

European Union and the European Convention on Human Rights – the accession of a giant

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Summary

The European Union, as well as the Council of Europe have long been significant actors in the field of human rights protection. The most important mechanism created to preserve human rights is the European Convention on Human Rights. Recognizing its importance, the EU now wishes to accede to this document. The legal background for accession has been created, and a positive political environment exists, fastening this complex process. But, the accession has yet to be carried out and its outcome is considered uncertain. Nevertheless, we must respect the efforts of the parties included to take this necessary step in stronger human rights protection in Europe.

Key words: European Union, European Convention on Human Rights, accession, human rights, case law

1. Introduction

The European Union (EU), as well as the Council of Europe (CoE) have long been significant actors on the international scene. Both were created after World War II with the purpose of preserving peace, but their main tasks were different. The most important mechanism of the Union was economical cooperation, while the European Convention on Human Rights (EConHR) immediately set forth human rights protection standards.¹

Currently, however, these two systems have more than a few things in common. Human rights protection has imposed itself as the most important task of virtually all international organizations. In modern Europe, it is only natural that a Union striving to achieve the highest possible standards of human rights protection, should enter the EConHR as a party.

This, however, is the point where questions and problems occur. Is the European Union a legal entity? Does it have substance in the way that state parties have? Why

¹ See more on the development of human rights protection mechanisms in Andrassy et al. *Međunarodno pravo*, Školska knjiga, Zagreb, 2010.

should it become a party to this Convention, when human rights are already guaranteed by its case law? These questions, alongside others, have been constantly on the agenda since the Union began its accession to the EConHR. Some have been answered, while others have yet to be disputed.

This paper will shortly show the development of human rights within the EU and in the system of the EConHR. Also, it will provide a brief insight on the questions and uncertainties arising from this complex process.

2. The development of the European human rights protection system

It is well-known that the EU has begun its legal existence as the European Coal and Steel Community. In 1958, the ECSC developed into the European Economic Community *via* the Rome Treaty and in 1993 into the European Union via the Treaty of Maastricht, expanding the competences of the original union to a larger economic area. But, this does not mean that the EU had limited its influence solely to economic rights. With time, it has become one of the most significant instruments of human rights protection.²

The CoE, on the other hand, is responsible for the creation of the EConHR. The system of protection created by this document has evolved since its beginnings, forming new standards in human rights protection.³

This journey, however, has been neither swift nor easy, which can be seen through a detailed review of the practice of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECrHR). Even though they have dealt with numerous human rights cases in their respective jurisdictions, there have often been tensions between the two courts due to different interpretations of certain rights and freedoms. The courts have also, as described *infra* in this article, exchanged opinions *via* their judgements, always working along side each other to create a more effective system of human rights protection in Europe. The accession of the EU to the EConHR will be the crucial moment in achieving that goal.

2.1. The development through founding treaties of the European Union

The original founding treaties contained virtually no reference to human rights.⁴ In the context of the EU, these rights were created later. Today, a large number of Articles from these ever-changing treaties show an increase in human rights regulations.⁵

The inspiration for this increase came from numerous sources. Primarily, it came from the constitutions of the member states, where all vital and absolute rights were listed.⁶ Secondly, it can be found in the extensive practice of the ECJ, that had slowly but firm-

² See more on the topic of historical development in Omejec, J. *Vijeće Europe i Europska Unija, institucionalni i pravni okvir*, Novi Informativ, Zagreb, 2008.

³ *Ibid.*

⁴ Full text of the Treaty on European Coal and Steel Community (1951) the Treaty of Rome (1957) and subsequent amendments available on http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm.

⁵ See *infra*.

⁶ "...fundamental rights form an integral part of the general principles of Community law whose observance it ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. The ECHR has special significance in that respect." Case C-299/95, Friedrich Kriemzow v. Austrian State [1997] ECR I-2629, at 2645; see also Case 44/79, Liselotte Hauer [1979] ECR 3727 at 3744-3745, Case 4/73, Nold [1974] ECR 491).

ly created some of the most important legal principles of human rights protection.⁷ And thirdly, it developed from other relevant sources and positive practice of the international community, such as the UN Charter, or the Universal Declaration of Human Rights.⁸

Influenced by these sources, the founding treaties, and consequently, the EU itself, slowly began to change. The Maastricht Treaty states in Article 6(2):

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”⁹

The Treaty of Amsterdam also emphasizes human rights as one of the foundations of the Union in its Article 6.¹⁰ Finally, the 1993 Copenhagen criteria¹¹ emphasized respect for human rights as one of the political prerequisites of the membership in the Union. Article 6 of the Treaty of Nice binds the EU institutions into respecting human rights under the Convention on Human Rights.¹² Finally, Article 2 of the Treaty of the European Union (TEU) states:

