of the EC Treaty to conclude an external agreement of a general nature, that is to say, encompassing all types of goods, even where those goods include ECSC products."[262]

The ECJ determined that the area of transport falls within the exclusive competence of the Community.

> "Even in the field of transport, the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. The Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules; consequently, the Member States have not lost all their powers to conclude international agreements in that sphere."[263]

1/94 Opinion reached a conclusion from evaluating together with implementing the common commercial policy and the competence of the EC; especially, in the area of

[261] "Opinion 1/94", par.81
[262] "Opinion 1/94", paragraphs VIII and 27
[263] "Opinion 1/94", par. 77

free movement of goods; it is unlikely that Member States have competence to act within the common commercial policy.[264]

In *Opinion 1/75*,[265] the ECJ stressed that the Community has the competence to adopt internal rules of Community law and has the power to conclude agreements with third countries in the field of common commercial policy as indicated in article ex. 113 (now article 133).

These two cases show that to provide the uniform application and to emphasize the supreme character of Community, Member States shall not have concurrent competence with the Community in the field of concluding the agreements on commercial policy. Just only, the Community has competence.

- Other article is article 37/2 of the EC Treaty.

This article is about the agriculture. Article 32/1 says that the agriculture and trade in agricultural products are involved within the common market and explained the meaning of the agricultural products: the agricultural products means the products of the soil, of stock farming and of fisheries and products of first-stage processing directly related to these products. Article 37/2 arranges who has exclusive right to dispose of the common agricultural policy:

> "Having taken into account the work of the Conference provided for in paragraph 1, after consulting the Economic and Social Committee and within two years of the entry into force of this Treaty, the Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organizations by one of the forms of common organization provided for in Article 34(1), and for implementing the measures specified in this title."

- Another one is article 83(1) of the ECT.

Article 83(1): "The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a

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[264] Yıldıray Sak, *Avrupa Birliği ile Üye Devletleri Arasındaki Yetki Paylaşımı Sorununa Hukuk Kuramı Yaklaşımı*, Marmara Üniversitesi Avrupa Topluluğu Enstitüsü Avrupa Birliği Hukuku Anabilim Dalı, Doktora Tezi, İstanbul, 2006**,** p. 117

[265] *Opinion 1/75 Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty*, [1975] ECR 1355,1365

qualified majority on a proposal from the Commission and after consulting the European Parliament."

Articles 81 and 82 are regarding about competition rules for the trade between Member States. The aims of the principles arranged in article 81 and 82 are to provide effective supervision and to simplify the administration as explained in article 83 (2/b).

- Lastly, some institutional arrangement spheres, such as the judicial proceedings rules of the ECJ and Court of the First Instance fall within the exclusive competence of the EU and Member States do not have competence to arrange.[266]

Part two of the Constitutional Treaty would include the competence lists in detail and by virtue of this arrangement, the Constitutional Treaty would become a simple, concise and transparent.[267] If the Constitutional Treaty had been ratified, it would have brought important changes for the system of competence.[268] The innovation would determine the competence categories which were never done in previously Treaties.[269] The competence types introduced by the Constitution were exclusive, shared and complementary.

According to article I-13 of the Constitution, the Union had exclusive competence in the areas of:

> (a) customs union;
> (b) The establishing of the competition rules necessary for the functioning of the internal market;
> (c) Monetary policy for the Member States whose currency is the euro;
> (d) The conservation of marine biological resources under the common fisheries policy;
> (e) Common commercial policy.
> (f) The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal

[266] Sak, p.117
[267] Blok, p. 5
[268] J.H.H. Weiler and Martina Kocjan, *Principles of Constitutional Law: The Relationship Between The Community, Legal Order and The National Legal Orders: Competencies*, Unit VI, Copyright J.H.H. Weiler & M. Kocjan, 2004/05, p.1, http://www.jeanmonnetprogram.org/eu/Units/documents/UNIT6-EU-2004-05.pdf, available on 03.01.2009
[269] Weiler and Kocjan,, p. 57

> competence, or insofar as its conclusion may affect common rules or alter their scope.

Through the way of enumerating the fields which Community has exclusive competence of the Community in the EC Treaty, Member States shall not have any competence to act in these fields. This circumstance shows the supreme character of Community law. This provides the contribution to the constitutionalization of the EU.

In *AETR Case,* the Commission applied for the annulment of the Council's proceedings regarding about concluding by Member States of the EEC concerning the work of crews of vehicles engaged in international road transport (AETR) on the basis of the article 230 of the ECT (ex. 173 EEC). The Council objected this claim. The relevant article entrusted the ECJ to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. This action could be brought by a Member State, the European Parliament, the Council or the Commission on grounds of a lack of competence, an infringement of an essential procedural requirement, an infringement of this Treaty or of any rule of law relating to its application, or a misuse of powers. The Commission claimed that article 75 of the EEC gave the Community competence to implement the common transport policy in the sphere of external relations and this article did not extend to the conclusion of agreements with third countries. The Council opposed that the competence to conclude the agreements with third countries could not be alleged in the absence of an express provision in the Treaty. Upon the arguments, the ECJ concluded that: [270]

> "In the absence of specific provisions of the treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy - a category into which, essentially, the AETR falls - one must turn to the general system of community law in the sphere of relations with third countries."

The matter of transport falls within the exclusive competence of the EC and the objectives of the Community by virtue of taking place on the EC territory. To determine

[270] Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1971]ECR 263, 274, par.12

the Community's competence to conclude agreements with third countries should be examined the whole field of objectives of the Treaty. The ECJ ruled that:[271]

> "Such authority arises not only from an express conferment by the treaty - as is the case with articles 113 and 114 for tariff and trade agreements and with article 238 for association agreements - but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions .
>
> Each time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*."*
>
> …These community powers exclude the possibility of concurrent powers on the part of member states, since any steps taken outside the framework of the community institutions would be incompatible with the unity of the common market and the uniform application of community law."

The point of this case's contribution to the constitutional principle, the Community has the exclusive competence to conclude an international agreement with third countries even if the Treaty does not confer this competence expressly. In the event of a lack of the express competence, it should be examined the whole objectives of the Treaty. The possibility of concurrent competence on the part of the Member State was rebutted on the grounds of the unity of the common market and the uniform application of Community law. The ECJ emphasized expressly that if Member States took any act within this field, this act would be incompatible with the Community law.

The ECJ emphasized this point in every case that the competence to conclude an international agreement may either flow an express competence envisaged in the Treaty or flow implicitly from the provisions.[272]

In this case, we meet the implied competence. In this regard, there exist two formulations for implied competence; these are narrow and wide formulations.

> "According to the narrow formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the exercise of the former; according to the wide formulation, the

[271] AETR Case, paragraphs 16, 17 and 31
[272] Craig and De Burca, p. 129

> existence of a given objective or function implies the existence of any power reasonably necessary to attain it."[273]

In the light of this explanation, after using the broader meaning of competence, the field which this competence is used belongs to the Community while after using the narrow meaning of competence, the field which this competence is used does no longer belong to the Community; the Community uses and exhausts it. The significant point for broader meaning of implied competence is that it should be proportionate and necessity between the relevant objectives and the relevant competence.

In Opinion 2/94, the ECJ came across the question whether the Community had competence to be a part of the European Convention on Human Rights (ECHR). Any Treaty article regulates the competence to the Community institutions to adopt rules on the protection of human rights expressly or implicitly. The ECJ applied the way of "filling the gaps or taking competence by itself."

Article 5/1 of the EC Treaty arranges the legal base for the Community to use competence entrusted in the Treaty. Article 308 uses together with the article 5/1 in the ECJ decision and doctrine; if incompetence circumstances are came into being, the institutions of the EU and the ECJ takes competence by themselves by using the way of interpretation laying down a kind of filling the gaps with using the articles of treaty and based on the objectives of the Treaty.[274] The Treaty of Rome contained the same provision on filling the gaps; article 235.

> "Article 308: If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[273] Craig and De Burca, p.123
[274] Sak, p. 111

Beside article 308, Craig and De Burca mentioned the broader legislative provisions, like article 94 and article 95 (ex. articles 100 and 100a) relating with harmonization of laws. [275]

"Article 235 is the elastic clause of the Community- its "necessary and proper" provision."[276]

The outstanding case about article 308 is Opinion 2/94. The importance of this case about the implied competence is to bring a limit for using an implied competence.[277] The Court held that:

> "That principle of conferred powers must be respected in both the internal action and the international action of the Community.
>
> Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect.
>
> 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.
>
> In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession." [278]

Thus, the limit for creating an implied competence is article 308, filling the gap. Any provisions granted the express or implied competence to the Community institutions, to be carried out the functions of the Community and to achieve the objectives of the Treaty, the procedure to be applied is article 308, 'filling the gaps'.[279]

The Court emphasized that:

> "That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions, whose effect

[275] Craig and De Burca, p. 125
[276] Weiler, *the Transformation of Europe*, p. 2443
[277] Sak, p. 109
[278] *Opinion 2/94, Accession of the European Communities to the European Human Rights Convention*, [1996] ECR 1759, paragraphs from 24 to 28
[279] Piet Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, OUP, 2004, p. 84

would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."[280]

The objectives are open-textured by their nature.[281] The institutions interpret "the objectives of the Community" widely in order to ensure every objective within the general framework of the Treaty; for instance, the adoption of the Regulation establishing a European Union Agency on Fundamental Rights.[282] This Regulation arranges the founding principles which the European Union shall respect; some of them are human rights and fundamental principles when implementing the Community law.[283] However, J. Weiler explained this issue as following:[284]

> "In a variety of field, including, for example, conclusion of international agreements, the granting of emergency food aid to third countries and creation of new institutions, the Community made use of Article 235 in a matter that was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense."

The ECJ explained when the article 308 can be used; namely,

> "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."[285]

In the light of article 308 and the Opinion 2/94, the conditions for taking competence by Community itself are:

- Taking competence by Community itself should be realized in the course of the operation of the common market.
- The Community should attain one of the objectives of the Community.
- No specific provisions of the Treaty confer on the Community institutions express or implied powers to act.

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[280] "Opinion 2/94", par.30
[281] Weiler, *the Transformation of Europe*, p.2444
[282] Europa Press Releases Rapid, *Scope of Article 308 of the EC Treaty,* Opinion of the Legal Service, European Council, 11198/07, JUR 261, DOC/07/4, Brussels, 22 June 2007, para.1, http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/07/4&format=HTML&aged=0&language=EN&guiLanguage=en, available on 18 April 2009
[283] Council Regulation No 168/2007 of 15 February 2007, OJ L53, 22.2.2007 in Official Journal of the Council, available on 19 April 2009
[284] Weiler, *the Transformation of Europe*, p. 2445
[285] "Opinion 2/94", par.29

- The Council shall take the appropriate measures acting unanimously on a proposal from the Commission and after consulting the European Parliament. So, this article shall not cover the area of the Council's single transaction.[286]

Alan Dashwood interpreted article 308 as an 'evolutionary way' and explained this point as following:

> "…reflecting the change in the nature of the Community; at this time of day, it should be understood as authorizing the creation of supplementary powers perceived as necessary not just for the purposes of the common market in which the Treaty allows action to be taken by the Community."[287]

In the cases of *Edicom*[288], *Biotechnological Directive*[289] and *Tariff Preferences*[290], the ECJ stressed that article 308 would be used only if any other provisions did not grant the competence to adopt the measures; in both these two cases, the relevant articles entrusted the Community and so there was no need to adopt the measures on the basis of the article 308.

