

Working Paper 2

Protection of Fundamental Rights through the Court of Justice of the European Communities

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On the homepage of this law faculty, I discovered the following words by Professor Peter Birks: ‘There is no shortage of recurrent reminders of the necessity of deepening knowledge and understanding of the phenomenon which we call law, and the cost to the world of failures in that endeavour. That cost can be counted daily in injustice, cruelty, violence, and abuse of power.’

It is of particular importance to know and understand fundamental human rights. In this paper, I would like to describe how they are protected by the European Court of Justice and how this protection is related to the protection afforded by the Constitutional Court of my own country, Germany, and by the European Court of Human Rights. I shall conclude with some remarks on the options for the future protection of fundamental rights in the European Union.

In memory of Sally Ball the examples I shall give you will be mainly taken from the domain of labour law.

The judge-made protection of fundamental rights in the European Community legal order

The protection of fundamental rights in the European Community legal order is a success story of judge-made law. It started with the famous 1969 ruling in *Stauder*.¹ The European Court of Justice then assumed that fundamental human rights are enshrined in the general principles of Community law the observance of which it ensures. In the

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¹ Case 29/69, [1969] ECR 419.

1974 *Nold*² judgment the Court explained that in safeguarding these rights it is bound to draw inspiration from constitutional traditions common to the Member States; similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law. In further developing its case-law on fundamental rights, the Court was mainly guided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court's conception of human rights protection was later on reflected in the Treaty on European Union (first in Article F paragraph 2, today in Article 6 paragraph 2).

The fundamental rights of Community law are primarily addressed to the institutions of the Community. Yet, as the Court held in *Wachauf*³ and *ERT*,⁴ the requirements of their protection are also binding on the Member States when they act in the scope of Community law, for example, when they implement Community rules.

The exercise of fundamental rights cannot be without limits. An example of the Court's case-law concerning this problem is the judgment in *Wachauf* which says:

The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights (...) provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.⁵

In the course of time, the European Court of Justice established numerous fundamental rights of Community law.⁶ A recent example is to be found in the judgment concerning the directive on the legal protection of biotechnical inventions. It says: 'It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the

² Case 4/73, [1974] ECR 491.

³ Case 5/88, [1989] ECR 2609.

⁴ Case C-260/89, [1991] ECR I-2925.

⁵ Para. 18.

⁶ See Theodor Schilling, EuGRZ 2000, 3.

general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.⁷

The catalogue of fundamental rights recognized by the Court is supplemented by objective principles in favour of the individual, likewise developed by judge-made law, such as the protection of legitimate expectations and the principle of proportionality. Moreover, it has to be borne in mind that the basic freedoms of the common market have the effect of fundamental rights in the movement between Member States and were rendered highly efficient by the Court's interpretation.

An example of the Court's case-law on fundamental rights in an employment relationship is the judgment in *Connolly*⁸ which was given extensive coverage in the British press. Let me briefly recall the essential facts: Mr. Connolly was an official of the Commission and the head of a unit on monetary policy. Whilst on leave on personal grounds, he published a book entitled *The Rotten Heart of Europe – The Dirty War for Europe's Money*. In it, he rejected European economic and monetary union and severely criticized members of the Commission and other superiors in a partial and insulting way. The Staff Regulations of the European Communities state that an official may not publish, or cause to be published, without permission of the appointing authority any matter dealing with the work of the Communities; permission may be refused only where the proposed publication is liable to prejudice the interests of the Communities. Mr. Connolly had not requested permission for the publication of his book. Following the recommendation of a disciplinary board, he was removed from his post. The European Court of Justice did not annul that decision.

The significance of the *Connolly* judgment goes far beyond the case itself because it contains general remarks on the freedom of expression in an employment relationship.

As concerns the limits of this freedom, the Court ruled: 'In terms of Article 10(2) of the ECHR, specific restrictions on the exercise of the right of freedom of expression can, in

⁷ Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079, para. 70.

