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Discourse upon the Constituent Human Rights Developments in the European Union

The aim of this article is to answer questions of the theoretical and practical meaning of the legal developments in the European Union concerning protection of human rights — what are the reasons and possible consequences of such developments for the European Union and its member states?

To begin with, on 22 June 2007, the leaders of the European Union reached an agreement in Brussels on an outline of new rules with the aim to replace the failed Treaty establishing the Constitution for Europe, which was rejected by certain voters in the year of 2005. The Intergovernmental Conference has now been delegated the task of drafting a reformulated treaty by the end of the year 2007. The Reform Treaty is intended to be ratified by the Member States of the European Union, but, as the majority of the above-mentioned developments have not taken place yet and the reformulated Treaty is supposed to preserve many of the key features of the Constitutional Treaty, this article begins with reflection on some earlier relevant legal developments in the European Union: On 9 May 2006, the Republic of Estonia ratified the Treaty establishing the Constitution for Europe. By that act, Estonia demonstrated her approval of the developments in the Constitutional Treaty, including the recognition by the Union of the rights, freedoms, and principles set out in the Charter of Fundamental Rights, and the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 14 December 2005, Estonia ratified Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, from 13 May 2004.¹ By that ratification, the Republic of Estonia demonstrated her willingness to support the developments concerning human rights in Europe. Estonia has made clear that the accession of the European Union to the Convention on Human Rights would improve the image of the European Union, because such development prevents the creation of a Union's exclusive human rights protection system.²

In order to answer the main questions posed at the beginning of this article, the paper has been structured as follows: The first section outlines the historical development of human rights and their protection under European Union law. The second section asks whether human rights are protected effectively in the European Union and tries to establish general criteria for effectiveness of protection of human rights in the European Union. Next, the third section discusses the possible accession of the European Union to the European Convention on Human Rights and the status of the Charter of Fundamental Rights of the European Union.

¹ The Ratification Act of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention. – RT II 2006, 1, 2.

² The Explanatory Letter to the Draft Ratification Act of the Treaty Establishing a Constitution for Europe. Available at [\(http://web-static.vu.ee/static/failid/370/PSL_Seletuskiri21.10.2004/\(16.05.2006\)\)](http://web-static.vu.ee/static/failid/370/PSL_Seletuskiri21.10.2004/(16.05.2006)) (in Estonian).

1. Current system for protection of human rights under European Union law

The progress seen thus far is that the European Court of Justice (also referred to as the Court of Justice) has elaborated a unwritten quasi-charter of fundamental rights for the European Union³, because at the time of composition and conclusion of the establishing treaties of the European Communities, the parties to those treaties were most interested in economic integration, and they probably hoped that the treaties would apply in areas or by methods not likely to violate human rights.⁴

In addition, formally European Union law does not yet contain a legally binding human rights codification, although the EC Treaty refers to the principle of democracy and other values and today has embraced the four fundamental freedoms, some citizens' rights, and certain economic and social rights; the preamble of the Single European Act affirms the respect of the Member States toward the promotion of "democracy on the basis of the fundamental rights recognised 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".⁵ Article 6 of the Treaty on EU states that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".⁶ The respect for fundamental rights was further strengthened in the Treaty of Amsterdam, by extending the jurisdiction of the Court of Justice to actions of the Community institutions.⁷ The Treaty of Amsterdam introduced a suspension clause to the Treaty on EU, determining which action should be taken in cases where a Member State seriously and persistently breaches the principles on which the Union is founded.⁸ For a considerable time, those have remained the only written references to rights in primary European Union law.

The absence of a legally binding codification of human rights from European Union law could not have meant that the Member States or institutions of the European Union might violate the human rights of the citizens of the European Union by taking or failing to take action. As stated above, for a long time the task of constitutionalisation for the European Community of human rights belonged to the Court of Justice. The Court of Justice perhaps started to assume this role in the year 1969, in the case of *Erich Stauder v. City of Ulm*, pronouncing that it would protect "the fundamental rights enshrined in the general principles of Community laws".⁹ The pronouncement of the Court of Justice was developed further in dialogue with the constitutional courts of the Member States, and here is essential the famous case of *Handelsgesellschaft*.¹⁰ The Court of Justice developed its pronouncements about human rights inter alia in the cases of *Nold*¹¹, *Prais*¹², *National Panasonic*¹³, *Pecastaing*¹⁴, *Hauer*¹⁵, and *Familienpress*.¹⁶ These cases recognise the fundamental rights as part of the principles of Community law but do not solve the problem of identification of such rights. In these cases, the Court of Justice referred to the human rights in the Convention on Human Rights and the constitutions and legal acts of the Member States as part of the principles of Community law. The Court of Justice and the basic treaties of the European Union refer to the Convention on Human Rights, because some Member States of the European Communities had acceded to the Convention on Human Rights before the entrance into force of the treaties establishing the European Communities, and consequently the aim of the establishing

³ See D. S. Binder. *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*. – Harvard Jean Monnet Working Paper Series 4/95.

