THE INTERFACE BETWEEN CONSTITUTION AND LABOR LAW IN GERMANY

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I. INTRODUCTION

The Basic Law, passed in 1949 as Constitution for the Western part of Germany, became also the Constitution for the unified Germany in 1990. The first and most important chapter of this Constitution contains a catalogue of fundamental rights that is of utmost importance. These fundamental rights more or less are the strongest pillar on which the Federal Republic of Germany is built. If it is explicitly allowed by the specific provision referring to a fundamental right this right may be restricted to a certain extent by legislation. But "in no case may the essence of a fundamental right be affected" (article 19, paragraph 2). The Constitution can be amended by a two-thirds majority in the legislative bodies. But amendments by which the principles guaranteed by the articles on fundamental rights would be affected are considered to be null and void (art. 79 par. 3). This safeguard against the abolishment of fundamental rights (and other pillars of the Constitution) is a reaction to the experience made in the Nazi-period where it became clear that majority vote does not prevent the perversion of the rule of law.

According to article 1, paragraph 3, of the Constitution, all three State powers—the legislature, the executive, and the judiciary—shall be bound by the fundamental rights. Article 1, paragraph 3, however, does not give a full picture of the scope of application of fundamental rights. It is much too narrow and therefore misleading. It only refers to the vertical application in the relationship between citizens and State. This reflects the traditional understanding of fundamental rights as a defense against State power, thereby guaranteeing the citizens an area of freedom in which the State cannot interfere. In the meantime, this traditional understanding is only considered to be the

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starting point. Fundamental rights nowadays are considered to be the expression of values on which the legal order as a whole is based. Therefore, they no longer can be ignored in the relationship between private actors. Inequality of power is not only characteristic for the relationship between State and citizens, but is also a growing phenomenon between private actors, as for example employers and employees. This insight has led in Germany to the concept of indirect horizontal application of fundamental rights. This is a soft way of introducing the fundamental rights into relationships between private actors. The fundamental rights are not applied strictly the same way as in the relationship between State and citizens but the general clauses of the law governing relationships between private actors are to be interpreted in light of the values expressed by the fundamental rights. This of course gives the judiciary a broad leeway of interpretation in adapting the fundamental rights to the specific situation.

Among the fundamental rights as guaranteed in the Constitution there is only one that might be considered fundamental social rights in a strict sense. According to article 9, paragraph 3, the right to form associations to safeguard and improve working and economic conditions is guaranteed to every individual and to every occupation and profession. One might be inclined to include article 12 into this category, which guarantees freedom of profession. Here of course the social impact is evident. But, after all, freedom of profession belongs to the set of classical rights of a civic society, even if its meaning has changed during history. The other fundamental rights evidently belong in the box of classical fundamental rights: human dignity (article 1); personal freedom (article 2); equality before the law (article 3); freedom of faith, conscience, and creed (article 4); freedom of expression and freedom of press (article 5); protection of marriage and family (article 6); freedom of education (article 7); freedom of assembly (article 8); protection of privacy in correspondence, posts, and telecommunication (article 10); freedom of movement (article 11) inviolability of the home (article 13); protection of private property (article 14); protection against deprivation of citizenship (article 16); right to asylum (article 16a); and right to petition (article 17). It is the main purpose of this contribution to show that it would be a totally misleading conception to ignore the social impact of these so-called classical fundamental rights. The strict separation between the so called classical fundamental rights and social fundamental rights does not make much sense any longer. After all, they are the two sides of the same coin. Fundamental freedoms and equality rights are useless

if the social basis is lacking. If social fundamental rights are not expressly guaranteed, the classical fundamental rights have to be interpreted in a social perspective if they do not want to risk losing their function. Germany is a very good example for such a reinterpretation of fundamental rights. Fundamental rights are no longer understood mainly to guarantee freedom and equality in a formal sense, but in a substantial way. This means that the social basis has to be included. Therefore it is no surprise that labor law in Germany to a great extent nowadays is nothing else but law derived from fundamental rights. The Federal Constitutional Court as guardian of the Constitution has great merits in developing and strengthening the concept of fundamental rights. But its intervention only covers the peak: situations where the impact of fundamental rights is highly controversial. Much more important is the interpretation of ordinary law by ordinary courts in light of the Constitution. In the area of labor law this important task is fulfilled by the labor courts, in particular by the Federal Labor Court.

