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FUNDAMENTAL RIGHTS AND THE EUROPEAN CITIZEN

A declaration to respect the fundamental rights of citizens in the European Community was signed in Luxembourg, April 5 1977, by the Presidents of the European Commission, the Council of Ministers and the European Parliament.

Fundamental rights as defined in Member States constitutions and elsewhere are given cardinal importance by the European Institutions. The Community's determination to protect them has been underlined strengthened by the declaration.

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FUNDAMENTAL RIGHTS AND THE
EUROPEAN CITIZEN

1. What are fundamental rights ?

The average European (if he or she does in fact exist) is likely to be a little puzzled when someone asks him about his "fundamental rights", but if anyone challenges his right to say or think what he likes, then he will defend it vigorously. That we all have fundamental rights is something we are lucky enough to be able to take for granted - it is only when we feel these rights to be challenged that we begin to think about them.

Our fundamental rights are those which we accept as being basic to our way of life, and they differ very little in substance throughout the nine EEC Member States. They were designed to protect us from undue interference by the State in our personal development, and they therefore include the freedom to own property, the freedom to practice whatever religion we choose, freedom of opinion, the freedom to meet together, freedom of speech and the freedom to choose our economic activity or profession.

These days, there is a growing tendency to include amongst the fundamental rights a number of social rights entailing obligations for the state, such as the right to work, and the right to receive social protection in case of need. If, for example, a person is unable to work for a prolonged period of time because of serious illness, then many people would claim that he has a fundamental right to financial help from the State. These social fundamental rights are now included in a number of international agreements, including the European Social Charter of 18.10.1961. and some countries (Switzerland, for example) are discussing the adoption of social fundamental rights into their constitutions. To date, no move has been made in this direction within the European Community.

We are also tending more and more to include general democratic demands amongst what we see as our fundamental rights. It is often claimed that we have a basic right to equality of treatment and to participate in the taking of decisions which affect the community as a whole. This view of democracy is now so widely held that we may consider democratic rights as being very closely related to fundamental rights.

These social and democratic fundamental rights apart, however, the basic rights to which a German, Frenchman, Irishman or any other citizen of any other of the EEC Member States can lay claim, are very similar, but the manner in which they are legally guaranteed in each of the Member States varies from country to country.

The German Basic Law of 1949, the Irish Constitution of 1937, the Italian Constitution of 1947 and the Luxembourg Constitution of 1868 (with its subsequent amendments), all contain comprehensive inventories of the fundamental rights to which their citizens can lay claim and, in addition, in Italy and Germany, the European Convention on Human Rights is also part of domestic law.

The Belgian Constitution of 1831 lists a number of fundamental rights, all bearing the stamp of the liberal thought of the period in which it was drawn up. The rights it contains are therefore almost exclusively rights of freedom, intended to protect the human being as such, and have little to do with his relations with society as a whole. Outside the Constitution, other guarantees of fundamental rights are found principally in the European Convention on Human Rights which came into force in Belgium as part of the law of the land on 13 May 1955.

The Danish Constitution of 1953 and the Dutch Constitution of 1815 both mention a number of fundamental rights, but leave the list incomplete. In Denmark, these rights are reinforced by judicial protection, and in the Netherlands, the fundamental rights guaranteed by the European Convention on Human Rights are of particular importance since a constitutional amendment of 1953 guarantees the direct application of international treaties signed by the Dutch government.

The Constitution of the Fifth French Republic of 1958 has no fixed catalogue of fundamental rights, but refers instead to the human rights of the Declaration of 1789 and to the Preamble of the Constitution of 1946. Between them, these two documents guarantee the basic classical freedoms and in addition, the European Convention on Human Rights has had force of law in France since 1974.

As for the British, it is well known that they always like to be different and they therefore have no written constitution at all with which to back up their fundamental rights. There is, however, a British constitution in the practical sense in that there exists in Britain an elaborate and established fabric of common and statutory law which protects citizens' interests and guarantees their rights - fundamental or otherwise.

