

The Protection of Fundamental Rights in the EU post Lisbon Treaty

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Abstract

The treaty of Lisbon, which entered into force on 1.12. 2009, represents a major step concerning the development of the protection of fundamental rights within the European Union. After the Lisbon Treaty entered into force the Charter of Fundamental Rights of the European Union has the status of a legally binding act. As a result, the Court of Justice of the European Union as well as the national courts have a mechanism available which shall serve as the principal basis on which they carry out their task of ensuring that in the interpretation and application of the EU law the fundamental rights are observed appropriately.

Also, the Treaty of Lisbon provides for the European Union to accede to the European Convention on Human Rights (ECHR). The legal base regarding the European Union accession to the ECHR is Article 6 (2) of the Treaty of the European Union (TEU, Article 218 (8) of the Treaty on the Functioning of the European Union (TFEU), Protocol 8 and Declaration 2 to the Lisbon Treaty. After the Charter acquired the status of a legally binding act as well as if the European Union accedes to the ECHR, this means a major step forward and shall extensively contribute when it comes to the protection of the fundamental rights within legal order of the European Union. This could be considered the consolidation of a legal framework regarding the protection of the human rights at European Union level.

Nevertheless, the main rationale of this article is to consider the formal sources of EU human rights, the application and interpretation of the Charter in the Member States, to whom provisions of the Chapter are addressed, the distinction between rights and principles, some of the ECJ cases regarding protection of human rights after the Lisbon Treaty as well as the EU accession to the ECHR.

Keywords: Protection of fundamental freedoms, EU charter on Human Rights, ECHR, EU accession to the ECHR.

Introduction

The EU Charter of Fundamental Rights (hereinafter: the Charter) was first drawn up in 1999-2000, following an initiative of the European Council to showcase the achievements of the EU in this field. The Charter was then solemnly proclaimed by the Commission, Parliament, and Council and politically approved by the Member States at the Nice European Council summit in December 2000 (Craig, De Burca, 2011, 394).

Due to the lack of legally binding effect of the Charter, the ECJ¹ 'refused' to refer on it for several years.² The Treaty of Lisbon amended Article 6 of the TEU to provide for

¹ After the Lisbon Treaty: Court of Justice of the European Union (ECJ).

² The First case in which the ECJ made direct reference to the Charter was Case C-540/03 Parliament v Council [2006] I-5769, at para 38. The Case was about Immigration Policy-Right to family reunification on minor children of third country nationals-Directive 2003/86/EC-Protection of Fundamental Rights. Directive 2003/86/EC determines the conditions for the exercise of the right to family reunification by third-country

recognition of the Charter, and while the text of the Charter has not been incorporated into the Treaty by Lisbon, Article 6 now provides that it will have the same legal value as EU treaties and is legally binding. Back in 2000, then President of the European Commission, Romano Prodi, introducing the Charter, stated that the objective of the Charter is, 'to make more visible and explicit to EU citizens the fundamental rights they already enjoy at European level'. Thus it brings together rights scattered throughout many different sources such as the ECHR, and United Nations (UN) and International Labour Organisation (ILO) agreements. The Charter has 50 rights, which are divided under six headings, namely: Human Dignity, Freedoms, Equality, Solidarity, Citizens Rights, and Justice (Douglas-Scott, 2011, 645).

The mandate originally given by the European Council to the body which first drafted the Charter of Rights was to consolidate and render visible the EU's existing 'obligations to respect fundamental rights' rather than to create anything new, and the sources on which the drafting body should draw were indicated.³ However, the Charter contains several innovation provisions, such as a prohibition on reproductive human cloning, and there are also notable omissions, for example protection of the rights of minorities.

The first chapter grants the fundamental rights such as human dignity⁴, the right to life, freedom from torture, slavery, and execution.⁵ The second chapter on freedoms also concentrates on the basic civil and political liberties to be found in the European Convention of the Human Rights,⁶ such as liberty, association,⁷ property,

nationals residing lawfully in the territory of the Member States. In particular it provides that a third-country national lawfully living in the European Community is in principle entitled to be joined by his or her children by way of family reunification. The Directive allows Member States to introduce certain derogations. The Parliament applied for annulment of three derogations from that principle as being contrary to fundamental rights, in particular the right to family life and the right to non-discrimination. The Court recalled that the legality of a directive is assessed by reference to the general principles of law, of which fundamental rights form an integral part. The Charter of Fundamental Rights of the European Union, which the Community legislature refers to in the Directive, although it is not a legally binding instrument (first citation by the Court in 2006 on the time the Charter was not yet legally binding).

³ These were specified as the right contained in the ECHR and those derived from the common constitutional traditions of the Member States, as well as from provisions of the European Social Charter and the Community Charter of Fundamental Social Rights of Workers: Conclusions of the Cologne European Council, June 1999.

⁴ The Charter, Article 1: *Human dignity is inviolable. It must be respected and protected.* The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble.

⁵ Charter of Fundamental Rights of the European Union, Official Journal of the European Union (2010/C/83/02). 30.03.2010.

⁶ The heads of state/governments of the European Union aspired to include in the Charter the general principles set out in the 1950 European Convention on Human Rights and those, derived from the constitutional traditions common to the EU countries.