According to the Act on Collective Agreements, the parties to collective agreements in Germany are entitled to act as if they would be legislators, namely to set norms to be respected by the parties to an individual employment contract as if they would be a statute. Therefore in setting such norms they are bound by the collective agreements as if they would be a legislator, which means that they are directly bound. The concept of indirect horizontal application is not needed here, even if the parties to collective agreements are of course private organizations.

Fundamental rights as guaranteed by the Constitution not only play a role where statutory law is to be interpreted but also where no legal texts whatsoever are available. Then it is the task of the judiciary to fill the gap by interpreting the Constitution and derive legal structures there from.

Fundamental rights in Germany do have a double face: they are first of all subjective rights of the individual, but to a great extent also institutional guarantees. If, for example, the freedom of press is guaranteed this not only means the freedom of those who produce the press to freely express their opinion and the right of the individuals to freely use the press to get information, but it also means the guarantee of the existence of a free press as an institution. Or if the family is guaranteed it not only means that individuals are guaranteed to have the right to get married and have a family, but it also means that marriage and family as institutions are to be protected. This focus on the need of the institutional basis has led to a further development of

the function of fundamental rights: the State not only has to provide the institutions as guaranteed by the fundamental rights but has a duty to do everything to provide a framework that makes sure that the fundamental rights are becoming relevant in actual practice: far beyond the traditional understanding of fundamental rights as mere defense against the State.

II. FREEDOM OF ASSOCIATION AS PROMINENT EXAMPLE OF HOW TO FILL THE GAP

In Germany there is no statute on strike and/or lock-out. Nevertheless there is a very elaborated law on strike and lock-out, exclusively developed by the judiciary, the Federal Labor Court, and to a certain extent the Federal Constitutional Court. The Courts based the whole system of these detailed and rather complicated rules on industrial conflict on one single phrase of the Constitution: "The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession" (article 9, paragraph 3 first sentence). Evidently this provision does not say a single word on strike and lock-out. It merely guarantees the fundamental individual right of association, the individual employee's right to form and join a trade union, and the individual employer's right to form and join an employer's association, nothing else.

In applying the philosophy sketched above the Courts made clear that individual freedom of association would be useless if the organization itself was not constitutionally protected either. Following this insight, the so-called collective freedom of association is understood as being implied by the individual freedom of association. This means constitutional protection of the organizations' existence as well as of their activities. One of the main activities of trade unions and employers' associations, of course, is collective bargaining. Hence, it is accepted that article 9, paragraph 3, of the Constitution—in spite of its wording—also guarantees a system of free collective bargaining as an institution in which the individual freedom of association can play a relevant role in actual practice. This first step implies the second one: Once it is agreed that a system of free collective bargaining is guaranteed by the Constitution, the philosophy sketched above requires that this system has to be shaped in a way that makes sure that it can fulfill the function to provide adequate working conditions. This is only possible if one side cannot dictate the conditions to the other one: the system needs a fair

balance of power to give each side an equal chance to reach an adequate compromise. This implies the right to strike: without this right collective bargaining would be nothing but collective begging. And according to the Federal Labor Court to a certain extent and under very specific conditions a right to defensive lock-out is needed in order to guarantee this balance of power in all circumstances of industrial action. Without going into any description of details of strike law or law on lock-out[1] it has to be stressed that the mere recourse to the Constitution's provision on the fundamental right of association is the only source for this whole set of law. Thereby the right to strike and—at least in principle—the right to lock-out become part of the constitutional guarantee.

III. VERTICAL AND HORIZONTAL APPLICATION

As already mentioned the legislature, executive, and judiciary are bound by the fundamental rights. To make sure that violations are not tolerated there is access for any person (be it a human being or a legal person) to the Federal Constitutional Court. The procedural requirements are ignored here. It is important that in the very end it is possible to get any measure by a State power to be examined by the Federal Constitutional Court.

