

# THE MULTIDIMENSIONAL EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION

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## ABSTRACT

*Human rights are one of the topical issues in today's society, on a European as well as on a global level and their protection is the subject of regulation by means of various conventions, declarations and charters. The European system of human rights protection is multidimensional and without a clear hierarchy. In this article, the Author presents the basic organizational determinants and a short overview of judgments and functioning of two courts, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg, in the field of human rights.*

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## 1. INTRODUCTION

Human rights are one of the topical issues in today's society, on a European as well as on a global level and their protection is the subject of regulation by means of various conventions, declarations and charters. However, the basic concepts crucial for the existence and proper development of the human rights system, such as the very term "human rights", and concepts such as freedom, priority right and minorities, have vague meanings, and are consequently practically disputable. Therefore, it is not surprising that there are many definitions and theories related to this topic. The circular definition of human rights itself and a lack of clarity about the sources of these rights (whether we have them because they derive from natural law or we have the rights that are given to us by the community<sup>1</sup>) lead to a situation in which the human rights are becoming

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<sup>1</sup> Graovac, G., Geneza i važnost prava na osobnu slobodu, *Zagrebačka pravna revija* 2(2) 2013; p. 240

dependent on the cultural - social - political interpretations of different societies, and are consequently a source of conflict. A clarification of the above-mentioned concepts is of fundamental importance for the system of human rights protection, both on the European and the global level.

In the next few paragraphs, the basic organizational determinants of the European human rights system will be elucidated and a short overview will be given on the judgments and the functioning of two courts, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.

## **2. THE EUROPEAN COURT OF HUMAN RIGHTS**

The Council of Europe was founded in 1949 as an international organization for the protection of human rights in Europe. At the very beginning of its work, it adopted the European Convention on Human Rights, signed in Rome on November 4<sup>th</sup>, 1950.

The catalogue of rights laid down in the Convention was inspired by the Universal Declaration of Human rights adopted two years earlier<sup>2</sup>. The Convention has established the European Commission of Human rights and the European Court for Human rights which were replaced by a single court sitting full time in 1998, in line with Protocol No. 11. The European Court for Human rights (ECtHR) is a judicial body for dispute resolution in the specific field of human rights. The ECtHR is situated in Strasbourg. It has become the largest international Court dealing with human rights. It is composed of as many judges as there are contracting Parties<sup>3</sup> (47 today).

In its work, the Court applies the European Convention of Human Rights, in which these rights, among others, are guaranteed: the right to life<sup>4</sup>, the right not to be subjected to torture, inhuman or degrading treatment or punishment,<sup>5</sup> freedom of thought, conscience and religion<sup>6</sup>, the right to marry and found a family<sup>7</sup>.

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<sup>2</sup> Barrionuevo Arevalo, L., *Adjudication of International Disputes in Europe: The role of the European Court of Justice and the European Court of Human rights*, p.10; ([http://www.euc.illinois.edu/\\_includes/docs/barrionuevo\\_European\\_Courts\\_Article1.pdf](http://www.euc.illinois.edu/_includes/docs/barrionuevo_European_Courts_Article1.pdf))

<sup>3</sup> European Convention on Human Rights, Article 20, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>4</sup> Article 2, European Convention on Human Rights

<sup>5</sup> Article 3, European Convention on Human Rights

<sup>6</sup> Article 9, European Convention on Human Rights

<sup>7</sup> Article 12, European Convention on Human Rights

The Convention provides limits to the rights, under the condition that these limits are foreseen by law, necessary in a democratic society and proportionate to the aim. The rights and freedoms guaranteed by the Convention are applied to anyone within the jurisdiction of its Contracting Parties. Thus, any Contracting State or private person, group of people, or a non-governmental organization which claims that its rights guaranteed by the Convention are violated by the state, may bring legal proceedings, after having exhausted all domestic legal remedies, as stated in the *Handyside* judgment<sup>8</sup>. When the Convention came into force, the majority of signatory States rejected proposals to give individuals the right of petition. Thus, the State could be made respondent only if the State gave its consent, either given ad hoc or by means of an optional clause, by which the States accept the jurisdiction of the Court in advance. An individual petition was possible only if the State in question accepted in advance. Also, an individual did not have direct access to the Court, nor a possibility of individual complaint. Protocol No 11, which came into force in 1998, substantially changed the way the Convention was applied and monitored, by subjecting the Contracting State to the absolute supervision by the European Court of Human Rights. The ECtHR is not an appellate court of the Member states, as it was stated in the *Edward* judgment<sup>9</sup>. The Contracting Parties commit oneself to abide the final judgment of the Court in any case to which they are parties<sup>10</sup>. Judgments by the Strasbourg Court are essentially declaratory judgments. The Court itself cannot annul or amend national measures or court decisions. Their execution is monitored by the Committee of Ministers of the Council of Europe.

