

”THE ACCESSION OF EU TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS” - TECHNICAL ASPECTS

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Abstract

“The continues changing of the European Communities [presently European Union, as resulted from the amendments brought in the last 16 years, and especially via the Treaty of Lisbon] has determinate the changing of the judicial system. The accession of the EU to the Convention will complete the EU system of protecting fundamental rights. The Declaration of Berlin on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome, as it was signed on 25th of March 2007 by all 27 members of European Union, is providing among others the principles and values based on respect of fundamental rights, common traditions of the member states, as well as promoting the variety of languages, cultures and regions within the EU. European Union stresses out again its intention to protect the freedoms of citizens and their civil rights by all possible means, including in front of the courts. The reassessment, via the Treaty of Lisbon, of the role of European Charter of Fundamental Rights and the accession to European Convention of Human Rights highlight the importance that each of them have separately, but as a whole in a complex legal system of the protection of human rights”.

Key words: treaties, rights, legal protection, European system

1. Introduction

Although it has not been legally regulated by means of the European Unions’ treaties, the principle of human rights protection has become since its regulation under the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), one of the most important principles.

The important value of the fundamental rights has been reiterated in 2007 in the Conference of Berlin, when the “*Berlin Declaration*¹” was signed by the 27 member states of the European Union (including the last two states acceding to the European Union as of January 1st, 2007, namely Romania and Bulgaria), on the occasion of 50 years anniversary from the signing of the Treaty of Rome by the 6 countries founding the European Union (EU)². This declaration occurred in a crisis moment faced by the European integration process, whereas the Constitutional Treaty had been rejected by France and Holland in 2005, as a result of the referendums performed in the said countries on the 29th of May 2005 with 69%, and 1st of June 2005 with 62% respectively.

The mentioned declaration reiterated principles and values of special meaning for the European Union and for the member states, among which we can mention as examples: freedom, democracy, rule of law, mutual respect, tolerance, justice etc, and also its undertaking of ensuring, respecting and protecting such, prohibiting any individual or member state from breaching them.

Also, Europe is reunified under the sign of European fundamental values, written in the EU Treaty, namely: freedom, democracy and respect for human fundamental rights and freedoms, as well as the rule of law.

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¹ The Conference was organized in Berlin by the German presidency, held between 1st of January – 30th of June 2007.

² France, Germany, Italy, Belgium, Luxembourg and the Netherlands.

Thus, the three Treaties by means of which the former European Communities (presently, European Union) were established³ did not stipulated provisions regarding the human rights protection throughout the former Community's business, such that before the Court of Justice of the European Union (CJEU) numerous matters have been raised regarding the observance and application of the human rights on a European level, by referral to "*the general principles existent on a national level in the common European juridical patrimony*"⁴.

Initially, the European Union did not have a catalogue of fundamental rights, the main sources being represented by the constitutional principles common to the member states and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁵, the importance of which arises from the fact that being ratified by all member states⁶, it represents the expression of their common values.

Although, the protection of the fundamental rights had not initially been a matter of specific concern for the European Union, presently bearing in mind the new economical, political, social, cultural and legal realities within the EU, this protection became one of the most important issue that concerns the main European institutions, the Court of Justice of the European Union⁷ and not least, the Member States of the EU.

As concern the issue of the EU's accession, Viviane Reding, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship said during the Hearing of the European Parliament's Constitutional Affairs Committee, that took held in Brussels, 18 March 2010 that "*the accession of the EU to the Convention will complete the EU system of protecting fundamental rights. Also, the constitutional significance of this accession was already noted by the European Court of Justice in 1994. [...] The Lisbon Treaty makes it clear that accession is not only an option, it is the destination*"⁸.

2. Enlarge on the matter

2.1. General aspects. The first referral on the "*human rights*" concept was introduced in the Preamble to the Single European Act signed on February 17th, 1986 and entering into effect as of July 1st, 1987, without stipulating the competency of the European Court of Justice (ECJ), in this respect. Subsequently articles 2 and 6 paragraph 1 of the Amsterdam Treaty (the former article F.2 of

³ The Treaty creating the European Community of Coal and Steel of April 18th, 1951, signed in Paris and coming into effect on the January 1st, 1952, and the Treaties of Rome creating the European Community for Atomic Energy, and the European Economic Community, respectively, signed on the date of March 25th, 1957 and coming into effect on the date of January 1st, 1958.

