The Constitutional Traditions Common to the Member States: Identification and Concretisation

Peter M. Huber[*]

Keywords: common constitutional traditions, human dignity, German Basic Law, European Convention on Human Rights, Charter of Fundamental Rights of the European Union, constitutional identity, national reservations, identification

A. The Common Constitutional Traditions in the Case-Law of the Court of Justice

1. Historical Foundations

The constitutional traditions and/or legal principles common to the Member States have played a central role in the case-law of the Court of Justice from the very beginning, and quickly became central jurisprudential tenets of the EU legal order a decisive part of the legal order in all Member States.

From the very beginning, the Court of Justice has derived general legal principles from the administrative law systems of the Member States, in order to be able, for example, to identify the legal requirements of an annulment of administrative decisions by institutions and other bodies of the European Union in accordance with the rule of law. Although EU law does not contain any general rules on the annulment of administrative decisions (revocation, withdrawal), it has drawn the regulatory regime applicable to them from the administrative law of the Member States. To take just one example, the decision in *Algera* of 12 July 1957 states:

* Peter M. Huber is Professor of Law at the Ludwig-Maximilians-Universität Munich. Formerly, he was Justice at the German Federal Constitutional Court and Minister of Interior of the Free State of Thuringia. This text has been previously published in: Court of Justice of the European Union, *EUnited in diversity – Between common constitutional traditions and national identities – International conference, Riga, Latvia, 2-3 September 2021 – Conference proceedings* (Publications Office of the European Union 2022).

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – CC BY – https://staging.nomos-elibrary.de/agb

'The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.'[1]

A high point in this respect is the fundamental rights case-law of the Court of Justice in the 1970s and 1980s, which was encouraged in particular by the decisions of the *Corte Costituzionale* (Italy) in the *Frontini* case[2] and the *Bundesverfassungsgericht* (Federal Constitutional Court, Germany) in its *Solange I* decision,[3] and examples of which include the decisions in the *Nold* and *Hauer* cases. However, as early as 1970, in its decision in *Internationale Handelsgesellschaft*, the Court of Justice had already emphasised the constitutional traditions common to the Member States as the basis of European protection of fundamental rights, provided that they were ensured within the framework of the structure and objectives of the European Economic Community.[4]

The first detailed statements on the free choice and pursuit of employment and the guarantee of property ownership could then be found in the judgment *Nold*. The Commission had authorised Ruhr-Kohle AG to amend its trading rules, which established the conditions for admitting coal wholesalers to the right of direct supply. On that basis, Nold, a coal and constructions materials trader based in Darmstadt, lost its status as a direct purchaser, which it had held for years. In his action for annulment brought against the authorisation, he argued that his right of ownership and his free choice and pursuit of employment had been violated. The Court answered as follows:

'(14) If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must

1 Judgment of 12 July 1957, *Algera and Others* v. *Common Assembly*, 7/56 and 3/57 to 7/57, EU:C:1957:7, 79 ff.

2 *Corte Costituzionale*, Decision No 183/1973 – *Frontini*, EuR 1974, 255.

3 BVerfGE 37, 271 ff.– *Solange I*.

4 Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, 1,125 ff.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – CC BY – https://staging.nomos-elibrary.de/agb

be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.
(15) The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision. It was for the applicant, confronted by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations.'[5]

This was further elaborated in the judgment *Hauer*, which remains (for the time being) the apex of the jurisprudential development of the EU's freedom of property rights and the freedom of trade or profession. Even though it was ultimately found that there was no violation of the fundamental rights in question, the decision is characterised by an extraordinary amount of effort in terms of argumentation and dogmatic reflection. In this case, the winegrower Liselotte Hauer applied for authorisation to plant vines on her property in Bad Dürkheim (Germany). Authorisation was refused on the ground, inter alia, that Regulation No 1162/76 on measures designed to adjust wine-growing potential to market requirements prohibited all new planting of vines for a longer period. The Court of Justice, which had been seised by way of a request for a preliminary ruling, stated:

'(17) The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights. …
(19) Having declared that persons are entitled to the peaceful enjoyment of their property, that provision [Article 1 to the first Protocol to the ECHR] envisages two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof. In this case it is

