

THE PRINCIPLE OF HUMAN RIGHTS PROTECTION IN VIEW OF THE BERLIN DECLARATION

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Abstract¹: „[...] His dignity is inviolable. His rights are inalienable. Women and men enjoy equal rights. [...] We preserve in the European Union the identities and diverse traditions of its Member States. We are enriched by open borders and a lively variety of languages, cultures and regions. [...] The European Union will continue to promote democracy, stability and prosperity beyond its borders”.

Thus, Declaration of Berlin on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome, as it was signed on 25th of March 2007 by all 27 members of European Union, is providing among others the principles and values based on respect of fundamental rights, common traditions of the member states, as well as promoting the variety of languages, cultures and regions within the EU. The European Union stresses out again its intention to protect the freedoms of citizens and their civil rights by all possible means, including in front of the courts.

Key words: European Union, human rights, protection of human rights

I. Introduction

Although it has not been legally regulated by means of the European Communities' Treaties, the principle of human rights protection has become since its regulation under the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), one of the most important principles.

The extremely important value of the fundamental rights was reiterated in 2007, by the “Berlin Declaration”², occurring in a crisis moment faced by the European integration process, whereas the Constitutional Treaty had been rejected by

France and Holland in 2005, as a result of the referendums performed in the said countries on the 29th of May 2005, and 1st of June 2005 respectively. Until the present moment, the Constitutional Treaty has been ratified in accordance with internal proceedings by 18 member states.

Thus, the three Treaties by means of which the European Communities were established³ did not stipulate provisions regarding the human rights protection throughout the Community's business, such that before the Court of Justice of the European Communities (hereinafter referred to as the Luxemburg Court or CJEC) numerous matters have been raised

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² Signed by the 27 Member States, during the Conference organized in Berlin by the German presidency

³ The Treaty creating the European Community of Coal and Steel of April 18th, 1951, signed in Paris and coming into effect on the January 1st, 1952, and the Treaties of Rome creating the European Community for Atomic Energy, and the European Economic Community, respectively, signed on the date of March 25th, 1957 and coming into effect on the date of January 1st, 1958.

regarding the observance and application of the human rights on a communitarian level, by referral to *“the general principles existent on a national level in the common European juridical patrimony”*⁴.

Initially, the European Union did not have a catalogue of the fundamental rights, the main sources being represented by the constitutional principles common to the member states and by the European Convention on Human Rights (ECHR), the importance of which arises from the fact that being ratified by all member states, it represents the expression of their common values.

Moreover, protection of the fundamental rights had not, initially, been a matter of specific concern for the European Communities. Aimed at an economical rather than political integration, the European institutions had no power to deal with areas likely to provoke violations of human rights⁵. Under such circumstances, the Court of Justice expressly denied the applicability of the provisions regarding the human rights observance as stipulated in the member states' constitutions⁶. Although in 1962, in the *Van Gend & Loos*⁷ case, the Court of Luxemburg affirmed, without directly referring to fundamental human

rights, that *“the community law also created rights on which individuals could directly rely”*, starting with the year 1969 ECHR confirmed its intent of ensuring the protection of the fundamental human rights, because *“the fundamental rights enshrined in the general principles of Community law and protected by the Court of Justice”*⁸.

Subsequently, in certain cases⁹ the Court affirmed that *“the protection of fundamental rights [our observation: the protection of which is ensured by the community judge] was inspired by the constitutional treaties common to the Member States, and the guidelines provided by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories”*. The aspect was also stressed that the protection of fundamental rights *“must be ensured within the framework of the structures and objectives of the European Community”*¹⁰.

However, according to the Report of the Committee for civil freedom, justice and internal affairs¹¹ in many areas the competencies of the Luxemburg Court are limited (see Title IV in the EC Treaty and article 35 of the EU Treaty) or even inexistent (the second pillar Title V of the EU Treaty),

⁴ Gyula Fabian, *Communitarian Institutional Law (Romanian: Drept institutional comunitar)*, 2nd edition, Sfera Juridica Publishing House, Cluj-Napoca, 2006, p. 86; Damian Chalmers, Giorgio Monti, Adam Tomkins, *European Union Law, texts and materials*, Cambridge University Press, 2006, p. 232 and the following.