⁸ Case C-274/99 P, [2001] ECR I-1611.

principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.’⁹

The rights of the institutions which can restrict the freedom of expression are thus derived from the interest of the citizens, namely their interest that tasks in the public interest are duly carried out. This approach allows a protection for whistleblowers who, in the public interest, aim at revealing that such tasks are not duly carried out.

Mr. Connolly had, as the Court put it, ‘challenged fundamental aspects of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith’.¹⁰ He obviously feared that these policies would lead to disaster but they were adopted by a Treaty modification with all its democratic procedures. The kind of criticism he had expressed in his book was incompatible with his function within the Commission. The reason why he lost his case was not the mere lack of prior permission for the publication.

As to the problem whether the requirement of prior permission was compatible with the fundamental right of freedom of expression, the Court ruled: ‘... in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively ... Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities’ interests.’¹¹

The Court built on this formula in the *Cwik* case decided soon after *Connolly*.¹² Mr. Cwik was a Commission official whose tasks included lecturing on the euro and

⁹ Para. 46.

¹⁰ Para. 62.

¹¹ Para. 53.

¹² Case C-340/00 P, [2001] ECR I-10269.

economic and monetary union. At an international conference he gave a lecture entitled 'The need for economic fine-tuning at the local and regional level in the monetary union of the European Union'. Afterwards, the organisers of the congress asked him to send them the text of his lecture so that it might be published with those of the other speakers. Mr. Cwik applied for permission to publish the text. It was refused on the ground that 'it put forward a point of view which is not that of the Commission, even though the latter has not adopted an official policy on the matter'. Mr. Cwik lodged a complaint under an internal procedure which was rejected. In its decision rejecting the complaint the Commission cited its need to preserve its room for manoeuvre prior to taking up a definitive stance on the question as to whether economic and monetary union called for territorial differentiation as regards wage and fiscal policies ('fine-tuning'). It claimed that its room for manoeuvre would have been jeopardised by the publication in point, since there was a risk that the relevant official's opinion would be mistaken for that of the institution employing him.

The Court of First Instance annulled that decision. The European Court of Justice dismissed the appeal lodged by the Commission against this judgment. It held that a mere reference to the political and economic climate at the time of the contested decision and to the sensitive nature of the issue concerned, or even to the quality of the text of the lecture was not sufficient to establish that there was a real risk of serious prejudice to the interests of the Communities, such as to justify restricting the fundamental right of an official to freedom of expression.¹³ In addition, it rejected these arguments on the ground that they were not mentioned either in the contested decision or in the decision rejecting the complaint.¹⁴

The Charter of fundamental rights of the European Union

For citizens in search of their rights, it is difficult to find the fundamental rights guaranteed by the Community since they are based on the Court's case-law. At the Cologne European Council meeting held in June 1999 the Heads of State or

¹³ Para. 28.

¹⁴ Para. 28.

Government agreed that it was necessary to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's citizens. A drafting committee, the so-called Convention, elaborated such a text.

The European Parliament proposed to include a reference to the Charter of Fundamental Rights in Art. 6 (2) of the Treaty of European Union. This proposal was supported by nine Member States and by the Commission but firmly rejected by five Member States. It was set aside once preparatory work began on the preliminary draft Treaty of Nice.¹⁵

The text of the Charter was solemnly proclaimed by the European Parliament, the Council and the Commission in December 2000. It was not signed by the Member States. However, it had been approved at the informal Biarritz European Council meeting held in October 2000.

The Advocates General immediately began to refer to the Charter in their opinions. I shall give you some examples related to labour law.

