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Legal Aspects of Accession of EU to ECHR

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Legal Aspects of Accession of EU to ECHR

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Abstract - The European Union (EU) became the guardian of the rights of Europeans. From a treaty-based entity the European Union became a supranational system based on democracy and where the treaties and the EU human rights principle operates as constitutional law. Moreover, the law of the European Union it is without doubt a form of European Public Law based on a system of administrative and increasingly constitutional law including its own Charter of Human Rights.

Into the European constitutional framework, from the second half of the last century, the political and judicial institutions of Europe have committed in creating a European constitutional order in which prevails the protection of human rights. The fundamental values belong to the European constitutional heritage, to Europe without borders and without double standards of protection. The rights declared in the constitutions must found concrete tools to render them effective. To ensure the effectiveness of the protection of human rights on our continent, the European Union's adherence to the European Convention of Human Rights (ECHR) is considered to be the ideal tool in the absence of a legal and formal link between the systems of Strasbourg and Luxembourg.

With the Treaty of Lisbon, the expected adherence of the EU to the ECHR was, in fact, hailed as "a courageous political, cultural and legal decision."

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I. Brief Remarks on the Nice Charter

a) Political tool or binding act?

Precondition for the establishment of a European State the fundamental rights have experienced a slow and peculiar statement in European legal order. The Treaties of Paris (ECSC Treaty - Paris 18 April 1951) and Rome (EEC Treaty and the Euratom Treaty - Rome March 25, 1957) establishing the European Communities, originally contained no catalog of fundamental rights to safeguard against potential abuse by Community institutions and was not even mentioned the need to ensure the protection of those rights. There are only some exceptions regarding the individual freedoms (of movement - Article 39 EC Treaty; of establishment – Article 43 EC Treaty; of providing services - Article 49 EC Treaty) necessary to realization of the common market. Therefore, the Community law arose as a «supranational order, without general purposes and, even more, without the task of protecting the fundamental rights related to the recognition of a *status civitatis* »[1].

During the years, the protection of the human rights promoted by the Court of Justice has had a positive echo in the European institutional scene, encouraging the progressive codification. The European theory of the human rights, prepared by the Community Court seems to have contributed to the formation of a true European constitutional law. On the one hand, the creation of the European constitutional space was made by the courts, by other, its gradual consolidation occurs through multiple attempts of codification of jurisprudential *acquis* into a *European Bill of Rights.*

The first textual reference to fundamental rights is found in the "Spinelli Project", i.e. the draft of the Treaty on European Union approved by the European Parliament on February, 14, 1984 but failed. Only in 1987 the Single European Act, inspired by the new orientation of the propositional case law on the subject, as well as the above-mentioned project, enrolled for the first time the fundamental rights in its Preamble: «Member States determined 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»[2]. To these statements, with no legal effect, did not follow any codification of the human rights.

The first textual basis binding to the Court of Justice in the field of fundamental rights has had with the Treaty of Maastricht[3] signed on 7 February 1992: the Article F of the Treaty (now Article 6.1) states that «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». Through the Article F the fundamental rights formally became sources of Community law, as higher-level general principles with respect to any act of the Community. In addition, unlike the previous case law,

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the provisions of the Article F seems to open the possibility of a joint relationship between the two sources of "production" of the human rights, the ECHR and the common constitutional traditions, contradicting the hypothesis, advanced by the doctrine, of a kind of hierarchy in favor of ECHR.

Moreover, the new dimension for the Protection of Fundamental Rights, formally inaugurated by the Treaty of Maastricht, has found a further strength in the European citizenship provided for by Article 8 of the Treaty, passing from "Europe of markets" to "Europe of citizens", giving to the European citizens a new legal status, in additional to their national citizenship. As is known, the moment of writing of fundamental rights in a special act will take place only with the Nice Charter proclaimed for the first time in December 2000.

The need to introduce in the framework of European legal order a catalog of fundamental rights has been the basis of intense debate in the history of the European Union, whose axis is biased by two conflicting positions: the first, favorable to the hypothesis of accession by the Community and the Union to the European Convention on Human Rights and Fundamental Freedoms guaranteed by the Strasbourg Court, the second, inclined to the development of a Charter of Fundamental Rights of European Union. The first hypothesis, long supported by the Commission, has been 'frozen' in the early 1990s, following the well-known Opinion 2/94[4] made by the Court of Justice in April 1994 on the incompatibility of accession of the European Community to the ECHR with the Treaty establishing the European Community (TEC). So, the decision to proceed with the drafting of a Charter of Fundamental Rights has been at the European Council in Cologne on 3-4 June 1999, when the Europe heads of state and government deliberated to strengthen the protection of fundamental rights in the European Union in an appropriate Charter and to delegate the task of drafting of this project to a "Convention".

From a formal point of view, the Charter of Nice appear to fall into the ranks of acts which have no legal effect required. In fact, it looks like a joint Declaration or as an inter-institutional agreement between the European Parliament, Commission and Council, proclaimed in Nice on 7 December 2000. The conclusions of the Nice European Council states that "in accordance with the conclusions of Cologne, the question of the scope of the Charter will be examined at a later time." In addition, the Declaration n. 23 on the future of Union, annexed to the Final Act of the Treaty of Nice, refers to the Conference on the revision of the Treaties planned for 2002 the definition of the status quo of the Charter of Fundamental Rights. Finally, to support the arguments of the non-binding nature of the Charter contributes its publication in the C series of the Official Journal dedicated to non-binding acts.[5]

The Charter has also been defined as an act of "constitutional substance", an expression of a constituent power capable of producing legal rules. That view has been strongly criticized on the base of the fact that the European Union, and therefore the power of its institutions, derive from the founding Treaties in accordance with the principle of conferred powers which establish that "the Community shall act within the limits of the powers conferred and of the objectives assigned to it by this Treaty"[6].

The Charter is not a legal *strictu sensu* source, it seems to have a political value susceptible to "provoke important legal consequences" both to the internal Member State order both to the European order.

