DISCRIMINATION IN THE EUROPEAN UNION: A PROBLEM AIMED TO BE RESOLVED OR JUST AN INSTRUMENT TO SERVE THE ECONOMIC TARGETS?

Avrupa Birliği'nde Ayrımcılık: Çözümlenmesi Hedeflenen Bir Problem mi Yoksa Sadece Ekonomik Amaçlara Ulaşmada Kullanılan Bir Araç mı?

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Abstract

The idea of European Union (EU), of which the traces can be pursued historically back to the 14th century, from the 1950s when the formal foundations of the Union was laid, up until today is based on the same aim: establishing a common market between member states, free of obstacles to '*free movement of goods, persons, services and capital*'. In the pursuit of its basic aim, the Treaty on the Functioning of the European Union (TFEU) prohibits certain types of discrimination, especially any discrimination on grounds of nationality prohibited by Article 18 of the TFEU.

The EU Commission, attaches special importance to the studies over the prohibition of nationality discrimination by setting this principle as one of the core principles underlying all Union policies. With the studies that have picked up speed in recent times, the aim of the EU has been stated to be achieving a deeper and a broader community, which would constitute a union not only consisting of an economic alliance.

The European Court of Justice (the ECJ or the Court) is, however, with no regard to the consistency in the application of the non-discrimination provisions. In some cases, the alleged discrimination is eminently strived to be abolished,

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whereas in others, particularly the ones in which the economic benefits are at stake, the Court does not refrain from discriminatory application.

The aim of this study is not only to examine the concept of 'discrimination' and its effects, but also to expose the somewhat 'twisted' approach of the ECJ, towards this problem, resulting in the prevalence of discrimination within the Union, in spite of the distinct articles contained in the TFEU. Meanwhile, this research aims to examine this 'corruption' comprehensively and produce some theories regarding the reasons behind discrimination in the EU and its continued existence.

Keywords: Discrimination on grounds of nationality, Problem of discrimination, Equality, EU-citizenship, Article 18 TFEU, Article 12 TEC, Free movement

Özet

Tarihsel olarak izleri 14. yüzyıla kadar izlenebilen Avrupa Birliği (AB); malların, sermayenin ve kişilerin serbest dolaşımı ve eşitlik ilkelerine dayanan ortak bir market sağlamak amacı ile oluşturulmuştur. Avrupa Birliği'nin İşleyişi Hakkında Antlaşma; bu amaç doğrultusunda Birlik içerisinde ayrımcılığı yasaklayıcı hükümler ihtiva etmekte olup, Antlaşmanın 18. maddesi, özellikle kişilerin tabiiyeti göz önünde bulundurularak yapılan ayrımcılığın engellenmesinin altı çizilmiştir.

Avrupa Birliği (AB) Konseyi ayrımcılığın önlenmesi ilkesini Birliğin temel prensipleri arasında göstererek bu konudaki çalışmalara önem vermiştir. Son dönemde hız kanana bu çalışmalar ile AB'nin amacının yalnızca ekonomik değil, sosyal değerleri de ön planda tutan ve her platform eşitliğe dayalı bir toplum oluşturma olduğunu göstermek için çaba sarf edilmiştir.

Avrupa Adalet Divanı (AAD) ise, ayrımcılığın önlenmesi hususundaki uygulamalarında, kimi zaman sosyal adaleti hırsla savunmuş ve eşitliği sağlamak adına tüm silahlarını kullanmış, ekonomik menfaatler devreye girdiği zaman diğer zamanlar da ise bu bakış açısından vazgeçerek istikrarsız bir tutum sergilemiştir.

Bu çalışmanın amacı ''ayrımcılık'' kavramının ve etkilerinin incelenmesinin yanı sıra, AAD'nin bu konudaki çelişkili yaklaşımını ve bu yaklaşımın nasıl kendi içinde ayrımcılığa yol açtığını ortaya koymaktır.

Çalışmanın genelinde ayrımcılığı (özellikle de tabiiyet ayrımcılığının) ortadan kaldırılması ve eşitliğin sağlanması adına açılan davalarda, AAD tarafından verilen kararların taşıdığı ikilemin, AAD'nin 'gerek sosyal, gerekse ticari değerlerin korunduğu bir Avrupa Birliği' formülünün ikinci bölümü olan ekonomik menfaatler bölümüne ağırlık vermesinden kaynaklandığı ve dolayısıyla istikrarsız ve çelişkili olan bu tablonun aynı zamanda bilinçli bir seçimin ürünü olduğu ortaya konulmuştur.

Anahtar Kelimeler: Tabiiyet ayrımcılığı, Ayrımcılık sorunu, Eşitlik, AB vatandaşlığı, Article 18 TFEU, Article 12 TEC, Serbest dolaşım

1. Introduction

The European Union (EU)[1] is set up with the aim of establishing a common market between member states, free of obstacles to ''*free movement of goods, persons, services and capital*''[2]. In the pursuit of its basic aim, the Treaty on the Functioning of the European Union (TFEU) prohibits certain types of discrimination, especially any discrimination on grounds of nationality[3]. Nationality discrimination is expressly prohibited by Article(Art.) 18 of the TFEU (ex Art. 12 of the Treaty on Establishing the European Community (TEC))[4], which states ''*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*''.

The prohibition on discrimination on grounds of nationality is of specific importance on the grounds that it is regarded as ''*one of the core principles*

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1 Up until the Treaty of Lisbon (Official Journal of the European Union (OJ) C306, 17.12.2007) which came into force in 01.12.2009, there was confusion on whether the term European Community (EC) or European Union (EU) is more correct to use. With the Article (Art.) 47 of Lisbon Treaty, 'legal personality' conferred upon the EU for the first time and the term issue had been solved. Thus, in this study, the term 'EU' will be used.

2 Consolidated Text of the Treaty on the Functioning of the European Union**,** OJ C83, 30.03.2010 (TFEU),Art. 26(2). Also at http://eur-lex.europa.eu/LexUri Serv/ Lex UriServ.Do?uri= OJ:C:2010:083: 0047: 0200:EN: PDF (17.08. 2011).

3 Ibid. Art. 18 See, also Charter of Fundamental Rights of the European Union, OJ C83, ***30.03.2010. A***rt. 21 (2).

4 Consolidated Text of the Treaty establishing the European Community, OJ C321E, 29.12.2006 (TEC).

underlying all Community policies''[5]. This statement is criticized by many commentators. De Búrca describes such statements as 'highly rhetorical' and impeaches the Commission of ''*making as indirect claim about the legitimacy of the Community legal order by suggesting that the EU legal system is permeated by a basic degree of fairness and justice*''[6].

Art. 18 TFEU is not the only Treaty provision where the equality principle or the principle of non-discrimination are expressly mentioned; Articles (Arts.) 19, 45, 49, 56, 57, 157(2) (a) TFEU (ex Arts. 13, 39, 43, 49, 50, 141(2)(a) TEC) all, even remotely, touch the concepts of equality and non-discrimination. The Union law declaring that the principle of non-discrimination is a principle, which underlies all Union aims, either fails to attain its 'underlying' objectives or the European authorities (the Commission, the Council and the Parliament) intentionally keep legislations that genuinely aim at non-discrimination limited in order to serve a greater nuncupative cause.

