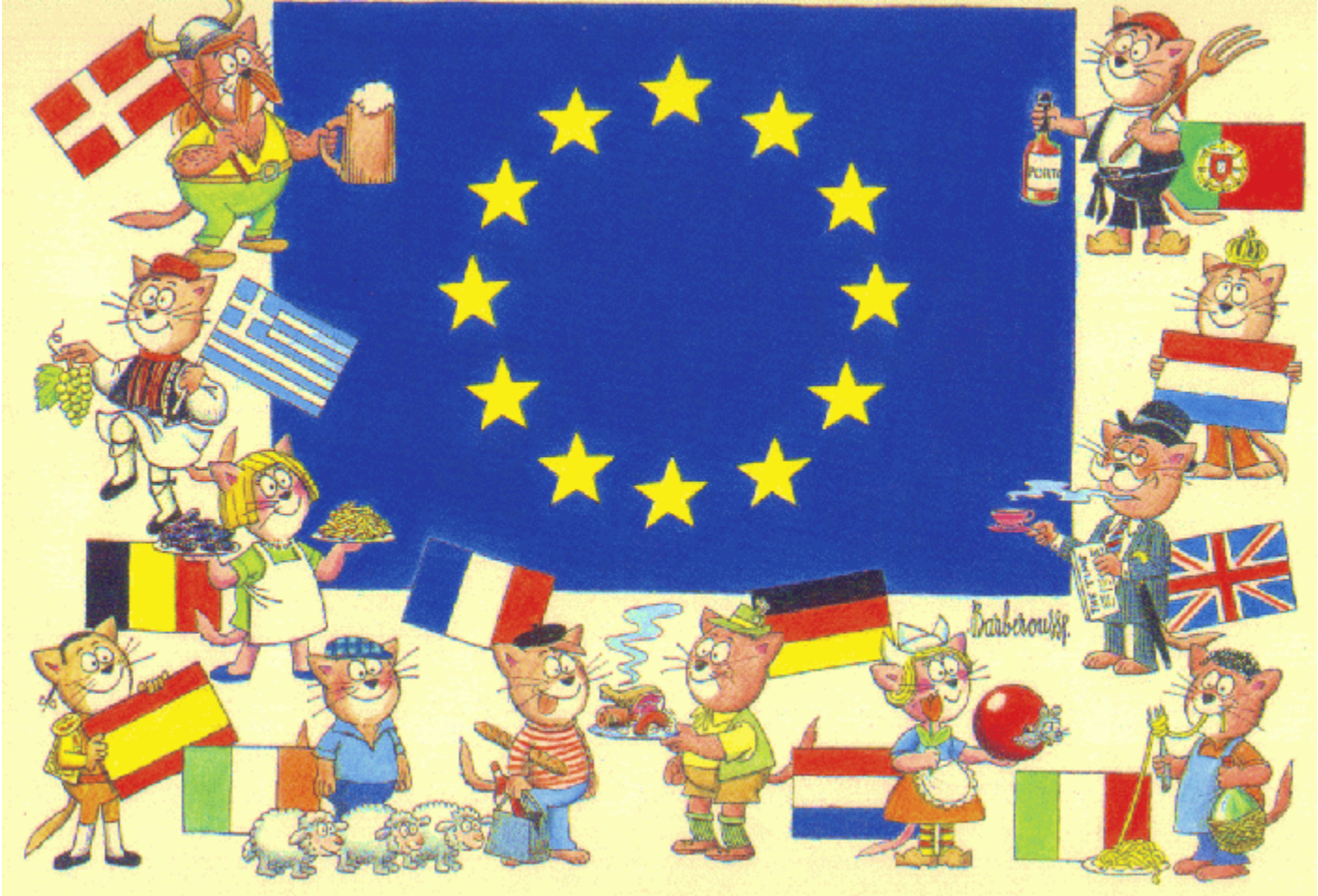




HUMAN RIGHTS 3 - NEW LEVEL OF PROTECTION: CIVIS EUROPEUS SUM!

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Human Rights 3 - New level of protection



INTRODUCTION

EU - New Kid on the Block

- Why should we have HRs protection in EU?
- ECSC 1951 was not about HRs....
- So why do we need them? What was EC about?
 - The more competences, the more limits on competences by MSs (HRs as a fortress of MSs)
 - The more competences, the more possibility of interference with HRs (EU attacking HRs)
 - Thousands of facets of non-discrimination... (beloved topic of EU HRs protection)



50s: THE ORIGINAL EC TREATY

- Article 119 EEC Treaty

„Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.

