Speakers´ Contributions

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE

TRAINING SEMINAR FOR LEGAL PROFESSIONALS
FOCUS ON SOCIAL LAW

416DT15 Trier, 15-16 September 2016

This series of seminars is organised with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission.

The Charter of Fundamental Rights of the EU in Practice
Training seminar for legal professionals / Focus on social law

Trier, 15-16 September 2016

Speakers' contributions 416DT15

Daniel Sarmiento Ramírez-Escudero

- The EU, Fundamental Rights and its Charter

Tobias Lock

- The scope of application and interpretation of the EU Charter
- Case Studies on Application of the EU Charter
- Workshop on the application of the Charter

Jeffrey Kenner

- Social rights and principles in the EU Charter of Fundamental Rights

Aaron Baker

- Equality and non-discrimination in employment
- Case studies introduction
- Case study 1
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- Case study 3

Anna Śledzińska-Simon

- Workshop on the application of selected substantive provisions of the EU Charter with relevance for social law

Johan Callewaert

- Fundamental Rights and their judges in Europe
- The Charter of Fundamental Rights and the European Convention of Human Rights:
  complementing or competing systems of fundamental rights protection in Europe?
- Article

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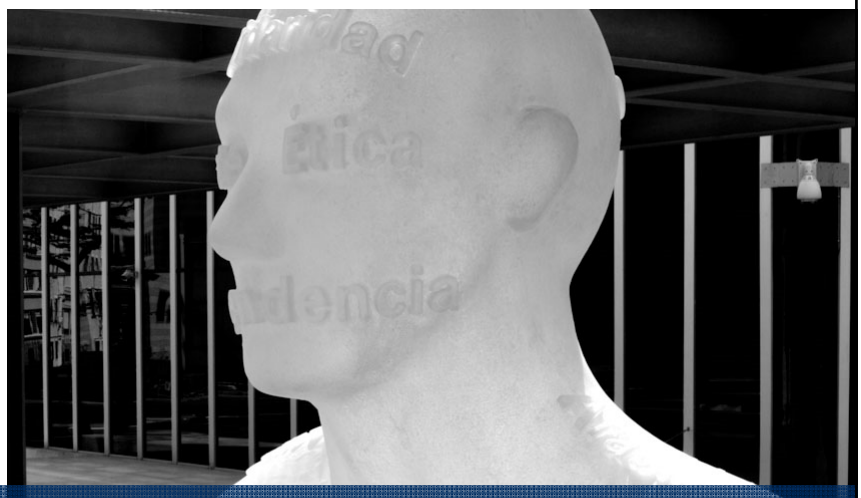
THE EU, FUNDAMENTAL RIGHTS AND ITS CHARTER

Daniel Sarmiento

Uría Menéndez / Universidad Complutense de Madrid

Trier, 15 September 2016

FUNDAMENTAL RIGHTS IN THE EU, A BRIEF HISTORY



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FUNDAMENTAL RIGHTS IN THE EU, A BRIEF HISTORY

1. PRIMACY AND FUNDAMENTAL RIGHTS: THE 1970's
2. TWO LEVELS: EU INSTITUTIONS / MEMBER STATES
3. THE LEGAL CATEGORY → GENERAL PRINCIPLES OF LAW
    1. Dignity (Omega, C-36/02)
    2. Freedom of expression (ERT, C-260/89)
    3. Freedom of religion (Prais/Council, 130/75)
    4. Property (Nold, 4/73)
    5. Effective remedy (Eridiana, 230/78)

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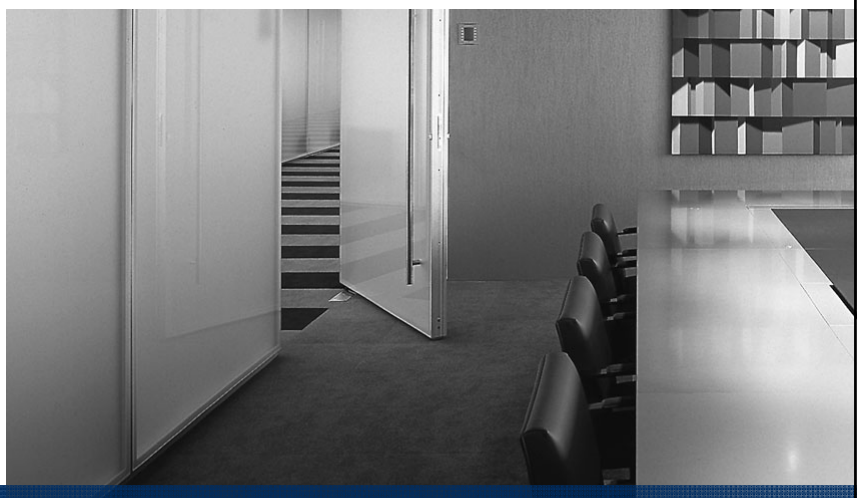
THE PRE-CHARTER UNION AND OTHER SOURCES OF FUNDAMENTAL RIGHTS



