

# International Standards for Securing the Protection of Fundamental Rights - the Role of the Judiciary

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1.

In order to introduce our discussion in this workshop, I want to quote the articles of the ECHR<sup>1</sup> and of the Charter of Fundamental Rights of the European Union (the Charter of Nice)<sup>2</sup> that represent a sort of ideal and (at the same time) legal reference for our debate.

The comparison between the article of the ECHR and the articles of the Charter show how wide is the extent of the social transformations intervened between 1950 and 2001; how many "attacks" to the sphere of the privacy the evolution of the society had meanwhile produced; in what extent the world of the jurists has elaborated the responses to be given to these attacks, the new principles for the protection.

But I want to quote, too, the introduction and some excerpts of the very recent Communication<sup>3</sup> (hereinafter: the Communication) of the European Commission related to the Stockholm Program<sup>4</sup>

So. On one hand we have the legal bases for the interventions by the European legislators and, on the other hand, the announced program, by the European legislators, on the field of Freedom, security and justice, in particular, as far as the issues of the personal data and of their protection are concerned.

The Communication starts by taking act that:

"Respect for the individual and for human dignity, referred to in the Charter, is a core value in the area of freedom, security and justice. In this area without internal borders citizens can move freely and enjoy their rights fully. The system for protecting fundamental rights in the EU legal order is particularly well developed. Both the Union and the Member States can, for example, draw on the expertise of the Fundamental Rights Agency."

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<sup>1</sup> Article 7 - Respect for private and family life: Everyone has the right to respect for his or her private and family life, home and communications.

**Article 8 - Protection of personal data**

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

<sup>2</sup> **Article 8 - Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>3</sup> COM (2009) 262/4 - Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen.

<sup>4</sup> The Stockholm Program is to define the framework for EU police and customs cooperation, rescue services, criminal and civil law cooperation, asylum, migration and visa policy for the period 2010-2014. The Programme will be discussed at the informal ministerial meeting in Stockholm in July 2009 and ultimately adopted by EU Heads of State and Government at the Summit in December 2009.

And then it announces a sort of a political will:

“The Union's accession to the European Convention on Human Rights - a powerful political symbol - will complete this system of protection by encouraging the case law of the Court of Justice of the European Communities and of the European Court of Human Rights to develop in step.

The Union is an area of shared values, values which are incompatible with the crimes of totalitarian regimes. In the interests of reconciliation, the memory of crimes against humanity must be a collective memory, shared by us all. The Union must play the role of facilitator, respecting the approach that each State adopts.

These values provide the basis for European citizenship and respect for them is an essential criterion for membership of the Union. European citizenship complements, but does not replace national citizenship. It confers rights and obligations specific to European citizens which must be given practical and effective expression”.

And it passes to recall the generally accepted principles on the field of

“Protection of personal data and privacy

1. purpose,
2. proportionality and legitimacy of processing,
3. limits on storage time,
4. security and confidentiality,
5. respect for the rights of the individual and
6. control by an
7. independent authority”.

2.

We must greet with the utmost interest the announcement on the accession to the ECHR. In a very close future we shall expect a general strengthening of the protection of the Fundamental Rights.

But at the same time we must recall that something - on this field - was already happening.

A mechanism of “multilevel judicial protection of the Fundamental Rights” was already intervened thanks to some institutional practices. Thanks to the decisions by the Courts.

In our Continent we have two International Courts, whose respective competences on the “European territory” cross each other, but cross the competences of the National Courts, too.

A situation and a crossing that leads to a sort of short circuit.

Each one of the European Courts belongs to an over-national system and is provided not only with a body of norms directly applicable, but also with norms that represent a sort of Fundamental Law of its own; these Courts are the “Judges of the Laws” in their own domains, thus they enjoy an institutional position quite of constitutional rank.

