Institutional Aspects of EU's accession to the European Convention on Human Rights

A Normative Approach to Human Rights Protection in Europe

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Abstract

With the Lisbon Treaty in place, the EU has the legal basis to accede to the European Convention on Human Rights (ECHR). The aim of the accession is to strengthen the protection of human rights in Europe, and give European citizens the same protection vis-à-vis acts of the Union as they presently enjoy from member states. EU's accession to the ECHR is welcomed, but as great as it is in theory as complicated it is in terms of institutional structure and division of competences between two legal regimes. It is crucial at this stage of the accession to define the Luxembourg and Strasbourg courts respective roles so that they can function individually and together in order to optimize European human rights protection. Using Weber's notion of concept formation this thesis establishes that values of hierarchy, competition and negotiation permeate the ongoing negotiation about how to design the institutional structure of the accession. These findings are supplemented with a normative discussion in which some elements of the institutional structures that are present in the debate are embraced and combined so as to make up an institutional set-up that would optimize human rights protection in Europe.

Key words: ECHR, human rights, institutional design, ideal types, normative approach

Words: 16.517

List of Abbreviations

ECHR	European Convention on Human Rights
The Convention	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court for Human Rights
Luxembourg Court	European Court of Justice
Strasbourg Court	European Court for Human Rights
TFEU	Treaty on the Functioning of the EU

1 Introduction

The Lisbon Treaty entered into force on 1 December 2009. Article 6 of the Lisbon Treaty provides that the European Union shall accede to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). This accession has a great symbolic value for the European human rights protection. However, it also raises several questions about the competence of the European Court of Human Rights to rule on issues of EU law, and the effect it may have on the policy making of the EU institutions (Leskinen 2010, p. 3)

The overall theme of this paper is the European human rights landscape. However, the aim of the research conducted here is less about highlighting the symbolic value and importance of protecting human rights, and more about how to best make use of existing institutions established to handle such protection. The purpose of the research is to delineate both what the accession entails as a corollary, and present a well-founded idea of how it should be structured. Hence, the starting point is constitutional with a focus on institutional aspects, rather that ideational with an aim to enhance the importance of human rights protection.

More specifically, the research focuses on the relationship between EU and the Council of Europe, especially their respective courts - the European Court of Justice (ECJ) and the European Court for Human Rights (ECtHR). In a machinery such as the EU we often see that too many cooks spoil the broth and, with respect to the theme and tone of the current debate, there seems to be a pending risk that such an issue may appear as a result of EU's accession to the ECHR. Issues related to structural ambiguity and division of competencies must be dealt with and solved before it will be possible to reach consensus on the accession modalities.

Therefore, my research revolves around the technical modalities of EU's accession to the ECHR. My aim is to make a contribution to the debate about how EU's accession to the ECHR can, in practice, improve human rights protection in Europe. With a normative approach I will study the controversies between the two legal systems. The findings will guide my understanding for what lies at the heart of the structural ambiguity of EU's accession to the ECHR. Based on this I will present an alternative idea about how the accession should proceed in order to optimize human rights protection.

1.1 Study Background

In order to fully understand the content of the present debate about EU's accession to the ECHR, it is necessary to understand previous action and interaction of the European Court of Justice and the European Court of Human Rights. Following a brief overview of how human rights protection in Europe has looked over the past fifty years, I will come back to the aim of this study, and the problems that guide the research.

1.1.1 Human Rights Protection in Europe - a Tale of two Courts

Once the European human rights landscape appeared to be a clearly structured machinery. There were two distinct "European" courts - the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg. The Strasbourg Court was set up by the Council of Europe as an enforcement institution of the European Convention on Human Rights (ECHR). The European Court of Justice was established with a much broader jurisdiction as it was set up to implement the legal framework of the European Communities (Douglas-Scott 2006, p. 632).

The ECtHR in Strasbourg was set up as a freestanding human rights court in 1959 to protect individuals against human rights abuses by member states of the ECHR. As a court it functions to rule on alleged violations of the ECHR. It may receive applications from individuals, private organizations or groups of individuals who think their rights under the ECHR has been violated. A complaint can not be directed against another individual or organisation, but must target a state and involve a breach for which the state can be held responsible.

Taken that the EU project started as a primarily economic enterprise, the issue of human rights protection was of marginal importance in Community law until the 1970s. In the 1970s, the ECJ began recognising the European Community's growing potential to influence fundamental rights protection and started adjudicating this area (Wetzel 2003, p. 2824). As a jurisdictional claim, the ECJ's decision to adopt fundamental rights protection standards threatened to interfere with existing fundamental rights standards, such as that established by the ECHR. At that time, the ECHR represented a rights protection standard agreed upon by all EU member states. Even though the EU itself had not signed the Convention, it provided a natural starting point for discussing Community-wide human rights protection (Ibid.). The increasing interest shown by the ECJ for human rights law changed the topography of the European human rights landscape, and it has been in a state of incremental change ever since.

The *International Handelsgesellschaft* case (11/70, 1970), in which the ECJ stated that the EEC was also bound by fundamental rights, is often considered to be the key starting point of ECJ's human rights jurisdiction. Today a variety of situations can arise in which the ECJ may have to assess a measure for its compatibility with human rights, and there are human rights cases aplenty in the

Luxembourg court. In parallel, claims have been brought to the human rights court in Strasbourg, challenging the compatibility of certain EC and EU measures with the European Convention. Even though the EU has not been a member of the ECHR, it has not stopped litigants from attacking EU measures - usually in cases where a member state implementing the EU measure has taken an action violating the Convention (Douglas-Scott 2006, p. 629).

As things stand, there exists an overlap of jurisdiction between the two courts. Especially so when, on occasions, cases arising from the same state conduct are heard in both courts. Through this kind of overlapping jurisdiction, the courts have established a strong example of legal pluralism, illustrating a variety of interesting interactions and relationships. The truth is, that the story of human rights protection in the EU is largely a story of interaction between the Luxembourg and the Strasbourg courts (Ibid. p.630). However, as pointed out by Douglas-Scott, as much as their relationship is symbiotic and incremental it is also messy and unpredictable. There have been situations were an ECJ opinion is at variance with Strasbourg case law. Such an exercise of conflicting jurisdiction damages the legitimacy of one or both courts and hinder their ability to protect fundamental rights (Ibid. p. 629).

1.1.2 Accession to the ECHR on the Agenda

It has been on the agenda for long that Europe must resolve the conflict and confusion resulting from the courts' overlapping jurisdictions. It has been held that the best means of achieving the necessary coherence between the ECHR and EU law would be if the EU acceded to the ECHR. This has repeatedly been advocated, both by the Council of Europe's Secretary General and Parliamentary Assembly, and by the European Commission and the European Parliament (Krüger 2002).

There are many reasons to why this has been advocated by several actors. Not the least that in view of the progress of integration within the EU, it would seem appropriate for the EU to have a written bill of rights - like most of its member states (Ibid.). Among the advocates for the necessity of EU' accession to the Convention, it has been held that it is does not make sense to make ratification of the ECHR a condition for EU membership, when the EU itself and its legislation is wholly exempt from supervision by the Convention bodies. Moreover, it has been held that it seems increasingly anachronistic that the EU should be the only legal space left in Europe which is not subject to external scrutiny by the Strasbourg Court. While all national laws, regulations, court judgements and other measures fall within that court's decision, the same has not applied to the EU legal acts (Ibid.).

Why, then, has accession not been achieved? Opponents to the accession have had the general attitude that accession entails a complicated process which, given the existing situation, is not really necessary. Objections have also been related to the autonomy EU's legal system and the problems embedded in the risk for subordination of the ECJ to the ECtHR (Ibid.). In 1996, the European Court of

Justice declared in its opinion 2/94 that the EU could not join the ECHR without an explicit treaty basis allowing it to do so. In the absence of such a basis in the at the time existing EC and EU Treaties, the accession would have to wait. There has been speculation that ECJ's decision was an example of what is referred to as judicial politics - implying that the decision was a result of the ECJ attempting to protect its own position at the pinnacle of the EU legal order. In any case, ECJ's declaration silenced the most intense debate about EU's accession to the Convention for a couple of years. It became an issue again during the summits and conferences that led up to the European Constitution - an ambitious EU-project which failed in the French and Dutch referendums. The ambition to join the ECHR was finally made possible by the Lisbon Treaty.

1.1.3 EU's Formal Accession to the ECHR

The ratification and entry into force of the Lisbon Treaty provides both the legal basis and an obligation for the EU's formal accession to the European Convention on Human Rights. The accession introduces new arrangements for the protection of human rights in Europe. It entails as a corollary, with the necessary institutional modifications, that the EU will accept the jurisdiction of the Strasbourg Court. Once the EU becomes a contracting party to the Convention, the European Court of Human Rights may scrutinize all acts of the EU institutions and bodies for their compatibility with the ECHR. Hence, the Strasbourg Court may well become the highest and final instance for ensuring fundamental rights protection on the European continent.

The formal accession to the ECHR that is now in the making resolves the current lack of jurisdiction in cases involving Community organs, thereby assuring that the minimum ECHR standards would apply at the Community level as well as the national level. Moreover, with the accession it is possible to overcome problems of conflicting fundamental rights law interpretations. Politically, accession strengthens the EU's democratic legitimacy by better defining the EU's relationship to its citizens and reaffirming its commitment to the protection of its citizens' rights (Wetzel 2003, p. 2838).

Hence, after many years on the agenda the accession is not merely a hypothetical idea. With the starting point being the ratification of the Lisbon Treaty which allows for EU's accession, we have now entered the phase in which the modalities of the accession are being negotiated. According to Article 218 (8) Treaty on the Functioning of the EU (TFEU), the agreement on accession shall be concluded unanimously by the Council. It shall also be approved by all 47 contracting parties to the ECHR in accordance with their constitutions. Article 218 (6) (a) (II) TFEU reads that the Council shall obtain the consent of the European Parliament for concluding the accession agreement. In addition, article 218 (19) TFEU provides for the European Parliament to be fully informed of all stages of the negotiations (europa.eu).