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THE PRE-CHARTER UNION AND OTHER SOURCES OF FUNDAMENTAL RIGHTS

1. THE ECHR AS A RELEVANT REFERENCE
2. A FAILED ACCESSION ATTEMPT (OPINION 2/94)
3. BOSPHORUS VS. IRELAND
4. NEVERTHLESS, TENSIONS PERSIST
    1. Kress vs. France
    2. Refusal to make references
    3. EFSP and EHJA

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THE PRE-CHARTER UNION, AND OTHER SOURCES OF FUNDAMENTAL RIGHTS

5. THE CONSTITUTIONAL TRADITIONS OF MEMBER STATES
    1. Individual, collective or consensual influence?
    2. Scope of "tradition"
    3. Scope of what is "constitutional"

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MAKING THE CHARTER

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MAKING THE CHARTER

1. THE FIRST CONVENTION
    1. A fourth-generation Charter
    2. A subtle balance between liberal rights and socio-economic rights
    3. The explanations
2. THE NICE IGC → The 2001 Inter-Institutional Declaration
3. THE SECOND CONVENTION
4. THIS LISBON TREATY

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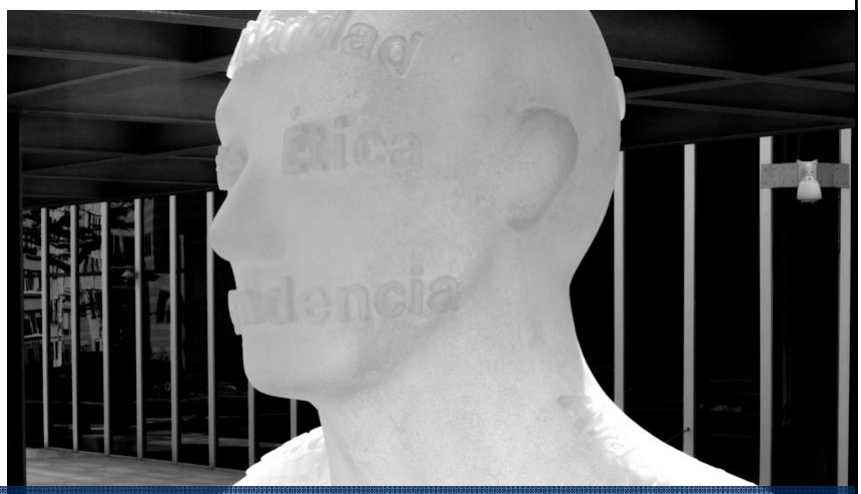
THE CHARTER IN ACTION



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THE CHARTER IN ACTION

1. IMPACT ON THE COURT OF JUSTICE
2. IMPACT ON NATIONAL COURTS
3. IMPACT ON THE LEGISLATURE
4. IMPACT ON THE OMBUDSMAN
5. IMPACT IN SPECIFIC AREAS OF EU LAW
    1. Competition Law
    2. Information Society
    3. Biotechnology
    4. Commercial Policy

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THE CHARTER IN ACTION

5. ACCESSION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS
    1. The draft accession agreement
    2. Opinion 2/13
    3. Aranyosi and Căldăraru (C-404/15)
    4. Avotnis vs. Lithuania (17502/07)

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Conclusion

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The scope of application and interpretation of the EU Charter

Dr Tobias Lock

ERA Trier, 15 September 2016

www.law.ed.ac.uk

Overview

1. Personal scope of the Charter
2. When does the Charter apply? – "implementing EU law" (Article 51)
3. Which prevails? EU law and national fundamental rights – the limits of Article 53
4. Rights or principles – the (direct) effect of Charter provisions

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Personal scope

Personal scope:

- Natural persons
  - Some rights reserved to EU citizens (see Title V on citizens' rights)
  - Most rights guaranteed to 'everyone' - follows also from Art 52 (3)
- Legal persons?
  - No general rule in the Charter
  - But CJEU in Case C-279/09 *DEB* (concerning Art 47)
    - Art 47 (and others) broad enough
    - German version uses 'Person' (and not 'Mensch' as in other articles)
  - Hence some Charter rights (e.g. 16, 17, procedural rights) certainly apply to legal persons; others (e.g. 1, 2, 3, 4) do not.

Applicability of the Charter

Article 51 - Field of application (= material scope)

1. 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.