As regards to the Member States, the Charter has a dual emphasis: on the one hand, as parameter of judgment in case of a serious and persistent breach of one or more principles stated in Article 6.1; on the other hand, as a contribution to the national courts to identify the category of fundamental rights protected in the European system[7].

With regard to the European Union, the Charter can operate, first, as an assessment parameter for the purpose of admission of new members which, as required by the Article 49 TEU, have to respect the principles stated in Article 6 paragraph 1 of TUE, including the fundamental rights and freedoms. The Charter is a certain point of reference for the States recently democratized to compare the compliance of their systems to the European standards of protection of the human rights. Furthermore, the Charter can be a sort of "compass" that can guide the choices of the European institutions, on which rests a duty of coherency with the rights contained in the Charter.

The references to the Charter are also important instruments adopted under the third pillar (Title I TUE) relating to matters in which the human rights has a considerable importance: it is enough to evoke the Decisions of 13 June 2002 no. 2002/475/JHA[8] on combating terrorism and no. 2002/584/JHA[9] on the arrest warrant and the surrender procedures between Member States, the decision on the establishment of Eurojust taken by the Council, under Article 34 par. 2 TEU on a proposal from the Federal Republic of Germany, Portugal, France, Sweden and Belgium.

Also in the framework of European legal order, also the Community judge gave a contribution to the enhancement of the Nice Charter despite of its no binding legal, as noted by the doctrine, the case law has shown that «the Charter is included in the "movement" of the law as a tool of explanation, identification and specification of a set of rights, already part of the *acquis communautaire*»[10].

The Charter is a form of codification of fundamental rights, a atypical source or an act which, though devoid of normative value in the strict sense, being "jurisdictionable" is not without legal force but acts as support of custom source and jurisprudence.

Despite the contribution of the Charter at the consolidation of a *European common Jus,* should not be forgotten that determined a number of vulnerable issues as its relationship with the European Convention of Human Rights (ECHR).

b) Nice Charter and the ECHR

Following the proclamation of the Charter of Nice, there has been a progressive polarization of the "galaxy of European rights" around two very different systems, the ECHR system and the system of European Union. The problem of coordination between the Charter and the Convention is generated by the fact that the two documents contain a different mechanism for limiting the human rights, one, based on the principle of the general clause, the other, on restrictive clauses ad hoc.

The Charter, to Article 52 first paragraph contains a restrictive clause "that allows restrictions to fundamental rights and freedoms recognized on condition (*inter alia*) that effectively respond to objectives of general interest" . The general restrictive clause of the first paragraph of Article 52 of the Charter of Nice is extended to rights guaranteed also by the Community Treaties, according to Article 52 second paragraph, and by the European Convention on Human Rights and Fundamental Freedoms (ex Article 52 the third paragraph). The Article 52 second paragraph seems to establish a hierarchical relationship between the limits laid down in the Treaties and the general restrictive clause provided in the Charter: rights which are based on treaties escape and are subject only to the conditions and limits laid down by the Treaties themselves.

As regards to the relationship between the Charter and the Convention, the third paragraph of Article 52 generates a dual problematic issue: first, to coordinate the relationship between general restrictive clause and those contained in the ad hoc European Convention on Human Rights: the Charter seems to solve this problem for the benefit of the ECHR, which is configured by the authors of the Charter as a minimum standard of protection. The third paragraph of Article 52 also raises another complex issue which represents the central problem of the relationship between the two systems of guarantee of rights, namely the relationship between the Strasbourg Court and the Court of Luxembourg.

What happens in case of differences in interpretation between the two courts? The framers of the Charter have attempted to introduce measures to prevent any conflicts of jurisprudence. First, in the Preamble of the Charter an explicit reference refers to the rights recognized by the Court of Justice of the European Communities and the European Court on Human Rights, without, envisage a special solution in case of jurisprudential conflict. In addition, the second paragraph of Article 53 of the Charter requires recourse to an interpretation of the fundamental rights protected by the Charter which does not affect the significance of the rights guaranteed by national constitutions of member states and other international instruments, in particular the European Convention on Human Rights: «nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application [...] by international agreements such as the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human rights and Fundamental Freedoms, and by the constitutions of the Member States.» In terms of the Article 53 the way to choose in case of conflict has an interpretative nature. This solution was considered by the Council of Europe as a compromise of temporary character in view of a more radical response to the problem of divergences in judicial decisions between the two courts, established by the accession of European Union to the Convention of Rome.

It is clear that the glowing core of relations between the European system of protection of fundamental rights and the ECHR system involves issues related to interaction between the Luxembourg Court and the Strasbourg Court - two judges who, though very different from each other, found a common battlefield in area of human rights, capable of triggering a "war between the two Courts»[13].

II. Coexistence of the Two European Courts and Their Cooperation

a) Cross-references between Luxembourg and Strasbourg Courts

The debate on the relationship between the Strasbourg Court and the Court of Luxembourg appears to be the crucial key in the protection of human rights in Europe because of the essentially "evolutive" dimension of the reciprocal influences between the Courts of Strasbourg and Luxembourg, especially in the analysis of misunderstandings that have characterized, on the one hand, the recognition by the Luxembourg Court of the *status* of the ECHR into European legal order and, by other, the recognition by the Commission and the European Court of *status* of the European Community into the conventional legal system. From the convergence of Courts is passed to the gradual integration of the respective legal systems, which has

contributed to the construction of what has been called the "European Constitutional Law".

The protection of fundamental rights within the EU has established not only as a goal but rather as a tool controlled by a dual cause: on the one hand, it has been introduced to confirm the integration and thus facilitate and ensure the future development, from the other, it has been a fortification of effectiveness and primacy of EU law against the claims of national constitutional courts, fearful of the breach by Union measures of fundamental rights provided in their laws.[14]

The relationship between the EU system and the conventional system of protection would seem to constitute a relationship of *species a genus:* the first mechanism based on a self-contained and confined to the exclusive competence of the Community, and the second focused on a wider and subsidiary mechanism of protection measures laid down by Member States. Therefore, two parallel systems, no communicative, no legal ties, whose the only *trait d'union* was the same legal source of rights, namely the ECHR.

