

The role of the Charter within the EU legal framework and its relevance for the national legal order

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General framework for protection of rights and freedoms

- theory of multilevel constitutionalism – system of divided power
- every level of government = constitutional document guaranteeing rights and freedoms of an individual (“sword and shield” for an individual)
- two-tier system: national constitution (level of Member State) and the EU Charter of Fundamental Rights (EU level)
- three-tier system: local level (e.g. federal units, autonomous provinces), level of Member States, the EU level
- system of remedies corresponding to each level; resolutions of conflicts between levels of protection
- supervisory character of the European Convention on Human Rights over the domestic and EU level

The EU Charter - legal status

- since Treaty of Lisbon - legally binding – art. 6 TEU
- limitations on the use of Charter
 - 📖 scope of applicability (EU + implementation of EU law by Member States) (Article 51 Section 1); no new competences (Art. 51 Section 2)
 - 📖 limitations on use of rights and freedoms (Art. 52 Section 1)
 - 📖 interpretation in accordance with the ECtHR (art. 52 Section 3) - but see also the practice of ECtHR quoting ECJ (e.g. *Schalk and Kopf v. Austria*)
 - 📖 interpretation in accordance with constitutional traditions of Member States (art. 52 Section 4)
- before the entry into force - use of the EU Charter as the point of reference in interpretation of the scope of fundamental rights (in numerous opinions of AG and the ECJ judgments)

Interpretation of the EU Charter

- the EU Charter as primary law (compare: status of fundamental rights before entry into force of the Lisbon Treaty)
- duplication of certain rights in the Charter and in the Treaties (e.g. related to EU citizenship)
- status of explanations to the Charter
- status of the British-Polish Protocol to the Charter
- impact of the EU accession to the UN Covenant on Rights of Persons with Disabilities on the interpretation of the Charter
- current status of the EU accession to the ECHR (draft Association Agreement) – see Article 6.2 TEU

Types of rights under the Charter – normative value

- directly enforceable rights and freedoms
- rights and freedoms referring to the EU law or domestic law – their interpretation depends on
 - national laws governing the use of rights (e.g. Art. 9 of the Charter), or
 - Community law and national laws and practices (e.g. Art. 27 of the Charter)
- principles („the Union recognizes and respects...”)
- aspirational norms („Union policies shall ensure...”)
- citizens' rights

Different dimensions of the use of the Charter

- Control of legislation at the EU level and international treaties entered by the EU in light of the Charter
- use of certain Charter provisions for internal EU policies (e.g. non-discrimination policy, right to good administration)
- reference to the Charter by the EU courts – growing number of preliminary references
- the Commission acting as guardian of Treaties (article 7 of the TEU, e.g. actions with respect to Hungary)
- domestic use of the Charter – reference to the Charter by domestic courts when implementing the EU law

Typical use of the Charter in case of violation at national level

1. Violation of fundamental rights by the Member State
2. Applicability of the EU law (when there is a fundamental rights' issue involving interpretation of EU legislation, e.g. national authority refers to the EU regulation)
3. Appeal against action by national authority to domestic court
4. Courts – preliminary reference to the Court of Justice of the European Union
5. Judgment of the CJ EU
6. Resolution of the case by domestic court as a follow up to judgment of the CJ EU



Lack of jurisdiction of the CJ EU

- Case C-27/11, *Vinkov*, inadmissibility decision – case concerned the purely internal situation; violation of road traffic regulations; Bulgarian court referred to number of EU laws
- Case C-370/12, *Pringle v. Ireland* – challenge of the European Stability Mechanism in light of the effective judicial protection; jurisdiction of the CJ EU was not established
- BUT – obligation to grant to asylum-seeker at the border minimum conditions for reception, even if the state is not responsible for examination of the asylum application under the EU law – Case C-179/11, *GISTI*

