THE EU CONSTITUTIONAL TREATY AND HUMAN RIGHTS

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ABSTRACT

THE EU CONSTITUTIONAL TREATY AND HUMAN RIGHTS

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The thesis seeks to answer the question whether the European Union (EU) constitutional treaty offers improved protection for human rights in the EU jurisdiction. Within this context, it first seeks to find out what the incorporation of the Charter of Fundamental Rights in the constitutional treaty promises for the human rights' field. Furthermore, it examines how the possible accession of the EU to the European Convention on Human Rights will affect this field. Then, it focuses on what the constitutional treaty offers for third countries concerning human rights. Finally, in the light of the recent developments on the treaty, the discussion enlightens the role of the constitutional treaty on protecting and developing human rights in the EU.

Keywords: EU Constitutional Treaty, Charter of Fundamental Rights, European Court of Justice, European Court of Human Rights, EU External Policy.

ÖZ

AB ANAYASASAL ANTLAŞMASI VE İNSAN HAKLARI

Savaşan, Zerrin
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Bu çalışma, Avrupa Birliği (AB) Anayasal Antlaşması'nın AB'deki insan hakları için daha iyi bir koruma sunup sunmadığı sorusunun yanıtını aramaktadır. Bu kapsamda, ilk olarak, Temel Haklar Şartı'nın anayasal antlaşmaya sokulmasının insan hakları alanında nasıl bir katkısı olabileceği tartışılmaktadır. Ayrıca, AB'nin Avrupa İnsan Hakları Sözleşmesi' ne katılışının bu alanı nasıl etkileyeceği incelenmektedir. Daha sonra, tez, anayasal antlaşmanın üçüncü ülkelere insan haklarına ilişkin neler vaat ettiği üzerinde durmaktadır. Antlaşma ile ilgili son gelişmeler ışığında, son olarak, tez, anayasal antlaşmanın insan haklarının korunması ve gelişmesi üzerindeki rolünü aydınlatmaktadır.

Anahtar Kelimeler: AB Anayasasal Antlaşması, Temel Haklar Şartı, Avrupa Toplulukları Adalet Divanı, Avrupa İnsan Hakları Mahkemesi, AB Dış Politikası.

To my mother,

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LIST OF ABBREVIATIONS

ALA : Asia and Latin America

CARDS: Community Assistance for Reconstruction, Development and Stabilisation

CFI : Court of First Instance

CFSP: Common Foreign and Security Policy

EC : European Community

ECSC : European Coal and Steel Community

ECJ : European Court of Justice

ECHR: European Convention on Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights

EDF : European Development Fund

EEC : European Economic Community

EIDHR: The European Initiative for Democracy and Human Rights

EP : European Parliament

EU: European Union

EURATOM: European Atomic Energy Community

GSP: Generalised System of Preferences

JHA : Justice and Home Affairs

MEDA: Mediterranean Countries

MFN : Most Favoured Nation

NGO: Non Governmental Organisation

PHARE: Action plan for co-ordinated aid to Poland and Hungary

OJEC: Official Journal of European Communities

SEA : Single European Act

TACIS: Technical Assistance to the Commonwealth of Independent States

TEC: Treaty on the European Community

TECE: Treaty Establishing a Constitution for Europe

TEU: Treaty on the European Union

UN: United Nations

WTO: World Trade Organization

CHAPTER I

INTRODUCTION

The initial aim of European integration was mainly economic, not political. This aim based on economic concerns affected the scope of the founding treaties of integration. First and foremost, the founding treaties aimed to make the economic integration easier. Therefore, they contained little reference to human rights. Then, a legal gap appeared regarding the protection of human rights in the European Union (EU) law. This gap was gradually and to a great extent filled by the European Court of Justice (ECJ). Since the political integration began to gain importance in the Community, there has been a significant political recognition of the protection of human rights. The provisions of the subsequent treaties –Treaty of European Union (TEU), Amsterdam treaty and Nice treaty– accelerated the development in the human rights field. However, so far, the constitutional treaty has been the most crucial treaty for human rights, since it has brought a new structure for their protection.

The thesis will try to identify whether this new structure offers better protection for human rights in the EU. For this purpose, it will first state what the incorporation of the Charter of Fundamental Rights in the constitutional treaty promises for the human rights' field. Apart from that, it will examine how the accession of the EU to the European Convention on Human Rights (ECHR)

will affect this field. Then, it will focus on what the constitutional treaty offers for third countries concerning human rights. Finally, in the light of the recent developments on the treaty, the thesis will enlighten the role of it on protecting and developing human rights in the EU.

To start with, the development of human rights in the EU will be evaluated in immediately following Chapter. Within this context, the founding treaties, some political initiatives and last three treaties, TEU-Amsterdam-Nice treaties, will be analyzed. In Chapter III, a discussion charting the evolution of the ECJ case law on human rights will be submitted emphasising the expansions and limitations in the field of protection. After examining the treaties and the case law, this thesis will focus on the new contributions of the treaty to the human rights protection in the EU. Firstly, the Charter of Fundamental Rights of the EU will be studied main rationale behind it will be revealed. To know the aim of it is fairly important, as it signifies the approach of the Union to the protection of human rights. Then, the preparation procedure of the Charter will be described due to the fact that it gives the signals of democratization of human rights politics. In addition, as it is very essential to know which rights the Charter involves and which ones it does not, the content of the Charter will be analyzed stressing the importance of social and economic rights and the scope of the Charter. In this Chapter, also, the guidance of the Charter for candidate countries and its legal status will be discussed. As a second contribution of the constitutional treaty, in Chapter V, the accession of the EU to the Convention will be examined. This examination begins with explaining

the debates regarding the accession until the constitutional treaty. Then, it clarifies some necessary modifications which will be required in the present systems of the EU and the ECHR in the event of a possible accession. After explaining the differences between the ECHR and the EU system, it will seek to find out whether these two different systems in the field of human rights lead to inconsistency. It will then scrutinize the consistency between the ECHR and the EU Charter, and also the consistency between case-law of the two courts, ECtHR and ECJ. In Chapter V, finally, the claims reinforcing the idea that the accession to the Convention will threaten the autonomy of the EU law and the status of the ECJ will be evaluated. In this part, it will be empasised that the accession will be by no means a threat, but instead, it will be an instrument for promoting the protection of human rights. In Chapter VI, after providing an overview of human rights in the EU's external policy, the thesis will focus on the improvements on human rights arising from the constitutional treaty. For this purpose, it will study the legal basis of human rights in the external policy and the consistency between its external and internal policies. Finally, the future of the constitutional treaty will be identified in the light of the recent developments, namely the Summits of June 2005 and June 2006. In this respect, the thesis will ask a question based on its findings. It will discuss whether the constitutional treaty promises a better protection for human rights emphasising the need for a human rights policy. The thesis will draw the conclusion that the constitutional treaty provides a better protection and its contributions to human rights can be the initial step towards establishing a common human rights policy.

CHAPTER II

EVOLUTION OF HUMAN RIGHTS IN THE EU

1. An Analysis of the Founding Treaties

1.1. Introduction

European integration was based on a legal system developed by the institutions of the integration. The institutions formed a binding legislation by taking their powers from the founding treaties concluded by the member states. In other words, legal system's structure was defined by the founding treaties and the amendments to them. The founding treaties, namely the treaties establishing the European Communities, were prepared and enacted particularly so as to reinforce and improve the aims of the integration: that is, to maintain peaceful relations between European countries dealing with economic problems of the post-war years. The real aim of the founding fathers of the European integration was the gradual movement towards a political integration. However, initially, it was preferred to establish strong ties between European countries in the economic field. In other words, in this period, the initial aim was to eliminate the possibility of another war in Europe, or at least, to diminish this possibility by establishing a cooperation between European countries. Therefore, the basic concern which guided the activities of the institutions were economic issues. In that context, human rights were not in the agenda of Europe.

1.2. The Paris and Rome Treaties and the TEU

The first founding treaty of the integration, the Paris treaty, established the European Coal and Steel Community (ECSC). The treaty ensured to remove trade restrictions between member states on coal and steel. It was concerned exclusively with relations in the coal and steel industries and the expansion of the production. In the preamble of the treaty, it is stated that establishing an economic community was 'the basis for a broader and deeper community.' The treaty thus gave the signals of the political integration aim of the Community. However, it involved nothing concerning human rights. This was understanable because the treaty was about a fairly narrow and technical area, coal and steel.

The Rome treaty, which created European Atomic Energy Community (EURATOM), was signed merely to provide the peaceful use of atomic energy. In the preamble of the treaty, it was underlined that the peaceful development of atomic energy would lead to the development and modernization of industry and contribute to the prosperity of Community peoples. Remarkably, the peace and economic concerns, designated on the basic aims of integration, were a priority in the treaty. Yet, like the Paris treaty, it did not include any reference to human rights.

In contrast to above mentioned founding treaties, the other Rome treaty, which established the European Economic Community (EEC),[1] was designed to operate in a much broader area than was the ECSC and EURATOM. It declared its aim in Article 2, as 'economic expansion, increased stability, and improved living standards.' Also, it stated that these were to be achieved by establishing a common market and harmonizing economic policies. Article 3 of the treaty indicated the activities to be managed for achieving these aims. In accordance with its aim, it was essentially concerned with economic freedoms. In Part II-Title III (Arts. 48-58), the treaty involved the right to freedom of movement of workers (Arts. 48-51). In addition, it abolished the restrictions on the freedom of establishment of nationals of a member state in the territory of another member state (Arts. 52-8). This abolition would be applied to restrictions on the setting up of agencies, branches and subsidiaries. The right of establishment would also include 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings' (Art. 52). Also, through Article 7, the treaty prohibited any discrimination on grounds of nationality. In Article 48/2, this prohibition on discrimination was repeated for workers. It was again emphasised by Article 220 that the protection of rights should have been under the same conditions as those accorded by the state to its nationals. Equal treatment for men and women in the workplace (Art. 119) and equal treatment for immigrant workers (Art. 51) were also granted by the treaty. Besides, the treaty made it clear in its preamble that its signatories were

[1] The TEU introduced amendments to the EEC treaty and renamed it the European Community treaty. In this part, it is the original EEC treaty that is mentioned, not the modified one.

committed to ‘preserve and strengthen peace and liberty.’ However, despite all these, human rights were not mentioned specifically in this treaty either.

Overall, the founding treaties neither include a list of human rights, nor deal with the issue of human rights sufficiently. Yet, despite this fact, Menendez (2001) indicates that ‘the ‘Little Europe’ of coal and steel, and later, that of the common market, set the preconditions for the protection of civic, social and economic rights in Europe.’According to him, the contribution of the ‘Little Europe’ has rendered possible the extensive protection of social and economic rights. Actually, as Menendez notes, the founding treaties can be seen as a basis for further steps as regards the development of human rights in Europe.

2. Some Political Initiatives and the SEA

As mentioned above, the founding treaties had omissions regarding the human rights field due to their natures. The Community institutions have tried to contemplate these omissions by issuing declarations, resolutions or memorandums. Thus, further steps that related to the protection of human rights could have been led by means of these initiatives. Therefore, these initiatives also deserve to be mentioned while evaluating the issue of human rights in the EU.

First, in 1973, the importance of human rights and democratic principles was emphasized by the Copenhagen European Council.[2] After four years, in 1977, the European Parliament, the Council and the Commission made a joint declaration on human rights. In the declaration, these istitutions, as policy-making bodies of the Community, highlighted the significance of protecting human rights in the Community. Also, they undertook to respect them when performing both their powers and Community's objectives. The institutions declared that human rights were derived from the constitutions of the member states, and the ECHR. By declaring those, they reaffirmed the decisions of the ECJ, since the Court had accepted the national constitutions and ECHR as the main legal sources for the protection of human rights. This joint declaration was approved by the Copenhagen European Council in 1978, in the 'Declaration on Democracy.' Through this declaration, it was confirmed that the members of Community were willing 'to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.'

The founding treaties of the Community did not include a list of human rights. Besides, they were not concerned about the accession of the Community to the ECHR. However, in 1970s, the debates on the possibility of the Community's accession to the ECHR and of a seperate list of rights emerged among the

[2] At the Copenhagen European Council, it was stated that 'nine members of the community are determined to defend the principles of representative democracy, the rule of law or social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European identity.'

bodies of the Community. However, the Commission's proposals in 1979[3] and 1990[4] and the resolutions of the European Parliament (EP) in 1979[5] and 1994[6] as regards the accession could not provide the accession of the EU to the Convention. In 1979 Resolution, the EP also adopted the drafting of a European Charter of Civil Rights. It continued to consider the incorporation of human rights in the EC after this resolution. As a result of these studies, it proposed the adoption of a declaration of human rights as a part of Community law in 1989.[7] The Community Charter of Fundamental Social Rights of Workers was also signed in the same year.[8]

Although these initiatives of the institutions promoted human rights aspect in Europe, human rights were first introduced into the treaties with the Single European Act (SEA) of 1986. The principical goal of the SEA was the establishment of a single market within a deadline of the end of 1992 (Art. 13, ex-art. 8a). Despite this fact, it indicated in its preamble the determination of the Community 'to work together to promote democracy on the basis of the fundamental rights.' It also stressed that the Community was aware of its responsibility 'to display the principles of democracy and compliance with the

[3] Bulletin of the EC, supplement 2/79, cited in Haapea (2004:78) and Nas (1998:61).