„The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”¹³

2.2. The Lisbon Treaty

The latest amendment to the Founding Treaties of the EU - the Lisbon Treaty - entered into force on 1 December 2009.¹⁴ Its purpose was to reform the Union in a way to make it more efficient and prone to changes with new and improved infrastructure. As stated above, it is an amendment, a supplement to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The Lisbon Treaty brought numerous novelties to the existing institutions of the EU.¹⁵ Firstly, the classical three pillar structure of the EU was erased in favour of a merger into a unified Union, with only a functional division to exclusive, shared and supporting competences. Two new posts were created at the very top of the EU hierarchy, the President of the European Council and the High Representative for Foreign Affairs and Security Policy.¹⁶ Also, the post of the EU Public Prosecutor was created.¹⁷ The Union was granted legal personality, and with it, the possibility to accede to the ECHR.¹⁸ The accession is within the jurisdiction of the EU Council, which shall decide on it unanimously.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Treaty on the European Union, 1992 OJ C191/01.

¹⁰ Article 6 reads as follows: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

¹¹ A set of rules created as accession prerequisites by the bodies of the EU and member states, for further details see http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm.

¹² “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

¹³ Treaty of the European Union, 2007 OJ C 306/01.

¹⁴ Full text of the Lisbon Treaty available at http://europa.eu/lisbon_treaty/index_en.htm

¹⁵ See more in Biondi, A. and Eeckhout, P., *EU law after Lisbon*, Oxford University press, Oxford, 2012.

¹⁶ Article 9b of the Lisbon Treaty, OJ C306 2007.

¹⁷ Article 69e of the Lisbon Treaty, OJ C306 2007.

¹⁸ Article 46a of the Lisbon Treaty, OJ C306 2007.

sly, due to the importance of the issue. Also, whereas in most cases only the opinion of the European Parliament will be requested, in case of the accession, the consent of the Parliament will be necessary. The European Parliament received an increase in its legislative powers, but, on the other hand, the European Citizen's Initiative was created, giving one million European citizens the possibility of legal initiative.¹⁹ One of the most important details in the light of human rights protection, is the fact that the Charter of Fundamental Rights has become legally binding. This document has been granted the same legal value as the Founding Treaties.

Despite all of the positive aspects of the Lisbon treaty, especially regarding the accession to the EConHR, Europe is still a long way from achieving a coherent and effective system of human rights protection.

2.2.1. Protocol No. 8 relating to Article 6(2) of the Treaty on the European Union, regarding the accession of the EU to the EConHR

The text of the Lisbon treaty consists of several protocols annexed to the Treaty, relating to different important issues.²⁰ One of them is certainly the accession of the EU to the human rights legacy of the CoE, the European Convention on Human Rights.

The regulation of this Protocol regards the special status that the EU should have in the human rights protection system, due to the fact that it is not a state, and can not be regarded as one in this complex system. It concluded that the agreement on accession must respect the special characteristics of EU law, and the Union itself.²¹ This particularly regards the Union's participation in the control bodies of the EConHR, and the appropriate assessment of claims and subjects to their respective representatives (Article 1).²² Article 2 emphasizes that nothing in the future accession shall compromise the competences of the Union, or the power of its bodies and structures.²³ It also states that the agreement will not affect member states in any way regarding the implementation of the Convention or its protocols, and the respective powers that the member states have regarding the reservations and derogations of its regulations.

The Protocol also points out that the agreement on accession will not effect Article 344 of the TFEU²⁴. This Article forbids states to bring complaints about the application of the Treaties to any other court other than the one provided by the Union. It guarantees the autonomy of EU law within the Convention system, and the ECJ as the final arbiter on its validity.

This Article is closely related to the system of preliminary reference in the EU. According to Articles 263 and 264 of the Treaty on the functioning of the EU, the ECJ is authorized to review the legality of legislative or other acts of EU institutions, to declare them void if necessary. This includes the competence to rule on the compatibility of acts of EU institutions with fundamental rights.

¹⁹ Article 8b, paragraph 4 of the Lisbon Treaty, OJ C306 2007.

²⁰ Full text of the Treaty and the amending Protocols available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>

²¹ Article 6, paragraph 2 of the Lisbon Treaty, OJ C306 2007.

²² Protocol 8 of the Consolidated Version of the Treaty on the European Union, 2007 OJ C 306/355.

²³ „The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.“

²⁴ “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

This competence of the ECJ has been elaborated in detail in the *Foto Frost* case.²⁵ According to this judgement, national courts against whose decisions legal remedies exist, are allowed to question the validity of Community acts. However, they are not allowed to proclaim Community acts invalid, which is within the exclusive jurisdiction of the Court of Justice of the EU. This case revealed the Court's strong opinion on the necessity of uniformity of EU law, regarding it to be essential for legal certainty and the coherence of the European legal order.

