



## **The Development of the EU's Human Rights Policy and its Human Rights Policies to Third Parties: Turkey as a Case**

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# Table of Contents

<b>TABLE OF CONTENTS .....</b>	<b>I</b>
<b>LIST OF ABBREVIATIONS .....</b>	<b>V</b>
<b>ABSTRACT .....</b>	<b>VII</b>
<b>CHAPTER I: INTRODUCTION.....</b>	<b>1</b>
A.    PROBLEM DEFINITION.....	2
B.    MAIN OBJECTIVES .....	3
C.    STRUCTURE OF THE THESIS.....	4
<b>CHAPTER II: THE DEVELOPMENT OF EU’S HUMAN RIGHTS POLICIES .....</b>	<b>7</b>
A.    HUMAN RIGHTS POLICIES WITHIN THE LEGAL ORDER OF THE EU .....	9
I. <i>The Founding Treaties of the European Community.....</i>	<i>9</i>
1.    The Treaty of Paris (1951).....	10
2.    The Treaties of Rome: EEC and EUROTOM.....	10
3.    Single European Act (1986) .....	12
4.    The Treaty of the European Union (1992 Maastricht Treaty).....	13
5.    Amsterdam Treaty (1997).....	15
6.    Nice Treaty (2001).....	16
II. <i>European Union Charter of Fundamental Rights .....</i>	<i>17</i>
III. <i>EU Constitution.....</i>	<i>21</i>
IV. <i>Human Rights in the Case Law of the ECJ.....</i>	<i>23</i>
B.    THE ROLE OF THE EU INSTITUTIONS IN HUMAN RIGHTS PROTECTION .....	28
I. <i>The European Parliament .....</i>	<i>28</i>
II. <i>The European Commission.....</i>	<i>31</i>
III. <i>The European Council .....</i>	<i>32</i>
IV. <i>The Court of Justice.....</i>	<i>33</i>
C.    THE CHALLENGES OF EU’S HUMAN RIGHTS POLICIES .....	33
I. <i>The Question of Competences .....</i>	<i>34</i>
II. <i>Reliance on Judicial Remedies and Lack of Monitoring System .....</i>	<i>35</i>
III. <i>Internal-External Contradiction .....</i>	<i>36</i>
D.    CONCLUSION .....	37

<b>CHAPTER III: EU'S HUMAN RIGHTS POLICIES FOR THIRD PARTIES .....</b>	<b>39</b>
A. HUMAN RIGHTS IN THE FOREIGN POLICY OF THE EU .....	40
I. <i>Human Rights in the European Political Cooperation</i> .....	41
II. <i>Human Rights in the Common Foreign and Security Policy</i> .....	42
B. HUMAN RIGHTS PROMOTION INSTRUMENTS OF THE EU .....	44
I. <i>Human Right Clauses in EU's Treaty Relations</i> .....	45
II. <i>The Implementation of Human Rights Clauses by the EU's Regional Programs</i> .....	48
1. Development Cooperation Agreements .....	48
a. Lomé Conventions with the ACP Countries .....	49
b. Cotonou Agreement .....	50
c. Development Cooperation Agreements with ALA and ASEAN Countries .....	52
2. Euro-Mediterranean Association Agreements .....	53
C. HUMAN RIGHTS CONDITIONALITY FOR MEMBERSHIP .....	55
I. <i>The Functioning of Human Rights Conditionality at the EU level</i> .....	56
II. <i>The Functioning of Human Rights Conditionality at Domestic Level</i> .....	61
D. CONCLUSION .....	64
 <b>CHAPTER IV: THE EFFECTIVENESS OF HUMAN RIGHTS CONDITIONALITY ON TURKEY .....</b>	 <b>67</b>
A. CONFLICT ISSUES: TURKEY'S HUMAN RIGHTS RECORD .....	69
I. <i>Civil-Military Relations</i> .....	69
II. <i>Minority Protection</i> .....	71
III. <i>Kurdish Problem</i> .....	72
IV. <i>Fundamental Freedoms</i> .....	75
1. Freedom of Expression .....	76
2. Freedom of Association .....	78
3. Freedom of Assembly .....	79
4. Freedom of Press .....	79
5. Freedom of Religion .....	80
6. Torture, Inhuman and Degrading Treatment or Punishment .....	81
B. THE INSTRUMENTS OF THE EU FOR HUMAN RIGHTS PROMOTION IN TURKEY .....	82
I. <i>Ankara Association Agreement (1963-1986)</i> .....	83
II. <i>Persistent Refusal of the Perspective of Membership (1987-1999)</i> .....	86
1. Turkey's Application for Membership (1987) .....	86
2. Custom Union (1995) .....	87
3. Luxemburg Council Decision (1997) .....	88
III. <i>Granting Candidate Status in the Helsinki Decision (1999-2004)</i> .....	89
C. THE EFFECTIVENESS OF THE CONDITIONALITY .....	91
I. <i>Reforms on Fundamental Rights</i> .....	91
1. Freedom of Expression .....	92
2. Freedom of Association .....	93
3. Freedom of Assembly .....	93

4.	Freedom of Press .....	94
II.	<i>Reforms on Human Rights and Minority Rights</i> .....	94
III.	<i>Reforms on Limiting the role of the Turkish Military</i> .....	95
D.	CONCLUSION .....	95
<b>CHAPTER V: THE CHALLENGES OF HUMAN RIGHTS PROMOTION IN TURKEY .....</b>		<b>99</b>
A.	THE DOMESTIC CHALLENGES OF HUMAN RIGHTS PROMOTION .....	100
I.	<i>State-Society Interaction</i> .....	101
1.	Strong-State Tradition .....	102
2.	Weak Civil Society for Promoting Democratization .....	106
II.	<i>The Perception of High Cost for Human Rights Convergence</i> .....	107
1.	Perceived Cost of Territorial Disintegration .....	108
2.	Perceived Cost of Political Islam .....	109
3.	Sevres Syndrome .....	110
III.	<i>The Distribution of Convergence Cost among Political Actors</i> .....	111
1.	The Kemalist Bureaucratic Elite .....	111
2.	The Turkish Military .....	112
3.	Extreme Nationalist Parties in Turkey .....	113
4.	Deep State .....	114
B.	THE EXTERNAL CHALLENGES OF HUMAN RIGHTS CONDITIONALITY .....	115
I.	<i>The Problem of Credibility of the EU</i> .....	116
II.	<i>Legitimacy of the Conditions</i> .....	117
III.	<i>The Perception of Double Standards</i> .....	119
III.	<i>The Lack of Financial Aid</i> .....	120
C.	CONCLUSION .....	120
<b>CHAPTER VI: CONCLUSION .....</b>		<b>123</b>
<b>REFERENCES .....</b>		<b>127</b>



## **List of Abbreviations**

African, Caribbean and Pacific countries (ACP)  
Asian and Latin American countries (ALA),  
Association of South Asian Nations (ASEAN)  
Central and Eastern European Countries (CEECs)  
Common Foreign and Security Policy (CFSP)  
Euro-Mediterranean Partnership (EMP)  
Euro-Mediterranean Partnership (EMP)  
European Atomic Energy Community (EUROTOM)  
European Atomic Energy Community (EUROTOM)  
European Coal and Steel Community (ECSC)  
European Coal and Steel Community (ECSC)  
European Convention on Human Rights (ECHR)  
European Court of Justice (ECJ)  
European Development Fund (EDF)  
European Development Fund (EDF)  
European Economic Community (EEC)  
European Economic Community (EEC)  
European Investment Bank (EIB)  
European Investment Bank (EIB)  
Justice and Home Affairs (JHA)  
Mediterranean and Middle Eastern Countries (MEDA)  
Mediterranean Democracy Program (MDP)  
Mediterranean Democracy Program (MDP)  
National Security Council (NSC)  
Single European Act (SEA)  
The European Union (EU)  
The Treaty Establishing a Constitution for Europe (TCE)





## **Abstract**

On the basis of the descriptive analysis of the internal human rights policies of the EU which gives general framework of evolution of the role of human rights in the legal order of the EU, the main aim of this thesis is generally to focus on EU's external human rights policies for third countries and its policy instruments for human rights promotion in the third countries, particularly in the candidate countries. In this framework, human rights conditionality for membership-association-development cooperation agreement as important policy instrument for human rights promotion in third countries is analyzed. Given the effectiveness of human rights conditionality for membership compared to other instruments of human rights promotion, by examining Turkish case, the extent to which the Union is capable of instigating domestic change among those states that aspire to become the EU members is analyzed. In this context, human rights problems of Turkey, the instruments that the EU has used for solving such human rights, their effectiveness and challenges of the human rights conditionality form the basis of this thesis.



## **Chapter I: Introduction**

Europe has experienced one of the most important historic transformations of the modern times through the “European integration” project. From the unpretentious beginning in the early 1950s, the European integration process has developed into one of the most outstanding geopolitical constructs since the emergence of the nation-state. It has gradually evolved from a solely economic community to the political Union, which endeavors to have an active presence in the international arena in a way of “deepening” and “widening” of Europe. Thus, the EU has turned out to be different from its original form, emphasizing its “economic identity” to the project underlining its “political identity,” the fundamental principle of which is respect for human rights.

The “deepening” of the EU in terms of commercial, economic, legal and political integration has had important implications for the development of the EU’s human rights policy. On the one hand, the “deepening” of the EU on the basis of political integration necessitates transparency, democratic principles, equality, social justice and respect for human rights at the European level for the Union citizens. On the other hand, the “deepening” of the EU on the basis of economic integration, which includes free movement of goods, services, people and capital, has increased the scope of the Union’s activities. This makes it likely that the individuals of the EU would be affected by the activities of the EU institutions and its legal structure. Thus, beside the requirements of the political integration, the probability of the EU’s institutions to result in human rights violations when they conduct their activities has intensified. This situation has increased the pressure by member states with a strong constitutional tradition on the EU to develop coherent internal human rights policies.

The other development which has also influenced the evolution of the EU’s human rights policy is the “widening” of the EU to candidate countries and the intensification of the EU’s relations with the third countries by creating commercial and economic ties. Due to the attractiveness of the EU for the candidate and third countries with regard to economic prosperity, political stability and international prestige, more and more countries want to create economic and political linkage with the EU. As the EU grows in economic and political strength, the EU membership or establishment of a relationship with the EU becomes more appealing. This appeal has endowed the EU a powerful instrument to promote democracy and human rights in the third countries. The adoption of democratic norms and ideals both in theory and in practice has turned out to be *sine quo* on condition for any state looking for a membership or creating any

type of relation with the EU. The EU has acted as a model for democracy, respect for human rights and the rule of law and it has actively involved itself in human rights promotion in these countries. Through this, the EU has become one of the most important institutions, which serves as an external dynamic for democratization and human rights promotion in the third countries.

Briefly, as an important moral foundation of the EU, respect for human rights has appeared to form an integral part of the of Europe's identity construction and self-definition. Corresponding with the EU's transformation from economic community to political Union by "widening" and "deepening," economic issues have become more and more subordinate to the fundamental issues leading to the core questions of the European standards of human rights protection on the national and the community level. This course of development has made it inevitable for the EU to have an internally coherent human rights policy throughout the Union and to take active position on the human rights problems abroad. In this sense, the role of the human rights in both internal and external affairs of the EU has tremendously increased.

The increasing role of the human rights both in the EU's internal and external relations has naturally shaped its relations with the third countries. One of the most important countries affected by this process is Turkey. Turkey-EU relations have been influenced by the EU's general stance concerning democracy and respect for human rights in its general external relations. The EU has been an active influence on Turkey to improve human rights since the early 1980. Taking the advantage of the institutional ties created by the Ankara Association Agreement, Custom Union, and Helsinki Council Decisions, the EU has instigated domestic change in terms of human rights and democratization in Turkey.

## **A. Problem Definition**

It is very clear that commitment to human rights has become one of the most important principles of the European integration. Starting in late 1960s, this approach of the EU/EC has been reconfirmed by the initiatives of the EU institutions, the decisions of the European Court of Justice (ECJ), and the provisions of the EU treaties, albeit more reluctantly at the beginning but stronger later. The EU/EC has attempted to develop a coherent and comprehensive human rights policy at the internal and external level since the beginning of the late 1960s.

The dynamics that shape the EU's human rights policy are wide ranging. They are determined by the member state-EU relations in the realm of internal human rights policies and target country-EU relations in the realm of the external human policies of the EU. Generally, the most important parameter that shapes the internal human rights policies of the EU is based on the question of competence, i.e. whether the EU

has a competence in human rights protection, which is generally under the jurisdiction of the member states. In external human rights policies, the question arises whether the EU as an external actor has the capacity to instigate domestic change on the basis of human rights promotion in target countries. If so, the question of the policy instruments that the EU would take the advantage to force the target countries to promote human rights emerges.

In this sense, analyzing the EU's human rights policy and its approach to third countries is not a straight forward task. It requires a multi-dimensional analysis focusing on the discussion of several questions including:

- What are the dynamics that make the EU develop human rights policy?
- What are the status and the role of human rights/fundamental rights in the Union legal order?
- What are the main challenges for the development of the EU's human rights policies?
- What are the EU's policy instruments in promoting human rights in its external relations and how effective are they?
- Under which conditions human rights conditionality of the EU is successful for the third countries?
- What are the domestic conditions of target countries that affect the success of human rights conditionality?

## **B. Main Objectives**

In this context, the concern of this thesis is to analyze the development of the EU's internal-external human rights policy basing on the discussion of the above questions. Rather than focusing on either internal or external policies, this thesis argues that only "the unified approach" including both aspects of the Union's approach presents the analytical tool that explains the human rights policies of the EU. On the basis of the descriptive analysis of the internal human rights policies of the EU, which gives a general framework for the evolution of the place of the human rights in the legal order of the EU, the main aim of this chapter is to focus on the EU's external human rights policies for third countries. Within this framework, the human rights conditionality for membership-association-development cooperation agreements is analyzed as an important policy instrument of the EU for human rights promotion in the third countries.

On the basis of this theoretical background, by examining the Turkish case, the extent to which the Union is capable of promoting domestic change among those states that aspire to become EU members and thereby how effective the EU's human rights conditionality for the applicant countries is analyzed.

Through this, Turkey is used to put the specific case to the general framework of the EU's external human rights policies. In analyzing the instruments through which the EU has endeavored to promote domestic change in terms of human rights and democratization in Turkey and by analyzing the scale of reforms undertaken, the present paper forms a study to understand the dynamics, effectiveness and the challenges of human rights conditionality in the relationship between the European Union and applicant country, namely, Turkey.

## **C. Structure of the Thesis**

This thesis consists of six Chapters. In Chapter 2, the development of the EU's internal human rights policy is analyzed. Here the focus is on the place of human rights in the legal order of the EU. In this context, the primary and case law of the EU including the human rights provisions of the founding treaties of the Community and the extension of the jurisdiction to the European Court of Justice (ECJ) in human rights issues are evaluated. Moreover, the role of the Union institutions such as the Commission, the Parliament and the Council in the development of the EU's human rights policy is given special emphasis. The challenges of the EU's human rights policies such as the question of competence, excessive judicial review and internal-external contradiction of the EU's policies, are also focused on.

In Chapter 3, the general emphasis is on the external human rights conditionality policy of the EU and policy instruments of the EU to promote domestic change in the third countries. Firstly here, the general framework of the EU's external human rights policy in the Common Foreign and Security Policy (CFSP) of the EU is drawn. Secondly, the EU's human rights conditionality policies towards the third countries are analyzed. Here the focus is on human rights clauses in development-cooperation and trade agreements, as an important policy instrument of the EU for consolidating and promoting human rights in the third countries. Lastly, the EU's human rights conditionality policy for the accession and the candidate countries is examined.

In Chapter 4, the effectiveness of human rights conditionality policies of the EU on Turkey is analyzed. In the first part, the focus is on a descriptive analysis of the general human rights and democracy problems in Turkey. This part is devoted to the conflict issues between Turkey and the EU. The reports of non-governmental organizations such as Human Rights Watch, Amnesty International, and the Commission Reports of the EU are taken as reference points in this part of the analysis. In the second part, the discussion is based on the process of Turkey becoming a target of human rights conditionality of the EU. In general, the focus is on human rights promotion instruments of the EU for Turkey, namely the Ankara Association Agreement in 1963, the Custom Union in 1995 and lastly the Helsinki Council decisions. In

the third part, the effectiveness of the EU instruments in promoting domestic change is analyzed, by focusing on the legislative reforms that Turkey adopted as a response to meet the EU's human rights conditions. Even though human rights promotion instruments of the EU, namely the Association Agreement and the Custom Union, were utilized to promote democracy and human rights, since Turkey became a target of human rights conditionality clearly following the Helsinki European Council in 1999 by getting candidate status, the focus of the reform process in Turkey is generally limited to a time period of 1999-2004.

In Chapter 5, the challenges of human rights conditionality policy of the EU in Turkey are analyzed. This chapter is divided into two parts. In the first part, the domestic challenges of the human rights conditionality of the EU are focused on. These challenges include state-society interaction in Turkey, the cost-benefit calculation of the political actors, and the distribution of the human rights convergence cost among the political actors. In the second part, the external challenges of human rights conditionality, namely the capacity of the EU's human rights conditionality to promote domestic change in Turkey is analyzed. These external challenges include the credibility problem, the perception of a double standard, the legitimacy of the conditions, and the non-existence of material commitment of the EU to promote human rights in Turkey. In this two level analysis the general theoretical framework explaining in which cases the conditionality is effective is referred to analyze Turkey's specific case and to put Turkey into general framework. In Chapter 6, some conclusions are drawn.





## Chapter II: The Development of EU's Human Rights Policies

The European Union (EU)) has experienced an unprecedented transformation from purely economic community to a more political and constitutional Union. It was an economic cooperation organization among member states in the beginning. But in time, it has increased its powers to the Justice and Home Affairs (JHA) and the Common Foreign and Security Policy (CFSP) underlining the Union's willingness to increase its say in the field of politics. This has initiated a process of deepening in the European Integration with many implications. On the one hand, such transformation has increased the activities of the Union on issues like fundamental and human rights protection. On the other hand, a considerable increase in the scope of the Community action has invoked the fear that member states would lost their political power at the national level. The contradiction has led to the tensions between the common whole that is the supranational Union and the constituent parts that are the sovereign nations.<sup>1</sup> In the light of these concerns of the member states, the constitutional structure of the Union has been formulated to find a way to balance the dominance of supranational Europe over national sovereignty, "the interests of integration and differentiation, of harmonization and diversity, of centralization and localization."<sup>2</sup>

It is also possible to see such dichotomy in the development of the EU's human rights policy. Human rights protection in the legal system of the EU has always been situated in the point between "common aspirations" of the European Union and "national particularity" of the member states.<sup>3</sup> Constitutional developments concerning human rights protection are based on mainly achieving a balance between "the integrity of the whole and the autonomy and identity of the parts."<sup>4</sup> It is "a search for equilibrium between unity and diversity that permits and encourages the emergence of a common European polity while still taking into account and respecting the basic values of national constitutional systems."<sup>5</sup> On the basis of this balance, human rights, whose protection and improvement are purely under the jurisdiction of the

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<sup>1</sup>Carozza, Paolo G., "Subsidiarity: As a Structural Principle of International Human Rights Law," *The American Journal of International Law*, Vol. 97/38 (2003), p: 51.

<sup>2</sup>De Búrca, Gráinne, "Re-appraising Subsidiarity's Significance after Amsterdam," *Harvard Jean Monnet Working Paper*, Vol. 7/99 (1999), p: 10. Available at: <http://www.jeanmonnetprogram.org/papers/99/990701.html>. It is accessed on 11.02.06.

<sup>3</sup>Carozza, Paolo G., *supra* note: 1, p: 52.

<sup>4</sup>Carozza, Paolo G., *supra* note: 1, p: 53.

<sup>5</sup>Carozza, Paolo G., *supra* note: 1, p: 53.

member states, have penetrated into the area of the Community influence. They become one of the most important elements of the “constitutional values” of the EU’s legal order.<sup>6</sup>

In this sense, the EU has firmly been committed to respect for human rights and it has become a defender of human rights both internally and externally. Since the late 1960s, it has tried to develop its own internal human rights policy at the EU level. In this process, the most challenging question has been the status and the place of human rights in the Union’s legal structure. The discussion has been based on non existence of any express provision of the founding treaties of the EU concerning human rights protection as well as the issue of enlarging the EU’s competence to human rights issue. The solution options have involved the accession by the Community to the European Convention on Human Rights (ECHR), adopting a “bill of rights” for the Union and the extension of the European Court of Justice (ECJ) competence to the human rights issue, especially for the activities of the EU institutions. Thus, the EU’s human rights policies have developed on the basis of the constitutional-political discussion about the extension of the Community competence and the attempts of the EU to incorporate enumerated human rights provisions to the founding and amending treaties of the EU.

On this basis, the concern of the present chapter is to make a legal analysis of the place and development of human rights policies in the EU’s constitutional structure. It tries to discuss the challenges of the EU’s human rights protection system and the role of the EU institutions in this structure. Such an analysis is also important in shedding light on the differences between the EU’s external and internal policies. The Chapter II consists of three basic parts. In the first part, the focus is based on the place of human rights in the legal order of the EU. In this part, the primary and case law of the EU are analysed. The part includes an analysis of the human rights provisions of the founding treaties of the Community. Moreover it comprises an evaluation of the extension of the jurisdiction of the European Court of Justice (ECJ) in human rights issues due to the important developments of its case law. In the second part, the role of the Union Institutions such as the Commission, the Parliament and the Council in the development of the EU’s human rights policy is examined. The emphasis here is mostly based on initiatives of the European institutions about human rights at the political level. In the third part, the challenges of the EU’s human rights policies such as the question of competences, depending excessive judicial review and internal-external contradiction of the EU’s policies are examined.

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<sup>6</sup>Toggenburg, Gabriel N., “The Debate on European Values and the Case of Cultural Diversity,” *European Diversity and Autonomy Papers EDAP*, No: 1 (2004), p: 10.

## **A. Human Rights Policies within the Legal Order of the EU**

The human rights policy of the EU has developed from two important legal sources. One is the “primary law” that is the treaties of the EU and the other is the “case law” of the ECJ. On the one hand, since the founding treaties of the Community do not explicitly mention human rights in their provisions, the breakthrough cases before the ECJ have had important implications for shaping the Community’s human rights approach and filling the gap of the non existence of enumerated human rights provisions. On the other hand, the improvement of human rights provisions of the EU’s treaties has important impact on the development of the EU’s human rights policy. The milestone developments in the primary law in this regard are the Single European Act 1986, (SEA), the Treaties of Maastricht (1992), Amsterdam (1996) and Nice (1999), and, finally, the EU Charter of Fundamental Rights (2000), which is now incorporated to the Draft Constitution. The political initiatives of the Community institutions have also influenced the EU’s human rights policy, even though, they are not legally binding.

### **I. The Founding Treaties of the European Community**

The founding treaties of the EU form the primary legislation of the EU. The recent founding treaty of the EU is the draft Treaty establishing the Constitution for Europe aiming to incorporate all the existing Treaties into a single text after its ratification by the member states. The other treaties are the Treaty of Paris (1951), establishing Coal and Steel Community, the Treaties of Rome (1957) establishing the European Atomic Energy Community, and the European Economic Community, and the Treaty establishing European Union (1992) which is also called Maastricht Treaty. In time, these treaties have been improved to follow the transformations in the world by the “amending treaties” including the Merger Treaty (1965), Single European Act (1986), the Treaty of Amsterdam (1997) and the Treaty of Nice (2001). They made institutional changes and brought new fields of activities for the European institution.

Even though the founding treaties of the EU provide an important legal basis for the internal and external human rights policy of the Union, human rights were not an outstanding issue in the first phases of the European integration project. In the early years, the Community did not involve deeply with the human rights issue. The integration was understood as solely economic in character and thereby human rights protection was purely under the jurisdiction of member states’ national courts. But in time, following the increase in the scope of the activities, the establishment of the principles of “direct effect” and “supremacy” of the Community law and the construction of the EU’s human rights competence by the case law, the EU has focused on human rights issues more strongly. It added or amended some human rights provisions in its primary law which led to the further institutionalization of the EU’s human rights policies.

## 1. The Treaty of Paris (1951)

In 1951, the Treaty of Paris establishing the European Coal and Steel Community (ECSC) was signed by Germany, France, Italy, Netherlands, Belgium and Luxemburg. This was the first treaty of the Community envisaging the unification of the coal and steel industries of France and Germany. Starting the integration from coal and steel industries was not by chance. It was believed that following the end of the war, European states were not ready to transfer their powers to a supranational institution in the political sphere.<sup>7</sup> Therefore, the integration would only be successful, if it was limited to specific technical areas.<sup>8</sup>

In terms of human rights, the ECSC's technical scope of the activities led to a belief among the founding fathers of the Treaty that the ECSC's did not have any area of influence that would interfere with fundamental rights.<sup>9</sup> In this sense, in this first Treaty of the European Community, there was not any emphasis on the protection of fundamental and human rights.

## 2. The Treaties of Rome: EEC and EUROTOM

Towards the late 1950s, European integration extended its scope from technical cooperation to a more broadly based economic integration. On 25<sup>th</sup> March 1957, the two treaties of Rome which established the European Economic Community (EEC) and the European Atomic Energy Community (EUROTOM) were signed. While the activities of the ECSC and the EUROTOM were limited to the area to in which they functioned, the Treaty founding European Economic Community had a comprehensive scope.<sup>10</sup> It included the establishment of common market, the abolishment of trade restriction, provisions prohibiting free movement of goods, services, capital and workers, common policy making in several fields, non discrimination of member state nationals and so on.<sup>11</sup>

Although the EEC regulates a broader area of influence which can lead to the infringements of human rights by the Community's institutions, the Treaty of Rome does not contain anything like the "bill of

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<sup>7</sup>Weatherill, Stephen and Beaumont, Paul, *The EU Law*, (London, Penguin books Ltd., 1999), p: 3.

<sup>8</sup>You can find a broader analysis of the development of European integration in Fontaine, Pascal, *A New Idea of Europe: the Schumann Declaration- 1950-2000*, (Luxemburg, Office for Official Publications of the European Communities, 2000), p: 11-12.

<sup>9</sup>Binder, Darcy S., "The European Court of Justice and the Protection of Fundamental Rights in the European Community; New Development and Future Possibilities in Expanding Fundamental Rights; Review to Member State Action," *Harvard Jean Monnet Working Papers*, Vol.4 (1995), p: 1.

<sup>10</sup>Weatherill, Stephen and Beaumont, Paul, *supra* note:7, p: 4.

<sup>11</sup>Weatherill, Stephen and Beaumont, Paul, *supra* note:7, p: 4.

rights.”<sup>12</sup> The Treaty mentions fundamental rights narrowly. For example, the Treaty by its Article 48 and Article 119 prohibits the discrimination basing on nationality and gender. Article 48 of the Treaty states that “*freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other conditions of work and employment.*” The discrimination which is based on gender is also prohibited by the Article 119 of the Treaty of Rome by stating “*each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.*” However, these rights are far away from being a comprehensive legal basis of human rights, although such provisions form the basis of several regulations and the case law of the ECJ concerning human rights.<sup>13</sup> According to Clapham (1991), they can be considered as articles which ensure smooth enjoyment of “fundamental community rights” rather than “universal human rights.”<sup>14</sup> For him, this is because the enforcement of the former depends on being a Community national only contrary to the latter which everyone can enjoy “regardless of nationality.”

There are several reasons for the original member states not to include human rights provisions or a “bill of rights” into the articles of the Treaty of Rome. The first reason is the consideration of member states that the establishment of European Communities is a functionalist process especially in the field of economics and technical matters,<sup>15</sup> which means the jurisdiction of the European Community is only limited to the economic sphere. In this sense, the protection of fundamental rights is the responsibility of the member states and must be protected at a national level by the constitutional provisions and instruments such as the European Convention on Human Rights (ECHR), providing a basic level of protection under the international law.<sup>16</sup> Beside this consideration, as a second reason of not including human rights provisions is that the original member states was unwilling to extent the Community powers or competences to human rights by the inclusion of “bills of rights” in the Treaty of Rome. They believed that the Community institutions would increase their jurisdiction “*as extending to anything not explicitly*

<sup>12</sup>Binder, Darcy S., *supra* note:9, p: 1.

<sup>13</sup>Duparc, Christiane, *Avrupa Toplulugu ve Insan Haklari*, (translated as European Community and Human Rights), (Luxembourg, Office for Official Publications of the European Communities, 1992), p: 12.

<sup>14</sup>See the discussion concerning the differences between “fundamental community rights” and “universal human rights” in Clapham, Andrew, *Human Rights and the European Community; a Critical Overview*, (Baden-Baden, Nomos, 1991), p: 34.

<sup>15</sup>Meehan, Michael, “(Un)Charted Waters: The Legal Background to Fundamental Rights Protection in the EU”, in. Feus, Kim, eds., *An EU Charter of Fundamental Rights: Text and Commentaries*, (UK, Federal Trust Series, 2000), p: 79.

<sup>16</sup>Meehan, Michael, *supra* note: 15, p: 79.

*prohibited by the enumerated guarantees.”*<sup>17</sup> However, such a discussion in the later years of the Community presents a dilemma. While member states make pressure to the Community to have human rights protection in the Community's legal order, the Community can not do it without extending its jurisdiction.

### 3. Single European Act (1986)

In February 1986, the twelve member states signed the Single European Act (SEA) which envisaged the opening of an internal market and ensuring free movement of goods, capital, services and people, thus creating an economic area among the member states as from 1 January 1993. For the first time, the Act made several modifications in the institutional structure of the Community by enlarging the competences of it. The act changed the unanimity principle in the Council's decisions with the qualified voting, extended the power of the parliament and introduced new competences in economic and social cohesion, research and technological development and the environment and lastly it set out provisions concerning political cooperation.<sup>18</sup>

In terms of the development of human rights policy within the EEC, the Act made contributions particularly in two aspects. Firstly, it mentioned directly for the first time in its preamble human rights issue and an international legal instrument by stating that the EEC has an aim “*to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.*” This has two implications. On the one hand, human rights become an important source of the Community primary law, meaning that such provision in the preamble of the SEA become a legally binding instrument for the member states parties to the Act. On the other hand, the Community with this preamble acknowledged the necessity of taking measures to promote human rights rather than only protecting human rights. This means that the Community adopted an active attitude towards human rights rather than a proactive attitude and by 1986 “the protections of human rights become an end itself.”<sup>19</sup> Secondly, since the Treaty focused in its preamble also on the responsibility of having solidarity to show “*the principles of democracy and*

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<sup>17</sup>Binder, Darcy S., *supra* note:9, p: 2.

<sup>18</sup>Ifestos, Panayiotis, *European Political Cooperation: Towards a Framework of Supranational Diplomacy*, (Brookfield, Gower Publishing Company, 1987), p: 347.

<sup>19</sup>Clapham, Andrew, “Where is the EU's Human Rights Common Foreign Policy and How it is Manifested in Multilateral Fore?” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p: 634.

*compliance with the law and with human rights to which they are attached,”* the treaty envisaged more cooperation among the member states in terms of human rights issues. Coupled with the provisions concerning political cooperation of member states in their foreign policies, it is possible to argue that the Act can envisage a linkage between human rights issue and foreign policy option of the member states.

#### **4. The Treaty of the European Union (1992 Maastricht Treaty)**

The Maastricht Treaty (formally, the Treaty of the European Union) was signed on 7 February 1992 in Maastricht between the members of the European Community and entered into force on 1 November 1993. The Treaty established a pillar structure. The first pillar is the Community Pillar, the second is the Common Foreign and Security Policy (CFSP) and the third is the Justice and Home Affairs (JHA). The first Pillar has a supra-national character but the second and the third pillar have inter-governmental feature. In the first pillar, the EC law has a direct effect which means that the Community law has supremacy over the national law in the event of conflict.<sup>20</sup> Outside the EC, in the second and third pillar, the principle of supremacy and direct effect is not relevant.<sup>21</sup>

Compared to other treaties of the Community stated above, the Maastricht Treaty gives particular importance to the human rights issue and recognizes human rights as the core of the community law. The first mentioning of the Maastricht Treaty concerning human rights can be found in its Preamble. Member states reconfirm *“their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.”* Moreover, it states in Article F(2) (now Art. 6 (2)) that *“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.”* In addition, Article F (3) sets out that *“the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.”* In this context, it is observed that human rights reference is now included into a Treaty article. With this article (Article F), the Treaty codifies the decision of the ECJ case law officially.<sup>22</sup> Some scholars believe that “material provisions” of the ECHR

<sup>20</sup>Weatherill, Stephen and Beaumont, Paul, *supra* note: 7, p: 12.

<sup>21</sup>Weatherill, Stephen and Beaumont, Paul, *supra* note: 7, p: 12.

<sup>22</sup>Schimmelfennig, Frank and Guido, Schwellnus, “The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding,” *Internal Project Dossier*, 2004, p: 2.

have now been introduced into the legal order and this leads to the “strict legal obligation” of the Union to observe the ECHR.<sup>23</sup>

The Treaty of the European Union has also increased the obligation under Article F(2) to a much larger area than the EC Treaties.<sup>24</sup> As it is stated above, the pillar structure of the European Union has brought new dimensions such as the CFSP and the JHA. Since Article F (2) which is stated above is placed in the common provisions, obligation of the EU under Article F (2) is applicable to all these pillars.<sup>25</sup> However, the impact of this innovation has decreased by the fact that the ECJ would not exercise its jurisdiction over acts of the Community institutions in the intergovernmental pillar.<sup>26</sup> As it is the case, in terms of the CFSP, the Treaty in Title V and Title VI contains its own specific references to human rights. For example, Article J (1) of the Treaty states that the objective of the CFSP is “*to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.*” In addition, in the field of the CFSP, the EU has developed instruments such as common positions, joint action and economic sanctions and it has made several commitments in terms of human rights issues with its relations by third parties.

It is also possible to see the growing role of human rights issue in the JHA pillar of the Treaty. For example, Article K (1) of the Treaty states areas of common interest of member states in the JHA, including: asylum policy; immigration policy, judicial co-operation in civil matters; judicial co-operation in criminal matters and so on. Pursuing these objectives, Article K.2 (1) of the Treaty makes necessary the compliance “*with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.*”

Briefly, the Maastricht Treaty mentions human rights several times in different provisions regulating different pillars of the Community. Such development can be attributed to the natural result of the movement of the Community to the Union. The more the Union transcends traditional economic area of influence and moves towards the political arena, the more it is apt to make legislation concerning human rights issue. However, it is important to state here that from the beginning, the Community has a limited

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<sup>23</sup>Neuwahl, Nanetta A., “The Treaty on European Union: A Step Forward in the Protection of Human Rights?” in Neuwahl, Nanette A., and Rosas, Alkan eds., *The European Union and Human Rights*, (Boston, Martinus Nijhoff Publishers, 1995), p: 13.

<sup>24</sup>Neuwahl, Nanetta A., *supra* note: 23, p: 16.

<sup>25</sup>Neuwahl, Nanetta A., *supra* note: 23, p: 16.

<sup>26</sup>Neuwahl, Nanetta A., *supra* note: 23, p: 16.



jurisdiction in the CFSP and the JHA in the human rights issues. The reason for this is that the ECJ was not given any jurisdiction to enforce the commitment concerning human rights in these new fields.

## 5. Amsterdam Treaty (1997)

The Amsterdam Treaty made several amendments in the provisions of the Maastricht Treaty and renumbered its provisions.<sup>27</sup> The first obvious change in the field of human rights is the modification of the old Article F of the Maastricht Treaty with Article 6 of the Amsterdam Treaty. Article 6 states 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.”* The Treaty also restates in its Article 6(2) Article F (2) of the Maastricht Treaty which is quoted above. By these improvements, the Treaty accepted human rights as general principle on which the Union is founded. This was also the reflection of the development of the ECJ's case law concerning the human rights issue.

