Chapter 11

Some Issues of Federalism and Constitutionality – Experiences of the European Union and Serbia

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Abstract

This Chapter deals with different aspects of federalism observed in the European Union and in the Republic of Serbia. The latter has changed its statehood several times in the last century and was mainly included as a part of complex states and federations after the Second World War. The experience of Serbia and states which it was a part of is similar to that of the EU. Although the method of creation was not the same, the structure, some aspects of decision-making and others factors are very similar. Some experiences from these states can be used in the study of the European Union. Also, the issue of human rights has a significant role in the constitutional system of every country. Human rights are regulated in a similar manner in the EU and the Republic of Serbia, and with future membership on the horizon there will be a stronger interaction between the two legal systems. There is a possibility that the EU joins the European Convention on Human Rights which could improve human rights protection in this international organisation. Moreover, the questions of primacy of EU law and judicial review are at the core of constitutionalism. The special, sub-national character of the European Union includes the supremacy of EU law over that of member states, like in a federation and also in the federations in which Serbia was a part of. Also, a judicial review of its acts is possible before the Court of the EU, which has substantial jurisprudence in this field regarding the direct and indirect review of the European Union's acts. With these characteristics of its legal system, the European Union is moving toward a state but it is still one *sui generis* international organisation.

Keywords: federalism, constitutionality, European Union, human rights, judicial review.

Bojan Tubic (2025) 'Some Issues of Federalism and Constitutionality – Experiences of the European Union and Serbia'. In: András Zs. Varga – Lilla Berkes (eds.) *Federalism as the Future of the Diverse EU?,* pp. 381–418. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2025.azsvlbffde_11

1. Introduction

The internal structure and organisation of the European Union has been a topic in the legal doctrine since the creation of this organisation. Even in the period of the Communities, the issue of constitutionality has been discussed. This chapter will try to analyse some aspects of the constitutionality and federal structure of the European Union. The first part will be devoted to federalism alone, by comparing the experiences of Serbia and previously Yugoslavia with the EU system. The second chapter will deal with the issue of the supremacy of EU law, linked to the issue of judicial review of acts in the EU, before the Court of Justice of the EU. This chapter will also deal with the position of human rights in the "constitutional" system of the EU, as one of the most important parts of constitutionality, comparing it with human rights protection in Serbia. In the third part the judicial review in the European Union as a central element of constitutionality will be discussed.

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2. Federalism in the European Union and the Republic of Serbia

Federalism can be regarded as the framework of how a modern state can be organised. It refers to a set of institutional arrangements dividing power between a central government and regional governments. The term "federalism" has been used as a normative idea and as a certain category of political institutions.[1] Historically, the United States is mentioned as the first modern federation and in the mid-nineteenth century parliamentary federalism appeared in Switzerland and Canada. Nowadays, there are different types of federations, such as integrated federation or a pluralist federation, which they can be distinguished by their methods of decision-making, or by the powers granted to the federal government. Also, there is an important issue as to whether the federations are national or multi-national. Nevertheless, a common characteristic of all of them is that federalism is a system of government in which the same territory is controlled by two levels of government, or as a political system in which at least two territorial levels of government share a sovereign constitutional authority over their respective division and joint share of law-making powers.

Federalism in the European Union has been in the focus of debates and discussions, since Robert Schuman.[2] Since the entry into force of the Lisbon treaty, the issue of sovereignty and how it is affected by institutional changes has been shifted into focus. The experiences of states in which the Republic of Serbia was a part of in the 20th century could be significant for the further organisation of the EU.

1 Watts, 2008, p. 8.
2 Temelkovska-Anevska, 2020, p. 59.

2.1. Serbia and federalism

In the period after the First World War, Serbia became a part of The Kingdom of Serbs, Croats and Slovenes (from 1929 it changed its name and was officially called Kingdom of Yugoslavia). Since its beginning, the state had the problem of its internal organisation, due to its multinational composition.

The first constitution of this state was the Vidovdan Constitution,[3] establishing a unitary monarchy. It envisaged 33 new administrative provinces, all ruled from the centre. In 1929, king Alexander I abolished the Constitution and introduced a personal dictatorship. The name of the country was changed to the "Kingdom of Yugoslavia" and the internal division was changed to nine new districts ("*banovinas*"). The aim was to better decentralise the country. The new Constitution was brought into effect in 1931 and was called September Constitution or "Octroyed" Constitution.[4] In the period before the World War II, there were no federal elements in the internal organisation of the Yugoslav state.

During the Second World War, there was a change of political regime in Yugoslavia and communist forces, led by Tito created a new state on a federal basis. One of the goals of establishing a federal system in a state is the attempt to combine the unity of state power with the preservation of the rights of states. The reason of establishing the federative system in Yugoslavia was to solve the national question, bearing in mind it was a multinational state. Any other form of state organisation would have been a source of dissatisfaction and conflict.[5]

The first socialist state in this territory was the Federative Peoples' Republic of Yugoslavia established by the Constitution in 1946.[6] It changed its name to the Socialist Federal Republic of Yugoslavia, in the new Constitution from 1963[7] and eleven years later, in 1974, another Constitution was adopted.[8] It established a new federal organisation with six republics and two autonomous provinces in the territory of the Socialist Republic of Serbia.[9]

The Constitution lays down which rights and duties concerning the realisation of common interests shall be exercised by the Federation through federal agencies, and which by the republican and provincial assemblies through their delegations to the S. F. R.Y. Assembly and by direct decision-making.[10] The function of the Federation was, amongst other roles, to ensure the independence and territorial integrity of the Socialist Federal Republic of Yugoslavia, and protect its sovereignty in international relations, and regulate matters concerning the settlement of conflicts of law between

3 Ustav Kraljevine Srba Hrvata i Slovenaca, 1921.
4 Oktroisani ustav, 1931.
5 Nikolic, 2017, p. 186.
6 Ustav Federativne Narodne Republike Jugoslavije, 1946.
7 Ustav Socijalističke Federativne Republike Jugoslavije, 1963.
8 Constitution of the Socialist Federal Republic of Yugoslavia, 1974.
9 Ustav Socijalističke Federativne Republike Jugoslavije, 1974.
10 Ustav Socijalističke Federativne Republike Jugoslavije, Art. 244.

republican and/or provincial Autonomous Provinces (conflict rules), and jurisdictional disputes between republican and/or provincial agencies of different Republics.[11]

After the secession of some members of the Federation,[12] a new Yugoslavia was created, namely the Federal Republic of Yugoslavia, with its Constitution adopted on 27 April 1992. It was composed of the Republic of Serbia and the Republic of Montenegro.[13] These member republics were sovereign in matters which were not reserved to the jurisdiction of the Federation.[14] In Section II of the Constitution there various freedoms, rights and duties of man and the citizen were envisaged.[15]

In 2003 a new form of state was created, called Serbia and Montenegro, replacing the Federal Republic of Yugoslavia. It was established by the Constitutional Charter of the State Union of Serbia and Montenegro. It was not a federation but rather a *sui generis* form of state organisation. It was based on the equality of the two member states – the state of Serbia and the state of Montenegro. Serbia and Montenegro was a single entity in international law and member of international global and regional organisations that set the international personality as a requirement for membership. The member states could be members of international global and regional organisations which did not set an international personality as a requirement for membership.[16] Human rights were not a part of the Constitutional charter but they were prescribed in the Charter on Human and Minority Rights and Civil Freedoms which was declared to form an integral part of the Constitutional Charter.[17] The member states were obliged to regulate, ensure and protect human and minority rights and civil freedoms in their respective territories. However, Serbia and Montenegro had the competence to monitor the exercise of human and minority rights and civil freedoms, and to ensure their protection in the case when such protection had not been provided by the member states.[18]

Article 60 of the Constitutional charter required that a minimum of three years should pass after its ratification before one of the member states could declare independence. This actually happened after three years, when Montenegro voted to approve an independence referendum in 2006. In the same year a Constitution of the Republic of Serbia was adopted.[19] It has not been a federal state but it consists of two autonomous provinces – Vojvodina and Kosovo and Metohija.[20] Human rights are guaranteed in Section Two of the Constitution.[21]

11 Ustav Socijalističke Federativne Republike Jugoslavije, Art. 281.
12 See: Weller, 1992.
13 Constitution of The Federal Republic of Yugoslavia, 1992, Art. 2, para. 1.
14 Constitution of The Federal Republic of Yugoslavia, 1992, Art. 5, para. 2.
15 Constitution of The Federal Republic of Yugoslavia, 1992, Arts. 19–68.
16 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 14.
17 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 8.
18 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 9.
19 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', Nos. 98/2006 and 115/2021.
20 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', 2006, Art. 182.
21 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', 2006, Art. 18–81.

