Commentaries

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Notes on the Fundamental Rights

Introduction

The six fundamental rights discussed below supplement the Charter of Fundamental Rights of the European Union (hereafter "Charter"). The first sentence of Article 51(1) of the Charter commits all EU institutions to the fundamental rights set out within it. Furthermore, the Charter commits all EU member states to the implementation of European Union law. Thus, when EU law is applied – even partially – these fundamental rights must also be observed. Because European Union law has long governed large areas of public life, the Charter's fundamental rights apply to a broad spectrum of policy areas previously decided at national level. In particular, environmental, climate, and data protection are largely determined by European law, along with numerous technical standards, and commercial and external trade law.

However, the Charter also serves as a benchmark beyond the implementation of EU law. A number of parliaments and courts within the European Union have already taken steps in this direction, and it is likely that this trend will continue in future. This is desirable in terms of creating a wide range of fundamental rights and ensuring a uniformly high level of protection for fundamental rights in the EU.

As the rights outlined below supplement the Charter, the latter's general provisions and interpretative standards apply to them (see Articles 52 to 54 of the Charter). This means that their essence may not be infringed, that any restrictions must always be appropriate, necessary and reasonable, and

may be brought before an independent and impartial court.

Article 1 – Environment

Everyone has the right to live in an environment that is healthy and protected.

Explanatory note:

Article 1 establishes a fundamental right to environmental protection. To date, the Charter of Fundamental Rights of the European Union contains only – in Article 37 – the objective of improving the quality of the environment, but not as a person's right. In the European Convention on Human Rights, the term "environment" is not even mentioned.

For over 50 years, lawyers and politicians have discussed whether a fundamental right to environmental protection should exist. This debate has become anachronistic given the escalating climate crisis.

Previously, the central argument made against having this kind of fundamental right was that it was unnecessary. Articles 2 and 3 of the Charter of Fundamental Rights, it was argued, assert a right to life and to the integrity of the person; environmental protection violations that damage a person's health are thus already violations of fundamental rights.

This legal restriction on protecting health was a constraint even in the past. It ignores the reality of the current challenges we face. For if the cause (high levels of greenhouse gas emissions) and the effect (drastic changes to the environment in a few decades at the latest) lie relatively far apart in time, it will take considerable effort for a plaintiff to supply proof of a particular health hazard in court. It is hard for young people to prove in a court of law that climate change will threaten their health in concrete and specific ways in a few decades. In court, people can only demonstrate to a limited extent why a loss of biodiversity will damage their health. Once a fundamental right to environmental protection is in place, measures to protect the climate and conserve species, and to guard against other environmental hazards, such as poor air quality in large parts of Europe, can be implemented much more effectively. The courts would not be required to undertake difficult, dogmatic deliberations about how directly or indirectly, concretely or abstractly, the health of a person must be threatened before a plaintiff can demand effective climate protection. Nor would the courts first have to decide whether a person's right to life and physical integrity, combined with the EU's general aim of protecting the environment, already gives individuals a fundamental right to a minimum ecological subsistence level. This would simply be the case. The resulting commitments to environmental protection would be considerable. This does not mean that environmental protection would override all other concerns, such as social balance or a free economy. However, environmental protection would shed its constitutional shadow existence and enter constitutional reality with real force.

Article 2 – Digital self-determination

Everyone has the right to digital self-determination. Excessive profiling or the manipulation of people is forbidden.

Explanatory note:

Article 2 confers the right to self-determination – which derives from the right to human dignity – on the digital world. Everyone should be able to move freely and take decisions freely within this world. The new fundamental right thereby goes beyond the conventional principles of data protection as guaranteed by the EU Charter of Fundamental Rights, the European Convention on Human Rights, and the constitutions of EU member states. These provisions protect the right of people to decide for themselves "who knows what about them, when, and on which occasions," as Germany's Federal Constitutional Court put it in its so-called "census judgement" of December 15, 1983. Such a right is now only realistic and appropriate in relation to the state, as data processing by companies has become so wide-ranging, complex and normalized that traditional forms of data protection can no longer guarantee self-determination.

Sentence 2 of this fundamental right identifies acts that undermine digital self-determination and are therefore

forbidden, namely the excessive profiling and manipulation of people. The prohibition applies to the entire legal system, and is thus not directed solely at the state, but applies to private actors as well. Both of these prohibited acts have to do with the processing of personal data – as follows from their contextual link to sentence 1. This reference to the digital sphere means that there is a clear parallel between Article 2's scope of protection and the EU's General Data Protection Regulation (GDPR) and its area of application. That is why not all private acts of profiling or manipulation are included here, and the prohibition applies only in relation to the recording of electronic data. However, it should be noted that the definition of the term "processing" in Article 4 (2) of the GDPR is a broad one, and covers everything from the recording and usage of data to the combining and deletion of data.