To some extent, these principles are not a novelty. They are all stated by the Maastricht Treaty with a different formulation having the same aim. The first innovation of the Amsterdam Treaty is Article 7(1) (ex. F.1) which gives the chance to the Community to determine whether there is an infringement of the member states to the principles stated in Article 6. In case there is in fact a violation, it gives the opportunity to the Community *“to suspend certain of the rights deriving from the application of the Treaty”* of the member state. With this principle, the Treaty also for the first time states *“a procedure for enforcing the principles on which the Union is founded.”*<sup>28</sup> However, the invocation of this provision is rather hard, since it is *“a political procedure to be initiated by the Parliament or the Commission.”*<sup>29</sup> In this sense, such provision has symbolic importance demonstrating the commitment of member states to the protection of human rights<sup>30</sup> rather than a legal source which is used widely. The second innovation is Article 46 (ex L) which enlarges the jurisdiction of the Court to the scope of Article 6(2) (ex F (2)) for the activities of the institutions by stating that, *“in so far as the Court has jurisdiction under the Treaties establishing the European Communities.”* The Court can make judicial scrutiny to the acts of the Community in terms of the consistency of human rights in a more structured way. The third innovation is that the Treaty accepts respect for human rights mentioned in Article 6(1) as precondition for accession of

<sup>27</sup>When discussing the provisions, I will make reference to the new numbers of the Amsterdam Treaty but write the old numbers in brackets.

<sup>28</sup>See the discussion concerning on the limitations of realizing this provision, Betten, Lammy and Grief, Nicholas, *EU Law and Human Rights*, (UK, Longman, 1998), p: 133.

<sup>29</sup>Betten, Lammy and Grief, Nicholas, *supra* note 28, p: 57.

<sup>30</sup>Betten, Lammy and Grief, Nicholas, *supra* note 28, p: 57.

the candidate countries with its Article 49 (ex O) stating that “*any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union.*”

To sum up, although it is not possible to consider human rights provisions of the Amsterdam Treaty as legally adequate for the promotion and protection of human rights, this Treaty of the European Union is an important step towards an enforceable human rights policy within the Union. At least, the Treaty gives the chance to the EJC to review the activities of the institutions in terms of human rights, extent human rights legislation in the Treaty to the second pillar, making respect for human rights a precondition of becoming a member and sustaining membership. However, it could not remedy the basic shortcomings of the Maastricht Treaty. The Amsterdam Treaty still lacks a catalogue of human rights enumerated in it and much still needs to be done to realize credible international human rights policies within the EU.

## **6. Nice Treaty (2001)**

The Treaty of Nice was signed on 26 February 2001. This Treaty amends some provisions of the Treaty of Amsterdam with an aim to prepare the Union for the challenges of the enlargement by the accession of new twelve members. The aim of the Treaty as it is stated in its preamble is “*to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union.*” The importance of the Nice Treaty for human rights lies on the fact that it amends Article 7 of the Amsterdam Treaty and proclaims the Charter. As it is stated above, Article 7 of the Treaty on the European Union has introduced the possibility of suspending membership, if the member countries would violate human rights. The Council acting “*by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament*” can determine “*the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)*” according to Article 7 (1) of the Amsterdam Treaty. However, the invocation of this procedure against any member states is very hard.

Thus, mainly due to the rise of the neo-Nazi Austrian Freedom Party in 2000, some EU members wanted the EU to respond quickly to human rights violations conducted within the EU. In the light of this consideration, the Treaty of Nice has supplemented the procedure of Article 7(1) of the Amsterdam Treaty with an instrument for preventing human rights violations.<sup>31</sup> According to Article 7 of the Treaty of Nice “*on a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of*

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<sup>31</sup>Gráinne, de Búrca, “Human Rights and the Charter Beyond,” *Harvard Jean Monnet Working Papers*, No: 10/01 (2001), p: 10.

the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1). By this way, one third of the Member States, the European Parliament or the Commission can request from the Council that it determines the existence of a risk of a breach of fundamental rights. The Council can determine by a four-fifths majority of its members and with the assent of the European Parliament the existence of serious and persistent violations by a member state. In the light of this decision, the Council can suspend some rights of the member state by a qualified majority. With this amendment “the power of the EU to investigate the internal policies of any member state so as to monitor compliance with human rights is now spelt out more clearly.”<sup>32</sup>

## II. European Union Charter of Fundamental Rights

As it is focused above there is not any “bill of rights” and the EU institutions are not directly bound by the ECHR, since the Community is not a party of the Convention. This has two important implications. On the one hand, the Community acts are not subject to the judicial review in terms of meeting basic human rights principles, which give community a broader discretion making more likely fundamental rights violations. On the other hand, due to the lack of “bill of rights” the Community did not mention explicitly which human rights it should respect. This led to the vagueness and uncertainty what rights should be respected at the Union level. Given these shortcomings of the Community law, and making the fundamental rights to be respected more concretely, at the Cologne European Council on the 3<sup>rd</sup> and 4<sup>th</sup> of June 1999, the EU Heads of States or Governments decided to establish a catalogue of rights in a Charter. In Nice 2000, the Presidents of the European Parliament, the European Council and the European Commission proclaimed the European Charter of Fundamental Rights and later the Charter was included into the European Constitution. By this way, before the ECJ and in the framework of the remedy system of the Treaties, the Charter which is initially a declaration is likely to become a legally binding instrument for the Community and for the member states on the condition that they implement Community law,<sup>33</sup> in case of the ratification of the Constitution.

The main goal of the Charter on which the member states have had consensus is realizing the transparency and coherent codes of rights by the systemization of fundamental rights protection and by the consolidation of legitimacy through it.<sup>34</sup> The present system of human rights protection in the EU is mainly based on common constitutional traditions of the member states and the ECHR. This led to the

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<sup>32</sup>Gráinne, de Búrca, *supra* note: 31, p:10.

<sup>33</sup>See Garcia, Ricardo A., “General Provisions of the Charter of Fundamental of the European Union,” *Jean Monnet Working Paper*, Vol.4/02 (2002), p: 4.

<sup>34</sup>See Philippe, Nina, *Die Charta der Grundrechte der Europäischen Union*, (Baden-Baden, Nomos, 2001), p:17.

uncertainty which human rights would be respected by the member states in the field of the Community law. In this sense, the Charter has an aim to make precise the legal protection guaranteed by the ECJ through ensuring a clear statement of the values and rights which the Community takes into the consideration. By this way, the citizens of Europe can easily refer to those rights. This would also increase the effectiveness and legitimacy of the ECJ's human rights jurisprudence at the community level<sup>35</sup> acting in the areas having human rights implications. Beside these general goals, the promotion of human rights protection,<sup>36</sup> supporting integration process,<sup>37</sup> establishment of European identity on the basis of common values,<sup>38</sup> achieving European constitution,<sup>39</sup> the symbolic influence of the Charter domestically and internationally,<sup>40</sup> are the other expected functions of the Charter. In the light of these goals, under six major headings namely dignity, freedoms, equality, solidarity, citizens' rights and justice, the Charter includes civil and political rights, economic and social rights as well as the citizenship rights coming from the Treaty.

In addition to these positive approaches to the Charter, there is also scepticism against it. The scepticism emerges from three basic issues concerning the Charter. The first issue is directly linked to the fear of the member states that the competence of the Community would increase to the areas where it has formerly no jurisdiction such as, property rights, succession, labor law, children's rights, rights to health and education, if the Charter would be incorporated into the Treaties. The implication that the Charter becomes legally binding and superior to national law led to the suspicion for the member states which fear a decrease of their national sovereignty. Given these concerns, the Charter makes particular statements for appeasing the

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<sup>35</sup>Vitorino, António, "The Charter of Fundamental Rights as a Foundation for the Area of Freedom, Security, and Justice," *Exeter Paper in European Law*, No: 4 (2000).

Available at: <http://www.law.ex.ac.uk/cels/LasokText2000Vitorino.doc>. It is accessed on 14.02.06.

<sup>36</sup>Tettinger, Peter J., "Die Charta der Grundrechte der Europäischen Union," *Neu Juristische Wochenschrift* (2001), p:1010. Quoted from Philippe, Nina, *Die Charta der Grundrechte der Europäischen Union*, (Baden-Baden, Nomos, 2001), p:17.

<sup>37</sup>Däubler, Gmelin H., "Eine Europäische Charta der Grundrechte - Beitrag zur gemeinsamen Identität," *Europäische Zeitschrift für Wirtschaftsrecht*, (2000), p:1. Quoted from Philippe, Nina, *Die Charta der Grundrechte der Europäischen Union*, (Baden-Baden, Nomos, 2001), p:17.

<sup>38</sup>Schmuck, Otto, "Die Ausarbeitung der Europäischen Grundrechtscharta als Element der Verfassungsentwicklung," *Integration* (2000), p:48-56. Quoted from Philippe, Nina, *Die Charta der Grundrechte der Europäischen Union*, (Baden-Baden, Nomos, 2001), p:17.

<sup>39</sup>Schmuck, Otto, *supra* note: 38, p: 17.

<sup>40</sup>Baer, Susanne, "Grundrechte-Charta Ante Portas," *Zeitschrift für Rechtspolitik*, (2000), p:361-364. Quoted from Philippe, Nina, *Die Charta der Grundrechte der Europäischen Union*, (Baden-Baden, Nomos, 2001), p:17.

unease of the member states.<sup>41</sup> For example, in terms of the address of the Charter in its Article 51, the Charter makes it very clear that the basic reference of the Charter is to the EU institutions, bodies, offices and agencies with regard to the principle of subsidiarity and member states when they are implementing the Community law. The Charter states that it will also not enlarge the area of influence of the Community and not grant new powers to the Community.<sup>42</sup>

The second debate concerning the Charter is based on the legal status of the Charter. The Charter was a solemn declaration proclaimed by the European Parliament, the Commission and the Council. According to the Cologne European Council decision in 1999 and the Nice European Council decision in December 2000, the legal status of the EU Charter would be decided later. The reason of the delay of determining the legal status of the EU Charter or giving preliminarily the status of “solemn declaration” is the unwillingness of some member states to incorporate the Charter to the treaties of the European Union. It is necessary to wait until the incorporation of the Charter to the present EU treaties to become a legally binding instrument.

The third issue arises from the question of “What would be the relationship between the Charter and the ECHR.” Indeed, such question had been raised many times during the first meetings of the Convention, which is the composition of the drafting body. There was the consideration that the Charter would subordinate the power of the ECHR, if it is incorporated into the primary law following the ratification of the Constitution. The argument is that the Charter would lead to uncertain and inconsistent human rights protection due to two different sources of protection system. For some against the Charter, this would lead to the inconsistency in the protection of human rights and jeopardize the place of the ECHR in the human rights protection. However, following a careful reading of the Charter provisions, it is possible to adopt a negative position against this argument. Firstly Article 53 (now Article II-113) of the Charter states that: *“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”* The aim of this provision is to set “a level of protection” and secure that human rights protection which is ensured by the Convention is “minimum standard.” To express in other way, the threshold of human rights protection which is provided

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<sup>41</sup>McCrudden, Christopher, “The Future of the EU Charter of Fundamental Rights,” *UACES Online Reflection Papers*, No: 1 (2002), p: 10. Available at: [www.uaces.org](http://www.uaces.org). It is accessed on 28.02.06.

<sup>42</sup>Article 51(2) of the Charter states that “this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

by the European Union can not be lower than the level of protection ensured by the ECHR. For this reason, the Charter can not be interpreted in a way that will result in an inferior level of protection provided by the Convention. The Convention in this sense must be a minimum level of protection and interpretation. Secondly, contrary to the arguments against the Charter, Article 52 (3) of the Charter states that *“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.”* While this provision is important in terms of avoiding the risk of different interpretation of the rights and freedoms corresponding to those guaranteed in the Convention by the Luxemburg and Strasburg Courts,<sup>43</sup> it presents the opportunity to go beyond the level of protection afforded by the Convention by pointing out that in Article 52 that the Charter *“shall not prevent the Union law providing more extensive protection.”*

Even if the above mentioned provisions of the Charter try to protect the status of the ECHR in the human rights regime of Europe and envisage more extensive protection than those found in the ECHR, the Charter could not “close the procedural gap between the two legal systems.”<sup>44</sup> Such a problem can only be solved completely by the EU's accession to the ECHR. The Treaties of Amsterdam and Maastricht did not open the way of accession to the ECHR due to the *Opinion 2/94, 28 March 1996* which states the amendments of the Treaties of the EU is necessary for becoming a contracting party to the Convention. For closing this procedural gap between these two legal systems, the Council of Europe recommended the Convention-a drafting body of the Charter- to accede to the ECHR.<sup>45</sup> Moreover, the Commission pointed out that *“the existence of a Charter does not diminish the interest in joining -the Convention-, as accession would effectively establish external supervision of fundamental rights at Union level”*<sup>46</sup> and then the Commission reconfirmed that *“if the draft Charter is silent on the question of Union accession to the European Convention, of course, it must be acknowledged that the question remains open,”*<sup>47</sup>

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<sup>43</sup>Garcia, Ricardo A., *supra* note:33, p: 8.

<sup>44</sup>Liisberg, Jonas B., “Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a Fountain of Law or Just an Inkblot?” *“Jean Monnet Working Paper*, No: 4/01 (2001), p: 8-9.

<sup>45</sup>Liisberg, Jonas B., *supra* note: 44, p: 8-9.

<sup>46</sup>European Commission, “Communication on the Charter of Fundamental Rights of the European Union,” (2000). Quoted from, Garcia, Ricardo A., *supra* note: 33, p: 12.

<sup>47</sup>European Commission, “Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union,” (2000), Brussels. Quoted from, Garcia, Ricardo A., *supra* note: 33, p: 13.

To sum up, in the discussion concerning the Charter, there have been divergent considerations regarding the Charter.<sup>48</sup> On the negative side of the coin, some of the scholars believe that the Charter would create problems of coherence and consistency due to the establishment of two different human rights protection regime. One is human rights protection afforded by the ECHR and the other is the Charter. On the positive side of the coin, the Charter is considered as a higher level of protection and codifies the already existing human rights in a way that it provides legal certainty. As it is focused above, the Charter with its provisions tries to appease the scepticism. In this sense, the argument supported here is mostly based on the latter stance, which perceives the Charter as a positive development in human rights protection system in Europe. The amendments which are made by the draft European constitution also contribute to resolve the above mentioned debates, to be elaborated in the proceeding part.

### III. EU Constitution

The European Convention, known also the Convention on the Future of Europe, was a body established by the Laeken European Council in December 2001. It has an aim of producing a draft constitution for the European Union for the Council to finalize and adopt. The Convention accomplished its task in July 2003 with their Draft Treaty establishing a Constitution for Europe. Beside additional issues, the Convention addressed four main issues set out Nice Council, that is, a more precise delimitation of competencies between the EU and the Member States in accordance with subsidiarity; the status of the Charter of Fundamental Rights; simplification of the Treaties to make them clearer and more accessible, and the role of national parliaments in the European architecture. The most relevant issue for this thesis is the status of the Charter of Fundamental Rights proclaimed at Nice.

The draft Treaty establishing European Constitution due to the work of the Convention has taken important steps for solving the debates concerning human rights issue, such as the legal status of the Charter, the lack of enumerated human rights and accession to the ECHR. The first improvement in terms of fundamental rights and freedoms made by the Constitution is the incorporation of the Charter to the EU constitution. In Article I-9(1), the Constitution states that “*the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.*” By this way, the Charter would become a part of the primary law of the EU and shift from a “solemn declaration” to a “legally binding document” for member states, if the Constitution is ratified. Overall, even though many changes are made in the wording of the Charter with the incorporation of it to the Constitution, in material

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<sup>48</sup>Ibid.

and legal regard, only minor amendments can be observed.<sup>49</sup> The reason for this is that the objective of integrating the Charter as a part of the Constitution is not to create new rights but to codify the existing rights that must be respected by the EU.

The second important improvement the Constitution has made in terms of human rights is to pave the way for the accession to the ECHR. The Constitution in its Article I-9(2) states that “*the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.*” As it is emphasized many times in this paper that non accession to the ECHR creates a credibility problem for the EU's human rights policy. After the ratification of the Constitution, the accession to the ECHR will help to increase the accountability in human rights issue.

Beside these new developments, as a third improvement, the Constitution reconfirms that the human rights are considered as general principles of law by stating that “*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law,*” in its Article I-9 (3).

Although these three points make possible the promotion of coherent human rights policy within the EU, there are still some problems in terms of ensuring a proper human rights protection. Overall, one of the most important problems is the ratification of the EU Constitution. Following the preparation of the Convention, the Treaty establishing a Constitution for Europe (TCE), commonly referred to as the European Constitution was signed in 2004 by representatives of the member states of the Union. It has been subject to ratification by all member states to become legally binding. On 29 May 2005, French and on 1 June 2005, Dutch voters rejected the treaty in the referendum. The failure of the constitution to win popular support in these countries caused other countries to postpone or halt their ratification procedures, and the Constitution now has a highly uncertain future. In this sense, the realisation of the above mentioned developments depends on the ratification of the TCE. Beside this general problem, even after the ratification of the Constitution, there would be some problems that will not be solved. For example, the Constitution does not solve sufficiently the easy access of individuals to the ECJ for the rights in the Charter. This is important because without an efficient system of remedies the rights granted by the Constitution would not be effective. In Article II-107, the Constitution states that “*everyone whose rights*

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<sup>49</sup>Brecht, Holger, “Änderungen an der EU Grundrechtecharta, Korrekturen durch Verfassungskonvent und Regierungskonferenz sowie Konsequenzen für die Auslegung der Charta,” *Zeitschrift für Europarechtliche Studien*, Heft 3 (2005), p:392.



*and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.”* Moreover, Article II-101 states that “*every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*” It is possible for the individual to bring a case against the EU acts on the basis of Article III 365 (4) which states that “*any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.*” This article states the basis for an individual to make a proceeding against an act of the EU in cases where this individual can pursue sue against a regulatory act which is of direct concern to an individual and does not entail implementing measures. This Article provides an insufficient procedure for an individual application in situation where individual rights protected by the Charter are violated. In this sense, the Constitution does not deal the problem of enforceability sufficiently. For this reason, instead of ECJ, the individuals can attempt to justify their rights under the Charter by national Courts.

#### **IV. Human Rights in the Case Law of the ECJ**

As it is argued above, the founding treaties of the European Union did not enumerate human rights principles in their legal texts, which the institutions of the Community and member states should respect. This is the natural result of the belief that protection of human rights can be ensured under the jurisdiction of member states' national courts rather than the ECJ. However, in time, mainly because of the principle of the direct effect and supremacy of the Community law over national legislations, member states persistently asked the ECJ to protect human rights in applying community law. For some member states, the principles of the direct effect and supremacy of European law which grant constitutional powers to the Community institutions with the implications of invalidating national legislation and lack of judicial control can not be possible without legal and judicial guarantees.<sup>50</sup> The first action came from constitutional courts of the Italy and Germany in the 1960s. They started to question the validity of the secondary Community legislation before the ECJ on the basis of the allegation that some Community legislation violated human rights which are protected by their national legislations. Such acts of the member states were an important challenge for the Community trying to consolidate principles of supremacy and the direct effect. As a response, the Court has tried to remedy this challenge by its case law decisions.

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<sup>50</sup>Weiler, Joseph H.H., “Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights,” in Neuwahl, Nanette A., and Rosas, Alkan eds., *The European Union and Human Rights*, (Boston, Martinus, Nijhoff Publishers, 1995), p: 57.

For practical reasons, it is possible to divide Court's case laws into three different periods. In the early cases, the Court had a passive stance towards human rights issue, but in time, in the later cases, it has started to deal with the human rights issue in the framework of the general principles of law and it has made reference to the important international human rights instruments such as the ECHR, and lastly the ECJ has tried to extent its jurisdiction to the activities of the member states in field of the Community law.

The Court had passive stance towards the human rights issue in the early cases such as *Stork*<sup>51</sup>, *Präsident*<sup>52</sup> and *Sgarlata*.<sup>53</sup> In all of these cases, the Court rejected to examine the Community legislations compatibility with the national legislation of member states concerning human rights. The Court explained the reasons of not referring to national legislations of member states in evaluating Community legislation in the *Stork* case. It stated that the Court is only required to apply and interpret the Treaty. The Court is not competent to apply the principles of national constitutional legislation of member states; even if it is related with the protection of fundamental rights. This attitude of the Court is mostly based on the consideration to protect supremacy of the Community law over national legislation and direct effect principle rather than the denial of human rights issue in the Community law.<sup>54</sup> However, if it was the intention, the reservation of the member states courts, particularly, German and Italian courts not to apply the Community law due to the lack of human rights guarantees in the Community's legal order deteriorated the supremacy and direct effect of the community law.

In this context, the Court made important attempts in "filling this gap" by using general principles as a source of law.<sup>55</sup> General principles are a source of law which international and national courts utilize "to fill the perceived lacunae in their legal system."<sup>56</sup> The Treaty gives the permission to the Court to use general principles of law in its judicial decision by stating in its Article 288(2) (ex Article 215(2)) that "*in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its*

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<sup>51</sup>Case C-1/58, Judgment of 04/02/1959, *Stork & Cie. / ECSC High Authority*, (Rec.1959, p:43).

<sup>52</sup>Case C-36/59, Judgment of 15/07/1960, *Präsident Ruhrkohlen-Verkaufsgesellschaft and others / ECSC High Authority* (Rec.1960, p: 857).

<sup>53</sup>Case C-40/64, Judgment of 01/04/1965, *Sgarlata and others / Commission EEC* (Rec.1965, p: 279).

<sup>54</sup>Hamme, Van Allein, "Human Rights and the Treaty of Rome," in Heffernan, Liz eds., *Human Rights: A European Perspective*, (Dublin, The Round Hall Press, 1994), p: 76.

<sup>55</sup>See the discussion on general principles as source of law, Witte, de Bruno, "The Past and Future Role of the ECJ in the Protection of Human Rights" in Alston, Philip eds., *The EU and Human Rights* (Oxford, Oxford University Press, 1999), p:865.

<sup>56</sup>Witte, de Bruno, *supra* note: 55, p: 865.

*servants in the performance of their duties.*” This has the implications that the Community law could contain unwritten rules as well. Although human rights explicitly stated in the constitutions of member states at national level and they have the value of their own which transcends ambiguity and wider category of general principles,<sup>57</sup> the Court had to use general principles doctrine for amalgamating the vagueness of human rights dimension, namely the lack of catalogue of human rights in the community legal order. The Court made its first endeavor in this framework in its *Stauder*<sup>58</sup> case. Contrary to its early decisions, the Court pointed out that human rights can be considered as the general principles of the Community law. This is an important method of interpreting Community law on the basis of human rights without written provisions. Such an approach of the Court was reconfirmed by its following judicial decision in the *Internationale Handelsgesellschaft*<sup>59</sup> case. But in this case, the Court made it clear that “*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 its constitutional structure.*”<sup>60</sup> But it explicitly restated its decision in the *Stauder* case that: “*The respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.*” Moreover, it added that the court would depend on the “*constitutional traditions common to the member states*” when it is protecting fundamental rights within “*the structure and objectives of the community.*”

The decision of the Court in the *Internationale Handelsgesellschaft* case led to an important reaction from the constitutional courts of the member states, especially, from the German Federal Constitutional Court (Bundesverfassungsgericht). As a response to the decision of the Court, German Constitutional Court in its *Solange I* ruling (1974)<sup>61</sup> decided that the German Constitutional Court would reserve the right of reviewing the compatibility of the Community law with the German Constitution as long as the Community does not have a codified catalogues of fundamental rights which are similar to the rights guaranteed by the German Constitution.<sup>62</sup> Moreover, the German Court would examine the compatibility of Community primary and secondary legislation with the German Constitutional Law in terms of human rights as long as the Community does not have an elected democratic parliament by the general suffrage that the Community institutions are responsible.<sup>63</sup>

<sup>57</sup> Betten, Lammy and Grief, Nicholas, *supra* note 28, p: 57.

<sup>58</sup> Case C 29/69, Judgment of 12/11/1969, *Stauder / Stadt Ulm* (Rec.1969, p: 419).

<sup>59</sup> Case C 11/70 Judgment of 17/12/1970, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Rec.1970, p:1125).

<sup>60</sup> *Ibid.*

<sup>61</sup> BVerfGE 37, 271 - *Solange I*.

<sup>62</sup> Betten, Lammy and Grief, Nicholas, *supra* note 28, p: 64-67.

<sup>63</sup> *Ibid.*

The German constitutional court softened its Solange I (1974) ruling in the Solange II (1986) <sup>64</sup> ruling by stating that “so long as the European Communities, and in particular the case law of the European Court, generally ensure the effective protection of fundamental rights...The Federal Constitutional Court of the Germany will no longer exercise its jurisdiction to decide on the applicability of secondary legislation review by the standard of the fundamental rights contained in the Constitution.”<sup>65</sup> In the light of this decision, the Constitutional Court of Germany declared that it would not review the secondary Community law with the German secondary legislation conditional upon (as long as) the ECJ provide human rights protection against Community acts which is equivalent to fundamental protection in the German constitution. Although the Constitutional Court of Germany has modified its position, they accepted the supremacy and direct effect doctrines on a conditional basis by stating as long as the Court respect for human rights. This attitude of the German Constitutional Court is important for showing the dissatisfaction of the member states from human rights protection at the Community level.

In the light of these challenges, the Court tried to extent its power to make judicial review of the Community acts for complying with human rights standards stated in international instruments. In the *Nold* <sup>66</sup> case, it made reference to the international treaties for the protection of human rights that the member states signed as “*guidelines which should be followed within the framework of community law.*” It stated that they can provide inspiration for the Community acts. However, the Court decision did not state explicitly the name of these international treaties. It become clear by the *Rutili*<sup>67</sup> case in 1975 that the Court made clearly reference to the ECHR as a source of guidelines for fundamental rights protection within the legal order of the Community. Following this decision, in the *Hauer* <sup>68</sup> judgment, the Court has made special focus on the ECHR among international treaties concerning human rights.

Briefly, the Court considers human rights as an integral part of the general principles of law, which the Community ensures in its acts. Thus, the Court draws inspiration from the constitutional traditions common to member states and international treaties concerning human rights, particularly, the ECHR. However, since the late 1980s, the Court accepted its decision in the *Waschauf*, <sup>69</sup> and *Elliniki Radiofonia*

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<sup>64</sup>BVerfGE 73, 339 - Solange II.

<sup>65</sup>English translation of the Solange II is quoted from Betten, Lammy and Grief, Nicholas, *supra* note 28, p: 67.

<sup>66</sup>Case C 4/ 73, Judgment of 14/05/1974, Nold KG / Commission (Rec.1974, p: 491).

<sup>67</sup>Case C 36/75, Judgment of 28/10/1975, Rutili / Ministre de l'intérieur (Rec.1975, p:1219).

<sup>68</sup>Case C 44/79, Judgment of 13/12/1979 , Hauer / Land Rheinland-Pfalz (Rec.1979,p:3727).

<sup>69</sup>Case C 5/88, Judgment of 13/07/1989, Wachauf / Bundesamt für Ernährung und Forstwirtschaft (Rec.1989, p:2609).

*Tileorasi*<sup>70</sup> – *Anonimi Etairia (ERT-AE)* cases that human rights are recognized as general principles of the Community law that also bind member states when they implement the Community law. This means that it extended its review power to the member states acts within the scope of the community law.<sup>71</sup> Such an extension of the Court's human rights jurisprudence to the member states acts within the sphere of the Community law led to the unwillingness of the member states.<sup>72</sup> It was considered that the Court aimed to increase its jurisdiction to the areas where member states court have jurisdiction rather than to protect human rights. These decisions do not mean that the competence of the Court enlarged to the area under the jurisdiction of the national legislator. But it is extended to a national rule which is covered by Community law.<sup>73</sup>

To sum up this discussion, the Court developed its case law concerning the human rights issue. This was to some extent the result of the dissatisfaction of the German and Italian constitutional courts, which argue that they would not accept direct effect and supremacy of the European law and they would review Community provisions for the compatibility with human rights. In this context, the Court started to respond these challenges and shifted the way of its decisions by using general principle doctrine. Three important phases are observed. In the first phase, especially, in early cases, the court rejected the argument that national legislation would not invalidate Community's legislations even though it is related to fundamental rights. However, given the challenges from the national courts of the member states, in the second phase, the Court decided that when the Community institutions exercised its powers, it would respect human rights as general principles of the Community law. For making more concrete what these general principles are the Court has made references to the ECHR and constitutional principles common to member states. The reactions of the member states are twofold. On the one hand, general principle approach was considered as too vague and giving the Court too big discretion.<sup>74</sup> Although with its case law the Court made a reference to the ECHR, European Social Charter (ESC), international treaties and constitutional principles and traditions, the reactions are based on the allegation that the rights enumerated in them hardly been developed by the Court and they have never been used to provide protection to the individuals.<sup>75</sup> In the light of these suspicions, some member states conditionally accepted the supremacy

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<sup>70</sup>Case C 259/89, Judgment of 18/06/1991, ERT / DEP (Rec.1991, p: I-2925).

<sup>71</sup>Witte, de Bruno, *supra* note: 55, p: 865.

<sup>72</sup>Avbelj, Matej, "European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Free Movement of Goods," *Harvard Jean Monnet Working Papers*, No: 06/04 (2004), p: 29.

<sup>73</sup>Binder, Darcy S., *supra* note:9, p:17.

<sup>74</sup>Besselink, Leonard F.M., "Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union," *Common Market Law Review*, Vol.35 (1998), p: 629.

<sup>75</sup>Clapham, Andreaw, *Human Rights and the European Community; a Critical Overview*, (Baden-Baden, Nomos, 1991), p: 50.

and the direct effect of the Community law. On the other hand, some satisfied with the general principles doctrine, since it only covered the acts of the Community, not the areas under the jurisdiction of member states.<sup>76</sup> In the third phase, the Court extended its jurisdiction to the member states action within the scope of the Community law. The response of the member states is rather complicated. It is enough here to state that the extension led to the scepticism of the member states fearing that they would lose national jurisdiction.

## **B. The Role of the EU Institutions in Human Rights Protection**

The European Union has attributed particular importance to human rights issues since the beginning of the 1970s by the initiatives of the several the EU institutions. With these initiatives at the political level, human rights were tried to be integrated as “a structural principle” of the European Community rather than integrating them to “the overall restructuring of the Community, acceptable to all Member states.”<sup>77</sup> In this sense, the EU institutions followed the path of the ECJ in adopting human rights protection for Community acts, on the one hand.<sup>78</sup> On the other hand, the activities of the EU institutions formed the general human rights context on which the Union functions.<sup>79</sup> Such situation makes the institutional framework on which human rights policy of the Union has developed particularly important.

### **I. The European Parliament**

The European Parliament which is the only elected body of the EU has particularly important for the development of the EU's internal and external human rights policy. It considers human rights as one of its important objectives. Originally, it has no formal competence to make and implement human rights<sup>80</sup> but it was successful in enlarging its power to these areas in time. The Parliament did it by several

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<sup>76</sup>Matej, Avbelj, *supra* note: 72, p: 29.

<sup>77</sup>Hamme, Van Allein, *supra* note: 54, p: 76.

<sup>78</sup>Meehan, Michael, *supra* note: 15, p: 80.

<sup>79</sup>Alston, Philip and Weiler, Joseph, H, “An Ever Closer Union” in Need of a Human Rights Policy: The European Union & Human Rights,” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999) p: 28.

<sup>80</sup>Boumans, Ey and Norbarts, Michael, “The European Parliament and Human Rights,” *Netherlands Quarterly of Human Rights*, Vol.7 (1989), p: 36-56.

declarations, ad hoc resolutions, annual reports, questions concerning human rights,<sup>81</sup> the importance of which is analyzed in the following part.

The European Parliament has tried to influence by several political initiatives the constitutional developments of the European Union and thereby it has made strong emphasis on human rights issues.<sup>82</sup> The first attempt of the Parliament in this framework is the “Joint Declaration by the European Parliament, the Council and the Commission on Fundamental Rights of 5 April 1977.” This can be considered as the first attempt of the European Parliament to incept official human rights policy of the EC, although it is not legally binding. The declaration states that given the treaties establishing European Communities and the secondary legislation of the ECJ are depended on the principles of fundamental rights, the European Parliament, the Council and the Commission declare that they give particular importance to the protection human and fundamental rights and will respect these rights when they are exercising their powers.<sup>83</sup> This declaration is important for the reconfirmation of the European institutions’ political will that they would do their best to protect human rights and fundamental freedoms. According to Reinhard and Laussegger (1999) with the Joint Declaration, the Parliament tries to give to some extent “political support and democratic legitimacy” to the case law of the ECJ which has made reference to the ECHR since the late 1960s.<sup>84</sup> Moreover, the European Parliament has accepted a new Declaration in 1989 which is called “Declaration of Fundamental Rights and Freedoms.” This can be considered as the first endeavour of the Parliament to introduce a “bill of rights” for the Community. For this reason, it has a symbolic value, even though it is not a legally binding document. The most important aim of the Parliament with this document was to call the Community institutions to adopt formally the declaration and to make the declaration a part of the Treaties.

As a second category of the initiatives of the Parliament in the human rights issue are the Parliament Resolutions and Annual Reports for the Human Rights conditions in the world and in the Community. The Resolution of the European Parliament on 27 April 1977 stating the necessity of accession to the ECHR, 14 September 1983 Resolutions which focuses on the enumerating fundamental rights in the future EU

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<sup>81</sup>See detailed analysis of the role of the European Parliament in human rights issue in Reinhard, Rack and Loussegger, Stefen, “The Role of the European Parliament; Past and Future,” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p: 800-823.

<sup>82</sup>Reinhard, Rack and Loussegger, Stefen, *supra* note: 81, p: 805.

<sup>83</sup>OJC 103, 27.4.1977, available at: <http://europa.eu.int/eur-lex/en/treaties/selected/livre602.html>. It is accessed on 02.03.06.

<sup>84</sup>Reinhard, Rack and Loussegger, Stefen, *supra* note: 81, p: 805.

constitutions, and the Resolutions of the European Parliament of 12 April 1989 accepting the Declaration of Fundamental Rights and Freedoms are the important examples in this respect.<sup>85</sup>

Beside the above mentioned declaration, there are also divergent initiatives of the Parliament to play an important role in the development of EU's human rights policy. For example, the *Parliament's draft Treaty on European Union on 14 February 1984 (Spinelli Report)* stating the EU would respect the political and civil rights in the ECHR as well as economic and cultural rights, *Parliaments Declaration on a List of Fundamental Rights on 12 April 1989 (De Grucht Report)* setting out a complete list of human rights, *The Committee on Institutional Affairs Draft Constitution on 10 February 1994 (Herman Report)* extending the scope of human rights in the De Grucht Report<sup>86</sup> are the other important attempts of the Parliament that affect the constitutional developments of the Union.

In addition to these declarations, resolutions and annual reports, the European Parliament has made several statements concerning the self engagement of institutions of the EU to the Charter. For example, on 8 November 2000, the European Parliament has made a decision approving the draft Charter of Fundamental Rights and Freedoms of the EU. Moreover, in Article 58 of the rules of Procedure of the European Parliament concerning the “the examination of respect for fundamental rights, the principles of subsidiary and proportionality, the rule of law, and financial implication,” it is stated that during the examination of a legislative proposal, the European Parliament shall attribute particular importance to the respect for human rights and the legislative act must be in conformity with the Charter. In this respect, the Statement of the President of the European Parliament Nicole Fontaine in Nice 2000 deserves particular attention, saying that “*the Charter will be the law guiding the actions of the Assembly....From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of the citizens throughout the Union.*” It is possible to conclude from these decisions that the EU parliament's stance towards the Charter is positive and has always endeavored adopting a legally binding fundamental rights catalogue for the EU. Inigo Mendez de Vigo who is the leader of the European Parliament representation expressed the attitude of the European Parliament more evidently. He says that “*the Charter of Fundamental Rights must be binding and must be incorporated into the Treaty. To the extent that the Treaties constitute the Constitutional Charter of the European Union, as reaffirmed by the case law of the Court of Justice, the Charter of Fundamental Rights should be part of it.*”<sup>87</sup> This statement

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<sup>85</sup>Hamme, Van Allein, *supra* note: 54, p 76.

<sup>86</sup>Hamme, Van Allein, *supra* note: 54, p 76.