⁷ The Charter, Article 11 (1) first sentence: *Everyone has the right to freedom of expression.* Pursuant to Article 52 (3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10 (2) of the Convention, without prejudice to any restrictions which

private and family life⁸, but contains in addition certain fundamental social rights such as the right to education, the right to engage in work, and the right to asylum, as well as a number of provisions which have gained particular prominence in the EU context, such the right to protection of data and the freedom to conduct a business.⁹ Chapter III on equality contains a basic equality-before-the-law guarantee,¹⁰ as well as a provision similar (though not identical) to that in Article 19 TFEU, a reference to positive action provisions in the field of equality before the law,¹¹ gender equality, protection of children's rights¹², rights of persons with disabilities ect. Chapter IV on solidarity contains certain labour rights and reflects some of the provisions of the European Social Charter¹³ which have already been integrated into EU law. This chapter contains mixture of fundamental provisions such as protection in the event of unjustified dismissal, prohibition of child labour and protection of young people at work, health care, environmental protection¹⁴, and consumer protection.

competition law of the Union may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10 (1) ECHR.

⁸ The Charter, Article 7: *everyone has the right to respect for his or her private and family life, home and communications*. This right guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. Also the scope and meaning are the same.

⁹ The Charter, Article: *The freedom to conduct a business in accordance with Union law and national law and practices is recognised*. This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73, Nold, paragraph 14 of the grounds, and of 27 September 1979, Case 230/78, paragraph 20 and 31 of the grounds and freedom of contract (see inter alia Sukkerfabriken Nykbing judgment, Case 151/78 paragraph 19 , TCA Article 4(1) and (2), which recognises free competition.

¹⁰ *Supra* note 4, p.396.

¹¹ The Charter, Article 20: *Everyone is equal before the law*. This Article corresponds to a principle which is included in all European Constitutions and has been recognised by the Court of Justice as a basic principle of Community Law (see judgment of 13 November 1984, Case 283/83, Racke judgment of 17 April 1977, Case C-15/95 EARL and Case C-292/97.

¹² This Article is based on the New York Convention on the Rights of the Child on 20 November 1989 by all the Member States, particularly Articles 3, 9, 12 and 13 thereof. Paragraph 3 takes account of the fact that, as part of the establishment if an area of freedom, security and justice, Union legislation on civil matters having cross-border implications, for which Article [III-170] of the Constitution confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both his or her parents.

¹³ The European Social Charter sets out rights and freedoms as well as establishes a supervisory mechanism guaranteeing their respect by the State Parties. Following its revision, the 1996 revised European Social Charter, which come into force in 1999, is gradually replacing the initial 1061 treaty. The rights guaranteed by the ESC concern all individuals in their daily lives, such as: housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination.

¹⁴ The environment protection principles has been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union. It also draws on the provisions of some national constitutions.

Chapter V contains 'citizen rights', many of which, unlike the other provisions of the Charter, are not universal but are guaranteed only to EU citizens.¹⁵ These include the rights of EU citizenship in Article 20-25 TFEU, while the more broadly applicable rights include the right of access to education and the right to good administration.¹⁶ Chapter VI comprise justice, such of the right to an effective remedy and to a fair trial, presumption of innocence¹⁷ and right of defence, principle of legality and proportionality and so on. Chapter VII includes the *general* provisions governing the interpretation and application of the Charter.

To whom are addressed provisions of the Charter?

*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*¹⁸

The aim of Article 51 is to determine the scope of the Charter¹⁹. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. The term 'institutions' is enshrined in the Treaties. The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation²⁰.

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that 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 (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules.²¹ Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

¹⁵ *Supra* note 4.

¹⁶ This was the first Chapter provision cited by the Court of First instance, Case T-54/99 max.mobil Telecommu-nication GmbH v Commission [2002] ECR II-313, 48.

¹⁷ The fundamental right of innocence is the same as Article 6(2) and (3) of the ECHR, which reads as follows: *everyone charged with a criminal offence shall be presumed innocence until proved guilty according to law.*

¹⁸ The Charter Article 51(1).

¹⁹ Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union, (2007/C 303/02) 14.12.2007

²⁰ See, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union.

²¹ Judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37.

However, during the drafting of the Charter²², several different proposals pertaining to the application of the Charter to Member States were put forward and discussed.²³ The proposals provided, in chronological order, that the provisions of the Charter be “binding on the Member States only where the latter transpose or apply the law of the Union,²⁴ “applicable...to Member States when implementing Community law,²⁵ “addressed...to the Member States exclusively within the framework of implementing Community law,²⁶ or “addressed...to the Member States exclusively within the scope of Union law.²⁷

Whilst the Charter is binding upon the member states, as drafted commentators have presumed that it could not be engaged in an action against a private individual in the way that some Treaty provisions may apply (e.g. with respect to free movement, employment discrimination etc). There may be an argument to say that because the courts form part of the state that the Charter can be invoked in horizontal proceedings. It is more likely that the courts will use the Charter as an interpretative aid which will create more of an indirect horizontal effect, as they are institutions which must ‘respect the rights, observe the principles and promote the application of the Charter.’ Interestingly, the Grand Chamber of the Court of Justice of the European Union has already invoked the Charter in private proceedings: see Case C-555/07 *Kucukdeveci v Swedex GmbH*, 19 January 2010 concerning employment discrimination where the Court noted that the Charter is to have the same legal value as the Treaties and that article 21(1) of the Charter prohibits age discrimination, and Case C-400/10 *PPU Deticek v Sgueglia* 5 October 2010 where the Court specifically referred to the requirement to ensure consideration of the best interests of the child in accordance with article 24 of the Charter in a contract dispute between parents. These cases suggest that the Court is unlikely to interpret the Charter differently to its existing approach to Treaty provisions which have horizontal effect. As we have seen above the provisions of the Charter are addressed to the various institutions and agencies of the EU, but to the Member States only when implementing Union law.

