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The European Union and its Reidentification as a Guardian of Human Rights

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Preface

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A. Introduction

Ladies and Gentlemen,

First, I would like to thank you for inviting me to speak to you today. It is a great pleasure to share my thoughts on the topic “The European Union and its reidentification as a guardian of human rights”.

Let me say right away that we are all witnesses to a tremendously exciting phase in the development of Europe’s legal systems. For lawyers it is thus a great challenge to understand the complex constellations of the European multi-level systems in detail and even more so to illustrate them. Our topic today holds a key position in this context.

Since the beginning of the European integration movement in the aftermath of the Second World War, the relationship of the European Union and its predecessor organisations with the protection of fundamental rights has not been an easy one. The European Economic Community (EEC) (established on 25 March 1957 in Rome by its six founding nations) as well as its successor organisations, the European Community (EC) and today’s European Union (EU) are a ”creation of law”,[1] and as such they necessitate a strong link to historically and politically legitimising elements such as the safeguarding of fundamental and human rights. Only such a legitimisation can prevent the codifying of this supranational legal order[2] in a way that EU citizens would perceive as an unjustifiable subjugation.

In this context, the following question arises: What does the protection of fundamental rights need to look like in order for the EU to be perceived as just and humane and to bear out its claims to be a home for its citizens?

[1] *Hallstein*, Die Europäische Gemeinschaft, 5nd ed. 1979, p. 53.
[2] Cf. in this regard *Kelsen*, Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik, 1st ed. 1934.

B. Developing the protection of human rights in the EU

I. How did the protection of human rights come into the Union?

Considering the numerous changes to the European Union since its foundation in the late 1950s, it is hardly surprising that the protection of human rights did not play a major role right from the beginning.[3] As the name suggests, the EEC was more about economic cooperation. However, some powers in Europe had already hoped for more integration. In fact, the European Economic Community was a rescue attempt following an initiative on establishing the European Political Community (EPC) that failed due to a vote in the French national assembly in the year of 1954.[4] The European Political Community had aimed at comprehensively reshaping the political landscape in the six member states of the European Coal and Steel Community (ECSC); Article 2 of its draft statute formulated safeguarding human and fundamental rights as their primary goal.[5]

However, in the light of the experiences following the Second World War, most European policymakers considered the granting of fundamental and human rights to be a "*domaine réservé*" of the single member states. This is shown by the fact that the 1950 European Convention on Human Rights (ECHR), the most important piece of legislation for the European protection of human rights, was created by the Council of Europe, an institution that works according to intergovernmental principles. Today, the Council of Europe's executive – the minister committee – still works according to the principle "one state, one vote". It was not until the ratification of the eleventh additional protocol of the ECHR, which came into force on the 1st of November 1998, that the European Court of Human Rights (ECtHR), the guardian of the European Convention on Human Rights, took on a supranational character, comparable to the European Union's legal system today.

It thus at first seemed that the protection of fundamental rights was to share the fate of the failed initiative on a federal political collaboration and remain in the competence of the single member states.

[3] *Kingreen*, in: Calliess/Ruffert (eds.), AEUV/EUV, 4th ed. 2011, Art. 6 EUV, paras 4 et seq.
[4] *Margedant*, in: Bergmann (ed.), Handlexikon der Europäischen Union, 4th ed. 2012, key word "Politische Union", II - 2.
[5] Cf. Draft Treaty establishing a statue of the European Communities, adopted by the ad-hoc-assembly on 10/03/1953, Art. 2, 1st indent.

II. The first years

However, whoever thought that in economic cooperation the protection of fundamental and human rights could simply be ignored was proved wrong. In the early 1960s, the Court of Justice of the European Union (ECJ) established the primacy of EU law.[6] The Court thus created a new legal category, which was neither national nor international law. Moreover, this new common legislation of Europe was to take precedence in conflict situations with national law, in order to safeguard the community spirit. However, the judges at this court, working at the time for the predecessors of the European Union, only had a small number of legal acts at their disposal on which to base their case law.

This, together with the fact that the EEC was beginning to play an ever more dominant role in the life of citizens and enterprises, necessarily led to disputes in the area of the protection of fundamental rights. The first important rulings were about member states handing out subsidised butter to people in need who were to be expelled[7] and about the foreclosure of private assets.[8] From the late 1960s, it was thus clear that the European Union and its predecessor organisations could not adopt a neutral stance on the protection of fundamental rights.