<sup>87</sup>Quoted from, Lindfelt, Mats, “The Implications of Proposed EU Charter of Fundamental Rights: A Political Declaration or a Legally Binding Instrument?” *Institute for Human Rights, Abo Akademi University*, (2001), p: 64. Available at: [http://www.abo.fi/institut/imr/norfa/mats2\\_implications.pdf](http://www.abo.fi/institut/imr/norfa/mats2_implications.pdf). It is accessed on 02.03.06.



is so clear showing the role that the Parliament has played for incorporating the Charter in EU's primary law.

Moreover, the Parliament has played a significant role in external policies of the European Union which is conducted by the Political Affairs Committee and the Subcommittee on human rights. By the questions concerning human rights to the Commission and Council, the Parliament members can say their consideration about the human rights issue in a third country.<sup>88</sup> The Parliament has influenced the development of the human rights conditionality in EU's relations with third countries, humanitarian aid, and development cooperation policies as well.<sup>89</sup> The Parliament has started uses its power with regard to the human rights issue in the conclusion of external agreement and budgetary powers.<sup>90</sup> The influence of the Parliament becomes important, as the Community enters into wide range of agreements with other actors.<sup>91</sup>

## II. European Commission

The Amsterdam Treaty has a considerable impact on the updating of the Commission role in the field of human rights. According to Alston and Weiler (1999), the transformation of the Commission role is in three respects.<sup>92</sup> Firstly, with the introduction of the CFSP, the Commission needs to work together with the Council through Troika and Council Committees in external relations. This was the result of the increasing role of the Commission in the second pillar devoted by the Treaty. For example, the Commission directly integrated in the European Political Cooperation and has given the chance to take its own initiatives in this arena. Secondly, the Amsterdam Treaty makes possible judicial review of the Community institutions by the ECJ with regard to the human rights issue. In order to prevent the invocation of such a procedure, the Commission would need to make a detailed analysis of its draft legislation and proposed measures for securing the suitability with the fundamental rights standards as stated in Article 6 (2). Thirdly, the Article 7 of the Amsterdam Treaty gives the chance of the termination of member states rights in case member states seriously and persistently violate human rights. According to this decision, the Commission is also charged with proposing the Council to come together for making

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<sup>88</sup>Reinhard, Rack and Lousseegger, Stefen, *supra* note: 81, p: 811.

<sup>89</sup>Reinhard, Rack and Lousseegger, Stefen, *supra* note: 81, p: 818.

<sup>90</sup>Bulterman, Mielle, "Human rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?" *School of Human Rights Research Series*, Vol. 7 (2001), p 64.

<sup>91</sup>Clapham, Andrew, *supra* note: 14, p: 72.

<sup>92</sup>Alston, Philip and Weiler, Joseph, H.H, *supra* note: 79, p: 39.

a decision. This made it necessary for the Commission to have a coherent methodology, adequate capacity, and guidelines in terms of the human rights issue in involving such cases.

In this context, the activities of the Commission have overwhelming importance in the protection of human rights as well. It made several political initiatives such as the Memorandum of the Commission of 4 April 1979 and the Commission Communication of 19 November 1990 on the accession of the Community to the ECHR. The most important feature of them is that for the first time with the Memorandum and for the second time with the Communication, the Commission tried to urge European Communities to accede to the ECHR.

By this way, the Commission has committed itself to the adoption of a fundamental rights catalogue for the Union, either through making a catalogue for the Union of its own or by acceding to the ECHR.<sup>93</sup> It is possible to see such a situation in the Commission attitude towards the Charter. For example, in Nice on 12.07.07, the President of the Commission made a statement as *“in the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote [...]. The citizens of Europe can rely on the Commission to ensure that the Charter will be respected [...].”* It seems obvious in this statement that the Commission has a strong motivation to commit itself to the Charter. It proclaimed that the Commission would take into account the Charter in their actions. To say it in other words, the Commission would bind itself to the Charter, although the Charter is not legally binding up until the ratification of the Constitution.

### III. European Council

The European Council which is the Summit of the Heads of the States and Governments and the Commission President has a key role in promoting human rights. It has adopted several declarations about human rights protection. Two important ones “Copenhagen Declaration on European Identity” of 14-15 December in 1973 which Heads of States and Governments accepted human rights as the fundamental elements of the European Identity construction<sup>94</sup> and the “Declaration on Democracy” of the Copenhagen Summit on 7 and 8 April 1978, by which the member states reconfirmed their will that they will “respect and safeguard the principles of representative democracy, of the rule of law, of social justice and of

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<sup>93</sup>Lindfelt, Mats, *supra* note: 87, p: 39.

<sup>94</sup>Meetings of the Heads of State or Government, Copenhagen on 14-15 December 1973, Bulletin. EC 12.1973, available at: <http://aei.pitt.edu/archive/00001439>. It is accessed on 02.03.06.

respect for human rights.”<sup>95</sup> Moreover, the intended role of the Council is to ensure “the coordination of human rights concern among the three pillars.”<sup>96</sup>

#### **IV. The Court of Justice**

Since the role of the ECJ is broadly focused on in the case law of the Community, it will not be dealt here. Enough is here to state that although all the EU institutions have involved in the development of human rights policy within the European Union, the most significant of which is the ECJ. The evolution of human rights policy of the European Union has gone in parallel to the development of the ECJ's case law which is analyzed above.

#### **C. The Challenges of EU's Human Rights Policies**

According to Weiler and Alston (1999) human rights policies of the EU are based on a paradox.<sup>97</sup> On the one hand, the EU is an ambitious advocator of the human rights in its internal and external policies<sup>98</sup> at least in its rhetoric. As it is stated above, human rights have taken its place as general principles of the Community law in the legal order of the EU. Several political initiatives of the Parliament and the Commission emphasized the importance of human rights issue and tried to provide human rights protection throughout the Union. Moreover, the Community has adopted strong instruments such as the principle of conditionality, financial resources, and human rights clauses in promoting and consolidating human rights in its relation with third parties. On the other hand, it has no “comprehensive and coherent policy” at internal and external level.<sup>99</sup> The EU has failed to adopt institutional, legislative and administrative arrangements suitable to its rhetoric. There are still important questions whether the EU has sufficient legal competence, institutional arrangements, and a catalogue of rights in human rights issues.

#### **I. The Question of Competences**

One of the most important stumbling blocks in developing a coherent and comprehensive human rights policy is the question of the competences. Article 5 of the EC Treaty states that “*the Community shall act*

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<sup>95</sup>The European Council, “Copenhagen Summit 1978, Copenhagen, 7-8 April 1978,” *Bulletin EC* (1978), Available at: <http://aei.pitt.edu/archive/00001439/>. It is accessed on 02.03.06.

<sup>96</sup>Alston, Philip and Weiler, Joseph, H.H, *supra* note: 79, p: 46.

<sup>97</sup>Alston, Philip and Weiler, Joseph, H.H, *supra* note: 79, p: 46.

<sup>98</sup>Alston, Philip and Weiler, Joseph, H.H, *supra* note: 79, p: 46.

<sup>99</sup>Alston, Philip and Weiler, Joseph, H.H, *supra* note: 79, p: 46.

*within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*" The areas which are not under the competence of the Community, the Community can take decision in accordance with the principle of subsidiary.<sup>100</sup> In terms of human rights, there has been a persistent discussion over the extent to which the Union should be deemed to have any legislative competence over fundamental rights.

Such question of the competence of the Community has posed many challenges to the development of a coherent human rights policy of the European Union. The first implication comes from the question that, if the Community has no competence in the field of human rights, how it will develop a coherent human rights policy. The validity of the Community acts can always be questioned legitimately through the argument of competence by the member states opposing the development of a human rights issue for several reasons. The debate on the competence of the EU diverts the attention from the real issue, jeopardizing the possibility of adopting efficient human rights policies. Moreover, the issue of the competence prevents the Community not to accede to the ECHR. The conclusion of the Court in the failure to sign the Convention does not show the lack of concern of the Community to the human rights issue, but its determination to act within its limits of its existing powers.<sup>101</sup> Not acceding to the ECHR because of the issue of competence itself presents many challenges to the development of the EU's human rights policy. This would lead to a lack of definition contents of human rights, of individual protection against the Community acts, of judicial review of the Community acts by the European Court of Human Rights, of legal certainty due to the failure to sign the Convention.<sup>102</sup> Moreover, at present such situation deprives the Community from important source of legitimacy, representing common values of the European citizenship and identity.<sup>103</sup> However, the ratification of the Constitution would present a hopeful development paving the way of accession to the ECHR.

## **II. Reliance on Judicial Remedies and Lack of Monitoring System**

According to Weiler and Alston (1999), human rights policy of the European Union has two important challenges.<sup>104</sup> The first one is that it relies on predominantly "judicial remedies" at the national and the Community level, which gives the power to the individuals to utilize the legal remedies of the Community. A judicial protection system of individual does not itself provide effective human rights

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<sup>100</sup>Article 5 of the EEC Treaty.

<sup>101</sup>Betten, Lammy and Grief, Nicholas, *supra* note: 27, p: 114.

<sup>102</sup>Betten, Lammy and Grief, Nicholas, *supra* note: 27, p: 114.

<sup>103</sup>Betten, Lammy and Grief, Nicholas, *supra* note: 27, p: 119.

<sup>104</sup>Alston, Philip and Weiler, Joseph, H.H., *supra* note: 79, p: 12-13.

protection for individuals. It is necessary but it is not enough. To ensure effective access to justice, additional policies that make the individual to use this “judicially enforceable law” is necessary. To say it in other words, “positive measures” and “proactive human rights policies” must be adopted to making individuals to use their rights effectively. The second challenge is the “knowledge and monitoring gap” in the human rights policies of the European Union. According to Weiler and Alston (1999) monitoring systems are the most important dimensions on which internal human rights policies are founded. In the EU's human rights system, there is no agency which is given the power to systematically collect information concerning human rights issues in the field of the application of Community law. For this reason, the Community has a lack of information which it relies on its decisions regarding the determination of “legislative and policy priorities” and “allocation of administrative and budgetary resources.”

### III. Internal-External Contradiction

There has been a great paradox between internal and external human rights of the European Union.<sup>105</sup> On the one side of the coin, the EU shows particular interest in the human rights issues in of its external relations by emphasizing this dimension in its bilateral and multilateral agreements. One of the most important objectives of the CFSP is “*to develop and consolidate democracy, the rule of law, and respect for human rights and fundamental freedoms*” providing an important legal basis of the protection of fundamental rights in the third countries, according to Article 11 (ex J.1) of the Amsterdam Treaty. Moreover, Article 177 (ex 130u) of the EC Treaty emphasizes explicitly that the linkage between respecting human rights and development of cooperation by stating that community policy in that areas “*shall contribute to the general objective of developing and consolidating democracy, the rule of law and respecting human rights and fundamental freedoms.*” The Commission also states that politically accession to the ECHR is a precondition for accession to the European Union. It emphasized that “*membership of the Council of Europe and of the European Convention for the Protection of Human Rights*” and *Fundamental Freedoms* has become an implicit condition for the accession to the European Union.”<sup>106</sup> On the other side of the coin, the Community has no competence to accede to the ECHR, which would provide a strong instrument for the protection of the human rights for the individuals against Community's acts. This situation is perhaps best described by the words of the Weiler, J.H.H saying that “all institutions seem to be playing a corporatist game, intent on promoting and preserving their own prerogatives under the guise of concern for human rights.....following faithfully the officers' maxim:

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<sup>105</sup>Cremona, Marise, “The EU and the External Dimension of Human Rights Policy” in Konstadinidis Strados V., eds., *Peoples' Europe; Tuning a Concept into Content*,” (Dartmouth, EC International Law Forum, 1999), p: 156.

<sup>106</sup>European Commission, “Communication on EU and the External Dimension of Human Rights Policy; From Rome to Maastricht Beyond,” (1995), Brussels.

don't do what I do, do what I tell you to do. In this way they seem to be taking their cue from Community as a whole, which is extremely apt to preach democracy to others when it, itself continues to suffer from series of democratic deficiencies and to insist that all newcomers adhere to the ECHR when itself, refuses to the some.”<sup>107</sup>

This paradox has many negative implications on the consolidation of democracy and human rights in the accession as well as third countries for the Community. The role that the EU would play in human rights promotion regarding external relations depends on coherent internal policy dimension which would provide institutional arrangements necessary for the implementation and improvement of effective external human rights policy.<sup>108</sup> Moreover, in the light of the universality and indivisibility of human rights, the credibility and seriousness of the EU human rights policies in the world can only be achieved by comprehensive and coherent internal policies.<sup>109</sup> Such consistency of internal and external policies would prevent the perception of double standard and unilateralism of EU human rights policies<sup>110</sup> and would give more impetus for the other countries to improve human rights situation in their home countries.

## D. Conclusion

In this paper I have endeavored to examine the development of the EU's human rights policy in the framework of the institutional and legal order of the European Union. Firstly, the provisions of the founding Treaties of the European Union concerning human rights issue were analyzed. It was concluded that the founding treaties of the European Union neither mention explicitly the statements regarding human rights nor have any catalogue of fundamental rights and freedoms, which results in discontent among some member states. They argue that it is likely that the Community acts would violate human rights and basic freedoms since there is no judicial control or review mechanism for the actions of the Community institutions. Moreover, if there is the principle of direct effect and supremacy of European law over the national legislation, it would be not possible to protect human rights on the basis of member's states constitutional guarantees. This creates a vacuum in the human rights protection against the acts of the Community, since a national legislation, even if it is related with human rights, can not be a source of

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<sup>107</sup>Weiler, Joseph, H.H. and Fries Sybilla C., “EC and EU Competences in Human Rights,” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p 149.

<sup>108</sup>Alston, Philip and Weiler, Joseph, H.H., *supra* note: 79, p: 8-9.

<sup>109</sup>Alston, Philip and Weiler, Joseph, H.H., *supra* note: 79, p: 8-9.

<sup>110</sup>Alston, Philip and Weiler, Joseph, H.H., *supra* note: 79, p: 8-9.

examining the validity of the Community legislation. Briefly, the lack of any “bill of rights” is the first parameter of the EU’s human rights policy which brings us to the second parameter.

Secondly, following the analysis of the ECJ’s cases, it was concluded that the Court has tried to remedy the lack of “bill of rights” in the Treaties by its case law decisions basing on general principles doctrine and constitutional traditions common to member states. If there is no “bill of rights” and if the Community wants the stability of the implementation of Community law without the invalidation of the member states law on the grounds of human rights, the logical thing to do is to bring the human rights dimension into the Community law. But now, the Community is challenged by its main principle, - the principle of competence and subsidiary - which means that the Community institutions can not extent its power to the areas which are under the jurisdiction of member states. Traditionally, human rights are devoted to the member states and the Community has no jurisdiction therein.

In the light of this limitation, the Community could make legislation which would affect its institutions and consider human rights as a general principles of a Community law and make reference to the basic international instruments such as the ECHR but put some stone on the road of acceding to it, by arguing in Opinion 2/94 that it has no competence to conclude an international treaty without constitutional amendment. So the second parameter of the EU’s human rights policy is that the EU has limited competence to extent its jurisdiction on human rights issue.

Thirdly, following the role of the European institutions such as the Parliament, the Commission and the European Council in promoting human rights, it was concluded that these institutions used human rights rhetoric in every occasion and adopt several political initiatives, declarations, resolutions emphasizing the importance human rights and the necessity of concluding the ECHR. At the institutional level, one can see the increasing role of the human rights issued by both internal and external acts of the Community institutions. At the member states level, as it is stated above the constitutional courts of member states such as Germany and Italy criticizing the lack of a catalogue of human rights in the Treaty. This situation brings us third parameter. The EU’s human rights policy is based on a paradox. On the one hand, there is a pressure from the member states to have a catalogue of human rights and increasing emphasis of the Community institutions on human rights issue in their rhetoric, on the other hand, the Community has no sufficient competence in human rights to respond to the pressure of the member states. It would not be able to extend such competence to human rights issues due the fear of member states subordinating their national jurisdiction. I would like to describe the situation as follows: it is possible to formulate human rights policies of the EU by three parameters that is, “the lack of “bill of rights”, “lack of competence”, and “paradox of reaching the gap between the first and second parameters. In this sense, the success of future human rights policies of the European Union will depend on a stabile balance between these three

parameters, which necessitate a constitutional, institutional and administrative transformation in the current system of the EU.

However, the overall picture of the human rights policies of the EU for the future is not so much pessimistic. Several important developments have been made in reinforcing human rights in the legal order of the Community. The European Union Charter of Fundamental Rights was incorporated into the Constitution and would become a part of the primary law. It would in the future, after the ratification of the Constitution, will function as “Bill of Rights” for the EU. Moreover, Article I-9(2) of the Constitution will pave the way for the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this context, the ratification of the EU constitution would be a significant remedy to the above mentioned shortcomings of the EU’s human rights policies.



## Chapter III: EU's Human Rights Policies for Third Parties

Following the discussion of the internal human rights policies of the European Union, which provides the general framework and the legal basis for the EU's human rights policies throughout the Union, it is necessary to analyse the importance of human rights in the EU's relations with the third countries. Human rights and democracy promotion in the third countries are among the most important objectives of the EU since the 1990s. This is due to the fact that the end of the Cold War, which led to the transition of the communist block countries to the western liberal democracy, coincides with the Community's attempt to define its Common Foreign Security Policies (CFSP) in its second pillar. The end of Cold War and the development of the CFSP are two important developments with their essential implications on the development of the EU's external human rights policies. At the international level, the end of the Cold War has brought about a change in the Western policy makers' perception of the human rights issues. Such policy makers no longer wanted to support non democratic, militaristic and repressive states for the sake of their strategic interests, as it happened in the bipolar world. At the European level, the change of the western states' perception came together with the EU's shift from an economic to a political entity. With its third pillar, the EU has acquired the CFSP, whose objective is to co-ordinate the foreign policy of the fifteen member states on the basis of respect for human rights in its external relation. While the Cold War has resulted in an ideological shift of western countries' approach to human rights, the adoption of the CFSP has endowed the Union with several policy instruments and institutional capacities for promoting democracy<sup>1</sup> and human rights in the third countries.

In this sense, the concern of this chapter is to find explanations to questions such as “in what ways the change of the perception towards human rights issues of the EU has crystallised itself in the EU's relations with the third countries” and “how in this process the EU has adopted policy instruments to promote human rights in the third countries.” Being an important policy instrument, the analysis of human rights conditionality for the EU's treaty relations and membership forms the basic attention of this chapter. Giving the overall picture of this thesis, such an evaluation is important for putting Turkey's specific case into the general framework of the EU's external human rights policy, since the sensitiveness of the EU towards the human rights situation in Turkey has always been the reflection of the EU's general stance

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<sup>1</sup>Youngs, Richard, *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, (Oxford, Oxford University Press, 2001), p: 28.

towards the human rights in the world. For this reason, special emphasis is also given to the parameters that influence the functioning of human rights conditionality at both domestic and EU levels.

Chapter 3 consists of three parts. In the first part, the general framework of the EU's external human rights policy in the CFSP of the EU is drawn. In the second part, human rights promotion instruments of the EU towards the third countries are analysed. In this part, the main concern is human rights conditionality for maintaining development-co-operation and trade agreements, by incorporating human rights clause into the EU's treaty relations, as an important policy instrument to consolidate human rights in the third countries. In the third part, the functioning of the EU's human rights conditionality for membership is examined. Even though conditionality for membership and the EU's treaty relations together form the human rights promotion instruments of the EU, considering the complexity of the former issue, a separate part is devoted to it.

## **A. Human Rights in the Foreign Policy of the EU**

Since the Treaty of Maastricht, the external relations of the European Union have been regulated by the CFSP, forming the second pillar of the European Union. At the beginning of the 1970s, the Community's competence in external relations was generally limited to the areas of trade and co-operation. Such limitation did not allow the Community to deal with political issues emerging from those external relations.<sup>2</sup> The Community did not show a great capacity of exerting its economic strength for its political ends. Firstly, the European Political Co-operation (EPC), existing *de facto* until the incorporation of the Single European Act (SEA) in 1986, tried to fill this gap. Later on, the CFSP (succesor of the EPC) took over this task. In general, these two institutions are aimed at speaking a unified voice<sup>3</sup> and envisaging the coordination of foreign policies of the member states at an intergovernmental level. In the CFSP and the EPC, every member state is eligible to sustain its own foreign policy based on its national interest, since the EU is not "a unified state actor with identifiable European interest."<sup>4</sup> Being an important component of the EU's foreign affairs, the common external human rights policy of the EU has been dealt with and influenced by these frameworks.

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<sup>2</sup>Ifestos, Panyiotis, *European Political Cooperation: Towards a Framework of Supranational Diplomacy*, (Brookfield, Gower Publishing Company, 1987), p: 134.

<sup>3</sup>Smith, Michael, "Understanding Europe's "New" Foreign and Security Policy," *Institute on Global Conflict and Cooperation Policy Papers*, Vol.52 (2000), p: 52-88.

Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1034&context=igcc>. It is accessed on 06.03.06.

<sup>4</sup>Wong, Reuben, "The Europeanization of Foreign Policy," in Hill, Christopher and Smith, Michael, eds., *The International Relations and the European Union*, (Oxford, Oxford University Press, 2005), p: 141.

## I. Human Rights in the European Political Cooperation

The EU started to deal with human rights issues in the third and accession countries in the framework of the EPC established in 1970. Until the late 1980s, human rights issues were dealt with the EPC diplomatic instruments such as demarches and declarations.<sup>5</sup> The first development in this context was the Copenhagen Declaration on European Identity by the Heads of State or Government Meeting on 14 December 1973. This declaration stated the affirmation of the member states' common will to speak with one voice in world affairs. These states pointed out the principles on which their actions are based in their external affairs as democracy, rule of law, social justice and respect for human rights. The second development was the adoption of the SEA in 1986, which formalised the process of intergovernmental foreign policy making.<sup>6</sup> The SEA stated explicitly human rights in its preamble and reinforced the importance of human rights by bringing a legal basis to human rights in its relations with third countries. In the preamble of the SEA it was declared that the Community is "*determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.*" As a third development, the adoption of the SEA was followed by the Foreign Minister Statements on Human Rights on 21 July 1986 meeting in the framework of the EPC, reconfirming that "*respect for human rights is one of the cornerstones of the European Political Cooperation.*" This was the first document to present the strategy of promoting human rights around the world, even though it did not mention how the EPC would promote human rights and did not envisage any mechanism for it. Just respect for human rights was here considered as one of the cornerstones of the EPC. The protection of human rights appeared to be perceived as the legitimate obligation of the world, which could not be left under the sole jurisdiction of the individual states.

The Declaration on Human Rights adopted by the Luxembourg European Council on 28 - 29 June 1991 and The Resolution on Human rights, Democracy and Development on 28 November 1991 adopted by the same Council and the representatives of the member states meeting within the Council are the last two important initiatives. The former initiative was the first to mention the inclusion of human rights clauses in agreements with third countries as an important aspect of active human rights policy. It focused on the

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<sup>5</sup>Smith, Karen E "The EU and the Promotion of Human Rights within the United Nations," *Paper Presented for International Studies Association Conference*, (2002).

Available at: [www.isanet.org/noarchive/smithke.html#\\_ftnref5](http://www.isanet.org/noarchive/smithke.html#_ftnref5). It is accessed on 08.03.06.

<sup>6</sup>Clapham, Andrew, "Where is the EU's Human Rights Common Foreign Policy and How it is Manifested in Multilateral Fore?" in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p: 631.

linkage between development and human rights. The latter one explicitly put equal emphasis on economic, social, cultural, civil and political rights, and hence it gave human rights an important role by stating that “the minimum requirement for democracy is the observance of certain civil and political rights, which fall under the broader category of human rights.” The objective of the Resolution was to provide the guidelines and procedures for the Community’s action to improve human rights in developing countries.

The importance of the documents mentioned above is based on the fact that they provide the guidelines, procedures and the priorities for external human rights policy of the EU. These documents emphasize that the protection of human rights is the fundamental part of the international relations. In this context, the member states are obliged to pursue a policy of promoting and safeguarding human rights and fundamental freedoms throughout the world. More importantly, these documents do not consider the rise in the member states voice due to human rights violations in third countries as intervention to the internal affairs or sovereignty of the states.<sup>7</sup> In addition, they provide important policy instruments for promoting human rights abroad. By means of these initiatives, the EU sets the principles of an active rather than reactive positive approach of the Community in human rights violations in the third countries.<sup>8</sup>

## **II. Human Rights in the Common Foreign and Security Policy**

With the conclusion of the Maastricht Treaty in 1992, the EPC was replaced by the CFSP of the EU. The establishment of the CFSP, which provides a legal framework, brought wider and deeper cooperation in the foreign policy of the EU. One of the most important aspects of the newly established the CFSP of the EU is human rights. The attribution of great importance to the human rights issue in the CFSP is to some extent a reflection of international developments on the Treaty of the EU (TEU) in 1992. The disintegration of the Communist block countries reduced the importance of the geopolitical considerations which determined the relation between Europe and the developing world during the Cold War.<sup>9</sup> There was a growing unwillingness in the European countries to support dictatorial and corrupted regimes as well as popular pressure in the developing world in order to put an end to authoritarian governments.<sup>10</sup> It is certain that the Maastricht Treaty, which was formulated, in a sense, as an instrument to respond to these international developments in the post Cold War gave human rights an outstanding role in the new CFSP

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<sup>7</sup>Clapham, Andrew, *supra* note: 6, p: 634.

<sup>8</sup>Clapham, Andrew, *supra* note: 6, p: 634.

<sup>9</sup>King, Toby, “Human Rights in European Foreign Policy: Success or Failure for Post-Modern Diplomacy,” *European Journal of International Law*, Vol.10/2 (1999), p: 313-317.

<sup>10</sup>King, Toby, *supra* note: 9, p: 324.

and thus consolidated the external human rights policy of the EU. The EU clearly demonstrated its stance in Article 11 (ex Article J.1) of the Maastricht Treaty, which broadened the following objectives of the CFSP:

- to safeguard the common values, fundamental interests and independence of the Union;
- to strengthen the security of the Union and its Member States in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

With such broadening, one of the most important objectives of the CFSP has become the reinforcement of democracy, human rights and the rule of law in the world. In order to meet such objectives of the CFSP, the Treaty endowed the EU with new instruments for its foreign policy such as common positions<sup>11</sup> on which member states' national policies must conform, joint actions,<sup>12</sup> and economic sanctions. The adoption of such instruments led to the opportunity for the EU "to take concrete action beyond more declaratory diplomacy in the field of human rights."<sup>13</sup>

In many occasions, the EPC and the CFSP have mentioned the principles and common values on which EU's foreign policy should be based on, like free and open government, the rule of law, protection of human rights, economic liberalism, institutionalised multilateral cooperation, and the peaceful resolution of disputes.<sup>14</sup> These values are "civilian power norms" favouring diplomacy over coercion; the use of economic tools for political crisis; and support for the rights of indigenous people and less developed states.<sup>15</sup> The development of the EPC and the CFSP on the basis of these "civilian power norms" and common values has naturally influenced the EU's adoption of a common foreign position regarding human rights issues and the democratic approach in the third and accession countries.

<sup>11</sup>Article 12 (ex Article J.2) of Treaty on European Union, (Consolidated version 1997).

<sup>12</sup>Article 13 (ex Article J.3) of Treaty on European Union, (Consolidated version 1997).

<sup>13</sup>Fouwels, Martine, "The European Union's Common Foreign and Security Policy and Human Rights," *Netherlands Quarterly of Human Rights*, Vol.15/3 (1997), p: 307.

<sup>14</sup>These principles are quoted from Smith, Michael, *supra* note: 3, p: 52.

<sup>15</sup>Hill, Christopher, "National Interests: the Insuperable Obstacles?" in Hill, Christopher, eds., *National Foreign Policies and European Political Cooperation*, (London, Allen and Unwin, 1983), p: 200. It is quoted from Smith Michael, *supra* note: 3, p: 52.

## **B. Human Rights Promotion Instruments of the EU**

While the EU has brought human rights aspect to its external relations, it has utilized economic policy instruments and positive-negative measures for promoting human rights in the third countries. Human rights promotion instruments of the EU are based on a “reward” and “punishment” system. Types of punishment are the deprivation of economic relations which is based on trade, cooperation-development and membership agreements that would be created by the EU in cases of human rights violations in the target country. Examples of reward are more aid, membership, stable economic relations, development, and international respect for target countries committed to democracy and human rights. As long as the target countries respect and promote human rights, they would take the advantage of the EU's economic instruments. Formerly the EU gave more emphasize on the punishment in cases of human rights violations, but later on, the tendency was to adopt more preventive policies, making the “rewards” conditional upon to the respect for human rights.

Until the Resolution of November 1991, the EU's approach to human rights was based on negative or punitive measures which emphasize sanctions as means of responding to human rights violations and disrespect for democratic principles.<sup>16</sup> Due to the failure of economic sanctions in improving human rights in the target countries, the Union has started to give more importance to the positive measures rather than negative ones in time.<sup>17</sup> The new system is based on carrot and sticks mechanism,<sup>18</sup> even though the sticks are rarely used. High priority is given to a positive approach through the provisions of financial resources, in cases of commitment to the human rights standards of the EU. But the right to use negative or punitive measures was kept in cases of desperate and serious human rights violations in third countries.<sup>19</sup> The aim of the positive measures in general is to reward the countries respecting human rights by increased assistance.

In this sense, the EU has increased its tools to promote democracy and human rights in the third countries since 1990s. The Union has increased its budget lines to fund the initiatives on promoting democracy and human rights in the target countries.<sup>20</sup> Funds that are granted to political aid have increased dramatically. Human rights clauses have been included into the new agreements with third countries. Moreover, these

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<sup>16</sup>Simma, Bruno, Aschenbrenner Beatrix J., and Schulte, Constanze, “Human Rights and Development Cooperation,” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p: 578.

<sup>17</sup>Simma, Bruno, *supra* note: 16, p: 578.

<sup>18</sup>Crawford, Gordon, “European Union Development Co-Operation and the Promotion of Democracy,” in Burnell, Peter, eds., *Democracy Assistance: International Co-operation for Democratization*, (London, FC, 2000), p: 91.

<sup>19</sup>Resolution of the Council, November, 1991.

<sup>20</sup>Youngs, Richard, *supra* note: 1, p: 30-31.

clauses within the regional aid protocols have explicitly stated additional assistance to be granted to the countries that commit human rights and democracy.<sup>21</sup> In addition to these positive measures, some coercive measures have been adopted. Human rights clauses in the EU's contractual relation have given the possibility of the EU to suspend its relations with third countries in case of abusing the democratic principles and human rights.<sup>22</sup>

Generally, the EU has two policy instruments for promoting democracy and human rights in the third countries. The first one is incorporating a "human rights clause" in all development, trade and cooperation treaties concluded between the EU and the third countries. By this way, the EU has engaged in human rights 'dialogue' with many countries arising from a range of instruments, based on regional and bilateral agreements. These programs include development cooperation agreements, with African, Caribbean and Pacific countries (ACP), Asian and Latin American countries (ALA), Mediterranean and Middle Eastern countries (MEDA) and Central and Eastern European Countries (CEECs). The strategies that the EU has used to promote human rights with these regional programs are generally similar around the globe. But the mechanism and the incentives to ensure the compliance to human rights sometimes differ for individual regions. This instrument of the EU to promote human rights is effective after the conclusion of the treaty with the third country. The second one is human rights conditionality for membership. In this case, the EU membership depends on the fulfilment of certain criteria. "The membership reward" is granted only if the target country fulfils the desired conditions. Such initiatives are important in showing how different human rights promotion instruments having distinct legal, financial and administrative framework are utilized by the EU to promote democracy and human rights in third countries like Turkey since 1990s.

## **I. Human Right Clauses in EU's Treaty Relations**

The EU has concluded a great number of preferential and non-preferential trading agreements with third countries. These include;

- Partnership and cooperation agreements
- Association or Europe agreements (as pre-accession agreements)
- Association agreements (not connected with pre-accession, see below)
- Cooperation agreements
- Trade and cooperation agreements
- Economic partnership agreements
- Political dialogue and cooperation agreements

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<sup>21</sup>Youngs, Richard, *supra* note: 1, p: 30-31.

<sup>22</sup>Youngs, Richard, *supra* note: 1, p: 35.

- Trade agreements
- Framework agreements
- Stabilization and cooperation agreements<sup>23</sup>

By the decision of the Council of Minister to adopt the Conclusions of the Commission Communication on 29 May 1995 concerning the inclusion of respect for democratic principles and human rights in agreements between the Community and the third countries, “standard human rights clause” has been incorporated into all forms of above mentioned agreements that the EU signed with third countries.

The decision to incorporate human rights clause has emerged upon the need of having explicit legal basis for the suspension of the agreement with third countries in cases of desperate human rights violations taking place in the concerned country,<sup>24</sup> since The *Vienna Convention on the Law of Treaties* does not give the possibility to suspend treaties purely on the basis of human rights violations. Such suspension can only be possible, if there are “material breaches” of the Treaty, including “a repudiation of the treaty not sanctioned by the present Convention” or “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”<sup>25</sup> Then, the suspension of the Treaty on the grounds of human rights can only be possible, if human rights violations are considered as “material breaches” of the Treaty. In this sense, the decision to include human rights as a part of the “essential clause,” which formulates sine quo non condition for the fulfilment of the objectives of the treaties, would provide a legal mechanism to the EU to suspend the treaties in cases of human rights violations in the third countries.

The human rights clause is comprised of two fundamental parts. The first part contains the “essential element clause” which is incorporated into the first provisions of the treaties, stating that; “*respect for democratic principles and fundamental human rights inspires external policies of the Community and of third countries and constitutes essential element of this agreement.*” The second part contains a “non execution clause” which supplements the “essential element clause” stating that: “*If either Party considers that the other party has failed to fulfil an obligation under this Agreement,*” especially fulfilling the obligation arising from the “essential clause,” “*it may make the appropriate measures.*” This non execution clause provides the possibility of taking necessary measures if there is a serious human rights violation. Moreover, it gives the opportunity to suspend the agreement.

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<sup>23</sup>Miller, Vaughne, “The Human Rights Clause in the EU’s External Agreements,” *Research Paper of House of Commons Library*, No: 04/33 (2004), p: 11-15.

Available at: <http://www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf>. It is accessed on 23.03.06.

<sup>24</sup>Cremona, Marie, “Human Rights and Democracy Clauses in the EC’s Trade Agreements,” in Emiliou, Nicholas and O’Keeffe, David, eds., *The European Union and World Trade Law*, (Wiley, London, 1996), p: 62 -77.

<sup>25</sup>Miller, Vaughne, *supra* note: 23, p: 11-15.



In cases of serious human rights violation, the Commission communication of 1995 makes clear that there are a range of “*appropriate measures*” including “the alteration of the contents of cooperation programs or the channels used; reduction of cultural, scientific and technical cooperation programs; postponement of a Joint Committee meeting; suspension of high-level bilateral contacts; postponement of new projects; refusal to follow up partners' initiatives; trade embargoes; suspension of arms sales, suspension of military cooperation and suspension of cooperation.”<sup>26</sup> But the existence of sanctions does not mean that the EU adopts negative measures instead of positive ones. The incorporation of the human rights clause generally underlines positive measures including “joint support for democracy and human rights, the accession, ratification and implementation of international human rights instruments where this is lacking, and the prevention of crises through the establishment of a consistent and long term relationship.”<sup>27</sup>

Bulterman (2001) states three main characteristic of the human rights clauses in the Treaty relations of the EU.<sup>28</sup> Firstly, he states that human rights clauses are different from the classic system of human rights law. Human rights clauses are included into bilateral agreements relating to the issues which are generally outside the human rights field, like issues access to the Community market, fishery rights and custom cooperation. The main goals of these agreements are not to ensure the commitment of the parties to the certain human rights standards. The incorporation of the human rights to the treaty relation has the objective of promoting respect for human rights in the third countries, but “the means to attain such objective is different from the classic human rights treaties.”<sup>29</sup> Briefly, with the inclusion of human rights clause, human rights become an integral part of the bilateral agreements that the EU concluded with third parties whose main objectives are not related with human rights. Secondly, by this linkage “human rights conditionality” has been brought to the EU's relations with third countries due to dependency of maintaining economic and cooperation relations on respect for human rights of the contracting parties. Thirdly, the incorporation of the human rights clause into the treaties of the EU can be an incentive for improvement of human rights in the third countries due to the positive measures that the EU provides in return of commitment to human rights.