On the other hand, an important rule exists in the human rights protection system of the CoE. According to well established rules of the EConHR, the ECtHR can only accept a case after all domestic remedies have been exhausted.²⁶

In the light of accession, we could easily imagine a situation where a case is brought before the ECtHR with the question of fundamental rights in the context of the EU without being brought before the ECJ first. Could the system of *preliminary reference* survive the accession? Legalists and lawyers alike question the need for a specific mechanism that would ensure the intervention of the ECJ prior to rulings of the ECtHR in these specific cases. There is harsh debate regarding the solution of this problem.²⁷ All member states, as well as the EU bodies have surely been reviewing this matter carefully and it could prove prudent to require some safeguards regarding this matter, since the EU is the only party to the Convention that has such powers in regard to the application of the Convention in specific cases.

Even though the Protocol is a short document, its significance is anything other than that. Protocol No. 8 has confirmed, in the written form, that the EU will undoubtedly have a special status as a state party to the Convention. This status should not be considered as the byproduct of a lack of political will, but rather a sign that the Union is, and will remain, a *sui generis* entity within this and any other international agreement that it signs.

2.3. The Charter of Fundamental Rights

As mentioned above, the EU had long lacked a codified and unified list of human rights. The struggle to compile such a list has lasted for more than forty years, since the first proposals for such a document date back to the 1970s.²⁸ Finally, in 2000, the Charter of Fundamental Rights was created and proclaimed by the Parliament, the Commission and the Council of Ministers.²⁹ It is a unique document, in which the basic values and rights of the Union have been included. Its legal status, however, was far from certain, since it was firstly used only as an interpretative tool. Only through the Lisbon Treaty in 2009, did this document receive something more than consultative status. Article 6(1) of the TEU states that the EU:

"...recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

²⁵ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], ECR I-4199.

²⁶ Article 35(1) states: „The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken.“

²⁷ See more in Broberg, Morten P., *Preliminary references to the European court of justice*, Oxford University Press, Oxford, 2010.

²⁸ For a detailed development, see *Joint Declaration of the Parliament, Council and Commission* from 1977, *EP Declaration of Fundamental Rights and Freedoms* from 1986, *Community Charter of Fundamental Social Rights* from 1989 and others.

²⁹ Full text of the Charter available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf

However, this Charter emphasizes that its implementation will not exceed EU competences.³⁰

Substantially, the Charter did not bring forth any new rights. All these rights were already protected, either by the ECHR, either through the jurisdiction of the ECJ or through secondary law. So, what was the purpose of this document? The answer might be found in the old Latin maxim: „*Quod non est in actis, non est in mundo.*“³¹ Its first and foremost purpose was to declare all these rights as fundamental ones, and in so doing, to give them greater argumentative force and stronger protection.

The Charter is divided into six basic parts, all referring to certain principles of protection that the Charter wishes to emphasize. These are followed by horizontal clauses, adding that the goals of the Charter have to be positively promoted (51/1), and that they correspond to the rights laid down in the European Convention on Human Rights. But, as Article 52/3 states, this will not prevent the Union from providing a more extensive level of protection. The provisions also emphasize (Article 54) a strict prohibition of the abuse of these rights.

The Charter shall apply to the bodies of the Union, member states and their institutions when they implement EU law.³²

However, it should be noted that a protocol has been added to the Charter, through which The United Kingdom, Poland, and, later on, the Czech Republic have excluded themselves from the application of this document for the time being. The justification for such a decision lies, as stated, in „*the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter.*“³³

2.3.1. Case law regarding the Charter before the Lisbon Treaty

Even before the Charter had a binding significance in EU law, significant ECJ practice existed regarding the implementation of its Articles.³⁴

For instance, the *Maruko* case³⁵ was significant because of its huge impact on anti discrimination policies (Article 21 of the Charter). It determined that the discrimination of homosexual marriages is an issue guided by EU law, even when exclusive member states competences, such as civil status or marriage, are concerned. A similar issue was involved in the *Unibet* case where the right to effective judicial protection was challenged (Article 47 of the Charter). Even though the EU has no competences regarding this field

„...*the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favorable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).*“³⁶

The same Article, but a different right, was challenged in the *Reynolds Tobacco* case,³⁷ where the right to effective remedy was questioned. This case emphasized how

³⁰ For further information see *Charter of fundamental Rights*, OJ 2007 C 303/13, Article 51.

³¹ This sentence could be translated as „What is not written, it is as though it does not exist.“

³² Article 51 of the Charter, defining its „Scope“.