In the process of execution of judgments, the ECtHR gives guidance to member states on how their law or practices must change in order to comply with the Convention, keeping in mind the different interpretations of the Convention from one Contracting State to another.

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<sup>8</sup> *Handyside v. the United Kingdom*, (5493/72) [1976] ECHR 5 (7 December 1976): “The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedom sites shrines. The institutions created by it make their own contribution to this task but they become involve donly through contentious proceedings and once all domestic remedies have been exhausted”

<sup>9</sup> *Edwards v. United Kingdom*, App. No. 13071/87, 15 Eur. Ct. H.R. (ser. A) 417, 431 (1992): it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic court and, as a general rule, it is for these courts to assess the evidence before them. The Court’s task is to ascertain whether the Court has jurisdiction over the protection of human rights in many Member States, and does not examine and determine the facts of each individual case proceedings in their entirety, including the questions whether the ways in which evidence was taken, were fair

<sup>10</sup> Article 46, European Convention on Human Rights

The Convention defines a minimum standard for the protection of human rights which a Contracting State should respect, and this way it can be concluded that the ECtHR will not expand its competences, but will ensure that the existing rights are not violated. The Convention defines the seven, eight or ten fundamental freedoms that are essential for a democratic way of life<sup>11</sup>.

In its work, the ECtHR applies the margin of appreciation doctrine, which gives to the Contracting parties an opportunity to decide on questions on which Contracting States often have different opinions. “Where the domestic law and practice of the Contracting states reveal a fairly substantial measure of common ground, a more extensive European supervision corresponds to a less discretionary power of appreciation<sup>12</sup>”.

In certain areas, the ECtHR gives to the Contracting States a wide margin of appreciation, so they can decide about the languages taught at public schools<sup>13</sup>, whether to allow or prohibit suicide or assisted suicide<sup>14</sup>, or determine when it is necessary to interfere with the freedom of expression in a democratic society<sup>15</sup>. The Court acts as a subsidiary Court especially in matters of moral nature, such as the criminalization of abortion, conjugal visits in prisons, etc.<sup>16</sup>. The ECtHR has dealt least with political and cultural issues, and most decisions were brought in the area of freedom of expression.

Even when not taking the margin of appreciation into account, the ECtHR has in many ways influenced the legislation and the conduct of Contracting States. Its judgments have the same effect as verdicts of the national courts, and the Contracting States change their legislation by aligning it with the Convention. Also, the Convention rights have an impact beyond any individual case to the extent that national officials, legislators, executives and judges take ECtHR’s jurisprudence into account in their own decision-making<sup>17</sup>.

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<sup>11</sup> Paul Costa, J., *The European Court of Human Rights and Its Recent Case Law*, TEXAS INTERNATIONAL LAW JOURNAL, (VOL. 38:455), p.458

<sup>12</sup> ECHR, *Sunday Times v. the United Kingdom*, (application 6538/74), judgment of 26.4.1979, para. 59.

<sup>13</sup> Gless, S. and Martin, J., *The comparative method in European Courts: A comparison between the CJEU and ECtHR*, Bergen Journal of Criminal Law and Criminal Justice, Vol. 1, Issue 1, 2013, p. 40.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Gless, S. and Martin, J., *The comparative method in European Courts: A comparison between the CJEU and ECtHR*, Bergen Journal of Criminal Law and Criminal Justice, Vol. 1, Issue 1, 2013, p. 41

<sup>17</sup> Stone Sweet, Alec, *On the Constitutional alisation of the Convention: The European Court of Human Rights as a Constitutional Court*, Yale Law School Legal Scholarship Repository, p.4

In many States, the ECtHR constitutes a part of domestic law and does not require special ways of implementation. In many cases judges routinely invoke the Convention and the national courts have been induced to strengthen their own systems of rights protection<sup>18</sup>.

