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ЮРИДИЧНЕ ЗАБЕЗПЕЧЕННЯ ПРАВ ЛЮДИНИ У ЄВРОПЕЙСЬКОМУ СОЮЗІ: СУЧАСНИЙ СТАН ТА ПЕРСПЕКТИВИ РОЗВИТКУ

Анотація. *Реалізація положень угоди про асоційоване членство з ЄС вимагає від України освоєння юридичних стандартів прав та свобод людини цього міжнародного формування. Система юридичного забезпечення прав людини у праві ЄС пройшла тривалий шлях становлення та розвитку: від первісного заперечення необхідності визнання таких прав до прийняття окремого міжнародного акта – Хартії ЄС, наділеною юридичною силою установчих договорів ЄС. Проте, незважаючи на значну історію свого становлення та розвитку, підстав констатувати, що нині система захисту прав людини у ЄС остаточно сформована і не потребує суттєвого удосконалення, немає. Європейський законодавець не обмежився наданням нормам Хартії ЄС сили установчих договорів, але й також включив до Лісабонського договору обов'язок ЄС приєднатися до ЄКПЛ, чим власне створив складну ситуацію юридичного дуалізму чинного та перспективного врегулювання статусу стандартів прав та свобод людини у ЄС. З одного боку, нині власне норми Хартії ЄС та встановлені на її основі Судом ЄС стандарти прав та свобод володіють вищою юридичною силою у правовій системі цього міжнародного формування, з іншого, – за умов виконання обов'язку приєднання ЄС до ЄКПЛ, вищим ступенем обов'язковості у питаннях визначення європейських стандартів прав людини у правовій системі ЄС володітиме ЄКПЛ, застосована у відповідній практиці ЄСПЛ. Для України відповідь на запитання, які ж тенденції у юридичному забезпеченні прав людини переважають у ЄС, впливатиме на вирішення проблеми пошуку оптимальних юридичних інструментів наближення законодавства України до права ЄС. Відтак, у статті досліджуються особливості становлення та розвитку інституту прав людини у Європейському Союзі. Аналізуються норми Хартії фундаментальних прав Європейського Союзу як головного юридичного інструменту гарантування прав людини у цьому формуванні, а також досліджуються перспективи удосконалення юридичного гарантування прав та свобод у Європейському Союзі з огляду на підготовку Договору про Приєднання Європейського Союзу до Конвенції про захист прав людини та основоположних свобод.*

Ключові слова: права людини, Європейський Союз, правозахисні принципи, Хартія основоположних прав.

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LEGAL SECURITY OF HUMAN RIGHTS IN THE EUROPEAN UNION: CURRENT STANCE AND PERSPECTIVES OF DEVELOPMENT

Abstract. *Implementation of the provisions of the Agreement on Association with EU requires Ukraine to master human rights standards of this international formation. The system of legal protection of human rights in EU law has come a long way of its formation and development: from the initial denial of necessity to recognise such rights to the adoption of a separate international act – the EU Charter, endowed with the legal force of the founding treaties of the EU. However, despite the considerable history of its formation and development, there are no grounds to state that the human rights protection system in the EU is now fully formed and does not need significant improvement. The European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system of this international formation; on the other, under the obligation of EU accession to the ECHR, the ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system. For Ukraine, the answer to the question what trends in the legal protection of human rights prevail in the EU will influence the solution of the problem of finding optimal legal instruments for approximation of the Ukrainian legislation to the EU law. Therefore, the article explores the peculiarities of the establishment and development of a human rights institute in the European Union. The norms of the Charter of Fundamental Rights of the European Union as the main legal instrument for guaranteeing human rights in this formation were analysed, as well as the prospects of improving the legal guarantee of rights and freedoms in the European Union with a view to the preparation of the Treaty on European Union Accession to the Convention on Human Rights and Fundamental Freedoms.*

Keywords: human rights, European Union, human rights principles, Charter of Fundamental Rights.

INTRODUCTION

The crisis that Ukraine has faced over the last six years requires decisive steps in the final definition and, in the end, the real approval of the foreign policy development vector. On the European continent, for our country, the most promising and effective directions of integration into the community of European civilisation states are such international formations as the Council of Europe (hereinafter – the CoE) and the European Union (hereinafter – the EU). Ukraine has solemnly proclaimed the inten-

tion to take a proper place in the world community since the beginning of its state building, and the first step in this direction was the accession of Ukraine to the CoE and the corresponding mastering of human rights standards of this organisation. At a time when the CoE is a promising form of political integration of European countries, even greater opportunities for cooperation not only in the political sphere but also in the sphere of economic, social and cultural are opened for Ukraine in such an international integration association as the EU, an association agreement with which was signed in March 2014 after fatal events on the Maidan during December 2013 – March 2014.

The change in the top leadership of the Ukrainian State following the election of the President of Ukraine in May 2019, as well as the re-election of the Verkhovna Rada in July of the same year, gives hope that the course for Ukraine's integration into the EU will receive a new round of development. Moreover, the recent events in the international arena are convincing enough to show the futility of, it can be said, the danger of changing the European integration direction of our country's development.

