

## **River and European Legislation**

### **General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights**

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**Abstract:** The basic principles stated and applied by the European Convention of 1950 and by the common constitutional traditions of the member states are considered general principles of the Law of the European Union regarding human rights. That is why we cannot talk about the juridical protection of human rights without being well-acquainted both with the text of the European Convention on human rights signed in Rome in the year 1950 and with the text of the Constitutions of the member States, which is – or should have been – in accordance with the framework of the common constitutional traditions. These general principles and norms should not only be known, but also included in the texts of the Constitutions of the States of the European Union, through which they should also assure and grant the juridical protection of the human fundamental rights and liberties, that have not always been respected in the spirit of the principle stated by the European Convention and by the constitutional Traditions of the states of the European Union.

**Keywords:** European Union Law; European Convention; human rights

The Treaty on European Union stipulates that “The Union shall respect the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law” (Art. 6, ex. art. F).

Thus, the basic principles formulated and alleged by the European Convention in 1950 and by the common constitutional traditions of The European Union Member States are considered as general principles of the Community Law on human rights. Nevertheless, a number of general principles and norms of The European Union Law are also provided and stated by the texts of certain European and international juridical documents (Treaties, Conventions, Declarations, etc.) on human rights and their juridical protection. Therefore, we should mention that the human rights are also assured and guaranteed by The European Community based on the general principles formulated by such documents, as, for example, The Treaty of Amsterdam, which enforced “anti-discrimination policies in fields like

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racial origin, sexual orientation, age, and religion” (Craig & De Búrca, 2003, p. 317).

The first juridical document – internationally accepted – that formulated the general principles and norms on human rights was The Universal Declaration of Human Rights, adopted and proclaimed by The United Nations in December 1948. The principles of this Declaration have been re-alleged and extended – as regards their contents – in the text of The European Convention signed in Rome in 1950, which at its turn is considered as a real Constitutional “Charter” – in the matter of human rights and freedom – for the fundamental legislation of The European Union Member States, i.e. for the texts of their Constitutions, which are in harmony – or should be – with the natural context of the common constitutional traditions.

Yet, these general principles and norms of The European Union Law are also deeply rooted in the jurisprudence of The European Court of Justice, where the human rights are placed on the first places in the top of priorities. However, The European Court of Justice has been and still is subjected to three major reproaches as regards the implementation of the protection of human rights. For instance, The Court has been criticized for “attempting to expand the influence of The Community Law into areas that belong to The Member States...” Another reproach represents the fact that The Court has “manipulated the rhetorical force of the juridical language... instead of protecting the values that are fundamentally intrinsic to the human condition”. Finally, it “has attempted to be active as a parallel European Court of the Human Rights, whilst its primary goal and position were completely different...” (Craig & De Búrca, 2003, p. 363). According to certain jurists, all these three reproaches actually reflect “... a specific degree of skepticism as regards the capacity of The European Court of Justice to implement the satisfactory system for protecting the human rights in The European Union” (Craig & De Búrca, 2003, p. 363).

The fact that the jurisprudence of The European Court of Justice has been as well one of the sources that generated a number of general principles and norms on the juridical protection of human rights is undeniably certified by numerous realities as the proportionality, the legitimate expectations, the non-discrimination, and the transparency (Craig & Grainne De Búrca, 2003, pp. 317-395). Instead, “the principle of the non-discrimination as regards the sexual orientation, racial origin, and age has been implemented and materialized within a secondary legislation...” (Craig & De Búrca, 2003, p. 395). Besides, as regards the principle of the non-discrimination on sexual orientation grounds, The European Court of Justice enforced – through its decisions – the provision that a person cannot be discriminated on grounds of sexual orientation – including the equal payment for equal labor – which should be protected and observed (Craig & De Búrca, 2003, p. 842-884).

