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LEGAL PRINCIPLES *VERSUS* FUNDAMENTAL RIGHTS POST-LISBON

Abstract

The legal principles are a relevant source of the EU law. They become mostly visible when one tries to analyse the EU regulations, when assessing the legality of the EU acts, although they can also come out as regulations whose violation will mean appropriate accountability. The legal principles originate not only from the EU law, but also from the international public law, the legal principles of the contemporary legal systems, as well as from the legal systems of the EU member-states. On the other hand, the EU recognises the rights, freedoms and principles determined in the Charter of fundamental Rights of the EU from 7 December 2000, adopted in Strasbourg on 12 December 2007. The Charter has the same legal weight as the other European and international human rights treaties. The provisions of this Charter do not in any way expand the competencies of the Union as defined in the treaties, however the rights, freedoms and principles stipulated in the Charter ought to be read in context of the general provisions from chapter 7 of the Charter. The Union will very soon accept the European Convention on Human Rights. This will not have implications on the EU competences as defined in the treaties.

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The fundamental rights, as guaranteed in the ECHR and in the constitutional traditions jointly of all EU member-states constitute the general principles of the EU law. This is included in Article 6 of the Lisbon Treaty dedicated to the fundamental rights and freedoms in the Union which will be the focal subject of analysis of this paper, in context of the application of the ECHR, as well as the national constitutions of the EU member-states. "The EU respects the fundamental rights as guaranteed in the ECHR signed in Rome on 4 November 1950 and which come as a result of the constitutional traditions of all member-states, as general principles of the EU law." The Maastricht version of the EU treaty (Article F(2)) and the amendments form Amsterdam 6(2) suppressed the human rights treaties in favour of the ECHR, but this did not diminish the functioning of the other human rights treaties as generators of general EU law principles. This narrower formula remained in the Lisbon version of the EU Treaty (now article 6(3)).

Keywords: fundamental rights and freedoms, legal principles, ECHR, EU Charter, legal generators, human rights treaties.

1. Legal principles as generators of EU law

The legal principles have an important role in the EU legal system. They are a basic element not only of the EU law, but also of the international public law, the contemporary legal systems, as well as the systems of the EU member-states. The legal principles are derived from the nature of the EU, its economic system determined in the treaties, and its goals, which are the main reason why the EU institutions were set up in the first place. Such a principle, for example, is the principle for non-discrimination based on nationality (included in the Article 18 of the TFEU, which has a general reference to overall prohibition of discrimination on any grounds (religious, sexual, national, etc.)

The group of legal principles also includes the principle of freedom, of equality, free movement of people, goods, capital and services, the principle of solidarity among the EU members etc. The group of legal principles from the field of the international public law, which are considered relevant source for the EU law by the European Court of Justice, include the principle "*pacta sunt servanda*", the principle of territorial integrity, the principle of

guaranteed citizens' basic freedoms and rights, the principle that stipulates that no country can expel its own citizen or prohibit his stay at the territory of his homeland, etc. These principles are considered by the European Court of Justice as a source of the EU law if they are considered compatible with the legal nature and with the institutional structure of the Union.[1]

The group of legal principles accepted by the contemporary legal systems includes the principle to non-discrimination, the principle of legality, the principle of equality, the principle of disposition of parties, the principle of legal safety, the right to appeal against the first instance court decisions, the process guarantees in the court procedure etc, while the legal principles that are common for the EU member-states legal systems are specifically outlined in Article 340 of the TFEU.

2. Formal sources of protection of fundamental rights in the EU

The development of protection of classic fundamental rights in the EU legal system is a true challenge for the national courts of the EU member-states. They call upon the case study of the European Court of Justice on issues that practically means respect for the constitutional rights and freedoms of the citizens in their homelands. The case-law of the EU, which, in fact, identifies the sources of protection of the fundamental rights, is codified in *Nold II.*

The primary sources, as general principles of the European law, include not only the "constitutional traditions of the member-countries", but also the

[1] See for more details: H. Schermers & D. F. Waelbroeck, , "*Judicial Protection in the EU*", Sixth Edition, The Hague-London-New York, 2011, (p. 133), as well as in: T. Tridimas, "*The General Principles of EU Law*", Second Edition, Oxford, 2007**.** NB: The character of the classic principles of the international public law leads to their selective application in the EU. For example, the classic principle of international public law, according to which the violation of the provisions of the treaties by one member-country gives the right to the other signatories to give up form its application is not applicable in the EU. The same applies to the principle where the EU member-countries cannot mutually execute justice contrary to the EU law based on the Vienna Convention for Agreed Law, or to apply the international law of reciprocity. For more details, see: V. Kambovski, T. Karakamisheva-Jovanovska, V. Efremova, *EU Law from Paris to Lisbon*, Vinsent Grafika, Skopje, 2012 (p. 253-255).

