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Master`s Thesis

EU accession to the European Convention on Human Rights: overview of the main challenges for the legal systems of the EU and the Convention, and ways to overcome them

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LIST OF ABBREVIATIONS

CfR EU, Charter – Charter of Fundamental Rights

CFSP – Common Foreign and Security Policy

DAA – Draft Accession Agreement for EU accession to the ECHR

ECHR – European Convention on Human Rights

CJEU, ECJ – European Court of Justice, Luxembourg Court

ECSC – European Coal and Steel Community

ECHR – European Convention on Human Rights, Convention

ECtHR – European Court of Human Rights, Strasbourg Court

EU – European Union

EEC – Treaty establishing the European Economic Community

TEU – Treaty of European Union

TFEU – Treaty on the Functioning of the European Union

FREMP – Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons

ABSTRACT AND KEY WORDS

The thesis gives insight into the overall scope and challenging fields of the EU accession to the European convention on human rights. It is established that the accession will be an important stage for creating a full-fledged mechanism in the field of protection of human rights. Institutional, substantive, procedural issues posed for the legal systems and the approaches of the EU institutions are analyzed. It is defined that for the purpose of getting all the advantages of EU accession to the Convention further technical amendments to the ECHR, additional protocols and agreements, legal procedure for co-respondent mechanism are required.

Key Words: EU, human rights, European Convention on Human Rights, the procedure of EU accession to ECHR, challenges for the EU legal order.

INTRODUCTION

The thesis gives insight into the overall scope and fields of the EU accession to the European convention on human rights, the main goal is to assess the overall challenges for it, and also to provide an overview of the complex issues in the European path for it. Above all to analyze and evaluate the impact of the accession process after its completion in conjunction with challenging tasks to deal with for legal orders of the EU and legal order of the ECHR and its role and importance for the EU citizens and the society.

The relevance of the topic comes with the fact that the international legal orders for the protection of human rights play an important role for the full functioning of society and the EU, as it is a guarantee against breach of human rights and this allows to provide mechanisms for the protection of all EU citizens and sets up standards which should be further upheld.

The research aims to provide an outline of the main challenges posed by the EU accession to the ECHR to legal orders of the EU and ECHR and to show the ways to overcome them. Using the systematic analysis of the main difficulties and most problematic aspects in the field of accession and as well to offer instruments that could facilitate these challenges.

Therefore, the research gives a complete look at the ways how this mechanism will work for EU citizens, and whether it will fully provide an opportunity to protect the rights by the relevant institutions of the European Union.

The tasks of the research are:

1. To establish whether the EU accession to the ECHR will have a significant improvement and positive impact on the human rights protection in the EU.
2. To demonstrate what challenges: institutional, substantive, procedural issues are posed for the legal systems and the approaches of the EU institutions, the ECJ's approach based on case law and Opinion 2/13 Treaty obligation to accede to the ECHR and the ECJ's opinion.
3. To identify main legal and practical measures and solutions in mitigating the established main difficulties raised by the EU accession to the ECHR on the legal systems of the EU and Convention.

The main object of the research is the process of the EU's accession to the ECHR.

Main objectives are to demonstrate an overview of challenges posed for the system of the EU and to find ways to overcome the difficulties addressing the following issues:

- rationale of the accession in terms of the level of protection, coordinating international obligations;

- show purpose of the accession, coherence of both legal systems of the EU and ECHR, issue of responsibility, conditions and scope (contents) of the accession;
- discuss the topic from the treaty law perspective, which offers a range of measures such as reservations, declarations, temporary application and other that could be relevant in the EU accession;
- raise issue of responsibility and recommended scenarios for accountability mechanism and judicial system; need of cooperation, implementing international obligations: ways to achieve this in regulation and in practice;
- to identify basic measures (legal and practical) as most relevant in mitigating the established main difficulties.

General scientific and special legal methods were used to achieve the research goal and solve its tasks. To achieve the set goal and solve the tasks defined in the work, general scientific and special scientific methods were used.

General scientific: historical, comparative-historical method - to study the stages of development of the EU accession to the Convention; analysis and synthesis. Universal philosophical methods, in this case dialectical - to determine the place of ECHR in the EU law and of the EU accession to the Convention, to study the multifaceted nature of human rights, and their connection.

Special-scientific – special-legal for processing legal material; the method of legal hermeneutics - to learn the concepts of "the right to protection against domestic violence", the concept of domestic violence, relationships in legal documents, current legal acts; historical.

Actual problems in the field of EU accession to the Convention are outlined in the materials of the reports of the European Commission, Grassi, M. on the balance between legal certainty and legality in European case law practice, Pellonpää M. and Ho-Dac M. on reflections of the principle of mutual trust, Cagiano de Azevedo R. on issues of sovereignty and *acquis communautaire*, Nicolas Bratza on freedom of religion, Johansen, S. Ø on the Opinion 2/13 etc.

Therefore, the research provides the critical overview of the potential impact of the EU accession to the Convention, an issue of which is still relevant as it has been discussed in the scholars community and on the political arena for almost half a century. The accession should bring the base for the creation of a single system of integrated legal standards, but for that to happen, there should be settled challenging issues. The research shows how the significant improvements would be reached and which hard questions come first.

PART I

1.1. OVERVIEW OF THE EU ACCESSION TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1.1.1. The history of the adoption of the European Convention on Human Rights and its significance for the participants

The Convention belongs to the oldest and most important treaties of the Council of Europe. It became a connecting link between all countries and across Europe. Therefore, it is known to be "the greatest achievement of the Council of Europe", "the first example of effective international legislation", "the only and most important political and legal denominator for the states of the European continent", "the constitution of human rights of the European community". The European Union has an important role in the process of improving the introducing Conventional system for human rights protection at the regional and universal levels and also in the development of legal instruments for the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms. And it's one of the key factors for changing the European system of human rights protection. The Convention was adopted in 1950 and entered into force in 1953, and it is the world's most successful system of norms of international law regarding the real protection of human rights. It was the devastating experience of the Second World War that forced the European community to strengthen the protection of human rights from the state, primarily as a reaction to flagrant violations of human rights during the times of fascism.

The Convention changed the legal positivism existing in international law in the 19th and early 20th centuries, which asserted that international law is a law only for states. This was explained by the fact that the convention granted the right not only to states, but also to natural persons to protect the rights provided for by its provisions (Repetto G., 2013, p.247).

Unity is the main goal of the Council of Europe, and the goal of the Convention consists in the convergence of the legal systems of the Member States of the CoE and the creation of a common European law on the protection of human rights (Statute of the Council of Europe, 1949). In particular, the purpose of the adoption of the Convention, as emphasized by the Strasbourg Court, is "the establishment of certain international standards that the high contracting parties are obliged to fulfill in their relations with the persons under their jurisdiction" (Sunday Times v. The United Kingdom, 1979) and "guarantee rights, the exercise of which will be practical and effective, not theoretical and illusory"

(Panteleyenko V. Ukraine, 2007). Therefore, the convention, as a pan-European standard of fundamental human rights and freedoms, plays an unchanging role.

The Convention, unlike other international treaties, goes beyond the usual mutual obligations between the participating states, in addition to the usual bilateral obligations, it creates objective obligations which, according to its preamble, provide a "collective guarantee". That is why the convention is considered a "constitutional instrument of the European social order". It not only provides a list of civil and political rights of individuals, but also provides every person in Europe with practical protection of their rights, placing obligations on states. The rights listed in the Convention should be considered "absolute" and to what extent their application in practice is balanced by other considerations. (Bond M., 2018, p.8). It also provides the right to an individual personal complaint, which allows any person to submit an application to the Court against his state. It also provides collective control over the implementation of decisions of the European Court of Human Rights, when states are subject to pressure from other Member States and supervision from their colleagues in the Committee of Ministers, the body that sits in Strasbourg and reviews the Court's decisions, in order to monitor the Member States' implementation of these decisions.

The importance of EU alignment with human rights has been a topic of debate of varying intensity for a long time. The timeline for the EU's accession to the ECHR is uncertain, because the need for this is obvious today, but has been a focus since the late 1970s, even before the formal creation of the European Union as we know it today. Formal and informal negotiations on how to achieve the completion of the EU accession started taking place both in the predecessor structure of the EU and in the Council of Europe already in the late 1970s. So far, a draft agreement was reached in 2013, but the process has been stalled due to various legal and political hurdles. It was also influenced by political changes or legal challenges, which eventually could delay the process.

Originally there was no integrated human rights protection mechanism in the EU. The human rights protection system operating in the EU Member States is complemented by the protection system at the level of the European Union. In addition, the protection of human rights and freedoms is also carried out within the framework of the Council of Europe, which includes all Member States of the European Union. Therefore, a situation arose when two independent human rights protection systems were formed in Europe - within the Council of Europe and within the European Union. The subject of EU accession to the Convention has been discussed by the international community since the end of the 1970s. and did not reach its logical conclusion until today (European Convention for the

Protection of Human Rights and Fundamental Freedoms, 1950).