In 1977 The European Council, the Commission for Human Rights and The European Parliament have signed the common Declaration that approved the development of the general principles of The European Court of Justice as integral part of The European Union Law; at the same time, they alleged the total involvement in “respecting the fundamental rights in their activities” (Craig & De Búrca, 2003, p. 349). This common Declaration has been followed by another one signed in 1986 and by The Declaration on Fundamental Rights and Freedoms issued by The European Parliament in 1989. Finally, in 1999 The European Council – gathered in Cologne – launched the initiative of drafting the Charter of The Fundamental Rights of The European Union Member States. The European Commission, Parliament, and Council have “solemnly” proclaimed the Charter, which has politically been approved by the European Member States when they gathered in Nice in December 2001; “yet, the decision on its legal status and especially the possible integration of the Charter in the Treaties... have been postponed until the gathering of The Inter-Governmental Conference in 2004” (Craig & De Búrca, 2003, p. 43).

On October the 9<sup>th</sup>, 1993, the heads of State and Government of the European Council Member States gathered in the “Vienna Summit Conference” and adopted the common Declaration, which – *inter allia* – mentions that the accession of the European States “emancipated from the communist oppression” to The European Union implies that the specific state “has aligned its institutions and juridical order to the fundamental principles of the democratic state subjected to the supremacy of the law and compliance with the human rights” (Council of Europe Manual, 2003, p. 524-525).

Therefore, in the spirit of the guidance established by this Conference, the accession of a specific state to the EU is *sine qua non* conditioned by the full compliance of its whole organizational-administrative and public system and its juridical order with the fundamental principles that define the democratic lawful state, whose citizens – without exception – must comply to the supremacy of the law and make the protection of the human rights their civic daily creed. Besides, the supremacy of the law over all citizens of one specific state – starting with the first citizen, the President, until the last inhabitant – is the one that makes the lawful democratic state, legitimated – in the context of the rest of the world’s states – by the very guarantee and protection of the fundamental human rights.

Amongst others, the Conference of Vienna (1993) made the following decisions:

1. Improving the efficiency of The European Convention on Human Rights “through the establishment of the unique Court to control the fulfillment of the commitments assumed”;

2. Engaging the “policy of fighting against racism, xenophobia, anti-Semitism, and intolerance” and adopting – in this goal – the specific “Declaration” and “Action Plan”;
3. Creating “the consultative organism that effectively represents both the local communities and the European regional ones” (Council of Europe Manual, 2003, p. 527-528) etc.

On the same occasion (Vienna 1993) the heads of State and Government of the European Council Member States have agreed on the reform of the mechanism that controls The European Convention of the Human Rights (Rome, 1950), through which “The European Council created – The Declaration of Vienna mentioned – the international system for protecting the rights of the human person as unique entity. The main characteristic of this system – the Declaration mentions – consists in the obligation of the signatory states to effectively protect the human rights as mentioned by the Convention and accept the international control on the observance of these rights. So far, The European Commission and The European Court on Human Rights have taken this responsibility” (Annex 1) (Council of Europe Manual, 2003, p. 528).

As regards the goal of this reform of the control mechanism of the European Convention on Human Rights it has been mentioned that it represents “the enhancement of the efficiency of the protection means, reduction of the procedure duration, and keeping the present high level of the human rights protection”. In this purpose, the Conference has also decided the establishment “as integral part of the Convention” of “the unique Court of Human Rights, which would replace the existing control organisms” (Council of Europe Manual, 2003, p. 528).

The third Annex of the Declaration mentions that “the achievement of the democratic pluralist society that respects the equal dignity of all human beings is one of the major goals of the European construction” (Council of Europe Manual, 2003, p. 530).

The same heads of State and Government of The European Council Member States – gathered in Vienna (1993) – ascertained “the resurgence of the racism, xenophobia, and anti-Semitism, along with the development of the intolerance attitude, increase of violence acts, especially against migrants and persons involved in immigration, and increase of degrading treatment and associated discriminatory practices”. Therefore, they condemned “... the most firmly all forms of racism, xenophobia, anti-Semitism, and intolerance, as well as all kind of religious discrimination” and engaged their States and Governments to act “against all ideologies, policies, and practices that instigate to racial hatred, violence, and discrimination, as well as against any act or language that strengthen the fears and tensions between the groups of persons belonging to various racial, ethnic, national, religious, or social origins” (Council of Europe Manual, 2003, p. 530).