The implementation of the provisions of the Association Agreement with the EU requires from Ukraine, among other things, the development of the EU legal system, in particular the legal rules on guaranteeing fundamental rights and freedoms. The human rights legal system in the EU has come a long way in development, with some caveats it can be argued that the complex of legal instruments for guaranteeing human rights in this international formation has evolved in accordance with the main stages of deepening the integration ties of European states. However, despite its considerable history of development, it is an exaggeration to say that the EU's human rights protection system is now fully established and does not need significant improvement. Therefore, the purpose of this article is to investigate the general laws, features and problems of the legal guarantee of fundamental rights and freedoms in the EU in order to bring Ukraine's legal system closer to the EU legal system.

1. MATERIALS AND METHODS

As is known, in the process of scientific activity, in order to obtain knowledge that objectively reflects reality, one must adhere to the basic tenets of methodology – the doctrine of the use of approaches and methods, ways and means of scientific research. The author examines certain contemporary aspects of international legal protection of human rights, which are related to the processes of legal guarantee of human rights in the EU – the international formation, with which Ukraine now seeks to build deep partnerships. As the human rights legal system in the EU has been being shaped for a long time under the influence of international and European human rights regulations, in particular the CoE legal acts, the case law of the European Court of Human Rights (hereinafter – the ECHR), the constitutional traditions of the Member States is still in the state of active formation; the methodological basis of

the proposed scientific intelligence is a number of general scientific and special legal methods of knowledge of political and legal phenomena.

This study is based on the hypothesis that the fundamental foundations, qualitative parameters of the human rights legal system in the EU have developed primarily under the influence of three human rights sources: the EU itself, the CoE (including ECtHR practices), as well as constitutional traditions of EU Member States. Therefore, dialectical, comparative legal research methods were applied in the process of studying the evolution of the establishment and current state of the human rights and freedoms institute in EU law. In order to study the patterns of influence on the development of the human rights guarantee tool in the EU, the main stages of development of this very unique international formation were the historical method of research. The sociological method of enquiry was used in the process of analysing the application by the Court of Justice of the EU of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter – the Euro Convention) in the decision-making process for human rights and freedoms before and after the granting of the EU Charter of Fundamental Rights[2] (hereinafter – the EU Charter) of a formal and binding nature in the system of sources of EU law.

Such methodological principles, it seems to us, will make it possible to evaluate and develop the appropriate program as much as possible to adapt the legislation of Ukraine to EU human rights standards.

2. RESULTS AND DISCUSSION

2.1 The role of the EU Court of Justice in the legal protection of human rights in the EU

Although in the early 1950s it was generally assumed that respect and protection of fundamental human rights was the sole responsibility of the CoE (since it was believed that the institutions of the so-called European Communities (the precursor to the EU, hereinafter – the EC) operated in certain sectors of the economy, cannot affect the implementation of the principle of protection of human rights), the realities of political and legal processes between EU Member States have shown that this is not true. In fact, from the first years of the functioning of the central judicial institution of the EC – the Court of Justice – it was proposed to decide on the conformity of the acts of the EU institutions with the constitutional provisions of the Member States in the field of human rights regulation [1].

For a long time, the principle of respect and protection of human rights has not been clearly distinguished in such fundamental, founding principles of the EU legal system

[1] Convention for the Protection of Human Rights and Fundamental Freedoms. (2013). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004

[2] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

as the *principles of freedom*, *democracy* and the *rule of law*. Initially, the founding documents of the EU did not guarantee respect for human rights and fundamental freedoms in the EU legal system [2]. Thus, until the second half of the 1960s, the Court of Justice refused to interpret the acts of the EC institutions on compliance with the constitutional provisions of the Member States in order to safeguard rights and freedoms. In 1959, four complaints were lodged with the Court of Justice in which the issue of the inconsistency of the decisions of the Supreme Authority was raised (a governing body established under the Treaty establishing the European Coal and Steel Community of 18 April 1951 (hereinafter – ECHR Treaty)) to the constitutional requirements for the rights of the nationals of the Member States. Having considered these four cases in a joint proceeding on 15 July 1960, the Court of Justice recognised its competence to decide the legality of acts of the Supreme Authority under the ECHR Treaty, but stated that it was not obliged to make such acts compatible with the national law of the members, except for their constitutional legislation. The Court also noted that "*Community law, as set out in the ECHR Treaty, does not contain any general principles that would guarantee fundamental rights*" [1].

However, further deployment of European integration processes inevitably raised the problem of ensuring fundamental human rights as one of the top-priority issues of the EU agenda, prompting the EU Court of Justice to change its position and finally begin the process of constitutionalisation of the Institute of Fundamental Rights and Freedoms. An important step in this direction was the *Loos* case, in which the Court of Justice stated that, regardless of the Member States, Community law not only establishes the duties of individuals but also consolidates fundamental rights as part of the European legal tradition [3]. In addition, the EU Court has stated that "the founding treaties should be construed as having direct effect and conferring individual rights which national courts must protect".

