

Session 1: THE ROLE OF THE CHARTER WITHIN THE EU LEGAL FRAMEWORK AND ITS RELEVANCE FOR THE NATIONAL LEGAL ORDER

A. INTRODUCTION

Important references in EU law to fundamental rights are the following:

Article 6 TEU

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

- sanctions procedure, in Article 7 TEU, whereby a member state's rights may be suspended if it engages in 'a serious and persistent breach . . . of values mentioned in Article 2.'

Additionally there are specific treaty items which qualify as fundamental rights namely:

- non-discrimination on grounds of nationality in Article 18 TFEU
- and equal treatment. Article 19 TFEU on non-discrimination: 'the Council . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'
- Also right to equal pay (Article 157 TFEU)
- Some fundamental rights exist as secondary legislation rather than treaty provisions - the equal treatment directives are good examples.

The EU has also now appointed a Commissioner, Viviane Reding, with new and special responsibilities for fundamental rights.

Fundamental rights as 'general principles of law'

Eg *Case 11/70 [1970] ECR 1125, Internationale Handelsgesellschaft.*

B. CHARTER OF FUNDAMENTAL RIGHTS

Introduction

On 7 December 2000, the EU Charter of Fundamental Rights was proclaimed by the respective presidents of the EU Institutions.

The Treaty of Lisbon amended Art 6 of the TEU to provide for recognition of the Charter, and while the text of the Charter has not been incorporated into the Treaty by Lisbon, Art 6 now provides that it will have the same legal value as EU treaties and is legally binding,

Article 6(1) TEU:

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union . . . which shall have the same legal value as the Treaties"

What rights does it cover?

The Charter has 50 rights, which is a considerable amount, if you say compare it to the ECHR or US BORs. They are divided under six headings, namely, rights to human dignity, Freedoms, Equality, Solidarity, Citizens Rights, Justice.

A full list of the sources of the rights included in the Charter is set out in the updated “explanations” of the Praesidium, see OJ 2007 C 303/17.

When is the Charter at issue?

1. - *At the negotiating stage*, the 3 key EU institutions involved in law and policy-making (the European Parliament, Council and Commission) have either specialised bodies or procedures that help to ensure proposals are consistent with the Charter.

2. *After legislation or policies have been adopted*, the Charter must be observed in their implementation.

a) *In the EU courts in Luxembourg*

b) *When does the Charter come into play at national level?*

C. ASSESSMENT OF CFR

Advantages of CFR:

Extensive protection of rights. Clarity – all in one document.

In a *Joint Communication from Presidents Costa and Skouris* of the ECJ and ECtHR in early 2011, it was observed that the Charter has rapidly become of primary importance in the recent case-law of the CJEU.

However, there are some problematic features of the Charter:

1. The often opaque language in which its provisions are drafted

2. some of its rights are highly qualified. Eg Article 27 28, 34. 35 and 36.

3. A *general limitations clause* set out in Article 52 applies to all of the rights

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

4. *Distinction between rights and principles.*

Art 52(5). ‘The provisions of this Charter which contain principles 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. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’

5. Scope

(a) Article 51 sets out scope of Charter:

‘The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. . .’

ERT ([1991] ECR I-2925 the Court found that EU human rights law applies to Member States not only when they are implementing EU law, but whenever they are ‘*acting within the scope of Community law.*’

R (Zagorski) v Secretary of State for Business, Innovation & Skills [2010] EWHC 3110 (Admin), paras 66-71, the English High Court held that a member State derogating from EU law was acting within the scope of EU law for the purposes of the Charter.

In Case C-411/10 *N.S.*, [2011] ECR 000 (for further commentary on which see below) Advocate General Trstenjak held that, in deciding an asylum application on whether an applicant should be returned to Greece under EU Regulation 343/2003, the EU was implementing EU law, and fell within the scope of the Charter.

(Also relevant on the issue of when EU fundamental rights law may apply to a Member state's actions: Case C-299/95, *Kremzow*, [1997] ECR I-2629; C-60/00 *Carpenter* [2002] ECR I-6279; C-328/04 *Attila Vajnai* [2005] ECR I-8577; Opinion of Advocate General Sharpston in Case C-34/09, *Ruiz Zambrano* [2011] ECR 000).

Further clarification came recently in the *Åkerberg Fransson* case. (Case C- 617/10 *Åkerberg Fransson*, judgement of 26 February 20130.

Extracts from judgement

17. It is to be recalled . . . that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

...

19. The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union 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, when requested to give a preliminary ruling, 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.

20. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.

6. Relationship with ECHR

Article 52(3), 'in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of Charter rights shall be the same as those laid down by the ECHR.'

That statement is, however, qualified by the next sentence, which provides that Article 52(3) 'shall not prevent Union law providing more extensive protection'.

Strasbourg caselaw: Article 52(3) CFR does not make express reference to the ECtHR's case law. Only the ECHR itself is mentioned. However, in *J McB v LE* (Case C-400/10 PPU *J McB v LE*, 5 October, [2010] ECR I 000) the CJEU held that where Charter rights are the same as those in the ECHR the Court of Justice should follow the clear and consistent jurisprudence of the ECtHRs.

Also, notably, Declaration on Article 6(2) of the TEU provides :

' . . . the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.'

7. The Charter and national constitutional rights:

Art 52(4). 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'

Article 53

Level of protection

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

But which rights in which constitutional traditions? Case C-36/02 *Omega* [2003] ECR I-9606 decided before the Charter became binding.