Dashwood associated the *Opinion 2/94* with the *Yusuf/Kadı*[291] cases; this is a conflict issue in the doctrine. Dashwood explained this:[292]

> "A special mechanism is provided for by Article 60 and Article 301 EC making it possible for the necessary legal steps to be taken under the EC Treaty, in order to implement a decision of the Union's common foreign and security policy (CFSP) imposing financial or economic sanctions on a third country. Since those Articles do not explicitly authorize so-called 'smart sanctions' aimed at individuals, Regulation 881/2002 was given Article 308 as an additional legal base. In holding this was a proper use of Article 308 the Court of First Instance made no attempt to establish any connection with 'the course of the operation of the common market'. That is a further indication of the acceptance of the European judicature of the whole Treaty thesis of the scope of Article 308."

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[286] Sak, p. 111

[287] House of Commons European Scrutiny Committee, *Article 308 of the EC Treaty*, Twenty-ninth Report of Session**,** 2006- 2007, published on 13 July 2007 by authority of the House of Commons, London, the Stationery Office Limited, p.8, http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmeuleg/41-xxix/41-xxix.pdf

[288] Case C-271/94 *European Parliament v Council of the European Union* [1996] ECR I-1689

[289] Case C-377/98 *the Netherlands V. European Parliament and Council of the European Union* [2001] ECR 7149

[290] Case C-45/86 *Commission of the European Communities v Council of the European Communities* [1987] ECR 1493

[291] Case T-306/01 *Yusuf and Al Barakaat International Foundation / Council and Commission* [2005] and Case T-315/01 *Kadi / Council and Commission* [2005]

[292] House of Commons European Scrunity Committee, p. 8-9

Article 308 is led to adopt the measures – regulations, directives, decisions- and led to provide flexibility.[293] The Constitution of European Union also included the same provision with the article 308, used the title of flexibility clause. Article I-18 of the Constitution did not include the condition of realizing in the course of the operation of the common market.

> Article I-18: Flexibility clause
>
> 1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
>
> 2. Using the procedure for monitoring the *subsidiarity* principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonization of Member States' laws.

To sum up, despite lacking of any provision granted the express or implicit competence to the Community to act, if the area falls within the objectives of the Community, the Community shall take the necessary action. The institutions put the wide interpretation on the concept of the objectives of the Community; so, the Community becomes to have wide competence fields.

Moreover, if the area which is beyond the scope of the exclusive competence and the necessary action can not achieved by the Member States and this can be achieved better by the Community, the Community shall take the action under the principle of *subsidiarity*. The principle of *subsidiarity* arranges the lawfulness of the exercise of the Community competence.[294] Previously, various definitions were put forward on the issue of *subsidiarity;* although none of them provided effective demarcating institutional responsibilities:[295]

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[293] Weiler, *the Transformation of Europe*, p. 2450
[294] Craig and De Burca, *EU Law*, p. 132
[295] James M.Buchanan, Karl Otto Pöhl, Victoria Curzon Price, Frank Vibert, Introduction by Graham Mather, *Europe's Constitutional Future, Institute of Economic Affairs*, First Published, Printed in Great Britain, 1990, p. 118-119

- The European Parliament' s definition was " the Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the member states acting separately, in particular those whose execution requires action by the union because their dimensions or effects extend beyond national frontiers." (Draft Treaty Establishing the European Union adopted by the European Parliament on 14 February 1984, article 12)
- The Commission's definition was "this is the principle which states that decisions should be taken as near as possible to the point of application. Decisions which can be taken at a local level should be taken there and not a regional level."

Previously, the principle of *subsidiarity* was originally found in the environment provisions; the Maastricht Treaty put the principle of *subsidiarity* into the general provisions of the Treaty and now, the relevant provision ensures the sufficient guidance.[296] Article B of the TEU granted the competence to respect the principle of *subsidiarity.* Generally, this principle's field of implementation is in the federal states; the principle of *subsidiarity* can be defined as "to inform the development of European federal democracy."[297] Besides, this principle has been implemented at the Community level. The principle of *subsidiarity* added to the EC Treaty with Article 5/2 (ex.3B):

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

The aim of using the competence in the most appropriate level, called the principle of *subsidiarity* is to control whether or not institutions act decision-making

[296] *The Future of the European Union Environment and Sustainable Development,* Contribution to the Convention on the Future of the Europe, 11 July 2002, http://www.congde.org/ant/documentos/convencion/Environmental%20NGOs%20EN.doc, par.7, available on 18 April 2009

[297] Andrew Duff, 'Subsidiarity within the European Community', A federal Trust Report, London, 1993: in Paul Graig and Grainne De Burca, *the Evolution of EU Law*, First Published, OUP, UK, p.29

criteria appropriately at the time of using the legislative activity on the non-exclusive type of competence of the EU.[298]

In the light of article 5, to use the competence in the most appropriate level, firstly, the Community shall act within the limits of the competence granted by the Treaty as taking into account the implied competence and flexibility clause. Secondly, when using the principle of *subsidiarity* in an area, this area shall be beyond the scope of the exclusive competence of the EU. There are two different opinions for the term of the exclusive competence; namely, A.G. Toth defended the broad view for the exclusive competence and stressed that exclusive competence takes place in where the powers have been transferred from Member States to the Community; according to him, the areas of free movement of goods, persons, services and capital; the Common Commercial Policy; competition; the Common Agricultural Policy; the conservation of fisheries and transport policy, the principle of *subsidiarity* could not be implemented "irrespective of whether the Community has actually exercised this power" and also the principle of *subsidiarity* could not be applied to the newer areas, such as environment, economic and social cohesion, education and vocational training, consumer protection and Social policy.[299] On the other hand, J.Steiner thought in favour of narrow view and said that:[300]

> "One is forced to conclusion that the only areas in which the Community has exclusive competence for the purposes of Article 3b are those in which it has already legislated… Surely the competence of Member States ends, not as Toth suggests, where the competence of the Community begins, but where its power has been exercised… The fact that the competence to act, even to act comprehensively, has been granted to the Community by the Treaty does not, and surely can not mean its competence to act in these areas can not be subject to the *subsidiarity* principle*."*

There is no clear division of exclusive or non-exclusive competence identified into the Treaty; besides, Member States has evaluated some sort of complementary or common competence in favour of their exclusive competence area in many cases or when the secondary legislation of EC are issued and this evaluation has caused to fall

[298] Sak, p. 123
[299] Craig and De Burca, *EU Law*, p. 134
[300] Craig and De Burca, *EU Law*, p. 134

the issues of education, public security and health within the competence of Member States; however in these areas, the principle of *subsidiarity* can not be applied.[301]

> "*Subsidiarity* must direct a genuine legislative inquiry into the consequences of the Community's refraining from taking a measure that it may legitimately take, in deference to the Member States' capacity to accomplish the same objectives; one's judgment about whether a measure comports with the principle of *subsidiarity* is a profoundly political one."[302]

To reduce the political structure, in 1999, the protocol on *subsidiarity* added to the Treaty of Amsterdam. The Protocol on the application of the principles of *subsidiarity* and proportionality, Protocols annexed to the Treaty of Amsterdam regulates the criteria for implementation of these principles. Article 3 of the Protocol confirmed article 5 of the EC Treaty for these issues above:

> "… The criteria referred to in the second paragraph of Article 5 of the Treaty shall relate to areas for which the Community does not have exclusive competence. The principle of *subsidiarity* provides a guide as to how those powers are to be exercised at the Community level. *Subsidiarity* is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified."

Article 5 brings another criterion; this is, if the objectives of the proposed action can not be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community, the Community can implement the *subsidiarity* principle and Community shall pay attention not to go beyond the objectives of the Treaty. Article 1 of the Protocol confirms that issue that "it shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty."

The criterion for the appropriateness shall first be determined at the level of Member State; if this determination is concluded affirmatively, Member States will use the competence. If the conclusion of determination is negative, on the other words, the proposed action can not be sufficiently achieved by Member States; we should go to

[301] Sak, p. 123
[302] G.A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and in the United States"*:* in Weiler and Kocjan, p.130

other step. This step is to determine whether or not the scale or effects of the proposed action can be better achieved by the Community. If the action is achieved by the Community better, the competence will belong to the Community; if the Community can not be achieved, the competence turns back to Member States. Article 5 of the Protocol brings clear guidelines to determine in which level the objectives of the proposed action can be sufficiently achieved.

> "For Community action to be justified, both aspects of the *subsidiarity* principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
> - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
> - action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."

Bermann explained the functions of *subsidiarity* in four different ways:[303] One of the functions is legislative function; the Commission before proposing a rule, the Parliament or other relevant institutions (such as Economic and Social Committee) before explaining their opinion on a proposed rule and the Council before accepting a proposed rule determine whether or not the measure is compatible with the principle of *subsidiarity*. Second is interpretive function; having adopted the proposed rule by the Commission and the Council, Court of Justice or the Member States officials interpret the relevant measure. Third one is adjudicatory function; it means that:

[303] Bermann, p. 149-150

> "Compliance with the principle of *subsidiarity* may be regarded as an element of the legality of Community action. The last one is performing a confidence- building function; the principle of *subsidiarity* can perform a confidence-building function by reassuring the constituent states, and notably the regions and other sub communities within the states, that their distinctiveness will be respected at the European Community level."

Performing this function is necessary for the legitimacy of the Community measures.

The important question to answer is whether the principle of *subsidiarity* depends on any judicial review.

The protocol on *subsidiarity* gives the competence to the each institution to ensure the compatibility of their competence to the principle of *subsidiarity.* Article 3 of the Protocol held that: "the principle of *subsidiarity* does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice."

Thus, as the ECJ goes on its interpretative activity on the competence of the EC, the ECJ shall not take attention the principle of *subsidiarity* in that aspect and article 3 shows the division between the judicial activity of the ECJ and the legislative activity of institutions.[304]

The ECJ makes the judicial review in two ways. First is, the ECJ controls the proposed action whether or not to fall within the exclusive competence of the EC. Second control is the control of proportionality. Second control concerns whether or not the EC institutions comply with the proportionality criteria of the principle of *subsidiarity* or which degree the institutions comply with when making the legislative acts.[305] The criteria are indicated in article 5/2 of the EC Treaty and the Protocol as I mentioned above.

[304] Sak, p. 125
[305] Sak, p. 126

The ECJ made the judicial review in some cases. One of them is *Working Time Directive Case*. The UK claimed that the relevant article (ex. article 118a; now 138) and the Directive about working conditions improving health and safety of workers violated the principle of *subsidiarity*. The UK's arguments were this area could not be satisfactory arranged by national measures; also the national measures would conflict to the EC Treaty; significantly damaged to the interests of the Member States and could be achieved better at the Community level. The relevant article should have been interpreted in the light of the principle of *subsidiarity*. The ECJ concluded that:[306]

> "The responsibility of the Council, under Article 118a, was to adopt minimum requirements so as to contribute, through harmonization, to achieving the objective of raising the level of health and safety protection of workers. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action."

In *Germany v. Parliament and Council Case*, the Federal Republic of Germany brought a case before the ECJ to require the annulment of Directive 94/19/EC of the European Parliament and of the Council deposit-guarantee schemes in the Community. Article 3(1) of the Directive brought an obligation on credit institutions to join a guarantee scheme and article 4(1) of the Directive imposed the export prohibition that depositors at branches set up by credit institutions in Member States other than those in which they are authorized could not exceed the cover offered by the corresponding guarantee scheme of the host Member State. Germany argued that these implementations were incompatible to the Community measures and that implementation made difficult even impossible to pursue branches' activities in the host Member State. Germany claimed that the Community institutions should have given detailed reasons to explain why only the Community, to the exclusion of the Member States, was empowered to act in the area in question; despite that the Community failed to state the reasons on which it was based, as required by Article 190 of the Treaty. The Parliament and the Council explained in the recital of the Directive that**:** [307]

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[306] Case 84/94, paragraphs 46 and 47

[307] Case C- 233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I- 2405, par.26

> "Consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable' and that it was `indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community."

The ECJ concluded that the explanation of the Parliament and the Council was compatible with the principle of the *subsidiarity* and they implemented the obligation give reasons under Article 190 of the Treaty and an express reference to the principle of *subsidiarity* was not be required. The decision was taken before entering the Protocol on Subsidiarity annexed to the Amsterdam.

