

Article

THE ROLE OF HUMAN RIGHTS IN SETTING THE BOUNDARIES OF SOVEREIGNTY AND THE AUTONOMY OF THE EU LEGAL ORDER

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ABSTRACT

Human rights in the eighteenth century were regarded as acquired rights within a certain legal context, for a specific legal community. However, during revolutions, such as in France, they have also been seen in the light of ‘universal natural law’. At the same time, constitutional rights may also be seen as further developed civil rights. In that case, however, not much is left over to do for the emancipatory power of human rights when it comes to the inviolable individual, human dignity and the humanization of society. Human rights should be placed at the forefront when devising the State’s Governmental apparatus and continue to function in the light of their universal origins. It is, therefore, disappointing that the European Union has taken it upon itself to determine the content and reach of human rights based on the autonomy of the European legal order by refusing to join the European Convention on Human Rights.

Keywords: EU Law; Human Rights.

Introduction

The state’s powers of setting boundaries appear clearly from a number of characteristics of the state: it exercises authority over a certain community, in a certain territory, by means of an organization set up to this end.¹ These characteristics illustrate the fact that although the state projects a self-image of a liberal, open society, its setting of boundaries entails a certain degree of isolation. The importance of citizen rights in mediaeval cities is well known: being registered as a *burgher* of a city gave a certain protection against feudal powers on the one hand and brigands on the other. As states, rather than cities came to be the basis on which societies were organized, a national government replaced the city council when it came to selecting people, values and policies. Similar to the old free cities, national states also want to be free from the interference of higher human authorities with objectives that differ from their own, and to be protected against chaos. National sovereignty gradually developed into a key principle of international law; for example, Art. 2 of the United Nations Charter speaks of ‘the principle of the sovereign equality of all its members.’

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¹ T. Koopmans, *Compendium van het staatsrecht*. Edited by Th.L. Bellekom, A.W. Heringa, J. van der Velde, L.F.M. Verhey. Deventer: Kluwer, 2002, p. 3.

In line with this principle, free states do not wish to be bound by the decisions of others against their own assent. The demands of the democratic constitutional state (including the separation of powers), are often less well organized at the international level than at the national level, where the state as a whole is supported by a government contract involving mutual obligations between government and citizens. However, the desire of sovereign states to be able in principle to determine which rules they accept, should not conflict with the requirements of an international system. States can sign treaties on a voluntary basis, they can join international organizations, they can accept customary law and they can recognize the jurisdiction of international courts. While there is no strict hierarchy between treaties, customary law and legal principles in public international law, many international rules are reasonably well complied with in practice.

Law is the sum total of rules and regulations that serve to support the functioning of societies, which are implemented by the necessary authority and are enforced by the necessary powers. A distinction should be drawn here between positive law and natural law. Positive law is the law that applies in a given concrete society, determined by chance and historical developments, and implemented by whoever happens to be in authority, or based on the society's convictions, and largely enforced by states. Natural law is a philosophical construct that applies to all societies independent of social factors that happen to prevail, and whoever happens to be in authority. It is derived from the nature of human beings and society.

The atrocities that took place during the Second World War, among other things, made it clear to the international community how degraded the law of a sovereign national state can be. Natural law offers a possible means of evaluating bad laws from a legal perspective that is independent of random factors and chance determination of who happens to be in power. The existing law is evaluated on the basis of legal principles governed by rationality and in line with the rational nature of human beings. As a result, natural law has moral authority.²

The extent to which this authority was growing became apparent through the recognition of human rights in international law with the founding of the United Nations. Donnelly identified the international normative universality of human rights.³ These rights were not new. They had been formulated in revolutionary times as claims against the absolutist state and as a reflection of the belief that individuals have a right to a certain degree of autonomy and freedom as a basis for a meaningful life, and that the state has a duty to respect and guarantee these rights. In many cases, it is a question of boundaries that should not be crossed by totalitarian regimes. Socialist views, among others, helped to establish the insight that such freedom can only be enjoyed if a number of socio-economic conditions are met.⁴

At the same time, human rights were seen in many constitutional states as the core of the rule of law, the 'highest law of the land' that could be used as a yardstick to test the validity of other norms. Human rights represent the ultimate boundary for the legislative, executive and judicial powers. This is reflected in the structure of the Council of Europe, but also in the way supranational powers are implemented in such international organizations as the European Union. EU law is interpreted as a new legal order, quite separate from international law. Despite regulations implemented by UN agreements, the European Court of Justice held that the EU regulations allowing listing and asset freezing against Kadi breached fundamental rights under

² U. Dhondt, *Natuurrecht*. Leuven: Acco, 1985, p. 3.

³ J. Donnelly, *Universal human rights in theory and practice*. Ithaca and London: Cornell University Press, 1989.

⁴ P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*. Edited by M.M.T.A. Brus, N.M. Blokker and L.A.J. Senden. Deventer: Kluwer, 2008, p. 359.

EU law. The constitutional law of the European Union was considered higher than international rules adopted in the framework of the United Nations.⁵ However, Opinion 2/13 of the European Court of Justice on the accession of the EU to the Convention on Human Rights gave priority to the autonomy of the EU legal system as the judges in Luxembourg were afraid that the EU's monopoly on dispute settlement was threatened. Giving priority to the protection of the EU's legal autonomy conflicts with the objective of EU accession to the European Convention on Human Rights. The question then arises of *whether human rights are fundamental rights granted by sovereign powers in a legal order, or innate rights arising out of universal natural law*.

The present article will start by discussing the limits imposed on sovereignty by natural law (section I). This is followed by a discussion of the limits of the government contract (section II) and of the differences between innate rights and those granted by the government (section III). The next topic is the commitment of the European Union to human rights (section IV). Finally, the article closes with a conclusion.

I. The Limits Imposed on Sovereignty by Natural Law

The concept of state sovereignty is intimately connected with the dissolution of what was seen in the Middle Ages as the unity formed by the spiritual authority of the Pope and the secular authority embodied in the German head of the Holy Roman Empire, the successor of the Roman Emperor. This oppressive unitary rule already gave rise to tensions during the Middle Ages and was gradually abandoned starting in the 16th century, under the influence of the Reformation, among other things.⁶ The system of sovereign states was affirmed by the Peace of Westphalia in 1648, which also saw the formal recognition of the Republic of the Seven United Provinces of the Netherlands in international law.