⁴ Gyula Fabian, *Drept institutional comunitar*, 2nd edition (Cluj-Napoca, Sfera Juridica Publishing House, 2006), p. 86; Damian Chalmers, Giorgio Monti, Adam Tomkins, *European Union Law, texts and materials* (Cambridge University Press, US, 2006), p. 232 and the following.

⁵ Websites: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf and http://www.echr.coe.int/NR/rdonlyres/E7126929-2E4A-43FB-91A3-B2B4F4D66BEC/0/ROU_CONV.pdf.

⁶ Presently, 47 states ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in accordance with their constitutional procedures.

⁷ According to art.1 paragraph 1 of TEU (former art.1 of TEU) "[...] *The HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION [...]*", which "*substitutes the European Community and succeeds it*" (art.1 paragraph 3 of TFEU). Moreover, on occasion of ruling judgment in Case C-345/08 Krzysztof Peśla / Justizministerium Mecklenburg-Vorpommern (published in OJEU, C series no.260 of 11.10.2008), the Court of Justice of the European Union used for the first time the phrase "*Union law*", thus replacing the phrase "*community law*". Taking into account the fact that it has not made a statement yet in respect of the courts of the CJEU, we think that by extrapolation the phrase "*community courts*" can be renamed as "*European Union courts*".

⁸ http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf.

the Treaty on European Union of 1993) consecrated the ensuring and protection of the fundamental rights within the European legal system⁹.

Initially, the EU Charter on fundamental rights proclaimed at Nice in December 2000 which represents a catalogue of fundamental rights applicable within the European Union, was not an integral part of the primary law. However, starting with 1st of December 2009 it becomes an integral part of the Treaty of Lisbon, having legally binding status.

Through this document, the European Union confirms its commitment to one of its basic principles, namely protection and respecting the fundamental rights. EU Charter brings together for the first time, within a single text, the main rights (political, civil, economic, social etc.) for the *ressortissants* of the European Union, giving them greater visibility and highlighting the importance of the rights. Moreover, the Union must respect the fundamental rights guaranteed by the European Convention on Human Rights and resulted from constitutional traditions common to the Member States, as general principles of Union law¹⁰.

The Treaty of Lisbon marks an important moment in the evolution of the European Union, because revises substantially article 6 of Treaty on European Union (TEU), as concern the legal status of the Charter by giving it the same legal value as the Treaties (art.6 para.1). Also, the article clarifies that “*the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*”. Furthermore, it stipulates that the Charter rights are to be interpreted in accordance with the “horizontal” provisions¹¹ of the Charter and with “*due regard*” to the Explanations prepared by the Bureau of the Charter Convention.

An important provision of the Treaty of Lisbon is the accession of EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, whilst the legal basis for the accession of the EU to the ECHR is art.6 para.2 of TEU¹² and Protocol No.8 relating to article 6 para.2 of the Treaty on European Union¹³ on the accession of the Union to the European Convention on the protection of human rights and fundamental freedoms, which is annexed to the Treaty on European Union, according to which “*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* [...] “*or the powers of its institutions*”. Moreover, the accession “[...] *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* [...]”.

Further to this, the Stockholm Programme¹⁵ calls for a “*rapid*” accession to the ECHR and invites the Commission to submit a recommendation to the Council “*as a matter of urgency*”. Thus,

⁹ Paul Craig and Grainne de Burca, *EU Law, text, cases and materials*, third edition (Oxford University Press, 2003, US) p.317; Thus, according to former art. 2 – The Union sets out its objectives “[...] of enhancing rights protection [...]”, former art. 6 para.1 of the EC Treaty – “*The Union is grounded on the principles of freedom [...] human rights and fundamental freedoms protection [...]* whilst par 2 of the same article stipulates that: “*The Union protects fundamental right as they are ensured by the European Convention on protecting the human rights and fundamental freedoms [...]*”. Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf).

¹⁰ Article 6 para.2 of TEU.

¹¹ Articles 51 to 54 of the Charter clarifying the Charter’s scope and applicability.

¹² Ex - article 6 of TEU.