"international treaties for protection of the human rights observed by the member-states or which have been signed or ratified by their institutions". [2]

"The common constitutional traditions and the human rights treaties signed by the EU member-countries are originally determined as sources of "inspiration" and as "guidelines" in the field of protection of the human rights. In some earlier cases in which the European Court of Justice has decided, the "inspirative language" was not visible,[3] and later it was restored in practice.

For the national courts, as well as for the EU member-countries authorities, the legal sources of fundamental rights are not the same. The national courts of the member-states are legally obliged to respect the charters for the rights as they are presented in the national constitutions. The member-states are also obliged to respect all ratified agreements (conventions) for protection of the human rights, although their application in wide proportion depends on the status of the document determined in the national constitution. It is interesting to mention that each member-state differently determines the protection of the rights and freedoms of its citizens on national level.

In this context, we can outline several examples of less protected rights on national level, compared to the protection provided with the EU law:

1. The right to life, protection from torture and slavery – Denmark;

2. The right to family life – in Poland the definition for monogamous heterosexual marriage is also expanded to cover the concept of "family life" in the national case-law, which provides lower level of protection than the Article 8 of the ECHR; also, in the Republic of Ireland, the scope of the right to family life is more restrictive than the one determined with the Article 8 of the ECHR;

3. The right to marriage – is not protected, for example, in the Constitutions of Malta and Holland;

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[2] ECJ 14 May 1974, Case 4-73, *J.Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities*, ECR 1974, 491, paragraph 13.

[3] ECJ, C-260/89, ERT, ECR 1991, I-2925, para. 44; ECJ, C-368/95, 26 June 1997, *Vereinigte Familliapress Zeitungsverlags und Vetriebs GmbH*, para. 24-25.

4. The right to industrial action – the Slovak constitutional law is quite narrow in its application compared to the right guaranteed with the Charter;

5. The social and economic rights determined in the Charter and in the international instruments are not guaranteed in many countries, including Republic of Ireland;

6. The status of the ECHR: In Hungary the quasi-dualistic system is viewed as an obstacle to the adequate protection of the rights guaranteed with the ECHR. This system limits the courts to use techniques of consistent reading; some authors understand the new article Q as giving advantage to the international over the national law, although the practice never confirmed this;

7. Lack of court resources for protection of the rights – the courts in Holland cannot validate the constitutionality of the acts adopted by the Parliament;

8. The Republic of Croatia and Malta experience lack of proportionality, i.e. the concept of indirect discrimination is unknown in their national legislations.

On the other hand, there are number of examples of rights that are more protected with the national system than they are with the EU law:

1. Republic of Ireland – the right to life of the unborn child;

2. Holland, Germany – absolute prohibition of censorship over expression of thoughts;

3. Holland – the right to education and equal education financial treatment;

4. Belgium, the Czech Republic, Hungary (and others): rights of ethnic, lingual and cultural minorities;

5. Republic of Slovenia: (details of) procedural laws compared with the ECHR and with the Charter;

6. Luxemburg – natural rights of the human being and right to family;

7. Republic of Slovakia, the Czech Republic, Poland, Bulgaria (and others): several social and economic rights;

8. Spain – the right to trial in absentia;

9. Portugal – The right to good administration.[4]

Some national concepts of the fundamental rights are treated as part of the constitutional identity of the country, which is, in fact, part of the national identity within the EU in accordance with the article 4(2) form the EU Treaty. By entering into force of the Lisbon Treaty, the European Court of Justice found itself incompetent in this segment also. The following can be highlighted as examples of rights that fall under the constitutional identity of the given country:

1. The basic fundamental rights in general, particularly the human dignity (Germany, Estonia);

2. The language rights (Belgium);

3. The basic elements of the democratic state in accordance with the concept of the rule of law (The Czech Republic, Estonia);