Although, as indicated above, not all the Member States apply the European Convention on Human Rights directly in their domestic law, since 1974, they have all ratified the Convention. There has been some discussion as to whether the European Community as such should sign, but the Commission holds that this is unnecessary, on the grounds that the "fundamental rights laid down as norms in the Convention are recognised as generally binding in the context of Community law without further constitutive act"(1)

2. Public opinion

When the EEC Treaty (the Treaty of Rome) was first drawn up, and especially later when Great Britain, Denmark and Ireland acceded to the European Community in January 1973, there was a great deal of public debate on the issue of national sovereignty and the fact that the Community citizen would be subject to a new authority bound neither by national fundamental rights, nor by a catalogue of fundamental rights at Community level.

The fears expressed at that time have now been largely allayed by the recent decisions of the Court of Justice of the European Communities in favour of fundamental rights and by the fact that no gross infringements of fundamental rights by Community institutions have yet materialised. The general opinion is now that the approach adopted by the Court of Justice is a sufficient guarantee in itself that the fundamental rights of the European citizen are recognised and sufficiently protected.

(1)

"The protection of fundamental rights in the European Community", EC Bulletin Supplement 5/76, p. 14

3. In the beginning

The EEC Treaty contains no catalogue of fundamental rights, nor does it give the kind of comprehensive protection or guarantee that one would expect in a written constitution of a national State.

Referring recently to the case of Internationale Handelsgesellschaft, on which the Court of Justice in Luxembourg gave a preliminary ruling in 1970, Judge Pescatore, the Luxembourg judge at the Court, said that :

" This case has drawn attention to the fact that the builders of the European Communities thought too little about the legal foundations of their edifice and paid too little attention to the protection of the basic rights of the individual within the European structure ".

During the European Parliament's debate on the Commission's report on fundamental rights, Sir Derek Walker Smith suggested that this was probably because the founding fathers considered that these matters would be taken care of in the European Convention on Human Rights to which all the Member States were expected to adhere, if they had not already done so. The problem with this, as Sir Derek pointed out, was that whereas the Convention deals mainly with civic and political rights, the Community is concerned mainly with economic and socio-political matters.

As a result of this situation, any insufficiency in the protection of fundamental rights under Community law may also, because Community law is supreme over national law, prejudice a citizen's rights under the law of his own Member State. The progress made by the Court of Justice in extending the protection given to fundamental rights in the Community through the development of its case law is therefore of basic importance to the Community citizens.

4. Fundamental rights in EEC Legislation

The EEC Treaty does contain references to particular individual rights although such basic rights as freedom of belief and conscience protection from unfair arrest and prosecution, postal secrecy, freedom of the press, artistic freedom and many others are hardly, if at all, affected by Community authority.

The fundamental rights upon which the existence of the European Community is more likely to have some effect are mainly in the economic and, to some extent, the social spheres.

For example, the prohibition of discrimination between Common Market citizens on the grounds of nationality is one of the basic principles of the Treaty of Rome. It is laid down in Article 7 of the Treaty, and referred to again in Articles 40, 45, 79 and 95. Similarly, in Article 119, the Treaty provides for equal pay for men and women doing equal work, and thus in 1957, was way ahead of contemporary legislation on equality in many of the Member States.

In economic sectors, the Treaty extends the rights of the European citizen beyond his own national boundaries to cover the whole of the European Community. Thus, it gives him the right to freedom of movement within the Community (Article 48 et seq.), to take up employment or set up his own business (freedom of establishment : Article 52 et seq.), or to enter any of the liberal professions in any of the Member States (Article 59). The Treaty of Rome therefore touches closely upon the fundamental right to practise a trade or occupation and indeed, in so doing, it extends this right.

Legislation on competition (Articles 85 and 86) also bears upon certain aspects of the principle of equality by protecting free competition and thereby preventing discrimination against smaller enterprises.

