

To what extent does EU law protect fundamental rights?

The Preamble of the European Union outlines that:

it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.¹

“Core fundamental rights” refer to those “rights”, or to those “levels of protection”, which are said to be universal, transcending any legitimate cultural or political difference among different societies in, at least, the universe of Europe.²

Neither the Treaty of Paris nor the Treaty of Rome contained any illusion to the protection of fundamental human rights. The initial trigger for the Court’s declaration that fundamental rights formed part of the EC legal order was:

“the challenge posed to the supremacy of Community law by Member State courts, which felt that EC legislation was encroaching upon important rights protected under national law.”³

Once the European Court of Justice, which played a major role in securing the growing awareness of fundamental rights, put in place its constitutional jurisprudence in cases such as *Van Gend en Loos*⁴ and *Costa*⁵, it became legally and politically imperative that a way had to be found to support fundamental human rights at the Community level.⁶

In *Van Gend en Loos*, the ECJ established direct effect, stating that Article 12 should be interpreted “as producing direct effects and reading individual rights”. Furthermore, it held that rights conferred on individuals by the EC legislation should be enforceable by those individuals in national courts.

¹ http://www.europarl.europa.eu/charter/pdf/text_en.pdf

² N. A. Neuwahl & A. Rosas, “The Treaty on European Union: A step forward in the protection of Human Rights?”, *The European Union and Human Rights*, (1995), 13

³ P. Craig & G. De Burca, “Human Rights in the EU”, *EU Law; Text, Cases and Materials*, 4th edn, (2007), 418

⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62); [1963] ECR 1; [1970] C.M.L.R. 1

⁵ *Costa v ENEL* (1964) ECR 585

⁶ N. A. Neuwahl & A. Rosas, “The Treaty on European Union: A step forward in the protection of Human Rights?”, *The European Union and Human Rights*, (1995), 13

With growing awareness of fundamental rights, especially throughout the European Community, these rights undoubtedly began to play a crucial role and therefore their protection became inevitable. In the 1970 case of *Handelsgesellschaft*⁷, which portrayed the importance of fundamental rights, the German *Verwaltungsgericht* referred to the ECJ the question of whether the import and export licensing system under the common organisation of the grain market was valid. In its ruling, the Court refused to impugn a Community act for incompatibility with the constitutional law of a Member State. Nevertheless, the Court added that:

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 Member States, must be insured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the *Verwaltungsgericht*, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

The judgment emphasises that the Court recognises fundamental rights as a general principle however refuses to protect it in a legislative manner. The ECJ's progressive development of an unwritten bill of rights for the Community was gradually given express recognition in the Treaties. In particular, Article 6 TEU declares that respect for fundamental rights and freedoms constitute one of the basic principles on which the Union is founded. Despite recognising fundamental rights as a basic principle, the ECJ was not willing to declare the ECHR formally binding upon the EC/EU and thus give it complete protection. The unwillingness of the EU to commit and protect fundamental rights on a legally binding degree is of great relevance. It was through case law that fundamental rights began to be recognised, acknowledged and protected up to a certain degree.

⁷ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, (1970) ECR 1125

It was acknowledged by the ECJ, in the recent case of *Reynolds Tobacco*⁸, that although the Charter “does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order⁹”.

Private parties are allowed to bring their matters in front of the European Court of Justice, under the principle of direct effect, in actions against acts of Community institutions.

The right of action is available to any individual or corporate body, against either a decision directed to him or it or a decision, which although in the form of a regulation or a decision addressed to someone else, is of direct and individual concern to him or it¹⁰.

A fundamental requirement, established in the case of *Plaumann*¹¹, is that a party must have sufficient legal interest in order to bring an action, as in the case of *Stauder*¹², where the court responded, “positively to an argument based on the fundamental right to human dignity¹³”. The *Stauder* case, which introduced the notion of fundamental rights in Community law, concerned a community scheme for the distribution of butter at reduced prices on the disclosure of the name of the recipient. The plaintiff claimed that the requirement of disclosure was contrary to his fundamental human rights as protected under the German Constitution. The issue was referred to the ECJ which interpreted the scheme as not necessarily requiring the said disclosure and that “... interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights ... protected by the Court.¹⁴”

In the case of *Carpenter*¹⁵, Mrs Carpenter, a national of the Philippines, was given leave to enter the United Kingdom as a visitor in 1994 for six months. She overstayed that

⁸ *R.J. Reynolds Tobacco Holdings v Commission* [2006] ECR I-7795, Case C-131/03 P

⁹ P. Craig & G. De Burca, “Human Rights in the EU”, *EU Law; Text, Cases and Materials*, 4th edn, (2007), 418

¹⁰ K.P.E. Lasok, “The Court of Justice and the Court of First Instance”, *Law & Institutions*, 7th edn., (2001), 306

¹¹ *Plaumann & Co v Commission* [1963] ECR 95; Case 25/62:

¹² *Stauder v City of Ulm* [1969] ECR 419, Case 29/69

¹³ P. Craig & G. De Burca, “Human Rights in the EU”, *EU Law; Text, Cases and Materials*, 4th edn, (2007), 318

¹⁴ <http://www.mifsudbonnici.com/lexnet/articles/artgenprinc.html>

¹⁵ *Carpenter v Secretary of State for the Home Department*, 11 June 2002, ECR 2002

leave and failed to apply for any extension of her stay. In 1996 she married Peter Carpenter, a United Kingdom national. The legal debate dealt with the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. In 2002, Court held in favour of Mrs Carpenter, stating that:

Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

The case discloses how the EU increasingly endeavoured to defend fundamental rights.