The independent case-law of the Luxembourg Court found its justification in the peculiarities of the system of protection of the human rights in the EU and in the absence of a formal legal relationship between the two legal systems: the protection of human rights must be guaranteed in the context of the structure and objectives of the Union; in addition, in the absence of a common catalog of fundamental rights, the Court has used heteronomous tools (i.e. "the constitutional traditions common to the Member States and the international treaties for the protection of the human rights, which the Member States have signed or had cooperated) to identify specifically the object of its protection, within which the ECHR has taken a particular significance.

The first sign of deference by the Judge of the fundamental rights vis-à-vis the Community Judge seems to rise in the case *Marckx v.* Belgium in 1979[15], in which the Strasbourg Court has joined *sic et sempliciter* the doctrine of prospective overruling as well as interpreted and applied by the Luxembourg Court in *Defrenne* case[17].

Emblematic of a "peaceful coexistence" of the two supranational Judges, the attempts of more explicit convergence of the European Court on the positions of the Community Court will have only the end of the nineties and are manifested in two forms: in some cases the Court has made cross-references to case law of his counterpart *ad adiuvandum*, in others, it has changed its orientation preferring to Luxembourg. Of greater importance for the purposes of the present work seems to be the second attitude of the Strasbourg Court, which in at least two cases has made a cross-reference to the Court of Justice for correct, partially, its case-law.[18]

For at least twenty years (1970-1990), because of the great differences that exist between the new Community system of protection of fundamental rights and the existing conventional system, the relationship between the Luxembourg Court and the Strasbourg Court were far from cordial. In particular, in the absence of a formal link between the two mechanisms of guarantee, the effectiveness of the system of protection of the human rights in Europe has been undermined by differing interpretations. In the case *Dorca Marina*[19], the Court of Justice has given a restrictive reading of these rights, limited the efficiency solely to proceedings before courts or tribunals and excluding, therefore, the applicability to the case submitted to it for a preliminary decision regarding an administrative penalty imposed by the Community Commission, a non-judicial body. The position taken by the Court of Justice was in accordance not only with the conventional provisions, but also with previous decisions of the European Court. Also in cases *Orkem v. Commission*[20] raised before the Court of Justice, and *Funke v. France*[21], decided by the European Court, it complained about the breach of the right against self-incrimination, accessory guarantee included among those arising from Article 6 of the ECHR regarding due process. The Luxembourg Court has ruled that the right not to incriminate oneself could be inferred from the provisions of Article 6 and the case law of the Strasbourg Court.

At the end of the eighties, another contrast between the jurisprudence of Luxembourg Court and Strasbourg Court took place with reference to Article 8 of the European Convention concerning the right to respect for private and family life[22]. But three years after this sentence, the Strasbourg Court has denied this approach, stating in the case *Niemietz v. Germany*[23], that "the scope of the concepts of privacy and residence referred to in that provision also covers certain conventional local or professional and commercial activities".

b) Through a homogeneous system in the case law of the two courts

Formulated for the first time by the Parliamentary Assembly in 1981[24], the proposed accession was re-launched by the European Parliament at beginning of the nineties in three resolutions adopted at December,15, 1993[25], January, 18 1994[26] and April, 26, 1995[27]. Further, in particular the Parliament insisted that the absence of a formal legal connection between the two systems of protection caused gaps in the Community framework, because of the removal of the organs of the European Community to the mechanism of conventional control, and amplified the risk of interpretive divergences.

On 19 April 1994 the Council of the European Union has asked the Court of Justice for an opinion on the compatibility of the proposed accession to the EC Treaty[28]. Specifically, the Court was asked to answer three questions: whether the request for an opinion in

the absence of a negotiating text of accession agreement was admissible, if the Community had the competence to conclude such an agreement, if the contents of this kind of agreement was compatible with the EC Treaty. On the first question, the Court ruled positively accepting the admissibility of the case on the basis of two main arguments: the preventive function of Article 228 TEC as a deterrent to the occurrence of difficulties during the negotiation of a treaty and the widespread knowledge of the text the Convention to which the Union should join. Upheld the admissibility, the Court focused its opinion on the question of jurisdiction, intentionally omitting to assess the compatibility of accession agreement with the EU Treaty. The Court has developed its own decision-making process by examining the principle of conferral, as codified in the Maastricht Treaty, but admitting that the conferral for the conclusion of international agreements could be implied. To this aim, it has examined the possibility of using the so-called principle of parallelism of the competences and the Article 235 TEC.

The Court found that the accession would result in a *"changement subsantiel"* (substantial change) of current Community system for the protection of the human rights as entered the Community in a distinct international institutional system and integrated. Such a change in the system of protection of fundamental rights to the Community would have a *"envergure constitutionnelle"* (constitutional feature) and, therefore, exceeded the limits of Article 235 TEC. Only an amendment to the Treaties through the ordinary revision procedure could allow the membership[29].

For over thirty years, the European Commission of Human Rights has absolutely excluded from its sphere of competence the analysis of prejudicial Community acts to the human rights protected by ECHR, creating a real "free zone" of protection of fundamental rights. It was a self restraint due to the lack of Community accession to the Convention.

Aware of the damage that had been created in the European system of protection of the human rights, the Commission, since the nineties, has inaugurated a timid shift in perspective expressed in various ways by the judgment M&Co[30], the Cantons[31] and the Matthews[32] judgments.

After the adoption of the controversial Opinion 2/94, the Court of Justice, influenced probably by the situation, issued three significant decisions heralding a rampant valorization of the ECHR and the Court at EU level.

The Court of Luxembourg made the first call to the jurisprudence of the European Court in its judgment *P v. S* in 1996[33]. The Court decided in the case informing the definition of transsexual made by the Judge of Strasbourg in the case of *Rees v. United Kingdom* in 1986[34]. Later, in the judgment *Familiapress* of 1997[35], the Court of Justice has used a precedent of Strasbourg as a parameter of a delicate balance between two opposing corollaries of freedom of the press stated in the Article 10 ECHR. Again, in judgment *Baustahlgewebe* of 1998[36], the Judge of Luxembourg has solved the case in question through the prism of the jurisprudence of the Strasbourg Court on reasonable length of processes, guarantee provided by Article 6 ECHR.

