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THE *BOSPHORUS AND OTHER PRINCIPLES* – A EUROPEAN BRIDGE TOWARDS PROTECTION OF THE FUNDAMENTAL RIGHTS IN THE CJEU AND IN THE ECTHR?

-abstract-

When in 2005 the ECtHR ruled on the case of *Bosphorus Airways Tourism and Commerce Anonymous v. Ireland*[1], no one even assumed that the *Bosphorus* will become a major guiding principle in the process of protection of the fundamental rights in the ECtHR and in the CJEU. Just a decade later, the Grand Chamber of the ECtHR, in its decision on the case *Avotiņš v. Latvia*[2], gave for the first time a detailed assessment for the Bosphorus principle as a rule for regulating the relations between the EU law and the ECHR, i.e. between the Luxemburg and the Strasbourg Courts, in the presence of a negative Opinion 2/13[3] adopted by the CJEU, which rejected the draft ECHR accession treaty.

This decision also contains the ECtHR's first views on the EU law and the *principle of mutual trust*, a principle which has been particularly respected by the CJEU in recent years.

Many believed that the ECtHR will modify the Bosphorus principle following the negative opinion of the CJEU. Although this did not happen, analysts warn that the main victims of this opinion will be the citizens whose rights will be violated by the EU acts. The responsibility for this situation will not fall on the Court in Luxembourg, but on the Court in Strasbourg, which will have to do everything it can when protect the rights of the citizens from the negative effects of this opinion.

In the ECtHR decision concerning the case of *Avotiņš v. Latvia*, we can clearly see that the Bosphorus principle is not dead. It is still alive and very dynamic. In the opinion of the Strasbourg Court, any action taken by a State must comply with the legal obligations of the State, and it will be deemed justified only if it seeks to protect the fundamental rights, such as the guarantees offered, as well as with regard to the mechanisms for controlling their protection, in a way that can be considered equivalent to that of the Convention.

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[1] See: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69564%22]}

[2] See: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163114%22]}

[3] See: https://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247

This equivalence does not have to be final and could be considered in the context of the protection of fundamental rights. If this equivalent protection is provided by the states, then the assumption would be that the state does not deny the requirements contained in the Convention when implementing the legal obligations arising from its membership in the EU or in the Council of Europe.
Except for the Bosphorus, this paper also analyses other important principles relevant to the procedure for the protection of fundamental rights. The goal of this paper is to determine the necessity of adequate application of the legal principles in the procedure for the protection of fundamental rights, at both the national and the European levels.

Key words: fundamental rights, Charter, protection, CJEU, ECtHR, ECHR, doctrine, principles

I. PROTECTION OF THE FUNDAMENTAL RIGHTS AND THE BOSPHORUS PRINCIPLE

Protection of human rights in Europe is taking place at several levels that compose the complexity of the system, defined through the three-dimensional network for the protection of fundamental rights. The framework of the European legal systems involves the national and the two regional legal systems, the EU legal system and the Council of Europe's system also known as "the system of the Convention".
At least so far, there is no clear ultimate institution having binding power to decide on the priority of one system over the other: each system resolves potential conflicts with the other system through acknowledging the autonomy and priority of its system[4] and searching of principles that are based on mutual cooperation.[5]
We ought to mention that the EU system and the "Convention system" are directly connected with the national legal systems of the EU member countries. The EU is not part of the Convention, however, all its member states are its signatories.
The common constitutional traditions of the EU member countries also create the foundation of fundamental rights as a common principle in EU law. The relations among the three legal principles are viewed through the prism of the different legal principles. Also, the relationship among the legal systems of the EU member states and the EU legal system is explained by the EU Court of Justice in its Opinion 2/13, which specifies that the constitutional structure of the EU has characteristics that refer exclusively to the institutional foundations of the EU, and to the nature of the EU law, i.e. the principle of shared responsibilities, the principle of supremacy of the EU law and the principle of direct effect, the principle of mutual trust among the member countries, and the principle of honest cooperation.
These principles create a network of rules and mutually connected legal relations among the member states on one and the EU on the other hand.[6] The Bosphorus case created the principle which was first applied in 2005 by the Strasbourg Court in the context of assessing whether an EU member country has acted in accordance with the ECHR or not when it adopted a certain

