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**REVIEW BY THE CONSTITUTIONAL
COURTS OF PROCEEDINGS BEFORE
ORDINARY COURTS APPLYING
COMMUNITY LAW**

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REPORT

**Issue of Fundamental Rights in the Practice
of the Court of Justice and of the Constitutional Courts**

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1. Since several years human rights are important topics for the European Law. They are main issues of the cases decided by Constitutional Courts and they have an important role in the practice of the European Court of Justice as well. This importance is obvious in the case of the national Constitutional Courts as national constitutions recognise in some way fundamental rights or even contain a catalogue of them. The situation is not the same with the European Court of Justice. The present paper covers but a small part of the topic. After a short overview of the development of the protection of fundamental rights in Community law some elements of the protection of property rights are sketched out.

Development of the protection of fundamental rights in the Community law

2. It has been pointed out that in the early 1950s attempts were made to include the protection of human rights into the treaties concerning European integration but without success. The usual explanation of the failure is that human rights are too sensible questions of constitutions and sovereignty¹. The European Communities were created and remained for a long time an organisation of market liberalisation. A slow development took place as a result of which social, environmental, cultural and other policy concerns were no more completely absent from the EC.

3. For a relatively long period it was the Court, which took steps for protecting human rights. The Court's interpretative role is considered as the main force attributing direct effectiveness to the rules of the Treaty on four freedoms – free movement of goods, persons and services, in particular – and positing their primacy over any conflicting national rules and policies². A rather great scepticism prevails, however, about the Court's ability to forge a satisfactory policy of human rights protection. It is thought that the Court's goals are primarily economic³. This tendency corresponds with the characteristic feature of the Community law in general where four freedoms prevail and political liberties cannot have but an additional role⁴. The role of fundamental rights in the Court's practice and its relationship with the four freedoms have got such an importance that Vassilios Skouris, President of the Court has dealt with the question in two articles published recently⁵.

4. The protection of fundamental rights has been established slowly in subsequent decisions of the Court. The problem was that there was no rule in the Treaty to be applied which could serve as a basis of the protection of fundamental rights. Thus the Court has invented and developed step by step the basis.

As a very first step, the decision in *Van Gend en Loos v. the Netherlands* can be mentioned in which there was but a hint at the rights of citizens. In this case the Court held:

“Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”⁶

¹ Fabrice Picod, Les sources, in : Frédéric Sudre et Henir Labayle (dir.), *Réalité et perspectives du droit communautaire des droits fondamentaux*, Bruxelles 2000, 130.

² Gráinne de Búrca, *The constitutional challenge of new governance in the European Union*, (2003) 28 *European Law Review* 817.

³ Paul Craig and Gráinne de Búrca, *EC Law*, Oxford, Clarendon Press 1995, 329.

⁴ Louis Dubouis, *Le rôle de la Cour de justice des Communautés européennes, Objet et portée de la protection*, *Revue Internationale de Droit Comparé* no 2-1981. 605.

⁵ Vassilios Skouris, *Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht*, *Die Öffentliche Verwaltung* (2006) 59. Jg. H. 3. 89-97, Vassilios Skouris, *Fundamental Rights and Fundamental Freedoms*, *European Business Law Review* (2006) 225-239.

⁶ Decision of 5 February 1963, case 26/62 [1963] ECR 1, part II. B.

The next important case was *Stauder v. City of Ulm* in which there was a direct reference to fundamental rights taken into consideration by the Court. It was stated that:

“Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the General Principles of Community Law and protected by the court.”⁷

The invention has been the application of general principles of community Law and the idea that the general principles include fundamental rights.

The above formulation was modified in *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*. The Court made two important statements in this decision. The first one concerned the relationship between Community law and national Constitutions, the other was an amended formulation of the *Stauder* decision on human rights:

“...the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.”⁸

The new formulation clearly expresses the view that fundamental rights are integral parts of the general principles. A new step has been taken explaining the nature of general principles. They are principles, which must be ensured by the Community and these principles derive from constitutional traditions considered to be common to the Member States.

5. 1974 seems to be an important year in further development.

The Court handed down a decision in the *J. Nold Kohlen- und Baustoffgroßhandlung v. Commission* case on 14 May 1974. The applicant requested that the Court should annul a decision of the Commission and declare it inapplicable as far as it relates to the applicant. According to the application the decision of the Commission violates in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the German Constitution and by the constitutions of other Member States and various international treaties, including in particular the convention for the protection of human rights and fundamental freedoms of 4 November 1950 and the protocol to that convention of 20 March 1952. The Court confirmed that fundamental rights form an integral part of the general principles of law. The definition of the general principles is, however, somewhat different from that of the *Handelsgesellschaft* case. According to the new version the Court draws inspiration from constitutional traditions common to the Member States. This formulation is rather vague but the Court goes further saying that “it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states”. The Convention for the Protection of Human

⁷ Decision of 12 November 1969, case 29/69 [1969] ECR 419, paragraph 7

⁸ Decision of 17 December 1970, case 11/70 [1970] ECR 1125. paragraphs 3 and 4

Rights and other treaties are also referred to as they “can supply guidelines which should be followed within the framework of Community Law”. The Court was, however, of the opinion that the right of ownership and the right freely to choose and practice trade and profession are always subject to limitations laid down in accordance with the public interest. The Court considered the applicant’s interest as mere commercial one the uncertainties of which are part of the very essence of economic activity⁹.