⁴ See G. More. *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?* – P. Craig, G. De Búrca (Eds.). *The Evolution of EU Law*. Oxford: Oxford University Press 1999, pp. 518–519.

⁵ Preamble. Single European Act.

⁶ Article 6 EU.

⁷ Article 46 EU. See also article 177 EC: Community policy in the area of development co-operation "shall contribute to the general objective of [...] respecting human rights and fundamental freedoms".

⁸ According to the suspension clause, some of a Member State's rights (e.g., the voting rights in the Council) may be suspended if the Member State seriously and persistently breaches the principles on which the Union is founded (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law).

⁹ Case C-29/69, *Erich Stauder v. City of Ulm*. – ECR 1969, p. 419.

¹⁰ Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECR 1970, p. 1125), where the Court of Justice made clear the supremacy of Community law over internal constitutional law.

¹¹ Case 4/73, *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission*. – ECR 1974, p. 491.

¹² Case 130/75, *Vivien Prais v. Council*. – ECR 1976, p. 1589.

¹³ Case 136/79, *National Panasonic (UK) Limited v. Commission*. – ECR 1980, p. 2033.

¹⁴ Case 98/79, *Josette Pecastaing v. Belgian State*. – ECR 1980, p. 691.

¹⁵ Case 44/79, *Liselotte Hauer v. Land Rheinland Pfalz*. – ECR 1979, p. 3727.

¹⁶ Case C-368/95, *Vereinigete Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*. – ECR 1997, p. I-3689.

treaties could not have been to help the Member States escape from their obligations under international law, including their obligations under the Convention on Human Rights. Since the Member States are responsible for European Community law, this law cannot violate the Convention on Human Rights.

The constitutionalisation of human rights by the Court of Justice has left unsolved the problem of certainty concerning such rights. That the Single European Act and the establishing treaties refer to the rights specified in the Convention on Human Rights and other human rights acts not in terms of rights but as to principles means that those rights do not have direct effect in the European Union. A brief explanation of the foregoing — in the case of *Handelsgesellschaft*, the Court of Justice stressed the supremacy of European Community law over the constitutional laws of the Member States¹⁷; consequently, there might exist the possibility that the Court of Justice considers Community law to take precedence also where the Convention on Human Rights should be concerned. Therefore, the author of this article supports the view that today the rights protected in the Convention on Human Rights have in the European Community the status of customary law only.

In addition to the problems in the European Union resulting from non-codification of human rights that undermine the principle of legal certainty, there exist jurisdictional problems: the internal courts and the European Court of Human Rights (referred to in this paper also as the Court of Human Rights) supervise the correspondence to the Convention on Human Rights of the internal laws of the Member States and the law under the intergovernmental co-operation, whereas the Court of Justice oversees the Community law arena. At the same time, one cannot submit a complaint against the judgments of the Court of Justice to the Court of Human Rights, because the European Community is not a party to the Convention on Human Rights. Although it is not excluded that a question discussed in the judgment of the Court of Justice might arise indirectly in the Court of Human Rights, the latter court has for political reasons not been willing to review the judgments of the Court of Justice as of a court of an independent international organisation. One may say that double supervision is exercised over human rights under European Union law — by the Court of Justice and the Court of Human Rights. Such a double review system has been found problematic because of the possible divergences in the interpretation of the Convention on Human Rights by those courts that may result in different degree of protection of fundamental rights.

As for a long while the fundamental rights remained undetermined, unwritten concepts, fixed mainly by the Court of Justice, in the year 1989 the European Parliament passed a Declaration on Fundamental Rights and Freedoms, the first provision of a catalogue of fundamental rights. In December 1998, at the Vienna European Council, was composed the Vienna Declaration, which indicated the need for visible rights. At Cologne, the European Council decided to create the project for the Charter of Fundamental Rights of the European Union, with the aim of consolidating the rights on European level into a charter, in order to make the rights more visible. In the year 2000, the Charter of Fundamental Rights of the European Union was adopted as a declaration. Later, this Charter was included in Part II of the Treaty Establishing a Constitution for Europe.

2. Are human rights effectively protected in the European Union?

2.1. What is effective protection?

The rights to a fair trial and an effective remedy are expressly absent from the written text of the valid constituent treaties of the European Union. Indirectly, the principles of a fair trial and an effective remedy can be derived from article 10 of the EC Treaty, meaning that the internal courts have to guarantee individuals the rights that are created to them under Community law¹⁸, or meaning that the Member States are obliged to provide sufficient judicial means to ensure effective protection of rights.¹⁹ The principles can be derived also from the Treaty on EU, where fundamental rights and the principle of separation of powers are unified in the statement that the signatories of “this Treaty follow human rights, fundamental freedoms and guarantees deriving from separation of powers”.²⁰

Articles 6 and 13 of the European Convention on Human Rights, what is legally binding to the Member States of the European Union and what the Treaty on EU refers to, specify the rights to a fair trial and an effective remedy. The right to court is set forth in article 6 of the Convention on Human Rights, with the meaning

¹⁷ Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. – ECR 1970, p. 1125.