³³ Protocol on the Application of the Charter of Fundamental Rights and Freedoms 2007 C 303/13, full text available at <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/676-protocol-on-the-application-of-the-charter-of-fundamental-rights-of-.html>.

³⁴ See more in Rodin, S. et. al. *Izbor presuda Europskog suda: gradivo za nastavu prava EU*, Novi Informator, Zagreb, 2009.

³⁵ Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2007] ECR I-89.

³⁶ Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern [2007] ECR I-103.

³⁷ Case C-131/03 P R.J. Reynolds Tobacco Holdings, Inc. and Others v Commission of the European Communities [2006] ECR I-34.

the inclusion of a certain right in the Charter shows its greater legal importance in the Community legal order.

2.3.2. Case law regarding the Charter after the Lisbon treaty

Even though case law of the ECJ regarding the rights implemented in the Charter of Fundamental Rights has not yet had time to develop extensively, it has shown significant breakthroughs, even in its very beginnings.

Mainly, we refer to the *Kücükdeveci* case³⁸ that appeared before the Court in 2007. A case both hated and glorified, it has been said that the ECJ used this case to, once again, expand its competences in an area where it previously had none. The case regards anti discrimination policies, which, as we have already established, represent a fundamental principle of EU law. In the *Kücükdeveci* case, however, this principle regarded the implementation of a directive³⁹ in a clearly horizontal situation. A young girl of Turkish nationality sued her employee for age based discrimination. Up to this case, the Court firmly neglected the direct effect of directives in horizontal situations. But, in *Kücükdeveci*, the Court changed its opinion, regarding directives that contain general principles or, better said, fundamental rights of the Union.⁴⁰ Whether or not the Court will confirm this standpoint, or diverge from it (as it often does) depends on its future practice. However, one thing is clear. This case has confirmed the growing significance of the Charter of Fundamental Rights in the light of implementing community law.

2.4. The practice of the ECJ regarding human rights

One of the important sources of human rights protection in the EU is the ECJ case law. Since its foundation, despite the fact that it had no charter of rights as a reference point, the ECJ protected certain human rights. From the basic economic rights at the beginnings of the European Communities to more complex social and political rights at later stages, the creative strength of the Court grew with each case.⁴¹ The Court aimed to create a standard of protection that would enable human rights to develop within the EU.

In the early development of the Court's practice, human rights arguments were often regarded as an obstacle to the supremacy of EU law. In *Stork v High Authority* (1958),⁴² the Court decided that it could not apply the constitutional law of a certain state. However, in *Stauder v City of Ulm* (1969), fundamental rights were viewed in a more positive way, as interpretative guides. *Internationale Handelsgesellschaft* (1970)⁴³ on the other hand, signified a turning point in the Court's approach. The Court firmly determined

³⁸ Case C-555/07, Seda Küçükdeveci v Swedex GmbH & Co. KG [2010] ECR I-151.

³⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2002] OJ L303/22.

⁴⁰ See more on the *Kucukdeveci* case in Duić, Dunja, *Nadredenost europskog prava nad ukupnim pravnim sustavom država članica: analiza presude Kucukdeveci*, u *Pravni vjesnik: tromjesečni glasnik za pravne i društveno-humanističke znanosti Pravnog fakulteta u Osijeku* br. 1, 2012., Osijek, str.71. - 85. and Martinović, Adrijana, *Zabrana diskriminacije na temelju dobi kao opće načelo prava EU i njezini učinci prema presudama Europskog suda u predmetima Mangold i Kucukdeveci*, u *Hrvatska pravna revija*, Zagreb, br. 5, 2010, str. 109. – 116.

⁴¹ See more on the steady development of human rights protection standards by the ECJ in Rodin, S. et. al. *Izbor presuda Europskog suda: gradivo za nastavu prava EU*, Novi Informator, Zagreb, 2009.

⁴² Case 1/58 Friedrich Stork & Cie v High Authority of the European Coal and Steel Community [1959].

⁴³ Case 11/70 Internationale Handelsgesellschaft mbH protiv Einfuhr- undVorratsstelle für Getreide und Futtermittel [1970] ECR I.

that the validity of community law cannot be determined through the criteria of national law, including the criteria of fundamental rights guaranteed by national constitutions. One of the foundations for this was a decision made in the same year, where the Court determined, in the *Nold* case (1974),⁴⁴ that human rights guarantees in the Union were derived from national constitutions. This case also confirmed that it could use all the international agreements and treaties that the member states have signed as certain interpretative tools regarding fundamental rights and freedoms. In this system, the EConHR is considered a document with special significance⁴⁵. However, the German National Court in question did not agree with this decision of the ECJ and requested the German Constitutional Court to check whether the measures of the Community were (un)constitutional. The German Constitutional Court, in the famous *Solange I* case (1974),⁴⁶ declared that in its opinion, the standards of protection of human rights in the Community were not on the level that the German Constitutional Court provides through the German Grundgesetz.⁴⁷ So the Constitutional Court ruled that *as long as* the level of protection of human rights in the Community remains as it is the German Constitutional Court intends to keep ruling upon the validity of Community law. But, the story did not end here. Twelve years later, in its judgment in *Solange II* (1986)⁴⁸, the German Constitutional Court noted that the level of protection of human rights in the European Community was raised to an acceptable level. As long as this level remains as such, the German Constitutional Court would no longer rule upon the validity of Community law.