2.2. Federalism in the European Union

In the European Union, since its creation, there have been intense debates on the existing and future type of its organisation. Some authors define the EU 'as a system of multi-level governance, where sovereignty rights are shared and divided between supranational, national and subnational institutions'.[22] The European Communities in their founding treaties have not envisaged a federal structure. During their development and later the development of the European Union, they acquired more and more sovereign rights in certain policy areas, even in those that are traditionally connected with state's sovereignty, such as monetary politics. Some of the statesmen and founders of the idea of the European Union have shared a certain view about this organisation as a federal entity. However, at least four different European federalist doctrines could be defined, represented by one or more of the important figures in the creation of the EU, like: Jean Monnet, Robert Schuman, Konrad Adenauer, Paul-Henri Spaak, Altiero Spinelli and Alcide de Gasperi.[23] Also, there were proposals of a new type of federalism based on democratic, decentralised jurisdictions, which differs from the existing system in the EU.[24] Moreover, in the European Parliament, there is an organised group of federalists, which advocates a constitution for a federal Europe.[25]

There are some manifestations of the federalism in the European Union. Namely, the ECJ has established the supremacy of EU law and there is a "constitutional review" for the consistency of acts within Treaties, which is binding through the almost uniform acceptance of its decisions by the domestic courts. Furthermore, the powers of the European Parliament have been increasing over the years. The European Commission differs from the secretariats of other international organisations. It holds a power to propose acts in legislative procedures and strong responsibilities to implement EU regulations. Pro-European politicians and lawyers argue that the federalisation of the EU should be continued, because of the results achieved so far. However, the process was interrupted after the proposal of the Constitution for Europe was rejected by some member states, and also after Brexit. Euro-sceptics evaluate federalisation of the EU negatively and are opposed to the creation of a European state.[26] The period after Brexit was used for the consolidation of the Union itself. Moreover, COVID pandemic appeared and conflict between the Russian Federation and Ukraine has greatly influenced the EU. Although they could be considered separate issues they are strongly connected, especially in the field of the enlargement of the European Union.

The EU system could be compared with that of Germany, the USA and others, like Serbia, in the field of territorial organisation. For example in the USA the Supreme

22 Borzel, 2003, p. 1.
23 Reho, 2018.
24 Frey, 2009, p. 2.
25 Kaiser, 2024.
26 Moravcsik, 2001, p. 162.

Court contributes to the harmonisation of laws in federal units and also affects some significant social issues like human rights. Likewise, the European Court of Justice has the competences of a Supreme and Constitutional court combined and has a large influence on the legal order of the European Union, for example in the preliminary rulings procedures and also in cases brought before it by the actions for annulment. In that way, the Court affects the legal order of the European Union, in the same way as constitutional courts do in states.

The position of EU norms has become stronger with almost every change of founding treaties and with new judgments of the ECJ. Community law and now EU law obtained supremacy over national law and the ECJ also granted direct effect to these legal norms so individuals could invoke them in proceedings against states in cases of their violation.

At the beginning, there was a strong opposition to the authorities of the Communities and later of the European Union. National courts did not easily accept the supremacy of the EU law. For example, in the case *Internationale Handelsgesellschaft* (Solange I), there was a conflict between German constitutional law and EU law on agricultural exports policy. The applicants argued that EU standards on agricultural licensing system was a disproportionate violation of their right to conduct business under the German constitution. The German Constitutional Court insisted that the fundamental rights under German Basic Law reign supreme over European law. The German court made preliminary reference to the ECJ, which affirmed the primacy of EU law. It held that the validity of EU law cannot be challenged by national law and measures but it can be challenged if EU law has breached fundamental rights. In a concrete case, no fundamental rights have been engaged.[27] In the case of Solange II, the German Constitutional Court stated that the ECJ gave adequate and effective protection of fundamental rights of the individuals and it decided to follow European jurisprudence so long as such protection continued.[28]

In other European countries, the supremacy of EC law and of ECJ case law has been endorsed. For example, in France, it was confirmed in numerous cases, although there were some cases in which France refused to comply with decisions made by the ECJ. In one case, the Court stated that by continuing after 1 January 1978 to apply its restrictive national system to the import of mutton and lamb from the United Kingdom, France had failed to fulfil its obligations under Articles 12 and 30 of the EEC Treaty.[29]

Therefore, the primacy of EU law has been confirmed in the early jurisprudence of the Court but also in Declaration 17 to the TFEU,[30] notwithstanding the occasional exceptions of defiance to the rules of the EU.

27 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970.

28 *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339, Solange II (1984) Case 345/82, [1987] 3 CMLR 225.

29 Commission v France (Mutton and Lamb), Case 232/78, Judgment, 25 September 1979, para. 11.

30 Consolidated version of the Treaty on the Functioning of the European Union, Declaration concerning primacy, Official Journal of the European Union, C 115/2008.

However, the EU lacks some important elements of federalism that would give it the means of becoming a federal state. For example, EU Member States have the exclusive power to amend or change the constitutive treaties of the EU. It should be unanimous and states would need to ratify those changes. Secondly, the EU has no real tax capacity. Also, it lacks the essential element of democratic control. Namely, the executive branch of the EU, The European Commission, is not determined by the will of the European citizens, either directly or indirectly, via the European Parliament.

3. Human rights in the European Union

Human rights protection at international level was intensified after the Second World War. In 1948, the United Nations General Assembly adopted one of the most important acts in this field, the Universal Declaration on Human Rights.[31] After that, numerous human rights conventions have been concluded, such as the International Covenant on Civil and Political Rights,[32] the International Covenant on Economic, Social and Cultural Rights,[33] the Convention on the Elimination of all Forms of Racial Discrimination,[34] and many others. There were also regional initiatives for the protection of human rights, and regional conventions were adopted. The most important of them is the European Convention on Human Rights,[35] which has the most significant influence on the European Union. The American Convention on Human Rights,[36] the African Charter on Human and Peoples' Rights[37] and others were also adopted.

The European Union has been transforming itself into a political community within a defined territory and with its own citizens, which are granted some fundamental rights and freedoms by the founding Treaties and also confirmed in the jurisdiction of the ECJ. Human rights are one of the most important part of a constitutional system.

In Europe there are two systems of regional human rights protection. One is the system established by the Council of Europe with its European Court of Human Rights, established by the European Convention on Human Rights. The other is the

31 Universal Declaration on Human Rights, General Assembly resolution 217 A.
32 International Covenant on Civil and Political Rights, 1966, p. 171.
33 International Covenant on Economic, Social and Cultural Rights, 1966, p. 3.
34 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, p. 195.
35 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950.
36 American Convention on Human Rights, 'Pact of San Jose', 1969, p. 123.
37 African Charter on Human and Peoples' Rights, 1981, Vol. 1520, p. 217.

system established in the European Union, by the founding treaties and jurisprudence of the Court of Justice of the EU. The new addition to human rights protection was given with the adoption of the EU Charter on Human Rights in 2000.[38] There was a concern that the active role of the EU in this field could endanger the role of the Council of Europe regarding human rights in Europe.[39] However, in 2007, a Memorandum of Understanding between the EU and the Council of Europe was adopted to resolve this relationship between the two international organisations.[40] It is stated that the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe. This organisation and the European Union will take all necessary measures to promote their cooperation by exchanging views on their respective activities and by preparing and implementing common strategies and programmes.[41] They reaffirmed their commitment to establish close cooperation and strengthen their relations in areas such as: human rights and fundamental freedoms, rule of law, legal cooperation and addressing new challenges, democracy and good governance, democratic stability etc.[42] Moreover, both organisations agreed to respect the universality of human rights, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, and to preserve the cohesion of the human rights protection system in Europe. The relevant Council of Europe norms will be cited as a reference in European Union documents.[43] It is especially emphasised that EU law has to be coherent with the relevant conventions of the Council of Europe. However, the former can provide more extensive protection.[44]

In the founding Treaties which established European Communities, there were no provisions on human rights. However, the Court of Justice of the European Communities invoked the principle of the supremacy of Community law, which provided some guarantees for the protection of fundamental rights. Fundamental human rights have been recognised by the ECJ as one of the elements of the general principles of Community law. The first judgment in that sense was the one in the case of *Stauder*[45] in 1969. A decade after, the ECJ referred to the constitutional traditions of the Member States, as in the case of *Internationale Handelsgesellschaft* and to the international human rights conventions, like in the *Nold case*.[46] In the former, the Court upheld that respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice.[47]

38 Charter on Human Rights and Fundamental Freedoms, 2012/C.
39 De Schutter, 2008, p. 511.
40 Memorandum of understanding between the Council of Europe and the European Union.
41 Memorandum of understanding between the Council of Europe and the European Union, para. 11.
42 Memorandum of understanding between the Council of Europe and the European Union, para. 14.
43 Memorandum of understanding between the Council of Europe and the European Union, para. 17.
44 Memorandum of understanding between the Council of Europe and the European Union, para. 19.
45 *Erich Stauder v City of Ulm – Sozialamt*, Case 29/69, Judgment, 12 November 1969.
46 *Nold KG v Commission*, Case 4/73, Judgment, 14 May 1974.
47 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970.

However, in the following period the ECJ also often found that there was no violation of human rights by European institutions. The present situation is that human rights are now the constant subject of cases in before both Court of Justice and the General Court. In some cases the ECJ has considered EU legislation invalid because it violates human rights. For example, in the case *Digital Rights Ireland*, the Court declared an entire directive relating to the retention data invalid.[48] Also, there are cases in which the Courts have inflicted sanctions against individuals and undertakings, like in the case of *Kadi*, which will be analysed in greater detail later in the text.[49] In this way, the Courts have applied the EU Charter on Human Rights and now 10% of all cases of the ECJ relate to fundamental rights.[50]

3.1. European Convention on Human Rights in the EU System

The European Convention on Human Rights acquired a special status in the proceeding before the ECJ which began to cite not only the text of the Convention but also judgments of the European Court of Human Rights in Strasbourg. The ECJ does not directly apply the European Convention or any other international human rights instrument, like the Universal Declaration of Human Rights. They serve as guidelines. However, in article 6, paragraph 3 of the TEU it is stated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the EU law,[51] which are recognised as one of the elements of the primary law of the EU.