The Convention will provide a mechanism for regulating and recognizing exclusive agreements on the choice of court in relations with the states that are parties to the Convention. In addition, the provisions of the Convention serve to improve the domestic legislation, which regulates international contractual jurisdiction, will contribute to the spread of the practice of applying contractual jurisdiction.

Another strong argument in favor of accession to the Convention is the expansion of opportunities to enforce decisions of domestic courts in other jurisdictions. Currently, obligations regarding the recognition and enforcement of decisions of domestic courts are based on bilateral and multilateral international treaties.

The absolute advantage of the Convention is the establishment of a relationship between international jurisdiction and the enforcement of judgments rendered in compliance with the rules of international jurisdiction, and is similar to the mechanism of enforcement of court judgments introduced within the European Union. In addition, in the future, with the expansion of the circle of participants, participation in the Convention will allow solving the issue of recognition and enforcement of foreign court decisions at the multilateral level.

The system of legal protection of human rights in EU law has gone through a long way of changes and improvements: from the initial denial of the importance of recognition of such rights to the ratification of a separate international act - the Charter of Fundamental Rights, which is endowed with the legal force of the founding treaties of the EU. However, despite the significant history of its formation and development, there are no sufficient grounds to state that the human rights protection system in the EU is now finally formed and does not require significant improvement. The European legislator did not limit himself to giving the norms of the EU Charter the force of founding treaties, and also included in the Treaty of Lisbon the obligation of the EU to accede the Convention, which, in fact, created a complex situation of legal dualism of the current and prospective regulation of the status standards of human rights and freedoms in the EU. On the one hand, currently the norms of the Charter and the standards of rights and freedoms established on its basis by the ECJ has the highest legal force in the legal system of this international formation, and on the other - under the conditions of the fulfillment of the obligation of the EU to join the ECHR, a higher degree of binding in matters of defining European standards of human rights in the EU legal system, the ECHR applied in the relevant practice of the European Court of Human Rights will prevail.

1.1.2. The role of the Lisbon Treaty in the accession of the EU to the European Convention on Human Rights for its participants

EU accession to the Convention is a legal requirement in accordance with the Lisbon Treaty. Issues related to EU reform have long been the objects of research in the scholar community, in particular. The EU has overcome the constitutional crisis through the adoption of the Lisbon Treaty, which aims to create a much better legal and institutional framework for the further unification of the European Union and the assertion of the role and position of the EU around the world, the strengthening of democratic principles in integral formation.

It is clearly stated in the founding treaties, in particular, in the preamble to the Treaty of Lisbon, that the EU respects human rights. Human rights are enshrined in the preamble of all founding treaties of the EU since the Maastricht Treaty (1993), Charter of Fundamental Rights. Starting with the Treaty of Amsterdam (1997), Art. 6 of the Treaty on the European Union provides a legal basis for the protection of fundamental rights. With the entry into force of the Lisbon Treaty, attention to human rights within the EU increased. The Lisbon Treaty is exactly the document that has significantly changed the principles of the European Union, reforming the activities of institutional bodies and the system of political decision-making.

EU accession to the ECHR has conditions in accordance with public international law, first, which provide the legal basis for this in the founding treaty, Art. 47 of TEU declares that the EU has a legal personality. The purpose of joining the EU to the ECHR is to contribute to the creation of a single European legal space, the achievement of a comprehensive system of human rights protection throughout the world. Europe. The very procedure of joining the European Union to the Convention is ongoing and requires the coordination of both the internal rules of the Council of Europe and the internal procedures in the European Union. But the process becomes long and controversial.

The very procedure of acceding the European Union to the ECHR is ongoing and requires the coordination of both the internal rules of the Council of Europe and the internal procedures in the European Union. But the process becomes long and controversial. Accession of the EU to the ECHR, provided for by the Treaty of Lisbon, will not lead to the expansion of the competence of the EU, but will create an obligation for its bodies to adhere to uniform standards in the field of human rights protection. The accession of the EU to the ECHR would be a significant step in bringing the European Union closer to its citizens, as they would be provided with the same means of legal protection of human rights both at the national level and at the EU level. EU accession to the ECHR would provide its

institutions certain legitimacy, trust and legal responsibility, which today belong to its Member States. It must be recognized that the accession of the EU to the ECHR would be historic the event, in our opinion, would eventually lead to the establishment of uniform standards in the field of rights protection people on the European continent. However, the negative the decision of the EU Court 2/13 of December 18, 2014 stopped this process indefinitely (Opinion pursuant to Article 218 (11) TFEU, 2014).

The annex to the Lisbon Treaty contains the Declaration of Fundamental Rights, which sets out a number of rights that the EU Member States are called to protect. It establishes minimum standards that ensure decent treatment of all EU citizens. After the Opinion 2/94 the Court emphasized that the Union does not have the competence to join the ECHR. Despite this, the EU Member States did not abandon the idea of joining the ECHR (Bello, J. et al., 1996, p.664). This was reflected in the new version of Art. 6 of the EU Treaty, which entered into force on the basis of the Lisbon Treaty in 2009, namely in the statement that the rights specifically guaranteed by the Convention and arising from the constitutional traditions of the Member States are general principles of EU law, as well as 2 Art. 6: "The Union joins the ECHR. This accession does not affect the powers of the EU defined by the Treaty". That is, the Treaty reserved the possibility for the corresponding accession. In addition, Protocol No. 8 was added to the founding treaties of the EU regarding Art. 6 of the Treaty on the EU in relation to the accession to the Union to the ECHR, which provides that the accession agreement must meet certain conditions, in particular, provide for the preservation of specific features of the law of the EU and the entire EU and ensure that the accession of the EU does not affect its powers or powers of its institutions. The Council of Europe also took appropriate steps and adopted Protocol No. 14 (entered into force on June 1, 2010), which supplemented the Convention with a provision on the possibility for it.

The current situation is that the rights enshrined in the ECHR are not legally binding for the EU and its institutions (Commission, Council, European Parliament, Court, etc.). ECJ regularly refer to the ECtHR case law in their decisions, but apply them indirectly, as part of general principles of EU This creates an imbalance that can lead to uncertainty and confusion as to who is ultimately responsible for any violations of ECHR rights. Until recently, the European Union did not have the necessary competence to accede to the ECHR. This has changed with the entry into force of the Treaty of Lisbon in 2009. The Treaty of Lisbon provides such competence and also obliges the EU to accede. Accession will further strengthen the protection of human rights by subjecting the Union's legal system to independent external scrutiny. Any person will be able to file a complaint about the

violation of ECHR rights to the European Court of Human Rights. Thus, the EU would find itself in the same situation as the Member States.

Despite the legal establishment of the provision on the accession of the EU to the ECHR and the legal framework created by the Council of Europe and the EU in order to facilitate the earliest possible implementation of such accession, the issue of it remains open today in the daily agenda of the EU. The existence of protection mechanisms by the Convention within the framework of the EU and the Council of Europe creates conflicts due to different interpretations by the judicial bodies of the two organizations. It seems to us that EU accession to the ECHR is possible from a legal point of view through the joint work of both the EU and the Council of Europe.

The issue came to the spotlight again with the adoption of the Charter in 2000). With the entry into force of the Treaty of Lisbon in 2009 and Protocol 14 to the ECHR in 2010, accession was no longer just a wish; it became a legal obligation under Article 6. Based on the provisions of Art. 1 of the Preamble of the EC Charter which says about achieving greater unity among its members in order to preserve and implement the ideals and principles that are their common acquisition, as well as to promote their economic and social progress (The preamble of the Charter, 2000). Also Art. 3 which defines the principles that must be not only "protected", but also "implemented", in particular, the principles of the rule of law and the exercise of human rights and fundamental freedoms by all persons under the jurisdiction of each member of the Council of Europe. Accession is the best means of achieving a coherent system of protection of fundamental rights in Europe. As the EU reaffirms its own values through its Charter, its accession to the ECHR would send a strong political signal of alignment between the EU and more understanding. This goal is achieved with the help of the bodies of the Council of Europe by considering issues of common interest, by concluding agreements and carrying out joint activities, in particular, in the field of human rights and the further implementation of human rights and fundamental freedoms.

The issue of human rights protection is one of the central issues in the EU common foreign and security policy. Article 21 of the TFEU shows determination to promote human rights and democracy in all its external influences (Lonardo L., 2018, p.587). The entry into force of the Charter of Fundamental Rights of the EU, and the prospect of adopting the jurisdiction of the European Court of Human Rights in the EU through its accession to the ECHR, emphasize the commitment of the EU in the field of human rights in all spheres. Within their own borders, the EU and its Member States are determined to lead by example in ensuring respect for human rights. The Union ensures the coherence of the policy of

human rights protection in foreign policy activities (Article 21 of the Treaty on the European Union).