²² Thomas von Danwitz and Katherina Paraschas, A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of the Fundamental Rights, *Fordham International Law Journal*, Volume 35 Issue 5, 2012.p.1396.

²³ See also Guy Braibant, *la Charte des Droits Fondamentaux de L’union Européenne: Témoignage et Commentaires* 251–53 (2001) (providing the teleology of Article 51 from the perspective of the vice-president of the Convention and member of the group of five who drafted the Charter).

²⁴ See Draft Charter of Fundamental Rights of the European Union, Charter 4123/1/00 Rev.1, Convent 5, at 9 (Feb. 15, 2000). This proposition was accompanied by the following commentary: “It is intended to indicate clearly that the Charter’s scope is restricted to the European Union and to avoid any application to the Member States when they are acting within their own jurisdiction.

²⁵ See Draft Charter of Fundamental Rights of the European Union, Charter 4149/00, Convent 13, at 2 (Mar. 8, 2000).

²⁶ See Draft Charter of Fundamental Rights of the European Union, Charter 4235/00, Convent 27, at 1 (Apr. 18, 2000).

²⁷ See Draft Charter of Fundamental Rights of the European Union, Charter 4316/00, Convent 34, at 9 (May 16, 2000).

The application of the Charter in the Member States

One of the sticking-points in the negotiations on the Charter of Fundamental Rights of the European Union¹ was the question of its applicability at national level. According to Article 51(1) of the Charter, whilst its provisions are addressed to the institutions, bodies, offices and agencies of the Union, they are also addressed to the Member States but then 'only when they are *implementing*²⁸ Union law'. This formulation has already provoked a great deal of discussion and also controversy. Furthermore, as Article 51(1) of the Charter refers to a situation of 'implementing' Union law, there has been much discussion on whether this expression is more restrictive than the 'scope' or 'field of application' of Union law²⁹. In the Explanations³⁰ relating to the Charter, reference is made both to the case law of the ECJ stating that the requirement to respect fundamental rights is binding on the Member States 'when they act in the scope of Union law' and to cases using the notion of 'implementation'.

'Implementing' thus cannot be given such a narrow reading that only some instances of the application of Union law are covered. It should also be observed that all the language versions of Article 51(1) of the Charter do not use the verb 'implement' (in French 'mise en oeuvre') but the verb 'apply' (for instance, in Finnish 'soveltaa' and in Swedish 'tillämpa'). It should also be recalled that the earlier case-law of the ECJ as well as the Explanations relating to the Charter refer to both 'implementing' Union law and acting within 'the scope of' Union law.

That said, it should be clear from the above that invoking a Charter provision will not suffice to convert a situation otherwise regulated by national law to one covered by Union law. The Charter is only applicable if the case concerns not only a Charter provision but also *another* norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case.³¹

To determine whether a situation falls within the scope of the Charter, as defined in its

²⁸ See Thomas von Danwitz and Katherina Paraschas *supra* note 25.p 1396-1399. In order to understand the scope of application of the Charter with regard to Member States it is essential to consider the teleology and the wording of Article 51 of the Charter as well as the related explanations, and especially the genesis of this Article. These elements show that the Charter applies to Member States only when they are "implementing Union law" and does not apply to national legislation that is within the sole competence of the Member States.

²⁹ Allan Rosas, (President of the Chamber Court of Justice of the European Union) *When is the EU Charter of Fundamental Rights Applicable at National Level?*, Jurisprudence 2012, 19(4),p.1269-1288.

³⁰ These Explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of 2000. They were later updated under the responsibility of the Praesidium of the European Convention which drafted the abortive Treaty establishing a Constitution for Europe, which was signed in October 2004 but never entered into force, [2004] OJ C310/1. The Explanations have been published as an annex to the Charter as adapted in 2007, [2007] OJ C303/717. See, e.g. Case C-279/09 *DEB*, judgment of 22 December 2010 nyr, para 32. See also Ziller, J. Le fabuleux destin des Explications relatives à la Charte des droits fondamentaux de l'Union européenne. In: *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué*. Paris: Dalloz, 2010, p. 765.

³¹ *Supra* note 31, p.1277.

Article 51, the Court examines³², in particular, whether the relevant national legislation is intended to implement a provision of EU law, the nature of the legislation, whether it pursues objectives other than those covered by EU law, and also whether there are specific rules of EU law on the matter or which may affect it. There are currently three situations in which it is clear that the application of the Charter is triggered.³³

First, 'implementing EU law' covers a Member State's legislative activity and judicial and administrative practices when fulfilling obligations under EU law. This is the case, for instance, when Member States ensure effective judicial protection for safeguarding rights which individuals derive from EU law, as they are obliged to do under Article 19 (1) TEU. The Free Movement Directive³⁴ permits Member States to restrict the freedom of movement of EU citizens on grounds of public policy, public security or public health. The Court held in the *ZZ*³⁵ case that the basis for such a refusal must be disclosed to the person concerned. In this case, the grounds for a decision refusing entry into the UK were not disclosed for reasons of national security. The Court confirmed that a person has the right to be informed of the basis for a decision to refuse entry, as the protection of national security cannot deny the right to a fair hearing, rendering the right to redress ineffective (Article 47).

