NOVA JURIS INTERPRETATIO
IN HODIERNA GENTIUM COMMUNIONE

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States systemic violations of the Rule of Law – A hard law approach

Miguel Poiares Maduro*

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1. Introduction

When the European Communities were created a mechanism of fundamental rights protection was absent from its legal order as it was any catalogue of fundamental rights. There are several reasons why the Treaties did not contain a bill of rights or indeed any system of fundamental rights protection[1]. First, it must be recalled that when the original Treaties where drafted the founding States probably did not foresee either their transformation into a constitutional document or the extent of the powers to be assumed by the European Communities[2]. The concern with fundamental rights, typical of traditional political communities as

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1 For a more in depth analysis see: J.H.H. WEILER, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities', Washington Law Review (1986), 1103, at p. 1110 ff.

2 But see the proposed Treaty on a political community which...

the States, was far away from the minds of the founding States. In this respect, the inclusion of a bill of rights in the Communities Treaties would have given the Community legal order State like characteristics that would appear more a threat than a guarantee.

Second, the original conception of the Treaties as international law instruments creating Communities of limited competences both limited the perception of the threat they could constitute to fundamental rights at national level and led States to assume that, if necessary, they could still control the acts of those Communities through national fundamental rights. On the one hand, the fact that States perceived Community competences to be clearly limited led them to assume that the scope of possible conflicts between Community acts and fundamental rights was to be extremely reduced. It could be said that the expectation was that the compatibility of Community law with fundamental rights was addressed at the moment of delegating those competences. National constitutional review, when ratifying the Treaties, would be the appropriate instrument to guarantee the compatibility between the obligations assumed by the State under Community law and fundamental rights. On the other hand, if conflicts did arise States probably expected their national constitutions to be the best guarantee for the protection of fundamental rights. Though it is a general principle of international law that no State can invoke domestic law to evade its international law obligations it is also well known that has not always stopped virtually all national legal systems from determining the inapplicability of international law provisions when in conflict with certain national rules (in particular, national constitutions). The dualist conception of the relationship between domestic law and international law establishes that in such cases the State may be internationally liable for the violation of the international law provisions but nevertheless continue to make national constitutions prevail over international norms. States could then assume that their national constitutions would continue to guarantee that no Community act would violate a fundamental right. Moreover, the degree and form of protection of fundamental rights would continue to be those established in the national constitution.

Third, it must also be remembered that judicial protection of fundamental rights was a relatively recent phenomenon in Europe. Though fundamental rights documents and bills of rights did exist for many years in European States they were primarily understood as providing guidance to the political process but not to give legal grounds for judicial ac-

tions. They were expected to guide the drafting of laws by the legislator but did not serve to control the validity of such laws. The sovereignty of the legislator (either in the form of 'parliamenty sovereignty' or in the form of the 'volonté general' expressed by the majority will) dominated the political organisation of European States for many years. The American tradition of constitutional judicial review was only introduced in Europe following the second world war and the discovery of the risks that the majoritarian will may also entail. At the time the founding Treaties of European integration were adopted, fundamental rights review was, therefore, a relatively recent concept in Europe. All this may have contributed to the absence of a system and catalogue of fundamental rights protection from the founding Treaties of the Communities.

These expectations where, however, overturned by the constitutional developments of the Community legal order and the scope of competences assumed by the Communities. On the one hand, the supremacy and direct effect attributed to Community acts meant that national constitutional provisions could no longer be used to guarantee the compatibility between those acts and fundamental rights. On the other hand, the increased perception of the wide scope of competences assumed by the Communities and of their open and undetermined character highlighted the risk of fundamental rights violations arising from the exercise of such Community powers.

