

# Contents

List of abbreviations .....	15
1. Introduction: The importance of international fundamental rights in today's world .....	17
2. The historic deficit of comprehensive guarantees of fundamental rights in the written Community/Union Law .....	19
2.1. The historic lacunas in the "lex scripta" on fundamental rights .....	19
2.2. The requirement of a comprehensive praetorian protection of fundamental rights .....	23
3. Dogmatic foundations of the fundamental rights' case-law of the ECJ .....	25
3.1. The emergence of fundamental rights' case-law of the ECJ .....	25
3.2. Sources of law in the light of fundamental rights' case-law of the ECJ .....	27
3.2.1. Primary sources of law: the general principles of the Community law .....	28
3.2.2. Secondary sources of law: Member States' constitutional traditions and European Convention on Human Rights (ECHR) .	30
3.2.2.1. Preliminary remark .....	30
3.2.2.2. Member States' constitutional traditions .....	31
3.2.2.3. European Convention on Human Rights (ECHR) .....	34
3.2.2.4. Excursus: the tense relationship between the Community/Union law and the national law in the area of fundamental rights .....	37

3.3. Definition and classification of fundamental rights in the light of the case-law of the ECJ .....	41
3.3.1. Fundamental rights and freedoms .....	41
3.3.2. Institutional guarantee vs. subjective individual right .....	42
3.3.3. Enforceable right vs. programme provisions (soft-law) .....	43
3.3.4. Rights of defence vs. rights to participate .....	43
3.3.5. Equality rights .....	44
3.4. Commitment to fundamental rights and entitlement to fundamental rights .....	45
3.4.1. Commitment to fundamental rights .....	45
3.4.2. Entitlement to fundamental rights .....	47
3.5. Restrictions on fundamental rights and limits of restrictions on fundamental rights .....	49
3.5.1. Preliminary remark .....	49
3.5.2. Restrictions on fundamental rights .....	50
3.5.3. Limits of restrictions on fundamental rights .....	51
3.5.3.1. Limits of restrictions on proportionality .....	52
3.5.3.2. Limits of restrictions on the guarantee of the substance (essential content) .....	53
3.6. Individual fundamental rights recognised by the case-law of the ECJ .....	54
3.6.1. Human dignity .....	54
3.6.2. Right to property .....	55
3.6.3. Freedom to pursue economic activities .....	57
3.6.4. Freedom of expression and religion .....	58
3.6.5. Respect for private and family life .....	59
3.6.6. Principle of equality .....	60
3.6.7. Principle of proportionality .....	62
3.6.8. Basic procedural rights .....	63
3.6.8.1. Legal certainty .....	64
3.6.8.2. Protection of legitimate expectations .....	65
3.6.8.3. Right to a hearing .....	66
3.6.8.4. Right against self-incrimination .....	67
3.6.8.5. The <i>ne bis in idem</i> principle .....	68
4. From the case-law of the ECJ to the European Charter of Fundamental Rights .....	69
4.1. Process of emergence of the Charter of Fundamental Rights .....	69
4.2. Legal nature of the Charter of Fundamental Rights prior to the Lisbon Treaty .....	70

4.3. Contents of the Charter of Fundamental Rights .....	72
4.3.1. Preliminary remark and overview .....	72
4.3.2. Human dignity .....	76
4.3.3. Freedoms .....	78
4.3.4. Equality .....	83
4.3.5. Solidarity .....	85
4.3.6. Citizens' rights .....	90
4.3.7. Justice .....	92
4.3.8. General provisions .....	94
4.3.8.1. Scope of the Charter of Fundamental Rights .....	94
4.3.8.2. Scope of guaranteed rights .....	97
4.3.8.3. Level of protection .....	99
4.3.8.4. Prohibition of abuse of rights .....	99
4.4. Summary appraisal of the Charter of Fundamental Rights .....	100
5. On the path to a legally binding catalogue of fundamental rights .....	103
5.1. Preliminary remark .....	103
5.2. Arguments in favour of a legally-binding force of the Charter of Fundamental Rights .....	105
5.3. Modalities for vesting the Charter of Fundamental Rights with legally-binding force .....	107
5.4. Arguments in favour of an accession of the Union to the ECHR ....	109
5.5. Modalities for an accession of the Union to the ECHR .....	111
6. Institutional protection of fundamental rights .....	113
6.1. Basic principles of the system of legal protection in the Community/Union .....	113
6.1.1 The European Community as a Community based on law .....	113
6.1.2. Dualistic structure of Community/Union jurisdiction .....	115
6.1.3. Roles and responsibilities of the institutional Union courts ...	116
6.1.4. Procedural law .....	118
6.1.4.1. Litigious procedure .....	118
6.1.4.1.1. Treaty infringement procedure .....	118
6.1.4.1.1.1. Presentation of the case .....	118
6.1.4.1.1.2. Assessment of the case with regard to the protection of fundamental rights .....	121

6.1.4.1.2. Actions for annulment and for failure to act .....	122
6.1.4.1.2.1. Presentation of the cases (Generalities) .....	122
6.1.4.1.2.2. Specificities of the action for annulment .....	123
6.1.4.1.2.3. Specificities of the action for failure to act .....	129
6.1.4.1.2.4. Assessment of the cases with regard to the protection of fundamental rights .....	131
6.1.4.1.3. Union actions for damages .....	132
6.1.4.1.3.1. Presentation of the cases (Generalities) .....	132
6.1.4.1.3.2. Specificities of the action for liability of the Union .....	133
6.1.4.1.3.3. Specificities of the action for State liability .....	135
6.1.4.1.3.4. Assessment of the cases with regard to the protection of fundamental rights .....	137
6.1.4.2. Preliminary ruling procedure .....	139
6.1.4.2.1. Presentation of the case (Generalities) .....	139
6.1.4.2.2. The concept of national courts .....	141
6.1.4.2.3. Right to refer and obligation to refer .....	141
6.1.4.2.4. Issues eligible for referral .....	144
6.1.4.2.5. Assessment of the case with regard to the protection of fundamental rights .....	145
6.1.5. Ways to improve the institutional protection of fundamental rights .....	146
6.1.5.1. Preliminary remark .....	146
6.1.5.2. Procedures, which are not suitable for an autonomous protection of fundamental rights .....	147
6.1.5.2.1. Union actions for damages .....	147
6.1.5.2.2. Preliminary ruling procedure .....	148

6.1.5.3. Procedures, which could, in a modified form, be suitable for an autonomous protection of fundamental rights .....	148
6.1.5.3.1. Treaty infringement procedure .....	148
6.1.5.3.2. Actions for annulment and for failure to act .....	149
6.1.5.4. Summary appraisal of the “suitability” of the existing types of procedures for the protection of fundamental rights before the institutional Union courts .....	151
6.1.5.5. Introduction of a special fundamental rights complaint .....	152
6.1.5.5.1. Preliminary remark .....	152
6.1.5.5.2. Subject-matter of an action .....	152
6.1.5.5.3. Right to bring an action .....	153
6.1.5.5.4. Scope of protection .....	153
6.1.5.5.5. Subsidiarity .....	154
6.1.5.5.6. Substantive jurisdiction of the ECJ .....	157
6.1.5.5.7. Legal effects of a judgement to be granted .....	157
7. Conclusion .....	159
Bibliography .....	163