In May 1974 another important decision was made. On 29 May 1974 the German Constitutional Court handed down the decision called “*Solange I.*”¹⁰. According to Jutta Limbach, who was President of the Constitutional Court at that time, the Court had to intervene as the EC did not have any catalogue of fundamental rights and these rights were not protected by the Community as they were by Germany¹¹.

As it is well known, the Community Law has developed and the German position has been modified since 1974.

6. In 1977 the Parliament, the Council and the Commission felt it necessary to take some steps in the field of fundamental rights and published a joint declaration. The declaration after recalling the case-law of the Court referred to the constitutions of the Member States as well as to the European Convention for the Protection of Human Rights.

7. In the decision *Liselotte Hauer v. Land Rheinland-Pfalz* of 1979 the Court answered preliminary questions concerning, among others, violation of property rights when applying Community rules. The Court underlined the importance of the unity of the common market and the cohesion of the Community. Therefore, rejected the application of any special criteria of a national legislation or constitutional law. The Court reaffirmed the formulation of the protection of fundamental rights declared in the *Nold* case. Considering the question of violation of property rights the Court quoted Art. 1. of Protocol 1 to the European Convention as a basis of the decision and made a comparison of the constitutional rules of some Member States. The Court examined “whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property”¹².

These aspects of examination seem to be important as they are usual questions in the practice of Constitutional Courts when deciding on restrictions imposed by a national Act of Parliament or a decree upon exercising a fundamental right.

It has become standard formulation to refer to general principles of common constitutional traditions containing the protection of fundamental rights and to international treaties, which can supply guidelines. In one of the important decisions, handed down later, in the case *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* the words: margin of appreciation of the Member States can be found¹³. The terminology is well known in the practice of the European Court of Human Rights.

⁹ Decision of 14 May 1974, case 4/73 [1974] ECR 491, paragraphs 13 and 14

¹⁰ BverfGE 37, 271

¹¹ Jutta Limbach: Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, *Europäische Grundrechte Zeitschrift* 2000, 27. Jg. 417-420. p.

¹² Decision of 13 December 1979, case 44/79 [1979] ECR 3727, paragraphs 14-20, 23, 32.

¹³ Decision of 13 July 1989, case 5/88, [1989] ECR 2609, paragraph 22

In the case *ERT* the Court has taken a step forward in connection with the application of the Convention. It stated that where applicable rules fall within the scope of Community law it is to be determined whether these rules are compatible with the “fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.” The decision refers to one of the fundamental rights as embodied in the Convention on Human Rights, “as a general principle of law the observance of which is ensured by the Court”¹⁴. The decision clearly shows that the Court takes into consideration the rules of the Convention, however, the basis of it cannot be more but general principles of law.

8. The constant practice of the Court is reflected in the Treaty on European Union. The third recital of the Preamble expresses that the Union is convinced of the importance of human rights: “confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”. Paragraphs 1 and 2 of Article 6 (ex Article F) of the consolidated text of the Treaty contain a formulation very similar to that of the decisions of the Court:

“1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2 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.”

9. Since the adoption of the Treaty on European Union protection of fundamental rights could be based on the rules of the Treaty. In several decisions the Court referred to the Convention for the Protection of Human Rights and to decisions of The European Court of Human Rights.

It has been discussed whether the European Union could become a signatory of the Convention. In the Opinion No. 2/94, the Court denied the possibility of the Union’s signing the Convention. The Court stated that respect for human rights is a condition of the lawfulness of Community acts. “Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all provisions of the Convention into the Community legal order.” Its consequences would, however, be “of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment”¹⁵.

At the meeting of the European Council held in Nice from 7 to 9 December 2000 the Charter of Fundamental Rights of the European Union was solemnly proclaimed. The fifth indent of the Preamble of the Charter reaffirms “the rights as they result, in particular, from the constitutional traditions and international obligations common to Member States” and different Treaties including the European Convention. It is important that reference is made to the case-law of the Court of Justice and of the European Court of Human Rights.

¹⁴ Decision of 18 June 1991, case 260/89, ECR [1991] 2925, paragraphs 42, 44

¹⁵ Opinion of 28 March 1996, ECR 1759, paragraphs 34, 35.