Applicability of the Charter

Article 51 - Field of application (= material scope)

1. 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**.

Application of the CFR in MS

- What does 'implementing' mean?
  - Explanations to the Charter: when MS 'act in the scope of EU law'
  - Reference to two pre-Charter cases
    - Case 5/88 *Wachauf*: where national authorities act as 'agents' of the EU:
      - implementation/application of EU law
    - Case C-260/89 *ERT*: where MS derogates from EU law, in particular free movement rights
      - Possible reasons e.g. public policy, public security, public health (contained in derogation provisions)

Application of the CFR in MS

What does 'implementing' mean?

- Case C-617/10 *Åkerberg Fransson*
  - Criminally prosecuted for tax evasion: income tax and VAT
    - Had already paid fine levied by tax authorities
    - Does prosecution violate *ne bis in idem* laid down in Article 48 CFR?
  - Court: Implementing = when MS acts *'within the scope of EU law'*

    "The applicability of EU law entails applicability of the fundamental rights guaranteed by the CFR."

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Application of the CFR in MS

- Case C-617/10 *Åkerberg Fransson* … cont'd
  - Is prosecution for tax evasion an 'implementation of EU law'?
    - EU's VAT Directives say that "every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion."
    - Art 325 TFEU "obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures"
      - EU's own resources include revenue from application of a uniform rate of VAT
      - Hence: direct link between VAT evasion and EU financial interest
  - Hence prosecution *for VAT evasion* = implementation
  - What about income tax evasion?
    - No implementation
    - Hence cases can 'split' in this sense: partly within the scope of EU law and partly outside

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Application of the CFR in MS

What does 'implementing' mean – criteria?

Case C-206/13 *Siragusa*:

'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.

- Is national legislation intended to implement a provision of EU law?
- Nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law.
- Whether there are specific rules of EU law on the matter capable of affecting it.

Article 53 CFR

Art 53 CFR:

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.

- Which prevails? EU law or national fundamental rights?
- Example: Case C-399/11 *Melloni*

Article 53 CFR

Case C-399/11 *Melloni*

- Sentenced in Italy *in absentia* to 10 years
- European Arrest Warrant issued by Italy to enforce the sentence
  - Arrested in Spain.
  - Now fighting extradition on basis of Spanish constitution, which does not allow for surrender after convictions *in absentia* if no possibility of appeal exists to challenge that conviction.

Article 53 CFR

Case C-399/11 *Melloni* cont'd

- Does national constitutional law prevail on the basis of Article 53 CFR?
- CJEU: no

  "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."

Article 53 CFR

Case C-399/11 *Melloni* cont'd

- Hence 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 Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.
- What room is left for Article 53?
  - Depends on MS discretion in implementation
    - Where no discretion, EU law standards prevail over national constitutional standards.
    - Where discretion, national constitutional standards can come into play (as long as MS stays within the confines of its discretion).

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Rights and Principles

Article 52 (5) CFR

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

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Rights and Principles

What is the difference to a right?

- Explanations: "[Principles] do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities."
- Hence every EU act or MS act implementing EU law must comply with the rights in the Charter
- But must comply with principles only if the principle has been implemented

Rights and Principles

Example: Case C-356/12 *Glatzel*

- Challenged provision in EU Directive 2006/126 on driving licences: made it impossible for him to renew driving license because almost blind in one eye (ambyopia)
- Arg was that contrary to Art 26 CFR, which CJEU considered to be a principle
  - Existence of a principle does not require EU legislature to adopt any specifci measure
  - Here: Directive deemed implementation (recital made reference to disabled people and provision concerning disabled persons therein)
- Principle does not, however, confer a subjective right on individuals which they can invoke as such
- Hence no case to be answered
- Shows a 'thin' understanding of the effects of a principle
  - Question remains what effect principles have?
  - Are they only effective when interpreting implementing legislation?

Rights and Principles

Which provisions contain rights, which principles?

- e.g. Article 25: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life."
- Title IV in general?
  - Debatable, in particular regarding right to collective bargaining and action (cf. Laval and Viking cases)
  - AG Cruz Villalon in C-176/12 *AMS* (18 July 2013): presumption for principle if in Title IV (see now ECJ, 15 Jan 2014)
  - But AG Trstenjak in C-282/10 *Dominguez*: Art 31 (paid annual leave) is a right, not a principle
- Explanations: Art. 25, 26, 37 (non-exhaustive list)

Time for questions

CASE STUDIES ON APPLICATION OF THE EU CHARTER

Dr Tobias Lock, University of Edinburgh

ERA, Trier 15 September 2016

1. Asylum seeker

On 1 May 2015 S, an Afghan national, crossed the Greek-Turkish border and was arrested by the Greek authorities who sent him back to Turkey. He spent two months detained in appalling conditions there before (somehow) making his way to the United Kingdom where he applied for asylum on 22 September 2015.