On December 12, 2011, at the proposal of the High Representative for Foreign Affairs, the EU Commission adopted the report that human rights and democracy at the center of the EU's foreign policy - on the way to greater efficiency. (Donskis L., 2012) On the basis of this document, the first document of the European Union was developed, which declares unified goals, principles and priorities in the field of human rights protection aimed at increasing the efficiency and coherence of the EU policy. Thus, in 2012, the Council of the European Union approved the Strategic Framework Program on Human Rights and Democracy together with the action plan for the protection of human rights and democracy, which is a tool for its implementation. The EU's strategic framework program is becoming a turning point in the EU's human rights policy before the adoption of this document, the European Union made decisions regarding the state of human rights protection in certain regions or countries over time, the EU has also developed a number of "principles" and other directives, but this document is the first single strategic document.

Anyway, as a result of acceding to the Convention, the European Union is integrated into the fundamental Conventional system, European system of human rights protection. The EU will be obliged to comply with the Convention under the external control of the European Court of Human Rights.

At the same time, this mechanism will act as an additional to the internal mechanism for the protection of human rights, which functions in the Union and is strengthened because of the inclusion of the Charter of Fundamental Human Rights of the European Union in the system of its constituent documents. accession to the Convention and its protocols will impose on the EU only obligations related to acts, measures and inaction of its institutions, bodies, institutions and agencies, as well as persons acting on its behalf. Nothing in the Convention or its protocols should require the EU to act or take measures in areas where it is not empowered.

The opinion regarding the EU accession to the ECHR would add greater coherence to the development of the issue of human rights protection in Europe, and also draws attention to the need to avoid competition between the two systems of human rights protection (within the European Union).

Also, the accession of the EU to the Convention will solve an important issue. Since there is a conflict when citizens of EU Member States (who have fully acceded the ECHR) are entitled to the protection of their rights, defined by the Convention, by filing complaints against the actions and decisions of the bodies of their states. However, the question arises

regarding the protection of similar rights in the event of their violation by the EU institutions. In the event of such accession, the ECtHR will be able to monitor the actions and/or inaction of EU institutions from the point of view of compliance with the rights guaranteed by the Convention. That is, the EU, which has the statute of a supranational union, will be on the same level as its Member States.

Undoubtedly, ensuring the right to choose a court and guaranteeing the execution of a court decision is important. From the very beginning, the parties are aware of the jurisdiction of their disputes, and therefore the procedure of the trial, the rules of application of substantive law, the duration and cost of the trial, the amount of reimbursement of court costs, etc. Anticipation of the above-mentioned circumstances is quite an important factor, as well as confidence in the execution of a court decision, which in general constitutes the main advantages of the regime provided for by the Convention.

The integration of the European system of human rights protection, which is expressed in the accession of the European Union to the system of the Convention and the improvement of the institutional mechanism guaranteed by the Convention within the European Union, leads to a strengthening of the role of the association in the development of mechanisms for the protection of human rights.

1.1.3. Problematic issues of the planned EU accession to the European Convention on Human Rights and the Relation between the Convention and EU law

There are concerns about the potential overlap between the European Court of Justice and the European Court of Human Rights. Balancing the authority of these two courts is another challenge. This is all part of ensuring the EU's accession to the ECHR works smoothly. There are quite a few challenges the EU accession could raise questions about the autonomy of the EU's legal order, lead to an increase in cases brought to the European Court of Human Rights, potentially overloading the system.

One major issue is the legal complexity involved. The EU has its own legal order, which isn't easy to reconcile with the ECHR system. Another challenge is political, because all EU Member States and the Council of Europe's members need to agree, and that's not always easy. Lastly, there's also the question of how the EU's accession will affect its relationship with its Member States. And it's a significant move because it will make the EU laws and actions subject to external judicial review. This will strengthen the protection of human rights within the EU and it is set to accede to the Convention. This means that the EU, like its Member States, will be subject to the jurisdiction of the European Court of Human Rights. It's a big step for human rights protection in Europe. It's a complex process, though, and it's been in the works for a while. There's a lot of legal and political issues. But once it happens, it will be a big milestone for the EU and for human rights in Europe.

Such accession will create guarantees of the same means of judicial control regarding the protection of human rights both at the national level and at the EU level. The accession of the EU to the Convention will be an important stage that will create a full-fledged mechanism in the field of protection of human rights and fundamental freedoms throughout Europe. Citizens will be able to challenge the actions of the EU before the ECtHR, the EU will be able to join its Member States in considering cases at the ECtHR regarding violations arising from EU legislation

Accession will become legally possible only when further amendments to the ECHR regarding methods of accession enter into force. The Treaty of Lisbon requires accession to be agreed by the Council of the EU and the European Parliament and to be ratified by all EU Member States. In addition, all ECHR Member States will have to agree to be bound by key conditions of accession, which require the formal consent of their national parliaments. From a political point of view, the link between accession and the incorporation of the EU Charter, which was so aptly established by the Laeken Declaration and the subsequent EU Convention and the Intergovernmental Conference, must be

maintained to ensure the consistent application of human rights law throughout Europe.

The main likely consequence of the EU accession to the Convention is the deprivation of the exclusive jurisdiction of the ECJ. Delegation of sovereign powers on judicial and institutional levels, makes it difficult to determine now whether the powers of the European Court will be lesser. The path to the integration of the EU Court into the human rights protection system established by the Convention is likely to be long and difficult. But mostly the accession to the Convention will not affect relations between the two courts; the relation between them cannot be based on hierarchy but would be more based on the principle of specialization. The accession will give a complete look to the system of protection of human and citizen rights in the EU. This mechanism will work for citizens of EU Member States, who are also EU citizens, and will fully provide an opportunity to protect their violated rights by the relevant institutions of the European Union. Negotiations are ongoing, and perhaps in the future we will witness the creation of a single system of integrated standards in the field of human rights protection in Europe.

However, one of the most important assets of the Council of Europe is the creation of a common legal space by applying the mechanism of Convention. However, there are still gaps in this space. And one of them is that the European legislation, the so-called *acquis communautaire*, as well as its implementation by European institutions and Member States are not yet covered by the protection of the European Convention on Human Rights. In practice, this means that today an EU citizen is deprived of the opportunity to appeal to the European Court of Human Rights in Strasbourg against violations of his rights by European institutions, or because of incorrect application of EU legislation by Member States. When the EU accedes to the ECHR, it will be integrated into the fundamental rights protection system of the ECHR. In addition to the internal protection of these rights by EU law and the ECJ, the EU will be bound to respect the ECHR and will be placed under the external control of the European Court of Human Rights. It will also increase the credibility of the EU in the eyes of third countries, which the EU regularly calls on in its bilateral relations to respect the ECHR.

The EU accession to the Convention took place starting from the end of the 1970s. The importance of EU alignment with human rights has been a topic of debate of varying intensity for a long time. The timeline for the EU accession to the ECHR is uncertain. The process has been ongoing for years and it's hard to predict when it will be completed. So far, a draft agreement was reached in 2013, but the process has been stalled due to various legal and political hurdles, it was also influenced by political changes or legal challenges, which eventually could delay the process. And it's a significant move because it will make

the EU's laws and actions subject to external judicial review. This will strengthen the protection of human rights within the EU.

There are quite a few challenges, the major issue is the legal complexity involved. The EU's accession could lead to an increase in cases brought to the European Court of Human Rights, potentially overloading the system. It could raise questions about the autonomy of the EU's legal order. This means that the EU, like its Member States, will be subject to the jurisdiction of the European Court of Human Rights. There are concerns about the potential overlap between the European Court of Justice and the European Court of Human Rights. Balancing the authority of these two courts is another challenge. The EU has its own legal order, which isn't easy to reconcile with the ECHR system. Another challenge is political. All EU Member States and the Council of Europe's members need to agree, and that's not always easy. Lastly, there's also the question of how the EU's accession will affect its relationship with its Member States. The EU is set to accede to the ECHR, it would be a big step for human rights protection in Europe. It's a complex process, though, but once it happens it will be a major achievement.

PART II

2.1. THE PROCESS OF EU ACCESSION TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

2.1.1. Regulation of relations between the European Court and the ECtHR

The European Court of Justice (ECJ) generally supports the EU's accession to the ECHR. It sees it as an important step in promoting and protecting human rights. However, the ECJ has raised some concerns about potential conflicts between its jurisdiction and that of the ECHR. It's a complex issue that's still being worked out. Also ECJ raises important issues which the other institutions cannot simply ignore.

