

The European Union and Fundamental Rights

On the road to a political Union

In the course of its accession to the European Union on 1 January 1995 Austria has become member of a political community. Since the Treaty of Maastricht, which came into force on 1 November 1993, European integration has overcome the economic dimension and paved the way to an ever closer union which shall lead towards an extensive political unification. Along with the supranational Economic Monetary Union (the so called first pillar), the task areas of the European Union consist of the intergovernmental Common Foreign and Security Policy (second pillar) and the Cooperation of the Interior and Justice (third pillar, officially called "police and judicial cooperation in criminal matters" since the Treaty of Amsterdam). The Union's task is to "organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples"; "decisions are taken as openly as possible and as closely as possible to the citizen." (Article 1, Treaty on European Union).

The Treaty of Maastricht marks a new qualitative stage in the European unification process. Unification does not only imply a stronger convergence of the European states, but in particular and also to strengthen the protection of the rights and interests of the Member States' citizens. One important measure in that context was the introduction of a citizenship of the Union, which is related to the nationality to a member state and provides certain rights, p.e. the right to freedom, to move and reside freely within the territory of the Member States, the right to vote at elections to the European Parliament, and the right to petition. Along with a general debate throughout the Union on democracy-political aspects like legitimacy and representation, the construction of a political union moved the European citizen increasingly into the center of discussions on further developments of the European unification process. The ratification procedure of the Treaty of Maastricht has clearly shown that the European citizens do not want to be passive spectators of the continent's unification any longer. Despite of his personal commitment, French President Mitterand only received a very narrow majority favoring the

creation of a political union¹. In Denmark, the referendum had to be repeated in order to gain the support of the Danish people for a shift towards a political Union². In a basic decision the German Court of Constitution emphasized that any step towards a further development of the European Union requires a parliamentary-democratic legitimacy in the Member States³. Austria legitimated its decision to join the Union with a democratic decision: In a referendum which was held on 12 June 1994 almost two third of the Austrian voters were in favor of the accession to the European Union as it was laid down in the Treaty of Maastricht.

The growing relevance of a democratically legitimated unification process has an impact on the position of the citizens in the Member States. They are increasingly moving into the focus of political life and need to play an active part. The discussion on fundamental rights reflected that development.

The development of fundamental rights in the European Community

The European Court of Justice (ECJ) in Luxembourg played an active part in the development of European fundamental rights. The initial concept of European integration focussed on economic unification that was determined by the four freedoms, i.e. freedom of movement, capital, goods, and services. Apparently, there was no need for a general charter on fundamental rights. However, the ECJ soon made clear that fundamental rights have to be considered in the European Community, too. In the late Sixties, the Court already derived the fundamental rights in its jurisdiction from the general Community law, ruling that these were the basic principles of Community law. These principles were developed by comparing the Member States' *acquis* of fundamental rights and their international treaties, referring in particular to the European Convention on Human Rights (ECHR) which had been ratified by all the Member States of the European Communities⁴. However, the ECHR was for the ECJ not a system of fundamental rights the court could directly apply, but only a source of guidelines to judge on matters from a fundamental rights' perspective: "Similarly, international treaties for the protection of human

¹ In the French referendum 51,2% of the voters decided in favour of the Maastricht Treaty, 48,8% against.

² In the first referendum in June 1992 50,7% of the Danish people voted against, 49,3% have been in favour. The second referendum in May 1993 brought a majority for Maastricht: 56,8% in favour, 43,2% against.

³ BVerfG, judgement of 12 October 1993 (Maastricht judgement), BVerfGE 89, 155

⁴ The ECHR is a basic document of the human rights in Europe. It is an multilateral international treaty, elaborated by the Council of Europe.

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."⁵

Consequently, the ECJ put that fundamental principle in concrete terms by recognizing individual fundamental rights in several decisions. In particular it accepted the right to equal treatment⁶, the right to non-discrimination⁷, freedom of religion and belief⁸, the right to privacy⁹, the right to the respect of family life¹⁰, etc.