This power to examine also applies to statutes, no matter how big the majority was in the Parliament. If they are not in line with the Constitution they may be declared null and void. To just give a prominent example of the area of labor law: when in 1976 the Act on Co-Determination (referring to the employees' representation in the supervisory board of big companies) was passed with an impressively large majority in Parliament, employers and employers' associations challenged the constitutionality of this statute, claiming that it would violate the fundamental right of the employer's freedom of profession (article 12) and the shareholders' fundamental right of property (article 14). In a very spectacular judgment, the Federal Constitutional Court confirmed the constitutionality of the statute, at the same time drawing far-reaching borderlines for a further extension of this concept of co-determination.[2] These borderlines may play an important role in the actual discussion on an amendment to the Act

1. For details of this development see Manfred Weiss, *Germany*, *in* STRIKES AND LOCK-OUTS IN INDUSTRIALIZED MARKET ECONOMIES 67 (Roger Blanpain et al. eds., 29 Bulletin of Comparative Labour Relations Series 1994).

2. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], judgment of Mar. 1, 1979 in BVerfGE 50, (290) (F.R.G.).

on Works Constitution containing the provisions on workers' participation by way of works councils.[3]

Whether a judgment by the Federal Labor Court is in line with the Constitution, of course, may also become a question of controversy. Also, in such cases the Federal Constitutional Court may be involved. This happened quite often in the past, last not least in the already sketched area of the right to strike and the right to lock-out.[4]

There is only one fundamental right where recourse to the concept of indirect horizontal application in the relationship between private actors is not needed: the already mentioned article 9, paragraph 3, on freedom of association. There it reads: "Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful." This implies that private actors as potential violators of the fundamental right are in the same position as are the legislative, executive, and judicial powers of the State. Any measure by an employer or by anybody else violating the employees' freedom of association would be null and void and might lead to sanctions.

In this context, it is important to at least indicate the complicated structure of this fundamental right. It not only protects the organized but also the non-organized employees and employers. This is true in spite of the wording of article 9, paragraph 3, of the Constitution that only refers to the so-called "positive freedom of association" guaranteeing the individual's right to form an association, to join an association, and to be active in an association. The Federal Labor Court and the Federal Constitutional Court interpret this constitutional guarantee in a way that also covers the so-called "negative freedom of association." The underlying idea is that the positive freedom would be no freedom at all if there would not be at the same time a guarantee to be left alone, to enjoy the freedom not to join an association, or to leave an association.

The demarcation line between the associations' right of collective freedom of association and individual negative freedom of association is not easy to be drawn. There is a significant amount of case law where the judiciary tries to find a fair balance between the two conflicting rights. A tendency to overstate the relevance of the "negative freedom of association" and thereby to significantly limit

3. See Manfred Weiss, *Zur aktuellen Bedeutung des Mitbestimmungsurteils*, *in* KRITISCHE VIERTELJAHRESSCHRIFT FUER GESETZGEBUNG UND RECHTSWISSENSCHAFT 405 *et seq.* (2000).

4. See as prominent recent examples BVerfG, EzA Nr. 97 and Nr. 107 zu GG [Federal Constitution] art. 9 Arbeitskampf.

the organizations' collective freedom of association can be observed. This may be well illustrated by the leading case in this area. By using the instrument of collective agreement, trade unions tried to establish clauses that would lead to the effect that some financial advantages would be reserved for trade union members, there should have always remained a certain small gap (in the area of fringe benefits) between union members and non-unionized employees. These so-called gap clauses led to a conflict between the positive freedom of association, backing the trade unions in increasing their attractivity, and the negative freedom of association, backing the non-unionized employees in their wish not to be tempted to join a trade union due to its increased attractivity. This conflict was solved in favor of the negative freedom of association, these clauses were held to be null and void. This judgment of the Federal Labor Court[5] provoked a critical discussion. By many authors the Court's attitude was understood as an over-estimation of the negative freedom of association. The Federal Labor Court, however, has maintained its view until today, rejecting the critical voices.[6]

IV. RIGHTS AND PRINCIPLES DERIVED FROM THE CONSTITUTION

In Germany, civil law protects specific rights against violation and provides remedies in case of violation. This set of rights has been amended: not by statutory law but by the judiciary in taking recourse to the values as expressed by the fundamental rights in the Constitution. Human dignity as the core value and the right to freely develop one's personality (articles 1 and 2) were the main source for such a strategy of developing rights that—once in existence—are now integrated in the set of rights already guaranteed there by statutory law.

