Legal Protection of Individuals in the European Communities

Volume I

The Individual and Community Law

A. G. Toth

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LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES

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THE INDIVIDUAL AND COMMUNITY LAW

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LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES

VOLUME I

TO MY WIFE

The Community is governed by the rule of law. . . . . A genuine rule of law in the European context implies binding rules which apply uniformly and which protect individual rights.

Court of Justice of the European Communities, *Report on European Union*, 15 July 1974

Foreword

In saying that it is a real pleasure to introduce the book of Dr. Toth, I am expressing a sentiment that has been growing during the reading of his manuscript. It was as if somebody took one away from the daily round involved in the upkeep and cleaning of the building erected by an evolving jurisprudence and led you some distance away to take a look at the whole. The author takes you on a conducted tour of the legal Community chapel, as a good connoisseur he looks for the general principles of its construction, points out the nature of the building materials and explains how those have influenced the results. He explains how the placing of the main supporting pillars (the actions) determine the form and divisions of the building. We are made to understand why the walls and the roof must needs have received the form and place which they were given (or are being given, for the work is not yet finished) to offer an optimal space and function. Some of the beauties are pointed out. The enthusiastic guide does not find failures, at the most he sees inadequacies or gaps, which, we are told, are due to the unfinished state of the building and are certain to be remedied. And so we are left with a general impression of harmony and consistence, of a well-conceived equilibrium between the necessities which confronted the builders and the scarcity of materials they were furnished with.

The daily practitioner, used to working in the rafters or to strengthening the faulty masonry, is perhaps overconscious of deficiencies in construction and, in his scepticism, may perceive behind what is being shown as logical and ingenious, the haphazard nature of the solution and only the skilful use of plaster and paint. But it is pleasing to meet with another approach and to discover that others see the purpose and general lines of the practitioner's effort so much more clearly than he does himself and that some of them even find beauty and logic in what to him were matters of necessity. Meanwhile let the practitioner beware of too much satisfaction. There is a difference between him and the teacher. The teacher has to introduce the new apprentice or the casual visitor to the building as a whole and to try to make him familiar with it. To be able to do that he should not start with details, but take the thing as a unity. He must stress the foundation in reason of the

construction and the cohesion of its various elements, if he wants his public to distinguish the essentials and so to learn to find their way in it for themselves. Once the apprentice starts working on his own, he will discover the bewildering detail and the unsatisfactory parts soon enough. But even when he has become a seasoned worker, it remains useful sometimes to stop a moment and come down (or come up) to listen to the guide and have the general design and the primary goals explained once again. Such an effort should make him thankful for the manner in which his daily work is put in a larger perspective and the sense of his efforts explained; he will return to his troublesome work feeling that, whatever the everyday deceptions, it is worthwhile and has purpose to it. You might even be beguiled into thinking your chapel to be something like a cathedral!

This describes the pleasure Dr. Toth's book gives me. It also indicates my appreciation and admiration. Not that I agree with all his observations and explanations. The mason will never completely agree with the guide; neither will the practitioner with the teacher. But it would be wrong to interrupt and try to correct or amplify his explanations. That would rob an introduction of its clarifying and illuminating force and sin against what Dr. Toth thinks is one of the fundamental principles of Community law, i.e. the principle of effectiveness (II, p. 232). Should one think that this is a somewhat double-edged compliment — in the sense of: what the author tells you may sound very well, but it is not really so — he would be completely wrong. Of course, it is gratifying when, after you have laboured for some twenty years in some secluded legal arbour, somebody writes a book about it of up to 500 pages — especially if he concludes that by and large you have done rather well. I mean that the reservation which I may have against some passages are nothing as compared to the happy surprise of meeting with an approach to the Community system of legal remedies, an approach which to me is so novel as to be little short of revolutionary. It puts the subject-matter and its problems in a perspective that I, and I think most of my generation, would never have thought of adopting, but one, which once it is offered, proves itself, systematically speaking, completely legitimate and, what is more, seems to open many interesting possibilities.

It is in two respects that I found Dr. Toth's text particularly novel.

In the first place it is characterized by its lack of historical explanations. When an elder generation tends to see the development of Community law as a process of growth and describes it according to a step-by-step method (we did this in the beginning, and of necessity then we had to do that and in consequence we were brought to such-and-such a conclusion), under the hands of Dr. Toth everything is presented as an achieved and well-proportioned system of legal protection. Where most would stress the complementary relationship of the Community system to the much more self-contained legal orders of the Member States, he presents it as a self-sufficient arrangement and stresses its inner logic. His development is entirely systematical and lacks those historical aperçus which to an elder generation are yet a matter of

course. The axis of his exposition is formed not by external elements such as the objectives of the authors of the Treaty, but is formed in something that is inherent in every legal system (or should in a lawyer's view be inherent in it), to wit: the legal protection of the individual. In doing so he also succeeds in delivering himself from the partisan impression that gives so many treatments of Community law the taste of a tract for the Community idea. He takes, as it were, the Community legal system as such and asks what are its qualities and potentialities as regards the protection of the citizen.