Both of the terms used in sentence 2 have negative connotations: only certain harmful forms of data processing are forbidden. "Profiling" relates predominantly to the phases of recording and combining data, while "manipulation" relates more to the purposes for which the data is used. "Excessive profiling" is characterized by the fact that more information is recorded about the data subject, or is obtained via data combination, than is necessary from his or her point of view. Disguising the lack of a connection between the reason for recording data and its benefit to the data controller is not necessary: in common usage, "profiling" is possible even when the data subject is aware that data is being recorded, but cannot avoid or does not wish to avoid disclosing his or her

data. Likewise, the transfer of data to third parties should be included in the prohibition if the person concerned has no interest in this transfer of data.

Manipulation is an opaque process by which the active party gains some form of advantage. By contrast, for instance, conventional advertising is a transparent means of influencing behavior. Not all personalized advertising is manipulative, provided it is recognizable as such and is welcomed, but certain forms of personalized advertising are – like those harnessing transitory states of mind (anger, sadness, etc.). Personalized political advertising can be especially manipulative, for example when targeting the particular susceptibilities that its addressees are assumed to have. Established methods of influencing brain activity – unless in the interests of the persons concerned – also fall into this category.

Article 3 – Artificial Intelligence

Everyone has the right to know that any algorithms imposed on them are transparent, verifiable and fair. Major decisions must be taken by a human being.

Explanatory note:

Algorithms intrude into ever more areas of our lives, thereby affecting our ability to exercise various fundamental rights, such as the right to privacy (surveillance measures), to human dignity (social welfare processes), to life and physical integrity (automated weapons systems), to a free press (selective representation of the news), to freedom of opinion and artistic expression (blocking or filtering), and so on.

The EU Charter of Fundamental Rights does not specify rules for the use of algorithms. The new cross-sectional fundamental right outlined in Article 3, sentence 1 thus offers courts, governments and legislators a benchmark for decision-making. The term "algorithm" theoretically includes any unambiguous set of instructions designed to solve a problem. However, the use of the overarching term "artificial intelligence" in Article 3's title makes it clear that only those algorithms which have reached a certain level of complexity are meant here. In current contexts, this especially includes machine learning technology. Sentence 1 underscores this by naming the criteria an algorithm must fulfil, precisely because self-learning programs now make these necessary. However, the scope of Article 3's application is limited to algorithms that are "imposed" on humans, which implies a negative effect on their lives. The "imposition" need not be direct – e.g. via an autonomous weapons system – but may also be indirect. This notably includes all programs consulted by the state as decision-making aids, for example in criminal proceedings.

Sentence 1 asserts that algorithms must be transparent. This typically means that the state must publish the source code of the algorithms it uses, should their use have negative consequences for a person. It remains to be seen how the courts will deal with the state's use of proprietary or closed-source software. It is probable that the transparency obligation in sentence 1 would shut down the state's frequently raised objection to making algorithms public, namely that it must protect the trade secrets of software manufacturers. States would then be faced with the choice of either developing their own software or buying the right to publish a source code from its manufacturer. Sentence 1 also asserts that algorithms must be verifiable. This means that the criteria and specific weighting an algorithm adopts, for example via a machine-learning process, must be comprehensible. If they are not, then their use is excluded. In procedural terms, being verifiable also means putting procedures in place that will enable humans to check automated decisions. Finally, algorithms must be fair – meaning that they should produce as few false hits as possible, and be free from the biases of programmers or training data, as well as generally free from discrimination.

Sentence 2 asserts that – notwithstanding the involvement of an algorithm – all "major" decisions must be taken by a human being. These are likely to be interventions that have an impact on life, limb and freedom, but also important social security decisions. This rules out the possibility, for example, that algorithms alone will someday decide the length of a prison

sentence or the payment for important medical treatments. The use of fully automated weapons systems is also excluded, e.g. the independent identification and elimination of an alleged terrorist by a drone. On the other hand, intelligent algorithms in weapon systems may be used as a defense against other autonomous weapons or for aborting attacks, because there is no negative effect on humans in either case.

