EU Charter of Fundamental Rights and Collective Labour Law

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I. Introduction

A. Why EU Fundamental Rights?

1. The European Union itself has no written body of fundamental rights. It has been unnecessary as long as nothing but the elimination of market obstacles was on its agenda. Such "negative integration" usually bears no correlation to fundamental rights: that the free movement of workers had increased the labour market (and perhaps also unemployment) and that going concerns were approaching financial ruin due to emerging foreign competition, are not issues pertaining to fundamental rights. Freedom of choice over employment, property as well as entrepreneurial freedom, are encompassed within the framework of the Market. To explicitly incorporate fundamental rights with this limitation into a Constitution or a Treaty would be inappropriate[1], although the issue itself is absolutely unequivocal. The discrimination prohibitions, however, are an exception – to that extent, Article 7 (citizenship of another Member State) and Article 119 (equality of pay for men and women) in the original version of the EEC Treaty had much to offer.

2. The situation changed as the Community increasingly developed its own constitutive activities. Those who prevent winegrowers from viticulture[2] or who instigate searching the premises of a large chemical company for reasons of antitrust violations[3] must take respect for fundamental rights into consideration. As "positive integration" progresses and the Community obtains further competencies, the lack of consolidated protection of fundamental rights has become critical.

B. Achievements and Deficits in the European Court of Justice's Jurisdiction

3. Catalysed in particular by the *Solange I* judgment of the German Federal Constitutional Court[4], the European Court of Justice (ECJ) assumed the role of "substitute constitution-making power" – the fact that at the time, the German Constitutional

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1 Art.12(1) of the German Basic Law, for example, ought to read: „All Germans have the right to freely choose their occupation, employment and educational centers to the extent that the Market provides the opportunity therefore."

2 See ECJ [1979], p.3727 ff. – HAUER.

3 See ECJ [1989], p.2859 ff. – HOECHST.

4 German Federal Constitutional Court, vol. 37, p.271 ff.

Court threatened to declare legal acts of the Community in contravention of German fundamental rights and therefore, invalid, as long as no equivalent fundamental rights protection at EEC level existed, resulted in a final push towards the recognition of binding fundamental rights in Community law.[5] Since then, they have been used by the ECJ as a measure against the acts of Community institutions. The reduction of the Constitutional Court's control competence in the *Solange II* judgment[6], recently upheld[7], seemed to indicate that all was well.

4. However, judicial protection of fundamental rights displays a row of considerable deficits. The praetorian development of fundamental rights means that the shaping of individual rights depends on whether or not the ECJ has a pertinent case before it. Despite more than 40 years of expanding jurisdiction, numerous blank spots remain. This applies in particular to "non-economic" basic rights, such as the protection of personal rights or the freedom of association.

Even where the ECJ had to take a stance, it restricted itself solely to the circumstances of the specific case. In accordance with French tradition, providing obiter dicta is the exception, rather than the rule. In legislatively regulated areas, such judicial restraint may be valued as a virtue, however, where a court is active in developing the law[8], the selective nature of its judgments leads to a lack of precedent certainty, as it remains unclear how other similar cases would be decided.

5. In addition to legal uncertainty, a justifiable concern arises that the Court proceeds expansively in acknowledging the existence of fundamental rights whilst simultaneously, to a great extent, rendering encroachments possible. Essentially, the Court's controllability is restricted to the question of whether the principle of proportionality was observed and whether the essence of the relevant basic right remained inviolate.[9] The Court's approach to the Banana Regime dispute was that regarding the question of whether the measures chosen by the Community's legislative arm were more or less appropriate, it could not replace the Council's judgement with its own if there was no evidence that these measures were "clearly unsuitable" for accomplishing the pursued aim.[10] In view of this minimal level of control, it is not surprising, in the area of economic-related basic rights, that in not a single case, did a legal act of the Community fail on the basis of violating a fundamental right.[11] The oft-mentioned exception, the case of an applicant for a Brussels civil service position who unwillingly underwent a HIV test[12], cannot correct the basic evaluation that even if one includes the

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5 For details, see DÄUBLER, *In bester Verfassung*. The enactment of the European Charter of Fundamental Rights, *Blätter für deutsche und internationale Politik 2000*, p.1315 ff.

