

*Peter Hilpold & Julia Waibl**

THE POET, THE LAW AND THE PROTECTION OF INDIVIDUAL RIGHTS: AN EU REFORM PROPOSAL FROM LITERATURE**

Abstract: *The European integration process is currently faced with a notable dilemma: While the need for new impetus and for far-reaching reform is widely felt, there is not only widespread resistance to any meaningful institutional reform but there is also a dearth of really innovative ideas. Europe is in danger of losing out with its citizens, who should have become its very foundation, in contrast to the early years when this integration process was mainly state driven. European institutions have tried to oppose this trend by organizing a grass-roots process for collecting ideas for reform. The results of the “Conference on the Future of Europe” were, however, not really convincing. This contribution attempts to examine the reform impulse coming from literature – in particular Ferdinand von Schirach’s “Jeder Mensch” – for its suitability to make a meaningful contribution to this discussion. It will be shown that one of his proposals – contained in Art. 6 of this booklet and proposing a right of the individual to bring fundamental rights claims directly before the Court of Justice of the European Union, deserves particular attention.*

Keywords: fundamental rights in the EU, access to court, state liability, Köbler jurisprudence, reform of the EU Treaties

* Peter Hilpold, Professor of International Law, European Law and Comparative Public Law at the University of Innsbruck; e-mail: Peter.Hilpold@uibk.ac.at; ORCID: 0000-0001-9947-3972. Julia Waibl, Intern at the Regional Court of Innsbruck (Austria); e-mail: julia.waibl@gmail.com.

** This article is based on P. Hilpold, “Jeder Mensch” von Ferdinand von Schirach – ein Reformvorschlag zum europäischen Grundrechtsschutz aus österreichischer Perspektive, in: P. Hilpold, W. Steinmair, A. Raffener (eds.), *Österreich und die EU im Umbruch*, Facultas, Wien: 2022, pp. 61-66, which has been updated, extended and re-focused. Particular attention is given in this context to Austrian and German legislation and jurisprudence.

1. INTRODUCTION

1.1. Reform as a continuing agenda

“Europa semper reformanda” could be seen as the EU’s motto if the development of European Union (EU) law is looked at from hindsight. The Lisbon Treaty of 13 December 2007, which entered into force on 1 December 2009, has provided some stability in turbulent times, but in reality if we look at the EU institutional system as a whole, beyond the formal borders of EU primary law we can see that even after 2009 EU law has been in continuous fermentation, adapting flexibly to the most urgent needs. In this regard the developments with respect to the Economic and Monetary Union (EMU) particularly come to mind.¹

Closely related to the economic crisis – which has accompanied nearly the whole period of the EU’s development since the entry into force of the Lisbon Treaty – is the Next Generation EU (NGEU) programme.² While the immediate impetus for adopting this programme, built on a series of sub-programmes, was the COVID-19 crisis, the reforms to be financed by this programme refer to structural deficits within the individual Member States (MSs), which long predated the advent of the COVID-19 pandemic.

But what about the individual, democracy, and the rule of law? Generally speaking, the period of the COVID-19 crisis was not a good one in this regard, with the development of programmes and positions related to the above prongs sometimes stalling, and in some sense even regressing. It suffices to refer to the strengthening of the sovereigntist movement; the near breakdown of the European Asylum System in 2015; and the increasing rule of law issues in some MSs,³ often characterized also by the term “backsliding”. The COVID-19 period itself constituted a major challenge for the protection of individual rights, at least in the sense that it laid bare a series of unresolved questions at the borderline between individual and collective rights which most lawyers had not even been aware of before.

¹ See P. Hilpold, *Die Europäische Wirtschafts- und Währungsunion – Ihr Umbau im Zeichen der Solidarität*, Springer, Berlin: 2021. Within (or accompanying) the EMU and its Fiscal Compact, new international law was set into force which had to fulfil functions originally pertaining to EU primary law. At the height of the financial and economic crisis, in 2012, a massive number of secondary law acts were adopted which profoundly remodelled the EMU.

² NGEU is a multi-tiered reform and aid package adopted by the EU in 2020 in order to counter the COVID-19 pandemic and to overcome, at the same time, the structural deficits within the MSs that made reaction to this challenge, at least initially, so inefficient and cumbersome. As a very consequence thereof, this programme became a huge economic aid programme, to be implemented until 2026 and to be financed by debts to be repaid until 2058. See Hilpold, *supra* note 2, B. de Witte, *The European Union’s COVID-19 recovery plan: The legal engineering of an economic policy shift*, 58(3) *Common Market Law Review* 635 (2021).

³ See Ch. Hillion, *Poland and Hungary are withdrawing from the EU*, *VerfassungsBlog*, 27 April 2020, available at: <https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/> (accessed 30 April 2023).

In general, when threats to basic EU principles became overwhelming the EU and its MSs have proven to be able to react flexibly, and the competence quarrels – which so strongly characterise everyday life in the Union – are usually swiftly pushed into the background. This was the case with the rule of law “backsliding” in some MSs, and also with regard to the sanitary crisis unleashed by the pandemic. As to the latter, the EU has taken over a coordinating role in the effort to find a more effective strategy in face of a threat of so far unknown proportions. This happened without enhanced contestations, despite a weak competence basis for such a Union action.⁴

Also in regard to the mounting rule of law challenges the EU and its MSs reacted with considerable determination, even starting Art. 7 procedures,⁵ adopting a rule of law conditionality regulation,⁶ and with the Court of Justice of the European Union (CJEU) taking a clear stance.⁷ In many other areas however, it has to be acknowledged that as of now the legislators and the governments have a long way to go to achieve really satisfactory results.