It followed logically from the independence of the state that a state should have a supreme power, enabling it to play a cohesive and a legislative role. The term used to denote this supreme power was 'sovereignty', which went back to the time of absolute monarchy when the highest power of the land and the person of the ruler, *suprema potestas*, were seen as united in the same individual. Sovereign states did not exist in a vacuum and wished to work together with other sovereign states in certain spheres; this led to the growth of agreements and codes of conduct that gradually developed into international law.⁷ In the framework of the attempt to create a strong French unitary state in the interests of law and order, the French jurist Jean Bodin (1530-1596) described the core of sovereignty in his *Six Books of the Republic* (1576) as 'the absolute and perpetual power of the Republic.' The positive right of the sovereign was decisive. Although Bodin regarded the ruler as subject to divine law and natural law, citizens could not derive any subjective rights from this.⁸

While other bodies, such as the Roman Catholic Church or a criminal gang, can also be seen as exercising organized authority over people in a certain geographical area, something more is

⁵ European Court of Justice, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council* [2008], ECR, I-6351.

⁶ M. de Blois, 'Soevereiniteit', Lukas van den Berge et al. (ed.), *Historische wortels van het recht*. Nijmegen: Ars Aequi Libri, 2014, pp. 263-272.

⁷ P.H. Kooijmans, *op. cit.*, p. 2.

⁸ J. Delbruck, 'International protection of human rights and state sovereignty', *Indiana Law Journal*, Volume 57, Issue 4, 1982, p. 567-578.

needed before such an organized unit can be called a state. This additional element is not just that the authority invested in a state is in principle the highest authority. It is also important that the authority is aimed at monopolizing the use of force to avoid internal conflicts and to guarantee internal and external security, and further that the authority can apply its power over all acts of all members of the community. The state, unlike other social communities, can enforce its authority. From a normative perspective, the state should in any case be constitutional and should be based on a government contract that places both government and citizens under mutual obligations. One of the aims of the government contract is to lay down natural human rights in writing, in order to underpin their legal validity.

This approach involving mutual obligations and the role of natural law brings us to the Dutch jurist Hugo de Groot, also known as Hugo Grotius (1583-1645).⁹ In his *De iure belli ac pacis* (1625), Grotius defines sovereignty as the highest authority whose actions are not subject to the legal powers of another, in the sense that they can be annulled by the will of another person.¹⁰ A distinction can be drawn between a communal and an individual holder of sovereignty. A communal holder of sovereignty is the state, an association of free individuals united by the interests of safeguarding legal rights and mutual benefit. An individual holder of sovereignty is a person, later a body or group of bodies within the state, that is invested with the highest authority. The English, for example, speak of the 'sovereignty of Parliament'. The sovereignty of the state has an internal aspect (relating to the power the highest authority exerts over its subjects) and an external aspect concerning the mutual relationship between states: sovereignty in the external sense includes legal equality, territorial integrity, freedom, political independence and the right to arrange one's international relations in accordance with one's own insights (possibly by the delegation of authority to an international organization).

Is the sovereign state subject to legal constraints? Grotius stated that it is, thus placing himself in opposition to the ideas of political realism, which favours *raison d'état*, as it was expounded by the Florentine diplomat Niccolò Machiavelli (1469-1527) in *Il Principe* (1513).¹¹ Machiavelli argued that rulers should *appear* to adhere to moral guidelines, but need not do so in practice; if reasons of state demand it, they can break their given word. Thus, Machiavelli states:

‘So it follows that a prudent ruler cannot, and must not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist. If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.’¹²

In contrast to Machiavelli, who shocked Europe with his ‘Bible of realpolitik,’ Grotius emphasized the duty of sovereign states to meet their legal obligations. But what justification can be given for the binding force of law? Grotius explained that it cannot be taken for granted that one party subjects himself to the will of another. It is not the power of the sovereign, but voluntary subjection that leads a free man to lose his freedom by subjecting of his own free will to the authority of another. Grotius emphasized that law is binding because it is based on an

⁹ J.K. Wright, ‘Historical thought in the era of the Enlightenment’, L. Kramer and S. Maza (ed.), *A companion to Western historical thought*. Oxford: Blackwell, 2002, 2006, p. 123-142.

¹⁰ Hugo Grotius, *De iure belli ac pacis* (1625). *The rights of war and peace, in three books*. Translation Jean Barbeyrac. Clark, New Jersey: The Lawbook Exchange, 2004, I.III.VII.1

¹¹ P. Findlen, ‘Historical thought in the renaissance’, L. Kramer and S. Maza (ed.), *A companion to Western historical thought*. Oxford: Blackwell, 2002, 2006, p. 99-120, especially p. 106.

¹² N. Machiavelli, *The Prince* (1513). Translated with notes by G. Bull. Introduction by A. Grafton. London: Penguin Books, 1961, 2003, p. 57.

agreement, and the binding force of an agreement is derived from the insight that it is better to comply with agreements than to break them. In turn, this insight is derived from natural law.¹³ This natural law, with its rational basis, indicates which actions are in accordance with man's rational and social nature. Grotius believed that human beings have a natural tendency to live in communities (*appetitus societas*). People are dependent on the help of others in order to meet their basic needs. It follows that their actions must support this communal life. This is why Grotius argued that keeping one's word is an essential condition for living together in peace. He went on to say that states have a similar duty to comply with international law, since they do not exist in isolation but rather are part of the community of all nations, the links between which are cemented by good faith. Grotius believed that international law does not serve the interests of the individual states so much as the interests of the international community as a whole. Since keeping one's word is one of the basic tenets of natural law, a crucial requirement for people to live in peace with others, it follows that treaties states make with other states must be honoured (*pacta sunt servanda*).¹⁴

II. The Limits of the Government Contract

While Grotius argued that sovereign states have a duty to comply with international law, Thomas Hobbes (1588-1679), in his work *Leviathan* (1651), defended the view that the sovereign should hold on to his sovereign rights. According to his political theory, only absolutism could prevent society from reverting into a 'state of nature' involving constant 'war of every man against every man' and ending in a life that was 'solitary, poor, nasty, brutish, and short'. He went on to say:

'The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly; is, to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will...'¹⁵

Hobbes saw the will of the ruler as the embodiment of the state. While protagonists of absolute monarchy in France based authority directly on the divine right of kings, Hobbes considered this authority to be founded on a social contract. 'The ruler's body is made up of the masses over whom he rules,' he wrote. Hobbes justified subjection to the will of the sovereign as essential for the preservation of law and order. It is noteworthy that he used the name of the horrendous sea monster Leviathan mentioned in the Bible to denote the sovereign state. The idea that the state may degenerate into a monster may have played a subconscious role here. It is further noteworthy that England – Hobbes' native land – and later Great Britain were spared absolutism, thanks to the Glorious Revolution of 1688.¹⁶

In Hobbes' opinion, there was not really any place for international law in international relations because of the absence of any supranational sovereignty. A number of sovereign states, all

¹³ C.W. Maris, F.C.L.M. Jacobs, *Recht, orde en vrijheid. Een historische inleiding in de rechtsfilosofie*. Deventer: Kluwer, 2011, pp. 130-131.

