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PILLAR III
HUMAN RIGHTS

The evolution of the perception of fundamental rights in the European Union

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I. ABSTRACT

This work addresses the development of the protection of Human Rights in the EU. It explores the development of EU human rights outside of the EU treaties, due to the constitutional courts of the Member States and the European Court of Justice. It mentions the most important judgments which contributed to such a development and it finally provides insight on the system of fundamental rights as it is now enshrined in the EU treaties and the European Charter of Human Rights.

KEY WORDS: *Human Rights, migration issues, European Union standards*

ABBREVIATIONS:

ECHR	European Court of Human Rights
ECJ / Court	European Court of Justice
ECR	European Court reports
EEC	European Economic Community
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union

II. INTRODUCTION

The originating Treaties establishing the European Communities did not contain[1] any direct provisions on the protection of human rights and fundamental freedoms going beyond the simple protection of the individual in the realization of the objectives of the Community.[2] The main objectives of the European Communities were purely economic.[3] That was the reason that Protection of Human Rights was not the primarily objective mentioned in the originating treaties. The European Economic Community (EEC) Treaty eluded the issue of human rights. It was held that fundamental rights were guaranteed by the national constitutions and at a regional level by the European Convention of Human Rights.[4]

[1] Treaty that constitutes the European Economic Community, signed in Rome on 25 March 1957 and entered in force on 1 January 1958.

[2] This is related to the objectives of the EC Treaty, so as to the realization of the single market, for example some personal liberties as the Right to move freely and the right not to be discriminated on the bases of nationality or sex.

[3] See von Bogdandy, *Doctrine of Principles,* Jean Monnet Working Paper 9/03 at p. 9 available at http://www.jeanmonnetprogram.org/papers/03/30901-01.html: Armin von Bogdandy says in his paper, that the creation of the EEC was "legitimated by goals that were to a large extent neutral with regard to constitutional issues". These include respect for fundamental rights.

[4] European Convention of Human Rights and fundamental freedoms, signed in Rome on 4 November 1950 and entered in force on 3 September 1953. See as related to this A. Viterbo, *Origine e sviluppo della Convenzione*

The legal literature before the years 2000[5] tented to deny the existence of a general EU competence in the field of fundamental rights. As many Member States were conferring many legislative powers to the EU through successive Treaty amendments and by the competence of the EU in adopting legislation in the field of fundamental rights this has changed and has confirmed that the protection of human rights is an intrinsic feature of the European Union and its Member States. One of the main factors for changing this image of a purely economic Union, was the case law of the European Court of Justice by developing an ever evolving jurisprudence confirming the obvious high protection of Human Rights based on general principles of law enshrined in the National constitutions of the Member States.

III. THE ECJ'S IMPACT ON THE DEVELOPMENT OF EU FUNDAMENTAL RIGHTS

Many authors argue that the role of the European Court of Justice (ECJ / Court) was very important in the recognition of fundamental rights based on the general principles of law, whose source was to be traced back to the national constitutions of the Member States. It was the European Court of Justice that, through its case law, recognized step-by-step fundamental rights as general principles of EEC law[6] and that through several decisions stated clearly the importance of the protection of human rights within the legal system of the Community.[7] In fact, the introduction of a system of fundamental rights has been one of the greatest achievements of the European Court of Justice, at a supranational level.[8]

At first in 1959, in the case of *Stork*, the Court excluded the possibility to assess violations of fundamental rights by the acts of the EU institutions in the light of the National Constitutions of the Member States.[9] This because one of the main objectives of the ECJ was to ensure the effectiveness of EU law and the applicability of the principle of the supremacy[10] of EU law over national law. In this context the first case law of the ECJ followed the supremacy doctrine according to which the validity and efficacy of EU law, even if likely to introduce direct effects to the legal positions of individuals, could not be challenged on the basis of rights recognized by the national constitutions of the Member States. This doctrine together with the lack of provisions in the EU Treaties regarding fundamental rights had left with no judicial remedy those individuals whose rights were violated by EU legislation. This worsened the

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europea dei diritti umani, in *La tutela dei diritti umani in Europa-tra sovranita statale e ordinamenti sovranazionali*, a cura di Andrea Caligiuri, Giuseppe Cataldi, Nicola Napoletano, CEDAM 2010, p.77 ss.