Great hopes have been placed on a new reform conference. The Commission’s White paper on the Future of Europe (2017)⁸ was thought by some to prepare the ground for such a reform process, but the proposals contained therein were rather vague and uninspiring and they did not set the sparks flying, neither within the MSs nor with their constituencies.

1.2. The Conference on the Future of Europe

Shortly thereafter, a new endeavour in this direction was commenced, this time however with a grass-roots approach, as it tried to reach out to the people and offer them a direct say as to the content of the specific individual proposals. The “Conference on the Future of Europe”⁹ was conceived as an “exercise in transnational participatory democracy”¹⁰ with absolutely innovative instruments designed to sort out a “European common will”, such as the use of a Multilingual Digital Platform

⁴ See Arts. 4(2)(k) and 168 of the Treaty on Functioning of the European Union (TFEU), which provide only a limited space for action. As is well known, the Conference on the Future of Europe issued a recommendation for “health and healthcare” to amend the two above-mentioned articles so to create a full-fledged shared competence in this area. See J. Järvinen, R. Scholz, K. Hoffmeister, *From COVID-19 towards a European Health Union: Proposals for Treaty reform on health*, Young European Federalists, May 2022, available at: <https://tinyurl.com/ys5655tk> (accessed 30 April 2023).

⁵ See O. Philipp, *Art. 7 EUV als Rettung für den Rechtsstaat?*, 16 Europäische Zeitschrift für Wirtschaftsrecht 697 (2021), p. 697.

⁶ See N. Kirst, *Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, 6 European Papers 101 (2021).

⁷ See L.D. Spieker, *Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH – Zugleich Bespr. von EuGH 22.2.2022 – RS(C-430/21)*, 7 Europäische Zeitschrift für Wirtschaftsrecht 326 (2022).

⁸ COM(2017)2025.

⁹ As to the Conference’s terms, see the European Council Conclusions of 12 December 2019, paras. 14-16.

¹⁰ See *Editorial Comments*, 59 Common Market Law Review 1583 (2022), p. 1583.

and the creation of “European Citizens’ Panels” as well as “National Citizens’ Panels”.¹¹ For a certain period of time, the aspiration to build a new Europe based on the needs expressed by the European citizens seemed about to transform into a reality.

The final report, published on 9 May 2022, contained 49 proposals and more than 300 measures to implement the more generic concepts into practice, It is however a rather unwieldy package of ideas that would need, at least in part, treaty reforms in order to be implemented. Some of these proposals (with attached implementing measures) relate to long overdue needs for reform; some can be considered as innovative; and others will probably turn out to be rather controversial if further pursued, such as the proposal to create a “fiscal capacity”.

As to the subject matter which is centre stage in this contribution – individual rights and the rule of law – proposal no. 25: “Rule of Law, Democratic values and European identity” could become meaningful if implemented with sufficient determination and coherence. Some of the measures foreseen in this context, as vague as they may currently appear in the text, could have considerable potential in the implementation process. This is particularly the case for measure no. 3:

The EU Charter of Fundamental Rights should be made universally applicable and enforceable. In addition, annual conferences on the rule of law (following the Commission’s Rule of law Report) with delegations from all Member States involving randomly selected and diverse citizens, civil servants, parliamentarians, local authorities, social partners and civil society should be organised. Organisations, including civil society, which promote the rule of law on the ground should also be further supported.

Making the EU Charter of Fundamental Rights “universally applicable and enforceable” could give an enormous boost to human rights protection. As is generally known this Charter has enormous potential, but its inherent substantive strength is considerably dampened by a series of limitations which were inserted into the final version,¹² which make the reach of the respective rights somewhat uncertain and thus contribute further to the aura of mystery and incomprehension surrounding the Charter.

Considerable hidden potential may also lie in the following statement: “the European citizenship should be strengthened [...] through a European citizenship statute providing citizen-specific rights and freedoms [...]”.

¹¹ *Ibidem.*

¹² See in particular, those in Arts. 51 and 41 of the Charter. See the various contributions in: F. Casarosa, M. Moraru (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights – The Added Value of the Charter of Fundamental Rights of the EU*, Edward Elgar, Cheltenham: 2022.

While the intended range and details of this “European citizenship statute” under the term “citizen-specific rights and freedoms” is not clear, it is at least arguable that the position of the individual as a right-holder should be strengthened in such a statute. It may be true that the history of the development of Union citizenship is often seen as an (almost) relentless expansion of the material content of these rights, but the procedural aspects and the issue of “legitimacy to act” need to be further addressed.¹³

It could be argued that such a “European citizenship statute” could constitute the basis for the further empowerment of the individual and initiate a thorough examination, and even rectification, of the legal lacunae which still weakens the ambitious concept of Union citizenship. However, at the moment it is not clear whether such a process of further clarification and “hardening” of these proposals will take place any time soon. While the reform plan will surely remain on the agenda, in the meantime too many unresolved issues in the European integration process which are in urgent need of reform have piled up. As a result, the discussion in the aftermath of the conclusion of the Conference has proven to be rather contentious and no common grounds for consent in this field are in sight, not even between the EU institutions themselves, not to mention the MSs.¹⁴

At the end of his recently published analysis on the ongoing EU reform discussion, Professor Jean Paul Jacqué asks: “Is there still any Spinelli in the Parliament?”¹⁵ This rhetorical question is, of course, directed at discovering whether there are still politicians in the European Parliament with the strength, idealism, and foresight of a man like Alberto Spinelli (1907-1986), who was one of the fathers of European integration. It is surely true that the European integration process needs, in the view of the formidable challenges it is faced with innovative, heuristic ideas in order to keep moving forward. It is also true that the legislative process since Spinelli’s times has profoundly changed, and not in the sense that the European Parliament has gained enormous additional weight in legislation. Instead, its changed role goes hand in hand with a modified nature of norm-setting which has become far more technical than it was in Spinelli’s times. Therefore we have to ask: Why not look for inspiration in this process outside the Parliament?