Advocate General Tizzano tackled the Charter in the *BECTU* case. It concerned the question whether, in the light of Article 7 of the Working Time Directive, the legislation of a Member State may lawfully provide that a worker's entitlement to paid annual leave will start to accrue only after completion of a minimum period of employment with the same employer. Tizzano quoted Article 31(2) of the Charter which declares – among other things – that every worker has the right to an annual period of paid leave. As to the legal effect of the Charter, Tizzano argued:

Admittedly, ... the Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. In its preamble, it is moreover stated that 'this Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity,

¹⁵ European Parliament: Draft Treaty of Nice (initial analysis), NT\427131EN.doc, p. 3.

the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights’.

I think, therefore, that in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.¹⁶

Advocate General Jacobs referred to the Charter in his opinion delivered in *Z v. European Parliament*.¹⁷ The central question of that case was whether a decision of the European Parliament to downgrade an officer on disciplinary grounds – including sexual harassment – should be annulled because the sanction was imposed after expiry of a time-limit. In this context, Jacobs noted that ‘the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 41(1) that “Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”.’¹⁸

At least a footnote was dedicated to the Charter in the opinion Advocate General Stix-Hackl delivered in infringement proceedings against Italy concerning the framework directive on health and safety at work. She mentioned that the importance of the right to healthy and safe working conditions was underlined by its inclusion in the Charter of Fundamental Rights.¹⁹

¹⁶ Case C-173/99, [2001] ECR I-4881, paras. 27-28.

¹⁷ Case C-270/99, [2001] ECR I-9197.

¹⁸ Para. 40.

¹⁹ Case C-49/00, *Commission v. Italy*, [2001] ECR-I-8575, footnote 11.

A different use of the Charter was made by Advocate General Mischo in his opinion delivered in *D and Kingdom of Sweden v. Council of the European Union*.²⁰ The case concerned the question whether a Community official linked to a person of the same sex by a registered partnership may claim to be treated as married for the purposes of a household allowance. Advocate General Mischo referred to Article 9 of the Charter which provides: ‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’ He pointed out that, according to the comments of the Praesidium of the Convention which drew up the Charter, Article 9 ‘neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex’. In Mischo’s opinion, this confirmed the difference of situation between marriage on the one hand and union between persons of the same sex on the other.²¹

So far, the Charter has not been used in the grounds of a decision by the European Court of Justice. In spite of Advocate General Tizzano’s reflections in *BECTU*, the judgment in that case only referred to the Community Charter of the Fundamental Rights of Workers which was mentioned in the fourth recital of the working time directive.²²

Yet more recently, the Court of First Instance made use of the Charter of Fundamental Rights of the European Union in the *max.mobil* case. It held: ‘the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union ... confirms that “[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”.’²³

In May 2002, in the *Jégo-Quéré* case, the Court of First Instance referred to the Charter again, this time to the right to an effective remedy before a tribunal enshrined in its

²⁰ Joined cases C-122/99 P and C-125/99 P, [2001] ECR I-4319.

²¹ Para. 97.

²² Case C-173/99, [2001] ECR I-4881, para. 39.

²³ Case T-54/99, [2002] ECR II-313, para. 48.

Article 47.²⁴ In the light of this right, which has also been recognized by the European Court of Justice in its case-law, the Court of First Instance developed a new, much less restrictive interpretation of the Treaty provision on actions by individuals for annulment of regulations, under Article 230(4) EC.

Relationship with the protection of fundamental rights by the German Federal Constitutional Court

The protection of fundamental rights at Community level has created a circle of fundamental rights that was added to the national circles of fundamental rights. As a result the question arises how these circles are related to one another.

