https://doi.org/10.59821/18294219-2023.2-bnab02

Norbert Bernsdorff[1]

Doctor of Law, Honorary Professor at Philipps-University Marburg, Faculty of Law,
National key expert on the European Charter of Fundamental Rights (in Vienna),
Retired Judge of the Third Instance Court on Social Affairs of Germany,
Member of the Editorial Board of the Scientific-Practical Journal "Legality" of the RA Prosecutor's Office

A EUROPEAN BILL OF RIGHTS: TAKING STOCK OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION[2]

Abstract

The Charter of Fundamental Rights of the European Union (EU) was proclaimed at the EU summit in Nice on 7 December 2000. Since 2009, it has been binding for the EU and the Member States. With seven titles and 54 articles, the Charter of Fundamental Rights sets out what the EU and the Member States have to observe.

What is the significance of the Charter? – Is it an inventory of what is already in force and therefore of no tangible benefit to the individual, or does it have "added value"? – Is it a new Bill of Rights? Euphoric advocates of the Charter of Fundamental Rights see it as an instrument for more European democracy and transparancy, even as a precursor to a European constitution. Sceptics doubt the necessity of the Charter. Fomer German Foreign Minister Josef Fischer has called it a "milestone in the history of European unification".

Keywords: European Charter of Fundamental Rights; Convention; Fundamental rights of the "new generation"; Fundamental social rights; ECJ; EctHR; Prohibition of the death penalty; Right to asylum; Right to protection of minorities; Preamble; German Constitution.

---

[1] Norbert Bernsdorff is also the author provided technical-scientific support at the working level for the "European Charter of Fundamental Rights Project" in 2000 for the representatives of the German Bundesrat in the Brussels Convention on Fundamental Rights.

[2] The article was presented on 14.08.2023 and was reviewed on 30.11.2023.

Introduction

With his opinion of 12 December 2013 on the references for a preliminary ruling from the High Court of Ireland[3] and the Constitutional Court of Austria[4], Advocate General Pedro Cruz Villalon has impressively brought the importance of the Charter of Fundamental Rights of the European Union (CFREU) to the attention of the (not only specialist) public. In these cases, the European Court of Justice (CJEU) was dealing with (referral) questions on the validity of Directive 2006/24/EC[5] ("Data Retention") on the basis of Art. 7, Art. 8 and Art. 52 (1) CFREU. The Advocate General proposed a judicial declaration of the invalidity of the Directive because it was entirely incompatible with Art. 52(1) CFREU and partially incompatible with Art. 7 CFREU.

On 1 December 2009, almost exactly ten years after the Brussels Convention on Fundamental Rights was constituted on 17 December 1999, the Treaty of Lisbon entered into force. According to Article 6 (1) of the (new) Treaty on European Union, the Charter of Fundamental Rights of 7 December 2000, as amended in Strasbourg on 12 December 2007, thus became legally binding[6].

Since 1 December 2009, Europe has to deal with another fundamental rights text: the European Charter of Fundamental Rights. It is a legal text of European primary law which in principle affects all areas of life; this is the reason for its immense significance. It is not a new "Magna Charta", as the Charter of Fundamental Rights was euphorically called when it was first proclaimed in Nice on 7 December 2000. However, it is in the tradition of other important human rights documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR). The "two poles" of fundamental rights protection "Karlsruhe-Strasbourg" for Germans has now become a "triangle", if you will: "Karlsruhe-Strasbourg-Luxembourg". A Bermuda Triangle, as the former President of the German Federal Constitutional Court Jutta Limbach once put it, mockingly[7].

However, the legally binding nature of the Charter of Fundamental Rights and the solemn words with which it was welcomed at various European summits cannot hide the fact that controversies regarding the meaning of this new fundamental rights text persist. What does the Charter of Fundamental Rights represent? Is it a mere inventory

---

[3] Case C-293/12, OJ EU 2012, No C 258, p. 11. See Judgement of the Court of Justice of the European Union in the Case C-293/12, Digital Rights Ireland Ltd./Minister for Communications etc. and Kärntner Landesregierung etc., 8 April 2014, ECLI:EU:C:2014:238.

[4] Case C-594/12, OJ EU 2013, No C 79, p. 7. See footnote 1.

[5] Directive of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ EC 2006, No L 105, p. 54.

[6] OJ EU 2007, No C 303, p. 1.

[7] The term goes back to Chr. Lenz in his comment on the "Gibraltar Judgement" of the European Court of Human Rights of 18.2.1999, EuZW, ISSN 0937-7204, 1999, p. 311 f.

of what is already in force, or does it still represent an opportunity for European constitution- making? The assessments in the media ranged from "fig leaf for brutal globalisation", "superfluous piece of busywork", "mere political wish list", "decorative piece in the European shop window" to "document of a European catalogue of values", "visiting card for Europe" or, as former German Foreign Minister *Joschka Fischer* described the Charter of Fundamental Rights, "milestone in the history of European unification". Against this background, it makes sense today - more than twenty years after its proclamation and almost fifteen years after the entry into force of the Charter of Fundamental Rights - to remember the past and to take a look behind the scenes of the Brussels Convention on Fundamental Rights, but also to venture an outlook on the legal and cognitive status of the year 2023 and to examine the acceptance of and response to the Charter of Fundamental Rights.

1. Arguments for a European Charter of Fundamental Rights - Occasion and Background

In the 1970s, the constitutional law teacher Hans-Georg Rupp described the European Community as "rule without fundamental rights". However, this statement was true in a considerably weakened form until more recent times. The Treaties of Rome (1957), Maastricht (1992) and Amsterdam (1997) created a European public authority endowed with executive and legislative powers. However, there is no explicit recognition of fundamental rights in the form of a written catalogue of fundamental rights. As the CJEU stated early on and is also accepted in principle by the member states of the Union, European law takes precedence over national law. However, an appeal to domestic fundamental rights against European legal acts was and is fundamentally excluded, as its protection of fundamental rights by national constitutional courts; otherwise, the uniform application of European law in the Member States of the European Union (EU) would be called into question. This is the principle that has also been recognized by the German Federal Constitutional Court for a long time.

However, the lack of a catalogue of fundamental rights did not mean that there was a lack of any fundamental rights protection at the European level. In 1969 (Stauder case), the CJEU created fundamental rights protection through judicial law, hesitantly at first, but later more and more emphatically. In doing so, it "borrowed" from other European legal texts, especially those of the Council of Europe. In this context, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950 and the European Social Charter (ESC) of 1961 are particularly worthy of mention. This jurisprudence of the CJEU was taken up by the Amsterdam Treaty, however not by creating a catalogue of fundamental rights, but by a mere reference in Art. 6 of the Treaty on European Union to fundamental rights enshrined elsewhere (ECHR; national constitutions, insofar as they showed consensus).

A group of experts set up by the European Commission considered the existing legal situation as unsatisfactory despite the changes brought about by the Treaty of Amsterdam and stated in February 1999: "The above-mentioned system of references is confusing and counterproductive. It is unclear what value is attached to such treaty texts that are not mentioned in the references. Fundamental rights as a whole run the risk of not going beyond a mere appeal to the institutions of the EU and the member states"[8].