There is a terminological difference between two systems regarding human rights protection. The ECJ uses term "fundamental rights", from the Stauder case. However, the European Court of Human Rights (ECtHR) uses term "human rights". Despite this, relations between two courts are harmonious and not conflictual.

In the jurisprudence of the European Court of Human Rights, the question of its jurisdiction to control the acts of the European Union was raised. Formally speaking, this jurisdiction is not constitutional in nature. The European Court of Human Rights cannot annul an act, but it can examine whether it is in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms. It still has no jurisdiction over the European Union, but only over its Member States.

The Court of Justice of the EC developed its jurisprudence on fundamental human rights at an early stage. In accordance with the practice of the EC Court, basic human rights are applied as a general legal principle of the legal order of the Union, and the European Convention has a special importance in this area. This principle, which arose in jurisprudence, was later incorporated into the Maastricht Treaty. Article 6,

48 *Digital Rights Ireland v Minister for Communications and Others*, Joined Cases C-293/12 and C-594/12, Judgment, 8 April 2014.

49 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008.

50 Allan Rosas, p. 206.

51 TEU, Art. 6, para. 3.

paragraph 2 of the EU Treaty stated in its earlier version that the European Union will respect fundamental rights, as they are guaranteed by the European Convention on Human Rights and are derived from constitutional traditions, which are common to the member states as a general principle of Union law. The European Union was not formally bound by the Convention, but in practice the result was the same. The ECJ has regularly cited and followed the jurisprudence of the European Court of Human Rights.[52] Since it was not a party to the Convention, the European Union was not subject to the jurisdiction of the European Court of Human Rights. Therefore, the legality of the acts of the European Union before this Court could only be controlled indirectly. The question of whether proceedings can be conducted collectively against the Member States of the European Community at that time was raised in the case of *Senator Lines v. the Fifteen Member States of the EU*.[53] The German company filed an application against all Member States due to the penalties imposed on it by the EC Commission and claimed that the adoption of the Commission's act violated the presumption of innocence and the right to a fair trial. The European Court of Human Rights rejected the claim on another basis and did not decide whether it could examine the legality of the Commission's act.

In cases where the acts of the European Union have been applied in a Member State individually, the acts of that state may be opened to examination before the Court of Strasbourg. The case of *Bosphorus Airways*[54] can be taken as an example. In this case, the plane, owned by the Yugoslav National Airlines, was detained at the airport in Dublin by the Irish authorities, in accordance with the United Nations resolution that imposed sanctions on the Federal Republic of Yugoslavia. This resolution was implemented in the European Union through regulation 990/93. Bosphorus Airways, the Turkish company that leased and operated the plane, challenged its detention in the Irish courts. The High Court of Ireland overturned the ministry's decision to detain the aircraft based on the regulation, but following the minister's appeal, the Supreme Court of Ireland sent a request to the EC Court for the interpretation of the given regulation of the European Community. One of the arguments of Bosphorus Airways was that the detention of the plane was a violation of the basic human rights of the applicant, especially the right to peaceful enjoyment of property and the freedom to continue with economic activities. The ECJ did not accept these arguments and replied to the Supreme Court of Ireland that the specific regulation applied in this case.[55] In this way, the Court of EC actually rejected the request of Bosphorus Airways which, among other things, was based on the European Convention and Article 1, Protocol 1 to the Convention. Following this, Bosphorus

52 *Krombach v Bamberski*, Case C-7/98, Judgment, 28 March 2000, para. 39; *Secretary of State for the Home Department v Akrich*, Case C-109/01, Judgment, 23 September 2003, para. 60.

53 *Senator Lines GmbH v the Fifteen Member States of the EU*, Press Release, 16 October 2003.

54 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996.

55 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996, para. 27.

Airways filed an application with the European Court of Human Rights regarding the detention of the plane by the Irish authorities. The Court made a decision that there was no violation of Article 1 of Protocol 1, i.e. violation of the right to property.[56] This case showed that the decisions and other acts of the Member States, although from the field of European Union law, can be subjected to the jurisdiction of the European Court of Human Rights.[57]

3.2. Accession of the European Union to the European Convention on Human Rights

The human rights protection system established by the European Convention on Human Rights and Fundamental Freedoms[58] is part of the European legal order. Certain authors believe that rules from this Convention have become regional customary legal rules, and some of them may also be regional *jus cogens* norms.[59] This Convention is open to signature and ratification by member states of the Council of Europe. To date, the European Union has not become a member of this international organisation and has not even signed the European Convention, so it cannot be a party to the proceedings before the European Court of Human Rights. This judicial instance could certainly improve the rule of law in the European Union, if applications by individuals against the European Union itself could be considered before it. Protocol number 14 to the European Convention on Human Rights and Freedoms enables the European Union to become a member of the European Convention on Human Rights. In addition to the adoption of the mentioned Protocol, it was necessary for the EU to have subjectivity, in order to have the right to accede to the European Convention. On March 28, 1996, the EC Court emphasised in its opinion that the founding treaties of the European Union must be amended in order for the European Communities to become members of the European Convention.[60] With the Treaty of Lisbon, the European Union is expressly granted a unique legal subjectivity,[61] although there are opinions that it had subjectivity even before its entry into force.[62] Also, the Treaty of Lisbon itself foresees the accession of the Eu-

56 *Bosphorus v Ireland*, Application No. 45036/98, ECtHR, 30 June 2005.
57 Lavranos, 2005, p. 219.
58 European Convention for the Protection of Human Rights and Fundamental Freedoms.
59 De Wet, 2006, p. 617.
60 Opinion 2/94, Opinion of the Court of 28 March 1996, para. 35.
61 Consolidated versions of the Treaty on European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 47.
62 Etinski, 2002, pp. 133–135. Some authors considered that since the Council concludes international agreements on behalf of the EU, this implies its legal subjectivity; Dashwood, 1998, p. 214. Others, on the other hand, believed that the EU has limited legal capacity, because the special declaration adopted with the Treaty of Amsterdam emphasises that the conclusion of the agreement does not imply the transfer of competence and sovereignty from the member states to the EU. Langrish, 1998, p. 14; In practice, the international legal subjectivity of the European Community, that is, the European Union, was fully accepted.

ropean Union to the European Convention on Human Rights.[63] The issue of accession was elaborated upon in a separate Declaration, adopted with the final act of the intergovernmental conference that adopted the Treaty of Lisbon, in which it was emphasised that the accession to the Convention would be regulated in such a way as to preserve the specificity of European Union law,[64] as well as in the Protocol to the Treaty of Lisbon.[65]

Article 6 of the Treaty on European Union states in paragraph 1 that the Charter has the same legal force as the founding treaties and envisages in the paragraph 2 that the European Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. This latter point has been a consequence and a response to Opinion 2/94 in which the ECJ held that the accession to the ECHR required a Treaty amendment. Going back to paragraph 2 of Article 6, it is stated that the accession to the Convention shall not affect the Union's competences as defined in the Treaties. This article is supplemented by Protocol No. 8 annexed to the Treaties, which states that there must be a separate accession agreement and specifies that this agreement shall ensure that the accession shall not affect the competences of the Union or the powers of its institutions. The Protocol also requires that the agreement shall make provisions for preserving the specific characteristics of the EU and EU law.[66]

From the procedural perspective, the accession agreement needs to be approved unanimously by the European Council and it can enter into force after it has been approved by all Member States. Moreover, the Contracting Parties of the ECHR also needs to conclude the agreement.

The ECJ was asked to provide an opinion on the conformity with the EU legal order of a draft accession agreement which had been negotiated between the European Commission and the Member States of the Council of Europe. In its Opinion 2/13, from 2014, the ECJ ruled that the draft accession agreement was incompatible with the EU legal order in many respects.[67] Besides the technical problems, there were also political obstacles.

63 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 6(2).

64 Declaration on Art. 6(2) of the Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union; Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 6(2).

65 Protocol relating to Art. 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the protection of human rights and fundamental freedoms, Official Journal of the European Union, 2012/C 326/1.

66 Protocol (No 8) relating to Art. 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Official Journal of the European Union 2012/ C 326/1.

67 Case Opinion 2/13, Opinion of the Court of 18 December 2014.

3.3. Human rights in Serbia

Human rights have been prescribed in all Constitutions of states which Serbia was a part of as a federal unit or in other forms. There were differences regarding human rights between these states, especially in the period after the Second World War, because until the Constitution of 1992 Yugoslavia in all its forms was a socialist state. This caused the different character of some human rights to be assured, especially economic and social rights, with different and unique regulation of the right of property introducing the right of self-management.

The Constitution of Serbia, which is now in force, envisages human and minority rights and freedoms in Section Two.[68] It is stated:

> The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right.[69]

This part of the Constitution is composed of three chapters including: fundamental principles, human rights and freedoms and rights of persons belonging to national minorities. A significant number of constitutional norms regulating human rights are placed in other sections of the Constitution, like the protection of national minorities, gender equality, the freedom of entrepreneurship and the status of foreign nationals. In total, more than one third of the constitutional text deals with human rights issues.[70]

Human rights are guaranteed in accordance with all international standards due to the fact that Serbia is a state party to all relevant international human rights conventions. The ECHR has a special significance, which is widely implemented in the Serbian legal system. However, Serbia has a significant number of cases before the ECtHR regarding alleged violations of the Convention. For example, the Court dealt with 1925 applications concerning Serbia in 2023 and with 3124 applications in 2022.[71]

The constitution of the Republic of Serbia prescribes human rights rather extensively covering all relevant groups and categories of human rights. The same applies with the EU Charter. We can conclude that human rights standards in the EU and Serbia are very similar, and are guaranteed in the same manner.