⁵ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf)

⁶ Gyula Fabian, *quoted paper*, p. 87.

⁷ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf) - *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration*, case 26/1962, published in 1963, ECR 1963.

⁸ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf) - *Case 29/1969, Stauder v. Stadt Ulm*, ECHR opinion of November 12th, 1969, rec. p. 419.

⁹ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf) - *Case 29/1969, Stauder v. Stadt Ulm*, ECHR opinion of November 12th, 1969, rec. p. 419; *case 11/1970 Internationale Handelsgesellschaft; mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel* ECHR opinion of December 17th, 1970, rec. p. 1125; *case 4/1973 Nold KG v. Comisie*, ECHR opinion of May 14th, 1974, rec. p. 491.

¹⁰ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf) - *case 11/1970 Internationale Handelsgesellschaft; mbH vs. Einfuhr - und Vorratsstelle für Getreide und Futtermittel* ECHR opinion of December 17th, 1970, rec. p. 1125; *Avise dated 28.03.1996, 2/1994, Rec. I-1759*.

¹¹ Report regarding the observance of the Charter for fundamental rights in the Commission's legislative suggestions: a systematic and rigorous monitoring procedure, Committee for civil freedoms, justice and internal affairs. Reporteur: Johannes Voggenhuber, (2005/2169(INI)), A6-0034/2007 of February 2nd, 2007, p.4.

which imposes a larger prudence for the European law giver when providing laws in areas that might affect the protection of fundamental rights. The same standpoint was confirmed by the European Parliament's Resolution of March 15th, 2007 regarding the observance of the Charter of fundamental rights in the Commission's legislative suggestions aimed to a systematic and rigorous monitoring procedure¹².

Enlarge on the matter of fundamental rights protection

The first referral on the "human rights" concept was introduced in the Preamble to the Single European Act signed on February 17th, 1986 and entering into effect as of July 1st, 1987, without stipulating the competency of the CJEC in this respect. Subsequently articles 2 and 6 paragraph (1) of the Amsterdam Treaty (the former article F.2 of the Treaty on European Union of 1993) consecrated the ensuring and protection of the fundamental rights within the community legal system¹³.

At the same time, the Community has begun to use its competency provided by the Amsterdam Treaty in respect with adopting anti-discrimination policies in areas such as: gender, race, orientation, age and religion. Also, in the year 2000 in Nice there has been officially designed and "proclaimed" the EU Charter of fundamental

rights. By such proclamation the fact was revealed that the fundamental rights protection in the EU would be more visible and transparent for the citizen and that in the future the Court of Justice would also be able to refer to the Charter upon examining the compatibility between a certain act with the fundamental rights, thus providing the Charter with the status of authentic interpretation of the juridical principles stipulated at art 6 in the EU Treaty¹⁴.

At the present moment a vivid debate exists on the significance of the fundamental human rights for the European Union (EU) and on the appropriate objective a human rights policy on EU level should have. Moreover, the fact is admitted that by the Court's praetorian jurisprudence a specific mechanism has been created for protecting the fundamental rights on a communitarian level, as the provisions of the ECHR are of particular influence in such process¹⁵.

Although the EU Charter on fundamental rights proclaimed at Nice in December 2000 represents a catalogue of the fundamental rights applicable within the Union, it is not yet an integrant part of the primary law, however it represents an integrant part of the Treaty on European Constitution, part II (*The Union's Charter on fundamental rights*)¹⁶, ratified according to the national provisions of the member states, by 18 member states of the EU until the present moment.

¹² Website: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0078+0+DOC+XML+V0//RO>

¹³ Paul Craig and Grainne de Burca, *EU Law, text, cases and materials, third edition*, Oxford University Press, 2003, p.317; O. Manolache, *Community Law (Romanian: Drept comunitar)*, fourth edition, revised and completed, All Beck Publishing House, 2003, p.24; Thus, according to art. 2 *The Union sets out its objectives [...] "of enhancing rights protection [...]"*, Art. 6 par. 1 of the EC Treaty *"The Union is grounded on the principles of freedom [...] human rights and fundamental freedoms protection [...] whilst par (2) of the same article "The Union protects fundamental right as they are ensured by the European Convention on protecting the human rights and fundamental freedoms", [...]"*. Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf)

¹⁴ Paul Craig and Grainne de Burca, quoted paper, p..317; O. Manolache, quoted paper, p.26.