III. Substantiation and consolidation

From the angle of the Luxemburg judges, the problem to be resolved consisted of easing the tension between the poles of the precedence and autonomy of Union law, on the one hand, and granting fundamental and human rights without a binding Community bill of rights, on the other. The many observers and co-artisans of the process of European integration rapidly became impatient: From the beginning the Federal Constitutional Court [in Karlsruhe] had also defended the guaranteeing of appropriate protection of fundamental rights in the European Community.[9]

And with this argument about the practical shaping of the protection of fundamental rights at the European level there began the discussion between Karlsruhe and Luxemburg about the successful distribution of competences between the lower and upper houses (*Bundestag* and

[6] ECJ, Case 6-64, *Costa*, ECLI:EU:C:1964:66; ECJ, Case 26-62, *van Gend & Loos*, ECLI:EU:C:1963:1.
[7] ECJ, Case 29-69, *Stauder*, ECLI:EU:C:1969:57; today you might call it a data protection problem.
[8] ECJ, Case 4-73, *Nold*, ECLI:EU:C:1974:51.
[9] *Voßkuhle*, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, p. 6.

Bundesrat) in Berlin and the European institutions in Brussels, Luxemburg and Strasbourg.[10] This balancing act increasingly shifted away from the protection of fundamental rights to other institutional issues, particularly during the "euro crisis". We are reminded e.g. of the decisions and rulings of the Federal Constitutional Court judges in 2014 on the European stability mechanism.[11]

This circumstance may be partly rooted in the fact the judges at the European Court of Justice in Luxemburg developed a very elegant solution to the problem of lack of sources for fundamental rights and have elaborated it further over the years. Anyone reading Article 6(3) of the Treaty on European Union (TEU) today can understand that the judges did not rely directly on Union law but chose "constitutional traditions common to the Member States"[12] as the basis for Community human rights protection. In other words, they used the list of fundamental and human rights contained in the constitutions of all the Member States combined in the individual case by the ECJ.

Moreover, the judges were able to note a certain harmonisation with respect to human rights by international cooperation in Europe, since all member states of the European Economic Community had ratified the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms. Through a total consideration of all these sets of fundamental and human rights catalogues, urgent legal questions with a fundamental rights context could be satisfactorily clarified against the background of a teleological, i.e. goal and purpose-oriented interpretation of Union law.[13] In addition, the ECJ attempted to confine itself to absolutely necessary statements with respect to questions relating to fundamental rights.

However, this approach came in for renewed criticism starting in the 1990s. The Treaty of Amsterdam significantly broadened the competences of the Community in the fields of coordinating justice, home affairs and security policy.[14] As of then, the legal order of the European Union covered areas that were closely related to fundamental rights.[15]

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[10] Cf. the "as long as" case law of the Karlsruhe judges originating from BVerfGE 37, 271 et seq. to the "Honeywell"-decision, 2 BvR 2661/06 (BAG) or the "Lisbon Judgment", BVerfGE 123, 267.

[11] 2 BvR 1390/12; cf. for the BVerfGs first request to the European Court for a preliminary ruling in the context of the "OMT"-decision *Brosius-Linke*, Die Vorlageentscheidung des BVerfG – Dogmatischer Stellungskampf mit Risiko, Saar Expert Papers, 1/2014.

[12] Art. 6(3) TEU.

[13] Cf. 2 BvR 197/83.

[14] *Hilf / Pache*, Der Vertrag von Amsterdam, NJW 1998, p. 706.

[15] Cf. for the actual legal situation *Callewaert*, Grundrechtsschutz und gegenseitige Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts, ZEuS 2014, p. 80 et seq.

