



**OF UNITY IN DIVERSITY AND INHERENT TENSIONS: INTERPRETING  
THE EUROPEAN UNION'S NEW ARCHITECTURE OF FUNDAMENTAL  
RIGHTS**

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The Treaty of Lisbon has attracted much scholarly attention. It has deeply changed the institutional basis of the European Union and, according to Article 1, paragraph 2 of the Treaty on European Union,<sup>1</sup> marked “a new stage in the process of creating an ever closer union among the peoples of Europe.” One of the important alterations concerns the status of fundamental rights in primary European Union law. Before December 1, 2009, European fundamental rights, unlike fundamental freedoms,<sup>2</sup> were a judicial creation of the European Court of Justice (E.C.J.). The E.C.J. “[drew] inspiration”<sup>3</sup> from comparisons between the constitutional traditions common to the Member States, the European Charter of Fundamental Rights (E.C.F.R.),<sup>4</sup> and international treaties, notably the European Convention of Human Rights (E.C.H.R.).<sup>5</sup> Although substantially these sources remain the basis of European fundamental rights, a significant difference post-Lisbon is their new binding character. The E.U. architecture of fundamental rights is now based on three pillars.<sup>6</sup> However, these are not separate, but interconnected. This interaction between a European catalog of fundamental rights and the reception of fundamental rights from the constitutional traditions common to the Member States reflects the Union’s dual nature and its dual basis of legitimacy.<sup>7</sup> After a brief overview of the three pillars of European fundamental rights in Part I, Part II will analyze the provisions on the interpretation of the E.C.F.R. as the center of interaction of the different legal sources. Part III will give a short outlook.

**I. THE EUROPEAN UNION'S NEW FUNDAMENTAL RIGHTS ARCHITECTURE**

With the entry into force of the amendments introduced by the Lisbon Treaty, the E.C.F.R., in a slightly modified version, has become a binding part of E.U. primary law; though the Charter was

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<sup>1</sup> Treaty on European Union, art. 1, ¶ 2, May 9, 2008, 2008 O.J. (C 115) 16 [hereinafter T.E.U.].

<sup>2</sup> In the T.E.U., fundamental freedoms are economic market freedoms.

<sup>3</sup> Case C-479/04, *Laserdisken ApS v Kulturministeriet*, 2006 E.C.R. I-8089, ¶ 61.

<sup>4</sup> Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C 303) 1 [hereinafter E.C.F.R.].

<sup>5</sup> Convention on the Protection of Human Rights and Fundamental Freedoms, Council Eur., Nov. 11, 1950, CETS No. 5 [hereinafter E.C.H.R.].

<sup>6</sup> Franz C. Mayer, *Der Vertrag von Lissabon und die Grundrechte*, 2009 *EUROPARECHT, BEIHEFT 1*, 87, 88 (2009) (F.R.G.); Eckhard Pache & Franziska Rösch, *Europäischer Grundrechtsschutz nach Lissabon—die Rolle der EMRK und der Grundrechtecharta in der EU*, 2008 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 519, 521 (2008) (F.R.G.).

<sup>7</sup> Cf. Paolo Carozza, *The Member States, in EU CHARTER OF FUNDAMENTAL RIGHTS AND THE MEMBER STATES: POLITICS, LAW AND POLICY* 35, 38 (Steve Peers & Angela Ward eds., 2004).

not actually incorporated into the Treaties the amendments, it shall have the same legal value as they have.<sup>8</sup> Thus, the fundamental rights of the E.C.F.R. have been put on an equal footing with the E.U. fundamental freedoms even with respect to the codification. This builds on recent E.C.J. case law holding that European fundamental rights might not only justify restrictions of fundamental freedoms, but can even limit the extent of the respective freedom as an “inherent limitation.”<sup>9</sup> In any case, the E.C.F.R. has become more visible, and its scope of application extended, since the jurisdiction of the E.C.J. now also covers the area of the former third pillar (police and judicial cooperation in criminal matters) which means that this area is now subject to judicial control on the basis of the fundamental rights.<sup>10</sup> However, substantively, no significant expansion of fundamental rights is intended.<sup>11</sup> This is evident from the preamble of the E.C.F.R., which states that the Charter *reaffirms* the (existing) rights. Of particular importance are the special rules on the scope and interpretation of the Charter in its Title VII.

