# Juridical Protection of Fundamental Rights after Lisbon

OANA ŞARAMET; ANAMARIA TOMA-BIANOV; RADU □ARAMET
Department of Law
University *Transilvania* from Brasov
Address 25 Eroilor Boulevard, Braşov
COUNTRY ROMANIA
oana_saramet_2005@yahoo.com; anamaria.bianov@unitbv.ro http://www.unitbv.ro

*Abstract:* - The coming into force of the Treaty of Lisbon generated many controversies with regard the field of protection of human rights. The ground for discord is represented by Article 6, paragraph 2 from TEU that provides for the formal accession of European Union to the European Convention of Human Rights, accession that will integrate EU in the Strasbourg control system, including here the jurisdiction of the European Court of Human Rights. Despite the political enthusiasm in this area, the juridical technicalities of this accession are extremely complex and lead to several major queries, many of them referred to into the following article.

*Key-Words:* - protection, fundamental, rights, European, court, chart, convention

## 1 Introduction

The juridical protection of human rights in the European community juridical order has a sinuous and rather controversial history, but we can finally say that it has reached a new era after the coming into force of the Treaty of Lisbon. Now we cannot say that the point reached by the Reform Treaty (as it was initially called) in human rights protection is not a very sensitive point, due to the European Union constitutional power to seek accession to ECHR, and in this event, due to the alleged superposition of the jurisdictions of European Court of Human Rights and of European Court of Justice, not to mention the redundancy offered by the Charter of Fundamental Rights. Nevertheless, the Lisbon Treaty marked a turning point in the juridical traditions of European Union, a point from which we can say that the protection of fundamental rights gained an explicit legal ground. In the following we'll make a short incursion in the history of European Union to outline the most representative moments in protecting fundamental rights.

The Treaty establishing the European Economic Community (EEC) (1957) wasn't very generous with the juridical protection of fundamental rights. Still, the EEC Treaty contained explicit references to the principle of equality of treatment, which was in turn connected to the free movement rights, in particular equality based on nationality; incidentally, this is after all a milestone of the Single Market, i.e. equality between undertakings, equality of salaries between workers, and in more general terms equality between all those subject which are engaged in intra-Community economic activities in the name of the principles of the common market. At that moment, the idea of including a charter of fundamental rights seemed to be at least redundant, if not shallow, since another organization was already in charge with protection of fundamental rights in Europe, namely the Council of Europe, founded in 1949. Not to mention that EEC primary goal wasn't to offer protection to fundamental rights, but to establish a common economical market for the signatory parties.

The lack of specific and exhaustive provisions for the protection of fundamental rights has not meant, however, the absence of legal protection. In its early existence, the European Court of Justice (ECJ) stated that fundamental rights form an integral part of the *general principles of law*. In the Judgment of the Court of Justice of 12 November 1969 it was for the first time, the ECJ stated that it ensured the respect of fundamental human rights enshrined in the general principles of Community law [1]. From then onwards, the ECJ has regularly interpreted or reviewed the validity of EC measures in the light of fundamental rights as protected by the Community legal order. We should mention here that for all these juridical statements, the ECJ lacked a codified declaration of fundamental rights. As a result, it has been regularly argued that the European Community, and then European Union, should seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of

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Fundamental Rights has finally become a core element of the Union's legal order.

## 2 EU Accession to ECHR

The Treaty of Lisbon retains in Article 6 the three pillars of Fundamental rights: The Charter, the recognition of the rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the rights as they result from the constitutional traditions common to the Member States. Article 6, paragraph 2 from TEU provides for the formal accession to the European Convention, accession that will integrate EU in the Strasbourg control system, including here the jurisdiction of the European Court of Human Rights (ECtHR) [2].