¹³ See P. Hilpold, *Nichtdiskriminierung und Unionsbürgerschaft*, in: M. Niedobitek (ed.), *Europarecht: Grundlagen Und Politiken Der Union* (2nd ed.), de Gruyter, Berlin: 2019, pp. 805-886.

¹⁴ See e.g. the critical remarks by Jean Paul Jacqué about the controversial role of the European Parliament, which has been accused of a rather self-centred attitude, in this process. See J.P. Jacqué, *The European Parliament’s Institutional Proposals Following the Conference on the Future of Europe: Much Ado about Nothing?*, 59 *Common Market Law Review* 129 (2022).

¹⁵ *Ibidem*, p. 141.

When the Conference for the Future of Europe, in its conclusions of 9 May 2022, called for a “more interactive and direct involvement” of Union citizens,¹⁶ this call could be interpreted as a plea to adopt a broader perspective in the search for ideas by original, innovative, and inspiring thinkers. Writers may be among the first to come to mind when such an attempt, which reaches beyond the traditional legislative bodies, is undertaken.¹⁷ Writers-lawyers-philosophers (a rare species, perhaps, but nonetheless in existence) may even be predestined to be chosen as such a source of inspiration. And this leads us to Ferdinand von Schirach.

2. FERDINAND VON SCHIRACH’S “JEDER MENSCH”

2.1. Introduction

The German writer-lawyer Ferdinand von Schirach¹⁸ has attracted considerable attention by a small blue booklet entitled “Jeder Mensch” (“Each man and woman” may be a fitting translation). It contains a proposal for six new articles to be added to the Charter of Fundamental Rights, and also provides some explanations for these proposals in the accompanying notes. This text provoked intense discussions immediately upon its publication. It could be assumed that in our modern reality, saturated with news coming from everywhere, that alone could be qualified as a success. An illustrious team of advisors contributed to this work: Prof. Dr. Remo Klinger, Dr. Ulrich Karpenstein, Dr. Bijan Moini, Prof. Dr. Armin von Bogdandy and Prof. Dr. Jens Kersten. However, anyone expecting a dogmatically sophisticated, erudite, epistemic text from German fundamental rights lawyers would have to be disappointed. The reform project penned in this booklet defies any traditional categorization. This circumstance may perhaps be irritating for lawyers, but on the other hand it also makes this text particularly interesting. As a consequence, the reactions to this publication have been rather variegated. There has been some exuberant praise for the project as a whole, accompanied with the remark that now finally someone is taking the initiative. Others agreed in principle, but added: “Criticism and reform proposals are important – but please not in this form!” And many other reactions fell somewhere in between these positions. Thus it could be said that von Schirach and his team of advisors have probably already achieved an important milestone. At last questions about the future that concern us all, but which we can’t seem to come to grips with technically, are being discussed on a very

¹⁶ 25th Proposal, measure 2.

¹⁷ In this regard, reference may be made to, *inter alia*, Robert Menasse, who has published a book – “Die Hauptstadt” (Suhrkamp 2017) – which lays bare the way the “Bruxelles complex” works (or, respectively, does not work).

¹⁸ Born 1964 in Munich (Germany).

accessible level. Unaccustomed as lawyers may be to such a take, if effectiveness is anything to go by the way this proposal has been drafted and presented deserves appreciation.

The space attributed to an article in an academic collective writing does not suffice for a detailed treatment of this proposal's individual articles. Therefore, only a few words can be said concerning single elements of the von Schirach text. As each article refers to pivotal societal questions of our time, there can be no doubt that monographs could be written on each of them.

In what follows, the discussion of these articles is divided in two parts. In the first part, the first five articles are given some summary consideration. Subsequently, Art. 6 is analysed in more detail, as this proposed provision is deemed to be of particular importance.

2.2. The single provisions in Arts. 1–5

Let's begin with the demand for a healthy, protected environment, postulated as a right proper (Art. 1). In view of the almost existential importance of the environment for humanity as a whole and the growing awareness of its fragility, the right to its protection was quite rightly placed at the top of the catalogue. The dramatic developments in the area of climate change, which have recently been the subject of global attention, have underlined the urgency of measures in this area. A closer look at this topic, however, quickly reveals that a good "clean environment" is the product of a complex social and political decision-making process that extends far beyond national borders, and in many cases assumes a global dimension. In each case a variety of opportunity costs must be considered and externalities taken into account, especially in a cross-border, transcontinental context.