[4] Cited in Haapea (2004:78) and Nas (1998:61).

[5] Official Journal of the EC, C 127, 21.5.1979 cited in Nas (1998:62).

[6] Official Journal of the EC, C 44, 14. 2.1994 P. 0032, cited in Nas (1998:62).

[7] Declaration by the European Parliament on Fundamental Rights and Freedoms 1989, *Official Journal of the European Communities,* No. C 120.

[8] For detailed information on the Community Social Charter, see Kenner (2003:7-13).

law and with human rights' so as to preserve international peace within the framework of the United Nations Charter. In short, human rights were mentioned for the first time with reference to the United Nations Charter in the SEA's preamble.

3. From TEU to the Constitutional Treaty: A Change of Speed in Only One Decade

The Treaty on European Union (1993) is of great political significance since the obligation of the Community to respect human rights was firstly contained in a treaty article (Art. F(2)) with this treaty.[9] The treaty also introduced the concept of European citizenship (Art. B, 8a-e TEU), which includes a series of human rights. The right of EU citizens to vote and to stand as a candidate in municipal and European elections in the member state of residence (Art. 8b), the right to petition the European Parliament and to apply to the European Ombudsman (Art. 8d), and the right to protection in third countries by the diplomatic and consular authorities of any member state (Art. 8c) were included in this treaty. The introduction of the provisions of citizenship made it possible to 'redefine the Communities as a political community of equals.' The rise of individuals as subjects of European law and the ECJ case-law accepting human rights within the unwritten principles of Community law

[9] The TEU consists of two parts. First one introduces amendments to the EEC treaty, and renaming it the TEC. The second part stands as a seperate treaty establishing the EU. However, the TEU, which gave the name European Union and the concept of EU citizenship for the first time, is a treaty on Union, not of Union. The constitutional treaty is in effect the treaty of European Union, for it establishes the EU for the first time as a distinct legal entity (Coughlan, 2006:3).

also reinforced the role of Communities on human rights. Thus, these three developments together enabled the role of Communities to shift 'from setting the preconditions to directly affirming fundamental rights' (Menendez, 2001).

Beside the introduction of citizenship, another contribution of the TEU was that 'the obligation under Article F (2) covered a much larger area' than the previous treaties (Neuwahl, 1995:14). Indeed, while Article J was constituting the second pillar of the EU, common foreign and security policy (CFSP), Article K constituted the third pillar, justice and home affairs (JHA). Then, Article F (2) became applicable to all pillars, since Article F (2) was within the common provisions. However, Article L excluded the jurisdiction of the ECJ in human rights cases including CFSP and JHA.[10] Thus, through this article, the jurisdiction of the ECJ was prevented in human rights cases including CFSP and JHA (Neuwahl, 2001:15).

In the treaty, there were two other references to human rights other than Article F(2). One of them was Article J 1-2 which declared 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms' as an objective of the CFSP. The other one was Article 130u (2). It was about development cooperation. It was stated in the article that 'Community policy in this area has to contribute to the general

[10] The Court's jurisdiction has been applied to the protection of human rights in the areas of visas, asylum and immigration, which have been transferred from the third pillar to the Community pillar by the TEC (Part III-Title IV).

objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.'

The TEU marked a new phase on human rights and democratic principles in the Community through all these innovations. By the signing of Amsterdam treaty,[11] this new phase led to more improvements in human rights. To begin with, Amsterdam treaty (1999) amended Article F TEU, and renumbered it as Article 6. In Article 6 (1),[12] it reaffirmed clearly the EU's foundation on human rights. In Article 6(2), it stated that the Union should respect human rights as general principles of Community law. In addition, it introduced 'a procedure to penalize a serious and persistent breach' of the principles mentioned in Article 6(1) (Art. 7(1)).[13] According to this article (Art. 7(1)), when an existence of a serious and persistent breach of a member state is the case, the Council can decide to suspend certain rights of the member states. This suspension can include the voting rights of the government representative in the Council (Art.7(2)). Nice treaty (2002) reinforced this procedure by amending Article 7(1). It gave the Council the opportunity to address 'appropriate recommendations' to the member state in question. Moreover, while the Amsterdam treaty provided that the ECJ would ensure

[11] See the possible new challenges which may have been brought by the post-Amsterdam years in the ECJ's case law (Witte, 1999:886).

[12] See Nowak (1999:692-94) for what the term human rights and fundamental freedoms means in Article 6(1).

[13] See Nowak (1999:690) for the information about Article 7, and also see Nowak (1999:694) and Williams (2004:105-10) for the determination of the existence of a serious and persistent breach of human rights.

that the European institutions respect fundamental rights (Art. 46(d)), the Nice treaty added to article that the ECJ would have jurisdiction in disputes concerning procedural provisions under Article 7 as well (Art. 46(e)). Article 309(2)TEC also empowered the Council to take measures against member states which infringed the principles laid down in Article 6. In addition to all these contributions of Amsterdam treaty, the principle of non-discrimination on grounds of nationality was enshrined in the TEC (Art. 12 TEC). According to the treaty, the Council is entitled to take appropriate action to act against 'discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (Art. 13 TEC). Last but not least, the Amsterdam treaty (Art. 49) added a new condition to the Article O TEU condition to become a member of the Union.[14] It stated that the applicant countries must respect the principles set out in Article 6(1) to become a member. The Amsterdam treaty, thus, formalised the political conditions of membership, with an expection of minority rights (Bartels, 2005:52 and Nowak, 1999:692).[15]

4. Conclusion

To conclude, the three treaties, namely TEU, Amsterdam treaty and Nice treaty, provided a speed change in the human rights field of the EU. Each has provided a further step for the protection of human rights. However, they

[14] Article O TEU stated that ' 'Any European State' may apply to become a member of the Union.' There was not a condition to become a member of the Union.

[15] See Wlliams (2004: 66-71) for the approach of the Community towards minority rights.

could not end the debate regarding the need for a seperate list of human rights in the EU and the need for the accession of the EU to the Convention. Moreover, they could not end the claims of third countries about the inconsistency of the EU's external action on human rights. They also could not provide the unification of the EU's external action and the clarification on the competences, values and objectives. When the the constitutional treaty is fully ratified, all these will be achieved by the implementation of its provisions.

CHAPTER III

EVOLUTION OF THE ECJ CASE LAW

1. To what extent, was a human rights protection offered by the ECJ?

In 1950s, the ECJ had refused to examine complaints regarding human rights in several cases. To illustrate this, in paragraph 4 of the judgment in Stork case,[16] it had ruled that the Court was only required to apply Community law, it was not empowered to apply the national law of the member states. It was not an extraordinary decision for the Court, as this decision was a result of the interpretation of the ECSC treaty (Arts. 8 and 31), and the treaty did not involve any human rights. However, the ECJ followed this approach concerning human rights in respect of the EEC treaty. In Sgarlata case,[17] the Court even ruled that the clearly restrictive wording of Article 173 EEC treaty (Art. 230 TEC) could not be overriden, even when it was a question of fundamental principles governing all the member states.

Consequently, the ECJ regarded itself as not empowered to offer a protection of human rights. It stated that the issue fell within the field of national law. The ECJ thus stricted the extent of its own authority by 'a rigid reading of the treaty

[16] Stork v. High Authority (Case 1/58 (1959), ECR 17, par. 4).

[17] Sgarlata and others v. Commission (Case 40/64 (1965) ECR 215).

wording' (Williams, 2004:146), by not exercising a a 'teleological approach' to interpretation (Binder, 1995:2).

The Court subsequently realized that it had to alter its interpretation regarding human rights when it claimed the concepts of the direct effect[18] and the supremacy[19] of European law. The transformation and growing capacity of the Community were also seen as the other reasons for the Court's change of attitude (Menedez, 2001). However, the general idea is that the ECJ discovered itself in a 'no-win situation' (Haapea, 2004: 42). As member states intended to create a limited legal system (Alter, 2001:183) so as to protect national sovereignity.[20] and national courts. Particularly, German and Italian courts, were reluctant to accept the supremacy of EC law.[21] The ECJ thus needed to realize a protection of human rights by developing a case law. In addition, in order to protect its supremacy over the national law of the member states,[22] Community law should have been sufficient to safeguard the protection of human rights with the same legal force as under national constitutions. Otherwise, the national courts could threaten the authority and also the supremacy of the ECJ. When national courts started to send the ECJ

[18] Van Gend en Loos (Case 26/62 (1963), ECR 1).

[19] Costa (Case 6/64 (1964), ECR 585).

[20] In the cases Van Gend and also Costa, it was emphasized that the states had limited their national sovereignity rights.

[21] See Binder (1995:3), Shaw (1996:189), Steiner, Woods and Twigg-Flesner (2003:71).

[22] In Simmenthal (Case 106/77), the Court affirmed the priority of Community legislation over all national law, including national constitutions (paragraphs 18, 24).

preliminary ruling references (under Art. 177 EEC treaty, Art. 234 EC treaty) and to enforce the supremacy of the EC law,[23] the ECJ gained opportunity to develop its doctrine further (Alter, 2001:190). Thus, it contributed to the development of human rights protection for several decades beginning from the 1969 case of Stauder.[24]

Stauder case is very crucial in the history of human rights protection in the EC law, because the ECJ recognized through this case for the first time that human rights are 'enshrined in the general principles[25] of Community law and protected by the Court (par. 7).'[26] In this case, it was asked whether the decision of the Commission (69/71/EEC) was compatible with the general principles of Community law. At the end of the case, the ECJ came to the conclusion that the general fundamental principles of the Community legal order had included respect for human rights, and the ECJ had to safeguard them. The second leading case in that respect was Internationale

[23] 'Member states have been unable to keep national courts from enforcing European law supremacy, nor have they been able to reverse the ECJ's transformation of the European legal system' (Alter, 2001:202). The success of the ECJ has been dependent on the cooperation of the member states, particularly their courts (Steiner, Woods and Twigg-Flesner, 2003:5).

[24] Stauder (Case 29/69 (1969), ECR 419).

[25] General principles of law are not to be confused with the fundamental principles of Community law, for example, the principle of free movement of goods and persons, of non-discrimination on the grounds of sex (Art. 141 TEC) and nationality (Art. 12 TEC).

[26] Neuwahl (1995:6) sees it as a new, but not a 'very bold innovation.' He explains that the ECJ should ensure the interpretation and application of this treaty and the law is observed according to Article 220 EC treaty (Art. 164 EEC treaty), and here the law can be understood as including the general principles.

Handelgesellschaft case (1970).[27] By means of this case, human rights formed the part of the general principles of Community law as in Stauder case. Besides, it went further and stressed that it should have drawn inspiration from the constitutional traditions common to the member states in safeguarding those rights.[28] The third cornerstone in the recognition of human rights has been the Nold case.[29] The Nold ruling affirmed that the ECJ would be empowered to be guided by the constitutional traditions of the member states. Also, it extended the source of its inspiration including international human rights treaties on which member states collaborated, or to which they were signatories. Thus, international human treaties became a guideline to be followed within the framework of Community law. Nevertheless, the explicit reference to the ECHR was not established in the Nold case. The ECJ confirmed in the cases of Rutili[30] and Hauer[31] that the rights protected by the ECHR form part of Community law.

[27] Internationael Handelgesellschaft (Case 11/70 (1970), ECR 1125).

[28] The Internationael Handelgesellschaft judgment can be taken as implying that only rights arising from traditions common to member states (the minimalist approach), or any human right upheld in the constitution of any member state (the maximalist approach) must be protected under EC law (Steiner, Woods and Twigg-Flesner, 2003:156).

[29] Nold (Case 4/73 (1974), ECR 491).

[30] Rutili (Case 36/75 (1975), ECR 1219).

[31] Hauer (Case 44/79 (1979), ECR 3727).