EU Member States have previously declared their desire "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality, and social justice" [3]. Yet no treaty provision specifically dealt with fundamental rights protection until the Maastricht Treaty (1992) when a new Article F(2) provided that the EU must respect fundamental rights as general principles of law [4]. This treaty provision, which became known as Article 6(2) of TEU was further amended to make clear that the EU is based inter alia on the principle of *respect for fundamental rights*. Indeed, the new Article 6 of TEU not only makes the Charter legally binding, but it also provides that the EU shall accede to the ECHR; this provision therefore requires EU action rather than merely offering an option – and that “such accession shall not affect the Union's competences as defined in the Treaties”. [5]

The EU accession to ECHR raised a lot of questions in both academic and political media. It was generally difficult to understand the necessity for the EU to be a member of ECHR whereas EU member states are all members of the Council of Europe and accession to the ECHR is one of the conditions of entry into the EU. The partisans of EU accession to the ECHR have argued that it will eventually afford citizens protection against EU acts similar to that which they already enjoy against national measures. It has been also stressed out that EU accession to ECHR is required to restrain any potential divergence in human rights standards between the ECJ and the ECtHR.

The most important arguments offered in support of EU accession to the ECHR were: EU accession would be symbolically important as it would send a positive message stressing the EU's commitment to fundamental rights protection; EU accession would also give a strong signal of the coherence between the EU legal system and the national ones; ECJ would come under direct, external and specialized judicial supervision in the same fashion as national courts.

Both the Lisbon Treaty and Protocol no. 14 to the ECHR, which amends the so-called control system of the Convention, have already paved the way for EU accession. This latter text, agreed in 2004 and which entered into force on 1 June 2010, not only provides a much necessary reform of the ECHR "control system" but also contains an article, namely Article 59(2) of the ECHR, making provision for the EU to accede to the Convention. Reform of the ECHR system and EU accession to the ECHR are, in fact, closely connected. In a few words, Protocol no. 14 aims to improve the effectiveness of the ECHR control system by providing mechanisms that should enable the Court to deal more promptly with clearly inadmissible applications and repetitive applications [6]. It is generally assumed that these additional modifications will be included either in a new amending protocol or in the future accession agreement to be soon negotiated between the EU and the Council of Europe.

With respect to this future accession agreement, being no ordinary treaty, it must be negotiated and concluded by the EU in accordance with the specific requirements laid down in Article 218 of TFEU [7]. This means that the Council will have to unanimously agree to adopt the decision concluding the agreement after having obtained the consent of the European Parliament. Furthermore, the accession agreement will have to be approved by each EU Member State in accordance with their respective constitutional requirements. As if this was not sufficiently complicated, the accession agreement will also have to be approved by all 47 existing contracting parties to the ECHR, again, in accordance with their respective national constitutional requirements. This means that some non-EU countries might also be tempted to follow Russia's past obstruction as regards the ratification of Protocol no. 14. Finally, the ECJ might even be asked to issue an advisory opinion as to whether the envisaged accession agreement is compatible with the EU Treaties.

Concerning the substantive features of Union law, it appears that the future agreement must essentially respect the principle of autonomy of the EU legal order.

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## 3. European Court of Justice and European Convention of Human Rights

As amended by the Treaty of Lisbon, Article 6(3) of TEU provides that "Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". [8] In doing so, the new Article 6(3) of TEU closely reflects the early jurisprudence of the ECJ according to which respect for fundamental rights forms an integral part of the general principles of law protected by the Court.

Its early jurisprudence the ECJ settled that the fundamental rights were an integral part of EU law and that in identifying particular fundamental rights and interpreting their content, the Court draws "inspiration" from the constitutional traditions of the Member States [9] and from international human rights treaties [10]. ECJ declared that international human rights treaties on which Member States collaborated, or to which they were signatories, also provided guidelines which should be followed within the framework of EU law. No measure could have the force of law unless it was compatible with the fundamental rights recognised and protected by the Member States' constitutions. In the late'70s the ECJ confirmed that the rights protected by the ECHR form part of community law [11]. ECJ have always recognized the "special significance" [12] of ECHR among the international treaties even though this expression was not explicitly used before 1989 [13].

In the field of EU law, the effect of this development is profound. Fundamental rights which are treated as an integral part of EU law can be used to challenge the validity of EU legislation or the actions of the EU institutions. So, for example, in a judgement from 18 June 1991, the ECJ held that where a Member State seeks to derogate from freedom of establishment and freedom to provide services, its justification for doing so must be compatible with the general principles of EU law, including (on the facts of that case, which concerned exclusive television rights) Article 10 of the ECHR [14].

Still, the ECJ has no jurisdiction to apply the ECHR, as the convention does not constitute a formal source of EU law, therefore the ECJ has referred to its provisions as well as to the jurisprudence of ECtHR in order to assist its interpretation of European human rights standards.