The E.C.H.R. will have an important status within the Union’s fundamental rights architecture. First, Article 6, paragraph 2 T.E.U. stipulates the European Union’s accession to the E.C.H.R. The necessary amendment of the E.C.H.R. has been reached with the long-pending ratification of Protocol No. 14 to the E.C.H.R.<sup>12</sup> by the Russian Federation, and has come into force on June 1, 2010. The new Article 59, paragraph 2 E.C.H.R. will state: “The European Union may accede to this Convention.” Joining the E.C.H.R. would bind E.U. institutions directly to the Convention. Previously, citizens could only indirectly apply to the European Court of Human Rights (E.Ct.H.R.) against the execution or implementation of Community law by the Member States. Concerns regarding international law may arise as a result of the accession, in so far as the E.C.H.R. also includes member States’ obligations of active protection (*Schutzpflichten*), whose fulfillment is not within the competences of the European Union.<sup>13</sup> Second, the E.C.H.R. already indirectly influences European Union law, as is discussed in the Part below.

In addition to the aforementioned, Article 6, paragraph 3 T.E.U. guarantees the existing, unwritten body of fundamental rights. Before the entry into force of the Treaty of Lisbon, the E.C.J. recognized European fundamental rights as an “integral part of the general principles of law,” which were also binding on the Union’s institutions.<sup>14</sup> In this context in particular, the constitutional traditions common to the Member States (common constitutional traditions) and the E.C.H.R. are important. Article 6, paragraph 3 T.E.U. shows that the E.C.F.R. (and the

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<sup>8</sup> Article 6, paragraph 1 T.E.U.

<sup>9</sup> Stefan Kadelbach & Niels Petersen, *Europäische Grundrechte als Schranken der Grundfreiheiten*, 30 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 693, 695 (2003) (F.R.G.).

<sup>10</sup> Mayer, *supra* note 6, at 101.

<sup>11</sup> Cf. Pache & Rösch, *supra* note 6, at 521.

<sup>12</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, CETS No. 194.

<sup>13</sup> Article 6, paragraph 2, sentence 2 T.E.U. makes it abundantly clear that an accession to the E.C.H.R. would not extend the competences of the Union.

<sup>14</sup> Case C-45/08, *Spector Photo Group NV v. Commissie voor het Bank-, Financie- en Assurantiewezen*, 2009 WL 4927720, ¶ 40 (Dec. 23, 2009); Case C-402/05, *Kadi v. Council of the European Union*, 2008 E.C.R. I-6351, ¶ 283; Case C-305/05, *Ordre des barreaux francophones et germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5305, ¶ 29; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, ¶ 3; Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, ¶ 7.

E.C.H.R., after the stipulated accession) does not replace the existing body of fundamental rights, but rather complements it.<sup>15</sup> However, more interesting than the rather general statements in Article 6, paragraphs 1 and 3 T.E.U. is probably the determination of the role of the common constitutional traditions within the framework of the E.C.F.R. as it is laid out in Article 52 E.C.F.R. This will be the focus of the analysis below.

## II. INTERPRETING THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

Interpreting the E.C.F.R. is a complex task.<sup>16</sup> Article 52 E.C.F.R., which governs the interpretation of the Charter, is a mirror image of the interrelation of the three pillars of European fundamental rights in the Treaty. However, the starting point for interpreting the E.C.F.R. is Article 6, paragraph 1, subparagraph 3 T.E.U., which (1) refers to Title VII of the Charter, and (2) demands “due regard” to the explanations of the E.C.F.R. Convention’s Praesidium,<sup>17</sup> although the latter have no binding effect and only serve as a “tool of interpretation intended to clarify the provisions of the Charter.”<sup>18</sup> Title VII contains, in particular, rules on the field of application<sup>19</sup> as well as the scope<sup>20</sup> and interpretation<sup>21</sup> of Charter rights.