2. Expansion of the Field of Protection

The ECJ has applied Community principles of human rights protection basicly to Community measures, such as Commission decisions, regulations and directives. The field of application was extended to the measures of the member states in a 'push and pull' process (Binder, 1995: 4).[32] That is, the Court has sometimes expressed a willingness to review them, and sometimes explicitly or implicitly, has rejected to review them. To illustrate, in Cinetheque case[33] and in Demirel case,[34] the Court ruled that it has no power to examine the compatibility of national legislation with the ECHR, as this falls within the jurisdiction of the national legislator. However, in more recent cases, the ECJ has applied Community principles of human rights protection even if the measures are adopted by the member states. Accordingly, Community principles of human rights protection have also affected some acts of the member states. These acts of member states can be revealed in three categories (Steiner, Woods and Twigg-Flesner, 2003:177). First, when member states are implementing Community law, they have to be bound by the same principles of Community law (Wachauf case, par. 19). [35] That is, when the member states were acting as an agent of the Community, on behalf of EU, they were obliged not to infringe human rights recognised by the Community. Secondly, when

[32] See Binder (1995:27-35) for the advantages and disadvantages of expanded review.

[33] Cinéthèque (Cases 60 and 61/84 (1985) ECR 2605).

[34] Demirel (Case 12/86 (1987), ECR 3719).

[35] Wachauf (Case 5/88 (1989), ECR 2609).

the rules of a member state are in derogation from fundamental principles of Community legal order, like free movement of goods and persons, member states are bound by EC law (ERT case, par.43).[36] Finally, when EC rights are enforced within national courts, human rights guaranteed in Community law should be protected at the level of member states as well (Konstantinidis case).[37]

3. Limitations in the Field of Protection

The main legal sources for the protection of fundamental rights have been constituted by the Court. The Court has made it quite clear that the general principles of law are to be regarded as a primary source of law.[38] However, it should be stressed that the common constitutional traditions of the member states and the international treaties do not establish a primary source of law in the Community law. This means, briefly, that although these sources offer inspiration and guidance,[39] the EC protection of human rights is, nevertheless, autonomous. In other words, the Community may

[36] ERT (Elliniki Radiofonia Tileorasi - Anonimi Etairia v. Dimotiki) (Case C-260/89 (1991), ECR I-2925).

[37] Konstantinidis (Case C-168/91 (1993), ECR I-1191).

[38] It has been accepted that fundamental rights take precedence over secondary Community law. What has not yet been settled, however, is their hierarchical relationship with the Community treaties. It seems that the relationship between the general principles and the Community treaties requires further analysis. Different writers put forward different theories, but the Court has not given a comprehensive theoretical account of the hierarchical position of the general principles of law (Kyriakou, 2001:4).

[39] Hauer (Case 44/79 (1979), ECR 3727). In this case, it is stated that '….the Court is bound to draw inspiration from constitutional traditions common to the member states, …., similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law' (par. 15).

not violate the Convention and common constitutional traditions, but may go beyond them (Weiler, 1996:8). However, it is noteworthy here that the EC protection of human rights has also to be consistent with the framework of the structure and objectives of the Community. This means that human rights can be subject to the limitations 'justified by the objectives of the Community'(Nold case, par.14). Then, restrictions may be imposed on the exercise of human rights, in particular in the context of a common organization of a market (Wachauf case, par.18), the unity of the common market and the cohesion of the Community (Hauer case, par.14). This narrow approach regarding the human rights has basicly emerged from the Community structure which has been concerned mostly with economic matters. As the wide approach was not adopted by the Court on human rights, it may be assumed that 'the Citizen of Europe status remains a market, rather than a civic status' (Shaw, 1996:193).

4. Conclusion

To sum up, in 1950s, the ECJ was refusing to examine complaints regarding human rights, as it had regarded itself not empowered to review issues involving the protection of human rights. In more recent cases, the ECJ has applied Community principles of human rights protection even if the measures are adopted by the member states. In contrast to the fifties, today the ECJ has been contributing to the development of human rights protection by its case law. However, the narrow approach of the Court which has emerged basicly

from the Community's economic concerns limits the protection of human rights. The limitations in the field of protection have resulted in some doubt about both the effectiveness and the coherence of the fundamental rights protection provided by the Court (Shaw, 1996:195 and Witte, 1999:870).

Shaw (1996) suggested a single written catalogue of fundamental rights and a supreme arbiter of fundamental rights for eliminating these doubts and the problems related to the jurispredence of the Court. The constitutional treaty incorporates the Charter of Fundamental Rights, the Charter is a part of the Constitution with also its preamble (Part II, Arts.61-114 TECE). In addition, it allowes the EU accession to the ECHR by its Article I-9(2) TECE. It grants the EU legal personality (Art. 7) and makes the accession possible. In short, when the constitutional treaty is fully ratified, the EU Charter will gain full legal effect and will be part of the EU law. Moreover, the accession of the EU to the Convention will materialize. Thus, the constitutional treaty will realize Shaw's suggestions.

CHAPTER IV

THE CHARTER OF FUNDAMENTAL RIGHTS

1. What was the Main Goal of the Charter?

Progress in the field of human rights and the protection of these rights have always been realized as very important issues within the EU. Particularly, when the priorities of the EU has been shifted from economic issues to the political ones, human rights issue has become the most sensitive condition of the EU. In Article 6(1) of the TEU, it was stated that the Union was founded on the values of respect for human dignity, the rule of law and respect for human rights. Despite this article, the EU did not have a set of human rights. As well as the constitutions of the member states, the ECHR has a human rights list for the bodies of the member states. However, the EU itself did not. It has been argued by commentators whether the organs of the Community needs to be constrained by a set of human rights. While some have claimed that it needs a bill of rights, others have claimed the opposite. For example, while Weiler (2000:96) has stated that the Union does not need 'more rights on lists, or more lists of rights,' Haapea has stressed that there is a real need to ratify the constitutional treaty, including the Charter, as a binding legal text.

Since the Cologne European Council (June, 1999), there have no longer been debate regarding the need for a seperate list of human rights in the EU. They are eliminated because the Cologne European Council decided to consolidate the human rights applicable at EU level in a Charter. In the conclusions of the Council, it was declared that there appeared to be a need to establish a Charter of Fundamental Rights. Indeed, there was remarkably a need for a Charter of Fundamental Rights, particularly in that period of the Union. In that period, the EU had establihed the citizenship of the EU with the TEU.[40] As a consequence of citizenship, the EU was evolving into an 'integrated area of freedom, security and justice' (Com, 2000, 559). This new phase of political integration forced the EU consider seriously forming a Charter of Fundamental Rights.

As a result of intensive working on the issue, on 7 December 2000, a Charter of Fundamental Rights was signed in Nice. While the Charter was being prepared, it was clear for the EU that its ultimate target was the political integration. And, for a successful political integration, the promotion of human rights protection within the EU was a must. Therefore, it was thought that the Charter could contribute to the political integration of the EU. For this purpose, the Charter first aimed to make the relevance of the rights more visible to the Union's citizens. The Union needed citizens who knew their rights. By means of the Charter, the citizens could know which rights they have and which rights they do not have. Consequently, they could seek the

[40] Article 8 TEU states that 'every person holding the nationality of a member state shall be a citizen of the Union' (Title II- Part II-Citizenship of the Union).

rights they do not have. The more they knew their rights, the more the protection of human rights in the Union would be developed. In addition, if they knew their rights well, they could be able to resist the violations of the organs of the Union. Thus, the Charter might be a tool 'to open up the existing law to democratic scrutiny' (Menendez, 2001).

2. The Making of the Charter: The Convention Body

It was held that the task of drawing up a draft charter should have been elaborated by a body (Convention) in the Cologne Summit (June, 1999). The Convention was entrusted with drafting a charter at the Tampere Summit (October, 1999). A draft then was adopted by the Convention on 2 October 2000. After the Biarritz European Council's (October 2000) approval, the draft was approved by the Parliament and the Commission, in turn, on 14 November 2000 and on 6 December 2000. The Convention could achieve to establish the Charter of Fundamental Rights in Nice summit (7 December 2000). It is important to discuss the Convention body here, as it is 'a special procedure, which is without precedent in the history of the EU.'[41]

The Convention consisted of 62 members and representatives from the Court of Justice of the European Communities, the Council of Europe and the European Court of Human Rights (two representatives per institution). A total of 62 members included 15 representatives of the heads of state or government

[41] Charter of Fundamental Rights of the European Union 2000, Office for Publications of the European Countries, p.2.

of the member states, one representative of the president of the European Commission, 16 members of the European Parliament, 30 members of national parliaments (two for each national parliament).

The Convention Bureau,[42] which consisted of the chairman (Roman Herzog, a former president of the Federal Republic of Germany and of the German Constitutional Court), the three vice-chairmen and the Commission representative, was set up to prepare a preliminary draft of the Charter. This bureau found it significant to be in a strict communication with all other members of the Convention.

Moreover, hearings of the Convention were held also for advisory bodies such as the European Economic and Social Committee, the Committee of the Regions, and also for the European Ombudsman as well as the applicant countries, social groups and experts.

All this shows that the preparation procedure of the EU Charter has been performed by various political actors. The Convention body provided a new approach to the Union in terms of democratization. So, the Charter implies 'a democratization of human rights politics' in the Union (Eriksen, 2003: 361).

[42] Charter of Fundamental Rights of the European Union 2000, Office for Publications of the European Countries, p.34.

3. The Rights Provided in the EU Charter and the Beneficiaries

3.1. Codification of Existing Rights, Incorporation of Social and Economic Rights and New Rights[43]

The EU Charter brings together the rights that exist in a range of national and international instruments. It also reaffirms them in a single document. In fact, it codifies the already existing civil, political, economic and social rights of European citizens and all persons resident in the EU (5th par., Preamble).[44] In addition, not only does it include the traditional rights such as right to life, freedom of expression, right to an effective remedy, but also new rights such as data protection (Art.68) and bioethics (Art.63). Why it includes these new rights is revealed in the 4th paragraph of the preamble. It states that it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments. The Charter also consists of rights that were not included in the ECHR. Founding a family other than marriage, not necessarily a marriage between men and women, but simply marriage (Art.69), is an illustration of

[43] However, the Charter contains no reference to collective rights (for example, minority rights), see Williams (2004:84) for detailed information on the issue.

[44] It was stated that the EU Charter should have contained civil, political, economic and social rights in the Cologne Summit.

these rights.[45] Yet, most importantly, social and economic rights (Arts.87-98) are incorporated in the Charter as distinct from the ECHR.

3.2. The Importance of Social and Economic Rights

By placing the social and economic rights within the Charter, the Charter gives equal status to human rights with market and social rights (Young, 2005:232 and Maduro, 2003:286). It is very significant, since the position of the social rights in the Community has been market oriented until the adoption of the Charter. That is, the social action of the EU has been dependent on the market integration's priorities (Maduro, 2003: 285 and Kenner, 2003: 5). Although there have been some efforts to promote social rights by means of European Social Charter (1961) and the Community Charter of the Fundamental Social Rights of Workers (1989),[46] there has been always a need for 'a more all-embracing approach to provide the EU with a human rights foundation with economic and social rights at its core' (Kenner, 2003: 13). Thus, the Charter attempts to correct this deficient status of social rights in the EU's constitutional discourse (Maduro, 2003: 286).

[45] ECHR (Art. 12–right to marry) states that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

[46] Article 136 TEC refers to European Social Charter (1961) and the Community Charter of the Fundamental Social Rights of Workers (1989).

It is true that there are some shortcomings concerning the social and economic rights within the Charter.[47] However, despite its shortcomings, the Charter may serve to raise the status of economic and social rights in the EU's legal order (Kenner, 2003: 25). Most importantly, it is expected that it can form a step towards the construction of a 'European Social Constitution' (Kenner, 2003: 25). [48]

3.3. The Content of the Charter

The EU Charter (Part II TECE) contains a preamble[49] and 54 articles, divided into seven sections:

Section I : Dignity (Articles 60- 65 TECE)

Section II : Freedoms (Articles 66-79 TECE)

Section III : Equality (Articles 80-86 TECE)

Section IV : Solidarity (Articles 87-98 TECE)

Section V : Citizens' rights (Articles 99-106 TECE)

[47] See Kenner (2003:1-25) for an analysis regarding the shortcomings of the Charter in terms of social and economic rights.

[48] It is expected that European Social Constitution may provide a more effective system of protection of social and economic rights within the EU's multi-level legal order (Kenner, 2003:25).

[49] Therefore, the EU constitutional treaty now has two preambles. The one is the preamble of the constitutional treaty itself, and the other is the preamble of the Charter.

Section VI : Justice (Articles 107-110 TECE)

Section VII : General provisions governing the interpretation and application of the charter (Articles 111-114 TECE)

Each of the first six sections are divided into seperate articles dealing with specific rights within the Charter. While it mentiones the specific situation of European citizens under the section V, it refers to categories of persons with special needs such as children (Art.84), the elderly people (Art.85), and people with a disability (Art.86) under section III. In section VII, it serves to determine the scope of the Charter by the general provisions.