The Union, and more specifically the ECJ, was criticised for having an under-developed fundamental rights dogma and consequently an insufficient human rights monitoring regime.[16] This circumstance was also politically intolerable for a united Europe since the protection of fundamental and human rights is regarded as the continent's trademark. In addition, the EU's ever greater enlargement towards the East revealed the need for an improved institutional form for these rights.[17]

IV. The Charter of Fundamental Rights of the European Union

At the end of the millennium it was therefore understandable that the EU needed to take new steps to protect fundamental rights: On 3rd and 4th June 1999 the heads of state or government agreed to draw up a *Charter of Fundamental Rights* in order to visibly enshrine the extraordinary significance and scope of these rights for the citizens of the Union. In order to perform this task, the European Council decided to appoint a separate body ('Convention') with representatives from the European Parliament, the national parliaments and governments, and the Commission.[18] This Convention, chaired by the former federal president of Germany, Roman Herzog,[19] rapidly made progress and soon presented a finished draft. The solemn proclamation followed on 7th of December 2000 in Nice.[20]

Originally the Charter was to have been part of the constitutional treaty of the European Union, but the latter's ratification process came to a stop after its rejection in the referenda held in France and the Netherlands.[21] The Charter of Fundamental Rights thus became what could be called a jelled substrate of the constitutional traditions common to the Member States.[22] As such, the number of references by courts and academics rapidly increased, which in a certain sense led to a de facto acceptance of the authority of the document.

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[16] *Schroeder*, Neues zur Grundrechtskontrolle in der Europäischen Union, EuZW 2011, p. 462.
[17] *Giegerich*, Die "europäische Föderation" – unendliche Annäherung an eine Utopie, in: Giegerich (ed.), Herausforderungen und Perspektiven der EU, 2012, p. 7.
[18] Report from the *Commission*, Third Report of the Commission on Citizenship of the Union, COM(2001) 506 final.; cf. *European Council*, Conclusions of the Presidency, Annex IV, reproduced in: Bulletin of the EU 6/1999, p. 39 et seq.
[19] *Häfner et al.*, In der Auseinandersetzung um eine Charta der Grundrechte der Europäischen Union, ZRP 2000, p. 365.
[20] *Tettinger*, Die Charta der Grundrechte der Europäischen Union, NJW 2001, p. 1010.
[21] *Rabe*, Zur Metamorphose des Europäischen Verfassungsvertrags, NJW 2007, p. 3153.
[22] *Huber*, Auslegung und Anwendung der Charta der Grundrechte, NJW 2011, p. 2385.

With the entering into force of the Lisbon Treaty on the 1st of December 2009 the Charter ultimately gained binding status, although it did not become a direct part of the treaties. It now supplements the Treaty on European Union and the Treaty on the Functioning of the European Union in terms of primary law.[23]

The remarkable thing about this document is that, from the start, it has almost exclusively been praised for the rights and guarantees it contains: With 54 Articles the Charter is extraordinarily long for a bill of fundamental rights. Its seven chapters ranging from dignity, freedoms, equality and solidarity to justice provide a comprehensive picture of the relationship of the individual to European sovereign power. The Charter does not omit any area of life, and even takes a position on current issues of medicine and biotechnology.[24]

On the other hand, serious differences of opinion were expressed regarding their scope of application. Heated political and academic discussions took place on the extent to which they were binding. Some took the view that the Charter did not change the existing European fundamental rights architecture in any way and only bound the EU institutions in implementing Union law. This attitude explained the opt-out statements by the United Kingdom and Poland during the ratification of the Lisbon Treaty.[25] The Czech Republic also first had difficulties in accepting the new EU fundamental rights instrument[26] although it since seems to have changed its position.[27] There were others who wanted to interpret the Charter as a "reserve" in the event of an inefficient national protection of fundamental rights.[28]

Ultimately the issue is always how Union law should be implemented with respect for human dignity and what is to be the criterion for this within the European Union. After all, most of the realisation of union law is not done by EU officials but by the public administrations of the Member States. However, if the latter category of indirect implementation of Union law were settled directly by the Charter, this would considerably increase its relevance for the Member States and the Union citizens.

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[23] Cf. Art. 6(1) TEU.

[24] *Knöll*, Die Charta der Grundrechte der Europäischen Union – Inhalte, Bewertung und Ausblick, NVwZ 2001, p. 393.

[25] Cf. Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

[26] *Pache / Rösch*, Die neue Grundrechtsordnung der EU nach dem Vertrag von Lissabon, EuR 2009, p. 783.

[27] Originally it was envisaged that after the completion of the ratification process of the Lisbon Treaty there would be a new amendment of the treaties and protocols in order to make the position of the Czech Republic similar to the UK's. This could have been achieved during the accession of Croatia as the 28th member of the Union, which was finalized on 01/07/2013. However, nothing happened.