The approach to action must therefore be twofold: on the one hand, a suitable international framework must be created that sets binding standards for the states. On the other hand, national (and in the EU and other integration zones also regional) enforcement instruments are needed. In fact, much has already been done at the international level, where the link between the environment and the protection of fundamental rights was established very early on. The 1972 Declaration of the United Nations Stockholm Conference on the Human Environment clearly set out the direction in its Art. 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

However, the process of translating these goals and requirements into “hard law” has been arduous, and the step to creating enforceable law is an even greater ambition. In the area of climate protection, the Paris Agreement of 2015 set an important course with its commitment to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels. The national climate protection plans consolidate these targets.

On 29 April 2021, the German Federal Constitutional Court took a significant step towards a more effective implementation of the climate protection targets by declaring the German Climate Protection Act 2019 to be contrary to the Fundamental Law (*Grundgesetz*) insofar as it lacks sufficient provisions for further emission reductions starting from 2031. The legal argumentation is very interesting and courageous: the complainants, some of whom are still very young, would be disproportionately burdened by the postponement of the necessary climate protection measures into the further future due to the restrictions on freedom that would thus become necessary. Environment and climate protection thus also becomes a generational issue. There are at least signs of approaches worldwide to make environmental concerns actionable.¹⁹ Art. 37 of the Charter of Fundamental Rights is too “conservative” in this respect.²⁰

Art. 2 of the von Shirach text calls for “digital self-determination”, and Art. 3 sets barriers to the development of artificial intelligence. Again, all these questions arise in an international context, and we have to ask whether it is for the EU to go it alone, and whether it is appropriate or even possible to act unilaterally. “Digital self-determination” is already realised in many respects by the EU’s General Data Protection Regulation,²¹ but the challenges and dangers that arise in this context are constantly appearing in new guises. Artificial intelligence is seen as a crucial driver for

¹⁹ As is well known, in the *Teitiota* case, the UN Human Rights Committee linked climate protection to the right to life and potentially inferred a right to protection from deportation. See MRA: Views of 24 October 2019, *Teitiota v New Zealand*, CCPR/C/127/D/2728/2016.

²⁰ This provision is as follows: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. In view of the developments that have taken place since the start of the new millennium, this provision appears to be rather vague and cautious. It is commonly agreed that Art. 37 does “not establish any individually justiciable right to environmental protection of any particular quality”. See E. Morgera, G.M. Durán, *Article 37*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights* (2nd ed.), Hart, Oxford: 2021, para. 37.01. As Morgera and Marín Durán further point out, “this contrasts with the approach taken in several national constitutions of the Member States, which not only place a responsibility on governmental authorities to protect the environment, but also recognize an autonomous right to a healthy environment” (*ibidem*). In this sense a reform as prospected in “Jeder Mensch” seems overdue and fully in line with the prevailing academic and political discussion in this area.

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1-88.

the economy and for technological development – although the dangers associated with it on a global level are well recognised. It makes little sense for Europe to go it alone here. On the other hand, it does make sense for the EU to aspire to be on top of the relevant technological developments and to make sure, at the same time, that all these developments are human-centred and in accordance with the pivotal values on which European integration is based. This was the exactly the way it was pursued by the EU in 2021.²²

However, simple solutions for resolving the related issues do not readily present themselves here. The digital space and artificial intelligence are increasingly becoming issues of international – economic, political and military – power struggles. If the EU is to be able to have a regulatory effect here, it must make sure that it continues to be one of the leading players in this field, which will require an enormous amount of effort. In a certain sense, Art. 3 of “Jeder Mensch” has anticipated, at least partly, what the EU – starting in the same year – has tried to propose and to implement.²³ There can be no doubt that succeeding in these attempts will require continuing efforts. In order to obtain the funds necessary for such an endeavour every effort which contributes to raising the needed public interest and awareness has to be appreciated. Art. 3 may pinpoint only one element of many as to the relationship between AI and fundamental rights, but it surely constitutes an important impulse for furthering the relevant discussion as a whole.

According to Art. 4 of “Jeder Mensch”, everyone has the right to be sure that statements made by public officials correspond to the truth. Those who do not wish to dismiss this demand all too cheaply as an expression of naivete will quickly find areas of application of particular explosiveness. Reminiscences of populist statements by politicians of major powers are common, as well as of “fake news” and of “alternative facts” that can stir up broad sections of the population and even endanger central democratic achievements (one only has to recall coup-like events such as the “storming of the Capitol” on 6 January 2021 which formed the blueprint for the Congress attack in Brasilia of 8 January 2023).

But one does not necessarily have to look overseas to recognise dangerous tendencies of this kind. It is legitimate and rational for politicians to be guided by the will of their voters. It is also legitimate and rational for politicians to want to pres-

²² See the Communication from the Commission, *Fostering a European approach to Artificial Intelligence*, COM(2021) 205 final, 21.4.2021.

²³ See European Commission, *Proposal for a Regulation Laying down harmonized rules on artificial intelligence*, COM(2021) 206 final, 21 March 2021. See also the endeavours by the Council of Europe Committee on AI to develop an international convention on AI. For criticism in this regard as to the lack of transparency, see M. Hickok, M. Rotenberg, K. Caunes, *The Council of Europe Creates a Black Box for AI Policy*, VerfassungsBlog, 24 January 2023, available at: <https://verfassungsblog.de/coe-black-box-ai/> (accessed 30 April 2023).

ent themselves in the best light. However, the path to populism²⁴ and demagogy is then often not far away, whereby behaviour of this kind in many cases does not even result in political responsibility.