[4] See: Eeckhout, P., 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 Current Legal Problems 169, p. 173.
[5] See: Huomo-Kettunen, M., Heterarchical Constitutional Structures in the European Legal Space, European Journal of Legal Studies, Volume 6, Issue 1 (Spring/Summer 2013), p. 47-65.
[6] See: Craig, P., "EU Accession to the ECHR: Competence, Procedure and Substance", Fordham International Law Journal, Vol. 36, No 1115, 2013.

legal act in which the EU law is applied. The Bosphorus principle is also known as the "equivalent protection doctrine", according to which there is no instant recognition and application of verdicts made by another EU member state, under the justification that this could violate the fundamental rights protected with the ECHR.

An important clarification for the Bosphorus principle is contained in another case, the *Matthews v United Kingdom.*[7] In fact, the **Matthews case was the first case in which the Court held that an EU Member State was in breach of the Convention brought about by EU law.** The violation was rooted in the EC Act on Direct Elections of 1976, a treaty concluded by all the EU Member States at the time. The Court in *Matthews* expressly stated that the Convention does not exclude the transfer of competencies to international organizations provided that Convention rights continue to be „secured". Member States' responsibility, therefore, continues even after such a transfer.

Unlike the *Matthews case***, the Bosphorus case does not specify only violation of the primary, but also of the secondary EU legislation. The main difference with regard to the protection of human rights is that the acts of the secondary legislation** can be challenged before the European Court of Justice.

"While Matthews established that the Member States of the EU remain generally accountable for human rights violations caused by the EU law, **the Bosphorus decision was seen as an attempt to accommodate the autonomy of the EU legal order within the premise set out in Matthews.** Furthermore, it was submitted that the judgment had to be viewed in the specific context of an EU accession to the Convention and of the potentially overlapping jurisdiction between the ECtHR and the CJEU".[8]

According to the Bosphorus principle, when the state is implementing the obligations deriving from the membership in an international organisation (in this case, the EU), it is assumed that it is led in accordance with the Convention, thus securing the protection of the human rights and freedoms in accordance with its provisions.

Despite the negative opinion of the EU Court of Justice regarding the draft treaty for the EU's joining the ECHR, the principle of primacy of the EU law obliges the Union to join the Convention.[9]

What remains unclear is whether the EU's joining the Convention will alter the position of the Strasbourg Court regarding the protection of the fundamental rights in the EU and the further application of the Bosphorus principle.

The Bosphorus case is crucial in shaping the relations between the protection of the fundamental rights by the Strasbourg Court and the Luxembourg Court. The Strasbourg Court considers that the EU legal order offers sufficient remedies in the event of violations of the ECHR, given that such an obligation arises from the membership of the EU member states in the Council of Europe and the fact that those countries are also signatories to the ECHR.

With the membership in the Council of Europe, part of the sovereignty of the countries is transferred to this international organization, which is justified by the fact that this organization should protect the fundamental rights, both from an aspect of provided guarantees and mechanisms for control and from an aspect of equivalence with what the Convention secures.

[7] See: https://www.lawteacher.net/cases/matthews-v-uk.php
[8] See: https://www.corteidh.or.cr/tablas/r26536.pdf
[9] See: https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.31/

In the context of the offered substantive guarantees and control mechanisms for the respect of the fundamental rights, equivalence is more of a synonym for comparison than for equalization.
However, this is a principle that is not final and may be subject to evaluation in light of some new developmental changes in the system of protection of fundamental rights.
This principle protects the EU from constant scrutiny, as the level of protection offered is considered equivalent to the extent to which the Union does not violate its obligations under the Convention and achieves its obligations deriving from the membership of the national legal systems in the Council of Europe.[10]
The EU can be considered a factual and potential factor for human rights violations through its legal acts, but also through the executive actions, it takes. That is why the Luxembourg Court has developed an internal control mechanism based on the constitutional traditions of the Member States and the permanent international instruments, in particular the ECHR.
However, what is evident is that the EU does not have sufficient external control mechanisms. The Court of Justice of the EU, in its opinion of 2/13 clearly states that the mechanism of mutual trust can be applied automatically and mechanically in each specific case if there is a need to resolve specific disputes in the field of human rights protection.
The Strasbourg Court is also on this line.
Namely, this court also considers that it must be confirmed when the protection of fundamental rights is "manifestly insufficient" and when action must be taken to protect the violated rights within the European system through the principles stated in the Bosphorus case.