5 Judgment of 14 May 1974, *Nold v. Commission*, 4/73, EU:C:1974:51, 491.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

incontestable that the prohibition on new planting cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited. On the other hand, there is no doubt that that prohibition restricts the use of the property. In this regard, the second paragraph of Article 1 of the Protocol provides an important indication in so far as it recognizes the right of a State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". Thus the Protocol accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed "necessary" by a State for the protection of the "general interest". ...
(20) Therefore, in order to be able to answer that question [concerning whether the contested regulation was contrary to fundamental rights], it is necessary to consider also the indications provided by the constitutional rules and practices of the ... Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14(2), first sentence), to its social function (Italian constitution, Article 42(2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14(2). second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. ...
(21) More particularly, all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.
...
(23) However, that finding does not deal completely with the problem raised by the Verwaltungsgericht. Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy, it is still necessary to examine

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property.'
It was likewise ultimately found that there was no such interference, or, moreover, a violation of the freedom of occupation.[6]

2. Dwindling Importance in the Case-Law of the Court of Justice

With the increasing number of Member States and the establishment of the European Union's fundamental rights standards in the form of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'), but above all with the integration of the Charter of Fundamental Rights of the European Union ('the Charter') into primary law, reliance on the constitutional traditions common to the Member States has been receding into the background in the case-law of the Court of Justice. This is understandable and is to a certain extent also in line with the Court of Justice's understanding of the autonomy of EU law. However, it does not sufficiently take into account the needs of the legal order and the constitutional structure of the European Union as a compound of its Member States.

B. The Common Constitutional Traditions as the Basis of the European Legal Order

1. Origins in the Treaties

According to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are general principles of EU law. Furthermore, Article 52(4) of the Charter provides that fundamental rights under the Charter, in so far as they result from the constitutional traditions common to the Member States, are to be interpreted in harmony with those traditions. Other provisions of primary law also refer, at least in essence, to the constitutional

6 Judgment of 13 December 1979, *Hauer*, 44/79, EU:C:1979:290, 3727 ff.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

traditions common to the Member States. This applies, for example, to the statement in Article 2 TEU, according to which respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, are common to all Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail, or to the second and third paragraphs of Article 340 TFEU, according to which the European Union and the European Central Bank (ECB), respectively, must, in accordance with the general principles common to the laws of the Member States, compensate any damage caused by their institutions or by their servants in the performance of their duties.

2. Common Constitutional Traditions in the Area of Fundamental Rights

The older case-law of the Court of Justice impressively developed the principle that the constitutional traditions common to the Member States are of central importance, above all to the understanding of fundamental rights. This has not changed significantly with the Charter coming into force, as can be seen by taking a closer look at the function and structure of the fundamental rights guarantees in their various forms.

In its *Ökotox* decision of 27 April 2021, the Second Senate of the Federal Constitutional Court held that the fundamental rights of the *Grundgesetz* (German Basic Law), the guarantees of the ECHR and the fundamental rights of the Charter are predominantly rooted in common constitutional traditions and are thus expressions of universal and common European values, with the consequence that the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by constitutional and apex courts are not only to be taken into account as a basis for the interpretation and application of the fundamental rights of the Basic Law, but are equally important for the interpretation and application the fundamental rights of the ECHR and the Charter.

The fundamental rights guarantees laid down in the German Basic Law (*Grundgesetz* – GG), the ECHR and the Charter are all based on the protection of human dignity, provide guarantees of protection which, in essence, are functionally comparable in terms of those entitled and obliged, in structure, and therefore largely constitute congruent guarantees.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – [CC BY] – https://staging.nomos-elibrary.de/agb

a) Human Dignity as the Archimedean Point of All Three Catalogues

With Article 1(1) GG and the precedence of the fundamental rights section over the provisions concerning the law governing State organisation, the *Grundgesetz*, for example, places emphasis on the primacy of the individual and his or her dignity over the power of the State and the enforcement of its interests.[7] Accordingly, all public authorities are obliged to respect and protect human dignity, and this includes, in particular, the safeguarding of personal individuality, identity and integrity as well as fundamental equality before the law.[8]

However, Article 1(2) GG also places the fundamental rights of the Basic Law in the universal tradition of human rights[9] and in the development of the international protection of human rights, attaching particular importance to the European tradition and development of fundamental rights.[10] The principles underlying the openness of the *Grundgesetz* to international and European law (preamble and Article 1(2), Article 23(1), Articles 24, 25, 26 and Article 59(2) GG) ensure that this also applies to the further development of both the universal and the European protection of fundamental rights.