¹⁵ Website: [http://www.venice.coe.int/docs/2003/CDL-DI\(2003\)001-e.pdf](http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf)

¹⁶ Treaty on creating an European Constitution, text commented and noted, Ministry of External Affairs, October 2004, p. 56 and the following.

It has been correctly considered by the doctrine¹⁷ that the Constitutional Treaty should “include the fundamental rights, because among others the document explains the matter of the importance of the European citizenship”. Thus, “this Charter represents the result of an original and unprecedented procedure in the history of the Union, finalized by signing and official recognition of the Charter, on behalf of their institutions by the chairmen of the European Parliament, Council and Commission on December 7th, 2000 in Nice¹⁸”.

Hence, according to Art.I 9 (entitled “Fundamental rights”) “The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II” (par. 1). “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution” (par. 2). “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law” (par. 3).

There must be mentioned that by the above said article there are clarified both the issue of the juridical value of the Charter of fundamental rights of the EU, and the issue of the Union’s adhesion to ECHR, an issue

which is not new, given the fact that the jurisdictional Court of Luxemburg is already paying considerable attention to the jurisprudence of the European Court for Human Rights (ECHR) in Strasbourg, however the divergences are not eliminated that exist between the two institutions and between the two juridical instruments for protecting the human rights¹⁹. Moreover, numerous articles have been undertaken from this Convention, such as: art. 3 forbidding torture; art. 4 par. 1 and 2 forbidding slavery and forced work; art. 5 individual’s right of freedom and safety; art. 8 respecting the private and family life etc. In the same time, a series of provisions have been undertaken from the Additional Protocols to the Convention, such as: Protocol no. 1, Protocol no. 2 etc. However, the special rights of the minorities are not included in the Charter, yet there is stipulated that there cannot be admitted by the member states and by the individuals discriminations grounded on their being a part of a national minority²⁰, also creating the obligation for the European Union to respect cultural, religious and linguistic diversity. In this respect, the Constitutional Treaty stipulates under art. II 82, suggestively entitled “Cultural, religious and linguistic diversity” that “The European Union respects cultural, religious and linguistic diversity”²¹.

Once the Treaty establishing a Constitution for the EU is adopted and comes into effect according to the

¹⁷ Augustin Fuerea, *European Community Law. General Part (Romanian: Drept comunitar european. Partea generala)*, All Beck Publishing House, Bucharest, 2003, p. 100.

¹⁸ Augustin Fuerea, p. 100-101.

¹⁹ Website: <http://www.mae.ro/index.php?unde=doc&id=28438&idlnk=1&cat=3>; Augustin Fuerea, *European Community Law. General Part (Romanian: Drept comunitar european. Partea generala)*, All Beck Publishing House, Bucharest, 2003, p. 144.

²⁰ Article II-81: “Non-discrimination” “(1) Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited”.

²¹ The Treaty establishing a Constitution for Europe, commented and noted text, Ministry of External Affairs, October 2004, p. 56 and the following; website: <http://www.mae.ro/index.php?unde=doc&id=28438&idlnk=1&cat=3>

constitutional proceedings specific to the member states, the Charter of fundamental rights shall become of binding juridical value, by its being included for the first time in a treaty (namely the Constitutional Treaty signed at Rome in October 2004). At the same time, this charter shall obtain constitutional value by its statute being regulated in the constitutional part of the Treaty draft, which represents a novelty element. Moreover, in the preamble of the Charter it is stipulated that such is aimed to *“reaffirm, with due regard for the powers and tasks of the Union and the principle of subsidiarity the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Union Treaty, the communitarian treaties, the ECHR, the Social Charters adopted by the European Council and by the European Community, as well as of the jurisprudence of CJEC and ECHR”*²².

Although it does not provide a definition for the “fundamental rights”, the Charter deems as such all the rights comprised in the mentioned document²³. The Charter refers to a total number of 53 fundamental rights, representing a minimum level of human rights protection²⁴. It is our opinion that this list of fundamental rights is not a limitative one, which means that the individuals in the member states can invoke before the CJEC other rights stipulated in the conventions and international treaties signed by the member states, whereas the European Union is to accede to the European Convention for Protection of the Human Rights and to its

additional protocols, as well as to the international conventions and treaties in the field of human rights protection, which it will have to observe and apply.