Sentence 2 requires such decisions to be taken by a human being. This should not be understood as a mere formality. On the contrary, depending on the area in question, measures must be taken – e.g. through liability regulations – that ensure humans carefully check the algorithm's suggested decisions. In addition, the person in question must be capable of carrying out such checks, for example by having had proper training and by being well-equipped with decision-making criteria.

What will probably need to be clarified by the courts is the handling of situations where immediate decisions are required, for example in cases involving traffic dangers. There are strong arguments for not applying sentence 2's scope of application in instances where a considered human decision would not be possible anyway.

The extent to which these principles should apply to algorithms employed by private actors also needs to be

discussed. The very notion of a cross-sectional fundamental right already suggests that the scope of Article 3 should extend beyond the state's use of algorithms. The choice of vocabulary here is also deliberately general: all algorithms imposed on humans and all major decisions are included. If one nonetheless wished to limit the horizontal effect of Article 3, a meaningful benchmark might be to ask to what extent people can evade an algorithm. In practice, this is often impossible in the case of applications used by large IT companies, such as the Google search algorithm. On the other hand, private companies cannot be forced to fully disclose their programs' source codes. Consequently, demands for verifiability are increasing. In principle, the same standards should apply to the fairness of corporate algorithms as to the use of algorithms by the state.

Articles 2 and 3 – in combination with the fundamental right to bring a lawsuit in Article 6 – are thus powerful tools for civil society to exert control over digitalization.

Article 4 – Truth

Everyone has the right to trust that statements made by the holders of public office are true.

Explanatory note:

Our democracies are based on trust in the political system and its actors. If elected or state-appointed holders of public office spread lies – quite possibly unimpeded – then trust dwindles and democracy is weakened.

Only a few years ago, parliaments and the media ensured that publicly disseminated lies were identified, exposed and corrected. There was no need for legal safeguards or even a judicially enforceable right of defense against lies by the state. However, recent years have shown that trust in these mechanisms is no longer justified. Even in democracies where "truth" was once a leitmotif of constitutional culture, the opposition offered by parliament and the media is frequently no longer sufficient. At the same time, new media platforms offer state actors undreamt-of opportunities to spread unproven and unprovable allegations very rapidly to a large audience – what would Trump have been without Twitter? Once parliamentary and media opposition become polarized, the focus is no longer on the truth of a statement, but only on where it sits on the political spectrum. In a postfactual age, tried and tested correctives fall away.

Against this backdrop, Article 4 asserts a right that can be enforced by any person against state-spread falsehoods. This provision has a mainly preventative character; it urges our representatives to be truthful. For no one who has been granted the power of high office can be allowed to systematically disseminate false factual claims, whether in an official capacity, or as a politician to the public or his party. Of course, he is still

at liberty to express his opinion freely, to evaluate facts in his own way, and to question scientific views in a reasoned fashion. However, in cases of false, i.e. unfounded factual claims, everyone has the right to defend themselves against those who misuse public office to spread untruths. That is why – within the scope of application of the Charter of Fundamental Rights – the right not to be subjected to state lies may be asserted by any person, regardless of whether they themselves have been libeled or slandered. This is logical, because everyone has a responsibility to defend democracy against the corrosive effects of state lies. And it is equally logical to extend this right of defense against the platforms that public officials use to systematically spread their falsehoods.

Courts throughout the European Union are entrusted with the task of distinguishing the truth from lies. When going about this task, they can draw on decades of experience, as well as rules developed by the European Court of Human Rights relating to procedure and the burden of proof. As such, there is just as little reason to fear deliberate abuse of the right conferred by Article 4 as there is to fear a lawsuit on an isolated factual claim that is built on pure ignorance, and which on closer inspection turns out to be false. Article 4 is by no means founded on a naively optimistic faith in truth, but rather on a simple realization: lies spread by the state present an underrated threat to our democracy and thus require further corrective measures – which have already proved their worth in constitutional states.

Article 5 – Globalization

Everyone has the right to be offered only those goods and services that are produced and provided in accordance with universal human rights.

Explanatory note:

Global supply chains account for 80% of the world's trade. Many of the products we buy are manufactured in the countries of the Global South. Often – with variations between regions and industries – this process violates universal human rights.

The UN Guiding Principles on Business and Human Rights (UNGPs), developed by John Ruggie in 2011, provide a framework at the level of international law that obliges large Western companies to observe certain rules so as to prevent human rights violations. Accordingly, global companies can outsource their production, but not their responsibilities. These Guiding Principles have set in motion a process of national law-making that regulates corporate due diligence obligations. France has taken a lead in this area with its 2017 Loi de Vigilance. In the Netherlands, a law to combat exploitative child labor came into force in 2020. In Germany and in other EU states, as well as at European Union level, political discussions are currently ongoing.