II. OTHER LEGAL PRINCIPLES IN THE EU LAW

Legal principles have an important role in the EU legal system. They are an integral element not only of EU law but also of the international public law, the contemporary legal systems, as well as of the legal systems of the EU member states. The legal principles derive from the nature of the EU, its economic system set out in the Treaties and the purposes for which the EU institutions were established. Such a legal principle, for example, is the principle of non-discrimination on the basis of nationality (as defined in Article 18 of the EU Treaty), which is broadened in the general prohibition of discrimination on any grounds (religious, gender, sexual, national, etc.)
The family of legal principles also includes the principle of freedom, the principle of equality, the principle of free movement of people, goods, capital and services, the principle of solidarity between the member states of the Union etc.

[10] „Presumption of equivalent protection (Bosphorus presumption) - the application of the presumption of equivalent protection in the legal system of the European Union was subject to two conditions: 1) the absence of any margin of manoeuvre on the part of the domestic authorities, 2) the deployment of the full potential of the supervisory mechanism provided for by European Union law. With regard to the first condition - the Senate of the Supreme Court of Latvia acted within the limits contained in a Regulation (Brussels I), which was directly applicable in the Member States; the refusal of recognition or enforcement of a foreign judgment was very limited. The interpretation given by the EU Court of Justice - this provision did not confer any discretion on the court from which the declaration of enforceability was sought. The Strasbourg Court - the Senate of the Latvian Supreme Court had not enjoyed any margin of manoeuvre in this case“.
https://www.ejtn.eu/PageFiles/19790/Interaction%20between%20ECHR%20and%20EU%20law%20Training%20of%20Judges%202021%2003%20FINAL%20-%20JOCIENE.pdf

The group of legal principles belonging to international public law, which the EU Court of Justice considers relevant source of EU law, includes the principle of "pacta sunt servanda", the principle of territorial integrity, the principle of guaranteed fundamental freedoms and rights of the citizens, the principle according to which no state has the right to expel its own citizen, nor to deny him access and residence on its own territory, etc. These principles are regarded by the Luxembourg Court as a source of EU law if they are considered compatible with the legal nature and institutional structure of the Union.[11]

Legal principles accepted in the modern legal systems include the principle of non-discrimination, the principle of legality, the principle of equality, the principle of disposition of the parties, the principle of legal certainty, the right to appeal against first instance judgments, procedural guarantees in the court proceedings, while the legal principles common for the legal systems of the EU member states are explicitly stated in Article 340 of the TFEU.

III. DIFFERENT CONCEPTS IN THE PROTECTION OF THE FUNDAMENTAL RIGHTS IN THE EU

Further development of the protection of the fundamental rights within the EU legal system is a real challenge for the national courts of the member states. They refer to the cases of the EU Court of Justice on issues that essentially mean respect for the constitutional rights and freedoms of the citizens of their countries. The case-law of the Union, which in fact identifies the sources of protection of the fundamental rights, is codified in *Nold II.*[12]

The primary sources, as general principles of the European law, include "the international agreements for the protection of the human rights which are respected by the member states, or which are signed or ratified by their institutions".[13]

"The common constitutional traditions and human rights treaties signed by the member states of the Union are originally defined as 'sources of inspiration' and as 'guidelines' in the field of human rights protection. In some previous cases of the Luxembourg Court, "the inspirational language" was not visible [14], to be later returned to its practice.

For the national courts, as well as for the authorities of the EU member states, the legal sources for the fundamental rights are not exactly the same. The national courts are legally bound to comply with acts and charters of the rights as they are contained in the national constitutions. In addition, the member states of the Union are obliged to comply with all ratified treaties (conventions) for human rights protection, even though their application largely depends on the

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[11] See: Schermers, Henry & Waelbroeck, Denis F., "Judicial Protection in the EU", Sixth Edition, The Hague-London-New York, 2011, (p. 133). Also, for more details: Tridimas Takis, "The General Principles of EU Law", Second Edition, Oxford, 2007.