Second, the Court established that the Charter applies when a Member State authority exercises a discretion that is vested in it by virtue of EU law. In *Kaveh Puid*³⁶ the Court confirmed its previously established case-law³⁷ and held that a Member State must not transfer an asylum seeker to the Member State initially identified as responsible if there are substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter.

Finally, national measures linked to the disbursement of EU funds under shared management may constitute implementation of EU law. In *Blanka Soukupová*,³⁸ the Court held that in implementing Council Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund Member States are required to respect the principles of equal treatment and non-discrimination, enshrined in Articles 20, 21(1) and 23 of the Charter. When providing early retirement support for elderly farmers, Member States are required to ensure equal treatment between women and men, and to prohibit any discrimination on grounds of gender.

³² National judges are increasingly aware of the Charter's impact, and they seek guidance from the Court on its application and interpretation under the preliminary rulings procedure.

³³ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2013 Report on the Application of the EU Charter of Fundamental Rights. Brussels, 14.04.2014 COM(2014) 224 final.

³⁴ Directive 2004/38/EC, OJ 2004 L 158, p. 77.

³⁵ ECJ, C-300/11 *ZZ v Secretary of State for the Home Department*, 4.6.2013.

³⁶ ECJ, C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14.11.2013.

³⁷ ECJ, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*, 21.12.2011.

³⁸ ECJ, C-401/11 *Blanka Soukupová*, 11.04.2013.

A much debated judgment in 2013 on the *applicability of the Charter* was the *Åkerberg Fransson* judgment³⁹. This ruling is an important step in the on-going process to clarify the interpretation of Article 51 of the Charter.

The Court was asked to clarify whether cases of national law which meet objectives laid down in EU law also amount to situations where EU law is being 'implemented' within the meaning of Article 51 of the Charter. The case was referred to the Court for a preliminary ruling by a District Court in Sweden, which was uncertain whether criminal proceedings for tax evasion in the context of VAT declarations could be brought against a defendant if an administrative tax penalty had already been imposed upon him for the same act of providing false information. Such proceedings were to be examined in relation to the *ne bis in idem* principle (the principle that a person should not be punished twice for the same offence), enshrined in Article 50 of the Charter, even though the underlying national legislation for these administrative penalties and criminal proceedings had not been adopted to transpose EU law.

The Court pointed to the fact that under EU law, the Member States have an obligation to ensure the collection of all the VAT due, to counter illegal activities affecting the financial interests of the EU, and to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own interests.⁴⁰ The EU's own resources include revenue from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. There is therefore a direct link between the collection of VAT revenue in compliance with the relevant EU law, and the availability to the EU budget of the corresponding VAT resources. Any lacuna in the collection of VAT revenue at a national level potentially impacts on the EU budget. The Court held that, '*[s]ince the fundamental rights guaranteed by the Charter must (...) 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*'⁴¹. According to the Court, the national law in this context was '*designed to penalise an infringement of [the] directive and [was] therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for a conduct prejudicial to the financial interests of the European Union.*'⁴²

As to the outcome of the case, the Court observed that the principle of preventing a person from being punished twice for the same offence does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties, as long as the tax penalty is not criminal in nature.

However, three recent cases are good examples of situations where the Court held that the Member States were not implementing EU law⁴³, and thus where the Charter did not apply.

³⁹ ECJ, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26.2.2013.

⁴⁰ *Supra* note para. 26.

⁴¹ *Supra* note para.21.

⁴² *Supra* note para.28.

⁴³ *Supra* note 36.

In *Pringle*,⁴⁴ the Court held that when Member States established a permanent crisis resolution mechanism for the Eurozone countries, they were not implementing EU law. The Treaties do not confer any specific competence on the EU to establish such a mechanism. Consequently, Member States were not implementing EU law within the meaning of Article 51, and the Charter did not apply. Second, in *Fierro and Marmorale*,⁴⁵ the Court examined Italian legislation which requires a deed of sale of real estate to be annulled if the real estate was modified without regard to town planning laws. Such automatic annulment hampers the exercise of the right to property. The Court declared the case inadmissible as there was no link between national laws on town planning and EU law. Third, in *Cholakova*⁴⁶, the Court examined a situation where the Bulgarian police had arrested Mrs Cholakova because she had refused to present her identity card during a police check. The Court held that, as Mrs Cholakova had not shown an intention to leave Bulgarian territory, the case was of a purely national nature. The Court held that it was not competent to deal with the case and declared it inadmissible.

In 2013 the Court dealt with a large number of cases concerning the Charter's applicability at national level⁴⁷. This highlights the Charter's increasing interaction with national legal systems. In this context, the *Åkerberg Fransson*⁴⁸ judgment plays an important role in further defining the Charter's application in the Member States by national judges, even though the case law in this respect is still evolving and likely to be continuously refined.

The distinction between rights and principles foreseen in Article 51 of the Charter

The preamble and the second sentence of Article 51(1) of the Charter explicitly introduce the distinction between "rights" and "principles." Article 52(5) clarifies the judicial nature of these "principles." The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights.⁴⁹ Paragraph 5 clarifies the distinction between 'rights' and 'principles'⁵⁰ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers,

⁴⁴ ECJ, C-370/12, *Thomas Pringle*, 27.11.2012.

⁴⁵ ECJ, C-106/13, *Francesco Fierro and Fabiana Marmorale v Edoardo Ronchi and Cosimo Scozza*, 30.5.2013.

⁴⁶ ECJ, C-14/13, *Gena Ivanova Cholakova*, 6.6.2013.

