

The Human Rights in EU Law.

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SUMMARY: 1. Preliminary ruling procedure in the EU law. – 2. Historical background of Human Rights in the EU. – 3. Idea of accession of the EU to the ECHR.

1. National courts of the members states of the EU are also European courts and they are primarily responsible for the proper application of EU Law. As European parliament had pointed out: «EU law would remained a dead letter if it is not properly applied in the Member States, including by national judges, who are therefore the keystone of the EU judicial system and who play a central role in the establishment of a single European legal order»⁽¹⁾

But, national courts do not have full jurisdiction to decide disputes on EU Law brought before them, since the ECJ hold the sole power to declare act of EU law invalid and have the final word in questions of interpretation of EU Law⁽²⁾. For this purpose, the Treaty provides a mechanism of preliminary ruling procedure, regulated by article 267 of TFEU⁽³⁾. Where

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⁽¹⁾ See *European Parliament resolution of 9th July 2008 on the role of the national judge in the European judicial system*, 2007/2027(INI) (access on 10th July 2010), p. 1.

⁽²⁾ H. BRIEM, *The preliminary ruling procedure as part of a complete system of remedies*, Master thesis, (Faculty of Law, University of Lund, 2005), p. 29., available at [http://web2.jur.lu.se/Internet/english/essay/Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/\\$File/xsmall.pdf?OpenElement](http://web2.jur.lu.se/Internet/english/essay/Masterth.nsf/0/2D469AC1BEBB44B6C1257013004071CB/$File/xsmall.pdf?OpenElement) (access on 13th April 2010).

⁽³⁾ The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19/3b of the Treaty on European Union (OJEU 2008 C 115, p. 13) and Article 267 of the Treaty on the Functioning of the European Union (OJEU 2008 C 115, p. 47) .

such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon⁽⁴⁾. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court⁽⁵⁾. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay⁽⁶⁾.

The ECJ described the role of Article 267 of TFEU (ex. Art. 234 EC) as «essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of Community»⁽⁷⁾. There is strong consensus over the importance of preliminary ruling procedure both for uniform application of EU Law but also for the whole process of the European integration. Most of the landmark judgments by the ECJ (e.g. *Van Gend en Loos*, *Costa v. ENEL* and *Simmenthal*) were handed after a national court requested the ECJ to give a judgment on the interpretation of EU Law in a preliminary ruling.

Under the preliminary ruling procedure, the role of ECJ is to give an interpretation of EU law or to rule on its validity, not to apply that law to the

⁽⁴⁾ See Art. 267/2 of TFEU.

⁽⁵⁾ See Art. 267/3 of TFEU.

⁽⁶⁾ This is a new provision in par. 4 of art. 267 TFEU regarding a person in custody. It could be brought in connection with the *new urgent preliminary ruling procedure* (so called PPU – from French *procédure préliminaire d'urgence*). It is the new type of procedure or we can even say the sub-type of the preliminary ruling procedure that is applied only in the area of freedom, security and justice. See T. PETRAŠEVIĆ, *Novi hitni prethodni postupak za područje slobode, sigurnosti i pravde – PPU* [New urgent preliminary ruling procedure in the area of freedom, security and justice – PPU], 2, Hrvatska javna uprava, 2010, pp. 427-463, and A. LAZOWSKI, 'Towards the reform of the preliminary ruling procedure in JHA area', in S. BRAUM AND A. WEYEMBERGH (eds.), *Le contrôle juridictionnel dans l'espace pénal européen*, Editions de l'Université de Bruxelles, 2009, pp. 211-226.

⁽⁷⁾ See par. 2 of Judgment in case C-146/73 (Rheinmühlen).

factual situation underlying the main proceedings, which is the task of the national court⁽⁸⁾. It should be also mentioned that for the referring court, the preliminary ruling procedure is only one step of the national procedure⁽⁹⁾.