¹³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:RO:PDF>.

¹⁴ The Treaty was signed on 4th of November 1950, in Rome, Italy. On 8th of December 2009 the European Commission issued a working paper in order to analyze the Agreement of EU accession to this Convention.

¹⁵ In this context, point 2.1. “*A Europe built on fundamental rights*” from the Stockholm Programme stipulates that “[...] *After the entry into force of the Lisbon Treaty, the rapid accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is of key importance [...]*”. “*The European Council invites:*

- *the Commission to submit a proposal on the accession of the Union to the European Convention for Protection of Human Rights and Fundamental Freedoms as a matter of urgency,*
- *the Union institutions and the Member States to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms throughout the legislative process by way of strengthening the application of the*

the EU would become the 48th Contracting Party of the Convention, without becoming a member of the Council of Europe (CoE).

The Treaty presents also the procedure for the accession to ECHR, namely “[...] *the Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements*” (article 218 of TFEU¹⁶). Also, the accession to ECHR and the provisions of the Charter shall not enlarge the competences of the EU established by the treaties enforced.

The advantages brought by the EU's accession to the Convention¹⁷, which have a high political and legal significance, are as follows:

- **From the perspective of the citizens**, accession will guarantee that any person claiming to be a victim of a violation of the Convention by an institution or body of the Union can bring a complaint against the Union before the Strasbourg Court under the same conditions as those applying to complaints brought against Member States;

- **In political terms**, accession means that the European Union reaffirms the pivotal role played by the Convention system for the protection of human rights in Europe, beyond the borders of the 27 Member States

- **In legal terms**, accession will be important before:

- it complements the introduction of a legally binding Charter of Fundamental rights. Accession to the Convention will ensure that the case-law of both Courts evolves in step. It is therefore an opportunity to develop a coherent system of fundamental rights protection throughout the Europe;

- it opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them to 27 Member States collectively;

- the Union will have at its disposal all rights that the Convention gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court. The Union will also be able to be represented in the Strasbourg Court with **an EU judge**.

2.2. Principle elements of the EU's accession to ECHR. Starting with January 2010, the Spanish Presidency of the European Union¹⁸ together with the European Commission and the representatives of the Member States of the EU and those of the Council of Europe (working group CDDH¹⁹) started the negotiations for the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the debates on the agreement on the mandate gave by the Council to the European Commission in order to sign the treaty on EU accession to the ECHR.

After a public debate, the Council adopted a negotiating mandate for the EU's accession to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and

methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights” - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:01:EN:HTML>.

¹⁶ Ex - article 300 of TEC.

¹⁷ http://ec.europa.eu/commission_2010-2014/redirect/pdf/speeches/speech_20100318_1_en.pdf.

¹⁸ Spain held the rotating presidency of the European Union during 1st of January – 31st of July 2010. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf.

¹⁹ Steering Committee for Human Rights (CDDH) is composed of representatives from all forty seven member States and a number of observers (from other countries, International Organisations and Non-Governmental Organisations).

on 17th of March 2010 the Commission tabled its recommendation for a negotiating mandate²⁰. Different Council working-groups have discussed the proposal since then.

The aforementioned mandate was adopted within the JHA Council that took place between 3-4 June 2010.

Regarding the principal elements of the negotiations, these are:

➤ *The institution which will act as a negotiator*

During the negotiations, the opinions of the Member States were different as regards the *institution who will act as a negotiator*, having regard to the various interpretation of article 218 of TFEU²¹, according to which the rule is that the negotiations are conducted by the European Commission, unless the case when the agreement refers to, exclusively or predominantly, on issues of foreign policy, in which situation the negotiations are conducted by the High Representative of the Union for Foreign Affairs and Security Policy. Also, according to other opinions, the representatives of Member States should be involved in the negotiations process in a grater manner.

➤ *Principles of negotiation*

Regarding the paragraph from the principles of negotiation to which Romania has expressed its concern (which provided that the Strasbourg court shall not interpret the EU law not even "*indirectly or incidentally*" and, especially, the rules on separation of powers between the EU and Member States), it was filled with a phrase stating that this principle cannot be interpreted in order to prevent the evaluation of the conformity of EU law with human rights by the European Court of Human Rights (ECtHR).