¹⁸ Article 10 EC directly reads: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community”.

¹⁹ M. Brearley, M. Hoskins. *Remedies in EC Law*. London: Longman 1994, p. 53.

²⁰ C. Harlow. *Access to Justice as a Human Right: The European Convention and the European Union*. – P. Alston et al (eds.). *The EU and Human Rights*. Oxford: Oxford University Press 1999, p. 188.

of entitlement to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. The right to court involves two types of elements or conditions, which must be guaranteed in all Member States adhering to the Convention whenever they apply article 6: firstly, the conditions that are expressly mentioned in article 6 and, secondly, the elements that are not expressly mentioned in article 6.^{*21} An example of the expressly mentioned conditions is the right to court itself. The conditions that are not mentioned explicitly have been developed by the Court of Human Rights. An example of the latter category of conditions is the principle that access to courts should be effective.

Despite the importance of the fair trial and effective remedy, the Court of Justice has not defined these principles for the Community, although the Court of Justice considers the principle of effective access to justice to be a fundamental principle of the Community. In its case law, the Court of Justice has interpreted that principle. The Court of Justice first recognised the principle of effective access to justice in the case of *Simmenthal*.^{*22} The Court of Justice developed that principle further, mainly in the years 1980 and 1990. In the case of *SPA Salgoil*, the latter court explained that the internal courts must effectively protect the interests if these are abridged by infringement of the EC Treaty^{*23}, and in the case of *Bozzetti* it explained that the rights granted by Community law to an individual must be effectively guaranteed in every case.^{*24} In the cases referred to, the main problem was caused by infringement of fundamental rights during the implementation of a Community act, which the Court did not consider justified.^{*25} In the case of *Johnston*, the Court of Justice confirmed that the principle of effective access to justice comes to the Community legal order from the common constitutional traditions of the Member States, and from articles 6 and 13 of the European Convention on Human Rights, which is legally binding for the Member States.^{*26} The Court of Justice has recognised this principle *inter alia* in the cases of *Heylens*^{*27}, *Vlassopoulou*^{*28}, *Borelli*^{*29}, *Dieter Kraus*^{*30}, and others.^{*31} Such extensive case law of the Court of Justice again demonstrates the important role of this Court in constitutionalisation of European Union law. However, since the Court of Justice is not formally bound by the Convention on Human Rights, the Court at least theoretically may interpret article 6 of the Convention on Human Rights restrictively.

One may conclude that in the case law of the Court of Justice the principle of effective access to justice means the obligation to guarantee to individuals all rights conferred on them by Community law. As such, the principle has been included in the Charter of Fundamental Rights, worded as the right to an effective remedy and to a fair trial, meaning the obligation of the Community institutions, as well as the Member States, to guarantee effective access to justice.^{*32}

2.2. The right to an effective remedy and to a fair trial in European Union law

Article 47 of the Charter of Fundamental Rights, headed 'Right to an effective remedy and to a fair trial', reads:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

²¹ U. Lõhmus (koost.). *Inimõigused ja nende kaitse Euroopas* (Human Rights and their Protection in Europe). Tartu: Sihtasutus Juridicum 2003, p. 147 (in Estonian).

²² Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. – ECR 1978, p. 629.

²³ Case 13/68, *SPA Salgoil v. Italian Ministry for Foreign Trade*. – ECR 1969, p. 453.

²⁴ Case 179/84, *Bozzetti v. Invernizzi SpA and Ministero del Tesoro*. – ECR 1985, p. 2301. See also: Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. – ECR 1978, p. 629.

²⁵ R. C. Smith. *Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection*. – P. Craig, G. De Búrca (Eds.). *The Evolution of EU Law*. Oxford: Oxford University Press, 1999, p. 308.

²⁶ Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*. – ECR 1986, p. 1651.

²⁷ Case 222/86, *Union nationale des entraineurs et Cadres techniques professionnels du football (UNECTEF) v. Georges Heylens and others*. – ECR 1987, p. 4097.

²⁸ Case C-340/89, *Vlassopoulou*. – ECR 1991, p. I-2357.

²⁹ Case C-97/91, *Oleificio Borelli*. – ECR 1992, p. I-6313.

³⁰ Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*. – ECR 1993, p. I-01663.

³¹ See M. Brearley, M. Hoskins (Note 19), p. 54.