[5] A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union,* in *Common Market Law Review* 2000, p. 307-338.

[6] Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *InternationaleHandelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491; J.N. Cunha Rodriguez, *The Incorporation of Fundamental Rights in the Community Legal Order*, in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law*, Oxford, 2010, p. 89. Cf. also T. Tridimas, *The General Principles of EU Law*, Oxford, 2007, p. 298.

[7] G.L.Tosato, *La tutela dei diritti fondamentali nella giurisprudenza della Corte delle Comunita europee,* in *Studi in onore di Giuseppe Sperduti, Milano, 1984, p. 717 ff; H.G. Schermers, The European Communities Bound by Human Rights, in Common Market Law Review, 1990, p. 249 ff;*

[8] B. de Witte, *The Past and the Future Role of the European Court of Justice in the Protection of Human Rights*, in P. Alston et al. (eds.), *The EU and Human Rights*, Oxford 1999, p. 859.

[9] ECJ Judgment of 4 February 1959, *Stork v. High Authority*, Case 1/158, paragraph 4.

[10] The supremacy of EU law means that every time that a case comes in front of the national court, if the national law is in conflict with the EU law, the national Court must apply the EU law.

position of domestic judges, which could not refuse to apply the provisions contained in acts of the institutions whenever they were inconsistent with the fundamental rights enshrined in their constitutions.[11]

Later on the situation changed. The ECJ in the case of *Stauder v. City of Ulm*[12] affirmed the solution that any provision of EU law would be null if contrary to human rights. This judgment stated expressly at paragraph 7: "…*the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community [Union] law and protected by the Court*." This recognized that fundamental human rights are part of the general principles of European Union Law. In a later case, *Internationale Handelsgesellschaft*[13], the ECJ goes beyond what it had affirmed in its *Stauder* judgment, stating that the conception of human rights applied by the ECJ, while deriving its validity solely from European Union law, is nevertheless "*inspired*" by national constitutional traditions. Some scholars have argued that the change of direction of the ECJ was a response to the case law of the Italian and German Constitutional Courts on an attempt to foster the doctrines of supremacy and direct effect of EU law within the national legal systems.[14]

In fact German Constitutional Court had doubts on whether EU law should prevail over the provisions of the German Constitution on fundamental human rights. In the case of "*Solange I*",[15] decided by Bundesverfassungsgericht, the German Constitutional Court stated that, in the absence of a codified catalogue of human rights on European Union law, it was impossible to decide whether the EU standards in respect of human rights protection were adequate. It concluded that the EU measure in question did not violate the fundamental rights provisions of the German constitution. However it affirmed the supremacy of the German Constitution and alluded to the possibility that the EU measure might be declared inapplicable in Germany if it violated its constitutional provisions. Only in 1986, in the case of *Wunsche Handelsgesellschaft* (*"Solange II")*,[16] the German Constitutional Court announced that it would no longer review EU measures to ensure that they did not infringe human rights. It left this to the European Court of Justice.

However – as one author has demonstrated – despite the willingness of the ECJ to avoid potential threats coming from the national courts, the case law of the ECJ was, rather than a purely defensive move, "*an impressive step in the development of a human rights culture in Europe*."[17] When the ECJ identified an unwritten catalogue of fundamental rights in the general principles of EU law, the protection of human rights was still much underdeveloped in the legal systems of the Member States.

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[11] N. Napoletano, *L'evoluzione della tutela dei diritti fondamentali nell'Unione europea*, in *La tutela dei diritti umani* in *Europa-tra sovranita statale e ordinamenti sovranazionali*, ed by A. Caligiuri, G. Cataldi, N. Napoletano, Padua 2010, p.5.

[12] ECJ judgment of 12 November 1969, *Stauder,* Case 29/69, [1969] ECR 419.