Otherwise, the specificity of the classical principles of international public law requires their selective application in the EU. Thus, for example, the classical principle of public international law that a Member State infringes the provisions of a treaty authorizing its other signatories to renounce its application does not apply in EU law. The same applies to the principle that EU member states cannot mutually administer justice contrary to EU law by invoking the Vienna Convention on the Law of Treaties, or by applying the internationally recognized law of reciprocity. See more in: Vlado Kambovski, Tanja Karakamisheva-Jovanovska, Veronika Efremova, European Union Law-from Paris to Lisbon, Vincent Graphics, Skopje, 2012, p.253-255.

[12] See : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0004

[13] See : ECJ 14 May 1974, Case 4-73, J.Nold, Kohlen und Baustoffgroβhandlung v Commission of the European Communities, ECR 1974, 491, paragraph 13.

[14] See : ECJ, C-260/89, ERT, ECR 1991, I-2925, para.44; ECJ, C-368/95, 26 June 1997, Vereinigte Familliapress Zeitungsverlags und Vetriebs GmbH, para.24-25.

status of the document within the national constitution. It is interesting to note that each member state determines differently the protection of the rights and freedoms of its citizens at the national level.

In this respect, we can name several examples for a lower level of protection of these rights at the national level compared to the protection provided by the EU law. For example, the right to life, protection from torture and slavery in Denmark; the right to family life in Poland; in the Republic of Ireland, the scope of the right to family life is more restrictive compared to the protection provided in Article 8 of the ECHR; in the constitutions of Malta and the Netherlands the right to marriage is not protected; the right to industrial action-the Slovak constitutional law is more strict on the application of these laws than, it is, for an example, the EU Fundamental Rights Charter; The social and economic rights listed in the Charter and in various international instruments are not guaranteed nationally in the same way in many countries, including the Republic of Ireland; the status of the ECHR is different in Hungary (the quasi-dualistic system is seen as an obstacle to ensuring adequate protection of the rights and freedoms set out in the ECHR. This system is considered to limit the courts from using consistent interpretation techniques; some authors read the new Article Q as giving primacy to international law over national law, although this was never confirmed in practice); lack of protection remedies – the courts in the Netherlands can not assess the constitutionality of the acts passed in Parliament; The Republic of Croatia and Malta lack proportionality, the concept of indirect discrimination is unknown in their national legislation.

We can also name examples of rights that are more protected in the national systems than they are in the EU legal system.

For example, the Republic of Ireland provides higher degree of protection of the right to life to an unborn child than is provided at EU level; in the Netherlands and Germany there is an absolute ban on pre-censorship in the expression of opinion; The Netherlands provides higher degree of protection of the right to education and educationally-financially equal treatment of citizens unlike the EU; in Belgium, in the Czech Republic, Hungary and other countries, the national systems provide higher degree of protection of the rights of ethnic, linguistic and cultural minorities compared to the EU standards; the Republic of Slovenia defines in more details the protection of the procedural rights compared to, for example, the Charter and the ECHR; at national level, Luxembourg provides greater protection of the natural rights of the individual and the family; In Slovakia, the Czech Republic, Poland, the Republic of Bulgaria and other countries, several social and economic rights are enjoy grater protection at national, than they do at EU level; in Spain the right to a trial in absentia is more strongly protected; in Portugal there is a stronger mechanism for protecting the right to good administration, etc.[15]

Some national concepts for the fundamental rights are treated as part of the national constitutional identity which is, in fact, part of the EU national identity under Article 4 (2) of the EU Treaty. With the entry into force of the Lisbon Treaty, the EU Court of Justice has declared itself competent in this area as well. In addition are examples of rights belonging to the constitutional identity of a given country: essential fundamental rights in general, and human dignity in particular (Germany, Estonia); language rights (Belgium); the essential elements of a democratic state according to the concept of the rule of law (Czech Republic, Estonia); linguistic and cultural rights, as well as the protection of the natural heritage (Slovenia, Hungary); the right

[15] See: Leonard F.M. Besselink, "The Protection of Fundamental Rights post-Lisabon-the Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions", http://www.fide2012.eu/index.php?doc-id=94.