In short, as Menendez (2001:9) also states, the content of the Charter was not formed to replace the sources and systems of protection of fundamental rights which coexist in Europe. It was formed to build upon the existing rights and systems. The Cologne European Council sets the main objective of the Charter as to make the rights more visible to the Union's citizens as mentioned above.[50] According to Czuczai (2003: 97), the purpose of bringing together the rights in a single text is to deepen and strengthen the culture of rights and responsibilities of the EU by this way. Whatever the purpose, as a consequence, the content of the Charter enshrines 'the very essence of the European *acquis* regarding fundamental rights' (Com, 2000, 644).

[50] See also Decision on Approving the Draft Charter of Fundamental Rights of the European Union (2003).

3.4. The Scope of the Charter: It does not Extend or Decrease the Powers of the EU

The Charter does not modify powers or tasks defined in the other parts of the constitutional treaty (Art.111/2 TECE). This neutrality of the Charter on the subject of the powers stems from 'the very nature of fundamental rights' (Com, 2000, 559). The main purpose of the fundamental rights and freedoms is not to create new competences, or to modify already existing tasks of the powers. The main purpose of them is only to protect individuals from violations of these powers by controllling them. This feature of the Charter prevents possible confusions which can emerge in relation to the sphere of the competences of the Union institutions.

According to the section VII of the Charter (Art.111/1 TECE), the provisions of the EU Charter are addressed basicly to the institutions and bodies of the Union when acting in the sphere of their competences. They are also addressed to the acts of member states when they are implementing Union law. However, this does not extend the field of application of Union law. In other words, the Charter does not create new competences beyond the powers of the Union. To illustrate, since shared competence between the Union and member states applies only to some aspects of the social policy (Art. I- 14, 2(b) TECE),[51] the Union has no competence to legislate on the right to strike (the right of collective bargaining and action, Art. 88 TECE). Therefore, the social rights as

[51] See the TECE (Part III-Title III- Chapter III-Section II).

the right to strike serve as 'possible guidelines for Union policy, but are only legally enforceable if member states adopt legislation in line with such guidelines' (Regan, 2005:10). Otherwise, they continue to remain outside the Union's legislation.

4. Enlargement of the EU and the Charter: A Clear Guide for Candidate Countries

The rule of law and this political criteria are a demonstration of a shared commitment in which the European integration has been firmly rooted from its beginning (Com, 2004, 656). Therefore, it is now quiet clear that becoming a member of the Union (Art. I- 58, TECE and Art.49 TEU) essentially entails the implementation of the criteria set out in the Copenhagen Summit. The first set of membership criteria of the Copenhagen Summit, political criteria, are the acceptance of and respect for the human rights' principles adopted by the EU. However, what is meant by human rights under this membership criteria is not clear.

The adoption of the Charter gives a detailed description and a better clarification about the first membership criterion of the Copenhagen Summit (Czuczai, 2003:109). It also clarifies the principles on which the Union is based under the first paragraph of Article 6. It sets out clearly the human rights covered by Article 6(2) and the provisions referring to it under Articles 7 (the imposition of the penalties) and 49 (conditions of Union membership). Thus,

the Charter reduces 'the longstanding uncertainty surrounding the identification of the human rights' in the EU (Pinelli, 2004: 360). In brief, it sets out clear rules regarding human rights, providing certainty and clarification to the citizens of the EU and to the candidate countries.

The provisions of the EU Charter are addressed to the acts of member states when they are implementing the Union law (Art.VII-111/1 TECE). The candidate countries, on the other hand, can not implement the EU law until their accession to the Union. Then, the Charter has to be interpreted as a 'post-accession condition' not as a pre-accession condition for the candidate countries (Czuczai, 2003: 109). Despite this fact, the candidate countries have to take the EU Charter into account in the period of their preparation for the accession to the EU, as the application to the Union for being a member already involves the acceptance of and respect for the principles contained in the Charter.

With the ratification of the constitutional treaty, the Charter will be part of the basic treaty of the Union. Also, it will have legal force rather than declaratory force. It is predictable that these will reinforce the dependency of the candidates on the Charter. The candidates will be more diligent and willing to comply with the Charter.

5. The Legal Status of the EU Charter: It is Now Integrated in the Constitutional Treaty

It was decided in Nice Summit that the question of the Charter's legal status would be considered later. In December 2001, the Laeken European Council decided to convene a 'Convention on the Future of Europe', in preparation for the next Intergovernmental Conference. The task of the Convention would be to consider the key issues such as the legal status of the Charter. Then, with the Laeken Declaration, it was stated that one of the main tasks of the 'Convention of the Future of Europe' was to decide whether the EU Charter should be included in European law or not (Laeken European Council, 2001). The European Parliament called for the EU Charter to be written into the constitutional treaty, in its desicion of 23 October 2002.[52] The European Convention, met under the chairmanship of Valéry Giscard d'Estaing, endorsed this idea and presented its draft TECE on 18 July 2003. Besides, the EU Charter was incorporated in the constitutional teaty in full on the same date. Thus, the Charter became a part of the constitutional treaty with its preamble (Part II, Arts. 61-114). So, the legal status of the EU Charter is now tied to that of the constitutional treaty.

The Charter has only a 'declaratory' character until the constitutional treaty is fully ratified to enter into force. It may be claimed that even if it has only a

[52] Decision on Approving the Draft Charter of Fundamental Rights of the European Union *2003, Official Journal of the European Communities,* No. C 300.

declaratory character, it does not mean that it has no effect (Com, 2000, 644). The Commission underlines that 'the Charter will produce all its effects, legal and others, whatever its nature.' According to Menendez (2002:472), 'the formal incorporation of the Charter into Community law is not a precondition for it to have legal bite.' Indeed, it may have significant effect in terms of the EU institutions' progress on fundamental rights. It may help them as 'a source of inspiration to guide their initiatives,' since the political meaning of the Charter is intended to guide the direction in which Union law is developed (EU Network, 2003:12). It has already had a significant effect on the ideological level in the field of human rights' protection within the EU and beyond (Haapea, 2004: 67). Moreover, it is already difficult for the Council and the Commission to ignore the Charter in the future since they proclaimed it jointly in Nice (Com, 2000, 644).[53] Last but not least, it may also become binding through the ECJ's referring to it as an expression of the general principles of law. As a matter of fact, the ECJ has recognised that the protection of fundamental rights constitutes one of the general principles of Community law.[54]

Despite all of these possible effects of the Charter, it will acquire full legal effect and will be part of the EU law, unfortunately, only if the constitutional treaty is fully ratified. The Constitutional treaty can enter into force when it has

[53] For supporting ideas see Haapea (2004:67) and Gerven (2004:263).

[54] For the first time, the Court recognised that fundamental human rights form a part of the general principles of Community law in the Stauder (Case 29/69 (1969) ECR 419). See the Chapter III of the thesis.

been adopted by each of the signatory countries in accordance with their own constitutional procedures. Until the constitutional treaty enters into force, the Charter will have no binding force. Therefore, the EU institutions will be able to refrain from referring to the Charter in their desicions and activities. To illustrate, the ECJ can prefer to take the ECHR, but not the Charter as primary source.[55] In fact, the ECJ referred to the decisions of the ECtHR in the case of KB v National Health Service Pensions Agency (2004).[56] This case was about the right to marry for transsexuals in their acquired gender. The ECtHR has already held in its decisions that to forbid transsexuals to marry in their acquired gender constitutes an infringement under Article 12 of the ECHR. Taking Article 12 of the ECHR, but not the Charter as reference to its decision, the ECJ found the legislation concerned incompatible with Community law.[57] It may be diffucult to refrain from referring to the Charter for the Council and the Commission as they are the organs that proclaimed it. However, it is not impossible if the Charter continues to have no binding force.

It is noteworthy to mention that once the constitutional treaty enters into force, under no circumstances will the ECJ and other EU institutions be able to deny

[55] For a long period of time, the ECJ refused to refer to the juripredence of the ECtHR as well, implicit references to the ECHR have been made by the ECJ since Nold (Case 4/73(1974) ECR 491). See the Chapter III of the thesis.

[56] KB v National Health Service Pensions Agency and Secretary of State for Health, 7 January 2004.

[57] In contrast to the ECJ, the ECtHR has not refrained from referring to the Charter. It has taken the EU Charter as 'a source of inspiration' in the interpretation of the ECHR. For example, in the case Goodwin v UK (2002) which is also about the rights of transexuals, it referred to the EU Charter.

its fundamental character. They will have to take the Charter as a basic reference in the field of human rights. Because all the EU institutions have to take one uniform standard,[58] the Charter will establish a uniform structure in the field of human rights. This uniform structure within the Union can preclude conflicts and provide a more consistent system in the human rights protection. Thus, it also can be a crucial step on the way to forming the 'European Standard' (Haapea, 2004: 92).[59]

[58] For Haapea (2004:86), 'in the enlarged Union of 25, it will be extremely difficult to extract a common tradition from constitutional systems differing immensely from one another.'

[59] 'Common or uniform standard' may be a better usage for the EU system in order to support the unity in diversity.

CHAPTER V

THE ACCESSION OF THE EU TO THE ECHR

1. The Way Towards Accession

The debate regarding the accession to the ECHR are not new for the Community. It started nearly thirty years ago, as the ECHR sytem was defined as 'a part of the cultural self-definition of European civilization' (Alston and Weiler, 1999: 30). The Commission issued a Memorandum as an initial step towards the accession of the Community to the ECHR in 1979.[60] Additionaly, the EP called for the accession in a Resolution of May 1979.[61] However, at the same time, some member states of the ECHR were opposed to the accession. So, the discussion on this matter was left aside for years. The Commission, then, renewed its proposal in a Communication in 1990.[62] The Communication pointed out that the accession could provide the unifomity in the member states which have different protection systems. Furthermore, it emphasised that the Union could become 'a comprehensive legal order with constitutional guarantees equivalent to those in the member states.' After four years from this Communication, the EP called for the accession to the ECHR

[60] Bulletin of the EC, supplement 2/79, cited in Haapea (2004: 78) and Nas (1998: 61).

[61] European Parliament Resolution 1979, *Official Journal of the European Communities*, No. C 127.

[62] Cited in Haapea (2004. 78) and Nas (1998: 61).

again in a Resolution of January 1994.[63] In the same year, the ECJ ruled on the issue (Opinion 2/94, 1996, ECR I-1759).[64] Within Opinion 2/94, the Court confirmed that 'respect for human rights is a precondition of the lawfulness of Community acts.' It concerned the use of Article 308 EC treaty (ex-article 235) as a basis to accede to the ECHR. Nevertheless, at the end, it decided that there was no provision in the treaties which conferred any power on the Community to accede to the ECHR. That means, a treaty amendment would be required in order to assure accession. It also stressed that the Union would enter into a disparate international organization. The differences between the Community legal order and Convention system could result in some problems. Therefore, the Court underlined that such an accession of the Community to the ECHR would also entail amendments to the provisions of the ECHR.

The Court's opinion then resulted in the failure of the accession to the Convention. Once the accession could not be realized, the criticisms were advanced about the Community's manner towards the accession. The Community was criticized by following that maxim, 'don't do what I do, do what I tell yo to do' (Weiler and Fries, 1999: 149). In fact, the Community has been always suggesting that its candidate states should have been members of the Convention. Nonetheless, the Community, itself, had refused to accede to

[63] Official Journal of the EC, C 44, 14. 2.1994 P. 0032 cited in Nas (1998: 62).

[64] Cited in Haapea (2004: 78), Weiler (2000: 97), Bartels (2005: 195).

the Convention. Moreover, it was asked why the EU could not be able to submit to the jurisdiction of the ECHR and its courts, while the member states could do (Shaw, 1996: 197). Thus, the debate regarding the accession of the EU to the ECHR has continued. As a consequence, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH, 2002) to prepare a study on the legal and technical issues of a possible accession on 28 March 2001. The CDHH set up a working group which would aim to examine the means of eliminating any contradiction between the EU and the ECHR systems (Council of Europe 2002).[65] Moreover, in December 2001, in the Laeken Declaration, one of the main questions which would be dealt with in the 'Convention of the Future of Europe' was whether the European Union should accede to the ECHR.

The constitutional treaty finished the discussions related to the accession by stating as follows: 'The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms' (Art.9/2 TECE and Protocol 32).[66] In addition, a reference to a possible accession was inserted in Protocol 14 (2004) to the ECHR, Article 17. Before the constitutional treaty was signed, the preamble to the SEA had already embodied the obligation for the EU to respect the rights as guaranteed by the ECHR. And subsequently ex-article F in

[65] See the Reports of the Working Group including 30 January-1 February 2002 and 11 March-13 March 2002, Available at: http://www.coe.int (accession in November 2005).

[66] This Protocol will be annexed to the constitutional treaty.

the TEU[67] formally involved the same obligation. However, the accession of the EU to the ECHR has not been addressed in a legislative text of the EU prior to the constitutional treaty. So, the constitutional treaty is very crucial for launching a new era regarding the protection of human rights in the history of human rights in Europe.

