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# The EU Charter of Fundamental Rights and the evolution of CJEU case-law

Academy of European Law, Trier

Prof. Adam Bodnar, SWPS University of Social Sciences and Humanities  
(Warsaw, Poland)

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## General framework for legal protection

- 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: 1) regional level (e.g. federal units, autonomous regions), 2) level of Member States, 3) 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 national and EU level (role of other international human rights’ treaties)

## Multi-level system of protection of rights

National constitution

EU Charter

European Convention for  
Human Rights  
+ UN instruments

## 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) – “provided by law”, protection of essence of rights, principle of proportionality
- 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)
- 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 (Art. 52 Section 7)

## Typology of rights

- 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...”) – see Art. 52 Section 5 of the Charter:
  - may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers
  - judicially cognisable only in the interpretation of such acts and in the ruling on their legality
- aspirational norms („Union policies shall ensure...”)
- rights of EU citizens

## Social rights in the EU

- wide scope of secondary legislation concerning social rights in the EU
- „social rights” defined in the Charter as „rights” or „principles”; question of justiciability of principles (Art. 52 Section 5 of the Charter)
- Art. 12 – freedom of trade unions, Art. 21 – non-discrimination principle and its applicability to social rights
- reliance on international law standards (such as European Social Charter) in interpretation of rights (before Lisbon Treaty); now - possibility of direct interpretation from the Charter
- impact on legislative making and on adjudication of certain rights by domestic and CJEU
- European Pillar of Social Rights, solemn proclamation by the European Parliament, the Council and the European Commission, 2017

## Different dimensions of the Charter use

- control of legislation at the EU level and international treaties ratified 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, digital policy – see recent 2021 Report by the European Commission on the EU Charter of Fundamental Rights)
- the Commission acting as guardian of Treaties (article 258 TFEU)
- application interpretation of the Charter by EU courts
- 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 of fundamental rights at a 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 national court
4. Courts – preliminary reference to the Court of Justice of the European Union
5. Judgment of the Court of Justice of the European Union – interpretation of EU law (including the EU Charter of Fundamental Rights)
6. Judgment of the national court as a follow up to judgment of the EU Court of Justice

## Example - right to vacation

- C-539/12, *Z.J.R. Lock v. British Gas Trading Limited*
- Remuneration for vacation – should it be based on regular basic remuneration (in case of applicant approx. 1.220 GBP) or should it include premiums earned during regular work (2350 GBP)?
- Reference by the CJEU to fundamental right to vacation – art. 31 Section 2 of the Charter
- Art. 7 of the Directive 2003/78 should be interpreted taking into account its content and the contemplated effect (para. 15)
- Detering effect of the current practice in a company for possibility to take vacation (para. 21)

## Charter and EU legislation – example of anti-discrimination laws

- Article 19 TFEU - EU competence to adopt anti-discrimination laws and policies (EU anti-discrimination policies)
- selected protected grounds of discrimination
- Art. 20 and 21 of the Charter – „constitutional” non-discrimination and equality clauses in the Charter
  - verification of the legislation, e.g. C-528/13, *Leger* - Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (OJ 2004 L 91, p.25)
  - strengthening the EU anti-discrimination legislation (e.g. C-555/07, *Seda Küçükdeveci* – discrimination due to age as a general principle of EU law)
- Art. 22 of the Charter – equality between men and women

## Interpretation of EU directives in light of the Charter – some examples

- Definition of disability – C-335/11, *Jette Ring*
- Obesity as disability – C-354/13, *Kaltoft*
- Privacy, data retention and bulk surveillance - C-623/17, *Privacy International*
- Discrimination by association – C-303/06, *Coleman*
- Retirement age for judges – C-286/12, *Commission v. Hungary*
- Homophobic remarks made by the patron of football club – C-81/12, *Accept Romania*
- Maximum age for recruitment of a police officer, C-416/13, *Vital Pérez v Ayuntamiento de Oviedo*
- Freedom of movement of EU citizens in same-sex relationship, C-673/16, *Coman*
- Judicial independence - *Associação Sindical dos Juizes Portugueses*, C-64/16

## Scope of application of the EU Charter

- case C-5/88 **Wachauf** - **agency situation** (implementing directives, execution of directly applicable EU acts, execution of national provisions enacted in implementing EU law)
- case C-260/89 **ERT** - **derogations** from free movement
- C-64/16 *Associação Sindical dos Juizes Portugueses* – **rule of law cases – principle of effective legal protection (Article 19 TEU – Article 47 CFREU)**
- C-617/10 *Åkerberg Fransson*, C-399/11 *Melloni*
- Criminal proceedings concerning tax fraud, but previously Mr. Fransson was punished with tax fines; applicability of *ne bis in idem* principle (article 50 of the Charter). Is the Charter applicable? EU law requires to adopt measures necessary to collect VAT tax, but the EU law does not harmonize penalties and criminal proceedings. Are such administrative and criminal rules „implementation of EU law“?