Subsequent to the EEC Treaty, the Community has adopted legislation which further extends the freedoms of individual citizens laid down in the Treaty. The Council of Ministers has recently adopted a directive intended to achieve equality of treatment for men and women with regard to access to employment, vocational training and promotion, and working conditions. At the present moment, the Council is also considering an action programme submitted to it by the Commission and designed to extend the rights of migrant workers within the Community.

5. The relationship between national and Community law

In the unlikely event of a conflict between Community and national law on a question of fundamental rights then, as pointed out above, Community law would take precedence over national law. Fortunately, this appears now to be a remote possibility. The European Commission, responsible for proposing all Community legislation, has had frequent opportunity to express its views on the protection of fundamental rights and has stated that "every contravention of human rights and every violation of democracy no matter where it may be, is abhorrent". It therefore goes to great length at every step of the drafting of Community legislation to ensure that fundamental rights remain in tact.

In recent years, two of the national courts have taken opportunities to state their positions with regard to this possible conflict. In 1973, the Italian Constitutional Court described such a conflict as "improbable" but nevertheless reserved the right in an extreme case to question the law of the EEC Treaty itself, if that law were to permit the infringement of fundamental rights guaranteed by the Italian Constitution.

In 1974, the German Federal Constitutional Court agreed that it could find no real conflict between Community legislation and the guarantees of fundamental rights provided under the German Basic Law, but that in its opinion, fundamental rights were insufficiently guaranteed under Community law since there was no written catalogue of rights. This question of the provision of a Community catalogue of fundamental rights is currently being widely discussed. It assumes added importance in view of present proposals for European Union.

6. The Court of Justice develops its theory on fundamental rights.

Over the years, the Court of Justice has moved gradually into the field of fundamental rights, and its case law is particularly important for the standard of protection of fundamental rights in the Community today. The Court's job is to ensure that law contained in the Treaty of Rome and subsequent legislative measures are correctly applied and in so doing, to review the legality of the acts of the Council and Commission (Article 173 of the EEC Treaty).

Over a twenty-year period, it has moved from a stance of non-intervention to an attitude of deep concern for the maintenance of fundamental rights in the Community and a role as self-appointed guardian of these rights. The case law now established by the Court is such as to prompt the European Parliament to acknowledge in a recent resolution that "in view of the development of Community jurisprudence concerned with the protection of fundamental rights ... the protection of these rights is now very clearly guaranteed by the Community Court and ... the level of legal security thus achieved at present in this essential sphere is certainly - in the circumstance - at least as high as that which would be provided by the adoption of a charter of fundamental rights".

In two very early judgments given in 1959 and 1960, the Court ruled that it was not competent to examine the legality of acts of the Community institutions within the framework of national fundamental rights.

It was not until the case of Stauder v. the City of Ulm that the Court acknowledged that fundamental rights were part of the general principles of the Community. In its judgment on the Stauder case, the Court referred to the "fundamental human rights enshrined in the general principles of Community law and protected by the Court".

The case itself was a fairly simple one. As a war victim, Herr Stauder was eligible for cheap butter under Community legislation adopted in 1969 to make butter available at special prices to beneficiaries under certain welfare schemes. According to the German arrangements for the implementation of this scheme, however, in order to obtain his butter, Herr Stauder had to present his local shopkeeper with a special coupon bearing his name. Herr Stauder and the German court which referred the matter to the European Court of Justice considered that the fact that a recipient of social welfare had to reveal his name to a third party was contrary to the fundamental rights guaranteed under the German Basic Law.

The Court of Justice ruled, however, that the German version of the Community text in question had been inaccurately translated and that Herr Stauder was not in fact required to reveal his identity. In this respect therefore, the case is not of great interest - its interest lies in the acknowledgment made by the Court that fundamental rights are entrenched in Community law by means of the general principles of law.

Shortly afterwards, in a judgment in the case of Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle (1), the Court declared that "respect for fundamental rights forms an integral part in the general principles of law of which the Court of Justice ensures respect".