³² Article 47 Charter of Fundamental Rights.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.^{*33}

The Charter of Fundamental Rights is not the only source that reflects the legal development of the right to an effective remedy and to a fair trial in the European Union. Also the work of the Convention that drafted the Treaty establishing a Constitution for Europe based on the real life developments in European Union law and on the needs of the citizens of the European Union. Although the Constitutional Treaty has failed by today, some developments in it and especially the explanations of such developments still remain important for the European Union and are worth quoting, especially during the time preceding the Reform Treaty.

With the aim of making the principle of access to justice visible for the European Union, this principle was included in article I-29 of the Constitutional Treaty, together with the institutional provisions concerning the Court of Justice. The first part of section 1 of article I-29 read:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.^{*34}

From this wording one may see that the principle of access to justice has two sides: from one angle the institutions of the Community are obliged to enforce the rights of individuals, and from the other side the internal courts must meet the obligations imposed on them by the constituent treaties, and the emphasis seems to have been put on the national courts.

2.3. Evaluation of protection of human rights under European Union law

2.3.1. Visibility of rights

As can be seen from the above, the majority of human rights have not been directly and visibly fixed in the legally binding acts of the European Union. This means that people cannot be exactly aware of what rights they actually have. People also remain unaware of how the Court of Justice interprets the rights that are indirectly derivable from different legal acts or conventions. Even if one assumes that the Court of Justice interprets a certain right in a certain way as it has done before, it still is difficult to predict the behaviour of the Court of Justice, as the Court is not formally bound by its previous decisions. What are the exact sources employed by the Court of Justice? What is the status of the judgments of the Court of Human Rights in the legal space of the European Union? One could also discuss whether it is correct that the Court of Justice creates new rights, as at least formally the aim of the courts in a *Rechtsunion* based on the democratic rule of law should not be the fulfilment of the functions of legislator. Set against the principle of legal certainty, such indeterminacy of rights does not conform with the principle of effective access to justice. From another perspective, a legislator cannot act comprehensively as regulator without the fear of being overregulative. If the legislator has not filled a legislative gap, the courts must fill the gap in order to avoid denial of justice. After the Court of Justice has filled the gap, the legislator is free to regulate the area, even if differently from said Court. If, by contrast, the legislator does not regulate the area, the interpretation of the court is valid until the court itself chooses to change its interpretation.

Leaving the question concerning the division of powers between the courts and the legislature aside, one could conclude here that invisibility of human rights in the European Community has had effects acting against the principle of legal certainty and cannot serve the purpose of effective access to justice.

2.3.2. Divergences in interpretation of human rights by the Court of Justice and the Court of Human Rights

This article has mentioned already that there are areas in European Union law where double judicial review is exercised over human rights — by the Court of Justice and by the Court of Human Rights. Such a double review system has been considered problematic, because divergences in interpretation of the Convention on Human Rights by these two courts may result in a different degree of protection of fundamental rights for the citizens of the European Union. It is questionable whether such problems can be overcome by human rights codification in a constituent treaty of the European Union, because this does not exclude the possibility that the Court of Justice may interpret the fundamental rights according to the special needs of the European Community. The latter is proved by the divergences that already exist in the judgments of the two different

³³ Article 47 Charter of Fundamental Rights. Compare with article 6 ECHR.

³⁴ Article I-29 TEC.

courts concerning these self-same issues.^{*35} Some such divergences may be caused by the fact that the Court of Justice derives its solutions from Community interest when interpreting human rights while the Court of Human Rights proceeds from concern for individual interest. The divergences should be avoided, because if different courts resolve identical issues differently, they may create double minimum standards, which may harm the universal meaning of human rights. For example, the judges of the Member States of the European Union who in parallel belong under the review system of the Court of Justice and of the Court of Human Rights may find it confusing to determine which court's interpretation they should follow. To avoid acting against the universal nature of human rights, attempts to make uniform the human rights legislation, as well as the case law, have been made in the European Union. As a consequence of such attempts at unification, it has been decided that the European Union adhere to the European Convention on Human Rights. It has been hoped that, were there one supreme court of ultimate human rights review in Europe, it would be easier to avoid divergence between the interpretations of the Court of Justice and the Court of Human Rights. The problem of divergent interpretation cannot be solved by the Charter of Fundamental Rights of the European Union, because the Charter does not foresee universal scope of protection.

2.3.3. Problems concerning the scope of judicial review

In addition to the problems concerning the invisibility of rights, double supervision, and the consequent possible double minimum standards, there exists another problem. Over the area of European Union law falling outside the scope of the first pillar, supervision can be exercised by national courts and the Court of Human Rights but not by the Court of Justice. At the same time, the acts taken under the second and third pillar affect the rights of the citizens of the European Union in the same way as do the acts taken under the first pillar. One may even assume that the acts taken under all three pillars affect the rights of individuals as acts of a single organisation, because the pillar areas are growing increasingly interrelated. Although the Court of Justice does not have jurisdiction over the acts taken under the second and third pillars, this cannot mean that basic rights may be violated by such acts. Therefore, at present, the Court of Human Rights has direct jurisdiction over the second and third pillars. If the Court of Justice and the Court of Human Rights now interpret rights differently, this may mean double human rights standards within the same organisation — the European Union. This problem could be overcome, one hopes, by the merger of the three pillars, which *inter alia* means wider jurisdiction of the Court of Justice.