The ECtHR and the Convention have had a great effect on the national legislation of Contracting States. We will now examine the issue of the European Court of Justice.

### **3. THE COURT OF JUSTICE**

As one of the European Union (EU) institutions, the Court of Justice (ECJ) has a fundamental role in furthering the objectives laid down in the Treaties, and is often called “the engine of European union”. Some theoreticians consider the ECJ as a constitutional Court, for others it is a typical international Court, while some say it is only a supranational Court. In whatever frame we put it, the fact remains that the Court has the final say on EU law, and thus it has the leading role in the EU legal order. The Court of Justice was established in 1952 as a single Court of Justice of the European Coal and Steel Communities, based in Luxembourg. It is composed of one judge per member state – currently are 28.

Throughout the past six decades, the ECJ has been experiencing changes, both formal and material ones, and has been monitoring changes in society, broadening its sphere of action. The history of the EU has been made up of judgments of the ECJ, and its opinions and interpretations have created and are creating a new European legal order.

Since the establishment of the ECJ, the founding members have had different visions in terms of its role and responsibilities. It was the wish of the Benelux countries that the court could determine questions both of legality and of discretion, and that only member states, and not individuals, should have access to it<sup>19</sup>. The Germans wanted a Court that would be more similar to a constitutional Court, and the French thought that the Court should not determine more than the legality of the decisions, and that even the right for private litigants to sue in the court is a step too far<sup>20</sup>. Its role and competences were the result of a

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<sup>18</sup> Stone Sweet, Alec, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court, Yale Law School Legal Scholarship Repository, p.10

<sup>19</sup> Tamm, D., The history of the Court of Justice, p.17, <http://research.ku.dk/search/?pure=en/publications/the-history-of-the-court-of-justice-of-the-european-union-since-its-origin%28b-c456acc-cclc-4518-9186-3cd6297653e2%29/export.html>

<sup>20</sup> Tamm, D., The history of the Court of Justice, p.17, <http://research.ku.dk/search/?pure=en/publications/the-history-of-the-court-of-justice-of-the-european-union-since-its-origin%28b-c456acc-cclc-4518-9186-3cd6297653e2%29/export.html>

compromise based on the idea of creating a new Europe. The ECJ underwent important institutional changes in 1986, when the Court of First Instance was attached to it by the Single European Act in order to reduce its heavy caseload. In 2009, the Court of First Instance was renamed as the General Court. A specialized court, the Civil Service Tribunal, was created in 2004.

These formal changes to the structure of the ECJ were followed by procedural changes, as well as material ones, relating to jurisdiction, which indirectly caused an increase in the variety of cases on which the court passed judgment.

#### **4. THE PROTECTION OF HUMAN RIGHTS THROUGH JUDGMENTS AND INTERPRETATIONS OF THE ECJ**

“The questions whether the company should pay the tax, whether a tenant is entitled to compensation or restrictions that can be made upon the import or export of whisky or cherry brandy are not the questions of same interest as abortion, penalty, and the right to carry a weapon<sup>21</sup>”. The character of the Union has changed through the decades and the political project was to be realized through economic means. Does the Union change its character through the interpretation of the ECJ judgments or does the ECJ extend its jurisdiction because of the changes in the character of the Union? Whatever the answer, we can now conclude that the Union is expanding its competences regarding inquiries which are more than just economic issues, such as questions about fundamental rights, taxes, asylum, competition, consumer protection, visas, social aid, security policy, etc. Its judgments have political and social consequences which affect the daily life of its citizens. All these questions have great moral, political and social implications.

Treaties establishing the European Communities did not contain the provisions on the protection of human rights, although plans to create the European political community and the European Defense Community have indicated that possibility<sup>22</sup>. Initially, the European Community had an almost exclusively economic character, and its goals were almost exclusively of economic nature. Issues of human rights were not widely discussed.