Melloni (Case C-399/11 *Melloni* [2013] ECR I-0000)

Extracts from Melloni judgement

58. That interpretation of Article 53 of the CFR would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order [...], rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State [...]

60. It is true that Article 53 CFR confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the CFR, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

61. However ... Article 4a(1) of [the EAW] FD does not allow MS to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

62. It should also be borne in mind that the [addition of Article 4a] [was] intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That FD effects a harmonisation of the conditions of execution of a EAW in the event of a conviction rendered in absentia, which reflects the consensus reached by all the MS regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a EAW.

63. Consequently, allowing a MS to avail itself of Article 53 CFR to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for [in article 4a FD], in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing MS, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that FD, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that FD.

64. ... the answer to the third question is that Article 53 CFR must be interpreted as not allowing a MS to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

[See also:

Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța v Radu, Case C- 396/11 (29 January 2013)

8. opt outs from the Charter?

UK and Polish Protocol to the Charter (Protocol 30 to Lisbon Treaty)

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

N.S. and M.E. and Others (Joined Cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR 000) AG Trstenjak

D. USING AND LITIGATING THE CHARTER

1. Since Lisbon the Charter has been cited by the Court on more than 300 occasions.

2. What does this case law reveal about the ways in which the Charter may be applied?

a) That the Charter has the importance of primary law and hierarchically stands over all acts of secondary law. So the Charter may form the basis *for assessing the validity of secondary acts* of law, and annulling them.

Notably, there are the cases in which the ECJ has declared EU provisions to be invalid: *Test-Achats* and *Volker* (Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR 000; *Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert* (9 November 2010).

b) the Charter is very often used to *used to interpret EU law*.

c) But third, notably there exist cases in which the ECJ failed to take the Charter into consideration.

Eg even though one of the main novelties of the Charter was the incorporation of specific provisions referred to the right to the integrity of the person in the fields of medicine and biology (Article 3(2) Charter), the Charter was not mentioned in *Brüstle*, about the interpretation of the concept of ‘human embryo’.

d) And unsurprisingly, perhaps, given the Court’s continuing history of ‘discovering’ fundamental rights as unwritten general principle of EU law (see for example Case C-114/04 *Mangold* [2005] ECR I-9981; and Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG*, [2010] ECR I-nyr on age discrimination as an unwritten general principle), the express provisions of the Charter are not seen as *confining* the Court of Justice.

3. We might also note that Fundamental rights cases tend to have a different nature depending on the European fora they are decided in.

Thus, cases before the General Court tend to focus more on balancing the societal interest pursued through competition law with fundamental rights mostly of legal persons rather than natural persons. On the other hand, judgments before the CJEU, often deal with situations where fundamental rights are invoked against Member States implementing Union law, and the Charter is evoked as specified in its Article 51(1).

4. YET using the Charter before the CJEU directly is relatively difficult because the CJEU is not primarily designed as a human rights court to deal with individual complaints. This is reflected in the types of procedures through which an individual can get access to the CJEU.

a) *Preliminary references*. (Article 267 TFEU). The example of the *N.S.* case, given above, shows how the ‘preliminary reference’ procedure works.

The case of *Association belge des Consommateurs Tests-Achats, ASBL et al. v. Conseil des ministres* (Case C-236/09, *Tests Achats* OJ C 130, 30.4.2011), mentioned above, also provides a recent example.

b) Beyond the preliminary reference procedure, it is very difficult to get access to the CJEU. While it is possible in theory to make a complaint directly to the CJEU that the EU itself has failed to comply with the Charter (through an ‘action for annulment’ under article 263 TFEU), an individual or organisation can usually only do this if he/she/it is specifically named by a piece of legislation. An example of this is the case of *Kadi and Al Barakaat International Foundation v. Council and Commission* (Case C-402/05 P and C-415/05, P. *Kadi* [2008] ECR I-6351).

c) The European Commission also has the power to make a complaint against an EU member state (through the ‘infringement procedure’ Art 258 TFEU) before the CJEU.

d) It is easier, however, for an individual to make a complaint to one of several bodies set up by the EU to investigate certain kinds of wrongdoing. Individuals who believe that there has been a misuse or failure to safeguard their personal data by an EU institution or body can make a complaint to the European Data Protection Supervisor. The European Parliament’s Committee on Petitions can act on a complaint about national authorities failing to implement EU law properly, including failure to respect the rights in the Charter.

The European Ombudsman also hears complaints which may have human rights implications. What these procedures have in common is that they do not deliver a legally binding outcome – rather, they are similar to mediation.

5. There remains an impression after this survey, that notwithstanding the increasing dominance of fundamental rights talk on the part of the CJEU in the interpretation and application of EU law, it is not always clear that the CJEU is willing to apply the requirements of fundamental rights with any particular rigour against the EU institutions themselves, most clearly as regards the EU Courts themselves and their procedures and hallowed practices. (See for example C-514/07 P, C-528/07 P and C-532/07 P, [Sweden v API and Commission](#) 21 September [2010] ECR I-nyr; [2011] 2 AC 359, ECJ at paras 92-93).

This kind of attitude may be thought to be one of the reasons behind the pressure for the EU itself to become a signatory to the ECHR with the consequence that the CJEU would in effect fall under the jurisdiction of the ECtHR.

6. The best argument for the Charter is the simplest, and one which should appeal to Europhile and Europhobe alike: the need for robust and accessible judicial protection for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law.

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