6 German Federal Constitutional Court, vol. 73, p.339 ff.

7 German Federal Constitutional Court, NJW 2000, p.3214 – Banana Regime.

8 Per the evaluation of G. HIRSCH, *Der EuGH im Spannungsverhältnis zwischen Gemeinschaftsrecht und nationalem Recht*, NJW 2000, 1820.

9 See KINGREEN for an overview, *Die Gemeinschaftsgrundrechte*, JUS 2000, p.857, at 861 ff.

10 ECJ I-1994, p.5039, at 5069.

11 KENNTNER, *Die Schrankenbestimmungen der EU-Grundrechte-Charta – Grundrechte ohne Schutzwirkung?*, ZRP 2000, p.424; RITGEN, *Grundrechtsschutz in der Europäischen Union*, ZRP 2000, p.372.

12 ECJ [1994], p.4737, at 4790.

"preventive effect" of the ECJ's fundamental rights jurisprudence (and believes the best of Brussels bureaucrats), the theory of a lack of control remains plausible. This becomes particularly clear upon when one compares the completely different principles applied by the ECJ to interventions in basic freedoms, such as the free movement of goods, the freedom to provide services, and so on.[13]

6. With regard to the rights of dependent workers, the problem exists that aside from official rights emanating from EU institutions, little "case material" providing an opportunity to develop social basic rights reaches Luxembourg. Although jurisprudence regarding labour law-related Directives is both ample and the subject of many controversies, for instance statements regarding the freedom of association and to strike, are extraordinarily rare in Community law.[14]

C. The reactions of political decision-makers

7. The policy-makers perceived the scattering of basic rights jurisprudence throughout various judgments as a defect, which could not fulfil an identification function. A "patchwork quilt" of individual judgments does not symbolise a consensus of values, which could hold significant importance for the unity of the Community. A written body of fundamental rights became necessary since the EU had extended beyond being an alliance based on economic and political-administrative objectives.[15] The European Council therefore decided in Cologne in 1999, to develop a European Charter of Fundamental Rights, which would also expressly include social rights.[16] In mid-October 1999 in Tampere, a committee of experts calling itself a "Convention" was created from 15 government representatives, 16 representatives of the European Parliament, 30 delegates from national parliaments and a representative of the European Commission. The chairman was the former German President, Roman Herzog.

In an unusually quick manner, the Convention agreed on a comprehensive 54 article document, welcomed by the special summit of heads of State and government leaders at Biarritz in October 2000, subsequently accepted by the Commission, the Council and the European Parliament as a "self-commitment", and ceremoniously enacted in December 2000 at the Summit in Nice.[17] The prominent ranking awarded to this document is demonstrated by the evident and succinct wish of a leading European jurist that the Nice Charter should develop a guiding effect similar to that of the Declaration of Human Rights of 1789.[18] Are we facing the beginning of a revolutionary process?

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[13] See KENNTNER, ZRP 2000, p.423 ff.

[14] For details, see DÄUBLER, *Die Koalitionsfreiheit im EG-Recht*, FS Hanau, 1999, p.489 ff.

[15] See in particular, BAER, *Grundrechts-Charta ante portas*, ZRP 2000 p.361 ff.; HÄFNER/STAWE/ZUEGG, *In der Auseinandersetzung um eine Charta der Grundrechte der Europäischen Union*, ZRP 2000, p.365 ff. Also DÄUBLER, *Sozialstaat EG? Die andere Dimension des Binnenmarkts*, Gütersloh 1989, p.90 ff.

[16] Repeated in J.MEYER/ENGELS, *Aufnahme von sozialen Grundrechten in die Europäische Grundrecht-Charta?*, ZRP 2000, p.368.

[17] The text is available in the Supplement to issue No. 35/2000 of the NJW, as well as in: Blätter für deutsche und internationale Politik 2000, p.1398 ff. ☞

D. Preconditions for Labour Law in the Charter

8. The Nice Charter of Fundamental rights is a comprehensive catalogue, including modern perils arising out of information and biotechnology.[19] The employer-employee relationship is addressed in different articles, which introduces new emphases in comparison to German collective labour law.

Art. 15 guarantees the freedom of employment as the "right to work and to freely choose or adopt an occupation". This conforms to Art.12(1) of the German Basic Law. In addition, the non-discrimination of third country nationals provided for in Art.15(3) can easily be located in German law, namely in § 75(1) of the Employees Representation Act. The freedom of association follows the example of Art. 11 of the European Convention on Human Rights (ECHR), and is provided for in Art. 12 as a sub-topic of the freedom of association.