## 4. ECJ vs. ECtHR

As already mentioned before, the Lisbon Treaty paves the way for a possible accession of the EU to the ECHR, which means that EU measures, including ECJ rulings, will be subject to the additional external and specialised check of the Strasbourg Court. From a legal point of view, it has often been argued that the most important reason for full EU accession to the ECHR may be the imperative to guarantee a congruent development of the jurisprudence of the ECtHR and that of the ECJ in the area of fundamental rights. Indeed, EU accession would finally enable the ECtHR to directly review EU measures by allowing natural or legal persons to bring applications against the EU before the Strasbourg Court under the same conditions as those applying to applications brought against national authorities, obviously after they have exhausted domestic remedies. It would also enable the EU to defend itself before the Strasbourg Court as well as being represented in this very same Court with an EU judge.

EU accession to the ECHR must not jeopardize the interpretative autonomy of the ECJ. Yet, it is well established in the case law of the ECtHR that it is primarily for the national authorities, and notably the national courts, to interpret and apply domestic law. Furthermore, the ECtHR does not rule on the validity of national law but on their compatibility with the Convention on a case-by-case basis and *in concreto*. The application of these principles to EU institutions and EU law should exclude therefore any problem on that front.

More problematic is the necessary adaptation of the proceedings in both individual and inter-State disputes before the ECtHR. Individuals should be allowed to challenge both the EU and the Member State where relevant. Regarding the settlement of inter-state disputes, while there should be no restriction on non-EU countries initiating proceedings against the EU in the Strasbourg Court, the principle of autonomy of the EU constitutional order requires that EU Member States be restrained from relying on the relevant ECtHR procedure [15] against the EU in the context of disputes solely concerning the interpretation or application of EU law. Any different solution would be contrary to Article 344 of TFEU and generally speaking, it is important not to enable the Member States of the EU to circumvent the exclusive jurisdiction of the ECJ [15].

Another important issue is whether the EU should be allowed to intervene as co-defendant in

any case brought against a Member State before the ECtHR when the case raises an issue concerning EU law. In our opinion, Member States should also be allowed to intervene as co-defendant in a case brought against the EU subject to the same conditions. Generally speaking, it is important to ensure that proceedings by non-Member Sates and individual applications could properly involve Member States and/or the Union since according to the Convention, a contracting Party is responsible for all acts and omissions of its organs.

It is extremely important that the accession agreement should not affect the authority of the ECJ. This is why some have suggested the adoption of a specific mechanism whereby prior ECJ intervention would be made compulsory before any ruling of the ECtHR. Such a system, however, would lead to additional delays for the parties and would raise the risk of open conflict between the two European courts. The EP resolution of 19 May 2010 on the institutional aspects of EU accession to the ECHR proclaimed in this issue that “it would be unwise to formalise relations” between the ECJ and the ECtHR “by establishing a preliminary ruling procedure before the latter or by creating a body or panel which would take decisions when one of the two courts intended to adopt an interpretation of the ECHR which differed from that adopted by the other” [17]. It may be that no specific mechanism between the two European Courts is actually required and, as a consequence, the exhaustion of legal remedies will continue to be an essential feature in the post accession system of judicial protection. This means that no natural or legal person will be allowed to initiate proceedings in the Strasbourg Court unless it has exhausted the internal system of remedies – the preliminary ruling procedure [18] being an integral part of this system.

The ECJ, in its fundamental rights case law, has long relied on the provisions of the ECHR and the case law of the Strasbourg Court even though it had no obligation to do so. This "specific feature" of the ECJ's jurisprudence explains, in part, why the ECtHR agreed to consider that the EU protects fundamental rights in a manner that can be considered equivalent to that for which the Convention provides and devises a “manifest deficiency test” in the Bosphorus case [19], that is, a low standard of scrutiny for EU measures. It has been argued that EU accession to the ECHR may impact the Bosphorus approach. Put differently, the ECtHR's rather deferential approach may be dropped or extended. Those in favour of abandoning this doctrine argue that it is important to avoid any double standard between the State parties to the ECHR and the EU. An extension of the Bosphorus approach's scope of application would mean, by contrast, that EU regulations or Commission decisions, for instance, would be subject, similarly to national measures that strictly apply or implement EU law, to a low degree of judicial scrutiny in Strasbourg. In any event, the accession agreement will probably be decisive for the future of the Bosphorus approach.