In *Biotechnology Patents Directive Case*[308], although this case was taken decision after entering the Protocol on Subsidiarity; the ECJ did not review the proportionality criteria in depth, like doing in the case 233/94.[309] The Netherlands brought an action before the ECJ for the annulment of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions. The Netherlands argued that this Directive infringed the principle of *subsidiarity* envisaged in the article 5 EC. The ECJ held that**:**

> "The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.
>
> Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point."

In *British American Tobacco Case*, manufactures in the UK brought the case on the bases for preliminary ruling for permission to apply for judicial review of 'the intention and/or obligation' of the United Kingdom Government to transpose the

[308] Case C- 377/98 *Netherlands v. Parliament & Council* [2001] ECR I-7079, paragraphs 32-33
[309] Sak, p. 129

Directive into national law. Four Member States joined that case in favour of the plaintiffs (Holland, Belgium, Sweden and France). Plaintiffs claimed that the Community did not take account of the principle of *subsidiarity* for the purpose of attaining the internal market. Some Member States brought an action against the Directive which aim was to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. (Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419, paragraph 86; Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, paragraph 35; Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, paragraph 15). Thereupon, the ECJ reviewed the compatibility to the article 5 of the EC and the Protocol on Subsidiarity. The Court cited that: [310]

> "The Directive's objective is to eliminate the barriers raised by the differences which still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection, in accordance with Article 95(3) EC.
>
> Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case."

The difference of this case from the previous cases is the ECJ put all relevant reasons of the relevant Directive into the text of the decision.[311]

The principle of *subsidiarity* was arranged in the Constitutional Treaty and in the Treaty of Lisbon too. The Constitutional Treaty regulated this issue in the part of Community competence. Article I-11 arranged that the limits of the competences are governed by the principle of conferral. Moreover, the use of Union competences is governed by the principles of *subsidiarity* and proportionality. The Constitutional Treaty extended the control of the compatibility of the demarcation of competences and also the principle of *subsidiarity*; the Protocol on the principles of *subsidiarity* and proportionality brought an early warning system covering the national parliaments.[312]

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[310] Case C- 491/01 *The Queen v.Secretary of the State for Health and British American Tobacco and Imperial Tobacco Ltd* [2002] ECR 137, paragraphs 181 and 182
[311] Sak, p. 130
[312] Weiler and Kocjan, p. 59

> "Article I-11/3: Under the principle of *subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of *subsidiarity* as laid down in the Protocol on the application of the principles of *subsidiarity* and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol."

The innovations were:

- The proposed action could not be sufficiently achieved by the Member States, either at central level or at regional and local level. So, instead of article 5(2) of the EC Treaty relating with the arrangement of the using the competence in the most appropriate level in two levels – Member States and the EU-, this arrangement divided the possible appropriate level into two levels for Member States: at central level or at regional and local level. [313]
- This article referred to the Protocol on the application of the principles of *subsidiarity* and proportionality annexed to the Constitutional Treaty.
- This article brought a competence to the national parliaments to ensure the compatibility of that principle with the procedure envisaged by the Protocol.

The Constitutional Treaty extended the application of *subsidiarity* and the role of Member States; namely, the Constitutional Treaty [314]

> - "increased information and transparency in relation to national parliaments (forwarding of Commission proposals, etc.);
> - assigned the new role to national parliaments, allowing them to deliver a reasoned opinion if they consider that the principle of *subsidiarity* has not been complied (early warning system) within six weeks from the date of transmission of a draft European legislative act."

The Treaty of Lisbon will bring article 3b instead of article 5 of the EC Treaty and the Protocol on the application of the principles of *subsidiarity* and proportionality. Article 3b/1 will be same with the relevant article envisaged by the Constitutional

[313] Sak, p. 133
[314] Weiler and Kocjan, p.60

Treaty that the use of the Union competences is governed by the principles of *subsidiarity* and proportionality. Article 3b/3 states that:

> "Under the principle of *subsidiarity,* in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of *subsidiarity* as laid down in the Protocol on the application of the principles of *subsidiarity* and proportionality. National Parliaments ensure compliance with the principle of *subsidiarity* in accordance with the procedure set out in that Protocol."

Every draft legislation will be involved a statement to explain why the proposal will be compatible with the principle of *subsidiarity.* The difference from the Constitutional Treaty is, national parliament or chamber of a national parliament will deliver a reasoned opinion on the incompatibility of the proposed action to the principle of *subsidiarity* within six weeks from the date of transmission of a draft European legislative act as indicated in article 6 of the Protocol of the principle of *subsidiarity* in Treaty of Lisbon (early warning system).

Article 7 indicates that the reasoned opinion on the incompatibility of the proposed action to the principle of *subsidiarity* should be taken one-third of the votes allocated in the national parliaments; then this will be reviewed by the Council, European Parliament and the Commission. Article 7/2: After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision. ("This procedure is commonly known as the yellow card"[315]) According to article 7/3, upon the national parliament gave reasoned opinion on the incompatibility of a proposed action, if the Commission originates this proposal which is subject to the qualified majority voting and co-decision of the Council and the European Parliament, the Commission will

[315] House of Commons Committee on European Scrutiny Thirty-Third Report, http://www.parliament.the-stationery office.com/pa/cm200708/cmselect/cmeuleg/563/56305.htm#n13, par.12, available on 12/04/09

decide to maintain, amend or withdraw the proposal. The Commission will submit to the European Parliament and the Council and national parliaments; if 55% of the members of the Council or a majority of the European Parliament thinks the incompatibility of the action to the principle of *subsidiarity,* the draft legislation will be failed. ("This procedure is commonly known as the 'orange card'."[316])

Finally, article 8 of the Treaty of Lisbon arranges that: "the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of *subsidiarity* by a legislative act."

To sum up, through the constitutionalization process, transferring the competence and the part of the national sovereignty to the EU shall constitute a touchstone. The competence of the EC shall base on the treaty provisions and the objectives of the treaty. The EC uses the express competence and in the event of an express competence, the EC uses the implied competence to reach the objectives of the treaty. In the event of an express or implied competence, the EC involves the procedure of filling the gaps and takes competence by itself in order to attain objectives of the Community. Furthermore, in areas which do not fall within its exclusive competence, the EC has still competence by using the competence in the most appropriate level; in other words, by invoking the principle of *subsidiarity*. Thus, the Community has wide competence fields to ensure the uniform implementation. The competences can be used under the single framework. The possibility of concurrent competence for the Member States is rebutted.

[316] House of Commons, par. 12

CHAPTER II: THE REACTION OF MEMBER STATES TO EU CONSTITUTIONALIZATION PROCESS

After ratification of the Maastricht Treaty, the claim of the ECJ to show itself as a final arbiter of constitutionality in Europe has became a subject of the Member States' highest court's judgments[317] and also, by these judgments, these courts have put forward their reactions on the constitutional process of the European Union and the Constitutional Treaty and the Treaty of Lisbon by their decisions.

A. GENERAL OVERVIEW OF MEMBER STATES ON EU CONSTITUTIONALISM THROUGH THE CONSTITUTIONAL TREATY

The Treaty of Rome can be characterized as a constitutional text; however, it was signed as an international treaty between sovereign states;[318] then in the Les Vert case, the ECJ classified the EC Treaty as a constitutional charter. Since the leading cases, especially, Van Gend En Loos and Costa& Enel, the ECJ created the principle of supremacy, direct effect of the EC Law and the principle of competence of EC to set the political and legal order and integration.[319] The issue of integration takes place under the idea of a written constitutional document in national legal order while in the European Union the issue of integrity is a contentious issue by virtue of including "the heterogeneous constituencies and causing to incremental evolution."[320] Integration has played a significant role on the EU constitution building. Integration should realize in three aspects:[321]

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[317] Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three Conception of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, CMLRev., Volume 36, 1999, p. 351

[318] Michael Longo, *The European Union's Search for a Constitutional Future*, the University of Melbourne, CERC Working Papers Series, No.3, 2001, http://www.cerc.unimelb.edu.au/publications/CERCWP032001.pdf, p.5, available in April 2009

[319] Jo Eric Murkens, *Essay: The Integrative Function of a European Constitution* (*Discussion of Chr. Dorau: Die Verfassungsfrage der Europäischen Union), 3 German Law Journal No. 2, 2002, http://www.germanlawjournal.com/article.php?id=134#text5, paragraphs 2-3, available* in April 2009

[320] Jürgen Bast and Philipp Dann, "European Ungleichzeitigkeit: Introductory Remarks on a Binational Discussion about Unity in the European Union": edited by Philipp Dann and Michal Rynkowski, , *The Unity of the European Constitution*, Germany: Springer, 2006,p. 3

[321] Michael Longo, *Constitutionalising Europe Processes and Practices*, Ashgate Publishing Limited, Great Britain, 2006, p. 17

- "One of them is political integration: is the creation of a union of states.
- Other is economic integration: is the abolition of trade restrictions among the members.
- Last one is legal integration: is the harmonization of law and adherence to the principle of supremacy of EU law over conflicting member state law."

Through the integration process, Member States improve a communal spirit and create a collective identity which makes them different from other community.[322] Maduro interpreted the integration of EU as below:[323]

> "European integration not only challenges national constitutions… it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution… European integration also challenges the legal monopoly of States and the hierarchical organization of the law (in which constitutional law is still conceived of as the 'higher law'.)"

The integration of the constitutionalism of Europe is applied through the principle of coordination, homogeneity and consensus;[324] however, the concept of integration comprises of the various counterparts; these are:[325]

- "Plurality and diversity: these are both representing valued principle of modern constitutional thought.
- Differentiation and variety: either mean a useful adaptation to a complex environment or a deviation from a given standard, depending on the context.
- Fragmentation and segmentation: cause to disorder and chaos or indicate some kind of structural defect of the polity."

Diversity in unity is valid but difference is the problems for European integration.[326] Article 1-8 of the Constitutional Treaty arranges the symbols of the Union; according to this article, the motto of the Union shall be: 'United in diversity'.

The process of European constitutional integration is one of the European Union objectives and based on a system of founding values which is common of the Member

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[322] Dieter Grimm, *Integration by Constitution*, Volume 3, Number 2&3, May 2005, OUP, p. 193, http://www.newschool.edu/tcds/wr09reader_europe/2_Grimm_IntegrationbyConstitution.pdf

[323] J.H.H Weiler, *On the Power of the World: Europe's Constitutional Iconography*, IJCL, Volume 3, 2005, OUP, p. 185 (quoted: Migule Maduro, *We The Court*, Hart Publishing, 1998, p. 175)

[324] Andrea Manzella, *Constitution and Unification*, Social Europe Journal, May 2005, http://www.social-europe-eu/fileadmin/user- upload/ Authors/Manzelaa 1-1.pdf, p. 21, available on March 2009

[325] Dann and Rynkowski, p.3

[326] Christine Landfried, *Difference as a Potential for European Constitution Making*, EUI, Robert Schuman Centre for Advanced Studies, European Forum Studies, EUI Working Papers, RSCAS No:2005/04, 2005, www. iue. it/RSCAS/ Publications/, p. 1, available in April 2009

States; such as democracy, equality, human rights, rule of law and the relationship between institutions and the idea of the European citizenship constitutes a step for integration; notwithstanding, three clauses are outstanding for integration of constitutionalism of Union with states: firstly, the clause of the principle of supremacy of Union legislation over the states' laws; secondly, the clause of the principle of pre-emptive which the Union has invoked in the event of conflicting matters; thirdly, the clause of the flexibility indicated in article 308 of the ECT and the article I-18 of the Constitutional Treaty.[327] In addition, the principle of *subsidiarity* plays significant role for integration.

> "In the process of European integration, constitutionalism is the prevailing form of power followed the claim of normative authority and is beneficial to solve the power issue between the Community and the Member States by determining the limits on the powers."[328]

There exists a debate on who has the ultimate authority and on whether or not Europe needs and can have a constitution.