First case after Lisbon Treaty

- Case C-403/09 *PPU, Detiček*, 23.12.2009
- custody over child awarded to father by Italian court, following the divorce
- mother moved to Slovenia and settled there with the child; requested a provisional custody over child to be recognized by Slovenian court; claimed that circumstances changed
- father - wanted to enforce Italian decision
- ECJ - fundamental right of a child to have personal relationship and contacts with both parents
- compare - ECtHR - *Gluhakovic v. Croatia* (application 21188/09, judgment of 12 April 2011)

IP rights in online environment and fundamental rights

- Case C-70/10, *Scarlet v. SABAM*, 24.11.2011
- Case C-360/10, *SABAM v. Netlog*, 16.2.2012.
- legal action to put an injunction on internet service providers and social networks as regards distribution of copyright protected material
- ECJ - installation of filtering system to prevent violation would violate:
 -  freedom to conduct business (Article 16 of the Charter)
 -  data protection of internet users and right to impart information with the use of internet
- importance of the case for public debate regarding non-ratification of the ACTA Agreement

Right to privacy and agricultural subsidies

- Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke, Eifert*, 9.10.2010
- publication of names of persons who obtained subsidies from European Agricultural Guarantee Fund and European Agricultural Fund for Rural Development
- reliance on the Charter - first judgment where it was the principal source of interpretation
- distinction between protection of personal data of natural persons and legal persons
- principle of proportionality as interpreted by the ECJ: appropriateness and necessity
- limitations on rights and freedoms - Article 52 Section 1 of the Charter

Dublin Regulation II

- Joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. e.a. v Refugee Applications Commissioner*, 21.12.2011.
- Dublin Regulation II and consequences of its application
- judicial dialogue with ECtHR - *M.S.S. v. Belgium and Greece*, application no. 30696/09, 21.01.2011.
- obligation to respect the Charter when examining asylum applications
- Member States must be aware of situation in countries to which extradition under Dublin II Regulation is made
- other important asylum-related cases (the Charter is also mostly used by domestic courts in such cases)

Non-discrimination principle and the EU Charter

- Article 21 of the Charter - non-discrimination principle
- Article 19 TFEU - legal competence to pass legislation in selected areas regarding anti-discrimination
- Case C-236/09, *Test-Achats*, 30.4.2011 - insurance premiums and discrimination due to sex
- C-144/04, *Mangold* and C-555/07, *Kücükdeveci* cases - non-discrimination due to age as a general principle of EU law



EU legislation strengthened by Article 21 of the Charter



however, lack of similar recognition in case C-147/08, *Jürgen Römer v. City of Hamburg*, 10.5.2011 (non-discrimination due to sexual orientation)



see also C-391/09 *Wardyn* case and rights of persons belonging to national minorities

EU Charter and Union citizenship

- EU citizenship is regulated both by the TFEU and the EU Charter
- EU Charter regulation strengthens the position of the EU citizenship
- concept of „reversing Solange” doctrine (Armin von Bogdandy and others, CMLRev, vol. 49 (2012), pp. 489–520)
- domestic impact of certain EU citizenship cases
- Case C-34/09, *Ruiz Zambrano*, 8.3.2011 - right to stay for irregular migrant if his/her children are of nationality of the given state
- limitation of rule: Case C-256/11, *Dereci and others*, 15.11.2011.

Use of the Charter by domestic courts

- report on use of the Charter by administrative courts (Madrid Colloquium, 2012)
- The Charter was referred by courts in all EU states, usually as an auxiliary source of interpretation; rare examples of direct use of the Charter; mostly principle of effective judicial protection (art. 47) and equality (art. 20 and 21);
- Examples: Austrian Constitutional Court – use of the Charter to examine the constitutionality of laws (14.03.2012); Supreme Court of Estonia, 12.12.2011 (data protection); Constitutional Court of Romania, 12.05.2011 (reference to art. 26 as a justification for domestic measure); Supreme Administrative Court of Czech Republic, 17.03.2011 (reference to art. 38 – rules and TV commercials)

Thank you for your attention

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