In this framework, the human rights clause has a dual nature.<sup>30</sup> On the one hand, it has an objective to express common interests of the parties to make a consultation and cooperation in the field of human

<sup>26</sup>Miller, Vaughne, *supra* note: 23, p: 11-15.

<sup>27</sup>Miller, Vaughne, *supra* note: 23, p: 11-15.

<sup>28</sup>Bulterman, Mielle, *Human Rights in the Treaty Relations of the European Community: Real Virtues and Virtual Reality*, (Oxford, Intersentia, 2001), p: 167-168.

<sup>29</sup>Bulterman, Mielle, *supra* note:28, p: 167-168.

<sup>30</sup>Bulterman, Mielle, *supra* note:28, p: 167-168.

rights. On the other hand, it has an aim to provide a legal basis for restrictive measures in case of human rights violation in third countries. In this sense, such clauses provide rewards and punishment at the same time. It gives the utilization of benefits arising from the treaty, including preferential treatment of the product, financial and technical aid, and development assistance in the case of the compliance with human rights. But also it stipulates sanctions, that is “the suspension of agreements” or more moderately “taking the necessary measures” in cases of grave human rights violations. But generally, although the clauses state sanctions and rewards at the same time; a positive approach to human rights, including financial support, incentives and systematic dialogue receive high priority and negative measures or sanctions are implemented in worst cases.

## **II. The Implementation of Human Rights Clauses by the EU's Regional Programs**

Since the late 1990s, human rights clauses have been incorporated into the EU's development-cooperation and association agreements on the basis of the regional and bilateral treaties including:

- The Development and Cooperation Agreements on the basis of Lomé and Cotonou Conventions with the African, Caribbean and Pacific (ACP), and Asian and Latin American (ALA) countries.
- The Association Agreement with Middle East and Mediterranean countries, which are also called “Barcelona Process.”
- Relations with the candidate states on the basis of European Agreements, generally including CEECs.

The enumeration of human right clauses to these agreements brought human rights conditionality to the EU's treaty relations and it has influenced promotion of human rights in the third countries. Even though these “regional programs” differ in financial and administrative framework, the first two have similar features basing on development cooperation. But the policy of the EU in the third regional category is more comprehensive and challenging than the first two. For this reason, the instruments used for the third category are analyzed separately under the subheading of the “human rights conditionality” for membership.

### **1. Development Cooperation Agreements**

Since the establishment of the European Community in 1958, the Community has sustained development cooperation policies towards the third countries granting preferential trade agreements, financial and technical aid and autonomous assistance to the developing countries. These countries are composed of former colonies, Mediterranean, Asia and Latin America (ALA) and African, Caribbean and Pacific countries (ACP countries). The EU is the largest donor of the development assistance in the world, which

accounts for 55 percent of the total development assistance in the world.<sup>31</sup> While approximately 84 percent of the Community assistance goes to developing countries, the remaining is distributed among the New Independent States (NIS) and economies in transition.<sup>32</sup>

Initially, the Community did not consider the political dimension of the development policy.<sup>33</sup> It was generally believed that the assistance to the economic development would be more adequate for growth.<sup>34</sup> However, starting in 1990s, democracy promotion and human rights have become an important component of the development cooperation policies of the EU. This was rather a result of the belief that growth is linked to the organizational structure of society. The relationship between human rights and development cooperation is generally based on political conditionality involving the binding of development aid to the commitments concerning human rights and liberal democracy in recipient countries.<sup>35</sup> In other words, it is founded on a system in which the rich donors are formulating demands on poor recipients, particularly for political and institutional change in the concerned countries.<sup>36</sup>

#### ***a. Lomé Conventions with the ACP Countries***

The EU integrated political conditionality to development agreements for the first time with the Lomé Conventions of the ACP countries. This regional development program granted preferential trade agreements and financial aid to the target countries. It was generally based on the stabilization of commodity prices within the Common Market, granting funds for the promotion of trade, duty and quota free access to the EEC for almost all ACP products.<sup>37</sup> There have been four Lomé Conventions: the Lomé I Convention, covering the period 1975-1980; the Lomé II Convention, covering the period 1980-1985; the Lomé III Convention, covering the period 1985-1990; and the Lomé IV and Revised Lomé IV, covering the period 1990-2000. After the expiry of the Lomé Convention in February 2000, a post-Lomé period has started with the new EU-ACP agreements on 23 June 2000 in Cotonou, Benin, called the Cotonou Agreement.

<sup>31</sup>This statistic is quoted from official web page of the Commission. Available at:

[http://europa.eu.int/comm/external\\_relations/human\\_rights/intro/index.htm#3](http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm#3). It is accessed on 09.03.06.

<sup>32</sup>Simma, Bruno, Aschenbrenner Beatrix J., and Schulte, Constanze, *supra* note: 16, p: 573.

<sup>33</sup>Simma, Bruno, Aschenbrenner Beatrix J., and Schulte, Constanze, *supra* note: 16, p: 573.

<sup>34</sup>Simma, Bruno, Aschenbrenner Beatrix J., and Schulte, Constanze, *supra* note: 16, p: 573.

<sup>35</sup>Sorensen, Georg, "Political Conditionality," *The European Journal of Development Research*, Vol. 5 (1993), p: 1.

<sup>36</sup>Sorensen, Georg, *supra* note: 35, p: 1.

<sup>37</sup>Babarinde, Olufemi, A., *Lomé Conventions and Development*, (Brookfield, Ashgate, 1994), p: 4.

Starting with the Lomé Conventions IV, it is possible to clearly see a human rights aspect in the development cooperation agreements. Lomé Convention IV incorporated the provision that each state would respect the UN Charter of Human Rights into the development-cooperation agreements with ACP countries. Moreover, the Convention included provisions on democracy, human rights and the rule of law, but no sanction mechanism was stated in. Thus, one can argue that there was a shift from purely economic provisions of the Lomé Convention III to a political realm.

A new version of Lomé IV adopted by the Mid-Term Review of the Convention in Mauritius on 4 November 1995 improved the provisions of the Convention concerning human rights and democracy promotion. With this improvement, human rights become the “*essential element*” of the Convention.<sup>38</sup> The “essential elements clause” in Article 4 of the Convention states that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration on Human Rights (UDHR) underpin the internal and external policies of the parties and constitute an ‘essential element’ of the agreement. For this reason, human rights are considered as a “basic factor of real development.” For instance, according to Article 366 of the Convention, if one party argues that the obligations arising from the essential element clause are not fulfilled by the other party, then, it has the right to “*to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.*” If there is no solution found, it is possible to partially or fully suspend the application of this Convention to the Party concerned. According to Lister (1997), the new provisions of the Lomé Convention IV have formalized a situation which existed *de facto*, since the Commission had already taken a decision to suspend an aid on the grounds of human rights violations. But it brought political criteria to receiving aid more transparent and more open to pressure.<sup>39</sup>

### **b. Cotonou Agreement**

The Cotonou agreement (2000-2020), which was signed on 23 June 2000 by the 77 ACP countries and 15 EU member states, and which will be valid until 2020, has totally transformed the non-political nature of Lomé Conventions with political parameters, stressing the importance of political dialogue and effective management of aid.<sup>40</sup> The main feature of the agreement is based on trends that have existed over the

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<sup>38</sup>Holland, Martin, “When is Foreign Policy not Foreign Policy? Cotonou, CFSP and External Relations with the Developing World,” *National Europe Center Paper*, Vol.28, (2002), p: 12.

Available at: <http://eprints.anu.edu.au/archive/00001389/>. It is accessed on 23.03.2006.

<sup>39</sup>Lister, Marjorie, *Relations with Developing Countries*, (London, Routledge, 1997), p: 135.

<sup>40</sup>Hurt, Stephen, R., “Cooperation and Coercion? The Cotonou Agreement between the EU and the ACP States and the End of the Lome Convention,” *Third World Quarterly*, Vol. 24/1 (2003), p: 161-176.

history of various Lomé Conventions, particularly apparent during the Lomé Convention IV in the 1990s. But some modifications were made in accordance with the transformations during the 1990s.

The main feature of the agreement in terms of human rights is that it reinforces the political conditionality initiated by the former Conventions. It reintroduces and broadens the essential elements clause of the Lomé Conventions and sanction mechanism. The agreement identifies essential elements of the Cotonou Agreement as respect for human rights; democratic principles; and the rule of law, which would domestically and internationally determine the conduct of the EU and the ACE.<sup>41</sup> The agreement in this context in its Article 9 states that “*Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural*” and democratic principles are considered as sources of legitimacy and legality of the state action. Violations of the essential elements may generally lead to a suspension of the agreement. However, full suspension is seen as a measure only of last resort.<sup>42</sup> In this sense, the assistance to ACP countries by the European Development Fund (EDF) and European Investment Bank (EIB) are directly related to the human rights provisions of the Cotonou Agreement, since the utilization of economic assistance or aids to be implemented under the Agreement is conditional upon the ACE countries respecting for human rights.

Moreover, the Cotonou agreement wants to make an explicit association between the political dimension, trade and development. For this reason, a political dialogue is introduced to the agreement. Article 8 states that the EU and ACP “shall regularly engage in a comprehensive, balanced, and deep political dialogue.” The objective of this dialogue is to “exchange information, to foster mutual understanding, and to facilitate the establishment of agreed priorities and shared agendas.” This political dialogue shall consist of “specific political issues of mutual concern or of general significance” including explicitly “the arms trade, excessive military expenditure, drugs and organized crime, or ethnic, religious or racial discrimination.” The dialogues particularly address “a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.”

Beside suspension clause and political dialogue, another element of the Cotonou agreement is the introduction of “rolling” which “involves an initial allocation of aid funds reviewed on a periodic basis

<sup>41</sup>Holland, Martin, “2020 Vision? The EU’s Cotonou Partnership Agreement,” *The Brown Journal of World Affairs*, Vol. 9/ 2 (2003) p: 163-175.

<sup>42</sup>Holland, Martin, *supra* note: 41, p: 163-175.

and adjusted according to an assessment of the need and performance.”<sup>43</sup> In other words, the financial assistance under the agreement is not granted automatically. Grants can be utilized by the ACP countries on the basis of an evaluation of the success of the receiving country in meeting requirements of the criteria set by the ACP countries and the EU. This has an objective to allow the EU to reward those ACP states effectively meeting the targets set for the EU development funds resources. In this sense, the move to ‘rolling programming’ is regarded as a way of efficient allocation of resources,<sup>44</sup> making possible the monitoring of aid allocations by political dialogue between the EU and ACP countries.

Starting with Lomé Convention III and its peaks with Cotonou Agreement, respect for human rights, democracy and rule of law have become fundamental elements of the EU's development policy. The ideological neutralism and non political nature of the Lomé Conventions have transformed towards politically more interventionist development policies of the EU during the 1990s. The EU started to influence the internal developments of the third countries particularly ACE states by utilizing the economic instruments of the development cooperation agreements, with an aim to promote democracy and human rights. The EU imposed political conditions for granting financial aids or assistance to the third countries particularly ACE states.

**c. *Development Cooperation Agreements with ALA and ASEAN Countries***

A similar development has taken place in respect of the Latin American and Asian context. A human rights clause has been incorporated to the development-cooperation agreements with ALA countries. Since the group of ASEAN countries is the second important trading partner of the Union, few agreements between the EU and the Asian countries include a reference to human rights directly. Nevertheless, there is an increasing pressure concerning respect for human rights and democratic values in relations between the EU and ASEAN countries. In this sense, 1996 Communication of the Commission stated that “development and consolidation of democracy and the respect for human rights must be important elements of the dialogue between the EU and ASEAN countries.” Thus the European Commission has accepted conditionality as a fundamental aspect of the EU-ASEAN relations.”

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<sup>43</sup>Dearden, Stephen “The Future Role of the European Union in Europe's Development Assistance,” *Cambridge Review of International Affairs*, Vol.16/ 1 (2003), p: 105-166.

<sup>44</sup>Dearden, Stephen, *supra* note: 43, p: 105-166.

## 2. Euro-Mediterranean Association Agreements

Human rights clauses in the Euro-Mediterranean association agreements initially have not played a significant role in the EU's political relations within Mediterranean neighbours, in contrast to Cotonou Agreement on which the EU has been more willing to take action under the human rights clause.<sup>45</sup> The role of the human rights began to be more apparent in EU's relations with Mediterranean partners more evidently since 1995 with the Barcelona Declaration, which is a legally non-binding declaration to the parties of the Euro-Mediterranean Association Agreements.<sup>46</sup> These agreements were the seeds of Euro-Mediterranean Partnership (EMP Barcelona Process), which was concluded by the Euro-Mediterranean Conference of Ministers of Foreign Affairs, held in Barcelona on 27-28 November 1995 and replaced the association agreements forming Euro-Mediterranean Partnership.

The legal source of EMP is the Barcelona Declaration. Three main objectives declared therein are:

- To establish a political and security partnership by creating an area of peace, stability and security in Mediterranean through political dialogue based on essential principles of international law such as the rule of law, respect for human rights and democracy.
- To establish an area of shared prosperity through an economic and financial partnership. The aim of the partnership in this context is creating a free trade area, implementing economic cooperation, increasing financial assistance of the EU to its partners.
- To create a dialogue between peoples of Mediterranean region through a social, cultural and human partnership aimed at encouraging understanding between cultures and exchanges between civil societies.<sup>47</sup>

In the light of these objectives, the Barcelona Declaration has given an important role to human rights. In its preamble, it is stated that “guaranteeing peace, stability and prosperity requires a strengthening of democracy and respect for human rights, sustainable and balanced economic and social development,

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<sup>45</sup>The Community first started to create economic rather than political relations with the Mediterranean countries by signing Association Agreements with Greece (1962), Turkey (1963), Malta (1970), and Cyprus (1972). This was followed by the co-operation agreements with the Maghreb countries such as Morocco (1976), Algeria, Tunisia (1976) and the Mashreq states namely Egypt (1977), Jordan (1977), Lebanon (1976) and Syria (1977) and Israel (1975). By this way, the Community granted preferential trade arrangements, easy access to the European markets and financial assistance. See detailed discussion of Euro-Mediterranean Association Agreements, Bartels, Lorand, “A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements,” *Mediterranean Politics*, Vol.9/3 (2004), p: 368–395.

<sup>46</sup>Bartels, Lorand, *supra* note: 45, p: 368–395.

<sup>47</sup>Full text of the declaration is available at: [http://europa.eu.int/comm/external\\_relations/euromed/bd.htm](http://europa.eu.int/comm/external_relations/euromed/bd.htm). It is accessed on 24.03.06.

measures to combat poverty and promotion of greater understanding between cultures, which are all essential aspects of partnership.” Thus, the Barcelona declaration gives a balanced importance to the economic, political and social rights. The promotion of democracy, respect for human rights, sustainable economic and social development, increasing prosperity, providing security, promotion of greater understanding between cultures are considered together as the fundamental parameters of the association relation with the Mediterranean countries.

Moreover, the provisions regulating the political and security partnership establishing a common area of peace and stability also mention human rights explicitly.<sup>48</sup> For example, the signatories of the declaration shall take into the consideration to act “in accordance with the United Nations Charter and the Universal Declaration of Human Rights, as well as other obligations under international law,” to develop “the rule of law and democracy in their political systems” and to “respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms,” as well as to “give favourable consideration, through dialogue between the parties, to exchanges of information on matters relating to human rights, fundamental freedoms, racism and xenophobia.” Although the Barcelona Declaration is not legally binding, the above mentioned provisions have a legal significance, which can be used to interpret the human rights clauses in the association agreements.<sup>49</sup>

As it was the case in Lomé Conventions, it is also possible to see political conditionality within the EMP. Most of the association agreements with the Mediterranean countries now include human rights clauses which make compulsory respect for human rights and democratic principles necessary. Similar to Lomé System, the EU has the right to take necessary measures or suspend financial and technical assistance under the association agreement in the case of violation of an “essential clause of the agreement.” For example, the MEDA Regulation, 1488/96,<sup>50</sup> established the principles of political and economic conditionality. The MEDA program constitutes the main financial instrument of the Euro-Mediterranean Partnership. According to Article 3 of the MEDA regulation, the Regulation is based on respect for democratic principles, the rule of law, human rights and fundamental freedoms. They constitute an essential element of the Regulation. For this reason, the violation of human rights will justify the adoption of appropriate measures. Funding can be suspended in the case of a violation of these principles. In several

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<sup>48</sup>Byrne, Iain and Shamas, Charles, *The Human Rights Implications of the MEDA Programs*, (Copenhagen, Euro-Mediterranean Human Rights Network, 2002), p: 21-23. Quoted from Bartels, Lorand, *supra* note: 45, p: 395.

<sup>49</sup>Bartels, Lorand, *supra* note: 45, p: 368–395.

<sup>50</sup>This regulation is available at: <http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do> It is accessed on 14.03.06.



cases, the EU has responded to violations by decreasing the allocation of funds rather than activating the formal provisions of the regulation.<sup>51</sup>

The important development for the promotion of human rights in the Mediterranean countries is the adoption of the Mediterranean Democracy Program (MDP) in 1996 by the initiative of the Parliament. The MDP constitutes a part of the Initiative for Democracy and Human Rights of the European Parliament which incorporates a series of budget headings dealing with the promotion of human rights in a single chapter. It has an aim to give subsidies to non-profit organizations, universities and research centers as well as public bodies to implement operations aiming to promote democracy, the rule of law, freedom of expression, freedom of assembly and freedom of association, to protect vulnerable groups and to increase awareness of socioeconomic rights and contribute to conflict resolution.<sup>52</sup>

Although several important parameters in terms of human rights have been brought, there are some doubts regarding the success of the MEDA programs.<sup>53</sup> The challenges of human rights clause of the MEDA program aroused from “the specific political constraints of European decision making, combined with the very particular spirit of consensus that informs the EMP, makes it very difficult to bring about any coercive measure sanctioning abusive behaviour.”<sup>54</sup> It is hard invoke any coercive measure sanctioning the acts of human rights in the Mediterranean Countries. In this sense, even there is a widespread and systematic violation throughout the region from the Maghreb to the Mashreq,<sup>55</sup> the EU has failed to enforce human rights conditionality clauses in the Mediterranean Association Agreements.

### C. Human Rights Conditionality for Membership

Conditionality for membership is one of the most powerful instruments of the EU in promoting human rights and democracy in the candidate countries. The first group of countries which became the target of strict political and economic conditionality of the EU was the Central and Eastern European Countries

<sup>51</sup>Emerson, Michael and Noutcheva, Gergana, “From Barcelona Process to Neighborhood Policy: Assessment and Open Issues,” *CEPS Working Paper*, No: 220 (2005), p: 3.

It is available <http://www.iemed.org/documents/emerson.pdf>. It is accessed on 14.03.06.

<sup>52</sup>See [http://europa.eu.int/comm/external\\_relations/human\\_rights/intro/index.htm](http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm) for more information about MEDA democracy program. It is accessed on 14.03.06.

<sup>53</sup>Schmid, Dorothe E., “The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership’s True Hierarchy of Objectives?” *Mediterranean Politics*, Vol.9/3 (2004), p: 396–421.

<sup>54</sup>Schmid Dorothe, E., *supra* note: 53, p.396–421.

<sup>55</sup>Schmid Dorothe, E., *supra* note: 53, p.396–421.

(CEECs). The EU forced the CEEC countries to make political and economic reforms or to meet certain criteria by binding the EU membership, trade cooperation and association agreements conditional upon achieving democracy, the rule of law, respect for human rights and minorities.<sup>56</sup> Realizing the EU criteria for membership which brings a greater degree of convergence with the EU's socio-economic standards and political values become a *sine quo non* condition for those states looking for membership.<sup>57</sup> Recently Bulgaria, Romania and Turkey have appeared to be the target countries of the human rights conditionality policies of the EU as well.

To some extent, the EU's democratic conditionality for membership is different from the EU's general human rights policies in its external affairs towards non-European third countries. It has considered human rights problems in the applicant countries as domestic issue at the EU level rather than an external issue. In this sense, the EU has imposed more extensive and deep range of conditionality demands and taken into account more seriously the quality of the democracy and human rights in the applicant countries. For instance, the Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships states that "when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State." However, the benefits of candidate countries utilizing with the membership outweighs that of third countries taking the advantage of financial aid and trade preferences of association-cooperation-development agreements. The conditionality for membership functions more effectively than the conditionality based on development cooperation agreements.

## **I. The Functioning of Human Rights Conditionality at the EU level**

The political conditionality entails "the *linking*, by a state or international organization, of *perceived benefits* to another state to the *fulfilment of conditions* relating to the protection of human rights and the advancement of democratic principles."<sup>58</sup> In other words, conditionality means the requirement of a state

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<sup>56</sup>Smith, Karen, E., "The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?" *European Foreign Affairs Review*, Vol. 2 (1998), p: 253–74.

<sup>57</sup>Anastasakis, Othon and Bechev, Dimitar, "EU Conditionality in South East Europe: Bringing Commitment to the Process," *SEESOX Policy Paper*, (2003).

Available at: <http://www.cespi.it/STOCCHIERO/dossierBalcani/conditionality.PDF>. It is accessed on 24.03.06.

<sup>58</sup>Smith, Karen E., "Western Actors and the Promotion of Democracy," in Zielonka, Jan and Pravda, Alex eds., *Democratic Consolidation in Eastern Europe: International and Transnational Factors*, (Oxford, Oxford University Press, 2001), 31-57.

or an international organization from third countries to respect human rights for getting development aid, creating a trade relation or membership. According to Schimmelfennig and Sedelmeier (2004), the basic logic behind the conditionality is “bargaining strategy for reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.”<sup>59</sup>

In this context, the functioning of the conditionality is based on several steps. The first step is to create a linkage between the donor and the recipient country. The attractiveness of the donor country or the organization in distributing several benefits would determine the decision of the recipient country to create a relation with the donor country or not. The second step is to set out certain conditions by the donor country or organization to the recipient country. These can be economic, financial and political conditions. And the final step is to link the granting of benefits such as financial aid, technical assistance and treaty relations to the fulfilment of these conditions.

It is possible to observe these aspects of the conditionality in the EU's relation with the candidate countries. Firstly, the linkage between the EU and the candidate or potential candidate countries is created by the Europe Agreements, the Association Partnerships, the Stabilization and Association Process on the basis of political norms and principles. The power asymmetry between the parties, which means the lack of alternative ideological or systemic paradigms for candidate countries, other than the EU membership,<sup>60</sup> for future stability and prosperity, generally determines strong desire of the applicant countries to create such linkage. It can also be argued that “passive leverage” of the EU arising from attraction of European markets and institutions<sup>61</sup> positively affects the applicant countries desire to create the linkage with the EU. In this process, even though the EU makes several commitments, it does not set any timetables or guarantees for the enlargement.<sup>62</sup> During that extended process of uncertainty, the policy of candidate

<sup>59</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, “Governance by Conditionality: The EU Rule Transfer to the Candidate Countries of Central and Eastern Europe,” *Journal of European Public Policy*, Vol.11/4 (2004) 661-679.

<sup>60</sup>Hughes, James, Sasse, Gwendolyn, and Gordon, Claire, “The EU Enlargement and Power Asymmetries: Conditionality and the Commission's Role in Regionalization in Central and Eastern Europe,” *LSE Working Paper* (2003), p: 1. Available at: <http://www.lse.ac.uk/collections/europeanInstitute/articles/hughesj2.pdf>. It is accessed on 21.03.06.

<sup>61</sup>Vachudova, Milada, A., “The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union,” *Robert Schumann Center of Advanced Studies Working Paper*, Vol.33 (2001), p: 23.

<sup>62</sup>Pinelli, Cesare, “Conditionality and Enlargement in Light of the EU Constitutional Developments,” *European Law Journal*, Vol. 10/3 (2004), p: 354–362.

countries is affected by the EU's "pre-accession" conditions.<sup>63</sup> The concerned countries become a target of democracy and human rights promotion policies of the EU via such process.

Existence of a linkage between the EU and candidate country is not sufficient for the creation of conditionality. As a second step, the EU sets out certain conditions to be met by the applicant countries. The legal basis of the fundamental conditions for membership lies on Article 49 (ex Article O) of the TEU. According to Article 49 (ex Article O), any European state can apply for membership to the Union as long as it respects the principles stated in Article 6(1), namely, human rights, democracy, liberty and fundamental freedoms. The final decision to be accepted as a member state is given by the unanimous decision of the Council and absolute majority of the European Parliament. Moreover, the Copenhagen European Council decisions of 1993 set out explicitly several political criteria for the EU for membership, to be met by the candidate countries. Membership criteria require achievement of:

- Institutional stability, democratization, the rule of law, human rights and respect to and protection of minorities. (Democracy criterion)
- The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; (Economic criterion) and
- The ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union.<sup>64</sup> (Acquis criterion)

Out of these; democratic conditionality concerns the fundamental political principles of the EU, the norms of human rights and liberal democracy. The Copenhagen democratic criteria are generally composed of five main areas of interest according to the documents released by the Union.<sup>65</sup> These basic areas are free and fair elections, functioning of the legislative, executive, and judiciary and anti corruption measures.<sup>66</sup> In addition to these requirements, there is also *acquis* conditionality. The member states have to meet the 'technical' preconditions for membership which are based on the adoption of the *acquis communautaire* in order to fulfil all the responsibilities of membership. Economic conditionality is generally based on functioning liberal market economy and the ability to deal with the competitive pressure within the EU. The Copenhagen criteria have been generally considered as one of the most important reference in evaluating the progress of the applicant countries in convergence the EU standards. It endowed an

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<sup>63</sup>Bretherton, Charlotte and Vogler, John, eds., *The European Union as a Global Actor*, (London, Routledge, 1999), p: 149. Quoted from Pinelli, Cesare, *supra* note: 62, p: 354–362.

<sup>64</sup>European Council, "Copenhagen European Council of 21 and 22 June 1993, Presidency Conclusions," (1993).

<sup>65</sup>Kochenov, Dimitry, "Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law," *European Integration Online Papers (EIOP)*, Vol. 8 (2004), p: 25. Available at: <http://eiop.or.at/eiop/texte/2004-010a.htm>. It is accessed on 20.03.06.

<sup>66</sup>Kochenov, Dimitry, *supra* note: 65, p: 25.

important tool to have an influence on the reform efforts of the individual candidate countries. In this sense, it can be defined as “an invitation to join the club coupled with the tightening of the club membership rules, in order to ensure that no barbarians get inside.”<sup>67</sup>

Thirdly, the EU sets rewards for the applicant countries for motivating them to comply with these criteria. It is assumed that “a state would not adopt the EU driven rules unless the Union included these as a condition of membership.”<sup>68</sup> The dominant logic behind the EU conditionality is the “bargaining strategy of reinforcement by reward,” under which the EU provides benefits for a target government to comply with its conditions. The rewards are used by the EU instrumentally to institutional and policy change in the applicant countries. For the applicant country, the benefits of the compliance provide strong incentive to fulfil the conditions. According to Grabbe (2001), there are five mechanisms (rewards) which are used by the EU for influencing reforms in the candidate countries.<sup>69</sup> These are:

- “Gate-keeping: access to negotiations and further stages in the accession process
- Benchmarking and monitoring,
- Models: provision of legislative and institutional templates,
- Money: aid and technical assistance,
- Advice and twinning.”<sup>70</sup>

According to Grabbe (2001) the gate keeping role of the EU and the decision to shift further stage of the negotiation is the most influential mechanism to promote domestic change in the applicant countries. The steps of the accession according to Luxembourg 1997 and Helsinki 1999 European Councils process are:

- Privileged trade access and additional aid.
- Signing and implementing an enhanced form of association agreement (Europe Agreements for the current candidates, Stabilization and Association Agreements for south-eastern European non-applicants).
- Opening of negotiations (explicitly dependent on meeting the democracy and human rights conditions since 1999).
- Signing of an accession treaty.
- Ratification of the accession treaty by national parliaments and the European Parliament.
- Entry as a full member.<sup>71</sup>

<sup>67</sup>Wojciech, Sadurski, "The Charter and Enlargement", *European Law Journal*, Vol.8 (2002), 340-362.

<sup>68</sup>Brusis, Martin, “The Instrumental Use of the European Union Conditionality: Regionalization in the Czech Republic and Slovakia,” *East European Politics and Societies*, Vol. 19/2 (2005), p: 291–316.

<sup>69</sup>Grabbe, Heather, “How does Europeanization affect the CEE Governance? Conditionality, Diffusion and the Diversity,” *Journal of European Public Policy*, Vol.8/6 (2001), p: 1013–1031.

<sup>70</sup>Grabbe, Heather, *supra* note:69, p:1013–1031

The EU uses its decision to shift different stages of the accession progress as a reward for the candidate countries. In this process, it also utilizes the “the threat of exclusion or the prospect of slowing progress to encourage particular changes in governance structures.”<sup>72</sup>

Moreover, the EU can affect the transformations in the candidate countries by monitoring the overall progress.<sup>73</sup> In this process, the Commission has an important role in evaluating the progress of candidate countries in meeting the political requirements of the Copenhagen criteria. It assesses the situation of the applicant countries by the regular reports. The evaluation of the membership performance in meeting the political criteria is divided into three parts. The first one is “Democracy and the Rule of Law,” the second one is “Human Rights and the Protection of Minorities,” and lastly, “General Evaluation.”<sup>74</sup> The assessment is based on the situation of civil and political, as well as economic, social and cultural rights but it is rather superficial and relates more to the *de jure* than the *de facto* situation, except the parts dealing with minority protection.<sup>75</sup>

Granting short term benefits such as financial aid and technical assistance is another reward mechanism. One of the most important aid mechanisms of the EU in this regard is PHARE (Poland and Hungary Development Assistance for the Restructuring of the Economy) established in 1989 for Poland and Hungary and has extended to include other candidate countries like Turkey. This program is designed so as to act as a ‘bridge’ for candidate countries in implementing the *acquis* and to prepare the considered countries for Structural Funding.<sup>76</sup> It is the main financial instrument to support pre-accession strategy of the EU.<sup>77</sup> The main instruments of the PHARE are TAIEX (Technical Assistance Information Exchange Office) and twinning; whose aim is transferring knowledge from member states to the candidate countries “to adapt their administrative and democratic institutions to comply with membership requirements by learning from member state experiences of framing the legislation and building the organizational capacity necessary to implement the *acquis*.”<sup>78</sup> Moreover, two new programs were introduced beside PHARE in 2000. These mechanisms are Instrument for Structural Policies for Pre-Accession (ISPA) and the Special

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<sup>71</sup>These stages are quoted from Grabbe, Heather, *supra* note: 69, p: 1013–1031.

<sup>72</sup>Grabbe, Heather, *supra* note: 69, p: 1013–1031.

<sup>73</sup>Grabbe, Heather, *supra* note: 69, p: 1013–1031.

<sup>74</sup>Nowak, Manfred, “Human Rights Conditionality in Relation to Entry to and Full Participation in the EU” in Alston, Philip eds., *The EU and Human Rights*, (Oxford, Oxford University Press, 1999), p: 691.

<sup>75</sup>Nowak, Manfred, *supra* note: 74, p: 691.

<sup>76</sup>Bailey, David and Proprius, De Lisa, “A Bridge to PHARE? EU Pre-Accession Aid and Capacity-Building in the Candidate Countries,” *Journal of Common Market Studies*, Vol. 42/1 (2004) p: 77–98.

<sup>77</sup>Simma, Bruno, Aschenbrenner J Beatrix, and Schulte, Constanze, *supra* note: 16, p: 592.

<sup>78</sup>Grabbe, Heather, *supra* note: 69, p: 1013–1031.

Accession Program for Agricultural and Rural Development (SAPARD) which assist the countries in issues such as environment, rural development and adaptation to the Common Agricultural Policy. The candidate country can get these financial and technical assistances as long as they meet the basic conditions of democracy, human rights and market economy.

However, the point is that the EU directly links these rewards mechanism to the political conditions. It applies positive conditionality. Its main strategy is “reinforcement by reward,” which is based on a system of the EU’s granting reward to the recipient country, if the concerned country fulfils the imposed requirements.<sup>79</sup> But if the recipient country does not comply with the conditions, the EU would not impose extra cost (reinforcement by punishment) or extra benefits (reinforcement by the punishment) to the concerned country.<sup>80</sup> In this sense, the conditionality strategy of the EU is generally based on positive rather than negative measures.

## **II. The Functioning of Human Rights Conditionality at Domestic Level**

The existence of the EU conditionality does not guarantee democratic domestic change in the candidate countries. The decision to comply is taken by the domestic actors of the candidate countries on the basis of their evaluation and perception of the EU conditions. In this sense, the effectiveness of the conditionality depends on the dynamics of the domestic policy in the candidate countries.<sup>81</sup> The candidate countries should take several parameters into account when they make their decision to comply with the conditions. The first parameter is the cost-benefit calculation for the adoption of the EU democratic conditions. If the conditions of entry are well-defined, the decision to comply with the EU standards is based on cost-benefit analysis of the applicant country. Benefits of joining must provide a strong incentive to meet the requirements. Examples of these benefits could be: the rise of income levels, democratic stability, prosperity and international prestige, regional security and so on. Basically the convergence would be achieved only if the benefits of adoption outweigh the domestic costs. Otherwise the success of the conditionality would be jeopardized. The greater the benefits of membership, the greater the potential political will in applicant country to meet the political and economic conditions.<sup>82</sup> Similarly, the lesser the costs of the adoption, the higher the political will in the applicant country to comply.

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<sup>79</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 59, p: 661-679.

<sup>80</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 59, p: 661-679.

<sup>81</sup>Brusis, Martin, *supra* note: 68, p: 291–316.

<sup>82</sup>Vachudova, Milada, *supra* note:61, p: 7.

As it is focused above, there are important rewards for all the applicant countries on the return of meeting the conditions set by the EU. However, contrary to the benefits distributed homogenously by the EU, the cost of governing elites in meeting the EU's domestic requirements varies according to the pattern of governance.<sup>83</sup> The cost of adoption the EU requirement is higher in the candidate countries with nationalist pattern of governments than liberal ones.<sup>84</sup> The domestic political strategies of these governments are generally based on ethnic nationalism, lack of minority rights and economic corruption, which are incompatible with the EU's requirements of liberal democracy and comprehensive economic reform.<sup>85</sup> For this reason, the compliance with the EU standards for these ruling elite proscribed the mechanism by which they consolidate their power.<sup>86</sup> Ethnic reconciliation would be costly for ruling elite in countries in which domestic political discourse has been heavily ethicized and the population has been conditioned to feel threatened.<sup>87</sup> In this sense, the more the political power are in the hands of authoritarian elites depending on ethnic nationalism and economic corruption for their political power, the less likely they take the decision to comply with the EU standards.

Moreover, not only the cost-benefit calculation of the ruling elite but also the size of domestic adoption costs and their distribution among domestic actors would determine whether the candidate countries will accept or reject the conditions.<sup>88</sup> The adoption for human rights standards is costly — otherwise it would have taken place in the absence of conditionality.<sup>89</sup> There are several domestic costs of adoption the EU human rights standards including opportunity costs, loss in welfare and power of private and public actors.<sup>90</sup> Schimmelfennig, and Sedelmeier (2004) calls these political actors “veto players,” that is, “actors whose agreement is necessary for a change in the status quo,”<sup>91</sup> since they have an important place in the decision making process on the basis of the human rights convergence. For this reason the effectiveness of conditionality depends on the preferences of the government and these public and private actors. They formulate their hypothesis as “the likelihood of rule adoption decreases with the number of veto players incurring net adoption costs (opportunity costs, welfare and power losses) from compliance.”<sup>92</sup>

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<sup>83</sup>Ibid.

<sup>84</sup>Ibid.

<sup>85</sup>Ibid.

<sup>86</sup>Ibid.

<sup>87</sup>Ibid.

<sup>88</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note:59, p: 661-679.