2.3.4. Problems under the first pillar concerning the *locus standi* of an individual

After the merger of the three European Union pillars, one will still face the problems that today characterise the first pillar area. All these problems affect protection of human rights, because a separate human rights action is absent in the European Community and, consequently, a human rights question may arise in each set of proceedings. Therefore, this article further investigates the general system of judicial remedies of the Community.

Today, individuals have more than one possibility in terms of ways to approach the Court of Justice if their rights seem to be violated by a Community act. Generally, such possibilities are foreseen in articles 230, 241, and 234 of the EC Treaty. If one examines these possibilities more closely, one finds the opportunities to be quite constrained. Firstly, article 230 (4) contains limits concerning the name of a contested act, as, according to the literal interpretation of the text of article 230 (4), an individual may initiate proceedings against a decision addressed to that person or against a decision that, though in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.^{*36} Secondly, if the act is not addressed to the concrete person, it must be of direct and individual concern to said person.^{*37} Thirdly, article 230 (5) foresees the time limit for bringing the action: an affected individual may approach the Court of Justice only within two months of the publication of the measure, or of the plaintiff's notification of it, or, in the absence thereof, of the day on which it came to the knowledge of the latter.^{*38} Section 5 of article 230 means that, even if an implementing measure will be taken on the basis of an allegedly invalid act, an individual has no right to plead for annulment of the basic act after the deadline foreseen in article 230 (5). From one

³⁵ For example, the Court of Justice has constrained the rights written in the ECHR more than the Court of Human Rights. For example, in the Case *Hoechst* the Court of Justice stated that the written in section 1 of article 8 ECHR inviolability of private rights does not embrace the territories and buildings of the commercial actors. In the Case *Niemietz*, the Court of Human Rights stated that this right embraces the territories and buildings of the commercial actors. See *Niemietz v. Germany*, Judgment of 16.12.1992, application No. 13710/88. – ECHR Series A (1992) No. 251-B; Case 46/87, *Hoechst v. Commission*. – ECR 1989, p. 2859. There have also existed other divergent cases. See comparatively: *Funke v. France*, Judgment of 25.02.1993, application No. 10828/84. – ECHR Series A (1993) No. A256-A; Case C-374/87, *Orkem*. – ECR 1989, p. 3283, etc. Referred to in *U. Löhms* (Note 21).

³⁶ Article 230 (4) EC.

³⁷ Article 230 (4) EC.

³⁸ Article 230 (5) EC.

standpoint, the time limit protects legal certainty; from the other side, not all possible effects of all acts can always be foreseen.

Although the Court of Justice has interpreted the literal text of article 230 liberally and has, for example, stated that, while it is making its determination concerning the act challenged, it does not derive its determination from the name of that act but considers the actual nature and aims of the act, and although in the cases of UPA^{*39} and Jégo-Quéré^{*40} broader interpretation of direct and individual concern was attempted, the Court of Justice has returned to the Plaumann formula, according to which the measure in question should affect specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee.^{*41} Consequently, the individuals' opportunities still remain constrained under article 230. Concerning the suggested amendments in the Constitutional Treaty, in article III-365 of that Treaty the word 'decision' was in cases of an 'act addressed to that person' replaced with 'act'. Still, the requirement for direct and individual concern and the time limit remained. Where regulatory acts are involved, any natural or legal person was allowed under the Constitutional Treaty to institute proceedings against a regulatory act that was of direct concern to him or her and did not entail implementing measures.^{*42} Therefore, one may conclude that the possibilities for individuals still remained constrained under article 230.

The judges and legal theorists have confirmed that the European Community has entrusted the effective protection of Community rights to internal courts as to Community courts.^{*43} At the same time, the internal courts cannot decide upon the validity of a Community act but have to refer questions concerning the validity of a Community act to the Court of Justice under article 234 of the EC Treaty. Such reference is broadly in the discretion of the internal courts that may not be bound by the request of the parties to the case being referred.^{*44} At the same time, the Court of Human Rights has avoided deciding upon those cases that are under the jurisdiction of the Court of Justice — therefore, the possibilities of individuals are quite constrained also under article 234.