It has been argued that this alleged hidden agenda is set to secure the commercial aspects of the Union while the authorities wear a concerned attitude and appear to be struggling with the problem of discrimination. However, the counterview of this claim relies on the applications of the European Court of Justice (the ECJ or the Court) and suggests that the decisions of the Court regarding discrimination on grounds of nationality reach out not only to those cases where there is *prima facie* discrimination but also to actions, which are *de facto*, discriminate against nationals of other Member States. Advocate General (AG) Francis G. Jacobs, on the contrary, states:

''*The prohibition on discrimination is of great symbolic importance inasmuch as it demonstrates that the Community is not just a commercial arrangement between the governments of the Member States, but a common*

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5 Communication from the Commission on Racism, Xenophobia and Anti-Semitism. Proposal for a Council Decision Designating 1997 as European Year Against Racism, European Union Commission Document (COM) (95) 653 final, 13 December 1995.

6 **DE BÚRCA,** *Grainne*, The Principle of Equal Treatment in EC Law, London: Sweet & Maxwell, 1997, p.13.

enterprise in which all the citizens of Europe are able to participate as individuals''[7].

The discussions mainly focus on the legitimacy of the Union legal order. The idea that a national of one Member State is favoured over another in certain circumstances is, undoubtedly in opposition to the fundamental principle of non-discrimination. However, anyone who is familiar with the case law of the ECJ can easily observe that this fundamental principle has not successfully created the preventative effect on discrimination, as one would have hoped. This failure, presumably, is a consequence of the selective application of the Treaty provisions on non-discrimination. De Búrca argues that the selective application is rather intentional and non-discrimination principle is ''*only selectively relevant*'' in certain specific areas of the Union[8].

The selective application of the non-discrimination principle is discussed by academics such as Mark Bell who assert that ''*The right to non-discrimination is thorough and well established in some areas, but weak and fragmented in others*''[9]. Incidentally, the areas where this principle is well established and the prohibitions are relatively strict, are happen to be the areas where the maintenance of equality serves the financial aspects of the Union in a beneficial manner.

The imbalance of regulations consequently, has motivated a hierarchy of equality[10], which is followed by a promotion of privileged categories like nationality discrimination. However, it is rather implausible and highly unlikely that these concepts have emerged unconsciously or as results of a genuine controversy against discrimination in the EU.

The aim of this study is not only to examine the concept of 'discrimination' and its effects, but also to expose the somewhat 'twisted' approach of the EU

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7 Opinion of **JACOBS, Francis G.** (Advocate General) in Joined Cases C-92/92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH, Branntwein* [1993] Common Market Law Review (CMLR) 773.

8 **DE BÚRCA,** *Grainne*, The Role of Equality in EC Law, London: Sweet & Maxwell, 1997, p.14.

9 **BELL, Mark,** Anti Discrimination Law and the European Union, Oxford: Oxford University Press, 2002, p.32.

10 **MCMULLAN, Caroline / HEGARTY, Angela / KEOWN, Caroline,** ''Hierarchies of Discrimination; the Political, Legal and Social Prioritization of the Equality Agenda in Northern Ireland'', Equal Opportunities International, Volume 15 (1996), pp.1.

authorities towards this problem, resulting in the prevalence of discrimination within the Union, in spite of the distinct articles contained in the TFEU[11]. This research aims to examine this 'corruption' comprehensively and produce some theories regarding the reasons behind discrimination in the EU and its continued existence. Furthermore, the essential objective is to raise questions about the feasibility of a 'discrimination-free' Union despite the current attitude demonstrated by the authorities. The questions that need to be answered, in order to attain these objectives, can be summarized as follows: Firstly, do certain institutions overlook or even promote discrimination. Secondly, provided that the EU is occupied mostly with the 'internal-market', what are the effects of the non-discrimination principle on the market dynamics and finally, is discrimination really an inevitable problem or an instrument for the EU authorities through which they secure the commercial dimensions of the Union.

In this study; at first hand, the EU will be analyzed through the application of its principles, the history of the Union will be reviewed briefly, and discrimination in the context of the Union will be discussed through the position of the EU authorities concerning the concept of discrimination, with the case law of the ECJ. Thereinafter, some theories regarding the causes and effects of the 'problem' of discrimination will be discussed and the possible methods of eluding this issue will be analyzed.

2. The EU and the EU LAW on DISCRIMINATION

In order to attain a solid judgment on the issue of discrimination in the context of the EU, first of all, the emergence, the initiatives underlying the establishment of the Union and the main tasks it is designed to achieve should be examined.

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[11] Lisbon Treaty modified TEC and Consolidated Text of the Treaty on the European Union, OJ C321E, 29.12.2006 (TEU-2006) by renumbering the articles of both Treaties and renaming the former. In terms of the Treaty provisions examined in this study, the material scope, though some minimally amended, have not changed throughout the Treaty Amendment Process. Meanwhile, both the new and the old numbers of the related articles are given in the study for the readers who want to make a comparison., yet in the cases cited, the updated versions will be used. For a further analysis, see **CRAIG, Paul,** The Lisbon Treaty:Law,Politics and the Treaty Reform, Oxford: Oxford University Press, 2010, pp.199-214.

2.1. General Background of the Union

World War II had left Western Europe weak and divided. The expansion of the Soviet Union coupled with the economic development of United States, generated a highly intimidating environment for wounded Europe. To overcome this weakness and avoid the imbalance of power, some of the Western European States, with the proposal of Robert Schuman (The French Foreign Minister at the time) decided to establish an international organization in order to develop a 'common market' in Europe. In accordance with the 'Schuman Plan', the 'Treaty establishing the European Coal and Steel Community'[12] (ECSC) was signed on 18 April 1951. This was designed to be more of an economic cooperation which would on the one hand compensate for the financial weaknesses caused by the War, on the other hand curb any excessive movements of nationalism.

The organization was initiated by bringing the coal and steel production of France and Germany under a common authority. As Sundberg-Weitman suggested ''*It should be open to any other European State to join this organization, which was, above all, intended as the first step towards a European Federation*''[13]. According to Robert Schuman, who is deservedly, regarded as the 'Founding Father' of the EU described such a community as indispensable in order to prevent peace. Moreover establishing an economic alliance in Europe in such a critical time, not only made Western Europe stronger, but also played a significant role in avoiding a potential war amongst the European States.

The economic success of the ECSC generated wide acclaim and a desire to expand this plan to other areas of economy. This resulted in the establishment of the European Economic Community[14] (EEC) on 25 March 1957. ''*The aim of the EEC, however, was much wider and less precisely defined than that of the*

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12 Treaty establishing the European Coal and Steel Community, OJ-not published, Date of signature: 18.04.1951, Entry into force: 24.07.1952.

13 **SUNDBERG-WEITMAN, Brita,** Discrimination on Grounds of Nationality, Free Movement of Workers and Freedom of Establishment under the EEC Treaty, Netherlands: North Holland Publishing, 1977, p.3.

14 Treaty establishing European Economic Community, OJ- not published, Date of signature: 25.03.1957, Entry into force: 01.01.1958.

ECSC''[15], naturally because the area of operation was considerably larger than the coal and steel industries.