Since 1950, the national requirements regarding fundamental rights have been safeguarded and supplemented by the ECHR, with which the Contracting States took, according to the preamble, 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights of 10 December 1948]', and they have since further refined them through 16 protocols. Even though human dignity is not expressly guaranteed within that framework, particular importance is attached to it in the ECHR. This is made clear in the prohibition of torture in Article 3 ECHR and the prohibition of slavery and forced labour in Article 4 ECHR, as well as in the preamble, which expressly refers to the Universal Declaration of Human Rights of 1948.[11]

7 See BVerfGE 7, 198 (204 ff.) – *Lüth*.
8 See BVerfGE 5, 85 (204); 12, 45 (53); 27, 1 (6); 35, 202 (225); 45, 187 (227); 96, 375 (399); 144, 20 (206 ff. para. 538 ff.).
9 See BVerfGE 152, 216 (240 para. 59) – *Recht auf Vergessen II*.
10 See BVerfGE 111, 307 (317 ff.); 112, 1 (26); 128, 326 (366 ff.); 148, 296 (350 ff. para. 126 ff.); 152, 152 (177 para. 61) – *Recht auf Vergessen I*.
11 See also ECtHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, nr. 2346/02, § 65.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

The Charter also places the focus on the individual, as evidenced by its preamble. Article 1 of the Charter recognises human dignity not only as a fundamental right in itself, but – according to the explanation to that article[12] – as 'the real basis of fundamental rights'. Moreover, the fundamental rights laid down in the Charter are tied in with both the constitutional traditions common to the Member States and the ECHR, in accordance with Article 52 et seq. of the Charter, and – in so far as they apply to German State authority – have in principle the same function as the fundamental rights laid down in the German constitution and the ECHR.[13]

Thus, the common point of reference for all three catalogues is the Universal Declaration of Human Rights of 10 December 1948, which emphasises, in its preamble, the central importance of human dignity.[14] Accordingly, all three catalogues of fundamental rights are ultimately concerned with the protection of the individual and his or her dignity. This is given concrete expression in the individual fundamental rights in an area-specific manner and fundamentally confers on the persons entitled to the rights concerned a right of self-determination in the respective areas of life, free from paternalism by public authority or social forces and structures.

b) Comparable Structure and Function of Fundamental Rights

Historically, jurisprudentially and functionally, the fundamental rights of the *Grundgesetz* primarily guarantee the individual's rights in order to enable him the defence of his self-determination against the State and other public authorities.[15] They protect the freedom and equality of citizens from unlawful interference by public authorities. Such interference must be proportionate and must not affect the essence of the fundamental rights (Article 19(2) GG). Those are also constitutional decisions in an objective

12 OJ 2007 C 303, 1, at 17.
13 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.
14 UN A/RES/217 A (III); see also Eckard Klein, 'Die Grundrechtsgesamtlage' in: Michael Sachs and Helmut Siekmann, *Der grundrechtsgeprägte Verfassungsstaat – Festschrift für Klaus Stern* (2012), 389 (390 ff.); Catherine-Amélie Chassin, 'La notion de dignité de la personne humaine dans la jurisprudence de la Cour de justice' in: Abdelwahab Biad and Valérie Parisot, *La Charte des droits fondamentaux de l'Union européenne* (2018), 138 ff.
15 See BVerfGE 7, 198 (204 ff.) – *Lüth*.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

sense, establishing values and principles which – irrespective of any individual concern – oblige public authorities to ensure that these rights do not become devoid of purpose in the reality of economic and social life. Fundamental rights thus form the dogmatic or constructive basis of participation and benefit rights as well as the State's duties to protect (*Schutzpflicht*). This does not call their primary orientation into question, but serves to reinforce their validity in everyday life.[16]

In terms of substance, and as interpreted by the European Court of Human Rights, the ECHR also contains guarantees of individual freedom and equality and safeguards them against State intervention where it is not in accordance with law or not necessary in a democratic society (see, for example, Article 8(2) ECHR). These guarantees are open to further development[17] and have become increasingly convergent with national constitutions. The protection of fundamental rights under the ECHR is not limited to protection against interference by the State on the individual's sphere of freedom, but also comprises – similar to the *Grundgesetz* – obligations to guarantee and protect rights.[18]