The principle of the supremacy of Community law over the internal law of the Member States has become particularly important in the field of cooperation mechanisms between the national courts of the EU Member States and the EU Court of Justice. This principle (first formulated by the Court of Justice in the *Costa* case) is the validity and bindingness of Community law rules (including judgments of the Court of Justice of the European Union as one of the sources of Community law) throughout the EU and of all European Union law subjects. Thus, the EU Court of Justice cooperates with the national courts of the Member States, explaining to them European law from the point of view of the interests of the whole Community and not of the individual Member States and of their objectives [4].

A further step towards ensuring fundamental human rights was the *Stauder* case (1969), in which the Court of Justice ruled that *human rights were the part of the general principles of Community law protected by it*. And later, in the case of *Nold* (1974), the EU Court stated that the Community law which it was to interpret was based *on the*

common constitutional traditions of the Member States and, when shaping the values of the Community, it would take into account conventions and agreements concluded with States, Members, as well as the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms [5] It is worth agreeing with the scientific literature that the decision in this case is a new step in the development of the case law of the Luxembourg Court, since it provides for the possibility of that "when interpreting and applying Community law Court of Justice will be guided and referred to the norms of international agreements signed by Member States" [1].

Thus, analysing the case-law of the Court of Justice, it is possible to distinguish two periods of its operation, which are radically different from the approaches used: if in the first stage, the EU Court of Justice avoided to recognise the problem of the necessity to protect fundamental human rights (directly referring to the fact that the founding treaties do not contain provisions on human rights protection), whereas since the second half of the 1960s, human rights protection has been recognised as an integral principle of EU law [6]. Moreover, thanks to the work of the Court of Justice, the gaps in the founding treaties of the EU on guaranteeing human rights and freedoms have been partially overcome. However, even appreciating the progress made in the functioning of the Court of Justice towards ensuring fundamental human rights and freedoms in the EU legal order, other EU institutions did not hesitate to point out the limitations of the Luxembourg Court's approach in formulating "human rights" principles. In its memorandum of 4 April 1979, the EU Commission stated, "*Nonetheless, however satisfactory and worthy of approval the method (of human rights protection – author's note) developed by the Court may be, it cannot rectify at least one of the shortcomings affecting the legal order of the Communities through the lack of a written catalogue of fundamental rights: the impossibility of knowing in advance which are the liberties which may not be infringed by the Community institutions under any circumstances. The European citizen has a legitimate interest in having his rights vis-a-vis the Community laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria.*[1]*"*

2.2 The establishment of the Institute for Human Rights in the founding treaties of the EU

It was only 30 years after the founding of the European Community (hereinafter referred to as the EC) that the Single European Act first made reference to the principle of protection of human rights. Paragraph 3 of the preamble to the Act states that the EU Member States are "determined to promote a joint effort to develop a democracy based on the rights recognised by the constitutions and laws of the Member States, the ECHR and the European Social Charter" [7].

[1] Memorandum of the Commission of the European Communities adopted on 4 April 1979. Bulletin of the European Communities, 1979. Supplement No 2/79. Para 5. Retrieved from http://aei.pitt.edu/6356/

The further process of the constitutionalisation of fundamental human rights was continued by the Treaty of Amsterdam of 2 October 1997[1]. The provisions of this document have made significant adjustments to the system of treaties establishing the EU: this is how the principle of respect for human rights and fundamental freedoms, previously enshrined only in the preamble to the EU Treaty, has become the foundation of EU integration processes[2]. In other words, the Treaty of Amsterdam gave the EU Court of Justice the right to apply to all acts of the EU institutions *minimum standards that are related to the protection of human rights in the way* they follow from the common constitutional traditions of the Member States and international human rights agreements [8; 9]. In addition to the general changes in the respect and protection of human rights as an institution throughout the EU, the provisions of the Treaty of Amsterdam provided for the introduction of some new aspects, forms of application of the principle of non-discrimination. The Treaty of Amsterdam has become a qualitatively new step towards ensuring the principle of non-discrimination: supplemented by Art. 3 (formerly, Article 2) of the EC Treaty states that "ensuring equality between women and men as a whole, and not just in employment, is one of the objectives of the Community".

While assessing the importance of the Treaty of Amsterdam in terms of enhancing the legal certainty of the human rights institute in the EU, foreign scientists equate its innovation with the status of a genuine "reform" in the field of human rights in the EU legal system, clearly enshrining fundamental rights provisions that have now become part of primary law EU [1].

In general, sharing the opinion of foreign scientists about the importance of the Treaty of Amsterdam[3] in the process of completing the full legal "integrity" of human rights and freedoms, the author thinks that the problems that this treaty has not solved should be mentioned. Thus, in particular, the intensification of integration processes between EU Member States was accompanied by the strengthening of legal support, first and foremost, of socio-economic human rights, whereas in the case-law of the EU Court, the situation of violations of the same regime of guaranteeing personal rights with socio-economic rights was threatened [2].