2. Necessary Modifications in the Present Systems of the EU and the ECHR

The Constitutional Treaty allows the EU accession to the ECHR by its Article I- 9(2). It also granted the EU legal personality (Art.7), and made the accession possible. However, there is still a need for further modifications in the present systems, both in the EU and in the Convention system.

With regard to the ECHR system, first, Article 59 of the ECHR should be amended by inserting a new paragraph as follows: 'The EU may accede to this Convention.' Also, the accession requires an agreement from the Council of Europe and its 46 member states. Furthermore, in protocol 14, the modifications to the Convention which are necessary to make possible such accession were not involved. So, a second ratification procedure will be necessary for those further modifications. Those and other necessary modifications to the ECHR are discussed in the 'Reflection Paper' of the secretariat of the Council of Europe (2001). They mainly concern the models

[67] This article would later be amended as Article 6 by the Amsterdam Treaty.

of participation in the control machinery of the ECHR (Court, Committee of Ministers), the role and chamber membership of the EU judge in the Court and the way of the representation of the EU in the Committee of Ministers.

With regard to the EU system, when the accesssion process is completed, the EU will be bound by the ECHR within the area of human rights protection. In fact, all the organs of the EU, even the ECJ and the CFI, will conform to the decisions of the ECtHR. Nonetheless, it will only be possible to refer a case to the ECtHR after having been exhausted all remedies at the national level and at the European level as well. As this application procedure is not a speedy and easy one, the 'Reflection Paper' suggests a speedier resolution (Council of Europe, 2001). This resolution enables the ECJ to be authorised to request an interpretation of the ECHR from the ECtHR.

To sum up, it is now quiet clear that in the event of a possible accession, some modifications in the present systems, both in the EU and the Convention, will be required. Furthermore, it is predictable that there will be some challenges concerning these modifications and their implementation. Even so, it is apparent that this incorporation of the constitutional treaty is a must for the Community. That is because, the number of the parties to the Convention has been growing from date to date. These new member states have been bringing their legal traditions to the system. Therefore, it has been stated that there will remain 'no explicit Community voice within the ECHR system' (Alston and Weiler, 1999: 31).

3. The Relationship Between the ECHR and the EU System

In order to understand what will change when the accession to the Convention is accomplished, it is necessary to know first of all the differences between the two systems. There are mainly five differences between them.

First, the EU is a supranational organization, but the ECHR system is an international one.

Also, the former one was not established for human rights protection, the initial goal of it was economic integration. In contrast to the Union, the ECHR was established only for promoting human rights beyond frontiers in Europe. Hence, the ECHR has been the main legal instrument for safeguarding fundamental rights in Europe for many years. It has been an essential source of law in the EU human rights jurisprudence.

Furthermore, the ECtHR, the judicial organ of the Convention system, is a specialised court on the issue of human rights protection. In fact, while the ECtHR is a court whose primary purpose is the protection of fundamental human rights, the ECJ is more concerned with the economic nature of the Union (Haapea, 2004: 76).[68] So, the reasoning of judgements is quite different with the two courts.

[68] Therefore, the ECJ needs some reforms regarding the human rights protection. See the suggestions of Witte (1999: 887-97) for reform in the field of human rights protection by the ECJ.

Unlike the ECtHR, the ECJ, the judicial organ of the EU, has competence in the interpretation and the application of all EU law. However, the ECJ has also competence in the issue of human rights. Therefore, rulings of the ECJ regarding human rights issues have been based on the principles set out in the ECHR and the jurisprudence of the ECtHR. However, because the EU has not been a party to the Convention, the ECtHR has not been competent to interpret provisions of Union law. In addition, it has had no direct jurisdiction over matters related to EU law. It may have exclusively indirect jurisdiction over the acts of the Union. Indirect jurisdiciton may emerge only if the actions of member states breaching ECHR are the results of Union acts. In the case that the ECtHR has indirect jurisdiction, the Union's institutions are not in a position to defend their actions before the Court. Having acceded to the Convention will ensure the Union to defend its actions (Regan, 2005: 11).

Last but not least, the application procedures of the two systems are different. To illustrate, under EU law, there are two sorts of remedies available in cases of infringements of human rights. First, a member state court may issue a request for a preliminary ruling to the ECJ (Art. 234(2) TEC or Art. 234(3) TEC). Secondly, any natural or legal person may institute proceedings against a decision of the Council or the Commission (Art. 230(4) TEC). Likewise, under the ECHR regime, there are two sorts of applications, namely state application (inter-state cases, Art.33 ECHR) and individual application (Art.34 ECHR). On the other hand, in order to apply to the ECtHR, as a prerequisite provision, all remedies under national law must be exhausted in conformity

with the conditions laid down in the ECHR (Art.35/1 ECHR). Only after having exhausted all domestic remedies, then, a complaint may be placed with the ECtHR. The ECtHR must base its judgments both on the Convention and on domestic law of the individual state.

4. Does the Accession Cause Inconsistency or Provide Consistency?

In view of the differences between these two systems, there seems to be a risk of disparity and inconsistency in the field of human rights protection in Europe. It should be initially stressed that the protection of human rights is an extremely sensitive issue for both the EU and the Convention legal orders. These two legal orders both depend on the same universal values related to human rights protection. However, it is apparent that, by means of the constitutional treaty, there will be two lists of rights which the EU will be responsible for. A list of rights safeguarded by the ECHR and another list set forth in the EU Charter will be on the agenda. This situation raises the question whether these different human rights systems constitute different standards in human rights protection in Europe. Remarkably, this is not the only problem. Another problem emerges because of the existence of two courts empowered on human rights issues. Indeed, when the accession to the Convention is complemented, not only will there be two different human rights systems, but also two different bodies of case-law, those of ECtHR and ECJ on human

rights respectively. This also raises now another question whether the case-law of two courts results in inconsistency in human rights protection in Europe.

4.1. The Two Human Rights' Lists, the ECHR and the Charter

The answer of the first question can be found in Article 112/3 of the constitutional treaty. The article points out that the rights set out in the EU Charter correspond in their meaning and scope to rights already laid down in the ECHR (Part II- Title VII TECE). Indeed, the constitutional treaty states that the Charter should comply with the ECHR. In addition, according to Article 113 TECE, nothing in the Charter should be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized by international agreements including the ECHR. Accordingly, these articles, Art.112 and Art.113 TECE, can be means to hinder practical difficulties arising from parallel implementation of the EU Charter and the ECHR. However, those do not mean that the Charter can not provide more extensive protection than the ECHR (Art. II-112/3 TECE). The Charter can provide more extensive protection than what the ECHR provides, and it does not result in inconsistency. That is because, within the ECHR system, the ECHR already provides the minimum standart of protection below which no state may fall. In other words, the contracting parties of the ECHR are 'free, perhaps even encouraged, to offer higher standards of protection to individuals' (Weiler, 1996: 3).

Consequently, accession to the ECHR is a 'complementary step'[69] for better protection of human rights. It should not be seen as an alternative to the EU Charter. 'The existence of the Charter does not render the question of accession any less interesting' (Com, 2000, 644).[70] That is because, the Charter expresses only 'what Europeans have in common' (Habermas, 2001:21) and it aims to avoid conflict (CDDH, 2002).[71] So, the Charter complies with the ECHR in the meaning and scope of rights. It also should not be interpreted as restricting human rights as recognized by the ECHR. At the same time, it can provide more extensive protection than the ECHR as a result of ECHR system. With the EU Charter coming into existence, then, no question of different human rights lists will remain for Europe. The ECtHR will possibly refer to the Charter for more extensive protection as well as the ECJ. Moreover, in no sense, will there be different standards on human rights.

4.2. The Case-law of the Two Courts on Human Rights, the ECtHR and the ECJ

In terms of the second question, which is about the diverse case-laws of the two courts, it should be mentioned that divergent interpretation is already possible in certain areas, such as European competition law, although the accession is not provided (Spielman, 1999: 777). Despite the modification of

[69] (Haapea, 2004: 78- 80), (Council of Europe, 2001), (Krüger, 2002), (Com, 2000, 644).

[70] For same opinion also see (Com, 2000, 559).

[71] For similar idea see Menendez (2001: 11).

the ECJ's decisions in recent cases in the same line with the ECHR and the jurisprudence of the ECtHR, the best way to avoid inconsistent case law is to accede formally to the Convention (Spielman, 1999: 777).[72] In other words, the diverging case-law problem will be solved spontaneously with the ratification of the constitutional treaty. In fact, once the ratification process of the constitutional treaty is complemented, the institutions of the Union will be bound by the ECHR. That is, through accession to the Convention, the Union institutions will be submitted to the same control as its member states. Indeed, in the case of the accession, if human rights are not adequately protected by EU law and institutions, the individuals will have a means of redress before the ECtHR (Young, 2005: 232). Most importantly, the ECJ and Court of First Instance (CFI), will even be bound by the ECHR and the decisions of the ECtHR. In fact, they will be responsible for ensuring that the rights and freedoms set forth in the Convention and the Charter are respected. Thus, the accession will guarantee 'perfect harmony in the interpretation of the two instruments' (Council of Europe, 2001). The possibility of different interpretations of the ECHR given by the ECtHR and the ECJ will be overcome (Shaw, 1996: 195). The risk of the case-law of the ECtHR diverging from that of the ECJ can thereby be remedied. Hence, the accession of the EU

[72] As for Gaja (1999: 800), on the other hand, accession by the Community to the ECHR is 'preferable, but not essenial.' What is required is that the ECHR should be recognized within the Council of Europe and also within the Community. He also emphasises the need for a monitoring system established not within the Community, but within the Council of Europe (Gaja, 1999: 781-800).

to the Convention is certainly 'one of the best means to avoid any contradiction between the two systems' (CDDH, 2002).[73]

To conclude, in order to maintain consistency between the jurisprudence on human rights of the two European courts, the best solution is to entrust the issue with a single court. That should be, no doubt, the ECtHR, a specialized court on human rights, which has wider experience and more sensibility to the need for the protection of human rights. The ECtHR can be entrusted as a single court on human rights protection with the accession.

5. Is the Accession a Threat for the Autonomy of the EU law and the Status of the ECJ?

When the constitutional treaty is ratified, the EU Charter will comply with the ECHR (Art.II-112/3 TECE). It also will not be interpreted as restricting human rights as recognized by the ECHR (Art.II-113 TECE). In this sense, it may be claimed that the primacy and the autonomy of the EU law can be threatened, as the EU Charter will be bound with the ECHR. On the other hand, when the constitutional treaty is ratified, the accession of the EU to the Convention will materialize. Then, the EU institutions, including the ECJ and the CFI, will be subject to the control of the ECtHR. It may be so claimed that the accession will threaten the autonomy of the ECJ, as the ECJ will be dependent on the ECtHR.

[73] For supporting ideas see Gerven (2004: 265).

5.1. The Autonomy of the EU law

The constitutional treaty provides an answer to the claims about whether the accession will threaten the autonomy and the primacy of the EU law. First, it proves that it does not confer any power which can threaten the autonomy or primacy of the EU law with Article I-6 TECE. This article states that the Constitution and the law adopted by the institutions of the Union should have primacy over the law of the member states. However, it eliminates the claims exactly through the last sentence of Article 112/3 (Part II- Title VII TECE). This sentence emphasizes that there is nothing which can prevent the EU law from providing more extensive protection than the ECHR. It thus enables the EU law to provide more extensive protection than the ECHR. Accordingly, the constitutional treaty does not lead to the application of ECHR norms over the EU law.

5.2. The Status of the ECJ

The ECJ is the only judicial organ which has competence in the interpretation and the application of EU law. Indeed, Article 220 of the EC treaty and also Article 29 of the constitutional treaty acknowledges that. It is also clear that the ECtHR is a specialised court on the issue of human rights protection. It is responsible for ensuring the observance of human rights in the states parties to the ECHR (Art.19 ECHR). When the accession of the EU to the Convention is completed, the ECtHR will have no competence to observe all judgments of the ECJ. It will be empowered to observe only the ones including the issues

about human rights under the scope of the Convention. So, the ECJ will continue to be the primary and independent judicial organ concerning the EU law. Nevertheless, on the issue of human rights protection, the ECJ will be dependent on the decisions of the ECtHR which will subject the jurisprudence of the ECJ to a second outside scrutiny (Weiler, 1996:17).

In spite of the possible influence of the Charter on the judgments of the ECJ, it is now predictable that it will not be easy for the ECJ to change its limited approach in which 'super freedoms' prevail over other universal human rights (Haapea, 2004: 73). By means of accession, an external review by a specialised court on human rights protection will be provided. This will probably affect the approach of the ECJ positively and strengthen the human rights at Union level. Since it is very substantial for the Union to improve human rights, the dependency of the ECJ to the ECtHR on human rights issues should not be understood as a threat to the autonomy of the ECJ.