68 Constitution of the Republic of Serbia, 2006, Arts. 18–81.
69 Constitution of the Republic of Serbia, 2006, Art. 18, para. 2.
70 Simović, Avramović and Zekavica, 2013, p. 411.
71 ECtHR, Press country profile – Serbia.

4. Judicial review in the European Union as one element of constitutionalism

Acts and decisions of international organisations, especially those adopted by their plenary bodies, are not subject to the right to appeal or control, and determining their legality is a significant difficulty. Most international organisations carry out some kind of coordination of the activities of states and their decisions are generally recommendations and not legally binding, so the absence of a judicial review of their acts was not of great importance. However, with the strengthening of the importance of international organisations and the need for the effective realisation of their goals and functions, through full cooperation of all member states, there is a need to establish some kind of control procedure. Certain international organisations make binding decisions that can affect the important interests of states and even of individuals. This is the nature of Security Council resolutions adopted on the basis of Chapter VII of the UN Charter. The European Union is not a classic international organisation, because at its essence is the transfer of some sovereign powers of the member states to the European Union, which makes decisions that are binding for the member states, as well as natural and legal persons. Therefore the control of its acts is of great importance. Today, there are no great opportunities for the realisation of the rule of law within international organisations, because few of them have judicial bodies, and where they exist, they do not have the jurisdiction for judicial review of the decisions of that organisation. However, this does not mean that a control system should not be introduced in organisations that make binding decisions for states and private entities. The rules of international organisations should in some cases be implemented in the legal systems of their member states. Usually, such rules are stated in conventions, which require special ratification by member states, while in some cases they are included in the binding rules of the organisation. Obligation by an international rule in this way does not provide a sufficient guarantee for a uniform interpretation, especially if such provisions are unclear. International judicial bodies can provide the final interpretation of the organisation's rules, in order to prevent different member states from applying similar provisions in a different way. However, the harmonisation of national legal systems through the rules of international organisations is still at an early stage.

The European Union has reached such a level that it has judicial bodies that guarantee a uniform interpretation of the rules it adopts. One of the ways to achieve a uniform application of the rules of international organisations is to establish a "supreme court" within the organisation that is competent enough to abolish and modify the decisions of national supreme courts in matters that are harmonised within the given organisation. The obstacle to this is the sovereignty of states, which find it difficult to accept the existence of an international court that would be above their highest judicial instances in the hierarchy. The EU Court does not have the authority to cancel and modify the decisions of national courts. A more acceptable

solution for states would perhaps be some form of opinion, which would be binding. That has been achieved in the preliminary rulings procedures.

Due to the specificity of the European Union and in the past of existing European Communities, judicial review is more developed in them than in classic international organisations. The sources of law of the European Union have primacy in relation to the national law of its member states. In order to preserve that primacy and avoid the constitutional examination of the law of the European Union before national courts, it was necessary to establish a mechanism of constitutional legal protection at the level of the European Union, together with an independent judicial body that had a mandatory jurisdiction and that could control the powers of specific institutions and the compliance of their activities with basic rights. Also, the decisions made by such a body must have sufficient democratic legitimacy. In the context of the Treaty on the Functioning of the EU, these conditions are met to a large extent, although not completely. The Court of the EU has the jurisdiction to examine the legality of acts of the European Union, in the light of their relationship with the higher law of this organisation. If a violation of that higher right is established, the result of the procedure will be the annulment of the contested act. The courts of the European Union and former European Communities had a significant jurisprudence regarding actions for the annulment of acts of the former Communities, and now the Union, from which it can be seen that this is an important issue, constantly arising in connection with various measures adopted within the European Union. In certain areas of European Union law, which directly concerns individuals, judicial review of acts plays a very important role in achieving the rule of law. Mechanisms of legal protections that are based on the mandatory jurisdiction of the EU Court create a complete system of legal protection within the European Union. Despite its shortcomings, the action for annulment is still the most effective means of control of the acts of the European Union. This control can also be performed through requests for preliminary rulings based on Article 267 of the Treaty on the Functioning of the EU. In this way, a significant, further form of protection of individuals provided for by the Treaty is ensured, although the national courts themselves do not have the jurisdiction to declare an act that has been passed by one of the institutions of the European Union invalid.

There is a position in legal theory that the European Court of Justice must interpret the provisions of the founding treaties so that the European Union can fulfil all the tasks entrusted to it by the States Parties. Compared to national constitutional courts, the ECJ is not limited by a narrow interpretation of the provisions of the founding Treaties. This interpretation of the role of the Court, which is all correct, contributes to the comprehensive protection of individuals, because the impact of the acts adopted by the institutions of the European Union is significant and exceptional. They directly affect the legal position of individuals and it must be possible to verify their legality.[72] This interpretation of the role of the Court, which is all correct, contributes to the comprehensive protection of individuals, because the impact of the acts adopted by the

72 Everling, 2000, p. 43.

institutions of the European Union is significant and exceptional. They directly affect the legal position of individuals and it must be possible to verify their legality.

The European Union is obliged to act in accordance with the principle of the rule of law in all areas. It has been confirmed already in the jurisprudence of the Court of Justice of the European Communities. For example, in the case of *Granaria v. Hofdproduktšap* from 1978, the Court mentioned the principle of the rule of law.[73] Later, in the case of *"The Green Party" v. Parliament*, the Court emphasised that the European Community is based on the rule of law and that no member state or institution can avoid a judicial review of its acts.[74] The same was confirmed in the case of *UPA v. Council*, where the Court held that the institutions of the European Community are subject to a judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.[75] Individuals are entitled to effective judicial protection of the rights that belong to them in the legal order of the European Union, and the right to such protection is one of the general legal principles arising from the common constitutional tradition of the member states

The control of the work of institutions can be done in two ways.[76] Firstly, it is necessary to ensure that the regulations passed by the institutions are legal, that is, that the specific institution is competent to pass a certain act, that the act was passed with the prescribed procedure, and that it is in accordance with the higher law. In this way, the activity of a certain authority is controlled through an action for annulment, which is now prescribed in Article 263 of the Treaty on the Functioning of the EU.

Another form of control of the legality of the acts of the European Union bodies is through the request for a preliminary ruling, which is provided for in Article 267 of the Treaty on the Functioning of the EU. The third form of monitoring the work of institutions is the control of their inactivity, meaning that it is necessary to ensure that institutions do not fail to pass acts when they have a legal obligation to do so. This form of protection is provided in Article 265 of the Treaty on the Functioning of the EU.

4.1. Direct control of the acts of the European Union

4.1.1. Actions for annulment

One of the competences of the Court of the EU is to examine the legality of acts passed by other bodies or institutions in the European Union system, in a procedure initiated by an action for the annulment of an act. This procedure is regulated by Article 263 of the Treaty on the Functioning of the EU. This control is very important

73 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten*, Case 101/78, Judgment, 13 February 1979, para. 5.

74 *Parti Ecologiste "Les Verts" v European Parliament*, Case 294/83, Judgment, 23 April 1986, para. 23.

75 *UPA v Council*, Case C-50/00 P, Judgment, 25 July 2002, para. 38.

76 On the development of the judicial review of the European Communities, see Bebr, 1981.

in view of the broad legislative powers that the Treaties give to the political institutions of the European Union.

An action for annulment can be filed against the acts of the Council, the Commission and the European Central Bank, except for recommendations and opinions, as well as against acts of the European Parliament and the European Council, if they are intended to produce legal effects towards third parties. The Court of the EU is also competent enough to control the legality of the acts of the bodies, services and agencies of the European Union, which produce effects towards third parties.[77] Article 269 of the Treaty on the Functioning of the EU provides that the Court of Justice of the EU will have the jurisdiction to decide on the legality of acts adopted by the European Council and the Council, in accordance with Article 7 of the Treaty on the EU, at the request of a member state affected by these acts and only in relation to procedural issues contained in that article. Such a request must be submitted within one month from the day when the decision was made, and the EU Court should make a decision within one month from the day the request was submitted.[78]

In the case of *IBM v Commission*, the Court considered that the effect of an act is the main criterion of whether it can be covered by the then Article 230 of the EC Treaty. Any act whose legal effects are binding on the applicant and capable of affecting their interests and causing a change in their legal position is an act or decision that can be the subject of an action for annulment based on Article 230 of the EC Treaty.[79] This approach was accepted in later jurisprudence.[80]

While decrees, directives and decisions have a binding effect and are in principle eligible for review, recommendations and opinions are not binding and are not eligible for judicial review. In practice, the question arose as to whether the measures adopted by the Council or the Commission and which produce legal consequences, but were not adopted in the form of a binding act, are eligible for control. The Court considered the given issue in the case of *ERTA – Commission v. Council*,[81] where the Commission sought the annulment of certain conclusions reached by the Council regarding the negotiating position of the member states in connection with the discussions on the agreement on European transport roads. The Court held that the then Article 173 implies that the acts that are suitable for the control of the Court are all those measures adopted by the institutions, which have been given binding legal effect. Furthermore, the Court emphasised that the goal of judicial control is to ensure a respect for rights when interpreting and applying the EC Treaty. It held that

77 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, 2008, Art. 263.