<sup>89</sup>Ibid.

<sup>90</sup>Ibid.

<sup>91</sup>Ibid.

<sup>92</sup>Ibid.



The applicant country should also consider the fact that the Union may make membership commitment to it or may want to create any forms of institutional relation like association relation or assistance. The prospect of membership is more influential than the prospect of assistance and association. The impact of the EU conditionality on the candidate countries is more than its influence on the third countries having no perspective of membership.<sup>93</sup> The good examples in this context are Balkan and the CEECs countries. The conditionality functions positively in most of the CEECs which were given the prospect of membership. But this is not the case for Balkan countries having no perspective of membership in the near future.<sup>94</sup> In this sense, the EU must give strong commitment for membership.

Moreover, the credibility of the EU to keep its commitments and clarity of conditions to be met are other parameters determining the decisions of the applicant countries to adopt the EU conditions.<sup>95</sup> The EU must be able to pay the rewards of membership as long as the applicant countries fulfil the conditions of entry. The credibility of the EU to keep its commitment would determine the positive decision of the member states to converge with the EU standards. Two points are important in this respect. Firstly, the EU should set very clear conditions for membership. This is functional for two reasons; the applicant country does not perceive any moving target problem and the failure to fulfil the conditions by the target date would be attributed to the applicant. This point has influential impact on the effectiveness of the EU conditionality given that three main Copenhagen conditions are very broad and open to the interpretation.<sup>96</sup> Secondly, the EU should show its credibility through setting a target date of entry.<sup>97</sup> Two target dates are necessary for achieving maximum credibility for the EU.<sup>98</sup> These are target dates of opening negotiations and the maximum period of negotiations on the condition that the applicant country fulfils the concerned requirements. These dates indicate that as long as an applicant country realizes conditions for membership, it would be integrated into the European Union.

To sum up, the EU conditionality has always been an important aspect of the EU policies towards applicant and candidate countries, which sets political and economic conditions for the membership. The basic proposition of the EU conditionality is that the political and economic integration as well as eventual

<sup>93</sup>Smith, Karin, *supra* note: 58, p. 31.

<sup>94</sup>Anastasakis, Othon and Bechev, Dimitar, *supra* note: 57; p: 1.

<sup>95</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 59, p: 661-679.

<sup>96</sup> Grabbe, Heather "A Partnership for Accession? The Implications of the EU Conditionality for the Central and East European Applicants," *Robert Schuman Centre Working Paper*, Vol.12/99 (1999), p: 6.

<sup>97</sup>Crombrughe, Alain, Beddoes, Zanny M., and Sachs, Jeffrey D., "EU Membership for Central Europe: Commitments, Speed and Conditionality," *Harvard Institute for International Development, Development Discussion Papers*, (1996), p: 26.

<sup>98</sup>*Ibid.*

membership depend on the applicant and candidate countries capacity to fulfil the conditions which are set by the EU's institution. In that sense, the EU conditionality is based on a catalogue of criteria which must be realized by the applicant countries in the course of integration. Realizing these targets would bring the applicant countries towards the rewards crystallized by the EU membership. By this way, the conditionality principle of the EU promotes reforms with regard to democratization, human rights and market economy in the applicant countries.

## **D. Conclusion**

This Chapter has analyzed the development and policy instruments of the EU's external human rights policy of the EU. In the light of the above discussion, several conclusions can be drawn with respect to EU's external human rights policy to be used to put Turkey into overall picture of the EU' human rights policies. First of all, the EU's human rights policy is generally determined by the transformations in the world politics and within the EU. On the one hand, the collapse of the Soviet Union and the transition of post communist states to the liberal market economy have changed the perception of the EU towards human rights issue. The EU is no longer in a position to support anti-communist non-democratic regimes for the sake of maintaining stable relations in the context of East-West rivalry. On the other hand, the EU has evolved from purely an economic community to a political Union basing on certain political norms and principles, such as democracy, the rule of law and human rights within the framework of CFSP and EPC. Such developments make human rights an important aspect of the EU's political identity and put human rights promotion into the significant goals of the foreign policy of the EU. In this sense, the first conclusion can be drawn as: the development of the human rights dimension in the external relations of the Community and within the framework of the EPC and the CFSP can not be analysed separately from increased concern for human rights in international relations, the political developments in the world and the development of the European Integration process from economic community to Union.

This change in the perception of the EU led to the introduction of political conditionality to EU's relation with third countries. The EU applies both negative and positive types of conditionality to the third countries. The system is generally based on "carrot and stick mechanism." One can refer to positive conditionality when the EU grants trade concession, financial and development aid or membership, if the recipient countries meet human rights condition. However, we may mention negative conditionality if the recipient country fails to comply with the conditions, sticks (punishments), which are the suspension of trade, cooperation agreements or the reduction of aid, are utilized. In its relations with third countries, the EU has a preferably use of 'carrots' rather than 'sticks.' In this sense, the second conclusion can be drawn

as: The EU's human rights policy is based on political conditionality for third countries basing on "reward" rather than "punishment system," except very grave human rights violations.

On the basis of the general EU's political conditionality policy, the EU has utilized two important instruments for promoting human rights in its relation with third parties. The first one is the incorporation of the human rights clause into the trade-cooperation-development agreements, as an "essential element clause," and "non execution clause." This development emerged from the need of having a legal basis for the application of sanction to the countries violating human rights. However, the EU's policy on the human rights clause has evolved, and the human rights clause is now generally used as the basis for 'positive' human rights conditionality, including political dialogue, monitoring and funding. The second instrument that the EU utilizes is human rights conditionality for membership for the applicant countries. Even though the logic behind these two instruments is the same, the scope of demands of the EU from the applicant countries is larger than the scope of demands appearing in relations with third countries. In this respect, very detailed human rights conditions emerged for the candidate countries compare to the other third countries.

The effectiveness of the EU conditionality on the applicants to meet the EU's demands is determined by several domestic and EU the level parameters. But in general terms, as a last aspect, the effectiveness of the conditionality is determined by the gap between the benefits of complying at the EU level and the cost of adjustment at the domestic level of the applicant countries. The likelihood of compliance is higher when the incentives to comply with the EU standards are greater than the domestic costs of adjustment. The higher the benefits granted by the EU are and the lesser the adjustment costs for the recipient country are, the more likely the recipient countries would comply with the EU standards. In this sense, functionality of conditionality stems from the asymmetrical power relation with the recipient and the donor country. Since the EU had the rewards to offer and so it has the tool to set the rules of the game. Other than these two important variables, credibility of the EU in terms of meeting its commitment and the pattern of applicant countries governance determine the effectiveness of the EU conditionality.



## Chapter IV: The Effectiveness of Human Rights Conditionality on Turkey

As it has been argued in the previous chapters of this thesis, the EU has experienced a radical transformation in the nature and direction of the European integration project during the late 1980s and 1990s. It has evolved from the economic “Community” to the political “Union” which led the underlying changes in both economic and political regard. In the political framework it has given more emphasis to democracy and human rights as an integral part of its identity and on this basis it has appeared to develop its internal and external human rights policies. Initially, as it is observed in the previous chapters, this increasing concern of the EU about human rights and democracy was reflected on the trade-cooperation and association agreements by incorporating “human rights clauses.” Later, respect for human rights becomes a *sine quo non* condition, defined by the Copenhagen criteria, for membership. Since the 1990s the membership for the EU has required not only democratic government but also a good quality of democracy and performance defined on the basis of human rights.

Parallel to these developments, during the course of 1980s and 1990s, the growing emphasis of the EU on human rights as the underlying aspect of the European identity, appeared to present a serious challenge for Turkey’s bid to become a full member of the EU. Ironically, in this period, Turkey was undergoing politically one of the most undemocratic, economically one of the most liberal periods of its history. On the one hand, the shift from “heavily protected and inward-oriented economy of the 1960s and the 1970s” to the far more “open and outward-oriented economy in the course of the 1980s and the 1990s” was experienced, making Turkey closer to the liberal economic structure of the EU<sup>1</sup> and consolidating institutional ties with the EU. On the other hand, following the transition to democracy in 1983 after the military intervention in September 1980, the emergence of Kurdish problem and the rise of the political Islam led to the militaristic measures taken by Turkey for solving such problems. These measures has resulted in serious human rights violations in Turkey. Indeed, politically, the EU and Turkey were two poles moving in the opposite direction in the 1980s and in the early 1990s.

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<sup>1</sup>Önis, Ziya, “An Awkward Partnership: Turkey’s Relations with the European Union in Comparative-Historical Perspective,” *Journal of European Integration History*, Vol. 7/1 (2001), p: 105-132.

However, since the 1980s the positive contribution of the EU on human rights promotion in Turkey has appeared to be felt as well. The EU has become one of the most important external dynamic to promote domestic change in terms of democracy and human rights in Turkey. Even though the demands of the EU have seriously contradicted the “taboo” issues of the Turkish Republic and have been fulfilled reluctantly, Turkey has started the endeavor of meeting political conditions for membership. Turkey has initiated ambitious plans of constitutional reforms for consolidating democracy and human rights. The peak of this process took place following the Helsinki Council Decision in December 1999, in which Turkey was given “candidate status.” First of all by using the sticks (sanctions) and later carrots (rewards), the road of Turkey going in the opposite direction of the EU was tried to be diverted.

On this basis, the aim of this chapter is to put Turkey as a good case study into the EU’s general framework of human rights promotion policies for third countries. Examining the instruments through which the EU has tried to promote human rights in Turkey and focusing on the scope of reforms undertaken following the Helsinki Council in 1999, the present chapter analyzes the parameters of human rights conditionality in the relationship between the European Union and Turkey. These parameters can be schematized as the “conflict issues” between Turkey and EU, namely human rights violations in Turkey, “the instruments” of the EU to solve such human rights problems and “the effectiveness” of the EU instruments to find a solution for these issues. In other words, the chapter will use Turkey as an important case for analyzing the success of human rights conditionality of the EU for the applicant countries and third countries. The basic proposition of this chapter is that the EU is “relatively”<sup>2</sup> successful in the improvement of human rights in Turkey in the post Helsinki period (1999-2004).

This chapter is made up of three parts. In the first part, the focus is on a descriptive analysis of the general human rights and democracy problems in Turkey. This part is devoted to the conflict issues between Turkey and the EU. The reports of non-governmental organizations such as Human Rights Watch, Amnesty International, and the Commission Reports of the EU are taken as reference points here. The largest part of the descriptive analysis is devoted these institutions’ view on certain human rights issues in Turkey. In the second part, the discussion is based on the process of Turkey’s becoming a target of human rights conditionality of the EU. In general, the focus is on human rights promotion instruments of the EU for Turkey, namely the Ankara Association Agreement in 1963, the Custom Union in 1995 and lastly Helsinki Council decisions. In the third part, the effectiveness of the EU instruments in promoting domestic change is analyzed, by focusing on legislative reforms that Turkey made as a response to meet

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<sup>2</sup>I use the term “relatively” because even though a great number of constitutional reforms were made in the post Helsinki period, there are still many challenges in terms of human rights promotion in Turkey. These shortcomings will be focused in the next chapter of this thesis.

the human rights conditions of the EU. Even though human rights promotion instruments of the EU namely the Association Agreement and the Custom Union were utilized to promote democracy and human rights, since Turkey became a target of human rights conditionality clearly following the Helsinki European Council by getting candidate status, the focus of the reform process in Turkey is generally limited to a time period of 1999-2004.

## **A. Conflict Issues: Turkey's Human Rights Record**

Turkey's aspiration to integrate into the Union has brought Turkey's human rights record to the top of the agenda of conflict issues between Turkey and the EU. The EU has named the areas in which Turkey has to initiate reforms in order to converge with the EU standards as human rights and democracy deficit. On the Turkish side, the demands of the EU have increased Turkey's concerns, since these issues are generally related with the "taboo" issues of Turkey. The solution to these problems necessitates not only making legislative reforms but also a total transformation of Turkey's tradition of the strong state, which is based on secularism and Turkish nationalism. The areas that necessitate the convergence with the EU human rights standards can be summarized as follows:

- Civil Military Relations: The role of the military in politics through the judiciary; the State Security Courts; and through the National Security Council;
- Minority Rights and the Kurdish Issue: including violations of human rights, torture, arbitrary arrest, detention, degrading treatment forced migration and so on.
- Limitations on Fundamental Rights and Freedoms: the Turkish Penal Code and its articles on fundamental freedoms such as freedom of expression and association; the death penalty.<sup>3</sup>

## **I. Civil-Military Relations**

Since the late Ottoman Empire, the Turkish army has had an influential role in Turkish politics, the reason for which lies in deep-rooted historical factors.<sup>4</sup> The army considers itself the guardian and protector of

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<sup>3</sup>See the discussion on problematic political areas between Turkey and the EU in: Bac, Muftuler M., "Turkey's Political Reforms and the Impact of the European Union," *South European Society and Politics*, Vol. 10/ 1 (2005), p: 17-31.

<sup>4</sup>Starting with the 19<sup>th</sup> century, the army first has become the target of Turkish modernization, and then it has turned out to be a very important actor that protects Turkish modernization, which is based on secularism, Turkish nationalism and Europeanization. It intervened three times in 1960, 1970, and 1980 to Turkish politics to "protect" these characteristic of Turkish modernization. Turkish military is still one of the most important challenges to the implementation of human rights reforms in Turkey. The role of the Turkish military requires very deep-historical-sociological analysis. In this sense, I focus on here very briefly the manifestation of Turkish military influence on

the secularism and territorial integrity of the Turkish state. It intervened three times in 1960, 1971, and 1980 respectively. From 1999 onwards, the role of the military in Turkish politics has become a very important issue between the EU and Turkey. For the EU such a role of the army is inconsistent with Western democratic standards, demonstrating the authoritarian state structure of Turkey. The EU has referred to this situation as firm evidence that Turkish democracy falls short of EU standards.

The role of the Turkish military on Turkish politics has arisen from two important sources. One is the “statutory obligations” and the other is the “moral authority derived from its public prestige and record of past intervention.”<sup>5</sup> In terms of the “statutory obligation,” the Turkish Military has exercised its influence through the National Security Council and the State Security Courts. The National Security Council is a body composed of the President, the Prime Minister, the Minister of Interior, and the Ministers of Foreign Affairs and Defense. It was created by the Article 111 of the 1961 Constitution with the aim to recommend the Council of Ministers the necessary guidelines, regarding the coordination of and the making of decisions which are related to national security.<sup>6</sup> It is in theory an advisory body to the civilian rule on security issues, but in practice it is more than that. It intervenes taking the decision on all important domestic and foreign matters made by elected civilians.

The military did not only intervene on the politics but also on the judiciary through the State Security Courts, which were abolished in 2003. Alleged offences under the anti-terrorist law, destroying the indivisible integrity of the state, its territory and nation, endangering the existence of the Turkish State and Republic, undermining or destroying or seizing the authority of the State, defendants were tried in the State Security Courts. This Court judged the crimes against the state. According to the Commission Report of 1998, there are “doubts about the impartiality of judges,” as among the three judges of the State Security Courts one judge is a military officer and “this was the only example in Europe in which civilians can be tried at least in part by military judges.”<sup>7</sup> This Court was an “extraordinary judicial body which was in conflict with the principle of natural judge” on the one hand; on the other hand, it gave important

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Turkish politics through National Security Council and State Security Courts. The broader analysis of the role of the army will be made in the next chapter of this thesis under the framework of the challenges of human rights protection in Turkey.

<sup>5</sup>Jenkins, Gareth, *Context and Circumstance: The Turkish Military and Politics*, (Oxford, Oxford University Press, 2001), p: 41.

<sup>6</sup>Ozyavuz, Tuncer, *Osmanli-Turk Anayasalari* (Ottoman-Turkish Constitutions), (Kocaeli, Aklim Publisher, 1997), p: 224. Quoted from: Jenkins, Gareth, *supra* note: 5, p: 45.

<sup>7</sup>European Commission, “Regular Report on Turkey’s Progress towards Accession,” (1998), Brussels.



leverage to the military in exercising its influence on the judicial process during the period of civilian governments.<sup>8</sup>

## II. Minority Protection

The protection of minorities is one of the most important aspects of the Copenhagen political criteria, the fulfillment of which determines the possibility of the member states' accession to the EU. Turkey's aspiration to integrate into the European Union has brought minority protection under close examination by the EU. However, Turkey has always been skeptical towards the ethnic, religious and linguistic minorities in Turkey and reluctant to grant them legal status due to historical, political and sociological reasons. Thus, the issue of minority protection has become the most problematic aspect of the Turkey-EU relation, jeopardizing the effectiveness of EU's political conditionality.

In Turkey, there are three sub-categories of minority groups,<sup>9</sup> *de facto*. The first group consists of religious communities (non-Muslims) including *Armenians, Jews, Greeks, Assyrians* and *Alevis*. The second group consists of ethnic communities, which are *Kurds, Romas, Arabs, Caucasians*, and *Balkan* migrants. The third group is made up of linguistic communities, including *Zazas* and *Lazs*. However, the existence of these minorities is not recognized by the Turkish Republic. Only national minorities recognized by the international treaties (particularly the Lausanne Treaty) are officially considered minorities in Turkey, including Armenians (50,000), Jews (25,000) and Greeks (5,000). This means only non-Muslims were granted minority status, leaving a great number of Muslim minorities without protection, even though these groups are ethnically, linguistically and culturally different. In this sense, in Turkey there are *de jure* and *de facto* differences in the treatment accorded to minorities officially recognized under the Lausanne Treaty and those outside its scope.<sup>10</sup> The former enjoys certain rights like managing its own churches, hospitals and schools and the latter is deprived of them. Thus, the first aspect of the human rights problem in Turkey with regard to minority protection is the Turkish officials' argument that according to the Treaty of Lausanne there is no ethnic, national and linguistic non-Muslim minority in Turkey.

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<sup>8</sup>Özbudun, Ergun and Yazici, Serap, *Democratization Reforms in Turkey*, (Ankara, Tesev, 2004), p: 42.

<sup>9</sup>Karimova, Nigar and Deverell, Edward, "Minorities in Turkey," *The Swedish Institute of International Affairs Occasional Papers*, No: 19 (2001), p: 6. Available at: <http://www.ui.se/texter/op19.pdf>. It is accessed on 02.04.06.

<sup>10</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1998), Brussels.

### III. Kurdish Problem

The above mentioned approach of Turkey towards minorities has directly linked minority issue to the Kurdish problem, which leaves Kurdish people forming the largest ethnic community, with a population of approximately 12.000.000-15.000.000 in Turkey,<sup>11</sup> without any minority protection system. The official ideology of Turkey towards the Kurdish issue has been to deny the existence of a Kurdish minority, and thus their cultural-linguistic rights, accompanied by brutal repression of those who speak about a Kurdish cause.

The origin of the Kurdish problem lies in deep-rooted historical factors. Following the establishment of the new Turkish Republic in 1923, the founding fathers of the new Republic – some scholars call these group modernist elites – initiated the construction of an “ethnically homogenous secular society.”<sup>12</sup> By this way, the process of qualifying the Kurds as Turks started, which seeded the dissatisfaction of the Kurdish people. As Bruinessen (1992) states, since 1925 there has been a systemic policy aiming at detribalization and assimilation of the Kurds in Turkey. In this process, everything that is related to a separate Kurdish identity was to be abolished, including language, (traditional) clothing and Kurdish names.<sup>13</sup> Following a Kurdish rebellion in 1925, the Kurds were deported to the big cities of Turkey, the Kurdish areas were declared a military zone, entire civil and administration of the Kurdish provinces in the east were placed under the “Inspector General of the East.”<sup>14</sup>

On this historical basis, the seeds of the PKK (The Kurdistan Workers Party), whose aim is to establish a Marxist Kurdish state, were planted. Although the origins of the PKK go back to 1973, the PKK was officially founded on the basis of a Kurdish political party with Marxist-Leninist ideology in 1978. As it was the case for all Marxist-Leninist organizations in Turkey, the military coup in 1980 prevented the activities of the PKK and the leaders of the organization fled to Syria. Since 1984 the PKK has started formerly the armed struggle. Initially, the main aim of the PKK was a Kurdish tribal society. It stated that Kurdistan is an area under colonial rule, in which tribal leaders and a comprador bourgeoisie cooperate to ease the state’s exploitation of the lower classes. It adopted a left wing anti-imperialist rhetoric. However, in the 1990s, the PKK has changed its Marxist rhetoric and instead it emphasized Kurdish nationalism

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<sup>11</sup>Oran, Baskin, *Türkiye’de Azınlıklar: Kavramlar, Lozan, İç Mevzuat, İctihat, Uygulama*, (Minorities in Turkey: Concepts, the Lausanne Treaty, the Internal Regulation and the Implementation) (Ankara, TESEV, 2004), p: 47.

<sup>12</sup>Kasaba, Resat and Bozdoğan, Sibel, “Turkey at a Crossroad,” *Journal of International Affairs*, Vol. 54/1 (2000), p: 5-20.

<sup>13</sup>Bruinessen, Van Martin, *Agha, Shaikh, and State: The Social and Political Structure of Kurdistan*, (London, Zed Books, 1992), p: 242.

<sup>14</sup>Gunter, Michael, M., *The Kurds and the Future of Turkey*, (London, Macmillan, 1997), p: 5-6.

with the aim of increasing the number of the Kurdish supporters who have a traditional and religious identity. The emergence of the PKK led to harsh reactions of the Turkish state and put the Kurdish region under the increasing influence of the Turkish military. The repressive methods of the Turkish military led to a series of human rights violations.

Generally, the negative developments in human rights issues during the late 1980s and 1990s were linked to the Kurdish problem. The struggle of the Turkish Republic against the PKK has resulted in serious human rights violations in Kurdish regions. Even though human rights violations in Turkey are a general problem of Turkey regardless of ethnic origin, there have been serious acts of infringement solely targeting Kurdish people. The human rights violations in the Kurdish region are generally based on (1) prohibitions against the use of Kurdish languages and culture, (2) the forceful displacement of the Kurdish population in the southeastern region and the killing of Kurdish civilians, (3) disappearances, extrajudicial executions, arbitrary detentions, and torture, (4) unfair trials in the State Security Courts, (5) the infringement of fundamental freedoms like freedom of assembly, press and the association.<sup>15</sup> Such violations have become hotly discussed issues between the EU and Turkey during the 1990s. Here only the first two human rights violations are dealt with, since they are purely targeting the Kurdish population. The others will be dealt with in the preceding part.

The prohibition of the use of Kurdish language and the suppression of Kurdish culture are the most important human rights violations in the framework of the Kurdish issue. The US State Department in its Country Report on Human Rights Practices for Turkey in 1996 states that “Turkey [the government] has long denied its Kurdish population, located largely in the southeast, basic cultural and linguistic rights.”<sup>16</sup> The EU Commission in its Regular Report of 2000 states that “regardless of whether or not Turkey is willing to consider any ethnical groups (implied Kurdish people generally) with a cultural identity and common traditions as “national minorities,” members of such groups are clearly still largely denied certain basic rights. Cultural rights for all Turks, irrespective of their ethnic origin, such as the right to broadcast in their mother tongue, to learn their mother tongue or to receive instruction in their mother tongue, are not guaranteed. In addition, these citizens are not given opportunities to express their views on such issues.”<sup>17</sup> Moreover, the Commission added that “in the case of Turkish citizens of Kurdish origin, it

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<sup>15</sup>Gunter, Michael, M., *supra* note: 14, p: 12.

<sup>16</sup>U.S. Department of State, “Turkey: Country Report on Human Rights Practices for 1996.” Available at: [http://www.state.gov/www/global/human\\_rights/1996](http://www.state.gov/www/global/human_rights/1996). It is accessed on 01.05.06.

<sup>17</sup>European Commission, “Regular Report on Turkey’s Progress towards Accession,” (2000), Brussels.

should be mentioned that the expression of pro-Kurdish views is still vigorously fought by the Turkish State.”<sup>18</sup>

Kurdish language was orally limited by *the Law Concerning Fundamental Provisions on Elections and Voter Registries* giving permission only to the use of the Turkish language for election propaganda or propaganda disseminated via radio and television. The 1982 Constitution of Turkey enshrines Turkish as the official language of Turkey. Some provisions of the Constitution, such as Article 28 stating that “publication shall not be made in any language prohibited by law,” Article 42 stating that “no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any training or education institutions” and the 1983 *Law on Publications in Languages* other than Turkish for the expression, dissemination and publication of opinions, restricted the use of Kurdish language.

Beside these general restrictions on the Kurdish language and culture, human rights organizations at a national and international level have focused on serious human rights violations in the Kurdish regions by the forceful displacement of the Kurdish population in the southeastern region and the killing of Kurdish civilians. During the 1980s and 1990s, Turkish security forces forcibly displaced the inhabitants of Kurdish villages for fighting against the PKK. The main reason behind the action of the Turkish government was that PKK members got the logistic support for their activities from the local people willingly or unwillingly. According to *Human Rights Watch*, since mid-1990s, more than 3,000 villages had been virtually destroyed, and, according to official figures, 378,335 Kurdish villagers have been displaced and left homeless.<sup>19</sup> The figure that is presented by the *Human Rights Association (HRA)* of Turkey is even more dramatic. Between 1989 and 1999, displacement from Kurdish villages was often accompanied by other human rights violations, including brutality, humiliations, threats, enforced disappearances, extra-judicial executions and torture.”<sup>20</sup>

To sum up, the Kurdish problem has led to the many forms of human rights violations since the late 1980s. The issue is generally based on the recognition of the cultural, identity and language rights of the Kurdish people. However, the problem was militarized by the launch of the PKK’s separatist activities. The Turkish government has tackled the Kurdish problem from a militaristic point of view, ignoring

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<sup>18</sup>European Commission, “Regular Report on Turkey’s Progress towards Accession,” (2000), Brussels.

<sup>19</sup>Human Rights Watch Report, “Still Critical: Prospects in 2005 for Internally Displaced Kurds in Turkey,” (2005). Available at: <http://hrw.org/english/docs/2005/03/07/turkey10261.htm>. It is accessed on 22.04.06

<sup>20</sup>Human Rights Association of Turkey, “House Demolitions and Forced Evictions Perpetrated by the Turkish Security Forces: A form of Cruel, Inhuman or Degrading Treatment or Punishment against the Kurdish Population,” *Notes Presented to the Committee against Torture*, (2003).

Available at: <http://www.ihtd.org.tr/eindex.html>. It is accessed on 22.04.06

social-economic-political aspects of the problem. For Turkey, the Kurdish problem has emerged from the separatist-terrorist activities of the PKK, necessitating the abolishment of it militarily. In light of this conclusion, Turkey has initiated an ambitious military struggle against the PKK. Such an attitude of Turkey led to many human rights violations in the Kurdish regions of Turkey, which attracted the EU's attention when it established its political identity on the basis of human rights and democratization. In this process, the Kurdish problem has become a major challenge for Turkey in its democratization and human rights promotion process. Turkey's dealing with the issue has been considered the "yardstick" by which Turkish democracy is judged.<sup>21</sup>

#### IV. Fundamental Freedoms

Turkey functions in accordance with the Constitution of 1982, which was drafted and adopted during the period of the military rule following the September 1980 coup. The military coup was a reactionary movement that targeted all political parties, most civil organizations, and the whole institutional framework in which they operated.<sup>22</sup> The founding fathers of the Constitution thought that the rights and liberties were the reasons of political violence during the 1961-1982. In this sense, they curtailed the freedoms that were granted by the previous constitution.

The 1982 Constitution has in this sense asserted the supremacy of the state over the realm of politics and placed limitations on the political system.<sup>23</sup> According to Gonenc (2005), "limitation was the rule, liberty was the exception" in the 1982 Constitution.<sup>24</sup> Major restrictive articles of the Constitution are on individual rights.<sup>25</sup> Rather than protecting individuals from the state, the 1982 Constitution of Turkey was written in a way that protects the state from an individual's activities. The provisions of the Constitution give a very narrowly defined area for civil liberties and political rights and thus it is the source of laws and practices that frequently undermine basic freedoms and human rights.<sup>26</sup> In this sense, most of the

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<sup>21</sup>Muftuler, Bac, M., "The Never Ending Story: Turkey and the European Union," *Middle Eastern Studies*; Vol.34/ 4 (1998), p: 240-260.

<sup>22</sup>Gonenc, Levent, "Recent Developments in the Field of Freedom of Expression in Turkey," *European Public Law*, Vol. 11/2 (2005), p: 241-259.

<sup>23</sup>Evin, Ahmet, "Changing Patterns of Cleavages Before and After 1980," in Heper, Metin and Evin, Ahmet, eds., *State, Democracy and Military in the 1980s*, (Berlin, Walter de Gruyter, 1988), p: 208.

<sup>24</sup>Gonenc, Levent, *supra* note: 22, p: 246.

<sup>25</sup>Dodd, Harold, C., "Political Modernization, the State, and Democracy: Approaches to the Study of Politics in Turkey," in Heper, Metin and Evin, Ahmet, eds., *"State, Democracy and Military in the 1980s,"* (Berlin, Walter de Gruyter, 1988), p: 20.

<sup>26</sup>Rouleau, Eric, "Turkey's Dream of Democracy," *Foreign Affairs*, Vol.79/16 (2000), p: 100-114.

provisions of the Turkish Constitution must be amended or totally suspended in order to comply with the EU standards of democratization and human rights. This has been implicitly suggested to the Turkish Republic many times by the EU through the Commission's Regular Reports and thus Turkey initiated an ambitious plan of constitutional amendments.

## 1. Freedom of Expression

The current Turkish Constitution has a very restrictive scope of freedom of expression. This limited area of freedom of expression of the 1982 Constitution has become an important issue of the Commission Reports starting with 1998. According to the Commission Report in 1999 the situation regarding freedom of expression remains worrying.<sup>27</sup> Turkey's record of protecting the rights of the individual and freedom of expression falls well short of the EU's standards.<sup>28</sup> Moreover, it is pointed out that an excessively narrow interpretation of the Constitution and other legal provisions, such as Articles 7 and 8 of the Anti-Terror Law, Articles 158, 159, 311 and 312 of the Criminal Code, which are related to the unity of the state, territorial integrity, and secularism, are used regularly to charge and sentence politicians, journalists and so on.<sup>29</sup> Additionally, Turkish legislation leads to interpretations that violate the freedom of expression as guaranteed by the European Convention of Human Rights.<sup>30</sup>

Even though in pluralist democracies and governments the limitations on freedom of speech only occur in very exceptional cases, in the Turkish Constitution it has been regulated rather contradictingly. The freedom of thought and opinion was regulated by the original Article 26<sup>31</sup> of the 1982 Constitution. In this article, it is stated that everyone has *"the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively."* But the exercise of these rights is restricted on several grounds ranging from *"protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the*

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<sup>27</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1999), Brussels.

<sup>28</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1999), Brussels.

<sup>29</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1998), Brussels.

<sup>30</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (2000), Brussels.

<sup>31</sup>This article was reformulated by the Constitutional Amendments in 2001.

*judiciary.*"<sup>32</sup> It is interesting to note here that there are several implicit reasons for restricting freedom of expression and the restrictions are longer than the original article regulating freedom of expression.

Moreover, the preamble of the Constitution also had a provision that further restricted freedom of expression. The preamble made reference to "*the determination that no protection shall be afforded to thoughts or opinions contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Atatürk, and that as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in State affairs and politics.*" In addition to this, the preamble clearly determined how democratic government should be considered in Turkey<sup>33</sup> by stating that "...no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from liberal democracy and the legal system instituted according to its requirements." Similarly, Article 130 of the Constitution states that "*Universities, members of the teaching staff and their assistants may freely engage in all kinds of scientific research and publication. However, this shall not include the liberty to engage in activities directed against the existence and independence of the State, and against the integrity and indivisibility of the Nation and the Country.*" According to Hakyemez and Akgun (2003), these statements create significant problem by limiting freedom of expression to the defense of the political status quo established by the Constitution itself.<sup>34</sup>

Not only the provisions of the Constitution, but also Article 8 of the Anti-Terror Law states that "*written or oral propaganda along with meetings, demonstration and marches that have the goal of destroying the indivisible integrity of the state with its territory and nations of the Republic can not be conducted.*" This article can and has been used against persons and groups whose ideas do not match the official ideology of the state. As it will be seen in the following part, this article was repealed in the framework of constitutional reforms in 2003. However, the repealing of this article does not guarantee effective protection of freedom of speech as long as the current constitutional system exists.<sup>35</sup>

In addition, Article 312 (now Article 216) of the Turkish Penal Code prohibited instigating the people having different social class, race, religion, sect or region to hatred or hostility against another part of the people in a way dangerous for the public security. This provision was also amended in 2002. But it had for

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<sup>32</sup>Hakyemez, Yusuf, S., and Akgun, Birol, "Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights," *Mediterranean Politics*, Vol.7/2 (2002), p: 54–78.

<sup>33</sup>Hakyemez, Yusuf, S., and Akgun, Birol, *supra* note: 32, p: 54–78.

<sup>34</sup>Gunduz, Aslan, "Human Rights and Turkey's Future in Europe," *Orbis* 45/1 (2001), p: 9–20.

<sup>35</sup>Gonenc, Levent, *supra* note: 22, p: 253.

a long time been used as a way to penalize writers and publishers for their views. Furthermore, another limitation to the freedom of expression is Article 159 of the Turkish Penal Code, which punishes insulting the Turkish national identity, the Republic or the Grand National Assembly of Turkey, the Turkish Government, the judicial organs, military or security institutions. According to Gunduz (2001) these provisions were initially planned to ensure the political and territorial integrity of the state, but in time, they have been used to limit freedom of expression concerning separatist-religious ideas.<sup>36</sup>

## 2. Freedom of Association

Freedom of association is another problematic area of human rights between Turkey and the EU. It is regulated by the original Article 33 of the Turkish Constitution, stating that “everyone has the right to form associations, or become a member of an association.” But, similar to freedom of expression, freedom of assembly is also subject to several restrictions. In Article 33, it is stated that the pursuance of political aims, engaging in political activities, receiving support from or giving support to political parties, or taking joint action with labor unions, public professional organizations or foundations were prohibited.<sup>37</sup> Furthermore, the Article stipulated that, while associations may normally be dissolved by a decision of a judge, they may also be suspended from activity by the competent (administrative) authority, pending a court decision in cases where delay endangers the indivisible integrity of the State, with its territory and nation, national security, national sovereignty, public order, the protection of the rights and freedoms of others or the prevention of offences. These provisions have very restrictive features making the activities of the non-governmental organizations in the framework of the freedom of association very hard.

However, there were several amendments that abolish the ban on the political activities of associations and permitted them to engage in collaborative action with political parties and other civil society organizations<sup>38</sup> in the process of harmonization of Turkish law with the EU standards. But even though some positive steps were taken concerning freedom of assembly, these developments were not reflected in the reports of the EU Commission. According to the Commission’s very recent Regular Report of 2004, it is stated that even though some restrictions have been eased regarding freedom of expression, the associations in Turkey still experience cumbersome procedures. Cases of prosecution against associations and particularly human rights defenders continue to occur<sup>39</sup> in Turkey, challenging the credibility of the implementation of the reforms.

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<sup>36</sup>Gunduz, Aslan, *supra* note: 34, p: 9–20.

<sup>37</sup>Özbudun, Ergun and Yazici, Serap, *supra* note: 8, p: 20-21.

<sup>38</sup>Özbudun, Ergun and Yazici, Serap, *supra* note: 8, p: 20-21.

<sup>39</sup>European Commission, “Regular Report on Turkey’s Progress towards Accession,” (2004), Brussels.



### **3. Freedom of Assembly**

Freedom of Assembly was regulated by the original Article 34 of the Turkish Constitution, which made freedom of assembly de facto impossible in Turkey. Before its amendment in 2001, Article 34 had stipulated that the competent administrative authority may determine the site and the route for a protest march and may prohibit a particular meeting or protest march, postpone it for not more than two months, in cases where there is a strong possibility that disturbances may arise, which would seriously upset public order, where the requirement of national security may be violated or where acts aimed at destroying the fundamental characteristics of the Republic may be committed. Moreover, it states that the associations, foundations, labor unions, and public professional organizations can not hold meetings or protest marches outside their own scope of activity and aims. This provision limits the right to peaceful assembly in Turkey in a broader scope.