And therein lies the second revolutionary gesture. He offers us a complete survey of the judicial remedies in Community law, the 'action against Member States' included, but he organizes it around the theme of protecting *the individual*. Those who grew up with Community law from the start have always put the accent on the constitutional aspect of the relations between the national systems of law and the Community system, between the powers of the institutions and those of the Member States and their authorities. We stressed, if I am allowed a pun, those aspects where we experienced stress. The 'grand arrêts de la Cour' were to us the Van Gend & Loos-ruling and the Costa-E.N.E.L. one and we found our main problem in the functioning of 'direct effect' and in the 'primacy' of Community law. Dr. Toth, although recognizing the importance of these rulings and problems, does away with this approach by asking what was the legal sense of this 'constitutional' scrimmage. And when he comes up with the answer, that it was the right of the individual as a citizen of the Common Market, he is able to base himself on the wording of these rulings itself. In doing so, he puts things in a very proper and adequate perspective and reminds us that the real judicial question was not: who has power to do what? but: to what end have these powers been given?, and his conviction is that this end must have been the raising of a roof over the heads of the individual people, capable of ensuring that they may in fact enjoy the advantages and rights that, in their better moments, the makers of the Treaties envisaged. I think this revolutionary in the best — but unhappily nearly forgotten — sense of the word: a turning around of things which puts them in their proper place.

The author will be the first one to observe that his approach is not so novel as I found it and there are some quite eminent predecessors who have shown him the way. In that he is right; in a certain way he might even be said to pick up a thread that more often guided the infant treatises on the role of the Court under the ECSC Treaty, but that for some time became neglected after the entry into force of the Treaties of Rome. Even then the individual was never forgotten; especially writers of a younger generation have always been more interested in the place and the protection of the individual. But Dr. Toth is, as far as I can see, the first one to place his treatment of the judicial functions in Community law in this perspective as being the most important and, in the long run, more conducive to its better understanding. I would be untrue to myself if I admitted that it is the only legitimate approach. But I welcome it as the sign that the study of Community law may be entering into a new phase,

where it will be enriched by the cultivation and development of aspects that hitherto remained in the dark or were considered as being of only a secondary importance.

As an old practitioner I feel proud and honoured to have been invited to appear as a godfather at the baptism of this book. It seems a strong healthy child destined to a long life and a happy growth, that promises to become a leader among its future fellows and to be capable of not a few worthwhile contributions to life in common, viz. the Community and its law.

A. M. DONNER

Preface

Twenty-five years of European integration have brought considerable political, economic and social advantages to the Member States and their nationals. Integration, however, is not limited to those areas alone. The construction of a United Europe cannot take place except under the rule of law and within a strictly defined legal framework. Thus legal integration, both in the form of creating uniform common rules and harmonising existing national laws, necessarily accompanies and in certain respects even precedes integration in other fields.

This places individuals — natural and legal persons — in an unprecedented position. While remaining under the political authority of their own States within the bonds of nationality, they become increasingly subject to the legal (legislative, executive, judicial) authority of the Communities, to the extent to which such authority is being transferred to the latter. Formerly owing allegiance to one Sovereign only, they now find themselves confronted with two. They stand at the intersection of two legal orders, applicable concurrently, which create rights and obligations, prohibitions and restrictions for them, sometimes cumulatively, sometimes to each other's exclusion, sometimes independently of one another. The clear-cut bilateral relations between the State and the individual, or between individuals, have now been replaced, in areas within Community competence, by a complex web of tripartite relationships involving the Community institutions, the Member States and their nationals. To the traditional dichotomy between the 'private interests' of the citizen and the 'public interests' of the State a new dimension has been added by the emergence of the concept of 'common interests' represented by the Communities, which affects them both.

All this necessitates a definition of the position of the individual in relation to Community institutions, the Member States and other individuals. It also requires an exploration of the means of legal protection available to him, at both Community and national level, vis-à-vis those other subjects of Community law. The emphasis on 'legal' (i.e. judicial) protection is justified by the absence at the present time of a satisfactory 'political' protection by a directly elected parliamentary body. An inquiry of this kind may help to throw some light on the question whether the individual has not been made

to sacrifice more of the traditional rights and liberties enjoyed in a democratic society than is warranted by the ultimate objectives of the integration process. Or, conversely, whether the rights and advantages created by the very same process are not liable to be made ineffective by what the European Court of Justice has called the 'inertia and resistance' of the Member States. In short, whether the 'Community citizen' enjoys adequate safeguards in respect of his rights, arising both from national and Community law, as required by the very concept of the rule of law by which the Communities are governed.