The problem of the correlation of these regimes has arisen in cases where the EU Court has had to monitor the observance of fundamental human rights in cases of violations by States of economic freedom, which, in fact, belong to or indirectly affect one of the human rights. This could be the case, for example, in the event of an EU citizen being expelled from a Member State (for example, if he violated economic conditions), thereby destroying the unity of family life (Article 8 of ECHR); or in the case of restric-

[1] The Amsterdam treaty. (1999, May). Retrieved from http://studies.in.ua/ru/istoriya-gosudarstva-i-prava-zar-h-stran-shpargalk/3776-amsterdamskiy-dogovr-yogo-zmst-znachennya.html

[2] *Ibidem*, 2000

[3] *Ibidem*, 2000

tions on the free provision of information services by the media directly affecting the right to freely disseminate information, regardless of frontiers (Article 10 of ECHR) [5]. In other words, the problem was that the EU judiciary, in particular the activities of the Court of Justice affected human rights protected by the ECHR, which resulted in a conflict in international judicial protection of human rights: the same rights were guaranteed at the same time by two different international jurisdictions, members of which were the same EU Member States.

Thus, new issues of legal guarantee of fundamental human rights were raised in the EU legal order, which could not be resolved by further deployment of the EU Court of Human Rights jurisprudence or simply by adding amendments and adjustments to the system of founding treaties.

At various stages of the functioning of the EC, questions were raised regarding its possible accession to the ECHR's human rights protection system. However, following a judgment of the European Court of Justice [*Opinion 2/94 on Accession by the Community to the ECHR*] stating that this Court held that the ECT Treaty did not confer powers on the European Community to join the ECHR, there was a need to find new ways of qualitatively new guaranteeing human rights and freedoms in the EU. During Germany's EU presidency in 1999, it was suggested "at the present stage of the EU's establishment to develop a Charter of Fundamental Rights (hereinafter – the EU Charter) in order to explicitly guarantee the Union citizens the highest priority of rights and freedoms." Such a document was eventually developed and was "solemnly proclaimed" by the European Parliament, the Council of Ministers and the European Commission in Nice on 7 December 2000[1]. At first, unfortunately, the Charter was not incorporated into the system of institutions of the EU treaties, even though it was not published in the "C" series of the official journal and not in the "L" series reserved for law. Thus, after its proclamation in 2000, the Charter was not legally binding and was first mentioned by the Court of Justice in 2006 only in the case of the legality of the Family Reunification Directive.

The "revolutionary" step in the direction of radically overcoming the new problems of the legal protection of human rights was to be the Treaty establishing a Constitution for Europe, which contained a list of rights and freedoms proclaimed in the EU Charter[2]. However, without receiving support at the level of national referendums of EU Member States, it was replaced by the Lisbon Treaty, which entered into force in December 2009.

2.3 The place of the EU Charter in the system of EU law sources

With the entry into force of the Lisbon Treaty on 1 December 2009, the EU Charter[3] has gained legal force of the founding Treaties of the EU. It is worth noting that only

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] *Ibidem*, 2000

[3] *Ibidem*, 2000

in the first year of the EU Charter, the EU Court cited its rules more than 30 times, and in November 2010 for the first time applied the EU Charter as a legal basis for repealing a number of EU regulations due to their contradiction with the EU Charter [10]. Taking into account the system of sources of EU law, in particular the division of such sources according to the degree of their fundamentality into primary and secondary [11] already established in the scientific literature, it can be argued that for the EU Court – a body which consistently enforces the principle of priority of EU law on the national legal systems of the Member States of this formation – after the entry into force of the Treaty of Lisbon[1] in the field of priority, the EU Charter, and not the ECHR, has become of paramount importance, despite the latter is recognised by the EU as one of the general principles of its legal system which (principles) are also sources of EU law.

However, the European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system in this international formation; on the other hand, subject to the obligation of EU accession to the ECHR, The ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system.

In such a situation, it is necessary to find out how the legal practice of the EU institutions, first of all, the ECJ, is moving. Because the answer to the question of finding effective ways to optimise the approximation of Ukrainian legislation to EU law will depend on the answer to the question of what trends in the legal protection of human rights prevail in the EU. Today, if the EU Court of Justice is of crucial importance to the norms of the EU Charter, and the EU Court of Justice implements even those EU Charter norms that implies the same human rights as the rights enshrined in the ECHR, there is a need for a fundamental adaptation of the human rights law of Ukraine to the standards of rights of EU person. However, despite formally binding character of EU Charter norms, the ECHR and the practice of its application by the retain high legal status in the case law of the EU Court of Justice – the priority given to Ukraine is the obligations arising from the ratification of the ECHR and the recognition of ECHR decisions as obligatory. The author will examine in more detail the human rights trends that are currently being pursued in EU law, notably the case law of the EU Court of Justice.

[1] Lisbon Treaty. (2009). Retrieved from http://radaprogram.org/infocenter/lisabonskyy-dogovir-dogovir-pro-reformuvannya-yevropeyskogo-soyuzu

2.4 Trends in the application of the EU Charter and the ECHR in the case law of the Court of Justice

The well-known American researcher on international human rights law, a Fellow at the Harvard University Grainne de Burka calculated the use of the EU Charter[1] by the EU Court of Justice from its solemn declaration in 2000 until 2009, when this act was made legally binding. According to the study, the EU Court of Justice referred to the EU Charter 59 times during the 9-year period. Moreover, the vast majority of such references were used as additional arguments. It should also be emphasised that during the analysed period, the EU Court of Justice applied the EU Charter provisions very systematically – mentioning the provisions of the EU Charter in some cases, and "forgetting" about them in similar cases. At the same time, according to similar calculations by the same researcher, during the 1998-2005 period, the ECtHR applied the ECHR provisions in its 81 decisions, indicating that the EU Court of Human Rights had made more frequent use of the provisions of this international human rights act before the EU Charter gained binding status [12].