The Court was able to go a little further in this case in defining its position on fundamental rights. The case involved export licences. In accordance with Community regulations, Internationale Handelsgesellschaft had applied for a licence to export maize meal. The licence was issued for a given period of time and when it expired and Internationale Handelsgesellschaft had not exported the full amount of meal licensed, it was required to forfeit a part of its initial deposit.

The German company claimed that the time requirement on exports interfered with its freedom of economic action, but the Court of Justice, in ruling that the time limit and deposit system were necessary means of obtaining valid statistics for trade, asserted that fundamental rights would be guaranteed "within the framework of the structure and objectives of the Community". The Court thus recognised that fundamental rights were not to be considered absolute. As in all legal systems, fundamental rights are subject to limitations, the extent of which depends on the nature of the right involved.

In 1974, in the Nold case, the Court took yet another step by declaring that in safeguarding fundamental rights, it was "bound to draw inspiration from the constitutional traditions common to the Member States", as well as from the international treaties on human rights on which the Member States have collaborated or of which they are signatories. Nold, a German wholesale coal business, had protested against certain Community regulations which had the effect of preventing it, because of its modest turnover, from receiving deliveries as a wholesale coal merchant. In Nold's view, the right at stake was the freedom to choose and practise a profession or trade.

Again, the Court adopted the view that the fundamental rights in question were subject to limitations justified by overall Community interests, on condition that they were not altered in substance. The particular interest of the case, however, lay in the

(1) CJEC 17.12.70, 11/70 (1970), ECR 1125

fact that this was the first time the Court had acknowledged that treaties such as the European Convention on Human Rights should be used as guidelines for Community law.

The case law already laid down in these judgments was extended with the case of M. Roland Rutili v The Minister of the Interior in which the Court referred to particular articles of the European Convention on Human Rights. In the light of the Convention, it restricted the limits a national authority can put for its own purposes on the freedom of movement for workers guaranteed by Article 48 of the EEC Treaty.

In the course of these judgments, the Court has evolved its case law in a far wider legal framework than that outlined in the Treaties and the implementing texts. It has shown that the protection of fundamental rights can be ensured by legal means even in the absence of a declaration of rights in the Treaties.

As the situation now stands, although national law can never claim priority over Community law, nevertheless the fundamental rights recognised in the Member States have to be taken into account by Community law and according to the Nold Judgment, the European Convention on Human Rights must also be considered in establishing such rights.

7. Theory put into practice

In its day-to day judgments, the Court of Justice is called upon to uphold the fundamental rights mentioned in the EEC Treaty. Cases involving individual citizens claiming their rights reach the European Court of Justice only via the national courts however, and the European Parliament therefore called in its resolution on the Commission's report on fundamental rights for the easing of access for individual citizens to the Court of Justice.

One case which did reach Luxembourg, through the Italian courts, and in which the European judges were called upon to uphold a right basic to Community law was that of Lynne Watson and Alessandro Belmann. The case dealt with the question of the freedom of movement, residence and establishment within the Nine of Community nationals.

Lynne Watson was a 17-year old English girl who in 1973 went to Milan to stay with an Italian, Alessandro Belmann and his family. When Miss Watson disappeared on a journey to Venice, Mr. Belmann notified the Italian police and promptly found himself in line for 6 months' imprisonment and/or a fine of up to 240,000 lire for not having notified the police of the presence of a foreign national under his roof within 24 hours of her arrival. Similarly, Miss Watson found herself liable to a maximum of 3 months' detention or a fine of up to 80,000 lire for not having reported to local police within three days of her arrival in Milan.

Before passing such strict sentences, the Prefettura di Milano decided to refer to the Court of Justice in Luxembourg to find whether such regulations applied to nationals of another Member State did not infringe Community provisions on free movement.

