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THE EVOLUTION OF FUNDAMENTAL RIGHTS PROTECTION WITHIN THE EU LEGAL ORDER

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Abstract

The issue of fundamental rights protection in the European Union is of highest importance. The discussion on the topic has been started as early as the beginning of 1970s, although the founding Treaties did not include any catalogue of fundamental rights. After a long evolutionary process with many actors involved, the final result is shown in the Treaty of Lisbon.

Keywords: *fundamental rights, EU primary law, ECJ case law*

Introduction

Already from the 17th century, the notion of fundamental rights as a burden in the arbitrariness of the rulers has been crystallized as an essential element of the polity organization in Europe. The father of classical liberalism, John Locke, has described the limitation of public authority based on the rights of the person; their protection and peaceful enjoyment is, according to the philosopher, the rationale for establishment of political society. We can clearly understand that in the European classical thought the concepts of fundamental rights and authority are mutually connected. The aim of this paper is to clarify the steps of fundamental rights protection in the peak of European civilization, the European Union.

In the case of the Communities and the Union, the public authority derives from the member states under the method of competence transfer. Hence, to the extent that the public authority is transferred, the protection of fundamental rights should follow the same way. Otherwise there would be no framework for the citizens of EU to be protected in cases of power abuse.

The absence of fundamental rights protection in the founding Treaties

At the time the Communities were established, the protection of fundamental rights seemed to be totally absent from the Treaty of Paris as well as from the Treaty of Rome. The creation of a common market in the European area and its development through the adoption of certain policies was the main aim during the first phases of the new organization, as proven by the wording of article 2 Treaty of Rome. The adoption of the so called Community freedoms (services, capital, good, workers)[1] acted as an important mean to the achievement of the above mentioned aim. The general institutional structure of the Treaties left no space for interpretation as to the approach on the protection of fundamental rights; it was the outcome of lack of political will on behalf of the founding member states to establish a protection mechanism and to include certain rights in the Treaties.

This lack of political will was not expressed for the first time at the establishment of the ECSC or the EEC. An entirely general provision, without any specific inclusion of rights

[1] For an extensive analysis of the Community freedoms, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, 2nd edition, Oxford, 2007.

as fundamental was contained in the proposal for the establishment of the European Defense Treaty in 1952 which was never adopted. The same result appeared in the proposal for the European Political Community where, nevertheless, the incorporation of the ECHR and its First Protocol at its legal order was included; after major disagreements, the idea was abandoned in 1954.[2] It can be said that the founding member states had not reached the level of institutional maturity required for the acceptance of common principles and their guarantee as rights in Community level.

Nevertheless, the Treaty of Rome contained certain articles that could be seen in the light of fundamental rights protection, even at a basic level, such as the prohibition of discrimination based on nationality (article 7) and the equal pay for equal work among men and women (article 119), yet more as necessary prerequisites for the normal operation of the common market, rather than rights *per se*. Furthermore, provisions that protect rights were added in the relevant chapters of community freedoms, for example the principle of non discrimination (articles 48, 52, 59 and 67 of the Treaty of Rome). In that case as well, we cannot speak of pure rights protection, but for burdens overcome in order to achieve the proper application of community freedoms as a mean for materialization of the common market.

The role of the ECJ

The position of the ECJ when issues of fundamental rights were raised was of highest importance in the evolution of their protection within the Union. Its initial approach at the end of the 1950s could be summarized in an attempt to avoid judging on the topic on the basis of not having jurisdiction.[3] The lack of explicit competence in conjunction to the absence of any fundamental rights catalogue in the community legal order, led the ECJ to adopt a more passive position in order not to create additional interpretational issues on the topic of (institutionally nonexistent) fundamental rights.

At the end of the 1960s, the situation changed dramatically. The ECJ got involved to issues of fundamental rights and substantially, on a case by case basis,[4] it established the principle of community protection of fundamental rights. Thus the ECJ drawn the conclusion that fundamental rights are part of general principles of community law and as such, the ECJ is obliged to protect. For that protection, the ECJ searched for sources which it found in the common constitutional traditions of the member states and the international agreements that the member states participate at. More specifically, it relied on the ECHR as a source of inspiration for the fundamental rights protection in the community legal order.

An important reason in the conversion of the ECJ was the founding decision of member states Constitutional Courts. Given the fact of the absence of a relevant catalogue in community legal order, the German Federal Constitutional Court[5] and the Constitutional Court of Italy[6] ruled that they retain the right to review Community acts for fundamental rights violations as guaranteed in the respective national Constitutions.

Despite explicit recognition in the ECJ case law, the ECHR had no binding effect in the Community legal order nor was the ECJ bound to follow the case law of the Strasbourg Court. Furthermore, there was no explicit concept of the protection of fundamental rights. In other words, there was no stability as to the extent of such protection; stability that could be secured only through formal institutional guarantee.