In 1974, the German Federal Constitutional Court gave an answer to this question in its so-called *Solange I*-decision.²⁵ It reserved the right to review the compatibility of Community law with the German Constitution as long as the Community does not have a catalogue of fundamental rights which is equivalent to the catalogue of fundamental rights guaranteed by the German Constitution. Impressed by the case-law of the European Court of Justice concerning fundamental rights the Federal Constitutional Court modified its position in its 1986 *Solange II*-decision.²⁶ It stated that in the sphere of competence of the European Communities, a standard of protection of fundamental rights had arisen that had to be deemed equal in substance to that provided by the German Constitution with regard to concept, contents and mode of operation. In view of this development, the Federal Constitutional Court announced that it would no longer review secondary Community law on the basis of the fundamental rights of the German Constitution, as long as the European Communities, and in particular its Court, generally ensure an efficient protection of fundamental rights against the authorities of the Communities that is to be deemed equal in substance to the protection of fundamental rights inalienably required by the German Constitution.

²⁴ Case T-177/01, [2002] ECR II-2365.

²⁵ BVerfGE 37, 271.

²⁶ BVerfGE 73, 339.

Some authors interpreted the 1993 Maastricht decision of the Federal Constitutional Court²⁷ to the effect that the Court had revised its *Solange II*-doctrine and returned to *Solange I*. In a decision of June 2000 concerning the market organisation for bananas, the Federal Constitutional Court corrected that misunderstanding.²⁸ It stressed that a congruent protection is not necessary.

In 2001, the Federal Constitutional Court added a further facet to this case-law when it tackled the duty to request a preliminary ruling imposed by the third paragraph of Article 234 EC.²⁹ The decision concerned a so-called *Verfassungsbeschwerde*, that is an appeal to the Federal Constitutional Court by an individual claiming that an act of public authorities violated his or her fundamental rights. In the case mentioned a female doctor had lodged such an appeal. She wanted to become a general practitioner and applied for admission to that profession. Yet her application was rejected. The reason was that she had not undergone the period of training in general medical practice on a full-time basis but in part-time employment for twice as long. She lost her case at first, second and third instance.

The Federal Administrative Court held that Community law imposed at least six months of full-time training in general medical practice. Even if the prohibition of indirect discrimination laid down in the Equal Treatment Directive were relevant, the directives on doctors would prevail according to the principles of speciality and priority.

The Federal Administrative Court did not request a preliminary ruling by the European Court of Justice. The doctor claimed that this violated her right to the judge determined by law, a principle recognized by the German Constitution. The Federal Constitutional Court agreed with this analysis. It annulled the judgment of the Federal Administrative Court because the omission of a preliminary reference was manifestly erroneous on two grounds. On the one hand, the Federal Administrative Court had assessed the problem of a conflict of directives on the basis of national standards only, without discussing the relevant case-law of the European Court of Justice. On the other hand, the Federal

²⁷ BVerfGE 89, 155.

²⁸ BVerfGE 102, 147.

Administrative Court had not taken into account the fact that the principle of equal treatment of men and women ranks among the fundamental rights of the Community legal order recognised by the European Court of Justice.

The Federal Constitutional Court emphasized how the two circles of fundamental rights are interlinked: The protection of the fundamental rights of the complainant would not be assured if the Federal Constitutional Court could not apply the test of fundamental rights for lack of competence and if the European Court of Justice were not given the opportunity to review secondary Community law on the basis of the fundamental rights developed for the Community.

Relationship with the protection of human rights by the European Court of Human Rights

In relations with the European Court of Human Rights, problems arise which are rather similar to those in relations with the German Federal Constitutional Court.

In the famous case *Matthews v. The United Kingdom*, decided in 1999, the European Court of Human Rights observed that acts of the EC as such cannot be challenged before that Court because the EC is not a Contracting Party. Yet it went on to say: ‘The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.’³⁰

The case was about the right to free elections guaranteed by Article 3 of Protocol No. 1 to the Convention. The applicant, a British citizen resident in Gibraltar, could not participate in the elections to the European Parliament. Her registration as a voter was refused because a provision of Annex II of the EC Act on Direct Elections of 1976 stated that ‘[t]he United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.’

²⁹ 1 BvR 1036/99, SozR 3-1100 Art. 101.

³⁰ Application no. 24833/94, Reports of Judgments and Decisions 1999-I, para. 32.