After another round of negotiations, another attempt to give the EU the right to join the ECHR could be the judicial approval of the Draft Agreement on EU Accession to the ECHR approved in April 2013. But the Opinion of the Luxembourg Court dated from 18.12.2014 No. 2/13 once again recognized the impossibility of such accession even in the presence of Part 2 of Art. 6 of the TEU, in accordance with the amendments introduced in 2007 by the Lisbon Treaty regarding the obligation of the EU to join the ECHR. (Opinion 2/13, 2014)

This decision contains the main arguments: if the accession of the EU to the ECHR takes place in accordance with the rules and procedures defined in the Draft Agreement, the risks to the basic foundations of the EU constitutional system will be created. This position is substantiated by Protocol No. 8 to the Treaty of Lisbon, according to which the provisions of Part 2 of Art. 6 of the EU Treaty on accession to the ECHR, (Protocol № 8 relating to Article 6(2) of the TEU, 2007) namely: special conditions for the possible participation of the Union in the control bodies of the European Convention; mechanisms are necessary to ensure the correctness of complaints by non- Member States and individual complaints, as the case may be, against Member States and/or against the EU.

The EU Court also draws attention to the importance of the notion of mutual trust, which is one of the foundation principles of the EU and risks connected to it, in case of joining the ECHR (Ho-Dac M., 2021). Therefore, the EU Court, by its decision, recognized the Draft Agreement as inadmissible due to its inconsistency with EU law. This principle plays an important role especially in the area of freedom, security and justice. (Pellonpää M., 2022, p.53) Since the EU is not a party to the ECHR, the EU Court cannot directly apply the Convention as part of the legislative of the EU. However, it applies the general principles of this legislation, which are the same for participating countries. Moreover, the majority of the EU Member States have implemented the provisions of the ECHR into their

domestic law through relevant treaty laws. Thus, the provisions of the Convention have been given the status of constitutional norms and came close to implementing the ECHR into the system of domestic law. Thus, institutional conflicts began to arise quite often between the jurisdictional spheres of the ECJ and the ECHR.

The EU was created as an economic community, so the competence of the EU Court back in time was limited to resolving issues in the economic sphere. Subsequently, the EU went beyond the framework of the economic union, which in turn expanded the powers of the EU Court, therefore the protection of human rights also belongs to its competence. For the first time, the official recognition of human rights at the community level took place with the entry into force of the Single European Act of 1987, and later this led to the appearance of its own catalog of EU rights - the Charter of Fundamental Rights of the EU (the Charter), which entered into force in 2009. Together with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union also became legally binding. Compared to the ECHR, the Charter enshrines a wider range of rights and freedoms: the right to the integrity of the individual (Article 3), freedom of creativity and science (Article 13), the right to asylum (Article 18) and others.

Regarding the relationship between the Charter and the ECHR, it is worth mentioning part 3 of Art. 52, which states that the rights provided for by the Charter, their content and application must coincide in content and application with the rights guaranteed by the Convention. This norm is not an obstacle to their broader protection under EU law. (EU Charter, 2000)

The control of the EU Court over national measures, including in the field of human rights protection, can be applied if the measures were implemented at the national level within the framework of Union competence, and with the goal of practical use of norms of EU law. This is due to the fact that these actions represent the delegation of the powers of the EU to the national authorities, and the delegation must always take place in compliance with the standards of the entity that authorizes to act, that is, in this case, it is the standards of human rights protection recognized by the EU. In accordance with part 1 of Art. 19 of the Treaty on the European Union, the Court of Justice of the EU is formally entrusted with the duty of ensuring compliance with EU legislation in the process of interpretation and application of founding treaties. In order to achieve the goals and objectives of the EU, the balance between the Member States must also be achieved through the activities of the Court of Justice of the EU. The court plays an important role in strengthening democracy and acts as a key link in the formation of the special legal order of the EU.

The supranational character of the EU legal system implies that Member States

recognize the supremacy of legal acts of the European Union over the norms of national legislation. This includes recognition of the jurisdiction of the EU Court and its decisions. (Doctrine of Supremacy of EU Law, 2021) The supranational character of the Convention consists in the binding nature of the decisions of the ECtHR for the state to which it applies and the corresponding influence, mainly through measures of a general nature, of each of the decisions of the ECtHR on national legal systems. According to Art. 344 of the Treaty on the Functioning of the European Union, (Johansen, S. Ø., 2015) the participating states undertake not to submit disputes regarding the interpretation or application of founding treaties to any other methods of settlement, except those provided for by them. This article establishes a mechanism that aims to prevent parallel legal proceedings that could lead to unequal interpretation or application of EU law.

It is worth paying attention to the decision of the EU Court in the case "Commission v Ireland" regarding the dispute between Great Britain and Ireland, in which the EU Court for the first time considered the issue of the correlation of its jurisdiction with the jurisdiction of other international judicial institutions. (Commission v Ireland, 2006)

The case was joined by the European Commission, which filed a lawsuit against Ireland at the Court of Justice of the European Union because the state violated its obligations under Art. 344.

The EU Court determined that the transfer of this dispute to an institution other than the EU Court jeopardizes the jurisdictional order defined by the founding treaties and, as a result, the autonomy of the legal system of the Union in general. According to the Court, the preservation of the autonomy of the EU legal system means the immutability of the powers of the Union and its institutions, established by the founding treaties, and a unified interpretation of the norms of EU law, which does not depend on the decisions of other legal systems, in particular those based on international law.

Any judicial institution is a potential threat to the autonomy of the EU legal order, since EU law began to cover a wide range of legal relations, it goes along with almost every branch of international law. The ECJ case law developed criteria for determining whether the applied limitation of the right is justified. Such a restriction should correspond to the goals of general interest pursued by the EU and should not create a disproportionate and unacceptable interference that violates the very essence of the guaranteed right. From the point of view of international law, the above position of the EU Court limits the right of Member States to protect their rights under international treaties. The same situation may occur in the case of the accession of the European Union to the ECHR as an independent entity.

Therefore, on December 18, 2014, the EU Court issued Opinion 2/13 on the incompatibility of the Draft Accession Agreement and EU rights, as well as the absence of legal grounds for EU accession to the Convention. He determined that as a result of this accession, the Convention, like any other international treaty concluded by the EU, will be binding on the institutions of the EU and its Member States and will form an integral part of EU law. In this case, the EU, like other contracting parties, will be subject to external control to ensure compliance with the rights and freedoms provided for by the Convention. Thus, the EU and its institutions, in particular the EU Court, will be subject to external control mechanisms provided for by the Convention, in particular by the ECtHR.

Conflicts between the European Court of Justice and the ECtHR arise due to the fact that a certain law is interpreted in different ways. Also, both courts have different approaches to the issue of limiting the protection of certain rights in the event of a conflict between the rights of private individuals. According to the position of the ECtHR, certain permitted limitations may apply to certain rights. In some cases, in order to make sure that the applied restrictions do not narrow the scope of the right to such a limit that touches the very essence of the right and deprives it of its effective protection, the Court must make sure that these restrictions can be foreseen, they are made in accordance with the law and the constitution - established by law, and also have a legitimate purpose.

The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. The Court of Justice created in its case law other criteria for determining whether the applied limitation of the right is justified. Such a restriction must correspond to the goals of general interest pursued by the EU and must not create a disproportionate and unacceptable interference that violates the very essence of the guaranteed right. The European Court of Justice (ECJ) generally supports the EU's accession to the ECHR. It sees it as an important step in promoting and protecting human rights. However, the ECJ has raised some concerns about potential conflicts between its jurisdiction and that of the ECHR (Rosas A., 2022, p.207). There are some conflicts between the European Court of Justice and the ECtHR due to the fact that a certain law is interpreted in different ways (Rincon-Eizaga L., 2008, p.136). Since the EU is not a party to the ECHR, the EU Court cannot directly apply the Convention as part of the legislative of the EU. The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. It's a complex issue that's still being worked out.

Thus, the European Court of Justice (ECJ) generally supports the EU accession to the ECHR. It sees it as an important step in promoting and protecting human rights. However,

the ECJ has raised some concerns about potential conflicts between its jurisdiction and that of the ECHR. The EU Court also draws attention to the importance of the notion of mutual trust, which is one of the foundation principles of the EU and risks connected to it, in case of joining the ECHR. There are some conflicts between the European Court of Justice and the ECtHR due to the fact that a certain law is interpreted in different ways. Since the EU is not a party to the ECHR, the EU Court cannot directly apply the Convention as part of the legislative of the EU as for now. The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. It's a complex issue that's still being worked out.

2.1.2. The procedure for EU accession to the European Convention on Human Rights and Fundamental Freedoms for its participants

The European Union institutions have generally been supportive of the accession to the Convention. They see it as a way to strengthen human rights protection across the continent. However, it's a complex process that involves navigating various legal and political challenges. The ECHR is undoubtedly the main document adopted by the Council of Europe in the field of human rights protection. It states that the governments that signed this Convention as members of the Council of Europe, taking into account the Universal Declaration of Human Rights, agreed to ensure the general and effective recognition of the rights proclaimed in the Declaration, their protection and development, the provision of these rights by the High Contracting Parties to everyone who is under their jurisdiction. To ensure these obligations, the European Court of Human Rights (hereinafter ECHR) is created.

