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# Editorial

## THE RELATIVE AUTONOMY OF THE EU HUMAN RIGHTS STANDARD

To this day the founding treaties of the European Union contain no legally binding bill of rights in the traditional sense protecting religion, privacy, family life, the freedom of expression, and so forth. As we all know, while the European Court of Justice initially rejected appeals relying on fundamental rights as found in national constitutions, the Court changed its position under pressure of German courts. The famous *Internationale Handelsgesellschaft*<sup>1</sup> judgment of 1970 revealed the Court's preoccupation with preserving the 'autonomy' of the EC legal order while at the same time asserting that the fundamental rights as they are found in the constitutional traditions common to the member states are to be guaranteed by the Court of Justice as general principles of Community law. In *Nold II*<sup>2</sup> (1974) it included the international human rights treaties to which the member states are a party in these general principles.

The Court has come a long way since those days. For a long time, the Court of Justice (and Court of First Instance) failed to apply with any amount of precision or clarity the terms set by the clauses of the fundamental rights provisions allowing for restrictions of the exercise of those rights. It always found it sufficient if a restriction could be said to be in the Community interest and did not take away the relevant right *in toto* – and in fact, a fundamental right had never limited the exercise of the economic rights at the core of European integration. It is only as of *Connolly*<sup>3</sup> that it has adopted an approach according to the rules of the art, in step with that of the ECtHR and national constitutional courts. Since *Connolly*, it can be said to be taking fundamental rights seriously, even though these fundamental rights are primarily found outside the EC/EU legal order in a strict sense.

The Court of Justice's fundamental rights standard is first of all applied to acts of the institutions. As long as the standard is taken seriously, this does not immediately raise problems. Controversy arises when it concerns the action (and failure to act) of member states. This generally concerns the application or implementation in national legal orders of EC or EU acts, and the autonomous actions of member state public authorities falling within the scope of Community (or other

<sup>1</sup> Case 11/70.

<sup>2</sup> Case 4/73.

<sup>3</sup> Case C-273/99.

EU) law. Member state authorities are self-evidently bound by the national constitutional standards and by the standards set by (incorporated) human rights treaties to which the member state in question is a party. Meanwhile, the Court of Justice's standard has been added, which they have to live up to as soon as there is some connection with EC law.

At this point, events take a new constitutional turn: whereas initially it was the member states' courts which had to force the Court of Justice to adopt a fundamental rights standard at all, and more precisely a standard such as they applied in their national constitutional system, now the tables have turned. The member state authorities are supposed to respect, and member state courts are supposed to apply, a standard as determined and developed by the Court of Justice.

The scope and context of the Court's fundamental rights scrutiny have expanded. Fundamental rights issues are assessed in the context of the interpretation of typical EC (and EU) law measures, in particular secondary legislation, and the EC economic market and internal market freedoms. One can say that in this type of cases, the fundamental rights issue is incidental to the interpretation of EC law as applied in member states. This is also true of situations in which autonomous member state action comes within the scope of Community law, as in *ERT* and *Familia Press*,<sup>4</sup> where it concerned restrictions on the freedom to provide services or goods under the rule of reason, which would have to comply with fundamental rights (in this case Article 10 ECHR). In these cases, fundamental rights protection *reinforces* the economic rights.

In *Familia Press*, it was moreover left to the national courts to assess whether there was an actual compliance with the fundamental rights standard, thus creating a division of judicial labour which initially did not centralise the application of this standard in Luxembourg. In *Schmidberger*,<sup>5</sup> however, – and arguably since *Schröder*<sup>6</sup> – the Court of Justice itself assesses whether a fundamental right itself would have to be respected by member state authorities. In these cases, the protection of fundamental rights did not reinforce but rather *restricted* (at least potentially) the exercise of an economic freedom. This is why the Court preferred to keep the review to itself and not leave it to national courts. One may wonder, however, if the Court possesses enough information about the circumstances of the case to perform that review.

Thus in *Laval*,<sup>7</sup> in which the fundamental right to strike was to be balanced against economic freedom of free movement of services, the Court of Justice did the balancing of these rights itself. But in the parallel case *ITF v. Viking Line*<sup>8</sup> case,

<sup>4</sup> Case C-260/89 and C-368/95, respectively.

<sup>5</sup> Case C-112/00.

<sup>6</sup> Case C-50/96; *see also* Joined Cases C-234/96 and C-235/96.

<sup>7</sup> Case C-341/05.

<sup>8</sup> Case C-438/05.

the Court gave very detailed guidelines for the national court to assess whether the use of the fundamental right to collective action lawfully restricts the freedom of establishment in the case at hand.