According to Regulation 604/2013 (known as 'Dublin III'), where an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. If the application was made in another Member State, the latter must transfer the asylum seeker to the Member State responsible. Upon entering the territory of a Member State, applicants are usually fingerprinted in order to ensure that they apply for asylum in the correct place.

However, each Member State may nonetheless decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Regulation.

In 2011 the European Court of Human Rights had held that there was a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers in Greece. It further held that any attempt to send an asylum seeker back to Greece would amount to a violation of the right not to be subjected to inhuman or degrading treatment laid down in Article 3 ECHR. This right is also contained in Article 4 of the Charter.

The United Kingdom decided to transfer S back to Greece as this was the Member State responsible for processing the asylum application. S appealed this decision to the High Court of England and Wales, which referred the case to the CJEU.

Questions

1. Does the Charter apply?

2. What (substantive) arguments can be advanced by the lawyers acting for S?

2. Data Retention

In 2014 the CJEU decided in Joined Cases C-293/12 and 594/12 *Digital Rights Ireland* that the EU's Data Retention Directive (2006/24/EC) was incompatible with Articles 7 and 8 of the Charter and declared it invalid. The Directive had *inter alia* provided that communication service providers had to retain communication data (parties to phone calls; internet access; location of mobile phones; not the *content* of calls/emails, however) for at least 6 months. Given that the Directive covered, 'in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception', the CJEU considered it to be disproportionate.

Directive 2002/58/EC on privacy and electronic communications provides for a number of safeguards concerning the confidentiality of communications; a duty to erase data held by a provider; etc. Article 15 of the Directive allows for a restriction of these rights in order to 'safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences.'

Article 1 of that Directive defines its scope as follows:

> 1. This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector […]
>
> 3. This Directive shall not apply to activities […] covered by Titles V and VI of the Treaty on European Union [AFSJ and CFSP], and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.

At the time Directive 2006/24/EC was declared invalid, Sweden had already transposed it into Swedish law (entered into force 1 March 2012). The Swedish legislation places Swedish telecommunications providers under similar duties as those laid down in the Directive, in particular as regards the type of data to be retained and the period of retention.

The day after the CJEU declared Directive 2006/24/EC invalid, Swedish internet provider Tele 2 stopped retaining data and transmitting it to the Swedish authorities. The Swedish Post and Telecommunications Authority then ordered Tele 2 to continue submitting that data given that the Swedish legislation was still intact. Tele 2 brought an appeal before the Stockholm Administrative Court arguing that the legislation was contrary to the Charter.

Questions

1. Does the Charter apply in this case?

2. Do you think the challenge by Tele 2 would be successful in substance?

3. Sacked Embassy employees

Ms B and Ms J are both Moroccan nationals. They were employed as members of the domestic staff respectively at the Sudanese and Libyan Embassies in London. They were both dismissed and brought claims against the respective Embassies for unfair dismissal, failure to pay the national minimum wage and breach of the Working Time Regulations 1998. Ms J also claims arrears of pay, racial discrimination and harassment.

Two of their claims derive from EU law, namely:

- the UK Working Time Regulations (1998) implement the European Working Time Directive 2003/88/EC into UK law
- the EU Directive 2000/43/EC (The Race Directive) is implemented in the UK by The Race Relations Act 1976 (Amendment) Regulations 2003, SI No 1626 amending the Race Relations Act of 1976.

The Embassies claimed state immunity in reliance on sections 16(1)(a) and 4(2)(b) of the UK State Immunity Act 1961 which transposes a Council of Europe Convention on that issue. The effect of section 16(1)(a) is that states enjoy a blanket immunity from UK courts' jurisdiction in respect of proceedings concerning employment of the members of an Embassy.

NB: Under the UK doctrine of Parliamentary sovereignty, UK courts do not have jurisdiction to invalidate Acts of the UK Parliament. The only thing they can do is 'disapply' them in the specific instance that they violate EU law.

Questions

1. Is the EU Charter also applicable given that Article 47 EU Charter of Fundamental Rights also guarantees the right to a fair trial?

2. Did invoking state immunity for these employment claims amount to a breach of human rights law, given that Article 6 ECHR (the right to a fair trial) guarantees access to the courts, according to the case law of the European Court of Human Rights (ECtHR)?

4. Court fees

M was dismissed by her company (K) in 2012. On 25 June 2012 M and K came to a 'conciliation settlement' in respect of M's dismissal, which entitled K to a payment of €20,000.