The Council of Europe and the European Union are the main intergovernmental regional organizations in Europe, the two most influential formations, the main goal of which is effective international integration and each of which has a certain legal source of functioning. The EU is not a party to this Convention, because the EU itself has not signed the treaty and therefore the European Court of Justice (ECJ) cannot directly apply the Convention as part of EU law, preventing individuals from taking EU institutions to the European Court of Human Rights (ECtHR) over human rights violations. However, the EU applies the general principles of this legislation, which are the same for participating countries. It is worth mentioning that all EU Member States are already part of the ECHR, which means they have ratified the Convention — which is the founding treaty of the ECHR since the creation of the EU. As it is separate from the EU still, it includes numerous countries that are not a part of the EU, CoE's 46 members. And the Convention is part of these general principles. Accession will encourage the EU to be directly bound by the ECHR and will strengthen cooperation between the EU and the Council of Europe. Convention rights and their interpretation by the ECtHR will be directly enforceable against the EU institutions and against Member States when acting within the scope of EU law (Eckes C., 2013, p.258).

The fact that the ECHR, as the main comprehensive document on the international protection of human rights, was adopted within the framework of the Council of Europe, and not the European Communities, is explained by several reasons, main of them are: First, at the time of creation, the European Communities did not exist a priori. Second, the

primary purpose of the Founding Agreement of the European Community was economic - Art. 47, and not political integration of Member States, and therefore, the need for detailed regulation of the sphere of human rights did not exist at this stage of the understanding of European integration, since the TEEC, 1957, which referred to other spheres of international cooperation. In addition, effective protection of human rights was already carried out at the level of the Council of Europe within the ECHR.

On the one hand, the acts of the EU institutional mechanism (the EU Commission and the European Parliament) continue to affirm the importance of accession, on the other hand, the process of developing legal instruments for establishing models of accession to the EU The Convention looks clearly protracted, which cannot but lead to thoughts about the shift of Union`s priorities in the field of human rights protection - from the unification of the existing EU and Council of Europe systems to the approval of the EU human rights protection system and the strengthening of the role of the Charter of Fundamental Rights in this system of EU rights.

The representatives of the CoE stated that the accession of the EU to the Convention will be an important stage that will create a full-fledged mechanism in the field of protection of human rights and fundamental freedoms throughout Europe. Citizens will be able to challenge the actions of the EU before the ECtHR, the EU will be able to join its Member States in considering cases at the ECtHR regarding violations arising from EU legislation. (Joint statement on behalf of the Council of Europe and the European Commission, 2020) Therefore, the issue of EU accession to the Convention, which has been discussed in the European community for almost half a century, remains relevant.

In favor of accession to the ECHR, the European Commission mentioned that it is a response to the long-awaited need to guarantee respect for human rights in the application and interpretation of it, first, this was clearly mentioned in Recommendation from the Commission dated from 17 March 2010. After that the Council nominated the Commission as the Union negotiator and appointing the Working Party on Fundamental Rights, FREMP in accordance with Article 218(4) TFEU in its 'authorisation decision' on 4 June 2010 (Authorisation decision, 2015) *Opinion 2/13* was delivered following a request by the European Commission according to Art. 218(11) TFEU on whether the draft agreement providing for the accession of the EU to the ECHR is compatible with the Treaties. (Request for an opinion, 2013) *It* heavily criticized the accession draft, it was emphasized that the risks of a failed accession can be severe, and it is incompatible.

After that, the first negotiation meeting started. The report of the first renegotiation meeting was on 22 October 2020, it was the 6TH meeting of the Steering Committee for

Human Rights (CDDH) ad hoc negotiation group (“47+1”) on the accession of the EU to the ECHR. Alongside with it, there was drafted the structure for discussion at the sixth meeting. Also, the EU Commission’s negotiating mandate was leaked for the unknown reason simultaneously with its approval in October 2019 (Meeting Report, 2020).

The EU and the CoE continue to assert the importance of accession. Until the Union ratifies the ECHR, there will be differences in human rights standards both at the European level and between the EU and its Member States. Such accession will create guarantees of the same means of judicial control regarding the protection of human rights both at the national level and at the EU level. The accession of the EU to the Convention, it will give a complete look to the system of protection of human and citizen rights in the EU. This mechanism will work for citizens of EU Member States who are also citizens of the EU and will fully provide an opportunity to protect their violated rights by the relevant institutions of the European Union. Negotiations are ongoing, and perhaps in the future we will witness the creation of a single system of integrated standards in the field of human rights protection in Europe.

The Council and the Union are the main intergovernmental regional organizations in Europe, the two most influential formations, the main goal of which is effective international integration and each of which has a certain legal source of functioning. The EU's institutions have generally been supportive of the accession to the ECHR. They see it as a way to strengthen human rights protection across the continent. However, it's a complex process that involves navigating various legal and political challenges. The EU and the Council of Europe continue to assert the importance of accession. It is worth mentioning that all EU Member States are already part of the ECHR, which means they have ratified the European Convention — which is the founding treaty of the European Court of Human Rights (ECHR) since the creation of the EU.

PART III

3.1. The perspective of positive effect from the European Union accession to the Convention for the Protection of Human Rights and Fundamental Freedoms

3.1.1. A positive aspect for EU citizens from their protection of rights guaranteed by the European Convention on Human Rights

The Convention as a living tool for every person to protect their rights has been the most important document in the international system of human rights protection. It has always been a guide for defining the ideals and values of democratic societies and as a foundation for the development of states governed by the rule of law, guaranteeing some of basic civil and political rights such as freedom of speech, freedom of religion, improving the rights of LGBTQI+ people, it makes a significant input to the field of regulation and implementation of the right to asylum. Accession will close the gaps in legal protection, giving European citizens the same protection in relation to the acts of the Union which they now use in relation to all the Member States of the EU.

Accession to the ECHR will be serious political indicator of the coexistence of the EU and the European human rights protection system because it will give citizens similar protections to those established by the EU acts enjoyed by all Member States, this is explained by the fact that the Member States have given the EU significant competence and the EU values, which provided in the Charter.

At the same time, the fundamental rights which promoted by the Convention are protected in various ways in the countries. The principles of the Convention and the jurisprudence of the European Court are taken into account in the decisions made by national courts, in the legislation adopted by parliaments, as well as in the decisions of national authorities. Therefore, the decision of the ECtHR is possible solution to protect human rights, but the Court must therefore strike a balance between the effective protection of citizens' rights and the respect of various constitutional orders of the Member States (Nicolas Bratza N., 2012, p.258).

There exists an issue of same sex marriages, it is in the national legislation level of each EU Member state: the Constitution, the family code, the practice of national courts. In general, de facto marriages and same-sex marriages have received wide legal recognition pretty everywhere. The right to marriage, enshrined in Article 12 of the Convention, continues to be interpreted by the Court as a form of family creation for exclusively heterosexual couples. At the same time, the ECtHR does not deny the right to same-sex

marriage, but refers this issue to the internal competence of the Member States of the Council of Europe.

As noted in the practice of the ECtHR, the absence of a legal mechanism for the registration of relations of same-sex marriages is a violation of the Convention. At the same time, the provision of the Constitution on the traditional family is not a basis for violating the rights of minorities. Member States of the Convention should ratify a law that will legally recognize same-sex couples and give them the opportunity to register their relationship as a family. The ECtHR has already issued plenty of decisions regarding some countries, taking into account the explanations of the government of the respondent states and this has become a practice. Some famous cases on same-sex relationships were "Mata Estevez v. Spain", which became iconic (Kozak v. Poland, 2010; Karner v. Austria, 2003). Italy and Greece have already implemented the Court's decisions. Such an obligation awaits Poland as well (Ilias Trispiotis, 2006, p.353). The Court recognized that the lack of legal regulation of same-sex relations is a violation of Article 8 (right to private family life) and 14 (prohibition of discrimination) of the ECHR.

The failure to comply with the decision of the Strasbourg Court in such cases is a "reputational risk" not just for Member States, but the Council of Europe and a signal to European countries that the state is not capable of adequately protecting human rights. Which can have an extremely negative impact on the unity of the EU.

The right to a same-sex union, as well as the perception of same-sex relationships as part of the right to respect for family life, entered the case law of the ECtHR in 2015. That was also the main question in the case "Oliari and Others v. Italy", in which for the first time the Court ruled that the inability of a same-sex couple to legally consolidate their union is a violation of the right to private and family life. The first precedent of recognition of the right to a same-sex union for homosexual partners, and the relationship in such couples as family life, the right to respect for which is enshrined in the ECHR, in the judicial practice of the ECHR took place in 2015 (Oliari and Others v. Italy, 2015)

In fact, the practice of the ECtHR makes a significant contribution to the field of dealing with the right to asylum. After analyzing the cases considered by the ECHR, it is possible to distinguish specific rights guaranteed by the Conventional system, which are very closely related to the right of a person to asylum. Article 2 of the ECHR provides for the right to life, and Art. 3 ECHR – prohibition of torture or inhuman or degrading treatment or punishment. This right is absolute, that is, it does not provide for any exceptions to the rule. Therefore, in connection with the right to asylum, this means that an asylum seeker

cannot be deported to a country where his right to life or the prohibition of torture may even be potentially violated.