The EEC, by virtue, of the 'Treaty on European Union'[16], which is also known as the Maastricht Treaty, was renovated and became the 'European Community' (EC). In addition to this, the 'EEC Treaty' was renamed as the 'Treaty establishing European Community'[17]. Unlike the EEC; the EC was claimed to be more than just an economic union.

After approximately twenty years, with the entry into force of the Lisbon Treaty which is regarded as the most important modifying Treaty acted after 1992, further changes had occurred[18]. The 'Treaty establishing European Community' had become to be named as the 'Treaty on the Functioning of the European Union' and articles of both TEC (new-TFEU) and TEU were renumbered. This time, it has gone a step further and EU has asserted to be the Union of justice and equality which would broaden the alliance between the European States However, as it will be revealed in the following sections, the goal of deeper integration failed to realize some of the most basic principles upon which it was founded.

2.2. The Aim of the EU

The tasks of the European Union were specified in six parts under Art. 3 (ex Art. 2) TEU[19]. In the first two paragraphs; promoting and preserving the values of the Union people and achieving their ''*well-beings*'' were set out to be the aims of the Treaty.

Leaving the terminology used in the former sections behind, in Art. 3(3) TEU it was clearly specified that:

"*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and*

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15 **HARTLEY, Trevor C.,** European Union Law in a Global Context: Text, Cases and Materials, Cambridge: Cambridge University Press, 2004, p. 12.

16 Treaty on European Union, OJ C191, 29.07.1992.

17 Consolidated Text of the Treaty establishing the European Community, OJ C224, 31.08.1992.

18 See, also supra note 11. For a detailed review, see **BOZKURT,Enver/ ÖZCAN, Mehmet / KÖKTAŞ, Arif,** Avrupa Birliği Hukuku, 4th edn., Ankara, 2008, pp. 60-73.

19 Consolidated Text of the Treaty on European Union**,** OJ C83, 30.03.2010 (TEU).

price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance''.

Following paragraphs strengthened the purpose highlighted in the previous one by aiming at the establishment of ''*economic cohesion*'', ''*economic and monetary union*'', ''*free and fair trade*'' and ''*eradication of poverty*''[20].

It is clear that, Art. 3 TEU embraces an imbalance between social and economic integration of the Union. Besides, the wording of the Article implies that the primary goal is to establish a common market and an economic union. The social aspects of the Article occupy a rather subsidiary role in the context of the Treaty. In other words, for an organization that claims to achieve a deeper and a broader Union, which would constitute a union, not only consisting of an economic alliance, but also involving social integrity and an individual justice system in order to 'secure' equal treatment, the text of the 'aim-stating' article speaks too loudly of economic interests. It has been argued that Union law tends to convert fundamental rights into ''*communitarian legal terms*''[21]. Furthermore, in the context of the EU, basic human rights can easily be manipulated into terms that would serve the achievement of the Union's economic objectives. Regrettably, it should be noted that the EU, even in its most social aspect, mainly pursues the economic integration of the Union. The Commission, to the contrary, disclaims such statements and declares that the economic goals play an instrumental role in bringing nationals of different Member States together, and thereby solidifying the social integration within the Union.

The European Parliament establishes the leading aims of the EU as ''*promoting economic and social progress by providing employment and equal treatment, introducing European citizenship and developing Europe, to be an area of freedom, security and justice*''[22].

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20 Ibid. Art. 3.

21 **COPPEL, Jason/ O'NEILL, Aidan,** ''The European Court of Justice; Taking Rights Seriously'', Legal Studies, Volume 12 (1992), p.227.

22 See ''Five top aims of the EU'', http://news.bbc.co.uk/cbbcnews/hi/newsid_2130000/ newsid_2139000/21390 71.stm (25.06.2011).

The statements of the EU authorities regarding the objectives of the Union, suggest that, the EU ultimately, aims at establishing a Union of justice where the principle of equal treatment underlies all Union actions. However, the exponential issue of discrimination either, does not strike the authorities as an obstacle to these stated objectives or it stands too far outside their jurisdiction.

2.3. Discrimination in the Context of the European Union

The measures taken by the EU against discrimination are unified under the expression of the principle of non-discrimination. The most eminent form of this principle is prescribed in Art. 18(1) of the TFEU (ex Art. 12(1) TEC)) under which ''*any discrimination on grounds of nationality''* is prohibited. The essence of this Article constructs a conception that is seemingly aiming at non-discrimination. In addition to this, the TFEU has numerous articles regarding the Union programme on discrimination[23].

The European Commission, over the years, has launched various campaigns against discrimination[24]. By virtue of the anti-discrimination clause contained in the Treaty of Amsterdam[25], the EU proclaimed the 'Charter on Fundamental Rights' at the Nice European Council in 2000. Enhancements to the Treaty were installed by sanctioning EU Directives 43 and 78, which are regarded as the EU anti-discrimination directives[26]. Although the issue of legal status of the Charter had been left unsolved until Lisbon Treaty, this 'long-term' problem, eventually, came to an end and the Charter has become legally binding[27].

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[23] See Articles (Arts.) 36,37(1), 40(2), 45(2), 46,57(2), 61, 92 72,95(1) 101(1)(d)102(c) 199(4) 199(5) and 200(5) TFEU (ex Arts. 30, 31(1), 34(2), 39(2), 40, 50(2), 54, 72, 75(1), 81(1)(d), 82(c), 183(4), 183(5) and 184(5) TEC).

[24] For an example, see the campaign, named ''For Diversity Against Discrimination'', http://ec.europa.eu/justice/ fdad/ cms/stop discrimination/activities/?langid=en (27 May 2011).

[25] The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, OJ C340, 10.11.1997.

[26] Council Directive 2000/43/EC, OJ L185, 29.06.June 2000, implements the principle of equal treatment between people, irrespective of racial or ethnic origin. Council Directive 2000/78/EC, OJ L303/16 of 27.11.2000, implements the principle of equal treatment in employment and training irrespective of religion or belief, disability, age or sexual orientations of workers and employees.

[27] For a detailed analysis, see **VAN BOCKEL, Bas,** The ne bis in idem Principle in EU Law, North Canada,USA:Kluwer Law International, 2010 pp. 173-202.

It would, conclusively, be ill advised to consider that the EU suffers from a shortage of instruments to eliminate discrimination. In theory, the European Union seems eager to abolish discrimination. However, in application, the EU has been and still is failing to achieve any positive progress as far as the issue of discrimination is concerned regardless of the various instruments it has at its disposal. The results of the survey seem to confirm the above-cited claim[28].

According to this research, discrimination on grounds of nationality, in particular, has the highest prevalence within the EU. Particularly, in countries such as Sweden, Netherlands, France, Denmark, Belgium and Italy, between 80 % and 85% of the citizens stated that, discrimination on grounds of nationality exists and gains strength in the EU is correlated with the State, which the individual is from. Therefore, this part of the survey established that, in the wording of the results sheet 'discrimination on ground of nationality is widespread within the European Union'. Moreover, the question 6 of the survey, which asked; ''*Would you say that belonging to the following groups tends to be an advantage or disadvantage or neither in your society at the current time?*''[29]. The groups being; disabled, aged, being a Roma (discrimination on grounds of nationality) and coming from a different ethnic origin, the public stated that belonging to any of those groups constituted a disadvantage when compared to the majority of their home States.