As should be evident from the points made above, negotiating the accession treaty and securing EU accession to the ECHR is likely to prove a slow, onerous and difficult process. Political enthusiasm may therefore be soon tempered by the dry legal complexity this process entails.

## 5. The Charter of Fundamental Rights vs. ECHR

In June 1999, the Cologne European Council concluded that the fundamental rights applicable at European Union (EU) level should be consolidated in a charter to give them greater visibility. The heads of state/government aspired to include in the charter the general principles set out in the 1950 European Convention on Human Rights and those derived from the constitutional traditions common to EU countries. In addition, the charter was to include the fundamental rights that apply to EU citizens as well as the economic and social rights contained in the Council of Europe Social Charter and the Community Charter of Fundamental Social Rights of Workers. It would also reflect the principles derived from the case law of the Court of Justice and the European Court of Human Rights.

The charter was drawn up by a convention consisting of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments. It was formally proclaimed in Nice in December 2000 by the European Parliament, Council and Commission. In December 2009, with the entry into force of the Lisbon Treaty, the charter was given binding legal effect equal to the Treaties.

The interpretation and application of the Charter of Fundamental Rights is made extremely complex by a series of confusing "horizontal clauses". The change to the legal status of the Charter also raises the question of whether the general principles of law may, or rather should progressively become a subsidiary and complementary source of EU fundamental rights by contrast to the ECHR which should be considered the "primary source".

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A rapid look at the Charter's fifty "rights, freedoms and principles" should lead the reasonable observer to conclude that the Charter may indeed be best described as a gifted crystallization of existing fundamental rights contained in the ECHR. What's more, the language used by the drafters of the Charter also reflects existing national, EU and international provisions. However, it is possible to argue that the Charter goes further than European Convention of Human Rights in guarantying the fundamental rights? The answer is yes due to the following arguments: First of all, the ECHR is mostly confined to civil and political rights whereas the Charter contains both civil and political rights, on the one hand, and economic, social and cultural rights on the other. The Charter also contains a small number of 'third generation' rights – rights which protect issues of global concern, such as the right to a clean environment. Secondly, the Charter goes further than the ECHR because it contains rights that were not envisaged at the time of the ECHR in 1950, including issues such as cloning and data protection. Thirdly, the Charter extends the meaning of some traditional rights into new areas. For instance, the ECHR speaks of the right of a man and woman to marry. The Charter uses more modern language, in line with national legislation which recognizes other ways of creating a family than marriage. Similarly, the section on equality in the Charter is more extensive than that in the ECHR. There is a very broad non-discrimination provision which, unlike article 14 of the ECHR, is free-standing (i.e. it is not necessary to show a violation of another right in addition to the right of non-discrimination). There are also specific provisions promoting equality of men and women, the rights of the child, the rights of the elderly and the rights of the less able bodied. The protection of equality between men and women does not, however, prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex (i.e. positive discrimination). Finally, it should be noted that the rights in the ECHR are considered to be a minimum standard of protection. It is recognised in article 52(3) of the Charter that the EU might provide a higher standard since it provides that "*this provision shall not prevent Union law providing more extensive protection*" [20].The result of this provision could be that the EU and national courts will build on and develop the ECHR rights through the Charter.

An important issue is whether the ECJ has now been empowered to review any provision of national law in the light of the Charter. Even in areas where the EU can legislate, the reach of the Charter is not boundless. The Charter settles that national authorities, when acting outside the scope of EU law, are not bound by its provisions since it provides that the national authorities must respect EU fundamental rights "only when they are implementing Union law" [21]. In other words, it is still a condition for the EU courts in exercising their jurisdiction that the relevant national measures fall "within the scope" of EU law. The individuals haven't now gained the right to institute judicial proceedings on the basis of any provision of the Charter, in any situation, against any measure adopted by national or EU public authorities. ECJ makes clear that EU fundamental rights are binding on national authorities when they apply provisions of EU law which are based on protection for fundamental rights, or enforce and interpret EU rules or invoke EU derogation rules relating to the fundamental economic freedoms such as the free movement of goods.