In addition to the above-mentioned judgments in which the Court has made a «*emprunt*» the ECHR and the jurisprudence of his court, worthy of mention are some more recent decisions in which the court of Luxembourg has made a real «*revirement*» respect to positions taken in the past and antithetical to those adopted by his counterpart in Strasbourg[37].

However, there is no denying the evolution of case law on the fundamental rights facilitated by a simultaneous and progressive convergence of the Strasbourg jurisprudence on the positions taken by the counterpart of Luxembourg.[38]

The progressive evolution of the relationship between the Luxembourg Court and the Strasbourg Court has led to an inevitable intertwining of the conventional and the EU system of protection of the human rights. The first confirmation of the "cross-fertilization"[39] between the two legal systems in question, there was with the judgment *Hornsby* in 1997[40]. The judgment *Hornsby* has been also an important settlement of two other relevant judgments of the Court of Human Rights, *S. A. Dangeville* of 2002[41] and *S. A. Cabinet Diot* of 2003[42] in which the failure to comply with Community law becomes the primary reason for the sentence of the France by the European Court.

Another example of «*intégration douce*» between the ECHR system and the EU system of protection of the human rights by the "cross-fertilization" promoted by both Courts in regard to the recognition of English transsexuals to marry. In the case *Goodwin43*, the European Court has decided to sentence for the first time the UK for injury of Article 12 ECHR on the right to marry and found a family, providing a new interpretation of the provision in question, mainly inspired by the Community Court of Justice and the Charter of Nice. After a little less than two years, the Luxembourg Court in the case *K. B*[44]. has, for the first time, to scrutinize the merits of the British national legislation on marriage, considering the prohibition of discrimination laid down in the Article 141 TEC not only to the direct enjoyment of the rights guaranteed by the Treaty, but also to their assumptions. In order to corroborate its position, the Court made an express reference to the judgment *Goodwin* of the European Court: "the European Court of Human Rights has held that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers

of civil status, they belong to the same sex, was a breach of their right to marry under Article 12 of the ECHR".

The relationship between the Strasbourg Court and its counterpart in Luxembourg would like to evolve through the prism of cooperation rather than in terms of dominance and power. Through the judgment *Bosphorus*[45], the Strasbourg Court, external actor, has self-invited in the legal system of the European Union. The Court of Human Rights has managed the operation to bring the European Union exactly where wanted it to be: that is bound to the ECHR. The relationship between the two European judges responds to a strictly hierarchical and competitive advantage of the Strasbourg Court.

The judgment *Bosphorus* could be seen as a kind of "technical proof" of the European Union's accession to the ECHR, without which the "development of relations between the two largest judicial protection of fundamental rights in Europe risks to be imperfect, although circular, as evidenced by two sentences respectively of the Court of Justice and the European Court: the *Kadi* and *Al Barakaat Foundation* of September 3, 2008[46] and the judgment *GC Demier and Baykara v. Turkey* of November 12, 2008[47]. A parallel examination of this judgments highlighted the mutual permeability of EU and conventional systems with respect to their values which, because of the osmosis process, seem to lose their original marking, becoming true European values of constitutional order. Although the "judicial policy" of the two courts seem to have had the positive effect of facilitating «*douce intégration*» between the respective legal systems to protect the human rights and to contribute to the construction of a European inter-constitutional law, it would be basic and simplistic to interpret the relationship between European jurisdictions like a «*harmonie euphorique*». There is still a "congenital separation" between the two courts, and in the absence of a formal and legally binding mechanism of coordination between them, relations between Luxembourg and Strasbourg seem destined to evolve along the lines of a sterile circularity of mutual and suspicious respect.

III. Effectiveness of Fundamental Rights Under the Lisbon Treaty

The EU accession to the ECHR is a decisive turning point in the EU law. Human rights had to accomplish a long path before become an essential element of community development, as demonstrated by the history of the last decade and, above all, by the Charter of Fundamental Rights of the European Union (2000), which had acquired binding value with the entry into force of the Lisbon Treaty (2009).

On 1st June 2010 entered into force the Protocol n.14 of the ECHR. Thanks to the new legal framework established by it, according to the amendment of Article 59, the access of European Union to the Convention, as established by Article 6 of the Treaty of Lisbon, will become possible. On 7 July 2010, therefore, began formal discussions aimed to membership of European Union to the ECHR. At the end of this process, the accession agreement will be signed by the Committee of Ministers of the Council of Europe and by the Council of the EU with the consent of the European Parliament. Once signed, the agreement must be ratified by all 47 parties to the Convention, including those that are also EU member states. It is a long path considering that today, at the end of 2012 and three years after the entry into force of the Lisbon Treaty and instead of the draft of legal instrument aimed to finalize the membership already prepared at the end of 2011, Article 6 still remains unrealized.

The EU's accession to the ECHR is necessary to ensure consistency between the case law of the two courts (the Court of Justice of the EU in Luxembourg and the European Court of Human Rights in Strasbourg), to submit the European norms to the same judgments in the same human rights standards of the 27 member countries, and to create a "common European space for human rights"[48].

Becoming the 48th signatory of the Convention, the Union will be heard in the cases examined by the European Court of Human Rights in Strasbourg, appointing a judge and giving to every European citizen, once carried out all the domestic remedies, a new possibility of appeal to this Court in cases of alleged breach of fundamental rights by the EU institutions.

As known, the question of accession of the European Union to the ECHR is a «*véritable arlésienne*»[49] of EU law, a goal that European scholars have attempted to pursue since the late 1970s of the last century.