For most people, obtaining asylum can be the last attempt to escape from real persecution or inhumane treatment in the country of origin (citizenship and/or permanent residence), because despite the permanent democratization of society and the increase in the number of social movements that stand up for the protection of human rights, a significant part of the population that suffers from such problems. That is why the proper regulation of relations on granting and receiving asylum, guaranteeing fundamental rights to each person can improve the situation in this area. On the way to this, one of the important Conventional international legal instruments and applying for the protection of one's violated right. Although consideration of asylum cases does not directly belong to the competence of the Court, the right to life, the prohibition of torture, the right to liberty and inviolability are often inseparable from the possibility of each person to exercise his right to international protection. And, as evidenced by the practice of the ECtHR, applying for the protection of one's conventional right can become an effective means of exercising the right to asylum.

Also the EU is characterized by religious diversity, and seeking ways to tolerance is a daily reality of the EU which meets the society. For that follows the right to freedom of religion, which is itself as a fundamental human right, and has already been interpreted in different ways in the case law of the ECtHR. With the accession to the Convention it would be a precious asset for the society (Tulkens F., 2014, p.529). Accession to the ECHR is also a way to ensure the harmonious development of the case law of the European Court of Human Rights. The Convention has become the legal basis for the development of a whole set of international legal regulations in the field of human rights and freedom and their guarantee for the protection. The primary responsibility for upholding the rights set forth in the Convention is on Member States, parliaments, and national courts of each country.

Thus, eventually the process of developing a qualitatively new European system under Conventional system would be started. The Convention has become an important component of the development of the national legal systems of European countries, an extremely influential factor in the involvement of fundamental values and norms regarding the protection of human rights, the rule of law and democracy in these systems.

3.1.2. The prospect of reforming the EU judicial system in the context of its accession to the European Convention on Human Rights

One of the most important creations of the Council of Europe is the creation of a common legal space in the European legislation system, that goal could be reached by applying the mechanism of the ECHR, but there are still complex issues to make the European human rights system more uniform, harmonized policy among the Member States, whereas there is still no uniform policy. The so-called *acquis communautaire*, as well as its implementation by European institutions and Member States are not yet covered by the protection of the living instrument of the Convention, since the EU is still on its way to its accession. The political frontier of the EU is the *acquis communautaire* and it will be able to expand as far as the *acquis communautaire* is respected and only if it is incorporated effectively into national legal orders of other Member States (Cagiano de Azevedo, R., Paparusso, A., Vaccaro, M., 2013, p.193). Essentially, the completion of the EU accession to the Convention will mean that the EU is subjected to the same rules and the same system of international legal system and Convention system. In practice, this means that today an EU citizen is deprived of the opportunity to appeal to the European Court of Human Rights in Strasbourg against violations of his rights by European institutions, or as a result of incorrect application of EU legislation by Member States.

It should be noted that for the ECtHR, the existence of dualism of human rights standards is extremely undesirable. Its current practice in cases directly or indirectly related to EU law is evidence of the desire to make this situation impossible, in particular by using the so-called "Bosphorus doctrine", which is based on the presumption of "equivalence of human rights protection" in the EU and the Council Europe. (Peers, Steve, 2006) The EU was also recognized as an organization with high standards of human rights protection, including by the ECHR. It is about the well-known decision of the ECtHR on the Bosphorus case. The case was that Turkish Bosphorus Airlines had leased an aircraft belonging to the Republic of Yugoslavia and flown it to Ireland for a stay. Bosphorus Airlines appealed the confiscation of the plane by Irish authorities under Regulation 990/93, which was about sanctions against Yugoslavia. on the grounds of violation of property rights to the EU Court, which rejected the claim. The airlines then appealed to the ECtHR, which accepted the concept of so-called "equivalent protection", which is the presumption that the EU has high human rights standards. Not having the competence to review EU acts, the ECtHR presumes that they meet the standards of the Convention on the Protection of Human Rights and Fundamental Rights (hereinafter referred to as the ECHR).

At the same time, taking into account the scope of the Convention, it is hard to predict that the mechanism proposed by the Convention will withstand competition with the mechanism and advantages of alternative dispute resolution. Along with this, it is important to note that the proper application of the Convention requires developed judicial practice, high qualification of judges, without which the application of the Convention will be very limited. There exists also a judicial issue of the co-respondent mechanism and the third-party intervention. It was opened as well in the Bosphorus case. The outcome of which shows that the co-respondent solution would enhance the effectiveness of the human rights protection in cases involving EU law, as the third-party intervention has distinctive weaknesses compared with a co-respondent mechanism (Callewaert J., 2014, p.65). After the accession of the European Union to the ECHR, there would be cases where an obligatory involvement of the Union in cases brought against a Member States would make sense. Some of the main now are: the third party is under no obligation to intervene and not bound by the Court's final judgment. In contrast, if the Union was made a co-respondent, the force of *res judicata* of a judgment would be extended to the EU. In cases where a violation was found, this would mean that the European Union would have to abide by the judgment under Art.46 ECHR. For these reasons, the co-respondent mechanism would be a worthwhile addition.

Also res judicata is important characteristic of EU procedural law and its respect for national rules regarding, established in Art 19(1) TEU (Turmo A., 2021, p.365). It is complex balance here between fundamental principles of legal certainty and legality, which is well present in CJEU, ECtHR case law (Grassi, M., 2023).

Strasbourg Court was created to monitor the observance of human and citizen rights and freedoms. The court acts as a safety cushion. The Convention guarantees each person specific rights, and its provisions are considered by the ECtHR as norms of direct effect. Individuals can file complaints about human rights violations against any of the 46 Member States before the Court in Strasbourg after they have exhausted all appeals at the national level. If the European Court finds that the applicant's human rights have been violated, the relevant state must ensure justice for the person in question. The State may also take measures to ensure that such cases do not recur. Actions taken by national authorities in response to the Court's decision are under the supervision of the Committee of Ministers of the Council of Europe.

The supranational character of EU law implies that EU Member States recognize the supremacy of legal acts of the European Union over the norms of national legislation. This includes recognition of the jurisdiction of the EU Court and its decisions. The supranational

character of the Convention consists in the binding nature of the decisions of the ECtHR for the state to which it applies and the corresponding influence, mainly through measures of a general nature, of each of the decisions of the ECtHR on national legal systems.

This is perfectly understood both in the EU and in the CoE, and that is why it was decided that for this reason the EU should accede to the Convention. In the case of the EU's accession to the ECHR, a unique situation is created when an international organization "opens itself" to external full-fledged judicial control by another international organization. A question arises regarding the consequences of such external monitoring, especially considering the existence of increasingly obvious inconsistencies between the EU and the Council of Europe in the approach to individual but rather sensitive problems (Burca, Grainne, 2009).

As well there are some issues between the EU Court and ECtHR. The EU Court determined systemic obstacles to the EU's accession to the ECHR. It should be noted that such decision was in the light of the circumstances that the EU was created as an economic community, so the competence of the EU Court back in time was limited to resolving issues in the economic sphere. Subsequently, the EU went beyond the framework of the economic union, which in turn expanded the powers of the EU Court, therefore the protection of human rights also belongs to its competence. For the first time, the official recognition of human rights at the community level took place with the entry into force of the Single European Act of 1987, and later this led to the appearance of its own catalog of EU rights - the Charter of Fundamental Rights of the EU, which entered into force in 2009.

The Court of Justice of the European Union began to develop its practice regarding human rights as early as 1969 with the decision on the Stauder case (Stauder v City of Ulm, 1969). This is confirmed by several decisions of the EU Court, which recognized human rights as the main principles of the law of the first communities, and then of the EU. The Court of the EU has been repeatedly condemned as an overly active body that goes beyond the powers of the integration association, creating standards for the protection of human rights, but it was this activity of the Court that became the driving force for the transformation of the EU into an association of a universal nature.

All the Member States are participating in the legal system of the EU through their membership in the CoE and are therefore bound by the Convention to protect human rights, and subject to the binding rulings of the Strasbourg Court, which adjudicates complaints from CoE Contracting parties for alleged infringements of the Conventional system.

Although ECtHR decisions are persuasive before the CJEU, but both Courts significantly shows less similarities in reference to each other. As for control over Member

States, in areas that do not belong to the competence of the Union, the Court has no mechanisms of influence on Member States and control over state measures regarding the observance of human rights. In this case, the responsibility for their observance rests with the national authorities.