[28] *Kirchhof*, Grundrechtsschutz durch europäische und nationale Gerichte, NJW 2011, p. 3685.

V. The new line of case law in Luxemburg

This difference of opinion was again characterised by the case law of the ECJ. In the decision on the "Åkerberg Fransson" case of 26 February 2013 the judges stated that the fundamental rights guaranteed under Union law were applicable in all cases governed by Union law but not outside it.[29]

Although this does not sound very spectacular, it clearly meant that the Charter of Fundamental Rights of the European Union was also directly applicable to those matters that – in simple terms – are only harmonised and not finally settled by a legal act of the European Union.[30] In other words, the Charter suddenly received a very broad area of application, which made the Luxemburg court a central component of European human rights protection and, by the same token, meant that the fundamental rights contained in the Charter were of substantial and tangible significance for the approximately 500 million citizens of the European Union. Directly after the ruling there was still speculation as to whether the ECJ would maintain this new, bold line of jurisprudence. So far, however, the tendency has seemed to be that the judges will continue to expand their role as a guardian of human rights.[31] This was shown clearly[32] by the spectacular ruling on the 8th of April 2014 revoking the Data Retention Directive,[33] which infringed Article 7 (Respect for private life) and 8 (Protection of personal data) of the Charter. The recent judgement in the Google Spain case was also following the same track.[34]

The gratifying tendency of the ECJ to intensify the protection of fundamental and human rights in the Union does not always meet with approval, however.[35] Particularly the German Federal Constitutional Court lost no time in expressing its doubts about a new boundary in the area of protecting human rights.[36]

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[29] ECJ, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para 19.
[30] *Gstrein / Zeitzmann*, Die "Åkerberg Fransson"-Entscheidung des EuGH - "Ne Bis In Idem" als Wegbereiter für einen effektiven Grundrechtsschutz in der EU?, ZEuS 2013, p. 247 et seq.
[31] Cf. ECJ, Case C-418/11, *Texdata Software GmbH*, OJ C 344 of 23/11/2013, p. 10; ECJ, C-265/13, *Marcos vs. Korota SA*, para 29; ECJ, C-176/12, *Association de médiation sociale*, OJ C 85 of 22/03/2014, p. 3, para 42.
[32] ECJ, Joined Cases C-293/12, C-594/12, *Digital Rights Ireland*.
[33] Directive 2006/24/EG.
[34] ECJ, Case C-131/12, *Google Spain und Google*.
[35] *Thym*, Die Reichweite der EU-Grundrechte-Charta – Zu viel Grundrechtsschutz?, NVwZ 2013, p. 891 et seq.
[36] *Giegerich*, Introduction: Trying to Fathom the Shallows of European Unification, in: Giegerich/Gstrein/Zeitzmann (eds.), The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States, 2014, p. 33 et seq.

Alluding to the "*Solange*" case law[37] of the Karlsruhe judges, some even speak now of a "reverse *Solange*" situation.[38] In other words, the ECJ, or the EU, are now the ones to set the standard to be kept by national supreme courts with regard to questions of fundamental rights. This is dubious for critical constitutional courts, like those in Germany, Denmark and the Czech Republic, because – due to the form of Union law – they are more closely bound to the case law of the ECJ than the decisions of the judges at the European Court of Human Rights in Strasbourg.[39]

There is no doubt that the institutional balance between national and European supreme courts must be kept in mind as we analyse this development. At present the process of accession by the European Union to the European Human Rights Convention is still underway. The question arises as to whether the ECJ might want to be more pro-active in questions of fundamental rights in order to preserve its institutional position vis-à-vis the European Court of Human Rights in Strasbourg.[40] The only certain thing so far is that the already complex European fundamental rights architecture is becoming increasingly more complex.[41]

C. The European Union as a guardian of human rights?

As we evaluate the contention that the EU has reidentified itself as a guardian of human rights, we must consider three central factors.