78 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, 2008, Art. 269.

79 *IBM v Commission*, Case 60/81, Judgment, 11 November 1981, para. 9.

80 *Bosman v Commission*, Case C-117/91, Order, 4 October 1991, para. 13; Commission v Greencore, Case C-123/03 P, Judgment, 9 December 2004, para. 44.

81 *Case 22-70* Commission of the European Communities v Council of the European Communities, 1971.

it would not be in accordance with this goal if the conditions for the admissibility of the action for annulment were to be interpreted so restrictively that the availability of this action was limited only to the acts listed in the then Article 189. The action for annulment must be available in relation to all measures adopted by institutions that are intended to have a binding effect, regardless of their nature or the form in which they were adopted.[82] Only through the consistent application of this rule can complete protection be achieved against illegal acts enacted by the institutions of the European Union. The position of the Court, expressed in the specific case, is certainly correct, because legal entities must always be given the right to challenge acts that affect their legal position.

Based on Article 263 of the Treaty on the Functioning of the EU[83] the acts of the institutions of the European Union may be annulled for the following reasons: a lack of competence, a violation of the basic rules of procedure, a violation of the Founding Treaties or other legal rule related to their application or an abuse of authority. The Court of Justice of the EU and the Court of General Jurisdiction observe *ex officio* the first two reasons. The other two grounds for annulment can only be considered by the courts if the applicant refers to them. Judicial control can only refer to the examination of the legality of the contested measure and not to its implementation.

During the development of the legal order of the European Community, the Court of First Instance and the EC Court examined the legality of each legal act, which could produce a legal effect. They tried to ensure that the legal order of the European Community was in accordance with the Founding Treaties, and this position was not changed even when the act represented an international obligation of the Community. If the EC Court refused to examine the legality of the inclusion of an international legal act in the legal order of the European Community, then the type of acts producing such a legal effect would be exempt from control. Because of this, the Court made a decision that the fact that the act is of an international origin is not relevant to its competence to ensure the rule of law in the European Community. It is the acceptance of the principle that applies to states, and they cannot invoke their internal law to avoid an international obligation.

The European Community was an actor on the international stage with an international legal capacity and had the authority to participate in the creation of international legal rules. Therefore, the international behaviour of the European Community had to be in accordance with public international law. International legal subjectivity implies international responsibility, which means that the Community can be held responsible if its behaviour is not in accordance with international law.[84] The legal nature of the Community has been interpreted differently in the legal doctrine and the practice of the EC Court. In *Costa v ENEL*, the Court held that contrary

82 *Case 22-70* Commission of the European Communities v Council of the European Communities, 1971, paras. 40–42.

83 The Treaty on the Functioning of the EU, Art. 263.

84 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 21.

to ordinary international treaties, the then EEC Treaty created its own legal system, although none of the Vienna Conventions on the Law of Treaties distinguishes between ordinary and special treaties.[85]

To a certain extent, the ECJ has accepted the approach according to which the European Community is subject to international law in its international activities. In its practice, it confirmed the existence and acceptance of the European Community's international obligations imposed on it by international customary rules.[86] The Court insisted on this only occasionally, through the principle of *pacta sunt servanda*, i.e. conduct in good faith.[87] The Court most often referred to the Vienna Convention on the Law of Treaties[88] from 1969, when it examined the legality of the secondary law of the European Community in relation to the provisions of a certain international treaty.[89] In the case *France v Commission*, the Court referred to the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations from 1986.[90] In some of its judgments, the Court accepted the binding character of international law in the European Community, which existed at that time.[91] According to the Court, the European Community must respect international law in the exercising of its powers, and corresponding acts of the European Community must be interpreted in the light of the relevant rules of international law. This approach of the Court is in accordance with the general principle of international law that domestic law cannot be opposed to international law, even when domestic law is of a constitutional character.[92]

An action for annulment can be filed by the institutions of the European Union, member states and natural and legal persons in order to protect themselves from illegal binding acts of some of the institutions, provided that special conditions for the admissibility of the claim are met. The member states, the Council, the European

85 *Costa v ENEL*, Case 6/64, Judgment, 15 July 1964. Theories about the legal nature of the EU ranged from the fact that it is not a classic international organisation, but rather an informal form of international cooperation, to the fact that it represents a specific framework of cooperation between member states in the fields of external and internal policies that use the institutional and legal framework of the European Community. There were also theories that the European Union is a unique, *sui generis*, international organisation with a supranational character. Misita, 2008, pp. 289–295.

86 *Opel Austria v Council*, Case T-115/94, Judgment, 22 January 1997, para. 90.

87 *Kupferberg v Hauptzollamt Mainz*, Case C-104/81, Judgment, 26 October 1982, para. 18., Hoesch AG v Bergrohr GmbH, Case 142/88, Judgment, 19 October 1989, para. 30.

88 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331.

89 *Opel Austria v Council*, Case T-115/94, Judgment, 22 January 1997, para. 91.

90 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 25.

91 Anklagemyndigheden v Poulsen and Diva Navigation, Case C-286/90, Judgment, 24 November 1992, para. 9; *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, Judgment, 16 June 1998, para. 45.

92 This principle has been established in the procedure before The Permanent Court of International Justice, PCIJ, 25 May 1926, Certain German Interest in Polish Upper Silesia, merits, *Germany v Poland*, PCIJ Rep. 1926, Ser. A, No. 7, p. 19.; PCIJ, Treatment of Polish Nationals and other persons of Polish origin or speech in the Dantzig territory, Advisory Opinion, 1932, Ser. A/B, No. 44, p. 24.

Parliament and the Commission are called "privileged applicants" and it is assumed that they have procedural legitimacy (*locus standi*), that is, a legal interest in examining the legality of all EU acts. They do not need to prove a legal interest to file an action for annulment. After the Treaty of Maastricht and the amendment of Article 230 of the EC Treaty at the time, the European Parliament and the European Central Bank were given the opportunity to initiate these procedures, in cases where their goal was to protect their competences, and after the Treaty of Amsterdam, the Court of Auditors was also given this opportunity. Article 263 paragraph 3 of the Treaty on the Functioning of the EU states that the Court will also have jurisdiction over actions filed by the Court of Auditors, the European Central Bank and the Committee of the Regions, which relate to the protection of their competences. The third group of subjects consists of natural and legal persons (individuals, companies, associations and similar entities), who have procedural legality if they can prove that they have a legal interest in filing an action, and they are called "non-privileged applicants".

If the Court determines that the action for annulment is founded, it will declare the contested act null and void. The annulment of an act implies that it disappears from the legal order of the Union, from the day it entered into force (*ab initio*), so that the parties to the proceedings return to the position they were in before its entry into force – *restitutio in integrum*.[93]

4.2. Indirect review of the European Union acts

Article 267 of the Treaty on the Functioning of the EU provides for a system of indirect examination of the legality of European Union acts, which operates independently of the procedure prescribed by Article 263, paragraph 4 of the Treaty on the Functioning of the EU. When an act of the Union requires implementation through some national measure, natural and legal persons can challenge the legality of the acts of the Union, in proceedings conducted before the courts of member states. They then prove that the act of the European Union, on which the national measure is based, is null and void. If the question of the legality of an act of the Union arises in a domestic legal dispute, the courts of the member states can, and in some cases must, refer the questions regarding the legality of the corresponding act to the ECJ, regardless of the fact that the period specified in Article 263 of the Treaty on the Functioning of the EU has expired. The consequence of this is that European Union acts can be challenged indirectly many years after their publication. In cases where such indirect examination is possible, the applicants do not have to prove the existence of a personal interest before the national court.[94]

The EC Court itself in several cases pointed to this alternative path and favoured this type of examination of the legality of acts. Its position was that

93 *Antillean Rice Mills v Commission*, Joined Cases T-480/93 and T-483/93, Judgment, 14 September 1995, para. 60.

94 Gormley, 2000, p. 169.

> with an action challenging a national measure implementing a Community decision, the applicant can challenge the legality of that decision and request the domestic court to rule on all allegations in the application, if this is necessary after addressing the EC Court for making a decision on the previous issue of validity.[95]

In the *Zuckerfabrik* case[96] it was confirmed that the system of legal protection established by the Community law at that time, includes the right of individuals to challenge the legality of Community regulations based on the then Article 177 EC Treaty (now Article 267 TFEU). This case demonstrates the Court's effort to develop effective remedies for individuals. Also, it insists on the existence of a coherent and interconnected system of legal remedies, at the national and Union level.

In the procedure under Article 267 of the Treaty on the Functioning of the EU, an allegedly illegal act of the European Union cannot be contested as such. An act passed at national level must be challenged, while the legality of an act of the European Union appears as a subsidiary issue. Even if the regulation is clearly illegal and violates the principles of the European Union, the individual must wait for its implementation and raise the question of its legality before a national court. However, there is a possibility that the contested measure of the European Union will not be implemented in the legal system of the member state, and that the individual will still suffer damage. In its practice, the ECJ held that only limited forms of judicial control will be possible in certain areas of the Union's activities. These are areas in which the Union institutions enjoy broad discretionary powers. Here, the Court limits itself to examining whether the exercise of such discretionary powers was violated by their abuse or manifest error, or whether the Commission exceeded its powers.[97] Also, the Court examines the legality of the Union act in relation to the violation of the principles of customary international law. When the rules of customary international law are complex and imprecise, judicial review must be limited to the question of whether, by adopting the contested rule, the Council committed an obvious error of judgment regarding the conditions for the application of that rule.[98]

The Lisbon Treaty does not specify the grounds for the annulment in proceedings of preliminary rulings, so in judicial practice it has been established that these grounds are the same as for the direct action for the annulment of an act.[99] In addition, acts can be annulled if they violate certain principles (proportionality, legitimate expectations, legal certainty and equality) that must be observed by EU authorities, as well as member states when applying European Union law. The annulment of the act will also occur if it violates basic human rights, or is contrary to

95 *Union Deutsche Lebensmittelwerke v Commission*, Case 97/85, Judgment, 21 May 1987, para. 12.