to equal treatment of people in general, and the right to equal educational freedom (Netherlands).[16]
The fundamental rights protection is an essential part of the constitutional identities of the EU member states. Depending on the level of harmonization of the protection of the fundamental rights between the member states of the Union, the EU has an obligation to respect the constitutional identity of each member state., which is especially important in the case of characteristics which are not common to all the member states of the Union.
The ECJ verdict in the omega case[17] directly demonstrates that the EU truly protects and respects the values of each of its member states. This case concerns a measure restricting the freedom of services, based on the specific German concept of human dignity, and in accordance with the German Basic Law. The case concerns a ban on the production and distribution of laser games. The Court justified this measure as a measure of public authority that is in line with the concept of human dignity. Here we should note that respect for the elements of a member state's constitutional identity does not always mean concern for the fundamental rights. Sometimes it can mean their limitation. This is evident in the case *Ilonka Sayn-Wittgenstein*[18] where the republican identity of Austria was the reason for restricting the rights of free movement, i.e. the person who was a party in the case was not allowed to use her royal titles as she could in Germany.

IV. LEGAL PRINCIPLES VIS-À-VIS THE FUNDAMENTAL RIGHTS AND FREEDOMS IN THE EU

In reality, there is no single approach among the EU member states when it comes to the relationship between the legal principles, on the one hand, and the fundamental rights and freedoms, on the other. It is possible, however, to divide the constitutional orders of the member states of the Union into two basic types:
1. Countries that follow the continental tradition of having (mainly) a codified document, a constitution, such as the Republic of France, Germany and Italy, and
2. Countries belonging to the group of the Anglo-Saxon tradition, such as, for example, the United Kingdom, the Scandinavian countries and the Netherlands.
While in the first group, the role of (mainly one document-the Constitution) is very strong, in the second group of countries there is a great diversity and fragmented plurality of documents of constitutional importance, where a broad space is left for the constitutional practice, different conventions and unwritten rules and principles. In the United Kingdom, for example, several general legal principles carry the effect of ensuring the protection of human rights based on the case law, as a right developed outside Parliament. This principle is mentioned in several well-known examples as *ne bis in idem*, the right to good administration and the right to a court judgment (in England and Wales, but not in Scotland).
In the Netherlands, common legal principles are widely used in public, private, and criminal law. Some of them are of great importance in the field of the protection of fundamental rights and have equivalent status, in particular the principle of equality, which was first used as a general

[16] Ibid
[17] See: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62002CJ0036
[18] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0208

principle by the Supreme Court of the Netherlands in the case of *Hoge Raad*[19], before the Dutch Constitution was codified in 1983.

There is a generally accepted opinion in the case law and the legal literature that the fundamental rights are part of the general legal principles without drawing a clear line between the legal principles on the one hand, and the fundamental rights on the other. It should be emphasized that there is no clear indicator of where the first category ends, and where the second category begins. The common legal principles and fundamental rights often have the same characteristics. For example, although the legal principles and fundamental rights ought to be written and specified in the constitution because by definition, they fall under the constitutional matter, most often they are unwritten, wide in scope, and very inaccurate. On the other hand, the fundamental rights and the common legal principles serve similar purposes: to protect the private and public interests of individuals and legal entities against violations of public or private activities and actions.

In Denmark for example, the common legal principles, such as the principle of equality, the principle of proportionality and legality are accepted and often used in practice. However, they are not recognized as principles of constitutional rank. Here we should mention the example that has taken place in this country where the possibility for an application of an unwritten constitutional principle of equality or non-discrimination was rejected in a law passed by the Parliament, although the Supreme Court has not ruled on this issue.

In Finland, too, although the role of the constitutional practice in the legal order is vast, the common legal principles as formal sources of law do not have a significant place in the legal system. They are viewed only as legal principles and nothing more.

Still, nowadays, fundamental rights are increasingly seen as principles. In Germany, for example, the fundamental rights are considered as the basis of legal principles, and not as their product. The Continental European legal systems put the fundamental rights, which are largely codified, first, as the starting point in the legal system. The legal principles strengthen the fundamental rights, especially when it comes to the principles contained in the Constitution - such as the principles of the rule of law, the legal state, legal certainty, etc.

