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Legal and Human Rights Protection in the EU



Wissenschaftliche Mustervorlage – Jura Hausarbeit im Bereich Europarecht

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List of Abbreviations

Art.	Article
cf.	compare
CFR	Charter of the Fundamental Rights o
CJEU	Court of Justice of the EU
ECHR	European Charta of Human Rights
EU	European Union
f	following
ICW	in conjunction with
No.	Number
p.	page
TEU	Treaty on European Union

A. Human Rights Protection in the EU

1. Sources of Human Rights Law in the EU

Like it is said in Art. 2 of the Treaty on European Union (TEU), the European Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights which is not only a programmatic guiding idea but a mandatory orientation for its domestic and foreign policy.¹ Those commitments are guaranteed through the Charter of Fundamental Rights of the EU (EU-Charter) which was proclaimed in 2000 and became part of the primary law in 2009 with the Lisbon Treaty.² Although all Member States of the EU have ratified the European Convention on Human Rights (ECHR) and the EU has according to Art. 6 (2) TEU obligated to conclude the ECHR, it has not joined it yet.³ But Art. 6 (3) TEU imposes the fundamental rights to the status of general principles of the EU law.

2. Fictitious case

Regulation (EU) No. 123/2021 of the European Parliament and of the council concerning the ban on Headscarves in the EU Member States - Art. 1: It is prohibited to wear any kind of Headscarf in public.

¹ *Schütze*, An Introduction to European Law, p. 84.

² *Lukic/Cuckovic*, A decade of balancing with EU human rights protection, p. 21.

³ *Lock*, The Future of EU Human Rights Law, p.428.

The regulation was created in the beginning of 2021 after several terrorist attacks in the EU. Fatma (F), who lives in Germany and is Muslim, cannot understand the new regulation. From her point of view a headscarf is an important symbol of her religion. She thinks that the regulation violates Art. 10 I of the Charter of Fundamental Rights of the European Union.

The Regulation (EU) No. 123/2021 violates Art. 10 (1) EU-Charter, if (1) the area of protection of Art. 10 EU-Charter (freedom of religion) applies in this case, (2) there is an interference and (3) the interference can't be justified.

1. Area of protection

Subjective aspect:

F has the right to claim Art. 10 (1) EU-Charter, because Art. 10 (1) EU-Charter is an "everyone-right" and B comes within the definition "everyone".

Objective aspect:

F considers the headscarf as an important symbol for her religion. This is within the extent of the defined right (Art. 10 (1) EU-Charter).

2. Interference

Who is bound by the right?

The European Parliament and the Council as institutions of the EU have created Art. 1 Regulation (EU) No. 123/2020. They are bound by Art. 10 (1) EU-Charter (cf. Art. 51 (1) 1 EU-Charter).

Interference

Art. 1 of the Regulation (EU) No. 123/2020 interferes with Art. 10 (1) EU-Charter. The rule of Art. 1 Regulation (EU) No. 123/2020 concerning the prohibition of wearing any kind of headscarf in public limits the legal position protected by Art. 10 (1) EU-Charter.

3. Justification for the interference

Legal basis

The interference is founded on a legal basis (the Regulation (EU) No. 123/2020, Art. 52 (1) 1 EU-Charter).

Legitimate objectives

Limitations have to meet objectives of general interest recognized by the Union or the need to protect rights and freedoms of others (Art. 52 (1) 2 EU-Charter). Legitimate objectives of Art. 1 Regulation (EU) No. 123/2020 are to protect the right to life (cf. Art. 2 (1) EU-Charter) and the right to the integrity of the person (cf. Art. 3 (1) EU-Charter).

Principle of proportionality

Suitability: Due to an apparent connection between terrorist attacks and a radical Islamism which is founded on an archaic and misogynistic interpretation of the Koran, there is definitely a possibility that the measure depicted in Art. 1 Regulation (EU) No. 123/2020 is suitable for the objectives pursued.

Necessity: It has to be considered, whether there are other means available which are equally efficient but less onerous. For example, the EU can introduce more precise identity checks on their external border. Alternatively, a deeper monitoring of all

potential terror cells in mosques, cultural facilities with an Islamic background combined with a dense supervision of internet forums and websites with an obvious conservative exegesis of the Koran could also be a method to prevent terrorism in the future.

But the counterbalance of the proposed alternatives and the ban of headscarves in public places, shows that the cost-benefit assessment is clearly in favor of Art. 1 Regulation (EU) No. 123/2020.

Conclusion: Art. 1 Regulation (EU) No. 123/2020 is a necessary interference.

Proportionality in the narrow sense: Balancing the conflicting interests and rights, on the one hand the interfered right (Art. 10 (1) EU-Charter: freedom of religion) and on the other hand the protected rights (Art. 2 (1) EU-Charter: the right to life and Art. 3 (1) EU-Charter: right to the integrity of the person), it seems to be obvious, that human life is the most important good protected by any document which is protecting fundamental human rights. Beside that fact, it should not be overseen that Art. 1 Regulation (EU) No. 123/2020 determinates a ban on headscarves only in public places. Women who have chosen to wear a burka or a hijab as a matter of principle, are free to do so in private spaces, like their homes or Islamic cultural facilities. This would also clearly show that the EU has avowed itself to a secularistic state system without any signs of religion in public.