⁴⁷ National judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter, as they directly ensure that individuals obtain full redress in cases where fundamental rights within the scope of EU law have not been respected.

⁴⁸ *Supra* note 42.

⁴⁹ Explanations relating to the Charter of Fundamental Rights, *supra* note 33.

⁵⁰ *Supra* note Explanations regarding Article 52(5).

and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.

The distinction between "rights" and "principles" – mentioned in the preamble of the Charter and the second sentence of Article 51(1) (Article II-111(1) of the Constitutional project) played an important role during the drafting of the Charter. In this regard, the Convention was especially influenced by Spanish constitutional law, particularly Article 53(3) of the Spanish Constitution concerning the justiciability of the guiding principles of social and economic policy⁵¹. The Convention also was influenced by French constitutional law, which features a distinction between rights that are fully justiciable and "principles of constitutional value" that do not give the individual persons a right to commence an action and only permits the constitutional council to determine whether the legislature took measures that are contrary to such principles. This distinction between "rights" and "principles" should reduce the divergence between constitutional traditions of Member States to a common denominator⁵². It served as a compromise during the intense and controversial discussions at the Convention regarding standards that contained subjective rights and those that only contained objective rights, particularly in relation to social rights whose justiciability had been challenged by certain members of the Convention. The differences between⁵³ the supported positions are explained by the different political sensibilities and distinct constitutional traditions regarding the existence and scope

⁵¹ Article 53(3) of the Spanish Constitution states: "El reconocimiento, el respeto y la protección de los principios reconocidos en el Capítulo tercero informaran la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Solo podrán ser alegados ante la Jurisdicción ordinaria de acuerdo con lo que dispongan las leyes que los desarrollen." CONSTITUCION ESPAÑOLA. B.O.E. N. 311, Dec. 29, 1978, art. 53 (Spain). An English translation is available at SPANISH CONSTITUTION art. 53, at 15, http://www.senado.es/constitu_i/indices/consti_ing.pdf ("Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.").

⁵² See Clemens Ladenburger, *Artikel 52 GRCh (Art. II -112 VVE) Tragweite und Auslegung der Rechte und Grundsätze*, in KOLNER Gemeinschaftskommentar zur Europäischen Grundrechte-Charta.

⁵³ See Thomas von Danwitz and Katherina Paraschas *supra* note 25.

of subjective and objective rights, in particular social rights.

The characterization of the articles of the Charter as either principles, rights, or both is not an easy task. However, Article 52(5) does not clearly distinguish which provisions are to be interpreted as 'rights' and which as 'principles'. It is often suggested that 'principles' refer to economic, social and cultural rights, although in fact only three provisions in the Charter explicitly use the word 'principle' Article 23 (principle of equality between men and women); Article 37 (sustainable development) and Article 47 (proportionality and legality of criminal offences). The Explanations are not of great help, especially as they note that some Articles may contain both rights and principles for example, Articles 23, 33 and 34. So the distinction remains rather unclear.⁵⁴

One is particularly faced with the question as to what standards of analysis should be applied to such a characterization. Given the wording of Article 52(5), the relevant explanations, and the origin of the distinction between "rights" and "principles" in the Charter, it seems clear that they do not confer a subjective right that can be invoked by individuals⁵⁵, an observation that serves as the point of departure for any analysis. In this regard, the explanations can offer useful suggestions, at least in some cases. Additionally, at the time of the Convention deliberations, it was emphasized that the wording of the Charter provisions should provide important suggestions for criteria under which to analyze whether something is a right or a principle. The same applies to the genesis of the articles and their respective goals⁵⁶.

It can be argued that the ruling of the Court of Justice of the European Union on amplification between rights and principles set out on the EU Charter are indispensable.

European Court of Justice case law regarding protection of human rights post-Lisbon

The 4th annual report published by the European Commission⁵⁷ on the application of the EU Charter of Fundamental Rights, shows that the importance and prominence of the EU Charter continues to rise: the Court of Justice of the EU increasingly applies the Charter in its decisions while national judges are more and more aware of the Charter's impact and seek guidance from the European Court of Justice.⁵⁸

The Charter has been a legally binding instrument of EU law since late 2009, binding both the EU institutions and the Member States when they act within the scope of EU

⁵⁴ See Sionaidh Douglas-Scott, *the EU and Human Rights after the Treaty of Lisbon*, Human Rights Law Review, *supra* note 6.

⁵⁵ See Jean-Paul Jacque, *La charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux*, 14 *Revue Européenne de Droit public* 107, 110 (2002).

⁵⁶ Thomas von Danwitz and Katherina Paraschas *supra* note 25.

⁵⁷ *Supra* note 36.

⁵⁸ The European Commission has also progressively sought to bring the Charter to life by taking action to promote and defend the rights of EU citizens laid down in the Charter. Since 2010, the European Commission has put in place a 'fundamental rights checklist' and as a result screens every legislative proposal to ensure it is "fundamental-rights proof".

law. Moreover, the growth of the Court's role as a human rights adjudicator⁵⁹ is not just a function of the coming into force of the Charter with a binding set of EU human rights commitments for the Court to enforce, but also a consequence of the continued expansion of the scope of EU law and policy. A significant part of the EU's legislative corpus now covers areas such as immigration and asylum, security and privacy, alongside many of the more traditional fields of EU policy including competition and market regulation. The EU, in other words, despite its recent economic woes, is a powerful and pervasive law-making entity with the capacity to impinge on fields of human freedom and welfare in many respects. Further, the coming into force of the Charter has widened the ECJ's human rights role not just by multiplying the rights provisions which it is empowered to enforce, but also by expanding the scope of the Court's jurisdiction over these extensive fields of law and policymaking. As has recently been pointed out, the Lisbon Treaty increased the likely extent of the ECJ's case law on fundamental rights issues in three ways: by repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody. The combination of these various features – the binding force of the Charter of Rights, the ever-expanding scope of EU powers and competences, and the extension of the Court's jurisdiction by the Lisbon Treaty – heralds a growing role for the Court as a human rights tribunal.

