Tomasz Jurczyk
Wroclaw University

The role of the Court of Justice of the European Union in setting European Union standards of protection of fundamental rights

1. Introduction

Thinking about bases of modern state in XXI century we can imagine a triangle consisting of three equal parts: democracy, rule of law and human rights. If we take away just one part, the whole construction will fall down. The principle of democracy and rule of law alone is not enough to safeguard our freedoms, as an example of nazi Germany proved. States relying only on these two principles are relatively easy to degenerate into lower forms of government. On the other hand, democracy and human rights, without rule of law will not guarantee human dignity to be observed properly and protected by impartial institutions. Therefore we need all three elements to make modern state working properly. Let`s focus on human rights now. One could even called them undemocratic, because in the name of protection of different kinds of minorities, the will of majority is limited. That is a paradox of human rights, they restrict majoritarian will on the one hand, but on the other, strengthen the system, protecting individuals against the potential tyranny of a state. We all agree, that any civilized state should have a constitutional chapter dedicated to protection of human rights and freedoms. In other words, human rights not only let the system working properly, in Europe they play very special role. After tragic experiences of XX century, it is human rights, which constitute about European credibility. That is why, all constitutions of European states take human rights so seriously, putting them usually into chapters two in constitutional text (that inner stratification is very important here, despite equal legal power of all constitutional provisions). In this context, there is no wonder, that an autonomous legal order evolving towards ever closer Union, since the early days of its existence, to be taken seriously and to retain credibility, had to put accent on human rights. Or, in other words, human rights had to be taken seriously by European Union institutions to bring credibility to the Union. In this field, one institution has been particularly active: Court of Justice.

2. The beginnings: human rights as general principles

Originally, when European Community was established its legal system resembled more international than state law, protection of human rights seemed to be non existing issue. At that time it was very difficult to predict the future evolution of what had been initially thought out as project of economic integration, following the failure of European Political Community. European Community institutions were generally designed to supervise functioning of certain elements of national economies, not to take care of the interest of individuals. The first test came on 1958, when the Court had to decide whether to judge Community provisions being binded to constitutionally protected human rights of the Member States. That was the case in Stork, when Community legislation was attacked on the ground of breaching German fundamental rights[1]. Responding to this issue the Court had two ways to react. To accept that claim known as mortage theory and thus be directly bound by fundamental rights of all constitutions of Member States or to reject it. In Stork, Court chose the latter option denying in this way any direct link between Community law and Member States fundamental rights, stating that "Under art. 8 of the Treaty the Commission is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently the Commission is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German Constitutional law." The same line of reasoning was confirmed in the next case, where the Court found, that "The applicant supports its arguments with German case-law on the interpretation of Article 14 of the Basic Law of the Federal Republic, which guarantees private property. It is not for the Court, whose function is to judge the legality of decisions adopted by the Commission, and as obviously follows, those adopted in the present case under art. 65 of the Treaty, to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the Court may neither interpret nor apply art. 14 of the German Basic Law in examining the legality of a decision of the Commission"[2]. Let`s imagine what could have happened, if the Court took opposite view, letting Members States constitutions to shape directly Union legal order in the field of human rights. The EU legal system would be trapped into maximum standard of protection of human

[1] Case 1/58, *Stork and Cie v. High Authority of the European Coal and Steel Community*, [1958] ECR 17.

[2] Joined cases 36, 37, 38/59 and 40/59, *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufgesellschaft mbH and I. Nold KG v. High Authority of the European Coal and Steel Community*, [1959] ECR 423.

rights, taking always the highest standard of protection of human rights from any Member State and then apply it to EU law. That system couldn`t work properly, as certain rights are protected differently in different states (for example environmental rights). The highest standard would also come back to all Member States during application of EU law and its interpretation by the Court. It was not possible for a long time to deny protection of individuals in the field of human rights on the ground of EU law, because individuals could initiate proceeding in domestic courts on the ground for breaching their constitutionally guaranteed rights. That could lead to catastrophy, if national courts would find EU law invalid. The Court had no choice but to respond positively to the expectations of domestic courts dealing with creation of adequate level of protection of human rights in EU law. Otherwise than in Stork, in case Stauder, the Court acknowledge for the first time, that fundamental rights are "enshrined in the general principles of European law"[3]. In the next important case the Court mentioned about existence of guarantees for protection of fundamental rights analogous to those in Member States, inherent in European law[4]. The Court acknowledge its role as a guardian of fundamental rights in European Union legal order, which constitute part of general principles of the EU legal system. Furthermore, the Court finds as a source of aspiration for newly discovered rights constitutional traditions common to the Member States. Further clarification of that position came in Nold case, where the Court stated, that "Fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures, which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines, which should be followed within the framework of law"[5]. In the Nold case, the Court found constitutional rights of Member states as indirect but inspiring source of law, and accentuated, for the first time significance of international treaties for the protection of fundamental rights. In Europe there is one particularly important international document dedicated to the protection of human rights: European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The significance of the Convention was confirmed by the Court in Hoechst case, where Court confirmed, what had already been known, that "the Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which

[3] Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419.