This also applies to the fundamental rights of the Charter, which protect the freedom and equality of EU citizens not only against interference by institutions, bodies, offices and agencies of the European Union, but also against interference by Member State authorities when they are implementing EU law (Article 51(1) of the Charter). The addressees of the Charter – like those of the Basic Law and the ECHR – are bound by the principle of proportionality and must not affect the essence of fundamental rights (Article 52(1) of the Charter). In addition, principles are derived from the fundamental rights of the Charter – in so far as they are not horizontally

16 See BVerfGE 50, 290 (337) – *Mitbestimmung*.

17 See, in relation to the ECHR as a 'living instrument', ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, nr. 5856/72, § 31; *Marckx v. Belgium*, judgment of 13 June 1979, nr. 6833/74, § 41; *Airey v. Ireland*, judgment of 9 October 1979, nr. 6289/73, § 26; *Rees v. United Kingdom*, judgment of 17 October 1986, nr. 9532/81, § 47; *Cossey v. United Kingdom*, judgment of 27 September 1990, nr. 10843/84, § 35; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, nr. 15318/89, § 71.

18 See Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, 2021), § 19; Jens Meyer-Ladewig and Martin Nettesheim, in: Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *EMRK* (4th edn, 2017), Art. 1, para. 8; Hans-Joachim Cremer, in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG* (2nd edn, 2013), Chapter 4, para. 63 ff.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

applicable[19] – and those principles may give rise to further (derivative) entitlements.[20] Against that background, the fundamental rights of the Charter constitute a fundamentally functional equivalent to the guarantees of the *Grundgesetz*.[21]

c) Largely Congruent Content

The three catalogues of fundamental rights are also largely congruent in terms of content. This already results in part from the 'most favourable provision' principle of Article 53 ECHR, in accordance with which the ECHR may not be construed as limiting or derogating from human rights and fundamental freedoms laid down in the law of the Contracting States. The provision therefore makes clear that the ECHR in any event constitutes a minimum standard common to the Contracting States, beyond which, however, they may go.[22] Therefore, in determining the content of guarantees, the European Court of Human Rights repeatedly refers to both national and EU fundamental rights.[23]

Similar considerations apply to the Charter. Already in its preamble, it refers to the constitutional traditions common to the Member States as well as the inviolable and inalienable human rights protected in international conventions and in the ECHR, thereby making clear that it serves to give (further) concrete expression to universal and European legal principles.

19 Regarding Article 21 of the Charter, see CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, 2005 [ECR], I-10013 (10040 ff., para. 77); judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paras 22, 51; critical in that regard: Højesteret (Denmark), judgment of 6 December 2016 – 15/2014.

20 See Eckhard Pache, in: Matthias Pechstein, Carsten Nowak and Ulrich Häde (eds), *Frankfurter Kommentar EUV/GRC/AEUV* (2017), *Art. 51 GRC*, para. 38; Armin Hatje, in: Ulrich Becker, Armin Hatje, Johann Schoo and Jürgen Schwarze (eds), *EU-Kommentar* (4th edn, 2019), *Art. 51 GRC*, para. 22.

21 See BVerfGE 152, 216 (239 ff., para. 59); BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37.

22 See Grabenwarter and Pabel (n. 18), § 2, para. 14.

23 See ECtHR (Grand Chamber), *Bosphorus Airways v. Ireland*, judgment of 30 June 2005, nr. 45036/98, § 148; *Zolothukin v. Russia*, judgment of 10 February 2009, nr. 14939/03, § 79; *Scoppola v. Italy*, judgment of 17 September 2009, nr. 10249/03, § 105; *Bayatyan v. Armenia*, judgment of 7 July 2011, nr. 23459/03, § 103 ff.; ECtHR, *TV Vest As & Rogaland Pensjonistparti v. Norway,* judgment of 11 December 2008, nr. 21132/05, §§ 24, 67; see also Dieter Kraus, in: Dörr, Grote and Marauhn (n. 18), Chapter 3, para. 24; Dagmar Richter, in: Dörr, Grote and Marauhn (n. 18), Chapter 9, paras 3, 74; Meyer-Ladewig, Nettesheim and von Raumer (n. 18), Introduction, para. 22.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

In 2009, the Treaty on European Union expressly elevated that concrete expression to the rank of primary law (Article 6(1) TEU), but at the same time also stipulated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general (legal) principles of EU law (Article 6(3) TEU). This is expressly clarified again in Article 52(3) and (4) of the Charter.