[13] ECJ judgment of 17 September 1970, *Internationale Handelsgesellschaft* , case 11/70, ECR 1125

[14] J. Kühling, *Fundamental Rights*, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Oxford, 2006, p. 501; F. Schimmelfennig, *Competition and Community: Constitutional Courts, Rethorical Action and the Institutionalization of Human Rights in the European Union*, in B. Rittberger and F. Schimmelfennig (eds.*), The Constitutionalization of the European Union*, London, 2007, p. 100.

[15] *Bundesverfassungsgericht,* 29 May 1974, [1974] 2 CMLR 540.

[16] Decision of 22 October 1986, [1987] 3 CMLR 225.

[17] B.O. Bryde, *The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism*, in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law,* Oxford, 2010, p. 119, 122.

Law Journal
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The European Court of Justice utilized the general principles of law to show the objectivity of its judgments. For this reason, the ECJ has developed the doctrine that the rules of European Union law may be derived not only from the Treaties and from legislation, but also from the general principles of law.[18] A further specification is contained in the judgment of *Nold* in 1974[19] where the ECJ, arguing that fundamental rights are an integral part of the general principles of law, has affirmed that in guaranteeing these rights it has to inspire its judgments to the common constitutional traditions of the Member States. The origin of the general principles of law is derived from different sources, but the most important are the European Union Treaties and the legal systems of the Member States.

As an example of the application of these principles we may consider Article 18 TFEU, which prohibits discriminations based on nationality between EU citizens as regards matters within the scope of the Treaty. The principle of equality finds expression in a number of provisions in the Treaties. Article 40(2) TFEU prohibits discrimination between producers and consumers in connection with agriculture and Article 157 TFEU establishes the principle of equal pay for equal work irrespective of sex. The European Court of Justice has gone beyond these specific provisions by holding that *there is a general principle of non-discrimination in EU law*[20].

International treaties constitute the second source of "*inspiration*" for the EU conception of fundamental human rights. If an EU measure were contrary to a human right provided for in a treaty to which a Member State was a party at the date of the entry in force of the originating EEC Treaty of 1957, or at the later date of that Member State's accession to the EU, the Member State might be unwilling to apply it on its territory for fear of breaching the treaty.[21] The most important international treaty in this respect is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). All the Member States are parties to it and the rights protected by it are considered as part of the EU conception of human Rights.[22] This Convention has also been considered by the ECJ - as its now under Article 6, para 3, TEU - as source of inspiration for the general principles of law to be applied on respect of human rights protection. To this purpose it was called expressly for the first time in the judgment of *Rutili* in 1975[23] and subsequently in the judgment *Hauer* 1979.[24]

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[18] A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri,* in *Rivista italiana di diritto publico comunitario, 1994, p. 521 ss;* A. Arnull, *The European Union and its Court of Justice, Oxford, 2003, p. 190 ss.*

[19] ECJ judgment of 14 may 1974, *Nold v. Commission*, Case 4/73 [1974].

[20] Judgment of *Frilli v. Belgium*, Case 1/172, [1972] ECR 457 (para 19 of the judgment); *Sotgiu v. Deutsche Bundespost*, Case 152/73, [1974] ECR 153 para 11 of the judgment; *ECSC v. Ferriere Sant'Anna*, Case 168/82, [1983] ECR 1681.

[21] Art.351 TFEU, which does provides that rights and obligations arising from treaties entered into before 1st January 1958 or before the accession of the relevant Member State to the EU, "shall not be affected by the provisions of this Treaty". This provision requires the EU not to prevent the Member State from upholding it.

[22] This was confirmed in many cases such as ECJ Judgment of 28 October 1975, *Rutili*, Case 36/75, 1975 ECR 1219 (what restrictions may be placed on human rights*);*ECJ judgment of *13 December 1979, Hawer v. Rheinland-Pfalz*, Case 44/79, 1979 ECR 3727 (First Protocol: right to property); *Pecasting v. Belgium*, Case 98/79, 1980 ECR 691 (Art.6: right to a fair hearing);

[23] Judgment of 28 October 1975, *Rutili*, case 36/75, para 32

[24] Judgment of 13 December 1979, *Hauer,* case 44/79, para 15.