If legitimacy of European polity is realized and this polity achieved the normative authority and political authority; in other words the principle of supremacy and direct effect and "the autonomous determination of the scope of actions" are succeed, the final authority between national polities and European polities must be solved.[329]

Some scholars are opposed to the constitutionalism and the European Constitution. On the contrary, some scholars are in favour of the constitutionalism and Constitution. Since 1957, some Member States, in especially France, United Kingdom and Denmark opposed to the idea of constitutionalism and national leaders, such as De Gaulle and Thatcher argued that "the Community remains a regime featuring intergovernmental cooperation, devoid of political unity."[330] Despite the opinion of national authorities, the ECJ achieved the process of constitutionalism by creating the

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[327] Manzella, p. 22 and 24
[328] Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism,* IJCL, Volume 3, Number 2&3, 2005, p. 337 and 342
[329] Maduro, p. 346
[330] Longo, *The European Union's Search for a Constitutional Future*, p. 14 and 15

constitutional principles, such as supremacy and direct effect of the EU law, the principle of *subsidiarity* and the implied competence as I mentioned above. Hence, the ECJ played an outstanding role in the integration and constitutional process and EU institutions correlates with the national institutions.[331] In the Brunner Case (Maastricht Decision)[332], the German Constitutional Court confirmed that view:

> "If a Council decision made in accordance with Titles V and VI of the Union Treaty should be implemented by a legal measure of the European Communities and constitutional rights were infringed as a result, then the European Court or alternatively the Federal Constitutional Court would offer adequate protection of those rights. Here, too, the Constitutional Court and the European Court are in a relationship of co-operation for the guarantee of constitutional protection, under which they complement each other."

About the issue of concrete constitution within the integration of constitutionalism, according to the European Commission Barometer Public Opinion in the European Union,[333] since 2001, support of the Constitutional Treaty has increased by 5 % points and 67% of all EU citizens aged 15 and over supported; 10% of EU citizens opposed to the constitution, the remaining 23% did not express their opinions. Different from the 2001 survey, the support rate has increased in many countries except Belgium (-2), the Netherlands (-1) and Portugal (no change); on the other hand the highest support rate realized in the UK (+ 14), Sweden (+11) and the Luxembourg (+10).

Although it has been nearly fifty years after concluding the Rome Treaty, as we seen below table, there is still no consensus for the future of the EU in Member States. The Community has evaluated from a basic customs union to a political and social organized union since last fifty years. However, some states forestalled this evolution by acting negatively or saying no to the referendums on approving treaties. Therefore, although the Member States governments' holds the control of the ship, it is very important to see where the passengers want to go. Below table is very important source for making right predictions on the future of the union.

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[331] Longo, *The European Union's Search for a Constitutional Future*, p.16
[332] *Manfred Brunner and Others v. The European Union Treaty* Cases [1994] CMLR 57, para.23
[333] European Commission Barometer Public Opinion in the European Union, Report Number 56, Release: April 2002, Fieldwork: October- November 2001, p.46,
http://ec.europa.eu/public_opinion/archives/eb/eb56/eb56_en.pdf, available in May 2009

Member States' public opinion about whether or not the European Union should have a constitution:

Should the European Union have a constitution?		
	% Should not	% Should
I	6	80
GR	14	78
S	9	76
NL	18	69
D	9	67
F	9	67
EU 15	10	67
L	13	67
B	14	65
E	9	64
A	10	64
IRL	6	62
UK	10	58
P	9	55
FIN	33	50
DK	34	50

Source: survey no. 56.2 - fieldwork October - November 2001 standard euro barometer 56 – fig. 3.9 in page 47 of the European Commission Barometer

Support for an EU constitution by knowledge about the EU (in %)[334]: 55 % of the low knowledge level, 73% of the Average knowledge level and 82 % of the high knowledge level supported the EU Constitution; however, 9% of the low knowledge level, 11% of the average knowledge level and 11 % of the high knowledge level opposed the EU Constitution.

French and Spanish Constitutional Courts, Finnish Parliament's Constitutional Law Committee, Belgium's Council of State and Estonia's Working Group thought that the Constitutional Treaty was an international treaty; not a constitution because this document did not alter the nature of the Union.[335] The grounds against a Constitution are:[336]

- "Lack of a common European identity
- Lack of demos

[334] Eurobarometer 56, p. 47
[335] Anneli Albi, "Introduction: The European Constitution and National Constitutions in the Context of Post-national Constitutionalism": in Anneli Albi and Jacques Ziller, *The European Constitution and National Constitutions, Ratification and Beyond,* Kluwer Law International, the Netherlands, 2007, p. 5
[336] Longo, *Constitutionalising Europe*, p. 149

- Lack of a receptive political culture
- EU is not a state"

The grounds for the opinion in favour of the Constitution are:[337]

- "The ad hoc treaty revision that has taken place through the IGC procedure has institutionalized a messy constitutional arrangement, which has largely by passed public approval.
- Ad hoc or piecemeal development of the EU's institutional structures will lead to anything like the grand design once envisaged.
- A formal constitution offers new possibilities for the protection of human and civil rights."

Weiler indicated that: "what Europe needs…is not a constitution but an ethos and telos to justify, if they can, the constitutionalism it has already embraced".[338] However, the European Constitutional Treaty has the distinctive effects:[339]

- "It has twofold legitimating effect with regard to the normative and political authority assumed by the EU and the constitutionalism developed to sustain it."
- It has the "mobilizing effect": the Constitutional Treaty would include the legal and political discourses; such as Europe's constitutional principles, founding rights and political organization.
- It has "discursive effect*"* because it depends on the constitutional discourse so it will be changed. The significant of the constitutional text is "to reconcile the political pluralism (different visions of Europe) with the viability of European project developed around a shared constitutional platform."
- It has "hermeneutic effect": "the adoption of constitutionalism as the form of power for the EU signifies a clear preference for constitutionalism as the appropriate hermeneutic framework for addressing the legal and political conflicts of the Union."

A discursive effect would acquire legitimizing power in the deliberative model.[340] Beside these distinctive effects; Jürgen Bast classified the Constitutional Treaty as a motor for legal and political unity and cited that the Constitutional Treaty took two functions upon itself; the first one is, "to stabilize of the Unity included the

[337] Longo, *Constitutionalising Europe*, p. 145
[338] Murkens, par.21
[339] Maduro, p. 353, 354 and 355
[340] Landfried, p. 7

identity of the institutions operating under the various founding treaties (single institutional framework) and the identity of the Member States that bear up the Union."[341] According to the article I-19 of the Constitutional Treaty, subparagraph 1:

> "1. The Union shall have an institutional framework which shall aim to:
> — promote its values,
> — advance its objectives,
> — serve its interests, those of its citizens and those of the Member States,
> — ensure the consistency, effectiveness and continuity of its policies and actions
> This institutional framework comprises:
> — The European Parliament,
> — The European Council,
> — The Council of Ministers (hereinafter referred to as the 'Council'),
> — The European Commission (hereinafter referred to as the 'Commission'),
> — The Court of Justice of the European Union.
> 2. Each institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The institutions shall practise mutual sincere cooperation."

Article I-5 (1) arranged the equality of Member States:

> "1. The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security."

Moreover, article I-10, subparagraph 1 arranged the citizenship of the Union: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

The second on is, "to promote new unity": included:[342]

> - "One Union, One Treaty": it means the codifying the EU and EC Treaties and transforming into a single constitutional text.
> - "One Union, One Personality: it means the formal abandonment of the pillar structure in favour of reestablishment under a single legal personality; a single organization."
> - "One Union, One Method: it means the formulation of overarching legal standards and the standardization of types of competence, legal instruments and law- making procedures; so called a unified legal regime."

[341] Jürgen Bast, " The Constitutional Treaty as a Reflexive Constitution": in Dann and Rynkowski, *the Unity of the European Constitution,* p. 15 and 16
[342] Bast, p. 17

The Heads of State and Government of 25 Member States signed the Treaty Establishing a Constitution for Europe in Rome on 29 October 2004; so the ratification process was started. The ratification process of constitution was firstly completed in Lithuania and Hungary; Italy, Spain, Germany, Belgium, Estonia and Finland looked the constitution affirmatively; on the other hand, France and the Netherlands opposed to the constitution and rejected while the United Kingdom, Ireland, Denmark, Slovakia, the Czech Republic, Poland and Sweden adopted the 'wait & see' approach.[343]

B. THE REACTION OF MEMBER STATES FOR CONSTITUTIONAL TREATIES

The reaction of Member States towards the confliction of Member States' acts and the European institutions' acts depends on the incorporation of EU law into the States' laws whether or not the States' are monist and dualist.[344] The differences between the monist system and the dualist system are first one is international law and domestic law are within one legal order in the monist system while international law and domestic law are different from each other in the dualist system. Secondly, in the monist system, international treaties can be applied after the parliamentary assent; hence they enter into national law per se while in the dualist system, an international law becomes a part of domestic law after incorporating expressly by a domestic law.[345] Either they shall change their constitutions or adopt an act, such as the UK adopted the European Communities Act in 1972.[346] Some Member States are dualist, for instance, the UK, Belgium, Germany, Ireland, Denmark, Sweden, Finland and Italy; some are monist, such as, France, the Netherlands and also, the Community law by virtue of having supreme character.

In the dualist system, the consequences of being different and independence of each legal order are firstly, valid norms within one legal order can not be implemented

[343] Albi and Ziller, p.4 and 5
[344] Josephine Steiner, *Textbook on EEC Law*, Third Edition, Blackstone Press Limited, 1992, p.42
[345] Steiner, p.42, Lawrence Collins, *European Community Law in U.K.*, Second Edition, Butterworths, London, 1980, p. 7; T. C. Hartley, *Constitutional Problems of the EU*, Hart Publishing, 1999, p. 134 and Andrew Charlesworth and Holly Cullen, *European Community Law*, First Edition, Pitman Publishing, 1994, p. 54
[346] Hartley, *Constitutional Problems of the EU,* p. 135

to other legal order; second one is it is unlikely to conflict between domestic law and international law.[347] In the monist system, the matter is who has the ultimate authority.[348]

By virtue of this matter, "some national courts do not accept the unconditionally monist view of the ECJ as regards the supremacy of EC Law."[349] The ECJ's view is that EU law is supremacy over the national law. Although some Member States' courts resist against the unconditional supremacy of Union law, Member States have accepted the supremacy of EU law implicitly by the ECJ for almost forty years.[350] Beside the supreme qualification, the Community law enacts laws which are applied and implemented within the Member States consistently.[351]

1. Maastricht, Amsterdam and Nice

I prefer to classify the reaction of some Member States depending on whether or not to be a founding state [352] and depending on their powers within the EU (for instance the UK and Spain). The common point why I chose these Member States is actions on whether treaties were compatible with their constitutions were brought before the Constitutional Courts in these Member States.

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[347] Hüseyin Pazarcı, *Uluslararası Hukuk Dersleri,* 1. Kitap, Gözden Geçirilmiş 10.Bası, Turhan Kitapevi, Ankara, 2004, p.20

[348] Pazarcı, *Uluslararası Hukuk Dersleri 1.Kitap*, p. 20

[349] Craig and De Burca, *EU Law*, p. 275

[350] Mattias Kumm and Victor Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union,* IJCL, Oxford Journals, Volume 3, Number 2-3, 2005, p. 474 and 477

[351] Longo, *Constitutionalising Europe*, p. 74

[352] The founding states are France, Germany, Italy, Belgium, Luxembourg and the Netherlands came together to ensure the coal and steel production and to avoid any competition in 1951.In 1973, the first countries to join to the Community were Denmark, Ireland and the United Kingdom; in 1981, Greece, in 1986 Spain and Portugal and in 1995 Austria, Finland and Sweden participated. In 2004, enlargement went on with Central and Eastern Europe Countries, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. In 2007, Bulgaria and Romania joined.

a) Germany

The Basic Law of the Federal Republic of Germany includes the article about the European Union. Article 23 specifies the participation of the Federal Republic of Germany to the European Union clearly and Germany can transfer its sovereign powers to the EU depending on this article.