➤ *The mechanism of "co-defendant"*

The purpose of the mechanism of "*co-defendant*" is to ensure that when a complaint is lodged to the ECtHR by citizen against a Member State on issues of law of the European Union, the Union shall have the possibility to become party in that case, as "*co-defendant*". Also, the mechanism allows Member States, as well, to intervene in a situation where an action is brought against the EU on issues of primary law (which are beyond the control of the Union, as these treaties concluded between Member States).

Although some states have opposed to the provision of establishing a special mechanism, in the final phase of negotiations the question of the mechanism of "*co-defendant*" has not raised any special problems. The reason is a new paragraph included in the negotiation directives providing for the need to introduce this mechanism.

The agreement of the parties was that the mandate will include only what the EU will have to agree in relation with the Member States of the Council of Europe (namely *the possibility* that the EU should become part of the case), whilst the internal mechanisms (i.e. *the obligation* for EU to intervene or the modality for allocating the compensations in relation to the applicant) shall be determined by *binding rules of procedure adopted within the EU*. According to a statement attached to the negotiating mandate, these rules will be discussed in the same time with the negotiation process and will be adopted unanimously, when signing the accession treaty.

²⁰<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/291&format=HTML&aged=0&language=E&guiLanguage=en>

²¹ Ex-article 300 of Treaty establishing the European Community (TEC).

➤ *Competency of the Court of Justice of European Union*

The involvement of the Court of Justice of EU caused the most intense negotiations, the positions of the States being substantially opposite. Thus, one of these positions²² considered that it is necessary to introduce a mechanism in order to bring a case before the Court of Justice of European Union *by suspending the procedure started before the European Court of Human Rights*.

Another element refers to keeping the Court of Justice of EU as a supreme court of a distinct legal system, which is not subject to any external control according to the international law (this provision shall be no longer a prerequisite after the accession to the ECHR)²³.

Another provision included in the final phase of the negotiating mandate referred to stipulating of certain provisions according to which the accession shall not affect a series of dispositions of TFEU²⁴ (especially art.275²⁵ of TFEU or 263 para.4²⁶ of TFEU), as well as to ensuring, through a separate declaration, that the mechanism for involving the European Court of Justice shall not modify the treaties.

Regarding **Romania** and taking into consideration the issue of EU's accession to ECHR, we want to highlight the following:

- during the negotiations, the Romanian's position was coordinated by the Ministry of Foreign Affairs and Ministry of Justice;

- regarding the principal elements of negotiations, the Romania has the following principles, namely:

- a) the EU's accession to ECHR shall increase the respect for human rights *by the Union and its institutions* (as regards the Member States, they are already parties to the European Convention on Human Rights);

- b) the EU's accession to ECHR shall serve the citizens and not necessarily the EU institutions so that the citizens can, in an efficient way, to file a petition before the Court in Strasbourg;

- c) the mechanism requested imperative by France (at the suggestion of the EU institutions - the Court of Justice and the European Commission) regarding the involvement of the Court of Justice of EU, in the cases when this court did not have the occasion to rule upon a case brought already in front of ECtHR, shall be made without any procedural delays, which would be a disadvantageous to citizens;

- d) as regards the mechanism of "*co-defendant*", Romania considered that it is necessary the mechanism could be triggered *not only by the European Union, but also by the Member States*, Romania being very interesting about this issue;

²² The opinion of France was supported by the Czech Republic.

²³ This point of view was expressed by France, which supported the position of the judges of the Court of Justice of the European Union. This opinion have been presented both by the Court's representative within the FREMP working-group and by non-paper containing a proposal for a mechanism submitted by judge Timmermans. The compromise was to include the phrase "*without causing unreasonable delays*" (starting from the formulation of the ECHR relating to implementation of article 6 - right to a fair trial).

²⁴ Treaty on the Functioning of the European Union.

²⁵ Article 275 of TFEU: „*The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union*”.

²⁶ Art. 263 para.4 of TFEU stipulates that “*any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*”.

e) as *the involvement of the Court of Justice of the European Union* is concern, Romania accepted a mechanism to involve the court in Luxembourg, but insisted that the proceedings before the ECtHR should not be suspended because of the inconveniences for the citizens. In this context, the procedure should be conducted in a reasonable time²⁷.