These efforts must be underpinned by a fundamental right to fair globalization, otherwise there is a danger that individual laws will fall short of the standard required to protect human rights. Human rights must be the benchmark, not the protection of entrepreneurial freedom. As long as human rights exist solely at the level of international and national law, their protection is not guaranteed.

This fundamental right is also necessary because even the best laws cannot be effectively enforced without it. There is debate among legal experts about whether factory workers in the Global South can invoke European fundamental rights. However, even if they could, it would not solve the problem that people from these manufacturing countries lack the resources to assert their fundamental rights in the European courts. Miners from the Congo or Indian children do not normally consult European lawyers. It is therefore necessary to give this fundamental right to those with easier access to the courts: the citizens of Europe. On the one hand, by exercising this fundamental right, they avoid becoming (silent) accomplices through buying goods whose production involves the violation of human rights. On the other, they are granted a procuratorial right to prevent gross human rights violations to those unable to enforce their rights themselves.

Article 5 defines its scope in a clear way, as the universal human rights applicable to supply chains derive from treaties generally

recognized by the community of states. These are the core labor standards of the International Labour Organization, which amongst other things regulate the abolition of forced labor and the prohibition of child labor. The service sector also falls into the remit of this fundamental right, as it is subject to similar risks, e.g. in Asian call centers.

Article 6 – Fundamental rights lawsuits

Everyone has the right to bring a lawsuit before the European Courts when the Charter's fundamental rights are systematically violated.

Explanatory note:

Fundamental rights can only have an impact if they are enforceable before the courts. The EU Charter of Fundamental Rights has refrained from introducing direct actions for fundamental rights before the European Court of Justice – roughly analogous to constitutional complaints in Germany. This is partly due to its reliance on the decentralized legal protection offered by the national courts, and partly because EU courts would be hopelessly overloaded with tens of thousands of fundamental rights actions from all over the European Union.

The trust placed in national courts and their willingness to cooperate with the ECJ is not justified everywhere: in many EU

states, effective legal protections and the independence of the courts have been called into question, while other jurisdictions refuse European protections of fundamental rights or cooperation with the ECJ. Those who for social, economic or other reasons are unable to access the European legal system continue to have their fundamental rights violated. Thus – in contrast to the German constitution – too many promises made by the Charter of Fundamental Rights have remained unfulfilled and unrecognized.

Given this background, there is a need for a fundamental rights lawsuit that can be filed by any person on the grounds that the Charter is being systematically – not just selectively – violated.

In the case of structural and recurrent violations of fundamental rights, people can and should join forces to prove before the EU courts that the EU or their home countries are violating the guarantees of the Charter – for example by disregarding the rights of refugees and minorities, or by placing the independence of the courts in doubt. Proof of having been personally affected is not required, nor may court costs be incurred in accordance with the (to be amended) ECJ statutes. Since the focus is purely on systematic violations of the Charter, the EU courts will not be overburdened. The past has shown that the EU Commission, in its capacity as the "guardian of the treaties," is unable to ensure the protection of fundamental rights within the European Union.

Contributors

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On Ferdinand von Schirach's *Everyone*

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In his book *Everyone*, Ferdinand von Schirach calls for the creation of a European constitution. We, the citizens of Europe, will give ourselves five new human rights that address the five major challenges we face today: the protection of our environment, the assertion of our digital self-determination, living alongside intelligent machines, the need for truth rather than lies as a prerequisite for our democracy, and above all, the end of exploitation in a globalized world.

I.

A democratic constitution is the legal foundation of a political community. Following the American and French revolutions, democratic constitutions were used to establish completely new political orders. The monarchy was replaced with democracy. Constitutions were therefore needed to give the new democratic order a comprehensive political and legal framework. They thus consisted and still regularly consist of two parts: a part on fundamental rights, which guarantees the civil liberties and equal rights of citizens, and an organizational part, which establishes a democratic and constitutional form of state through a parliament (legislature), government (executive) and jurisdiction (judiciary).

As part of the constitutional development of Europe, its constitutional states decided, following the Second World War, to establish the European communities (the EEC and EC) and

then the European Union. So it was not the citizens of Europe, but European constitutional states that created the European Union. This is why the EU does not have a constitution, but rather a set of treaties that guarantee the rights of the Union's citizens, and that govern the aims, organization, competences and policies of the EU: the Treaty on European Union (TEU), the Charter of Fundamental Rights of the European Union (CFREU), the Treaty on the Functioning of the European Union (TFEU).