And the questionable handling of truth concerns not only the highest political echelons, but also the state apparatus and the holders of positions of power in general. The arbitrariness of civil servants in the authoritarian state and untruthful statements in court by “dignitaries” without consequences are just two examples. In Austria, this phenomenon has recently acquired a disconcerting, additional topicality through the proposal to release witnesses in Parliamentary Enquiry Commissions from the obligation to tell the truth. Compliance with the truth obligation is facilitated and promoted by transparency measures. In Austria, the abolition of far-reaching restrictions on “official secrets” (*Amtsgeheimnis*) – an authoritarian relic from the Habsburg era and unique in its backwardness in the whole of Europe – would seem overdue in this context. Such an abolition has been often promised, but regularly discarded after elections, as this instrument is of course a very comfortable tool for those in power. No answer needs to be given on issues declared to be an “official secret”. And as this qualification is attributed very generously to many issues surrounding public administrative actions, and furthermore inasmuch as public employees face severe criminal charges if information declared as secret becomes public, public control over many spheres of public actions is heavily restricted.

Truth also means responsibility: Law experts, and of course even more so the victims of the Ischgl case, are looking forward to seeing the outcome of the respective public liability proceedings currently underway, where the responsibility of key decision-makers in the Corona epidemic has to be clarified.²⁵ So far, it has been widely overlooked that this problem also has a pronounced EU law aspect. After all, tourists (many of the victims in Ischgl were foreign tourists) fall under the passive freedom to provide services and thus the scope of application of the Charter of Fundamental Rights is opened, which in Art. 2 protects the right to life.

²⁴ See A. Carcano, *The Challenges of Populism: What Role for International Law Scholars?*, 1 *Diritti umani e diritto internazionale* 5 (2020).

²⁵ As far as can be seen, one of the two authors of this article, Peter Hilpold, was the first to present this thesis, which was subsequently taken up by the lawyers defending the Ischgl victims. See P. Hilpold, *Die Corona-Opfer von Ischgl können sich auf EU-Recht stützen*, *Der Standard*, 11 October 2021, available at: <https://www.derstandard.de/story/2000130324845/die-corona-opfer-von-ischgl-koennen-sich-auf-eu-rechtl> (accessed 30 April 2023). As is well-known, in Ischgl, a tourism hotspot in Tyrol (Austria) in Spring 2020 many infection with COVID 19 occurred. Public authorities were accused of having taken preventive measures too late. The accusation was that profit counted more the life of peoples and that authorities did not intervene in time when the pandemic hit this village.

This right is also associated with corresponding duties to protect.²⁶ It is possible that here, too, the CJEU will ultimately have to clarify the scope of national responsibility.²⁷ Responsibility is, of course, an important element of the rule of law: all EU Member States must work on this as well.²⁸

Art. 5 of “Jeder Mensch” refers to the supply chains in the international production of goods and services and to the need to respect human rights in these processes. While there are many international instruments with similar aims, Art. 5 is special as it thereby suggests that these general obligations be transformed into enforceable individual rights. Approaches to this end already exist. The challenges involved are enormous, but can be overcome.²⁹ A first step was taken in Germany with the Supply Chain Act of 11 June 2021.³⁰ In Austria, the discussion on this issue is still lagging far behind.

2.3. Article 6: The proposal to introduce a (limited) individual complaints procedure before European Courts

This proposal is the subject of particular attention herein, as it is deemed to be fundamental and hints at what could constitute a real step forward. Art. 6 of the von Shirach book states that each man or woman may bring an action for a violation of the Charter before European Courts, which presumably refers to the CJEU. Art. 6 is probably closest to the area of traditional fundamental rights protection, even

²⁶ It has been claimed that the Epidemics Act does not give rise to individual claims. It has been shown, however, that the facts mentioned fall into the scope of application of EU law and therefore this position appears to be hardly tenable.

²⁷ A referral to the ECJ on the basis of Art. 267(3) TFEU was suggested by the plaintiffs but (after completion of this article) denied by the Austrian Supreme Court (“Oberster Gerichtshof - OGH”, 1 Ob 199/22d, 15 May 2023) although the plaintiffs presented a series of convincing arguments why this case would fall into the purview of EU law. For a first critical statement as to this decision see P. Hilpold, *Ischgl: Hat wieder wer das Licht ausgemacht?*, in: *Die Presse* 31 August 2023, p. 26. It is hard to see, how the C.I.L.F.I.T-jurisprudence (which exceptionally releases Supreme Courts from the obligation to submit questions to the CJEU) could apply here. Access to the CJEU would still be possible in the context of a state liability procedure or in case of infringement proceedings. While liability procedures have proved to be widely ineffective, infringements proceedings are highly unlikely to be started. Prominent lawyers qualified this situation as a further confirmation of the fact that individuals should be granted direct access to the CJEU.

²⁸ For more on the situation in Austria, see in particular M. Berger, *Zeugnisse für Musterschüler sehen anders aus*, *Der Standard*, 25 July 2021, available at: <https://www.derstandard.at/story/2000128424109/zeugnisse-fuer-musterschueler-sehen-anders-aus>; see also P. Hilpold, *Eine lustlose Formübung*, *Wiener Zeitung*, 21 July 2021, available at: <https://www.wienerzeitung.at/meinung/gastkommentare/2113597-Eine-lustlose-Formuebung.html> (both accessed 30 April 2023).