¹⁴ M. de Blois, *op. cit.*, p. 268.

¹⁵ Thomas Hobbes, *Leviathan* (1651). Edited with an introduction and notes by J.C.A. Gaskin. Oxford: Oxford University Press, 1996, 2008, ch. Xvii, nr. 13, p. 114.

¹⁶ J. Merriman, *A history of modern Europe*. Third Edition. Volume One. From the Renaissance to the Age of Napoleon. New York, London: W.W. Norton & Company, 1996, 2010, p. 244.

aiming at self-preservation, co-existed in a kind of state of nature. International public law set the rules for this coexistence.¹⁷ The average citizen had little or no input here. This is one of the reasons why international public law is still regarded as a horizontal or decentralized system. The legal philosopher John Austin (1790-1859) was also opposed to the idea that sovereign states had a duty of compliance with natural law or divine law. He was sceptical about the claims of international law, since he defined law as the commands of a sovereign who is habitually obeyed, which are backed up by threats of sanctions. He saw the sovereign as the highest authority in a community, who does not owe obedience to any higher authority. Austin wanted a concept of law that was independent of morals and etiquette, and was prepared to concede the possibility that law may consist of very unjust commands.¹⁸ The legal philosopher H.L.A. (Herbert) Hart (1907-1992) took a more moderate approach to legal positivism. He believed that law is more than obedience to the commands of a sovereign authority, backed up by threats of sanctions and custom, and looked for the foundations of law not in the principles of natural law but in the social reality of legal practices that are seen by those subject to them – and in particular by those in authority – as based on binding rules. A custom can be perceived by external examination, but Hart emphasized that a rule is also based on a normative awareness that behaviour should comply with the rule. This approach does give a basis for justification of international rules, for even if there are no supranational bodies to whom sovereign states owe obedience, there are many international rules based on treaties and custom that are followed in practice and that can be regarded as providing binding guidelines for proper behaviour, in any case by legal authorities.¹⁹

Russia's recent annexation of the Crimea in 2014 was a contravention of the rules of international law. This illustrates the weakness of basing international rules on social practice, since the practice – at least for the moment – is that Putin remains in power. De Blois formulated the fragility of this justification of international law on the basis of social practice as follows: 'The rule *pacta sunt servanda* would lose its validity if a sufficiently large number of states and other international actors decided to follow Machiavelli's advice.'²⁰ Hart regarded the legal system primarily as a social fact, but he did mention the need for a 'minimum content of Natural Law' to be present.²¹ From this perspective, we are not talking about 'eternal laws,' but rather about a number of fundamental standards, such as a prohibition against violence, that should be present in every legal system because such standards are necessary for the survival of any society.²² As applied to states in the international system, 'sovereignty' can be seen as a mistake and as a barrier to the realization of human values.²³

As states have been increasingly working together to realize certain interests, international law has increasingly become not only the law of coexistence but also the law of joint efforts of cooperation, and as such, has had more impact on the individual citizen. The belief in international law has been growing, leaving the last word not to individual sovereign states but to the 'global rule of law.' The UN Charter has been interpreted in this light as the 'constitution

¹⁷ P.H. Kooijmans, *op. cit.*, p. 3, 5.

¹⁸ J. Austin, *The Province of Jurisprudence Determined* (1832, 1861). London: Weidenfeld and Nicolson, 1954.

¹⁹ H.L.A. Hart, *The Concept of Law* (1961). Oxford: Clarendon Press, 1994 (2).

²⁰ M. de Blois, *op. cit.*, p. 271.

²¹ H.L.A. Hart, *op. cit.*, pp. 193-194.

²² J.W. Sap, *Decency versus Justice. The Call for Morality in the Netherlands*. Assen: Van Gorcum, 1997, p. 40.

²³ L. Henkin, 'Human Rights and State "Sovereignty"', *Georgia Journal of International and Comparative Law*, 25, 1996, p. 31-45.

of the international community.²⁴ Thinking along these lines, Jürgen Habermas explicitly argued in favour of ‘cosmopolitan law and a state of peoples that set aside the sovereignty of its Member States in view of creating a world community of equal and free world citizens.’. He rejected the distinction between ‘moral’ human rights and ‘legal’ fundamental rights.²⁵ Very shortly after this, Habermas withdrew his argument in favour of a federal world state, speaking instead of a multi-level world order with three legal systems, a world organization for peace enforcement and maintenance of human rights, regional organizations such as the European Union to take care of economics and the environment, and national states for cultural affairs.²⁶ Such a system would ensure universal protection of human rights, for everyone everywhere, as it would lead to a unique form of inclusion without exclusion. The validity of the legal boundaries of national and regional legal systems would then become subordinate to the unlimited power of a universal legal system. National and regional particularism in matters concerning human rights would then have to give way to the ‘unlimited dictates of universal reason.’.

Is this step from regarding human rights as moral rights, to seeing them successively as fundamental rights and then as legal rights – unless a manifold of individuals are deemed to take up the first-person – possible plural perspective of ‘we’? Hans Lindahl doubts strongly whether human rights can do the job Habermas wants them to do, to include without excluding.²⁷ Lindahl does however agree that ‘as the manifestation of an irredeemably broken universality, human rights retain a critical function with respect to legal orders without becoming a totalizing category. Human rights are not so much the archetypical “rights of others,” as rather the rights of strangers. Human rights evoke the normative blind spot of a collective’s legal order.’ According to Lindahl, they summon us, the collective, to political self-restraint.²⁸

Natural law can play a role in facilitating the step from moral human rights to legal fundamental rights. Natural law is already a kind of law, and it is related to the positive law of a particular community (which may be a supranational community). Natural law can be regarded as a critical study of the standards required by society, which brings us into the field of ethics. Where are the boundaries of the contract situated? Natural law occupies an intermediate position between positive law and ethics, and can help to avoid the situation where the sovereign state unilaterally determines the content of the fundamental rights.