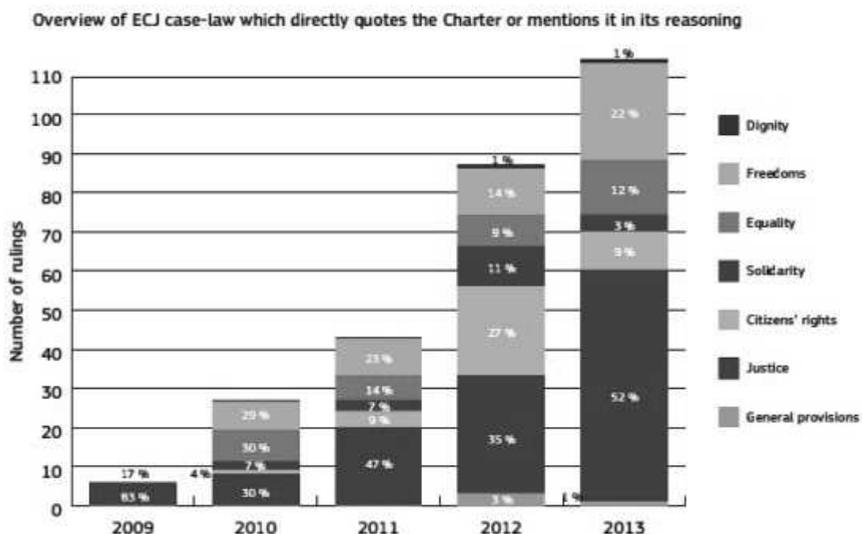
Yet the Court's role as a human rights adjudicator is actually a relatively recent one. Despite the fact that the Court has made reference, for several decades since the early 1970s, to fundamental rights as general principles of law, and to provisions of the European Convention on Human Rights as a source of inspiration underpinning these general principles, the number of cases involving substantive human rights claims remained low for those first decades. And although this number has increased over the past decade or so since the Charter was first drafted, it is really since the coming into force of the Charter that there has been a sharp rise in the number of cases invoking human rights claims.

In January 2010, in the *Küçükdeveci*⁶⁰ case, the Court underlined for the first time the new legal status of the Charter, stating that “the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties” and referred to Article 21 of the charter as regards non-discrimination on grounds of age. The treaty of Lisbon did not disrupt fundamental rights in their substance. In that respect, in two judgments of 3 May 2012 in which Article 47 of the Charter was invoked, the Court ruled that, before the entry into force of the Treaty of Lisbon, in several cases, the right to a fair trial, as enshrined, notably, in Article 6 of the European Convention, was already a fundamental right that the European Union respected as a general principle under Article 6, paragraph 2, EU. Nevertheless, from the Treaty of Lisbon,

⁵⁹ Graine De Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*. Oxford University 2012.

⁶⁰ Judgment of 19 January 2010, *Küçükdeveci*, case C-555/07, ECR I-365.

the Charter, which was used as an added value in the reasoning of the Court, has become a “reference text and a starting point” when the Court has to consider issues concerning EU fundamental rights.



The European Union Courts have increasingly referred to the Charter in their decisions. The number of decisions of these Courts quoting the Charter in their reasoning developed from 43 in 2011 to 87 in 2012. In 2013, the number of these decisions quoting the Charter amounted to 114, which is almost a triple of the number of cases of 2011.⁶¹

The EU institutions’ regard to the Charter is scrutinised by the Court⁶², which delivered several judgments to ensure that the EU institutions act in line with the Charter. These judgments also related to how well EU legislation and decisions addressed to individuals comply with the Charter.

The EU can issue penalties or restrictive measures which might impact on the fundamental rights of the person to whom these are issued. In the *Kadi II*⁶³ appeal judgment, the Court clarified certain procedural rights of persons suspected of association with terrorism, including the right to good administration, the right to an effective remedy and the right to a fair trial (Articles 41 and 47). The Court ensured the protection of fundamental rights and freedoms whilst recognising the imperative need to combat international terrorism. Mr Kadi’s assets had been frozen by the Commission, implementing a decision by the UN Sanctions Committee, as part of a UN Security Council resolution. The Court stated that, since no information or evidence had been produced by the Commission to substantiate the allegations

⁶¹ European Commission, Press Release, Fundamental Rights: Importance of EU Charter grows as citizens stand to benefit, Brussels, 14 April 2014. Also the figure 1 is taken from the same sources.

⁶² *Supra* note 36.

⁶³ ECJ, C-584/10 P *Commission and Others v Kadi (Kadi II)*, Appeal Case against T-85/09 *Kadi v Commission (Kadi I)*, 18.07.2013.

that Mr Kadi was involved in activities linked to international terrorism (allegations he strongly denied), those allegations did not justify the adoption, at EU level, of restrictive measures against him.