Equal remuneration without discrimination based on sex means:

- (a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and*
- (b) that remuneration for work at time-rates shall be the same for the same job.“*



60S: FOUNDING CASE LAW PRINCIPLES

- Case 26/62 Van Gend & Loos [1963] ECR 1:
„...According to the spirit, the general scheme and the wording of the treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect...“
- Case 6/64 Costa v. ENEL [1964] ECR 614: *„The transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail.“*



70s: FIRST HR CASES – WHO IS THE DEFENDOR FIDEI?

- **Case 11/70 Internationale Handesgesellschaft [1970] ECR 1125:**
weird facts of HRs cases in EC/EU....

The applicant, a German import-export company, obtained an export licence in respect of 20,000 metric tonnes of maize meal, the validity of which expired on 31 December 1967. Council regulation 120/67 had set up a system for the common organization of the cereal market, whereby a licence could be obtained by lodging a deposit, and that deposit would be forfeited if the goods were not exported within the period of time set. A part of the applicant's company's deposit was forfeited when the licence expired without the maize having been exported, and the company brought proceedings before the administrative court claiming the return of this sum and questioning the validity of the deposit system. The national court referred the case to the ECJ.



70s: FIRST HR CASES - WHO IS THE DEFENSOR FIDEI?

„3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law . The validity of such measures can only be judged in the light of community law . **In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.** However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded . In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice . the protection of such rights, whilst inspired by **the constitutional traditions common to the member states**, must be ensured within the framework of the structure and objectives of the community . It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system.“

Don't use German constitution against EC, EC will protect HRs better....;-)



70s: FIRST HR CASES - WHO IS THE DEFENSOR FIDEI?

- Time of Solange I 1974:

„Solange der Integrationsprozess der Gemeinschaft nicht so weit fortgeschritten ist, dass das Gemeinschaftsrecht auch einen von einem Parlament beschlossenen und in Geltung stehenden formulierten Grundrechtskatalog enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist, ist nach Einholung der in Art. 234 EG geforderten Entscheidung des EuGH die Vorlage eines Gerichtes der Bundesrepublik Deutschland an das BVerfG im Normenkontrollverfahren zulässig und geboten, wenn das Gericht die für es entscheidungserhebliche Vorschrift des Gemeinschaftsrechts in der vom EuGH gegebenen Auslegung für unanwendbar hält, weil und soweit sie mit einem der Grundrechte des Grundgesetzes kollidiert.“
BVerfGE 37, 271

As long as EC is not protecting HRs, Germany will protect them itself...



70s: FIRST HR CASES - DISCRIMINATION

- ECJ judgment of 8 April 1976. - Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena. Case 43-75:

„39 In fact , since article 119 is mandatory in nature , the prohibition on discrimination between men and women applies not only to the action of public authorities , but also extends to all agreements which are intended to regulate paid labour collectively , as well as to contracts between individuals .

40 The reply to the first question must therefore be that the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals , in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements , as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service , whether private or public .“



80s: FIRST HR CASES – WHERE ARE THEY?

Case 5/88 Wachauf [1989] ECR 2609 – quotas for milk production

„17. *The Court has consistently held, in particular in its judgment ... Hauer v Land Rheinland Pfalz [1979], that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community . International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law.*

...

22. *The Community regulations in question accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.*“

If there is sufficiently wide margin of appreciation, then it's for the MSs to protect HRs.



80s: FIRST HR CASES – WHERE ARE THEY?

- Time of Solange II 1986:

„Solange die Europäische Gemeinschaft, insbesondere die Rechtsprechung des Gerichtshofs der Gemeinschaften einen wirksamen Schutz der Grundrechte gegenüber der Hoheitsgewalt der Gemeinschaften generell gewährleistet, der dem vom Grundgesetz als unabdingbar gebotenen Grundrechtsschutz im Wesentlichen gleich zu achten ist, zumal den Wesensgehalt der Grundrechte generell verbürgt, wird das BVerfG seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht, das als Rechtsgrundlage für ein Verhalten deutscher Gerichte oder Behörden im Hoheitsgebiet der Bundesrepublik Deutschland in Anspruch genommen wird, nicht mehr ausüben und dieses Recht mithin nicht mehr am Maßstab der Grundrechte überprüfen; entsprechende Vorlagen nach Art. 100 I GG sind somit unzulässig.“ BvR 197/83

As long as EC is protecting HRs, Germany will not use Constitution against EC measures...



80s: FIRST HR CASES: WHAT DO WE HAVE IN COMMON?