Lindahl’s comments indicate that the initial optimism expressed by Habermas on the subject of universal civil rights, however noble its intention, needs to be tempered to a certain extent. There is no need to discard the idea of the sovereign state. In fact, sovereign states are needed more than ever to maintain order and a peaceful existence in a divided and fragmented world, in the interests of general welfare. What is required is critical examination of the legislation and policy of sovereign states and international structures and organizations as the EU, to ensure

²⁴ B. Fassbender, ‘The Meaning of International Constitutional law’, in: N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*. Cambridge: Cambridge University Press, 2007, pp. 307-328.

²⁵ J. Habermas, *The Inclusion of the Other: Studies in Political Theory*. Translation Ciaran Cronin and Pablo de Greiff. Cambridge: Polity Press, 2005, pp. 181, 190.

²⁶ J. Habermas, *The Divided West*. Translation Ciaran Cronin. Cambridge: Polity Press, 2006, p. 136.

²⁷ H. Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*. Oxford: Oxford University Press, 2013, p. 243.

²⁸ H. Lindahl, *op. cit.*, p. 248.

that society is provided with the right standards required for general welfare. Natural human rights will need to play a permanent role in this critical examination.

III. The Difference between Innate Human Rights and Fundamental Rights Granted by the Government

Where do human rights come from? It is fascinating to trace the development of this concept over the ages, from the breakthrough of the idea of equality. This concept, fostered by the ancient Stoic philosophers and the literal breaking of boundaries by Alexander the Great, led to the disappearance of divisions between the Greeks and the Barbarians. The Stoics claimed that people are equal and are born free; Christianity subsequently embraced these ideas. Everyone is equal in the eyes of God, but there was great inequality on earth during the Middle Ages. Rights and privileges were accorded to groups such as the Guilds, or through the *Magna Charta* of 1215 to the Barons. There were not yet any fundamental rights or human rights in the modern sense of the word.²⁹

The conflict between the positive law laid down by the ruler and the principles of natural law was resolved by a number of revolutions with important international resonance: the Reformation, sparked off by Martin Luther's publication of his Ninety-Five Theses in 1517, the Netherlands (1579, 1581, 1787), England (1649, 1688), America (1776), France (1789) and Russia (1917). People had recourse to Parliament in their search for freedom and civil rights. This development is particularly visible in England, where great attention was paid to legal process and Parliament became much more powerful – especially in the 17th century. People's natural civil and human rights were promulgated. The American Declaration of Independence speaks of certain inalienable rights to which people are entitled by the laws of nature, while in Europe emphasis was placed more on political rights. Political theories claimed that the state was based on a contract, either between free individuals (the social contract) or between citizens and their administration (the government contract). The world would never be the same again after Jean-Jacques Rousseau introduced the idea of the *volonté générale* (general will) as a basis for the doctrine of popular sovereignty and human equality. Rousseau believed (incorrectly) that the *volonté générale* would provide a sufficient guarantee of the fundamental rights of man.³⁰

Rousseau took a risk when he postulated that human rights are conditional on the acceptance of a social contract. Robespierre, one of the key figures of the French Revolution, kept a copy of Rousseau's book *Du Contrat Social* next to his bed. Rousseau's rejection of natural law leads to a rejection of natural rights. It is better to assume, with Grotius, that society is a natural phenomenon, and that people have certain inalienable rights to which they are entitled by the laws of nature. People do not have natural rights on the basis of the social contract; rather, human rights predate the state. American politicians emphasized that man and his rights are created in the image and likeness of the Creator.³¹

The concept of fundamental rights is derived from the tension between the all-powerful state - the sea monster Leviathan that gobbles up all rights of the citizens – and the state based on the idea that the individual, who should be granted individual freedoms, is guaranteed an autonomous field for his endeavours. It is hardly surprising that any discussion of fundamental rights focuses on certain key dates such as 1776 and 1789, when the revolt of the American and

²⁹ P.C. Kop, *Mens en Burger. Een Geschiedenis van de Grondrechten*. Zutphen: Walburg Pers, 2009, pp. 24-25.

³⁰ P.C. Kop, *op. cit.*, pp. 152-153, 276.

³¹ J.A. Hofman, J.W. Sap and I. Sewandono, *Grondrechten in Evenwicht*. Deventer: Kluwer, 1995.

French people, against what they saw as intolerable oppression by the sovereign, ushered in a new era. The somewhat egoistic nature of the rights acquired in this way is understandable, in view of the suffering that preceded them.³² Universalism has to start somewhere.

It is striking how quickly the European elite dropped the ideas of popular sovereignty and human rights, rationalism and a constitution, in favour of sovereignty of the state and tradition. During the Bourbon Restoration following the fall of Napoleon, the spirit of revolution had to go back into the bottle. The freedom of the people was suddenly a path that could no longer be followed, and the people were once more regarded as subjects without a voice, rather than as citizens who shared the task of governance. Once again, they heard the voice of Louis XIV of France, saying *L'état, c'est moi*.³³ Early 19th-century Dutch constitutional law echoed the same attitude.³⁴ It was not until 1983 that the Dutch Constitution started with a list of fundamental rights.³⁵

The study of constitutional law in 19th-century Germany was so advanced that the field of fundamental rights was mapped out in great detail, turning this into a sort of branch of administrative law. This left a blind spot, since the emancipatory power of fundamental rights tended to be forgotten.³⁶ The belief that a status quo concerning the significance of the fundamental rights had been reached led to a tendency among scholars to focus on the history of these fundamental rights, which fitted in well with certain ideological or national interests. Many different theories were developed concerning these rights. These ranged from total rejection and absolute refusal to believe that they even existed, and defence on the basis of a Christian view of the state or of natural-law considerations, to a partial recognition on the basis of the sovereignty of the state, which may or may not be combined with strictly legalistic considerations concerning subjective public law.³⁷ At the same time, proponents of the historical law school tried to break with the revolutionary ideas of the abstract-mathematical school. Reactionary thinkers like De Bonald, De Maistre, De Lamennais, Von Haller, Adam Müller and Von Görres did their best to re-establish the legal and constitutional systems of the *Ancien Régime*.³⁸ Friedrich von Gentz (1764-1832) emphasized the importance of faith, and of the Church as an institution. He went so far as to regard any sympathy with the views of Martin Luther, and in particular his Ninety-Five Theses (published in 1517), as the seeds of revolution. Von Gentz was against all forms of political representation.³⁹

³² B. van Roermund, 'Migrants, Humans and Human Rights', in: Hans Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*. Oxford: Hart, 2009, pp. 161-182.

³³ P.C. Kop, *op. cit.*, pp. 159-161.