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[2] S. Martin (ed.), *The Construction of Europe: Essays in Honor of Emile Noel*, Kluwer Academic Publishers, Dordrecht, 1994, p.p. 19-40.

[3] C-1/58 Stork vs. High Authority [1959] ECR 17, C-36/59, 37/59, 38/59 and 40/59 Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG vs. High Authority [1960] ECR 423.

[4] Pivotal cases are C-29/69 Stauder vs. City of Ulm [1969] ECR 419, C-11/70 Internationale Handelsgesellschaft [1970] ECR 1125, C-4/73 Nold vs. Commission [1974] ECR 491, C-36/75 Rutili vs. French Minister of the Interior [1975] ECR 1219, C-44/79 Liselotte Hauer vs. Land Rheinland-Pfalz [1979] ECR 3745.

[5] Solange, BVerfGE 37, 271.

[6] 183/73 Frontini vs. Ministero delle Finanze.

Fundamental rights in the foreground: discussion on improvement

Under the influence of the case law, basically of the ECJ but also of member states courts, already from the 1970s, an extensive debate has started on the position and the role of fundamental rights in the community legal order. Given the institutional background of the time, the possible solutions for improvement of fundamental rights status were developed on two basic pillars: the accession of EC/EU to ECHR and the adoption of a community catalogue. The Commission directly expressed a detailed opinion on the first pillar in 1979 in the relevant Commission Memorandum[7] where the advantages and disadvantages of such a decision were analyzed.[8]

Firstly, a possible accession would empower the political position of the EC/EU as an organization that openly aims to the protection of fundamental rights by accepting the external review of the ECHR. Since the protection of rights is historically an integral part of the European identity, the EC/EU would prove its devotion to principles already outlined as rights in the ECHR.

In addition, accession to ECHR would clarify the relation between community law and ECHR in cases of possible conflict. In that sense, on one hand the member states would not held responsible for issues that are substantially related to violations on behalf of EC/EU acts, on the other hand the EC/EU would be in position to directly defend its legislation before the Strasbourg Court as a High Contracting Party of the ECHR.

Because of accession, the ones who were persistently demanding for a catalogue of fundamental rights in EC/EU would be reassured. As the formulation of such catalogue would be a difficult, laborious and time consuming attempt, the ECHR constituted a "ready" catalogue that all member states have included to their national legal orders. In that way, the danger of national courts decisions that are related to fundamental rights violations based on national constitutional provisions will be narrowed. Accession would also intensify attention of community institutions in issues of compliance with fundamental rights and at the same time in avoidance of conflicts.[9]

The basic arguments against accession of EC/EU to ECHR could be summarized in those of political and institutional character. The first category pertained the strict perception that the EC/EU should have its own catalogue of rights. Since the nature of EC/EU, especially at that time, prescribed the focus more on economic rights rather than traditional civil rights that are basically guaranteed in ECHR,[10] a possible accession would mislead the debate from the major topic which was the creation of a fundamental rights catalogue connected to the nature of EC/EU.

Another important argument against such accession was related to the institutional structure of the ECHR. Generally speaking, the ECHR has been established to accept states not unions of states. This is easily proven from the terminology used therein such as "State", "national security" or "country". In that sense, a large amendment should take place in the ECHR in order to be able to accept the EC/EU as a member. A fundamental parameter of that difference is that of limited access to justice in community legal order, unlike the other ECHR members; a right definitely important that should be noticeably improved within EC/EU.

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[7] Commission Memorandum, *Accession of the Communities to the European Convention on Human Rights*, Bulletin of the European Communities, Supplement 2/79, Brussels, 1979.

[8] K. Economides, J. Weiler, *Reports of Communities*, Modern Law Review, vol. 42, Blackwell Publishing, Oxford, 1979, p.p. 683-695, B. Paulin, Mary Minch, *The European Community and the European Convention on Human Rights*, Government and Opposition, vol. 15, Blackwell Publishing, Oxford, 1980, p.p. 31-47.

[9] Loreta Saltinyte, *European Union accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe?*, Jurisprudence, vol. 17, Mykolas Romeris University, Vilnius, 2010, p.p. 177-196.

[10] R. Blackburn, J. Polakiewicz (eds.), *Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000*, Oxford University Press, Oxford, 2001, p.p. 8-9.

Furthermore, the participation of EC/EU representatives could be problematic in the sense of complete connection between the citizenship of a member state and the EC/EU citizenship, but also because of the extremely large population of the Union. Although the participation of Union representatives to the ECHR institutions (Parliamentary Assembly, Committee of Ministers, Court) is necessary, it should be promoted in such a way that the balance between the Union's special characteristics and the other ECHR members would be maintained.