Together with the ECJ as a fundamental rights authority, the European Court constantly tried to act as a driving force in fundamental rights affairs. It was only in the Seventies when the EP introduced the human rights problem into the dialogue with Third World countries and clearly expressed itself against the violation of human rights.

In 1977 it issued a declaration on the political principles of the definition of fundamental rights which was accepted by the Council and the Commission and signed by the Presidents of the three institutions in Luxembourg.

The Treaty of Amsterdam

The Treaty of Amsterdam gave a new dimension to the debate on fundamental rights in the European Union. Even though that treaty did not comprise an extensive codification of the fundamental freedoms and human rights, it introduced substantial changes, partly as a continuation of the Treaty of Maastricht. For the first time, Article 6 Section 1 of the Treaty on European Union contains a catalog of principles which mentions the respect for human rights and fundamental freedoms, along with liberty, democracy and the rule of law. These principles are the basis of the EJC when controlling actions of the Community institutions in the fields of the Community Treaty and the third pillar of the Treaty of Maastricht; they are also a prerequisite to an application for membership (Art. 49 Treaty on European Union)

⁵ Case 4/73 Nold AG vs Commission of the European Communities, 1974 ECR, 491, para. 13.

⁶ Case Casagrande 1974 ECR 773.

⁷ Case Defrenne vs Sabena 1976 ECR 455.

⁸ Case Prais 1976 ECR 1598, 1599.

⁹ Case National Panasonic 1980 ECR 2033, 2056ff.

¹⁰ Case Commission vs Germany 1989 ECR 1263.

For the first time, the violation of the mentioned basic principles can be sanctioned. In the case of a serious and persistent breach of these principles by a Member State, the Council, meeting in the composition of the Heads of State and Government and acting by unanimity on a proposal by one third of the Member States or the Commission and after obtaining the assent of the European Parliament, may determine the existence of such a serious and persistent breach. On the ground of that ruling the Council, acting by a qualified majority, may impose sanctions. These sanctions do not allow an exclusion of the Member State in question. However, certain rights deriving from the Treaty may be suspended, including the voting rights of the representative of the government of that Member State in the Council.

The Treaty of Nice includes the provision that the Council may direct recommendations towards a Member State that is clearly running the risk of a serious breach of the principles laid down in Art.6 Sec.1 in the Treaty on European Union. Such a measure requires a substantial proposal of one third of the Member States, the EP or the EC. Before that decision, which requires a 4/5 majority, the Member State in question has to be heard; the Council can also ask independent experts to submit a report on the situation in the Member State in question within a reasonable period of time.

Furthermore it needs to be stressed that Art. 6 Sec. 2 of the Treaty on European Union comprises the respect for the fundamental rights laid down in the European Convention on Human Rights: "The European Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Article 13 of the Treaty establishing the European Community is of further importance, too. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. So far, the Council has made use of that competence in two directives¹¹

Briefly, the fundamental rights situation resulting from the Treaty of Amsterdam is the following:

¹¹ These directives must be implemented by the Member States.

- The respect for human rights and fundamental freedoms is a basic principle that may lead to sanctions in case of a serious and persistent breach of the latter. It is a precondition for the accession of new candidates.
- Discrimination based on various reasons is protected in the primary law and secondary legislation (Art. 13 of the Treaty on establishing the European Community and relevant guidelines).
- The system of fundamental rights established by the ECHR has to be respected and is a guideline in the Union's fundamental rights policy and practice.
- The fundamental rights exercised in the jurisdiction of the ECJ are by fact part of the fundamental rights *acquis* of the EU because it can be assumed that the ECJ will not revoke its jurisdiction.

Idea and significance of a Charter of Fundamental Rights of the European Union

Soon the fundamental rights situation resulting from the Treaty of Amsterdam rang in a new phase in the Union's fundamental rights policy. In discussions particular emphasis was put on the fact that a system of fundamental rights of the European Union would constitute a necessary measure for the strengthening of the European identity and the development of a European constitution. The wide-spread proposal that the European Union should sign the ECHR and thus make the binding fundamental rights system decided upon by the Council of Europe in 1950 applicable to the institutions and organs of the European Union was shattered by the ECJ in Luxembourg. In a report that was published in 1996 following a petition from April 1994 the court found that the EU had no competence to join the ECHR and was not authorized to make rules in the field of human rights or conclude relevant international treaties. However, the Member States did not reach an agreement on a possible amendment of the Community treaties which would have laid down such a basis.