Concerning the possibility of contesting matters before the Court of Justice, the applicability of a regulation under article 241 of the EC Treaty, although here does not exist such a time limit as foreseen in article 230 (5), involves an application under article 241 being incidental by nature, which means that such a plea can be made not separately but only under the framework of the main proceedings.^{*45}

Because of such problems as those referred to above, the Court in the case of Jégo-Quéré indicated that, in the circumstances, there was no right of action before the national courts and that, when the plaintiff's action for annulment before the Court of First Instance would be dismissed as inadmissible, because the contested Community provisions were of general application, any legal remedy enabling it to challenge the legality of the contested Community provisions would be denied. That way, the applicant would have been deprived of the right to an effective remedy, of the kind guaranteed by the legal order based on the EC Treaty, and in particular under articles 6 and 13 of the Convention on Human Rights.^{*46}

If a Community institution fails to act, an individual may bring an action under article 232 of the EC Treaty. Article 232 states that any natural or legal person may complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion. The Court of Justice has applied to this article the conditions that it has applied concerning article 230, which means that the possibilities afforded to an individual are quite constrained also under article 232.

If a Community institution or its servants have caused damage, the Community shall, in accordance with article 288 of the EC Treaty and the general principles common to the laws of the Member States, make good any damage caused in the performance of their duties. As the action for damages is a separate action, it helps to complement the possibilities provided to individuals.

³⁹ See order in Case T-173/98, *Unión de Pequeños Agricultores v. Council*. – ECR 1999, p. II-3357; Case C-50/00, *Unión de Pequeños Agricultores v. Council*. – ECR 2002, p. I-6677; Opinion of the Advocate General Jacobs in Case C-50/00, *Unión de Pequeños Agricultores v. Council*.

⁴⁰ See judgments in Cases T-177/01, *Jégo-Quéré v. Commission*. – ECR 2002, p. II-2365, and C-263/02 *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425; Opinion of the Advocate General Jacobs in Case C-263/02 P, *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425.

⁴¹ Case 25/62, *Plaumann v. Commission*. – ECR 1963, p. 95.

⁴² Article III-365 TEC.

⁴³ See for example: Case C-188/92 *TWD, Textilwerke Deggendorf GmbH v. Germany*. – ECR 1994, p. I-833.

⁴⁴ Article 234 EC.

⁴⁵ Article 241 EC.

⁴⁶ Cases T-177/01, *Jégo-Quéré v. Commission*. – ECR 2002, p. II-2365, and C-263/02 *Commission v. Jégo-Quéré*. – ECR 2004, p. I-3425.

2.3.5. Problems concerning responsibility

All Member States of the European Union are bound by the European Convention on Human Rights. At the same time, neither the European Union nor the European Community is member to the Convention on Human Rights. This means that if an action or inaction of the European Union or European Community violates human rights, the responsibility for such action (or inaction) rests with those Member States that participate in the decision-making procedures of the European Union. Since the institutions of the European Union are acquiring ever more supranational powers, such allocation of responsibility may not be justified.

In addition to the problems indicated above, effective access to justice is constrained by such general ‘side factors’ as the personality of the deciding judge, which indicates that there can never exist absolutely effective protection of rights, which in itself is a quite undetermined legal concept. The analysis of all such factors is beyond the scope of this article, which only indicates the major legal problems concerning the protection of human rights in the European Union.

2.4. The measure for the European Union

In order to move to something more effective, one should, besides measuring the effectiveness generally, and the effectiveness of a concrete ‘something’, also establish criteria for effectiveness for that concrete ‘something’. Therefore, the article now draws attention to some general conditions that should be fulfilled as a prerequisite for being able to talk about the effectiveness of the system for protection of human rights in the European Union, which could serve as the basis for the constitutional developments. The author of this article supports the following recommendations. In order to guarantee effective protection of human rights in the European Union, first, all of the changes should take into account the universal nature of human rights⁴⁷ and the need to guarantee principles characteristic to a democratic society. Secondly, deriving from the need to guarantee the principle of legal certainty, human rights should be more or less comprehensively⁴⁸ visibly codified. Thirdly, in order to guarantee human rights universally, they should be codified uniformly for the whole of Europe. Fourthly, with the aim of avoiding divergent interpretation of human rights by the Court of Human Rights and the Court of Justice, the jurisdiction of the Court of Justice should in addition to the first pillar embrace the second and third pillars of the European Union — and should be controlled ultimately by the Court of Human Rights.⁴⁹ Fifthly, in order for human rights to be applied systematically, they should be guaranteed in the constituent act of the European Union that binds the institutions as well as Member States of the European Union. Sixthly, the enforcement system for guaranteeing human rights should be effective, because without effective enforcement even universally and comprehensively visible human rights cannot be guaranteed. Effective enforcement starts with effective access to court both on internal and on European Union level.

This means that the European Union needs a clear legal basis in order to better guarantee human rights. Such codification should be based on careful scientific research that is grounded foremost in the universal nature of human rights and the historical developments in Europe. The suggestions that were set forth in the Constitutional Treaty are as follows: article I-9 (2)’s “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms” and article I-9 (1)’s “The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights [...]”. Both of these developments are still actual in the European Union and will take place despite the failure of the Constitutional Treaty. Below, the article makes a brief attempt to assess whether the accession of the European Union to the European Convention on Human Rights and the legal bindingness of the Charter of Fundamental Rights could guarantee effective protection of fundamental rights in the European Union.