3. Mutual Influence of the Fundamental Right Guarantees

Against that background, it is not only the interpretation of the fundamental rights guaranteed in the German constitution that is determined by the ECHR, the Charter and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and supreme courts. The interpretation of the Charter must be guided by the ECHR and the constitutional traditions common to the Member States as given concrete expression by the aforementioned courts too.[24] The same applies to the ECHR.

This remains true notwithstanding the fact that the ECHR (only) has the status of a Federal law in the German legal system (Article 59(2) GG), accordingly is subordinate to the *Grundgesetz* and does therefore not, in principle, belong to the standard of review of the Federal Constitutional Court. However, in accordance with its settled case-law, the guarantees of the ECHR guide the interpretation of the fundamental rights and the rule-of-law principles of the German Basic Law in accordance with Article 1(2) GG[25] and thus have gained an indirect constitutional dimension. This also applies to the Charter[26] as well as the constitutional traditions common to other democratic constitutional States in the European legal space[27] and the concrete expression given to them by apex courts.[28] The fact that the abovementioned sources are also taken into account in the interpretation of the fundamental rights of the Grudges is not merely an expression of

24 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.
25 See BVerfGE 74, 358 (370); 111, 307 (316 ff.); 120, 180 (200 ff.); 128, 326 (367 ff.); 138, 296 (355 ff., para. 149); 152, 152 (176, para. 58) – *Recht auf Vergessen I*.
26 See BVerfGE 152, 152 (177 ff., para. 60) – *Recht auf Vergessen I*.
27 See Stefan Storr, Sebastian Unger and Ferdinand Wollenschläger (eds), *Der Europäische Rechtsraum* (2021).
28 See BVerfGE 32, 54 (70); 128, 226 (253, 267); 154, 17 (100, para. 125).

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

the German Basic Law's openness towards European law and the Federal Constitutional Court's responsibility for integration. Rather, it takes into account Germany's integration into the European legal space and its development, promotes the strengthening of common European fundamental rights standards and prevents friction and inconsistencies in guaranteeing fundamental rights protection in the interest of its effectiveness and legal certainty.

In view of the express provisions in the Treaties, the common roots, not least in human dignity, and the largely congruent content of the guarantees, the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and apex courts are also to be taken as the basis for the interpretation and application of the Charter – taking into account inter alia also the fundamental rights of the *Grundgesetz* and the case-law of the Federal Constitutional Court. This was expressed by the Second Senate already before, i.e. in its decision of 1 December 2020.[29]

These findings are not questioned by the fact that the fundamental rights guarantees of the Charter, the ECHR, the *Grundgesetz* and other national constiutions are not completely congruent, as a large proportion of the (minor) divergences is based less on conceptual differences in the specific guarantees than on the different ways in which they have been interpreted by the competent courts. However, the interpretation of the Charter must not be based on particular understandings that are evident only in the legal practice of some Member States. Where substantive divergences exist, it is up to the Court of Justice to clarify them within the framework of a preliminary ruling procedure pursuant to Article 267(3) TFEU in order to preserve unity and coherence of EU law.[30]

4. Constitutional Identity and National Reservations of Review

It is also inherent to the constitutional traditions common to the Member States that the Member States participate in European integration only on the basis of their respective national constitutions and that, therefore, a certain degree of constitutional identity or sovereignty is inviolable, the

---

29 See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – para. 37 – *Rumänien II*.

30 See BVerfGE 152, 216 (244 ff., para. 71) – *Recht auf Vergessen II*; BVerfG, decision of 27 April 2021 – 2 BvR 206/14 – para. 73 – *Ökotox*.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

preservation of which the national constitutional and apex courts must ensure.

a) Constitutional Limits on Open Statehood and Constitutional Identity

The vast majority of national constitutions contain explicit or implicit provisions – developed by case-law and jurisprudence – on the limits to open statehood of the respective Member State even if the concrete boundaries of those limits have not yet been sufficiently clarified in every Member State.