The public poll, eventually, revealed that, discrimination on grounds of nationality (64%), discrimination on grounds of being disabled (53%), discrimination on grounds of sexual orientation (50%) and discrimination on grounds of religious beliefs (40%) are widespread and still in existence. However, Bell indicates that ''*Anti-discrimination law has been a central element of social policy from the earliest stages of European integration*''[30]. When it is assumed that anti-discrimination law had been a central element of social policy, the scenery takes a turn for the worse. In other words; when the EU seemingly, struggles to abolish discrimination, through tough measures and legislative policies and even though the general policy underlying all Union

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28 ''Eurobarometer EC'', January 2007, http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf (06 June 2011) , (Eurobarometer EC), pp. 4-5 and pp. 7-14.

29 Eurobarometer EC, **at p.5.**

30 **BELL,** p. 32 (par. 1).

aims is designated as the principle of equality; it is inexplicable that discrimination as a general conception is still so widespread within the EU.

There must be a deeper explanation for this fact rather than just 'failure'. The reason why the EU is 'way' over-sensitive as far as discrimination is concerned, is of essential importance: Is it because the Union authorities, somewhat naively, are devoted to constituting justice and peace in the Union or does the issue of discrimination stand in the way of the economic benefits of the EU?

2.3.1. Is the Problem of Discrimination Dealt with Seriously in the Context of EU?

In the first part of the previous century, the principle of non-discrimination was based on ''*protectionist*'' grounds. In terms of protectionism policies, it has been stated that '*'Custom duties and quantitative restrictions on imports were intended to induce people to buy domestic goods rather than imported ones*''[31].

Quantitative restrictions have served as an instrument for a State to restrict imports, in order to protect its own industries. This kind of protectionism was not 'cut for' a common market and most importantly for free trade. That is to say, the EU authorities have come to the realization that, to attain a 'common market' within the EU, they had to abolish any measures restricting the amount of commodities that may be imported from another Member State. Consequently, in ***Geddo v. Nationale Risi***,[32] the ECJ by virtue of Art. 34 TFEU (ex Art. 28 TEC), held that such measures amounting to a total ban on imports constituted a quantitative restriction, and therefore were prohibited.

It has been argued that Art. 34 TFEU has gone further than what was initially intended by it since ***Casis de Dijon***[33] case. ''*It has been clear since **Casis de Dijon** that Art. 30* TEC (now Art. 36 of the TFEU) *went beyond a mere prohibition of measures adopted with a protectionist objective*''[34]. The Court's

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31 **SUNDBERG-WEITMAN,** p. 9 (par. 1).

32 Case 2/73 *Riseria Luigi Geddo v Ente Nazionale Risi* [1973] European Court Reports (ECR) 865.

33 Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

34 **BERNARD, Nicolas,** ''Discrimination and Free Movement in EC Law'', International and Comparative Law Quarterly, Volume 45 (1996), p. 91 (par. 2).

ruling established that the concept of measures having equivalent effect on quantitative restrictions is not to be perceived as, any action that had a negative impact on the quantity of inter-state trade.

While the restrictions relating to 'product rules' were still subject to the principle of mutual recognition, which was accepted as a consequence of ***Cassis de Dijon***, the ruling in ***Keck***[35], which involved the resale of goods at a loss, contradictory to a French Law prohibiting such an action, revealed that the outer limit of the law on the rules relating to prohibition of indiscriminately applicable measures could be enforced as 'selling arrangements' which were regarded as being outside the provisions of Union law.

Art. 34 TFEU, which caused certain ambiguities variety in application, was highly criticized by many writers. As observed by Chalmers ''*the only certainty about Art. 28 TEC was that it was confused*''[36].

This Article is applicable only where there is a discriminatory impact on imported goods. According to Bernard, the difference between requirements imposed on goods and restrictions on selling arrangements is that no specific evidence of discrimination needs to be adduced regarding the requirements on goods themselves, as the very imposition of the importing State's rules is per se discriminatory, although such discrimination may be justified by reference to a legitimate objective[37].

This inconsistency in application can be grounded on the EU authority's tendency to 'bend the rules' and interpret regulations in a manner that best serves the growth of economy in the EU. Moreover, Art. 36 of the TFEU, which states that:

''*The provisions of Articles 34 and 35 (ex. Art. 29 TEC) shall not preclude prohibitions or restrictions on imports exports or goods in transit justified on grounds of public morality or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing*

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35 Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097(*Keck* case).

36 **CHALMERS, Damian,** ''Repackaging the Internal Market- The Ramifications of the Keck Judgment'', European Law Review, Volume 19 Issue 4 (1994), pp. 385. See, also **WEATHERILL, Stephen**, Cases and materials on EU law, Oxford University Press, 2007, p. 391.

37 **BERNARD,** pp. 92–93.

artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'', forms a suitable environment for justification of discriminatory measures. Furthermore, Art. 36 TFEU allows justification for direct discrimination in contrary to mandatory requirements, which provide grounds of justification for indirect discrimination[38]. The wording of the Article proves that it legitimizes discrimination. What is more, various ECJ case precedents contribute to the ambiguity to the text of this Article.

The ***Aragonesa case***[39] concerns import licenses and how they are dealt with under Union provisions. In particular, Aragonesa de Publicidad Exterior, which operated advertising hoardings, came into conflict with the Departmento de Sanidad y Seguridad Social (Department of Health and Social Security of the Autonomous Community of Catalonia) on the basis of failing to comply with the prohibition issued by the 'Department'. This rule involved a prohibition on the advertising of beverages having an alcoholic strength of more than 23 degrees, in the media, on the streets, and highways (except to indicate centres of production and sale) in cinemas and on public transport[40]. The ECJ held that such a prohibition does not constitute the means of discrimination and that even if it constituted a measure having equivalent effect in the context of Art. 34 TFEU; it is in accordance with the public security clause in Art. 36 TFEU. Besides, the prohibition on advertising such a specific commodity neither affects nor restricts the trade between Member States.

In light of the Court's decision, one may assume that the mandatory requirements doctrine is not competent to justify direct discrimination, which can only be justified under Art. 36 TFEU. However, the Court decided otherwise in the ***Walloon Waste Case***[41]. The case obviously involved direct discrimination by virtue of the fact that 'Wallonia' was specifically separated in applications regarding, the disposal of waste, when compared to other Member

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38 **EHLERS, Dirk/ BECKER, Ulrich,** European Fundamental Rights and Freedoms, Berlin: Walter de Gruyter, 2007, pp. 243-244.

39 Joined Cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamato de Sanidad y Seguridad Social de la Generalitat de Cataluna* [1991] ECR I-4151, (*Aragonesa* case).

40 See the case summary and operative part of the *Aragonesa* case.

41 Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

States. Since environmental protection was not included as a method of justification under the scope of Art. 36 TFEU and because this measure is in accordance with the Union benefits, the ECJ came to an arbitrary decision. The Court argued that such a direct discrimination could be justified under mandatory requirements, regardless of previous judgments that do not support this conclusion.

The above stated examples demonstrate that a surprisingly large amount of the measures taken by the Union Institutions, in order to develop and enhance the EU, provide grounds for arbitrary implementations thus, applications that are discriminatory. The presumed reason of such inconsistency can be attributed to the tendency of the EU authorities, to lay out economically guided regulations that are designed to be perceived as, social integration policies within the Union.