It may seem that the standards of protection set forth by the ECJ are firm, but we must emphasize that the Court still revises rights on a *case by case basis* and its opinion is always subject to change should the circumstances provide for it. Secondly, even though the Court provided substantial protection of human rights in its judgments, it also made sure that fundamental rights were never conceived as absolute. They are undoubtedly subject to restrictions, as long as they correspond to the objectives of the Union and as long as the very substance of the right is not challenged.⁴⁹ The interference with such a right must not be inappropriate or disproportionate.⁵⁰ Fundamental freedoms frequently collided with market freedoms, which could be expected, taking into account the economic nature of the Union. The freedoms which prevailed depended on a case by case basis.⁵¹ Thus, a firmer rule of determining the solution of this collision was created - a proportionality test.⁵² A certain measure has to have a legitimate interest and be appropriate and necessary for it to be able to derogate a certain fundamental right.⁵³

⁴⁴ Case 4/73 *Nold v. Commission*, [1974] ECR 491.

⁴⁵ Case 4/73 *Nold v. Commission*, [1974] ECR 491.

⁴⁶ *Solange I* (1974) BVerfGE 37, 271, 2 BvL 52/71.

⁴⁷ The Republic of Germany does not have a *Constitution*, but rather a *Grundgesetz*, which means *Basic Law*, performing the role of a constitution.

⁴⁸ *Solange II* (1986) BVerfGE 73, 339, 2 BvR 197/83.

⁴⁹ See Case 4/73 *Nold v. Commission* [1974] ECR 491, at 508, paragraph 14, and also case 5/88 *Wachauf v. Germany* [1989] ECR 2639.

⁵⁰ "The fundamental rights recognised by the court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights." *Ibid.*, paragraph 18

⁵¹ For a detailed review of the most important judgments and opinions of the ECJ see Rodin, S. Et al. *Izbor presuda Europskog suda: gradivo za nastavu prava EU*, Novi Informator, Zagreb, 2009.

⁵² See more proportionality in Rodin, S. *Načelo proporcionalnosti - porijeklo, ustavno utemeljenje i primjena* u Zbornik Pravnog fakulteta u Zagrebu, Zagreb, br. 1-2, 2000., str. 31. - 53.

⁵³ See more in Borchardt, K. D., *Abeceda prava Europske Unije*, Ured za publikacije Europske Unije, Luksemburg, 2011.

In addition, the Court has had the unpleasant and complicated task of assessing the matter of conflicts between two fundamental rights. The difficulty of this task may be best seen in the *Grogan* case (1991),⁵⁴ which opposed the right to free speech to the right to life. The case took place in Catholic Ireland, where abortion is illegal, as well as providing any information about it. The right to life has a specific meaning in Ireland, whereas spreading information about a certain service was not considered to fall into the scope of providing the service. However, the Court acted in accordance with the fact that no developed standard on the matter existed, and thus, that Ireland had a wide margin of discretion in asserting the importance of certain rights.

The existence of this wide margin of discretion was emphasized once again in the *Omega* case (2004),⁵⁵ where the German concept of human dignity opposed market freedoms. However, the Court emphasized that the lawfulness of these national measures is validated through tests of non discrimination and proportionality.

Other cases, such as the above mentioned *Maruko* case, also challenge the margin of discretion, particularly regarding the fact that member states have very different definitions of marriage.

It is thus clear that the Court had many difficulties in defining even the basic standards of protection of certain human rights. This task was aggravated by the fact that the legal, social and political traditions of member states differed so much that a standard acceptable to most states would become a mere minimum of what was needed. On the other hand, the Court could not step beyond its jurisdiction and impose equal standards for all. Thus, the system of human rights protection within the EU had to be changed and improved.