With respect to Germany, for instance, the Federal Constitutional Court has repeatedly emphasised in a long line of case-law[31] that the conferral of power to the European Union does not entail the power 'to abandon, through the conferral of sovereign rights on intergovernmental institutions, the identity of the constitution by affecting its basic structure. i. e. the substructures that constitute it'.[32] The constitution amending legislator has codified that case-law in the third sentence of Article 23(1) GG and settled that Article 79(2) and (3) also applies to '... the establishment of the European Union and to the amendment of its legal bases in the Treaties by which ... [the] content of the *Grundgesetz* is amended or supplemented or such amendments or supplements are enabled ...'.[33] Similar provisions can be found in almost all other Member States:[34] In Denmark the constitution entails as unalienable the requirement of sovereign statehood,[35] in France and Italy the republican form of government,[36] and in Austria the 'establishing provisions of the Federal Constitution' (*Baugesetze der Bundesverfassung*), in the form they were given by the Treaty of Accession of Austria of 1994.[37] In Greece, human rights and the foundations of the

31 BVerfGE 37, 271 ff. – *Solange I*; 73, 339 ff. – *Solange II*; 75, 223 ff. – *Kloppenburg*.

32 BVerfGE 73, 339, 375 ff.– *Solange II*.

33 For a somewhat less serious approach to those limits, see Jürgen Schwarze, 'Ist das Grundgesetz ein Hindernis auf dem Weg nach Europa?', JuristenZeitung (1999), 637, 640.

34 Belgian Consitutional Court, Decision No. 62/2016 of 28 April 2016.

35 Højesteret (Supreme Court), judgment of 6 April 1998, I 361/1997, EuGRZ (1999), 49, 52, para. 9.8.

36 Article 89 of the French Constitution; CC Décision n° 2017-749 DC du 31 juillet 2017 - CETA.

37 Christoph Grabenwarter, 'Offene Staatlichkeit: Österreich' in: Armin von Bogdandy, Pedro Cruz Villalon and Peter Huber (eds), *Handbuch Ius Publicum Europaeum, Band II, Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht* (2008), § 20, paras 34, 55; Theo Öhlinger, *Verfassungsrechtliche Aspekte des Vertrages von Amsterdam in*

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – CC BY – https://staging.nomos-elibrary.de/agb

democratic order of the State are conceived as not to be affected by European integration (Article 28(2) and (3) of the Greek Constitution), as are the 'presidential' parliamentary democracy that is set out in Article 110(1) of the Greek Constitution, human dignity, equal access to public office, freedom of personal development, liberty of the person, or the separation of powers enshrined in Article 26 of the Greek Constitution.[38] The Swedish Instrument of Government refers to 'the principles by which the State is governed' as a limit to integration (Chapter 10, § 5), to which the legal literature attributes, above all, the Freedom of Press Act, transparency and access to documents.[39] In Spain, too, the Tribunal Constitucional has recognised a 'core' of 'values and principles' in the Spanish constitution that cannot be affected by integration, but has left open the question of their precise delimitation so far.[40] The only exception to this is the Netherlands, which, with regard to the transfer of sovereign rights, provides only for a procedural hurdle for the transfer of sovereign rights (Article 91(3) of the *Grondwet* (Constitution of the Kingdom of the Netherlands)).[41]

b) National Reservations of Review

It is self-evident that such constitutional limits to integration can be monitored and enforced only by the courts, which are responsible for the integrity of the national constitution.

In accordance with settled case-law of the Federal Constitutional Court, Article 23(1) Sentence 1 GG contains a promise of effectiveness and implementation with regard to EU law,[42] which also includes the endowing of EU law with precedence of application over national law in the statue of ratification in accordance with the second sentence of Article 23(1)

Österreich in: Waldemar Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam* (1998), 297, 300 ff.

38 Regarding the problems of interpretation, see Julia Iliopoulos-Strangas, 'Offene Staatlichkeit: Griechenland' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 16, para. 41 ff.

39 Joakim Nergelius, 'Offene Staatlichkeit: Schweden' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 22, paras 19, 34.

40 STC 64/1991; DTC 1/2004; Antonio López Castillo, 'Offene Staatlichkeit: Spanien' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 24, paras 21, 63 ff.

41 For greater detail, see the summary in Peter M. Huber, 'Offene Staatlichkeit: Vergleich' in: von Bogdandy, Cruz Villalon and Huber (n. 38), § 26, para. 85 ff.