The control of the EU Court over national measures, including in the field of human rights protection, can be applied if the measures were implemented at the national level within the framework of EU competence, and with the aim of implementation of norms of EU law. This is due to the fact that these actions represent the delegation of the powers of the Union to the national authorities, and the delegation must always take place in compliance with the standards of the entity that authorizes to act, that is, in this case, it is the standards of human rights protection recognized by the EU.

It is worth assessing the degree of reality of the risks to the autonomy of EU law in the case of joining the ECHR, taking into account the fact that the ECHR mechanism provides for appropriate internal "safeguards" that are actively used and have proven their effectiveness to preserve the autonomy of the legal systems of the ECHR participants (for example, clauses in accordance with Article 57 of the ECHR, etc.) (Council of Europe, 2010). The procedural tools of the EU Court can also be used to "remove" the technical and procedural inconsistencies of the two judicial mechanisms. For example, the EU Court can use the accelerated review procedure in the case of involving the EU as a co-defendant in a case at the ECtHR, where there is a problem of obtaining an opinion of the EU Court on a legal act relevant to the subject of the trial in the shortest possible time.

Currently, most European countries are simultaneously members of two large international organizations - the Council of Europe and the European Union. In the process of researching the legal bases of the activity of two, at first glance, similar judicial bodies, the question arose of delimiting their competence, since it may coincide during the consideration of certain categories of cases, as well as regarding the expediency of establishing differences in the functioning of the analyzed supranational courts.

Among the national, international, and supranational tools for the protection of human rights that can be used by their citizens, the most important place is occupied by the European Court of Human Rights, created in 1959 in accordance with the Convention, and the Court of Justice, which has been operating since 1952 in accordance with the Treaty establishing the European Community. The first of them was established as a control mechanism for compliance with the Convention (Treaty establishing the European Economic Community, 1957).

Uncertainty regarding the prospects and methods of implementation of Art. 59 ECHR does not contribute to the strengthening of cooperation between the EU and the Council of Europe in the field of human rights protection. This objectively creates uncertainty regarding the prospects of the contracting parties of the CoE, which are oriented towards EU membership.

In addition, by focusing on "individual, mainly technical and procedural aspects", the Court of Justice of the EU in order to preserve its own status as a key element of the processes of "constitutionalization of the EU" actually manipulates threats to the effectiveness and autonomy of the EU legal system. The draft Agreement contains a number of compromise solutions, which allowed to overcome certain technical and procedural problems. For example, part 1 of Art. 1 of the Draft Agreement provided that the EU's accession to the Convention is interpreted in a limited way - only the Convention itself and Protocols No. 1 and No. 6, since not all Protocols to the Convention have been ratified by EU Member States. Such compromise solutions can be reanimated in the case of the renewal of the negotiation process, which turns it into a permanent process (European Commission, 2017). The Court protects the supremacy, integrity, and inviolability of EU law through a certain disregard for the basic values of a democratic society.

Analyzing the differences between the EU Court and the ECtHR, it is first of all worth paying attention to the appeal procedure. Firstly, the subjects of appeals to the Court of Justice of the EU are Member States, institutions, individuals, and legal entities. Interestingly, individuals and legal entities are non-privileged plaintiffs and may participate in proceedings against individuals or legal entities as well as institutions. Individuals and legal entities cannot file a lawsuit against the state. The ECtHR is authorized due to Art. Art. 33, 34 of the ECHR to consider interstate disputes, as well as individual applications of individuals, groups of individuals, as well as non-governmental organizations against Member States of the Convention, unlike the EU Court. (European Convention on Human Rights, 1950) The Convention established the European Court, which was created as a control mechanism for the protection of the rights guaranteed by the ECHR, therefore, the competence of the ECHR is limited by the purpose of the Convention. Also here is a difference in the relationship of the EU Court and the ECtHR with national judicial bodies. Although national courts are not part of the judicial system of the European Union, the hierarchy is preserved in certain cases.

In particular, in Art. 267 of the TFEU provides for the procedure of preliminary appeal of national courts to the Court of Justice (Udo Bux, Mariusz Maciejewski, 2023).

This procedure is designed to ensure uniform application and interpretation of the provisions of the legislation. Usually, individuals or legal entities cannot directly apply to the Court of Justice of the EU with a corresponding appeal, but this right of national courts can be applied in cases related to the protection of the rights of such persons. In general, the preliminary appeal procedure is one of the guarantees of the right to a fair trial. As for the ECHR, in Art. 35 of the ECHR one of the conditions for the admissibility of the application is the use of all national methods of protection. Thus, the Court assesses the final decision of the national courts and verifies their compliance with the Convention. It should be noted that there is no provision in the Convention that national courts should use the practice of the ECtHR, the consolidation of such a norm rests with the national legislative body.

Conflicts between the European Court of Justice and the ECtHR arise due to the fact that a certain law is interpreted in different ways. Also, both courts have different approaches to the issue of limiting the protection of certain rights in the event of a conflict between the rights of private individuals. According to the position of the ECtHR, certain permitted limitations may apply to certain rights. In some cases, in order to make sure that the applied restrictions do not narrow the scope of the right to such a limit that touches the very essence of the right and deprives it of its effective protection, the Court must make sure that these restrictions can be foreseen, they are made in accordance with the law and the constitution - established by law, and also have a legitimate purpose. The status of the EU Court is similar to that currently enjoyed by national constitutional or supreme courts in relation to the ECtHR. Nevertheless, when analyzing the interaction between the two courts, the question of the hierarchical relationship between the ECJ and the ECtHR cannot be avoided.

In the case that citizens of the Union do not receive adequate protection of their rights during the consideration of cases at the Luxembourg Court, nothing prevents them from applying to the Convention with reference to the provisions of it. Since the Union considers itself bound by the provisions of the Convention, the interpretations of the ECHR are also binding on the EU. All this will eventually lead to the fact that in the field of human rights, the case law of the Strasbourg Court will have a higher legal force than the relevant case law of the CJEU, therefore, the process of unification in the field of human rights protection in Europe will probably take place. Indeed, homogenization will have a positive impact on the protection of human rights. At the same time, the exclusion from the jurisdiction of human rights can best be characterized as "integration sensitivity", which has always been characteristic of the judicial practice of the CJEU. When interpreting

fundamental rights, the ECtHR will not be able to take into account the current goals and structure of the Union (which play a significant role in the practice of the EU Court) or the degree of integration, since the same standards of human rights must be applied within the Union and other contracting states of the ECtHR. Nevertheless, all these problems can be solved by making a reference to the interpretation in accordance with the ECHR in the Charter, which will allow a departure from the requirements of the identical content and scope of fundamental rights only in a positive direction: only in those cases when a higher level of protection is provided.

The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. The plane of conflict between the EU and the ECHR in the field of human rights is called:

a) the system of granting asylum to refugees in the EU based on the so-called Dublin Regulation of the EU (more than 1,000 statements regarding the violation of the norms of the ECHR during the decision on the deportation of refugees from EU Member States are awaiting a decision in the ECHR);

b) the practice of applying the European Arrest Warrant in the EU, which, it is claimed, differs significantly from the established practice of the ECtHR regarding the application of Art. 3 and Art. 6 ECHR;

c) EU antimonopoly practice with its extremely high fines and unreasonably large powers of the European Commission to investigate violations and impose fines

In accordance with Part 1 of Art. 19 of the Treaty on the European Union, the Court of Justice of the EU is formally entrusted with the duty of ensuring compliance with EU legislation in the process of interpretation and application of founding treaties. In order to achieve the goals and objectives of the EU, the balance between the Member States must also be achieved through the activities of the Court of Justice of the EU. The court plays an important role in strengthening democracy and acts as a key link in the formation of the special legal order of the EU.

In turn, the accession of the EU to the ECHR could put an end to the process of forming a dual system of human rights standards in the practice of the Court of the EU and the ECHR. Therefore, there is a need to take measures to unify the approach of the ECtHR and the Court of Justice in solving cases related to the protection of human rights and to harmonize standards in this area within the CE and EU. However, as is known, the negative decision of the EU Court 2/13 of 18.12.2014 stopped this for an indefinite period.

It can be concluded that the two European Courts not only function differently, but also relate differently to the national courts of the states. The EU Treaty, with the aim of

uniform application of the provisions of its legislation, established a system of "prior decisions" (prejudice): if national courts are faced with the problem of interpretation of the Treaty or other EU acts, they can make a request to the Court of Justice of the EU in order to obtain a preliminary ruling on any - any problems of interpretation in the case under their consideration. But the ECtHR prioritizes the citation of its own case law, and the consequence of that that is endless reformulation of jurisprudence (Miron A., 2020, p.8). And thus national courts are instructed to follow the Court's interpretations. At the same time, the ECtHR is more isolated than the EU Court, its role is to check whether there has been a violation of the Convention at the national level.