With time, the Court has to respond to the questions regarding EU legal acts being disputed for violations of fundamental rights in national laws. In this

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<sup>21</sup> Tamm, D., The history of the Court of Justice, p.29, <http://research.ku.dk/search/?pure=en/publications/the-history-of-the-court-of-justice-of-the-european-union-since-its-origin%28bc456acc-c4c-4518-9186-3cd6297653e2%29/export.html>

<sup>22</sup> Crnić Grotić, V.; Sgardelli Car,N., Ljudska prava u Europskoj uniji u praksi Europskog suda u Luksemburgu, Zbornik PFZ, 60, (5) 971-994 (2010), p. 974

case the Court explained that its jurisdiction is to apply Community law only, and that it is not competent in the field of national laws of the Member States, such as in *Stork and Geitling*: “it is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority ... to ensure that the provisions of domestic law are respected, even constitutional provisions in force in one or another Member State... Therefore the Court cannot interpret nor apply Article 14 of the German Constitution by examining the legality of the decision of High Authority. Furthermore, Community law, according to the Treaty establishing the European Coal and Steel Community, does not contain any general principle that explicitly or otherwise guarantees the realization of violated rights<sup>23</sup>.”

The Court has changed its position for the first time in 1969 in the Judgment *Erich Stauder v City*, where it stated that it ensures the respect of fundamental human rights enshrined in the general principles of Community law.

In the seventies, the Court changed its line of reasoning and highlighted the fundamental rights as general principles that bind communities and their bodies. In *Internationale Handelsgesellschaft*, the ECJ had stated that “the validity of Community measures could only be judged according to Community criteria, not according to principles enshrined in the German constitution<sup>24</sup>.” The ECJ also explained that: “Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of justice, the protection of such rights, while inspired by the constitutional tradition common to the Member States must be ensured within the framework of the structure and objectives of the community<sup>25</sup>.”

In *Internationale Handelsgesellschaft (Solange I)* [1974], the German Federal Constitutional Court (FCC) did not accept this ruling, and stated that the protection of fundamental human rights was an essential element of the Basic Law, and that this power could not automatically be restricted by transferring sovereignty to a supranational organization under Article 24 of the Basic law. In the opinion of the FCC, the fundamental rights guaranteed by the Basic Law were insufficiently protected under Community law, as the Community lacked a democratically legitimated and directly elected parliament, as well as a codified catalogue of human rights.

In 1986, the German Constitutional Court gave up that attitude in *Solange II*, claiming that “as long as the Community generally ensured an effective

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<sup>23</sup> Judg. February 4th, 1959, Judg. 1/58, *Stork V.High Authority*, February 1960, Judg. 16-18/59, *Geitling v. High Authority*

<sup>24</sup> Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125

<sup>25</sup> *Ibid.*

protection of fundamental rights...the FCC would no longer exercise its jurisdiction to decide on the application of secondary Community legislation<sup>26</sup>.”

In the “Nold” case, the ECJ based the protection of the fundamental rights not only on the constitutional principles of the Member States, but also on the international conventions.

The next important step in the field of the protection of the human rights was the Joint Declaration by the European Parliament, the Council and the Commission from 1977, which gave primary importance to the protection of fundamental rights deriving from the constitution of the Member States and the European Convention for the protection of human first and fundamental freedoms.

In its cases, the ECJ has often dealt with issues of violations of the Convention<sup>27</sup>. In 1989, in the ERT case concerning a Greek television monopoly, the ECJ referred expressly to the “freedom of expression, as embodied in Article 10 of the Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court<sup>28</sup>.”

There have been occasions when similar cases were differently interpreted by the two courts, such as in the example of the Grogan case (of the ECJ) and the Open Door and Dublin Well Woman (of the ECtHR), in which Article 10 of the Convention on the right to freedom of expression was interpreted<sup>29</sup>. A student association distributed a leaflet to women who wanted to have an abortion in other countries, but sharing of information was prohibited by the Society for the Protection of Unborn Children. The ECJ did not decide on the main issue of the legality of abortion, but ruled that abortion constitutes a “service” within the meaning of Article 60 of the EEC Treaty, and thus was not subject to restrictions. So, the key question was whether there was a violation of Community law rather than national law. A related case is the Open Door and Dublin Well Woman, in which the European Court of Human Rights was deciding on the freedom of expression. Open Door Ltd was an organization which provided free information on abortion services and which filed a com-