42 See BVerfGE 126, 286 (302); 140, 317 (335, para. 37) – *Identitätskontrolle I*; 142, 123 (186 ff., para. 117) – *OMT*.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

GG.[43] This, in principle, also applies with regard to conflicting national constitutional law and, in the event of a conflict, generally leads to the inapplicability of that law in the specific case.[44] However, the precedence of application of EU law exists only by virtue of and within the framework of the constitutional conferral of power.[45] Therefore, the limits to the opening of the German legal order to EU law, which is foreseen in the *Grundgesetz* and is implemented by the integration legislature, reside not only in the integration programme laid down in the Treaties, but also in the identity of the constitution. This cannot, except by revolution, neither be changed, nor be affected by integration (third sentence of Article 23(1) in conjunction with Article 79(3) GG). The precedence of application exists only to the extent that the Basic Law and the statute of ratification permit or provide for the transfer of sovereign rights.[46] Only to that extent is the application of EU law in Germany democratically legitimised.[47] The Federal Constitutional Court guarantees those limits through, in particular, judicial review of matters pertaining to identity and matters potentially involving *ultra vires* acts. Similar constitutional reservations do exist for the constitutional or apex courts of other Member States.[48]

---

43 See BVerfGE 73, 339 (375); 123, 267 (354); 129, 78 (100); 134, 366 (383, para. 24) – *OMT-Vorlage*; BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 73 ff. – *e.A. EPGÜ II*.

44 See BVerfGE 126, 286 (301) – *Honeywell*; 129, 78 (100); 140, 317 (335, para. 38 ff.) – *Identitätskontrolle I*; 142, 123 (187, para. 118) – *OMT*.

45 See BVerfGE 73, 339 (375) – *Solange II*; 75, 223 (242) – *Kloppenburg*; 123, 267 (354) – *Lissabon*; 134, 366 (381 ff., para. 20 ff.) – *OMT-Vorlage*.

46 See BVerfGE 37, 271 (279 ff.); 58, 1 (30 ff.); 73, 339 (375 ff.); 75, 223 (242); 89, 155 (190); 123, 267 (348 ff., 402); 126, 286 (302); 129, 78 (99); 134, 366 (384, para. 26); 140, 317 (336, para. 40); 142, 123 (187 ff., para. 120); 154, 17 (89 ff., para. 109); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 74 – *e.A. EPGÜ II*.

47 See BVerfGE 142, 123 (187 ff., para. 120); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – para. 74 – *e.A. EPGÜ II*.

48 In that regard, see, for the Kingdom of Belgium: Constitutional Court, decision No 62/2016 of 28 April 2016, para. B.8.7.; for the Kingdom of Denmark: Højesteret, judgment of 6 April 1998 – I 361/1997, Section 9.8.; judgment of 6 December 2016, I 15/2014; for the Republic of Estonia: Riigikohus, judgment of 12 July 2012, 3-4-1-6-12, para. 128, 223; for the French Republic: Conseil Constitutionnel, decision No 2006-540 DC of 27 July 2006, para. 19; decision No 2011-631 DC of 9 June 2011, para. 45; decision No 2017-749 DC of 31 July 2017, para. 9 ff.; Conseil d'État, decision No 393099 of 21 April 2021, para. 5; for Ireland: Supreme Court of Ireland, *Crotty* v. *An Taoiseach* (1987), I.R. 713 (783); *S.P.U.C. (Ireland) Ltd. v. Grogan* (1989), I.R. 753 (765); for the Italian Republic: Corte Costituzionale, decision No 183/1973, para. 3 ff.; decision No 168/1991, para. 4; decision No 24/2017, para. 2; for Latvia: Satversmes

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – [CC BY] – https://staging.nomos-elibrary.de/agb

C. Identification of a Common Constitutional Tradition

In its case-law on fundamental rights and on principles of general administrative law, the Court of Justice has established the method that the identification of general legal principles, in general, and constitutional traditions common to the Member States, in particular, must be carried out by an evaluative legal comparison. A common constitutional tradition does not require all Member States to share it, but it must exist in the majority of Member States, at least from a functional point of view. In view of the degree to which the spheres of Roman law and Germanic law have shaped EU law as a whole, a common constitutional tradition or a general legal principle can be assumed only if it demonstrably exists in both spheres of legal tradition and in a substantial number of Member States. The number of European Union citizens who are already subject to such a principle may also play a role in that respect. In accordance with the persuasive case-law of the Court of Justice, the same applies to international treaties of the Member States, in particular with regard to the protection of human rights.