The initial debate on fundamental rights in European integration was, therefore, about the risk that the new powers assumed at the European level might bring to the fundamental rights and rule of law usually guaranteed in its Member States. The initial cases brought to the Court of Justice regarded this matter. It is well known, and not necessary to develop in here, how the Court of Justice "introduced" such fundamental rights protection at EU level also so as to prevent any challenge to EU law supremacy by national constitutional courts. In *Internationale Handelsgesellschaft* [3] the ECJ, while proclaiming that the supremacy of Community acts could not be questioned by any national norm (whatever its legal ranking) also affirmed that EU acts would have to respect fundamental rights which form part of the general principles of Community law. In this way, the Court reserved to itself final jurisdiction regarding the validity and effects of Community acts, while answering to national constitu-

[3] Proc. 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, (1970) ECR 112.

tional concerns, by introducing a jurisprudential mechanism of fundamental rights control at the European level.

For years, the fundamental rights discourse on European integration was therefore focused on the need for the Community legal order to take fundamental rights seriously in reviewing the powers of Community institutions not Member States. The protection of fundamental rights in States was either to be addressed under national constitutions or under the European Convention of Human Rights and Fundamental Freedoms. Gradually, however, the focus has shifted to the need for the European Union to also guarantee fundamental rights and the rule of law at the level of its Member States.

2. EU Protection of Fundamental Rights in its Member States: reasons and instruments

The expansion of European integration (raising increased interdependence between its Member states, including in fundamental rights sensitive issues), successive enlargements and the incomplete nature of the ECHR system (limited in scope and with weak enforcement mechanisms) have driven the need to guarantee that Member States of the European Union comply with a basic set of fundamental values now defined in Article 2 TEU. These comprise democracy, the rule of law and fundamental rights. They are also accession criteria for any candidate Member State under Article 49 TEU.

It has become clear, however, that simply controlling compliance with such values at the moment of accession is not enough. It is in this context that Article 7 was inserted into the Treaties. Paras 1 to 3 of Article 7 state the following:

> 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

> The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
> 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
> 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
> The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

The problem with Article 7 is that it depends on a political decision and not judicial enforcement and the requirements triggering that political decision are extremely demanding and hard to satisfy (in particular, the unanimity, excluding the concerned Member State, necessary for applying sanctions in case of a serious and persistent violation of the values of Article 2). This difficulty, together with the political character of the assessment, places a high political premium on triggering its application. The Commission has recently, for the first time, initiated such procedure against Poland but even if it might get four fifths of the Member States to declare that there is clear risk of a serious breach what if Poland continues not to correct such breach? Will it be possible to then get the unanimous decision necessary to trigger sanctions? And what if a small number of Member States (or even a single other Member State under n.2) block the application of Article 7? The credibility of the EU in terms of fundamental rights protection would be cleared threatened and Article 7 perceived as totally ineffective. As a consequence, its deterrence value would also disappear.

The Commission has also tried to supplement some of the shortcomings of Article 7 by introducing the rule of law dialogue procedure. This was initially thought to be a soft law mechanism alternative to Article 7 whereby the Commission would engage in a constructive dialogue with the concerned Member State and, if necessary, issue recommenda-

tions in its regard. The expectation was that either the constructive approach might work on itself or then the name and shame phase of the procedure would eventually lead the State into correcting the identified risks to the rule of law. So far, it has not worked that way. The instrument lacks the teeth necessary to drive Member States into compliance. So much so that the Commission now tries to use the threat of triggering Article 7 to lead Member States to follow its recommendations. Naturally, this threat effectiveness is hindering by the difficulties in applying Article 7 itself that I have mentioned.

In this context, the Commission has also tried, whenever possible, to link the fundamental rights or rule of law problem with another EU law issue. This was the case of the Hungarian Law that instituted a retirement age of 62 for judges, thereby allowing a massive replacement of judges in Hungary, arguably to give to the ruling party the possibility to appoint judges friendlier to its views. The Commission used the Directive prohibiting age discrimination to start an infringement against Hungary and won. However, since the framing of the case was not the protection of judicial independence it was possible for Hungary to remedy the situation by compensating the retired judges without reinstating most of them and thereby achieving the purported political intention of the government contrary to the rule of law…