In March 1996, the veto of the Court of Justice of the European Communities to conclude a Treaty regarding the "Accession of Union to the ECHR" slows down the achievement of that goal, but wasn't let to fall into oblivion. A fundamental step to strengthen the protection of the rights of citizens inside the Union and give "constitutional dignity" to the process of European integration, was arrived with the Charter of Nice. Then with the Laeken Convention in 2001 was given "the opportunity to incorporate the Charter of Fundamental Rights in the basic treaty and to put the question of the "European Community's accession to the European Convention on Human Rights". After long debates was deemed the need not to consider the Nice Charter and the European Convention on Human Rights as alternatives, but as complementary tools which presume a mutual reinforcement in the protection of human rights. The Charter was constitutionalizated, becoming Part II of the Treaty establishing a Constitution for Europe and Article I-9 established the legal basis that would allow the Union to accede to the Convention.

Apparently failed under the blows of the French and Dutch referenda, the constitutional process has, however, produced significant effects largely inherited from the Treaty of Lisbon. In terms of protection of fundamental rights, there are three most important news, covered by the Constitution and "transplanted", with some modifications, in the new Treaty: the attribution of legal force to the Charter of Nice, the strengthening of the procedural legitimacy of individuals complementary to the extension of the powers of the Court of Justice and, finally, the introduction of the necessary legal basis to allow the accession of European Union to the ECHR.

The Lisbon Treaty, by operating a mere reference to the Charter, led to a de-constitutionalization of it, a *capitis diminutio* inserted in the logic of elimination of a series of constitutional symbols from the previous text, starting with the *nomen* of the Treaty that should have adopted a Constitution for Europe. In the new Lisbon Treaty, the Charter does not take neither the name of *treaty* nor *protocol* - names that have the same value from the legal point of view.

From a substantial point of view, the attribution of legal force to the Charter raised three issues regarding (1) the impact of the Charter on the competences of the Union, (2) the relationship between the Charter and the ECHR and (3) the "variable geometry"'s application of the Charter in accordance with the provisions of the British-Polish Protocol.

If we consider the practice of the Court of Justice, this has never prevail the reasons of the limits of competence on reasons of fundamental rights[50]. Moreover, the Court of Justice aims to have the typical role of the constitutional courts, and would hardly be brought to abdicate the status of "constitutional jurisdiction of freedom" in favor of the exaltation of the principle of division of powers.

The rights recognized in the Charter which correspond to rights guaranteed by the ECHR have the same meaning and effectiveness of those incorporated in the last one, especially considering the detailed provisions of the ECHR which allow restrictions to these rights. The Article 52, paragraph 3 of the Charter makes it clear that this Article shall not preclude a more extensive protection already achieved or that could be established by the regulations of the Union or by some articles of the Charter which, although based on the ECHR, go beyond as far as the EU law has already reached a higher level of protection. Furthermore, according to the Article 53, the protection afforded by the ECHR is configured as minimum protection, being allowed a more extensive protection by the Charter of Nice. According to some scholars[51], the reference to the ECHR and the case law of the Strasbourg Court, does not appear such as to exclude any conflict in the application of the provisions of the ECHR and the Charter of Rights by the Courts of Luxembourg and Strasbourg and, more generally, between the EU system and that of the European Convention. Since these horizontal clauses would ensure consistency between the two instruments in the case of the rights recognized in both systems, several points remain obscure or at least unresolved[52].

The Protocol n. 7 on implementing the Charter of Fundamental Rights to Poland and the United Kingdom has been defined as a text "totally useless from a legal point of view"[53], the adoption of which was affected only by the logic of domestic politics: the Warsaw government feared interference of the Union in its policies of moral order and the United Kingdom feared an extensive application of social rights established by Title IV of the Charter. From the protocol it emerged two macroscopic inconsistencies: a first aspect concerns the paradoxical recognition *expressis verbis* of the purpose of mere "codification" of the Charter of rights already existing at the level of Union. How could the United Kingdom and Poland invoke the Protocol in order to escape from Charter's obligations, since the ECJ, in most cases in which the Chart could serve as a parameter for considering English or Polish legislation incompatible with the European law.

Accession of the EU to the ECHR is a controversy stage in the European constitutional process and its membership will represent a further forward step in the judicial protection of fundamental rights and a complex structure of relations between the two European Courts. Accession was saw as a "political signal" of the great Europe to pursue a common aim, i.e. the protection of human rights into the European constitutional space. As an ad hoc instrument to ensure the effectiveness and consistency the judicial protection of fundamental rights in Europe, the adherence could have also disadvantages which threat the specificity of EU law. This is due to the fact that currently the protection of fundamental rights in Europe is affected by the non-coordinated interactions between the systems of Strasbourg and Luxembourg, in particular the lack of a formal link between the two European courts. The European Court of Human Rights may invoke the international responsibility of every member of the Union that is both part of the Convention, for the breach of the Convention, even if the source of the breach of law could be found in a national measure implementing the European Union legislation or in a European *tout court* act (cases *Matthews* and *Bosphorus*). In this situation, the Strasbourg Court is unable to prosecute the subject directly responsible for any breach of the ECHR, i.e. the Union. The accession of Union to the ECHR will allow the representation of the Union as such is, both into the Europe Court and into the Committee of Ministers of the Council of Europe, the body responsible for the monitoring of the execution by the member states of judgments of the Court. In addition, the risk of conflict of loyalties between States will be avoided, as being the

Union subject to the obligations of the Convention, in case of a conflict between the two systems, the ECHR norms have to be considered binding on the individual Member States and the unconventional acts of the Union will determinate specific responsibilities to assert themselves by the standard tools provided by the ECHR.

The accession of Union to the ECHR should lead the Strasbourg Court to standardize the control measures against national and European acts, ending the vicious policy of "double standards". To this should be added that the accession of Union to the ECHR guarantees to individuals the access to additional appeal against the acts of the European institutions which violate their fundamental rights[54].