According to estimates by another well-known British human rights researcher, Laurent Schek, during 1998-2005, the Court of Justice relied 7.5 times more frequently on ECHR provisions than on all other human rights instruments, including the EU Charter. The researcher also notes that the ECHR's provisions also prevailed in the activities of the Advocates General in the same period, and decreased sharply after the entry into force of the Lisbon Treaty [13]. Therefore, it can be concluded that for a long time the ECHR and the ECtHR's practice have been used by the Court of Justice as an important source of standards in the field of human rights and freedoms, even though the EU was not (and is not) a party to the ECHR, and therefore did not obliged to comply with its provisions. Adoption of the Lisbon Treaty[2] has made the EU Charter binding, giving it equal status with the founding Treaties of the EU.

According to the calculations of Grainne De Burke from the moment of the adoption of the Treaty of Lisbon until the end of 2012, the EU Court of Justice referred to the EU Charter 122 times, with 27 decisions giving a rather detailed analysis of the applicability of the EU Charter, and the remaining 95 decisions only mentioning this document. 10 of the 27 judgments where the ECJ applied the EU Charter also referred to ECHR provisions and ECtHR practices that were consistent with the interpretation and application of the EU Charter in specific cases. In the other 95 judgments where the EU Court of Justice has confined itself to formally mentioning the EU Charter, the ECHR has been referred to in a similar manner, generally only 10 times [12]. In other words, during the period 2009-2012 in 122 cases where the EU Charter was applied,

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] Lisbon treaty. (2009). Retrieved from http://radaprogram.org/infocenter/lisabonskyy-dogovir-dogovir-pro-reformuvannya-yevropeyskogo-soyuzu

the ECJ has referred to the ECHR only 18 times. Of these, in 10 cases, the ECJ analysed relevant ECtHR practices and analysed the feasibility of applying ECHR provisions and their substantive alignment with the relevant EU Charter provisions. Instead, in the other 8 cases, the EU Court of Justice limited itself to a formal citation of ECHR provisions, not comparing its content with that of the EU Charter.

The data, according to the author, however indicate that since the EU Charter has become binding, the frequency of ECtHR references to ECHR provisions and ECtHR practices has decreased, but instead the number of references to the EU Charter has increased. Moreover, as the figures above show, the EU Court of Justice today quite often interprets and applies the provisions of the EU Charter in isolation, refusing to interpret it through the lens of the ECHR, despite the fact that a considerable number of the rights enshrined in the EU Charter (their content and scope) have in fact been "transferred" from the text of the ECHR to the text of the EU Charter. In comparison to the ECHR, the EU Charter enshrines a much larger list of rights and freedoms, such as the right to the integrity of an individual (Article 3 of the Charter), freedom of creativity and science (Article 13 of the Charter), the right to asylum (Article 18 of the Charter), and a set of unique rights vested in EU citizens (Articles 39 – 46 of the Charter). In general, approving the importance of this document in the EU legal order, the question arises: can the process of constitutionalisation of human rights in the EU be considered as completed, and therefore the problems that have arisen at different stages of European integration have finally been properly addressed? In answering this question, in author's opinion, attention should be drawn to certain practical problems in applying the Charter to protect fundamental human rights.

First, EU Charter norms are binding only on the EU institutions in the exercise of their powers (in particular when adopting the relevant legal acts), and on the EU Member States when implementing Union law provisions. Whereas individuals as subjects of EU law enforcement have limited procedural capacity to challenge acts of EU institutions for violations of the most recent rights and freedoms enshrined in the EU Charter. According to Art. 263 of the Treaty on the Functioning of the EU, private individuals have the right to appeal against an act of an EU institution which is not addressed to them personally (and the vast majority of those acts are of that nature) only if such act gives rise to direct legal consequences for them and affects them personally [14]. These principles (*personal and direct nature of the act*) have been elaborated in detail in the case law of the Court of Justice, and, as the scientific literature indicates, the complexity of adhering to these criteria in practice makes it impossible for individuals to directly challenge acts of EU institutions based on the provisions of the EU Charter [15].

Therefore, it can be concluded that in order to make full use of the opportunities arising from the EU Charter, a fundamental liberalisation of the procedural legal status of private entities is necessary, which will directly enable them to challenge acts of the EU institutions for violation of fundamental rights and freedoms [16; 17].