The European Court was created as a control mechanism for the protection of the rights guaranteed by the ECHR; therefore, the competence of the ECHR is limited by the purpose of the Convention. The Court of Justice developed in its case law other criteria for determining whether the applied limitation of the right is justified. Such a restriction should correspond to the goals of general interest pursued by the EU and should not create a disproportionate and unacceptable interference that violates the very essence of the guaranteed right.

From the point of view of international law, the above position of the EU Court limits the right of Member States to protect their rights under international treaties. The same situation may occur in the case of the accession of the European Union to the ECHR as an independent entity.

Therefore, in the practice of two courts, there is a discrepancy in interpretation, which, accordingly, leads to different decisions of similar cases. Such a situation is negative in view of the fact that it violates the unity of the approach to the interpretation of the content and scope of human rights in Europe.

Some circumstances of duration and thoroughness of the preparation of the Draft Agreement were discussed in the Opinion 2/13 issued by the EU Court, the Court defined systemic obstacles to the EU's accession to the ECHR. Although it is obvious that Conclusion 2/13 not only clarified the situation, but also created additional obstacles, the legal content of which is not obvious. The EU Court mentioned the incompatibilities of the draft Accession Agreement and EU rights, as well as the absence of legal grounds for EU accession to the Convention. It was determined that as a result of this accession, the Convention, like any other international treaty concluded by the EU, will be binding on the institutions of the EU and its Member States and will form an integral part of EU law. In this case, the EU, like other Member States, will be subject to external control in order to ensure compliance with the rights and freedoms provided for by the Conventional system.

Thus, the EU and its institutions, in particular the EU Court, will be subject to external control mechanisms provided for by the Convention, in particular by the ECtHR.

Conclusion 2/13 is just another stage in the complex and contradictory process of harmonizing the efforts of the Council of Europe and the EU in creating a coherent and effective European system of human rights protection. The legal formulations of Conclusion 2/13 have political implications and consequences that are not entirely consistent with the political will of the EU Member States to create a single European system of human rights protection (Eeckhout P., 2015, p.975).

The problem of determining the mechanisms and principles of interaction between the Council of Europe and the EU in the field of human rights protection has always existed, although its relevance and urgency have changed. The economic nature of the EU at the initial stage created the illusion of "inferior value" of human rights, which was soon replaced by the belief in the need to fill the corresponding gap of the "new legal order", the effective functioning of which required the formulation of human rights standards. It is significant that this happened mainly due to the practice of the EU Court, which somewhat later in the Preamble of the Charter, which was recognized as one of the main sources of formulating the content of human rights within the framework of the EU.

So, it's important to create appropriate standards in order to protect human rights, so as to ensure the supremacy and autonomy of EU law, which could be done by acceding to the Convention.

The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. There is conflict between the EU and the ECHR in the field of human rights. There are some issues in cooperation between the EU and the Council of Europe in the field of human rights protection. Also in the practice of two courts, CJEU and ECtHR there is a discrepancy in interpretation, which, accordingly, leads to different decisions of similar cases. Such a situation is negative in view of the fact that it violates the unity of the approach to the interpretation of the content and scope of human rights in Europe. In the Opinion 2/13 issued by the EU Court, the EU Court recognized as systemic obstacles to the EU's accession to the ECHR.

Exists also a judicial issue of the co-respondent mechanism and the third-party intervention. It was opened as well in the Bosphorus case. The outcome of which shows that the co-respondent solution would enhance the effectiveness of the human rights protection in cases involving EU law, as the third-party intervention has distinctive weaknesses compared with a co-respondent mechanism.

CONCLUSIONS

1. With the conducted analysis it is established that the Convention has become an important component of the development of the national legal systems of European countries, an extremely influential factor in the involvement of fundamental values and norms regarding the protection of human rights, the rule of law and democracy in these systems. The EU accession to the ECHR will have a significant improvement and positive impact on the rights protection in the EU, because the process of creating a qualitatively new European system for the protection of human rights and freedoms would be started. The EU is set to accede to the ECHR, it would be a big step for human rights protection in Europe. However, It's a complex process which involves navigating various legal and political challenges, but once it happens it will be a major achievement.

2. In the result of research it is revealed that EU has its own legal order, which isn't easy to reconcile with the ECHR system and there are significant challenges. One of them is political, because EU Member States and the CoE members need to agree, and that's not always easy and there's also the question of how the EU's accession will affect its relationship with its Member States. The approaches of the CoE and the EU consider the main goal of the accession to be an effective international integration. The EU institutions have generally been supportive of the accession to the ECHR and see it as a way to strengthen human rights protection. However, it's a complex process that involves navigating various legal and political challenges.

In the result of analyzing the problem of EU accession to the Convention were defined such main challenges:

1) There is conflict between the EU and the ECHR in the field of human rights. Since the EU is not a party to the ECHR, the ECJ cannot directly apply the Convention as part of the legislation of the EU. There is a necessity in coherence in the legal protection for integrating the substantive provisions of the ECHR and the review of EU primary law by the ECtHR.

2) There are some conflicts between the ECJ and the ECtHR due to the fact that a certain law is interpreted in different ways. The practice of the EU Court often demonstrates the autonomy of its application and interpretation of human rights and freedoms, in contrast to the ECHR. Also in the practice of two courts, ECJ and ECtHR there is a discrepancy in interpretation, which, accordingly, leads to different decisions of similar cases. Such a situation is negative in view of the fact that it violates the unity of the approach to the interpretation of the content and scope of human rights in Europe.

3) The ECJ has raised some concerns about potential conflicts between its jurisdiction and that of the ECHR. In the Opinion 2/13 issued by the EUCourt were defined some challenges recognised as systemic obstacles which are not yet settled.

4) There is also a judicial issue of the co-respondent mechanism and the third party intervention, which was first discussed in Bosphorus case. The outcome of which shows that the co-respondent solution would enhance the effectiveness of the human rights protection in cases involving EU law, as the third party intervention has distinctive weaknesses compared with a co-respondent mechanism..

5) There are some issues in cooperation between the EU and the CoE in the field of human rights protection. It is worth mentioning that all EU Member States are already part of the ECHR, which means they have ratified the ECHR since the creation of the EU. The ECJ generally supports the EU accession to the ECHR and sees it as an important step in promoting and protecting human rights.

Accession to the Convention would result in a substantial change for the legal system for protection of human rights, the EU will be integrated into the Conventional system. In addition to the internal protection of these rights by EU law and the ECJ, the EU will be bound to respect the ECHR and will be placed under the external control of the ECtHR. Procedural issues involve questions of autonomy and competence, the fundamental principle of the EU of mutual trust, allocation of responsibility and the co-respondent mechanism.

3. As the result of identification of the main legal and practical challenges, it was established next solutions to the challenges defined. As there is a need to preserve the specific features of the EU, and the law of the EU, the autonomy of the EU legal order with the accession, solving the problem of the distribution of competence at the national and EU level the next challenges will require further technical amendments to the ECHR and additional protocols to it. Main legal technicalities could be regulated in additional agreements between the Council of Europe and the EU, the Rulings of Court or possibly in resolutions of the Committee of Ministers either by means of an amending protocol or by means of an accession treaty to be concluded between the EU and all States parties to the Convention, the co-respondent mechanism would be a worthwhile addition.

Such steps create guarantees of the same means of judicial control regarding the human rights protection of both at the national level of the parties of the EU and at the European level. Eventually the completion of the process will close a long time discussion since the late 1970s.

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SUMMARY

EU accession to the European Convention on Human Rights: overview of the main challenges for the legal system of the EU and the Convention, and ways to overcome them.

Diana Hulivata

This master thesis provides analysis of the main challenges posed by the EU accession to the ECHR to legal order of the EU and ECHR and to show the ways to overcome them, analyzing the main difficulties and most problematic aspects and as well to offering instruments that could facilitate these challenges. This topic is most revealed through the prism of the study of issues of mechanism for the protection of human rights for all EU citizens. The thesis analyzes the ways for reforming European legal order with the EU accession to the Convention and whether it will fully provide an opportunity to protect human rights by the relevant institutions of the European Union.

Examining the challenges of the EU accession to the ECHR, the importance of the Convention as a guarantee against breach of human rights for the full functioning of society and the EU is established. In the research is clearly distinguished substantial changes and procedural issues for the legal system for protection of human rights with the EU integration into the fundamental rights protection system of the ECHR. The analysis of the legal and scholar scope of the related matters on the EU accession to the ECHR allows conclusions to be drawn regarding the internal protection of these rights by EU law and the ECJ, questions of autonomy of the EU and competence of ECtHR, allocation of responsibility and the co-respondent mechanism. Due to a detailed analysis the main legal and practical challenges, and solutions to the challenges are defined. The EU accession to the ECHR will have a significant improvement and positive impact on the rights protection in the EU and what challenges, because the process of creating a qualitatively new European system for the protection of human rights and freedoms would be started.