Moreover, according to the Commission's Report of 2004, in some cases of peaceful protest, the authorities have used a disproportionate use of force.<sup>40</sup> Even though Turkey has made some reforms as a part of its legislative reform process, particularly in improving the Law on Public Meetings and Demonstrations, police violence and local government restrictions weaken freedom of assembly. Human Rights Watch pointed out in 2004 that "the Turkish government is gaining international credit for recent legislative progress on human rights in many areas including freedom of assembly. But when Turkish citizens attempt to gather publicly to voice their concerns and criticisms they frequently meet official restrictions and police brutality."<sup>41</sup>

### **4. Freedom of Press**

The Turkish Constitution has specific articles particularly concerning the freedom of press. Articles 28, 29, 20, 33 and 133 of the Constitution regulate freedom of press. These provisions were amended in 2001 and further liberalized in the process of constitutional reforms. According to Article 28 of the Constitution, the press is free and shall not be censored and the State shall take the necessary measures to ensure the freedom of the press and freedom of information. In the limitation of freedom of the press, the same limitation applied to the Article 26 relating to freedom of expression is also applicable. "Anyone who writes or prints any news or articles which threaten the internal or external security of the state or the indivisible integrity of the state with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets and anyone who prints or transmits such news or

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<sup>40</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (2004), Brussels.

<sup>41</sup>Human Rights Watch, "Turkey: Curbs on Assembly Undermine EU Bid," (2004). Available at: <http://hrw.org/english/docs/2004/04/28/turkey8501.htm>. It is accessed on 25.04.06.

articles to others for the above purposes, shall be held responsible under the law relevant to these offences.”

The constitutional framework is implemented and completed by two essential laws, namely the Press Law and the Law on the Establishment of Radio and Television Enterprises and their Broadcasts. All broadcasts on all television and radio stations are placed under the supervision of the Radio and Television Supreme Council (RTUK). Several issues considered sensitive by the state, such as national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible territorial and national integrity of the state, are also incorporated to the restrictions of the press and broadcasting laws.

The Commission evaluates freedom of press in Turkey in 1998 as “...on occasion certain Turkish newspapers have been censored at the printing stage. There is also a high degree of self-censorship as the media are well aware of the strictness with which constitutional and legal limits to freedom of expression are applied. Public criticism of the armed forces or the peaceful advocacy of alternatives to the basic principles of the Turkish State (e.g. territorial integrity and secularism) may both lead to criminal charges being pressed. Confiscation of newspapers, books or films also occurs, mostly in relation to coverage of the situation in south-east Turkey. Objective and independent reporting by Turkish media of the Kurdish issue is not possible. Despite these restrictions, the media frequently criticize the authorities for their actions in other policy areas.”<sup>42</sup>

## 5. Freedom of Religion

One of the basic features of the Turkish Republic as it is stated above is secularism. In Article 2 of the Turkish Constitution, which defines the characteristic of the Republic, it is stated that “the Republic of Turkey is a democratic, secular and social state governed by the rule of law.” Secularism according to the Constitution is not interfering in state affairs and politics through sacred religious feelings. The Republic’s program of secularization has been in accordance with the French *laïque* or Jacobin model.<sup>43</sup> Contrary to Anglo-Saxon version of secularism which is neutral on the issues of religious activities, Turkey’s secularism tries to rid all public areas from manifestations of religion and puts religion under the strict control of the state.<sup>44</sup> In light of this consideration, Article 136 of the Turkish Constitution gives an important institutional role to the Department of Religious affairs. By establishing such an institution, the

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<sup>42</sup>European Commission, “Regular Report on Turkey’s Progress towards Accession,” (1998), Brussels.

<sup>43</sup>Toprak, Binnaz, “Islam and Turkey,” *Turkish Studies*, Vol.6/2 (2005), p: 167–186.

<sup>44</sup>Yavuz, Hakan, “Turkey’s Fault Lines and the Crisis of Kemalism,” *Current History* (2000), p: 33-38.

state has lost its neutrality towards religious issues and controls all religious activities throughout Turkey. This situation is a little bit ironic. On the one hand, the state focuses on a strict separation of religion from politics; on the other hand, it becomes highly Sunni Islamic, which is the dominant religious sect in Turkey. In this sense, the only religious sect which is supported, and whose rights are guaranteed, is the Sunni-Muslim sect in Turkey. This fact has found its expression in the Commission's Report of 1998. According to this report, it is stated that even though religious minorities in Turkey are free to exercise their religion, in practice, there are several restrictions affecting the ownership of premises and the expansion of activities.<sup>45</sup> Moreover, it is stated that the Assyrian Orthodox religion is not recognized as a religious minority and Turkey's Alawi Muslims have no government-salaried Alawi religious leaders, in contrast to Sunni religious leaders. In addition to this, "the army plays an active role in upholding the principle of secularism in the Turkish society against certain strands of Islam that are considered to be opposed to this principle."<sup>46</sup>

## **6. Torture, Inhuman and Degrading Treatment or Punishment**

The other human rights violations that are necessary to mention here are torture, extra-judicial or dubious killings that occur mostly in Turkey.<sup>47</sup> Even though, torture is widespread throughout Turkey, according to the Human Rights Association Report of Torture for 2003, the highest number of torture cases is generally seen in the southeastern region of Turkey.<sup>48</sup> This does not mean that "torture" is only experienced in the Kurdish region. Even though the government has declared "zero tolerance" for torture and initiated significant reforms in the past five years, torture is still practiced in Turkey. According to the Turkish Human Rights Association, there have been 692 incidents of torture and ill treatment by police forces in the first six months of 2004.<sup>49</sup> 597 people were referred to the Human Rights Association for medical treatment after suffering torture, ill treatment and illness arising from prison conditions.<sup>50</sup> According to a report of Human Rights Watch "due to poor supervision of police stations, certain police units deny or delay detainees access to a lawyer, fail to inform families that their relatives have been detained, attempt

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<sup>45</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1998), Brussels.

<sup>46</sup>European Commission, "Regular Report on Turkey's Progress towards Accession," (1998), Brussels.

<sup>47</sup>Gunter, Michael, M., *supra* note: 14, p: 13.

<sup>48</sup>Human Rights Association of Turkey, "Regular Report of Human Rights Violations in Turkey," (2003). Available at: <http://www.ihd.org.tr/index.html>. It is accessed on 22.04.06.

<sup>49</sup>Human Rights Watch, "Torture World Wide," (2005). Available at: <http://hrw.org/english/docs/2005/04/27/china10549.htm>. It is accessed on 22.04.06.

<sup>50</sup>*Ibid.*

to suppress or influence medical reports which record ill-treatment, and still do not reliably apply special protections for child detainees.”<sup>51</sup>

## **B. The Instruments of the EU for Human Rights Promotion in Turkey**

As it is argued in the previous chapters of this thesis, the EU has important instruments to promote domestic change in the candidate countries. The instruments of the EU to promote domestic change on the basis of human rights and democratization are financial aid, trade and development-cooperation-association agreements and granting or refusing membership. The EU has bound the utilization of these rewards (instruments for human rights protection) by the associate or candidate countries to the fulfillment of certain political conditions. In association-development-cooperation agreements, the EU has incorporated a “human rights clause” as an “essential element” of the agreement, non-compliance to which leads to the suspension of the agreement. In membership relation, the EU has not only looked at the existence of democracy, but has taken into the account the quality of the democracy, based on human rights and the rule of law. In these aspects, the EU has very strict conditions of human rights and democracy in the candidate countries, which are determined by the Copenhagen criteria. Thereby the political conditionality has turned out to be one of the most robust external parameter for domestic change in the candidate countries or in the third countries with association, development and cooperation agreements.

Formerly as an associate country, and later as a candidate country, Turkey has become the target of the political conditionality policies of the EU and the EU has utilized the mechanisms for democratization and human rights promotion in Turkey. The EU had several instruments at its disposal. These are 1) Ankara Association Agreement from 1963 to 1987 2) The refusal of Turkey’s membership application from 1987 to 1999 3) Granting candidate status to Turkey according to the Helsinki Council Decisions from 1999 to 2004. Formerly, the mechanisms are generally based on suspension of financial aid or trade preferences that the Association agreement provided. Later the decisions to consolidate or decline the institutional ties that the Turkey wanted to create were used to promote human rights in Turkey. Whatever the instruments, the EU was “relatively” successful especially in the last period to initiate domestic change in Turkey.

In the first period (1963-1987), the relations were determined by the Ankara Association Agreement that was signed in 1963. It is possible to divide this period into two sub-parts. In the first period (1963-1980), the EU was completely silent concerning human rights issues in Turkey, emphasizing the economic aspect of the relation. In the second part (1980-1986), in accordance with the developments in EU’s internal-

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<sup>51</sup>Ibid.

external policies of the 1980s, the EU started to utilize its tools and developed legal mechanisms for concerning itself with human rights issue in Turkey. But the EU's emphasis on human rights issue was still not very strong.

In 1987, Turkey applied for full membership but its membership request has been rejected up until 1999. This period (1987-1999) can be characterized as one during which the EU was increasingly concerned about human rights issues in Turkey. Turkey's application for membership changed the rewards mechanism that the EU had used to promote human rights in Turkey. There were three important decisions in this period: The refusal of Turkey's membership application in 1987, instead of membership application, the revival of Association Agreement by implementing the Customs Union in 1995, and the decision not to grant "candidate status" to Turkey in the Luxemburg Summit in 1997. In this period, the EU had started to utilize both the "perspective of membership," even though it was not very clear, and the "Association Agreement," including the decision to pass from the preparatory stage of the Agreement to the Customs Union or suspending the financial aid that the Association Agreement envisaged to provide. Thus, it can be argued that the EU had used "negative conditionality", emphasizing sanctions in cases of serious human rights violations in Turkey. Generally speaking, the EU human rights promotion policy of the EU towards Turkey was not successful in this period.

In the last period (1999-2004), the EU took advantage of the "perspective of membership" to motivate Turkey to make human rights reforms following the decision to grant candidate country status to Turkey through the Helsinki Council Decision in 1999. This was also a decision to shift from negative conditionality, emphasizing "sanctions", to the positive conditionality, focusing on the "reward" that is membership. Among the above mentioned mechanisms, the instrument of perspective of membership that the Helsinki Council granted to Turkey is "relatively" successful in promoting domestic change in Turkey regarding efficient human rights and democratic standards. Indeed, Turkey has initiated a very ambitious reform process and started membership negotiations with the EU.

## **I. Ankara Association Agreement (1963-1986)**

Turkey signed the Association Agreement with the EU on 12 September 1963 and an Additional Protocol in 1970. Thereby it accepted the supervision of the higher authority of the EC/EU over its own political system, even though initially this was not so clear for the policy makers of the Turkey.<sup>52</sup> The Ankara Agreement envisaged a stage by stage integration process. It had three stages the preparatory, the

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<sup>52</sup>Muftuler, Bac M., "The impact of the European Union on Turkish Politics," *East European Quarterly*, Vol. 34/2 (2000), p: 159-179.

transitional stages and the Customs Union. The agreement had implicit perspective of full membership in the Community at an uncertain time period, as long as appropriate conditions were fulfilled by Turkey.<sup>53</sup> It defined the relationship between Turkey and the EU in primarily economic terms, namely membership in the Customs Union combined with free mobility of labor.<sup>54</sup>

In this context, even though there were human rights violations in Turkey in 1970, the EU was silent on human rights violations in Turkey in 1970s. Indeed, contrary to the Union's association agreements with the most CEECs (other than Poland and Hungary), neither the 1964 Association Agreement with Turkey, nor the 1995 Customs Union included a human rights clause, on the basis of which an agreement could be suspended in case of human rights violations.<sup>55</sup> Given that it was only in 1989 during the 4<sup>th</sup> Lomé Convention that a "human rights clause" first appeared in the trade-and-cooperation agreements and it began to appear regularly in such agreements only as of 1995, the non-existence of such a clause is understandable.<sup>56</sup> Moreover, the EU's human rights policy until the mid-1980s was "inward looking" and there was no "institutional framework" by which the member states' human rights policy could be coordinated.<sup>57</sup> In this sense, one must wait up until the beginning of 1980s, to hear about the EU's human rights issues in Turkey.

The first signs of the introduction of political dimensions of the Turkey-EU association relations can be observed in the reaction of the EU to the military coup in September 1980. According to Muftuculer (2000), in the course of 1980-1988, the EC by its institutions, such as the Commission and the Parliament, attempted to force Turkey to a transition to democracy by utilizing several "punitive measures" such as the freezing of the Association Agreement and the suspension of financial aid.<sup>58</sup> However, although following the military coup some initiatives were taken by the Commission and the Council, the

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<sup>53</sup> For a detailed discussion on whether the Ankara Association Agreement granted a "perspective of membership" see Kabalioglu, Haluk, "The Relation between Turkey and the EU: Turkish Perspective," in Bagci, Huseyin, Jackson, Janes and Kuhnhardt, Ludger eds., *The Parameters of Partnership: The US-Turkey-Europe*, (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p: 19-69.

<sup>54</sup> Önis, Ziya, "Luxembourg, Helsinki and Beyond: Towards an Interpretation of Recent Turkey-EU Relations," *Government and Opposition*, Vol. 35/4 (2000).

<sup>55</sup> Zalewsk, Piotr, "Sticks, Carrots and Great Expectations: Human Rights Conditionality and Turkey's Path towards Membership of the European Union," *Center for International Relations*, (2004). Available at: [http://www.csm.org.pl/pl/files/raporty/2004/rap\\_i\\_an\\_1604a.pdf](http://www.csm.org.pl/pl/files/raporty/2004/rap_i_an_1604a.pdf)

<sup>56</sup> Zalewsk, Piotr, *supra* note: 55, p:

<sup>57</sup> Ugur, Mehmet, *The European Union and Turkey: An Anchor Credibility Dilemma*, (Aldershot, Ashgate, 1999), p: 216.

<sup>58</sup> Muftuler-Bac, Meltem, *supra* note: 52, p: 159-179.

approaches of the EU institutions, which considered the strategic importance of Turkey in the course of Cold War, except the Parliament, were generally passive.<sup>59</sup> On 17 September 1980, the EU Parliament adopted a resolution, which stated that “the military rule in Turkey was incompatible either with Turkey’s commitment under the European Convention or with its association with the EU. A suspension of relations would be considered if Turkey did not return to democratic rule as soon as possible.”<sup>60</sup> On 10-11 April 1980 the EU Parliament passed a resolution that called on the Commission, the Council and the member states ‘take on their responsibilities’ and demanded from the EU and the member states to inform Turkey that the association agreement would be suspended immediately, if Turkey did not return to democracy within two months.”<sup>61</sup> As a response to this pressure, first of all, the EU decided to suspend the Fourth Financial Protocol, which was planned to be granted in the framework of the Association Agreement following the arrest of the leaders of the political parties in Turkey in 1981, and then, one year later, it finally decided to freeze the association relation until Turkey would transit to democracy.

Even though by suspending Ankara Association Agreement and financial aid the EU adopted a negative conditionality and emphasized sanctions from 1980 to 1987, the EU was generally passive towards human rights issues in Turkey and it was unwilling to impose sanctions on Turkey due to the strategic considerations of the Cold War. In this sense, the human rights policies of the EU towards Turkey were very incoherent and ineffective in promoting domestic change in terms of human rights in and the democratization of Turkey. Thus, as an instrument of human rights promotion, the association agreement did not produce successful results.

The general human rights policy of the EU towards Turkey from 1963 to 1987 can be summarized as:

- In the early years of the Association Agreement (1960-1970), there was no emphasis on the human rights issues in Turkey due to the economic character of the Community, focusing on economic aspects of the relation rather than its political dimension. Even though it is evident that there were human rights violations in Turkey in 1970, the EU in this period was generally silent on the human rights issue in Turkey.
- Starting in the 1980s, the EU has gradually increased its attention to the human rights issue in Turkey (1980-1987). But generally, the attention of the EU at this period was low-level and reactionary rather than active. The reason for this is that the military coup, which excluded the civilian government, made the perspective of membership impossible and resulted in the

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<sup>59</sup>Ugur, Mehmet, *supra* note: 57, p: 219.

<sup>60</sup>Agence Europe, 18.9.1980, p: 7. Quoted from Ugur, Mehmet, *supra* note: 57, p: 219.

<sup>61</sup>Ugur, Mehmet, *supra* note: 57, p: 220.

suspension of the Association Agreement. Under these conditions, the EU had no motivation to force Turkey to reconsolidate democratic rule.

- The EU was also reluctant to force Turkey into making reforms and afraid of jeopardizing the relations, due to the strategic importance of Turkey during the Cold War
- Overall, the EU was not successful in promoting domestic change in this period.

## **II. Persistent Refusal of the Perspective of Membership (1987-1999)**

Turkey's human rights problems have become one of the most important issues between the EU and Turkey from 1986 onwards. In this period, the EU had a more active human rights policy towards Turkey. The EU utilized several instruments to promote human rights in Turkey by making institutional ties with the EU conditional upon to the fulfillment of human rights protection in areas such as minority rights, the Kurdish problem, antidemocratic articles of the 1982 Constitution, the death penalty and anti-terror law. The Human Rights conditionality of the EU became very obvious when responding to Turkey's membership application in 1987, during the Customs Union negotiations of 1995 and the refusal of the granting candidate status to Turkey in the Luxembourg Council decision of 1997.

### **1. Turkey's Application for Membership (1987)**

As soon as Turkey reconsolidated parliamentary democracy in 1983, it started to promote its relations with the EU and applied for full membership in 1987. Before the application for membership, Turkey made several legislative reforms to improve human rights, such as repealing the decree freezing the assets of the Greek minority in Turkey since the first Cyprus crisis in 1963, giving the possibility of individual application to the ECHR on 23 January 1987, establishing a Parliamentary Committee for monitoring human rights development in Turkey. These reforms were made under pressure of the EU. However, the outcome was not positive. Turkey was not granted full membership. As a response to Turkey's application for full membership in 1987, in its Opinion of December 18, 1989, the Commission stated that Turkey's accession to the EU is unlikely at the moment due to the democracy deficit, non-existence of respect for human rights, the Kurdish problem and so on.<sup>62</sup> Thus, as the second best alternative, Turkey had to settle for the Customs Union, which had already been guaranteed by the Ankara Agreement.<sup>63</sup>

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<sup>62</sup>Muftuler-Bac, Meltem, *supra* note: 52, p: 159-179.

<sup>63</sup>Önis, Ziya, "An Awkward Partnership: Turkey's Relations with the European Union in Comparative-Historical Perspective," *Journal of European Integration History*, Vol. 7/1 (2001).



## 2. Custom Union (1995)

It is also possible to see the effect of the political conditionality during the Customs Union negotiations, in which Turkey's political situation, particularly the improvement of human rights, the 1982 Constitution, the Kurdish problem, become very obvious for any kind of relation with the EU.<sup>64</sup> As stated above, the Ankara Association Agreement envisaged three stages, the preparatory, the transitional and the Customs Union. The transition from one stage to the other was not automatic and each necessitated further negotiations. During the negotiations for the Customs Union, Turkey's human rights situation became a very important issue. The EU parliament condemned the arrest of the pro-Kurdish members of parliament and delayed the ratification of the agreement. To ease the pressure right before the European Parliament's vote on the Custom Union Agreement in 1995, Turkey made constitutional amendments to the 1982 Constitution having the aim of liberalizing constitutional provisions on freedom of expression and thought and its anti-terror law.<sup>65</sup> This improvement made possible the ratification of the Custom Union. Even though these constitutional changes were very limited developments, the Commission stated that Turkey "reaffirmed the credibility of the Turkish government's to comply with the obligations arising out of the European Convention of Human Rights." Thus, it forced the European Parliament to give its approval to the conclusion of the Customs Union Agreement with Turkey and the EP reluctantly gave its consent to the Custom Union Agreement in December 1995.

Following the ratification of the Custom Union Agreement, the Parliament had sustained its concerns on human rights in Turkey. In its Resolution on the human rights situation in Turkey, the Parliament pointed out that its approval to the Custom Union was conditional upon the fulfillment of several criteria. These were 1) the implementation of human rights standards, 2) the consolidation of democracy through constitutional reforms, 3) non-violent and non-military solution of the Kurdish question through granting the Kurds minority rights, 4) the solution of the Cyprus problem.<sup>66</sup> These conditions were naturally not fulfilled. Since there was no "human rights clause" in the Custom Union Agreement, it was not possible to suspend the agreement completely. Instead, the European Parliament used its budgetary power and suspended the financial aid that the EU would normally grant on the basis of the Custom Union Agreement.<sup>67</sup>

<sup>64</sup>Muftuler-Bac, Meltem, *supra* note: 52, p: 159-179.

<sup>65</sup>Krauss, Stefan, "The European Parliament in EU External Relations: The Customs Union with Turkey," *European Foreign Affairs Review*, Vol.5 (2000), p: 215-237.

<sup>66</sup>European Parliament, "Resolution on the Human Rights Situation in Turkey," 13 December 1995.

<sup>67</sup>Krauss, Stefan, *supra* note 65, p: 215-237.

### **3. Luxembourg Council Decision (1997)**

One of the most important turning points in EU-Turkey relations was the exclusion of Turkey as a candidate country from the expansion of the EU, even though it included all the applicant countries from Central and Eastern Europe, as well as Cyprus during the Luxembourg Summit of December 1997. This was a very big disappointment for Turkey. While Turkey was excluded from the enlargement process, the EU aimed to integrate former communist states with a deep authoritarian legacy and less experience in democracy than Turkey. In the Luxembourg Council Conclusions, Turkey's eligibility for accession, and the lack of necessary economic and political conditions for the membership were restated. The European Councils pointed out that "strengthening Turkey's links with the European Union also depends on that country's pursuit of the political and economic reforms on which it has embarked, including the alignment of human rights standards and practices on those in force in the European Union; respect for and protection of minorities; the establishment of satisfactory"<sup>68</sup>

Contrary to the previous periods (1987-1997), not giving candidate status to Turkey produced very negative results in terms of human rights promotion in Turkey. Shortly after the Luxembourg Council decisions, Turkey started to freeze its diplomatic relations with the EU. In a state of non-existence of perspective of membership, between 1997 and 1999, only very limited progress was made in terms of democratization and human rights promotion, including a few amendments to the Penal Code, the reduction of police custody for suspected crimes, and the removal of military judges from serving in the State Security Courts. Aware of the negative implications on human rights issues and Turkey-EU relation, two years after the Luxembourg Council, the EU changed its policy towards Turkey.

The basic characteristics of human rights conditionality policy of the EU in the course of 1987-1999 can be summarized as:

- Compared to the previous periods (1963-1987), in this period (1987-1999), the EU increased its criticism concerning Turkey's human rights situation due to increasing institutional ties based on Turkey's application for membership and the Custom Union.
- Demands for membership became very apparent making Turkey the target of human rights conditionality policies of the EU.
- The perspective for membership given by the EU in this period was not very clear. The EU generally emphasized a further integration of Turkey, on the basis of the Association Agreement, the last stage of which was the Custom Union, at a level less than membership. This has jeopardized the credibility of the EU for Turkey, which had seen the Custom Union as first step of integration into the EU rather than the final destination for a long time.

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<sup>68</sup>Luxembourg European Council, "Presidency Conclusions," 12-13 December 1997.

- As an instrument to promote human rights, the EU utilized sanctions rather than incentives several times. Negative conditionality tools of the EU were the suspension of the Association Agreement, and not granting financial aids or not concluding Custom Union Agreement negotiations with Turkey as long as Turkey does not fulfill human rights criteria.
- Given the non-existence of membership perspective and emphasis on sanctions rather than rewards, the potential of the EU to promote domestic change in Turkey was generally weak.

### III. Granting Candidate Status in the Helsinki Decision (1999-2004)

However, Turkey's exclusion from the enlargement process did not last too long. Surprisingly, in its Helsinki Summit of December 1999, the Council shifted Turkey's status from applicant to a candidate country and thereby gave Turkey a clear perspective of membership. The Helsinki Council Decisions declared that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States. Building on the existing European strategy, Turkey, like other candidate States, will benefit from a pre-accession strategy to stimulate and support its reforms. This will include enhanced political dialogue, with emphasis on progress towards fulfilling the political criteria for accession with particular reference to the issue of human rights."<sup>69</sup> If positive conditionality for membership is based on the belief that the membership perspective will promote the potential member states to comply with the EU standards, stated in the Copenhagen criteria, the Helsinki Council for the first time gave membership perspective to Turkey. For the first time, in Turkey-EU relations, the perspective of membership was apparent to such an extent. Thereby the EU showed "the carrot of membership" and bound the granting of such a "carrot" to the fulfillment of certain conditions.

After the Helsinki decision, Accession Partnership (AP) was declared on 8 March 2001 by the EU. The framework regulation, which has the aim of providing the legal basis for the Accession Partnership, was adopted by the General Affairs Council on 26 February 2001. Under the heading Enhanced Political Dialogue and Political Criteria, the document highlighted 11 short term and 8 medium term priorities, which had to be adopted to fulfill the Copenhagen Criteria.

The Turkish Government declared its own *National Program for the Adoption of the EU acquis* on 19 March 2001 and it was submitted to the EU Commission on 26 March 2001. The National Program was designed according to the short and medium term priorities, which were stated in the Accession Partnership Document. It is an endeavor of the political elites in Turkey to find a balance between the

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<sup>69</sup>Helsinki European Council, "Presidency Conclusions," 10–11 December 1999.

need to fulfill the Copenhagen criteria and the reluctance to implement reforms concerning sensitive issues in the short term.<sup>70</sup>

On this basis, Turkey has experienced unprecedented transformation in terms of human rights promotion and democratization. The EU conditionality has started to produce its first significant effects following this decision. Turkey adopted a great number of constitutional amendments and “harmonization laws” between 1999 and 2004 to comply with the Copenhagen criteria. The constitutional amendments that have been made in the process of meeting the political Copenhagen criteria represent more than simple reforms for Turkey and they are important steps for a radical transformation or departure from the Turkish authoritarian structure of the state. This impetus of change was generally due to “the incentive of membership” or, speaking in the jargon of the conditionality, “the reward of membership” that the EU granted by giving official candidate status to Turkey following the Helsinki Council decision. Indeed, such an unparalleled constitutional transformation in Turkey was appreciated by the EU, paving the way for European Council decision on 17 December 2004 to start negotiations with Turkey, even though, were still been problems in terms of implementing the reforms.

The basic nature of the human rights conditionality policy following Helsinki Council Decision can be summarized as:

- The EU shifted from negative conditionality to the positive conditionality, emphasizing rewards - in this case the “perspective of membership” – rather than focusing on the sanctions as it had been the case in the previous periods. The EU bound the opening of membership negotiations to the fulfillment of certain conditions. The basis of this approach by the EU is based on the understanding that as long as Turkey fulfills human rights conditions, membership is open to it.
- Since there was the perspective of membership, the EU’s approach was considered more credible, giving more impetus to the legislative reforms in Turkey.
- The human rights conditionality for membership was effective compared to the previous periods.

In this sense, the main point of this part is that Turkey has “relatively” consolidated democracy and human rights since 1999 due to the membership perspective that the Helsinki Summit granted to Turkey. However, this does not mean that Turkey has achieved an efficient level of human rights protection. It is only argued that compared to the other historical periods, Turkey has taken important steps in the human rights and democratization process and has started to discuss the validity of official ideology and taboo issues.. To support this main argument, the following part is mainly devoted to the political reforms for

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<sup>70</sup>Önis, Ziya, “Domestic Politics, International Norms and Challenges to the State: Turkey-EU Relations in the Post-Helsinki Era,” *Turkish Studies*, Vol. 4/1 (2003). It is also published as a chapter in Çarkoğlu, Ali and Rubin, Barry eds., *Turkey and the European Union*, (London, Frank Cass Publishers, 2003), p: 13.

changing the authoritarian heritage of the 1982 Constitution for the time period of 1999 to 2004, even though Turkey had made attempts earlier to change the undemocratic structure of the state.<sup>71</sup>

## **C. The effectiveness of the Conditionality**

After the re-transition to democracy in 1983, the Turkish Constitution was amended eight times (in 1987, 1993, 1995, twice in 1999, 2001, 2002 and 2004) to improve the protection of fundamental rights, the rule of law, and to limit the military's role in politics. However, Turkey has started an ambitious reform process in 2001, two years after the Helsinki Council Decision and enacted seven reform "packages" and important "harmonization laws." In October 2001, the Turkish Grand National Assembly made 34 constitutional amendments, most of them in the area of human rights. In 2001–2003 seven harmonization packages were approved, which changed laws in the Penal Code and the Anti-Terror Law that were generally used to limit fundamental freedoms and human rights. In May 2004 new constitutional amendments changing ten articles of the Constitution were passed, including the abolition of capital punishment, the strengthening of gender equality, providing for the civilianization of the Higher Education Board (YOK) and abolishing State Security Courts. An eighth harmonization package, which implemented the second set of constitutional amendments, was adopted in June 2004. These reforms were generally based on the constitutional amendments that improved fundamental rights and freedoms, focused on minority issues and regulated civil military relations. To show how effective the human rights conditionality is, this part only deals with very important constitutional amendments, concerning fundamental rights, minority protection and civil military relations.

### **I. Reforms on Fundamental Rights**

In 2001, the first significant amendments were made to the Constitution. Article 13, concerning the restriction of fundamental rights, was amended. The new provision states that “fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.” Due to this amendment, the general grounds on which the legislative body could base restrictions are removed, and it is accepted that the fundamental rights should only be restricted on the grounds stated in their own articles. Before this

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<sup>71</sup>Gonenc, Levent, “The Dynamics of Political Reform in Turkey,” *Europa-Kolleg Hamburg Institute for Integration Research, Discussion Paper*, No:1 (2006), p: 1. Available at: <http://www.europa-kolleg-hamburg.de/deutsch/diskussion/pdf/Paper2006.pdf>. It is last accessed on 01.05.06.

amendment, the general reasons for restrictions could be on the grounds of safeguarding the indivisible integrity of the state, with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and as well as specific reason in the concerned articles. However, in this new system, fundamental rights can partially be limited in conformity with the reasons mentioned in the concerned articles of the Constitution; and the fundamental rights, which do not include any grounds for restriction, can not be subject to any restriction.<sup>72</sup>

Moreover, the amended Article 13 gives place to the principle of the “essence of the rights” and “proportionality.” This principle is based on the understanding that the restrictions on fundamental rights can not be limited through infringing the essence of the fundamental rights and must be proportional. Article 14 which originally states that none of the rights and freedoms in the Constitution may be exercised with the aim of “endangering” the nature of the Turkish state as a Republic or to establish an alternative system of government was amended. The new Article 14 provides that these rights and freedoms may be restricted “for activities undertaken with the aim of destroying the democratic and secular Republic based on human rights.”

## **1. Freedom of Expression**

Important amendments concerning freedom of thought and expression were made to meet the political Copenhagen criteria. As stated above, under the 1982 Constitution, the “thoughts and opinions” which contradicted the official ideology were considered a crime and lead to serious punishment. In this context, Article 26 of the Constitution, the original form which is stated above, was amended with the aim of complying with the EU standards in this area, even though the new wording did not extend the scope of the freedom of expression.<sup>73</sup> The first change was that the general grounds for restriction, which were cut from Article 13, were added to Article 26 as specific grounds. The second important change in the field of the freedom of expression is that the fifth paragraph of the preamble, which previously restricted fundamental freedoms and rights for the people who disseminated thoughts and opinions contrary to Turkish national interests, Turkey’s national and territorial integrity and the modernism of Ataturk, has now been amended to ensure that only “activity” that is in violation of these provisions is subject to this exclusion.<sup>74</sup>

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<sup>72</sup>Gonenc, Levent, *supra* note: 22, p: 241-259.

<sup>73</sup>Gonenc, Levent, *supra* note: 22, p: 241-259.

<sup>74</sup>Gonenc, Levent, “The 2001 Amendments to the 1982 Constitution of Turkey,” *Ankara Law Review*, Vol. 1/1, p: 89-109.

In January 2002, the Turkish Penal Code and other legislations were also amended in line with the constitutional amendments. The Parliament passed changes to Articles 159 and 312 of the Penal Code and Article 8 of the anti Terror law, which are analyzed above. The original Article 159 of the Turkish Penal Code stated that “those who publicly insult or deride the moral character of Turkish-ness, the Republic, the Grand National Assembly, the Government and its Ministries, the military or security forces of the State or the moral character of the judiciary, shall be sentenced to one to six years of severe imprisonment.” By the third adjustment package, the scope of Article 159 was narrowed so that criticism of the military, state institutions, Parliament, the government, the justice system or Turkish identity are no longer punished unless they don’t have an aim to “insult” those institutions. Moreover, maximum punishment was reduced from six to three years. Additionally, Article 312 of the Turkish Penal Code was changed in the first adjustment package. The amended Article 312 of the Turkish penal code states that instigating hatred or hostility towards people of a different social class, race, religion, sect or region can only be considered a crime when it endangers public security. But it is still open to the Courts to decide whether such a danger is present in the concerned cases.<sup>75</sup> The first package of reforms also changed Articles 7 and 8 of the Anti-Terror Law, shortened the punishment for certain offences and reduced bans on television and radio broadcasts that allegedly were “propaganda” that may promote “terrorist methods.” But essentially Article 8 of the Anti-Terror-Law was unchanged.<sup>76</sup>

## **2. Freedom of Association**

Several constitutional amendments were made to liberalize the provisions concerning freedom of associations in 2001. The most important change in this context is the abolishment of the second paragraph of Article 33, which originally required a government permit to establish an association or foundation. The general restrictions imposed on associations were replaced by specific restrictions. Some amendments were made to the Law on the Establishment of Associations, so that there are no limitations for contact with foreign counterparts.

## **3. Freedom of Assembly**

The original Article 34 of the Constitution, which is stated above, was amended. These paragraphs were abolished with the constitutional amendment of 2001. Hereby the scope of the freedom of assembly was

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<sup>75</sup>Hale, William, “Human Rights, the European Union and the Turkish Accession Process” in Çarkoğlu, Ali and Rubin, Barry eds., *Turkey and the European Union*, (London, Frank Cass Publishers, 2003), p: 115.

<sup>76</sup>Hale, William, *supra* note: 75, p: 115.

broadened considerably. Certain provisions of the Law on Public Meetings and Protest Marches were also liberalized with the second and third reform laws packages.

#### **4. Freedom of Press**

A further improvement was brought about by the constitutional amendment of 2004, according to which printing presses and their annexes shall not be seized, confiscated, or barred from operation on the grounds of being an instrument of crime. While the original text of Article 30 recognized this guarantee, it provided for exceptions in cases where conviction for offences against the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic or national security is involved. These exceptions were deleted from the Article. In addition to these constitutional amendments, certain provisions of the Press Law were liberalized with the second, third, and fourth reform packages.

## **II. Reforms on Human Rights and Minority Rights**

As stated above, human rights protection and minority rights have been the most important issue between Turkey and the European Union. Even though there are other minorities in Turkey, the minority issue in Turkey has always been related to the Kurdish issue. Considerable improvements were made with the packages of constitutional reform in terms of human rights protection and minority rights starting with 2001. The first important development in this context is the amendment of Article 26 of the Turkish Constitution. The original version of the Article 26, which states that “*no language prohibited by law shall be used in the expression and dissemination of thought,*” and Article 28, which points out that “*publication shall not be made in any language forbidden by law.*” With these constitutional amendments in 2001, these sentences were deleted from Article 26 and Article 28. These constitutional amendments were generally aimed at the Kurdish people.

To implement these constitutional changes, the Anti-Terror Law was amended in a way that allows broadcasting in languages other than Turkish. Moreover, the amendments concerning Article 8 of the Anti-Terror Law reduce the maximum period of banning radio and TV channels from broadcasting for disseminating “propaganda against the unity of the State” from fifteen to seven days. The High Audio-Visual Board (RTUK) Law was amended with the third reform package and now gives permission to broadcast “in different languages and dialects used traditionally by Turkish citizens in their daily lives.” The third reform package changed the Law on Foreign Language Education and Teaching, which gives the opportunity of learning and teaching different languages.



