

Introducing the Charter

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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
- status of the EU accession to the ECHR – opinion of CJEU no. 2/2013 of 18 December 2014

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, by equality bodies, ombudspersons etc.

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

C-617/10 Åkerberg Fransson – scope of applicability

- 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“?
- Para. 19: *„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“*

Fransson - continued

- reference by the CJEU to the explanations to the EU Charter – „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” (para. 20)
- Para. 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.”
- Effect: „scope of application of the EU law” equals „implementation of the EU law”
- See also case C-562/12 - *Liivimaa Lihaveis MTU* – adoption of the programme manual by the monitoring committee implements EU law within the meaning of Article 51(1) of the Charter. It excluded the possibility of judicial review of decisions by the monitoring committee to reject a subsidy – violation of Article 47 of the Charter

Charter and EU legislation

- 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 Küçükdevici* – discrimination due to age as a general principle of EU law)
- Art. 22 of the Charter – equality between men and women
- growing use of the Charter by the UE institutions, domestic bodies and courts

Selected cases clarifying EU directives

- Sexual orientation cases – *Hay, Tadao Maruko, Roemer*
- Definition of disability – C-335/11, *Jette Ring*
- Obesity as disability – C-354/13, *Kaltoft*
- Reasonable accommodation – C-312/11, *Commission v. Italy*
- 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* (please note the special role of the equality body in Romania)
- Maximum age for recruitment of a police officer, C-416/13, *Vital Pérez v Ayuntamiento de Oviedo*

EU law vs. ECHR

- protection of human rights - two „speeds” in Europe
- development of case-law under EU directives
- open catalogue of grounds covered by Article 14 ECHR and Protocol No. 12 (e.g. *Karner v. Austria*, *Glor v. Switzerland*)
- Joint handbook by the FRA and ECHR
- constraints:
 - Article 14 may be used only in conjunction with other right (e.g. *Bączkowski v. Poland*, freedom of assembly, *Pareskeva v. Bulgaria*, right to court)
 - Protocol No. 12 may refer to discrimination in any legal provisions (*Sejdic and Finci v. Bosnia and Herzegovina*)
 - Protocol No. 12 is ratified by only a few countries (almost no jurisprudence)

Conclusions

- The EU Charter is a legally binding document and used often in practice of the CJEU
- The CJEU clarified the scope of applicability of the EU Charter vis-a-vis harmonization of the EU law by Member States (art. 51 of the Charter)
- The CJEU clarified the relationship between the national and the EU standards of fundamental rights' protection in case of implementation of the EU law
- Non-discrimination and equality principle is frequently used by the CJEU in its jurisprudence

Thank you for your attention

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