That problem provoked the idea of elaborating a charter of fundamental rights for the Union itself. That charter aimed to emphasize the character of the European Union as a community of rules and values. Holding the presidency of the Council in the first six months of 1999, it was particularly Germany that supported that idea. At the Cologne European Council on 3./4. June

1999 the green lights were given for an ambitious and extensive fundamental rights project. The European Council assigned the task to draft a charter of fundamental rights. For that purpose a specific body was created, made up by 15 personal representatives of the Heads of State and Government of the 15 Member States, 30 representatives of the national parliaments, 16 representatives of the European Parliament and 1 representative of the European Commission. The ECJ and the Council of Europe were granted observer status. In the history of European integration the implementation of such a body was a real novelty. For the first time the preparation of decisions was transferred to an institution that had its authorization from both the institutions of the Member States (government and parliament) and the European Union (EP).

The Cologne European Council entrusted that convention with the task to present a draft Charter of fundamental rights "in due time before the European Council in December 2000" so that it could be solemnly proclaimed at the Nice summit under French Presidency. Afterwards it had reviewed "if and how the charter could be integrated into the treaties." The task included only a mandate to draft an analysis of the fundamental rights at the moment.

It took the Convention of Fundamental Rights, as that body called itself, nine months to carry out that task. The discussion procedure was established at the informal Tampere summit in October 1999. The meetings of the Convention members took place in Brussels, alternating between the facilities of the European Parliament and the Council. The sessions were open to the public; the Presidency was responsible for the draft texts and consisted of one Chairman elected by the Convention and three Vice-Chairmen on behalf of the three groups of personal representatives of the Heads of State and Government, the national parliaments and the European Parliament. In the debates all the official languages of the European Union were allowed. The hearings of the NGO's and the applicant countries were of particular importance. The decision making process followed the consensus proceedings, i.e. the Presidency determined a consent ability; no votes were taken.

The Convention of Fundamental Rights performed the task with which it had been entrusted by the Cologne European Council. On 2 October 2000, after intense debates that went on for months, it presented a draft Charter with 54 articles which can be considered a genuine system of fundamental rights of the European Union. In many respects the result is a compromise between quite dissenting opinions in the Convention. However, it is the first analysis of fundamental

rights relevant to the European Union. In a few aspects, the draft tried to establish new fundamental rights, p.e. in the fields of the right to asylum, protection of personal data, and the right to good governance.

The Charter was solemnly proclaimed at the Nice summit in December 2000. It is a political proclamation but no legally binding document.

Fundamental rights guaranteed by the Charter

The Charter of Fundamental Rights contains a systematic synopsis of the Union's *acquis* of fundamental rights. These rights are divided into six sections that include a typology of fundamental rights. For the first time, the Charter sets out in a single text the whole range of classical civil rights and liberties and social rights. Therefore, the Charter not only contains rights that protect the individual against intrusions by the state, but also provides the citizen with the right to certain services rendered by the state. In the following, a short overview on the Charter's content will be given:

The preamble at the beginning of the Charter emphasizes the fact that the enjoyment of these rights entails "responsibilities and duties with regard to other persons, to the human community and to future generations."

The first section of the Charter is dedicated to human dignity. Article 1 provides that "human dignity is inviolable. It must be respected and protected." The protection of human dignity is not only a specific fundamental right, but also a basic norm of the Charter of Fundamental Rights in general. The respect of human dignity is a decisive principle for all matters and in particular for the social fundamental rights.

The second section is about civil rights and liberties. They are the hard core of the classical fundamental rights and include for example the right to liberty and security, the respect for private and family life, freedom of conscience and religion, freedom of speech, freedom of assembly and association, the right to education, the freedom to conduct a business, the right to property, and the right to asylum.