M then applied to the competent court to enforce payment of the sum owed by K. That court however stayed the enforcement proceedings because K was insolvent. That stay was to last for as long as insolvency proceedings had not been brought to an end.

M lodged an appeal against this decision. Given that she failed to provide evidence that she had paid the court fees for the appeal, the appeal was dismissed.

M then lodged an appeal against this decision arguing that she was not liable to pay court fees as this would be contrary to her rights under Article 47 of the Charter.

Under the relevant domestic law, a party in an employment case 'for the purpose of bringing actions to enforce their employment rights in insolvency proceedings' is exempt from payment of court fees.

The final objective of the steps taken by M was to obtain a legal declaration of K's insolvency in order to be able to claim for compensation from the competent national guarantee institution set up under Directive 2008/94.

Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer provides that it shall 'apply to employees' claims from contracts of employment or employment relationships and existing against employers who are in a state of insolvency.' Furthermore, the Directive defines under what circumstances and employer is considered insolvent and provides that Member States must ensure that employees' outstanding pay claims are guaranteed.

Question:

Can M rely on the Charter?

5 Death row

Z is a US national and inmate on death row in a US prison. His execution by lethal injection is scheduled to take place on 25 September 2016. The substance used in such executions is Sodium Thiopental, which is manufactured (worldwide only) in the UK and thus needs to be imported into the US in order to carry out the execution.

Council Regulation (EC) 1061/2009 is the principal EU instrument establishing common rules for exports and regulating export controls. The basic principle is laid down in Article 1:

> "The exportation of products from the European Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this regulation."

However Article 10 permits Member States to derogate from the basic principle:

> "Without prejudice to any other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property."

The lawyers acting for Z request the UK government to ban the export of Sodium Thiopental to the United States. The government refuses to do so and a case is taken to the English High Court.

1. Would Z be able to rely on the ECHR given that Article 1 ECHR states:
"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"?

2. Can Z rely on the Charter in order to force the UK government to ban the export of Sodium Thiopental?

6. Sunday trading

Sunshine Garden Centre, a Belgian garden centre operator, objected to its competitors' (Happy Plants Garden Centre) refusal to comply with national legislation requiring retailers to observe one day of closure per week. They brought legal proceedings in the Belgian courts requesting that they be ordered to cease the practice and comply with the requirement to observe one day of rest per week.

Happy Plants Garden Centre argued in their defence that the Belgian obligation was contrary to EU law. They persuaded the Belgian Constitutional Court to make a preliminary reference to the Court of Justice on that point.

a) First, the CJEU was requested to determine whether the contested Belgian legislation was contrary to the principles of equality and non-discrimination set out in Articles 20 and 21 of the Charter, read in the light of Articles 15 and 16 of the Charter.

b) Secondly, the CJEU was asked to consider the Belgian measure's compatibility with the Treaty provisions on the free movement of goods and services (Articles 34, 35 and 56 TFEU).

Questions:

1. Please advise whether the Charter may apply in this case.

2. What might be the consequences in this case if the Court were to find that the Charter were applicable?

Workshop on the application of the Charter

Dr Tobias Lock

ERA Trier, 15 September 2016

www.law.ed.ac.uk

1. Asylum Seeker

Based on Joined cases C-411/10 and C-493/10 (NS and ME)

1. Does the Charter apply?
   - Is UK implementing Union law here – Article 51 (1) CFR?
   - Discretion as a factor?

66. that discretionary power must be exercised in accordance with the other provisions of that regulation.

67. the derogation from the principle laid down in [Article 13] of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of [Art 17 of] Regulation [604/2013] and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

1. Asylum Seeker

Based on Joined cases C-411/10 and C-493/10 (NS and ME)

2. Substantive arguments

- ECHR precedent?
  - See Article 52 (3) CFR (not mentioned by the ECJ)
- What is the consequence of a finding that returning asylum seeker would be in violation of Article 4 CFR?
  - Goes to the heart of the principle of mutual recognition, i.e. presumption that all MS act in a way that is compliant with the Charter

1. Asylum Seeker

ECJ:

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Regulation No [604/2013] indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No [604/2013] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

2. Data Retention

Based on Case C-203/15 (pending)

1. Does the Charter apply in this case?
    - P: Directive on which national law based is invalid
        - Is national law still implementation of that Directive?
            - Presumably not
    - Or is Sweden 'implementing EU law' for another reason – see Directive 2002/58
        - Article 1 (3) of that Directive excludes certain areas of the law from its scope, but not telecoms (see AG Opinion, paras 84-97)
        - Are general data retention obligations an implementation of Directive 2002/58?
            - Yes, because specifically provided for by Article 15 of that Directive (see AG Opinion paras 117-122)