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<sup>26</sup> BVerfGE 73, 339 2 BvR 197/83 Solange II-decision

<sup>27</sup> Vivien Prais v Council of the European Communities. - Case 130-75., 27 October 1976; 15 December 1995. - Union royalebelge des sociétés de football association ASBL v Jean-Marc Bosman, Case C-415/93

<sup>28</sup> Tamm, D., The history of the Court of Justice, p.29, <http://research.ku.dk/search/?pure=en/publications/the-history-of-the-court-of-justice-of-the-european-union-since-its-origin%28bc456acc-cclc-4518-9186-3cd6297653e2%29/export.html>

<sup>29</sup> Crnić Grotić, V.; Sgardelli Car, N., Ljudska prava u Europskoj uniji u praksi Europskog suda u Luksemburgu, Zbornik PFZ, 60, (5) 971-994 (2010), p. 984, 985.



plaint because of the ban on providing information. The ECtHR found that there was a violation of the right to freedom of expression, as entrenched in Article 10 of the Convention.

Differences in interpretation have also occurred in the case of Hoechst AG, in connection with the search of business premises based on an investigation, in which the plaintiff considered that there was a violation of the right to protection of privacy of the home guaranteed under Article 8 of the Convention<sup>30</sup>. The ECJ stated that this right does not apply to business premises. The ECtHR provided a completely contrary interpretation in the Niemietz case, when they claimed that “understanding of the notion of private life should not exclude activities of a professional or business nature since, finally, most of the people in its working life has an important, if not the greatest option of creating relationships with the outside world<sup>31</sup>.” Although there have been differences in the interpretation of the two Courts, in a similar case in 2002, the ECJ referred to the practice of the ECtHR as relevant, and accepted its explanation.

The ECJ has respected the reasoning of the ECtHR and has increasingly referred to Strasbourg case law, although it has never used the expression “bound by” the Convention. Rather, the Conventions have been seen as a source of inspiration taken from general principles of law.<sup>32</sup>

## **5. THE RELATIONSHIP OF THE ECtHR AND THE PROTECTION OF HUMAN RIGHTS IN THE EU**

At the end of the 1970's the Strasbourg court was confronted with the European Community (EC) question for the first time. In 1978, in *CFDT v the EC*, the applicants directed their complaint against the EC as such but also against all EC member states taken collectively and individually. The Strasbourg court decided that it did not have jurisdiction because the EC is not a contracting party to the ECtHR. However, a change in the line of reasoning of the ECtHR came in *M.&Co.v. Germany* where it stated “that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights”. But, “the transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise

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<sup>30</sup> *Ibid.*, p. 986.

<sup>31</sup> *Ibid.*, p. 987.

<sup>32</sup> Laurent Scheek, *The Relationship between the European Courts and Integration through Human Rights*, *ZaoRV* 65 (2005), 837-885, p.853

of transferred powers<sup>33</sup>.” So, Member States have to respect their obligations which come from the Convention, no matter if they are part of other organization as the Member States of EU are<sup>34</sup>.

In the *Bosphorus* case, an applicant claimed that an EU measure had infringed their rights under the European Convention on Human Rights. The European Court of Human Rights stated that it would review EC measures through national implementing acts only if the EU system of human rights protection is below the level of the Convention standard. The decision illustrates the ambition of the ECtHR to steer the middle course between the necessity to confirm its former case-law on the Member States’ responsibility for transferred power so as not to give *carte blanche* to the EC, and the difficulty of providing the EU Member States with a system of control as regards the compatibility of Community acts with the ECtHR<sup>35</sup>.

In the *Matthew* judgment, the ECtHR reversed its position and showed that it feels responsible for controlling EU legal acts, and that is able to pass judgment on a Member State. The case was about deciding whether the United Kingdom could be held responsible for not having organized European elections in Gibraltar in 1994. The Court concluded that the United Kingdom was responsible for the consequences of the Maastricht Treaty. The ECtHR refrained from reviewing EU action based on the doctrine of “equivalent protection”, claiming that as long as the protection offered by the EU in a certain case is not dysfunctional, and thus not manifestly deficient, it will refrain from intervention<sup>36</sup>.