5.3. A Threat for the Autonomy of the EU Law or a Means to Reinforce the EU Law?

After the accession, European citizens will have the right to apply to the ECtHR against the institutions of the EU. This opportunity will possibly enhance credibility of the EU law and the ECJ among the European citizens. Moreover, it will also enable the EU to confirm its standing in the international sphere as a Union that relies on the law in human rights field. Therefore, the

accession of the EU to the Convention cannot be a threat either to the automony or primacy of the EU law, or to the status of the ECJ. On the contrary, it can be a means to reinforce the EU law and the ECJ.

6. Conclusion

The EU needs the ECtHR as a single court on human rights protection. Luxembourg Prime Minister Jean-Claude Juncker's report, presented to the Council of Europe Parliamentary Assembly, also endorses this opinion.[74] Mr. Juncker made a series of proposals in his report. They are all for strengthening the partnership between the two European organizations- Council of Europe and the EU.[75] In one of his proposals, he remarkably emphasised the significance of the accession. Most importantly, he underlined that the EU should become a member of the Council of Europe by 2010 (EU-Turkey News Network, 2006). This clearly shows that the EU is aware of the necessity of the accession. So, it is predictable that it will work hard for the constitutional treaty's ratification as it will provide the legal basis for the accession. Even if the ratification process has failed by the negative votes in France and the Netherlands, the EU will seek to reach a consensus on the constitutional treaty before 2009 (European Council, 2006). Then, it will probably provide the accession in 2010 at the latest.

[74] He is also the rapporteur on the future of relations between Council of Europe and the EU.

[75] In the Presidency Conclusions the European Council expresses its appreciation to Prime Minister Jean-Claude Juncker for his report on the future relations between the Council of Europe and the European Union and it emphaises that his report deserves further consideration (Brussels European Council, 2006).

CHAPTER VI

HUMAN RIGHTS, THE CONSTITUTIONAL TREATY AND THIRD COUNTRIES

1. An Overview of Human Rights in the EU's External Policy

The human rights field in the EU's external policy is very huge and comprehensive. In order to understand the contributions of the constitutional treaty to this field, it is crucial to give a short overview regarding the human rights issues in the EU's external policy.

The human rights in the EU's external policy can be described briefly in four main parts, the introduction of trade preferences for promoting human rights, the assistance of the Community on human rights through the development policy, human rights as an objective of CFSP and finally human rights as a membership conditionality.

In terms of trade preferences or restrictions, there are already rules within the international aggrements for promoting respect for human rights, 'even if the issue of conditionality is controversial' (Brandtner and Rosas, 1999: 699). Nonetheless, it is noteworthy that mostly because of the MFN principle, the scope for promoting human rights is limited within the World Trade

Organization (WTO) (Eeckhout, 2004: 481). So, the Community has used trade preferences in its trade policy instruments for enhancing human rights. It has used them to the countries of South-east Europe. 'The matter is best known under the heading of conditionality' (Brandtner and Rosas, 1998: 478). Also it has used them to the developing countries benefiting from the EC's GSP system.[76]

With regard to the Community's development cooperation policy, a specific reference to human rights was first included in Article 5 of the Lomé IV (1990-2000). Then, the resolution of 28 November 1991[77] involved human rights as an objective of development cooperation policy. It basicly emphasised a positive approach towards human rights in its relations with third states, with a preference for political dialogue rather than sanctions.[78] The assistance of the Community in the development policy has been available through regional programmes.[79] These programmes have been established by the Community to

[76] The GSP system involves two mechanisms. First mechanism provides special incentive arrengements, while the other results in the withdrawal of the preferences. The legal basis of this system is established by the Regulations 3281/ 94 and 1256/96 (Brandtner and Rosas, 1998: 477) and (Brandtner and Rosas, 1999: 713). The current version of the basic regulation is 2501/2001 (Eeckhout, 2004: 482). The legal basis of the withdrawal of trade preferences is Article 133 (ex-art. 113) EC treaty (Brandtner and Rosas, 1999:712).

[77] In the Declaration on Human Rights, on 28-29 June 1991, it was also underlined that 'Through the policy of cooperation and by including clauses on human rights in economic and cooperation agreements with third countries, the Community and its member States actively promote human rights.'

[78] See Simma, Jo Beatrix and Schulte (1999: 578-582) of the reasons of prefering positive measures instead of sanctions.

[79] These programmes are the European Development Fund (EDF), ALA, PHARE, TACIS, MEDA, CARDS. The European Initiative for Democracy and Human Rights (EIDHR), established in 1999 by two regulations, is complementary to these programmes and to the EU's

facilitate humanitarian aid targeted at coping with poverty in the third countries. They have been also aimed to promote human rights, democracy, the rule of law and good governance by creating an institutional and legislative framework for them. Moreover, they enhance the role of the Community in electoral assistance activities which form a new theme in development cooperation (Simma, Jo Beatrix and Schulte, 1999: 597).

The CFSP was established as the second pillar of the EU through the TEU. Article 11 TEU (ex-art. J1) for the first time set the development and consolidation of 'democracy and the rule of law, and respect for human rights and fundamental freedoms' as an objective of the EU's CFSP.[80] Under CFSP, the EU and its member states have a variety of instruments of which 'legal effect are unclear, but which have consequences under international law.'[81] The EU pursues CFSP objectives set out in Article 11 TEU by using these instruments (Art. 12 (ex-art. J2) TEU). Three of them, common strategies (Art. 13), common positions (Art. 15) and joint actions (Art. 14 TEU), are mentioned in the treaty.[82] They all have enabled the Union to undertake

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CFSP objectives in the fields of human rights, democratisation and conflict prevention' (Com, 2001). See also (Bartels, 2005: 65) for detailed information about the programmes and EIDHR.

[80] See Bilgiç (2003: 8-14) and Gropas (1999: 10) for the detailed information on the causes of the strengthening of the EU's external policy on human rights.

[81] Koskenniemmi (1998) cited in Eeckhout (2004: 407) at the footnote 54.

[82] A number of common positions, joint actions and common strategies with human rights as a principle objective have been adopted since the 1993 TEU (Art. J2). For the examples see (Bartels, 2005: 71-72). Also see Bilgiç (2003: 22-25) and Eeckhout (2004: 398-407) for the detailed information concerning the common positions, joint actions and common strategies.

concrete actions. However, there are other instruments of the CFSP which are not mentined in the treaty.[83] There are also Council decisions which can be reqired for implementing joint actions and common positions (Art. 23(2)TEU) (Eeckhout, 2004: 407). The Council is the most important actor for the conduct of the CFSP, its powers are greater than the other institutions (Art. 13(3)TEU). CFSP decisions can be taken by the Council. These decisions are adopted unanimously (Art. 23(1), TEU). It is maintained in Art. III- 293 TECE as well, so it is too difficult for the EU 'to develop common policies on matters of general interest' (Eeckhout, 2004: 412). Furthermore, the ECJ has no jurisdiction in CFSP issues (Art. 46 (ex-art. L) TEU). The exclusion of a supervisory role of the ECJ in CFSP limits the human rights aspect of the Union's foreign policy. The ECJ continues to lack jurisdiction in CFSP matters (Art. III-376 TECE) in the constitutional treaty as well. However, there are now two exceptions. First, it has jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons (Art. III-376 TECE). Secondly, the unified procedure for the conclusion of international agreements is also vital for the CFSP agreements (Art. III-325 TECE), and this procedure is not outside the Court's jurisdiction (Eeckhout, 2004: 419). Yet, this is not the end of the problem. It can be a step towards a stronger role of the ECJ in CFSP matters.

[83] See Bilgiç (2003: 28-30) and Eeckhout (2004: 407) for the detailed information concerning the instruments which are not mentined in the treaty such as political statements, declarations, démarches and human rights diologues and consultations.

Human rights as a membership conditionality is the other part of the external action of the EU. It is not a new issue in terms of the EU's external human rights policy. For example, the European Community rejected Spain's application to join the Community in 1967. The application was rejected because of the fact that non-democratic countries could not meet the criterion of membership. The Community also froze its association with Greece because of a military coup in that period.[84],[85] In 1978, Copenhagen European Council emphasized the importance of respect for human rights within the 'Declaration on Democracy' (Copenhagen European Council, 1978). In a report in 1992, the Commission restated that there were three basic conditions for membership, European identity, democratic status and respect of human rights.[86] However, 'the absence of an explicit concern with human rights in the accession of the states began to change' by means of the accession processes of the CEECs (Williams, 2004: 58). In 1993, the Copenhagen European Council declared that those CEECs had to meet some conditions. One of the Copenhagen membership criteria has stipulated that 'the candidate countries should achieve stability of the institutions guaranteeing democracy, the rule of law, human

[84] See Bartels (2004: 50-51) for other examples, Spain and Portugal, and for the detailed information about the past implementations of the Community in terms of membership conditionality.

[85] Williams (2004: 58) states that 'the return of democracy seemed to be a sufficient guarantee,' in just abovementioned countries, since they have 'European' status.

[86] Europe and the Challenge of Enlargement 1992, European Commission Bulletin Supplement, 3/92, 11.

rights and respect for and protection of minorities.'[87] Therefore, since then, the conditions of the Copenhagen summit have been understood to form the basic conditions for possible future applicants. With the publication of 'Agenda 2000', 'the European Commission instituted a more rigorous approach to compliance with this condition' (Bartels, 2005: 53).

2. What will change after the Constitutional Treaty?

2.1. The Legal Basis of Human Rights in the External Policy

The treaties of the Union and human rights clause in the agreements provide the legal basis for the incorporation of human rights in the Union's external policy. This legitimacy has been also reinforced by the institutions of the Union.[88] The Declaration adopted by the European Council on 29 June 1991[89] and the Resolution of the Development Council of Ministers of 28 November 1991,[90] are among the most crucial milestones in the creation of the EC's external policy on human rights. These two Councils set the guidelines, priorities, procedures, and methods of action for the EC's human rights and

[87] For other conditions see Copenhagen European Council 1993, Presidency Conclusions, Available at: http://europa.eu/european_council/conclusions/index_en.htm (accession in December 2005).

[88] See Napoli (1995) and also Baehr (1996) for the detailed information regarding the contributions of the Union's institutions. See Lausegger and Rack (1999) for the detailed information about the role of the EP's in the field of human rights, and also Napoli (1995: 302) for the same idea that the EP has played a key role. See also Cremona (1999: 137) for the role of the ECJ, and the effect of the case, Commisssion v. Council (AETR).

[89] Cited in Duparc (1992: 21) and Gropas (1999:13).

[90] The Communication of the Commission (25 March 1991) on human rights, democracy and development cooperation was followed by this resolution. This is cited in Duparc (1992: 21), Eeckhout (2004:467) and Gropas (1999:13).

development policies. Moreover, the Union's external actions in the field of human rights are governed by the two basic regulations, 975/1999 and 1976/1999, adopted by the Council. All Community agreements with third countries contain a human rights clause since 1995, on the basis of a communication (Com, 1995, 216).[91] Thus, human rights clause began to serve as a model (or standard) clause, constituting the *acquis communautaire* in this area (Riedel and Will1, 1999: 732). However, the inclusion of human rights clause has not intented to signify 'a negative or punitive approach' (Com, 2001, 252), but to respect and promote universal values by means of dialogue and positive measures (Com, 1995, 567).

To sum up, there is a legal basis for the incorporation of human rights in the Union's external policy, as the current EC treaties already offer a legal basis 'for putting human rights at the heart of EU external action' (Eeckhout, 2004: 484). However, the provisions relating to the Union's external action in the previous treaties are not grouped under a title, but placed in a number of different places. In addition, there is an unclear link between the sections, namely, development cooperation, the CFSP or the trade policy in these treaties (Sebban, 2004: 33). Therefore, current EU law, which is composed of various treaties amending each other, is very difficult to understand. The constitutional treaty will provide clear and simple provisions under a single

[91] See Riedel and Will1 (1999: 726-32) and the annex of the essay at p. 753 for the typology of human rights clauses. Also, see Eeckhout (2004: 476-79) and Bartels (2005: 1-31, 81-123).

title relating to the external action.[92] It will also provide a single legal personality for the EU (Art. 7). Thus, the EU will have the opportunity to take legal actions about itself. Hence, the constitutional treaty's 'general emphasis on human rights and its unification of external action' (Eeckhout, 2004: 484) may be a step towards a stronger legal basis for human rights in the external policy.