Free movement provisions, for that matter, which are described as 'the ultimate application' towards the social integration within the EU, when examined in a detailed manner, reveal that the primary aim is not to enhance the social integration process after all. As mentioned earlier, quantitative restrictions, prohibited by Art. 34 of the TFEU, constitute the essence of one (free movement of goods), among the four freedoms which are classified under 'Fundamental Rights'[42]. The EU law has abolished such measures of national protectionism, as they did not sit well with the idea of a 'common trade market'. The outcome is simple: 'smooth trading' between the Member States free of barriers and restrictions, thus the free movement of goods. Free movement of persons, on the other hand, tough it seemed like the most humane application of the Treaty provisions, was implemented to generate competition and therefore, enhance production quality and quantity in the Member States.

The main point here is that it would be unrealistic to even suggest that free movement provisions aim solely at social integration within the Union. However, Derrick Wyatt claims that ''*Such a functional economic approach to the interpretation of the free movement provisions is likely to be inadequate for two reasons*''[43]. As an initial basis for justification of his argument, he puts

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[42] **KARLUK, Rıdvan,** ''Avrupa Birliği'nde Dört Temel Özgürlük'', in Avrupa Birliği Hukuku ve Avrupa Kurumları, Ankara:Türkiye Barolar Birliği Yayınları, September 2006, pp. 83-133.

[43] **ARNULL, Anthony/ WYATT, Derrick,** Wyatt and Dashwood's European Union Law, London:Sweet & Max-well,, 2006, p. 705.

forward the provisions outlined in the text of Art. 6 of the Clayton Anti-Trust Act, which states ''*The labour of a human being is not a commodity or an article of commerce.*''[44] and the rights granted to the workers by Art. 45 TFEU (ex Art. 39 TEC). Wyatt suggests that by using these rights, the Union worker would, not only be serving the economic objectives of the EU, but also he would have a chance to improve his standard of living.

The second basis of this claim has to do with the history of the Union and the previous attempts to form various economic unions in Europe. In accordance with Wyatt's claim, which indicates that a similar political aim has been tried to be achieved by means of economic integration in the past yet it has failed, the real reason why the EU seems so eager to abolish discrimination becomes eminent. That is to say, the EU authorities, eventually, had to come to the realization that it is not feasible to attain such a political and economic union unless social integration was also provided, thus, establishing social integration became the first objective for the EU.

This claim rather than being entirely incorrect, is incomplete with regards to whether the free movement provisions function as economic tools for economic integration or not. Nonetheless, the two reasons, on which the claim is based on, only substantiate the argument of this study. The fact that the EU authorities attached so much importance to social integration, demonstrates their understanding of the importance of providing social justice to be able to maintain, their economic targets.

Art. 18 of the TFEU which is regarded as the very essence of the free movement provisions[45] and the free movement provisions themselves are demonstrated as the tools which allow the Union worker to improve his standard of life and exercise his rights in freedom and dignity. In this context, as AG Francis G. Jacobs stated, the fundamental object aimed to be attained by the Treaty is ''*…to achieve an integrated economy in which, the factors of production, as well as the fruits of production, may move freely and without distortion thus, bringing about a more efficient allocation of resources and a*

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[44] The Clayton Antitrust Act, 15.10.1914, 15 United State Code 18**,** Chapter. 323, 38 Stat. 730, Art. 6.

[45] **TEKİNALP, Ünal /TEKİNALP, Gülören,** Avrupa Birliği Hukuku, İstanbul, 2nd edn., May 2000, p.330.

more perfect division of labour''[46]. This remark by AG Jacobs constitutes an exemplary indication as far as the actual function of the free movement provision is concerned.

The free movement provisions and their purpose play an essential role in pivoting this study's arguments on facts. Forasmuch as they provide the strongest indication for the EU authorities to claim that, the principle of equality and the non-discrimination principle occupy a central role in EU law. This claim has also been proven otherwise by the case law of the EU itself, which will be examined in the next section. It should, however, be noted that the free movement provisions do not serve any other function than justification for abolishing protectionism by assuring that the 'fruits of production' (goods) and the 'factors of production' (workers and services) may move freely within the Union. In other words, the principle of equality acts as an instrument to achieve other Union goals as, freedom of movement and the integration of the market.

This research does not intend to pin the EU as a 'wholly discriminatory' Union. For, on the one hand, given the provisions and the legislations on discrimination, it is eminent that, EU strives to abolish discrimination; on the other hand, it does not refrain from discriminatory applications when the economic benefits are at stake. Therefore, it would be well advised to label EU as a 'partially discriminatory Union'. The so-called 'war' on discrimination, is not the outcome of a 'pure intend' to establish a socially enhanced Union, but it is a consequence of the market oriented view of the EU law. Discrimination has to be eliminated in order to provide more workers and facilitate free movement, which entirely serves to the market integration.

The effective functioning of the internal market depends on the worker's mobility and his ability to move feely within the Union to find employment. ''*Such persons are likely to find this challenging if they counter discrimination on grounds of nationality*''[47]. This constitutes the one of the primary reasons why the EU authorities intend to abolish discrimination, yet somehow they manage to create an image, which causes many commentators to suggest that the principle of non-discrimination underlies all Union aims. The authorities

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46 **JACOBS, Francis,** the General Principle, p.1 (par. 4).

47 **SARGEANT, Malcolm,** Discrimination on Grounds of Nationality, Edinburgh, UK: Pearson Longman, 2004, p.16 (par.1).

indicate that freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship[48].

The principle of non-discrimination does play a significant role in the EU law, and freedom from discrimination is a right conferred by the Treaty, however, their application is selective. It is not that the Union authorities care 'a great deal' about the social aspects of a non-discriminatory Union; it is the fact that they are obliged to provide a non-discriminatory environment 'free of obstacles' to achieve a greater economy and attain the market integration.

The concept of 'discrimination in the EU' is rather different from what is implied by the wording of the text. This bizarre conception of the issue betrays itself, in the evaluation of the main aims and the whole structure of the EU. Granting rights only to a 'scope of people', creating a concept called 'EU citizenship', differentiating between the 'EU citizens' and the third country nationals, even though they lawfully reside in the same territory, even in the same city, in any event enter the scope of discrimination. Therefore, the concepts of non-discrimination and equal treatment stand far outside the reach of the EU, even if the justice is somehow provided in its scope of application. Regrettably, it seems impossible for EU to attain such level of justice provided that it means the market-oriented structure has to be transformed into a balanced system of both social and economic integration.

The aforementioned analysis, in conclusion, develops an idea of discrimination in the context of the EU law. However, in order to solidify the point, the applications of the ECJ must be examined in detail. The arbitrary applications and decisions of the Court lack a certain standard in case law and plays a crucial role in proving this study's argument.

2.3.2 The Case Law on the Issue of Discrimination: Does the EU Jurisprudence Sincerely Support an Anti-Discriminatory Viewpoint?

It would be more effective to examine the case law separately and as a whole in order to basically illustrate the variances in application regardless of

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48 Opinion of Advocate General Francis JACOBS in Case C-274/96, *Criminal Proceeding Against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637, (*Bickel and Franz* case), par. 24.

the theory. This section of the study consists of cases regarding the free movement provisions and discrimination as a result of the application of these provisions.