The member states' protection of the fundamental rights resides in the provisions of art. 7 from the EUT (former art. F1), according to which: *“On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in art. 6 par. 1, and address appropriate recommendations to that state”*.

Until the present moment, the procedure provided under art 7 of the EUT has not yet been used against any member state²⁵. An eloquent example in this respect is the fact that in February 2000, when the Austrian governing was obtained by the Party of Freedom, of right extreme, lead at that date by Joerg Haider, the procedure stipulated under art 7 of the EUT was not used against Austria. In return, the 14 member states entered an extra-judicial agreement according to which they would have no bilateral contacts with the Austrian government. However, such issue was solved six months later, when the *“Committee of Wise Men”* ascertained that the Austrian government had registered a relatively good protection of human rights. Moreover, the committee's report suggested that on the Union's level an agency for human rights should be established, in order

²² Cyula Fabian, quoted paper, p.89.

²³ Ovidiu Tinca, *General Community Law (Romanian: Drept comunitar general)*, third edition, Lumina Lex Publishing House, Bucharest, 2005, p. 171.

²⁴ Cyula Fabian, quoted paper, p.89.

²⁵ Stephen Weatherill, *Cases and Materials on EU Law*, sixth edition, Oxford University Press, 2003, p.78-79.

for the human rights protection in the member states to be monitored²⁶. Thus, on March 1st, 2007 the Agency for Fundamental Rights of the European Union²⁷ was set up, headquartered in Vienna. The mentioned agency follows in its rights the European Observer for racist and xenophobic phenomena²⁸.

The observance and protection against breach of the fundamental rights are stipulated in the draft of Constitutional Treaty, under Title VI "Justice" of part 2 - *Charter on the fundamental rights of the EU* - according to which "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article" (par. 1). "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented" (par. 2). "Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice" (par. 3)²⁹.

During its activity CJEC has granted protection on a Community level to the following rights, already consecrated in the international juridical order, such as: prohibition of discrimination; right to fair

trial and efficient legal aid³⁰; protection of private and family life; freedom of speech³¹; right to effective recourse; freedom in performing professional and economical activities; freedom of movement; property right³²; non-retroactive nature of criminal law; equality principle; religious freedom³³ etc.

According to the CJEC opinion, such admitted rights can only be exercised within specific limits, which must not come against the substance of that law area, which must meet a general interest pursued by the Community and which must not represent a disproportionate intervention compared to the followed aim³⁴.

In doctrine and in the specialized literature³⁵ no clear distinction could be made between the human fundamental rights, regulated by the Constitutional Treaty, and other law principles (undertaken from the national constitutions of the member states, from the international treaties signed by such, or the rights stipulated in the EUT), and hence they are applied up to the limits of confusion. Moreover, a series of this sort of general principles have been acknowledged by the Court of Justice, and can also be included in the human rights category, namely:

- Fundamental right to house inviolability (as a common principle found in the juridical

²⁶ Damian Chalmers, Giorgio Monti, Adam Tomkins, quoted paper, p. 245.

²⁷ (EC) Regulations no. 168/2007 of the Council of February 15th, 2007 regarding the establishment of the Agency for Fundamental Rights of the European Union

²⁸ (EC) Regulations no. 1035/97 of the Council JO L 151, 10.6.1997, p. 1. Regulation as modified by (EC) Regulations no. 1652/2003 (JO L 245, 29.9.2003, p. 33).

²⁹ Website: http://www.mae.ro/poze_editare/Tratat_Constitutie%20UE.pdf Treaty for establishing an European Constitution, commented and noted text, Ministry of External Affairs, October 2004, p. 70 and the following.

³⁰ Case no. 222/1984 Johnston vs. Chief Constable of Royal Ulster Constabulary, CJEC Collection 1986, p. 1651.

³¹ Cases 60 and 61 /1984 Cinetheque vs. Federation Nationale des Cinemas Français, CJEC Collection 1986, p.2605.