A. Privacy Protection

First, there is the general right to respect one's personality. This means that any infringement into the private sphere of an individual is as well forbidden as the disrespectful treatment of an individual that might harm his or her position in the estimation by others. From this general law a specific one in addition was developed: the right of self-determination in reference to an individual's personal data. The existence of these rights, of course, does not exclude the problem that

5. BAG [Federal Labor Court], EzA Nr. 3 zu GG [Federal Constitution] art. 9.
6. *See*, *e.g.*, BAG, EzA Nr. 42 zu GG [Federal Constitution] art. 9.

they might be in conflict with other values protected by the Constitution. In such a situation it is the judiciary's task to develop a fair balance between these conflicting positions, each one backed by the catalogue of fundamental rights in the Constitution.

The functioning of the general right to respect one's personality and of the specific right to self-determination in reference to the individual's personal data may be illustrated by the way the Courts restrict the employer's possibility to get information from job applicants. Formerly, the employer was free to ask the applicants all possible questions and make them undergo all kinds of tests. This has changed significantly: the rights just mentioned are now seen as an important restriction for such practices. However, the employer's right to get information on the applicant in principle is backed by the fundamental rights in the Constitution, in particular by the employer's freedom of profession, by the protection of private ownership of means of production, and, last not least, by the freedom to develop one's personality, which is considered to be the constitutional basis for the freedom to choose the contractual partner. In short, a fair balance has to be found between the conflicting positions. In order to find a solution to this conflict the Courts only allow questions that are in the employer's justified and approvable interest, and need to be answered because of the employment relationship to be established, may be asked. The employer's interest must actually be so strong that the employee's interest in protecting the inviolability of his privacy is considered less important. The applicant is not obliged to answer inadmissible questions and—more important for evident practical reasons—is allowed to answer inadmissible questions with a lie. Only a false answer to a rightfully asked question can be considered fraudulent misrepresentation with the legal consequence that the employer may contest the contract of employment. Due to the fact that Germany has a very efficient protection against unfair dismissals, the wrong answer to an inadmissible question may not only bring the applicant into the employment relationship but also guarantee its maintenance. The tendency, in view of the rights protecting the applicant's privacy, is to increasingly restrict the employer's right to ask questions invading the private life of the applicant. To give an example: the employer may only ask about previous convictions if the job at stake requires this. Thus, for example, an accountant or a cashier may be questioned about previous convictions for property offenses, or a truck driver may be asked about previous convictions for traffic offenses. But even then the applicant need not declare previous convictions or disclose the underlying facts of the conviction

if the previous convictions are no longer registered in the Federal Central Register for Convictions or if they need no longer be listed in the policy certificate of good conduct, i.e., not in cases of insignificant offenses or offenses committed more than five years ago. The example shows that the Courts' discretionary power in drawing the demarcation line is enormous. But it is perhaps the only way to find a fair balance between the conflicting values as expressed by the Constitution.[7]

B. The Right to Work

In Germany there is no right to work in the sense that an individual would be entitled to get a job. The right to work, however, plays a role within an already existing job, and this again is only due to articles 1 and 2 of the Constitution.

According to the statutory provision (section 611 of the Civil Code), which defines the mutual rights and duties in an employment relationship, the employee is obliged to work and the employer is obliged to pay the salary. There is no employer's duty to allow the employee to work. Therefore, the employer is fulfilling the contractual duties by simply paying the salary. This has led to situations (particularly in cases where the term of notice for dismissal was extended by contract and therefore very long) where the employer was ready to pay the salary until the end of the employment relationship but did not allow the employee to show up and perform the work to which the employee was obliged by the contract. This approach became more and more understood to be incompatible with the principles laid down in articles 1 and 2 of the Constitution, namely human dignity and the right to free development of one's personality. Self-fulfillment of one's personality by working, at least in the German context, is considered to be an essential element of the freedom to develop one's personality. That is why the Federal Labour Court has established the employee's right to work and not merely get the remuneration. At first, this right was only granted for certain professions, now it is a general and uncontested rule. Only under certain very restricted conditions (for example, if the employee is suspected of grave misconduct) can the employer still unilaterally declare the suspension and thereby is freed from the duty to allow the