Concerning the second pillar for improvement of fundamental rights protection in EC/EU, the creation of a special catalogue, the general approach was much more positive. From the beginning of the whole debate, all institutional actors agreed on the creation of a fundamental rights catalogue within the Union. Besides the symbolic value that such a catalogue would add by enhancing the loyalty of the Union to fundamental rights, it would also contribute to the creation of legal certainty to its citizens. With the adoption of such catalogue in EU law, the position of the citizens would be highly empowered in relation to the Union and the member states when implementing EU law. Furthermore, this catalogue would be developed on the basis of the Union's special characteristics and would therefore contribute towards European integration.

However, despite all positive approach, formidable difficulties arose that delayed the progress of the formulation; difficulties related to political and technical character. Was it possible a consensus to be reached between member states with totally different traditions on issues of fundamental rights protection, such as the United Kingdom and Germany? Besides that, what rights should be included in the catalogue of the Union? Should there be merely economic rights or traditional civil ones?[11] As a result, it can be said that it is extremely hard for certain member states to accept a binding catalogue within the Union, especially in the case that the rights contained therein conspicuously differed from their constitutional traditions.[12]

Reference on primary law

A first attempt of institutional inclusion for the protection of fundamental rights in the EU primary law, based in substance and terms on the ECJ case law, took place in 1986 in the preamble of the European Single Act. The determination of the member states to enhance democracy on the basis of fundamental rights as recognized in the Constitutions and laws of the member states, the ECHR and the Social Charter, with emphasis on freedom, equality and social justice was demonstrated. Although politically important, this inclusion did not differ much from a political declaration since it did not have any binding effect.

Consequently, in the Maastricht Treaty article F, par. 2 stated that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". In that way, a fundamental rights provision was included for the first time in the body of EU primary law. Nevertheless, this approach was not totally clear; respect of fundamental rights does not mean binding effect in legal terms towards ECHR or the common constitutional traditions. Therefore this attempt remained semi completed.

The Treaty revision that took place with the Amsterdam Treaty had little effect on the development of a more complete recognition of fundamental rights protection within the Union. In other words, the Amsterdam revision did not lead to a clear under identification of certain rights, either by forming a catalogue or by institutionalizing a possible accession to ECHR. Hence, the expression of respect towards fundamental rights as guaranteed in the ECHR and the common constitutional traditions of the member states was simply repeated.

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[11] The enrichment with all generations of rights is proposed in R. Hanski, M. Suksi (eds.), *An Introduction to the International Protection of Human Rights*, Abo University, Institute for Human Rights, Turku, 1999, p.p. 49-64.

[12] R. Bernhardt, *The protection of fundamental rights in the European Community*, Bulletin of the European Communities, Supplement 5/76, Brussels, 1976, p. 27.

The contribution of the Treaty of Amsterdam can be found elsewhere. The institutionalization of a specific mechanism to suspend certain of the Treaty rights, including the voting rights of the member state representative in the Council, to member states that seriously and persistently violate fundamental rights demonstrated political will for fundamental rights protection.[13]

In that institutional environment the creation of an EU catalogue started in 1999. Taking into account the general progress of European integration in other domains and the increasing need for a unambiguous recognition of fundamental rights for the EU citizens, the German Presidency put the issue as priority on its agenda and laid the foundation for its practical materialization. In that way, the Charter of Fundamental Rights of the European Union was formed.[14]

The Treaty of Lisbon and full recognition

After the revision of Nice and despite the declaration of the EU Charter of Fundamental Rights, there was no further progress on the institutional recognition of fundamental rights; it remained at the level of declaration. The giant step was taken with the Treaty establishing a Constitution for Europe, a Treaty that was never enforced. Hence, the full recognition of fundamental rights in EU legal order was achieved in the Treaty of Lisbon. In a general spirit of revision that led to fundamental institutional changes to the functioning of the European Union, the new article 6 TEU contained two major changes: 1) the recognition of the rights, freedoms and principles of the EU Charter which shall have the same legal value as the Treaties[15] and 2) the background for the EU accession to ECHR.[16]

Conclusion

In the field of fundamental rights protection in EU legal order, the Treaty of Lisbon inaugurated a period of important changes of constitutional value. The highly expected catalogue, the EU Charter, obtained the same legal value with the Treaties and the Union can finally access to the ECHR. In this manner, the European Union acquired an autonomous constitutional framework for the protection of fundamental rights within its legal order. The development of this achievement passed through many stages and followed an evolutionary route. This route reveals the burdens that need to be overcome during the process of integration. The initial lack of political will was fulfilled with brave judicial activism by the ECJ which acted as a true constitutional court in nature. Now, the practical application of this whole new framework remains to be seen.

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[13] The mechanism belongs to negative integration, P. Alston, J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, European Journal of International Law, vol. 9, Oxford University Press, Oxford, 1998, p. 665.

[14] On the issue, S. Peers, Angela Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004.

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[16] A. Biondi, P. Eeckhout, Stephanie Ripley (eds.), *op. cit.*, p.p. 180-196.

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