Another section deals with the core problems of equality. The principle that every individual is equal before the law has been interpreted by the modern fundamental rights policy particularly as a principle of non-discrimination. In particular any discrimination on the following grounds shall be prohibited: sex, race, color, ethnic or social origins, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. As an expression of that non-discrimination that section guarantees equality between men and women, cultural, religious, and linguistic diversity, the rights of the child, the rights of the elderly, and the integration of persons with disabilities.

It has already been stated that the linkage between classical and social fundamental rights is a specific characteristic of the Charter. Chapter IV is called "Solidarity". It contains the traditional protection rights of employees like the right to information and consultation within the undertaking, the right of collective action (including the right to strike), protection in the event of unjustified dismissal, the right to fair and just working conditions. On the other hand, the chapter establishes the responsibilities of the Union to guarantee a system of social security and social assistance and to ensure health care, environmental and consumer protection.

Chapter V is dedicated to the citizens' rights. In addition to the national citizenship of the Member States the Treaty of Maastricht laid down the citizenship of the Union which guarantees concrete rights listed in the Treaty establishing the European Community. These rights have been incorporated into the Charter, and one important fundamental right was added: "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." The right to good governance includes the right to compensation if the organs or servants of the Community cause any damage in the performance of their duties. The citizens' rights of the Union which have been valid so far are now part of the Charter. These include the right to vote and stand as a candidate at elections to the European Parliament and at municipal elections, the right to petition, the right to refer to the Ombudsman cases of maladministration, and diplomatic and consular protection in third countries in which a Member State is not presented.

Chapter VI contains the guarantee of judicial rights. In their majority, these rights have been founded in the ECHR, including the right to an effective remedy and to a fair trial, the right of defense, the presumption of innocence, etc.

In a final chapter it is stressed that the provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. The Charter does not establish any new power or task for the Union. The meaning and scope of the rights laid down by the Convention shall be the same as in the case of the rights guaranteed in the ECHR.

The Charter: A contribution to the constitutionalisation process in the European Union

The ongoing discussions about the EU-Charter aroused a lot of expectations. The committed supporters of a European constitution consider it an important progress in the development of a European constitutionalism. The debates about a European constitution are quite controversial. Opponents of that idea refer to the fact that the term constitution is tied to the state. Since the European Union has no nation it cannot act as a constituent force. That attitude requires further analysis. In a supranational organization power is exercised, too. That process takes place within the framework of a system of fundamental rights and principles agreed upon by the Member States. Thus the European constitution is a contractual constitution. The incorporation of a Charter of Fundamental Rights into the treaties, i.e. into the constitutional system of the Union and the Community, is an important measure because it defines the relationship between the European citizens and the institutions of the European Union from a new level in terms of quality. Thus the integration of the Charter into primary law is a further step in the constitutionalisation process of the Union and the Community.

Future perspectives of the fundamental rights policy of the European Union

In the course of the solemn proclamation of the Charter of Fundamental Rights on the eve of the Nice summit in December 2000 the EU gained a new political declaration on fundamental rights. However, that declaration is not legally binding. Thus the future debate will focus on that fact. At the Nice summit no commitment was made in that respect. In a declaration for the final acts of the conference on the future of the Union a timetable for a future process was made: In 2001 the Swedish and Belgian Presidency (Sweden will hold the Presidency in the first, Belgium in the second half of 2001), will initiate an extensive debate with all groups of interest (representatives of politics, business, university, civil society, etc.) in cooperation with the European Commission and the European Parliament. In December 2001 the European Council will agree upon a declaration establishing the appropriate measures for that process which includes the discussion

of the status of the Charter. At a Governmental Conference in 2004 the content of that process will be debated with regard to necessary treaty amendments.

In any case, the EU-Charter has already created a new awareness of fundamental rights within the European Union. In view of the increasing economic globalization the legal protection of fundamental rights in Europe is an important goal to ensure the political and social sphere of every person. That process limits the public power of the institutions of the European Union. Fundamental rights are also and rightly considered an expression of an objective system of values that is valid for the both the European Community and the political system of the Member States. They are a fundamental element of the European identity.