7. For this development, see MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY 73 (2000).

employee to perform the work according to the employment contract.[8]

This right to work has been extended by the Federal Labour Court into the context of the lawsuit on the lawfulness of a dismissal. The German law protecting against unfair dismissals is focusing on reinstatement in case of an unlawful dismissal. However, even if the dismissal is judged to be unlawful the employer can still reach a dissolution of the employment contract and thereby prevent reinstatement. Such a dissolution, however, is granted by the Court under two conditions: first the employer has to pay a certain financial compensation and second it has to be demonstrated that further fruitful cooperation can no longer be expected. The latter precondition can be fulfilled relatively easily if the employee is no longer integrated in the company. If, however, the employee still remains there and continues working, it is much more difficult for the employer to convince the Court that further fruitful cooperation can no longer be expected. Therefore the question of whether the employee has a right to continue working during the whole period of the lawsuit became crucial. Such a lawsuit on the lawfulness of a dismissal can last several years, if all levels of the Court system (Labour Court, Labour Court of Appeal, Federal Labor Court) are involved. This explains why this question became a matter of such enormous controversy. The Federal Labor Court in a spectacular judgment[9] elaborated a compromise. In view of the uncertainty as to the question of whether or not the dismissal has been lawful and therefore has terminated the employment relationship, the dismissed employee has no right to remain in the company and to continue to work there. But—and this is the important innovation—if, according to the decision of the Labour Court of first instance, the dismissal is considered to be unlawful, the dismissed employee is entitled to continue working for the remaining period of the lawsuit in the appellate levels until its final decision. In other words, once there is a strong indication of the unlawfulness of the dismissal, the employee's interest in continuing working prevails over the employer's interest. This new approach has significantly improved the employee's possibility to get reinstated in case of an unlawful dismissal.

8. *See id.* at 80.
9. BAGE 48, 122.

C. The Principle of Equal Treatment

According to article 3, paragraph 1, of the Constitution "all persons shall be equal before the law." This fundamental right has become the legitimacy basis for the principle of equal treatment that was again developed by the judiciary and that plays a very important role in employment relationships.

The principle of equal treatment only applies to group oriented regulations of working conditions. The principle of equal treatment, on the one hand, demands that every member within a group must be treated equally. It limits, on the other hand, the employer's freedom to divide the workforce into different working conditions. The principle of equal treatment does not totally exclude different treatment. It prohibits arbitrary distinctions but allows differences that are specifically justified. The requirements for such a justification become more onerous. To just give an example, if an employer gives a gratification to white-collars and not to blue-collars this evidently would be a group oriented regulation. Therefore the principle of equal treatment applies. The relevant question to be asked would be whether the distinction made between white-collars and blue-collars is justified by the goal to be reached by the gratification.[10] This of course depends very much on the nature of such a gratification. If such a justification would be denied, the consequence would be that those who were excluded (in this example, the blue-collars) would get the same as the privileged group gets (in this example, the white-collars). It may well be that the excluded group consists of many more members than the privileged one: in such a case the principle of equal treatment may turn out to be very expensive for the employer. This of course is very ambiguous: in order to not be trapped by the principle of equal treatment, the employer might be inclined to abolish gratifications and similar favorable conditions for the employees at all. But the example shows that the principle of equal treatment as deducted from the constitutional guarantee of equal treatment not only is understood as a formal prohibition to discriminate, but as a vehicle to equal distribution of services granted by the employer. The practical impact of this principle should not be underestimated.

10. As examples see BAG [Federal Labor Court], EzA Nr. 38 - 40 zu § 242 BGB [Civil Code] Gleichbehandlung (and behind Nr. 40 M. Weiss, Gemeinsame Anmerkung).