³⁴ Though moderated by the king's acceptance of sovereignty subject to guarantees concerning the introduction of a constitution. See J.W. Sap, *The Netherlands Constitution, 1848-1998. Historical reflections*. Utrecht: Lemma, 2000, p. 92.

³⁵ J.W. Sap, 'De aanbeveling van de Nationale Conventie om een Constitutioneel Hof in te stellen', *NJCM-Bulletin. Nederlands Tijdschrift voor de Mensenrechten*, jaargang 32, nummer 5, 2007, pp. 590-602.

³⁶ P.C. Kop, *op. cit.*, p. 237.

³⁷ P. C. Kop, *op. cit.*, p. 225.

³⁸ H.J. van Eikema Hommes, *Hoofdlijnen van de geschiedenis der rechtsfilosofie*. Deventer: Kluwer, 1972, p. 159.

³⁹ P.C. Kop, *op. cit.*, pp. 226-227; H. Brandt (ed.), *Restauration und Frühliberalismus 1814-1840*. Darmstadt, 1979, p. 216.

It was difficult for Germans to admit that Germany had been deeply affected by the French Revolution and Napoleon.⁴⁰ Many German jurists in the second half of the 19th century regarded fundamental rights as no more than objective legal norms. According to this theory, law and fundamental rights were all derived from the sovereign state. Fundamental rights were primarily considered as norms to be followed by the state powers, and certainly as no more than indications for the administration. In contrast, the theory of subjective public law believed that all legal orders were based on certain perceptions of rights and duties, and that fundamental rights represented limitations on the will of the state. In this view, there is a certain legal relationship between the state and the individual, from which it follows that individual rights are subjective rights. It will be clear that this view of fundamental rights, no more than objective legal norms, leaves a blind spot in which the claims of natural law to universal validity disappear.⁴¹ There are links between escapism (the wish to escape from reality), romanticism (where behaviour is largely guided by feelings) and biologism (the attempt to explain human life on a biological basis, with reference to such ideas as evolutionary advantage and survival of the fittest), which have been exploited by Fascists in times of crisis and unemployment, to justify their ethnic cleansings.

Georg Jellinek (1851-1911), a German public lawyer who had to leave Vienna in 1889 because of his Jewish roots, was a shining exception to this rather dismal picture. His studies of the history of law focused on the concrete content of human rights and civil rights, and on a comparison of the various 18th-century explanations of these rights.⁴² He regarded American views on this subject, and the American Revolution, as correct and organically anchored in the English legal system, as opposed to the French Revolution which he saw as an erroneous break with history. The French Revolution (and the accompanying Terror) met with very little sympathy from conservative Germany at the end of the 19th century.⁴³ Now it is true, of course, that each country develops in its own way. It is impossible to transfer the developments in the former English colonies on the East Coast of North America to France without making substantial corrections to take local conditions and national character (*Volksgeist*) into consideration. Any textual comparison in this field will have to take differences in concepts and circumstances into account. Nevertheless, the basic ideas underlying the various revolutions that took place at the end of the 18th century in the search for human dignity, do display marked similarities.

When considering the contrast between American and French approaches to revolution, Jellinek furthermore stressed the great significance of the struggle for freedom of conscience and freedom of religion, the mother of all fundamental rights. He suggested that it might not be appropriate to consider the French Revolution as the only source of subsequent fundamental rights, thus allying himself with an influential approach that was also supported by the young Abraham Kuyper.⁴⁴ The constitutional developments on the American East Coast came long before the French Revolution, and were partly based on the structure of a trading company

⁴⁰ H. Liebersohn, 'German historical writing from Ranke to Weber: the primacy of politics', L. Kramer and S. Maza (ed.), *A companion to Western historical thought*. Oxford: Blackwell, 2002, 2006, p. 166-184, especially p. 170.

⁴¹ P.C. Kop, *op. cit.*, p. 238.

⁴² G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte*. Leipzig, 1895, 1904, 1919, 1927.

⁴³ P.C. Kop, *op. cit.*, p. 253.

⁴⁴ A. Kuyper, *Het Calvinisme. Oorsprong en waarborg van onze constitutionele vrijheden. Een Nederlandse gedachte* (1874). Edited by J.W. Sap and H.E.S. Woldring, and turned into contemporary Dutch by L.W. Lagendijk. Kampen: Kok, 2004.

with shareholders. They were in themselves sufficient to provide a measure of support for Jellinek's theory.⁴⁵

It is characteristic of the various declarations of rights that have been formulated, that fundamental rights apply not only to established citizen, but to everyone, irrespective of class.⁴⁶ Moreover, the great philosopher John Locke argued for the existence of innate rights, derived from natural law on the basis of the premise that man is a rational, moral free being.⁴⁷ Freedom of opinion, which is both a human right and a civil right, is of primary importance here. Citizens can demand an appropriate attitude from the government concerning such subjective rights.⁴⁸ The essence of fundamental rights is that they allow autonomous individuals to develop freely and ensure them protection against undue interference from the state or other socio-economic, political or socio-cultural powers.⁴⁹

The conviction that gradually grew in North America towards the end of the 18th century, was that society was an apolitical system that worked best without external interference. It was considered that a simple democracy could govern itself. After all, there was the common law. Involvement of the legislator was hardly necessary, since human rights were in principle anchored in society. A Bill of Rights, an expression of common sense, was mainly needed for propaganda purposes. Liberal thinkers regarded the state as a necessary evil, which was only required to correct the course steered by society in cases of emergency. Man is born free, and does not receive his freedom as a gift from the state (which is regarded more as a threat than as a benefactor). One of the purposes of declarations of human rights in North America was to ensure a free economic life. The government was only supposed to intervene in the people's economic life, if external factors led to a crisis. One of the purposes of human rights was to ensure that the government did not interfere in the affairs of citizens, and to guarantee freedom of opportunity both in involvement in production and trade, and in involvement in public debate.

The American vision was defended against the background of a relatively simple economy, backed up by the principles of the common law. However, both Rousseau and the Physiocrats realized that in the case of a more complex economy like that of France, the relationship between civil society and the state could only be determined against the background of society as a political system. The morality of new citizens is also shaped by the state, which has its own moral pretensions involving duties as well as rights for the citizens. This may be one of the reasons for the difference between the welfare states of Western Europe and North America, where the government is regarded more as a necessary evil and the separation of powers between the legislative, executive and judiciary branches is taken more seriously.⁵⁰

IV. The European Union's Commitment to Fundamental Rights

⁴⁵ J.W. Sap, *Protestantisme en democratie in Massachusetts, 1630-1780*. Preadvies CJV. Zwolle: W.E.J. Tjeenk Willink, 1996; J.W. Sap, *Paving the Way for Revolution. Calvinism and the Struggle for a Democratic State*. Amsterdam: VU University Press, 2001.