Art. 27 under the chapter "Solidarity", requires notification and consultation of employees or their representation in a timely manner. Art. 28 concerns collective negotiations and strikes. It reads as follows:

"Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike actions."

Of further interest, is the right to protection from unjustified dismissal set out in Art. 30, as well as the right of every worker to healthy, safe and dignified working conditions in Art. 31.

More or less as a "counterbalance" thereto, Art. 16 guarantees that "The freedom to conduct business in accordance with Community law and national laws and practices is recognised".

9. Are the rules of the game altered by these? Will there, in the future, be an independent European system of employment relations in addition to national systems – one that is likely to continuously expand its subject matter? Will there perhaps be a "radiating effect" on national areas?[20]

II. Field of Application of the Charter

10. According to Art.51(2), in no way does the Charter shift jurisdiction between the Member States and the Community. Art.51(1) makes this clear by stating that the

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[18] HILF, Supplement to Issue No. 35/2000 of the NJW, p.5; conversely, skeptical regarding a reinforcement of the protection of fundamental rights in the EU, v. Bogdandy, JZ 2001, p.157 ff.

[19] BAER, ZRP 2000, p.363; NICKEL, *Zur Zukunft des Bundesverfassungsgerichts im Zeitalter der Europäisierung*, JZ 2001, 630. Also, the draft formulations in DÄUBLER, *Sozialstaat EG? Art. 5,6 und 9*, p.113 ff.

[20] On this topic, see TETTINGER, *Die Charta der Grundrechte der Europäischen Union NJW 2001, 1015*

organs and institutions of the Union are bound to the fullest extent whilst the Member States are solely bound partially, i.e. in executing the law of the Union. The "explanatory note" of the Charter provided by the chairmanship of the Convention refers to the ECJ's jurisdiction, repeating that the Member States are bound when acting within "the framework of Community law".[21]

11. The extent to which this condition is fulfilled cannot be stated in a convenient formula. The decision to recruit women into the German Army[22] made it clear that even national defence has to take Community law standards into consideration.[23] If the Federal Armed Forces were to refuse to accept women, the freedom to associate under Art. 12(1) of the Charter would most likely be invoked. In actual fact, Community law only regulates this one point and leaves the rest to the Member States themselves; even discriminatory treatment of other EU nationals is essentially permitted under Art.39(4) of the EC Treaty.

Much stronger is the penetration of Community law in the area of competencies of European works councils: their existence, along with their (minimum) powers, is enabled by EU law, and therefore Community fundamental rights are applicable.

According to the ECJ's jurisprudence, Member States must also observe EU fundamental rights when relying upon exemption provisions enabling intervention in one of the four basic freedoms.[24] This is anything but obvious, since it relates to the exercise of economic competences, which the Member States have expressly retained.[25] Nevertheless, one must take into consideration that the Charter may also be referred to.

The ECJ has opened up a new area of Community law in that it has especially derived a "duty of protection" out of the basic freedom of movement of goods, which Member States must observe.[26] Should roadblocks hold up commercial cross-border truck drivers, the issue arises of whether Member States are obliged to intervene. In that case, the virtually unknown problem of a conflict between the fundamental rights of the "blockader" and that of the freedom of movement of goods could arise.

Ultimately, the question may be posed whether the legality of a demonstration, directed against intended or existing decisions of a Community institution, is defined according to national or EU law. Taking into account the addressees and the typical cross-border characteristic, one could select the latter, however, certain uncertainties are difficult to avoid.

12. The overview clearly indicates just how far-reaching Community law already is today. To that extent, it would be utterly wrong to regard the Charter of Fundamental Rights as a legal document restricted to the internal area of the EU institutions, that is,

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[21] *Wachauf*, ECJ [1989], p.2609; ECJ [1991], I-2925 in EuZW 1991, p. 507-ERT. The explanatory note is contained in the supplement to Issue No. 35/2000 of the NJW.

[22] *Kreil*, ECJ, NJW 2000, 497.

[23] G. HIRSCH, footnoted above, NJW 2000, p.1820.

[24] *Rutili*, ECJ [1975], p.1219 in EuGRZ 1976, p.2; ECJ [1991-I-2925, 2964-ERT; *Kommission v Germany*, ECJ 1992-I-2575, p.2609.

[25] RITGEN, ZRP 2000, 373.