But it could lead to both the loss of autonomy of European law, understood as independence from national and international law, that the alteration in the division of powers between Member States and Union. Concerning the first aspect, it was found that the autonomy of the EU law may be affected by the loss of the Court's role as the exclusive judge of European law, by the loss of the monopoly of the Court in the resolution of disputes between states and the submission of European institutions to the control of "third judge", non-European. As a result of accession, the Luxembourg Court could lose, first, the exclusive power to rule on the validity of European acts, as his counterpart in Strasbourg would be empowered to inspect such acts in terms of respect for the human rights. In terms of Article 33 of the Convention, the member states can submit to the judgment of the Strasbourg Court disputes arising between them, or between a State and a European institution thereby undermining the role of arbiter of the exclusive European order that Articles 292, 226 and 230 TCE established to the Judge of Luxembourg. Finally, one important critic of adherence is the fear that a non-European judge, member of the Strasbourg Court to whose control the Union would be subject, could judge not "knowingly". The possible drawback accession just now described do not appear to be fully justified or otherwise insurmountable. the European Court of Human Rights as an external judge to EU law, does not have the power to void EU acts or to invalidate the judgments of the Court of Justice, as well as does not have the right to cancel or set aside the rules and the national judgments. The jurisdiction of the Strasbourg Court is limited to detection of any breaches of the human rights by national acts, Europeans in the future, the Strasbourg Court will have to examine concrete cases related legislation and acts of Union which infringe the Convention, and when will decide, the Court must take into account the specific characteristics of the Union and EU law. Secondly, the risk that disputes between member states or between member states and the European Union are submitted directly to the knowledge of the Strasbourg Court according to the Article 33 of ECHR, bypassing the jurisdiction of the Luxembourg Court, seems to be overcome by the provisions of the Protocol n. 8 attached to the Lisbon Treaty, which at Article 3 establish that "no provision of the Accession Agreement shall affect Article 344 TFEU which states that "Member States undertake not to submit a dispute concerning interpretation or application of the Treaties to any method of settlement other than those provided for therein."

The European Union's accession to the ECHR is configured also as essential step to achieve a consistent approach between the external dimension and the internal dimension of European policy on human rights. The paradox that had characterized the attitude of the Union, in fact, was to proclaim, on the one hand, a bastion of human rights both inside and outside of the EU, and to escape, on the other hand, in front of absence of a comprehensive and coherent design in this area, in both dimensions. Despite the fact that the main guardians of human rights continue to be the Member States, each within its own territory, it is true that the EU had become an active party, affirming the value of its effort in this direction on the international scene, influencing the third countries through cooperation and trade agreements, imposing strict requirements on human rights for the states that required the membership, and implementing a number of initiatives in support of human rights at the level of civil society, as the surveillance of the elections or the monitoring activities. In any case, at least until the middle of the decade, the European Union continued to lack a policy for human rights fully autonomous in both dimensions.

Between 1995-2005 there has been a significant evolution with respect to human rights in external and internal relations, with the achievement of a comprehensive, coherent and horizontal approach in this area. In this field, and for all the nineties, EU policies have proved just credible enough to suggest a real abdication of responsibility by the Union. On the one hand, remained an important issue of competences between the EU and Member States, fearful in respect of any loss of sovereignty in this field (also because of the fact that human rights is a branch growing and potentially extendable to every sphere of life), the risk could, in fact, be to exceed the constitutional powers of the Union, limited to a small number of human rights. The rhetoric used by the Union in the external relations regarding the importance of human rights, of their universality and indivisibility, helped to undermine the Union's operate, making manifest the incoherency and vulnerability. In this way, the Union became easily attacked by using the criterion of "two weights, two measures" in this context, demanding a lot from non-member countries, and thus applying a higher standard in external relations, and then tend to disappear in domestic issues relating to the same countries that

make it up. Commercial and economic power, and therefore called upon to fulfill a role of responsibility in the field of human rights, the Union would not had to give up its role as defender of these rights, and the role that tried to interpret in multilateral frameworks or relations with third countries, and then reiterate its lack of general competence, as soon as we moved to the internal level.

Seen in this light, then, the question of the accession of the Community to the ECHR became a manifestation of this contradiction. This is especially true when it considers that the principles of liberty, democracy, human rights and rule of law was made a condition for the accession of new Member States and their membership in the Convention system as a prerequisite to access request. On the contrary, the EU's accession to the ECHR would be able to submit Union's action to the scrutiny of the Strasbourg Court of Human Rights, if the EU institutions will not be vigilant enough, including the Court of Justice. In addition, in accordance with the criteria of the indivisibility and universality, the internal and the external dimension should be two sides of the same coin.

The big loop that European human rights faced after 2000 is constituted, not only and not so much, in terms of recovering the historical delay accumulated in the internal dimension in respect of the acceleration by developments in external relations; it now resided in the need to make these two aspects mutually complementary.

The orientation of the Strasbourg Court vis-à-vis the control of EU acts shows that the interference zones within the jurisdiction of the Luxembourg and Strasbourg Courts are still «*suscettibles* de *s'accroitre*». Over the years there has been a mutual cooperation in order to harmonize their legal guidelines and eliminate the seeds of inconsistency inherent in the duality of mechanisms of protection.

From a technical and legal point of view, the accession of European Union to the ECHR, as was pointed out by the Steering Committee of the human rights, involves not only some amendments of the text of the Convention and the Protocols, but also modest administrative reforms. With regard to the amendments to the Convention, it must be called up the ECHR norms regarding the accession (Article 59) and the enforcement of judgments of the Court of Human Rights (Article 46). Regarding the Article 59 of the Convention, only the member states of the Council of Europe can sign and ratify the Convention. The statutory provision in question has been changed from Article 17 of Protocol n.14. Regarding the participation of the European Union to the Committee of Ministers, the body responsible for monitoring the execution of final judgments of the Court, it should be noted that the Article 46, paragraph 2 of the ECHR confers the right to vote in that body solely to the member states of the Council of Europe, in accordance to Article 14 of the Statute. Therefore, to enable the Union to participate actively in the Committee, in theory it would be necessary, not only a revision of the Convention, but also an amendment to the Statute of the Council. It would be appropriate that the right to vote of the European Union in the Committee of Ministers would not be limited only to EU issues but would include all matters discussed by the Committee in the enforcement of judgments of the European Court.

The membership of the Union to the ECHR raises problems of terminology that does not seem, however, to impose a reform of the Convention text.