Some theoreticians have stated that the ECtHR started to control human rights on the European level slowly and gradually. However, the ECtHR considered that it has no competence to review EU acts directly.

## **6. CHARTER OF FUNDAMENTAL RIGHTS**

The next step in the formal protection of human rights in the European Union was the Charter of fundamental rights, and with its application the possibility of contradictions in the case-law between the two Courts has increased.

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<sup>33</sup> M.&Co.v. Germany[1990]ECHR, (Ser. A)

<sup>34</sup> Kuhnert, K., [http://www.utrechtlawreview.org/Volume 2, Issue 2 \(December\) 2006](http://www.utrechtlawreview.org/Volume%202,%20Issue%202%20(December)%202006,%20p.%20176), p. 176

<sup>35</sup> Kuhnert, K., [http://www.utrechtlawreview.org/Volume 2, Issue 2 \(December\) 2006](http://www.utrechtlawreview.org/Volume%202,%20Issue%202%20(December)%202006,%20p.%20178), p. 178

<sup>36</sup> Gless, S. and Martin, J., *The comparative method in European Courts: A comparison between the CJEU and ECtHR*, *Bergen Journal of Criminal Law and Criminal Justice*, Vol. 1, Issue 1, 2013, p.49

Often cited as the most important reason for its adoption is the EU crisis of legitimacy, which is significantly related to the lack of Union protection of fundamental rights. Furthermore, the increased visibility of the fundamental rights which would encourage citizens to use them<sup>37</sup> is often indicated as an additional reason.

Many of the provisions in the Charter are based on, but are not identical to those of the ECtHR. In the Charter preamble it is stated that the Charter “reaffirms the rights as they result, in particular, from ... the European Convention for the Protection of Human Rights and Fundamental Freedoms...the social charters adopted by the Community and the Council of Europe and the case-law of ... the European Court of Human Rights<sup>38</sup>.”

Regarding EU competences, in the Charter it is stated that it “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties<sup>39</sup>.”

The ECtHR defined a minimum standard for the protection of human rights which the Member States should respect. That minimum standard is also guaranteed in the Charter, but the Charter also leaves space for providing more extensive protection<sup>40</sup>. However, the level of protection provided by the Charter is vague. In Article 53 of the Charter it is stated: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law...including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.” The Article provides protection for already recognized human rights and freedoms. Although the possibility for conflict between rights recognized by international organizations and the rights recognized by the Charter is low, which is easy to conclude from ECtHR and ECJ practice, that possibility increases when, for example, the Member States provide a higher level of fundamental rights protection than it is provided by the Charter. In that way, the supremacy and the autonomy of EU law could be endangered. The Court addressed this issue in the Melloni case C-399/11. The case concerned the issue of relation of different standards of human rights protection at the national level and European Union level regarding the execution of a European Arrest Warrant (“EAW”). The Spanish Constitutional Court asked the ECJ the three

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<sup>37</sup> Selanec, G., *Reforma Europske unije - Lisabonski ugovor, Povelja temeljnih prava*, Narodne Novine, Zagreb 2009., p.188