First, EU law is constantly adding new competences and regulatory material. This recently necessitated the amendment of the Lisbon Treaty and the discussion about the euro, sovereign debt and the bank crisis. These matters have pressed changes on the institutions.[42] But also the area of foreign and security policy is a legal matter that has not been harmonised by the

[37] BVerfGE 37, 271 et seq.
[38] *Von Bogdandy, et al.*, Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States, CML Rev. 49, 2012, p. 489; cf. also *Canor*, Solange horizontal – Der Schutz der EU-Grundrechte zwischen Mitgliedstaaten, ZaöRV 2013, p. 249 et seq.
[39] *Lange*, Verschiebungen im europäischen Grundrechtssystem?, NVwZ 2014, p. 173; *Klein*, Straßburger Wolken am Karlsruher Himmel – Zum geänderten Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte seit 1998, NVwZ 2010, p. 221-225.
[40] *Gstrein*, Der geeinte Menschenrechtsschutz im Europa der Vielfalt – Zum Verhältnis der Luxemburger und Straßburger Gerichtshöfe nach Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention, ZEuS 2012, point C.
[41] *Polakiewicz*, EU law and the ECHR: will the European Union's accession square the circle?, E.H.R.L.R. 2013, 6, p. 592.
[42] *Kadelbach*, Lehren aus der Finanzkrise – Ein Vorschlag zur Reform der Politischen Institutionen der Europäischen Union, EuR 2013, p. 497 et seq.

European Union.[43] The increasing interconnections of regions in the context of globalisation will, however, make it ever more necessary and effective for Europeans to speak with one voice on these matters.[44] Hesitant moves in this direction are the EU High Representative,[45] the European External Action Service (EEAS)[46] and the European Defence Agency.[47]

Secondly, not only the scope of the areas governed by Union law is growing, but also the intensity with which they affect the life of citizens. This is exemplified in the above-mentioned ruling on Data Retention,[48] or the case law of the ECJ relating to Internet Service Providers and their obligation to monitor the activity of their customers in the event of the latter's infringement of copyright.[49]

And thirdly, the institutional position of the Union in the protection of fundamental and human rights continues to be questionable. It has to find its place in the structure made up of national supreme courts, global institutions such as the UN's Human Rights Council[50] and other regional institutions, such as the European Court of Human Rights in Strasbourg. In this connection, the conclusion of the accession negotiations of the EU to the Council of Europe's European Convention on Human Rights (ECHR) is undoubtedly of outstanding importance at the moment.[51]

The process of reidentifying the European Union in the area of human rights protection must therefore be analysed against the background outlined above. If this is to be successful, there will be some tangible challenges to meet.

[43] Cf. Art. 24(1) second subparagrah.
[44] Cf. for an analysis of the constitutional requirements *Kadelbach*, National Constitutional Reservations with Respect to External Security Policy, p. 210 et seq.; *Stein*, National Constitutional Reservations with Respect to Internal Security Policy, p. 203 et seq., both in Giegerich/Gstrein/Zeitzmann (eds.), The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States, 2014.
[45] Art. 18 TEU.
[46] *Martenczuk*, Der Europäische Auswärtige Dienst, EuR-Bei 2012, p. 189 et seq.
[47] Art. 45 TEU; *Heuninckx*, The European Defence Agency Capability Development Plan and the European Armaments Cooperation Strategy, P.P.L.R. 2009, 4, NA136-143.
[48] ECJ, Joined Cases C-293/12, C-594/12, *Digital Rights Ireland*.
[49] ECJ, Case C-360/10, *SABAM*, ECLI:EU:C:2012:85; Case C-314/12, *UPC Telekabel Wien*.
[50] Established in United Nations, A/Res/60/251, resolution of 03/04/2006.
[51] *Polakiewicz*, EU law and the ECHR: will the European Union's accession square the circle?, E.H.R.L.R. 2013, 6, p. 597 et seq.

I. The multi-level system of protection of European fundamental rights

In Europe the multi-faceted national, regional and global systems for the protection of fundamental and human rights are closely intertwined, which is both a blessing and a curse. The last few decades have seen the establishment of a dialogue on fundamental rights between the different legal systems or (supreme) courts in Europe which has taken the form of a horizontal and semi-vertical exchange. This discourse is being conducted beyond the borders of the European Union.[52]

The result has been a mutual cross-fertilisation with new ideas and approaches and a process of administering justice tending towards a convergence between the different standpoints.[53] In this context, socially controversial topics such as the abolition of the death penalty,[54] the question of the legal admissibility of abortion, dealing with assisted dying or the state approval of homosexual marriages have, through mutually observing behaviour in the individual states, gradually led to the evolution of legal principles. The individual countries and their institutions first have a broad margin of appreciation in handing down their decisions, which over time crystallises into a normative principle through common, supranational legislation and case law. This can be called "normative crystallisation". A common standard is created although initially the form it will take is open, along the lines of the slogan of the European Union: "United in diversity."

