

The Protection of Fundamental Rights in the Legal Order of the European Union

With Emphasis on the
Institutional Protection of those Rights



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1. Introduction: The importance of international fundamental rights in today's world

The protection of fundamental rights in the legal order of the European Communities/European Union has long been a subject of just as lively and as critical discussion. The following reasons may be responsible for the growing awareness of the fundamental rights:

First, the alarming increase in intolerance, persecution and violence, which causes the political conflicts in vast regions of the world, has increased the awareness for providing fundamental rights and human rights protection. The "Charter for a New Europe", which was adopted on 21.11.1990 in Paris by the Heads of State and Government of the Conference for Security and Cooperation in Europe, makes it quite clear: "Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an overmighty State. Their observance and full exercise are the foundation of freedom, justice and peace."

Another reason for the high topicality of the discussion on fundamental rights may be sought in the close connection of the problem with the demand for the rule of law and democracy. Europe is in a state of profound social and political flux. The decade-long cherished hopes and expectations of all the European people for democratic regimes, which are committed to human rights and fundamental freedoms, now seem to come true. The "Charter for European Security" of the OSCE, adopted in Istanbul on 19.11.1999, states that "The Heads of State or Government of the participating States ... reaffirm that respect for human rights and fundamental freedoms, democracy and the rule of law is at the core of OSCE's comprehensive concept of security" (Point 19 of the Charter)".

A third point concerns the shift in the understanding of fundamental rights in modern society. In the classic fundamental rights catalogues of the constitutions, the liberal fundamental and human rights, such as the protection of personal freedom against governmental paternalism and regimentation were prominent, and today, the fundamental social rights, such as the right to work, social security, education and culture are increasingly taking the center stage. Their function consists not so much in securing the individual spaces of freedom, but rather in justifying

the rights to benefit from the State and society, social rights of codetermination and participation.

Particular attention is paid to the issue of fundamental rights within the scope of the legal order of the European Communities/European Union. Traditionally, the fundamental rights are an attribute of the States. The EC/EU is (still) not generally believed to be a polity, but a supranational organisation emerged from a functionally limited association of sovereign States. It does not have the three classic elements of statehood, viz., national territory, constitutive people and State power¹: Its territory is the aggregate of the territories of the Member States, and its territorial borders coincide with their external borders; its population is the totality of the people of the Member States. The sovereign power exercised by it is not original, but results from the partial transfer of sovereign rights by the Member States of the EC/EU.

Nevertheless, the EC/EU already possesses state-like characteristics; it exercises quasi state-like power, which is, above all, reflected in the following central aspects: It has its own autonomous legal order, which intrinsically differentiates it from the legal order established by the general international agreements; its provisions can have direct effect, and in fact, not only vis-à-vis those Member States, which constituted them, but also vis-à-vis the individuals², and they enjoy primacy over any national law.³ In view of these specificities of the Community/Union Law, the principle of the *rule of law* demands that the EC/EU respects and protects the fundamental rights in a similar manner as a polity.

1 According to the famous “Allgemeine Staatslehre” [General Theory of the State] by Georg Jellinek, 3rd edition, 1914, reprint 1966, p. 394 et seqq..

2 Judgement of 5.2.1963, van Gend & Loos, Case 26/62, ECR 1963, 1.

3 Judgement of 15.7.1964, Costa v E.N.E.L., Case 6/64, ECR 1964, 1251.