2.5. The European Convention on Human Rights

The EConHR is one of the most important documents on human rights in the modern world. This year, it celebrates its 60th anniversary, reaffirming its value as the foundation of a very elaborate system of human rights protection.⁵⁶ Even though its basis was the UN Universal Declaration of Human Rights (1948), the difference between these two documents was considerable.⁵⁷ The Convention did not only list human rights as many of its predecessors did, but it also created an obligation of its states parties to respect these rights, and created the European Court of Human Rights, as a supreme body able to adjudicate on eventual breaches of Convention regulations.⁵⁸

In its Articles, it aims to protect the fundamental rights of the modern world, such as the right to life (Article 2), the right to liberty and security (Article 5), and the right to privacy (Article 8), it prohibits discrimination (Article 14) etc. All of these rights enjoy equal protection, even though some of them are considered to be absolute, and some can be conditional. Another important part of this new human rights protection system were the detailed rules regarding procedure before the Court that left little room for discretion to state parties.⁵⁹

⁵⁴ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I.

⁵⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I.

⁵⁶ Detailed insight into the legacy of the EConHR and the CoE can be found on the webpage of the Council dedicated to the EConHR <http://human-rights-convention.org/>

⁵⁷ See more in Andrassy, J. et. al., *Međunarodno pravo*, Školska knjiga, Zagreb, 2010.

⁵⁸ See more in Omejec, J., *Europski sud za ljudska prava*, u *Zbornik Pravnog fakulteta u Zagrebu*, Zagreb, br. 3-4, 1999., str. 487. – 527.

⁵⁹ For better insight regarding procedural issues before the Court, see full text of the Rules of the Court on <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>

Apart from its signatories, the importance of this document has also been confirmed in the EU, where it has been an inspiration for several Articles in the Founding Treaties, and an aid to the work of the ECJ, when human rights guarantees were needed.

An extensive analysis of the EConHR and its protection system exceeds the purposes of this article and thus it will not be provided here. For a detailed insight into the matter the reader should consult relevant literature.⁶⁰ However, that relevant case law of the Court regarding the relationship between the ECJ and the ECtHR, should be presented, in light of the development of human rights protection standards.

2.5.1. *The practice of the ECtHR regarding the European Union*

As stated above, even though the EU is not yet a party to the Convention, the ECtHR had to include the Union into its judgments on numerous occasions.

For instance, in 1958, the issue of signing two treaties successively, which could eventually preclude each other, came before the European Commission. They held that

“...if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty”⁶¹

Another relevant case appeared before the Court in 1977 where a French union challenged a decision of the European Coal and Steel Community. The Commission, however, held that this case was inadmissible because it was directed towards a person, or, better said, an entity, that was not a party to the Convention.⁶² On the other hand, the Commission’s work included several cases regarding the state’s margin of discretion when implementing Community measures. An important case occurred in 1984, when a French politician complained about the law on electing members of the European Parliament. He protested that his right against discrimination was breached, and that he had lost the right to free elections and the right to effective remedy in this matter.⁶³ The problematic part was that the legal aspects in question were those where the state party enjoyed substantial discretion. Even though the Commission held that, in principle, the responsibility of an individual state could be challenged in a case where certain rights enshrined in the EConHR are at the same time a part of state competences being transferred to a higher contracting party. Nevertheless, it dismissed the application.

2.5.1.1. The Bosphorus doctrine - method of indirect review

When Protocol 11⁶⁴ of the EConHR came into force in 1998, and the European Commission on Human Rights ceased to exist, the Court was left alone. But, this does not mean that its fruitful work for the protection of human rights suffered. On the contrary, it grew even more.⁶⁵ The most important case that came before the Court since the

⁶⁰ See e.g. Mowbray, A., *Cases, materials, and commentary on the European Convention on Human Rights*, Oxford University Press, Oxford, 2012.

⁶¹ CD 235/56, [1958], Yearbook 2, p. 256.

⁶² Confédération Française Démocratique du Travail v. the European Communities (1977) Series A 8030.

⁶³ Etienne Tête v. France (1984.) no. 11123/84.

⁶⁴ Protocol no. 11 to the European Convention on Human Rights, restructuring the control machinery of the European Court of Human Rights (1998) ETS no. 155

⁶⁵ The Court publishes a detailed yearly statistic regarding the amount of cases received, discarded and resolved. When viewing the statistic data for the year 1998, it is visible that the number of cases grew exponentially when the