V. INDIRECT HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS

As already mentioned, indirect horizontal application of fundamental rights is by far the most important method to infiltrate the whole legal system, including labor law, by the values expressed in the Constitution's catalogue of fundamental rights. Therefore, it is simply impossible to give a comprehensive overview of the many varieties of cases in which this method is applied. It rather might be helpful to just indicate some typical constellations in which it plays a dominant role.

A. Monitoring the Content of the Employment Contract

According to the traditional philosophy of civil law it is up to the parties to a contract to agree on whatever they want, as long as they respect the limits set by statutory law. In labor law this traditional philosophy also applies. There, of course, not only statutes but also collective agreements and work agreements as concluded between works council and employer[11] narrow the limits left for individual agreements. But there is still much space for contractual freedom in actual practice.

As far as the employment contract is concerned the parties are not considered to be in an equal power position. This equality of factual power, however, is one of the basic underlying assumptions of the idea of contractual freedom: As long as there is no possibility for one side to more or less dictate the contractual conditions to the other side there is no need for intervention, each side has the same chance to reach a fair compromise. The Labour Courts in Germany consider the employer to be typically in a stronger position than the employee. Therefore, the power balance has to be re-established by Court intervention, of course, of only one of the parties seeks the Courts' support. According to a general clause embedded in the Civil Code, all contracts, including employment contracts, have to correspond to the principles of equity and good faith (section 242). This formula as such is more or less meaningless but it opens the door for bringing in the value system as expressed by the fundamental rights in the Constitution. And these values thereby become the decisive criteria for monitoring the contractual content. The monitoring procedure is more severe in reference to standardized contracts in comparison to

11. For this category see WEISS & SCHMIDT, *supra* note 7, at 205.

contracts that are individually negotiated. But even in the latter alternative the employment contract is subject to the Courts' monitoring.

There are cases where it is pretty evident that the contract is violating the spirit of fundamental rights. To just give an example: There were employment contracts with stewardesses and stewards of airlines stipulating that the contract automatically is terminated if the stewardess or the steward gets married. This, of course, was judged by the Courts as being an evident and strong violation of the spirit of the fundamental right guaranteeing marriage and family as expressed by article 6 of the Constitution.[12]

Most of the time the violation is not so evident. Then the monitoring is much more complicated. To again give an example: If an employer pays for specific training or educational programs in order to give the employee a chance to improve his or her level of qualification it is only natural that the employer is interested in keeping this higher qualified employee and profiting from his or her new skills. Therefore, it is common practice that the employer agrees with the employee to pay for the education but to get the payment refunded if the employee quits the job before a certain date. Formerly such contractual clauses to repay such payments were considered to be unproblematic. The fundamental right on freedom of profession, however, not only guarantees the free choice of a profession but also the freedom to perform the profession (article 12 of the Constitution). This freedom of performance might be violated if the employee is prevented from making an optimal use of his or her qualification by not being able to move to another employer due to such a contractual clause. The contractual obligation to refund the payment in case of quitting the job turns out to a certain extent to be a "golden chain": on the one hand the opportunity to improve the level of qualification and on the other hand the need to remain in the actual employment relationship. In examining such clauses in view of the fundamental right guaranteeing the freedom of profession the Federal Labour Court still allows such clauses to be agreed upon in principle. However, there are significant limits. The period for which the employee must stay is to be limited. The time frame depends on the amount of payment and on the question of whether the new qualification is mainly one to be used internally in the company or one that is attractive on the labor market in general. The time frame also depends on the modalities of repayment, whether, for example, the

12. BAG [Federal Labor Court], AP Nr. 1 zu Art. 6 Ehe u. Familie.

whole amount is to be repaid whenever the employee leaves during this period or whether it is reduced step by step (full amount if quitting the first year, less if quitting the second year, even less if quitting the third year, etc.). In short and to make the point, the recourse to the fundamental right on freedom of profession has led to a very flexible pattern of limitation of such clauses that give the Courts a significant leeway in applying it to the individual case.[13]