The first purpose of Article 52, paragraph 3, sentence 1 E.C.F.R. is to create coherence between the E.C.F.R. and E.C.H.R. by stipulating that those Charter rights which correspond to E.C.H.R. rights shall have the same “meaning and scope” as those rights of the E.C.H.R., including the interpretation in the E.C.H.R.’s Protocols and in the E.Ct.H.R. case law.<sup>22</sup> Sentence 2, however, shows that this coherence only forms a minimum protection. The E.C.F.R. might still go further and provide for a higher level of protection.

While Article 52, paragraph 3 E.C.F.R. thus refers to the horizontal (international law) relationship between the E.C.F.R. and E.C.H.R., Article 52, paragraph 4 E.C.F.R. concerns the vertical dimension towards the fundamental rights of the Member States. According to the wording of Article 52, paragraph 4 E.C.F.R. fundamental rights, in so far as they result from the common constitutional traditions, shall be interpreted “in harmony with those traditions.” This illustrates that consistency between the E.C.F.R. and the fundamental rights of Article 6, paragraph 3 T.E.U. shall be reached.<sup>23</sup> Therefore, the interpretation of a Charter right requires determining whether a corresponding fundamental right is part of the common constitutional traditions and, if so, what content those traditions provide for this right. The purpose is not to find

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<sup>15</sup> Cf. Pache & Rösch, *supra* note 6, at 521.

<sup>16</sup> For a detailed analysis of the implications on human dignity, see Felix Ekardt & Daniel Kornack, “*Europäische*” und “*deutsche*” Menschenwürde und die europäische Methodik der Grundrechtsinterpretation, 13 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (forthcoming 2010) (F.R.G.).

<sup>17</sup> Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303) 17, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:En:PDF>.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> Article 51 E.C.F.R.

<sup>20</sup> Article 52, paragraphs 1–2, 5–6 E.C.F.R.

<sup>21</sup> Article 52, paragraphs 3–7 E.C.F.R.

<sup>22</sup> Explanations Relating to the Charter of Fundamental Rights, *supra* note 17, at 33.

<sup>23</sup> *Id.* at 34.

a “lowest common denominator.” Rather, the E.C.F.R. aims at establishing a high standard of protection.<sup>24</sup> This corresponds to the expressions of previous E.C.J. case law.<sup>25</sup>

Prior to the new Article 52, paragraph 4 E.C.F.R., taking into account the common constitutional traditions or international treaty obligations was a subordinated method of interpretation and only used by the E.C.J. if the standard methods would not yield a definite result.<sup>26</sup> Article 52, paragraph 4 E.C.F.R. now stipulates that in so far as the E.C.F.R. recognizes fundamental rights resulting from common constitutional traditions, these rights shall be interpreted “in harmony with those traditions.” Unlike Article 52, paragraph 3 E.C.F.R., paragraph 4 does not allow a higher level of protection. Instead, the focus is on the “harmony” of the interpretations. It is therefore necessary, first, to clarify whether in the common constitutional traditions a fundamental right corresponding to the Charter right to be investigated exists. If this is *not* the case, then Article 52, paragraph 4 E.C.F.R. has no further implication and the meaning of the Charter right has to be determined through the usual methods of interpretation. On the other hand, if such a corresponding right *does* exist, the following situations need be distinguished: (1) If the analysis of the common constitutional traditions shows that the fundamental right clearly does (or does not) have the assumed meaning, the interpretation of the Charter right must be in accordance with this result. “Harmony” in this case is to be understood as equality of results. (2) If, however, the analysis of the common constitutional traditions does not yield a clear result with regard to the interpretation in question, but instead leads to a number of possible answers, then the usual methods of interpretation are applied to determine the Charter right’s meaning. In the latter case, the content of the constitutional traditions only sets a framework which the further interpretation may not exceed or fall below. In this case, due to the lack of a clear outcome, “harmony” cannot be understood as equality of results, but rather as avoidance of contradiction within the identified range of possible outcomes.