[4] Case 11/70, *Internationale Handelsgesellschaft mbh v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, [1979] ECR 1125.

[5] Case 4/73, *Nold v. Commission,* [1974] ECR 491.

the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member State have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 is of particular significance in that regard"[6]. In these cases the Court confirmed, that it recognizes different systems of protection of human rights (national and international), although not directly.

3. Level of protection of fundamental rights in EU law

The new system of protection of fundamental rights that has been created by the jurisprudence of the Court differentiate from already existing ones in Member States or international law. But had the Court any choice, to decide for instance to bind itself directly to one of those systems (national or international). The idea of "ever closer union" has been materializing for three generations already, which means, that European union legal system is evolving much faster than any legal system of its Member States. At the same time, the Court had been developing its another key principle of primacy of EU law over national law, to support cohesion of new legal system. In such circumstances, the Court needs flexibility to act respectively to changing conditions of integration. General principles constitute excellent legal tool to protect fundamental rights and main goal of the Union: efficient functioning of internal market. Due to its flexibility, the Court can find appropriate standard of protection of fundamental rights without breaching other values (mostly of economical nature). It is the perspective of the Union, which Court has to take into consideration first. General principles offer right flexibility (here lies the difference between individual rights guaranteed by constitutions of Member States and general principles of EU law). The Polish Constitutional Tribunal also had to rely on general principles of law it found in the system in the 90`s before the Polish Constitution of 1997 has become legally binding. When it happened, general principles had been constitutionalized and now Constitutional Tribunal limits itself to the interpretation of already existing constitutional principles (which it discovered in legal system). From this perspective, I believe, the judicial activism is just a necessary part of the activity of any court, national or international, for one purpose, to make system working. The law usually is very efficient tool that helps to regulate social problems and restore order but in times of rapid changes like transformation of a whole system from totalitarian or authoritarian towards democracy, sometimes the legislator is not able to provide citizens with adequate level of necessary regulations. That is the case, when courts needs flexibility and rely on general principles or creating new ones to fill the gap in legislation. There

[6] Joined cases 46/87 and 227/88, *Hoechst v. Commission,* [1989] ECR 2859.

is nothing wrong it this thinking, simply due to short of proper legislation, the role of the courts rises and they become more active in its jurisprudence. That is a role of the courts not only to interpret but also to safeguard legal systems[7].

In searching for level of protection of fundamental rights, there are three possible options. The first option is to find common denominator of all rights protected by Member States, the Court obliged itself in Nold to draw inspiration from, implying a common minimum standard. Is it possible, when Member States vary so much in level of protection of certain rights. There are states in European Union who value principle of equality and social justice over freedom rights and offer to its citizens very sophisticated systems of social benefits. On the other hand, there are states where societies take more individualistic approach and are attached to personal freedoms at the expense of social rights catalogue (right now Poland is very good example of this way of thinking about relations between individuals and the state, where the state has very little to offer to its citizens focusing rather on freedom rights which accentuate individualism). The Court rejected minimalist approach in Hauer, concluding that it is enough to discover a fundamental right, when it is protected only in several States[8]. The maximalist approach is just the other side of the same coin, making a Union and Member States a hostage to the regulations existing in one or few states (one thing is sure in that context, that accusations of the Court of not taking fundamental rights seriously would come to an end once for all). As we see, the only sensible solution for the Court was to create its own independent standard of protection of fundamental rights for the whole Union, binding the Court in its interpretations of the rights only indirectly into constitutions of the Member States.