First, the terms state and nation, or national security and economic well-being of the country contained in certain articles of the Convention should be adapted to the presence of the European Union as a new member. Since an ad hoc revision of each provision of the Convention would require a disproportionate effort compared to the scope of terminological inaccuracies, such *defaillance* of the text could be overcome with the adoption of a general clause of interpretation in order to clarify that these terms shall be applied *mutatis mutandis* to the European Union.[55]

Then, with regard to the participation of the Union to the proceedings held before the Strasbourg Court, at least two aspects are relevant. First, in case of an appeal to the European Court directed against the Union, this may participate in the process as a defense - an expert judge in European law would be nominated for (*au titre de*) the Union, whose special status was excluded by virtue of the principle of equality on which is based the entire conventional system. The judge of the Union shall enjoy the same status as a representative judge as other contracting parties, ensuring the representation of all legal systems, the contribution of each party to the collective guarantee mechanism established by the Convention and reinforces the legitimacy of the decisions taken by the Court. Second, according to the Article 36, first paragraph of the ECHR, the Union should have the right to participate in the hearings as a third party, in cases where the petitioner is a citizen. This situation does not involve a revision of the Convention but it could be settled by an agreement between the European Union and its member states, or better, in the context of the Accession Treaty.

With regard to the bureaucratic-administrative amendments, it is enough to mention the issue of the financial contribution of the European Union to the costs of operation of the control mechanism of the Convention: that question doesn't require an amendment of the Article 50 of the Convention and could be resolved by the adoption of an ad hoc provision that contains an enabling legal basis.

From a substantive point of view, the membership of the European Union to the ECHR, according to some scholars[56], may have a negative

effect on the functioning of the mechanism of protection of fundamental rights created by the Convention because of the possible increase of individual appeals to the Strasbourg Court. But also this problem is overcome by the Protocol n.14 which provides the strengthening of the capacity to filter individual complaints, a more efficient process of categorizing the repetitive appeals and the new condition of admissibility in base of the prejudice suffered by the petitioner.

The analysis of the impact of the construction of a bridge between the legal and institutional systems of Strasbourg and Luxembourg seems to "demystify" the question of accession, demonstrating not only that it is legally realistic but also desirable. At this stage of negotiations, an evaluation of perspective on the post-accession in the European constitutional space is essential: the new legal relationship between the two para-constitutional Courts will be able to ensure consistent and effective protection of fundamental rights in Europe? Undoubtedly, there seems clear that the accession of European Union to the ECHR, resulting in a major change in the relationship between inter-institutional systems of Strasbourg and Luxembourg, will help to amplify the standard of protection of fundamental rights in the European constitutional space.

Decided the accession of the Union, the discussion is now open with regards the modalities to realize it, taking into account the particular nature of the Union without distort the uniform protection of human rights in Europe. Many actors - not only within the Union - intervene in the process that opens. Technical aspects of the problems and possible solutions will overlap the political dimension of such an event for the Union and its 27 Member States, and for the Council of Europe and its 47 member states.

IV. Conclusions

As a result of establishment of a mechanism for formal connection between the Courts of Luxembourg and Strasbourg, the accession will help to raise the standard of protection of the human rights of in the European constitutional space on condition that there will be eliminated a series of legal and formal obstacles. By a "convergence (only) parallel" between their jurisprudential you went to a flawed integration between the system of Strasbourg and the Luxembourg, heralding further flaws in the protection of fundamental rights. The lack of a legal and institutional link between the Union's system and the ECHR, has set up a sort of immunity from jurisdiction in the hands of the European institutions even though their acts are liable to be sued before the Strasbourg Court for violation of human rights.

Effectiveness also means homogeneity of the means of protection, so if the instrument is not uniform, the protection will inevitably be inconsistent. Such considerations explain, therefore, the favor shown by the writer towards the creation of a bridge between the institutional-regulatory system of Strasbourg and the Luxembourg, a definitive *actio finium regundorum*. But, as noted, the accession of European Union to the ECHR raises a number of procedural and substantial problems whose solution is a *conditio sine qua non*, so that the 'missing link' created by the Lisbon Treaty brings the desired effects.

The accession will have to follow a long and complex procedure and will be subject to the unanimous approval of the Member States of the European Union. The Council of Europe, for its part, will have to implement significant institutional changes to allow the representation of the Union within the Court and the Committee of Ministers. Formal and technical issues raised by accession, although solvable, definitely require time-consuming and an accentuated collaboration and spirit of solidarity between Member States.

On the substantive level, the concrete partnership of the Courts of Strasbourg and Luxembourg within of the new legal framework designed by the Lisbon Treaty must, in fact, ensure a harmonious and uniform protection of fundamental rights in the following two different tools: the Charter of Nice and the European Convention of Human Rights. Only through a regular cooperation between the two European Courts it could be resolved the potential contradictions and conflicts of interpretation that the presence of two different Bill of Rights will be able to cause. The Judges of Luxembourg and Strasbourg will facilitate the transition from a forced cooperation between them to a co-forced one, in line with the new European constitutionalism characterized by a multicenter network of relations between courts, increased by the principle of loyal cooperation. It is not ruled out a healthy competition between the courts for the seizure of "constitutional primacy" in Europe of rights; this would be a beneficial competition especially for the EU law.

The European Union assumes a policy, legal and cultural liability, a responsibility that can only encourage the evolution and that, in fact, means that fundamental rights are at the base of a new socio-cultural perspective. The Union's presence as an independent subject in the Convention could mean the beginning of a renewed awareness of the meaning of common European citizenship, could pave the way for a development of doctrine in the field of fundamental rights such as to mark the opening of a new chapter for integration, as well as providing an important tool for foreign policy, with which to enforce respect for human rights, at least in the area of ECHR.