Protocol is *Bosphorus Airways v. Ireland* case (1998).⁶⁶ The case concerned an aircraft, leased by the applicant by a Yugoslav company that was impounded in Ireland in 1993. The impound was a result of Ireland's international obligation to act against Yugoslavia, on the basis a Community Regulation giving effect to UN sanctions against this former state. On the other hand, in doing so, Ireland became liable before the ECtHR for breaches of the ECHR. The Court of Human Rights found itself in a difficult situation, having to respond to a case where the country simply complied with one set of rules, only to break another. It was also the first case where the Court decided to debate upon the merits of a case regarding measures giving effect to Community law where the country had no margin of appreciation. The Court firstly stated that states are generally liable for their other international legal obligations. However, when the obligation concerns an international system that provides at least an equivalent level of human rights protection as that of the ECHR, there is a rebuttable presumption of validity for such state acts. It has also been noted that *equivalent* does not mean *identical*, but rather very similar. The possibility of different interpretation of this term gave rise to the possibility to rebut this presumption in cases where an equivalent level of protection is not met. State action is considered justified when the organization on behalf which they are acting, provides not only substantive protection, but also when it offers effective measures of protection. Thus, it was been confirmed in ECtHR case law that measures which leave states discretion in implementation.⁶⁷ It could be argued that this case is quite similar to the *Solange* case that appeared before the ECJ and could be considered as something of a guideline directed to the EU, when human rights are concerned.

The importance of this rule has been confirmed through codification in the Charter of Fundamental Rights, Article 52(3).⁶⁸ This guiding rule, now codified, reflects the specificity of the EU legal order, as stated in the Articles of Protocol XVI of the Lisbon Treaty regarding the accession to the ECHR.

One could argue that this system of indirect review could result in severe consequences, when states could find themselves in a situation where they either have to breach EU law, to respect the ECHR, or to breach the ECHR in respecting EU law. A system should be created to help avoid these situations, and this is one of the strongest arguments to as why the EU should accede to the ECHR. It has yet to be shown whether or not the Bosphorus doctrine on the principle of equivalence will remain active even after the accession.

It should be mentioned that there are also several pending cases before the Court, seeking to evolve the Court's case law even more.⁶⁹

3. Accession of the European Union to the ECHR

The accession of the EU to the ECHR is currently under way, but it is not an idea that is new either to the EU or the CoE. As a matter of fact, this idea has been discussed

Commission ceased to exist. Reports available at <http://www.echr.coe.int/echr/en/header/reports+and+statistics/statistics/statistical+data>

⁶⁶ *Bosphorus Hava Yollari Turizm AS v. Ireland* (2010) no. 45036/98

⁶⁷ *Cantoni v. France* (1996) (45/1995/551/637)

⁶⁸ "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

⁶⁹ For cases currently pending before the Grand Chamber of the Court visit <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Grand+Chamber/faq.htm>

for more than 30 years.⁷⁰ However, only since the 1990s did the relevant authorities feel that accession would not be possible without amending the Treaties.⁷¹

The general view at the time was that the EU was not competent to access to the EConHR, and there was no specific provision in the Founding Treaties that could make it possible. Also, at that time, the EU had no competence in the area of human rights.⁷²

However, relevant case law existed, since the ECJ often referred to the judgments and opinions of the ECtHR, and similar action was taken from the ECtHR regarding the ECJ.⁷³

Despite the aforementioned initial lack of competence in the area of human rights, several opinions (1/76, 1/91)⁷⁴ eventually concluded that, theoretically, the EU could join an association with its own judicial control (e. g. the WTO).

After several decades, it became obvious that the CoE will be the EU's next partner. The 2007 Memorandum of Understanding (MoU), a document that structures and guides the relations between these two organizations, confirms the CoE's role as "*the benchmark for human rights, rule of law and democracy in Europe.*"⁷⁵

These historical efforts resulted in the regulations of the Lisbon treaty, where the possibility for accession to an international agreement was finally created.⁷⁶ In other words, the Lisbon treaty went even further, confirming that the EU will accede specifically to the EConHR in its Article 6:

*"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*⁷⁷

The EConHR contains a similar regulation in its Article 59 (as amended by Protocol 14, of 1 June 2010): "*The European Union may accede to this Convention.*"⁷⁸ These two important documents created the legal basis for accession.

However, this does not mean that the accession has simply to be carried out. An accession treaty has yet to be created, even though a rough idea of its future appearance has already been created.⁷⁹ Furthermore, this future document, according to Part Five, Title V *International agreements* of the Lisbon Treaty, will have to be ratified unanimously by the Council of Ministers (EU), with a two third majority in the European Parliament (EU), by all of the 27 member states (EU) and all of the 47 state parties (EConHR).⁸⁰ Thus, despite the overall enthusiasm this process is likely to take some time, in order to be carried out effectively and correctly.

⁷⁰ See more in Tobias, Lock, EU Accession to the ECHR: Implications for Judicial Review in Strasbourg, European Law Review, Issue 6, 2010, Sweet and Maxwell, London

⁷¹ Opinion 2/94 of the Court of Justice [1996] Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷² See opinion of the CoE Steering Committee on Human Rights (CDDH) from 2002 *Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights*, CDDH(2002)010, Addendum 2

⁷³ See relevant case law from both the ECJ and the ECtHR regarding human rights protection standards *supra*.