The attempt to give the European Union a democratic constitution along the lines of democratic constitutional states (2004) foundered after referendums in France and the Netherlands (2005). For this reason, our understanding of the European Union today is still as a union of states and constitutions, whose democratic legitimacy is expressed through national constitutions and European treaties.

II.

Set against these historical and political developments, this call for European citizens to give themselves five new human rights is groundbreaking. We, the citizens of Europe, will wield our constituent power: not to replace an outdated political order with a completely new one, but to add five new human rights to the democratic and constitutional union in which we in Europe already live today. This is a revolutionary act on the part of European citizens. However, it is not a revolution against existing constitutional structures, but rather a revolution to enable their further development.

On the one hand, the revolutionary nature of this call lies in European citizens giving themselves the five new human rights, rather than being given them by member states or by the European Union. On the other, the five new human rights are revolutionary in and of themselves. They are revolutionary because they collectively address the major social, ecological, digital, political and economic questions of our time and of the future. As such, they also represent a genuine political opportunity to establish a European constitution. Whereas the comprehensive European constitutional treaty of 2004, with over four hundred articles, failed to achieve democratic consensus, we citizens can agree on these five new human rights. Less is more! For once we have agreed on these five new human rights, we will also be able to roll them out within the whole of the European constitutional union. The human rights at the heart of these five new rights will revolutionize the aims and policies of the European Union and its member states. They can also be enforced by every single individual through the act of bringing a fundamental rights lawsuit before the European Courts, as specified in Article 6 of the call.

III.

European citizens will thus use their constituent power to adopt the five new human rights. The fundamental democratic idea underlying this constituent power is: the citizens give their constitution to themselves. They vote as free and equal citizens for the constitution, which they promise to abide by both individually and collectively. When it comes to

the question of how this act of creating a constitution should be carried out, there are no universal rules or simple formulas. Historically, for example, democratic constitutional states have entrusted elected or representative national assemblies, or constitutional conventions, with the task of drafting a constitution, which has then been voted on by citizens or parliaments. However, possible routes for creating a constitution will differ according to social, media and political conditions.

The process of creating a European constitution today is shaped above all by two factors, both of which are relevant to the vote on the five new human rights. The first is the digital interconnectedness of European society. This allows European citizens to vote digitally on the five new human rights, to demonstrate that these have been accepted by a majority within European society. The second, as mentioned above, is the European citizens' aim when adopting the five new human rights: rather than being directed against the European Union and its member states, it seeks to bring about a revolutionary extension of European constitutional structures through the five new human rights. Given this, European citizens have every reason to expect that the democratic European Union (Art. 2, Art. 9 ff. TEU) and its democratic member states will not reject the democratic process of voting on the five new human rights, but keep an open mind in terms of constitutional politics and constitutional law. The European Union and its member states would support the constitutional process constructively, and

most importantly also recognize its outcome. European citizens can themselves contribute to the strengthening of this procedural support for the rights and their acknowledgement by the EU and its member states: the more citizens that vote for the five new human rights, the more awareness there will be of the constitutional process in the European public sphere, meaning that the EU's political institutions and its member states can and must respond to it democratically.

In addition, citizens can use the instruments of representative, plebiscitary, participatory and associative democracy (Art. 10, Art. 11 TEU) to promote a constructive response by European and member state institutions to the constitutional process and to the five new human rights. At a European level, citizens have the option of addressing joint petitions to the European Parliament (Art. 44 CFREU; Art. 24, Subparagraph 1, Art. 227 TFEU) and a European citizens' initiative to the Commission (Art. 11(4) TEU; Art. 24, Subparagraph 1, TFEU), so that the latter can support the constitutional process constructively and ensure the recognition of the five new human rights. European civil society can enter into an open and transparent dialogue with the institutions of the European Union about the five new human rights (Article 11(1) and (2) TEU) and, in particular, help to enthuse political parties about them at a European level (Article 10(4) TEU). Web 2.0 and social media also offer citizens very positive opportunities to advocate the five new human rights within the European Union's political institutions, in the spirit of associative democracy. At the level of the member states, citizens have the same democratic instruments at their

disposal to ensure support for and recognition of the five new human rights.

IV.

In these ways, this revolutionary call to European citizens combines the practical responsibility that we all have for each other with the idea of a European constitution.

Translated by Kat Hall