Second, notwithstanding the fact that the Charter is an evolutionary treaty, both in terms of the nomenclature of human rights guaranteed by it and of their technical and legal formulation and structuring in different parts of this document, the unduly excessive abstractness of certain provisions is evident. On the one hand, the Charter relates to the evolution of constitutional law in Europe as a whole, and, on the other, to how European law itself has evolved. In particular, the Charter enshrines the fundamental rights identified on the basis of precedents, recognised by the EU Court of Justice as the unwritten general principles of law of this international entity. It should be noted that a number of provisions of this act are relatively defined, moreover, purely declarative in nature, which unreasonably broadens the scope of the institutions of the EU institutions in determining their directions of practical implementation of the provisions of the EU Charter.

For example, justified criticism is the wording of Art. 37 and 38 of the EU Charter. Thus, Art. 37 states that "European Union policies should include an increased level of environmental protection and ensure that its quality is improved in accordance with the principle of sustainable development". On the one hand, it is important that this article provides not only the preservation of the environment, but the high level of its protection and improvement of the quality of the environment in accordance with the growing scientific and technological and financial capacities of the EU countries; on the other hand, the provision does not withstand any criticism in the light of the principle of legal certainty, in particular as regards the specific possibilities of human behaviour that would follow from the wording of this article. The lack of clearly articulated environmental human rights (such as the right to a safe environment, the right to reliable environmental information, the right to participate in environmental decision-making) is clearly a disadvantage of the Charter[1]. Similarly, the wording of Article 38 of the EU Charter, which also fails to verify the principle of legal certainty, deserves criticism.

Thirdly, the EU Charter (in particular Article 52 § 52) contains provisions under which the rights and freedoms enshrined in this document must, in the course of its application, have meaning and scope in accordance with the same rights and freedoms as enshrined in the ECHR[2]. This rule is intended to ensure that the principles of human rights protection enshrined in the ECHR and developed by the ECtHR will be properly and fully reflected in the case law of the Court of Justice.

2.5 Prospects for EU accession to ECHR

Since the provisions of the founding Treaties in the current version of the EU Treaty (Article 6) provide for the obligation of the EU to join the human rights protection system based on the ECHR, it seems that the above issues of inconsistency in the

[1] European Union Charter of Fundamental Rights. (2000). Retrieved from https://zakon.rada.gov.ua/laws/show/994_524

[2] The Amsterdam treaty. (1999, May). Retrieved from http://studies.in.ua/ru/istoriya-gosudarstva-i-prava-zar-h-stran-shpargalk/3776-amsterdamskiy-dogovr-yogo-zmst-znachennya.html

legal protection of human rights in the EU legal system could be more effectively solved after recognition of the ECtHR's binding jurisdiction. After all, the result of such a move would be to submit controversial issues to an independent, authoritative international arbitrator such as the ECtHR. In general, the idea of EU accession to the ECHR has been actively debated by politicians and lawyers since the late 1970s. However, as noted earlier, in its judgment of 2/94 of 28 March 1996, the Court of Justice stated that the European Community did not have the necessary powers to accede to the ECHR, and such a step required the amendment of the founding treaties. Following the promulgation of such a legal position by an EU court, for a long time (over 14 years), the process of EU accession to the ECHR did not take place until it became apparent that the accumulation of the case law of the Luxembourg Court in the field of human rights protection was based on the application of the EU Charter provisions (in particular those that fix the same human rights with the rights guaranteed by the ECHR) entails a gradual divergence of relevant human rights practices between the ECJ and the ECtHR. Consequently, negotiations on EU accession to the ECHR began in July 2010 and resulted in the development of a draft treaty.

Therefore, the author considers in more detail the legal rules that will mediate the EU accession process to the ECHR and that of particular relevance in the context of the study, will determine the limits of judicial review of the ECtHR by acts of the EU bodies after the signature of the relevant treaty (hereinafter referred to as the Accession Treaty).

Article 1 (b) of Protocol No. 8 to the Accession Treaty requires that such an agreement "provides for the mechanism necessary to ensure that complaints by non-member States and individual complaints of human rights violations are properly addressed against an EU Member State or the EU itself"[1]. At the same time, Art. 3 of this Protocol stipulates that "nothing in the Accession Treaty shall affect the application of Art. 344 of the Treaty on the Functioning of the EU (hereinafter referred to as the TFEU), and Art. 6 (2) of the EC Treaty states that "accession to the ECHR will not affect the powers of the Union as defined in the treaties" [18]. This article requires that "Member States undertake not to use any other means of dispute settlement concerning the interpretation and application of the Treaties than those specified in this Treaty." As explained by the EU Court of Justice in the MOX case, "this provision also applies to all disputes concerning secondary EU law" [19]. In other words, Art. 344 of the TFEU establishes a monopoly on the Court of Justice to resolve any dispute that arises between Member States and affects EU law.

What are the practical implications of the legal provisions that mediate the EU accession process to the ECHR? First, it is important that the prescriptions of Art. 344 of

[1] Draft legal instruments on the accession of the European Union to the European Convention on Human Rights. Retrieved from www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en/pdf

the TFEU actually serves as a legal basis for preventing the ECtHR from inviting one EU Member State against another Member State to violate its human rights as a result of the application of EU law. Therefore, the legal possibilities of recourse to the ECtHR for the protection of human rights in cases concerning the application by Member States of EU law are virtually nullified [19]. Second, a similar problem arises in the case of a hypothetical complaint of human rights violations guaranteed by the ECHR, an EU Member State against the EU itself, or the EU against its Member State. As the subject of such a complaint will be in one way or another the problem of interpretation and application of EU law, such categories of cases will also fall out the jurisdiction of the ECtHR.