> "Article 23/1: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of *subsidiarity*, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

Article 24 of the German Constitution (Basic Law for the Federal Republic of Germany) constitutes a legal basis for transferring the sovereign powers to international institutions. Decision of 18 October 1967, the Federal Constitutional Court emphasized that the EEC Treaty is the Constitution of the Community.[353] Article 25 ruled that the general rules of public international law form part of the federal law; they take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.

The Federal Constitutional Court made decisions on the supremacy of Community law; the first outstanding cases are *Solange I* and *Solange II*. These cases were generally about in the event of any confliction on fundamental rights and were about the issue of ultimate authority. A German import and export undertaking brought an action before the Administrative Court on the ground that the deposit system brought by the Community Regulation was incompatible with the German Constitutional law; the Administrative Court applied to the ECJ and required the preliminary ruling. The

[353] Rainer Arnold, 'Germany and the EU Constitutional Treaty': in Albi and Ziller, p. 60 (quoted: BverfGE [Decisions of the Federal Constitutional Court], Decision of 18 October 1967, Band (Vol.) 22, 293)

ECJ ruled that in *Solange I Case*:[354] "national rules of law could not take precedence over Community law because of the latter's autonomous status." Contrarily, the Administrative Court held that: "the European Community law can be examined for its compatibility with the Basic Law; it is not entitled to take precedence over national law in its entirety."[355]

Then the Administrative Court applied before the Federal Constitutional Court and asked whether or not the deposit system under Community law was compatible with the German Basic Law under article 100 (1) of the Basic Law. The German Constitutional Court stated that:[356]

> "Article 24 of the Basic Law deals with the transfer of sovereign rights to inter-state institutions. This cannot be taken literally. Like every constitutional provision of a similarly fundamental nature, Article 24 of the Basic Law must be understood and construed in the overall context of the whole Basic Law. That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law that is, it does not open any such way through the legislation of the inter-state institution. Certainly, the competent Community organs can make law which the competent German constitutional organs could not make under the law of the Basic Law and which is nonetheless valid and is to be applied directly in the Federal Republic of Germany.
> …Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism."

To sum up, German Constitutional Court adopted the supremacy of Community law but not unconditionally; the condition is, as long as (Solange means) the Community did not solve the concerned 'conflict of norms' between the provisions of Community law and national constitutional rules, the German Constitution rules took precedence.[357]

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[354] Case 11/70 "Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel" [1970] ECR 1125 in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)* [1972] CMLR 177, par.2
[355] "Solange I" , par.3
[356] "Solange I", paragraphs 3 and 4
[357] Craig and De Burca, *EU Law*, p. 291

12 years later, the issue of fundamental rights was developed in the Community level and the Community institutions accepted the fundamental rights and democracy. Member States of European Community became party to the European Convention on Human Rights.[358] In 1986, there was an important case before the German Constitutional Court, called *Solange II* [359]; in that case, the Court stated that:

> "In view of these developments, it must be held that, so long as the European Communities and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law."

To sum up, the German Constitutional Court accepted the control of the European Communities and judicial organs of the EC by virtue of being provided and developed the protection of fundamental rights by the Community law.[360] As long as the European Communities provided the protection of fundamental rights, the German Constitutional Court would not have any jurisdiction on deciding whether or not the Community law would apply.

In the *Brunner Case,* Germany terminated the ratification process of Maastricht Treaty on 18 December 1992; the German Bundestag (Parliament) adopted the Act of Accession to the Maastricht (Union) Treaty and altered the German Constitution; some articles of the Constitution changed; such as article 24 and added new articles. The complainants claimed that the Act of Accession to the Union Treaty and the Act to amend the Constitution were infringed the constitutional rights and guarantees and fundamental principles of the German Constitution. For instance, "the protection of human dignity becomes subject to instead of the German people, the people of the European Union exercise powers of state"; an other complaint ground was the

[358] Craig and De Burca, *EU Law*, p.292
[359] *Re Wünche Handelsgesellschaft* (Solange II) [1987] CMLR 225, par. f
[360] Arnold, p. 64

complaint no longer became subject to the new monetary system; instead of Mark, when he used the euro, this circumstance was infringed his economic and political freedom and infringed article 38 of the German Constitution giving the individual right of participation to the election.[361] The Court emphasized that the Federal Constitutional Court continued to provide the effective protection of basic rights for the inhabitants of Germany and would maintain this protection against the sovereign powers of the Communities and it was cited that the Constitutional Court and the European Court were co-operate with each other to protect the constitutional protection.[362]

The implementation of sovereign power in the EU has been based on the authorizations of Member States and the implementation and improvement of the Treaty must be realized by the will of the contracting parties; the Union protects the democratic bases existing in the Member States; "the democratic bases of the Union will be built up in step with the integration process and a living democracy will also be maintained in the Member States as integration progresses."[363] The Constitutional Court concluded that:[364]

> "If European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented from applying them in Germany.
>
> … Germany preserves the quality of a sovereign State in its own right and the status of sovereign equality with their States…
>
> …Inasmuch as the Treaties establishing the European Communities, on the one hand, confer sovereign rights applicable to limited factual circumstances and, on the other hand, provide for Treaty amendments this distinction is also important for the future treatment of the individual powers. Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of article 235 of the EEC Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the Communities and of Treaty interpretation as allowing maximum exploitation of Community powers (effet utile), in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have

[361] *Manfred Brunner and Others v. The European Union Treaty Cases* [1994] CMLR 57, par.1 (b) and 2 (b).
[362] "Brunner" paragraphs 13 and 23
[363] "Brunner Case", paragraphs 46, 82, 106 and 107
[364] Brunner Case, paragraphs 49, 55 and 99

> effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany."

In the Brunner Case, the Constitutional Court stated that the Constitutional Court had jurisdiction all legislative acts relating with the German Constitutional law irrespective of the relevant act was national, international or supranational.[365] Hence, the Federal Constitution Court had jurisdiction to review acts of European institutions whether they exceeded the limits of competence. If they exceed the limits of competence, acts of European institutions would not have any legal effect in Germany.

All these cases show that the acceptance of supremacy of the Community law is not unconditional.

Banana Case was about whether the application of the common organization of the market in bananas of the European Community was compatible with the organization of Federal Republic of Germany. The claim was fundamental rights guaranteed by the Basic Law were violated by the relevant regulation of the Council of the Community on the common organization of the market in bananas. The Constitutional Court implemented the decisions of the Solange I and II cases decisively:[366]

> "As long as the European Communities, in particular European case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of fundamental rights contained in the Basic Law."

To sum up, as long as the European Community protected the fundamental rights adequately, the Constitutional Court would not have any jurisdiction to review the

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[365] Kumm, p. 368

[366] *Banana Case*, Bundesverfassungsgericht, 2 BvL 1/97, 6 June 2000, par.36 in http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html, available in July 2009

Community acts in the matter of transferring competence and limitation of sovereignty.[367]

b) Italy

Article 11 of the Italian Constitution makes the limitation of sovereignty possible; the condition for this is Italy can transfer its sovereignty to the international sovereignty to ensure the peace and justice if the principle of reciprocity is guaranteed; however the point taking the attention is this article does not contain the European expression; it contains the expression of international. However, this article should be considered to be general rule which is applied for the European integration.[368]

> Article 11: "it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends."

The cases which Italian Court's recognition of the supremacy of Community law conditionally[369] are:

*Frontini Cas*e[370]was about the claim of incompatibility of the EC Regulation on agricultural levies to the Italian law. The Court emphasized that:

> "It is hardly necessary to add that by Article 11 of the Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein and it should therefore be excluded that such limitation of sovereignty, concretely laid out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man and it is obvious that if ever Article 189 had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the fundamental principles."

[367] Sak, p.70
[368] Marta Cartabia, "The Ratification of the European Constitutional Treaty in Italy" in Albi and Ziller, p. 41
[369] Craig and De Burca, p. 298
[370] *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372

So, Community law shall not be incompatible with the fundamental constitutional principles of Italian constitutional order and inalienable of rights of citizens.

In *Granital Case*,[371] the Constitutional Court recognized the supremacy of Community law; namely, if the relevant Community regulation being compatible with the Italian constitutional principles and fundamental rights of Italian citizens was contrary to the relevant national law issued after the Community regulation, the Community act would be applied. The condition for this was that the field of conflicting acts fell within the Community competence.[372]

In *Fragd Case,*[373] the Constitutional Court ruled that if the Community law infringed the Constitution rights concerning fundamental human rights; this Community law is not implemented.

c) France

Before 1958, France adopted a 'harmonizing' interpretation to apply both the principles of sovereignty of Parliament and the supremacy of the treaties over national law; this interpretation was, if the treaty and national law were conflict with each other, whose date was later, this was implemented; if the treaty was of a later date, this treaty was implemented[374]; after the issuing of the Constitution in 1958, article 55 solved this issue and ruled that: "treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party." According to article 54, the Constitutional Council has the duty to review international agreements of treaties whether contains a

[371] *Granital v. Amministrazione delle Finanze*, Decision No.170 of 8 June 1984 [1984] 21 CMLR 756
[372] Sak, p.66
[373] *Spa Fragd v. Amministrazione delle Finanze*, Decision No.232 of 21 April 1989 [1989] 72 RDI
[374] Jacqueline Dutheil de la Rochere, "The Attitude of French Courts Towards ECJ Case-Law": in Gordon Slynn Slynn of Hadley, David O'Keeffe, Gordon Slynn, Antonio Bavasso**,** *Judicial Review in European Union Law*, Kluwer Law International, 2000, p.418, google books, http://books.google.com.tr/books?id=VtnrPe8Z9a4C&pg=PA420&lpg=PA420&dq=nicolo+case&source=bl&ots=WSko2HG9Q&sig=ZbWCJYhctmvz113lw969vNzFfEU&hl=tr&ei=i5EOStmiFIqfsgaHz6yPCA&sa=X&oi=book_result&ct=result&resnum=2#PPA418,M1, available in June 2009

contrary clause to the Constitution; if the Constitutional Council finds the contrary clause, international agreements or treaties can not be entered into force before amending the Constitution.

In the case of *Societe Cafes Jacques Vabre*[375], the Court (Cour de Cassation/ the highest judicial court) adopted the supremacy of Community law (both primary and secondary legislation) over conflicting national law in accordance with article 55 of the French Constitution.

Nevertheless, the Administrative Court (Conseil d'Etat) ruled the opposed decision that if the EC Treaty was incompatible with the secondary national rule, the secondary national rule prevailed over the EC Treaty.[376]

In *Nicolo Case*,[377] the applicant brought an action relating with the annulment of the 1989 French election for the European Parliament and claimed that the overseas departments and territories should have been excluded from the election which was provided the Act of 1977; but in this election, this could not be realized. In that case; the Commissaire de Gouverment, Mr. Frydman emphasized that:[378]

> "On the basis, therefore, I propose that you should agree to give treaties precedence over later statues.
>
> I am aware that the Court of Justice of the European Communities- which as we know, gives the Community law absolute supremacy over the rules of national law, even if they are constitutional- has not hesitated for its part to affirm the obligation to refuse to apply in any situation which was contrary to Community legislation.
>
> Finally, it should be emphasized that the Cour de Cassation, although it seems to hesitate on this point, has applied in 1975 decision to all international acts, whether by the Community or not.
>
> I therefore suggest that you should base your decision on Article 55 of the Constitution and extend its ambit to all international agreements."