96 *Zuckerfabrick Süderdithmarschen v Hauptzollamt Itzehoe*, Joined Cases C-143/88 and C-92/89, Judgment, 21 December 1991.

97 *Racke v Hauptzollamt Mainz*, Case 98/78, Judgment, 25 January 1979, para. 5; *National Farmers' Union*, Case C-157/96, Judgment, 5 May 1998, para. 39.

98 *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, Judgment, 16 June 1998, para. 52.

99 Tillotson, 2000, p. 546.

the principles of public international law. In this way, the possibilities for controlling the legality of acts have been significantly expanded in relation to the text of the founding treaties themselves, which certainly contributes to the strengthening of the rule of law in the European Union.

The courts of the member states cannot judge the legality of an act of the European Union on their own, and that was also the case when it came to acts of the Community. The European Court of Justice, in the case of *Foto Frost*, ruled that a national court does not have the authority to declare a specific act illegal, but can issue a temporary measure, which postpones its implementation.[100] If the solution were to be accepted for national courts to decide on issues of legality of the acts of the European Union, it could lead to different solutions in the application of its law in member states. Such a solution would be contrary to the principles on which the European Union functions. Judges in member states have discretionary powers when referring matters to the Court of Justice of the EU. Jurisprudence in some countries indicates the difficulties that private entities have when they need to convince domestic judges to turn to the Court of the EU, contesting the legality of an act of the European Union. The discretionary powers of national judges are one of the most significant problems in achieving effective judicial protection against abuses of the institutions of the European Union. The position of applicants is better when dealing with the highest judicial instances in one of the Member States. Namely, a national court against whose decisions there is no legal remedy under national law, has the obligation to refer the question based on Article 267 of the Treaty on the Functioning of the EU, when there is a serious doubt regarding the legality of a measure.[101] Otherwise, it would be responsible for violating EU law. During the interpretation of Community law at that time, it was confirmed that a member state will be responsible for its violation, if the national judiciary fails to refer questions based on the then Article 234 of the EC Treaty.[102] This principle can also be applied when examining the legality of an act, although it remains the discretionary authority of the domestic judge to decide whether the question of legality is raised within the meaning of Article 267 of the Treaty on the Functioning of the EU. The obligation to request an opinion arises only when the domestic court takes the view that the legality arguments are well founded.[103]

National courts have reduced powers in proceedings to determine the legality of an act, because it is necessary to ensure the uniform application of Union law, which would be very difficult if the courts of member states were given discretionary powers to declare Union acts invalid. Also, the exclusive jurisdiction in the hands of

100 *Foto Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, Judgment, 22 October 1987, paras. 13–20.

101 *Foto Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, Judgment, 22 October 1987, para. 17.; *Gaston Schul v Minister van Landbouw*, Case C-461/03, Judgment, 6 December 2005, para. 25.

102 *Köbler v Austria*, Case C-224/01, Judgment, 30 September 2003, para. 55; Traghetti del Mediterraneo v Italy, Case C-173/03, Judgment, 13 June 2006, para. 32.

103 *International Air Transport Association and European Low Fares Airline Association v Department of Transport*, Case C-344/04, Judgment, 10 January 2006, para. 28.

the Court of Justice of the EU is necessary to guarantee a coherence in the system of legal protection in the European Union, and national courts can suspend the implementation of a national measure based on a contested EU act. The Court concluded that the differences between the courts in the member states, regarding the legality of the acts of the Union, could threaten the unity of the legal order of the Union and violate the basic requirement of legal certainty.[104] On the other hand, the Court of EC held that national courts can review the legality of a Community act and can conclude that a specific act is completely legal. In doing so, they do not call into question the existence of that act of the European Community.[105] In such cases, there remains the possibility that another national court may take a different position on an act and send the question of legality to the EC Court.

In its jurisprudence, the Court held that the decision on the illegality of an act binds not only the national court that referred the question on the basis of the former Article 234, but that it represents a sufficient basis for any other national court to consider that act invalid, in the sense of the judgment that should bring.[106]

4.2.1. Effectiveness of indirect examination of legality of European Union acts

By interpreting the former Article 234 of the EC Treaty, the EC Court favoured the rights of individuals to judicial review. It held that regulations are not the only type of Community rule that can be subject to judicial review. Directives and decisions can also be challenged on the basis of indirect control of the legality of European Union acts. In this way, private entities were given the opportunity to initiate an examination of the legality of all legal acts of the European Union that have a direct effect in domestic law. The grounds for examining legality have been expanded in relation to an action for annulment. In these procedures, the question whether the acts are in accordance with general legal principles and basic human rights can be examined. The consequence of this is that private entities have a wide range of rules to rely on when they want to establish that the Community institutions have exceeded the limits in the exercise of their powers.

Moreover, it was established in the jurisprudence that although the judgment which declares the act of the European Union null and void is referred only to the national court that brought the issue before the Court, it holds sufficient grounds for any other national court to regard that specific act as null and void.

This procedure, in addition to its positive characteristics, also has certain disadvantages. National courts are not authorised to make a decision on the legality of an act of the European Union. Rather, their role is to assess whether the request for a finding of illegality is well founded in order to refer the matter to the Court of

104 *Woodspring District Council v Bakers of Nailsea Ltd*, Case C-27/95, Judgment, 15 April 1997, para. 20.
105 *Woodspring District Council v Bakers of Nailsea Ltd, Case C-27/95*, Judgment, 15 April 1997, para. 19.
106 *International Chemical Corporation v Amministrazione delle Finanze*, Case 66/80, Judgment, 13 May 1981, para. 18.

Justice of the EU under Article 267. Also, national courts, except those against whose decisions exists is no legal remedy, do not have to refer the matter to the Court of the EU on the legality of an act. They may make an error in assessing whether a referral is necessary. Sometimes there is no domestic regulation that can be examined. The proposal to decide on the requests for preliminary ruling leads to delays and creates additional costs.

4.3. Relation between European Union Law and Public International Law

International treaties represent an important source of European Union law. The introduction of international rules into the legal order of the European Union can be viewed within the framework of two theoretical models on the relationship between two types of law – monism and dualism. Today, the prevailing view is that the relationship between European Union law and international law is exactly monistic. When consent is given to be bound by an international treaty, it enters into force in accordance with the provisions of the treaty itself and Article 12 of the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations. The monistic theory does not deny the *sui generis* character of European Union law, as different from international law, but only considers that these two rights are part of one universal legal order.[107] The EC Treaty was reminiscent of monistic systems and the Court found in the *Haegemann* case that the provisions of an international treaty are an integral part of the EC legal order from the moment it enters into force ("Haegemann principle").[108]

The competence of the European Union in the conclusion of international agreements has been continuously expanded.[109] In its practice, the Court of EC established that an international agreement must be in accordance with the primary law of the European Community. It performed an *a posteriori* control of the legality of the conclusion of an international agreement, one of the state's parties of which was a member of the European Community. In its Opinion 1/75 of November 11, 1975, the Court indirectly pointed out that its jurisdiction was extended to be able to declare invalid the conclusion of an international agreement. It held that the question of whether the conclusion of a treaty falls within the jurisdiction of the European Community and whether it was carried out in accordance with the provisions of the Treaty is a question that can be submitted to the EC Court.[110]

107 Peters, 1997, p. 21.

108 *Haegemann v Belgium*, Case C-181/73, Judgment, 30 April 1974, para. 5. In this case it was an agreement between EEC and Greece. The same principle applies to other agreements concluded by the European Union. See: Snyder, 2003, p. 315.

109 Mignolli, 2002, p. 111.

110 Opinion 1/75 given pursuant to Art. 228(1) of the EEC Treaty.

In the case of *France v. Commission*, the question of challenging an international treaty arose.[111] France argued that the Commission concluded the agreement with the US on its own, without the involvement of the Council and argued that this was in breach of the then Article 228 of the EEC Treaty.[112] The Court of Justice considered the issue due to the fact that the institutions of the Community concluded the treaty in violation of the procedural conditions provided for in the former Article 228 of the EC Treaty.[113] The Court based its reasoning on the founding Treaty, which gave it powers to ensure that the law was respected and therefore retained jurisdiction to examine the legality of an act incorporating an international obligation into the legal system of the European Community.[114] The Commission asked whether the application should be filed against the decision authorising its vice president to sign the treaty, or against the treaty itself. Advocate General Tezauro argued in his opinion that the Court in no way excluded the possibility of directly examining the treaty.[115] He referred to Opinion 1/75 and the *Hegeman* case in support of his view that an international treaty is an act of an institution, as is the decision to conclude it. However, the Court did not listen to the suggestion of the Advocate General in this case, because the possibility of directly examining an international treaty could lead to non-compliance with international legal norms and to the international responsibility of the Community. The Court also held that in the event of non-compliance with the Treaty by the Commission, the European Community could be held internationally responsible.[116] In order to avoid these consequences, the Court made a legal distinction between concluding a treaty and an internal decision to conclude it. In accordance with this, the Court did not annul the international treaty, but only annulled the internal act by which it was decided to conclude that treaty. The Court annulled the given act because the Commission of the European Community did not have the competence to conclude the given international agreement. The court did not apply Article 46 of the 1986 Vienna Convention on the Law of Treaties,[117] which provides for strict criteria for challenging consent to be bound by a treaty. When consent to be bound by an international treaty is given in violation of a substantive or

111 *France v Commission*, Case C-327/91, Judgment, 9 August 1994.