What subjects will have the *real procedural capacity* to initiate the protection of human rights in cases arising from relationships initiated by acts of EU law? *Complaints of non-state actors*. With regard to individual complaints regarding human rights violations, they can be considered as effective means of protecting human rights from acts of the EU institutions and Member States, provided that such factors are taken into account. It is well known that the issue of human rights protection in the EU legal order has previously been the subject of consideration of the ECtHR in a number of cases, among which the case of *Boshorus v. Ireland* [20] and *Mss v. Belgium and Greece* [19]. In the first of these, the ECtHR formulated the principle of so-called "equivalent protection of human rights". In particular, when considering a complaint against an EU Member State that has fulfilled its responsibilities under one of the EU regulations, the ECtHR has stated, "The actions of a State taken to fulfil its legal responsibilities are justified as long as the organisation concerned is considered to protect fundamental human rights, both in terms of the material safeguards used and the mechanisms that ensure their observance in a way that can be considered at least equivalent to that afforded by the Convention" [20]. In several subsequent decisions, the ECtHR upheld and clarified its understanding of the principle of "equivalent protection of human rights", in particular with respect to the obligations under Art. 6 of ECHR (*Kokkelvisserіy v. The Netherlands*).

In the case of *Mss v. Belgium and Greece* The ECtHR considered the treatment of an Afghan national against Belgium under the Dublin II Regulation. The Belgian authorities took steps to expel the applicant to Greece, which, he said, should not have been expelled due to cases of inhuman and degrading treatment in Greece of asylum seekers. The ECtHR opposed Belgium because "EU regulations in this case give the state some autonomy in actions it has not use". The ECtHR, therefore, stated that "the approach developed in *Boshorus v. Ireland* cannot be applied" [21]. Therefore, if, at the stage of assessing the admissibility of an individual complaint of a human rights violation by an EU Member State in the context of fulfilling its obligations under EU law, the ECtHR concludes that the principle of "equivalent legal protection" should be raised

in the complaint, the issue of human rights protection remains in the domain of the EU Court of Justice. Will this approach contribute to the full protection of human rights? It seems that the answer to this question will not be difficult. With regard to individual complaints against the EU itself (despite the fact that such an opportunity to protect human rights is opened after the signing of the Accession Treaty), it seems that the number of such complaints, in view of the specific rule of law of the EU, in particular with regard to decision-making and the distribution of powers between EU Member States and its organs, will not be big.

The above analysis of the provisions of the EU Treaty of Accession draft, in author's opinion, allow the maximum consideration of the EU's interests in the area of maintaining the EU's unique (sui generis) legal order, the division of competences between its institutions and Member States, as well as any interference of "unwanted" entities in the EU legal system. Moreover, the Treaty of Accession draft, figuratively speaking, so far overlooks the weak issues of human rights protection by EU institutions and Member States that it seems like a document in the form of a protocol of intent rather than a treaty aimed at giving rise to specific legal consequences. In such a formulation, it would appear that the Treaty of Accession should have the force of res judicata in the near future and give the EU full legitimacy in discussing human rights issues with other countries. However, contrary to all expectations, on 18 December 2014, the Court of Justice adopted Opinion 2/13 on the incompatibility of the EU Treaty of Accession with the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the result that the EU accession to the ECHR is postponed indefinitely [22; 23].

A detailed analysis of the ECJ Opinion 2/13 of 18 December 2014 clearly requires separate scientific research. However, it should be noted that the main arguments on which the EU Court of Justice has based its negative decision are, paradoxically, the very problems that the document developers sought to exhaustively anticipate and regulate: 1) ensuring the rule of law of the EU; 2) the principle of good faith cooperation and autonomy of EU law; 3) the principle of the ECJ's monopoly on conflict resolution; 4) the problem of involving the EU or Member State as co-responders [22].

CONCLUSIONS

The implementation of the provisions of the Association Agreement with the EU requires Ukraine, among other things, to master the EU legal system, in particular the legal rules on guaranteeing fundamental rights and freedoms. The system of legal protection of human rights in EU law has come a long way in its formation and development: from the initial denial of the necessity to recognise such rights to the adoption of a separate international act – the EU Charter endowed with the legal force of the founding treaties of the EU. However, despite its considerable history

of formation and development, it is reasonable to conclude that there is no ground to call the EU's human rights protection system fully established system without necessity for further improvements.