⁴⁶ A.F. de Savornin Lohman, who was strongly influenced by conservative ideas, totally rejected the concept of "innate rights". A.F. de Savornin Lohman, *Onze Constitutie*, Utrecht, 1901, 1907, p. 293.

⁴⁷ J. Locke, *Two Treatises of Government* (1689, 1690). Edited with an introduction and notes by P. Laslett. Cambridge: Cambridge University Press, 1960, 1967, 1988.

⁴⁸ P.C. Kop, *op. cit.*, pp. 20-21.

⁴⁹ P.C. Kop, *op. cit.*, p. 22.

⁵⁰ P.C. Kop, *op. cit.*, pp. 68-70, 80-81.

The equality of sovereign states, with all the horizontal relationships and fragmentation this entails, is the formal point of departure of public international law. The vertical structure of the European Union, ever since the foundation of the European Coal and Steel Community (ECSC) in 1951, is quite different from this, and may be seen as a refreshing change.⁵¹ This is organized on a community model that has a supranational character in certain fields, limiting the sovereignty of the Member States in these fields. The Member States of the Union were prepared to relinquish some of their sovereignty in exchange for benefits such as economic prosperity and security. Over the years, the Union has gradually transcended its original form of a cooperative alliance of states and has developed into a community of states and citizens, with its own legal order based on shared values and objectives.

EU Member States have a duty of loyalty to the Union, as laid down in Art. 4 (3) of the Treaty on European Union (TEU). The powers of Member States are limited by certain obligations and prohibitions. These powers are attributed to the institutions and agencies of the Union in order to permit them to realize EU objectives. The EU acts as a supranational government with a clear separation of legislative, executive and judiciary powers and with institutions organized in a balanced framework, which can only perform their tasks in mutual cooperation. The pursuance of EU objectives by EU institutions requires a certain degree of independence of the participating Member States, which is particularly reflected by the composition and action of the European Commission, the European Parliament and the European Court of Justice. The powers of the European Union must be limited by constitutional requirements, such as fundamental rights.

Since the 1960's, the European Court of Justice ruled in two landmark cases that the sovereignty of Member States is limited. Member States can no longer act unilaterally. They have created a new departure in international law, whereby Member States and citizens can appeal directly to supranational rules.⁵² The European Court of Justice also ruled that law stemming from the treaty of Rome could not be overridden by domestic legal provisions.⁵³ The prejudicial procedure allows national judges to function as part of the EU structure. The European Court of Justice is not afraid of making forceful rulings if these are required to protect the complex structure of the EU. The legal structure of the EU allows the EU and its Member States to divide their powers in a certain way, giving the EU model of the Union a more vertical and constitutional character.⁵⁴

Despite this vertical structure, there is still room for independent sovereignty of the Member States in a supranational organization like the European Union. Member States take part in the discussions of the EU; they were the ones who decide, in the interests of joint objectives from which they themselves profit, to limit their sovereignty. This was done by assuming obligations that lead to the pooling of national powers or the transfer of such powers to a higher level in a supranational organization like the European Union. The Council of Ministers is the highest legislative body of the Union. Member States of the Union are prepared to relinquish some of their sovereignty if they get something in return.⁵⁵

⁵¹ H. de Waele, *Autonome rechtsordes. Enkele beschouwingen over de emancipatie, proliferatie en fragmentatie van internationale en Europese normsystemen*. The Hague: Boom, 2015, p. 16.

⁵² European Court of Justice, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁵³ European Court of Justice, Case 6/64, *Costa v. ENEL* [1964] ECR 585.

⁵⁴ R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees recht*. Deventer: Kluwer, 2012, pp. 44-45.

⁵⁵ P.H. Kooijmans, *op. cit.*, p. 4.

The Treaty of Lisbon, which became law on 1st December 2009, placed relatively new concepts such as national identity higher on the EU agenda. Lisbon has also led to increased awareness of sovereignty issues. When viewed from the perspective of political philosophy, there are many possible answers to the question of where the highest authority lies that is not derived from others. From a legal perspective, it is often stated that supreme power belongs to the national Parliament. Even when a more bottom-up approach is taken to the question of sovereignty, as in the Swiss model, the issue of sovereignty remains topical from a political philosophy and legal viewpoint.⁵⁶ Despite the drive towards an ever closer union between the European peoples, since 2009 Member States have a formal right to withdraw from the Union (Art. 50 TEU) - a right used by the United Kingdom after the Brexit referendum (23 June 2016). This makes it clear that EU Member States are not provinces of a superstate. While sovereign states do have limited powers in present-day Europe, they have certainly not disappeared.

As regards the commitment of the supranational European Union to fundamental rights, Article 2 of the TEU suggests that human rights belong to the constituting values of the Union, and help to form the basis of the legal order. This means that fundamental rights are more than a particular branch of the law: they are related to the fundamental moral values of European society, as laid down in the European Convention on Human Rights (ECHR), first promulgated in 1950. It was unfortunate for the citizens that fundamental rights were introduced into Union law via the general principles of Community law, for fundamental rights are much more than that: they are the ultimate, visible boundary of the Union's government structure. Respect for fundamental rights should be a precondition for the validity of specific European Union legislation.

The European Court of Justice deserves recognition for the way in which it has built up a body of jurisprudence on fundamental rights since the end of the 1960s. However, this was not very visible for the ordinary citizen, though this visibility was somewhat increased by the EU Charter of Fundamental Rights, a declaration appended to the Treaty of Nice in 2000. The non-binding nature of the Charter meant that measures to protect fundamental rights continued to be difficult.⁵⁷ Accession of the Union to the ECHR seemed to be called for, in order to plug certain loopholes in the protection of fundamental rights.⁵⁸ Firstly, individuals had only limited access to European institutions. Secondly, the Common Foreign and Security Policy (CFSP) made hardly any provisions for judicial review, making it almost impossible to check compliance with human rights. And thirdly, it was feared that Luxembourg (the home of the European Court of Justice) and Strasbourg (the home of the European Court of Human Rights, ECtHR) could interpret human rights in different ways. Moreover, in its *Bosphorus* judgement, the ECtHR laid down that it would not review national measures or standards that were a direct consequence of membership of the Union, if there was no question of discretionary powers of the Member State, and no manifest violation of the ECHR.⁵⁹ This means that those parts of national legislation that were derived directly from EU law would not be reviewed by the ECtHR.