<sup>38</sup> EU Charter of Fundamental Rights (2000/C 364/01), Preamble

<sup>39</sup> *Ibid.*, Article 50, para. 2

<sup>40</sup> *Ibid.*, Article 52 para. 3

questions in which the third was, whether a Member State can, based on Article 53 of the Charter, provide a higher level of protection than the protection given by European Union law. The ECJ ruled that „only in a situation where an action of a Member State is not entirely determined by European Union law, do national courts and authorities remain free to apply national standards of protection of fundamental rights. However, even in these cases, the level of protection provided by the Charter of Fundamental Rights, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law must not thereby be compromised.“<sup>41</sup> The reasoning of the ECJ demonstrates that any kind of EU law, primary as well as secondary, is superior to any kind of national law of the Member States, including the national constitution.<sup>42</sup> In the future there is a possibility of a conflict between EU and national levels of fundamental rights protection while the ECJ made its reasoning about fundamental rights central, without leaving the Member states the possibility to provide a higher level of protection. This set positioned the EU fundamental rights protection at the maximum level. A possible consequence could be that an EU act could never be declared invalid for breach of fundamental rights. Daniel Halberstam stated that „it should have been clear that the generic reservation of more expansive rights at the Member State level was dead on arrival. Since the earliest days of the Community, and confirmed repeatedly even after the Union expressed its concern for human rights, a Member State was not allowed to object to EU law simply on the grounds that the EU measure violated an idiosyncratic human right found in that Member State’s constitution. The rights reservation in Article 53 FRC could not possibly resurrect those claims. To be sure, there can be—and there is—a certain give and take between the Member State high courts and the CJEU on defining the extent of rights protection with the Union.“<sup>43</sup>

Regarding the field of application of the Charter, it is unclear whether the Charter is binding on human rights issues in the area of EU law alone, or also in areas left to the jurisdiction of the Member States, in which the EU has the power to coordinate and support them<sup>44</sup>. The Article 51 states that the Charter only applies to acts of the Member States” when they are implementing Union

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<sup>41</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*,(2013)

<sup>42</sup> Nergelius, J., Kristoffersson, - *Human rights in EU law 2014: Two key cases of 2013*, Swedish studies in European law, Volume 6, Oxford and Portland, Oregon, 2015. p. 5

<sup>43</sup> Halberstam, D., *It’s the Autonomy, Stupid!*” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward Michigan Law, University of Michigan, Paper NO.432, 2015, p.21

<sup>44</sup> Selanec, G., *Reforma Europske unije, - Lisabonski ugovor, Povelja temeljnih prava*, Narodne Novine, Zagreb 2009., p.177

law”. It could be concluded that the scope of the Charter is limited on human rights issues in the area of EU law alone. The ECJ delivered a judgment on that matter in the Fransson case. The case concerned criminal proceeding has been initiated against Mr. Akerberg Fransson for tax fraud. He was charged with several financial tax offences by the Swedish authorities. Mr. Fransson considered that the charges were violating the *ne bis in idem* principle, because he had already been subject to tax surcharge for the same facts. He relied on Article 50 CFR to challenge the charges before the domestic court. The issue was whether the Charter was applied in the case or whether the case fell within the scope of EU law. The Court, relying on its case law, ruled that Article 51 of the Charter, is to be interpreted in the following manner: “*The requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law*”<sup>45</sup>. It can be concluded that the ECJ did not pay attention to the Charter’s wording which limited the Charter’s scope strictly to situations in which national legislators implement EU law. Instead it concluded that Charter applies to Member State actions that are within the scope of EU law which is a very broad interpretation of the Charter. The questions of the level of protection provided by the Charter and the question of the area of its application is very important, not only theoretically but also practically, while the Union is slowly expanding its jurisdiction in an area which is left for the Member States to regulate. In the Maruko case the ECJ stated that de facto it has authority in an area that is exclusively in competences of Member States: “Even when a matter falls within the ambit of their reserved powers, the Member States cannot absolve themselves from the general duty imposed on them to respect the law of the Union, which includes the respect of the provisions relating to the principle of non-discrimination.” Because of the above mentioned facts, the question arises, should there be a third arbiter (since there is a great possibility for conflicts between constitutional Member States and ECJ judges) that would bind the EU? The answer could offer the projected accession to the ECHR that triggers questions about the autonomy of EU law, which is the genetic code of that system of law.<sup>46</sup>

## **7. EU ACCESS TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS**

The ECJ and the ECtHR are courts with different histories, within different organizations, with different goals, but both competitive and cooperative.

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<sup>45</sup> Case C-617/10 Åklagaren v. Hans Åkerberg Fransson (2013)

<sup>46</sup> Eeckhout, P., Human Rights and the Autonomy of EU Law: Pluralism or Integration?, Current Legal Problems Advance Access published June 28, 2013, p.2

However, this multiple human rights protection system causes much uncertainty. The EU jurisdiction was limited in the area of human rights while under the obligation to respect the ECtHR. Individuals could turn to Strasbourg and claim that their fundamental rights had been breached<sup>47</sup>. When a lot of competences were transferred to the EU, individuals were deprived of that possibility in a field which was and is regulated by EU acts.