Here regional courts like the ECJ or the ECtHR in Strasbourg only seem to have an outstanding and privileged position. That is because national courts do not hesitate to openly question their even only implicit claims to have higher status. For example, the president of the Federal Constitutional Court, Andreas Voßkuhle, would rather see the European system of protecting fundamental rights as a "mobile" and not e.g. a pyramid.[55] The European association of constitutional courts is, according to his views, a living and changing organ that, as it continues to develop, deserves ongoing monitoring, accompaniment and balancing.[56]

But this opinion does not seem to be shared by supreme court judges everywhere in Europe. National constitutional courts such as the Austrian one, which recognised the legally binding

[52] *Hertig Randall,* Der grundrechtliche Dialog der Gerichte in Europa, EuGRZ 2014, p. 7 et seq.
[53] *Ibid.*, p. 18.
[54] *Ibid.*, p. 10 et seq.
[55] *Voßkuhle*, Pyramide oder Mobile? – Menschenrechtsschutz durch die europäischen Verfassungsgerichte, EuGRZ 2014, p. 165-167.
[56] *Ibid.*, p. 165.

effect of the Charter of Fundamental Rights of the European Union for itself, even before the ECJ handed down its ruling on the "Åkerberg Fransson" case,[57] seem rather to presuppose a pyramid structure of European jurisdiction in questions of fundamental rights.

However, we have to broaden our sights. The Commission of the European Union is correct when it indicates, that the EU institutions must go further than merely respecting the legal requirements vested in the Charter. They must continue fulfilling the political task of promoting a fundamental rights culture for all citizens, economic actors and public authorities alike. The fact that the Commission has received more than 3 000 letters from the general public regarding the respect of fundamental rights indicates that individuals are aware of their rights and demand respect for them.[58]

A concrete example is the above-mentioned decision of the Austrian constitutional court, more precisely the underlying facts of the case. Here the person affected by a sovereign measure, appealing against a decision by the Austrian asylum authorities, referred directly to the Charter of Fundamental Rights of the European Union, without there apparently being a normative reference point for doing so.

Ultimately we must conclude that, although the system of European protection of fundamental rights works as a whole, it is very complex and therefore many traps must be avoided on the path towards the correct resolution of the problems. About sixty years after its creation it is not yet complete. This may be perceived as a problem, but also as an opportunity: only this way can a system preserve diversity over time without becoming institutionally unstable.

II. The problem of effective legal protection

The reverse side of this possibility of mutual influencing of the institutions in Europe and the EU is the lack of transparency regarding the number of actors and their powers.

This leads to the very real danger that the individual affected might no longer know where to turn in the event of an infringement of rights, if practically all national constitutions contain a similar provision as Article 47 of the Charter of Fundamental Rights, providing for "the right to an effective remedy and a fair trial".

[57] Austrian Constitutional Court, U 466/11, U 1836/11 of 14/03/2012, paras 32 et seq.
[58] European Commission, SWD(2014) 141 final, SWD(2014) 142 final, p. 12.

This applies, in particular, also in the relationship between the European Union and the ECHR, which will require a new procedure ("co-respondent" mechanism) if the EU accedes to it.[59]

There is undoubtedly a risk of citizens getting lost in the "human rights confusion". Hence the state and European authorities and courts must not leave it up to the legally uninitiated individual to always choose the right institutional address for his/her complaints and otherwise only react rigorously when stating that the appeal is inadmissible.