This was also the unanimous view of all European institutions and bodies in the end. In the German, and above all in the European public, there have been repeated calls for the EU to accede to the ECHR as an association of states. Such an accession would possibly make the creation of a Charter of Fundamental Rights, i.e. the Union's own legal text, unnecessary. According to an opinion of the CJEU in 1996, however, this path was blocked; after that, the Union Treaty had to be amended. For a long time, no agreement could be reached on this. In the meantime, however, the legal hurdles have been removed; Article 6(2) of the (new) Treaty on European Union makes EU accession to the ECHR obligatory. The conditions for this under convention law are now also fulfilled.

2. The Content and Institutional Framework - Cologne and Tampere

As is generally known, the initiative to create a Charter of Fundamental Rights came from the German Council Presidency. In June 1999, the European Council, i.e. the assembly of the EU heads of state and government, entrusted a body with this task at its meeting in Cologne. The content and function of the future Charter of Fundamental Rights were paraphrased as follows: "The fundamental rights confirmed and shaped by the CJEU are to be summarized and thus made more visible. Thus, if one takes the wording of its decision seriously, the European Council had in mind the preservation of the existing rather than the creation of something new in terms of content. The Charter was to comprise three groups, in Brussels terminology three "baskets" of fundamental rights: the classical fundamental rights of freedom, equality and procedure (so-called first basket), the Union citizens' rights (so-called second basket) and the economic and social rights (so-called third basket). On the question of the legally binding nature of the Charter of Fundamental Rights, the Cologne decision was clear. "Whether and, if so, how the Charter should be incorporated into the Treaties" was to be examined only after its proclamation, i.e. in the course of the following intergovernmental conference (so-called two-stage procedure).

The working modalities of the body, later called the "Convention", were established in October 1999 at the summit in Tampere, Finland: The Convention comprised 62 members and four observers (CJEU/Council of Europe - European Court of Human

[8] Report "Fundamental Rights in the European Union vouch for - Time to Act", p. 13 ff.

Rights). It was composed of representatives of the 15 national governments, 30 national parliamentarians, as well as 16 members of the European Parliament and one representative of the European Commission. The Convention was chaired by the former President of the German Federal Constitutional Court, former German President and representative of the Federal Government Roman Herzog, Herzog thus in a double role. Delegated by the German Bundestag were MP Jürgen Meyer, who later made a name for himself in the conception of fundamental social rights, and as his deputy MP, later Federal Environment Minister and Federal Economics Minister Peter Altmaier.

If one wants to take stock and evaluate the Charter of Fundamental Rights, one must also look at the Convention procedure. At the time, it could be gathered from the press that this procedure was celebrated as a success by all those involved. This assessment was and is justified: Having the Charter of Fundamental Rights negotiated by a Convention was an experiment. Admittedly, the Convention was not envisaged as an institution in the founding treaties of the EU. However, in view of its composition — about three quarters of its members were parliamentarians - it provided an additional, unprecedented parliamentary legitimacy. For this reason, the European law expert Meinhard Hilf considered this procedure to be a model and recommended it for imitation in further reforms of the Union[9]. Following on from this success story, the "Convention on the Future of Europe" was formed on 28 February 2002 as a second convention to draw up recommendations for a European constitution.

3. The Deliberations in the Convention on Fundamental Rights -Technical procedure, content-related points of contention

If one intends to give a kind of workshop or laboratory report[10] on the Convention deliberations, one is forced to impose limitations. Too many topics would have to be addressed. The debates held in the 18 sessions of the Brussels Convention will therefore only be briefly outlined here.

The former President of the German Federal Constitutional Court and German President Roman Herzog played a decisive role in shaping the Charter of Fundamental Rights and contributed significantly to the success of the project with his balancing manner. Yet he did not have it easy sincehe was assigned a double task: as government commissioner he was to represent the German Federal Government in the Convention, and as Convention Chairman he was to coordinate the interests of all member states. After his election as Convention Chairman, he effectively no longer performed the first function; a problem for the German Federal Government, which has since been unable to place its amendments in the plenary session of the Convention with any external effect. Nevertheless, Herzog presented a list of fundamental rights he had drawn up very

[9] FAZ of 6.12.2000: "Parliaments in a central position".
[10] Cf. on this topos Die Zeit of 16.3.2000: "Die Wertegemeinschaft Europa im Labor".

early on and was one of the first to submit a proposal for discussion. He also demanded that the content of the Charter of Fundamental Rights be designed as if it were immediately binding. This was somewhat contradictory to the Cologne resolution, but had a great integrative effect on all those who wanted to discuss the legally binding nature of the Charter of Fundamental Rights in the Convention. In the end, it was his merit that the Charter of Fundamental Rights, at least in its systematics, is based on the German constitution and takes the commitment to human dignity as its starting point: the principle of human dignity as a "mother fundamental right".

In Germany, the Convention deliberations were flanked by a lively debate. The cooperation between the German Convention members was always a reflection of these discussions in Germany. Until the end of May 2000, the German Convention members pulled together across the parties on all important issues. However, this state of affairs changed when the two major parties in Germany discovered their particular "hobby-horses". These include, for example, the demand for the inclusion of a fundamental right to a homeland and protection against expulsion on the one hand, and the demand for the inclusion of same-sex partnerships in marriage and family protection on the other.

How democratic and transparent was the Convention procedure really? -This topic was and is one of the least discussed in public, but undoubtedly one of the most sensitive: the Fundamental Rights Convention worked without rules of procedure. It was difficult to establish minority and majority opinions in the Convention. There were no votes in plenary to determine whether individual articles or the Charter as a whole could be approved. It was exclusively in the hands and thus the responsibility of the Praesidium, which did not meet in public, to determine whether a text was capable of consensus or not. The final compromises were therefore not found in the plenary session of the Convention, but in the Praesidium. This is the only way to explain, for example, that the demand for the inclusion of artistic and scientific freedom and a right to con scientious objection, which had been raised by a majority from the beginning, was ignored for months and only taken into account in the final phase of the Convention's deliberations. A little story on the side: In June 2000, the Praesidium received 371 amendments on 506 pages on fundamental social rights from the midst of the plenum. Just one day later, the Bureau reacted to this flood of amendments with a compromise paper and claimed to have incorporated the amendments. The displeasure in the plenum was great.

The Fundamental Rights Convention has always had to perform a balancing act, whether in the area of classical fundamental rights or fundamental social rights. - Which (extreme) positions had to be brought together?

Opinions are divided on Europe, especially when it comes to projects such as a European Charter of Fundamental Rights. Some really wanted it, others just wanted a "sham". This was also the way in which the Convention debated the content of the

Charter. Euphoric advocates of the Charter of Fundamental Rights, including many MEPs, saw it as an instrument for more European democracy, closeness to the citizens and transparency, even as a preliminary stage for a European constitution. This commitment of the European parliamentarians was not entirely altruistic since the European Parliament expected the creation of such a constitution to increase its own competences. Sceptics doubted the necessity of the Charter. They feared that this "catalogue of values", if incorporated into the European treaties, would be enforceable by the citizens of the EU against their national governments and that undesirable national obligations might follow. Interesting alliances emerged in the Fundamental Rights Convention: for example, French and Belgian conservatives, almost the entire left in the Scandinavian countries and the British Tories. However, there were different reasons for these positions in each case. The representatives of the Scandinavian countries, for example, were concerned that their own very high national standard of fundamental rights would be "devalued" by a European Charter of Fundamental Rights with only a "moderate" level of protection. There were long discussions, for example, in the area of environmental protection, which the Finns and Swedes did not want to be anthropocentric but ecocentric and strengthened by an individual fundamental right.