1.1.4 Structural Problems of the Accession

Although of great symbolic as well as real legal and political value, the accession is permeated by problematic issues. As pointed out by van den Berghe, a number of institutional and political hurdles to accession remain, both on the EU side and on the European Council's side. Overall, the hurdles relate to structural ambiguity among the actors and institutions involved.

More specifically, a few overarching problems must be solved before accession will be possible in practice. One issue that has been raised is that the autonomy of the EU legal order must not be undermined as a result of the accession. Another concern is that the ECtHR, in its judgements, might not give sufficient consideration to EU concerns. As opposed to the ECJ, it is not part of the polity whose acts it reviews. One other problem that has been highlighted, not the least by the European Council, is that accession, while improving the EU's human rights protection, would lengthen the Strasbourg courts' procedures. Considering that the ECtHR already is overburdened with pending cases, this is an issue that must be dealt with (van den Berghe 2010, p. 110).

We are thus faced with a situation that has great potential for improving the human rights protection in Europe. However, as great as it sounds in theory as complicated it is as far as division of competencies, institutional structure and trust in between the European institutions are concerned. EU's formal accession to ECHR is no longer a topic for debate, it is juridically and politically established that EU can and must accede. Nevertheless, questions remain on how this is best done in practice. As Wetzel puts it, "how can we guarantee the ECHR's uniform application across the EU and the rest of Europe in light of the ECJ's interest in maintaining its supremacy, as well as an autonomous Community legal order?" (Wetzel 2003, p. 2825)

As pointed out by Torbjörn Jagland, EU's accession to the Convention will complete "a cycle that begun at the end of the second world war when human rights visionaries drew up the world's first international texts and the Council of Europe began its work to establish democracy and the rule of law across the continent." (Jagland 2010). The EU will join a European family of 47 countries, including global players such as Russia and Turkey, in a system that brings them all under the same legal standards, to be monitored by the same court. The exact accession modalities will now have to be agreed upon by all Council of Europe member states, as well as the EU.

1.2 Aim and Problem

In this study, I will concentrate on the debate about the above mentioned accession modalities. Among the many complicated issues associated with the accession, there is one particular aspect that has stirred up extra debate and tension among the involved actors. This is the question regarding the exact scope of judicial competencies that the European Court for Human Rights should

possess as result of EU's accession to the ECHR. With a normative approach, I will elaborate on the following question:

What institutional set-up between the European Court of Justice and the European Court for Human Rights would optimize human rights protection in Europe?

Normative questions require a judgement to be made against some prior explicit objective or benchmark. In order to present a normative argument on how the accession should be structured, I must understand what ideas already exist on this matter and from that form my own position. Only by understanding what normative positions there are in the current debate will I be able to justify the position I take. Hence, I will proceed with a two-step analysis using ideal types to conduct a text analysis, and follow this up with a normative discussion based on the findings from the analysis.

1.2.1 Delimitations

One important aspect of this research is that it will not present the means to an end. Accession will still be in the making when the result of this research is presented. What it aims to provide is a well-founded argumentation that can contribute to the debate on how to solve the institutional hurdles that remain before the actors involved can reach consensus on the structure of the accession. In order to present a normative, but still tentative, argument on how the accession should be structured it is useful to have an overview of the negotiating parties, and the core values of their respective argumentation as regards the accession. Taken that the accession is still in the making, the ideal types will screen the debate about the accession, rather than the accession itself.

1.2.2 Disposition

As a next step, I will present and discuss the chosen theoretical framework. Taken that the study requires a two-step analysis, I will present each theory separately, and also explain how each complement the other in the type of research conducted here. After that, I will illustrate how the chosen theories will be turned into methodological tools with which I will conduct a text analysis, followed up by a normative discussion based upon the findings from the text analysis.

In the analysis chapter, three subsections will treat the same body of text, but the analysis in each section will be conducted with different parts of the analytical tool, namely the three different ideal types. Concluding this chapter, I will present my findings and discuss to what extent each ideal type is represented, and correspond, to the real debate about EU's accession to the ECHR. In a final chapter I will embrace the normative findings of the text analysis, and building

upon these findings I will discuss an alternative solution to how the accession should be structured in order to optimize the human rights protection in EU.

2 Theoretical Framework

The problem posed must be framed with a theoretical framework since this makes up the guide of principles for how to navigate, interpret and analyse the material at hand. The theoretical framework helps to determine what aspects to analyse, and helps the author as well as the reader to fundamentally structure and understand the research problem. Thus, it is important at this stage to refine the theoretical approach chosen for the research, and to define how the formulated problem relates to the theoretical context.

2.1 Normative Theory

Badersten argues that it is a central and urgent task for social scientists to engage in normative analysis, hence to scientifically problematize and rationally argue for positions that we take in value-added questions. This, he adds, is because most of the important social issues we deal with in research have a value-added connotation (2005, p. 7-8). Beckman and Mörkenstam note that when talking about political concepts such as 'state', 'democracy' or 'justice' it is difficult to avoid asking normative questions (2009, p. 8-9). Normative questions are those seeking answers about what is good and evil, right and wrong, desirable and detestable. They seek answers to how something *should be* and how this can be *justified* (Badersten 2005, p. 8-9). With normative questions we can develop and revise arguments for how political power should be distributed and exercised, and imply how one should act in relation to political problems. Hence, normative argumentation make it possible to criticise and evaluate actual policies and institutions (Beckman and Mörkenstam 2009, p. 8-9).

As pointed out by Hilpinen, with normative statements we state how things ought to be, as well as what ought to be done to get there (1997, p. 335). MacCormick holds that law could be viewed as a form of normative order. He suggests that political power is power-in-fact whereas 'legal power' is power of another sort, namely normative power that is confined to the realm of the 'ought'. Political power is the power that make sure that we act in a certain way, while legal power bring it about the norms defining that we ought to act in a certain way (1997, p. 412-413).

EU's accession to the ECHR is not a new topic, it has previously been debated and researched by academics, lawyers and politicians. This means that there are many value-based positions and proposals on how EU's accession to the ECHR should proceed in order to reach the best possible result. Hence, it makes up an interesting field for normative analysis. Even though there still are those who do

not agree on the necessity of EU's accession to the ECHR, analysis on whether or not the accession should take place is no longer actual. The accession is juridically and politically established and will take place. What is important is to establish how the accession will take place, and on this note there are many divergent arguments, each claiming to have the better solution to how the accession should be.

A central part of normative social analysis is that it seeks to uncover and question the value-added conflicts that surrounds certain social phenomena. The intention is not necessarily to justify a specific normative principle or a specific form of social organization, but rather to clarify the meaning of the current value-added conflicts and demonstrate that different assumptions lead to different, sometimes contrasting views of how society should be organized (Badersten 2005, p. 30). The substance of value-added conflicts can vary widely. All have in common that they are based on value-added statements which are first defined and given a precise meaning and then, explicitly or implicitly, contrasted or ranked in relation to other value-added ideas or statements (Ibid. p. 31).

In order to depict what value-added conflicts there are about EU's accession to the ECHR, it is useful to complement the normative framework with a theory of concept formation. This allows for a categorization of the existing value-added thoughts regarding the social phenomena at hand. The categorization enables me to define each value and give a more precise meaning on the substance of the value-added conflict that is being dealt with.

2.2 Theory of Concept Formation

Concept formation is a "process by which a person learns to sort specific experiences into general rules or classes" (Hunt). One such theory of concept formation is Weber's notion of 'ideal types'. Implicit in Weber's work is the notion that constructing an ideal type is a way of learning about the real world. His main thesis is that social, economic and historical research can never be fully inductive or descriptive as one must and does always approach it with a conceptual apparatus. An ideal type is a kind of conceptual or analytical model which can be used as a tool for understanding the world. A well constructed and well-founded ideal type can be a tool with which it is possible to describe and explain the characteristics of certain social phenomena (Coser 1977). Hence, ideal types are statements of general form that highlights the existence of certain constellations of elements of actions or thought (Burger 1987, p. 134).

The ideal type is an analytical methodology well suited for making comparisons between the constructed type and empirical reality. It is a tool that serves the investigator as a measuring rod to ascertain similarities as well as deviations in concrete cases. If we say that the value-added argumentation that make up the current debate about how to best structure EU's accession to ECHR is the empirical reality, ideal types work well as tools to depict and define the

constellation of thoughts that make up and contrast each other in that debate. The comparison between the constructed ideal types and the empirical reality can lead to further understanding not only about how empirical reality stands, but how different aspects of it is justified. Hence, the combination of a normative analytical framework and the additional use of a theory of concept formation make it possible to present and justify a well-grounded and value-added argumentation on how something should be. In this case it enables new arguments on how EU's accession to the ECHR should be structured.

2.3 Institutions Matter

I want to make clear that the focus of my research is not on whether or whom is looking to maximize human rights protection in Europe, but how - with the existing means - this protection is best guaranteed. Hence, I am not dealing with the normative question on whether or not human rights should be protected in Europe. This is a study on how to optimize the institutional and judicial structure in order to maximize human rights protection in Europe.

Over the last decade, 'the new institutionalism' has allowed political scientists to reappraise how political institutions can be conceptualized. It offers a perspective on how political life is organized, functions and changes in contemporary democracies. In contrast with older institutionalism which used formal-legal rules as proxies for political action, the new institutionalism is permeated by behavioral elements. This new turn includes a set of theoretical ideas, assumptions and hypotheses concerning the relations among institutional characteristics, political agency, performance, institutional change, and the wider social context of politics. The new institutionalism assumes that political life is not solely organised around policy making, aggregation of predetermined preferences and resources. Instead, its advocates hold that politics involves a search for collective purpose, direction, meaning, and belonging. The basic units of analysis of the new institutionalism are internalized rules and practices, identities and roles, normative and causal beliefs, and resources; not micro-rational individuals or macro forces (Olsen 2007, p. 2-4).