2. Data Retention

Based on Case C-203/15 (pending)

2. Do you think the challenge by Tele 2 will be successful in substance?

- Compatible with Articles 7 and 8 CFR?
  - AG Opinion: interference, so that compliance with requirements for derogation in Art 52 (1) CFR necessary, in particular proportionality
    - While general data retention obligations not *per se* unnecessary, they must comply with the safeguards demanded by the ECJ in *Digital Rights Ireland*
    - And: must be proportionate *stricto sensu* as well

2. Data Retention

Based on Case C-203/15 (pending)

This means in particular:

- Must lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 CFR (*Digital Rights Ireland* paras 60-68), such as
  - Who can access the data?
  - Exceptions to what data can be stored, in particular in relation to professional secrecy.
  - Clear retention periods taking into account the usefulness for the purposes pursued by the legislation.
  - Safeguards against risk of abuse.

3. Sacked embassy employees

Based on Benkharbouche and Janah v Sudan/Lybia [2015] EWCA Civ 33 (England and Wales Court of Appeal)

1. Charter applicable?

   "it is common ground that both claimants have claims that fall within the scope of EU law. As the judge explained, Ms. Benkharbouche's claims under the Working Time Regulations and Ms. Janah's claims under the Working Time Regulations and for racial discrimination and harassment are derived from EU measures.

   They have other claims which they accept are not within EU law, such as claims for unfair dismissal.

   The question of what falls within the scope of EU law is controversial in some contexts but no one has taken issue with the point that in part Ms. Benkharbouche's claims and Ms. Janah's claims are within the scope of EU law . . ."

3. Sacked embassy employees

Based on Benkharbouche and Janah v Sudan/Lybia [2015] EWCA Civ 33 (England and Wales Court of Appeal)

2. State immunity = breach of human rights law?

- established line of ECtHR jurisprudence holds that restrictions on the access to court of embassy staff engage Article 6, but can be justified with reference to 'the legitimate aim of complying with international law to promote comity and good relations between States'
- However, the UK Court concluded that an immunity of such breadth as in s 16 UK State Immunity Act, which obstructs low-level staff from bringing claims that do not touch issues sensitive to their employer states, was not within 'the range of tenable views of what is required by international law' and was, hence, an infringement of Article 6 [53].
- It went on to carry out a similar comparative law exercise with respect to s.4(2)(b) UK State Immunity Act, which requires an individual to be either British or British-resident when they are hired in order to benefit from the section's exception to the general state immunity. As there was no established body of international practice consistent with s.4(2)(b), it similarly constituted a breach of Article 6 in conjunction with Article 14 of the Convention [66].

3. Sacked embassy employees

Based on Benkharbouche and Janah v Sudan/Lybia [2015] EWCA Civ 33 (England and Wales Court of Appeal)

Additional questions raised:

- Horizontal application of Art 47 CFR?
  - Yes (correct result though Court's reasoning unconvincing)
- Remedy?
  - Disapplication in so far as EU law claims are concerned.
  - Domestic remedy [in this case declaration of incompatibility] for the rest of the claims.

4. Court fees

Based on Case C-265/13 *Torralbo Marcos*

Can M rely on the Charter?

- P: national legislation on court fees not *intended* to implement provisions of EU law.
- Nonetheless, M is trying to eventually obtain compensation as provided for by Directive 2008/94

4. Court fees

Based on Case C-265/13 *Torralbo Marcos*

ECJ:

> 36 […] it must be noted that, at the present stage of the main proceedings, the situation at issue does not fall within the scope of that directive or, in general, of the scope of European Union law.
>
> 37 […] it follows from the terms of Article 2(1) of Directive 2008/94 that whether or not an employer must be deemed to be in a state of insolvency, for the purposes of that directive, is a matter of the national law and of a decision or finding of the competent national authority.

- Case appears to suggest that there needs to be a direct connection (not too much remoteness) between the MS obligation under EU law and the case at hand.

5. Death row

Based on English and Welsh High Court *Zagorski* [2010] EWHC 3110 (Admin)

1. Would he be able to rely on the ECHR?

- No because case outside of the UK's jurisdiction:

"In the present case the obligation of the United Kingdom under the Convention does not extend to securing Convention rights to these Claimants. The Claimants are US citizens convicted and sentenced by US Courts in respect of offences committed in the United States. They are being held in the United States.

They face a penalty imposed in accordance of the laws of the United States which will be implemented there. They are not and never have been at any material times within the territorial jurisdiction of the United Kingdom. The fact that the drug may be exported from the United Kingdom and the fact that the decision of the Defendant was taken in the United Kingdom do not serve to bring this matter within the jurisdiction of the United Kingdom for the purposes of Article 1."