The British government representative Lord Peter Goldsmith, Tony Blair's spearhead in the Convention, proved to be a constant "brakeman". From the British government's point of view, the aim was to allow as little European competence as possible to "pass" without isolating itself. In the European press, this British position was described thus: The British favour a free trade statute, not a catalogue of fundamental rights. However, there was another reason for the stubbornness of the British government representative. For example, the Convention hardly took note of the fact that the ECHR of 1950 was only transposed into English law in the mid-2000s (Human Rights Act of 1998). This can be explained by the British legal tradition, according to which the British legislature was subject to almost no legal barriers until then. For a long time, British citizens were unable to assert violations of the ECHR by the legislature before the courts of their country. It was feared that the fundamental change in British law introduced by the Human Rights Act would be intensified beyond what was intended if a binding Charter of Fundamental Rights were to establish further and possibly higher standards of fundamental rights. Incidentally, there was some sympathy for this position among many accession countries. Since they too had only recently implemented the ECHR in their national legal systems, many accession countries, led by Estonia, were also sceptical about the Charter of Fundamental Rights.

What content-related disputes determined the discussion process? A look at some fundamental rights or groups of fundamental rights shows how sensitively the discussions were conducted in some cases.

a) The Dispute over the so-called Modern Fundamental Rights or Fundamental Rights of the "New Generation

Surprising as it may sound, the Charter of Fundamental Rights is in some places more up-to-date than the German Basic Law. For example, it addresses the new threats in the field of information technology and genetic engineering through a detailed data protection provision in Article 8 of the Charter and the prohibition of eugenic practices and human reproductive cloning in Article 3(2) of the Charter. The fundamental right to good administration in Article 41 of the Charter is also modern in this sense.

The ban on cloning was very controversial. According to its wording, Art. 3 (2)(d) CFREU only prohibits the socalled reproductive cloning of humans. Conservative Convention members particularլը saw this as a softening of the general ban on cloning, bcause it implicitly permitted socalled therapeutic cloning. Both forms of cloning aim to create embryos, the first for the purpose of reproduction, the second for the purpose of research. Corresponding objections were not taken into account in the subsequent period. To this day, there are complaints that this is a "linguistic trick" which opens all doors to the further development of biotechnology under European law in the future. However, the discussion on the value of other forms of cloning and the legislative decision on this is merely shifted to the Member States by Article 3(2)(d) of the CFREU[11].

b) Controversies around Fundamental Social Rights

The European Community was created as an economic alliance with a clear focus on the free movement of people, goods, capital and services. Breathing "soul" into it and eliminating the social imbalance in the EU was one of the goals pursued with the Charter of Fundamental Rights. The transformation from an economic community to a community of values and from a community of rights to a community of rights was invoked again and again during the deliberations over the Convention. The former President of the Federal Constitutional Court, Jutta Limbach, therefore received much applause when she stated that the Charter could help to "civilise capitalism"[12].

The area of fundamental social rights contained considerable explosive material. Within the scope of the Convention, all conceivable positions were taken: complete rejection of the enshrinement of social rights, inclusion of social rights at least as programme sentences, structuring of fundamental social rights as genuine performance rights against the Union and the member states. The critics essentially put forward the following argument against a social formulation of the Charter of Fundamental Rights:

---

[11] Cf. on this in detail and with further evidence M. Borowsky, in: J. Meyer/S. Hölscheidt, Charta der Grundrechte der Europäischen Union, Commentary, 5th ed., ISBN 978-3-8487-5548-6, 2019, Art. 3 margin note 46.

[12] FAZ of 8.7.2000.

Basic social rights are too expensive because they overburden entrepreneurs and public coffers and endanger "Europe as a business location". The "right to work", which was mostly misunderstood as a "right to a job", also aroused the greatest suspicion.

As a result, the Fundamental Rights Convention chose a middle course. Accordingly, in the chapter on "Solidarity" (Title IV), those fundamental social rights that were already standard in the member states were recognized with restrained, rather tentative formulations. This is undoubtedly the merit of Jürgen Meyer, the representative of the German Bundestag in the Convention. The compromise proposal13, which he called the "three-pillar model", was approved by the majority of the Convention. In the area of the "second pillar", the model adopted the typology of basic economic and social rights of the international social rights covenants. It was also based on the idea of a "tripartite division of the levels of obligations" developed there and exposed the different "effective layers" of fundamental economic and social rights. According to this, each fundamental social right gives rise to three obligations on the part of the member state or the EU: an obligation to respect, an obligation to protect and an obligation to promote. Applied to the right on work or, as it is called in Art. 15 CFREU, the right "to work", this means, for example: The duty to respect ensures that exercise of the profession is not disproportionately restricted. The duty to protect, which is primarily directed against third parties, forces appropriate legislation to protect against dismissal. The duty to promote is intended to encourage member states, for example, to organize an employment agency. Thus: not a performance character, but a defensive character of fundamental social rights[14].

Finally, a remark: The inclusion of fundamental social rights in the Charter, i.e. the so-called third basket, was indispensable for the Convention. In a letter dated 27 April 2000, the UN Committee on Economic, Social and Cultural Rights had addressed "cautionary notes" to the Convention Chairman Roman Herzog. The letter stated that a renunciation of the anchoring of fundamental social rights in the Charter of Fundamental Rights would be regarded as a violation of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966[15, 16].

[13] Cf. for details N. Bernsdorff, Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union - Diskussionsstand und Konzept, VSSR, ISSN 0941-861X, 2001, p. 1, 10 ff.; N. Bernsdorff, Die Charta der Grundrechte der Europäischen Union - Notwendigkeit, Prozess und Auswirkungen, NdsVBl., ISSN 0946-7971, 2001, pp. 177, 179 f.

[14] In detail N. Bernsdorff, in: J. Meyer/S. Hölscheidt, loc.cit., Art. 15 margin note 15 f, with further references.

[15] BGBl 1973 II, 1570.

[16] "The Committee ... would nevertheless like to point out that if economic and social rights were not to be integrated in the Draft Charter on an equal footing with civil and political rights, such negative regional signals would be highly detrimental to the full realization of all human rights at both the international and domestic level, and would have to be regarded as a retrogressive step contravening the existing obligations of Member States of the European Union under the International Convention on Economic, Social and Cultural Rights".

c) The Dispute over the Ban on the Death Penalty, the Right of Asylum and the Right to Protect Minorities

The fact that the Charter of Fundamental Rights, beyond its legal significance, was also intended to have a political signal effect at the time - for example with regard to Turkey: meaning the Özcalan trial - became apparent in the dispute over the ban on the death penalty. The -Spanish government representative Alvaro Rodriguez-Bereijo had energetically expressed reservations about an absolute ban on the death penalty. Although the death penalty had been abolished in Spain, the Spanish constitution provided for the admissibility of the death penalty in the case of war, in accordance with a law to be created at that time. The human rights acquis of the ECHR may not be exceeded. Article 2 (2) of the CFREU shows that the Spanish government representative could not prevail. According to this, no one may be sentenced to the death penalty or executed. Any other result would have been absolutely unacceptable for the European community of values; today there has long been consensus in Europe that the death penalty is no longer compatible with the "level of member states' conceptions of justice"[17].