According to Rothstein, it is the institutional form that encourages decision-makers as well as citizens to see to the public good instead of their own narrow self-interest. Inspired by behavioral elements, he presents a political model where actors engage in deliberation and debate, and strive for a sort of constitutional solution that makes it possible for groups and individuals to reach common solutions to collective problems. According to Rothstein, the existence of social norms such as the willingness to act in a collective and solidaristic manner, can be traced to existing political institutions. Added to that he argues that society's norms are not structurally given by culture or history. The differences in norms between societies can be traced to the design of their political institutions. With this he means that we as citizens can decide which norms shall prevail. In this

particular case those who design the institutional structure of EU's accession to the ECHR, can create norms for the field of human rights protection in the EU (1998, p. 117-118). Rothstein's view is the converse view of that held by a realist institutionalist. For realists, institutions are little more than tools for state power, meaning that states rarely allow international institutions to become significant autonomous actors. The only reason states spend a significant amount of time and effort constructing institutions is because it is a way for them to advance or impede state goals in the international setting, in terms of economy, environment or security. Hence, states fight over institutional design because it affects international outcomes (Koremenos et.al. 2001, p. 762).

2.3.1 Designing International Institutions

In light of the 'new institutional turn' it has become important to carry out more detailed analyses of specific institutional arrangements and questions of institutional design. Hence, it has become more fruitful to investigate the precise mechanisms through which institutional cooperation can emerge. The design of international institutions is not random - they are the result of rational, purposive interactions among states and other international actors aiming to solve specific problems (Koremenos 2001, 2009). With few exceptions, the goal with EU's accession to the ECHR is guided by the same overarching principle - namely that the higher protection of human rights, the better. Even if the ultimate goal for the involved actors may be to build up a well functioning institutional structure for human rights protection in Europe, there are many different answers to how this structure should take form. As pointed out by Olsen, "the principles and rules on which an institution is constituted are never fully accepted by the entire society and political orders are never perfectly integrated" (2007, p. 2-4). Many underlying questions are likely to permeate the ongoing negotiations about EU's accession. What institutional capacities are needed for success? Should the institutional structure be centralized to collect data, monitor compliance, or even enforce some rules? Or should it be more decentralized, serving mainly as a forum for periodic bargaining? Should all actors be given equal voice, or should some have only an informal, consultative role? (Koremeos 2001, p. 769).

As pointed out by Tosiek, the integration process of the EU is a clear example of the constant search for a compromise among various concepts represented by actors such as politicians and scholars, on the EU as well as the national level (Tosiek, p. 1). In order to conceptualize the values that may guide the different views about institutional structure of EU's accession to the ECHR, I refer to the work of Mayntz (2004) and Sharpf (2000) as regards governance and EU policy-making. According to them, governance can be understood as institutionalized modes of co-ordination through which collectively binding decisions are adopted and implemented. Hence, governance consists of both structure and process. When constructing the ideal types that will be used in the analysis of the debate, I focus on governance structures and refer to these as institutions and actor constellations. Inspired by Börzel, I have three different types of institutionalized

structures that inspire the construction of my ideal types; *hierarchy, competition systems*[1] and *negotiation systems*.

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[1] The concept 'competition system' is inspired by my market mechanisms in the sense that these can be institutionalized to co-ordinate actors' behaviour through competition. In this thesis, the concept of 'competition system' is used to describe the type of institutional set-up where rules and structure evolves out of and builds upon competition/rivalry.

3 Method

In order to take a normative stance for how the remaining hurdles for EU's accession should best be overcome, I must understand what ideas already exist on this matter and from that form my own position. Only by understanding what normative positions there are in the current debate will I be able to justify the position I take. In the following chapter, I present how I proceed in order to construct analytical tools that will help me depict what values are present in the debate.

3.1 Normative Approach

In normative-methodological terms, I employ the type of normative approach that Badersten classifies as normative analysis in the strict sense. It requires that the researcher is able to justify a particular act or special permit on the basis of a precise and well-reasoned set of values. The essence of this normative approach is that you argue for a specific idea of what is good or desirable and present a clear value-specific answer to a should-question (Badersten 2005, p. 47-49). The ambition when conducting normative analysis in the strict sense is not only to convey criticism of other arguments and answer questions on what policies should be implemented. This type of normative analysis strive to present good reasons for many of the assumptions we otherwise take for granted. With normative analysis in the strict sense we do not only examine what a particular principle should entail, but also why this principle should be accepted in its form and purpose (Beckman and Mörkenstam 2009, p. 10).

Ideal types will make up the analytical model, which will be used as a comparative "yardstick" to describe, analyze and understand the current debate about EU's accession to the ECHR. More specifically, the ideal types will depict the different ideas, or "constructions of thoughts", about institutional structures that have been and are present in the debate on EU's accession to the ECHR. The purpose of this is to map and understand the legal and institutional hurdles that remain to accession, as well as what solutions have been put forward to overcome them. Ultimately, based on the understanding I get from the analysis conducted with ideal types, my aim is to form and present my own opinion on how the accession should be.

3.2 Ideal Types

Here, the ideal types will be used as tools with which to reconstruct systems of ideas. It is important to note that an ideal type does not represent an average. The question asked in connection to the use of ideal types as methodological tools is not whether the phenomenon analyzed belongs to a certain class, but to what extent the phenomenon is similar to the pure ideal type (Esaiasson et. al. 2007, p. 159). Having constructed ideal types representing different systems of ideas, they can be applied as tools to screen the existing empirical data on a certain topic (Bergström and Boréus 2005, p. 159). Since the question I pose entails the following; "what *institutional structure* would result in the best *protection for human rights*", it is important to construct ideal types that can capture and be compared to different types of institutional structures.

3.2.1 Analytical Tools

Three governance structures inspire the construction of my ideal types; a hierarchic system, a competition system and a negotiation system. These three are based upon fundamentally different ideas as regards coordination, decision-making and division of competencies.

Hierarchies are based on an institutionalized relationship of domination and subordination that significantly restrains the autonomy of subordinate actors. In competition and negotiation systems, the formal relations between the actors are viewed as equal. They often differ with regard to their bargaining power, but in these systems no actor is subordinate to the other. Competition systems do not provide for any structural coupling, whereas the negotiation systems are characterized by loose coupling (Börzel 2010, p. 194). In *hierarchical systems*, decision-making is usually authoritative, and actors must obey. In the non-hierarchical competition- and negotiation systems, decision-making takes other forms. In *competition systems*, actors are largely motivated by egoistic self-interest. However, they pursue a common goal or some scarce resources of which they wish to obtain as much as possible by performing better than their competitors. In *negotiation systems,* conflicts of interest are solved by negotiation. Agreement is achieved by negotiating a compromise and granting mutual concessions, on the basis of fixed preferences, or processes of non-manipulative persuasion, through which actors develop common interests and change their preferences accordingly (Ibid. p. 196).

As far as competence in between institutions is concerned, the ideal types are guided by different ideas. A hierarchical system is based upon asymmetrical influence in between the actors and institutions. In EU-institutional terms it resembles the concept of supranational centralization, which reigns where some actors have the power to take legally binding decisions without requiring the consent of the the other involved actors. In competition systems, political rivalry entails that actors contribute to the provision of collective goods and services by

pursuing their self interest. Consequently, they adjust their behaviour in accordance with what they want to gain from the decision. The division of competencies is guided by mutual adjustment. In negotiation systems, all actors that are involved in such a system should have equal possibility to influence each other in the decision-making - through side-payments, bargaining and arguing. Hence, the principle of mutual recognition prevails as a guiding principle for division of competencies (Ibid. p. 196-198).

Table 1, is a compilation of the analytical tool. The ideal types are correlated with some of the most important elements of the debate - which are also related to the research question posed in this study. The table as a whole gives an overview of how advocates of each institutional structure may view EU's accession to the ECHR and the structure of it.

Table 1.

	Hierarchy	Competition	Negotiation
Institutional co-ordination	tight coupling	no structural coupling	loose coupling
Decision-making	authoritative	competition	bargaining or arguing
Division of competence	asymmetrical influence	mutual adjustment	mutual influence

The content of *Table 1* will be used as a tool to screen the debate about the accession modalities. However, the debate dealt with in this thesis does not revolve around strictly political governance structures. Rather, it could be viewed as a political debate about judicial protection. Hence the ideal types, as well as the elements of the debate, must be slightly modified in order to capture the essential parts of these negotiations.

Institutional coordination should here be read as the relationship between the Luxembourg and Strasbourg courts. *Decision-making* should be understood as the status of the documents that make up the legal instruments for each judicial structure, and what court should interpret the respective provisions. The *division of competencies* captures how and where each institutional actor in the structure should be taken into consideration and participate in the judicial process. The modification will be further explained in the following chapter.

3.3 Material

The thesis is based on a wide range of materials. My primary source has been official documents from all the institutions involved. I have used documents and transcripts of committee and plenary debates in the EU institutions. In addition, I

have analyzed speeches held in the European institutions, the two Courts and at several high level meetings and summits. In addition, there are numerous academic articles written about the relationship between the EU and the Council of Europe, as well as between the two courts. The amount of articles shows that there has been a wide, and at some points intense, scholarly debate about this topic. The articles have been chosen on the premises that the title and the keywords relate to the topic of this study. The electronic sources include information from the official website of the EU as well as a number of articles with general EU-information.

As previously mentioned, the talks about EU's accession were reawakened in the discussions that led up to the failed EU Constitution, and later the Lisbon Treaty. Hence, most of the material will be from the time span between the Convention of the Future of Europe in 2002 to date.

3.4 Methodological Considerations

When criticising the use of normative analysis, sceptics often target the normative-methodological development - or rather the lack of it. Many say that normative methodology does not satisfactory meet the required scientific standard in terms of being systematic, coherent and precise. Due to the lack of these standards, normative analysis is considered to be unscientific (Badersten 2005, p. 9). According to Badersten, intersubjectivity is a prerequisite if value judgements are to be made the subject of scientific analysis. However, it is a highly debated and controversial philosophical issue that about how we determine the boundaries between personal judgements and intersubjectively meaningful values (Ibid. p. 12).

Bernstein holds that whether we are speaking about empirical judgements or normative judgements, it is possible to call them 'objective' if they can properly be justified. It is therefore important, in normative analysis more than anywhere, that a researcher makes sure that who ever come across his research will be able to familiarize themselves with, follow, reconstruct and criticize the reasoning that has led to the results. This is what poses the biggest challenge, but at the same time entails the utmost possibility, for great success for the tradition of normative analysis (Bernstein 2010, p. 198).