4. EU fundamental rights in national legal orders

Since the beginning of its creation EU affects the shape of legal systems of its Member States. The question that rises here is what standard of protection of fundamental rights prevails, when Member States implement EU legislation: national or EU standard? In Wachauf case, the Court had a chance to shed a light on this issue, confirming that in case of implementation of EU legislation, national authorities are obliged to respect EU standards of protection of fundamental rights[9]. This argument the Court used in Wachauf case to justify its position regarding review of national law seems to be logical after application of functional criteria. Then it turns out, that national authorities serve as executive branch. In the same way the national courts can be called courts of lower rank comparing to Court of Justice of European Union, although there is no

[7] J. Coppel, A. O`Neill, *The European Court of Justice: Taking Rights Seriously?,* [1992] CML Rev. 669.
[8] *Case 44/79, Hauer v. Land Rheinland-Pfalz*, [1979] ECR 3727.
[9] Case 5/88, *Wachauf v. Bundesamt fur Ernahrung und Forstwirtschaft,* [1989] ECR 2609.

institutional interdependence between them. The fact is, that the position the Court presented in Wachauf gives it almost unlimited power to review most of the national legislation that exist in national legal orders, on the ground of potential incompatibility with EU fundamental rights. The same reasoning presented above deals with situations when Members States derogate from EU law "in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided by Union law. Must be interpreted in the light of the general principles of law and in particular fundamental rights"[10]. Here the Court has to also check, if the subject of judicial review falls within the scope of EU law.

5. The Court of Justice of the European Union and European Convention for the Protection of Human Rights and Fundamental Freedoms

With regard to the question of relation between the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and fundamental rights of EU law, it is worth saying, that Court has never recognized the Convention as a direct source of fundamental rights confirming its consequent position in case Schmidberger where found that "according to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance in that respect"[11].

Right now the EU is not a party to the European Convention, so by now there is no direct control of the European Convention system over the system of protection of fundamental rights in EU. It doesn`t mean that there is no control at all. In case M & Co v. Germany, European Commission of Human Rights took a view, that "transfer of power to international organization does not exclude the State`s responsibility under the Convention with regard to the exercise of the transferred powers", although "it would be contrary to the very idea of transferring powers to an international organization to hold Member States responsible for examining in each individual case"[12]. According to the European Commission of Human Rights, the State is responsible for quality of protection

[10] *Case C-260/89, Elliniki Radiophonia Tileorassi (ERT) et al. v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolas Avdellas* et al., [1991] ECR I-2925.

[11] Case C-112/00, *Schmidberger, Internationale Transporte und Planzuge v. Austria* [2003] ECR I-5659.

[12] *M & Co v. Federal Republic of Germany*, (1990) 65 DR 138.

of fundamental rights in EU legal order generally. This position imposed indirect control of EU fundamental rights by European Court of Human Rights in Strasbourg. That position was later clarified in case Bosphorus, where European Court of Human Rights stated, that "The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international organization in order to pursue cooperation in certain fields of activity. Moreover, even as the holder of such transferred sovereign power, that organization is not itself held responsible under the Convention for proceedings before, or decisions of its organs as long as it is not a Contracting Party. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party`s jurisdiction from scrutiny under the Convention. In reconciling both these positions and thereby establishing the extent to which a State`s action can be justified by its compliance with obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty, the Court has recognized that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention. In the Court`s view, State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which mcan be considered at least equivalent to that for which the Convention provides. By equivalent the Court means comparable; any requirement that the organization`s protection be identical could run counter to the interest of international cooperation pursued"[13].

In case Bosphorus the European Court of Human Rights followed a middle way, avoiding two extremes: no control at all over jurisprudence of the Court in Luxembourg or total control imposing its full standard of protection. Indirect control of protection of fundamental rights in EU as long as the Court in Luxembourg ensures equivalent protection, gives the Court in Luxembourg flexibility necessary to pursue the aims established by the Treaties. It also means lower review standard to European Union.

It is very likely, that conditions of compliance presented in Bosphorus will disappear with accession of European Union to the Convention.

The future relations between Convention and EU law seems to be clear now since Lisbon Treaty come to life. The art. 6(2) TEU says literally, that EU is obliged to accede

[13] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, [2006] 42 EHRR 1.

to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6. Conclusions

The role of the Court in the process of European integration has been the subject of numerous analysis. On its way, the Court has been also accused of breaking its constitutional competences to create new legal reality in the field of EU law to boost the process of integration. It is the Court who created principle of primacy and direct effect of EU law to let EU legal system evolve and become more cohesive. Finally, it is the Court, who discovered fundamental rights and constitutionalize them in the form of general principles of EU law. Being accused of judicial activism on the one hand, conducting sometimes very difficult dialogue with Constitutional Tribunals of Member States, the Court has done its best to push the process of integration forward and make the very complicated system working. Today, with the existence of European Charter of Fundamental Rights and expected accession of European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms the system of protection of fundamental rights in European Union is almost completed. Without a courage of the Court of Justice in this field of its activity to break new grounds and conquer new territories, influencing legal reality in Member States to implement noble ideas established by founding fathers of the European Union, most of them would have never come true. The protection of fundamental rights constitute one these ideas, which has been successfully implemented bringing credibility to the European Union.