2.3. Other technical details. At the level of the Council of Europe a working-group composed of 14 states has been established (7 Member States of EU *which includes Romania*, and 7 third countries to the EU), which assists CDDH²⁸ (“delegation” of the Council of Europe) in negotiating process with the EU.

The compromise provided that the negotiation of the EU’s accession to ECHR by the European Commission and the establishing a special committee (in this case being appointed the working - group FREMP) which the Commission is obliged to consult it during the negotiations.

As concern the EU, during these negotiations the Commission informs and consults the working party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)²⁹, as the special committee appointed by the Council, in accordance with article 218 para.4 of TFEU³⁰. Also, the Commission shall report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee.

In order to establish the working program, on 23 of June 2010, the first meeting of FREMP working-group took place at the request of the Belgium presidency of the European Union, situation in which the presidency asked the negotiator (the European Commission) to present a project to be send to the CoE *before starting the negotiations*. Also, after each meeting the Commission shall report and discuss all the elements of the negotiating mandate for the next meeting.

During July 2010 - February 2011 several meetings took place between the representatives of European Commission and the CoE, whilst the first formal meeting of the FREMP Working-Group for analyzing the future policy on this topic took place in September 2010. The representative of the European Commission informed the Working Party FREMP that the next meetings of the CDDH-UE will take place on 15-18 March 2011.

As regards Romania, the presence of the Romanian representative in the working – group composed by 14 states for assisting CDDH can be very valuable, both in terms of knowledge by Romania the proposals sent by the Commission and the dissemination of the information to other Member States.

3. Conclusions

EU’s accession to the Convention is one of four key components of an ambitious and comprehensive fundamental rights policy at the level of the European Union.

With the entry into force of the Lisbon Treaty, the EU’s Charter of Fundamental Rights is legally binding for 27 countries and represents the most modern codification of fundamental rights in the world. This legally binding Charter represents a major step forward in terms of our political commitment to fundamental rights. It entrenches all the rights found in the Convention.

The Charter goes further, enshrining other rights and principles, including economic and social rights that come from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. In the Charter, we also find

²⁷ This aspect was proposed by Romania during the JHA Council that took place between 3 – 4 May 2010.

²⁸ Steering Committee for Human Rights (CDDH).

²⁹ This group is composed of counselors of justice and home affairs.

³⁰ According to art.218 para.4 of TFEU (ex-article 300 of TEC) “the Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.”

the so-called "third generation" fundamental rights, such as data protection, guarantees on bioethics and on good administration.

Furthermore, the matter of human rights is of extreme importance and has been reiterated upon the Conference organized by the in force German presidency of the European Union in the document of strong political and juridical value – the Berlin Declaration, signed and undertaken by the 27 member states of the European Union. In this context, “*peace and freedom*”, “*democracy and the (ideal) rule of law*”, “*mutual respect and shared responsibility*”, “*tolerance, justice and participation*”, “*equality in rights and social solidarity*” are some of the principles and values of the EU listed in the anniversary Berlin Declaration.

In the end, we want to highlight the fact that the promotion of fundamental rights is one of the priorities of the Stockholm programme setting the strategic guidelines for developing an area of freedom, security and justice in Europe.

The European Commission is seeking a smooth insertion of the European Union into the system of the Convention of Protection of Human Rights. The accession should therefore preserve the substantive and procedural features of that system also with respect to the Union as a new Contracting Party.

Protecting fundamental rights is about upholding human dignity and the full enjoyment of rights. In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention. The accession of the European Union to the Convention is an incentive to develop the policies that strengthen the effectiveness of the fundamental rights that people enjoy in Europe.

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Abbreviations

- Art. - article
- CDDH - Steering Committee for Human Rights

- CJEU – Court of Justice of the European Union, the Court of Luxembourg
- CoE – Council of Europe
- ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR – European Court for Human Rights
- EU - European Union
- FREMP - Fundamental Rights, Citizens Rights and Free Movement of Persons
- JHA – Justice and Home Affairs
- No. - number
- OJEU – Official Journal of the European Union
- P. – page
- Para – paragraph
- TEC - Treaty establishing the European Community
- TEU - Treaty on European Union
- TFEU - Treaty on the Functioning of the European Union