²⁹ See P. Hilpold, *Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten – Völkerrechtliche Anforderungen*, in: A. Reinisch, S. Hobe, E.-M. Kieninger (eds.), *50 Berichte der Deutschen Gesellschaft für Internationales Recht, Unternehmensverantwortung und Internationales Recht*, C.F. Müller, Heidelberg: 2020, pp. 182-228.

³⁰ See D.F. Berg, M. Kramme (eds.), *Lieferkettensorgfaltspflichtengesetz. Kommentar*, C.H. Beck, München: 2023.

though such a right, as acknowledged in this draft article, does not exist as of yet. The introduction of such a possibility to act would be rather easy to implement and create direct added value for the Charter. Granting the individual a fundamental rights action before the CJEU would at the same time be ground-breaking. While there is some exaggeration elsewhere in the draft articles of “Jeder Mensch”, here we find too much caution. Why should this action only be admissible in cases of “systematic violations”? So that – according to the current standard – only the “renegades of the rule of law” (so wonderfully formulated by Ulrich Hufeld) – would be affected by this provision? The lack of individual access of citizens to the CJEU is a real problem in the Union – especially when it occurs in individual MSs where courts of last instance are reluctant to refer politically sensitive cases to Luxembourg. When such courts in the EU MSs decline to even give reasons for this – and improbable as it may seem, such courts exist! – the problem becomes compounded. The Charter of Fundamental Rights thus becomes a chimera; a political document whose relevance depends on whether the competent court or judge is acquainted with EU law and is prepared to apply it.³¹

In his explanations with respect to this fundamental right, Professor Karpenstein emphasizes the importance of a fundamental rights action, putting forth the argument that fundamental rights can only be effective if there is also a possibility to enforce them. In his reflections, he also criticizes the EU’s decision not to introduce the possibility of a direct legal action in the Charter and to rely instead on the cooperation of the CJEU with the national courts, and thus on decentralized legal protection.³²

Furthermore, as already stated the fundamental rights action as proposed in Art. 6 of the “Jeder Mensch draft articles” should be available only in cases of systemic violations of fundamental rights, and not in the case of individual, specific violations (“*im Falle von strukturellen und wiederkehrenden Grundrechtsverletzungen*” (“in the case of structural and recurring fundamental rights violations”). Moreover, it would not be necessary to prove the presence of an individual legal interest,³³

³¹ See most recently the CJEU judgment in Case C-546/18 *Adler*, ECLI:EU:C:2021:711. It is astonishing that the lack of effective access to a court in the Takeover Act has not already been earlier stated at the national level, and that the laborious path to Luxembourg had to be taken in this respect first (fortunately, the Federal Administrative Court submitted here a preliminary question to the CJEU). See also an important judgment of the CJEU in C-561/19 *Consorzio Italian Management*, ECLI:EU:C:2021:799. In this judgment, the obligation of Courts of last instance to submit questions of EU law interpretation (or validity) to the CJEU was strengthened, and in particular a qualified obligation to state reasons in the case of non-submission in accordance with the C.I.L.F.I.T. criteria was created. It will be interesting to see how the national supreme courts will react to this jurisprudence. See also P. Hilpold, *Stärkung der Vorlagepflicht letztinstanzlicher Gerichte*, 45 *Neue Juristische Wochenschrift* 3290 (2021).

³² See U. Karpenstein, *Ferdinand von Schirach. Jeder Mensch. Comments and Remarks*, Luchterhand, München: 2021, p. 22.

³³ *Ibidem*.

a circumstance which would make a huge difference with respect to the current legal protection situation. Von Schirach also foresees that the introduction of a direct action option in fundamental rights matters would make the Charter better known among the European population. According to him, the German Basic Law so widely popular in Germany only because individuals can invoke it before the Federal Constitutional Court.³⁴

Calls for a European fundamental rights action were voiced early on in past EU reform discussions, but such an action was not introduced either in the course of the European Constitutional Treaty – which in the end did not come into being anyway – or in the context of the reform realized by the Treaty of Lisbon. In a note to the members of the then Constitutional Convention, the Working Group II on the Charter pointed out that in the course of its deliberations the group had to deal with the question of whether there was a need to extend or reorganize the possibilities for individuals to bring actions before the European courts.³⁵

The Freiburg draft³⁶ was written by the Franco-German working group for the Constitutional Convention and contained the following formulation for a fundamental rights complaint:

Any natural or legal person may challenge a legal act of the Union on the grounds that it infringes a right conferred on that person by the Charter of Fundamental Rights of the Union, provided that no other legal remedy is available to challenge the infringement of the fundamental right. Specific conditions may be laid down for the acceptance of a fundamental rights complaint.

However, the attempt to include a fundamental rights complaint ultimately failed. In its final report, the Working Group II on the Charter argued against the introduction of such a complaint option, pointing out that if the Charter were to be incorporated into the Constitutional Treaty, the EU's existing system of legal protection would be available anyway.³⁷ Both the Working Group on the Court of Justice³⁸ and the Praesidium of the Convention³⁹ followed this view, and as a result the integration of a fundamental rights complaint into the draft Constitutional

³⁴ See F. von Schirach, *Interview with Mathias Döpfner, Jeder Mensch kann Europa verändern*, Welt 27 September 2022, available at: <https://www.welt.de/politik/deutschland/article229697153/Von-Schirach-und-Doepfner-Ein-Gespraech-ueber-neue-Grundrechte-fuer-Europa.html> (accessed 30 April 2023).