References Références Referencias

1. R. Adam, 'Da Colonia a Nizza: la Carta dei diritti fondamentali dell'Unione europea' [From Cologne to Nice: the Charter of Fundamental Rights of the

European Union], 4 Diritto dell'Unione europea (2000).
2. G. Amato, M. Delmas Marty,D. Marquand-S. Romano, What Future for Europe?, Robert Schuman Centre for Advanced Studies-E.U.I., 2000.
3. P. Auvret, L'adhésion de l'Union à la Convention européenne des droits de l'homme, in Joël Rideau (a cura di), Les droits fondamentaux dans l'Union européenne – Dans le sillage de la Constitution européenne, Bruylant, Bruxelles, 2009.
4. G. Braibant, La Charte des droits fondamentaux de l'Union européenne, (Paris Editions du Seuil 2001).
5. A. Barbera, 'La Carta europea dei diritti: una fonte di ri-cognizione?' [The European Charter of rights: a source of re-cognition?], Diritto dell'Unione europea (2003), p. 13 ss.
6. A. Cassese, I diritti umani oggi[Today's human rights] (Roma-Bari Laterza 2005).
7. B. Conforti, 'La Carta dei diritti fondamentali dell'Unione europea e la Convenzione dei diritti umani' [The Charter of Fundamental Rights of EU and the Convention and Human Rights], in L. S. ROSSI (a cura di), Carta dei diritti fondamentali e Costituzione dell'Unione Europea [The Charter of Fundamental Rights and the Constitution of EU] (Milano Giuffrè 2001).
8. S. Douglass-Scott, 'A tale of two Court Luxembourg, Strasbourg and the rowing European human rights acquis', Common Market Law Review (2006), p.654.
9. S. Gardbaum, 'Human Rights as International Constitutional Rights', 19 European Journal of International Law (2008).
10. P.H. Imbert, 'De l'adhésion de l'Union européenne à la CEDH', 2 Droits fondamentaux (2002).
11. F. Kauff-Gazin, 'Les droits fondamentaux dans le traitè de Lisbonne: un bilan contrasté', 7 Europe (2008).
12. M. Kaufmann, Europäische Integration und Demokratieprinzip, (Baden Baden 1997).
13. S. Mangiameli, 'La Carta dei diritti fondamentali dell'Unione europea' [The Charter of Fundamental Rights of European Union], 1 Diritto pubblico comparato ed europeo (2001), pp. 176 ss.
14. G. Morbidelli, 'Corti costituzionali e corti europee: la tutela dei diritti (dal punto di vista della Corte di Lussemburgo)' [Constitutional Courts and the European Courts: the protection of the rights (from the point of view of the Luxembourg Court)], Diritto processuale amministrativo (2006), p. 341.
15. M. Napoli (a cura di), La Carta di Nizza – I diritti fondamentali dell'Europa [The Charter of Nice – Fundamental Rights of Europe] (Milano V&P 2004).
16. F. Palermo, La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sopranazionale [The European Union's form of state. For a constitutional theory of supranational integration] (Padova Cedam 2005).
17. S. Panunzio (a cura di), I diritti fondamentali e le Corti in Europa [Fundamemtal Rights and the Courts in Europe] (Napoli Jovene 2005).
18. A. Pizzorusso, 'Costituzionalismo e Unione Europea' [Constitutionalism and European Union], Atti del convegno di studi su: La costituzione europea tra Stati nazionali e globalizzazione, Roma 19-20 June 2003, <www.arifs.it/blpizzo3.htm> visited 25 October 2012.
19. J.-L. Quermonne, Le système politique de l'Union européenne. Des Communautés économiques à l'Union politique, troisième ed (Paris Montchrestien 1998).
20. ---------- L'Europe en quête de légitimité (Paris Presses de Sciences Politiques 2001).
21. G. Ress, Parlamentarismo e democrazia in Europa [The parliamentarism and democracy in Europe] (Napoli Guida 1999).
22. P. Ridola, 'La parlamentarizzazione degli assetti istituzionali dell'Unione Europea fra democrazia rappresentativa e democrazia partecipativa' [The parliamentary process of the institutional arrangements of the European Union between representative democracy and participatory democracy], <http://giurisprudenza.unica.it > visited 20 October 2012.
23. M. de Salvia, Compendium de la CEDH – Les principes directeurs de la jurisprudence relative à la Convention européenne des droits de l'homme (Strasbourg-Arligton Editions N. P. Engel Kehl 1998).
24. V. Sciarabba, Tra fonti e corti: diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali [Between sources of law and Courts: fundamental rights and principles in Europe: constitutional profiles and comparative supranational developments] (Padova Cedam 2008).
25. F. W. Scharpf, Governing in Europe: Effective and Democratic? (New York Oxford University Press 1999).
26. J. Shaw, 'Postnational Constitutionalism in the European Union', 4 Journal of European Public Policy (1999), p.579.
27. L. Siedentopf, La democrazia in Europa [Democracy in Europe] (Torino Einaudi 2001).
28. L. Scheeck, 'Solving Europe's binary human rights puzzle', 15Question de recherché/Research in question (2005).
29. G. Telese, 'La Carta dei diritti fondamentali cerca la via per essere Costituzione' [The Chart of Fundamental Rights seeking the way to become Constitution], 25 Diritto e Giustizia (2000), p. 75.
30. G. Tesauro, 'I diritti fondamentali nella giurisprudenza della Corte di giustizia', Rivista internazionale dei diritti dell'uomo (1992), p. 426 ss.
31. R. Vaubel, 'The Constitutional Future of the

European Union', 7 Constitutional Political Economy (1996), p. 317.
32. U. Villani, 'Il protocollo n. 14 alla Convezione europea dei diritti dell'uomo' [Protocol n.14 on European Convention of Human Rights], 3 La Comunità internazionale (2004), pp. 487 ss.
33. ---------- 'I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea' [The fundamental rights between the Charter of Nice, European Convention on Human Rights and the European Constitution], Diritto dell'Unione Europea (2004), p. 153.
34. ---------- La protezione internazionale dei diritti umani [The International protection of human rights] (LUISS Roma 2005).
35. A. Williams, EU Human Rights Policies – A Study in Irony (New York Oxford University Press 2004).
36. V. Zagrebelsky, 'La prevista adesione dell'Unione Europea alla Convenzione europea dei diritti dell'uomo' [The anticipated accession of the European Union to the European Convention on Human Rights], <www.forumcostituzionale.it > visited 21 October 2012.
37. J. Ziller, Il nuovo Trattato europeo [The new European Treaty] (Bologna il Mulino 2007).