2.1.1. Clarification on the Competences, Values and the Objectives

The previous treaties include sections on development cooperation, on the CFSP or on the trade policy, but 'the link between these sections is not clear' (Sebban, 2004: 33). The constitutional treaty aims to clarify the links between the various elements of Europe's external policies. So, it groups the provisions relating to the Union's external action under a single title 'The Union's external action' (Part III-Title V). This section involves eight seperate chapters. That is, the external policies of the EU, such as CFSP, common commercial policy and development policy are integrated within a single title, but they remain within separate sections, which are independent from each other.

The constitutionl treaty also clarifies the Union's competences (Sebban, 2004: 31). It divides them into three main categories, exclusive competence of the Union (Art. I-13), competence shared between the Union and the member

[92] Draft Constitution for Europe prepared by the European Convention, Presentation to Citizens 2004, *Office for Publications of the European Communities,* p.22.

states (Art. I-14), areas where the Union carries out supporting, coordinating or complementary actions (Art. I-17). According to that division, common commercial policy is involved in the exclusive competence of the EU (Art.I-13(e)). Development cooperation and humanitarian aid are considered as shared competence (Art. I-14(4)).[93] The Union's competence in matters of CFSP is governed by a seperate article (Art. I-16), it is stated in the article that the EU has competence in all areas of foreign policy, all questions regarding the Union's security and its common defence.

Moreover, within the constitutional treaty, the founding values (Art. I-2) and objectives (Art. I-3) of the EU seem to be defined in a very clear manner as different from the previous EC treaties (Sebban, 2004: 30). The focus is on respect for human rights as it has a particular importance for the EU. Therefore, respect for human rights is proclaimed as a main value on which the Union is founded (Art. I-2), as an objective in Article I-3, and as a basis in Part II, the EU Charter. Also, the constitutional treaty contains a new Article I-57 concerning the neighbourhood of the EU. This article envisages the development of 'a special relationship with neighbouring states, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union' (Part I-Title VIII). It is significant that the emphasis here is again

[93] The constitutional treaty also defines the Union is cooperation with developing countries under the articles on development cooperation (Art. III-316-318 TECE) and non developing countries under the articles on economic, financial and technical cooperation (Art. III 319-320 TECE), as different from the EC treaty (177-180 TEC). The TEC does not state that development policy targets developing countries clearly. To illustrate, Article 181a TEC which was introduced by the Nice treaty states that the Community carry out economic, financial and technical cooperation with third countries, not with non developing countries. Therefore, this article is also open to developing countries. See also Sebban (2004: 34).

on the values of the Union. This shows that the constitutional treaty aims to promote and uphold the Union's values including mainly respect for human rights in the Union's external action.

Last but not least, in Article III-292 (1) TECE, respect for human rights is declared as a principle which will guide the Union's action in the international area. It is also stated as an objective for the Union's external action (Art. III-292(2) TECE). Thus, all the policies of the external action, not only development policy but also trade policy, associations with third countries and the CFSP will have the promotion of human rights as one of their objectives (Art. III-292 (3) TECE).[94] This expresses the general attempt of the constitutional treaty to unify the Union's external action under a single set of principles and objectives, which include protecting and promoting human rights. To reinforce the legal basis of the human rights by placing it at the heart of EU's external action, as main value and objective of the EU, will possibly have a positive influence on Europe's relations with the rest of the world.

2.1.2. A Single Legal Personality

According to the current EU law, the EU consists of the Communities (the Community, EURATOM, and the ECSC), a CFSP and cooperation on JHA. Therefore, the EC has a legal personality (Art. 281 EC treaty (ex-art. 210), but

[94] Article III-292(3) TECE clearly states that the Union will respect these principles and pursue these objectives in the development and implementation of the different areas of the Union's external action.

the EU has only a framework of political cooperation without legal personality. As the EU does not have a legal personality, it cannot be a signotary part of an international treaty. [95] The constitutional treaty will change this situation, since it will grant for the first time legal personality to the EU (Art. I-7). By having a legal personality, the EU will be able, as an organisation, to enter into international agreements, to represent the EU's international relations, and to conclude treaties. So, the constitutional treaty confirms that the Union can establish and maintain relations with international organizations in its chapter VII (Art. III-327 TECE). In addition, it specifies how and when the Union can negotiate international agreements in chapter VI (Art. III-323-326 TECE). It states that the Union may conclude an agreement (Art. III-323 TECE), and it sets out clearly the procedure to be followed (Art. III-325 TECE).

The human rights treaty, ECHR is the treaty specifically referred to in the previous treaties of the EU. Moreover, most of the member states of the EU have been long-term participants in the system of the Council of Europe. Nevertheless, until the constitutional treaty (Art. I-7), the EU itself was not allowed to acceed to the ECHR, since it did not have a legal personality. By the constitutional treaty, the EU's accession to the ECHR is made possible (Art. I-9(2)). When the constitutionl treaty is fully ratified, accession will effectively establish an external review of human rights performance of the EU institutions by an independent and a specialised court on the human rights protection. It is

[95] Moreover, as for Coughlan (2006: 4), under the constitutional treaty the European citizens would no longer be just honorary or notional citizens of an EU that has no legal personality.

expected that 'the existence of a check by outsiders will be a sign of self-confidence and a useful message to those third countires whose human rights performance is monitored by the EU' (Witte, 1999: 890).

2.2. The Consistecy in the EU's External Policy[96]

Grouping the provisions relating to the Union's external action under a single title, the clarification of the Union's competences also in the external policies, clarification of the values and the objectives of the EU, and unification of the Union's external action under a single set of principles and objectives; all this shows that the constitutional treaty recognises the necessity of consistency between all external policies. So, it explicitly states that 'the Union should ensure consistency between the different areas of its external action' (Art. III-292 (3) TECE).

2.2.1. A Single EU Foreign Minister

The constitutional treaty abolishes the pillars division, which results from repealing the previous European treaties (Art. IV- 437 TECE). Thus, 'the CFSP will no longer be governed by provisions in a seperate treaty' (Eeckhout, 2004:418). In addition, it provides a single EU foreign minister (Art. I-28 TECE). The EU foreign minister will merge the high representative for the

[96] See Williams (2004: 79-128) for the information related to the distinctions in the definition of rights, in the methods of surveillance, and in the powers of enforcement and also for the arguments explaining the condition by means of four propositions. Also, see Clapham (1999: 627-83) for the corcerns for the consistency on differents issues (pp.636-41), the importance of the consistency in multilateral fora (pp.641-65), and for the recommendations to ensure consistency (pp.665-83).

CFSP and the member of the Commission responsible for external relations.[97] He will be a vice-president of the Commission (Art. I-26(5), 28(4) TECE) as responsible for coordinating external relations and will chair the Foreign Affairs Council (Art. I-28(3), Art. III- 296(1) TECE). Therefore, he will have the the competence to represent the Union, to speak on behalf of the Union with third countries, and also to display the Union's position in the international organizations (Art. III-296(2) TECE). While doing his tasks, he will be assisted by a European External Action Service. For this reason, Foreign Ministers asked at a meeting in May 2006 how Europe's voice in the world can be enhanced without the tools provided for by the constitutional treaty, such as a common EU foreign minister and a common diplomatic service (Beunderman, 2006).

To sum up, these functions of the single minister will possibly bring more consistency to the Union's external action. The EU's consistency in its external action may enhance its effectiveness and more importantly its credibility in its international relations. Consequently, the more credible the EU becomes for the third countries, the more positive relations they can establish. In this sense, particularly, human rights aspect of the EU's external relations can have the opportunity to develop more easily.

[97] As regards CFSP instruments, there is not very big change, only European decisions are added to the instruments (Art. I-33(1) TECE). See also Eeckhout (2004: 420).

2.2.2. The Consistecy Between Internal and External Policies: The Effect of the Charter

The constitutional treaty, in Article I-3, dedicates a whole paragraph (par. 4) to the relations the Union has with the wider world which is directly linked to external policy. In this paragraph, it is underlined that the values of the Union are to be upheld and promoted by the Union 'in its relations with the wider world' (Art. I-3(4) TECE). This means that the Union will not only safeguard and advance its values in its external action, but it will also have to uphold them. This implies that in seeking to influence the third countries regarding the human rights protection, the actions of the Union itself must be based on human rights.

The human rights standards set forth in the Charter for internal policies are the same as for external policies. The Union thus have to respect the same rules when implementing both internal and external policies. That is, the EU Charter (Part II TECE) promises to make the EU's external policy on human rights consistent with its internal practice (Pinelli, 2004 :360). The Union has been usually accused of applying inconsistent standards by the third countries. So, the implementation of the Charter may be a clear response to ones who accuse the Union of employing double standards (Eriksen, 2003: 371 and Com, 2000, 559).

In brief, then, when the EU itself is based on consistent standards with its strong commitment, it then renders consistency between internal and external policies. Rendering consistency possibly enables the EU to be seen more credible by the third countries. Then, it is expected that the third countries become more willing to comply with the human rights standards of the EU. The Union thus can make a remarkable contribution to promote human rights within third countries.

3. Conclusion

Accordingly, by the means of these contributions of the constitutional treaty, the criticisms about the Union's hypocrisy on human rights' issues can be met. The Union can be an effective and strong actor in both internal and external spheres. Hereby, not only it improves the current level of protection of human rights in the Union, but it also plays a key role in promoting human rights in the third countries.

CHAPTER VII

THE FUTURE OF THE CONSTITUTIONAL TREATY

1. Recent Developments on the Constitutional Treaty

1.1. What came out of the Summits June 2005 and June 2006?

Once the constitutional treaty has been ratified, it can enter into force and become effective, in principle, according to the constitutional treaty, on 01 November 2006 (Art.IV-447). Declaration 30 on the ratification of the constitutional treaty also states that 'two years after the signature of the treaty, if, four fifths of the member states have ratified it and one or more member states have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.' The Union then can use the increasing number of ratifications as a means of pressure on member states which are unwilling or unable to ratify the constitutional treaty.[98] However, this can not be compatible with the preconditions for international and EU treaties' entry into force, as the provisions of the existing treaties and the constitutional treaty (Art.48 TEU, Art.313 TEC(ex-art.247) and Art.IV-447 TECE) confirm the member states's sovereignity to ratify or not (Heeger, 2006:8). Therefore, at the end of the first day of the European Council 2005, Jean-Claude Juncker, President of the European Council, stated that 'the date

[98] 'Penelope', an unofficial draft constitution drawn up by ex-commission president Prodi's team at the end of 2002, had suggested that member states which did not approve the text should leave the Union (Beunderman, 2006).

initially planned for a report on ratification of the treaty, 1 November 2006, was not still tenable' (Council of the EU, 2005). Nevertheless, the process of ratification has not been abandoned. It was seen more appropriate to start a 'period of reflection' in order to make explanations and discussions on ratification of the constitutional treaty in all member states until the Brussels European Council, 2006. In the Brussels European Council (2006), it was emphasised after the period of reflection that the EU should now focus on 'delivery of concrete results and implementation of projects.' Therefore, the "period of reflection" on the constitution has ended and the "two-track" stage has been initiated. That means, while the Union has been using 'the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect', at the same time, German presidency will prepare a report regarding the constitutional treaty and examine possible future developments. It is estimated that the 'necessary steps for the constitutional treaty's ratification will have been taken during the second semester of 2008 at the latest.' European Parliament(2006) also states that the necessary constitutional settlement should be established when the citizens of the Union are called to the European elections in 2009. In other words, it seems that the process concerning the ratification will not be completed until 2009.

1.2. What is the Status of the Constitutional Treaty at Present?

The constitutional treaty was unanimously adopted by the heads of state or government of the 25 member states and the 3 candidate countries on 18 June

2004. It was also signed by them on 29 October of the same year. However, it will not take effect until it has been ratified by the 25 member states in accordance with their own constitutional procedures (Art.IV-447 TECE). So far, the constitutional treaty has been ratified by 13 of the 25 member states. Two others, Germany and Belgium, have nearly finished ratifying it. Finland is likely to ratify it in the next few months. On the other hand, five others, Denmark, Ireland, Sweden, United Kingdom and Portugal delayed ratification in the uncertain future. Moreover, Poland and Czech Republic are calling for a new constitution. More important still, the people of France and the Netherlands rejected it on 29 May and 1 June 2005 respectively by referandum (Lorant, 2006: 20-21). As it cannot come into force unless it is ratified by all 25 member states, it seems that it will be put on hold until the second semester of 2008 (European Council, 2006).

2. Will the Constitutional Treaty Offer Better Protection for Human Rights?

In the view of the new improvements of the constitutional treaty in the human rights field, it can be stated that '[a] stronger protection of human rights is neither neccesary nor desirable' (Young, 2005:220). However, the constitutional treaty has not been ratified yet and it seems that it will be put on hold until 2009 as mentioned above. Therefore, until that time, it will not have legal force. That means, the EU Charter will continue to have only declaratory effect, the accession will not be not provided and the provisions

relating to the Union's external action in the previous treaties will continue to be implemented. Also, for the accession, the ratification of the constitutional treaty is not adequate. Actually, the accession requires an agreement from the Council of Europe and its 46 member states. Besides, there is still a need for some further modifications in the present systems, both in the EU and the Convention as mentioned in Chapter V. The issue which is more important is that the EU does not have a human rights policy and will not have one by the constitutional treaty.