Law Journal
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LAWJOURNAL.AL ISSUE 7

IV. THE EU SYSTEM OF FUNDAMENTAL RIGHTS

The scope of EU law is determined by the Treaties, as implemented in secondary law and as interpreted by the ECJ. As declared by the treaties human rights are part of the founding values of the EU. More specifically Article 2 TEU provides:

> "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"

In addition to the general references to fundamental rights in the Preambles to the Single European Act and the Treaty on the European Union,[25]Article 6(2) TEU, appearing in its original form as Article F par 2, expressly required the Union to respect fundamental rights as part of the general principles of EU law. Reference was made to the ECHR and the constitutional traditions of the Member States. Amendments brought by the Treaty of Amsterdam specified that the respect for human rights was a precondition for joining the European Union.[26]

It should be considered that the European system for the protection of fundamental rights is characterized by a multi-layered structure.[27] Three diverse sets of normative orders can be identified: a national one, the national constitutions; a supranational one, the European Union; and an international one the ECHR. These orders co-exist each with its own laws and institutions for the protection of fundamental rights. These systems may overlap and interact to ensure an advanced degree of protection of individual rights and liberties. A challenge of ineffectiveness emerges when there is substantive overlap of norms. That overlap generates disputes in the protection of fundamental rights.

At the national level, the protection of fundamental rights has been a distinctive feature of all the Constitutions adopted after World War II in Europe.[28] A very important development has been the adoption of a binding catalogue of fundamental rights safeguarded by the judicial control performed by constitutional courts, vested with the power to review the respect of those rights by domestic legislation, as well as generally by acts granting the force of law to international treaties entered into by the State.[29] Italy is a good example of the said European constitutionalist trend, since fundamental rights are

[25]Under the Treaty of Amsterdam an amendment was added to reference to fundamental social rights.

[26]Article 49 and 6(1) TEU.

[27] I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, in *Common Market Law Review* (1999), p. 703; I. Pernice, *Multilevel Constitutionalism in the European Union*, in *European Law Review* (2002), p. 511; and I. Pernice, *The Treaty of Lisbon. Multilevel Constitutionalism in Action*, in *Columbia Journal of European Law* (2009), p. 349.

[28] A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe (OUP, Oxford, 2000); M. Shapiro, "Rights in the European Union: Convergent with the USA?*, in N. Jabko et al. (eds.), *The State of the EU: With US or Against US? European Trends in American Perspective*, Oxford, 2005, p. 378.

[29]M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2:4 *International Journal of Constitutional Law* (2004), p. 633

proclaimed in the first part of the 1948 Constitution,[30] a higher law that can only be modified through a process of constitutional revision. A centralized Constitutional Court, has been set up to review the compatibility of ordinary statutes with the Constitution[31]and its fundamental rights.[32] Equally, in the United Kingdom the question of the protection of fundamental rights re-emerged when in 1998 the Parliament decided to incorporate the ECHR in domestic law, empowering ordinary courts to adjudicate fundamental rights cases and to declare however, the incompatibility, without affecting the validity, of an act of Parliament with the ECHR when it infringes upon the rights and liberties codified therein.

At the supranational level there is the EU. The EU Treaty's main provision concerning the EU fundamental rights standards opens by spelling out the recognition of the EU Charter of Fundamental Rights, thus suggesting this is the prime source of fundamental rights protection in the EU legal order (Article 6 TEU).

> "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*. *The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*".

The EU Charter can be understood as the more detailed articulation of the specific rights and principles which were protected previously as general principles of EU law. In other words, it specifies which of these rights are contained in the common constitutional traditions of the Member States and in the human rights treaties to which they are parties.[33] It makes visible what the EU standard of fundamental rights protection is. The scope of the Charter has been defined in its Article 51:

> "*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*.
>
> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*."