Since the Amsterdam Treaty, the EU is also competent in the field of asylum. For this reason, a provision on the right of asylum was rightly included in Art. 18 CFREU. The enshrinement of the right of asylum was preceded by an impressive controversy which had many facets: Many Convention members wanted to grant the right of asylum not only to third-country nationals, but also to EU citizens. The Kurdish problem in Turkey, which was one of the candidates for accession at the time, was undoubtedly decisive here. Here it was misjudged that the purpose of the right of asylum, to obtain protection from persecution in another country, can in fact already be achieved through the residence provisions of Union law. Nevertheless, in application of Article 18 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, nationals of Member States are also entitled to asylum. However, the "Asylum Protocol" referred to above, now No. 24, provides that "in view of the level of protection of fundamental rights and freedoms in the Member States of the Union", the Member States are to be regarded as safe countries of origin for each other, with the consequence that an asylum application will regularly be unfounded[18].

In particular, the European Greens were of the opinion that the right of asylum should be designed as an individually enforceable right. The majority in the Convention considered this proposal unacceptable; they argued for less and only wanted to tolerate an objective guarantee of the right to asylum. From the point of view of the Federal Republic of Germany, the current wording of Article 18 of the European Convention

---

[17] Spain has since refrained from introducing the death penalty in times of war: M. Borowski, in: J. Meyer/S. Hölscheidt, loc.cit., Art. 2 margin note 24.

[18] Cf. G. Jochum, in: P. Tettinger/Kl. Stern, Europäische Grundrechte-Charta, Kölner Gemeinschaftskommentar, ISBN 978-3-406-54409-5, 2006, Art. 18 margin note. 15.

on Human Rights still does not accurately reflect this position of the Convention; the term "right to asylum" is particularly objectionable here[19]. During this - naturally emotionally charged - debate, turbulent scenes took place during the plenary session of the Convention. Johannes Voggenhuber, a Green MEP from Austria, demanded that the restriction of the right to freedom of movement to EU citizens be abolished and that this right be extended to third-country nationals as compensation for a mere objective guarantee of the right to asylum. If we take a look at Article 45 (2) CFREU, we will see that he has at least partially succeeded with this demand. According to this, third-country nationals with legal residence are granted freedom of movement and residence "in accordance with the Treaties", i.e. in compliance with the Union's competence[20].

A final word on the right to protection of minorities in Article 22 CFREU! - In this Article, the Union acknowledges the diversity of cultures, religions and languages in Europe. Thus, this provision enshrines elements of minority protection and takes Europe's cultural heritage into account. From the point of view of a larger group of Convention members, there was a deplorable gap here. The Charter of Fundamental Rights does not respond to the human rights sins of the past century: expulsion and ethnic cleansing. Of course, this was also discussed in the Convention; even the former Vice-President of the European Parliament, Ingo Friederichs, repeatedly called for the inclusion of a right to protection against expulsion. But the drafting of the Charter of Fundamental Rights was also a genuinely political process. Under certain circumstances, a right to return to one's ancestral territories should have been linked to a right to protection against expulsion: a bad signal against the background that in the course of the eastward enlargement of the Union, the Czech Republic for example, was a candidate for accession. In this respect, it would not have helped to point out that property restitution claims arising from confiscations and land reforms in the war and post-war years could not be based on Article 17 CFREU "ratione temporis". For, as "instantaneous acts", these no longer cause violations of rights that continue into the present[21].

d) Disputes over the Preamble

At the last moment, a controversy arose over the wording of the preamble to the Charter of Fundamental Rights. In Roman Herzog's absence, the representatives of the secular states France and Belgium had the reference to the "religious heritage" in the preamble deleted by the Convention Presidium. This was vigorously opposed by the conservative European parliamentarians, as well as representatives of Austria and Luxembourg. A compromise was found: The final version of the Charter of Fundamental

---

[19] On its substantive scope N. Bernsdorff, in: J. Meyer/S. Hölscheidt, loc.cit., Art. 18 margin note 13a.

[20] Today regulated in Art. 77 et seq. of the Treaty on the Functioning of the European Union.

[21] See in detail J. Meyer/N. Bernsdorff, Die Grundrechtecharta begründet keine Eigentumsrückgabeansprüche in Tschechien, EuZW, ISSN 0937-7204, 2009, p. 793.

Rights invokes the "spiritual and moral heritage" in its English and French versions. There were no objections to "spiritual" being rendered as "spiritual-religious" in the official German language version. Ultimately, however, the question of religious and transcendental references remained unresolvedsince, according to CJEU case law, the need for uniform interpretation and application of all official texts prohibits any isolated consideration of provisions in one of their language versions. Here, difficulties of interpretation are likely to be pre-programmed[22].

4. Outlook: The Charter of Fundamental Rights in Legal Practice

A leaflet from the European Commission, the European Parliament and the German Federal Government recently read: Finally, Europe guarantees your fundamental rights! The citizens of Germany can sue for these rights if necessary. - Of course, the flyer says nothing about the difficulties this poses for the user of the law. What is comforting is the following: All member states are currently struggling over the statics of the new - as it is called "- fundamental rights architecture".

According to recent research, the Charter of Fundamental Rights has only been applied with restraint by German courts, even though it has been in force for almost fifteen years. The first reason for this is, of course, that the Charter of Fundamental Rights as a legal standard only takes effect "ratione temporis" from 1 December 2009; in principle, it does not apply to circumstances prior to that date. However, this finding can also be explained by uncertainties in the classification of the Charter in the already existing - international and national - fundamental rights and human rights systems. What is the balance? - In several rulings on spousal reunification and protection against deportation, the German Federal Administrative Court merely mentioned Article 7, Article 19 and Article 21 CFREU - as supplementary standards - alongside German fundamental rights. The German Federal Supreme Court has proceeded in the same way, limiting itself in several decisions on the "Walter Sedlmayr" murder trial to stating that freedom of the press is now also protected in Article 11 of the European Charter of Fundamental Rights. In a larger number of decisions by the 3rd Senate and two preliminary references by the 6th Senate, the German Federal Labour Court, referring to the CJEU's "Kücükde- veci ruling" of 19 January 2010[23], merely notes that the prohibition of age discrimination is now — namely in the Charter of Fundamental Rights - also secured under primary law. And the German Federal Constitutional Court? - In its highly regarded ruling of 6 July 2010 on the "ultra vires control"[24], the Second Senate of the Federal Constitutional Court stated - in an obiter dictum - that

[22] Cf. the reference to the so-called nonian procedure in J. Meyer, in: J. Meyer/S. Hölscheidt, loc. cit., Preamble, margin note 32; also R. Streinz, in: R. Streinz, EUV/AEUV, 2nd ed, ISBN 978-3-406-69481-3, 2012, Preamble GR-Charta, margin note 9, fn. 15.

[23] Judgement of the Court of Justice of the European Union in the Case C-555/07, Seda Kükükdeveci/Swedex GmbH & Co. KG, 19 January 2010, ECLI:EU:C:2010:21.