The real problem of the EU is 'the absence of a human rights policy' (Alston and Weiler, 1999 and Weiler, 2000). For making the rights real, the essential need of the EU is for programmes and agencies, since the rights are already granted by the treaties and judicially protected by the various levels of European courts (Weiler, 2000: 96). The EU needs a human rights policy involving a Commissioner, a Directorate General, a budget and a horizantal action plan courts (Weiler, 2000: 96). Actually, a human rights policy may be the best way to ensure the effective implementation of the rules and decisions on human rights. By an establishment of a human rights policy, an effective implementation of the legislative texts and the judgments of the courts can be achieved. Nonetheless, before establishing a policy, as a precondition, the legislation about the policy should be well-prepared, that is, they should be clear-simple and understandable. In addition, legislative acts and judgments of the courts about them should not cause incompabilities. These are *sine qua non* for the success of the policy. So, the EU needs the constitutional treaty

and its innovations such as the accession, a single foreign minister, legal personality, a European agency on human rights, etc. The EU also requires it 'in order to make the Charter of Fundamental Rights legally binding, build a European democracy and make the Union more capable of action and more social' (European Parliament, 2006). It can be proposed to 'de facto implement' these innovations or 'cherry-picking' from the constitutional treaty (Heeger, 2006:9). It can be also proposed to amend the existing treaties. Nevertheless, these are not certain and right solutions for the EU's future. That is because, the constitutional treaty can provide a unified system – a constitutional order– which the EU needs for a long time.[99] Within a constitutional order, the EU can cope with the major political challenges facing Europe (European Parliament, 2006). It can thus cope with not only political challenges, but also challenges regarding the protection of human rights.

Due to these reasons, the constitutional treaty is very significant in the history of human rights in Europe. It is right that it ignores any direct reference to a human rights policy (Williams, 2004: 194). However, its contributions to the protection of human rights can be the initial steps on the way towards a more comprehensive human rights policy. It should not be forgotten that the

[99] The other reason may be that the constitutional treaty has been generally recognised as 'the fulfilment of the federalist goal of the 1950 Schuman Declaration' or as a means 'to become real citizens of a real EU Federation' (Coughlan, 2006: 4).

creation of the 'Network of Independent Human Rights Experts'[100] in 2002 and 'Human Rights Agency'[101] in 2003 are the results of these contributions.

Overall, the constitutional treaty provides a better protection, but not the best one (Lawson, 2005: 27). It provides a clear list of rights and gives it legal force. In addition, it eliminates the possible inconsistency between the ECHR and the Charter, and also between the two courts, the ECtHR and the ECJ. It also ensures an external review of human rights in the EU by an independent and international court. Finally, it reinforces the legal basis of human rights in the external policy providing for the first time legal personality to the EU (Art. I-7 TECE). Further, it also supports the consistency between its external and internal policies providing a single EU foreign minister (Art. I-28 TECE). Briefly, it leaves the door of sustaining the development of protection in human rights, but it does not entirely open it. For making these innovations of the constitutional treaty in practice, they need to be confirmed and then pursued first by the organs of the Union, and gradually by every individual in the EU. In other words, they need 'contuinity.' The constitutional treaty alone is not able to provide it, programmes and agencies regarding human rights should also be supported. In other words, the establishment of a comprehensive human

[100] The 'Network of Independent Human Rights Experts' was created in 2002, by the recommendation of the European Parliament. It was created to receive evaluations on the implementation of each of the rights laid down in the EU Charter. It produced its first report on 31 March 2003 on the situation of fundamental rights, in the period of the year 2002, within the EU and the member states. This report was prepared by taking into account developments in national laws, the case law of the ECJ and the ECtHR and any notable case law of the member states' national and constitutional courts.

[101] The establishment of Human Rights Agency was decided by the European Council in Milano, in 2003.

rights policy should be the aim. However, it should not be also forgotten that only the establisment of it does not mean the end of the problems. If a human rights policy can be established, then, there will be some other challenges. For dealing with these, new challenges, other avenues will have to be explored. In other words, there will always be a search for the better in the field of human rights.

CHAPTER VIII

CONCLUSION

The main aim of the thesis has been to analyse whether the constitutional treaty offers better protection of human rights in the EU. In order to realize the new contributions of the constitutional treaty to the human rights, it was essential to evaluate the treaties and the case law of the EU. In this respect, the thesis has first examined the development of human rights in the Union. Based on its evaluation, the thesis has found that there are mainly three significant contributions of the constitutional treaty in human rights' field. These are the incorporation of the Charter, the accession of the EU to the ECHR and lastly placing human rights to the heart of EU's external policy.

When the ratification process of the treaty is completely finished, the EU Charter will acquire full legal effect and will be part of the EU law. Therefore, the thesis has firstly focused on the Charter of the EU. After examining the main aim of its preparation and the preparation procedure –the Convention Body–, it has analyzed which rights the EU Charter includes, and for whom. Through this analysis, the thesis has identified that the Charter codifies the already existing civil, political, economic and social rights of European citizens and all persons resident in the EU. In addition, not only does it include the traditional rights, but also new rights such as data protection (Art.68), bioethics (Art.63). The thesis has stressed that the Charter

also consists of rights that were not included in the ECHR such as right to marry, right to found a family (Art.69) and most importantly, social and economic rights (Arts.87-98). After clarifying the content of the Charter, the thesis has explored the scope of the Charter. Within this context, it has argued that the main purpose of the Charter is not to create new competences, or to modify already existing tasks of the powers. It has also found that this feature of the Charter prevents possible confusions which can emerge relevant to the sphere of the competences of the Union institutions. This brief analysis on the content and the scope of the Charter has provided that the provisions of the EU Charter are addressed to the acts of member states (Art.VII-111/1 TECE). According to that, the candidate countries can not implement the EU law until their accession to the Union. However, the thesis has found that not only the member states but also the candidate countries have to take the Charter into account, because the application to the Union already involves the acceptance of and respect for the Charter. The thesis has then conluded that the Charter is a clear guide for not only the citizens of the EU but also for the candidate countries. Dealing with the effect of the Charter on the candidate countries has arised the question of the Charter's legal status, as it is predictable that having legal force of the Charter will reinforce the dependency of the candidates to the Charter. Therefore, in the last part regarding the Charter, the thesis has discussed the legal status of the Charter. Through this discussion, it has been realized that it is is now part of the constitutional treaty in the process of ratification. Once the constitutional treaty enters into force, the Charter then will have legal force. The thesis has explored that through the

legally binding Charter, the Union will have to respect the same standards for both internal and external policies. Moreover, the ECJ and other EU institutions will have to take it as a basic reference in the field of human rights. Consequently, the Charter will ensure to establish a uniform structure in the field of human rights.

In addition to incorporating the Charter, the constitutional treaty also allows the EU accession to the ECHR in its Article I-9(2). By means of accession, an external review will be ensured on abuses of human rights by an independent and a specialized court on human rights. So, after examining the Charter's influences in human rights field, the thesis has studied the possible results of the EU's accession to the Convention. While doing that, it has first explained the debate regarding the accession until the constitutional treaty. Then, it has put forward that some modifications are necessary in the present systems of the EU and the ECHR to make the accession in practice. After explaining the differences between the ECHR and the EU system, the thesis has asked whether these two different systems in the field of human rights lead to inconsistency. It has then scrutinized the consistency between the ECHR and the EU Charter, and also the consistency between case-law of the two courts, ECtHR and ECJ. The claims supporting that there is a risk of diverging lists of human rights and case law of two courts have been assessed. After this assessment, the thesis has recognized that a risk of inconsistency will not have to remain following the accession. In case of the accession, the ECJ and Court of First Instance (CFI), will be bound by the ECHR. The ECtHR will have

right to give the final decisions in the interpretation of both ECHR and the EU Charter. Moreover, the rights set out in the EU Charter will have to correspond in their meaning and scope to rights already laid down in the ECHR (Art. II-112/3 TECE). To conclude, the thesis has found that in the case that the constitutional treaty is ratified, it is predictable that this will provide the consistency, not inconsistency between the two systems. Moreover, it will enable European citizens to apply against the institutions of the EU, thus it will strengthen the protection of European citizens's rights. Most importantly, in the international area, the Union will be able to enhance its credibility confirming that it is a Union depended on the law particularly in human rights field. However, in case of the accession, it may be claimed that the autonomy of the EU law can be threatened, as the EU Charter will be bound with the ECHR. On the other side, the EU institutions, including the ECJ and the CFI, will be subject to the control of the ECtHR. It may be also claimed that the accession will threaten the autonomy of the ECJ. Therefore, the thesis has questioned whether the accession of the EU to the Convention is a threat to the automony of the EU law, and also the status of the ECJ. Based on its findings, it has underlined that the accession of the EU to the Convention can not be a threat to the automony of the EU law, and also the status of the ECJ. On the contrary, it may be a means to reinforce the EU law and the ECJ. That is because, through the accession, the EU law and the ECJ may enhance their credibility among the European citizens. In addition to that, the EU confirms its standing in the international sphere as a Union depended on the law in human rights field.

As a third contribution of the treaty, the thesis has examined human rights in the EU's external policy. After drawing a framework on human rights in the EU's external policy, the thesis has sought the improvements on human rights arising from the constitutional treaty. For this purpose, the legal basis of human rights in the external policy and the consistency between its external and internal policies has been scrutinized. As regards the legal basis, the thesis has found that the constitutional treaty strengthens the legal base providing legal personality to the EU (Art. I-7) for the first time and unifying the Union's external action under a single set of principles and objectives. As regards the consistency between its external and internal policies, it has identified that the constitutional treaty recognises the necessity of consistency between its external and internal policies by incorporating the Charter. That is because, human rights standards set forth in the Charter for internal policies are the same as for external policies. The Union thus have to respect the same rules when implementing both internal and external policies. In addition, it provides a single EU foreign minister (Art. I-28 TECE) for the first time. Last but not least, it guarantees that the Union will not only safeguard and advance its values in its external action, but also it will have to uphold them (Art. I-3(4) TECE). Consequently, the thesis agrees with the idea that the claims about the Union's hypocrisy on human rights' issues can be diminished through the contributions of consitutional treaty. The Union can be an effective and strong actor in both internal and external spheres. Hereby, not only it improves the current level of protection of human rights in the Union, but it also plays a key role in promoting human rights in the third countries.

Finally, the thesis has tried to identify the future of the constitutional treaty in the light of the recent developments, namely the Summits of June 2005 and June 2006. Within this context, a question has been dealt with. It has been asked whether the constitutional treaty promises a better protection for human rights emphasising the need of a human rights policy. It should be highlighted that the study of this thesis has already concentrated on reaching the right answer of this question. Examining the new improvements of the constitutional treaty in the human rights field has illustrated that the constitutional treaty provides a better protection, but not the best one. The treaty provides a clear list of rights and gives it legal force. In addition, it eliminates the possible inconsistency between the ECHR and the Charter, and also between the two courts, the ECtHR and the ECJ. It also ensures an external review of human rights in the EU by an independent and international court. Finally, it reinforces the legal basis of human rights in the external policy providing for the first time legal personality to the EU (Art. I-7 TECE). Further, it supports the consistency between its external and internal policies providing a single EU foreign minister (Art. I-28 TECE). Despite all those, the real need of the EU is a human rights policy. The constitutional treaty alone is not able to make these innovations in practice. Actually, a human rights policy may be the best way to ensure the effective implementation of the rules and decisions on human rights with its agencies, programmes. Nonetheless, before establishing a policy, as a precondition, the legislation about the policy should be well-prepared. In addition, legislative acts and judgments of the courts about them should not cause incompabilities. The constitutional treaty provides all those. Moreover,

the EU needs the constitutional treaty and its innovations such as the accession, a single foreign minister, legal personality, a European agency on human rights, etc. Although there are some proposals like 'de facto implemention' of these innovations, 'cherry-picking' from the constitutional treaty or the amendment of the existing treaties, the thesis has claimed that these are not certain and right solutions for the EU's future. It has pointed out that instead of these proposals, the constitutional treaty should be supported, as it can provide a unified system –a constitutional order– which the EU needs for a long time. Within a constitutional order, the EU can cope with the challenges regarding the protection of human rights.

Because of these reasons and based on all findings of it, the thesis has concluded that although it is not adequate, the constitutional treaty offers better. The contributions of it to the protection of human rights can be the initial step on the way towards a human rights policy. So, it should be expected that it is very significant in the history of human rights in Europe.

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