*Schmidberger* is a classic example of a case in which EC law and the fundamental rights standard are applied as two sets of norms to member state acts. These two sets of norms are taken to be equally important and independent legal norms. This equivalent and independent value of economic freedoms and fundamental rights seems to be respected in the case-law following *Schmidberger*, for instance in *Laval* and *ITF v. Viking Line*.

As this independent meaning and value of fundamental rights is further consolidated, in practice, a claim that a fundamental right has been infringed becomes sufficient for the Court of Justice to be competent. For the moment there is the need of some added connection, however remote, with EC law, or some transnational context in the case, even if it is only a hypothetical one. In *Carpenter*,<sup>9</sup> the potential use which Mr Carpenter could make of the freedom to provide services to other member states was sufficient to engage the competence of the Court. Already under the present case-law, it is no longer necessary that a transnational element is involved, but it is sufficient that a piece of secondary EC harmonisation legislation is involved. We know this for sure since *Österreichischer Rundfunk* and *Lindqvist*.<sup>10</sup>

In this connection, it is pertinent to remark that the Treaty-maker and the Community legislature, as well, are responsible for a shift towards a balancing of fundamental rights *per se*. Article 141 EC was still in essence a balancing of fundamental rights against economic rights as introduced in the original EEC Treaty. The French wished not to be at a disadvantage compared to other member states who allowed such discrimination and could hence produce at lower cost. Article 13 EC, introduced in 1998 by the Treaty of Amsterdam, however, is the basis for fundamental rights legislation which is no longer merely geared to balancing general fundamental rights against economic (internal market) rights. It has become a much broader human rights clause. As it touches on a range of grounds for discrimination, it also implies the necessity of balancing classic fundamental rights against each other.

The clearest example of Community legislation in this area is Article 4(2) of the Framework Employment Directive on discrimination in relation to (very broadly) employment.<sup>11</sup> It contains a clause according to which the freedom of belief and religion as contained in legislative and constitutional rules and practice of member states may constitute a justifiable exception to discrimination. However, it adds that an organisation based on religious identity or belief should not

<sup>9</sup> Case C-60/99.

<sup>10</sup> Case C-195/06 and C-101/01, respectively.

<sup>11</sup> Council Directive 2000/78/EC, OJ L 303/16, 2/12/2000.

invoke this right to justify discrimination on another ground than religion or belief. This provision implies a legislative balancing of conflicting claims to equal human rights protection, and existing national legislation and case-law may be at odds with this. Thus it would seem that the Netherlands General Equal Treatment Act, which was adopted after heated debate in parliament and society, is in conflict with the Directive. The Act allows schools based on a religious denomination not to appoint, or to dismiss, a person on the basis of his sexual orientation for reasons beyond the mere fact of the person's homosexuality (for instance, when a teacher brings his or her partner to a school party and engages in romantic kissing). The Commission has begun infringement proceedings against the Netherlands, as well as a number of other member states, for failure to comply with the Directive. If these cases make it to the Court, it will be evident that there is no economic nexus at the basis of the fundamental rights claim. There is no real internal market or other transnational economic interest at stake, only the issue whether member states have correctly balanced the right to freedom of religion and belief – which is often based on one of several non-identical models of state and church relationships – against other rights, in particular the prohibition of discrimination. The Court would be acting purely as a human rights court.

We can point to the recent *Centro Europa 7*<sup>12</sup> case. The referring national court, the Italian *Consiglio di Stato*, raised as first and primary question to the Court of Justice whether the Italian legislature had infringed the freedom of expression as guaranteed by Article 10 ECHR as referred to by Article 6(2) EU Treaty, and more specifically the media pluralism inherent in it. The Court avoided addressing the question. The Advocate-General, however, distinguished between on the one hand, jurisdiction to review any national measure in the light of fundamental rights and on the other hand, jurisdiction to examine whether member states provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfil their other obligations as members of the Union. The latter, he asserted, is within the competence of the Court, but the former is not. As we remarked, the Court skirted the issue. But we must wonder how long it can do that. If the Court is competent to adjudicate a pure human rights issue in member states on the basis of a piece of Community legislation, while this adjudication neither has a bearing on either internal market or other economic rights nor has a transnational dimension, why would it then not be able to adjudicate any other infringement of a classic fundamental right contained in the EU fundamental rights standard applied by the Court? A nexus with either Community legislation or a transnational situation would suffice to create a general human rights competence, as Advocate-General Jacobs already outlined in his famous opinion in *Konstantinidis*.<sup>13</sup>

<sup>12</sup> Case C-380/05.

<sup>13</sup> Case C-168/91.