It is the object of this book to investigate these questions. Volume I sets out to define the status of the individual in the Community legal order, more particularly in the light of the nature, scope, sources and fundamental principles of Community law (Part I). Volume II deals with the various remedies and procedures that are available to individuals, both in the European Court of Justice (Part II) and in national courts (Part III), in order to enforce their substantive Community rights and to protect themselves against illegally imposed obligations, restrictions and sanctions. While, inevitably, the Community Court of Justice stands in the centre of these investigations, the book does not purport to provide an exhaustive treatment of the Court. Thus it does not deal with the Court's internal organisation, nor with those aspects of its jurisdiction which play no or only a minor part in the protection of individual rights. Nor are staff cases as such covered, although they are fully considered insofar as they lay down generally applicable rules and principles. Thus, apart from the procedure before the Court and some general aspects of its jurisdiction, Part II is limited to a discussion of the five main forms of action (actions for annulment, for failure to act, for damages, against sanctions and against Member States). References for preliminary rulings are dealt with in Part III. As regards the topics falling within the scope of the book, however, the intention has been to present a systematic, comprehensive and up-to-date exposition of the law. While an attempt has been made to place the rules and principles discussed in the wider context of the Treaties' objectives and the European Court of Justice's underlying philosophies, a practical approach is followed throughout.

This work is a lawyer's book, aimed primarily at legal practitioners, legal advisers in commercial and industrial undertakings, Government officials, European and national civil servants, who must expect to find themselves increasingly called upon to deal with cases involving questions of Community law. It is hoped that it will prove a useful tool also for law teachers and students, especially for those studying Community law at an advanced or postgraduate level. Volume I, which covers some more general topics, may be found suitable for use as a student textbook in an undergraduate course in Community law. As a whole, the book is designed to complement specialised works dealing with various areas of substantive Community law and thus fill a gap in existing legal literature.

The subject-matter of the book is regulated by relatively few provisions of the Community Treaties and acts of institutions. For the most part it is governed by the case-law of the Court of Justice. While the decisions of the Court must not be treated as generally binding 'precedents', they play an

extremely important role in the structure of Community law. Over the quarter of a century of its existence, the Court of Justice has laid down, with a remarkable degree of consistency, a considerable body of rules and principles relative to the subject-matter of these volumes which fill in the many gaps left open by the Treaties or define the concepts employed by them. Most of these have now passed into the general corpus of Community law where they have acquired, as it were, an independent existence. One of the major objectives of this work has been to collect, analyse and present in a systematic way these rules and principles, thus attempting to provide a comprehensive coverage of the relevant case-law of the Court. This includes the opinions of the Advocates-General which have been considered throughout alongside the Court's decisions. The opinions are always referred to separately where they (a) elucidate a point of law which is not, or only cursorily, dealt with by the Court or (b) present an extensive analysis, or give account of the genesis, historical background, etc. of a rule or principle and (in either case) are not incompatible with the decision of the Court. By contrast, they are not as a rule mentioned separately where they (a) have been substantially adopted by the Court and incorporated in its judgment or (b) are incompatible with the latter. National decisions available in English translations are also covered. An attempt has been made throughout to follow the legal terminology used in the European Court Reports. The notes have been prepared with the intention of giving as full references as possible to the relevant decisions and opinions on all major points dealt with in the text. They thus may be used as a 'guide' to the case-law of the Court. It is thought that this may be helpful to practitioners in the preparation of a case and to academics in the carrying out of further research. Although the manuscript was completed in January 1977, it has been possible to incorporate at the proof stage the most important decisions that the European Court and some of the national courts handed down by the end of 1977.

In conclusion, I wish to thank Judge A. M. Donner for the honour he has done me in finding time amidst his many other commitments to contribute his generous Foreword. I am very grateful to Professor John W. Bridge, of the University of Exeter, for undertaking the task of reading the whole manuscript and for making so many valuable comments and suggestions. These have greatly helped in improving the text. For any remaining errors the responsibility is mine alone. I am also grateful to Mrs. Elaine Smith, of the Law School Secretariat at the University of Strathclyde, who has typed the entire manuscript — efficiently, conscientiously and always cheerfully. I would like to acknowledge the patience with which my Publishers have accepted successive delays on my part in the completion of the project, and the efficiency and care with which they have produced the book.

Finally, my thanks are due to my wife for her unfailing encouragement, support and, above all, patience during the whole time of preparation and writing. To her this book is gratefully dedicated.

Glasgow
1 January 1978

A. G. TOTH

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