⁴⁷ M. Piechowiak. What are Human Rights? The Concept of Human Rights and Their Extra-Legal Justification. – R. Hanski, M. Suksi (Eds.). An Introduction to the International Protection of Human Rights. A Textbook. Turku/Åbo: Institute for Human Rights, Åbo Academy University 1999, pp. 3–13.

⁴⁸ “More or less comprehensively” because it is allegedly technically impossible to codify all human rights, since it is impossible to exactly define all human rights. See A. O’Neill. The Protection of Fundamental Rights in Scotland as a General Principle of Community Law – the case of Booker Aquaculture. – European Human Rights Law Review 2000/1, p. 24.

⁴⁹ See A. von Bogdandy. The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union. – Common Market Law Review 2000/6, pp. 1307–1338.

3. The developments toward more effective human rights protection for the European Union

3.1. Should the European Union accede to the Convention on Human Rights?

The accession of the European Union to the Convention on Human Rights would make human rights more visible for individuals. Such accession would eliminate discrepancies from interpretations of human rights by the Court of Human Rights and the Court of Justice, and by so doing guarantees the principle of legal certainty, more systematic application of human rights, and gives the citizens the same degree of protection of their fundamental rights at the European Union level as they enjoy in their home states. It would enable direct control by the Court of Human Rights over the compatibility of European Union institutions' acts with the Convention on Human Rights, and it would enable responsibility of the European Union for human rights violations.

Accession of the European Union to the Convention on Human Rights required an amendment to the Convention on Human Rights, as only a state could become a party to the Convention on Human Rights, not an international organisation. Such amendment was made with Protocol 14 to the Convention on Human Rights, which needs to be accepted by all States Parties to the convention. According to the Court of Justice, an amendment to the basic treaties of the European Community was necessary as well, because accession to the Convention on Human Rights means, in addition to integration of all of the provisions of that Convention into the European Community legal order, entry into a distinct international system.^{*50}

Other practical and technical problems that accompany the accession of the European Union to the Convention on Human Rights will be addressed in regulation in the accession treaty to the Convention on Human Rights. At the same time, accession does not solve all of the problems concerning protection of human rights in the European Union. First, if the European Union accedes to the Convention on Human Rights, the rights accompanying technical and scientific developments, as well as many economic, social, and cultural rights that the Convention on Human Rights does not include, would still remain uncodified. Secondly, accession to the Convention on Human Rights means joining a supervisory system, which places the European Union institutions under the jurisdiction of the Court of Human Rights, thus altering the position of the Court of Justice as that of the highest court of the European Union. Consequently, some related questions discussed by the European (Future) Convention are whether the Convention on Human Rights would, besides decisional supremacy, have normative supremacy — a hierarchically higher position over the European Union *acquis*, making the politics of the European Union perhaps determined too much by the Court of Human Rights.^{*51} Because the judicial interpretation gives content to laws, the ultimate authority to interpret laws has been regarded as that of the law-giver, not the person who first wrote or spoke such laws.^{*52} The European (Future) Convention still came to the conclusion that the Court of Justice abandons only part of its human rights independence.^{*53} There still remain some other questions, such as whether the accession can absolutely abolish the possibility of the Court of Justice and the Court of Human Rights coming to different conclusions regarding the interpretation and application of the Convention on Human Rights, which are difficult to answer.

3.2. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union, worked out by the first convention method in the Union^{*54}, was adopted at the Nice Summit in the year 2000 in the form of a legally non-binding declaration.^{*55} One purpose of this Charter — as emphasised in the Preamble of the Charter — is to strengthen the protection of fundamental rights in the European Union by making them more visible for the citizens; therefore, the Charter can be seen as a way to bring the European Union closer to the citizens. The persons given obligations by the Charter are the institutions, bodies, offices, and agencies of the European Union, and the Member States

⁵⁰ Opinion 2/94. – ECR 1996, p. I-1759. See also P. Alston et al (Eds.). *The EU and Human Rights*. Oxford: Oxford University Press 1999.

⁵¹ European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR”. Brussels, 22 October 2002, CONV 354/02, WG II 16.

⁵² H. L. A. Hart. *The Concept of Law*. Oxford: Clarendon Press 1997, p. 141.

⁵³ European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR” (Note 51).

⁵⁴ Document CHARTE 4487/00 (CONVENT 50), 28 September 2000.

⁵⁵ European Council Conclusions from Nice, 7–10 December 2000. See also J. B. Liisberg. *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a Fountain of Law or Just an Inkblot?* – *Common Market Law Review* 2001/28, pp. 1171–1199.

when they are implementing Union law, in the exercise of their respective powers.^{*56} The Charter is expected to become legally binding.