- Case C-260/89 ERT [1991] ECR I-2925:

ERT, a Greek radio station and television company, enjoyed exclusive broadcasting rights under a Greek statute. It sought an injunction against an information company and Mr. Kouvelas, the Mayor of Thessaloniki, who had set up a rival television station. The respondent argued that ERT's exclusive rights infringed the free movement and competition provisions of EC law. The Greek government invoked Articles 45 and 55 EC which allowed it to impose restrictions for reasons of public policy. Mayor of Thessaloniki counter-argued that these could not be invoked as the conduct violated Article 10 ECHR relating to freedom of expression.



80s: FIRST HR CASES: WHAT DO WE HAVE IN COMMON?

- „41. *With regard to Article 10 of the European Convention on Human Rights, ... it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories ... The European Convention on Human Rights has special significance in that respect (...). It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany ... the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.*
42. *As the Court has held (...), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.*



80s: FIRST HR CASES: WHAT DO WE HAVE IN COMMON?

43. *In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.*
44. *It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.*“



90s: LET US BE EUROPEAN CITIZENS!

- Judgment of ECJ in Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et al.*
 - Story and result?
 - Or clash between 4 freedoms and Human Rights like in *Schmidberger*.... (Case C-112/00, 12 June 2003, *Eugene Schmidberger v. Austria*)



90s: LET US BE EUROPEAN CITIZENS!

- Opinion of Advocate general Jacobs in Case C-168/91 Konstantinidis [1993] ECR I-1191 – what was it about? Languages....?

„46. In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights.”



90s: LET US BE EUROPEAN CITIZENS!

- Judgment in Case C-168/91 Konstantinidis [1993] ECR I-1191
- What remained of AG opinion?

„15 Rules of that kind are to be regarded as incompatible with Article 52 of the Treaty only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article.

16 Such interference occurs if a Greek national is obliged by the legislation of the State in which he is established to use, in the pursuit of his occupation, a spelling of his name derived from the transliteration used in the registers of civil status if that spelling is such as to modify its pronunciation and if the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.“



90s: LET US BE EUROPEAN CITIZENS!

- Maastricht Treaty 1992:

„F2 TEU: The 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 8 TEC

- 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.*
- 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

Article 8a

- 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.*
- 2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.“*



90s: LET US BE EUROPEAN CITIZENS!

- TEU after Amsterdam Treaty:

„Article 6

- 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*
- 2. The 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.“*



2000: THE CHARTER AND HER STORY

- Drafted by a body called the “Convention” on the basis of a decision of the Cologne summit adopted in June 1999.
 - Answer to whether the EU should accede to European Convention on Human Rights or should have its own Bill of Rights and how to solve the problem of ever more intensive interference of the ever-closer Union into human rights problemacy.
 - Solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7 December 2000. But it was not annexed to the fundamental Treaties (although it had been “drafted as if it were to have full legal effect”) and its legal force remained undetermined
 - The first attempt to make the Charter legally binding done in the draft EU Constitution Treaty.
 - After the Lisbon Treaty, replacing EU Constitution Treaty, came into force on 1 December 2009, was the Charter made legally binding as proclaimed by Art. 6 para. 1 of the Treaty on European Union.



2000: THE CHARTER AND HER STORY

- Art. 6 para. 1 of the Treaty on European Union (after Lisbon):
 - „Article 6
 1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
 2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*
 3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*“



2000: THE CHARTER AND HER STORY

- Charter building on ECHR and case-law (preamble):
 - *„This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.“*



2000: THE CHARTER AND HER STORY

- Structure:
 - Dignity
 - Freedoms
 - Equality
 - Solidarity
 - Citizen´s Rights
 - Justice



2000: THE CHARTER AND HER STORY

○ Field of application:

- „Article 51

Field of application

- 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
- 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.“*



2000: THE CHARTER AND HER STORY

- *„Member States only when they are implementing Union law“*
 - Member State authorities executing outright obligations stemming from Union – „agency“
 - Member State measures that implement Union law, including directives which only lay down minimum harmonization or grant a margin of discretion
 - national limitations of a right granted by EU law (mostly the market freedoms) trigger the application of EU fundamental rights



2000: THE CHARTER AND HER TROUBLES

- Charter as a happy end of HRs story in EU? That was a good joke....;-)



2000: THE CHARTER AND HER TROUBLES

- Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (and the Czech Republic?)

„Article 1

- 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
- 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.“



FOR TOMORROW – RIGHT TO LIFE

- Try to find as many arguments for and against death penalty as you can...divided into two groups.
- Congratulations for survival;-)