4. The language and cultural rights, such as the protection of the cultural heritage (Slovenia, Hungary);

5. The right to equal treatment in general and the right to equal education freedom (Holland).[5]

The protection of the fundamental rights is a founding stone of the constitutional identities of the EU member-states. Dependant on the level of coordination in the part of protection of the fundamental rights between the EU and the member-states, the EU is obliged to respect the constitutional identity of each and every member country, which is particularly important when it comes to characteristics that are not common for all EU members. And it becomes implicit that the EU is indeed protecting the values of each and every member-state in the European Court of Justice decision in the *Omega* case. This case concerns the restriction of the freedom of services, based on the specific German concept of human dignity, and passed by the German Trial Court. This case, namely, refers to a ban to production of laser

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[4] See: L. F. M. Besselink, "The Protection of Fundamental Rights post-Lisabon-the Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions", http://www.fide2012.eu/index.php?doc-id=94.

[5] Ibid.

video games. The court justified this decision as a measure that is in accordance with the concept of human dignity. We should also mention that the respect of the elements of the constitutional identity of the member-state do not always mean looking after the fundamental rights. Sometimes it also means restricting these rights. This is evident in the *Sayn-Wittgenstein* case, where the Republican identity of Austria was a reason for restricting the rights to free movement, to a level where the person who was party in the case was not allowed to use the royal titles that he could have used in Germany.

3. Legal principles vis-à-vis the fundamental rights and freedoms in the EU

Seen from a legal and conceptual point of view, there is no single approach for the EU member-states when it comes to the relation between the legal principles and the fundamental rights and freedoms. What can be done is to divide the constitutional orders of the members-states into two groups:

1. Countries that follow the continental tradition of one codified document, a Constitution, such as the case of France, Germany, Italy etc, and

2. Other countries that follow the Anglo-Saxon tradition, like the UK, the Scandinavian countries and Holland.

While in the first group the role of (one document only) the Constitution is very strong, in the second group there is vast disproportion and fragmented plurality of the documents with constitutional character, which leaves wide working space for the constitutional practice, for the conventions and for the unwritten rules and principles. In the UK, for example, several legal principles are put in effect to provide protection of the human rights developed based on the case-law, as law developed outside the Parliament. Good examples for this are the principle *ne bis in idem,* the right to good administration and the right to a court trial (in England and Wales, while different in Scotland).

In Holland, the common legal principles are used in a wide proportion in the public, private, as well as in the punitive law. Some of them have great importance in the field of protection of the fundamental rights and have an equivalent status, especially the right to equality, which was used as a principle for the first time by the Supreme Court of Holland in the case of *Hoge Raad* before the codification of the Constitution in 1983.

In the case-law, as well as in the law books there is a common opinion that the fundamental rights are part of the general legal principles on one hand, and of the fundamental rights, on the other. In this context, we should point out that there is no clear indicator where the first category ends and where the second one starts. The general legal principles and the fundamental rights often have the same characteristics. For example, although the legal principles and the fundamental rights are formally written and specified in a constitution, since by definition they fall under the constitutional category, they are most often non-written, very broad and very vague. On the other hand, the fundamental rights and the general legal principles serve similar purposes: to protect the private and public interests of the physical and legal entities from the public or private violations.

In Denmark, for example the general legal principles, such as the principle of equality, the principle of proportionality and the principle of legality are accepted and often used in practice. Still, they are not recognised as constitutional principles. Such is the Danish case in which the application of the principle for equality and non-discrimination outside a law adopted by the parliament was rejected, even though the Supreme Court has not decided on this case.

Also in Finland, even though the constitutional practice in the legal order is vast, the general legal principles as formal sources of the law do not occupy an important place in the legal system. They are viewed merely as legal principles and nothing more than that.

Still, in present days, the fundamental rights are more and more accepted as principles, like, for example, in Germany, where the fundamental rights are taken as basis for the legal principles and not as their by-product. The continental European legal systems position the fundamental rights, mainly in codified form, as starting point in the legal system. The legal principles strengthen the fundamental rights, particularly when it comes to the principles that are included in the Constitution, such as the principle of legal state, the principle of the rule of the law, the principle of legal certanity etc.