5. Death row

Based on English and Welsh High Court *Zagorski* [2010] EWHC 3110 (Admin)

2. Can Z rely on the Charter?

- Rights: Article 2 (right to life) and Article 4 (right not to be subjected to inhuman punishment)
- Is UK implementing EU law here?
  - Export controls closely circumscribed by EU rules (Zagorski, para 67)
  - High Court: this is an ERT (Pfleger)-type case: derogation from EU law
  - Thus: UK is 'implementing EU law'
- High Court: however given that Articles 2 and 4 CFR are "co-extensive" with Articles 2 and 3 ECHR they cannot confer rights on claimants that would not have them under the Convention.
- Case dismissed.

6. Sunday Trading

Based on Case C-483/12 *Pelckmans Turnhout*

1. Is the Charter applicable?

ECJ

22 There is nothing specific in the order for reference demonstrating that the legal situation at issue in the main proceedings comes within the scope of EU law. . .

24 In any event, as regards the application of Articles 34 TFEU to 36 TFEU governing the free movement of goods, referred to by that court, it must be borne in mind, as this Court has observed on a number of occasions, that those provisions do not apply to national rules concerning the closure of shops that are enforceable against all economic operators pursuing activities within the national territory and that affect, in the same way, in law and in fact, the sale of domestic products and of products from other Member States…

26 It follows from all the foregoing that it has not been established that the Court has jurisdiction to interpret the provisions of the Charter referred to by the referring court.

6. Sunday Trading

Based on Case C-483/12 *Pelckmans Turnhout*

2. What might be the consequences if it were applicable?

- Belgian law would need to be disapplied by virtue of the Charter.
  - Though it would not be contrary to free movement law…
- Might one therefore argue that Article 51 (2) CFR had been violated?
  "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

Any further questions?

Social rights and principles in the EU Charter of Fundamental Rights

JEFF KENNER
PROFESSOR OF EUROPEAN LAW
UNIVERSITY OF NOTTINGHAM

The University of Nottingham

Structure of presentation

1. Sources of social rights and principles in EU law
2. The continuing significance of the Community Social Charter (CSC) 1989
3. Social rights and principles in the Solidarity Chapter of the Charter of Fundamental Rights (CFR) – contents and case studies

Sources of social rights and principles in the EU legal order

- Art 151 TFEU – refers to ESC and CSC as sources of EU social policy
- EU legislation – e.g. Working Time Directive; Decision authorising ratification by Member States of the Maritime Labour Convention
- case law of the CJEU – general principles and "particularly important" social rights
- social rights in the CFR sourced from, inter alia, from ESC, Revised ESC, CSC
- ILO Declaration on Fundamental Rights and Principles – no direct reference in the CFR

The continuing significance of the Community Social Charter

- non-binding but referenced in the TFEU, EU legislation, the CFR and case law
- inspired by ILO and ESC – social rights focus
- aim to strengthen social policy in the Member States not simply reflect social rights
- includes decent work - fair remuneration, social protection, decency in retirement
- legislative impulse on EU institutions; implementation obligation on Member States; non-retrogression

CFR – points of contrast with the CSC

- CFR has 'same legal value' as the treaties – EU primary law – reaffirms rights
- broader focus - civil, political, economic and social rights, freedoms and principles
- no reference to ILO in the Explanations (sources)
- selected social rights – missing ESC rights, dilution of social protection
- no legislative impulse on EU institutions but addressed to them
- no direct implementation obligation on the part of the Member States

UN and CoE sources of social rights and principles in the CFR explanations - examples

- freedom of association Art 12 – Art 11 ECHR
- right to engage in work Art 15 – Art 1(2) ESC
- rights of the child Art 24 – UN CRC
- integration of disabled people Art 26 – Art 15 ESC
- collective barg & action Art 28 – Art 6 ESC
- unjust dismissal protection Art 30 – Art 24 RESC
- family and professional life – Art 33 - Art 16 ESC
- social security and assistance – Art 34 - Arts 12-13 ESC

EU sources of social rights and principles in the CFR - examples

- non-discrimination, Art 21 – Art 19 TFEU
- gender equality, Art 23 – Arts 3 and 8 TEU, Art 157 TFEU
- workers' right to information and consultation, Art 27 – points 17, 18 CSC, Art 6 ESC
- fair and just working conditions, Art 31 – Dirs 89/391/EEC and 2003/88/EC
- prohibition of child labour and protection of young workers, Art 32 - Dir 94/33/EC, Art 7 ESC