Numerous examples of this type of intervention could be given. A very prominent one is the Federal Labour Court's jurisdiction on clauses by which the employee is prevented from competing with the employer after termination of the employment relationship. There is a specific statutory regulation on how to treat such clauses in the Commercial Code for white-collars performing commercial tasks. For all other groups of employees', however, there is no statutory provision whatsoever. Again, in view of the fundamental right on freedom of profession, the Federal Labor Court[14] has limited the possibility of such non-completion clauses and transferred the legal regime governing the white-collars with commercial tasks to all other employees. This means that the non-competition clause must be in writing, the limitation of the freedom to compete cannot exceed a period of two years after the contract has been terminated, and for the time of non-competition the employer has to pay to the employee a yearly amount of money corresponding to at least half of the yearly salary the employee received before the contract was terminated. In addition the clause is only valid if the employer has a justified business interest in the employee's non-competition and if it, in view of the region, the time, and the subject of non-competition, does not cause unreasonable disadvantages for the employee, taking into account the circumstances of each individual case. Again this pattern shows that the Courts enjoy a significant leeway in applying the impact of the fundamental right to the individual case and in determining the limits.

B. Monitoring the Specification of the Contract

According to the rules of German labor law, the employee is obliged to work under the employer's command, authority, and control. In other words, the employer has the right to unilaterally specify the contractual obligations of the employee by giving him or her orders. This power, of course, can be delegated to supervising

13. As examples of this jurisprudence see BAG [Federal Labor Court], EzA Nr. 13 and 21 zu GG [Federal Constitution] art. 12.
14. BAG [Federal Labor Court], EzA Nr. 10 zu § 74 HGB.

personnel within the organization of the establishment. The employee must obey the orders, otherwise he or she might risk a breach of contract, which might lead to sanctions. The right to specify the employee's contractual duties is limited by the wording of the contract which usually is rather vague. The problem, however, is whether there are further limits to this right to give such orders. The Civil Code contains a provision that is relevant in this contexts: the person who is entitled to unilaterally give orders has to use his or her discretion power in a way which respects the principle of equity (section 315). Again this general clause is very unspecific and more or less meaningless, but it opens the door for the values as expressed by the fundamental rights embedded in the Constitution.

An example may illustrate how this mechanism works. A researcher in a chemical company refuses to follow the employer's order to participate in a project that is supposed to develop pharmaceutical devices in order to reduce the injuries caused by nuclear weapons. This, at first glance, looks like an evident case of breach of contract. However, the employee claims that the participation in this project would be incompatible with his conscience. The Federal Labour Court[15] examined this case in view of the fundamental right on freedom of conscience (article 4, paragraph 1 of the Constitution), making reference to the content of this fundamental right as shaped by the Federal Constitutional Court. The latter developed a very far reaching protection of an individual's conscience by stating that it is up to the individual to decide the content of his or her conscience and that there are, at least in principle, no criteria that can be applied from outside. Of course, this does not exclude the denial of the protection in cases that evidently have nothing to do with conscience. Nevertheless the individual's possibility to take recourse to this category is only limited by a very broad frame. In the case at stake, this meant that the employee's recourse to the conscience was justified and that it was not the Court's business to examine whether the employee's understanding of conscience is in line with the Court's understanding. Therefore the impact of this fundamental right in such cases is far-reaching: the refusal is justified and by no means a breach of contract. However, it should at least be mentioned that this result is not without risk for the employee. The justified refusal may lead to the fact that the employee is incapable of performing the contractual work if, under the given conditions, there is no possibility to give him or her other work

15. BAGE 62, 59.

covered by the frame of the respective contractual duties. This depends very much on the position of the employee and on the size of the company at stake. However, in the context discussed here it is only important to demonstrate the limitation of the employer's unilateral right to specify the contractual duties. And here again fundamental rights turn out to be the crucial category.

C. Monitoring the Justification of a Dismissal

According to German labor law, a dismissal without notice (a so-called "extraordinary dismissal") is justified if "there are reasons which in view of all circumstances of the case and in evaluating the interests of both parties make it unacceptable for either of the parties to fulfil the contract until the end of the period of notice" (section 626 of the Civil Code). And under the regime of the Act on Protection against unfair Dismissals a dismissal with term of notice (a so-called "ordinary dismissal") is only socially justified and thereby lawful if there are reasons concerning the employee's personality, reasons concerning the employee's behavior, or urgent economic reasons (section 1). It is pretty evident that the formula for justification of an extraordinary dismissal and the broad notions for the justification of an ordinary dismissal under the Act on Protection against unfair Dismissals are very unspecific and therefore give the Courts a tremendous leeway drawing the demarcation line between justification and non-justification. In interpreting the formula referring to the extraordinary dismissal and in interpreting the notions concerning the ordinary dismissal, the Courts are obliged to perform this task in light of the values as expressed by the catalogue of the fundamental rights of the Constitution.