In *Besselink*,⁶⁴ the General Court gave effect to the right of access to documents, enshrined in Article 42 of the Charter, and it annulled in part the Council decision refusing access to a document on the EU's accession to the ECHR. The Court held that the Council made an error of assessment in refusing access to one of the negotiating directives it had adopted. The position reflected in this document had already been communicated to the negotiating parties. Therefore its disclosure could not jeopardise the climate of confidence between the negotiating parties.

The Court reviewed the compatibility of the Framework Decision on the European Arrest Warrant⁶⁵ (EAW) with Articles 47 and 48 of the Charter. The Court was asked if a Member State could make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid any adverse effects on the right to a fair trial and the rights of the defence as guaranteed by the constitution of the Member State surrendering the person in question.⁶⁶ The Court held that the Framework Decision on the EAW was fully compatible with the Charter. To make the surrender of a person subject to a condition not provided for under the Framework Decision would undermine the principles of mutual trust and recognition that that decision purports to uphold, and would compromise its effectiveness.

EU Accession to the ECHR

The long-debate question whether the EU should accede to the ECHR was finally settled by the Lisbon Treaty's amendment to Article 6(2) TEU, which declares that the EU shall accede to the ECHR⁶⁷. Given that the EU now has its own Charter of Rights, much of which is closely modelled on the ECHR, the question arises why EU accession to the ECHR is still considered to be necessary or desirable.

The EU has continued to encounter criticism of its human rights role, and scepticism as to whether its commitment to promoting human rights rather than only EU economic and political interest is genuine. A second accusation was that the Court had used the rhetorical force of the language of rights, while in reality mainly advancing the commercial goal of the internal market, being biased in favour of 'market

⁶⁴ General Court, T-331/11 *Besselink v Council*, 12.09.2013.

⁶⁵ Framework Decision 2002/584/JHA as amended by Framework Decision 2009/299/JHA, OJ 2009 L, 81, p.24.

⁶⁶ ECJ, C-399/11 *Stefano Melloni v Ministerio fiscal*, 26.2.2013.

⁶⁷ However, for some time, a specific obstacle to EU accession was the Luxembourg Court's *Opinion 2/94* on whether the then Community had the power to accede to the European Convention. In that Opinion the ECJ held that, as EC law then stood, the Community had no competence to accede to the ECHR as there was no adequate legal basis in the Treaty for accession, rejecting the argument that Article 308 of the EC (then the governing provision) might serve as a base. Therefore, accession could only be brought about by way of Treaty amendment. Article 6(2) of the TEU, as amended, has removed that obstacle, providing a legal basis for EU accession.

rights' instead of protecting values which are genuinely fundamental to the human condition. The desirability of being able to challenge acts of the EU directly before the ECHR has been presented as a clear argument in favour of accession. Accession will thus mean that the ECJ will no longer be the final official arbiter of the lawfulness of EU action which is alleged to violate human rights.⁶⁸

In 2001, the Working Group GT-DH-EU was instructed to carry out a study of the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the EU to the ECHR, as well as of the means to avoid any contradiction between the legal system of the EU and that of the ECHR.

On 4 June 2010, the EU Ministers of Justice gave the European Commission the mandate to conduct negotiations on their behalf. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad-hoc mandate to its Steering Committee for Human Rights (CDDH) to elaborate, in co-operation with the European Commission, the necessary legal instrument for the accession. The CDDH entrusted the informal working group CDDH-UE with this task. It was composed of 14 experts from the Council of Europe member states (7 from EU member states and 7 from non-EU member states). The group held 8 meetings between July 2010 and June 2011. On 14 October 2011, the CDDH transmitted a report to the Committee of Ministers on the work done by the CDDH-UE, and the draft legal instrument in appendix. Given the political implications and some of the issues that were raised, on 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the EU within the ad hoc group "47+1" and to finalise the legal instrument dealing with the accession modalities. The ad hoc group held 5 meetings in Strasbourg. The last meeting was held on 2-5 April 2013.

The negotiators, representatives of the 47 Council of Europe member states and of the European Union, have finalised the draft accession agreement⁶⁹ of the European Union to the European Convention on Human Rights. It consists of a package of texts, equally necessary for the accession of the EU to the ECHR: a draft agreement on the accession of the EU to the ECHR and a draft explanatory report, a draft declaration by the EU, a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU would be a party, a draft model of a memorandum of understanding.

The draft agreement contains provisions on the scope of the accession, including as regards the accession to the ECHR protocols or the admissible reservations, on the needed adjustments to the ECHR text and system, including the creation of a co-respondent mechanism in cases involving both the EU and one or more of its member states, on the participation of the EU in the Council of Europe bodies, on the EU financial participation to the ECHR system and on its right to vote within the Committee of Ministers.

⁶⁸ See Paul Graig Grainne de Burca, EU LAW, *supra* note 4.

⁶⁹ Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, Strasbourg, Wednesday 3 April (10 a.m.) – Friday 5 April 2013 (4.30 p.m.) Council of Europe, Strasbourg, 10 June 2013.

A formal linking of the EU and ECHR⁷⁰ could be seen as underlining EU concern with human rights, and also eliminate charges of double standards, based on the criticism that whereas the EU requires all of its Member States to be parties of the ECHR, it is not itself a party. It would also minimise the danger of conflicting rulings emanating from the ECJ, and ECHR, given that they could now rule on virtually identical issues.