In the Declaration of Strasbourg signed on October 11, 1997 the heads of State and Government of the Member State of The Council of Europe have solemnly reaffirmed their attachment to “the respect for human rights” and underlined “the essential role of the Council of Europe in the development of norms in the field of human rights”. At the same time, they decided to strengthen “the protection of the human rights”, ensuring that the institutions of their States “are capable of effectively defending the rights of individuals on continental scale” (Council of Europe Manual, 2003, p. 533). They have also launched “the call for the universal abolition of the death penalty”, insisted on the maintenance of the “existing moratoria on executions in Europe”, and reaffirmed their decision “to reinforce the means to prevent and combat torture and inhuman or degrading treatment or punishment”, along with calling for “the intensification of the fight against racism, xenophobia, anti-Semitism and intolerance” and expressing their desire “to develop for democratic citizenship based on the rights and responsibilities of citizens and the participation of the young people in civil society”, the heads have also engaged themselves to ensuring “a proper balance between the right to information and respect for private life” (Council of Europe Manual, 2003, pp. 533-535) etc.

On the same occasion an “Action Plan” has been defined. Amongst others, the States have committed themselves “to prohibit all use of cloning techniques aiming at creating genetically identical human beings”, to strengthen “... the activities of the European Commission against Racism and Intolerance”, to promote “the social rights”, and to adopt “a program to promote the interests of children, in partnership with the international and non-governmental organizations concerned” (Council of Europe Manual, 2003, pp. 536-537) etc.

The Declaration of Budapest adopted by the Committee of Foreign Ministers of the Council of Europe’s Member States on May 7, 1999 (at its 104<sup>th</sup> Session) reminds that “the human rights” have been amongst “the permanent priorities for post-war Europe” (Council of Europe Manual, 2003, p. 538). The same Declaration reaffirms “the primacy of the human person” in the politics of the States, “through effectively guarantee the fundamental rights”, “promoting these rights and those protected by other basic Council of Europe instruments...”, encouraging “the free flow of information, opinions, and ideas through the use of the new information technologies”, ensuring “respect for human rights and human dignity, notably freedom of expression, as well as the protection of minors, the protection of privacy and personal data, and the protection of the individual against all forms of racial discrimination in the use of development of the new information technology... “ (Council of Europe Manual, 2003, pp. 541-543) etc.

Through the Resolution (99) 50, the same Committee of Foreign Ministers – gathered in Budapest (May 7, 1999) – decided “to institute the office of Council of Europe Commissioner for Human Rights (“The Commissioner”) (Appendix II, Preamble) (Council of Europe Manual, 2003, p. 544). “The Commissioner shall be

a non-judicial institution to promote education in, awareness of and respect for human rights...” (Art. 1). Amongst others, The Commissioner – elected by the Parliamentary Assembly (cf. Art. 9) – provides the Council of Europe with “advice and information on the protection of human rights and prevention of human rights violation” (Art. 3, c), facilitates “the activities of the national ombudsmen or similar institutions in the field of human rights” (Art. 3, d), identifies “the possible shortcomings in the law and practice of the member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe...” (Art. 3, e) etc.

As it is well-known, so far there has not been very much attention paid to the matter of the so-called “imperfections of the legislation and practices in the Member States as regards the compliance with the human rights”. Is it possible that such “imperfections” do not exist in any of the EU Member States?! Anyway the situation might be, one should keep in mind that such an institution of the Commissioner of Council of Europe Commissioner for Human Rights, in spite of the lack of judicial character, is meant to promote education and awareness amongst the EU citizens as regards the compliance with the human rights. In this regard, for the implementation of this educational and awareness promoting process the institution has a reliable ally represented by the specialists in the Law Faculties that teach “The Juridical Protection of the Human Rights” as part of the Academic Curriculum, because its effective and real contribution to the awareness and education of the young people in the fields of democratic citizenship, and the compliance with the human rights.