Other developments in this respect are the abolishment of the death penalty, which had generally evolved due to the discussion of sentencing Abdullah Ocalan to death. The August 2002 package abolished the death penalty in peacetimes and in 2004 the death penalty was abolished completely. Another development was paving the way for the retrial of all cases that the European Court of Human Rights found to be in violation of the European Convention of Human Rights. These cases are generally decided in State Security Courts that had one military and two civilian judges. In this sense, the Turkish government replaced the military judge with a civilian judge in June 1999 during Abdullah Ocalan's trial.

### **III. Reforms on limiting the role of the Turkish Military**

The amendments increase the number of civilian members in the NSC from five to nine. Before the constitutional amendments in the post-Helsinki Period (1999-2004), the members of the National Security Council were the President of the Republic, the Prime Minister, the Chief of Staff of the Armed Forces, the Ministers of National Defense, Internal and Foreign Affairs, the Commanders of the Army, Navy and the Air Force and the General Commander of the Gendarmerie. With the constitutional amendments to Article 118, the civilian members of the National Security Council increased to four, so that civilian officials constitute the majority for the first time. Moreover, Article 118 states that the views and the opinions of the NSC are not obligatory but advisory. Another development in terms of democratization was made in 2002, when the state of emergency in Kurdish provinces was abolished after 15 years. Another constitutional amendment that limits the influence of the military on the judiciary is the abolishment of the State Security Courts. These courts were first established in 1973 and then incorporated into the 1982 Constitution. They were accounted for civilian and military judges and public prosecutors had an aim of judging the crimes against the state. First of all, military judges and public prosecutors were banned from these courts, and with the constitutional amendment in 2004, the State Security Courts were abolished completely, thereby limiting the role of the military.

### **D. Conclusion**

The human rights conditionality of the EU for Turkey can be schematized as a domestic conflict issue in Turkey, the instruments of the EU to help solve these problems and later the effectiveness of the EU instruments in terms of promoting domestic change. The conflict issues between Turkey and the EU are composed of the authoritarian structure of Turkish state and the human rights violations in Turkey. As it is argued in the first part of this chapter, these can be summarized as the civilian-military relationship, minority protection, the Kurdish issue, democracy deficit, non-existence of respect for the fundamental

rights and freedoms and so on. These issues have been well documented in the Regular Reports of the Commission since 1998.

These conflict issues, which lead to serious human rights violations, have existed since the establishment of Turkey. The interesting point here is the shift of the EU's concern with these conflict issues and the taking advantage of the EU's policy mechanisms to promote human rights in Turkey. The instruments of the EU to promote domestic change in terms of human rights are the Ankara Association Agreement in 1964, Turkey's membership application in 1987, the Custom Union Agreement in 1995, the Luxemburg Council Decisions in 1997, and the Helsinki Council Decisions in 1999. Initially, in the 1960s-1970s, the EU did not have strong political consideration and fully-fledged external-internal human rights policies. It was a purely economic Community that emphasized trade and economic aspects of the relations among member states. In this sense, neither the Ankara Association Agreement in 1963 nor the Custom Union Agreement in 1995, which was the last stage of the Ankara Association Agreement, had any "human rights clause", which could provide a legal basis for suspension of the agreement or financial aid in cases of serious human rights violations in Turkey. Between 1980 and 1987 weakly and between 1987 and 1999 strongly, the EU appeared to increase its pressure on Turkey concerning human rights issues. This was due to the radical transformation that had started in the nature and direction of the European integration project. Starting in the 1980s, which corresponded with the increasing number of initiatives of the EU in developing internal and external human rights policy through its primary and secondary law, the EU has increased its attention to the political aspect of the relations with Turkey. Given the overall human rights policy of the EU, the goal was to promote democracy and human rights in the third countries. In light of this goal, the EU has promoted instruments of democracy and human rights promotion. In line with this development, Turkey has become a target of human rights conditionality policies of the EU since 1980 and the EU started to use its institutional ties as instruments of democracy and human rights promotion.

Formerly (1980-1999) the EU increased its domestic influence on human rights issues by using negative conditionality and thus emphasized the reduction or suspension of benefits if Turkey did not comply with stated conditions rather than rewards for fulfilling certain conditions. The system utilized punishments (sticks) rather than rewards (carrots). In Turkey's case sanctions were the suspension of financial aid or the Association Agreement, which it experienced following the military coup in Turkey and after the establishment of Custom Union. Later, the post-Helsinki Decision in 1999, granting candidate status to Turkey, the human rights policy of the EU has shifted from negative conditionality to positive conditionality. This decision gave the "perspective of membership" (reward) for the first time, the acquisition of which depends on the fulfillment of certain conditions. The list of political conditions is long and contradicts with the taboo issues of Turkey, but, initially, Turkey had robust motivation to initiate a reform.

Among the policy instruments of the EU to promote human rights in Turkey, the effectiveness of the Helsinki Council Decision, is “relatively” more powerful than the other instruments. Compared to the democratization process in Turkey following the Association Agreement of 1964, which granted a relatively weak membership perspective, the democratization attempts of Turkey in the post-Helsinki Council, since 1999, give Turkey official candidate status and thereby a clear perspective of membership that is more credible and deep-rooted. In the post-Helsinki reform process, Turkey was faced with a more balanced “set of conditions and incentives” to conduct the reforms required by the EU for a full-membership. Thus, the Helsinki Decision provided a more powerful impetus for change in Turkey’s domestic politics and helped to promote a series of radical reforms on the democratization front than the Ankara Association Agreement and Custom Union.



## **Chapter V: The Challenges of Human Rights Promotion in Turkey**

The Helsinki Council Decision in 1999 which granted Turkey the perspective of membership and an opportunity to utilize the pre-accession strategy has instigated the adoption of important constitutional and political reforms. But there are still very important shortcomings in meeting human rights criteria due to the number of restrictions on freedom of thought, freedom of the press and freedom of association and minority protection. More importantly, there is the problem of implementation of the legislative reforms, without which the reforms are only cosmetic changes to satisfy the EU demands. Furthermore, one can also observe a rise in Turkish nationalism and the re-emergence of Kurdish militaristic struggle providing a suitable condition for the adaptation of the measures limiting fundamental rights and freedoms. For instance, in March 2006, the government proposed an amendment to the Anti-Terror Law in Turkey again demonstrating a clear evidence of the backward movement in human rights issue. On this basis, defining the human rights picture of Turkey in the early months of the 2006 is far away from optimism. Turkey has started to slide back the long-lasting problems of the past. Thus, the commitments of Turkey in fulfilling the Copenhagen criteria have turned out to be another ‘dead letter’ in the history of the EU-Turkish relations.

The most important question here is to ask “why the EU’s human rights conditionality is relatively successful in Turkey’s case” or “what the parameters that prevent Turkey’s meeting European human rights standards are?” The concern of this chapter here is to analyze the dynamics that pose an important challenge for Turkey in realizing the human rights criteria of the EU. The analysis split into two levels. On the one hand, the domestic historical-sociological and political factors of Turkey that present important challenges to the EU’s human rights conditionality are analyzed. On the other hand, at the EU level, the challenges human rights conditionality policy is discussed. The reason for this two level analysis is that the effectiveness of the human rights conditionality of the EU not only depends on the domestic factors but also the external factors namely the capacity of the EU in promoting domestic change in the target countries.

This chapter is divided into two parts. In the first part, the domestic challenges of the human rights conditionality of the EU are focused on. These challenges include state-society interaction in Turkey, the cost-benefit calculation of the political actors, the distribution of the cost of human rights convergence among the political actors, and the impunity of the perpetrators of the human rights violators in Turkey. In

the second part, the external challenges of human rights conditionality, namely the capacity of the EU's human rights conditionality to promote domestic change in Turkey will be analyzed. These external challenges include the credibility problem, the perception of double standard, the legitimacy of the conditions, and the non-existence of well developed financial aid to promote human rights in Turkey. In this two level analysis, the general theoretical framework explaining in which cases the conditionality is effective is referred to analyze Turkey's specific case.

## **A. The Domestic Challenges of Human Rights Promotion**

In Chapter 3, the variables that determine the effectiveness of the conditionality are focused on. These parameters can be summarized as: 1) The more authoritarian and nationalist the state structure, the less likely the influence of the EU in promoting domestic change in the target country.<sup>1</sup> 2) The higher the domestic political costs of (human rights) convergence for the target government, the less likely conditionality will be effective.<sup>2</sup> 3) The more the political actors incur adoption cost of human rights convergence, including the opportunity costs, welfare and power losses, the less likely the convergence with the EU human rights standards.<sup>3</sup> 4) The stronger the identification of the target government with the EU international community, the more likely conditionality will be effective.<sup>4</sup>

Generally, it is suitable to apply the above mentioned theoretical framework to Turkey's case to understand the challenges of the human rights conditionality of the EU. Using this theoretical framework is important to look at whether domestic conditions allow implementation of the EU norms and standards or, alternatively, whether they work against the EU's efforts in promoting democracy in Turkey. The most important domestic challenge posing an important threat to the implementation of the human rights reforms, are "the strong-state, weak civil society model" of state-society interaction, the perception of high cost for human rights convergence, the distribution of high "adoption cost" among political parties, illegal organizations, and modernist elite.

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<sup>1</sup>For similar arguments see Vachudova, Anna M., "The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union," *European University Institute of Florence RSCAS Working Paper*, Vol. 33 (2001), p: 1-30.

<sup>2</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, "Governance by Conditionality: The EU Rule Transfer to the Candidate Countries of Central and Eastern Europe," *Journal of European Public Policy*, Vol.11/4 (2004) p: 661-679.

<sup>3</sup>Schimmelfennig Frank and Sedelmeier Ulrich, *supra* note:2, p: 661-679.

<sup>4</sup>Schimmelfennig, Frank, Engert, Stefan. and Knobel, Heiko, "Costs, Commitments, and Compliance: The Impact of the EU Democratic Conditionality on Latvia, Slovakia, and Turkey," *Journal of Common Market Studies*, Vol. 41/3 (2001), p: 495-517.

## I. State-Society Interaction

One of the most important determinants of the effectiveness of the human rights conditionality is the domestic structure of the target country. Human rights conditionality of the EU has little leverage on the countries where the state-society interaction is based on “strong state, and weak society” model. It is generally more successful in the countries, which are more familiar with liberal values rather than an authoritarian state.<sup>5</sup> The reason for this is that in the liberal countries with a strong civil society supporting democratization and human rights, it is easy for external actors demanding change in the target country to find support from domestic actors, particularly from civil organizations. For the external actors in these societies it is possible to make cooperation with domestic actors so that the government is subject to both inside and outside pressure. To the extent that the domestic society does not subordinate itself to the state, the external actor can find transnational networks of political parties, non-governmental organizations and individuals in the target state.<sup>6</sup> In this sense, conditionality generally is not effective in authoritarian countries as it does not allow the development of strong domestic society pressuring for domestic change in cooperation with external actors a chance. Moreover, human rights conditionality is not successful in nationalist patterns of governments, since they adopt “domestic political strategies characterized by ethnic nationalism and economic corruption that are incompatible with the EU’s requirements of liberal democracy and comprehensive economic reform.”<sup>7</sup>

State-society interaction in Turkey is generally based on a “strong state and “weak society” model, which strongly favors the traditional status quo, and poses important challenges to the implementation of the human rights conditions. On the one hand, as the sole defender of territorial integrity and secularism, the state has considered every improvement in the fields of human rights and democratization a challenge to its power. On the other hand, it is too “strong” and only gives a very limited space for the development of the civil society that demands more democratization and human rights promotion. In the absence of domestic support that puts pressure on the state, the EU’s capacity to influence the domestic change in Turkey is limited. To make the picture clearer, it is necessary to look at the historical roots of the state - society interaction in Turkey.

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<sup>5</sup>Vachudova, Anna M., *supra* note: 1, p: 5-6.

<sup>6</sup>Kubicek, Paul, “Turkish Accession to the EU in Comparative Perspective,” *Oxford Occasional Paper*, Vol.1/04 (2004), p: 11.

<sup>7</sup>Vachudova, Anna M., *supra* note: 1, p: 5-6.

## 1. Strong-State Tradition

The Turkish Republic inherited a strong bureaucratic state from the Ottoman Empire. This strong bureaucratic state was formed with an aim to prevent the formation of economically and politically powerful groups that could function independently from the central government.<sup>8</sup> The system worked in a way to sustain an ethnically, religiously and linguistically heterogeneous empire by strengthening the state structure and oppressing the groups which were likely to jeopardize the power of the state. This heritage of the Ottoman Empire can be seen in contemporary Turkey, especially in the course of Turkey's top-to-bottom modernization project by the modernist Kemalist elite.

The modernization project of the kemalist elite was a comprehensive and definite orientation towards European social, cultural and political values. It is based on the adoption of wide range of cultural, social and political reforms<sup>9</sup> for catching civilized western world. The modernization project has three important features. The first one is secularism. Contrary to the important role of the Islam on the Ottoman rulling, the new Turkish Republic strictly refused the influence of Islam on the state. Islam was considered as an important challenge to progress and modernization. Thus, the strict separation of state from religion formed the founding principle of the new republic. The second one is the construction of a nation-state on the basis of Turkish nationalism in an ethnically heterogeneous society, meaning the rejection of different ethnic minorities in Turkey. The third component, as the locomotive of the modernization, the modernist elite i.e. the Kemalist elite forming the center of the state were empowered excessively to protect these basic components, namely secularism and territorial integrity of Turkey.

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<sup>8</sup>Evin, Ahmet, "Communitarian Structures and Social Change" in Evin, Ahmet eds., *Modern Turkey: Continuity and Change*, (Opladen, Leske and Budrich, 1984), p: 11-24.

<sup>9</sup>The reforms that were made in this process are wide ranging. In political reformations; the Sultanate was abolished in November 1922. The Republic was declared in 1923, October 29th. The Caliphship was abolished in March 1924. Instead of a multiethnic Empire the nation-state was established. In social reformations; the hat as opposed to *fez* was introduced (1925). The activities of religious sects were banned by law (1925). The Western calendar was introduced (1925). The international numeric system was introduced (1928). The Metric system was introduced (1931). Nicknames and personal titles were abolished (1934). Religious attire was prohibited in public (1934). According to this law, religious personalities, irrespective of the religious groups they belonged to were not to wear religious attire in public but only in their sanctuaries. The surname law is introduced (1934) the modern secular system of jurisprudence instead of religious law is introduced (1926). Cultural reformations: Turkish women by giving them political and social rights are liberated. The Roman alphabet is introduced and adopted (1928). These reforms were based on the six principles of Kemal Ataturk. These are Republicanism, Nationalism, Popularism, Etatism, Secularism and Revolutionism.



The modernist elite had undertaken very significant transformations in the process of constructing 'modern' social and political structures from a traditional society, which defined itself on the basis of religious terms. The center role of the modernist elite in Turkey's modernization has emerged from the idea that "the superior material qualities of the West, its science and technology can only be synthesized with the spirituality of the East with a project from without which necessarily involves the intellectuals who take upon themselves the task of transforming a popular consciousness steeped in centuries of superstition and irrational folk religion."<sup>10</sup> In this sense, the modernist elite in Turkey have been obsessively antagonistic to the ancient regime of the Ottoman Muslim state and society.

Thus, in the first reform attempts in the early Turkish Republic, the Kemalist elite tried to get rid of Islamic elements in Turkey's cultural, political and daily life, including the abolishment of Caliph, visible symbols of Islam, such as the Islamic and traditional dress codes, the Arabic script and the calendar, which was based on the flight of Muhammad and so on. Instead of an Islamic political and societal order, strict separation of Islam and state was adopted, including the cultural secularization of the society, replacement of Islamic law with the Swiss Civil Code, the adoption of the Latin script, the secularization of education by adopting a European education system as well as European dress codes, music and styles.

The second element of Turkish modernization was to create a homogenous Turkish identity on the heritage of Ottoman's multi ethnic society. The Turkish identity during the Ottoman Empire was not considered the official identity of the Ottoman Empire. It was only one component of the Muslim population of the Empire, which was comprised of Albanians, Turcoman nomads, Anatolian Turkish peasants, Circassians, Kurds and Arabs whose the basis of identity was being Muslim.<sup>11</sup> Religion united the Muslim populations during the Ottoman Empire. In the new Republic the separation of state and religion reduced the role of Islam in unifying different ethnic groups under the umbrella of Islamic identity.

The separation of state from religion created an ideological vacuum which was tried to be filled by alternative identities. The Kemalist solution was to create an alternative to the Islamic identity by promoting "Turkish-ness" and make the people to unite around it. However, nation building, which was

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<sup>10</sup>Kadioglu, Ayse, "The Paradox of Turkish Nationalism and the Construction of Official Identity," *Middle Eastern Studies*, Vol. 32/ 2 (1996), p: 177-194.

<sup>11</sup>Mardin, Şerif, "European Culture and Development of Modern Turkey" in Evin, Ahmet and Denton, Geoffrey, eds., *Turkey and European Community*, (Opdalen, Luske and Budrich, 1990), p: 13.

based on Turkish nationalism, became the main source of political conflict and violence.<sup>12</sup> While the modernist elite dictated a Turkish identity on the diverse ethnicities, they became the center of resistance against this imposition since the non-Turks became non-entities in modern Turkey.<sup>13</sup>

Due to the positivistic stance of the Kemalist modernist elite and its hostility towards a religious and traditional structure of society and the emphasis on a homogenous Turkish identity, two poles crystallized in Turkish society. One is ‘the center’ or ‘white Turks’ and the other is ‘periphery’ or ‘the black Turks.’ The center is comprised of urban, educated, governing and modernist Kemalist elite, forming ‘the zone of prosperity’ and consolidating its power with its aim of civilizing and modernizing the irrational masses of the society forming ‘the periphery,’ centered on poor, religious and marginalized part of the society, including the Kurds and Islamists.<sup>14</sup> The relationship between these groups is contradictory. The center has subordinated the people forming the periphery and considered them masses that needed to be civilized and restricted the participation of these masses in political life until the ideal society that they envisioned emerged.<sup>15</sup> Moreover, the center entered into the public life and regulated every aspect of the Turkish society and excluded the periphery from this process. The result of this contradiction is the ‘tension between Islamic and state notions of secularism’ and the tension of ‘a rigid state ideology of homogeneity overshadowing the cultural rights of the Kurds and other communal groups.’<sup>16</sup>

These three components of Turkish modernization i.e. secularism, the construction of a nation-state with a single ethnic identity and the role of the modernist elite in protecting these values – together with the political, cultural and social westernization have several implications for the adoption of the EU’s human rights standards. The implication of the modernization that is more relevant to the human rights promotion is the enduring state of fear from ‘domestic enemies’ of the Republic, which are the proponents of political Islam posing a threat to secularism and minorities challenging the project of constructing an ethnically homogenous nation-state. Due to these fears of the modernist elite, Turkey’s democracy has

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<sup>12</sup>Joost, Jongerden, ‘Resettlement and Reconstruction of Identity: The Case of the Kurds in Turkey,’ *The Global Review of Ethno-Politics*, Vol. 1/1, (2001), p: 80-86.

<sup>13</sup>Barkey, Henry J. and Fuller, Graham F., *Turkey's Kurdish Question*, (Boston, Rowman and Littlefield Publishers, 1998), p: 10.

<sup>14</sup>Yavuz, Hakan, M., ‘Cleansing Islam from the Public Sphere,’ *Journal of International Affairs*, Vol.1 (2000), p: 54.

<sup>15</sup>Aydin, Suavi, *Amacimiz Devletin Bekasi: Demokratiklesme Surecinde Devlet ve Yurttaslar*, (Istanbul, TESEV Yayinlari, 2005), p: 26. Quoted from Gürbey, Sinem, ‘Civil Society and Islam in Turkey,’ *Columbia University Graduate Student Conference* (2006), p: 9.

<sup>16</sup>Yavuz, Hakan M., ‘Turkey’s Fault Lines and the Crisis of Kemalism,’ *Current History*, (2000), p: 33-39.

never become thoroughly pluralist.<sup>17</sup> According to Gole (1997), “throughout Republican history, all kinds of differentiation – ethnic, ideological, religious and economic – have been viewed not as natural components of a pluralist democracy but as sources of instability and as threats to unity and progress.”<sup>18</sup> This situation poses an important challenge to the implementation of human rights standards that is required by the EU due to the Kemalist elite reading the reforms demanded by the EU as jeopardizing the basic components of the modernization project.

Moreover, due to “real” or “perceived” fears, the Kemalist modernist elite has the role “to curtail deviation from the official line of a homogeneous nation-state united under the leadership of the enlightened modernizing elite.” Taking advantage of the “threat” to the territorial integrity of Turkey, the Kemalist elite strengthened their position against the society. Turkey has become a “strong, centralized and highly bureaucratic state.”<sup>19</sup> In this political structure, the state is not an apparatus for society, but instead the society is owned by the state.<sup>20</sup> The result of this political establishment is the hindrance of the emergence of a strong society demanding democratization and human rights as an important component of a pluralist democracy.

To sum up, the state tradition of Turkey, which is “superficially Western” in form while remaining rigidly authoritarian and dogmatic in substance, stressing republicanism over democracy, homogeneity over difference, the military over the civilian, and the state over society<sup>21</sup>, forms the basic domestic challenge that prevents human rights promotion in Turkey. At the center of the contemporary political crisis between Turkey and the EU lie three sociopolitical consequences of Kemalism: 1) “the uncritical ideology of modernization of Kemalism prevents open discussion that would lead to a new and inclusive social contract that recognizes the cultural diversity of Turkey; 2) it does not tolerate the articulation of different identities and lifestyles in the public sphere since they undermine the Kemalist vision of an ideal society; and 3) it treats politics as a process of guiding political development and engineering a new society.”<sup>22</sup>

<sup>17</sup>Rumford, Chris, “Failing the EU Test? Turkey’s National Programme, EU Candidature and the Complexities of Democratic Reform,” *Mediterranean Politics*, Vol.7/1 (2002), p: 51–68.

<sup>18</sup>Gole, Nilufer, ‘The Quest for the Islamic Self Within the Context of Modernity’, in Bozdogan, Sibel and Kasaba, Resat eds., *Rethinking Modernity and National Identity in Turkey*, (Washington; University of Washington Press, 1997), p: 84.

<sup>19</sup>Ozbudun, Ertugrul, “Turkey: How far from Consolidation,” *Journal of Democracy*, Vol. 7/3 (1996), p: 123-138.

<sup>20</sup>Soven, Suleyman and Shaw, Ian, “Turkey and the European Union: Modernizing a Traditional State,” *Social Policy and Administration*, Vol. 37/2 (2003), p: 108-120.

<sup>21</sup>Yavuz Hakan M., *supra* note: 14, p: 54.

<sup>22</sup>Yavuz Hakan M., *supra* note: 16, p: 33-39.

## 2. Weak Civil Society for Promoting Democratization

The modernization project which has been undertaken in a top-down fashion, deeply affected the evolution of civil society in Turkey. The above mentioned strong state tradition on the basis of official Kemalist ideology serves to prevent the development of a civil society that could function freely. Even though it is not possible to speak of a non-existence of civil society on a superficial level with a plethora of non-governmental organizations, civil society in Turkey civil society remains underdeveloped and is still constrained by the state.<sup>23</sup> The state allows “the organizational appearance of civil society” under the pretext of a democratic regime. However, the dominance of the state over the individuals and groups in society results in the repression of the groups that the state does not find suitable to the official ideology of the Kemalist state. In this sense, the approach of the state towards civil society is not homeogenous; it reacts on a selective basis, favoring the different institutions of the civil society defending the official ideology and repressing the others criticizing official ideology of the state.

This situation has influenced the implementation of human rights in several respects. First of all, the commitment of Turkey to human rights promotion has been relinquished because of the absence of a bottom-up mechanism of checks and balances,<sup>24</sup> which a strong pro-EU civil society can provide for the implementation and promotion of human rights standards. The lack of a strong civil society in Turkey “gives both governments and parties ample space for discretionary decision-making and strongly limits the influence of societal actors on day-to-day policy-making,”<sup>25</sup> which is particularly valid for the human rights issue in Turkey. Secondly, even in cases where civil society is powerful enough to function as checks and balances for domestic change, the extremely heterogeneous and fragmented nature of the civil society would restrict the power of the Turkish civil society<sup>26</sup> in promoting domestic change in human rights issues. As stated above, there are “pro Kemalist civil society organizations supporting official ideology of the state, and the civil society organizations demanding human rights promotion. It is not possible for the Kemalist civil society organization “enforcing the restoration of the existing legal-institutional framework along the lines of laicism, modern life, national unity, and nationalism,”<sup>27</sup> to

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<sup>23</sup>Karaman, Lutfullah and Aras Bülent, “The Crisis of Civil Society in Turkey,” *Journal of Economic and Social Research*, Vol. 2 /2 (2000) p: 39-58.

<sup>24</sup>Ugur, Mehmet, “Europeanization and Convergence via Incomplete Contracts? The Case of Turkey,” *South European Society and Politics*, Vol. 5/2 (2000), p. 217-242.

<sup>25</sup>Schimmelfennig, Frank, Engert, Stefen and Knobel, Heiko, *supra* note: 4, p: 495-517.

<sup>26</sup>Kubicek, Paul “The Earthquake, Europe, and Prospects for Political Change in Turkey,” *Middle East Review of International Affairs*, Vol. 5/2 (2001), p. 34–47.

<sup>27</sup>Erdogan, Necmi, “Kemalist non-Governmental Organizations: Troubled Elites in Defence of a Sacred Heritage,” in Yerasimos, Stefanos, Seufert, Günter and Vorhoff, Karin, eds. *Civil Society in the Grip of Nationalism*, (Hamburg, Orient-Institut, 2000), p. 251–282.

support democratization and human rights promotion which are incompatible with Kemalist principles. Thirdly, the cost of campaigning for democratization for the social groups in Turkey is high, as it involves “high risks, ranging from detention through torture to very long prison sentences and, sometimes, executions.”<sup>28</sup> In this sense, the demands for democratization from the civil society has maintained through ups and downs depending on the cost of expressing democratization demands and human rights.<sup>29</sup>

Any other factor that contributes further to the poor human rights record of Turkey is the heavy involvement of the state to the economy. In Turkey, the legitimacy of state is not determined by the extent of democratization and human rights promotion but “the extent to which the government was able to distribute economic rents.”<sup>30</sup> The lack of democratization and human rights is tolerated provided that the state makes the access of “state provided economic rents” possible for the certain groups. “The context for state-society interaction in Turkey has increased the returns on lobbying for the attainment of economic rents whereas it decreased the returns on campaigning for democratization.”<sup>31</sup> This situation led to the increasing corruption at the expense of tolerance to the lack of democratization and human rights.

Briefly, strong-state tradition coupled with the weak civil society of Turkey jeopardized the implementation of human rights in Turkey. Even though it appears that Turkey has strong public support in being granted to the EU membership, in reality, it does not have strong support for the promotion of human rights issues touching incontrovertible issues of Turkey. This poses important challenge for the human rights promotion in Turkey. On the one hand, the reforms that are imposed by the EU clash with the historical dogmas of Turkey. On the other hand, the non-existence of a strong homogenous civil society support due to the high cost of the demands for democratization left the EU alone without domestic support to pressure the state to implement reforms.

## **II. The Perception of High Cost for Human Rights Convergence**

As argued in Chapter 3 of this thesis, human rights conditionality of the EU works in a way of “reinforcement for reward,”<sup>32</sup> whose strategy is withholding the reward in cases of failure to meet the conditions. In this strategy the external actor does not intervene “either coercively or supportively to

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<sup>28</sup>Ugur, Mehmet, *The European Union and Turkey: An Anchor Credibility Dilemma*, (Aldershot, Ashgate, 1999), p: 69.

<sup>29</sup>Ugur, Mehmet, *supra* note: 28, p: 69.

<sup>30</sup>Ugur, Mehmet, *supra* note: 24, p. 217-242.

<sup>31</sup>Ugur, Mehmet, *supra* note: 24, p. 217-242.

<sup>32</sup>The concept belongs to the Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 2, p: 661-679.

change the cost–benefit assessment of the target government by inflicting extra costs (reinforcement by punishment) or offering unconditional assistance (reinforcement by support).”<sup>33</sup> As has been repeated many times in this thesis, the rewards can be membership, financial assistance, preferential trade agreements and so on. Then the political actors make cost-benefit calculation to decide if the rewards given by the external actor are worth the cost of adoption. Such a cost-benefit assessment of the target country determines the success of conditionality. When the rewards are more than the cost of adaptation, the convergence is experienced. When the cost is bigger than the benefits, the policy of the conditionality is not be successful.

In Turkey’s case it is not easy to make a cost-benefit calculation for the convergence of human rights standards and democratization. On the one hand, the human rights conditions imposed by the EU demanding reforms on cultural and minority rights are generally considered too costly for the Kemalist elite of Turkey in the short term. They are perceived detrimental to the territorial integrity and secular character of the Turkish Republic. On the other hand, the membership in EU is considered the final destination of Turkish modernization, reconfirming Turkey’s European identity. As mentioned above, a state-led modernization strategy could not get the popular support of the religious groups and minorities in Turkey. In this sense, membership in the EU is considered a guarantee for the Europeanization process in Turkey. Coupled with wealth, prosperity, welfare and international prestige the EU membership would bring, this situation has increased the benefit part of the equilibrium in the long run. However, given Turkey’s unwillingness of human rights reform, it can be concluded that Turkey takes into account “perceived” short term cost rather than “perceived” long term benefits of an eventual Europeanization. Such a cost-benefit calculation negatively overweighed the cost side of the equilibrium and has influenced the implementation of human rights in Turkey negatively.

## **1. Perceived Cost of Territorial Disintegration**

From Turkey’s perspective, one of the most important perceived costs of human rights convergence of EU’s standard is territorial disintegration. Minority rights protection is particularly important in this regard. Minority rights protection (it is possible to read it as Kurdish problem) envisaged by the EU represents one of two basic issues that have increased the perception of high cost for human rights convergence for the domestic elite in Turkey. The Kemalist elite has considered that granting minority rights to the Kurdish people would conflict with the interests of the state and they consider that any

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<sup>33</sup>Schimmelfennig, Frank, Engert, Stefen and Knobel, Heiko, *supra* note:4, p: 495-517.

discussion of cultural rights or cultural autonomy is out of the question.<sup>34</sup> In this context, the concern about threats to the unitary character of the state has made the discussion on the reforms that would jeopardize the sovereignty and territorial integrity of the state, and envisage decentralization a taboo issue for Turkey. Considering the strong emphasis of the EU on minority protection as a *sine quo non* condition of the membership, this approach of the Kemalist elite poses an important challenge to the Turkey's fully fledged human rights protection system.

In short, even though the Turkish state has supported and considered membership to the EU as the final destination of the Turkish modernization process, they consider that integration into the EU can not be at the cost of the losing sovereignty and autonomy.<sup>35</sup> Thus, the Turkish state has been reluctant to initiate the kinds of reforms that are perceived to undermine the autonomy and sovereignty of the nation state.

## 2. Perceived Cost of Political Islam

Another challenge that prevents the promotion of human rights is the threat of the rise of Islam. A major force that shapes Turkey's political structure is the Islamic movement.<sup>36</sup> Indeed, one of the most important challenges that confront laicism in Turkey is political Islam that is, using religion to control the government and imposing Islamic values on public space.<sup>37</sup> The threat perceived from the rise of political Islam in Turkey has increased the adoption cost of human rights convergence in the perception of the domestic elites in Turkey.

The belief that the imposition of the EU human rights standards brought "the transmission of values conducive to liberal democracy, namely the importance of a strong and pluralistic society, as well as a cultural relativism that recognized the right of 'others' to co-exist"<sup>38</sup> influenced the cost-benefit calculations of the domestic Kemalist elites in Turkey. The Kemalist elite which has always been a "traditional and uncompromising stronghold of secular and territorial nationalism," considers that the extension of religious freedoms to human rights standards imposed by the EU would challenge "the

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<sup>34</sup>Onis, Ziya, "Turkey, Europe, and Paradoxes of Identity: Perspectives on the International Context of Democracization," *Mediterranean Quarterly*, Vol.10/3 (1999), p: 107-126.

<sup>35</sup>Cizre, Ümit, "The Anatomy of the Turkish Military's Political Economy," *Comparative Politics*, Vol. 29/2 (1997), p. 57-74.

<sup>36</sup>Yavuz Hakan M., *supra* note: 14, p: 33-39.

<sup>37</sup>Yavuz Hakan M., *supra* note: 14, p: 33-39.

<sup>38</sup>Onis, Ziya, "The Political Economy of Islamic Resurgence in Turkey: The Rise of the Welfare Party in Perspective," *Third World Quarterly*, Vol. 18/ 4 (1997), p 743- 766.

authoritarian secularism” of the Turkish state.<sup>39</sup> The EU could “provide certain protection for Islamists in Turkey and enable them to be more vocal in their identity claims. In that sense, the EU reforms clearly posed to the boundaries of democratic politics set by the Turkish state.”<sup>40</sup>

### 3. Sevres Syndrome

The cost-benefit calculation of the modernist elite for human rights convergence was negatively affected by what is commonly referred to as the ‘Sevres syndrome’ in Turkey.<sup>41</sup> The Sevres Syndrome is inherited from the legacy of the 1920 Treaty of Sevres. It is the perception of the Kemalist elite that it is being encircled by internal (for example Kurds and Islamist) and external enemies (Greece and Iran) attempting to destroy the Turkish state under the supervision of the western European countries. This perception of Turkey forms one of the most important components of Turkish foreign policy. According to Jung (2001) “Turkey’s foreign relations are still under the impact of the traditionalist Kemalist worldview. On the one hand, there is the latent mistrust towards both the West and the Middle Eastern neighbors. On the other hand, this worldview is mirrored by the narrow notion of security—limited to the sovereignty and territorial integrity of the state—that characterizes Turkish politics.”<sup>42</sup> This makes the perception of the cost of convergence with the EU standards for the Kemalist elite excessively high. They considered that the eventual intention of the EU is not to promote human rights in Turkey, but to divide. This can be best observed by the Suleyman Demirel’s, the former president of Turkey, reaction to the demands of the EU concerning the political solution of the Kurdish problem. He accused the West that they wanted “to involve the Sevres Treaty to set up a Kurdish state in the region, (...) and that this was what they meant by political solution.”<sup>43</sup>

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<sup>39</sup>Ibid.

<sup>40</sup>Önis, Ziya and Keymen, Fuat, “Helsinki, Copenhagen and Beyond: Challenges to the New Europe and the Turkish State” in Uğur, Mehmet and Canefe, Nergis eds., *Turkey and European Integration: Prospects and Issues in the Post-Helsinki Era*, (London, Routledge, 2004), p: 17.

<sup>41</sup>Tocci, Nathalie, “Europeanization in Turkey: Trigger or Anchor for Reform?” *South European Society and Politics* Vol. 10/ 1 (2005), p. 73–83.

<sup>42</sup>Jung, Dietrich, “Sevres Syndrome: Turkish Foreign Policy and its Historical Legacies” in Moller, Bjorn eds., *Oil & Water: Cooperative Security in the Persian Gulf*, (London, I.B. Tauris Publishers, 2001), p. 131-159.

<sup>43</sup> Gözen, Ramazan, “Two Processes in Turkish Foreign Policy: Integration and Isolation,” *Foreign Policy*, Vol.21/1-2, p: 119. Quoted from Jung, Dietrich, *supra* note: 42, p. 131-159.



### III. The Distribution of Convergence Cost among Political Actors

The success of conditionality also depends on “the readiness and willingness of elites in applicant countries to respond.” According to Schimmelfennig and Sedelmeier (2001), beside the domestic cost of adoption, the distribution of these costs among the domestic actors will determine the effectiveness of the conditionality.<sup>44</sup> “The simple model of conditionality might suggest that domestic elites roll over in the face of international pressure; they may be reluctant to do so, particularly if reforms such as democratization jeopardize their hold on power.”<sup>45</sup>

In Turkey’s case, the likely actors which are negatively affected by the human rights convergence and incurring higher cost are the Kemalist bureaucratic elite, army and some illegal groups acting within the state, particularly the members of deep state and village guards. Given the democratization that the EU would bring to Turkey the power of these groups in the state would be undermined.