It is quite apparent that today the legal order of the EU has no complaint option comparable to a constitutional appeal, and that the direct legal protection of the individual on the basis of the provisions of the Union member states is generally weak.[60] The central bridge must now, and in the future too, be the preliminary rulings procedure pursuant to Article 267 of the Treaty on the Functioning of the European Union, which gives the ECJ in Luxemburg the opportunity to interpret and elaborate on difficult legal issues within the European legal system. However, this system can only work if the national courts can follow the principle, as is also proposed in legal literature: When in doubt, ask for a preliminary ruling![61] The holding back of important legal issues and confining them to national legal systems – on the basis of wrongly understood judicial and political entitlement – will in the medium to long-term create more harm than good and thus backfire.[62] The German Federal Constitutional Court has recently seemed to agree with this insight, since in 2014 it filed a request to the ECJ for a preliminary ruling for the first time in its history.[63]

III. The citizens' trust in the Union as a guardian of human rights

The intention of all these activities is only to provide as effective and comprehensive protection and guarantee for the dignity of Europeans. After all, to relate to the first sentence of the Legal

[59] *Polakiewicz*, E.H.R.L.R. 2013, 6, p. 597 et seq.; *Gstrein*, ZEuS 2012, point B, II.
[60] *Petzold*, Noch einmal: Effektiver Rechtsschutz in Gefahr?, EuZW 2014, p. 290.
[61] *Kühling*, Die Nicht-Vorlage als Bärendienst – Plädoyer für eine höhere Kommunikationsfreude im Mehrebenensystem, EuZW 2013, p. 642.
[62] *Ibid*.
[63] BVerfGE, decisions of 17/12/2013 and 14/01/2014, 2 BvR 1390/12 (partially separated as 2 BvR 2728/13), 2 BvR 1421/12 (partially separated as 2 BvR 2729/13), 2 BvR 1438/12 (partially separated as 2 BvR 2730/13), 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12 (partially separated as 2 BvR 2731/13), 2 BvE 6/12 (partially separated as 2 BvE 13/13).

Explanations of the Charter: The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.[64]

If the European Union is to win the hearts of people and turn an idea into a feeling,[65] the basic guarantees of the rule of law must be secured. The European Union, and particularly the ECJ, has certainly taken some notable initiatives in recent times. However, the goal is still far off. This challenge will indeed never be met. And the actual situation will never correspond to the desired ideal. But this Herculean task is not the labours of Sisyphus!

Since the concept of dignity is not a legal one but has to be reflected in some way in the legal system,[66] it corresponds both to the nature of this concept and also to the European idea if the different legal systems can mutually enhance one another without our needing to fear for the unity or integrity of the whole order.

D. Conclusion and outlook

This paper has aimed to show that the European Union is trying to further develop the protection of human rights in Europe. It is encouraging to see that there is an element of strengthening the protection of fundamental rights while, at the same time, it is possible to identify an integrative component.

The ECJ and EU institutions intend to bring Europe closer to the EU citizens by increasingly ensuring a high level of protection with regard to fundamental and human rights issues. In the end, it was this element of supranationality that, after the Second World War, turned the European system of human rights protection into a global role model for other world regions concerning its institutional structure.

This re-orientation process of the European Union is not taking place on an entirely voluntary basis. The EU is under immense external and internal pressure. In view of the impending accession of the EU to the ECHR, the European Court of Justice would be wise to protect its sole right to interpret EU law in practice, as laid down in Article 19(1) sentence 2 TEU, against

[64] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), as last revised on 14/12/2007, Explanation on Article 1 – Human dignity.

[65] Based on the statement of the Irish singer Bono Vox from 07/03/2014 in front of the congress of the European People's Party in Dublin: „Europe is a thought that still needs to become a feeling".

[66] Cf. in this regard *Herdegen*, in: Maunz/Dürig (eds.), Grundgesetz Kommentar, 69th delivery, München 2013, part B, I., IV., para 52.

the European Court of Human Rights in Strasbourg. Moreover, the citizens will only accept a united Europe if it offers a tangible hope for a brighter future. It is thus necessary to guarantee an effective and well-oiled system of protection for the fundamental rights of individuals.

In the end, this last conclusion should be paramount. Nowadays, the question is no longer whether we should venture to tackle the European project or not. If anyone asks about what the old Europe has to offer to the world, the answer can only be: social exchange and a life in peace and mutual respect in a way that is unique on this planet.

The European Union has proved that it has the potential to improve everybody's lives. But how do we shape it in order to exploit its full potential? Its re-definition as a protector of human rights is a key element in this process.

Thank you for your attention!

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