In their ruling on the situation, the Luxembourg judges emphasised that Articles 48 to 66 of the EEC Treaty (dealing with free movement) and the implementing measures subsequently adopted, formed a fundamental principle of the Treaty.

Those articles gave the individual rights which national courts must protect and which must take precedence over any conflicting national rule. The Court concluded therefore that, although national authorities may require citizens of other Member States to report their presence for administrative purposes, the conditions attached to this requirement (such as time limits) and the penalties inflicted if it is not fulfilled should not be so unreasonable as to actively discourage the movement of persons within the Community.

The Court thus underlined the importance it attached to its task of upholding the rights of the individual.

In 1975, the Court of Justice took a decision upholding women's right to equal pay. It has already been mentioned that Article 119 of the EEC Treaty guarantees the payment of equal pay for equal work to both men and women. The principle should have been incorporated in national legislation by 1962 but in fact, for economic reasons, has not become a fact of national law until very recently.

As a result of this time lag, Miss Defrenne, a Belgian air stewardess, took out a legal action against Sabena, her employer, for paying her less than was being paid to an air steward with the same seniority and qualifications.

The Belgian court referred the matter to Luxembourg for a ruling on whether or not, in the absence of national implementing legislation, an individual could claim his rights directly under the EEC Treaty.

The Court of Justice in turn referred to Article 119 of the Treaty and ruled that in spite of the fact that the Belgian government had not passed any legislation to that effect, Miss Defrenne's right to equal pay was guaranteed by the Treaty and as such, had to be upheld.

The Court of Justice obviously has a vital part to play in upholding the rights of the individual, but the European Commission also has certain powers to act if it considers that any measures of national law are infringing rights granted to EEC citizens under the Rome Treaty. Under the procedure known as "Treaty infringement procedure", it can bring a case against any government it considers to have done this.

In the case of the Commission v. the French Republic for example, it had been brought to the Commission's attention that under French Maritime Law, only people of French nationality could be employed aboard French ships. The Commission therefore brought an action against the French Government for breach of Community legislation on non-discrimination against nationals of other Member States, and despite the French claim that this was a maritime law and therefore did not apply actually on French territory, the Luxembourg judges upheld the Commission's action on the grounds that the law did in fact constitute unfair discrimination by the French against citizens of other Member States.

Thus Community institutions are actively ensuring on more than one front that fundamental rights laid down in the Treaties and in the general principles of law are upheld.

8. The future

As we have seen, there have been calls for the Community to produce its own catalogue of fundamental rights, given the tendency for it to adopt increasingly specific rules which affect the individual ever more directly.

In its report on the protection of fundamental rights, the Commission admits that such a catalogue would have many advantages in that it would make the current position much clearer. On the other hand, it points out, such a catalogue would have to be based on present guarantees of fundamental rights in the Nine and would have to be agreed by all the Member States. It would therefore be the subject of compromises and deletions and would necessarily become a minimum standard.

The Commission therefore sides with the Court in preferring as a solution the continuance of the Court's work of developing optimum standards of protection through case law.

Meanwhile, however, the Community has stated its intention of moving towards European Union and the achievement of such a union is likely to throw a different light upon things. As Belgian Prime Minister, Leo Tindemans, said in his report on European Union: "The gradual increase in the powers of the European institutions which will make itself felt while the Union is being built up will make it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognised and protected".

Accordingly, the Commission's view on the protection of fundamental rights in the event of a European Union is somewhat different from its view of things under present circumstances, and it in fact shares the view of the European Parliament on the matter.

In its report on the protection of fundamental rights, the Commission points out that a European Union "would apply over a much larger area and would reveal a much more political quality than those of the present Communities". Just as it would be difficult to imagine the constitution of a democratic state without any provision for the protection of fundamental rights, so it would also be difficult to create a European Union without this type of protection.

In the light of European Union, then, the creation of a European catalogue of fundamental rights looks distinctly possible. In the meantime, the proposed Community resolution on the protection of fundamental rights will act as a valuable pointer.

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