2. The EEC Treaty (1957) had no specific provisions on the protection of fundamental rights - economic integration. In a series of early cases, the CJEU even refused to recognize fundamental rights (e.g. Stork, Geitling, Sgarlata etc.) Because of that, some national courts reserved the right to declare Community law inapplicable if they deemed it incompatible with domestic constitutional provisions. The most famous case is *Solange I* (1974). The Court of Justice of the European Community started to emphasize the obligation to observe human rights in its own rulings, so in 1963, in case *Stauder v. Ulm* clarifies: «fundamental human rights are enshrined in the general principles of Community law and protected by the Court».

Since the EC did not have their own catalogue of human rights, the ECJ was compelled to seek inspiration elsewhere: «the constitutional traditions common to the Member States» and «international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories».

After that the CJEU developed significant case law concerning human rights (C-36/75, Rutili, [1975] ECR 1219; C-149/77, Defrenne - Sabena, [1978] ECR 1365; C-44/79, Hauer - Land Rheinland-Pfalz, [1979] ECR 3727 and C-155/79). This case law was later enshrined in EU law, in the Maastricht Treaty (TEU).

Solange II (1986): «in the sphere of competence of the European Communities, a standard of protection of Fundamental rights had arisen that had to be deemed equal in substance to that provided by the German

⁽⁸⁾ See point 7 of the Information note, cit. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

⁽⁹⁾ See T. ČAPETA, *Sudovi Europske unije. Nacionalni sudovi kao europski sudovi* [EU Courts – National Courts as European Courts], Zagreb, IMO, 2002, p. 251.

Constitution». BwG would no longer review secondary Community law on the basis of the fundamental rights of the German Constitution, as long as the European Communities, and in particular its Court, generally ensure an efficient protection of fundamental rights...

Art. F (Art. 6 of the TEU) stated that the Union «shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms».

But there was a persistent sense of unease that an organization as powerful as the European Union did not have its own binding catalogue of human rights. So, during the German presidency of Council on the 7th of December 2000, at the European Council in Nice, the European Charter of Fundamental Rights was proclaimed. The Lisbon Treaty invested the Charter with this legally binding status. On 1st December 2009, the Charter acquired the same legal status as the Treaties.

3. The sole idea of accession of the EU to the Convention is not the new one. The Commission was the first one who proposed the accession in 1979 and repeated in 1990. On 30th November 1994, the Council decided to seek the advice of the Court of Justice. The result was Opinion 2/94, in which the CJEU advised against accession. The Court observed that accession was impossible in the light of Community law since there was no firm legal basis for it⁽¹⁰⁾.

Ever since, things have significantly changed. Firstly, the new Treaty basis was introduced by the Lisbon. Art. 6(2) TEU states: «The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties». ⁽¹¹⁾ Furthermore, there is the Protocol 8, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the “specific characteristics” of

⁽¹⁰⁾ See more at: M. KUIJER, *The accession of the EU to the ECHR: a gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?*, in *Amsterdam Law Forum*, 2011, 3, pp. 17-32.

⁽¹¹⁾ Art. 6/2 TEU.

EU law. Apart from EU legal regulation in the Council of Europe legal order a new Protocol 14 in the Art. 59(2) introduced that: «The European Union may accede to this Convention».

Furthermore, Art. 47 TEU explicitly recognizes the legal personality of the EU and as an integral part *ius contrahendi*. Finally, Art. 218 TFEU (Lisbon) regulates the international agreements and in the Art. 218(11) TFEU gives the possibility for Member State, the European Parliament, the Council or the Commission to obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised⁽¹²⁾.

After the entering into force of the Lisbon Treaty, upon the recommendation of the Commission, the Council adopted a decision on 4th June 2010 authorising the opening of negotiations for an accession agreement. Draft Accession Agreement of the EU to the ECHR was adopted at 5th April 2013⁽¹³⁾. Based on the legitimacy under Art. 218(11) to obtain the Opinion of the CJEU, the Commission requested an Opinion of the compatibility of the Accession Agreement with the Treaties. Finally the CJEU published its negative Opinion on 18th December 2014.

⁽¹²⁾ Art. 218/11 TFEU.

⁽¹³⁾ Council of Europe , cooperation with other international organisations http://www.coe.int/t/dgbl/standardsetting/hrpolicy/Accession/default_en.asp accessed 15th August 2015.