On the same occasion of the 50<sup>th</sup> anniversary of The European Council, The Foreign Ministers Committee – gathered in Budapest in May 1999 – have also adopted “The Declaration and Programme on Education for Democratic Citizenship, Based on the Rights and Responsibilities of Citizens”, published as “Appendix III” (Council of Europe Manual, 2003, pp. 546-551). Nevertheless, amongst others, the text of the Declaration stipulates that such an education in the spirit of the democratic citizenship “... aims to instill a culture of human rights, which will ensure full respect for those rights and understanding of responsibilities that flow from them” and “prepares people to live in a multicultural society and to deal with difference knowledgeably, sensibly, tolerantly and morally” (Art. 11, 3-4).

It is beyond any doubt that the instilment of the “culture of human rights” in the population of the EU States is an urgent and obvious need, as certified by the verbal slippage practiced by some of the EU citizens, as well as the sentences issued by some magistrates from a number of European States; hence the obligation of the City to educate its citizens in the spirit of understanding their responsibility to live “tolerantly” and “morally”, although some persons still reject

the terms “moral” or “morality” and prefer instead the word “ethical” or “ethics”, which were unfortunately included in their language between 1947 and 1989.

“The International Covenant on Civil and Political Rights”, adopted by the Organization of the United Nations in 1966 – and ratified by Romania in 1974 through the Decree n. 212/1974 (Official Monitor n. 146/02.11.1974) – stipulates that each “person” (human being) has the right to “liberty of movement and freedom to chose his residence” (Art. 12 & 1) and, *ipso facto*, “shall be free to leave any country, including his own” (Art. 12 & 2). These human rights can only be subjected to certain restriction in situations provided by law, when it is “necessary to protect national security, public order, public health or morals or the rights and freedoms of others...” (Art. 12 & 3).

Thus, amongst the restrictions related to the guarantee of these rights it is mentioned as well “*the public morality*”, which undoubtedly proves that committing any immoral deed, cannot be justified in the name of the so-called human rights. This “*public morality*” that guides or should guide the human society implies a moral law as well, because the human rights and freedoms are not only protected by the juridical law, but also by the moral law (Dura, 2004, pp. 15-46; 2011, pp. 158-173), which – amongst others – provides the obligation “*honeste vivere, alterum non laedere, suum cuique tribuere*” (Justiniani Institutiones, 2002, lb. I, 3) (to live honestly, not to harm another person, and to give anyone what belongs to him).

Through the same Declaration the member States of The European Council were called to “promote democratic citizenship based on the maintenance and further realization of human rights and fundamental freedoms” (Art. 14).

In the Final Declaration – adopted by the heads of States and Government of the Council of Europe, gathered in Strasbourg for the Second Summit (Council of Europe Manual, 2003, p. 546-551), established that special attention should be paid within the Program “to the following essential issues”:

- “The human rights, including their social dimension and the obligation of each person to respect other individuals’ rights” (Art. 3, 2);
- “The relations between rights and responsibilities, as well as the common responsibilities for fighting against social exclusion, marginalization, civic apathy, intolerance, and violence” (Art. 3, 3);
- “Teaching the democracy in schools and universities, including the participation in the decision-making process and associative structures of pupils, students, and teachers” (Art. 3, 6);
- “... Education in the spirit of human rights, civic education, intercultural education, history teaching...” (Art. 3, 8);

- “Develop anytime when possible the process of research within the member States to ensure the participation of interested persons... in utilization of the research outputs” (Art. 5, 5).

The brief analysis of certain international and European juridical documents – especially a number of Declarations – revealed the affirmation of a number of general principles and norms on human rights, including their juridical protection. Nevertheless, such principles and norms should not only be known, but also included in the Constitutions of the EU Member States, thus, the juridical protection of the fundamental human rights and freedoms can be guaranteed (Dura, 2010, pp. 153-192; 2012, pp. 86-95; Mititelu, 2012, pp. 70-77), as it is well-known that such fundamental rights and freedoms have not always been respected in the spirit of the provisions mentioned by The European Convention and The Common Constitutional Traditions of the EU Member States. Besides, the legal cases judged by The Court of Strasbourg prove beyond any doubt this sad reality of the present.

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