The future relationship between the EU Charter and ECHR

Debate about the future relationship between the EU and the ECHR is, as old as the idea itself of EU accession to the ECHR. Prior to the Lisbon Treaty the ECHR jurisprudence was the most formative influence on the European Court of Justice's (ECJ) own fundamental rights' case law⁷¹, but the EU was not formally bound by the ECHR, and there were doubts over its competence to accede.⁷²

The Lisbon Treaty formally resolved the status of the EU's Charter of Rights by rendering it legally binding with the same legal status as the constituent treaties. The Lisbon Treaty also stipulated that the EU should accede to the ECHR, albeit with the caveat that such accession should not affect the Union's competences as defined in the Treaty on European Union ("TEU") and Treaty on the Functioning of the European Union ("TFEU"). There is a Protocol attached to the Lisbon Treaty, which states that the agreement relating to accession to the ECHR must make provision for preserving the specific characteristics of the Union and Union law. This is in particular with regard to the arrangements for the Union's participation in the control bodies of the ECHR, and the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. The discourse concerning EU Accession to the ECHR has been coloured implicitly if not explicitly by the assumption that things would be simpler for the states that are party to both the EU and the ECHR if the EU did not have a separate rights-based instrument in the form of the EU Charter of Rights.⁷³

The substantive⁷⁴ relationship between the EU and the ECHR prior to accession will continue to be governed by existing case law. From the perspective of the European Court of Human Rights the leading decision on the relationship between fundamental rights protection afforded by the EU and the ECHR was the *Bosphorus* case⁹. The applicant had leased two planes from the Yugoslav Airlines, JAT, and one of these planes was impounded in Ireland. The plane was impounded pursuant to an EC Regulation and this Regulation had been enacted in furtherance of United Nations ("UN") sanctions against the former Federal Republic of Yugoslavia. The applicant

⁷⁰ See Sionaidh Douglas-Scott, *the EU and Human Rights After the Treaty of Lisbon*, Human Rights Law Review 11:4(2011), 645-682.

⁷¹ See Guy Harpaz, *The European Court of justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy*. 46 Common Market Law Review. 105, 108 (2009).

⁷² See Opinion 2/94, *On Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] E.C.R. 1-1759.

⁷³ Paul Craig, EU Accession to the ECHR, *Fordham International Law Journal*, Vol:2013:1114.

⁷⁴ *Supra* note.

argued that the seizure infringed its property rights under the Convention. This issue was considered by the ECJ, which found against the applicant, the essence of its decision being that the Regulation implementing the UN sanctions policy was proportionate.

The applicant then brought an action against Ireland before the ECHR arguing that the impounding of the plane violated Article 1 of Protocol No 1, which protects property rights. 4 The Strasbourg Court held that it was legitimate for contracting parties to the ECHR to transfer power to an international organization such as the EU, even if the organization was not itself a contracting party under the ECHR. The state contracting party however remained responsible for all acts and omissions of its organs, irrespective of whether they were the result of domestic law, or the need to comply with an international obligation flowing from membership of an international organization. If this were not so then the state's obligations under the ECHR could be evaded when power was transferred to an international organization. The Strasbourg Court however also emphasized that a "State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations", that numerous Convention cases had confirmed this and that such cases concerned review by the Strasbourg Court "of the exercise of State discretion for which EC law provided." The majority did not regard the *Bosphorus* case on its facts as raising such an issue, since the impugned act concerned solely compliance by Ireland with an EC obligation flowing from a directly applicable Regulation that left no discretion to the Irish authorities.

EU accession to the ECHR will enhance consistency in the application of human rights all over Europe, foresting a harmonious development of the relevant case-law of European Court of Human Rights and the Court of Justice of the European Union. However, after an opinion⁷⁵ of the EU Court of Justice which concluded that the accession agreement is not compatible with EU law, such an accession would be possible only if the agreement is re-drafted and takes into consideration the Court's remarks.

Conclusions

The Lisbon Treaty had foreseen no timeline concerning the accession to the ECHR. However, negotiations began in 2010 and were carried forward by a committee composed of representatives from the ECHR and the EU. The committee reached an agreement in July 2011, which had to be approved by the appropriate decision-making organ within the EU and ECHR correspondingly. The working group reached agreement ' on the draft text in April 2013. Such an accession expected to bring a new era regarding the protection of human rights in the EU as well as a new dimension to inter-institutional judicial relationships between the two courts. The formal link of the EU and ECHR could be seen as an advantage regarding human rights protection within the EU. Thus, reducing and would also minimise the menace in relation to conflicting rulings emanating from the ECJ, and ECHR.

Even though, the Lisbon Treaty introduced significant changes regarding the

⁷⁵ ECJ Opinion No. 2/13, date 18 December 2014.

protection of human rights within the EU, the most significant of which lie in the amendments to Article 6 of the Treaty on European Union, allowing the EU accessing to the ECHR, such an accession proved to be not an easy task. Especially, after the Court of Justice of the European Union opinion 2/13, ruling that the accession agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with EU law, precisely Article 6(2) TEU. The opinion derives as a result of the request submitted to the Court of Justice of the European Union by the European Commission, asking the Court if the draft agreement providing for the accession is compatible with the Treaties.

Nevertheless, the Article 6(2) TEU imposed an obligation on the EU to accede to the ECHR as well as the negotiations process completed, the ECJ opinion 'cancelled' the accession process currently. There are many arguments that support the accession of the European Union to the European Convention on Human Rights, arguing that such an accession fosters the EU's credibility and the coherence of human rights protection in Europe, including the so called 'third generation' fundamental rights, such as: data protection, guarantees on bioethics, consumer protection as well as transparent administration.

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