With that being said, remains the fact that the EU competences have multiplied over the last 20 years, and have grown beyond just economic ones, leading to an absence of external judicial control.

Until the Lisbon Treaty, the EU did not have the legal basis to **accede to the Convention because it did not have legal personality, and**, as far as the Council of Europe was concerned, its Statute provided that only states can access its Statute, not the EU. However, Article 6(2) of the Treaty of the EU provides that “The Union shall accede to the European Convention for the Protection of Human Rights and fundamental freedoms.” **The accession of the EU to the Convention became a legal obligation under the Treaty of Lisbon, which entered into force on December 1<sup>st</sup>, 2009.**

After accession, the ECJ would remain the final authority on the interpretation of EU law and the ECtHR would be the final authority on the interpretation of the European Convention of Human Rights<sup>48</sup>. The Union shall be supervised by the ECtHR with regard to its compliance with the Convention and the ECtHR will have the possibility to review the acts of EU institutions<sup>49</sup>. Individuals will be able to file a complaint about the infringement of ECtHR rights by the EU before the European Court of Human Rights, but they will need to turn to the ECJ before they can lodge an application to the ECtHR. In that way, many theoretical questions would be resolved. But will there be an accession, and under which conditions? On December 18<sup>th</sup>, 2014, the Court of Justice of the European Union ruled that the draft agreement on the accession of the European Union to the European Convention on Human Rights (ECHR), which was finalized in April 2013, is not compatible with EU law.

The Court states that “there is the approach adopted in the draft agreement, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU. Accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law and that the agreement envisaged

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<sup>47</sup> Ritleng, D., The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, Uppsala Faculty of Law, Working Paper 2012:1, p.7

<sup>48</sup> [http://www.echr.coe.int/Documents/UE\\_FAQ\\_ENG.pdf](http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf)

<sup>49</sup> Ibid.

contains no provision to prevent such a development...”. It further says that “the ECHR gives the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR, the ECHR should be coordinated with the Charter and also that the primacy, unity and effectiveness of EU law are not compromised and that there is no provision in the draft agreement to ensure such coordination.”

As the Courts’ main reasons for rejecting the draft agreement, it is stated that it “disregards the intrinsic nature of the EU”, “undermines the autonomy of EU law”, “that the primacy, unity and effectiveness of EU law are compromised”.

All these constitute a system called the “sui generis” system. The “sui generis” system of the EU was created by ECJ judgments. The ECJ was the key factor for creating an autonomous system which gives primacy, unity and effectiveness to EU law. The fact is that ECJ has the authorization to change the autonomous system, “sui generis” system, accepted by the Member states. The “sui generis” definition does not prohibit the questioning of these specific characteristics. “Specific characteristics” are by definition specific, which means they are not lasting and stable, but subject to change. Indeed, it is easier to affect specific characteristics of the EU, precisely because of its particularities in functioning, than **maybe a parliamentary republic, federal or international organization, whose functioning we know very well**. However, every system needs autonomy and preservation of its effectiveness. EU law has its own foundational rules and principles. It has its own rules of recognition.<sup>50</sup> The CJEU’s has and should have the power to determine what the law of the Union is and to be ultimately responsible for questions of the interpretation and validity of EU law. But that EU law autonomy has clear limits, and ought not to lead to the autarky of EU law.<sup>51</sup>

## 8. CONCLUSION

The relation between the Courts, including the regulation of human rights, is a complex area that has an **impact on the daily life of** the citizens of the Union. In this Article, the main issues regarding the formal organization of European human rights, its complexity, multidimensionality and ambiguity, are shown. There is a plurality of legal Systems, each with their autonomy, courts and legal perspective, its limits and boundaries. The accession of the European Union to the European Convention on Human Rights raises many

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<sup>50</sup> Eeckhout, P., Human Rights and the Autonomy of EU Law: Pluralism or Integration?, Current Legal Problems Advance Access published June 28, 2013, p.11

<sup>51</sup> Ibid., p.4

questions regarding the very foundations of the European Union system. Now the question remains – how and under which conditions will the EU fulfill its obligation under the Lisbon treaty? It remains to be seen.

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