The European Court of Human Rights concluded that there was a violation of Article 3 of Protocol No. 1. It flowed from the said annex to the 1976 Act, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. They constituted international instruments which were freely entered into by the United Kingdom. The European Court of Human Rights pointed out: 'Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.'³¹

This was the first decision finding that a Member State of the EC had violated a right guaranteed by the European Convention on Human Rights in a conflict that was the direct result of Community law. There are divergent opinions on its scope and on the meaning of the remark that legal protection through the European Court of Justice was not possible. Are all the Member States collectively responsible in each individual case in which the protection of fundamental rights afforded by the European Court of Justice lags behind the guarantees of the European Convention on Human Rights?

Assuming that the answer to this question has to be in the affirmative, some litigants lodged applications against all 15 Member States of the EC with the European Court of Human Rights. The first of these applications was rejected as inadmissible because the European Convention on Human Rights did not imply the alleged right to be informed on remedies which the European Court of Justice had not acknowledged. The question whether the application could actually be directed against the 15 Member States was explicitly left open.³² For a while it seemed that the case of *Senator Lines*³³ against the

³¹ Para. 33.

³² Case *Société Guérin Automobiles contre les 15 États de l'Union Européenne*, Application no. 51717/99, admissibility decision of 04/07/2000.

³³ Application no. 56672/00.

15 Member States of the European Union would produce the answer to that question. The case was triggered by a decision of the European Court of Justice concerning an application for interim relief against a fine imposed by the Commission. Senator Lines had claimed that the right to a fair trial was violated.³⁴

The question to what extent the Member States are responsible under the European Convention on Human Rights arose already in the case *M & Co v. Federal Republic of Germany* decided in 1990.³⁵ At that time, the European Commission of Human Rights had jurisdiction. It held that:

the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive equivalent protection. ... It would be contrary to the very idea of transferring powers to an international organisation to hold the Member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 of the Convention was respected in the underlying proceedings.

This decision was obviously inspired by the *Solange* case-law of the German Federal Constitutional Court. The *Matthews* judgment is not incompatible with this approach because it concerned a sphere in which the European Court of Justice could not afford protection.

Outlook

The Convention on the future of the European Union, as a part of its important task, also discussed whether the Charter of Fundamental Rights should be included in the basic treaty under consideration, and whether the European Community should accede to the European Convention of Human Rights. Its response to both questions was in the affirmative.

³⁴ The President of the European Court of Human Rights decided to cancel the hearing which had been scheduled for October 2003, in light of the judgment of the Court of First Instance setting aside the fine imposed by the European Commission.

³⁵ No. 13258/87.

Though of great symbolic importance, the inclusion of the Charter in the treaty would not fundamentally alter the protection of fundamental rights in the Community legal order. According to its Article 51(2), it does not establish any new power or task for the Community or the Union, or modify the powers and tasks defined by the Treaties.

In contrast, accession to the Convention of Human Rights would entail a substantial change in the present Community system for the protection of human rights, in that it would entail the entry of the Community into a distinct international institutional system.³⁶ As a prerequisite, the Convention of Human Rights would have to be modified because at present only States can sign it. If the Community were given the same status as the Member States, it would be represented by one judge in the European Court of Human Rights. He or she would be elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by the European Community – certainly a difficult procedure for a Community composed of numerous states.

Yet the citizens would gain a new procedural device: they could enforce the human rights of the Convention by applications against the Community lodged with the European Court of Human Rights. In view of the very limited direct access individuals have, according to the case-law of the European Court of Justice, to the Community court system, this improvement of protection should not be underestimated. The other option is to improve the access of individuals to the Community court system. Theoretically, both options could be combined. But a combined approach would create new risks of its own, namely the frequent non-respect of the fundamental right to get one's case heard in a reasonable time.

³⁶ See Opinion 2/94 (Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms), [1996] ECR I-1759, para. 34.