[24] BVerfG, decision of 6 July 2010, 2 BvR 2661/06, BVerfGE 126, p. 286.

EU law has, at least since December 2009, contained a fundamental right to protection against age discrimination. In its judgement of 24 April 2013 on the constitutionality of the "Antiterrordatei- Gesetz" (Anti-Terrorism Data File Act)[25], which also attracted attention, the First Senate expressed its opinion on the applicability of the protection of fundamental rights under EU law from Article 8 of the CFREU and denied this.

Insofar as references to the Charter of Fundamental Rights can be found in the German specialised courts, they tend to be descriptive. They suggest that German and European fundamental rights have the same protective content. So far, there has been no in-depth discussion on the scope of application, the scope of protection of individual fundamental rights and the system of barriers. The CJEU is less restrained. While it had already taken the Charter of Fundamental Rights into account as "soft law" until it became legally binding, it has been taking it seriously since 2010. For example, it judges custody decisions against the standard of Article 24 (3) CFREU ("rights of the child") and makes a firm statement on its scope of protection, measures decisions on family reunification against Article 7 CFREU ("respect for private and family life"), comments on the relationship between the right to collective bargaining in Article 28 CFREU and the freedom of association in the German constitution, etc. In response to submissions from Belgium, Greece and Austria, statements on fundamental social rights, such as "health protection" in Art. 35 CFREU, are expected soon.

a) Whom does the European Charter of Fundamental Rights Entitle, whom does it Oblige? - Charter and German Constitution

How does the Charter of Fundamental Rights relate to the fundamental rights of the German constitution? What will happen to the fundamental rights standards that the German Federal Constitutional Court has sensitively "distilled out" in decades of case law? -The question of the remaining significance of national fundamental rights guarantees is rarely answered clearly in politics and jurisprudence, and often evasively. The starting point for considerations on this must be the scope of application of the European Charter of Fundamental Rights (Art. 51 CFREU).

In principle, all people can invoke the fundamental rights of the Charter and not only the nationals of the Member States, i.e. the citizens of the Union. The classic fundamental rights of freedom, equality and procedure as well as the fundamental social rights are thus also available to third-country nationals. This is right, because it was indispensable for these fundamental rights to be defined as "everyone's rights" in view of the member states' international human rights obligations. According to the Cologne decision, the Convention on Fundamental Rights should take into account the common constitutional traditions of the member states in its "creation process". However, these were generally considered to be influenced not only by the national fundamental rights

[25] BVerfG, Judgment of 24.4.2013, 1 BvR 1215/07, EuGRZ, ISSN 0341-9800, 2013, p. 174.

catalogues, but also by the international obligations of the member states. For reasons that had found expression in European treaty law (at the time Art. 17 et seq. of the Treaty establishing the European Community), and in accordance with the Cologne Decision, certain Charter rights should exceptionally be reserved for Union citizens. These include the political rights of participation (Art. 39, Art. 40 CFREU) and the (economic) rights of free movement (Art. 15 (2), Art. 45 (1) CFREU).

Who is obliged to respect the European Charter of Fundamental Rights can be inferred from Article 51 (1), first sentence, of the Charter: "This Charter shall apply to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". This makes it clear that the Charter of Fundamental Rights binds the EU and its subdivisions. However, legal acts of the EU member states are also subject to its regime under the conditions stated there. Article 51 (1), first sentence, CFREU thus codifies the case law of the CJEU, which has assumed since 1986 at the latest that the fundamental rights of Community law are to be observed as general principles of law "in" the Community. According to all this, there is only room for the application of national fundamental rights where national, and exclusively national, law is "implemented".

In the euphoria of the Convention's deliberations, many Convention members "proclaimed" that the fundamental rights of the Charter of Fundamental Rights should not replace national fundamental rights, but only supplement them. Formally speaking, these representatives are right. Both catalogues exist de jure unrelated to each other. This means that their requirements must always be fulfilled cumulatively. Ultimately, European and national fundamental rights act like different networks stretched over one another. Legal scholars, however, raise their fingers in warning and predict that the fundamental rights of the German Basic Law will be superseded and replaced in the long run. And this will also happen outside the scope of the Charter of Fundamental Rights. As early as April 2000, at a hearing of the EU committees of the German Bundestag and Bundesrat[26], the constitutional law professor Hans Hugo Klein pointed out that European fundamental rights, by their very existence, would influence the interpretation of national fundamental rights provisions and lead to a certain standardization of the interpretation of fundamental rights in the member states. This "unitarization potential" of a binding Charter of Fundamental Rights should not be underestimated.

In addition, the Convention on Fundamental Rights pursued a clearly restrictive approach in drafting Article 51 (1) CFREU. The originally proposed passage "in the application of Union law" failed early on due to the resistance of the Member States. The members of the Convention wanted to deliberately avoid adopting the CJEU's case law, which is known as ERT-case law[27] and which is perceived as "sucking up compe-

[26] Public Hearing of the EU Committees of the German Bundestag and the Bundesrat on 5 April 2000 on the Charter of Fundamental Rights of the European Union, Materials Collection, Part II, p. 17.

tence", and to call on the CJEU to exercise restraint. The intention was to limit the CJEU's competence to review fundamental rights in the area of fundamental freedoms and to reassert the old, unproblematic "Wachauf" jurisprudence from 1989[28], which only applies to the implementation of Union law. Unfortunately, this signal is in danger of being overheard. Unfortunately, the Convention on Fundamental Rights itself named the European Court of Justice case-law as a reference case-law in its explanations on Article 51 of the European Charter of Fundamental Rights. Following on from this, there are more and more announcements from Brussels (European Commission) and Luxembourg (CJEU) that they want to interpret the scope of the Charter correspondingly broadly, precisely in the sense of this European Court of Justice case law.

These tendencies are the only explanation for the fact that the German Federal Constitutional Court in its judgement of 24 April 2013 on the "Anti-Terrorism Data File Act"[29], explicitly referring to the CJEU's decision in the Akerberg Fransson case[30], made it clear that "every factual reference of a regulation to the merely abstract scope of application of Union law" is not sufficient for the Member States to be bound by the fundamental rights laid down in the Charter of Fundamental Rights and that "purely factual effects on Union law" are not sufficient either. The scope of application of the Charter is therefore not necessarily opened just because Member State action takes place in an area that is "somehow" covered by Union competences or has a proximity to them. Furthermore, the area in question must actually be regulated by Union law. The fact that it could be regulated by Union law is also not sufficient in itself.

b) The Relationship between the European Court of Justice (Luxembourg) and the European Court of Human Rights (Strasbourg)

The deliberations over the Convention in Brussels were always followed very closely by Marc Fischbach. Fischbach was a judge at the European Court of Human Rights (ECtHR), which is responsible for monitoring compliance with the ECHR. Judge Fischbach was one of the four non-voting observers in Brussels. His preference would have been for the European Union to join the ECHR. Mere wrangling over competences?

In the past, due to the lack of its own catalogue of fundamental rights, the CJEU had taken into account or adopted the case law of the ECtHR in substance when exercising fundamental rights jurisdiction in the area of application of the ECHR guarantees. Although there was no obligation to refer cases to the Human Rights Court, there was

---

[27] Judgement of the Court of Justice of the European Union in the Case C-260/89, Elliniki Radiophonia (ERT)/Dimotiki Etaira, 18 June 1991, ECLI:EU:C:1991:254.