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[375] *Administration des Douanes v. Societe Cafes Jacques Vabre et SARL Weigel et Cie*, Decision of 14 May 1975 [1975] 2 CMLR 336

[376] *Syndicat General de Fabricants de Semoules de France*, Decision 1 March 1968 [1970] CMLR 395

[377] *Raoul Georges Nicolo* [1990] 1 CMLR 173

[378] Andrew Oppenheimer, *The Relationship between the European Community law and National law: the Cases*, Volume 1, Cambridge University, 1999, p.353-354 in google books http://books.google.com.tr/books?id=laGbr9KAF64C&dq=andrew+oppenheimer&printsec=frontcover&source=bl&ots=hYp2qlPnya&sig=nZSGI5Iy12pXLsg6e3erEXZBBcI&hl=tr&ei=_MUOSqm6FtnA_AanmOi4Cg&sa=X&oi=book_result&ct=result&resnum=1, available in June 2009

Since Nicolo case, the Conseil d'Etat has adopted the supremacy of Community law over French statues but this Court has not adopted the supremacy of the EC law over the Constitution itself; it declared this point in the case of Sarran and Levacher (decision of 30 October 1998).[379]

On 11 March 1992 the President of the Republic applied to the Constitutional Council on the basis of article 54 about whether the Treaty on European Union was compatible with the Constitution and it was needed to revise the Constitution. On 9 April 1992, the Constitutional Council cited that the Treaty on European Union could be ratified after the revision of the Constitution. The Council held that: [380]

> "Only French "French nationals" were entitled to vote and stand as candidates at elections of local decision-making bodies, and notably of municipal councils and members of the Council of Paris.
>
> The establishment of a single monetary… policy …would deprive each individual Member State of the essential conditions for the exercise of its national sovereignty.
>
> The Constitutional Council inferred from the measures relating to the entry and movement of persons in the internal market, applicable from 1 January 1996, that the exercise by the State of essential powers inherent in its sovereignty would be affected; it held that paragraph 3 of Article 100c inserted in the Treaty establishing the European Community by Article G of the Treaty on European Union was unconstitutional.

Moreover, the Court emphasized that the clause on having Member States' citizens the right to vote at the election of European Parliament was not unconstitutional because the European Parliament shall take its competence from treaties; not from the French Constitution.[381]

After this decision, the French Constitution was amended; the new article was added under the title of the European Communities and the European Union. Namely,

> Article 88- 1: "The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common.
>
> Article 88- 2: Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to

[379] Craig and De Burca, *EU Law*, p. 288
[380] Decision 92-312 DC of 2 September 1992 Treaty on European Union, http://www.ecln.net/documents/Decisons-France/dec_92-312_dc_maastricht_ii_english.pdf, available in August 2009, paragraphs 15, 32 and 38
[381] Sak, p. 68

the transfer of powers necessary for the establishment of the European Economic and Monetary Union.

Article 88- 3: Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators."

d) Denmark

The relevant article to allow transferring the powers to the international institutions is section 20/1 of the Danish Constitution:

> "Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation."

Section 20/2 regulates the procedures of transferring the powers; the first way is, for the relevant Bill lead to transfer the powers, above a majority of five- sixths of the Members of the Parliament shall adopt this; if this majority can not be reached, the majority required for the passing of ordinary Bill shall be taken and if the Government maintains it, the Bill shall be submitted for a referendum.

> "Section 20/2: For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Parliament shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in Section 42."

The significant case is *Carlsen v. Rasmussen.*[382] In that case, the plaintiffs brought an action to object the ratification of the Maastricht Treaty/ Treaty on the European Union. "The appellants argued that the powers delegated to the Community under the Maastricht Agreement were too ill- defined to satisfy the requirements of section 20."[383] The Supreme Court did not accept this claim and ruled there were no

[382] *Carlsen v. Rasmussen*, Danish Supreme Court, judgment of 6 April 1998 [1999] 3 CMLR 854

[383] T. C. Hartley, *The Foundations of European Community Law*, Oxford, Sixth Edition, 2007, p.246 in google books,http://books.google.com.tr/books?id=bv31-Inq4FoC&pg=PA246&lpg=PA246&dq=danish+supreme+court,+case+361/1997&source=bl&ots=ceVDueQi9y&sig

unconstitutional points to ratify the Treaty on the European Union; the Court's grounds were:[384]

- Article 20 did not open the way to enact legal acts which were controversial to the Danish Constitution.
- The European Community could not determine their powers.
- The Danish Court gave an expression of the meaning of the article 20 of the Danish Constitution; "Danish courts can not be derived of their right to judge for themselves whether EC acts go beyond the powers conferred on the Community."

Thus, Danish Courts can review EC acts whether they fall within the competence granted to the Community; if EC acts go beyond the competence conferred on the Community, they can not be applied in Denmark.

The Treaty of Maastricht was firstly submitted a referendum in Denmark and citizens rejected the Treaty; whereupon, in 1992, the European Council gave special status in relation to European co-operation by a declaration to Denmark with some out-opts of Danish government; this declaration was submitted to the citizens by referendum in 1993 and at this time, Danish citizens adopted the agreement; Denmark indicated its opt-outs in four areas; these are:[385]

- Economic and Monetary Union: Denmark declared its reservation on the single currency – euro-.
- European Citizenship: Denmark suggested that the European citizenship should supplement the national citizenship; and in 1997 Amsterdam Treaty, this point was added.
- Common defence: Denmark declared its reservation to preparation and implementation the defence implications.

=Xu74WXCXnvjsQwRAscsJKtP7xiE&hl=tr&ei=k1sRSuSbDMqNsAba4qGGCA&sa=X&oi=book_result&ct=result&resnum=5#PPP1,M1, available in June 2009

[384] Hartley, *Constitutional Problems of the European Union,* p. 158 and 159

[385] Ministry of Foreign Affairs of Denmark, EU, *The Danish Out-opts*, edited 22 November 2006, available in May 2009, http://www.um.dk/en/menu/EU/TheDanishOptouts/

- Justice and Home Affairs: Denmark would not be a part in certain areas of EU judicial cooperation.

e) The United Kingdom

Comparison with other Member States, the amending rules of constitution is so hard in the UK by virtue of a lack of written Constitution and not binding the current parliament acts to the future parliament.[386] Due to being dualist, the Parliament enacted the European Communities Act 1972. Article 2 allows the legal effect of Community acts in the UK:

> "1. All such rights, poers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

'From time to time' means that when the European Communities Act, the Community law could be applied both the current time and in the future.[387]

Article 2(2) regulates the implementation of Community law; the act may make either Order in Council, or any designated Minister or department may by regulations for purpose of implementing any Community obligation of the United Kingdom or enabling any such obligation to be implemented or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time.

> Article 2/4: "…any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section…"

[386] Craig and De Burca, *EU Law*, p. 301-302
[387] Hartley, *Constitutional Problems of the European Union*, p. 169

Article 2/4 read together with article 3/1 showed the supremacy of Community law; article 3/1 ruled that:

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court)."

"So, the intention of Parliament is that all acts of Parliament should be subordinated to Community law."[388]

Macarthys v. Smitt Case [389] was about the incompatibility between the relevant article of EC Treaty and 1970 Equal Pay Act. Lord Denning said that:

> "In construing our statute, we are entitled to look to the EC Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law."

The principle of the sovereignty of Parliament is the inevitable main principle; it shall be borne in mind the question of how the Community law prevails over the national law. The answer of this question is the Parliament has a duty to limit its powers and if the Parliament agrees to transfer its powers to Community or to prevail Community law over national law; in that situation, the Community will have it or the Community law will prevail; hence, the final word belongs to the Parliament in conformity with the principle of sovereignty.[390]

In Macarthys case, Lord Denning said:

> "… If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."

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[388] Hartley, *the Foundations of European Community Law*, p. 261
[389] *Macarthys v. Smith* [1979] 3 All ER 325, 329
[390] Hartley, *the Foundations of European Community Law*, p. 261 and 262

On the contrary, in Garland v British Rail case[391], Lord Diplock did not agree with Lord Denning's decision:[392]

> "It is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom are to be construed, if they are reasonable capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it."

The important cases are *Factortame I* and *II*.[393] A Spanish fishing company applied to the UK's court and claimed that the Merchant Shipping Act 1988 was incompatible with the EEC; UK law banned the foreign ships to fish in UK's waters while the EEC provided fishing. The first judgment occurred before the ECJ judgment case; the second judgment occurred coming after from the ECJ judgment.

In the *Factortame I Judgment*, the Divisional Court gave interim relief and brought before the ECJ that whether or not the implementation to the Spanish company under the Merchant Shipping Act was compatible with the EEC Treaty.

In *Factortame II Judgment*, Lord Bridge said that:

> "Under the terms of the 1972 European Communities Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments."

Thoburn Case[394] is significant due to being new case. The judge took a decision as same with Lord Denning in 2002. Just only British law gives the permission to European Communities Act to prevail:[395]

> "Thus, there is nothing in the European Communities Act which allows the European Court or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United

[391] *Garland v British Rail* [1983] 2 AC 771
[392] Craig and De Burca, *EU Law,* p.305
[393] *R v Sectretary of State for Transport (ex parte Factortame)* [1990] 2 AC 85 and *R v Sectretary of State for Transport (ex parte Factortame)* No 2 [1991] 1 AC 603
[394] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 ("Metric Martyrs" ruling) 18 Feb 2002
[395] Hartley, *the Foundations of European Community Law*, p. 262

> Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it… Being sovereign, it (the British Parliament) can not abandon its sovereignty. Accordingly, there are no circumstances in which the jurisprudence of the European Court can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly can not be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands."

Consequently, Member States' Constitutional Courts accepted the supremacy of Community law conditionally. The common opinion of national constitutional courts is they accept the supreme qualification of Union law as long as Union law shall not be contrary to the fundamental rights and principles of national constitutions. If they find EC acts incompatible to their national constitutions, EC acts shall not be applied. So, this shows that Member States do not want to lose their sovereignty totally and they do not transfer all competences to the Union.

2. The Constitutional Treaty and the Treaty of Lisbon

The difference between the Constitutional Treaty and the Treaty of Lisbon regarding with the formal aspect is the Treaty of Lisbon was emerged from the IGC. The Treaty of Lisbon adopted amendments to some provisions of the Treaty on EU and the Treaty Establishing the European Community which did not replace them.

I will analyze the reactions of some Member States to issued treaties. France, Spain, Germany and Slovenia faced (met) the cases before their Constitutional Courts on whether the Constitutional Treaty or the Treaty of Lisbon was compatible with their constitutions.

a) Spain

Before signing the TCE, there had been government change in Spain on 14 March 2004. Three days ago from election, there had been terrorist attack in Madrid. This resulted in changing of government and affecting the reaction of Spain to the

European Constitution. The prime minister, "Rodriguez Zapatero promoted the signing of the TCE in Rome on 19 October 2004 and Organic Law No.1/2005 authorized the Spain's ratification of the Treaty Establishing a Constitution for Europe was published on 21 May 2005."[396]

The Attorney General applied to the Spanish Constitutional Court to take a binding declaration on whether article I-6 of the Constitutional Treaty and articles II-111 and II-112 of the Constitutional Treaty were compatible with the Spanish Constitution. Besides these requirements, Government required the opinion that:

> "The sufficiency of Article 93 CE in order to channel the consent of the State to said Treaty or, as applicable, on the procedure for the constitutional reform which must be implemented to adapt the text of the Spanish Constitution to the aforementioned international Treaty."[397]

Article I-6 arranged the primacy of the Constitution over the national laws; articles II-111 and AII-112 were general provisions governing the interpretation and application of the Charter of Fundamental Rights that the Charter could not extend its powers beyond the powers of the Union and its limitation.

Article 93 CE specifies that:

> "Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred."

Then, Government applied to State Council; according to the State Council's decision on 21 October 2004 that:

> "Although the system for the attribution of competences in the Treaties (whose repeal shall lead to the system considered here) has led to the questioning of the existence of sufficiently defined competences as the object of the attribution set forth in Article 93 of the Constitution, the new system set forth in the Treaty explains and details the competence framework of the Union, consequently reducing the broad margin for interpretation allowed by the Treaties until now."