112 It was later article 300 of the TEC.

113 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 28.

114 Leal-Arcas, ex: 2003, p. 222.

115 *France v Commission*, Case C-327/91, Judgment, 9 August 1994; Opinion of the Advocate General Tesauro of 16 December 1993, para. 9.

116 *France v Commission*, Case C-327/91, Judgment, 9 August 1994; Opinion of the Advocate General Tesauro of 16 December 1993, para. 25.

117 Art. 46 of the Vienna Convention on the Law of Treaties: '1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance…. 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith'.

procedural rule of the founding Treaties, that treaty will never become an integral part of the Community's legal order. In accordance with this, the Court made a distinction between the decision to conclude the treaty and the conclusion itself, because otherwise it would have had to refuse jurisdiction to control the legality of the conclusion of the treaty.[118] The Court of the EC, creating the aforementioned distinction and performing a posteriori control of the legality of concluding international agreements, held that the exercise of competences entrusted to Community institutions in international matters cannot avoid judicial control of the legality of adopted acts.[119]

Also, if the Court of the EU were to be asked to decide on the legality of an international agreement, as in the preliminary ruling, it would have to consider whether that agreement is in accordance with the Treaty on the Functioning of the EU. Certain authors believe that, if a given treaty is found to be inconsistent with the Treaty on the Functioning of the EU, the Court would have to conclude that the Treaty has primacy in relation to it.[120] Doubts arise here, as in the case of direct claims against international treaties, regarding the jurisdiction of the Court to declare the international treaty itself invalid, which is not an act of the Union, but a joint agreement of the state's parties. A solution that is more in line with Article 267 of the EU Treaty is to allow the declaration of nullity only of the internal act concluding the agreement.

4.4. Judicial review in relation to Security Council Resolutions

The jurisprudence of the EC Court has been consistent in that the main criterion for determining whether the Court has the jurisdiction to review the legality of an act of a Community institution is to determine whether a given act produces a legal effect. The judgments of the Court of First Instance in the cases of *Yusuf*[121] and *Kadi*[122] briefly changed this established practice of the Court. They called into question the previous reasoning of the EC Court regarding its competence to control the legality of an act of one of the institutions of the Community, which transfers an international act into the legal system of the European Community. In its jurisprudence, the Court of the EC held that the European Community is based on the rule of law, so that neither the member states nor the institutions of the Community can avoid control of the question of whether their acts are in accordance with the basic constitutional act – the EC Treaty, which established a complete system of legal means and procedures, created to enable the EC Court to control the legality of all acts of institutions that produce legal effects, regardless of their nature and form.[123] In the case

118 See: *Germany v Council*, Case C-122/95, Judgment, 10 March 1998, para. 42.
119 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 16.
120 Heliskoski, 2000, p. 395.
121 *Yusuf and Al Barakaat v Council and Commission*, Case T-306/01, Judgment, 21 September 2005.
122 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005.
123 *Commission v Council* (ERTA case), Case 22/70, Judgment, 31 March 1971, para. 42.

of *Reynolds Tobacco and others v Commission*, the EC Court held that access to justice is one of the constitutive elements of the Community, based on the rule of law. The EC Treaty established a complete system of legal remedies and procedures designed to enable the EC Court to control the legality of acts of institutions.[124]

The European Court of Justice insisted on the issue of basic human rights within the Community due to legal disagreements with national constitutional courts, and especially with the German Constitutional Court regarding the issue of jurisdiction. In the case of *Internationale Handelsgesellschaft*, the EC Court took the view that the legality of an institution's act can be assessed only on the basis of EC law, excluding all national provisions, even those of a constitutional nature.[125] In this decision, it tried to confirm the supremacy of European Community law over national law. If the national constitutional courts would unilaterally interpret whether the law of the European Community respects human rights, it would threaten the essential constitutional principles in the Communities. In the case of *Dow Chemical Ibérica and Others v Commission of the European Communities*, the Court held that reference to violations of fundamental human rights, as they are formulated in a constitution of a member state or to national constitutional principles, may not affect the legality of an act of the Community or its effect on the territory of that country.[126]

In the case of *Bosphorus Airways*, the legality of the Council Regulation was challenged, which incorporated the Security Council resolution into the Community legal order, which violated the applicant's property rights. The Court considered that it is established practice that the basic human rights invoked by Bosphorus Airways are not absolute and that their enjoyment may be subject to restrictions justified by the general interest of the Community.[127] The goal of this specific regulation was in accordance with the general interest of the Community, so taking the applicant's property did not constitute a violation of their basic human rights. In this case, the Court of the EC would not have refused its jurisdiction if it had found that the resolution was not in accordance with the general interest of the Community, because there were no restrictions to control the legality of the given regulation.

4.4.1. Cases Yusuf and Kadi

In the *Yusuf* and *Kadi* cases, the applicants sought the annulment of several EC Regulations, among others Regulation 881/2002 of May 27, 2002, which incorporated several UN Security Council resolutions into the EC legal system. These resolutions were adopted after the attack on the World Trade Center in New York on September 11, 2001. EC regulations imposed certain restrictive measures against specific

124 R.J. Reynolds v Commission, Case C-131/03 P, Judgment, 12 September 2006, paras. 74–77.

125 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970, para. 3.

126 *Dow Chemical Ibérica v Commission*, Joined Cases 97/87, 98/87, and 99/87, Judgment, 17 October 1989, para. 38.

127 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996, para. 21.

individuals and groups linked to Osama Bin Laden, the Al-Qaeda network and the Taliban regime. The Court of First Instance rejected all the demands of the applicants regarding the annulment of the given regulations. In these cases, the Court of First Instance made certain decisions on the relationship between the international legal order created within the UN and the legal order of the European Community. The Court considered it legitimate to mechanically subject Community law to applicable international norms, drawing a parallel with the classic rule in international law, which is provided for in Article 27 of the Vienna Convention on the Law of Treaties, according to which internal law cannot be assumed to be international, because European Community law is only domestic when compared to international law.[128] Some European lawyers disputed this qualification because, according to them, the peculiarities of the Community's supranational legal order gave this international organisation unique institutional characteristics, on the basis of which the supremacy of international law does not exist in relation to the Community's legal order.[129]

In the *Kadi* case, the Court of First Instance referred to the fact that in accordance with Article 103 of the UN Charter, the provisions of the Charter take precedence over all other treaties.[130] Decisions made by the Security Council, which are stipulated in Article 25 of the UN Charter, have primacy in relation to international agreements.[131] The Court claimed that it was obliged, based on the founding treaties, to adopt all measures necessary to enable the member states to fulfil the obligations imposed on them by their membership in the United Nations.[132] The Court was of the opinion that the European Community cannot adopt legislative acts independently of the obligations arising from the UN Charter. It held that the applicant's arguments based on the claim that the Community legal order was independent of the United Nations and governed by its own legal rules which must be rejected. The authority of the institutions, when they adopted contested EC Regulations, was limited, because they could not change the content of Security Council resolutions. Control of the legality of the adoption of EC Regulations would be equated with control of the legality of the substance of Security Council resolutions. The court clearly refused the jurisdiction to control the legality of the contested EC Regulation despite the possible violation of the basic human rights of the applicant and thus, in this way, indirectly decided that some acts of the institutions can to a certain extent avoid judicial control. It considered that it could not control the legality of the contested EC Regulation due to the limitations imposed by general international law.[133] The position was taken that it had no jurisdiction to control the legality of the resolutions, neither on the basis of international law, nor on the basis of Community law.

128 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 182.
129 Pescatore, 1961, p. 129; Simon, 2000, p. 207.
130 Art.103 of the Charter of the United Nations, 1945.
131 Art. 25 of the UN Charter: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.
132 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 204.
133 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 212.

Referring to the cases of *Raka* and *Poulsen*, it considered that if it were to engage in control, it would not be in accordance with the principle that the competences of the Community and the Court of First Instance must be used in accordance with international law. The applicant in this case relied on his inalienable basic human rights, which are an integral part of the general legal principles of the Community. The Court decided that the establishment of a violation of fundamental human rights protected by the legal order of the Community could not affect the legality of an act of the Security Council or its effects on the territory of the Community.[134] By all means, the Court of First Instance could not under any circumstances have the authority to declare the decision of the Security Council invalid. Instead, it could, in accordance with the jurisprudence of the Court of Justice, distinguish between an international act to be incorporated into the legal system of the Community and an act of an institution which had decided to undertake the implementation of Security Council resolutions and thus deprive the resolution of any of any legal effect in the Community order. The ECJ has distinguished between an international act and an act of foreign policy when there is a conflict between primary Community law and an international source. However, the Court of First Instance did not accept this distinction. In its opinion, the violation of subjective rights recognised by the law of the European Community, even those of a fundamental nature, could not justify the legal control of the EC Regulation that incorporates the resolution of the UN Security Council into the legal order of the European Community, because such acts, as a rule, fall outside the scope of the Court's control, which has no authority to question, even indirectly, their legality in the light of Community law.[135] The Court of the First Instance decided that it still had the authority to control the legality of a resolution of the Security Council, if it contradicted an imperative norm of public international law, i.e. by the *ius cogens* norm.