³² Case no. 55/1988 Wachauf v. Bundesamt fur Ernährung und Forstwirtschaft, CJEC Collection 1986, p.2609.

³³ Case no. 130/1975 Paris v. Ministries Council, CJEC Collection 1976, p.1589.

³⁴ Augustin Fuerea, *European Community Law. General Part (Romanian: Drept comunitar european. Partea generala)*, All Beck Publishing House, Bucharest, 2003, p. 144.

³⁵ O. Manolache, quoted paper, p. 27-29; Gyula Fabian, quoted paper, p. 88; Damian Chalmers, Giorgio Monti, Adam Tomkins, quoted paper, p. 237 and the following.

systems of all member states, of relevancy being the case of *Hoechst AG v. the Commission*³⁶;

- The right to meet and use union labor related rights. Such right was asserted as a law principle, which cannot be subjected to any limitations for the interest of public safety and security, others from those needed in order to protect such interests in a democratic society, nor can it affect the rights ensured by the European Convention for Human Rights of 1950 signed in Rome and by its additional Protocols. In a case of 1995 (*Union royale Belge des societes de football association ASBL v. Jean-Marc Bosman and others*)³⁷ it has been considered that in respect with the arguments based on the principle regarding the freedom of associating, it must be acknowledged that the principle stipulated under art. 11 from the European Convention for human rights and fundamental freedoms protection, also arising from the constitutional traditions of the member states, is one of the fundamental rights, as the Court itself constantly set out and as it is reasserted in the preamble of the Single European Act of 1986 and in art. F2 of EUT, rights protected under the communitarian juridical order. However, the rules drafted by the sport associations regarding the national court cannot be deemed as

necessary in order to ensure the use of such right by the mentioned associations, clubs or by their players;

- The right to protection of the private and family life, comprised under art. 8 of the European Convention for Human Rights, also arising from the common constitutional traditions of the member states. Regarding such principle, CJEC has mentioned that this is one of the fundamental rights protected by the communitarian juridical order, no derogations being accepted from the member states' observing such right, especially including the individual's right of keeping the secret of his/her health condition etc.³⁸

The protection of human fundamental rights has been reiterated as mentioned above in the Conference of Berlin, when the "Berlin Declaration" was signed by the 27 member states of the European Union (including the last two states acceding to the European Union as of January 1st, 2007, namely Romania and Bulgaria), on the occasion of 50 years anniversary from the signing of the Treaty of Rome by the 6 countries founding the European Communities³⁹. This is the most important political statement of the last half of century for the EU history. Moreover, the mentioned declaration reiterated principles and values of special meaning for the Union and for the member states, among which we can mention as examples: freedom, democracy, rule of law, mutual respect, tolerance, justice etc, and also its

³⁶ Cases 46/87 and 227/88 *Hoechst AG v. the Commission*, opinion of 21.09.1989, in ECR, 1989.

³⁷ Case 415/93, *Union royale Belge des societes de football association ASBL v. J.M. Bosman and others*, opinion of 15.10.1995, in ECR, 1995.

³⁸ O. Manolache, quoted paper, p.27-29.

³⁹ France, Germany, Italy, Belgium, Luxemburg and Holland.

undertaking of ensuring, respecting and protecting such, prohibiting any individual or member state from breaching them.

Also, Europe is reunified under the sign of European fundamental values, written in the EU Treaty, namely: freedom, democracy and respect for human fundamental rights and freedoms, as well as the rule of law.

Conclusions

The matter of human rights is of extreme importance and has been reiterated upon at the Conference organized by the German presidency of the European Union in the document of strong political and juridical value the Berlin Declaration,

signed and undertaken by the 27 member states of the European Union. Under such circumstances, among the priorities of the German presidency of the EU there are: strengthening the European freedom, security and justice area, the protection of the fundamental rights.

Moreover, "Peace and freedom", "democracy and the (ideal) rule of law", "mutual respect and shared responsibility", "tolerance, justice and participation", "equality in rights and social solidarity" are some of the principles and values of the EU listed in the anniversary Berlin Declaration.

One of the future aims of the European Union, mentioned in the Berlin Declaration, is for the EU to become a more powerful voice on the international relations scene, as unique player.

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