The function of the fundamental right on freedom of expression might be used as an example to illustrate the role that indirect horizontal application of fundamental rights plays in the area of dismissal. The Constitution guarantees to everyone "the right freely to express and disseminate his or her opinion by speech, writing and pictures" (article, 5 paragraph 1). It, of course, only plays a role if an opinion is to be expressed. According to the doctrine of indirect horizontal application of fundamental rights, there is no doubt that this guarantee also applies to employment relationships. Freedom of expression is one of the basic pillars of a democratic and pluralistic society. Therefore, it is self-evident that it cannot be kept away from the area of employment that essentially determines the lives of the vast majority of citizens. However, it has to be mentioned that the

constitutional guarantee of free expression of opinion is limited "by provisions of the general laws" (article 5, paragraph 2). According to the generally accepted interpretation, these "provisions" also include uncontested principles of law. In individual labor law this would be the duty of loyalty and the duty not to disturb the "peace" in the establishment. In finding out whether the expression of a specific opinion by an employee may constitute a justification of an extraordinary or an ordinary dismissal, the Courts have to counterbalance the fundamental right of free expression of opinion with the employee's duties. In making this evaluation, the Courts again possess a significant power of discretion. Therefore, it is difficult to predict the outcome in an individual case. It has to be stated, however, that the recourse to the freedom of expression has led to a very interesting trend. The huge amount of case law in this area clearly shows that, compared to the 1950s, more weight is given to the freedom of expression, at the same time reducing the relevance of the duty of loyalty and the duty not to disturb the "peace" in the establishment.[16] This is especially true in cases where public concern plays a role. This shows that the recourse to fundamental rights by way of indirect horizontal application is by no means static, but instead very dynamic. In this context the scholarly debate influencing the judges' perception of the fundamental rights plays an important role.

VI. CONCLUSION

The very sketchy description of the interface between fundamental rights as guaranteed by the Constitution and labor law has shown that labor law in many ways is infiltrated by these fundamental rights. Emancipated from the traditional understanding of defense instruments of the citizens against State power, fundamental rights have become a value system that defines to a great extent the content of the legal system as a whole. Since all the law has to be interpreted in the light of the Constitution, the judicial power has grown to a significant extent. The method of indirect horizontal application of fundamental rights opens the door for a flexible and soft approach to integrate the basic values into the different areas of law.

16. See the overview in G. Schaub, *Die Freiheit der Meinungsaeusserung im Individualarbeits- und Betriebsverfassungsrecht*, RECHT DER ARBEIT 137 (1979).

In labor law the recourse to fundamental rights is of specific importance due to the inequality of the position of the employer and the employee. On the whole, the Courts have succeeded in developing a fair balance between conflicting fundamental values as well as between fundamental values and economic needs. The weight of the fundamental rights in labor law has increased rather than decreased during the last few decades. The Courts, as guardians of fundamental rights, have demonstrated their independence, remaining relatively unaffected by the sometimes hectic activities of politicians and interest groups to change the perspectives of labor law. This attitude is not only characteristic for the Federal Constitutional Court and the Federal Labour Court but for the Courts in general.

The position taken by the Courts also has a preventive effect. The judiciary's focus on fundamental rights makes the legislator cautious. The threat that an intended statute could be considered unconstitutional actually works as a very efficient limitation in the legislative process. The present discussion on the planned amendment to the Act on works councils is a good illustration of this phenomenon.

The bottom line of all this is very clear: fundamental rights as guaranteed by the Constitution play a significant role in the genesis and application of labor law. Last, but not least, they are the most important safeguard against any attempt of destroying the protective function of labor law, thereby resisting modernistic trends. In the search for a labor law providing a fair balance between flexibility and security, the fundamental rights as embedded in the German Constitution are a good point of orientation.