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[396] Pablo Perez Tremps and Alejandro Saiz Arnaiz, "Spain's Ratification of the Treaty Establishing a Constitution for Europe: Prior Constitutional Review, Referendum and Parliamentary Approval": in Albi and Ziller p. 46, 47

[397] *Declaration 1/2004, Case 6603-2004, Re the EU Constitutional Treaty and the Spanish Constitution*, 13 December 2004, reported in [2005] 1 CMLR 981 part 1: Recitals, par.1

So, the State Council verified the way of approval procedure of the Constitutional Treaty should be article 93 of the Spanish Constitution. The Constitutional Court characterized article 93 as a constitutional way for integration to the European Communities and article 93 led to transfer of conferral competence derived from the Constitution to international organizations and supranational organizations. However, the integration to the European Union and transferring the competence to the European Union were not unconditional and depended on the some material limits. The Constitutional Court emphasized that:

> "Consequently, the constitutional transfer enabled by Art. 93 CE is subject to material limits imposed on the transfer itself. Said material limits, not expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Art. 10.1 CE), limits which, as we shall see later, are scrupulously respected in the Treaty under analysis."

So, the European legislation should be compatible with the national sovereignty and constitutional fundamental principles.

The answer of the Constitutional Court for other question about the supremacy of Community law envisaged in article I-6 and II-113, the Court qualified these articles as:

> "a guarantee of the existence of the states and their basic structures, as well as their values, principles and fundamental rights, which under no circumstances may become unrecognizable after the phenomenon of the transfer of the exercise of competences to the supra-state organization.
>
> Consequently, the primacy proclaimed in the Treaty which lays down a Constitution for Europe operates with regard to a legislation which is built on the common values of the constitutions of the states integrated into the Union and their constitutional traditions."
>
> The proclamation of the primacy of Union legislation by Article I-6 of the Treaty does not contradict the supremacy of the Constitution."

Hence, the supremacy of Union law was valid only when the implementation of the attributed competences from the sovereign states to the Union and article 93 was adequate to ratify the TCE without constitutional amendments.

It is sufficient to say the referendum is just deemed to be consultative according to the article 92. Article 92 arranges that: "Political decisions of special importance may be submitted to all citizens in a consultative referendum."

b) France

A case came before the French Constitutional Council was about whether need a revision of the French constitution to ratify the Constitutional Treaty. During the process of ratification, two control mechanisms are used. One of them is political control; the law must be approved either by the Parliament or by the people through a referendum. Second is judicial control by the Constitutional Council depending on article 54.[398] "If an international agreement includes a clause contrary to the Constitution, authorization to ratify or approve it may only be given after a revision of the Constitution." The Constitutional Council examined the Constitutional Treaty in regard with the issues of supremacy and competence. The Constitutional Council held that: [399]

> "Any provisions of the Treaty which, in a matter inherent to the exercise of national sovereignty and already coming under the competences of the Union or the Community, modify the applicable rules of decision-making, either by replacing the unanimous vote by a qualified majority vote in the Council, thus depriving France of any power to oppose such a decision, or by conferring decision- making powers on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative, require a revision of the Constitution;
>
> Consequently, once the measures involved are dependent upon a decision of the Council acting by a qualified majority, in particular under the provisions of Articles III-270 and III-271, when relating to powers already transferred in the field of judicial cooperation in criminal matters, of articles III-273 and III-276, which concern the structure, functioning, mission and tasks of Eurojust and Europol, and those of b) of paragraph 2 of Article III-300 relating to actions or positions of the Union decided on the proposal of the Minister of Foreign Affairs of the Union, they require a revision of the Constitution."

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[398] Loi'c Azoulai and Felix Ronkes Agerbeek, *Case law: Conseil constitutionnel (French Constitutional Council), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe*, CML Rev., Number 42, 2005, p. 871

[399] Conseil constitutionnel (French Constitutional Council), *Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe,* paragraphs 29 and 30 in http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2004_505dc.pdf, available in August 2009

Moreover, provisions of the Constitutional Treaty relating with family law, the minimum rules of criminal procedure, foreign policy and common security and defence policy taken by the Council of the EU acting by a qualified majority instead of acting by a unanimous decision were contrary to the French Constitution; thus, these provisions needed a revision of the French Constitution.[400]

To sum up, if the Treaty provision affects the exercise of national sovereignty, a prior revision of the French Constitution should be needed. In that case, the Constitutional Council decided on this point.

> "The Conseil remains strongly attached to the idea of the domestic constitutional order as the source of legitimacy and control of the European constitutional order. The result is a calculated equilibrium: the Conseil rejects the idea of a fusion of constitutional orders in support of a superior European legal order, but it allows for the concurrence of constitutional developments in Europe."[401]

Following this decision, the French Constitution was amended on 28 February 2005; the new version of article 88/1 was:

> "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.
> It shall participate in the European Union in the conditions provided for by the Treaty establishing a Constitution for Europe signed on 29 October 2004."

So, the judicial control mechanism was terminated for Constitutional Treaty. On 13 December 2007, the President of the Republic applied to the Constitutional Council whether the Treaty of Lisbon was compatible with the French Constitution and whether the French Constitution needed a prior revision. The Constitutional Council cited that the provisions relating with the fight against terrorism and against trafficking in human beings, with judicial cooperation on civil matter and criminal matter which

[400] Decision No. 2004-505 DC, paragraphs 34 and 35
[401] Azoulai and Agerbeek, p. 886

transferred to the EU under the ordinary legislative procedure powers needed a revision of the French Constitution. The Council continued that:[402]

> "Any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative requires a revision of the Constitution."

The Constitutional Council enumerated the provisions which required a prior revision of the French Constitution; such as the provision about extending the field of agreements which the Council of the EU might approve after taking the consent of the EP and the provision on family law which was subject to ordinary legislative procedure.

Following this decision, the French Constitution was changed; the amending articles are 88-1 and article 88-5 on future enlargement.

> Article 88-1 arranges: *"*the Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common.
>
> It shall participate in the European Union in the conditions provided for by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December, 2007."

> Article 88-5: "Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union and to the European Communities shall be submitted to referendum by the president of the republic."

c) Germany

Germany approved the Treaty of Lisbon on 23/05/2008. However, Germany faced with a case about the Act Approving the Treaty of Lisbon was compatible with the basic law. A politician Peter Gauweiler and some deputies brought a complaint to

[402] Conseil constitutionnel (French Constitutional Council), Decision No: 2007-560 DC December 20th 2007 on Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, par.20 in http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007560dc.pdf, available in August 2009

the Federal Constitution Court. It was claimed that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in EU Matters violated article 38.1 with article 23.1 of the Basic Law because the Bundestag and the Bundesrat would not have "sufficient rights of participation in European lawmaking procedures and treaty amendment procedures."[403] Article 23 under the title of European Union held that:

> "1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of *subsidiarity*, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

Article 38.1 arranges the election of Members of the German Bundestag. It said that: "…shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience."

The rights of participation should be evaluated within the constitutional fundamental right in accordance with article 38.1 and identity of constitution in accordance with 79.3. According to article 79.3, "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process… shall be inadmissible." Constitutional identity was codified in article 23.1 with 79.3. The Constitutional Court held that:[404]

> "The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to watch, within the boundaries of its competences, over the Community or Union authority's not violating the constitutional identity by its acts and not evidently transgressing the competences conferred on it. The transfer of competences, which has been increased once again by the Treaty of Lisbon and the independence of decision-making procedures therefore require an effective ultra vires review

[403] Federal Constitutional Court, *Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon,* Press release no. 72/2009, par.1, available in http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html, available on 15 August 2009

[404] Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon, par.5

> and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany."

So, the Constitutional Court should review the Union's acts whether or not to infringe the constitutional identity and the European integration should not belong to the political discretion of national constitutional bodies. The Court stressed that 'the Basic Law wanted European integration and international peaceful order.' After that, the Court stipulated the conditions to transfer sovereign powers to the European Union. These conditions were:[405]

- The integration programme should be based on the principle of conferral
- It should be respected to the Member States' constitutional identity.
- "The Federal Republic of Germany does not lose its ability to politically and socially shape the living conditions on its own responsibility."

The Federal Constitution Court has a duty to make the ultra vires review and identity review; in other words, this Court has a duty to evaluate whether the European Institutions exceeded their powers and whether the constitutional identity of the Basic Law was respected. The Court emphasized that:[406]

> "The exercise of these competences of review, which are constitutionally required, safeguards the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, even with progressing integration. Its application in a given case follows the principle of the Basic Law's openness towards European Law."

The Court concluded that the Act Approving the Treaty of Lisbon did not infringe the German Constitution; however, legislative bodies of State- Bundestag and Bundesrat- would not have sufficient rights of participation after entering into force of the Treaty of Lisbon; by virtue of this reason, the Act Extending and Strengthening the Rights of the Bundestag and Bundesrat in European Union Matters was not compatible with article 23.1 of the Basic Law on the ground that the responsibility for integration should belong to the national constitutional bodies in the aspect of participation under article 23.1.

[405] Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon, part 2, par. c
[406] Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon, part 2, par. e

There exist two possibilities; these are either the amending of the Treaty of Lisbon or the amending of the German Constitution. Currently, it is not determined which one is realized. Generally, Member States prefer to change the treaty. This shows the importance of the Member States' reactions through the process of achieving the Union.

d) Slovenia

The legislative activity of the Central and Eastern Europe (CEE) countries in the preceding years has largely been dominated by taking over EU legislation."[407] CEE countries' constitutional acts regarding with their membership became more openness and more decisive than the acts of Member States in Western Europe. Because they had possibility to make arrangement in accordance with EU treaties, decisions of the ECJ and decisions of national constitutional courts.[408] Ten CEE countries experienced the Communist regime. "The characteristic feature of the post- Communist constitutions of CEE is that they are distinctly more protective of sovereignty than most countries in Western Europe."[409] The Europe Agreement between the EU and the CEE countries after ratified were directly applied in the constitutional systems of Lithuania, Bulgaria, Poland, Estonia and Slovenia. In the constitutional system of the Czech Republic, Slovakia and Romania, only human rights treaties were supreme by virtue of being dualist countries before while other provisions entered into force after ratified by a statute. This procedure was amended in the Czech Republic and Slovakia in 2001 EU amendments and in Romania in 2003 EU amendments after adopted of the monist approach; just Hungary remains a dualist country.[410] "The norms of international law have not had precedence in Hungary legal order. But the important of supremacy of EU law remained unresolved in the context of Hungary's strongly dualist setting."[411]

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[407] Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, First Published, the United Kingdom, 2005, p.2
[408] Sak, p. 73
[409] Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe,* p. 24
[410] Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, p. 41 and 42
[411] Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, p. 85 and 86

Some Constitutional Courts of the CEE countries has encountered on issues relating with the compatibility of the provisions of Europe Agreements with the national constitutions.[412] The example of Slovenia is outstanding example. Namely, Slovakia, the Czech Republic and Slovenia made amendments for harmonisation of national law with EU law more comprehensively than other CEE countries. However, the distinctive feature of Slovenia from Slovakia and the Czech Republic is the Slovenian Constitution includes "the mechanism for constitutional review of international treaties."[413] Namely, the Constitutional Court has a duty of pre-review on the conformity of international treaties with the Constitution on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly enacted by article 160 of the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.