³⁵ See CONV 72/02, 31.5.2002, pp. 3f.

³⁶ See Freiburg Draft for a European Constitutional Treaty of November 12, 2002, available at: <http://www.leforum.de/de/FreiburgerEntwurf.pdf> (accessed 30 April 2023).

³⁷ See Final Report of Working Group II “Charter”, CONV 354/02, 22.10.2002, p. 15.

³⁸ See Final Report of the Working Group on the Court of Justice, CONV 636/03, no. 19.

³⁹ See CONV 477/03, 10.1.2003, no. 27.

Treaty was omitted. The Treaty of Lisbon also failed to raise the status of individual rights protection in fundamental rights issues.⁴⁰ The failure to incorporate a fundamental rights complaint was not due to conflicting opinions within the Convention; in fact the proposal to introduce a separate fundamental rights complaint – which had been made only a few years earlier – was not even discussed.⁴¹

In general, the effectiveness of the Charter of Fundamental Rights suffers greatly from a low awareness and the lack of effective enforcement instruments. As long as the rights of the Charter are not directly enforceable, the most impressive catalogue of rights is of little use if the content is not perceived or understood by national courts. Much could be achieved in this context through training, education, and awareness-raising measures, but the decisive step towards comprehensive practical relevance will probably only be taken with the enforceability of at least the most essential parts of the Charter.

In Europe, it must also be taken into account that the fundamental rights system of the European Convention on Human Rights (ECHR) has considerably lost importance in recent years due to the fact that complainants rarely have effective access to this court anymore. A reform that was intended to improve access to the court has actually turned into its opposite: formally, the XIth Additional Protocol did grant direct access to the court. However, the systematic declaration of inadmissibility of complaints (over 95% of complaints are declared inadmissible!) has rendered this provision practically obsolete.⁴² What experts in both theory and practice in this field emphasise over and over again is that: Whereas in the past national supreme courts had to expect at least a certain number of their judgments to be reviewed, the probability of such a review occurring is now extremely low.

The divergence between the actual fundamental rights situation and the image of their “excellent” protection that exists among the European population is significant here. It is for this reason that the difference between the “law in the books” and the “law in action” is so striking, especially in the legal field of fundamental rights. It was precisely the European Convention on Human Rights that played a pioneering role and demonstrated that – at least in theory – the Universal Declaration of Human Rights, which has no binding effect, can be translated into a binding treaty and then be implemented effectively.

⁴⁰ See R. Streinz, Ch. Ohler, Ch. Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, C.H. Beck, München: 2010, p. 126.

⁴¹ See M. Knecht, *Präambel zur GRC*, in: U. Becker, A. Hatje, J. Schoo, J. Schwarze (eds.), *EU-Kommentar*, Nomos, Baden-Baden: 2019, no. 17.

⁴² See P. Hilpold: *Europas Menschenrechte werden 70 – und werfen Licht und Schatten*, Wiener Zeitung, 21 August 2020, p. 11; L. Weh, *Ein Geniestreich mit immer schwächerer Rechtsdurchsetzung*, Wiener Zeitung, 4 September 2020, p. 11; A.E. Hollaender, *Gute Ziele – mangelhafte Durchsetzung*, Wiener Zeitung, 11 September 2020, p. 13.

In purely substantive terms, there is no lack of fundamental rights protection in the EU. Both the European Convention on Human Rights and the Charter of Fundamental Rights, which became binding on EU Member States in 2009, offer sufficient protection *on paper*. The problem here, however, lies in the lack of enforceability of these rights by individuals. As already mentioned, the majority of cases fail at the pre-trial stage before the European Court of Human Rights (ECtHR), i.e. they are not even dealt with in substance. This is due in particular to the system of handling individual complaints before the ECtHR, which allows single judges to decide on their admissibility and accordingly on the further handling of the case. Notes rejecting claims regularly assert only that the claim was “manifestly ill-founded” according to Art. 35.3(a) ECHR.

In this context, it is interesting to note the statements of Professor Steven Greer, a former judge at the ECtHR, who argues that “there is no realistic prospect of justice being systematically delivered to every applicant with a legitimate complaint about a Convention violation. And unless it is systematic, individual justice becomes arbitrary and is, therefore not justice at all”.⁴³ This ultimately leads to a “denial of justice” by the ECtHR.⁴⁴ These are strong words that should galvanize human rights lawyers – and not only them!

CONCLUSIONS

As already explained, Art. 6 of the “Jeder Mensch draft articles” has been attributed particular attention in this analysis. Strangely, in the public debate some of the other proposals seem to have garnered more attention, in particular insofar as highly topical issues such as the environment are addressed.

It is argued here, however, that all the issues mentioned in the Arts. 1–5, as important as they may be – and there can be no doubt that they are of essential relevance – are dealt with in appropriate fora with the required attention and expertise. The von Schirach text may act in this regard as a booster to these discussions, and in many ways it emphasizes the primary importance of these topics; and this in itself is surely also a remarkable contribution.

Where the “Jeder Mensch” text really breaks important new ground however is in the procedural area, when it highlights the need to grant direct access to the

⁴³ See J. Gerards, R. Slowe, *Human Rights in the Council of Europe and the European Union*, Cambridge University Press, Cambridge: 2018, p. 111. To believe in the objectivity of this test is, according to Greer, “naïve” (S. Greer, *What’s Wrong with the European Convention on Human Rights?*, 30(3) *Human Rights Quarterly* 680 (2008), p. 686).