Some critics argue that Weber's notion of ideal types tend to focus on extreme phenomena and that it is difficult to show how the types and their elements fit into a theory that tries to capture a social system. Aware of its fictional nature, Weber has tried to make clear that the ideal type never seeks to claim its validity in terms of a reproduction of or correspondence with social reality. They are abstract designs where typical elements of social phenomena, which may never fully appear in real life, are refined. Hence, the ideal type is an objective that one can strive to approximate, but never fully achieve (Weber 1904).

The ideal type, as it is used in the research conducted here, should be considered an artificial construction that is based on the compilation of important,

and for the topic at hand relevant, ideas. It is not employed as a construction meant to present exact measurements of how things stand, but rather to indicate some tendencies that are present in the part of society that is being researched. The ideal type, in its purely fictional nature, is a methodological utopia that cannot be found empirically anywhere in reality (stanford.edu). To many critics, the terms 'ideal' and type' has caused a lot of confusion. In this thesis, 'ideal' is understood as an abstract, analytical term correspondent with the term 'idea'. 'Type' is used as an equivalent to the term 'representative' in today's methodology. This means that the 'ideal types' are 'representative ideas'. They are employed with the aim to enlighten what are the typical elements and differences among the negotiating parties participating in the discussion on how to structure EU's accession to the ECHR (Kukartz 1991, p. 4).

3.5 Operationalization

In social research, validity represents the most problematic, yet most central problem. Questions and problems are formulated on a theoretical level, whereas the research is conducted on an operationalizational level. According to Esaiasson et. al. this produces a recurrent problem of translation – do we empirically investigate what we theoretically claim to be researching; how is the validity of our research? Validity of a study depends on to what extent the conceptual tools measure what they intend to measure (2007, p. 61-63).

Esaiasson et. al. point out that the problem of validity is increasingly difficult to overcome when the distance between the theoretical definition and the operational indicator is wide. In this study, a text analysis conducted with ideal types is used to provide findings from which I can proceed with a normative discussion. The aim of the normative discussion is to reach and justify my answer to the should-question that I pose in the introductory chapter. Hence, I have chosen a quite theoretical method to answer a straight-forward and value-added question. In accordance with what Esaiasson et. al. advice on this matter, my intention is to avoid being too spontaneous in my research and keep a systematic argumentation that is clearly supported by the sources used (Ibid.).

I will screen all the material with one ideal type at the time. This is a way to fulfil the requirement of intersubjectivity in normative research. It is a useful method that ensures that I pay the same amount of attention to all parts of the material, and that each of my ideal types will be used to the same extent when screening the debate. In addition, it will enable the reader to follow my analytical procedure. This would had been more difficult if I referred more spontaneously to the massive amount of material that I have at hand.

4 Analysis

At the heart of the debate concerning the structural ambiguity permeating the accession lies ECJ's subordination to the Strasbourg court, the status of the EU Charter of Fundamental Rights vis-à-vis the Convention, and EU's representation in the bodies of the Convention. When screening the debate, I will exemplify what is being held by the negotiating parties regarding these issues, and relate them to the ideal types.

4.1 Ideal Type of a Hierarchic System

In a hierarchic system, co-ordination should be made up in tight coupling, possibly some sort of formal mechanism between the two Courts. The interpretation and execution of EU law should be made by one authoritative court. Hence, the division of competences should be structured asymmetric.

4.1.1 The Debate

As pointed out in a document from the Spanish Presidency (Note 6180/19 2010), it is important that the accession complies with the conditions laid out in the Treaties and Protocols (especially Protocol No 8 relating to Article 6 (2) of the TEU) where the non affectation of the Union's competences, and preservation of the monopoly of the ECJ to interpret EU law is stated. Such writings could be interpreted as if there is no other institutional structure possible than an hierarchic system, where the ECJ remains as a supreme interpreter of all EU law. Nevertheless, ECJ's unaffected legal status can be regarded in different ways.

In a Commission MEMO, released in connection with the recommendation to the member states to start the negotiations, I read "the EU's accession will not change the Union's legal order" (Commission 2010). In a speech held by Commissioner Reding, responsible for justice, fundamental rights and citizenship, I hear , "the Strasbourg Court should in principle not interpret Union law". Reading such statements, I draw the conclusion that the hierarchic norm does guide some of the negotiating parties from the political sphere.

The European Parliament's report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by a vast majority of parliamentarians in the plenary session in May 2010. Representing the compromise of 736 members of the Parliament, this report contains many

different values about the conditions on which the negotiations on the legal instrument for EU's accession to the ECHR should proceed, and the hierarchical value is present. In the report I find the following passage:

"the Court of Human Rights must be regarded not as a higher court but rather as having special jurisdiction in exercising external supervision over the Union's compliance with obligations under international law arising from its accession to the ECHR" (Jáuregi Atondo 2009)

The paragraph can be interpreted as such, the cooperation between the Courts is of great symbolic value for the coherence of European human rights law - but the coupling must not make up a risk for the EU legal system to become subordinate to the ECHR. Having voted for the adoption of the report, some members of the parliament make clear that the supremacy of the European Court of Justice must prevail.

"It should be noted that accession does not grant the EU membership of the Council of Europe, or call into question the autonomy of Union law, since the ECJ remains the only authority adjudicating on issues relating to the validity and interpretation of Union law." (European Parliament, MEP Teixeira 2010)

These are short statements, easily overlooked in texts filled with passages about the symbolic legal and political value of the accession, and how it will strengthen human rights protection on the whole European continent. Nevertheless, they should not be overlooked. An underlying norm of a hierarchic system between the European Communities and the European Convention on Human Rights, and their respective courts, may not be a prominent idea among the involved political actors, but it is present.

Coming across a text written by Advocate General Jacobs from the European Court of Justice, I find a substantive amount of arguments comparable to the ideal type of a hierarchical system. General Jacobs does not support the accession. He regards it absolutely unnecessary, and claims that the accession seem to be a result of political leaders who put more value in symbols than in substance. Instead, he suggests that Community law could be modified in order to cover the aspects of human rights protection where it does currently not have competencies.

"The solution should rather be to extend the jurisdiction of the EU courts to enable them to review such action (...)." (Jacobs, p. 295)

Another sensitive area as regard the division of competencies in between the Luxembourg court and the Strasbourg court is that there are questions of the Strasbourg court ruling where the ECJ is not allowed to rule. This would effectively sideline the Luxembourg court. A judge at the ECJ, expresses his concern about how accession to the Convention brings up the possibility of individuals having recourse to the Strasbourg court over complaints about EU military missions. This relates to the fact that the ECJ has no jurisdiction in the realm of common foreign and security policy or over the validity or

proportionality of police operations carried out by a member state. This raises the question of the Strasbourg court ruling where the ECJ is not allowed to rule, and also the extent to which member states are liable for actions carried out in the name of the EU.

Commenting on this complicated issue, Jacobs shows yet again that he would prefer a European legal system run by the ECJ with extended powers.

"It is not easy to explain the persistent resistance of the Member States to conferring jurisdiction on the ECJ, especially in areas where the liberty of the individual is directly in issue. If the explanation is a fear of a hyper-active Court, such a fear is not justified. Even in the sensitive field of the common foreign and security policy, the Court could be relied upon not to overturn decisions of high policy, but rather to ensure the protection of the interests of individuals." (Jacobs, p. 296)

There seem to be an idea present among the judicially active participants of the debate, that the accession to the Convention is not the perfect solution to better European human rights protection. As visible in Jacobs argumentation, accession may even be regarded as unnecessary. Meanwhile, in the political sphere it is frequently pointed out that there is a great symbolic value in the accession, while at the same time maintained that the ECJ must stand unaffected by the accession. In an opinion (C-402/05 P), advocate general Maduro from the ECJ states the following:

"Although the purpose of the Convention is the maintenance and further realisation of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level."

"The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community" (Maduro 2008, p. 15)

In opposite to Maduro, Greer and Williams argue that "although the ECJ may have ambitions to occupy the position of a constitutional court, it has never come to terms with the consequences of such an approach for human rights generally in Europe" (Greer and Williams 2009, p.463, 477). Discussing the relationship between the Strasbourg and Luxembourg courts, Douglas-Scott notes that although the Strasbourg court is increasingly referring to Luxembourg, it is likely to not want to be seen to rely too much on the ECJ. This could be a result of fear for seeming to shed its pre-eminence as Europe's senior human rights court. With this statement, Douglas-Scott puts light on the European Court for Human Rights as perceiving itself to be the senior, possibly hierarchically superior, court (Douglas-Scott 2006, p. 629).

4.1.2 Summary

It is clear that when guided by the hierarchic ideal type, the negotiations revolve around arguments about the judicial competences of each legal system vis-à-vis the other. There are no hierarchic values to be found in the debate about the structural ambiguity between the EU Charter and the Convention, nor anything about how the EU should be represented in the Convention bodies.

Representatives from the EU sphere, positive to the accession as a whole, do fuel the debate with arguments entailing that the EU legal system must under no circumstances be affected or in any way subordinated to the ECHR legal measures. It is accepted that accession will allow the Strasbourg court to scrutinize all acts of the EU institutions and bodies for their compatibility with the ECHR. However, the right to scrutinize the EU law must under no circumstances spill over to any other legal areas.

The few accession-sceptic voices pronounced in the debate show clear signs of hierarchic values, promoting the ECJ as the prominent Court and criticizing the accession as unnecessary. In the scholarly debate, there are even insinuations that the European Court for Human Rights regards itself the hierarchically superior court.

4.2 Ideal Type of a Competition System

The ideal type of a competition system rejects any kind of structural coupling. As regards protection of human rights, the instrument that ensures the best protection should prevail. Hence, the legal landscape for human rights protection would be made up by two complementing, or competing, legal instruments. Thus, the division of competencies would be the result of mutual adjustment.

4.2.1 The Debate

The need for a EU Charter of Fundamental Rights became obvious when EU policies under the area of freedom, security and justice began to develop in the mid-1990s. With the ratification of the Lisbon Treaty in 2009 these policies, previously under the third pillar, shifted from intergovernmental co-operation between member states to the Community method. There is no doubt that security, home affairs, and justice relates very closely to the EU citizens personal rights and freedoms. The Charter can be seen as a counterpart for EU's new competencies in this area (Pernice 2008, p. 236-237).