[26] ECJ, EuZW 1998, p.84; also G. HIRSCH, NJW 2000, p.1820; RITGEN, ZRP 2000, p.373.

to the employment relationships between the Community institutions and their employees.

III. Binding Effect

13. Despite its proclamation of being a "ceremonial declaration", the Charter of Fundamental Rights is no regular component of Community law. Whether it will be incorporated into the Treaties as a "Fundamental Rights Section" will be decided in the framework of the post-Nice process. Considering the form of its development by parliamentarily legitimised parties, the Charter possesses a different status to other similar declarations.[27] There is, therefore, agreement in literature that even without formal integration into the Treaties, the ECJ will conduct itself correspondingly with the Charter in its basic rights jurisprudence.[28]

14. The actual problem lies in determining which intensity this "recourse" will have. Existing references do not enable any definite conclusions. In his Opinion dated 01.02.2001[29], Attorney-General Alber stated that like Art.16 of the EC Treaty (Amsterdam), Art.36 of the Charter was an expression of "a fundamental value judgement in Community law".[30] The European Court of First Instance observed in a case before it that the questionable measures at issue occurred prior to the proclamation of the Charter on 7th December 2000 and could, therefore, not be measured against it.[31]

In some literature, there is unspecific mention of the Charter proffering a "quarry" for the further development of basic rights jurisprudence.[32] Others have specifically stated that the guaranteed rights in the ECHR represent a minimum protection[33], surely relating to Art.36(3) of the Charter, which states that rights equally guaranteed in both the Charter and the ECHR have the same meaning and scope as the latter. Therefore, better protection cannot be excluded. Where the constitutional traditions of the Member States exceed the Charter, the former are held to be authoritative.[34] This is also correct, although it is difficult to imagine that the Court will be faced with a single case of this sort.

In addition, the significant limitation opportunities have experienced no obvious regulation in this context. Art. 52(1) requires that law provide for intervention and that the "essence" of the rights and freedoms be observed. In addition, it states:

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27 NICKEL, JZ 2001, p.631.

28 MEYER/ENGELS, ZRP 2000, p.371; NICKEL, JZ 2001, p.631; RITGEN, ZRP 2000, p.373; TETTINGER, NJW 2001, p.1010; likewise in English, HEPPLE, *The EU Charter of Fundamental Rights*, Industrial Law Journal 2001, p.231.

29 *Universaldienst* – Case C-340/99.

30 Ibid, para. 94.

31 Case T-112/98, para. 76.

32 TETTINGER, NJW 2001, p.1015.

33 HILF, Supplement to Issue No 35/2000 of the NJW, p.5.

34 Ibid, p.6.

"Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of the general interest recognised by the Union or the need to protect the rights and freedoms of others."

This could be interpreted in such a way that aside from the suitability of the methods and the necessity of the intervention, a proportionality test, in the narrow sense, is to be carried out, which would considerably increase control checks in consideration of the jurisprudence to date. On the other hand, the explanatory note drawn up by the chairmanship of the Convention refers literally to the ECJ's own summary of its limited jurisdiction:[35] "According to case law of the Court, the practice of these rights, in particular in the framework of a common market organisation, are subject to limitations insofar as this is genuinely in accordance with the objectives of the Union in the general interest and do not represent a disproportional intervention, which infringes upon the essence of these rights." An extensive admittance of interventions as in the Banana Market judgment[36] is, therefore, definitely not excluded.

IV. Guiding points in collective labour law

A. Freedom of association

15. Like its national counterparts, industrial relations of the EU will be founded on the basic right to freedom of association. Art.12(1) of the Charter provides "every person" with the right "to freedom of association at all levels, in particular, in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests." The provision is silent on definitions and the spectrum of activities of trade unions. However, since the explanatory note refers specifically to Art. 11 of the ECHR, reliance can inevitably be placed on the jurisprudence of the European Court of Human Rights.[37] To that extent, it is also emphasised in the explanatory note that Art. 12 surpasses the ECHR since it also encompasses the European level. This means that not only central, but also membership organisations are possible within the sphere of Community law. Of relevance is that the explanatory note refers to the specific limitations of Art. 11 ECHR, according to which, for example, only those limitations are permitted which "are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". This embodies far more safeguards than those presumed under the sweeping limitations in Art. 52(1) of the Charter.

All of these statements are established on a highly abstract level – unavoidable under the circumstances. The dogmatic structural work will be carried out when real conflicts are being dealt with.[38] This also applies to the question, to which extent and with which rights employer organisations are endowed.