But then there is also a risk that the extrusion of Islamic symbols out of public could force the islamistic groups to drive underground and therefore become more difficult to supervise for the state. This would impede the direction of impact which is the fight against terrorism.

All in all, I finally come to the conclusion that the objectives pursued by Art. 1 Regulation (EU) No. 123/2020 are of greater importance than living out the freedom of religion in public spaces.

Conclusion: Art. 1 Regulation (EU) No. 123/2020 is proportional in the narrow sense.

The guarantee of the essence of rights

Although Art 1 Regulation (EU) No. 123/2020 limits the right protected by Art. 10 (1) EU-charter, a core of the right still remains due to the possibility to wear the religious headscarf in private places.

4. Result

Art. 1 Regulation (EU) No. 123/2020 interferes with Art. 2(1) and Art. 3 (1) EU-Charter, but this is justified. Accordingly, there is no violation of the freedom of religion.

B. Legal Protection in the EU and ECHR

Relation between the legal nature of the EU and the function of the CJEU

The legal nature of the EU is controversially discussed due to its unique position in the international state order. Due to the exceptional mixture of federal and confederal elements the term *sui generis* seems to reflect the legal and political system of the

EU in an appropriate way.⁴ The Court of Justice of the EU (CJEU) has two main functions: It serves not only as a judicial institution but also ensures the correct interpretation and application of EU law in its function as the “guardian of the Treatys”.⁵ This dual function correlates with the structure of the EU, where sovereign states are subordinating to a supranational framework.

Means of direct judicial protection

As means for a direct judicial protection the Treaty provides the Action for Annulment (Art. 263. TEU), the action for Inaction (Art. 265 TEU) and the action for Damages (Art. 30 TEU ICW Art. 340 TEU). Whereas the first one is reserved to the Member States and certain institutions, the others may be aroused by individuals violated through EU law.⁶

Distinction between privileged and non- privileged applicants in the annulment procedure (Art. 263TFEU)

The privileged applicants of an Annulment procedure incorporate the Member States, the European Parliament, the Council and the Commission. In contrast, the second category of non-privileged applicants consists of the Court of auditors, the European Central Bank and the Committee of the Regions. While the first group may start its action against any legal act of the EU,

⁴ *Perocevic*, European Union Legal Nature: EU as sui generis – a platypus-like society, p. 114.

⁵ *Cini / Perez-Solozano*, European Union Politics, p. 190.

⁶ *Cuyvers*, Judicial Protection under EU Law, p. 254-259.

the non-privileged group can only claim if the respective legal act affects their own rights guaranteed by the Treatys.⁷

Court's responsibility of developing the criteria for non-contractual liability

The criteria for non-contractual liability were developed by the CJEU due to the reference to the general principles of common law of all Member States in art. 340 (2) TFEU. The reason for leaving this task to the CJEU may be the privilege of the Court to determine its own liability position which is applicable in all Member States in the same way.

Unwritten general principles of EU-law to ensure that in the interpretation and application of the Treaties the law is observed

a. General principles

The general principles of EU law are taking the function of gap fillers in the written Union law. Besides they are providing the opportunity to recourse to constitutional standards which are fundamental for the European legal order to the Courts of the EU.⁸

b. Legislative competence of the Court

According to Art. 19 (1) sentence 2 TEU the Court of Justice of the EU has the obligation to insure the homogeneity of interpretation and application of the Treaties in all Member

⁷ Cuyvers, *Judicial Protection under EU Law*, p. 254 f.

⁸ Rzotkiewicz, *The General Principles of EU Law*, p. 465.

States. This aim is put into practice by preliminary ruling (cf. Art. 267 TFEU), which deals with the question of national courts referencing to the interpretation of EU law. Due to the fact, that the decision of the preliminary ruling is binding erga omnes, the conclusions and statements made assessed by the judges are located on the same level as other legal acts that are binding the Member states and EU institutions.

Bibliography

Cini, Michelle / Perez-Solorzano Borragan, European Union Politics, 6th edition, Oxford 2019.

Cuyvers, Armin, Judicial Protection under EU Law: Direct Actions, in : *Ugirashebuja, Emanuel / Ruhangisa, John / Ottervanger, Tom*, East African Community Law: Institutional, substantive and Comparative EU Aspects, Leiden 2017, p. 254-263.

Hoffmann, Herwig, General principles of EU law and EU administrative law, in: *Barnard, Catherine / Peers, Steve*, European Union Law, 2nd edition, Oxford 2017, p. 198-226.

Lock, Tobias, The future of EU Human Rights Law: is Accession to the ECHR Still Desirable?, *Journal of International and Comparative Law* 2020, p. 427-447.

Lukic, Maja / Cuckovic, Bojana, A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests, *EU and Comparative Law Issues and Challenges Series* 2020, Vol. 4, p. 21-43.

Perocevic, Katarina, European Union Legal Nature: EU as sui generis – a platypus-like society, *InterEULawEast* 2017, 4 (2), p. 101-116.

Rzotkiewicz, Marek, The General Principles of EU Law and Their Role in the Review of State Aid Put into Effect by Member States, *European State Aid Law Quarterly* 3/2013, p. 464-477.

Schütze, Robert, An Introduction to European Law, 3rd edition, Oxford 2020.