[28] Judgement of the Court of Justice of the European Union in the Case C-5/88, Hubert Wachauf/Bundesamt für Ernährung und Forsttwirtschaft, 13 July 1989, ECLI:EU:C:1989:321.

[29] BVerfG, Judgment of 24.4.2013, 1 BvR 1215/07, EuGRZ, ISSN 0341-9800, 2013, pp. 174, 185.

[30] Judgement of the Court of Justice of the European Union in the Case C-617/10, Aklagaren/Hans Akerberg Fransson, 7 May 2013, ECLI:EU:C:2013:280.

a loose cooperation relationship. In this way, a divergence of the fundamental rights or human rights situation in Europe was prevented. The ECtHR had a certain "sovereignty of interpretation".

This has changed with a binding EU Charter of Fundamental Rights: The protection of fundamental rights under Community and Union law became independent. It formally replaced the ECHR. The Union now has its own legal text. This entails the danger of creating two systems of human rights protection or double standards, a "luxury legal protection" for nationals of the 27 member states of the EU and a "basic legal protection" for nationals of those contracting states of the Council of Europe that are not members of the EU[31]. On the other hand, the CJEU, despite its solid work, did not appear to be a "guardian of fundamental rights"[32]. Thus, measures of the Community Legislator had not yet (at all) failed at the CJEU due to a violation of fundamental rights. The skepticismskepticism of the Human Rights Court towards the project of a Charter of Fundamental Rights was therefore not simply the result of "unfruitful competitive thinking". Rather, it was an expression of serious concern about the potential for conflict inherent in two incoherent systems of protection[33].

Insofar as the Charter in its Art. 52 (3) stipulates that the rights corresponding to the ECHR guarantees have the same meaning and scope as the latter, the problem of (necessary) coherence is only imperfectly solved. The opening clause in sentence 2 of the provision tends to stand in the way of an orientation towards the case law of the ECtHR. The reference in the preamble (fifth recital or paragraph V) also does not readily leave room for its consideration. What legal and above all political dynamics will be inherent in the relationship between the CJEU and the ECtHR in the future is highly uncertain. Whether and "in which direction" the accession of the Union to the ECHR, which is obligatory according to Article 6 (2) of the Treaty on European Union, will tranquilize the relationship, is completely open[34].

---

[31] Likewise Chr. Alber/K. Widmaier, Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung, EuGRZ, ISSN 0341-9800, 2000, pp. 497, 501 f.; on the public discussion of this question cf. various articles in NZZ of 15.3.2000, FAZ of 25.9.2000 and 27.9.2000 as well as NZZ of 30.9.2000 and 4.11.2000.

[32] Cf. for example G. Ress, Menschenrechte, europäisches Gemeinschaftsrecht und nationales Verfassungsrecht, in: H. Haller/Chr. Kopetzki/R. Novak/Th. Paulson/B. Raschauer/G. Ress/E. Wiederin, Staat und Recht, Festschrift für Günther Winkler, ISBN 3211830243, 1997, pp. 897, 917 ff.

[33] For this reason, and this is interesting, Switzerland, which as is well known is not a member of the European Union, has energetically intervened in the debate on the Charter of Fundamental Rights; cf. for example L. Nabholz-Haidegger in NZZ of 4.11.2000.

[34] Instructive on this Kl. Spiekermann, Die Folgen des Beitritts der EU zur EMRK für das Verhältnis des EuGH zum EGMR und den damit einhergehenden Individualrechtsschutz, ISBN 978-3-8487-0650-1, 2013, p. 171 ff.

c) Scope for Action of the German Federal Constitutional Court - Change of meaning?

The relationship of the German Federal Constitutional Court to the CJEU has always been a special one. The attributes with which it was labelled were mostly taken from the vocabulary of disaster control[35].

There was talk of "confrontation", "power struggle" and a "conceivable super-disaster". It is left to more comprehensive publications to trace the chequered history of this relationship[36]. However, a few basic remarks are necessary at this point:

From the very beginning, the German Federal Constitutional Court expressed its intention to preserve the standard of fundamental rights protection it had achieved, even in the process of European integration. Because it lacked a corresponding standard of fundamental rights at the European level, it saw itself as authorized to review Community legal acts without restriction against the yardstick of the fundamental rights of the German constitution. It then later "scaled back" this power of review it had assumed, after the CJEU had itself developed fundamental rights under judicial law. Admittedly, the Federal Constitutional Court did not abandon its claim in principle to review Community/Union legal acts for their conformity with fundamental rights. However, it no longer exercised its jurisdiction because fundamental rights protection comparable to the standard of the German constitution had been established at the European level in the meantime. This was the message of the "Solange I"-, "Eurocontrol"- and "Solange II"-decisions of the German Federal Constitutional Court. The Federal Constitutional Court continued this case law without a break in thought in the "Maastricht"-ruling (1993) and confirmed it in the "Banana" -ruling (2000)[37].

Under the regime of the European Charter of Fundamental Rights, the German Federal Constitutional Court has experienced a "dwindling of tasks". The protection of fundamental rights in Europe is considerably improved. This means that the final decision-making competence or reserve competence assumed by the Federal Constitutional Court has only theoretical significance; it is hardly conceivable that the CJEU will ever lower its protection of fundamental rights below that of the German Constitution in the future[38]. In the future, it will obviously be more a matter of "warding off" the latter's "encroachments" on its own portfolio of tasks with reference to a cooperative relationship between the German Federal Constitutional Court and the CJEU[39]; the rul-

[35] Cf. J. Limbach in FR of 10.8.2000.

[36] For an introduction: G. Nicolaysen, Der Streit zwischen dem deutschen Bundesverfassungsgericht und dem Europäischen Gerichtshof, EuR, ISSN 0531-2485, 2000, p. 495 ff.

[37] Cf. J. Limbach, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ, ISSN 0341-9800, 2000, pp. 417, 419.

[38] Cf. BVerfG, judgement of 12.10.1993, 2 BvR 2134/92 et al, BVerfGE 89, pp. 155, 174 f.; BVerfG, decision of 7.6.2000, 2 BvL 1/97, BVerfGE 102, pp. 147, 164.

[39] Cf. BVerfG, judgment of 24.4.2013, 1 BvR 1215/07, EuGRZ, ISSN 0341-9800, 2013, pp. 174, 185, with reference to BVerfGE 126, pp. 286, 307.

ing of the Federal Constitutional Court of 24 April 2013 on the constitutionality of the "Anti-Terrorism Data File Act" is an eloquent example of this[40].

In principle, however, the aforementioned changes in competences must be viewed and evaluated from the perspective of the people in the Union, incidentally also in the opinion of the German Federal Constitutional Court. The former judge of the Federal Constitutional Court, Udo Steiner, has made it clear that it is not a question of whether the German Federal Constitutional Court will lose importance as a constitutional body in the course of the future division of judicial responsibility for fundamental rights in the European Union. The only decisive factor was whether the high standards of national constitutional jurisdiction in matters of fundamental rights would be maintained at the level of Community or Union law[41]. The former President of the German Federal Constitutional Court, Jutta Limbach, also emphasized this aspect of an effective binding of European public authority by fundamental rights[42].