The first case to be examined is the ***Wood*** case[49], where Helena Wood, a student in London died in a traffic accident in Australia. Her parents, as an outcome of the claim they brought before the French authorities, have reached an agreement with the guarantee fund which, entitles the persons related to the late Helena Wood a certain amount of compensation. However, this agreement excluded the father of the deceased James Wood, on the grounds of his British nationality.

Mr. Wood who had been living, working and paying taxes in France for 20 years claimed his right to the above-mentioned compensation relying on the fundamental principle of non-discrimination on grounds of nationality which-as noted earlier under Art. 18 TFEU.

The ECJ held that, ''*...because Mr. Wood's situation falls within the scope of application of the Treaty*…'' as a Union national who has exercised his right within the free movement provisions, ''*...he may rely on his right, not to suffer discrimination on grounds of nationality*'' [50].

What needs to be pointed out in this judgment of the Court is that Mr. Wood has been granted compensation relying on his right not to suffer discrimination on grounds of nationality only because he is considered as an EU citizen. Art. 18 TFEU prohibits any discrimination on grounds of nationality provided that the specific situation falls under the scope of the application of the Treaty. The second paragraph of the Article constitutes an eminent authorization to nationality discrimination against 'non-Union nationals'. That is to say, if Mr. Wood had not been an EU citizen he would have been deprived of the aforementioned compensation. In other words; a non-Union national, residing lawfully and working in the same Member State, is considered condign to suffer from discrimination on grounds of nationality, where as a British national, under the same circumstances is protected by Art. 18 TFEU solely because he has used his rights granted by Art. 39 TEC (now Art. 45 TFEU).

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49 Case C-164/07 *James Wood v. Fonds de garentie des victimes des actes de terrorisme et d'autres infractions* [2008] ECR I-4143, (*Wood* case).

50 **Ibid. par. 12.**

It would be irrational to discuss whether this application constituted discrimination on grounds of nationality or not. Even though there have been arguments regarding the interpretation of Art. 45 TFEU which secures the right of free movement of worker, it could have been perceived to include non-EU citizens lawfully residing and working within the EU[51]. However, by this judgment the Court of 'Justice' has legitimized discrimination against non-Union nationals lawfully residing and working within the EU.

The entire concept of the EU citizenship, which was introduced under Art. 17 of the Maastricht Treaty, extended by the Treaty of Amsterdam[52] and as a final attempt, (though) 'minimally' amended[53] under Art. 20 of the TFEU, generates discrimination against, non-EU nationals.

The discrimination detected in the ***Wood*** case essentially originated from the concept of the EU citizenship being per se discriminatory. Another case related to discrimination on ground of nationality and the concept of EU citizenship is, ***Bickel and Franz***[54], a case that demonstrates how the ECJ acts with no regard to the consistency in application of the provisions. An Austrian national, who had been found guilty of driving a 'lorry' under the influence of alcohol in Italy and a German tourist condemned with the possession of a prohibited type of knife, demanded to have the legal proceedings to take place in German. They based their request on the rules that protected the German-speaking community in the Italian province of Bolzano. The Court considered this, as an act of discrimination on grounds of nationality and indicated that the freedom to provide services included all citizens of Member States, who are in another Member State, with the intention to receive services, issued, as what I would like to call, a controversial decision. The ECJ held that:

''*The exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to*

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51 **BURROWS, F.,** Free Movement in European Community Law, Oxford:Clarendon Press, 1987, p.124

52 See supra note 25.

53 For a detailed analysis, see **BIRKINSHAW, Patrick,** European Union Legal Order After Lisbon, North Canada,USA:Kluwer Law International, 2010, see pp.201-204.

54 *Bickel and Franz* case, see supra note 48.

communicate with the administrative and judicial authorities of a State on the same footing as its nationals''.[55]

In accordance with Art. 18 TFEU, Mr. Bickel and Mr. Franz were, as the Court noted ''*In principle, entitled to treatment, no less favourable than that accorded to nationals of the host Member State so far as concerns the use of languages which are spoken there*''[56].

The case involved applications of the criminal legislation in Italy. However, the basis of the decision and the judgment itself constituted the key features as to the aims of this study. The verdict reached by the Court, as cited above is highly controversial, to the effect that the reasoning of the decision is based on discrimination not only against non-EU citizens but also against the 'socially-privileged' EU-citizens.

The broad 'interpretation' of the right to move and reside freely within the Union, suggests that this right is subject to enhancement if the person exercising the right is able to use the given language as advanced as to communicate with the authorities of that State. The 'reverse-expression' of this decision implies that in a hypothetical situation where, a French tourist counters the same circumstances, s/he will have to seek a French-speaking community in order to 'enhance' his rights that are granted by the Treaty. Otherwise, he will have to settle with the 'same old', standard rights, which he is entitled to as an EU-citizen moving freely within the Union. In another hypothetical situation, where a Member State national who is not from a German-speaking country, but happens to speak German as a second language, demands to have the proceedings in German, claiming that he would be able to express himself better without an interpreter, in the exact same circumstances as Bickel and Franz. In accordance with the previous judgment of the Court, this individual might as well be discriminated on the grounds of his linguistic skills. Even though he is a Member State national exercising his 'Treaty-given' rights in another Member State, he cannot 'enhance' his rights under the reason that he is not able to use the given language on the same footing as the nationals of that Member State. Therefore, Mr. Bickel and Mr. Franz in this particular situation happened to be

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55 Ibid. par. 15.

56 Ibid. p.16.

'more equal' when compared to other Member State nationals in a similar condition.

Some commentators suggest that because this case depends on linguistic ability, it constitutes indirect discrimination; therefore, it should be subject to objective justification. However, the ECJ, in the ***Bickel*** case had already detected the nationality discrimination, which consequently disapproves such arguments.

The following two cases are of significant importance with regard to introducing the application of the citizenship provision for the first time.

The first case is that of ***Maria Martinez Sala***[57], where a Spanish national who had been living and working in Germany for a number of years, applied for a child-rearing benefit but was refused on the grounds that she was not a German national and she did not hold a residence permit at the time, even though she had granted a residence permit in the past. She objected that the grounds, which she received a refusal constituted discrimination on grounds of nationality. However, the German Government argued that she did not come within the scope of application of the Treaty even if she had been discriminated. The ECJ, on the contrary, indicated that because she was authorized to live there before, she should be considered as a lawfully residing citizen of another Member State and that in accordance with the citizenship provisions provided by Art. 21 TFEU, she came within the scope of the application of the Treaty. Consequently, she was entitled to rely on Art. 18 TFEU and thus, shield herself from suffering discrimination on grounds of nationality. The further application of this judgment was recorded in the ***Grzelczyk*** case[58]. Rudy Grzelczyk, a French Student who was studying in Belgium, had undertaken part-time work during his first three years in order to pay his rent. However, in his final year, he decided not to work and focus on his studies, instead of working he applied for 'minimex', which was a non-contributory minimum subsistence allowance for students. He received a refusal from the Government of Belgium on the basis that he was not a Belgian Student. The ECJ, in a similar approach with the ***Maria Martinez Sala*** case, played the EU citizenship card in order to establish

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[57] Case C-85/96 *Maria Martinez Sala v. Freistaat Bayern* [1998] ECR I-2691, (*Maria Martinez Sala* case).