In the legal doctrine, the decision of the Court of First Instance was criticised.[136] The declaration of the Security Council as the supreme legislator, whose decisions are not subject to control, was particularly controversial. According to some authors, the member states agreed to the primacy of EU law because of the constitutional guarantees it provides. Such guarantees do not exist, however, when it comes to the Security Council.[137]

The EC Court, however, decided in the appeal procedure in these cases that the claims for annulment against the contested regulation were eligible for discussion and decision making.[138] The EC Court confirmed that the European Community was based on the rule of law and that member states and their institutions could not avoid a review, whether their acts were or were not in accordance with the basic

134 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 224.
135 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 225.
136 Lavranos, 2006, p. 480; Lavranos, 2007, pp. 13–15; Bulterman, 2006, p. 770.
137 Amato and Ziller, 2007, p. 283.
138 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008.

constitutional text – the EC Treaty. Also, it was confirmed that human rights are an integral part of general legal principles whose observance is ensured by the Court. Respect for human rights is a condition of the legality of Community acts, and measures that are inconsistent with the respect of human rights are not acceptable in the Community.[139] Therefore, the obligations prescribed by the international agreement could not be contrary to the constitutional principles from the EC Treaty and all acts of the Community must respect basic human rights. In the circumstances of these two cases, the control of legality was applied to the act enabling the operation of the international treaty, and not to the treaty itself.[140] The judgment of the Court, which would decide that the act of the European Community, which should enable the effect of the resolution, was contrary to the higher law in the legal order of the Community, and would not lead to a challenge of the primacy of such a resolution in international law. In this ruling, the Court referred to an earlier decision in the case of *Germany v Council*, in which it annulled the Council's decision approving an international treaty after finding that the decision violated the principle of non-discrimination, which was one of the general principles of Community law.[141]

In its earlier jurisprudence, the Court established that the activities of the European Community in the field of cooperation and development, provided for in the then Articles 177 to 181 of the EC Treaty, must be carried out in compliance with the obligations stipulated in the United Nations and other international organisations.[142] Compliance with the obligations prescribed within the framework of the United Nations is also necessary in the area of maintaining international peace and security. By adopting acts on the basis of the then Articles 60 and 301 of the EC Treaty, the European Community enabled the legal effect of Security Council resolutions adopted on the basis of Chapter VII of the UN Charter.[143] Also, the powers specified in these articles of the EC Treaty could only be exercised by adopting a common position or undertaking a joint action, based on the provisions of the EC Treaty that related to the Common Foreign and Security Policy. When implementing a specific resolution of the Security Council, the Community had to take into account the terms and objectives of the given resolution and the relevant obligations under the Charter concerning that implementation. The UN Charter does not impose a special way of implementing the resolutions adopted by the Security Council on the basis of Chapter VII of the UN Charter, since they acquire legal effect in accordance with the

139 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, para. 284.

140 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, para. 286.

141 *Germany v Council*, Case C-122/95, Judgment, 10 March 1998.

142 *Commission v Council*, Case C-91/05, Judgment, 20 May 2008, para. 65.

143 Article 24 of the UN Charter states that the adoption of these resolution represents primary responsibility which is conferred to this organ at the global level. This responsibility includes the power to determine what represents the threat to international peace and security and to take all necessary measures to maintain or restore it.

procedure applied in the domestic legal order of each member state of the United Nations. The UN Charter leaves member states free to choose how to incorporate these resolutions into their domestic legal order.

In the case of *Kadi*, the Court of EC pointed out that in its previous practice it had accepted that on the basis of the former Article 307 of the Treaty on the EC,[144] the derogation of even a primary right, for example provisions on common trade policy, could be allowed. The former Article 297[145] implicitly allowed the existence of obstacles in the functioning of the common market, when they were caused by measures taken by member states to implement international obligations they accepted in order to maintain international peace and security. These provisions, however, could not be interpreted in such a way as to allow the derogation of the principles of freedom, democracy and the respect for human rights and fundamental freedoms. Article 307 of the EC Treaty did not allow the derogation from the principles that were part of the very foundations of the Community's legal order. One of them is the protection of basic human rights, including the judicial control of the legality of the acts of the European Community in terms of their compliance with those basic rights.[146]

The former Article 300, paragraph 7 of the EC Treaty provided that agreements concluded under the terms of that Article are binding for Community institutions and Member States. Based on this provision, provided it was applicable to the UN Charter, it would have primacy over secondary acts in the European Community. This primacy at the level of Community law would not extend to primary law, that is, to general legal principles of which human rights are an integral part. This interpretation was also supported in the former Article 300, paragraph 6 of the EC Treaty, according to which an international agreement could not enter into force if the Court gave a negative opinion of its conformity with the EC Treaty.

In the *Kadi* case, the EC Court held that the contested regulation could not be viewed as an act directly attributable to the United Nations, nor as an act of one of its special bodies created on the basis of Chapter VII of the UN Charter.[147] In the end, the EC Court concluded that Community courts must, in accordance with the powers entrusted to them by the EC Treaty, ensure full control of the legality of all Community acts in relation to basic human rights that form part of the general principles of Community law, including the control of Community acts, which, as the contested regulation, were created to enable the effect of resolutions adopted by the Security Council based on Chapter VII of the UN Charter. The EC Court ruled that the Court of First Instance erred in the application of law, when it claimed that from the principles governing the relationship between the international legal order within the UN and the Community legal order, it follows that the contested regulation must be exempt from jurisdiction as long as it was in accordance with the norms of jus

144 TFEU, Art. 351.
145 TFEU, Art. 347.
146 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008, paras. 301–305.
147 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008, para. 314.

cogens, since it was actually enacted to give effect to a resolution adopted by the Security Council on the basis of Chapter VII of the UN Charter. Based on this, the Court of EC found that the grounds for the action were well founded and that the judgments against which the appeals were filed were annulled. Also, the Court annulled Council Regulation (EC) No. 881/2002 of May 27, 2002, insofar as it concerned the applicant. States can, during the implementation of Security Council resolutions, control their compliance with human rights. However, even if they have not done so, they must implement them in accordance with Article 25 of the UN Charter. In the case of *Kadi*, the Presidency of the EU, after the judgment of the EC Court, an explanation was received from the UN Sanctions Committee stating why Mr. Kadi and the international foundation Al Barakat were placed on the list. The EU Commission concluded that their listing was justified due to their links to Al Qaeda and adopted a new regulation leaving Kadi and the foundation on the sanctions list. Some authors believe that the EU institutions could not have acted differently, because if they had lifted the sanctions against the applicants, it would have led to the EU member states failing to fulfil their obligations under Article 25 of the UN Charter.[148]

5. Conclusion

Taking into consideration all of the analysed aspects of the constitutionality, it can be concluded that European Union has acquired some fundamental federal qualities, although it has not become a federation. The current structure of the European Union indicates that there are some federal elements in this organisation. However, there is no doubt that the EU is an international organisation which has special characteristics giving it the status of a specific supranational organisation. However, it must be emphasised that the resistance of states to the powers and competences of the EU has been present from the beginning.

The federal structure entails some of the joint functions of the central government, which are lacking in the current EU system. The examples of SFRY and especially of the State Union of Serbia and Montenegro could be of some value to the EU, in order to adjust its politics towards the new forms of integration.

Human rights as an inevitable element of every modern constitution has become a part of the system of the EU. The EU Charter on fundamental rights, was supported with the jurisprudence of the ECJ long before the Charter had been adopted, clearly indicating that human rights have a significant role in a sovereign state. This special importance is given to the relationship with the European Convention on Human Rights and the Court in Strasbourg. With the EU's accession to the Convention, the human rights protection in the EU would undoubtedly be improved.

148 Etinski, 2010, p. 88.

The issue of judicial review is of high importance for every constitutional order. Also, it is important for the European Union, in its transformation into a federal state, or at least in its attempt to become that.

The role of guardian of the Treaty has led to the fact that the EC Court has decided that there is no legal act that is exempt from judicial review. An identical position was accepted by the EU Court. If it refused to examine the legality of the inclusion of an international legal instrument in the legal order of the European Union, then some acts that produce legal effects would be exempt from control. Because of this, the Court made a decision that the fact that an act is of international origin is not relevant to its competence in ensuring the rule of law in the European Union. Also, the Court is obliged to check whether the founding treaties have been respected in the international relations of the European Union. If the then EC Court in the cases of *Yusuf and Kadi* had refused jurisdiction to control the acts of the European Community, a new distinction could have arisen between the EC Court and national courts, where the latter would unilaterally control the legality of those acts in relation to basic human rights. This could have had far-reaching consequences for the constitutional system in Europe. In the Treaty of Lisbon, the judicial control of the acts of the European Union has also been given a significant purview, and it can be said that its scope has been expanded with the facilitation of individuals to initiate proceedings for the annulment of the acts of the European Union. Current practice indicates that there is a constant effort to improve the rule of law in the European Union, through the strengthening of judicial protection mechanisms.

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