Individuals can rely on the European Court of Human Rights when fighting for their fundamental rights.

Accepted legally binding obligations to secure the classical human rights for all persons within their jurisdiction and to allow all individuals, to bring claims against them leading to a binding judgement by an international court finding them in breach¹⁶.

In the case of *Dudgeon*¹⁷, the applicant was a shipping clerk and gay activist in Belfast, Ireland. He claimed that the police investigation in relation to his homosexuality was in breach of his right under Article 8 of the ECHR. The Court agreed with the commission that Northern Ireland's criminalisation of homosexual acts between consenting adults was a violation of Article 8 of the ECHR. However, the ruling continued, "it was for countries to fix for themselves...any appropriate extension of the age of consent in relation to such conduct." *Dudgeon's* case displays that the EU is inclined to point out at fundamental rights but will not attempt to enforce them.

In 1999, the European Council launched an initiative to draft a Charter of Fundamental Rights for the EU. The Charter was solemnly proclaimed by the Commission, Parliament, and Council and was politically approved by the Member States at the Nice

16 D.J. Harris, M. O'Boyle, C. Warbrick, "The Convention and the European Union", *Law of the European Convention on Human Rights*, (1995), 29

17 *Dudgeon v UK* [1981] ECHR 7525/76

European Council summit in 2000. It was drafted as if it were to have full legal effect, but the question of its ultimate legal status was left to be decided by the political process following the Nice and Laeken European Council Declarations.

The Charter aimed to bring together into a single, simple text all the personal, civic, political, economic and social rights enjoyed by the citizens and residents of the European Union. The provisions were addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.¹⁸

The aim was not, as stated in Article 51(2), “to establish any new power or task for the Community or the Union or modify powers and tasks defined by the Treaties”. With regard to Member States, Article 51(1) EUCFR confirms existing case law, which has held that there is only an obligation on the Member States to respect fundamental rights under EU law when they are acting in the context of Community law.¹⁹

The broader formulation clearly also covers cases in which Member States are derogating from EC law and it is a formulation which has been repeated and enforced by the ECJ in many cases, including the landmark *ERT* case.²⁰

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments.

Opposition towards the Charter puts restraints on the effectiveness of the EU to deal with the protection of fundamental human rights. So far, there is no indication that the Court is inclined to reduce the scope of its jurisdiction over Member State action for

¹⁸ http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_intro_en.htm

¹⁹ *Karlsson and Others*”

²⁰ *D. Mancini and D. Keeling*, “From CILFIT to ERT: The Constitutional Challenge Facing the European Court” (1991) 11 YBEL 1, 11-12.

compliance with fundamental rights, and there is every indication that it views the Charter as an affirmation of its case law concerning the sources of human rights as general principles of EC law.

The European Union's dominant focus remains an economic one, and the debate over the appropriate scope of its "human rights role" remains lively and contested even after the adoption of the Charter of Fundamental Rights. The Charter, as it stands, is not a treaty, constitutional, or legal document, and has the ambiguous value of a "solemn proclamation" by three of the Union's most important institutions. Its power is limited, as it has no formal legal status.²¹

The Charter's lack of legal status does not mean, however, that it has no effect. Advocates-General Tizzano, Léger and Mischo have stated that "the Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States."²²

At the request of the European Council in 2007, the Intergovernmental Conference (IGC), drew up a new Reform Treaty to enable the EU to face the challenges of the 21st century and realise its true potential. This Treaty focuses on the EU's need for modernisation and reform.

In addition, the reform treaty will give more rights and values for Europeans and the Charter of Fundamental Rights will be given the same legal status as the EU treaties themselves. Providing that the Reform Treaty is implemented, the EU will have recognised and provided fundamental rights to a full extent.

This seems most likely considering that the final text of the Treaty drawn up by the ICG was approved during the informal European Council in Lisbon in October and will be signed by the Member States in December 2007. The text of the Charter will not be

²¹ http://www.europarl.europa.eu/charter/default_en.htm

²² <http://europa.eu/scadplus/leg/en/lvb/l33501.htm>

included, but will be legally binding in all Member States except the UK.²³ The importance of the Charter in the development of the European Union must be clearly recognised. It underlines the democratic and rights-based nature of the European Union.

It took the EU over twenty years to recognise fundamental rights after the foundation of the Council of Europe and another 40 years, assuming that the reform treaty is implemented in 2009, to make them legally binding. Throughout these years, the EU was willing to recognise fundamental rights but not ready to make them legally binding thus being protected to a limited extent.

²³ <http://europa.eu/scadplus/leg/en/lvb/l33501.htm>