[58] Case C-184/99 *Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignes –Louvain-la-Neuve* [2001] ECR I-6193, (*Grzelczyk* case).

grounds for the application of Art. 18 TFEU. Rudy Grzelczyk therefore came within the scope of the Treaty, which granted him the right to non-discriminatory treatment.

The distinctive features of these cases were how the ECJ used the concept of European Union citizenship and broadened the scope of application for the principle of non-discrimination on grounds of nationality[59]. In ***Grzelczyk*** the Court held that ''*EU citizenship is destined to be a factor enabling those who find themselves in the same situation to enjoy the same treatment in law, irrespective of their nationality*''[60].

The above-mentioned applications of the ECJ, notwithstanding the discriminatory character they bear against non-EU citizens, are surprisingly in lack of the economic intend which, the Union authorities are in the habit of, unsuccessfully camouflaging in seemingly social applications. In other words, the Court may have discriminated against non-EU nationals 'who may find themselves in the same situation' and it may have implied that only EU citizens are to 'enjoy the same treatment in law irrespective of their nationality'. However, these are direct consequences of the EU citizenship concept.

The ECJ diverged from its previous rulings by issuing a judgment, which was not economically guided hence, did not generate discrimination against the EU citizens. Yet, the Court reveals its true colours in the cases; ***Blaizot v University of Liege***[61]and ***Gravier v City of Liege***[62]. In ***Gravier***, a French student enrolled for a course in University of Liege in Belgium and was charged with a fee, which the Belgian Students was not obliged to pay. Although she claimed that this was discrimination on grounds of nationality, the University responded by stating that for this situation to qualify as discrimination on grounds of nationality, her situation has to fall within the scope of application of the Treaty. The ECJ contravened this claim by stating that this situation did fall within the scope of the Treaty for Ms. Gravier was a student, and that constituted

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59 For a similar view see, **SHAW Jo,** ''The Problem of Membership in European Union Citizenship'' in Zenon BANKOSKI-Andrew SCOTT (Eds.), The European Union and its Order: the Legal Theory of European Integration, UK:Wiley-Blackwell, 2000, pp.65-91.

60 *Grzelczyk* case, par. 31.

61 Case 24/86 *Blaizot v. University of Liege* [1988] ECR.I-3798.

62 Case 293/83 *Gravier v. City of Liege* [1985] ECR.I-593.

vocational training, which was linked with the free movement rights. However; in ***Blaizot v University of Liege***, even though the Court encountered the same situation with that of Millie Gravier, the judgment in this case was expanded in a fashion that it clarifies the 'consternation' of the seemingly social approach demonstrated in ***Grzelczyk*** **and** ***Maritnez Sala***. The Court by its judgment have established that EU citizens, as students studying in another Member State came within the scope of application of the Treaty by virtue of the free movement provisions. Yet, in order to qualify to fall within the scope of this judgment, the course being studied abroad had to constitute a preparation for a future occupation. Furthermore, except for; for instance, 'vocational training', for the courses that are not linked to a future occupation, the Treaty did not provide any protection. Therefore, an EU citizen who studies a general knowledge course is left outside the scope of the Treaty.

Although the economically inactive (i.e. students) were included within the scope of the free movement provisions by the virtue of Art. 21 TFEU which was introduced by the Maastricht Treaty, the ECJ has, somehow, managed to find the means to attach the application of this to an economic action, as far as social assistance for the students is concerned. The judgments of the Court that are related to 'vocational training' and 'social assistance' caused deficiencies as to whether any student from a different Member State could rely on Arts. 18 and 21 of the TFEU anytime their application for social assistance is rejected.

The concept of EU citizenship being likely to generate discrimination, by its own, in several areas, has led the Court to find itself countering the benefits of the host Member States in situations as such. Consequently, the Court had to make sacrifices for the sakes of the principle of non-discrimination, the concept of EU-citizenship and for the slightly protectionist benefits of the host Member States.

The ***Trojani***[63] case involves a French national being refused the Belgian 'minimex' on grounds of his nationality. Similarly, to the ***Grzelczyk*** case, where it was established that in order for a non-economically active Union citizen to rely on his or her rights of Art. 18 TFEU in situations concerning social assistance, he or she had to be lawfully residing in the host State. However, in

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63 Case C-456/02 *Trojani v.* **Centre Public d'aide sociale de Bruxelles** [2004] ECR I-7573, (*Trojani* case).

the case of *Trojani*, the key feature was that Mr.Trojani has been granted a residence permit, which led the Court to expand the judgment in ***Grzelczyk***. In ***Trojani***, the Court held that ''*A citizen of the Union who is not economically active may rely on Art. 12 TEC* (now Art. 18 TFEU) *where he has been lawfully resident in the host member state for a certain time or possesses a residence permit'*'[64].

The expression of 'certain time' has rendered the right to non-discriminatory treatment contingent on lawful residence for a specified period of time, which is likely to generate ambiguity as to how much time is necessary for the integration of a Member State student to another State. Subsequently, the ECJ granted the right to determine the duration of residence in order to be equally treated, to Member States, provided that the conditions imposed specified a certain length of time such as two years[65]. Nonetheless, in the case of ***Dany Bidar***, the ECJ prohibited the Member States from imposing indefinite conditions and stated that a Member State could not lay down a condition that could not be fulfilled by nationals of another Member state, which was the case for the requirement that students be settled[66].

Art. 18 of the TFEU, while prohibiting any discrimination on grounds of nationality within the scope of the Treaty, makes a reference to Treaty provisions, particularly, on free movement by involving the expression of 'special provisions'. In other words if the particular situation cannot be covered by the related Treaty provision or there are no Treaty provisions on the subject, Art. 18 TFEU would be independently applied. The Court held in its related judgments that when the discrimination is incompatible with the particular provision it will directly be incompatible with Art. 18 TFEU[67].

The above-mentioned cases involved independent application of Art. 18 TFEU, for it is more efficient thus beneficial to examine the judgments based on the same legislation in order to differentiate and criticize the applications of the Court. Conclusively, it is clarifying to build the argument mostly on Art. 18

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64 Ibid. par.43.

65 Case C-209/3 *The Queen, on the Application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, (*Dany Bindar* case).

66 *Dany Bindar* case, paras.56–59.

67 See case C-246/89 *Commision v.United Kingdom* [1991] ECR I-4585, par. 18 and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651 paras.20-21.

TFEU in order to provide the necessary frame to attest that discrimination is still prevalent.

Another case to be examined demonstrates how the ECJ imposes the non-discrimination policies to differentiate 'EU citizens' as opposed to others, in almost every aspect of 'social integration'. In this case which the Commission brought against Spain[68], a system that the Government of Spain applied was challenged to be incompatible with the Treaty. The system suggested that Spanish citizens, other Member State nationals and any foreign residents living in Spain were entitled to free admission to Spanish museums, provided that they were under 21 years of age. While Spain strived to direct young population to take an interest in culture, the Commission claimed that this application was contradictory to freedom to provide and receive services covered by Art. 49 TEC (now Art. 56 TFEU). Moreover, the inequality of treatment on this subject was considered to have a negative effect on the conditions under which the services were provided.