The Charter has taken up almost all fundamental rights that have been written down in the Convention on Human Rights; therefore, it can be deduced that the Charter confirms the role of the Convention on Human Rights in the legal order of the European Union. In addition, the Charter includes — besides the civil and political rights of the Convention on Human Rights — economic and social rights, which are not addressed in said Convention.^{*57} This means that, compared to the Convention on Human Rights, the Charter makes visible also economic, social, and cultural rights for the European Union. Such development enables more systematic interpretation of human rights. Although the Charter is already binding in the legal space of the European Union through the interpretations of the Court of Justice, other Union institutions, the Court of Human Rights, and applications of the citizens of Europe, the formal bindingness of the Charter would guarantee better realisation of the principle of legal certainty. Important is that the Charter includes also ‘new’ human rights that have been born in the course of later scientific and technical developments.^{*58}

In addition to the positive aspects, one may see some problems concerning the Charter, such as unclear meaning of rights, unclear systematic limitation of rights, and unclear scope of application of the horizontal articles of the Charter. Under criticism has also been the choice of rights in the Charter.

The Charter of Fundamental Rights cannot in itself guarantee uniform application of human rights by the Court of Justice and the Court of Human Rights; it could even widen the discrepancies between these courts. As seen from the discussion above, the divergences in the case law of the Court of Justice and the Court of Human Rights could be reduced when the Court of Human Rights has the status of directly controlling court over the Court of Justice. Therefore, the author of this article supports both developments: the accession of the European Union to the Convention on Human Rights and the Charter of Fundamental Rights.

4. Conclusions

This article first concluded that the judicial protection of human rights has not been effective in the European Union; therefore, questions concerning the accession of the European Union to the Convention on Human Rights and the status of the Charter of Fundamental Rights of the European Union were discussed. In addition, the article tried to establish criteria that should generally help to guarantee effective protection of human rights in the European Union. With regard thereto, the article concluded that, in order to guarantee effective protection of human rights in the European Union, at least the following conditions should be met:

- human rights should be changed such that they are more visible by their uniform codification for the whole of Europe;
- (at least human-rights-related) jurisdiction of the Court of Justice should, in addition to the first pillar of the European Union, embrace the second and third pillars;
- the human rights protection system should ultimately be controlled by one court;
- human rights should be guaranteed in a constituent act for the European Union; and
- the enforcement system for protection of human rights should be effective.

The author is of the opinion that the accession of the European Union to the Convention on Human Rights would guarantee human rights more universally in Europe and that such accession takes into account European historical traditions and values. The accession to the Convention on Human Rights would make human rights more visible for individuals. Such accession would to a certain extent eliminate differences from interpretations of human rights by the Court of Human Rights and the Court of Justice, thus guaranteeing the principle of legal certainty, and systematic application of human rights. Such accession would give the citizens the same degree of protection of their fundamental rights at the European Union level as they enjoy in their home states; it would enable direct control by the Court of Human Rights over the compatibility of European Union institutions’ acts with the Convention on Human Rights; and it would enable the responsibility of the European Union for human rights violations.

⁵⁶ Article II-112 TEC.

⁵⁷ About the sources of the Charter see *supra*, European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR” (Note 51). See also A. W. Heringa. *Towards an EU Charter of Fundamental Rights?* – Maastricht Journal of European Comparative Law 2000/2, p. 14; M. Gijzen. *The Charter: A Milestone for Social Protection in Europe?* – Maastricht Journal of European Comparative Law 2000, No. 2, pp. 33–48; K. Lenaerts, E. De Smijter. *A “Bill of Rights” for the European Union.* – Common Market Law Review 2001/38, p. 299; T. Eicke. *The European Charter of Fundamental Rights — unique opportunity or unwelcome distraction.* – European Human Rights Law Review 2000/3, pp. 280–296.

⁵⁸ European Convention. Report of Working Group II “Incorporation of the Charter / Accession to the ECHR” (Note 51).

The Charter of Fundamental Rights would guarantee protection of human rights on a wider level than citizenship; it clearly codifies fundamental rights, including rights not set forth in the Convention on Human Rights, and some 'new' rights. The Charter helps to approximate the application of human rights by the European Union and internal institutions, as it states that it would be binding upon European Union institutions, and upon the Member States to the extent that they implement Union law.

Therefore, the accession of the European Union to the Convention on Human Rights and the Charter of Fundamental Rights imply more effective protection of human rights. At the same time, the accession to the Convention on Human Rights and the Charter of Fundamental Rights do not eliminate all problems with application of human rights, because, for example, there still remain three systems of controlling bodies where human rights are concerned in the European Union — the internal courts, the Court of Justice, and the Court of Human Rights. When the European Union accedes to the Convention on Human Rights and the majority of human rights in the European Union are applied under the supervision, and consequently in the light of the interpretations of, the Court of Human Rights, which serves the aim of uniform application of human rights, such development in itself cannot reduce the problems concerning individual standing.