It is not always easy to determine when the common constitutional traditions have a certain meaning. Thus, Article 52 E.C.F.R. (intentionally or unintentionally) gives the E.C.J. considerable leeway in the interpretation. In the past, the E.C.J. simply stated that the constitutional traditions had the respective right in common (or that they did not). In light of the goal of a high standard of protection, it is clear that it does not matter whether a particular right is in place in *all* Member States’ constitutions.<sup>27</sup> On the other hand, the ECJ has also rejected the idea of a maximum standard derived from the protection available in any Member State.<sup>28</sup> Furthermore, the notion of the constitutional *traditions* of the Member States is also broader than,

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<sup>24</sup> *Id.*

<sup>25</sup> Cf. Opinion of Advocate General Mengozzi, C-354/04, *Gestoras Pro Amnistia v. Council of the European Union*, 2007 E.C.R. I-1579, ¶ AG138; Explanations Relating to the Charter of Fundamental Rights, *supra* note 17, at 34.

<sup>26</sup> Due to the absence of a written bill of rights, the E.C.J. found itself unable to determine the existence and content of certain fundamental rights merely by the usual methods of interpretation of Community law. Therefore, it regularly referred to the constitutional traditions common to the Member States and international treaties, including the E.C.H.R.; cf., e.g., Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609, ¶ 33.

<sup>27</sup> For the same conclusion, cf. ROLAND WINKLER, *DIE GRUNDRECHTE DER EUROPÄISCHEN UNION* 71 (2006).

<sup>28</sup> Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice’s Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 458 (2004).

for example, the reference to the Member States' constitutions in Article 53 E.C.F.R. Therefore, in a particular case it can be quite uncertain whether the E.C.J. will recognize a certain right in the common constitutional traditions and, more importantly, what content this right might have. The existing case law in this regard seems to apply a kind of common-sense determination rather than a clear procedure.<sup>29</sup> For example, it remains unclear whether it might be sufficient to analyze only a selection of Member States (and, if so, which States). To increase predictability, it might be desirable for the Council and the European Parliament or the E.C.J. to concretize the procedure for determining the content of the common constitutional traditions. However, a purely mechanical counting process of Member States laws would certainly not be appropriate.

### III. OUTLOOK

From a practical point of view, it remains to be seen whether the E.C.J. will engage at all in a differentiated analysis of the different sources of fundamental rights under Article 6 T.E.U. and explicitly state the different outcomes or whether, with regard to the substantial coherence of the three pillars of fundamental rights,<sup>30</sup> it will follow its more recent case law and apply an overall consideration of the E.C.F.R., E.C.H.R., and constitutional traditions common to the Member States. In any case, the consideration of the Member States' constitutional traditions might be understood as an expression either of European "unity in diversity" and the idea of subsidiarity, or of Member States' resistance to a comprehensive principle of priority in favor of E.U. law and to the extension of the Union's competences. The fundamental debate about the relationship between the Union and the Member States will continue. The caveats in the Lisbon decision of the German Federal Constitutional Court,<sup>31</sup> and the United Kingdom's, Poland's, and the Czech Republic's opposition expressed in the Protocol on the Application of the E.C.F.R., are only a few examples of the inherent tensions the "ever closer union" has to face.

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<sup>29</sup> Cf., e.g., Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, ¶¶ 2, 18 (holding that effective judicial control is "a principle which underlies the constitutional traditions common to the Member States"); Case C-85/87, *Dow Benelux v. Comm'n of the European Communities*, 1989 E.C.R. 3137, ¶¶ 4, 28 (recognizing a fundamental right to the inviolability of the home with respect to "private dwellings of natural persons" but not buildings owned by enterprises due to "not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises").

<sup>30</sup> Cf. Pache & Rösch, *supra* note 6, at 521.

<sup>31</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (F.R.G.).