When it comes to the EU law, the role the legal principles play for protection of the fundamental rights in the EU is unique and cannot be viewed in context of the case-law of any EU member-state. It is not in accordance with any specific legal concept or doctrine of legal sources, although, historically, it can be explained as a consequence of the lack of codification of the provisions on the classic human rights in the founding treaties of the

European Community. When they were actually codified, the fundamental rights became dominant over the common legal principles, regardless of the specific constitutional tradition of the EU member-states. This is particularly visible in the UK, having in mind the fact that the acts of the British Parliament have an advantage over the common law.

There is one general remark when it comes to the nature of the common legal principles. Namely, it is believed that these principles are missing clarity and precision, having in mind their general nature. This explains the conclusion why in some EU member- states "the common principles of the law" are placed below the laws, despite the stronger position they have when it comes to their application by the courts.

Still, on the other hand, no one can deny the fundamental nature of the "constitutional principles", which can be put in effect only if they are codified in the constitution. In this case, they have much more a character of rules, rather than character of principles, both in the EU members, as well as in the EU itself. As an example of constitutional principle we can point out the Article 6(3) before Lisbon, and now Article 2 of the Treaty, as viewed in the *Kadi.I* case.[6]

4. The function of the common legal principles according to Article 6(3) of the Lisbon Treaty

The function that the Article 6(3) of the Lisbon Treaty has today in a situation where the Charter of the Fundamental Rights became a compulsory document in the Union, is an issue of essential importance for the legal system of the Union. The answer to this question is in the fact that the Article 6(3) is viewed as an important supplement to the ECHR and to the Charter, in sense that the sides who accepted the EU Treaty agree that not all aspects are covered with Article 6(1) and (2), i.e. that there are some aspects that can fall under the principles of Article 6(3). This article is, namely, of key importance for the coherent spirit of the constitutional order in the EU, both for the Union and for the member-states. This comes from the fact that this

[6] Case C-402/05, C-415/05 P, para. 303: "These provisions (about the primary role of the international obligations deriving from the UN Charter) cannot be understood as authorisation for derogation of the principles for freedom, democracy and respect of the human rights and the fundamental freedoms determined in Article 6(1) of the EU Treaty, as basis for the Union."

provision is a door through which the constitutional rights that the authorities have to observe in the member-states actually enter in the EU law.

Article 6(3) gives a possibility for the EU law to keep in touch with the progress of the common constitutional tradition of the member-states when it comes to the fundamental rights. Although in some countries-signatories of the ECHR articles 6 and 13 of the Convention do not give direct right to access to the court regardless of the legal provisions in the national law, in many cases the progress of this independent right is evident. In the EU courts this is viewed as a right to use of legal remedies. For example, the first instance court found this right as part of the international *ius cogens* in the *Kadi I* case. Other examples for the evolution of this right are, for example, the rights of the transsexuals in certain legal systems, the right to marriage, as well as the importance of several private and other rights that generate from the technical and technological development, like in, for example, the field of security, biotechnology and medicine. This function is considered only partially covered by Article 52(1) and (2) of the EU Charter.[7]

Article 6(3) is believed to have the capacity to play a very specific role in Poland and in the UK in context of the application of the Protocol 30 of the Lisbon Treaty and in context of the application of the Charter in these countries. It is expected to have the same specific role in the Czech Republic, as well as in Ireland, if, according to the Constitution of the Republic of Ireland, a special protocol is made about the scope and the application of the protection of the right to life, protection of the family and the protection of the right to education, and in accordance with the decision adopted by the Heads of State and Governments on 19 June 2009. If these protocols have a restricting effect on the scope of the rights guaranteed by the Charter, we may conclude that these restrictions will not undermine the application of the equivalent fundamental rights as principles of the EU law in accordance with Article 6(3).

[7] Having in mind the fact that the Charter recognises the fundamental rights in a way they are determined in the constitutional traditions of the member states, these rights ought to be interpreted in accordance with these traditions.