⁵⁶ J.W. Sap, *Switzerland as the model for a federal Europe*. VDE Europa Lecture 2013. Amsterdam: Association for a democratic Europe. Amstelveen: EON Pers, 2014.

⁵⁷ J.W. Sap, *Het EU-Handvest van de grondrechten. De opmaat voor de Europese Grondwet*. Deventer: Kluwer, 2003, p. 59.

⁵⁸ C.J. Van de Heyning, 'Advies 2/13 van het Hof van Justitie: flinke stap terug voor toetreding Europese Unie tot Europees Verdrag tot bescherming van de rechten van de mens', *NTER*, March 2015, no. 2, pp. 55-61.

⁵⁹ ECtHR judgment of 30 June 2005, Appl. No. 45036/98, Case *Bosphorus v Ireland*, EHRC 2005/91.

The Treaty of Lisbon, which came into effect in 2009, gave the EU Charter of Fundamental Rights the status of primary law. This improved the status of fundamental rights substantially. Claimants could invoke the provisions of the EU Charter in cases heard by EU courts – and even, pursuant to the provisions of Art. 51 of the EU Charter, in cases heard by national courts as long as implementation of EU law was concerned. Furthermore, Art. 6 (2) of the TEU states that the Union will accede to the ECHR; all these measures would make it possible to plug the above-mentioned loopholes.

The improved status of fundamental rights in the EU is important because of the relationship between fundamental rights and economic freedoms. It is undesirable for the mix of EU principles and rules to be richer in economic freedoms than in fundamental human rights. The European Court of Justice ruled once that fundamental rights are not absolute but must be judged in their social context, where the internal market – the heart of the European integration project – is more important.⁶⁰ The European Economic Community – the predecessor of the European Union – focused on expanding the European market, leaving the protection of human rights to the Council of Europe. Fundamental rights were considered less relevant, in any case not the highest law of the land. In cases like *Schmidberger*⁶¹ and *Omega Spielhallen*⁶², the free movement of goods was considered to be the key objective to which exceptions could be made to comply with fundamental rights, if Member States chose to do so. After the Treaty of Lisbon came into force, the provisions of Article 3 (2) of the TEU (promoting freedom, security and justice) were cited more often than those of subsection 3 of the same article, which dealt with promotion of the internal market. Universal human rights should form the basis and the check of European Union law. Article 6 of the TEU mentions several sources of fundamental rights: the EU Charter, ECHR, general principles and constitutional traditions. The EU Charter demands ‘positive action’ from the Union’s legislative arm to ensure compliance with fundamental rights.⁶³

As regards the relationship between the EU Charter of Fundamental Rights and the ECHR, it is encouraging that the ECHR is regarded as a guideline for interpretation of the EU Charter. It is often predicted that the European Court of Human Rights (ECtHR) will serve as the last bulwark of European fundamental rights, in order to avoid a possible relaxation of standards in this field. Art. 52 (3) of the EU Charter states that its provisions shall not prevent Union law from providing more extensive protection than the ECHR. On the other hand, since the ECHR is not a static text but a ‘living instrument’, the EU Charter can be used by the European Court of Human Rights in Strasbourg to keep the interpretation of articles of the ECHR up to date.⁶⁴

After the Member States of the Union had provided a legal basis for the accession of the Union to the ECHR through the provisions of Art. 6 (2) of the TEU, a result of Opinion 2/94, Member States of the Council of Europe also provided a legal basis for accession of the Union to the ECHR through the provisions of Art. 59 (2) of the ECHR. A proposal for a draft agreement on accession of the Union to the ECHR was prepared in 2011, and there was regular consultation on this topic between the judges in Luxembourg and Strasbourg. In April 2013, a draft

⁶⁰ European Court of Justice, Case 5/88, *Wachauf v Germany* [1989] ECR 2609.

⁶¹ European Court of Justice, Case 112/00, *Schmidberger v Republic of Austria* [2003] ECR I-5659.

⁶² European Court of Justice, Case 36/02, *Omega Spielhallen* [2004] ECR I-9609.

⁶³ M. Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional Setting*. Abo: Abo Akademi University, 2007, p. 305.

⁶⁴ A. Pahladsingh and H.J.Th.M. van Roosmalen, ‘Het Handvest van de Grondrechten van de Europese Unie één jaar juridisch bindend: rechtspraak in kaart’, *NTER*, March 2011, no. 2, pp. 54-61.

agreement about the accession of the European Union to the ECHR was signed. Then the Commission asked the European Court of Justice for an Opinion on the Draft Agreement.

There was great consternation when the European Court of Justice delivered its notorious binding Opinion 2/13 that the draft agreement on accession of the Union to the ECHR was incompatible with the EU Treaties.⁶⁵ This Opinion was contrary to the impartial submission of advocate-general Kokott. Accession of the European Union to the ECHR would, in the opinion of the Court, endanger the specific characteristics and the autonomy of EU law – that is, the unity, priority and effectiveness of EU law. The accession could also place the position of the European Court of Justice, as ultimate arbiter of the interpretation of EU law, at risk.⁶⁶

According to Article 19 TEU, the European Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. If the Court rules that the draft agreement is illegal, the draft agreement can only enter into force after it is first amended (Article 218 (11) TFEU). But Opinion 2/13 is very disappointing. It does not seem to do justice to the attempts already made in the draft agreement to respect the autonomy of EU law. There was an agreement, but the European Court of Justice gave priority to the autonomy of the EU legal system, regardless of the objective of EU accession to the ECHR, and of the added value the accession can bring to the protection of human rights. This accession is grounded in the Treaty and is in the interests of the international community. It is true that, in contrast to ordinary international treaties, the EU Treaties have created their own legal system. But autonomy is a strange concept here, because international organizations are bound by international law and the international normative universality of human rights.⁶⁷ Claims to sovereignty are claims to legal authority. ‘Legal authority rests, however, upon a relationship, in which the level of authority is accepted not just by one party seeking it but also by the parties subjected to it’, according to Chalmers, Davies and Monti.⁶⁸ Since the Treaty of Lisbon, the Member States of the EU have created this legal basis for accession. Is the EU so afraid of limited government and an ‘external’ human rights check? The ECtHR regards the European Union as bound by international human rights law. It is a wrong assumption that the EU system is committed exclusively to EU values, principally to EU autonomy and the impermeability of EU territory, and to the welfare of the EU as a monolithic entity.⁶⁹ Further discussions are needed, also in connection with the internal organization of the common foreign and security policy (CFSP) within the Union and the relationship of this policy to human rights – a sensitive issue that the European Court of Justice is hardly competent to handle. It is clear that the European Court of Justice does not wish the ECtHR to determine the boundaries of the CFSP, while the European Court of Justice itself is not allowed to review CFSP measures. Forced uniformity of the Union approach to matters relating to human rights is undesirable. What is desirable when it comes to promotion of fundamental rights, is harmony between the two systems involved, the European

⁶⁵ European Court of Justice 18 December 2014, Opinion 2/13 concerning Article 218 (11) of the TFEU.