This brings us to the implications of the direction in which the competence of the Court is developing, and in particular its relationship to the fundamental rights standards applied in member states by the national (constitutional and other) courts. First, the issue of divergent standards is interesting. So far, the EU standard was found outside the 'autonomous' EC and EU legal order, in the common constitutional traditions of the member states and in the human rights treaties to which they are a party (the EU not being a party to any of them). To the extent that the Court relied on those exogenous standards, it reduced the risk of its own divergence from national courts.

The EU Charter of Fundamental Rights, adopted in 2000 as a political and legally non-binding articulation of the fundamental rights to be protected as general principles of Community law, did not really change the standard, inasmuch as the Charter is an articulation of the common constitutional traditions of the member states on the point of fundamental rights, and of the human rights treaties to which they are a party. Nor was it changed by the fact that ever since *Parliament v. Council (Family Reunification Directive)*,<sup>14</sup> the ECJ has reversed its earlier case-law and has begun referring to the Charter in its case-law as evidence of the rights implied in the fundamental rights standard. But as the Court's interpretation of the Charter might evolve, it may become a more and more autonomous standard. This may become all the more so when the Charter acquires the rank of treaty law, after the entry into force of the Reform Treaty signed in Lisbon.

A check on this standard not falling below the ECHR might be that in the Treaty of Lisbon, the EU is also envisaged to become a party to the ECHR, and hence become subject to external scrutiny by the ECtHR. This check, however, would only happen in concrete cases if the ECtHR were to reverse the *Bosphorus*<sup>15</sup> judgment in which it declined to exercise its powers of review on non-discretionary member state action based on a binding EC legislative measure as long as the Court of Justice guarantees the general observance of a human rights standard. Although many think that such a reversal is to be expected, it remains to be seen whether the ECtHR would actually do so, as few of the arguments for the ECtHR's abdication of competence would change as a consequence of the EU becoming a party to the ECHR. But if *Bosphorus* were overruled, it would mean that at least a minimum human rights standard would be applicable to both the EU and its member states.

But what about the standard, as enforced by the Court of Justice, that the EU institutions impose on member states? Does this replace national standards which might impose a higher threshold on the exercise of public authority than the EU standard? A majority view of the doctrine had long considered the EU standard

<sup>14</sup> Case C-540/03.

<sup>15</sup> ECtHR 30 June 2005 *Bosphorus v. Ireland*, Appl. No. 45036/98.

to be a standard in itself which should apply in all member states uniformly, and therefore a maximum standard from which member states cannot diverge at all. *Omega Spielballen- und Automatenaufstellungs-GmbH*,<sup>16</sup> however, pointed in a different direction. It left to member states a margin of discretion in determining whether a restriction of the free movement of services for reasons of public policy is justified, while the public policy interest involved here was the protection of human dignity, a fundamental right protected by the *Grundgesetz*. The Court found that it is *not* necessary that all member states apply the same standard, even if it concerns a restriction of one of the fundamental economic freedoms on which the EU is based, as long as the restriction is necessary and cannot be realised with less restrictive measures; both conditions were considered to be fulfilled. This clearly allows for member state fundamental rights standards which are stricter than those of other member states and of the Union institutions. Ultimately, because in a case like this we are dealing with an EU standard – the case clearly concerned a matter within the scope of EU law – this standard potentially varies from member state to member state. To this extent the autonomous EU standard is not really autonomous at all.

It can be hoped that this sensitivity for the variety of national standards remains. There are some signs pointing in this direction. Firstly, the Court has begun showing a more general sensitivity for the constitutional *specifica* of member states (witness *Azores, Spain v. UK*),<sup>17</sup> This may well be a sign that the Court is aware of the importance of Article 6(1) and (3) EU, which is more strongly phrased in the Lisbon Treaty: the European Union shall respect the member states' national identities, inherent in their fundamental structures, political and constitutional (Article 4(2) EU as revised by the Lisbon Treaty). Essential to these structures are the particular fundamental rights of each of the member states. Secondly, the fact that Article 6 EU after the Treaty of Lisbon makes the Charter legally binding, thus creating what may become an autonomous standard, as well as prescribes accession to the ECHR, introducing heteronomous control by the ECtHR, is not the end of the matter. The revised EU Treaty will also retain in Article 6(4), *inter alia*, the provision that fundamental rights as they result from the constitutional traditions common to the member states shall remain general principles of Union law. Hence, the bill of rights contained in the Charter will always be accompanied by a set of dynamic fundamental rights principles which connect to the member states' constitutional orders.

LB/JHR

<sup>16</sup> Case C-36/02.

<sup>17</sup> Case C-88/03 and Case C-145/04, respectively.