## Scope of applicability of the EU Charter

- C-617/10 Åkerberg Fransson
- *„fundamental rights guaranteed in the legal order of the EU are applicable in **all situations governed by European Union law, but not outside such situations**. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation **falls within the scope of European Union law**, the Court [...] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures*
- *„national authorities and courts remain free to apply national standards [...], provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”*
- C-399/11 Melloni – higher standard of protection of rights at the national level? Such approach would undermine effectiveness and primacy of the EU law. But – if issue is not fully regulated by the EU law, such approach could be possible.

## Judicial independence standards in the CJEU

- Article 19 of the Treaty on European Union – principle of effective legal protection
- C-64/16, *Associação Sindical dos Juizes Portugueses*, judgment of 27 February 2018

*In order for [the effective legal protection] to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.*

*The guarantee of independence, which is inherent in the task of adjudication [...] is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.*

## When the CJEU and Article 47 of the Charter might be helpful? Some examples

- Interpretation of „Stockholm Programme” directives, e.g. C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*
- Family cases (including mutual recognition of judgments), e.g. Case C-403/09 PPU, *Detiček*, 23.12.2009
- Use of the European Arrest Warrant – e.g. C-216/18 PPU (*Celmer case*)
- Access to remedies, e.g. possibility to review a project in light of the environmental impact, C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus v. Région wallonne*
- Access to legal aid in civil cases, e.g. C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*
- Standards of mandatory mediation proceedings, e.g. *Joined cases C-317/08 to C-320/08, Rosalba Alassini v. Telecom Italia SpA*

## Right to an effective remedy

- remedy must be effective and practical, and not illusory and theoretical – general legal standard (e.g. Polish access to legal abortion cases)
- right to compensation for violation of law (including deprivation of liberty)
- it is responsibility of the EU Member States to create a system of remedies, when the EU does not regulate it, e.g. C-583/11 P, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union* (case concerning marketing of seal products in the EU's internal market)
- remedy should be provided in case of violation of EU law by domestic authorities (long-standing case-law of the CJEU)
- specific performance, including injunctions concerning access to on-line content, C-314/12, *UPC Telekabel Wien*



## Horizontal effect of the EU Charter

- Vertical effect: public power vs. individual; horizontal effect: individual vs. individual
- Limitations stemming from Article 51 of the EU Charter; certain provisions of the Charter as referring to private relations
- Development of secondary legislation regulating relations between private parties – interpretation by CJEU in light of the EU Charter
- C-144/04, *Mangold* – non-discrimination due to age as a general principle of EU law; aftermath of *Mangold*
- C-176/12, *Association de médiation sociale* and C-282/10, *Dominguez* – which provisions of the EU Charter may have horizontal effect?
- C-414/15, *Egenberger* – scope of Article 21 of the EU Charter, potential horizontal effect („prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law”)
- C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, judgment of 6 November 2018

## *Bauer* case – potential horizontal applicability

- Article 31 Section 2 of the Charter; disputes involving: local authority and private individual (*Wuppertal v. Bauer*); private employer and private individual (*Willmeroth v. Broßonn*)
- Article 31(2) Charter: national court must disapply national legislation pursuant to which the death of a worker retroactively deprives him (and his legal heirs) of the entitlement to paid annual leave acquired before the death; **employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu** which they are required to pay pursuant to the fundamental right guaranteed by that provision.
- Para. 87: *With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.*

## Summary

- The EU Charter of Fundamental Rights is a „living instrument”
- due to the multi-level system of governance (or federalization of the European Union) it could be compared to national constitutions’ chapters on fundamental rights (or bills of rights)
- CJEU jurisprudence provides guidance on interpretation of the Charter
- growing EU secondary legislation on issues related to fundamental rights (procedural rights, asylum and migration, data protection, privacy, judicial cooperation, consumer rights, non-discrimination) creates an opportunity for the development of the Charter interpretation
- potential horizontal applicability of the EU Charter; but we should have here cautious approach due to sensitive nature of relations between the EU and Member States in a legislative sphere
- importance of the Charter is annually analysed in reports by the Commission and the EU Agency for Fundamental Rights

Thank you for your attention

Twitter: @adbodnar  
abodnar@swps.edu.pl