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The work of the Court of Justice of the European Union in the protection of Human Rights

1. INTRODUCTION

As an introduction, I must mention that the original founding Treaties of the European Communities were silent on this issue. In fact, they did not include any provision on the protection of fundamental rights in the European Communities. This still raises the question whether this silence was an unintentional lacuna or a conscious disregard.

The initial action of the European Court of Justice increased these doubts, since when the fundamental rights recognised in the national Constitutions of the Member States came into conflict with European Community law, the Court stated, in its judgments *Stork and Co. v. High Authority* of 4.2.1959 and *Präsident and Others v. High Authority* of 15.7.1960, that "Community law cannot be overruled on the basis of national law, even if that law is constitutional". Thus, the Court of

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Justice ignored the fundamental rights recognised in the Constitutions of the Member States in order to assert the primacy of Community law over them.

This was followed by a strong reaction from the Constitutional Courts of the Member States. Thus, the German Constitutional Court, in its judgments of 18.10.1967 and *Solange I* of 29.3.1974, stated that "the primacy of Community law over German law is acceptable only if there is satisfactory protection of fundamental rights at Community level". Moreover, the Italian Constitutional Court adopted the same attitude in its judgments *Frontini et Pozzani* of 27.12.1973 and *Granital* of 8.6.1984.

2 THE PRAETORIAN CONSTRUCTION OF THE COURT OF JUSTICE ON FUNDAMENTAL RIGHTS

Faced with the questioning of the principle of the primacy of Community law by the Constitutional Courts, the Court of Justice initiated a Copernican turn in its jurisprudence, beginning to consolidate a very important doctrine on fundamental rights. In fact, despite the silence of the Treaties establishing the European Communities, the Court of Justice recognised the value of fundamental rights in three stages. First, it stated in its *Stauder* judgment of 12.11.1969 that "the fundamental rights of the individual underlie the general principles of Community law, respect for which is ensured by the

Court of Justice". It then added a second legal basis by stating, in its *Internationale Handelsgesellschaft* judgment of 17 December 1970, "that the safeguarding of these rights, even if they are inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community". Finally, in its *Nold* Judgment of 14.5.1974, it added a third legal basis, stating: ...

"That the international treaties for the protection of human rights to which the Member States have been party or to which they have acceded may also provide indications which should be taken into account in the framework of Community law".

The Court of Justice's praetorian construction of fundamental rights consists in the fact that, despite the silence of the founding Treaties, the Court has always repeated *ad infinitum, from the Nold* judgment onwards, these three legal bases for incorporating fundamental rights into Community law in all disputes on fundamental rights that have been brought before it.

This attitude was recognised and accepted by the Constitutional Courts. Thus, the German Constitutional Court, in its *Solange II* judgment of 22.10.1986, stated that: "The protection of fundamental rights has long since been assured in the Community legal order, so that there is no longer any reason to question their primacy over German law".

With regard to the importance that the Court of Justice attaches to fundamental rights, four points should be mentioned. First, in its *Wachauf* judgment of 13.7.1989, the Court stated that: "a Community rule which deprives an individual of a fundamental right (...) would be incompatible with the requirements flowing from the protection of fundamental rights in the Community legal order. Those requirements are also binding on the Member States when they apply Community law, with the result that the latter are obliged, as far as possible, to apply that law in such a way as not to undermine those requirements".

In its *ERT* judgment of 18.6.1991, the Court deduced: "that measures incompatible with respect for the human rights thus recognised and guaranteed cannot be admitted in the Community".

Thirdly, in its Opinion 2/94 of 28.3.1996, it stated that: "respect for human rights is therefore a condition for the legality of Community acts".

Finally, it should be noted that in its *Kadi and Al Barakaat International Foundation v. Council and Commission* judgment of 3.9.2008, the Court went so far as to state: "that the obligations imposed by an international agreement cannot have the effect of undermining the constitutional principles of the European Community Treaty, which include the principle that all Community acts must respect fundamental rights (...)".