In any event, this approach has its limits on the limited number and scope of EU rules that directly address issues that can be related to the rule of law and fundamental rights. This would only change if EU fundamental rights would be directly applicable to the States what is not the general principle so far. The extent to which EU fundamental rights can be used to review the acts of Member States has been referred to as incorporating EU fundamental rights into national legal orders. This makes allusion to the process through which the American Supreme Court incorporated the Bill of Rights of the American Constitution[4] (which initially was only directed at the federal government) into the due process clause directed at the individual States. This, *de facto*, made the Bill of Rights applicable to the States even in their pure domestic arenas. No such fully fledge incorporation as yet occurred in EU law. However, it is well known that the European Court of Justice has extended the initial reach of EU fundamental rights to also cover State actions that fall

[4] The Bill of Rights corresponds to the first 10 amendments of the American Constitution.

within the scope of application of EU law, notably when they either implement EU law or derogate from it.[5] In this regard, Article 51 (1) of the Charter could be argued to even restrict that scope since (at least in the English version)[6] it determines that the provisions of the Charter are only applicable to the Member States 'when they are implementing Union law'. This would appear indeed to limit the more extensive scope of application previously recognised in the case law of the European Court of Justice. In the latter, as stated, EU fundamental rights may also be applied to State acts that derogate from EU rules. If interpreted literally, Article 51 (1) could thus lead to a more restrictive scope application of EU fundamental rights. This has not, however, been the case and the Court of Justice has consistently decided that whether a State action is or not reviewable under EU fundamental rights depends on whether that action falls within the scope of application of EU law. That can be the case, as in the Hungarian judges retirement law, because there is an dimension of a certain fundamental right (such as age discrimination) that is directly regulated by EU law or because the action of the State takes place in the context of implementing an EU act (eg transposing a Directive) or is an exception to another EU rule (eg a restriction to free movement). Outside this link to another EU provision, however, it is not possible for EU law to be used to enforce fundamental rights and the rule of law in a Member State.

Arguments have been made in the past to extend the role of EU law and the Court in applying fundamental rights to Member actions. Famously, in his Opinion in *Konstantinidis*, Advocate General Jacobs expressed the view that any national of one Member State pursuing an economic activity in another Member State could invoke the protection of EU fundamental rights:

> 'In my opinion, a Community national who goes to another Member State as a worker or self-employed person … is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of

[5] See: Case 5/88, Wachauf (1989) ECR 2609; and Case C-260/89, Elliniki Radiophonia Tileorassi AE v. Domitiki Etairia Pliroforissis and Sotiris Kouvelas [1991] ECR I-2925.

[6] Some of the other language versions of this provision are more open.

> fundamental values, in particular those laid down in the European Convention of Human Rights. In other words, he is entitled to say "*civis europeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights.' [7]

The Court, however, had a different view and did not endorse the Advocate General's opinion that any violation, by the host State, of a fundamental right of a national from another Member State could hinder his or her right to free movement so long as that fundamental right could be said to be part of that "*civis europeus sum*". The Court probably feared that it would be a step too far to introduce a general review of fundamental rights by EU Law in Member States at that stage of integration and taking into account the nature of the EU judicial system. Such a large expansion of the scope of EU fundamental rights review could also have as a consequence that a large array of national measures, otherwise not connected to EU law, could be challenged under EU law and, ultimately, brought to the Court of Justice (in the same way that fundamental rights give rise to a substantial body of litigation in most Member States national judicial systems with centralized or decentralized review of fundamental rights). The consequences would be two-fold: increased tension with national sovereignty on a large spectrum of issues; and a flood of cases to the Court of Justice that, without *a certiori* mechanism, would likely have seen its workload become unmanageable.

In a later case,[8] of remarkable importance and notoriety in Italy, I proposed to the Court of Justice, in my then role as Advocate General, a more nuanced approach that, while aiming to introduce some judicial oversight and enforcement of fundamental rights and the rule of law in Member States would not raise the risks just mentioned. The Court did not address such proposal in its judgment having decided the case on a different basis. It is that proposal that I now want to revisit and refine, also in light of more recent developments of EU Law.

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[7] Case C-168/91 [1993] ECR I-1191, at paragraph 46.
[8] Centro Europa 7.