⁶⁶ S. Saurugger and F. Terpan, *The Court of Justice of the European Union and the Politics of Law*. London: Palgrave, 2017, p. 176-177.

⁶⁷ R. Freedman and N. Lemay-Hebert, “‘Jistis ak Reparasyon pou Tot Viktim Kolera MINUSTAH’”: The United Nations and the Right to Health in Haiti’, *Leiden Journal of International Law*, Volume 28, Number 3, September 2015, p. 507-527.

⁶⁸ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Cases and Materials*. Cambridge: Cambridge University Press, 2010, p. 187.

⁶⁹ L. Henkin, *op. cit.*, p. 32.

Union and the Council of Europe, between Luxembourg and Strasbourg.⁷⁰ This harmony is unfortunately lacking, as Opinion 2/13 of the European Court of Justice shows.

Conclusion

A state, and thus also an international organization like the European Union, should be constitutional. There should in any case be a government contract, with mutual obligations and rights applying both to the government and to the citizens. This government contract should certainly contain, in addition to a description of the government institutions and their powers, a written confirmation of natural human rights. Human rights are rights one has because one is a human being, so they are held universally by all human beings. These rights should be regarded as inalienable and indestructible by their very nature, and linked to ideas of freedom and human dignity. Sovereign states and international organizations should regard human rights as the manifestation of our common humanity. It is thus wrong to think that these rights are derived from the government contract: they are derived from the nature of human beings and society. The international system has moved beyond state values and EU values towards human values; from a liberal state system to a welfare system.⁷¹ It is of course necessary to write them down in order to confirm their existence, enhance their visibility and to avoid misunderstanding. This was the case during the French Revolution (1789), after the Second World War in the Universal Declaration of Human Rights (1948), in the European Convention on Human Rights (1950) and in the EU Charter of Fundamental Rights (2000), during the preparations for expansion of the Union to Central and Eastern Europe.

The universal dynamic of human rights may not be sabotaged by the insistence of sovereign states or the EU on their own competence to grant such rights. Systems where the sovereign can determine the content and scope of the fundamental rights always entails the risk that aspirations towards freedom and human rights will be emasculated. The point of departure must be that the validity of human rights is independent of the will of the sovereign, and of the written declaration of fundamental rights in constitutional law. The heart of the idea of fundamental rights is found in the relationship between individuals and groups of individuals, who are invested in sovereignty and other leaders, and represents a concretization of moral principles. The aim is to create a domain within which the individual is autonomous with respect to the rulers, no matter whether they be a national government or the structure representing the authority of the Union. With Locke, it can be argued that freedom and fundamental rights predate the state, or it can be held that these rights are a part of civilization, based on principles of natural law.⁷² In any case, it is desirable to regard natural law as a type of law between positive law and ethics. Basing human rights on a natural law approach ensures a correction of the blind spot sovereign powers tend to have when judging the rights of humans.

During the Enlightenment, basic political freedoms were regarded as a precondition for recognition of the constitutional state. In the 19th century, after the fall of Napoleon, fundamental rights were regarded by the conservative forces of reaction – especially in German-speaking countries – as merely a derivative of constitutional law. The rights of the subject – as opposed to those of the citizen – were regarded as dependent on the will of the ruler, and the

⁷⁰ J. Callewaert, 'The European Convention on Human Rights and European Union Law: a long way to harmony', *European Human Rights Law Review*, 2009, pp. 768-783.

⁷¹ L. Henkin, *op. cit.*, p. 35.

⁷² J. van der Hoeven, *De plaats van de Grondwet in het Constitutionele Recht*. Zwolle: W.E.J. Tjeenk Willink, 1988, p. 189.

idea of equality was regarded as a delusion. Human rights were seen not as predating the state but as being granted by the state. Fundamental rights were the result of a dialogue of the state with itself. This 19th-century German approach paved the way for a constitutional theory that the Nazi regime was able to misuse by claiming that it was the state that determined what the human rights of the individual was, who was a citizen and who was not, who was entitled to live and who would be murdered. This approach eliminated the emancipatory aspect of fundamental rights.

That is why the permanent boundary between natural law and positive law needs to be recognized when creating theories about fundamental rights. The basis in natural law of ideas about freedom, equality, democracy and fundamental rights may not be forgotten when considering the special nature of fundamental rights. Universality of reason means that natural law transcends time. Just laws are part of this natural law. It is true that natural law only offers general principles. The concretization of law, provided by positive law, is not part of the competence of natural law. But positive law must be true to the heart of every law, which is only to be found in natural law. That is because natural law has a moral force linked with the rational nature of man, which keeps things moving in the world. There is no way that the train of natural law can be 'stuck on the border'.

Are freedom and equality completely established in Union law? Has the situation stabilized? As long as the structure of the European Union still contains elements that prevent full implementation of fundamental rights, it is understandable that Member States have created a legal basis for accession of the Union to the ECHR. It is regrettable that in the opinion of the European Court of Justice, such accession cannot be allowed because it would put the special characteristics and autonomy of Union law at risk.

Harmony between the systems of the European Union and the Council of Europe is important in the interests of promotion of fundamental rights. It is even more important that freedom and equality do not lose their original emancipatory power and political authority, for fundamental rights are not derived from the sovereign power of the Union and relegated to the position of rules of administrators and legislators. In that sense, it is a pity that the Charter of the Fundamental Rights of the European Union has been given the name it has, since what is at stake is not fundamental rights of the Union but innate human rights. The attempts to achieve uniformity of fundamental rights controlled by the Union – where the European Court of Justice is the sole arbiter of the rules of the game, approving or rejecting certain situations in a series of judgements – does no justice to the way human rights are based on natural law. Now that Member States, with the support of their citizens, have taken the initiative in 2009 of creating a legal basis for accession of the EU to the ECHR, it is wrong for the European Court of Justice to misuse the autonomy of Union law to prevent the European Court of Human Rights in Strasbourg from being accepted as the independent and final arbiter of fundamental rights in the European region of the world.