When it comes to EU law, the role of the general legal principles for protection of the fundamental rights is unique and cannot be viewed in parallel with the practice of any member state. It is not in synergy with any particular legal concept or doctrinal aspect of the legal sources, however, historically it is explained as a result of the absence of codification of the provisions of the classical human rights in the founding treaties of the Community. The moment they were codified, the fundamental rights became dominant over the general legal principles, regardless of the specific constitutional tradition of the EU member states. This is especially evident in the United Kingdom, where the acts of the British Parliament take precedence over the common law.

There is a general remark when it comes to the nature of the common legal principles. Namely, these principles are considered to lack clarity and precision given their rather general nature. This explains why in some EU member states "the common legal principles" are put under the laws, despite the dominant position that these principles have in terms of their application by the courts.

[19] See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61976CJ0042

However, one cannot ignore the fundamental nature of the "constitutional principles", which have an effect only if they are codified in the constitution. In this case, they have much more a character of a rule rather than a principle, both in the EU member states and in the EU itself. An example of a constitutional principle is Article 6 (3) before the Lisbon treaty, and now Article 2 of the Treaty, i.e. its role in the *Kadi I case.*[20]

V. THE LEGAL PRINCIPLES UNDER ARTICLE 6 (3) OF THE LISBON TREATY

The question on the functioning of Article 6 (3) of the Lisbon Treaty today, in a situation where the Charter of Fundamental Rights has become a mandatory document in the Union, is essential for the EU legal system. The answer to this question lies in the fact that Article 6 (3) is considered as a significant addition to the Charter and the ECHR, in the sense that the parties that have accepted the EU Agreement agree that not all aspects are covered by Article 6 (1) and (2), i.e. they agree that some other aspects can be put under the principles listed in article 6 (3). Namely, this article is of crucial importance for the promotion of the coherence between the EU constitutional order, on the one hand, and the member states of the Union, on the other. This is due to the fact that the provision serves as a gateway for the national constitutional rights that the authorities of the member states are obliged to respect under the EU law.

Article 6 (3) gives the EU the right to remain in touch with the development of the common constitutional traditions of the member states in the field of fundamental rights. Although in some ECHR signatory countries the Articles 6 and 13 of the Convention do not secure the direct right of access to a court regardless of the legal provisions in the national law, in most countries the tendency for such an independent right is visible. In the EU courts, this is considered a right to use a legal remedy. The First Instance court even considered this right as part of the international *ius cogens* во *Kadi I*[21].

Other examples of the evolution in this sense are the rights of the transgender people in some legal systems, the right to marry, as well as the importance of several private and other rights arising from the technical-technological development, such as in the fields of security, biotechnology and medicine. This is considered to be partially covered by Article 52, paragraphs 3 and 4 of the EU Charter.[22]

Article 6 (3) of the Treaty is considered to be able to play a very specific role in Poland and in the United Kingdom in the context of the application of the Protocol 30 of the Lisbon Treaty, and in regard to the application of the Charter in these countries. The same specific role is expected to occur with the application of this Protocol in the Czech Republic as well as in the Republic of Ireland, if, in accordance with the Constitution of the Republic of Ireland, a special Protocol is developed on the scope of the protection of the right to life, the protection of the family and the protection of the rights to education, in accordance with the Decision adopted by the Heads of State and Government on 19 June 2009.

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[20] Case C-402/05, C-415/05 P, para.303: „These provisions (on the primacy of international obligations undertaken in accordance with the UN Charter) can not be construed as authorizing the derogation of the principles of liberty, democracy and respect for human rights and fundamental freedoms outlined in Article 6 (1) of the EU Treaty as basis of the Union ".

[21] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402

[22] Given that the Charter recognizes fundamental rights as set out in the constitutional traditions of the Member States, these rights should be interpreted in accordance with these traditions.

If these protocols have the effect of limiting the scope of the Charter rights, it can be concluded that this restriction will not undermine the implementation of other equivalent fundamental rights as principles of the EU law under Article 6 (3).