The European Courts of Human Rights has been considered among “the (at least) materially constitutional Judges of the Freedoms”<sup>5</sup>. While, as far as the Court of Justice of the European Union is concerned, it's enough to remind that the Court must ensure that in the interpretation and application of the Treaties the law is observed; that the Member State fulfil their obligations under the Treaty; it is empowered to review the legality of acts adopted jointly by the other European Highest Institutions; the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty.

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<sup>5</sup> M.A. EISSEN, L'interaction des jurisprudences constitutionnelles nationales et de la jurisprudence de la Cour européenne des Droits de l'homme, in D. ROUSSEAU et F. SUDRE (a cura di), Conseil constitutionnel et Cour européenne des Droits de l'homme. Droits et libertés en Europe, Paris, STH, 1990, 138.

If we consider the Council of Europe States, we can realise that half of the 46 Countries have a Court or Tribunal explicitly defined as “constitutional”.

The Judges by the 46 Countries of CE are subjected to their own Fundamental Law and to that other Fundamental Charter represented by the ECHR; among them there are the Judges by the 25 Countries that must apply the UE norms. Both of them have a further duty; they must interpret the National norms in a “faithful way”, in conformity with the European norms in force in their Countries; to be more exact, an interpretation that shall be faithful to the “living Law”, that is to the meaning of the European norms given by the interpretation of the competent European Court.

### 3.

It is a long since the Court of Luxembourg bridged the initial its gap on the issue of Human Rights.

Its jurisprudence on this field started with the quite famous cases *Stauder* by 1969<sup>6</sup> and *Internationale Handelsgesellschaft*<sup>7</sup> by 1970; into which we can read that the respect of Fundamental Rights is a constituent part of the general Principles of the Law, whose respect is ensured by the Court of Justice. In some extent the jurisprudence quite preceded the “work” of the Legislator, quite prepared a cultural field, so that thanks to the Treaties of Maastricht and Amsterdam, we arrived to have article 6 that solemnly states:

“The Union shall respect 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”.

And the last step has been the Charter of Fundamental Rights of the EU, into which we can find some definitions, some wider definitions of the Rights and the Freedoms as they were defined by the ECHR.

And, as far as the Charter is concerned, we must recall the, notwithstanding its “weak formal existence” (indeed, it was only proclaimed), the Courts began quite immediately after this proclamation to apply its norms. It deals with not only a mere reference, an argument aimed to strengthen a conclusion that some different (and formally binding) norms already allowed. Indeed, there was a further use of the Charter. And the most evident example is given by a decision of the Court of Strasbourg<sup>8</sup>. The case dealt with some administrative Laws of the UK system; among other points, the Court concluded that there was a violation of article 12<sup>9</sup> of the Convention and what is relevant in our debate is an argument adopted in the reasoning of the decision. Indeed when examining the legal notion of family, we can read the following:

“The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women”.

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<sup>6</sup>Decision 12 Novembre 1969, case 29/69.

<sup>7</sup>Decision 17 December 1970, case 11/70.

<sup>8</sup> Case of Christine Goodwin v. The United Kingdom (*Application No. 28957/95*) 11 July 2002

<sup>9</sup> Article 12 - **Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

In this case we are in front of an utilisation of a not binding legal text<sup>10</sup> as a tool aimed to extend the contents of a right not provided for and then not protected by the ECHR.

I wanted to mention this particular decision only as a sort of paradigmatic example of a phenomenon that is interesting not only the two European Courts, but a very great deal of national Courts as well.

The institutional practices are considering the Charter of Nice as a source of rights, a legal and quite binding source of rights.

The extent of this phenomenon is so wide the we (I'm referring to my association Medel, along with two Italian cultural institutions) to study this jurisprudence, involving in this scientific work searchers all around Europe. A web site has been created, [www.europeanrights.eu](http://www.europeanrights.eu); it hosts the abstracts of the judicial decisions (by the two European Courts, but by the National one as well) that make a reference to the Charter, along with notes of commentary.

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<sup>10</sup> Article 9 - Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.