The European legislator not confined to giving the EU Charter the force of the founding treaties, but also included in the Lisbon Treaty the obligation of the EU to accede to the ECHR, which in itself created a difficult situation of legal dualism of the current and perspective regulation of the status of human rights and freedoms standards in the EU. On the one hand, the norms of the EU Charter and the standards established by the Court of Justice of the European Union today have the highest legal force in the legal system of this international formation; on the other, under the obligation of EU accession to the ECHR, the ECHR, which has been applied in the relevant ECtHR practice, will have a knack for defining European human rights standards in the EU legal system. For Ukraine, the answer to the question what trends in the legal protection of human rights prevail in the EU will influence the solution of the problem of finding optimal legal instruments for approximation of the Ukrainian legislation to the EU law. Today, if the EU Court of Justice is of crucial importance to the norms of the EU Charter, and the EU Court of Justice implements even those EU Charter norms that implies the same human rights as the rights enshrined in the ECHR, there is a need for a fundamental adaptation of the human rights law of Ukraine to the standards of rights of EU person. However, despite formally binding character of EU Charter norms, the ECHR and the practice of its application by the retain high legal status in the case law of the EU Court of Justice – the priority given to Ukraine is the obligations arising from the ratification of the ECHR and the recognition of ECHR decisions as obligatory.

EU accession to the ECHR as foreseen in the Lisbon Treaty could end the process of establishing a dual system of human rights standards in the case law of the Court of Justice and the ECtHR, even eventually lead to the harmonisation of the EC and EU human rights standards, but a negative decision of the EU Court of Justice 2/13 of December 18, 2014, halted this process indefinitely. The EU accession process to the ECHR can be continued, as it seems to the author, after substantially refining the Treaty of Accession and amending the founding Treaties of the EU.

REFERENCES

[1] De Witte, B. (2019). The relative autonomy of the european union's fundamental rights regime. *Nordic Journal of International Law,* 88(1), 65-85.

[2] Dobrianskiy, S. (2006). *Actual Problems of the General Theory of Human Rights*. Lviv: "Astron".

[3] Case C- 26/62 Van Gend en Loos vs. Belastigen Administration. European Court Reports. (1963, February). Retrieved from http://curia.europa.eu/juris/liste.jsf?num=C-26/62

[4] Case C- 6/64 Costa vs.E. N. E. L. European Court Reports. (1964, July). Retrieved from http://curia.europa.eu/juris/liste.jsf?num=C-6/64

[5] Beiter, K. D., Karran, T., & Appiagyei-Atua, K. (2016). Academic freedom and its protection in the law of european states: Measuring an international human right. *European Journal of Comparative Law and Governance,* 3(3), 254-345.
[6] Novitsky, V. V. (2018). The guarantees of human rights and freedoms in the european union: The experience for Ukraine. *Journal of Advanced Research in Law and Economics,* 9(7), 2397-2402.
[7] Tabushka, S. (2013). The Single European Act was signed in February 1986 (enteres into force in Luly, 1987). Human Rights protection development within legal system of the European Union. *Law of Ukraine*, 3, 100-107.
[8] Guerra, L. L. (2017). The European court of human rights, the court of justice of the European Union and "le mouvement nécessaire des choses". *Teoria y Realidad Constitucional,* 39(1), 163-188.
[9] Voland, T., & Schiebel, B. (2017). Advisory opinions of the european court of human rights: Unbalancing the system of human rights protection in Europe? *Human Rights Law Review,* 17(1), 73-95.
[10] Joined cases C- 92/09 and C-93/09 Volker and Markus Schecke Gbr (C- 92/09) Harmut Eifert (C-93/09) v/ Land Hassen. Retrieved from http://curia.europa.eu/juris/document/
[11] Garnett, K., & Parsons, D. J. (2017). Multi-case review of the application of the precautionary principle in european union law and case law. *Risk Analysis,* 37(3), 502-516.
[12] Borgesius, F. J. Z., & Steenbruggen, W. (2019). The right to communications confidentiality in europe: Protecting privacy, freedom of expression, and trust. *Theoretical Inquiries in Law,* 20(1), 291-322.
[13] Scheeck, L. (2010). *Constitutional activism and fundamental rights in Europe: common interests through transnational socialization. Political Sociology of the European Union. Reassessing Constructivism.* Manchester: Manchester University.
[14] Espadafor, C. M. L. (2019). Extra-taxation and property right in the European Union law. *Age of Human Rights Journal,* 12, 84-104.
[15] Shpakovych, O. N. (2018). International and european law in the constitutions of european union's member states. *Astra Salvensis,* 6, 409-422.
[16] Karska, E., & Karski, K. (2019). Judicial dialogue in human rights: Introductory remarks. *International Community Law Review,* 21(5), 391-399.
[17] Komarova, T. (2017). The court of justice of the european union and international legal order. *Russian Law Journal,* 5(3), 140-167.
[18] Solomakha, A. G. (2018). Current status and prospects of implementation of european public administration principles in Ukraine. *European Research Studies Journal,* 21, 453-459.
[19] Gaja, G. *Acession to the ECHR*. EU Law after the Lisbon Treaty (2012). Oxford: Oxford University Press.
[20] ECHR Reports 2005 – VI 107, 152 (para 137). Retrieved from https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf
[21] Case of Mss v. Belgium and Greece, Appl. №30696/09, Judgement of 21 January. Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103050%22]}
[22] Latino, A. (2017). *The principle of non-refoulement between international law and European union law*. *Leiden Studies on the Frontiers of International Law*, 3, 2017, 131-151.
[23] Patel, C. (2018). Human rights in the international system. *IPPR Progressive Review*, 25(1), 7-15.

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