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[35] *Karlsson,* ECJ Case C-292/97, para. 45.

[36] ECJ [1996] I-6065 in NJW 1997, p.1225.

[37] For an overview, see FROWEIN/PEUKERT, *EMRK-Kommentar*, 2.ed, introduction to Art.11.

[38] See TETTINGER, NJW 2001, p.1014.

B. Freedom to conclude collective agreements

16. Art. 28 of the Charter provides employees and employers "or their respective organisations" with the right to negotiate and conclude collective agreements at the appropriate levels. Both, Community law and national law are equally referred to here.

Art. 28 has "horizontal effect" in the sense that labour relations in the private sector are also included.[39] The reference to Community law "and" individual State laws and practices can be explained in that the Charter also incorporates guarantees for which the Community has not had any jurisdiction to date. The most prominent example thereof is the prohibition against the death penalty and execution in Art.2(2), although the EU has never had any criminal jurisdiction and certainly not a guillotine or a hangman. Art. 28 could be viewed such that the parties' freedom of choice of law under Community law permits the conclusion of collective labour agreements in accordance with either national law or EU law. The Charter does not define how these are to be conceptually comprehended; nevertheless, the binding effect is one of its essential criteria. European Works Councils may potentially be employees' negotiators, as they are ultimately established on the basis of the agreement between the parties and not the fulfilment of a legal duty. Therefore, on the basis of Art. 28 of the Charter, they can conclude binding agreements with central management, as is already the practice in some cases.[40]

17. Whether and to what extent, the freedom of enterprise under Art. 16 of the Charter acts as a barrier to collective negotiations cannot be estimated at this time. The explanatory note provided by the Convention's chairmanship is of little help. It states that the right under Art. 16 is "naturally exercised under the limitations of Community law and national law of the Member States" and could be limited in accordance with Art. 52(1). The question is also open as to whether it protects solely the "entrepreneurial person"[41] or whether protection extends to the business activities of a legal entity.[42] That the formulation of the Charter is tailored strongly towards the individual, that is, more of a person-based ("personalistic") character, leads to agreement with the former view.

C. Industrial disputes

18. Art. 28 further provides both parties with the right, "in cases of conflicts of interest, to take collective action to defend their interests, including strike actions". The Chairmanship's explanatory note refers in the first instance to Art. 6 of the European Social Charter, which also concerns so-called wildcat strikes and protest strikes.[43] These

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[39] TETTINGER, NJW 2001, p.1011.

[40] See KLEBE/ROTH, *Die Gewerkschaften auf dem Weg zu einer internationalen Strategie?*, AiB 2000, p.749 ff.

[41] See TETTINGER, NJW 2001, p.1011.

[42] See also DÄUBLER, *Blätter für deutsche und internationale Politik 2000*, p.1318.

[43] DÄUBLER, *Zur Verurteilung der Bundesrepublik durch das Ministerkomitee des Europarats wegen Zurückbleibens des deutschen Arbeitskampfrechts hinter Art. 6 Ziff.4 ESC*, AuR 1998, p.144 ff.

principles could be transposed to the sphere of Community law, although the passage following in the explanatory note refers to national legal systems determining whether particular dispute measures may concurrently be implemented in several Member States. The compromising nature which characterises social rights as a whole[44] is particularly clear here: both employers and employees are given a piece of sugar, even if this does not necessarily lead to a consistent system. Controversy will probably also develop the discussion on the permissibility of lockouts.

D. Information and consultation

19. Art. 27 provides for "timely" information and consultation of employees or their representatives under the conditions of Community law and laws and practices of the Member States. This affords no great insight. Directives such as the proposal "to establish a general framework for information and consultation of workers in the EU"[45] are easily justifiable in the context of Art. 27 of the Charter.

V. Perspectives

20. The European Charter of Fundamental Rights is the first step. Its global objective is the creation of an advanced free and social framework for labour relations in the EU. Even if it is incorporated into the Treaties, the future rules of the game are by no means established. The actual influence held by employers and unions will only become clear with the passage of a long process. Active participation in that process is strongly recommended for those who, like Maxime Stroobant, feel obliged to strive for a working world worth living in.

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[44] HILF, footnoted above, p.6.

[45] BR-Dr. 1002/98; see also DEINERT, NZA 1999, p.800 ff.