3. THE JURISPRUDENCE OF THE COURT OF JUSTICE TODAY

At present, two main sets of ideas about the case law of the Court of Justice on fundamental rights can be highlighted.

Firstly, it is worth mentioning that the Lisbon Treaty has introduced a triple legal basis for the protection of fundamental rights in Article 6 of the Treaty on European Union, which is having important repercussions on the case law of the Court of Justice.

Thus, Article 6.3 of the Treaty on European Union states that: "the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and those which result from the constitutional traditions common to the Member States shall form part of the law of the Union as general principles". This provision "reproduces" with slight nuances the praetorian construction of the Court of Justice.

In contrast, Article 6.1 states that: "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 on 12 December 2007 in Strasbourg, Corrigendum (...), which shall have the same legal value as the Treaties".

This provision has broken the uniformity of the Court of Justice's praetorian construction. Since then, it has been possible to find four types of judgments in this area. Firstly, judgments that apply established case-law without even mentioning the Charter of Fundamental Rights, such as the *Arcelor v. Parliament and Council* judgment of 2 March 2010. Secondly, judgments that apply established case-law, using the Charter as a confirmatory interpretative element, for example by stating that the Charter "reaffirms" its previous established case-law, as in its *Tay Za v. Council* judgment of 19.5.2010. Thirdly, there are judgments that apply the consolidated case-law, plus the Charter applied autonomously, i.e. as a new source of primary law, as in the *Kücükdeveci* judgment of 19.1.2010. Finally, fourthly, there are judgments which apply the Charter autonomously, i.e. as a new source of primary law, without including any reference to established case-law. This was the case in the *McB* judgment of 5.10.2010.

It should also be noted that the provision in Article 6(2) that the Union "shall accede to" the European Convention on Human Rights will further accentuate the break in the uniformity of the Court of Justice's pre-trial construction by introducing a third legal basis.

However, I must point out that this new legal basis will not increase the catalogue of protected fundamental rights since, on the one hand, the

European Convention on Human Rights is already applied as an international treaty of "special" or "particular" importance in the field of human rights in the Court of Justice's preliminary rulings. This has been the case since the judgment of 28.10.1975, *Rutili*. On the other hand, it should be recalled that the rights recognised in the European Convention on Human Rights constitute a "minimum threshold" when applying the Charter, as provided for in Art. 52.3 of the Charter itself and recognised by the Court in its judgment of 22.12.2010, *DEB*.

However, we must recognise that the Union's accession to the European Convention will increase judicial safeguards by introducing a final appeal to the European Court of Human Rights. Thus, the Court of Justice of the European Union will no longer be the "ultimate guarantor" of the protection of fundamental rights in the European Union. This is a consequence that the Court of Justice has taken a very dim view of, as was made clear in its Opinion 2/13 of 18.12.2014.

The second major group of ideas to be highlighted concerns the value of the Charter of Fundamental Rights in the case law of the Court of Justice. It should be borne in mind that, by virtue of Article 6(1) of the Treaty on European Union, the Charter is an international treaty which has the same value as the founding Treaties. This has been recognised by the Court itself in its *Kücükdeveci* judgment of 19.1.2010.

For this reason, the Court of Justice of the European Union has come to recognise that the application of the Charter of Fundamental Rights has primacy over the national constitutions of the Member States. This was affirmed by the Court of Justice in its Melloni Judgment with regard to the Spanish Constitution.

This was affirmed by the Court in its *Melloni* Judgment of 26.2.2013, stating that: "According to settled case-law, by virtue of the principle of the primacy of Union law, which is an essential characteristic of the legal order of the Union (...), the reliance by a Member State on provisions of national law, even if they are of constitutional rank [in this case, the Spanish Constitution], cannot affect the effectiveness of Union law [in this case, the Charter of Fundamental Rights of the European Union] in the territory of that State".