5. Conclusion

The legal principles are the source of the EU law though which the fundamental rights, as they are protected by the member-states (with the national and with the international treaties for the rights and freedoms) are incorporated in the EU law. Although the European Court of Justice is motivated to incorporate the guarantees for the autonomy of the EU legal order, which is endangered by the continuous calls for the rights protected by the EU member states,[8] it does not diminish the heterogeneous character of the sources incorporated in the EU legal principles. The legal principles remain part of the Article 6(3) of the TFEU, without taking into consideration the compulsory nature of the EU Charter for Fundamental Rights. In the EU law there is a distinction between legal principles that refer directly to the protection of the fundamental rights, where some originate from heterogenic and other from more autonomous sources of the EU law. This distinction comes as a consequence of the incomplete codification i.e. description of the legal principles by the ECJ in the EU Treaty, from Maastricht until today.

When it comes to the fundamental rights, there is a more coordinated image in all EU member-states, having in mind the fact that in all of them the European Convention for Protection of the Human Rights and Freedoms, the EU charter and other international and European accords are mentioned as legal source. Still, some differences are evident, which in some member-states are latent, while in others they are concretely manifested. The differences that can lead to potential conflicts are most often resolved through use of interpreting techniques with harmonising effects. For the second group of cases, the absence of national laws is supplemented with international or with European accords for protection of the fundamental rights, by supplementing the national set of laws, when the courts are in position to apply them. Having in mind the fact that all EU members have incorporated the ECHR, this becomes tendency in all of them, although in some countries there are reservations regarding the power of the courts to apply them fully, as in the case of Republic of Ireland and the UK when it

[8] See ECJ, case 11/70, December 1970, *Internationale Handelgesellschaft*, para. 3: "In fact, observing of the fundamental rights is an integral part of the common legal principles protected by the ECJ. The protection of these rights, inspired by the constitutional traditions jointly for all member states must be secured within the structure and the goals of the Community."

comes to the Parliament acts. This penetration in the European and in the international rights not always goes by without problems and without controversies, as a consequence of the tensions that exist among the individual rights on one hand, and the public interest on the other.

In several member-states, the European rights are viewed as potential interfering in the national political priorities. This criticism is focused on the practice of the European Court of Human Rights, which is considered to be facing a "crisis of legitimacy". Although the European Court of Justice has many other roles besides the protection of the fundamental rights, the growth of this criticism can also tackle the ECJ.

The third group of cases is the most problematic one. These are the cases where the national, European or international fundamental rights are in conflict with the national jurisdiction, i.e. with some of the levels of protection of these rights. The question is which level of protection will dominate, having in mind the actual collision of the rights coming from different sources. Many of the potential differences are overcome with so-called judicial techniques of "consistent interpretation", through which the standards of the national fundamental rights are viewed in the light of the European and the international standards. This can be outlined explicitly in the national constitution,[9] or it can be derived from the constitution.[10]

Regarding the international and the European treaties for the human rights, the issue of the constitutional status and the ranking of the treaties can be decisive for the national courts. Some differences can be found among the systems that consider the ECHR as part of the national legislation in the "monistic" tradition and the systems that have "dualistic" legal tradition. The later directly apply the ECHR and prefer to find inspiration in the Strasbourg

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[9] The case of Spain, Hungary and the UK.

[10] The Italian Constitutional court in its decisions No. 348 and 349 from 2007 found that the laws must be read by the lower instance national courts in accordance with the ECHR, as it is done by the European court of Human Rights, however, in case of conflict the case should be passed to the Constitutional Court, who must give advantage to the ECHR in accordance with the Article 117(1) of the Italian Constitution. This is different from the EU law, which is given direct effect in accordance with the legitimate constitionality (Article of the Italian constitution), by limiting the sovereignty through creation of special legal EU order, position outside the national framework, where the competence of the Constitutional Court is limited.

case-law. In some of the "monistic" systems, the ECHR is directly incorporated in the Constitution and there all courts, directly and actively apply it,[11] even to a level that they themselves believe they are restricting the importance of the national constitutional provisions on human rights.[12]

In all three types of constitutional orders, the courts are led by the case-law of the ECHR, which is the reason why the national court decisions have legitimacy of presented law of Strasbourg. In some member-countries, the courts do not have the possibility to apply the ECHR (and its case law) fully, either because of the rank and status of the ECHR over the national law, or because of the distribution of authorities which secures restrictiveness of the legal remedies in front of the courts.

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[11] See Constitution of Slovenia, where Article 15(5) contains a maximalist clause when it comes to the international human rights.

[12] The case of Holland.