The next stage was the Treaty establishing a Constitution for Europe. Paragraph 2 Article 7 declared “The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Paragraph 3 maintained, however, the main idea worked out by the Court of Justice stating the “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 Members States, shall constitute general principles of the Union’s law.”

It is well known that the future of the Constitution is not clear and that the Charter has no legal binding character. Thus, the case-law of the Court has a decisive importance.

10. After having outlined the development of the protection of fundamental rights in the Community Law main principles of the protection should be summarised. Basic ideas of the Court’s practice concerning decision making on acceptability of restrictions upon exercise of fundamental freedoms can be found in the case *Reinhard Gebhard v. Consiglio dell’Ordine degli Avocati e Procuratori di Milano*. According to it national measures must fulfil four conditions: “they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”¹⁶

Protection of property and Constitutional Courts

11. Protection of fundamental rights has been present since the beginning of the activity Constitutional Courts. It had been an important field of decision making also of Constitutional Courts of countries, which have acceded recently to the Union, prior to the development of protection in Community law reached its present stage. In all accession countries the European Convention for the Protection of Human Rights and Fundamental Freedoms had been promulgated and decisions of the European Court of Human Rights has been taken into consideration by Constitutional Courts, too.

It is a widely accepted view that we live in a new transnational legal order based on universal rights, common values¹⁷. It is also admitted that there is a tendency of cultural globalisation, which means, from the point of view of the topic, a worldwide ideology of human rights¹⁸. In reality there are considerable differences in the understanding of different rights. Some of the existing problems are mentioned in the following.

12. The first problem is the different definition of fundamental rights. As Joseph Weiler has put it, fundamental rights form an important part of the identity of the different societies rooted in history, social and political culture. The choice of human rights is about the choice of fundamental values.¹⁹

In several countries of Europe there have been very important changes in political systems during the XXth century. It brought about very different ideologies and preferences for

¹⁶ Decision of 30 November 1995, case 55/94 [1995] ECR 4165, paragraph 37

¹⁷ Paul W. Kahn, Comparative Constitutionalism in a New Key, Michigan Law Review 101, (2003) 2682.

¹⁸ Jean-Bernard Auby, Globalisation et droit public, Revue Européenne de Droit Public vol. 14. 2002, 1220-1221.

¹⁹ Joseph H. Weiler, Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights, in: Nanette A. Neuwahl, Allan Rosas (ed.), The European Union and Human Rights, The Hague, Boston, London 1995. 51, 54.

specific social values. The changes in the understanding of fundamental rights have reflected the changes of political systems²⁰. It is particularly true in the case of the new accession countries. One of the fields where the change of the political system concerned the very essence of the concept was property. Twenty years ago private property was tolerated in the system of hierarchy of different forms of ownership but it belonged to the basis of the prevailing ideology that private property should be restricted. The system changed and legal rules of the former system were repealed but the change of the whole institutional system takes a long time²¹. The change of the mentality is particularly long process.

There is another problem, too. In the German legal literature Professor Leisner has pointed out that there is no common constitutional tradition of the older Member States either in the field of property. The meaning of property is different in Germany, in the United Kingdom and in the other states. According to his analysis the Court of Justice has never tried to formulate a definition of property right protected under the Community law and a well-based comparison is missing in this field of public law²².

13. Some other questions are to be taken into consideration because of the fact that the Member States of the European Union are signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The legal position of the Convention is, however, different according to the principle accepted in the different states concerning international treaties.

In theory the international treaty can be superior to any domestic law including the constitution or it can be incorporated into the constitution or it can be part of the domestic law but below the level of the constitution²³. Consequently, there are different solutions concerning the relationship of the rules of the Constitution of the state concerned and that of the Convention. As a result the approach of the Constitutional Courts to the interpretation of fundamental rights is different.

In Hungary Paragraph (1) Article 7 contains a provision on international law:

“The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country’s domestic law with the obligations assumed under international law.”

The formulation of the rule is not clear and it was interpreted in different ways. § 9 of the Act L. of 2005 on the procedure concerning international treaties stated that if the Parliament has given authorisation to the acknowledgment of the binding force of a treaty, it has to be promulgated by an Act of Parliament or by a Government Decree. The ministerial grounding of the bill presented to the Parliament has characterised the position of the Hungarian system as a dualist one.

²⁰ Bernd Rüthers, *Recht und Juristen im Wechsel der Systeme und Ideologien*, *Neue Justiz* 2003. 7. 337.

²¹ John Marangos, *Alternative Methods of Institutional Development for Transition Economies*, *Journal of International and Theoretical Economics* 158 (2002) 487, 492.

²² Walter Leisner, *Der europäische Eigentumsbegriff*, in: J. I. Ipsen, H.-W. Rengeling, J. U. Mössner, A. Weber (hrsg.), *Verfassungsrecht im Wandel*, Köln, Berlin, Bonn, München 1995. 400-402.