With the Charter in place, why must the EU accede to the Convention? The European Charter for Fundamental rights and freedom obliges the EU to act and

legislate consistently with its articles. The Luxembourg Court will strike down any EU legislation that contravenes it. However, there are certain restrictions on the protection provided by the EU Charter. It only applies to EU law and does not extend the competencies given to it in the treaties. In addition, Article 6 of the amended TEU and Article 51(2) of the Charter itself restricts the Charter from extending the competencies of the EU. This means that the ECJ will not be able to legislate to vindicate a right set out in the Charter unless the power to do such is set out in the treaties. Nor is there any possibility for individuals to take member states to Court unless their rights have been breached when the member state in question was implementing EU law (Pernice 2008, p 237).

This means that the optimization of human rights protection in EU cannot be reached solely by relying on the EU Charter. The most effective human rights protection requires that the EU is also integrated in the Strasbourg control system, including the jurisdiction of the European Court of Human Rights.

"Our EU Charter represents the most modern codification of fundamental rights in the world. We, Europeans can be proud of it. The Charter entrenches all the rights found in the European Convention on Human Rights. The meaning and scope of these rights are the same as those laid down by the ECHR. The Charter, however, goes further and also enshrines other rights and principles, including economic and social rights resulting from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments." (Reding 2010)

It may be a controversial thing to state, but I do not think it is completely out of line to wonder if there exists an underlying wish on part of the EU representatives that the EU charter would had been formulated in a way that had it covering all legal aspects of the human rights arena. Maybe it would be easier to optimize human rights protection if we could rely on one instead of two legal orders? I find support for my thought in advocate general Jacobs statement:

"There was certainly much to be said for the idea that the European Union should have its own charter of rights, particularly suited to its own competences and activities and expressing its own values. As it finally emerged from the negotiating process, however, the Charter might be liable to be confusing, or even misleading;" (Jacobs p. 293)

Myjer admits that at the level of the Council of Europe there has been some concern that the case-law of the ECJ and the Court in Strasbourg might diverge as far as human rights are concerned. In order to avoid such controversies declarations and debates have stressed the need, "in regard to the European Union Charter of Fundamental Rights, to find means to avoid a situation in which there are competing and potentially conflicting systems of human rights protection, with the risk of weakening the overall protection of human rights in Europe". In addition, it has constantly been "reaffirmed that the Convention must continue to play a central role as the constitutional instrument of European public order on which the democratic stability of the Continent depends" (Myjer 2000)

As pointed out by van den Berghe, the EU Charter contains two provisions governing the relationship between the two instruments. Both provisions are formulated as to avoid inconsistencies between the Charter and the Convention. In the field of human rights and fundamental freedoms which are recognised by both the EU and the Convention, article 52(3) of the Charter reads that 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Article 53 of the Charter provides that 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [by the Convention]'. However, as van den Berghe points out, these provisions refer to the Convention, not to the rulings and case-law of the Court of Human Right. As held by many authors in the scholarly debate, this means that the provisions only marginally diminish the probability of conflicting interpretations from the two courts (Douglas-Scott 2006, p. 639).

Analysing the co-existence of national, international and supranational systems of protection for human rights, di Federico states that, "the protection of human rights often remains tangled in the tortuous mechanisms generated by the (described) multi-level system." He seems, however, convinced that the entry into force of the Lisbon Treaty has allowed the creation of a more complete, coherent and consistent legal framework for human rights protection. He sees that whereas the nature of the EU Charter will guarantee the respect of a uniform standard of protection in the elaboration and implementation of EU law, the jurisdiction of the Strasbourg court will ensure that EU institutions, including ECJ, acts in accordance with the ECHR (di Federico 2007, p. 54).

In contrast, Douglas-Scott goes as far as to claim that with the two existing European courts we are facing a situation of 'Kafkian complexity'. He holds that the complex human rights jurisdiction of the ECJ and Court of Human Rights provides a striking illustration of a European legal space of overlapping jurisdictions and segmented authority.

"The member states of the EU become defendants in Strasbourg when what is at issue is an EU act, supranational in character. So national governments, rather than the EU Commission, defend the case and the EU has only intervener status. This transformation of an EU act into an intergovernmental one undermines the supranational role of the Commission. It is also a problem for the member states which must bear responsibility for a finding against them for what is essentially an EU action. This is the price for Strasbourg achieving a level of control over the EU, while respecting its autonomy as a separate legal order." (Douglas-Scott 2006, p. 639).

Wentzel criticises how experts argue that this type of analysis, comparing different rights protection systems to determine which guarantees a higher protection level, comes from a "misconceived perception" as to the quantifiability of human rights. According to Wentzel, it must be possible to compare human rights protection standards against one another. If not, it would be "impossible to ascertain whether legislation protecting fundamental rights complies with local constitutional or international protection standards." Wetzel even suggests that "despite the existence of conflicting rights within the Charter, the EU and its Member States

will ultimately strike a desired balance that, at the very least, affords the minimum ECHR protection standard to all rights" (Wetzel 2002, p. 2858).

4.2.2 Summary

Screening the debate with the ideal type of a competition system, the discussion focuses very much on the EU Charter of Fundamental Rights. Nothing is mentioned as regards the relationship between the courts. This could very well be interpreted as a rejection, or non-interest, for any formal cooperation, hence in accordance with the ideal type. The competitive value steers arguments about how human rights protection is improved and secured by evolving measures on part of both legal regimes.

In this sense, I found that representatives of the EU legal order were keen on clarifying the importance and status of the EU charter. However, all negotiating parties are in accordance that the EU Charter leaves gaps in the protection, hence it is not an option to rely solely on it as the supreme legal protection. It must therefore be complemented by accession and protection under the ECHR. In case of diverging standards between the two systems, mutual adjustment prevails. In this case, that would mean that the legal standard that provides the greater protection for the applicant in the case concerned prevail, and the respective court carries out the verdict.

In the scholarly debate, much attention has been paid to the importance of avoiding diverging jurisprudence on part of these two legal documents. This, they hold, would be devastating for the legal order as it could steer up competitiveness between the courts and become counterproductive for human rights protection.

4.3 Ideal Type of a Negotiation System

The key to strong protection for human rights in Europe is cooperation, grounded on parity between the legal instruments. As far as institutional structure is concerned, the formal coupling between the courts may be loose but it is important that it is guided by the value of negotiation. On this note, EU's representation in the European Convention bodies turns out to be a central point of the discussion that brings out argumentation guided by this ideal type. Allowing accurate and fair representation and participation from the EU in the Convention bodies, will be met with respect and result in an improved relationship between the two Courts. According to this ideal type, relationship built on equality, that allows for bargaining and negotiation, will optimize human rights protection.

4.3.1 The Debate

The European Parliament's report on institutional aspects of EU accession to the ECHR, includes passages about how the accession will bring forward a harmonious development of the two European courts in the field of human rights, particularly because of the increased need for dialogue and cooperation (Jáuregi Atondo 2009). Hence, this report is an instrument with which advocates of a negotiation system, as well as the above mentioned hierarchic promoters, bring out their wish. Deputy Secretary General of the Council of Europe, Krüger, holds that "when it comes to protecting fundamental and human rights, the European Convention on Human Rights and Community law is based on the same values and principles." This means that any concern on part of the ECJ's legal status as subordinated to that of the Strasbourg court is unjustified (Krüger 2002).

Krüger holds that "the Strasbourg Court is in no sense a higher court than the Supreme Courts or the Constitutional Courts of our countries. It is simply a "more specialised" court, responsible under the European Convention on Human Rights (...)." Hence, as soon as the EU has acceded to the ECHR, the tasks of the Luxembourg and Strasbourg Courts would be complementary (Ibid.). The idea of the Strasbourg Court as a specialized court is present also in the report from the European Parliament. As understood from this perspective, the Strasbourg court as a specialized court is the opposite of a hierarchical system, and with this it is possible to avoid any risk of competitiveness.

"(...) the European Court of Human Rights must be regarded not only as a superior authority but rather as a specialised court exercising external supervision over the Union's compliance with obligations under international law arising from its accession to the ECHR; the relationship between the two European courts shall not be hierarchical but rather a relationship of specialisation;" (Jáuregi Atondo 2009, p. 5)

In terms of values that we often relate to human rights protection, altruism and equality seems more familiar than competition and power. Nevertheless, in order to reach the mentioned level of cooperation, there must be settings in which the cooperative relations between the courts can be established. In the Parliament report, the idea of formalised relations between the courts is not considered necessary. Instead, the report says that the courts should rely on their already established and regular dialogue.

"Considers that it would be unwise to formalise relations between the Court of Justice and the European Court of Human Rights (...) recalls in this context Declaration No 2 concerning Article 6 (2) of the Treaty on European Union, which notes the existence of a regular dialogue between the Court of Justice and the European Court of Human Rights, which should be reinforced when the Union accedes to the ECHR;" (Jáuregi Atondo 2009, p. 7)

With no formalised coupling where dialogue and cooperation can take place, other structural adjustments must me made. Related to this, the Parliament report stresses that "accession to the ECHR does not make the Union a member of the

Council of Europe but that a degree of participation by the Union in the bodies associated with the Convention is necessary in order to ensure proper integration of the Union into the Convention system and that, therefore, the Union should have certain rights in this domain" (Jáuregi Atondo 2009, p. 6).

Among the rights that the European Parliament asks for are a post for a judge who participates in the work of the Strasbourg Court on an equal footing with the other judges. The right to attend and vote at meetings of the Committee of Ministers as this is a setting where essential parts of Strasbourg judgements are handled. In addition, the report contains a wish for the right of the European Parliament to appoint or send a certain number of representatives to the Parliamentary Assembly of the Council of Europe when the latter elects judges to the Strasbourg Court (Ibid.).