The official Explanations Relating to the scope of the Charter of Fundamental Rights[34] state: "*As regards the Member States, it follows unambiguously from the case-law of the European Court of Justice that the*

[30] For a general view, V. Onida, *La Costituzione*, Bologna, 2007, p.13 and G. Zagrebelsky*, La legge e la sua giustizia*, Bologna, 2008, p.387.
[31] T. Groppi, *The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review*, *Journal of Comparative Law* (2008) p. 101.
[32] A. Barbera and A. Morrone (eds.*), I diritti fondamentali*, Padua, 2011, p. 38.
[33] Article (2) TEU prior to the Lisbon Treaty.
[34] Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

requirement to respect fundamental rights defined in the context of the EU is only binding on the Member States when they act in the scope of EU law."

In conformity with article 51 of the Charter, in *Wachauf* the ECJ held that fundamental rights, were binding upon the Member States when they implement EU law. However the extent to which a state is 'implementing EU law" is subject of debate as regards to the field of legislation regulated by the EU.

The case law of the ECJ in the past showed tendencies to bring a matter easily within the scope of EU law when a fundamental rights concern was involved. The case of *Carpenter* [35] is an example, where the ECJ cast the net of EU law very widely.[36]
This is evident in *Dereci*[37] concerning a provision in the 'Dublin' Regulation[38] on the basis of which a Member State always has discretion to examine an asylum application which is not its responsibility under the criteria set out in the Regulation. Whereas the UK government constructed this to imply a sovereign right which put the matter outside the scope of Article 51(1) EU Charter, the Court found it was a discretionary power under the Common European Asylum System governed by the relevant Regulation, having certain procedural consequences under that Regulation. Hence, it concluded the exercise of the discretionary power must be considered as "*implementing Union law*" within the meaning of Article 51(1) of the Charter.[39]

At the international level there is the ECHR to which there is a reference in the Charter which provides in its Article 52 that:

> *"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".*

Pursuant to this disposition the Charter rights correspond to rights under the ECHR. This makes the meaning and scope of those Charter rights dependent on the interpretation of the ECtHR, which adheres to the doctrine of the ECHR as a "*living instrument*", entailing the necessity of a dynamic interpretation of the Convention rights in light of contemporary social and legal developments.[40] Also, the second sentence of Article 52 (3) of the Charter spells out that the parallel interpretation of ECHR and Charter rights "*shall not prevent Union law providing more extensive protection*" than the ECHR. This means that the Charter broadens the scope toward an interpretational development of rights beyond that of the ECHR.

[35] C-60/00, *Carpenter*, [2002] ECR I-6279.
[36] For a critic view see Editorial Comment, *Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State*, in *Common Market Law Review* 2003, p. 537-543.
[37] Joined Cases C 411/10 and C 493/10, 21 December 2011; relevant in this context are paragraphs 64-68.
[38] Article 3(2) of Regulation No 343/2003.
[39] Joined Cases C-411/10 and C-493/10, 21 December 2011, N.S., para. 116-120.
[40] E.g. ECtHR (Application no. 34503/97), Grand Chamber, 12 November 2008, *Demir and Baykara v Turkey,* para.146: "[T]he Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies."

Law Journal
ISSN 2523-1766
LAWJOURNAL.AL ISSUE 7

V. CONCLUSIONS AND RECOMMENDATIONS

Fundamental rights are part of the constitutional identity of the EU. Whenever the EU acts, it must respect and promote these rights. Fundamental rights in Europe are protected by the Charter and the ECHR, as well as by the Member States' adherence to their common constitutional traditions in the field of fundamental rights and the human rights treaties to which they are a party, may indeed be said to constitute an "existential requirement for the EU legal order".[41] The respect of fundamental rights is also prerequisite for EU membership (article 49 TEU).

Albania as a country aspiring to become a member of the European Union, has to conform to such high standards of protection of human rights. In fact during the accession process the country will have to show that it fulfills these standards and it is ready to be part of the European Union. Thus it should work toward the establishment of a legal system which respects the rule of law and protects human rights in all its instances.

[41] Conclusions of Advocate General Poiares Maduro, in Case C-380/05, *Centro Europa 7 Srl*, para. 19.