VI. CONCLUSION

The legal principles are the source of EU law through which the fundamental rights are protected, in a form in which they are protected by the EU member states, (with the national and international treaties on the rights and freedoms) and thus are incorporated into the EU law.
Although the Luxembourg court is motivated to incorporate the autonomy of the EU legal order, which is threatened by the continuing calls for the rights protected by the EU member states,[23] it does not reduce the heteronomy of the sources incorporated in the EU legal principles.
The legal principles remain as part of Article 6(3) of the TFEU, not taking into account the binding nature of the EU Charter on Fundamental Rights. There is a division of the legal principles in the EU law which refer directly to the protection of the fundamental rights, some of which come from heteronomous, while others from autonomous sources of the EU law. This difference is a consequence of the incomplete codification of the description of the legal principles by the EU Court of Justice in the EU Treaty, from Maastricht until today.
When it comes to the fundamental rights, there is a more harmonious picture in all EU member states, given the fact that in all of them the European Convention for the Protection of the Human Rights and Freedoms, the EU Charter and the other international and European acts on human rights and freedoms are applied as a formal source of the law.
However, some differences are evident, which in some member states have remained latent, and in others, they are specifically manifested. The differences that can lead to potential conflicts are usually resolved through the use of interpreting techniques with harmonizing effects.
In the second group of cases, the absence of national rights is covered by international or European documents for the protection of the fundamental rights, by supplementing the national set of rights, if or when the courts are competent to apply these rights.
Given the fact that all EU member states have incorporated the ECHR, this is becoming a trend in all of them, although in some countries there are reservations about the capacity of the courts to apply the provisions of the Convention in full, as is the case with the Republic of Ireland and the United Kingdom when it comes to the acts passed by the national parliament. This interference between the national and the international/European law does not always go smoothly and without controversy as a result of the tensions that exist between the individual rights on the one hand, and the public interest, on the other.
In several member states, European rights are seen as potentially interfering with the national political priorities. This criticism focuses on the case law of the European Court of Human Rights, which is seen as facing an 'identity crisis.

[23] See: ECJ, Case 11/70, 17 December 1970, Internationale Handelgesellschaft, para.3: „After all, respect for fundamental rights is an integral part of the general legal principles protected by the ECJ. The protection of these rights, which is inspired by constitutional traditions common to all Member States, must be ensured within the framework of the structure and objectives of the Community “.

Although the EU Court of Justice has many other judicial roles besides the protection of fundamental rights, the extension of this kind of criticism may eventually reach the case law of this Court as well.

The third group of cases is perhaps the most problematic. These are the cases where national, European or international fundamental rights conflict with the national jurisdiction, with one of these levels of protection of these rights. The question is which level of protection will dominate, given the existing "collision" for the same rights coming from different sources. Many of the potential differences are overcome by the so-called court techniques of "consistent interpretation" by which the standards of the national fundamental rights are interpreted in the light of the European and international standards on fundamental rights. This may be explicitly contained in the national constitution,[24] or it can be derived from the constitution.[25]

As for the international and European human rights treaties, the question for the constitutional status and the ranking of the treaties can be decisive for the national courts.

Some differences can be found between systems in which the ECHR is considered an integral part of the national law in the "monistic" tradition, and the systems that have a "dualistic" legal tradition. The latter applies the ECHR directly and prefers to "draw inspiration" from the case law of the Strasbourg Court. In some of the "monistic" systems, the ECHR is directly incorporated in the constitution and there all courts directly and actively apply the ECHR,[26] to the extent that they themselves consider they are diminishing the significance of the national constitutional provisions on human rights.[27]

In all three types of constitutional order, the courts are governed by the case-law of the ECtHR, due to which the national court decisions have the legitimacy of the Strasbourg case law. In some member states the courts are not able to apply the ECHR (and the ECtHR case law) entirely, or because of the status and the rank of the ECHR above the national law, or because of the division of powers that ensures restrictive legal remedies before the courts.

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[24] The example of Spain, Hungary and the United Kingdom

[25] The Italian Constitutional Court in its decisions no. 348 and 349 of 2007 considered that laws must be interpreted by lower national courts in accordance with the ECHR, as the European Court of Human Rights does, but in case of conflict, the case should be settled by the Constitutional Court, which must give preference to the ECHR in accordance with Article 117 (1) of the Italian Constitution. This is different from the EU law, which, in short, has been given direct effect under legitimacy (Article 11 of the Italian Constitution), limiting the sovereignty by creating a separate EU legal order, which is set outside the national framework where the competence of the Constitutional court is limited.

[26] See: The Constitution of Slovenia, article 15(5).

[27] The example of Holand.

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