In a report from the 2002, the European Council's Steering Committee for Human Rights (CDDH) present their view of technical and legal issues of a possible EU accession to the ECHR. As regards the right for an EU representatives to vote in the Committee of Ministers, the authors of the study argue that "it would seem logical that, as any other Party to the Convention, the EC/EU would be entitled to one vote." On the other hand, they argue, EU's sphere of competence could be seen as more limited than the sovereignty of the states. This, in turn, would justify some limitation of EU participation in the supervision of execution of judgments. Nevertheless, it is also recognised in the study that it could be claimed that, in the view of the principle of collective enforcement of the rights contained in the Convention, it would not be justified to limit the right to vote only to the supervision of judgements involving EU law. This would give rise to an asymmetrical situation vis-à-vis other Contracting Parties (Steering Committee for Human Rights 2002, p. 10).

When discussing the presence of an EU judge in the Strasbourg court, the steering committee have trouble finding a practical solution. The truth is that the EU is not a state party to the ECHR, hence it is more difficult to structure the representation of the EU in the Convention bodies. Nevertheless, from the EU's perspective, the Protocol relating to Article 6(2) of the TEU on the accession of the Union to the Convention specifies in its Article 1 that such accession must preserve the EU's and EU law's specific characteristics, in particular concerning 'the Union's possible participation in the control bodies of the [Convention]'.

Commissioner Reding holds that also the European Commission is of the opinion that from an institutional point of view, it is important that representatives of the EU should participate in the bodies of the Convention. This, Reding holds, regards above all the Strasbourg Court itself. The presence in the Strasbourg Court of a judge elected for each Contracting Party is one of the founding principles of the Convention. The principle of the presence in the Court of a judge elected for the Union is therefore of the highest interest to the Union, as Union law is a separate, autonomous and highly specialised legal order.

As pointed out by van den Berghe, "from the Council of Europe's perspective, Protocol No 14 to the Convention renders accession of the EU to the Convention possible. Its Article 17, which amends Article 59(2) of the Convention, provides that 'The European Union may accede to this Convention'." However, it is not

clear, at this stage, how the EU should be represented in the organs of the Council of Europe such as the Court of Human Rights and the Committee of Ministers (2010, p. 152).

What is clear is that an institutional structure aiming for negotiation and mutual influence must contain spaces for the type of arguing and bargaining that allows such structure. There has not been much scholarly attention on how the EU should be represented in the control bodies of the Convention. Whereas most articles and studies on the coming accession notice that the technical details such as EU's representation in the Convention bodies will be an important and not easily solved part of the negotiations, none present theoretical answers about a n applicable solution.

4.3.2 Summary

Present in the accession-debate there are also negotiating parties who hold that protection of human rights must not include any trace of competition, nor hierarchy. They are advocates of a judicial structure where the division of competence is mutual and decision-making grounded in bargaining. These arguers focus much of their attention on equal representation of all contractual parties in the control bodies of the Convention and the Strasbourg Court. Representatives from the EU are very keen on equal representation on part of the EU, as all other Convention members. The Council point of view, and the scholarly debate, implies that EU's representation is not as clear cut as that of the member states. Still, it is on all parts established that the EU should be represented, the question is to what extent and in what form.

4.4 Conclusion

I have conducted a text analysis of the past ten years debate about EU's accession to the ECHR. As analytical tools, I used ideal types inspired by norms that represent the foundation of three different European governance structures. Comparing the ideal types with the actual debate, I analyzed the occurrences of specific ideas in the debate about EU's accession to the ECHR. I found that values of hierarchy, competition as well as negotiation are present in the negotiations. From this I draw the conclusion that the accession modalities are debated among advocates inspired by these three values.

For advocates of the hierarchic structure, reference is frequently made to Article 6 (2) of the Lisbon Treaty where it is stated that accession must not affect the Union's competencies, and protocol No. 8 in which it is clarified that the ECJ must preserve the right to interpret EU law. According to this normative stance, the most important aspect when negotiating the accession modalities is that the ECJ is not subordinated by the Strasbourg court. There are no explicit statements about the importance of tight coupling between the courts, however I would argue

that tight coupling is embedded in a system of subordination. The asymmetric structure, preserving the ECJ's supremacy, would allow it to have certain control over the Court of Human rights in Strasbourg.

The European Charter for Fundamental rights and freedom obliges the EU to act and legislate consistently with its articles. The Luxembourg Court will strike down any EU legislation that contravenes it. The Charter has been called "the most modern codification of fundamental rights in the world". Still, mainly due to the formulation in some of its own articles, human rights protection under the EU Charter is not exhaustive. Therefore, it must be combined with EU's accession to the Convention. Hence, the structural ambition is a legal system made up by the two documents, complementing one another. In order to establish human rights jurisdiction, such a system requires adjustments on part of the actors from both legal regimes. The structural element of institutional cooperation is not mentioned in this debate, hence it is consistent with the ideal type that implies that there exists no aim for structural coupling in a competitive system.

The line of argumentation guided by the ideal type building upon the value of negotiation insist on an institutional structure in which the EU is fully represented in the control bodies of the Convention. Such representation would guarantees that there are platforms were negotiation can lead to decision-making deriving from mutual influence. Loose coupling is enough, as long as it is ensured that a dialogue between the representatives from the two legal instruments will take place at any necessary occasion. Thus, regardless its non-state structure, the EU must be allowed to accede and participate in the Convention bodies on the same premises as the other 47 contractual parties.

The context and aim of normative analysis may vary widely, but it is not possible to find a way around the methodological starting point that the bearing normative principles or fundamental values must be specified and defined before they can form the basis for an argumentation or discussion of problems. As previously mentioned, normative questions require a judgement to be made against some prior explicit objective. I have used ideal types as analytical tools to analyze the occurrences of specific ideas in the debate about EU's accession to the ECHR. The purpose was to get an idea of to what extent the institutional structures that the ideal types represent are present in the negotiations. Now, the systematic screening of the negotiations will allow me to present and reflect upon my normative standpoint, as a judgement against the explicit objectives that I found in the debate.

5 Normative Approach to EU's Accession

In the following chapter, previously analyzed norm structures make up the benchmarks upon which I will formulate my argumentation. It is my aim to illuminate an alternative institutional structure that would optimize human rights protection in the EU. Hence, this is where I present how the structure of EU's accession *should* be designed, and *why*. The purpose with the normative discussion is not to argue for the prominence of one of the previously described structures above the others, nor to create some sort of scale in which I position the three on the premises that one is 'best' and another the 'worst'. The discussion will build upon the principles of mutual exclusion, and mutual recognition, of all three governance structures. This way, I will be able to highlight positive, as well as negative, features of each institutional structure.

5.1 The Relationship between Luxembourg and Strasbourg

What is central at this point in the negotiations, on part of all three institutional structures, is that the accession modalities are defined and established so as to leave no room for random human rights legislation in the future. Unclear legal formalities leaves a risk for failing to reach the aim of EU's accession to the ECHR, namely improved human rights protection on the European continent. As far as the formal relationship between the two courts is concerned, the negotiation system strives for a loose relationship where the connection builds upon EU's representation in the Convention bodies. In such a system, each pending human rights case would be subject for negotiation between the courts, relying on previous case law and the legal document that is in force. No formal relation at all, as promoted in the ideal type of a competition system, poses a risk for the development of an unintended institutional relationship. With no definition of what the formal relationship ought to be, one of the two legal systems may reign the supremacy over the other without the accession modalities being properly designed to handle this kind of development. The hierarchic system that I have found present in the ongoing debate entails that the ECJ preserves its supremacy as the supreme EU court. In such a structure, the ECtHR only exercises external control in order to ensure the minimum common standards guaranteed by the ECHR. This would mean that as long as the ECJ ensures the respect of those minimum standards, the ECtHR would not have any reason to intervene. With such a structure, the ECJ would be able to protect its own position at the pinnacle of the EU legal order.

In the alternative institutional structure that I propose, the formal relationship between the courts would remain hierarchic, but as opposed to the one present in the debate, the Court of Human Rights would have 'supremacy' over ECJ to interpret and execute human rights law. In my view, the autonomy and authority of the two courts would be strengthened if each have the final say in its own area of jurisdiction. Allowing the Strasbourg Court a level of supremacy in cases involving the protection of human rights would in no way mean that the European Union was being incorporated into a legal order foreign to its nature. The EU would simply be recognising the international monitoring system, which applies to all its member States. The Strasbourg court would not review all the ECJ judgements, but only the small percentage involving human rights issues.

Founded on the principle of subsidiarity, appointing the ECtHR as the supreme human rights court in Europe would not entail total subordination of the ECJ, hence this institutional structure would respect Article 6 of the Lisbon Treaty. Whereas the EU institutions would be primarily responsible for ensuring that the rights enshrined in the Convention were respected, the ECtHR would take the final decisions on alleged violations of fundamental rights. The ECJ would continue to take the final decisions on all questions of Community law, but if the Strasbourg court found incompatibilities between the ECHR and EU law, the relevant European Union institutions would be responsible for taking the action needed to bring the corresponding regulations into line with the Convention's requirements. In sum, this means that if the ultimate aim of EU's accession to the ECHR is to optimize human rights protection, the best institutional structure would build upon a hierarchic relationship between the courts. In all matters of human rights law, the formal relationship between the courts would entail direct subordination of the ECJ to the European Court of Human Rights.

5.2 Execution of Human Rights Law

The legally binding EU Charter for fundamental Rights provides great protection for human rights in EU. However, it does not include the right of individual petition, which is 'the cornerstone of the European system'. This means the protection for human rights enshrined in the Charter must still be complemented by EU's accession to the ECHR. This leaves us with a legal landscape dependent on two legally binding documents, the EU Charter and the European Convention on Human Rights. In terms of protection, two legally binding human rights instruments could make up a great foundation for jurisdiction in this field. However, it is important to avoid tensions between the two legal systems since it could risk having a negative effect on the legal landscape it tries to uphold. There is no lack of altruistic and ambitious visions as far as the coordination of the two legal instruments are concerned. Nevertheless, what happens if a situation arises in which the case-law of the two courts actually diverge - and both systems are in force. Will the coordination happen as smoothly as the visionary declarations illustrate or will we witness a legal tug of war between Strasbourg and

Luxembourg? And more importantly, how would the risk of divergent case law expose those involved in the case, how would the individual plaintiffs seeking vindication for their rights and freedom be affected?