⁷⁴ For further information see Opinion 1/76 of the Court of Justice [1977] and Opinion 1/91 of the Court of Justice [1991].

⁷⁵ Report for the 120th Ministerial Session on Co-operation between the Council of Europe and the European Union CM(2010)52.

⁷⁶ We beg the reader not to consider that the author is of the opinion that the only reason for treaty amendment was the accession to the EU. The Lisbon treaty has far reaching consequences, one of which is indeed the possibility of accession.

⁷⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01.

⁷⁸ Protocol no. 14 to the European Convention on Human Rights ETS no. 194.

⁷⁹ For an extensive overview of the potential difficulties see Krüger, H.C. and Polakiewicz, J., *Proposals for a Coherent Human Rights Protection System in Europe* in Human Rights Law Journal 1, 3, 2002

⁸⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01 art. 218.

The significance of EU's accession is due to the fact that the EU is undoubtedly different from a state and that it is, *via* this fact, possibly subject to specific rules of accession. The accession will mean much more for the Union than it did for state parties. Firstly, this means that the EConHR becomes a part of EU law, and not just a reference point it has been so far. Even though the national courts and bodies have already applied it as part of their law, they can now apply it as a part of EU law, and so can the ECJ. This also means that, alongside the indirect review system created by the Bosphorus doctrine, a system of direct control will be created, leaving the EU institutions, and the entire European legal system, open to direct scrutiny by the ECtHR.

In regard to the accession process itself, numerous questions have yet to be answered. For example, one of the most important issues is - what is the Union acceding to regarding the numerous protocols of the EConHR? This is relevant because not all of the member states are state parties to all protocols. Secondly, institutional issues arise, such as whether the EU will have its own judge in the ECtHR, how should he be appointed, and should he have a normal or a limited role? Also, should the EU be represented in the Committee of Ministers and by whom, regarding to which is the corresponding body in the Union? Should the Union be represented in the CoE Parliamentary Assembly, and if so, how? These are all legitimate questions that the negotiation process will have to answer. The EU bodies feel that a degree of participation should be ensured within the Convention system and the Court, and this opinion has been strongly emphasized in the negotiations.

However, it is clear that the parties involved have proven that they are committed to a rapid accession. The negotiations have reached the highest point, and the accession is now just a matter of time.⁸¹ Its importance is even greater because the EConHR is considered to be only the first of many conventions and agreements that the EU will accede to. This is most evident in the aforementioned *International agreements* title of the Lisbon Treaty, which enables the EU to accede to virtually any international agreement.⁸²

4. Conclusion

Today, the effective protection of human rights is one of the most important fields of international cooperation. Numerous actors on the international stage are coming together, realizing their strength is greater when combined. The EU was not originally designed as an institution that would protect human rights. However, its evolution brought with it several changes. Today, we see the EU not only as one of the world's largest economic mechanisms, but also as a human rights protector. The CoE, even though a political institution, was committed to human rights protection from its very beginning. The EConHR is its most important international agreement in the light of human rights protection.

⁸¹ To gain information on the current status of the accession, see available documents and newsfeeds on the webpages of the Council of Europe www.coe.int and the European Union www.europa.eu

⁸² Article 216

1. The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Article 217

The Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

In their work, these two institutions have often crossed each others' paths, referring to one another in numerous ways. The next logical step towards effective protection presented itself in the idea of an accession of the EU to the EConHR. Even though the idea is not new, only in the last two years has the accession become a burning issue. Legal foundations have been created, and the parties involved came together in a complex negotiation process. Even though the process itself has yet to be completed, the aim is already clear. Both the EU and the Council of Europe have decided to take this necessary step in order to achieve greater protection for all the peoples in Europe. And that is something that, despite the necessary criticism, must be respected and honoured.

Europska Unija i Europska konvencija o ljudskim pravima – pristupanje diva

Europska unija, kao i Vijeće Europe već su dugo značajni akteri u području zaštite ljudskih prava. Najvažniji mehanizam stvoren za očuvanje ljudskih prava je Europska konvencija o ljudskim pravima. Prepoznajući njezinu važnost, EU sada želi pristupiti ovom dokumentu. Pravna podloga za ulazak je stvorena, kao i pozitivno političko okruženje, ubrzavajući taj složen proces. No, pristupanje tek treba provesti i njegov ishod smatra se neizvjesnim. Bez obzira na to, moramo poštovati nastojanja uključenih aktera odlučnih da iskorače prema jačoj zaštiti ljudskih prava u Europi.

Ključne riječi: Europska unija, Europska konvencija o ljudskim pravima, pristupanje, ljudska prava, sudska praksa