A common constitutional tradition or a general principle of law, on the other hand, cannot be decreed in a decisionistic manner. Rather, new constitutional traditions or legal principles must grow bottom up. Institutions, bodies, offices and agencies of the European Union that disregard that requirement act *ultra vires*; national courts that do so act unlawfully as well and, potentially – for example in cases where they assume an *acte clair* within the meaning of Article 267 TFEU – arbitrarily.

The question was addressed by the Federal Constitutional Court in its decision in *Honeywell* of 6 July 2010, which concerned whether a general principle of prohibition of discrimination on grounds of age could be derived from the common constitutional traditions and the international treaties of the Member States, even though, at the time of the decision in *Mangold* [49] – which formed part of the subject matter of the proceedings in *Honeywell* – only 2 of the 15 constitutions of the Member States contained

tiesa, judgment of 7 April 2009, 2008-35-01, para. 17; for the Republic of Poland: Trybunał Konstytucyjny, judgments of 11 May 2005, K 18/04, paras 4.1., 10.2.; of 24 November 2010, K 32/09, para. 2.1. ff.; of 16 November 2011, SK 45/09, paras 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31 January 2012, 2012/01/31 – Pl. ÚS 5/12, Section VII; for Croatia: Ustavni Sud, decision of 21 April 2015, U-VIIR-1158/2015, para. 60.

49 Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

a specific prohibition of discrimination based on age.[50] The Second Senate ultimately did not rule on the merits, because the general principle of the prohibition of discrimination on grounds of age, which was challenged with regard to its derivation from the constitutional traditions common to the Member States, neither established a new area of competence for the European Union at the expense of the Member States nor did it extend an existing competence, so that the criterion of structural significance required for *ultra vires* review was not met. Nevertheless, it can be surmised that the derivation of that principle from the common constitutional traditions of the Member states might not have been entirely convincing.[51]

D. Consequences

The constitutional traditions common to the Member States have enduring relevance not only for the area of fundamental rights, and the importance of that relevance has not yet been fully grasped. They force all participants in the European network of courts (*Rechtsprechungsverbund*), but above all the European Court of Human Rights, the Court of Justice and also the national constitutional and apex courts, to make greater efforts with regard to constitutional comparison and to the development of robust methods for their identification and concretisation.

This requires – above all for the Court of Justice, which is charged with the task of practically implementing the unity in diversity prescribed by the Treaties – an institutionalised dialogue with the constitutional and apex courts of the Member States when it comes to identifying common constitutional traditions or touching the respective constitutional identities. In such cases, the Court of Justice should not take the decision without a robust safeguard – unlike what happened in the *Egenberger* case.[52] The second paragraph of Article 24 of the Statute of the Court of Justice already allows – one might also argue obliges – it *de lege lata* to clarify this question *lege artis*. Ideally, this would take place by means of a request addressed to the court seised to interpret the constitution in a binding manner. *De lege*

50 Opinion of Advocate General Mazák in Palacios de la Villa, C-411/05, EU:C:2007:106], I-8531, point 88; Sven Hölscheidt, in: Jürgen Meyer, *Kommentar zur Charta der Grundrechte der EU* (2nd edn, 2006), Art. 21, para. 15.

51 BVerfGE 126, 296 (…) – *Honeywell*.

52 Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb

ferenda, however, the Treaty legislature should insert an Article 267a TFEU, which provides for such a reverse preliminary ruling procedure in detail and entitles and – in the areas listed in Article 4(2) TEU – obliges the Court of Justice to obtain a preliminary ruling from the respective constitutional or supreme courts of the Member States. This would be the keystone in the vault of the network of constitutional courts.[53]

53 See Christoph Grabenwarter, Peter M. Huber, Rajko Knez and Ineta Ziemele, 'The role of the constitutional courts in the European judicial network', European Public Law 27 (2021), 43 (58 ff.).

https://doi.org/10.5771/9783748939030-405, am 29.10.2024, 22:16:08
Open Access – (cc) BY – https://staging.nomos-elibrary.de/agb