Taking these aspects into account, we are dealing with two structural options; the competition structure in which the legal document that offers best protection prevails, and the negotiation system where negotiation on a case-to-case basis would set the standard for human rights protection. Important to note here is that the Charter entrenches all the rights of the ECHR, but goes even further as it also includes some economic and social rights resulting from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. This means that the scope of the rights included in the Charter are the same as those laid down by the ECHR, but with some additional measures. Returning to the ultimate aim of the institutional structure, which is to optimize human rights protection, the negotiation system in which protection is defined on a case-to-case basis appears too vague to be the most accurate set-up. However, in combination with the competition system I discern an interesting structure as regards this aspect of the accession modalities.

Revolving around the principle that 'best protection prevails', the structure that I propose entails that the usefulness of each legal instrument, and thereof competence of each court, is established in the currently ongoing negotiations. Hence, there must not be room for future ambiguousness as far as legal instrument and interpreter of these is concerned. Nevertheless, there must be space for deliberation when a case is pending that entails rights that may be legally covered by the Charter, but not the Convention. Such deliberation would be made possible if the EU is represented in the Convention bodies, an accession modality that will be further discussed in the next section. Relying on its supremacy in human rights law, the specialized Strasbourg court should execute all the rights and principles laid down in the ECHR as this would provide the same extent of protection as that covered by the Charter. If, however, it is established by representatives from both courts that the pending case falls under any of the additional economic and social rights enshrined only in the EU Charter, the ECJ reigns power as the last legal instance for interpreting human rights law. In such cases, the ECtHR would not intervene in the execution of legislation. Under this principle, the verdicts reached at the end of each case will strike a desired balance that, at the very least, affords the minimum ECHR protection standard to all rights, and it would even guarantee citizens some additional human rights protection under the EU Charter.

5.3 Dividing Competences between two Legal Regimes

The measures that have been put into force over the last years in the realm of improving human rights protection in the EU - the accession to the ECHR, the establishment of the EU Charter and the Lisbon Reform Treaty - all strove to formalise and strengthen the interface between the Luxembourg regime and the

Strasbourg regime. As a result of the accession, strengthened coordination between the legal regimes is a fact. Now it is central to establish how the competencies possessed by the two regimes shall be combined and distributed. More precise, it must be perfectly clear how and where each institutional actor in the structure should be taken into consideration and participate in the judicial process concerning human rights law.

Looking at the debate about the accession modalities, there are three views present on how to best distribute the competencies. In a hierarchical system, this is not a central issue as it is structured according to the idea of subordination. In such a system the court that has the ultimate say in the interpretation of law does not need to coordinate with any other actor, hence the division of competencies is asymmetric. If we look to the ideal type of a competition system, it is illustrated as one in which actors compete over meeting certain performance criteria and consequently they adjust their behaviour accordingly. Related to the human rights protection in Europe, the value of competition guides thoughts about letting the court or the legal instrument that offers the best protection prevail. Hence, in a competition system all actors ought to be ready to adjust their behaviour in order to get what they want. In this debate, the division of competencies between the involved actors is the most central modality in the negotiation system. Whereas the actors in a competition system ought to be prepared for mutual adjustment in order to get what they want, actors in a negotiation system must be ready to recognise each others ideas and wishes in order to reach any kind of decision-making.

From the debate, it is clear that there is agreement between the European Council and the EU that the EU should be represented in the Convention bodies. However, there is no clear accordance on the details and scope of the representation. Representatives from the EU are very keen on equal representation on part of the EU, as all other Convention members. The European Council's point of view, and the scholarly debate, implies that EU's representation is not as clear cut as that of the member states. In this respect, the values embedded in the negotiation system appears to be the most attractive. As far as institutional structure is concerned, the formal coupling between the courts may be loose but it is important that it is guided by the right for fair representation. Allowing accurate and fair representation and participation from the EU in the Convention bodies, will be met with respect and result in an improved relationship between the two Courts. Even if the the Strasbourg court should have supremacy in interpreting human rights legislation, it is important that the EU partakes and give input through a dialogue that precedes the ECtHR's verdicts.

In their contribution to the debate about accession modalities, the European Parliament requests a post for judge who is on equal footing with the Strasbourg judges and the right to attend and vote in the Committee of Ministers meetings where pending cases in the ECtHR are handled. Commissioner Reding also holds that it is important that representatives from the EU are allowed to participate in the bodies of the Convention. This wish has been met with some hesitation on part of the Council of Europe. Reference has been made to how EU's sphere of competence could be seen as more limited than the sovereignty of the states. This,

in turn, would justify some limitation of EU participation in the supervision of execution of human rights judgments. Nevertheless, the presence in the Strasbourg Court of a judge elected for each Contracting Party is one of the founding principles of the Convention. Considering that Union law is a separate, autonomous and highly specialised legal order, it is of highest interest for the EU to have the representation of a judge there.

In view of the institutional structure that I propose, what is most important in this aspect is that EU's representation in the Convention bodies must not become a control mechanism over human rights legislation on EU's part. The full representation of the EU and ECJ in the Convention bodies ought to be designed as a platform for judicial deliberation about those cases where it appears needed. This way, the EU can give input and suggestions, however, its representatives must not dominate and take over the interpretation and execution of human rights law under the ECHR.

5.4 Structuring EU's Accession to the ECHR

Based upon the findings from the text analysis I have taken a stance for an institutional structure that I regard most likely to ensure the best human rights protection in EU after the accession to the ECHR. The structure builds upon a subordination of the ECJ to the ECtHR on case law related to human rights protection. Still, it leaves room for EU representation in the Convention bodies as the EU, like all other Contracting Parties, should be represented by an EU judge in Strasbourg. However, the representation must be clearly defined as one that is established as a means for deliberation, and must under no circumstances leave room for the EU to exercise power in a domain that is not covered by its competencies. The subordination will not affect EU's supremacy to interpret EU law, especially considering that the principle of subsidiarity prevails. This means that the ECtHR would be allowed to exercise the powers it possesses as a specialized human rights court. We are thus looking for a structure in which the ECJ is subordinated the ECtHR on measures enshrined in the ECHR, and were the EU has the right to be represented in the Convention bodies to the same extent that all other Contractual Parties, taken that the representative is present for deliberation rather than to exercise power. However, yet another problematic issue is embedded in the structure that is under construction, namely that of the two legally binding instruments, the Convention and the EU Charter.

For the sake of optimization of human rights protection, the preferable situation would have allowed the EU to rely solely on the EU Charter as it in itself offers great protection for human rights in EU. This would have diminished the risk for confusing and counterproductive legislation which is the risk when two courts, in parallel, interpret the articles of two legally binding instruments. However, the EU Charter does not allow individual petition and therefore it does not provide enough protection as a legal instrument. Hence, it must be

complemented by EU's accession to the ECHR. As Commissioner Reding puts it, "the EU Charter includes all the rights found in the Convention. However, the Charter goes further and also enshrines other rights and principles, including economic and social rights". This means that the Charter have some additional means for protection. Therefore, I propose that in the light of the principle 'best protection prevails', the specialized Human Rights court should be the legal guardian of all cases pertaining to the articles of the Convention. If, however, a case appears were it is established by deliberation that the breach of law is not covered by the ECHR but by the Charter, the execution of law should be carried out by the ECJ, with no external supervision by the Strasbourg court.

Table 2 offers a compilation of the values that are present in the debate about EU's accession to the ECHR. Building upon the previously analyzed norm structures, I hereby add an alternative way in which the accession modalities could be designed. Relying on previous findings, I argue that this institutional structure provides the best alternative for improving the judicial protection of human rights in Europe.

Table 2.

	Hierarchy	Competition	Negotiation	Normative Contribution
Institutional co-ordination	tight coupling	no structural coupling	loose coupling	subordinate ECJ
Decision-making	authoritative	competition	bargaining or arguing	'best protection prevails'
Division of competence	asymmetrical influence	mutual adjustment	mutual influence	representation for deliberation

In sum, the proposed structure does not completely exclude any of the values that make up the ideal types that guide the analysis of the ongoing debate. Instead, it builds upon elements from each one of them, and combine them into a structure that would define, detect and embrace all aspects of human rights protection. What is positive is that this means that the accession modalities that together would form the best institutional structure for optimal protection are all present in the current debate. However, it is necessary for the negotiating parties to take them into account and combine them in a slightly different manner.

6 Conclusion

Through an increasingly interactive relationship over the last fifty years, the European Court of Justice and the European Court for Human Rights have established a strong example of legal pluralism, illustrating a variety of interesting interactions and relationships. There has, however, also been situations of conflicting jurisdiction between the two courts. Such conflicting jurisdiction damages the legitimacy of the courts and hinder their ability to protect fundamental rights and freedom. In order to mend this legal inconvenience and achieve the best means of coherence between EU law and the ECHR, representatives from the EU as well as the European Council have advocated that EU must accede to the Convention. With the accession, the EU will be subject to the jurisdiction of the Strasbourg court in the same way that contractual member states are. Taken that the EU has developed into an organ that makes up legally binding decisions through directives, regulations and decisions, it, as well as its member states, may violate the ECHR in its decision-making. There has previously not been a treaty basis for the EU to accede to the ECHR, but the ratification of the Lisbon Treaty provides both the legal basis and an obligation for the EU's formal accession to the ECHR.

However, the accession is permeated by problematic issues. A number of institutional and political hurdles related to structural ambiguity between the actors involved remain. If these issues are not properly solved, the legal landscape that the accession aims to uphold may not succeed and the legal security aimed for may not serve the citizens in the way it is meant to do. Hence, it is important to structure the accession modalities in a manner that optimize human rights protection in Europe, and leave no space for future misinterpretation. In the light of this, the aim of this study has been to propose an institutional design of EU's accession to the European Convention on Human Rights that would optimize the human rights protection in Europe.

The accession to the ECHR is commonly demonstrated as a major step forward in terms of European human rights protection. Speeches about how this can be viewed as the 'completion of EU human rights protection' outshines scepticism and concerns about the exact meaning and scope of the accession. The institutional design of EU's accession to the ECHR is central to its functionality and reputation among those it concerns. The Convention protects everybody comprised by a contractual member states' jurisdiction. As a result of the accession, it will also protect anyone under jurisdiction that is affected by the lawmaking of the EU. If the institutional set-up of the accession is not structured with judicial and political refinement, those who theoretically are to receive better protection from it may be caught in judicial uncertainties when applying for a complaint. If the accession is built on idealistic ideas about coordination and

institutional interplay, but really is hierarchic and permeated by inconsistencies, it may negatively affect those it aim to protect.