²³ Rudolf Bernhardt, *The Convention and Domestic Law*, in: R. St. J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for the Protection of Human Rights*, Dordrecht, Boston, London 1993, 26-27.

The Convention was promulgated by an Act of Parliament in 1993²⁴. The Convention was signed by Hungary much earlier but the promulgation was delayed during the former regime. At the time of the political changes the text of the Convention was taken into consideration and fundamental rights recognised by the Convention were incorporated into the Constitution but their formulation is different from that of the Convention. Thus the Constitutional Court makes decisions on basis of the Constitution referring to, if it seems necessary, the case-law of the European Court of Human Rights.

14. A further question of the interpretation of fundamental rights is put because of the differences in the roles of the Court of Justice, the European Court of Human Rights and the Constitutional Courts.

The main task of the Court of Justice is to ensure the law is observed in the interpretation and application of the Treaty establishing the European Community²⁵.

The jurisdiction of the European Court of Human Rights extends to matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it²⁶. The Court has to take into consideration that the aim of the Council of Europe declared in the Preamble of the Convention is the achievement of greater unity between its members maintaining and further realising human rights and fundamental freedoms²⁷.

The competences of the Constitutional Courts of different countries vary. There is, however, at least one common element: all Constitutional Courts have to examine whether a legal rule concerned is compatible with relevant rules of the Constitution of the country. As there are differences in the history, social and political culture, values of different countries, decisions of the Constitutional Courts will not reach the same conclusions.

Both the Court of Justice and the European Court of Human Rights make decisions in concrete cases, on the other side the analysis of the compatibility of a legal rule with the Constitution is an abstract examination.

It is evident on basis of the main task of the above Courts that they examine a certain rule excluding or restricting the exercise of a fundamental right from different points of view. Therefore, there may be differences in their decisions. This aspect of the problems is not quite the same as it was studied in the framework of a project some years ago focussing upon the construction of a constitutional, “rule of law” Community²⁸. Nevertheless, one of the statements made by a reporter in this context concerns our topic, too. As Bruno de Witte has put it, the relation between European legal integration and fundamental principles and values of the constitutions of the Member States is far from settled and this difference has surfaced strongly in recent years²⁹.

²⁴ Act XXXI. of 1993

²⁵ Article 220 (ex Article 164) of the Treaty

²⁶ Paragraph 1 Article 32 of the Convention

²⁷ See third recital of the Preamble of the Convention.

²⁸ Alec Stone Sweet, Constitutional Dialogues in the European Community, in: Anna-Marie Slaughter, Alec Stone Sweet, Joseph Weiler (ed.) *The European Court and National Courts – Doctrine and Jurisprudence*, Oxford 1997 (reprinted 2003), 305.

²⁹ Bruno de Witte, Sovereignty and European Integration: The Weight of Legal Tradition, in: Anna-Marie Slaughter, Alec Stone Sweet, Joseph Weiler (ed.) *The European Court and National Courts – Doctrine and Jurisprudence*, Oxford 1997 (reprinted 2003), 305.

15. Since some years the role of the courts has changed. The Court of Justice has become to some extent a special kind of Constitutional Court³⁰. The activity of the European Court of Human Rights has a double character: it helps citizens and has a role similar to a Constitutional Court. It depends on the future development which function will get greater importance³¹. Both Courts maintain the unity of interpretation of the law belonging to their competence.

Examining the possibility of exercising fundamental rights is in the competence of both of the mentioned Courts and of the Constitutional Courts as well. The protection of property is a good example of the problems of the coincidence of competences. The very phenomenon of property rights can be questionable. It is obvious that fundamental right to own property does not cover the same rights as it is known in the Civil Law of different countries. It is not quite clear, however, what kind of rights are covered when protecting property rights (recently the Hungarian Constitutional Court has examined restrictions on the exercise of the profession of doctors on basis of property rights because the claimant referred to property rights but it could have been examined from other constitutional aspects, too). Conditions of depriving someone from property are formulated in not the same manner in the legal rules to be applied by the mentioned Courts. Regulation of restrictions imposed upon the exercise of property and its interpretation is even more varying in different jurisdictions. There are very primitive questions which are not clarified: e.g. are the limits of the property rights immanent in these rights /deriving from social conditions/ or not, what is public interest /it has become particularly important after the far reaching privatisation process/, etc. Therefore, the continuation of the dialogue of Courts is important in this field, too.

³⁰ Jürgen Schwarze, Der Rechtsschutz Privater vor dem Europäischen Gerichtshof: Grundlagen, Entwicklung und Perspektiven des Individualrechtsschutzes im Gemeinschaftsrechts, Das Deutsche Verwaltungsblatt 2002, 1298.

³¹ Lucius Wildhaber, Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte ? Europäische Grundrechtszeitschrift 2002. 570, 573