The Court, in accordance with the proposition by the AG Claus Gulmann, labeled this difference in treatment as incompatible with Arts. 18 and 56 of the TFEU and referring to the argument by the Kingdom of Spain, indicating that neither the application ''*…constitutes discrimination nor it is an obstacle to freedom to provide and receive services and found the argument to be unacceptable. While for Spanish nationals the right of free admission stems directly from the regulation, the grant of that advantage to foreigners constitute, discrimination against Member State nationals and therefore is in breach of Art. 12* (now Art. 18 TFEU) *and Art. 49 (*now Art. 56 TFEU)''[69].

The Kingdom of Spain has committed a fatal mistake of granting a fragment of non-EU citizens a right, which a fragment of EU citizens is not entitled to enjoy. Regardless of the aim of this application, which was to make young people take an interest in culture by granting them easier access to museums, the ECJ misperceived this situation as a non-EU national enjoying a right that an EU national cannot enjoy. The key feature here is that the separation was not made in regard to their EU citizenship any EU citizen was entitled to enjoy this right provided that he or she is under 21. Basically, the

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68 Case C-45/93 *Commission v. Spain* [1994] ECR I-911.

69 Ibid. par.9.

intention of Spain was to ease the way for the young people to access cultural aspects. However, The Commission and hence, the Court found this unacceptable and incompatible with the 'somehow' related Treaty provisions. The only evaluation that can be made regarding such a greedy reaction is that this application was too socially oriented for the aims of the EU. An application lacking any economic concerns, which does not grant preferential treatment to anybody particularly not to EU citizens solely on the grounds of their EU citizenship, would easily be deemed 'unacceptable' by the Court forasmuch as it counters almost all the concepts that the EU wishes to impose. Conclusively, it should be noted that the Kingdom of Spain 'should have known better' about the possible consequences of an attempt which was aimed to enhance the public socially when the privileged citizens of the EU are around.

The last case to be analyzed in this chapter is ***Vatsouras and Josif Koupatantze***[70]. *In this case,* the question of whether it is possible to exclude job-seekers from other Member States from certain financial benefits had been raised. Particularly, Mr. *Vatsouras and Mr. Josif Koupatantze*, who are Greek nationals residing and seeking employment in Germany, had been entitled to certain financial benefits under par. 7(1) of Book II of the German Code of Social Law (Sozialgesetzbuch II) (the SGB II)[71]. However, based on their professional activity they commenced, *Arbeitsgemeinschaft* (Social Services Agency-'ARGE') ended those benefits by a decision on 27 July 2006 for Mr. Vatsouras and by other on 15 January 2007 for Mr. Koupatantze, Even though, the ARGE decisions were objected, they were dismissed on the grounds that once a foreign national **has** been provided any kind of assistance under par. (1) of the SGB II, s/he would be excluded from claiming the further based on par. (2) thereof. Following the dismissal, both Mr. Vatsouras and Mr. Koupatantze appealed against those decisions to the Sozialgericht Nürnberg (Social Court, Nuremberg), which referred the questions of whether Art. 24(2) of Directive 2004/38 is compatible with Art. 18 TFEU when read together with Art. 45 TFEU and whether if Art. 18 TFEU preclude national rules excluding EU citizens from receiving social assistance that are granted to non-EU citizen, to the ECJ for a preliminary ruling.

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[70] Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585, (*Vatsouras and Josif Koupatantze* case).

[71] The German Code of Social Law (Sozialgesetzbuch II), Book II, par. 7(1).

The ECJ had, after repeating the basic principles of Union citizenship set out in Directive 2004/38 namely, citizens of Members States seeking employment and their families can freely enjoy the right to move and reside within the Union, underlined that Art. 24(2) of the Directive must be interpreted with Art. 45(2) TFEU, which concerns right to equal treatment. By construing the said Articles together, the Court arrived the conclusion that:

''*Nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Art. 39(2)TEC* (now Art. 45(2) TFEU) *in order to facilitate access to labour market''*[72].

Regarding the second question, the ECJ had, without doubt, noted that the principle of non-discrimination in Art. 18 TFEU is 'preserved' for the EU citizens by stating this Article ''*...is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries*"[73]. In other words, the Court had given the promise of a discrimination-free Union for only EU-citizens whereas when the benefits of the non-EU-citizens are at stake, it is possible that they suffer from discrimination. Therefore, with this case the Court this enunciated the legitimacy of the discrimination between EU and non-EU citizens.

Various examples of the Court's case law examined above demonstrate that the applications of the ECJ have the tendency to fluctuate in accordance with the benefits of the EU generating discrimination on grounds of nationality rather than abolishing it.

3 CONCLUDING REMARKS

Within the era of the EU, it seems fairly clear that the 'problem' of discrimination has not been dealt with in an effective manner. Nonetheless, it can be questioned whether this is the result of an intentional choice or an insufficiency of the Union institutions to solve this problem efficiently. Under all circumstances, it is clear that discrimination is prevalent within the EU, in spite of the distinct Treaty articles and Union provisions allegedly aiming at non-discrimination. The current situation in Europe is devastating for a Union

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72 *Vatsouras and Josif Koupatantze* case, par. 40.

73 *Vatsouras and Josif Koupatantze* case, par. 50 (Also See paras. 50-52).

that claims to have an underlying principle of equality and which has stated that its primary objective is to abolish discrimination within its territory. However, EU, being an 'entirely economical operation' never seemed to be frustrated in its determined journey towards market integration.

This research study has attempted to expose that the EU intends to abolish discrimination yet with different expectations than establishing a Union of justice and equality. Learning from the mistakes of previous alliances in Europe, the 'Founding Fathers' of the EU apprehended that the only successful way to economic integration is through the social integration within the Union. In other words, they have discovered that economic prosperity within a Union could only be provided by a self-sufficient internal market and in order to establish a market that is self sufficient; the goods, the services but most importantly the persons had to move freely without countering any obstacles and difference in treatment. Such objectives were impossible to attain with the prominence of protectionism within the Union and the Member States. Therefore, the EU authorities constructed a method that would effectively demolish the barrier that stood between the EU and its Member States. This method involved, prohibiting discrimination (discrimination on grounds of nationality in particular) in order to eliminate the protectionism of the Member States, however they have never considered themselves subject to this prohibition. It is made clear by this research that the main focus of the EU is and has always been on the market integration hence the EU authorities embodied and applied almost all of the Treaty provisions, in such a fashion that, in one way or another, it would contribute to the internal market.

In my opinion, the EU is a 'purely' economic organization, however, it is not their economic expectations or ambitions that meant to be criticized by this study, but it is the deceitful means that they try to use in order to attain them. The issue of discrimination seems to, not to be resolved, in a near future: Firstly, it is almost impossible to attain a discrimination-free environment within a Union that involves such great nations. Great nations come with greater egos, which would constitute conflicts that may lead to wars or it would generate relations that may lead to discrimination. Secondly, even if it were a possible state to attain, the EU law would not necessarily condone it, because it would be unable to maintain the flexibility it requires in its policy construction due to restrictive social regulations. Therefore, there is a strong argument favoring the necessity of discrimination in the EU. It has been established by this study that

discrimination in EU is necessary for the usage of the EU authorities; yet it should be prohibited as far as the Member States come are concerned. In sum, for the sake of economic aims, the concept of discrimination does not seem to be a problem, which the Union authorities have to face in a literal sense, but rather an instrument through which they manage to control all the States within the European Union.

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