⁴⁴ See P. Mahoney, *The European Court of Human Rights and its Ever-Growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition*, in: S. Flogiatis, T. Zwart, J. Fraser (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, Edward Elgar, Cheltenham: 2013, pp. 18ff., 25.

CJEU. It is true that these proposals are not fully new, as they have been discussed also before and during EU reform conferences. But the fact that all these initiatives ended in nothing underscores how contentious these issues are and how strongly MSs resist any such attempts to infiltrate one of their last bastions of absolute sovereignty. This is a fight against the Hobbesian Leviathan, which is, in this area, still strong and unaffected by a more Lockean state vision⁴⁵ based on a social contract where individuals agree to public authority under the condition that they have access to an impartial judiciary. Growing sensitivity of the need for a more effective protection in the EU in this regard requires that more consideration and care be given to the issue of direct access to the CJEU, without the limits attached in Art. 6 of the Schirach-document, which can hardly be justified.

Some of the reforms proposed in the von Schirach text may touch upon norms of limited justiciability and they may require further extensive consideration. This is the case, for example, concerning the demand for a healthy and protected environment. However, even in this case it has to be remarked that the above-mentioned ruling of the German Federal Constitutional Court on the Climate Protection Act has shown that even such complex issues are amenable to legal justiciability, at least in the longer run. On the other hand, other articles (especially 4, 5 and 6) refer to an immediate need for legal action and also propose a concrete possibility for such action.

There can be no doubt: If any individual proposal of this text finds its way in the next treaty reform proposal as a result of this project, von Schirach and his team of advisors will have earned lasting merits for the European fundamental rights and integration project. For example, a reform leading to the enforceability in Europe of fundamental rights violations committed outside the EU borders would be a success of enormous dimensions. Figuratively speaking, Lafayette would thus return to the USA, where the exact equivalent regulation, the Alien Tort Claims Act, had its teeth pulled out (especially in *Kiobel*⁴⁶). The individual rights complaint before the European courts, on the other hand, is a must if European law is to find its way into the thinking of national lawyers – and not only in the MSs which have joined the EU more recently.⁴⁷

After all, the ability to enforce the law also by direct actions by individuals is an essential component of a functioning rule of law State. We could say that this works in the same way as a craftsman cannot go about his work without the right tools. The need for reform in the EU is demonstrated not least by the criticism frequently voiced in particular about the current system of legal protection for individuals.

⁴⁵ See J. Locke, *Two Treatises of Government*, 1690.

⁴⁶ 569 U.S. 108, 124–25 (2013).

⁴⁷ See P. Hilpold, *Ringens um europäische Werte – Österreich in der EU*, in: P. Hilpold, A. Raffener, W. Steinmair (eds.), *Rechtsstaatlichkeit, Grundrechte und Solidarität in Österreich und in Europa – Festgabe zum 85. Geburtstag von Professor Heinrich Neisser, einem europäischen Humanisten*, Facultas, Wien: 2021, pp. 262-298.

Ferdinand von Schirach's initiative, with the modifications and refinements as shown above, could be an important step towards the translation of these requests into applicable norms.

Of course, the provision in Art. 6 of von Schirach's book, like those in the preceding articles, is an expression of requests that have already been voiced before in different fora. There can be no doubt that also in the future new instruments and channels will appear through which or whereby proposals of such a kind can be presented. In the academic world, a myriad of publications has theorized about each of these proposals, albeit often in a somewhat different form. The von Schirach text is therefore not the only text presenting proposals of this kind, and surely it is not a text which is innovative in each and every element.

In its comprehensive structure, however, and in the specific formulation of most of these proposals, originality stands out – an originality that may make an essential contribution to the ongoing reform process.

Lawyers often tend to neglect the importance of literature in undergirding and steering the law-creating process. In the end, both literature and law operate with identical or very similar instruments, and they both try to structure reality in a way that makes life on Earth somewhat more comprehensible and endows it with sense, meaning and direction. Today it seems that the borders between these two neighbouring and in many ways related fields are becoming porous. Common interests and missions are being discovered. As the European integration projects are in need of ideals and strongly felt values to bring about a new impetus to this process and to carry it forward with renewed energy,⁴⁸ it should be ever more taken into account that the world of art and literature surely harbours spirited idealists whose contributions, even though coming from outside of the epistemic legal community, should no longer be underestimated. On the other hand, literature and the arts, if they want to remain relevant and reflective of the societal reality in Europe, may profit from a closer look at the European integration process as both a political and a legal process. It would seem, taking into account the many unresolved questions still left open in the European integration process, that law as the expression of the pivotal societal rules that govern our daily life is too delicate and important of an issue to be left exclusively to the epistemic community of lawyers. As has recently been said, Europe is a child of literature.⁴⁹ In this moment of turmoil, the child may find important guidance if it listens again to its parents.

⁴⁸ For more on the role of lawyers as individuals in the further development of international law, see P. Hilpold, *Teaching International Law in the 21st Century – Opening up the Hidden Room in the Palace of International Law*, 27 April 2022, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081412 (accessed 30 April 2023).

⁴⁹ See A. Platthaus, *Das Geisterkonzil unseres Abendlandes*, FAZ, 10 February 2019, available at: <https://www.faz.net/aktuell/feuilleton/debatten/das-geisterkonzil-unseres-abendlandes-kommentar-zu-europaliteratur-16031741.html> (accessed 30 April 2023).