Introduction

After the Second World War, European co-operation and integration efforts took two different strands. One strand consisted of the focus on democracy, human rights and the rule of law, with the Council of Europe (1949) and the European Convention on Human Rights (ECHR) as one of its main institutional and legal components. Another strand consisted of economic integration, starting with the European Coal and Steel Community (1952) and later the European Economic Community (1957) and the European Atomic Energy Community (1957).

The institutional framework of the first strand, the Council of Europe, was entrusted with a broad agenda but with a rather modest level of integration. The story of the birth and development of the European Communities and later the European Union (EU) is quite different: The process started as “deep” integration, with supra-national features, including the establishment of the Court of Justice of the European Communities (European Court of Justice, ECJ) in Luxembourg already in 1952, but with an integration agenda of relatively limited scope.

As there were no explicit human rights/fundamental rights provisions in the founding Treaties of 1951 and 1957, and the Community was not a party to the ECHR or any other human rights convention, the introduction into Community law of a system of protection of fundamental rights is essentially a story of judge-made law. Through

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the cases of Stauder (1969), Internationale Handelsgesellschaft (1970) and Nold (1974), the ECJ made it clear that fundamental rights form part of the general principles of Community law whose observance the Court is called upon to ensure.

In the earlier days of European integration, however, the Court of Justice held that it was not competent to examine whether European Coal and Steel Community decisions were in violation of fundamental rights principles of a national constitution.\(^2\) This finding as such is not surprising, as the Court was and is called upon to interpret and apply Community law, not national law, and had to keep in mind the need for uniform application of Community law.\(^2\) But the fact that the Court stopped there and did not embark on any effort to develop a fundamental rights regime at Community level, despite a hint in this direction by its Advocate General,\(^4\) can also be explained by the limited material scope of European integration as perceived in the 1950s and early 1960s.\(^5\) In such a limited context of economic integration, the Luxembourg judges did perhaps not think it necessary to limit the powers of the Community institutions by restraints imposed by a largely unwritten set of fundamental rights.\(^6\)

During the 1960s, and particularly after the principles of direct affect and supremacy of Community law had been asserted in Van Gend en Loos (1963) and Costa v. ENEL (1964),\(^7\) concerns were expressed notably in German and Italian constitutional doctrine and case-law about the possibility of conflict between a Community law declared supreme but bereft of a system of protection of human rights/fundamental rights, on the one hand, and national constitutional bills of rights, on the other.\(^8\)

The first answer of the ECJ came in Stauder, where the Court referred to the fundamental rights of the person enshrined in the general principles of Community law whose observance the Court ensures (“les droits fondamentaux de la personne compris

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\(^5\) A. Rosas, ‘The Legal Sources of EU Fundamental Rights’, in Colneric, supra note 2, pp. 87–102, here at p. 87.

\(^6\) This hypothesis is suggested by H. Rasmussen, On Law and Policy in the European Court of Justice (Martinus Nijhoff, Dordrecht, 1986) pp. 395, 403–440, who also mentions the alternative (according to him, less likely) explanation that the Luxembourg judges felt that in the absence of a Community Bill of Rights, it was up to national judges to ensure the necessary protection.

\(^7\) Case 26/62 Van Gend en Loos [1963] ECR 1 (which established that not only regulations, but also primary law may have direct effects and thus may be invoked directly by individuals before courts and authorities); Case 6/64, Costa v. ENEL [1964] ECR 585.

\(^8\) Pescatore, supra note 3, pp. 634–636. See also the Order of 18 October 1967 of the German Constitutional Court, VVerfGE 22, pp. 293, 298, 299.