The Government of Slovenia applied to the Constitutional Court relating with the compatibility of the provisions of Europe Agreement Establishing an Association between the Republic of Slovenia and European Community and its Member States with the Slovenian Constitution. The Court cited that:[414]

> "Competent State body may not approve any such commitment of the Republic of Slovenia under international law as would be in disagreement with the Constitution. A commitment under international law would be in disagreement with the Constitution if, by the coming into force of an international agreement, it created directly applicable unconstitutional norms in internal law, or if it bound the State to adopt any such instrument of internal law as would be in disagreement with the Constitution.
>
> According to the provision of article 8 of the Constitution, statutes and other legislative measures shall accord with international agreements which bind Slovenia. According to the provision of paragraph 2 of article 153 of the Constitution, statutes must conform with international agreements currently in force and adopted by the National Assembly, and regulations and other legislative measures must also conform with other ratified international agreements. To actually ensure such conformity, the constitutioner in indent 2 of paragraph 1 of article 160 of the Constitution laid down the jurisdiction of the Constitutional Court to decide upon the conformity of statutes, regulations and by-laws with international

[412] For instance, Bulgarian Constitutional Court, Decision No.7, 2 July 1992, *Durzhaven Vestnik 56/92 on Interpretation of Articles 85(3) and 149(1.4) of the Constitution;* Slovakian Constitutional Court, Decision No. 95/99, II, US 91/99, *on the Protection of Right Guaranteed by an International Treaty*; Hungarian Constitutional Court, Decision No.30/1998, *on the European Agreement* (VI 25) AB.

[413] Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, p. 67 and 74

[414] Decision No. RM- 1/97, *Uradni list RS*, No. 40/97 on Europe Agreement, paragraphs VII and 12 in http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/920B1846747C32CCC12571720029D449, available on 20 August 2009

> agreements adopted by the State. Thus, in the hierarchy of legal acts in Slovenia, international agreements rank above statutory provisions."

However, according to the constitutional system of Slovenia, international law had not supreme qualification over the constitutional provisions; international law had supreme over statutory provisions.

According to article 153/2,

> "Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties."

If the Court found the incompatibility of the agreement to the Slovenian Constitution, the law on approval of this agreement would be abrogated. This decision was valid within the internal legal system and did not affect the obligation of Slovenia within the international law. The reason for this, according to the Court was "to eliminate unconstitutional legal norms from the internal law of the Republic of Slovenia; if this occurs after the coming into force of an international agreement, this leads to the violation of obligations of the Republic of Slovenia arising from international law."[415]

Article 3 of Slovenian Constitution under the title of European Union said that:

> "Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values."

Article 3 (3) arranges the supremacy of EU law; namely:

> "Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations.

[415] Decision No. RM- 1/97, paragraphs 12 and 13

International law shall be applied in which Slovenia has transferred the exercise of some sovereign rights to international organisations which are based on democracy, the principle of rule of law, human rights and fundamental freedoms. This provision was enacted by inspiring from the article 6 of the Treaty on the European Union.[416] According to article 6 of the TEU, "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."

[416] Sak, p. 89

CONCLUSION

A Constitution has been emerged through a need of a high norm to live together of people within an order as obeying the rules. However, the concept of a constitution is not only used within the national law. Nowadays, we become witnesses to far away from the understanding of nation-state. In an international arena, States prefer to be close-cooperation among themselves to implement their common interests; especially, in the spheres of economic, security and human rights. So, States come together and created international organisations. In the light of Aristotle's "*politeia*", the founding treaties of international organisations are deemed to be a material constitution by virtue of including the aim of organisations, the rules of their functions and their institutions' competences. So, the concept of a constitution is separated from the concept of a state. The ECJ in its decisions classified the EC Treaty as a constitutional charter.

Not just only the EU has constitutional structures but also the UN and the WTO have constitutional workings. Notwithstanding, the differences of the EU are firstly, EU law shall be binding for all Member States even if they disagree and for individuals directly; secondly, the EU has judicial mechanism to impose sanctions on the EU's institutions and Member States; thirdly, Member States have limited their sovereign rights by virtue of transferring some sovereign rights to the EU. Member States do not delegate their competences to the EU. Albi explained the difference between the delegation and transferring the competence; namely,

> "the meaning of delegation' in constitutional law is limited to the transfer of powers to a lower institution or organisation. The transfer of state powers to the European institutions is, according to Community law, permanent and it is not possible to draw these powers back."[417]

Thus, the EU has autonomous character apart from an international organisation. The ECJ emphasized in Costa & Enel case that European Union has its own legal capacity and its own personality. Through the constitutionalization process, the ECJ created the constitutive principles of the Community legal order. The ECJ's decisions about the supremacy of Community law, the principles of direct effect and uniform

[417] Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, p.119

applicability constitute touchstones for the constitutionalization process in the EU and the preliminary ruling procedure led Member States to apply the ECJ for the interpretation of the EC Treaty, the validity and the interpretation of the acts of the institutions. Moreover, the Community has exclusive competence which is based on Treaty provision within the legal framework of legitimacy.

The principle of supremacy of Union law shows that not only the European Union law is supreme; but also Union law arranges the confliction of norms that European Union law is prevail over national law which is incompatible to the Union law.

As seen in the decisions of the ECJ, treaties become an integral part of Member States legal systems. Member States shall apply the Community provisions effectively in the event of a conflict between Community law and national law, Community law shall implement. After entering into force of Community law, Member States shall not enact any national provisions which will be contrary to the Community law. The implementation of Community law shall not differ from one Member State to another Member State. It shall be ensured the uniform application. Moreover, national courts shall not have jurisdiction to review the Community provision.

To reach a constitutional order in the EU, the contribution of the principle of direct effect is inevitable. The principle of direct effect ensures a provision of EU law to be applied before a national court and creates individual rights which national courts shall protect. The ECJ explained what the direct effect means in one of the outstanding cases; in Van Gend En Loos. Namely, the direct effect of Community law means that not only Community law imposes obligations but also it confers the enforceable rights to individuals.

Direct effect and direct applicability change the hierarchy of norms; namely, there is no hierarchy between regulations, directives and decisions.

Through the principle of direct effect, the provisions of Community law implement directly effective within the national legal order. It enforces Member States to change their laws. Member States have a duty not to implement their national norms in the event of a conflict between national norms and Community norms. So, European Union law is supreme over national laws. The principle of supremacy ensures the effectiveness of the principle of direct effect and the principle of direct effect is an instrument to implement the principle of supremacy. These two principles make EU law as a constitutional order.

The principle of conferral competence based on Treaty articles is significant development for the process of constitutionalization of the EU and to reach the European integration. Member States transfer their competences to European Union. Thus, Member States can have no possibility to take competences back. In *Van Gend En Loos Case,* albeit in limited spheres, Member States have limited their sovereign rights.[418] Member States can not decide which competence belongs to the EU and which competence belongs to Member States.[419]

Through the way of enumerating the fields which Community has exclusive competence of the Community in the EC Treaty, Member States shall not have any competence to act in these fields. In the event of a lack of the express competence, it should be examined the whole objectives of the Treaty. To be used the competence by the EU, the ECJ created the implied competence. It should be proportionate and necessity between the relevant objectives and the relevant competence. This principle emerges from the existence of a competence in the EU. In the event of an express or implied competence, the EU still does not leave its competence to Member States. The outstanding case for this is Opinion 2/94. The Treaty provisions do not involve the express or implied competence for human right protection, to realize the functions of the Community and to reach the objectives of the Treaty, the EU invokes the procedure of

[418] Van Gend En Loos", part B, par.4
[419] Arthur Benz and Christina Zimmer, *The EU's Competences: The 'Vertical' Perspective on the Multilevel System, Living Reviews in European Governance*, Volume 3, No.3, Published by Connecting Excellence on European Governance (CONNEX) and New Modes of Governance (NEWGOV), 2008, p.6, http://www.astrid-online.it/rassegna/14-07-2008/studi--ric/BENZ_ZIMMER_LivRev_30_06_08.pdf:, available in March 2009

filling the gaps. Moreover, if the area which is beyond the scope of the exclusive competence, the Community has a duty to take an appropriate action only if the scale or effects of the proposed action can not achieved by the Member States and this can be achieved better by the Community. The Community uses the competence in the most appropriate level or in other words, the principle of *subsidiarity* within the scope of what is necessary to realize the aims of the Treaty. Thus, the Community has wide competence fields.

The constitutionalization process includes the constitutional dialogues between the ECJ and the constitutional courts of Member States.[420] The matter of who has an ultimate authority has not resolved yet. In the process of being adopted treaties by Member States could not be resolved seamlessly. The constitutional courts of some Member States resist the decisions of the ECJ relating with the supremacy of EU law. I chose some Member States in which actions were brought before their constitutional courts on whether the treaties or Constitutional Treaty or Treaty of Lisbon was compatible with their constitutions.

Generally, Constitutional Courts of Member States adopted the supremacy of Community law, but not unconditionally. The common opinion of national constitutional courts is they accept the supreme qualification of Union law as long as Union law shall not be contrary to the fundamental rights and principles of national constitutions. If they find EC acts incompatible to their national constitutions, EC acts shall not be applied. They are not willing to lose their sovereignty in all fields and to transfer all competences. For instance, the German Constitutional Court's approaches toward treaties, the Constitutional Treaty and the Treaty of Lisbon were at the beginning, as long as the Community could not solve the issue of a conflict of norms between the provisions of Community law and national constitutional rules, the German Constitution rules took precedence. In other its decision, the German Constitutional Court accepted the control of the European Communities and judicial organs of EC by

[420] Alec Stone Sweet, " Constitutional Dialogues in the European Community", edited by Alec Stone Sweet, Joseph H H Weiler, *The European Courts & National Courts Doctrine and Jurisprudence, Legal Change in its Social Context*, Oxford: Hart Publishing, 1998, p.305

virtue of being provided and developed the protection of fundamental rights by the Community law.[421] But again this acceptance would not be unconditional. The Federal Constitutional Court did not intervene to be implemented the Community law so far as the Community carried on the protection of fundamental rights. In another case relating with the Constitutional Treaty, the Federal Constitutional Court had jurisdiction to review acts of European institutions whether they exceeded the limits of competence. If they exceed the limits of competence, acts of European institutions would not have any legal effect in Germany. This approach of German Constitutional Court was kept on the judgment on the Treaty of Lisbon. This Court had a duty to evaluate whether the European Institutions exceeded their powers and whether the constitutional identity of the Basic Law was respected. So, it is not determined how Germany will treat upon the decision of Constitutional Court about the incompatibility of some articles of Treaty of Lisbon to the German Constitution.

Generally, Member States prefers not to apply the conflicting Community rules instead of amending their constitution.

Beside the matter of ultimate authority, Europe dealt with the issue on whether or not Europe needs and can have a constitution. In the ratification process of the Constitutional Treaty, Member States did not receive the Constitutional Treaty favourably. The grounds against a Constitution are "a lack of a common European identity, a lack of demos, a lack of a receptive political culture and EU is not a state."[422] Citizens in France and in the Netherlands rejected the Constitutional Treaty. Their reactions seemed as an important resistance. Thus, the idea of Constitutional Treaty was rebutted without entering into force. This is a significant defeat through the process of the constitutionalization of the EU. However, in this thesis, I try to make a detail analysis in the light of the decisions of constitutional courts instead of mentioning the political features behind the rejection of the Constitutional Treaty. By virtue of this reason, I do not prefer to mention the consequences of referendum.

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421 Arnold, p. 64

422 Michael Longo, *Constitutionalising Europe Processes and Practices*, Ashgate Publishing Limited, Great Britain, 2006p. 149

However, for the Treaty of Lisbon, Member States' opinions are affirmative. At the beginning of ratification process of the Treaty of Lisbon, it was chiefly emphasized in the Treaty of Lisbon, the new treaty brings some amendment to the TEU and EC Treaty. It was not preferred to denominate 'constitution' to a new treaty.

To sum up, constitutionalization process of the EU has been providing step by step. The EU passed significant processes in the way of constitutionalization by creating constitutional principles. On the other hand, after rejected the Constitutional Treaty, it is treated cautiously for a new treaty. Although it has been nearly fifty years after concluding the Rome Treaty, there is still no consensus for the future of the EU among Member States.

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