#### 1. The Kemalist Bureaucratic Elite

Given the theoretical framework that Schimmelfennig and Sedelmeier (2004) point out, the human rights conditionality of the EU would be determined by the distribution of the adaptation costs to the domestic actors influential in the decision making process.<sup>46</sup> According to Prezowski (1998), democratization is possible “if there are institutions that provide a reasonable expectation that interest of major political forces would not be affected highly adversely under democratic competition, given the resources that these forces can muster.” Elite groups will promote democracy when their interests are protected under more democratic conditions.<sup>47</sup> “Those who fear the loss of their socio-politically given privileges under democratic competition would not agree with it, since those privileges are not attained by means of their own merits.”<sup>48</sup>

If the major challenge facing Turkey on the path to full membership of the EU lies in the sphere of state-society interaction and the distribution of adaptation cost of human rights standards and democratization

<sup>44</sup>Schimmelfennig, Frank, Engert, Steffen and Knobel, Heiko, *supra* note: 4, p: 495-517.

<sup>45</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 2, p: 661-679.

<sup>46</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 2, p: 661-679.

<sup>47</sup>Prezowski, Adam, “Democracy as a Contingent Outcome of Conflicts” in Elster, Jon and Slagstad, Rune, eds., *Constitution and Democracy* (Cambridge, Cambridge University Press, 1988), p. 59-81. Quoted Onis, Ziya and Turem, Umut “Entrepreneurs, Democracy and Citizenship in Turkey,” *Comparative Politics*, Vol. 35/4 (2002), p: 24.

<sup>48</sup>Giannakopoulos, Angelos and Bozyigit, Esat, “Turkey’s European Perspectives: Historical-Cultural and Political Aspects,” *Balkanistica*, Vol.18 (2005), p: 67-97.

among political actors, then it is very clear that the Kemalist elite, consisting mainly of military-administrative forces and their civil political and intellectual allies, would be the major political actor that would lose its political powers and socio-politically given privileges under the political structure basing on democratic and human rights standards envisaged by the EU.<sup>49</sup>

Due to the high adaptation cost, this “loser” group has been the main barrier in the realization of fully-fledged human rights standards in Turkey. It is very obvious that the further democratization that the EU would bring to Turkey would weaken “the established power positions” of the Kemalist elite. Since they are in the position to influence the decision-making process according to their interests, they utilize their veto power on decisions that would impact their power position. The undermining of the Kemalist elite’s power position in the EU’s human rights standards convergence would in this sense influence the human rights promotion in Turkey negatively.

## **2. The Turkish Military**

Even though it is not possible to speak about a homogenous Kemalist elite that opposes the reform process, since they are torn between reform oriented neo-Kemalists, which have a more liberal interpretation of Kemalism and hard-line Kemalists, it is obvious that among the Kemalist elite, the army would face the highest adaptation cost and presents an important challenge to the effectiveness of EU’s human rights conditionality.

The military of Turkey has always had an important place in the political structure of Turkey. It has acted as guarantor of the Kemalist legacy and has considered its duty to not only to protect the territorial integrity and secular structure of the Turkish state against external threats, but also to protect it against internal challenges. Turkey has experienced three military coups since 1960, even though the military restored democratic order for a short time. However, through constitutional design and other sources of influence, the military has been able to determine the parameters within which democracy would operate.

Contrary to the army’s position in the Turkish political structure, the requirement to remove the military’s influence from the political arena is one of the most important conditions that the EU demanded from Turkey. Today it is widely accepted that the Turkish military’s influence is a serious impediment to the democratization and modernization of Turkish society and the central role of the military is considered a barrier to an eventual EU membership. Becoming a member of the EU necessitates that the military gives up considerable political power. It is this cost of giving up political power that presents an important

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<sup>49</sup>Ibid.

challenge to human rights promotion in Turkey. The military as the guardian of the secular and unitary state wants to maintain its role in politics. The combined forces of distrust towards Europe, an awareness of its own importance and fear of the deterioration of the Kemalist state at the hands of civilian politicians, make the military unwilling to face the cost of disappearing from the political arena.<sup>50</sup> Thus the army acts as an important veto power in further democratization. This situation has been a little bit ironic. Turkey has been pushed to move to Europe by the endeavor of the Turkish army and considered itself the guarantor of Westernization at the expense of the religious and traditional society. Now it is the role of this very organization that is under pressure from the West.

### 3. Extreme Nationalist Parties in Turkey

The other political actors that act as an important barrier in the promotion of human rights in Turkey are the extreme nationalist political parties, particularly, the Nationalist Action Party (MHP) in Turkey. Indeed, the MHP is one of the most important political groups that oppose Turkish endeavor of fulfilling the legal criteria regarding membership.<sup>51</sup> However, it is not fair to say that MHP is the only party that is against EU membership. Beside Kemalist bureaucratic and militaristic elite-even though these groups are not explicitly stating they are in the anti EU camp-left wing nationalists and extremists have also raised their opposition to the EU membership.<sup>52</sup> Among these groups, the role of the MHP is particularly important, since they were the part of the government and critical in passing the reforms. Even though in the 3 November elections in 2002 the MHP could not enter into the parliament, considering “continual influence of radical nationalism in Turkish politics,” the possibility that the MHP will be a powerful actor in the future is high.

The MHP would face important cost of adaptation in terms of power loss, since their power lies in public support of mobilizing the anti-EU sentiments of the Turkish nationalist. In this sense, the MHP benefits from defending its place in the anti-EU camp and opposing the legal reforms in the field of human rights and particularly in the Kurdish issue. Given that the eventual membership to the EU would bring

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<sup>50</sup>Tank, Pinar, “Turkey as a ‘Special Case’ for the EU: Will the Generals Retreat from Politics?” *Security Dialogue*, Vol.32/2, p: 217-230. Quoted from: Schimmelfennig, Frank, Engert, Stefan and Knobel, Heiko, *supra* note: 4, p: 495-517.

<sup>51</sup>Canefe, Nergis and Bora, Tanil, “Intellectual Roots of Anti European Sentiments in Turkish Politics: The Case of Radical Turkish Nationalism,” in Carkoglu, Ali, and Rubin, Barry, eds., *Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamic*, (London, Frank Cass, 2003) p: 127-148.

<sup>52</sup>Avci, Gamze, “Turkey’s Slow EU Candidacy: Insurmountable Hurdles to Membership or Simple Euro-Sceptism,” in Carkoglu, Ali, and Rubin, Barry, *Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamic*, (London, Frank Cass, 2003) p: 149-169.

transparency to political life in Turkey, the adaptation cost of the MHP, whose members have generally been involved in paramilitary insurgencies, “organized political violence, and state centric totalitarian political scenarios,” would further jeopardize the power position of the MHP. This situation has and will act as an important barrier in the promotion of human rights in Turkey.

#### 4. Deep State

Another actor that prevents the adaptation and implementation of the EU human rights standards is the ‘deep state,’ an illegal group within the state, whose members are “the military, the police, the gendarmerie and Gendarmerie Intelligence and Counter Terror Unit (JITEM), which is the Turkish army’s secret force, along with an array of tribal armies, village guards, other intelligence services and secret death squads,”<sup>53</sup> and the National Intelligence Organization. These groups have been used to suppress the Kurdish movement in the Southeast region of Turkey. “The “deep state” is made up of elements from the military, security and judicial establishments wedded to a fiercely nationalist, statist ideology who, if need be, are ready to block or even oust a government that does not share their vision.”<sup>54</sup> These groups are “hidden powers that secretly rule behind the façade of its so-called and much heralded “Republican Democracy.”<sup>55</sup> They are hold within governmental and judicial institutions and circles in Turkey, since they are considered as the “protectors of the nation.”<sup>56</sup> They believe that they work on behalf of the nation and the state and so may sometimes be willing to ignore the law.

The most important event revealed clearly the relationship between the “deep state” with the military, and governmental circles was the “Susurluk accident” in November 1996. In the Susurluk accident in 1995, a car which had four passengers crashed with a lorry. Three of the four passengers of the car died. These passengers are Abdullah Catli,<sup>57</sup> who is an extreme Turkish nationalist and neo fascist militant wanted for

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<sup>53</sup> Gorvett, John, “Turkish Deep State and Semdinli: Turkey’s “Deep State Surfaces in Former Presidents Words, Deeds on Kurdish Town,” *Washington Report* (2006), p: 37-41. Available at: [http://www.wrmea.com/archives/Jan\\_Feb\\_2006/0601037.html](http://www.wrmea.com/archives/Jan_Feb_2006/0601037.html). It is accessed on 08.05.06.

<sup>54</sup> Gareth, Jones, “Bombing throws spotlight on Turkey,” *Turkish Daily News*, November (2005), Available at: <http://www.turkishdailynews.com.tr/article.php?enewsid=28558>. It is accessed on 08.05.06.

<sup>55</sup> Kurdish Human Rights Project Report, “The Extra-Judicial Killing of Şiyar Perinçek: Trial Observation,” (2005) Available: <http://www.khrp.org/publish/p2005/KHRP%20BHRC%20Relatives%20of%20human%20rights%20defenders%20at%20risk%202005.pdf>, p: 42. It is accessed on 04.06.05.

<sup>56</sup> Ibid.

<sup>57</sup> Abdullah Catli is the member of Gladio “stay-behind” NATO clandestine network, he was instrumental in destroying the Armenian Secret Army for the Liberation of Armenia (ASALA), and worked with the cooperation of the Turkish state and Gladio, NATO’s paramilitary anticommunist organization during the Cold War. Member of

politically-motivated murders of seven university students who were the member of Turkish Labor Party in 1978. Sedat Bucak, a Kurdish tribal leader, parliamentarian, and commander of a pro-state village guard force in southeastern Turkey; Huseyin Kocadag, the Head of the Istanbul Police Academy and woman believed to have links with organized crime. The accident was described as definite proof of the link between politics, organized crime and the bureaucracy, referred to as the "deep state" in Turkish politics. This incident made clear that there are covert sub-states or gangs inside the state which are carrying operations that affects Turkish daily lives and politics.

The members of "deep state" groups have been used to suppress Kurdish movement in the Southeast region of Turkey, the armed Armenian extremist group ASALA and in drug and arms smuggling.<sup>58</sup> The use of state' these ultra nationalists and members of the organized crime within the state led to the serious human rights violations. These illegal formations within the state have often been linked with serious human rights abuses, and to address deep flaws in the "rule of law."<sup>59</sup> They were granted important power positions and acted as important interest groups. Further democratization and human rights promotion that would bring stability to the region would pose an important challenge to the power positions of these groups. Their interwoven patterns of interests have always led to opposition to democratization in the Southeast in particular and Turkey in general.<sup>60</sup> The likely cost of the EU human rights convergence of in Turkey would lead to more stability and transparency, decrease the need for these groups and weaken their power provided to these groups. In this sense, this group would act as important barrier in the democratization process in Turkey in the light of their cost-benefit calculations.

## **B. The External Challenges of Human Rights Conditionality**

As it is argued in Chapter 2, the success of the human rights conditionality of the EU depends on not only on domestic factors but also on external factors. In addition to the domestic challenges that have influenced the effectiveness of human rights conditionality of the EU in Turkey, there are also external

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Gladio "stay-behind" NATO clandestine network, he was instrumental in destroying the Armenian Secret Army for the Liberation of Armenia (ASALA), and worked with the cooperation of the Turkish state and Gladio, NATO's paramilitary anticommunist organization during the Cold War. This information about Abdullah Catli is cited from Çatlı, Abdullah, *Wikipedia, The Free Encyclopedia*, (2006). It is accessed on 05.06.2005.

Available at: [http://en.wikipedia.org/w/index.php?title=Abdullah\\_%C3%87atl%C4%B1&oldid=55352364](http://en.wikipedia.org/w/index.php?title=Abdullah_%C3%87atl%C4%B1&oldid=55352364).

<sup>58</sup> Nebiler, Halil, "Yazicioglu Çatli Iliskisi," *Cumhuriyet Hafta*, December 6, (1996).

<sup>59</sup> Human Rights Watch, "Human Rights Development in Turkey," (1999).

Available at: <http://www.hrw.org/worldreport99/europe/turkey.html>. It is accessed on 05.06.06.

<sup>60</sup> Ibid.

challenges arising from the failure of the EU to act as an effective external dynamic to promote human rights in Turkey. These shortcomings of the EU's human rights conditionality towards Turkey arose from the credibility of the EU for giving the perspective of membership, the perception of a double standard, the legitimacy of the conditions that are imposed on Turkey and the non-existence of the material commitment to promote human rights in Turkey.

## **I. The Problem of Credibility of the EU**

One of the most important factors that determine the success of the human rights conditionality is the credibility of the external actor to distribute the reward in cases of rule adaptation in the target countries or to withhold rewards in cases of non compliance.<sup>61</sup> If the EU makes the reward of membership or financial assistance conditional upon to the fulfillment of certain criteria, it must be in a position to grant them to the candidate state following the convergence with the demanded standards.<sup>62</sup> On the other hand, the EU must have the ability to withhold the reward i.e. the perspective of membership or financial aid, if the candidate country does not fulfill the condition.<sup>63</sup> If there is a credibility problem with the external actor to distribute the rewards in case of rule adaptation or to withhold the rewards in cases of non-compliance, the political conditionality would not be successful. In Turkey's case the latter functions properly, but the former is not as effective as the latter. While the EU is eager to use the threat of withholding membership or financial aid, the EU has a credibility problem and is reluctant to grant Turkey the EU membership, even after the fulfillment of the Copenhagen criteria.

In this sense, the credibility of membership commitment of the EU is one of the most important challenges to the effectiveness of human rights conditionality to promote domestic change in Turkey. In Turkey's case, the EU has never provided a clear accession strategy in order to prepare Turkey for the membership or clear accession commitment, if Turkey fulfills the necessary political and human rights conditions imposed by the EU.<sup>64</sup> "While all other candidates had a roadmap for accession and clear indications of their future roles in EU institutions, Turkey had neither. Furthermore, although it gained the formal title of 'EU candidate', in practice its integration with the Union was not immediately and significantly enhanced. The decision formally to include Turkey in the accession process in 1999 was initially mainly a symbolic,

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<sup>61</sup>Schimmelfennig, Frank and Sedelmeier, Ulrich, *supra* note: 2, p: 661-679.

<sup>62</sup>Ibid.

<sup>63</sup>Ibid.

<sup>64</sup>Arikan, Harun, *Turkey and the EU: An Awkward Candidate for EU Membership*, (Burlington, Ashgate, 2003), p: 142-143.

albeit important, gesture.”<sup>65</sup> In this sense, even though the Helsinki Council Decision in 1999 gave Turkey the perspective of membership, Turkey is not sure about the chance of becoming a member of the EU.

The EU’s approach towards Turkey is generally based on a “containment policy” the objective of which is maintaining closer relations with Turkey, while delaying Turkish membership for the foreseeable future.<sup>66</sup> The consideration that “whatever we do, they would not accept us as members” prevails in Turkey. One of the good relatively recent examples in this context is the discussion of the “privileged partnership.” Even on the day of the opening negotiations on 3 October 2005, some EU member states were offered “privileged partnership” with the EU rather than a guaranteed path to full membership. “

Moreover, the credibility problem of the EU’s commitment to full membership has been lessened by the change of political parties following the elections in EU member states. Different political parties in EU member states have different attitude towards Turkey’s accession. Overnight, “a government committed to Turkish membership (such as the German SPD) can be replaced by a government (such as the CDU/CSU), for which Turkey – whether or not it meets the Copenhagen criteria – is not, and will never be, a legitimate candidate for membership.”<sup>67</sup> For this reason, beside the Copenhagen criteria, “the whim of Member State politicians, whose capacity to convince European electorates of the ‘dangers’ of Turkish accession”<sup>68</sup> has signaled Turkey the non credibility of the EU towards Turkey’s membership.

The existence of an ongoing discussion on the desirability of Turkey’s membership is perceived in Turkey as the evidence of the lack of a clear and consistent EU strategy and commitment towards Turkey.<sup>69</sup> The negative signals from member states concerning the lower possibility of Turkey’s membership, coupled with historical suspiciousness of Europe’s domestic elite and anti-European sentiments, the credibility of the EU to deliver the rewards, i.e. eventual Turkish membership, is weakened in the perception of the domestic elites in Turkey.

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<sup>65</sup>Tocci, Nathalie, *supra* note: 41, p. 73–83.

<sup>66</sup>*Ibid.*

<sup>67</sup>Zalewski, Piotr, “Sticks, Carrots and Great Expectations: Human Rights Conditionality and Turkey’s Path towards Membership of the European Union,” *Center for International Relations*, Online Paper. Available at: [http://www.csm.org.pl/pl/files/raporty/2004/rap\\_i\\_an\\_1604a.pdf](http://www.csm.org.pl/pl/files/raporty/2004/rap_i_an_1604a.pdf). It is last accessed on 08.05.2006.

<sup>68</sup>*Ibid.*

<sup>69</sup>Tocci, Nathalie, *supra* note: 41, p. 73–83.

## II. Legitimacy of the Conditions

According to the Frank (1990), if conditions that are required by the EU are founded on rules, which are shared among by the Member States, clearly defined, and coherently applied in the EU, their compliance pull is high.<sup>70</sup> The European Council in Helsinki (10-11 December 1999) declared that Turkey is a candidate state “destined to join the Union on the basis of the same criteria as applied to the other candidate states.” In this Council it was stated that the compliance with the Copenhagen criteria including stable democratic institutions, the rule of law, respect for human rights and minorities, a functioning market economy and the adoption of *acquis communautaire*, is a prerequisite for membership. However, in the discussion of Turkey’s membership the conditions that Turkey must fulfill for the membership transcend standard Copenhagen conditions. Thus, for a long time Turkey felt a “moving target” problem because the EU is changing the rules of the game, after the game started.

In this sense, it is difficult to find conditions, which Turkey must fulfill in EU-Turkey relations that are “clearly defined and coherently applied.” The EU member states have always raised doubts about Turkey’s accession on the basis of non-Copenhagen related conditions imposed on Turkey.<sup>71</sup> Their concerns include Turkey’s size, the demographic growth and the level of economic development (with evident concerns over Turkish immigration to Western Europe), as well as Turkey’s location bordering the volatile Middle East and Caucasus.<sup>72</sup> More importantly, Turkey’s Muslim identity and culture appears to be considered challenge to the eventual membership very openly by the Christian and conservative parties in Europe. Several European politicians have stated that the EU is a “civilization project” in which “Turkey has no place.”<sup>73</sup> Most of the Turkish people believe that Turkey will not be admitted to join the “Christian club” regardless of Turkey fulfilling the Copenhagen criteria. This situation presents an important challenge to effectiveness of the conditionality. The question becomes very frequent: “why reform” if at the end, the EU would close the door due to the differences in cultural and religious identity. This situation is also considered unfair, since cultural and religious identity are not a part of Copenhagen criteria.

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<sup>70</sup>Franck, Thomas M., *The Power of Legitimacy among Nations*, (New York, Oxford University Press, 1990). Quoted from Schimmelfennig, Frank, Engert, Stefan and Knobel, Heiko, *supra* note: 4, p: 495-517.

<sup>71</sup>Tocci, Nathalie, *supra* note: 41, p. 73–83.

<sup>72</sup>Tocci, Nathalie, *supra* note: 41, p. 73–83.

<sup>73</sup>These politicians are former German Chancellor Helmut Kohl (*The Guardian*, March 7, 1997) and former French President Valéry Giscard d’Estaing (*Le Monde*, November 8, 2002). Similar statements have been made by other, less prominent officials. Quoted from Kubicek, Paul, *supra* note: 6, p: 26.



Secondly, Turkey has been subject to different conditions which are not applied to the other candidate countries, which jeopardizes the legitimacy of the conditions imposed by the EU. One of the good examples in this framework is the Cyprus issue. The EU obliged Turkey to find a solution to the Cyprus issue before Turkey's membership. Even though the Cyprus issue is not a condition of the Copenhagen criteria, finding a solution to the Cyprus is stated as a short term priority of the Turkey's Accession Partnership which makes the solution a *sine quo non* condition for Turkey's membership.<sup>74</sup> For Turkey, "this has been nothing less than "Greek blackmail", as Athens, arguably, tried to use its position within the EU to force Turkey to make concessions on the long-standing division of the island"<sup>75</sup> and it is nothing to do with the Copenhagen Criteria.

Briefly, the EU made Turkey's accession conditional not only on the normal set of objective criteria but also on subjective criteria including relations with Greece, the resolution of the Cyprus question which was considered as unjust and discriminatory. For the possibility of the solving of all these problems and in turn the fulfillment of Copenhagen criteria, the EU has at its disposal the religious and cultural differences as important instrument for exclusion. Such considerations of Turkey make easier the deviation from the human rights standards and deteriorate the effectiveness of the EU's human rights conditionality to promoting domestic change.

### III. The Perception of Double Standards

The perception of a double standard is another factor that negatively influences the effectiveness of the conditionality policies of the external actor. If a target country perceives 'double standards' in the approach of the external actor, the conditionality policies would not produce the expected results of domestic political change. In EU-Turkey relations, one of the most important factors that prevent the effectiveness of the EU's human rights conditionality is this "double standard." Far from being objectively distant from any candidate countries not respecting human rights, the EU underlines human rights problems with certain countries like Turkey and subordinates human rights issue with the other candidate countries.

In the eyes of the Turkish leaders, the arbitrary nature of the EU's decision to upgrade one relationship *in order to address* a poor human rights situation and to downgrade another *because of* a poor human rights

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<sup>74</sup>Suvarierol, Semin, "The Cyprus Obstacle on Turkey's Road to Membership in the European Union," in Carkoglu, Ali, and Rubin, Barry, eds., *Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamic*, (London, Frank Cass, 2003), p: 55-78.

<sup>75</sup>Kubicek, Paul, *supra* note: 6, p: 26.

situation”<sup>76</sup> were the clear proof of the EU’s double standard, affecting the effectiveness of the conditionality in Turkey. This perception of double standards particularly in human rights issues was in its peak in the course of the enlargement of the Community towards its eastern periphery during the 1990s by integrating the post-Communist countries of Central and Eastern Europe. While Turkey was explicitly excluded from the countries considered for potential full-membership, the eastern countries, which have similar economic conditions as Turkey and a far more limited experience of democratic government, were accepted as candidate countries.<sup>77</sup> There were several points that increased the perception of a double standard in Turkey. First of all, these countries did not fulfill the political conditions of Copenhagen. It was believed that by giving candidate status to these countries, the possibility of promoting democratization and human rights would increase in these candidate countries.<sup>78</sup> However, it was exactly this point that prevented the EU granting Turkey candidate status. The quality of democratization and human rights were not considered sufficient enough to accept Turkey as a candidate country.<sup>79</sup>

### III. The Lack of Financial Aid

The perception of the double standard that emerged following the Luxembourg Summit was increased by the fact that the Union had taken important steps in utilizing financial aid during the 1990s in the context of the pre-accession strategy for incorporating the former communist countries of the Central and Eastern Europe into its orbit. In this context, the EU granted to the Central and Eastern Europe Countries important amount of financial resources under the auspices of the PHARE program compared to the limited financial aid that was provided to the Turkey.<sup>80</sup> In the 1990s, Turkey received less than 5 Euros per capita of aid, as compared to levels of 10-45 euros for the CEEC accession countries.<sup>81</sup> The EU’s increasing attention to human rights issues in Turkey has perpetually been at odds with the financial support to which it was linked.<sup>82</sup>

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<sup>76</sup>Zalewski, Piotr, *supra* note: 30, p: 58.

<sup>77</sup>Ziya, Onis, “Luxembourg, Helsinki and Beyond: Towards an Interpretation of Recent. Turkey-EU Relations,” *Government and Opposition*, Vol.35/4 (2000), 463-483.

<sup>78</sup>Zalewski, Piotr, *supra* note: 30, p: 58

<sup>79</sup>*Ibid.*

<sup>80</sup>*Ibid.*

<sup>81</sup>Avci, Gamze, “Putting the Turkish Candidacy into Context,” *European Foreign Affairs Review*, Vol. 7 (2002), p. 91-110. Quoted from Zalewski, Piotr, *supra* note: 67, p: 39.

<sup>82</sup> Zalewski, Piotr, *supra* note: 67, p: 39.

## **C. Conclusion**

In this Chapter, the domestic and external challenges of the EU's human rights conditionality in Turkey are examined with the help of several theoretical frameworks that explain the conditions of success of the EU's human rights conditionality. In Turkey's case, the effectiveness of the EU's human rights conditionality depends on the interplay of domestic and external factors. In conformity with the general theoretical framework, the domestic factors that determine the effectiveness of human rights conditionality are the state-society interaction in Turkey, the cost-benefit calculation of the domestic elite, the distribution of adoption cost of human rights convergence among the political actors active in decision making. The external factors that have an influence on the effectiveness of the human rights conditionality are the capability of the EU as in promoting domestic change in Turkey, determined by the credibility of the EU's commitment, the legitimacy of the conditions, and the non-existence of a double standard and material commitment.

Given these factors that determine the effectiveness of the EU human rights conditionality in Turkey, it is concluded that the human rights conditionality of the EU is not very efficient in Turkey's case. However, this does not mean that the EU has not influenced domestic change in human rights promotion in Turkey. At least on paper, Turkey has made several constitutional amendments. But there are still problems in the implementation of these amendments. Considering Turkey's legal and political structure, it is easy for Turkey to deviate from their commitments to human rights. Following the opening negotiations with Turkey, Turkey has experienced a process of walking backwards concerning the human rights issue, due to the increasing nationalism, the rise of PKK's military activities and the revoking of the activities of the deep state. In this sense, the basic question that this chapter tries to answer is why the EU's human rights conditionality failed.

The most important challenge of the human rights conditionality is related to the domestic politics of Turkey, which is the result of the state and society interaction in Turkey. The state-society interaction in Turkey is in essence the "strong state" and "weak society" model. The strong state tradition together with the Kemalist ideology is based on a commitment to secularism and the unitary nation-state, with its well-defined boundaries that centralizes the state at the expense of the society. The state was given the role of protecting these basic components of the Kemalist ideology. The results of this situation are two-fold. On the one hand, any idea, person or group that is against the Kemalist ideology was repressed. On the other hand, the development of the state at the expense of the society prevented the flourishing of the civil society that builds the domestic support of the EU to promote human rights in Turkey.

The other challenge of human rights promotion in Turkey is the strong emphasis on threats to the territorial integrity of the state and the secular character of the Turkish Republic. The consideration that if Turkey implements the reform imposed by the EU, it would lose its territorial integrity and secular character means that in this sense, the cost of convergence to the human rights standards for domestic elite in Turkey appeared to be higher than its benefits. This situation blocks the opportunity of a more open political system, which would be in a position to respect the human rights of the people whose opinions differ from official ideology. In addition, the distribution of the adaptation cost of human rights among the political actors also influences the effectiveness of human rights conditionality. There are some interest groups, political parties and illegal organizations such as Deep State that benefit from the undemocratic structure of the state. They would incur important political costs, in terms of power and wealth lost following the human rights convergence. Since they have privileged power positions in the state, they use their influence in the decision making process and prevent a human rights reform.

Beside these domestic challenges of implementation, there are also external challenges arising from the EU's human rights conditionality policies towards Turkey. The EU's human rights conditionality policies have important shortcomings. Among these shortcomings, which are important to mention are the lack of credibility of the EU's commitment to Turkey's full membership, even should Turkey fulfill the Copenhagen political criteria, the lack of legitimacy of the EU conditions, the double standard of EU's human rights conditionality towards Turkey and the lack of material commitment of the EU to promote human rights in Turkey. Contrary to the other accession countries for which the EU has more active human rights promotion policies by guiding and catalyzing the political reforms, the EU's response to human rights issues in Turkey is more reactive and lacks the necessary instruments to promote democratization.

## **Chapter VI: Conclusion**

Given the internal and external aspects of the EU's human rights policy can not be separated from each other, this thesis adopted a unified approach in analyzing the development of the EU's human rights policies. On the basis of the descriptive analysis of the EU's internal human rights policies, forming the general framework for the evolution of the place of the human rights in the EU's legal order, this chapter generally focused on the EU's external human rights policies for third countries and its policy instruments for human rights promotion in these third countries, particularly in the candidate countries. Thus, one of the most important tasks of this thesis was to analyze the discussion of human rights conditionality for membership, financial aid and trade-cooperation agreements. After generally examining the EU's general concern about democracy and human rights in its relations with the third countries and the instruments to promote human rights, the EU's position on democracy and human rights in respect to applicant country was analyzed in the framework of the discussion of Turkey's case. Turkey was used as a case to test the effectiveness of human rights conditionality of the EU for membership and to put a specific case to the general theoretical framework of human rights conditionality. Turkey was chosen because of the fact that Turkey-EU relations have been affected by the EU's general position regarding democracy and respect for human rights in its general external relations as well as the extent of the effectiveness of EU's human rights conditionality.

On this basis, some important conclusions can be drawn for the human rights policies of the EU. Firstly, it is possible to divide the development of the EU's human rights policy into three different time periods, each of which has different parameters. The first period is the "inward looking" stage during which the EU tried to develop its internal human rights policies up until the first half of the 1980s. In this period the political discussion was based on the status and the role of human rights in the Union's legal order. Since the founding treaties of the EU established the Community, whose objectives were restricted to economic integration founded on liberal free market principles, they did not contain any explicit provisions for the protection of human rights. The lack of a human rights dimension in the legal order of the Union was tried to be overcome by the ECJ decisions concerning human rights. The debate on the solution has also included the option of accession by the ECHR and adopting a Bill of Rights for the EU. The ratification of the EU Constitution would realize these options, since the Charter of Fundamental Rights of the European Union would be incorporated into the Constitution and the Constitution opened the way for acceding to the ECHR. However, the Constitution has not been yet ratified.

In the second period starting in 1986, the EU had an “outward looking” human rights policy, in which the EU developed an external human rights policy. Democracy, human rights and the rule of law have turned out to be the principle characteristics of the EU’s external relations. Respect for human rights and democratic principles have appeared to influence the EU’s external relations. Moreover, human rights clauses and democratic principles have been gradually introduced into the Union’s development and co-operation agreements, giving the possibility of suspending those agreements in cases of human rights violations. On this basis, contractual agreements signed between the EU and third countries have become one of the main tools of the Union in promoting human rights and fundamental freedoms in third countries. The Euro-Mediterranean Partnership and 4<sup>th</sup> Lomé Convention were important agreements into which human rights clause were incorporated.

With the third period, starting with 1992, the EU’s external human rights policy became very active through the human rights conditionality for membership in the course of enlargement. The European Council at its Copenhagen summit agreed that ‘membership requires the applicant countries to have stable institutions able to guarantee democracy, the rule of law, human rights, respect for and protection of minorities. Compared to the human rights approach of the EU to third countries in the framework of contractual relations, human rights conditionality has been applied even more strictly in the EU’s association policy towards countries that aspire to join the Union. The rule of law, democratic principles and respect for human rights has become an even more important determining feature in EU policy.

In line with the developments taking place in the EU’s approach to human rights issue in the world, in this thesis, Turkey was chosen as a case to test the effectiveness of human rights conditionality policy of the EU. In this respect, on the basis of the reports of the EU Commission and human rights organizations, several human rights related areas are considered to pose important challenge to the EU-Turkey relations. These areas are civil-military relation, minority protection, Kurdish problem, and fundamental freedoms including freedom of expression, freedom of association, freedom of assembly, freedom of press, and freedom of religion. Due the development of the EU’s external human rights policy, the EU started to use human rights promotion instruments on Turkey to solve such problems. The instruments that the EU has used to promote human rights are Ankara Association Agreement (1963), persistent refusal of the perspective of membership, and granting candidate status in the Helsinki Council Decision (1999).

On the basis of using different human rights promotion instruments for Turkey, it is possible to divide the EU’s human rights conditionality policy towards Turkey into three different phases. The first periods started with the conclusion of Ankara Agreement with Turkey in 1963 and lasted until the signing of Single European Act in 1986. Given that the EU was involved in the development of an internal human

rights policy, the EU was silent towards the human rights issue in Turkey in this period, even though some voices in Europe were raised following the military coup in 1980. Due to the increasing attention of the EU to human rights issues in its external relations, starting with 1986 and up until the Helsinki Council Decision in 1999, the EU has increased its attention to human rights issue in Turkey and utilized the contractual relation created by the Ankara Association Agreement to promote human rights, particularly by opening negotiations for the Custom Union in 1995 and granting or declining financial aid conditional upon to the respect for human rights. Unfortunately, this phase corresponded with the period in which very violent human rights violations occurred in Turkey due to the rise of Islam and Kurdish separatism. Starting in 1999 with the Helsinki Council Decision, the EU increased its attention to Turkey more than ever. It used the perspective of membership to promote human rights and democratization in Turkey. Compared to other historical periods, in this period human rights conditionality has been “relatively” successful in initiating domestic change in Turkey. The EU has played a very important role by instigating change towards more democratic state structure respecting human rights. In the post-Helsinki period, the EU has played an important role by making Turkey to transform its state-centric ruling structure into a more democratic and pluralist one. Recent developments in Turkey’s democratic structure in the post Helsinki period would have not been envisaged, at least at such rapid pace, without a perspective of membership.

However, this does not mean that human rights conditionality is totally successful in Turkey’s case. There are still important external and internal challenges concerning a proper realization of human rights standards in Turkey. In internal challenges, firstly, the state-society interaction in Turkey which is based on strong state and weak civil society model prevents the development of strong domestic support from civil society for human rights reform. Secondly, since the human rights reforms which Turkey must fulfill are mainly linked to the minority rights and democratization, political actors thought that further liberalization would lead to not only the disintegration of state but also jeopardize the secular character of the Republic. For them the cost of complying the EU’s human rights standards is territorial disintegration or losing secular character of the state, making the cost side bigger than the benefit side of the balance sheet. Thirdly, there are political actors and interest groups within the state structure in Turkey that are likely to lose their political powers, welfare and prestige in case of human rights convergence. These groups are Kemalist modernist elite, military, nationalist parties and illegal organization functioning within the state, which is also called “deep state.” In this sense, the distribution of human rights convergence costs for these groups are very high. Since they have important role in the decision making process for human rights and influential within the state, they are important stumbling block for human rights promotion in Turkey.

In the external challenges, firstly, there is the credibility problem of the EU to keep its commitment of full membership, even if Turkey fulfills the required conditions. In Turkey's case, the EU has never provided a clear accession strategy in order to prepare Turkey for the membership or clear accession commitment, even if Turkey fulfills necessary political and human rights conditions imposed by the EU. This led to the unwillingness of Turkey or the lack of motivation to make ambition reforms. Secondly, the perception of double standard is another factor that negatively influences the effectiveness of the conditionality policy of the EU on Turkey. Far from being objectively distant from any candidate countries not respecting human rights, the EU underlines human rights problems with certain countries like Turkey and subordinates human rights issue with the other candidate countries. Thirdly, in Turkey there are doubts about the legitimacy of the condition that are imposed to Turkey. It is difficult to find the existence of conditions that are "clearly defined and coherently applied," which Turkey must fulfill in EU-Turkey relations. The EU member states have always raised their doubts about Turkey's accession on the basis of non Copenhagen related conditions imposed on Turkey such as Turkey's size, the demographic growth and the level of economic development.

To sum up, the success of the human rights conditionality policy of the EU on Turkey in the future depends on the ability of the key actors both at the EU and Turkey level to keep its commitments on human rights issue. On the EU side, the EU has to give clear perspective of membership, more financial aid and impose very clear conditions that will be fulfilled by Turkey. The ability of the EU to keep its commitments, i.e. eventual membership, would change the cost-benefit calculation of the domestic political elite. The EU should make clear commitment that the EU would guarantee the territorial integrity and secular character of Turkey. This would give a sense of security to Turkish people who are sensitive to these issues. It would prevent the manipulation of Turkish people by the use of domestic political actors' anti-European and anti-democratization rhetoric, which are actually having an aim to preserve their power positions. This would also provide a fertile ground for the development of civil society supporting democratization.



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