Conclusion

The European Charter of Fundamental Rights is still in the "reception phase"! It is no secret that the provisions of the Charter, including its so-called basic texts, i.e. the legal sources from which it is derived, are still not sufficiently taken into account in German legal practice. The enforcement of the standards of the ECHR is still deficient; the same applies, with restrictions, to the rest of European primary and secondary law. Finally, texts such as the ESC and the Community Charter of the Fundamental Social Rights of Workers have a real shadowy existence. Since it has become legally binding, however, the European Charter of Fundamental Rights participates in the primacy of application of Union law. According to the CJEU, this exists without restriction and, in the opinion of the German Federal Constitutional Court, also in principle before national constitutional law. In plain language, this means that the fundamental rights of the Charter take precedence over the fundamental rights of the German constitution within their scope of application and in cases of conflict. For the legal texts just described, the ECHR, the ESC, the Community Charter, etc., this means that insofar as they are materially "received" by the Charter of Fundamental Rights and raised to the level of fundamental rights, they are given direct validity through the Charter, which they did not have before, and they are given a rank above the German system of fundamental rights.

[40] Critical of this is Th. von Danwitz, EuGRZ, ISSN 0341-9800, 2013, pp. 253, 261. However, the Federal Constitutional Court's preliminary ruling of 14 January 2014 on the "OMT Decision" of the Council of the European Central Bank (2 BvR 2728, 2729, 2730 and 2731/13 as well as BvE 13/13) now appears as a somewhat conciliatory act.

[41] See for example U. Steiner, Richterliche Grundrechtsverantwortung in Europa, in: Staat, Kirche, Ver- waltung, Festschrift für Hartmut Maurer zum 70. Geburtstag, ISBN 978-3-406-47755-3, 2001, pp. 16, 22.

[42] Thus J. Limbach, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ, ISSN 0341-9800, 2000, pp. 417, 420.

Since 1 December 2009, German courts in particular have had no choice but to use the fundamental rights of the Charter of Fundamental Rights as a yardstick. In this respect, they act as "Union courts"; their role as the "extended arm" of European jurisdiction is particularly emphasized in Article 19 (1) of the Treaty on European Union. In any case, when applying the fundamental rights of the German Constitution, the German courts must examine what the relevant European fundamental right determines as interpreted by the CJEU[43].

The time for criticizing the Charter of Fundamental Rights and measuring it against the yardstick of the fundamental rights of the German Constitution should, after all, be over, as the former President of the German Federal Supreme Court Günter Hirsch rightly points out[44].

"Critical reviews" had their place in the drafting phase of the Charter, during the Convention deliberations and the subsequent intergovernmental conferences. Now, at the level of law and knowledge of the year 2023, it is important to familiarize oneself with the provisions of the Charter of Fundamental Rights and to contribute to a common European dogmatics of fundamental rights.

[43] Accurately G. Hirsch, Die Aufnahme der Grundrechte-Charta in den Verfassungsvertrag, in: J. Schwarze, Der Verfassungsentwurf des Europäischen Konvents, 1st ed., ISBN 978-3-8329-0685-6, 2004, pp. 111, 117.

[44] G. Hirsch, Die Aufnahme der Grundrechte-Charta in den Verfassungsvertrag, in: J. Schwarze, Der Verfassungsentwurf des Europäischen Konvents, 1st ed., ISBN 978-3-8329-0685-6, 2004, pp. 111, 124.

Reference list (գրականության ցանկ, список литературы)

1. Chr. Alber/K. Widmaier, Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung, EuGRZ, ISSN 0341-9800, 2000, p. 497.
   Chr. Alber/K. Widmaier, The EU Charter of Fundamental Rights and its impact on case law, EuGRZ, ISSN 0341-9800, 2000, p. 497.
2. N. Bernsdorff, Die Charta der Grundrechte der Europäischen Union – Notwendigkeit, Prozess, Auswirkungen, NdsVBl., ISSN 0946-7971, 2001, p. 177.
   N. Bernsdorff, The Charter of Fundamental Rights of the European Union – Necessity, Process, Impact, NdsVBl., ISSN 0946-7971, 2001, p. 177.
3. N. Bernsdorff, Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union, VSSR, ISSN 0941-861X, 2001, p. 1.
   N. Bernsdorff, Fundamental social rights in the Charter of Fundamental Rights of the European Union, VSSR, ISSN 0941-861X, 2001, p. 1.
4. Th. von Danwitz, Verfassungsrechtliche Herausforderungen in der jüngsten Rechtsprechung des EuGH, EuGRZ, ISSN 0341-9800, 2013, p. 253.
   Th. von Danwitz, Constitutional challenges in the recent case law of the EuGH, EuGRZ, ISSN 0341-9800, 2013, p. 253.
5. H. Haller/Chr. Kopetzki/R. Novak/Th. Paulson/B. Raschauer/G. Ress/E. Wiederin (eds.), Staat und Recht, Festschrift für Günter Winkler, ISBN 3211830243, 1997.
6. G. Hirsch, Die Aufnahme der Grundrechte-Charta in den Verfassungsvertrag, in: J. Schwarze, Der Verfassungsentwurf des Europäischen Konvents, 1. Aufl., ISBN 978-3-8329-0685-6, 2004, p. 111.

G. Hirsch, The inclusion of the Charter of Fundamental Rights in the Constitutional Treaty, in: J. Schwarze, The Draft Constitution of the European Convention, 1st ed., ISBN 978-3-8329-0685-6, 2004, p. 111.

7. J. Limbach, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, EuGRZ, ISSN 0341-9800, 2000, p. 417.
   J. Limbach, The cooperation of the courts in the future European fundamental rights architecture, EuGRZ, ISSN 0341-9800, 2000, p. 417.
8. J. Limbach, FR vom 10.8.2000.
9. J. Meyer/N. Bernsdorff, Die Grundrechtecharta begründet keine Eigentumsrückgabeansprüche in Tschechien, EuZW, ISSN 0937-7204, 2009, p. 793.
   J. Meyer/N. Bernsdorff, The Charter of Fundamental Rights does not establish any claims for property restitution in the Czech Republic, EuZW, ISSN 0937-7204, 2009, p. 793.
10. J. Meyer/S. Hölscheidt (eds.), Charta der Grundrechte der Europäischen Union, Kommentar, 5. Aufl., ISBN 978-3-8487-5548-6, 2019.
    J. Meyer/S. Hölscheidt (eds.), Charter of Fundamental Rights of the European