With this in mind, I found it important at this stage to depict what ideas about institutional structures are represented in the negotiations. Hence, inspired by Weber's notion of concept formation, I screened the debate with ideal types representing institutional structures. It entails a scientific risk to conduct research with the aim to present solutions to problems embedded in a process that is not yet possible to overview in retrospect. Nevertheless, I would argue that it is an important part of a researchers' assignment to provide civil servants and decision-makers with expertise on issues that are still in the making. Expertise based upon scientific weighing may have positive effect on the outcome of decision-making, in the public as well as the private sector. Methodologically, a normative approach makes this possible. Normative questions require a judgement to be made against some prior explicit objective. Building upon the values embedded in the institutional structures that I found present in the ongoing negotiations, I discussed the advantages and disadvantages of some key elements of designing institutional structures. Concluding this discussion, I presented an alternative design of the accession modalities.

It is not possible to argue that all elements of any of the ideal types is being advocated by any of the negotiating parties. Nevertheless, some elements of each institutional design inherent in my ideal types are clearly represented. This means that the values of hierarchy, competition as well as negotiation influence the negotiations about the accession modalities. An overview of the debate shows that advocates of the hierarchic system put a lot of focus on the formal relationship between the courts, promoting the supremacy of the ECJ to interpret human rights law. Looking to the competition system, the debate revolves around what legal instrument shall prevail, and which court should interpret it. No clear structure is discernible, but EU representatives fuel the debate with a lot of talk about the importance of the EU Charter. In order to achieve a structure based upon the value of negotiation, its advocates focus all their attention on arguing for the EU's full representation in the Convention's control bodies.

Building upon the findings from the analysis I ultimately presented an institutional structure that I hold as the one that would ensure the best protection for human rights in Europe. My alternative design of the accession modalities would build upon a 'hierarchic' formal relationship between the two courts. However, in contrast to the hierarchic model present in the real debate, the optimal relationship 'subordinates' the ECJ and allows the ECtHR to function as a specialized human rights court. The principle of 'best protection prevails' would guide the design of the structural modalities pertaining to the execution of human rights law. This means that the specialized human rights court in Strasbourg interprets all law that is enshrined in the ECHR as well as the EU Charter. Would it, however, be agreed by representatives from both courts that a case falls under the articles about social and economic rights that are only covered by the EU Charter, the ECJ obtains supremacy to interpret and execute the verdict. As such, the results reached at the end of each case will strike a desired balance that, at the very least, affords the minimum ECHR protection standard to all rights. As far as

the division of competencies between the actors involved is concerned, I advocate full representation of the EU in the Convention bodies. Although the power of the EU may not be comparable to the sovereignty of member states, the presence in the Strasbourg Court of a judge elected for each contracting party is one of the founding principles of the Convention. Nevertheless, the representation in the Court and Committee of Ministers ought to build upon the principle of deliberation. This means that EU representatives may give input on each pending case, but they must under no circumstances make use of its representation as a means to dominate and take over the interpretation and execution of human rights law under the ECHR.

In the end, it seems as if the success of the proposed institutional design depends on the ECJ's willingness to abstain from some of its legal supremacy. The ECJ ought to be ready to step down from the pinnacle of the EU legal order, at least in the field of human rights law. With regard to the legal landscape the EU tries to uphold with the accession, I hope that the more reluctant representatives from the Community legal order are ready to make some concessions on part of their legal superiority in order to improve the legal landscape for European citizens. In Europe, the idea of human rights has found expression in the European Convention on Human Rights. Human rights are based on universal values, and with that in mind it should be in the interest of all actors involved in this debate to leave ideas of autonomy behind and see to the best of those who are in need of an improved legal landscape for human rights.

7 Executive Summary

This thesis analyses a number of institutional aspects embedded in EU's forthcoming accession to the European Convention for Human Rights (ECHR). In trying to answer the question, *What institutional set-up between the European Court of Justice and the European Court for Human Rights would optimize human rights protection in Europe?* the analysis and discussion focuses on the importance of the design and set-up of institutional structures as a means to achieve optimal human rights protection.

The ECHR is an international treaty serving to protect human rights and fundamental freedoms in Europe. As contractual parties to the ECHR, all member states of the Union have an obligation to respect the content of the ECHR, even when they are applying or implementing EU law. The ECHR and its judicial mechanism - the Court for Human Rights in Strasbourg - has previously not applied to EU acts. Taken that all national laws, regulations, court judgements and other European measures fall within the Strasbourg court's decision, it has repeatedly been held that it seems unjustified that the EU should be the only legal space left in Europe which is not subject to external scrutiny by the Strasbourg court. Also, seeing that the EU has developed into an organ that makes up legally binding decisions through directives, regulations and decisions, it, as well as its member states, may violate the ECHR in its decision-making. The idea about EU acceding to the ECHR has been on the agenda before, but in 1996 the European Court of Justice (ECJ) - EU's highest court in matters of European Union law - declared that the EU could not join the ECHR without an explicit treaty basis allowing it to do so.

More than a decade after ECJ's decision, the coming into force of the Lisbon Treaty establishes the legal basis for the EU's accession to the ECHR. By submitting the EU to independent external control, the aim of the accession is to strengthen the protection of human rights in Europe. It will close gaps in legal protection by giving European citizens the same protection vis-à-vis acts of the Union as they presently enjoy from member states. Although of great symbolic as well as real legal and political value, the accession is permeated by problematic issues. A number of institutional and political hurdles to accession remain. Overall, the hurdles relate to structural ambiguity among the actors and institutions involved. Visible in the ongoing negotiations about the accession modalities are more or less explicit attempts on part of the ECJ to maintain its supremacy, as well as an autonomous Community legal order. This means that whereas the stated purpose for the EU to accede to the ECHR is to improve the legal human rights landscape in Europe, some of the actors designing the accession may advocate institutional structures that will not serve the intended purpose.

The institutional structure of the accession is important because it establishes the rules of procedure that will set the standard for the human rights protection aimed for with this accession. The legal landscape for human rights is to be upheld by two regimes, the ECJ and the Court for Human Rights in Strasbourg. It is important that the actors representing each regime know who has the mandate to act and execute on what human rights issue. If such modalities are not clearly defined but left to future interpretation, legal uncertainty may affect those individuals who eventually will seek remedies for their justice at the European level. At present the accession modalities are negotiated among the parties involved. Before the accession is fully achieved, all state parties to the ECHR as well as the EU as such, will have to express their consent to be bound by the key accession modalities. The same modalities will also require formal consent by national Parliaments as well as the European Parliament.

Inspired by Weber's notion of concept formation, I have analysed the ongoing debate about the accession. The aim of this analysis is to delineate what values are present in the negotiations about the accession modalities. The analysis has been followed up with a normative discussion in which the purpose is to present an alternative institutional structure that I hold as the best institutional design for optimization of European human rights protection. Present in the debate I found values of *hierarchy, competition* and *negotiation*. These values inspire the negotiating parties' ideas on how to structure the institutional set-up of EU's accession to the ECHR. In order to depict how they inspire different institutional structures, three accession modalities were correlated with the values, namely *the relationship between the ECJ and the Court for Human Rights*, *the interpretation and execution of human rights law* and *the division of competencies between two legal regimes*.

An overview of the debate shows that advocates of a hierarchic system put a lot of focus on the formal relationship between the two courts, promoting the supremacy of the ECJ to interpret European human rights law. The value of competition inspires EU representatives to fuel the debate with promotion of the importance of the EU Charter. The EU Charter is EU's legally binding instrument for human rights and freedom. Unfortunately, it leaves some gaps in the protection and must be complemented by the accession to the ECHR. Hence, this debate revolves around questions on what legal instrument shall prevail for protecting which rights, and which court should interpret it. Those negotiating with the aim to structure the accession as a legal system for negotiation, focus on arguments for the EU's full representation in the Convention's control bodies. In their view, representation that allows for dialogue between the legal regimes is a guarantee for great judicial human rights protection.

None of the institutional structures that are present in the negotiation would make up an all-embracing judicial system for human rights protection. Nevertheless, by combining elements inspired by the values of hierarchy, competition and negotiation it is possible to design an institutional structure that, at least theoretically, would optimize human rights protection in Europe. The best institutional set-up would partly build upon a 'hierarchic' formal relationship between the courts, it would include elements of competition when interpreting

and executing law, and it would build upon full representation allowing for negotiation in the Convention bodies. However, in contrast to the hierarchic model present in the debate, this formal relationship 'subordinates' the ECJ and allows the Court in Strasbourg to function as a specialized human rights court. The principle of 'best protection prevails' would guide the execution of human rights law. This means that the specialized human rights court in Strasbourg interprets all law that is enshrined in the ECHR as well as the EU Charter. Would it, however, be the case that an application falls under the articles about social and economic rights that are only covered by the EU Charter, the ECJ obtains supremacy to interpret and execute the verdict. In this institutional structure, full representation of the EU in the Convention bodies is advocated. Nevertheless, the EU representation in the Human Rights Court and Committee of Ministers ought to build upon the principle of deliberation. This means that EU representatives may give input on each pending case, but they must under no circumstances make use of their representation as a means to dominate and take over the interpretation and execution of human rights law under the ECHR.

Referring to the findings from the idea analysis and normative discussion conducted in this thesis, I hold that the institutional set-up proposed here would give good judicial protection for human rights and freedom in Europe. It would give applicants a clear picture about where to turn with their judicial complaint, and it would allow each court to interpret case law that pertain to its foremost competencies. In addition, it would guarantee a platform for deliberation between the two legal regimes in cases where such is necessary. At present, it is clear that the ongoing debate about the structure of the accession is not exempted from ECJ's tendencies to put its own autonomy above optimization of human rights protection. The institutional alternative presented in this thesis can only apply if such ideas are abandoned. Human rights are based on universal values, and for the sake of human rights protection the more reluctant representatives from the Community legal order ought to make some concessions on part of their legal superiority in order to improve the legal landscape for European citizens.

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