Not only does Article 6(3) TEU reiterate the traditional principle that fundamental rights, as guaranteed by the ECHR, "shall constitute general principles of the Union's law," Article 52(3) of the Charter also provides that insofar as it contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention". In addition to this "minimum standard" rule, it is further specified that this provision shall not prevent EU law providing more extensive protection.

As a conclusion, the Charter constitutes a more progressive and innovative instrument than the ECHR, still, in our opinion there is no reason why the ECJ would not continue to be inspired by the case law of the ECtHR when developing its fundamental rights jurisprudence.

## 6 Conclusion

EU accession to ECHR will be a truly historic moment. With this future accession we'll be probably putting in place the missing link in Europe's system of fundamental rights protection, guaranteeing coherence between the approaches of the Council of Europe and the European Union. The EU's accession to the ECHR will place the EU on the same footing as its Member States with regard to the system of fundamental rights protection supervised by the European Court of Human Rights in Strasbourg. It will allow for the EU's voice to be heard when cases come before the Strasbourg Court. With accession, the EU would become the 48th signatory of the ECHR. Still, the political strong

will must face all the controversies emphasized previously for the accession process not to prove a slow, onerous and difficult one.

*References:*

[1] Judgment of 12 November 1969; Erich Stauder v City of Ulm – Sozialamt (Reference for a preliminary ruling: Verwaltungsgericht Stuttgart - Germany); Case 29/69; ECR 1969 p. 419

[2] *Consolidated version of the Treaty on European Union (TUE)* - Article 6, paragraph 2: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties” in *Official Journal of the European Union,* No.C115/13 from 9/05/2008

[3] *Preamble of the Single European Act*, 1986 as seen in *Official Journal of European Communities*, No. L169/4, from 29/06/1987, p.2

[4] *The Maastricht Treaty*, Article F(2): “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law” on http://www.eurotreaties.com/maastrichteu.pdf.

[5] *Consolidated version of the Treaty on European Union (TUE)* - Article 6 paragraph 1 in *Official Journal of the European Union,* No.C115/13 from 9/05/2008

[6] Explanatory Report, *Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, § 101

[7] *Consolidated version of the Treaty on the Functioning of European Union*, Article 218, in *Official Journal of the European Union,* No.C115/145 from 9/05/2008

[8] *Consolidated version of the Treaty on European Union (TUE)* - Article 6 paragraph 3 in *Official Journal of the European Union,* No.C115/13 from 9/05/2008

[9] Judgment of 17 December 1970; Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel; Case 11/70; ECR 1970 p. 1125

[10] Order of 14 May 1974, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4/73; ECR 1975 p. 985

[11] Judgment of 28 October 1975; - Roland Rutili v Ministre de l'intérieur. - Reference for a preliminary ruling: Tribunal administratif de Paris - France. - Public policy. - Case 36-75 and Judgment of the Court of 13 December 1979; Liselotte Hauer v Land Rheinland-Pfalz (Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany Prohibition on new planting of vines); Case 44/79; ECR 1979 p. 3727

[12] Opinion 2/94 on Accession by the Community to the ECHR ; ECR 1996 p. I-1759

[13] Judgment of the Court of 21 September 1989 on Joined Cases 46-87 and 227-88 Hoechst AG v Commission of the European Communities; ECR 1989 p. 2859

[14] Judgment of the Court of 18 June 1991, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others Case C-260/89; ECR 1991 p. I-2925

[15] *Convention for the Protection of Human Rights and Fundamental Freedoms* as amended by Protocols No. 11 and No. 14, Article 33

[16] *Consolidated version of the Treaty on the Functioning of European Union*, Article 344, in *Official Journal of the European Union,* No.C115/145 from 9/05/2008

[17] *European Parliament resolution of 19 May 2010 on the institutional aspects of EU accession to the ECHR*, paragraph 15

[18] *Consolidated version of the Treaty on the Functioning of European Union*, Article 267, in *Official Journal of the European Union,* No.C115/145 from 9/05/2008

[19] Case Of European Court Of Human Rights, June 30, 2005 - Case Of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland

[20] *Charter of Fundamental Rights of the European Union*; article 52(3) in *Official Journal of the European Union,* No.C83/389 from 30/03/2010

[21] Charter of Fundamental Rights of the European Union; article 52(5) in Official Journal of the European Union, No.C83/389 from 30/03/2010