Union, Commentary, 5th ed., ISBN 978-3-8487-5548-6, 2019.
11. L. Nabholz-Haidegger, NZZ vom 4.11.2000.
12. G. Nicolaysen, Der Streit zwischen dem deutschen Bundesverfassungsgericht und dem Europäischen Gerichtshof, EuR, ISSN 0531-2485, 2000, p. 495.
    G. Nicolaysen, The dispute between the German Federal Constitutional Court and the European Court of Justice, EuR, ISSN 0531-2485, 2000, p. 495.
13. J. Spiekermann, Die Folgen des Beitritts der EU zur EMRK für das Verhältnis des EuGH zum EGMR und den damit einhergehenden Individualrechtsschutz, ISBN 978-3-8487-0650-1, 2013, p. 171.
    J. Spiekermann, The consequences of the EU's accession to the ECHR for the relationship between the ECJ and the ECHR and the associated individual legal protection, ISBN 978-3-8487-0650-1, 2013, p. 171.
14. U. Steiner, Richterliche Grundrechtsverantwortung in Europa, in: Staat, Kirche, Verwaltung – Festschrift für Hartmut Maurer zum 70. Geburtstag, ISBN 978-3-406-47755-3, 2001, p. 16.
    U. Steiner, Judicial Responsibility for Fundamental Rights in Europe, in: Staat, Kirche, Verwaltung – Festschrift für Hartmut Maurer zum 70. Geburtstag, ISBN 978-3-406-47755-3, 2001, p. 16.
15. R. Streinz (ed.), EUV/AEUV, Kommentar, 2. Aufl., ISBN 978-3-406-69481-3, 2012.
16. P. Tettinger/Kl. Stern (eds.), Europäische Grundrechte-Charta, Kölner Gemeinschaftskommentar, ISBN 978-3-406-54409-5, 2006.
    P. Tettinger/Cl. Stern (eds.), European Charter of Fundamental Rights, Kölner Commentary, ISBN 978-3-406-54409-5, 2006.
17. Judgement of the Court of Justice of the European Union in the Case 5/88, Hubert Wachauf/Bundesamt für Ernährung und Forstwirtschaft, 13 July 1989, ECLI:EU:C:1989:321.
18. Judgement of the Court of Justice of the European Union in the Case C-260/89, Elliniki Radiophonia/Dimotiki Etairia, 18 June 1991, ECLI:EU:C:1991:254.
19. Judgement of the Court of Justice of the European Union in the Case C-555/07, Seda Kükükdeveci/Swedex GmbH & Co. KG, 19 January 2010, ECLI:EU:C:2010:21.
20. Judgement of the Court of Justice of the European Union in the Case C-617/10, Aklagaren/Hans Akerberg Fransson, 7 May 2013, ECLI:EU:C:2013:280.
21. Judgement of the Court of Justice of the European Union in the Case C-293/12, Digital Rights Ireland Ltd./Minister for Communications u.a. and Kärntner Landesregierung u.a., 8 April 2014, ECLI:EU:C:2014:238.
22. Case C-594/12; see No.21.

Նորբերթ Քերնսդորֆ

Իրավաբանական գիտությունների դոկտոր,
Մարբուրգի Ֆիլիպսի անվան համալսարանի պատվավոր պրոֆեսոր,
Հիմնարար իրավունքների Եվրոպական միության խարտիայի
ազգային փորձագետ (Վիեննայում), Գերմանիայի դաշնային
սոցիալական դատարանի նախկին դատավոր,
ՀՀ դատախազության «Օրինականություն» գիտագործնական պարբերականի
խմբագրական խորհրդի անդամ

ԻՐԱՎՈՒՆՔՆԵՐԻ ԵՎՐՈՊԱԿԱՆ ՀՈՋԱԿԱԳԻՐ. ԵՎՐՈՊԱԿԱՆ ՄԻՈՒԹՅԱՆ ՀԻՄՆԱՐԱՐ ԻՐԱՎՈՒՆՔՆԵՐԻ ԽԱՐՏԻԱՅԻ ՎԵՐԼՈՒԾՈՒԹՅՈՒՆ[1]

Համառոտագիր

Եվրամիության հիմնարար իրավունքների խարտիան հռչակվել է 2000 թվականի դեկտեմբերի 7-ին Նիցցայում կայացած ԵՄ գագաթնաժողովում: 2009 թվականից այն պարտադիր է ԵՄ-ի և անդամ պետությունների համար: Յոթ վերնագրերի և 54 հոդվածների սահմաններում Հիմնարար իրավունքների խարտիան նախատեսում է, թե ինչ իրավունքներ պետք է պահպանեն ԵՄ-ն և անդամ պետությունները:

Ո՞րն է Խարտիայի նշանակությունը: Արդյո՞ք դա արդեն գործող իրավունքների ամփոփման փաստաթուղթ է և անձի համար նոր իրավունքների չի ամրագրում, թե՞ այն ունի «հավելյալ արժեք»: Արդյո՞ք այն նոր իրավունքների հռչակագիր է: Հիմնարար իրավունքների խարտիայի ջատագովներն այն համարում են եվրոպական ժողովրդավարության և թափանցիկության ապահովման արդյունավետ գործիք, նույնիսկ որպես Եվրոպական սահմանադրության նախադրյալ, իսկ թերահավատները կասկածում են Խարտիայի անհրաժեշտության մեջ: Գերմանիայի նախկին արտգործնախարար Յոզեֆ Ֆիշերը դա անվանել է «Եվրոպական ունիֆիկացման սկզբնաքար»:

Հիմնաբառեր- Հիմնարար իրավունքների եվրոպական խարտիա, կոնվենցիա, «Նոր սերնդի» հիմնարար իրավունքները, հիմնարար սոցիալական իրավունքներ, Եվրոպական միության արդարադատության դատարան, ՄԻԵԴ, մահապատժի արգելում, ապաստանի իրավունք, փոքրամասնությունների պաշտպանության իրավունք, նախաբան, Գերմանիայի սահմանադրություն:

[1] Հոդվածը ներկայացվել է 14.08.2023թ., գրախոսվել է 30.11.2023թ.:

Норберт Бернсдорф

Доктор юридических наук, почетный профессор Марбургского университета им. Филиппа,
национальный ключевой эксперт Хартии Европейского Союза об основных правах (в Вене),
судья в отставке Суда третьей инстанции по социальным вопросам Германии,
член редакционной коллегии научно-практического журнала «Законность» Прокуратуры РА

ЕВРОПЕЙСКИЙ БИЛЛЬ О ПРАВАХ: ИТОГИ ХАРТИИ ЕВРОПЕЙСКОГО СОЮЗА ОБ ОСНОВНЫХ ПРАВАХ[1]

Абстракт

Хартия Европейского Союза (ЕС) об основных правах была провозглашена на саммите ЕС в Ницце 7 декабря 2000 года. С 2009 года она является обязательной для ЕС и государств-членов. ЕС и государства-члены должны соблюдать положения, которые изложены в семи главах и 54 статьях Хартии об основных правах.

В чем значение Хартии? Является ли это инвентаризацией того, что уже действует и, следовательно, не приносит ощутимой пользы человеку, или это имеет «добавленную ценность»? Это новый Билль о правах? Рьяные поборники Хартии об основных правах видят в ней инструмент обеспечения прозрачности европейской демократии и даже предшественника Европейской конституции. Скептики сомневаются в необходимости Хартии. Экс-министр иностранных дел Германии Йозеф Фишер назвал это «вехой в истории объединения Европы».

Ключевые слова: Европейская хартия об основных правах; конвенция; фундаментальные права «нового поколения»; основные социальные права; Европейский суд; ЕСПЧ; запрет смертной казни; право на убежище; защита прав меньшинств; преамбула; Конституция Германии.

---

[1] Статья была представлена 14.08.2023 и прошла рецензирование 30.11.2023.