Explaining the CFR – problem areas for social rights and principles

- scope, Art 51, limited obligations on Member States – only when 'implementing' EU law, no extension of field of application
- 'national laws and practices' Art 52(6)
- corresponding rights from ECHR, Art 52(3)
- hierarchy of rights and principles – some social rights are horizontal but others are not
- 'principles' not judicially cognisable, Art 52(5)
- balance economic freedoms and social rights

Hierarchy of social rights and principles – Solidarity Chapter

- **strong rights** – working time, rest, paid annual leave, Art 31(2), prohibition of child labour, protection of young workers, Art 32, maternity and paternity rights, Art 33
- **weak rights / principles** – workers' right to information, Art 27, collective bargaining/action, Art 28, unjust dismissal protection, Art 30, health care, Art 35
- **mere principles –** levels of social security, Art 34(1) and Arts 36-38 – environment and consumer protection

Case study 1 – scope of the Charter – Art 30, Cases C-488-491/12 & 562/12 *Nagy*

"Every worker has a right to protection against unjustified dismissal, in accordance with Union law and national practice"

- **no Commission proposal despite legal basis in Art 153 TFEU**
- **Art 24 RESC – 20/28 EU MS have ratified – not Hungary**
- **ILO Conv No 158 – 10/28 EU MS have ratified**
- **ECtHR, dismissal without giving reason violates Art 6 ECHR – *K.M.C.* v *Hungary*, 2012 – ECtHR cited CFR commitment**
- **CJEU – no jurisdiction – no implementation obligation under Art 51 CFR**
- **see also Case C-122/15 *C* (2 June 2016) – age discrimination case - direct taxation - outside scope of EU law**

Case study 2 – scope of the Charter – Art 31(2), C-579/12 RX-II *Strack*

- "Every worker has the right … to an annual period of paid leave" – source Art 7 of Dir 2003/88 – rights of EU staff?
- Art 288 TFEU – directives addressed to MS; but CFR addressed to EU institutions, Art 51
- CST – Charter applied – appeal to GC – GC held: no EU Staff Regs autonomous. Limited carry over period for long-term sickness
- CJ, agreed with CST, must be interpreted consistently with CFR and in conformity with case law. CFR yardstick for measurement of lawfulness of all EU acts

Case Study 3 – horizontal application of CFR Art 21, Case C-555/07 *Kücükdeveci*

- national provisions falling within the scope of EU law must conform with principle of non-discrimination on grounds of age, Dir 2000/78, Art 21 CFR
- national courts have a duty to disapply any contrary provision of national law falling within the scope of EU law – similar to the principle of 'direct effect' – horizontal application between private parties
- compare with *AMS* case on Art 27 CFR – workshop
- applied in Case C-441/14 *Rasmussen* (19 April 2016)
- but note Case C-432/14 *O v Bio Philippe Auguste* (1 Oct 2015) Member States enjoy a broad discretion in their choice not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it

Case study 4, Art 34(3) right or principle? C-571/10 *Kamberaj*

- "the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources" – in accordance with national law and practices
- Italian case - lower rate of housing benefit for non-EU nationals. Long-term Residents Dir 2003/109 grants right to equal treatment for LTRs but limited to "core benefits"
- CJEU – ambiguous on right/principle but was part of implementation of Art 34(3) therefore justiciable - left to national court to determine whether this amounted to a right to equal treatment to housing benefit

Case Study 5 – Case C-176/12 AMS compare with *Kücükdeveci*

- Art 27, workers' guarantee of information and consultation in accordance with national law and practice – Dir 2002/14/EC
- French law excluded some staff from calculation of threshold for worker involvement. Could they rely on Art 27 to enforce 'rights' under Directive?
- No. Art 27 is collective not individual right - not possible to infer that Art 3(1) of Dir is directly applicable rule of law - no link with a 'general principle of law' recognised by CJEU
- source of Art 27 from RESC and CSC not discussed
- CJEU criticised for reducing a right sourced from a Directive to a mere principle

Balancing economic freedoms and social rights

- **EXAMPLE 1 – freedoms v social rights: freedom to conduct a business, Art 16, based on case law of CJEU trumps fundamental social rights, Arts 28, right of collective bargaining, Case C-426/11 *Alemo-Herron***

Balancing economic freedoms and social rights

- **EXAMPLE 2 – C-438/05 *Viking* & C-341/05 *Laval* – where is the centre of gravity between market freedoms and social rights? National law and practices? Compare with *Demir* ECtHR 2008 - relevance of *Opinion 2/13* on EU Accession to the ECHR**

Equality and non-discrimination in employment

Does the Charter matter?

Aaron Baker, Durham University, UK

ERA, Trier, 15 September 2016

Durham University

Overview

Sources of EU anti-discrimination law

EU anti-discrimination concepts

- Direct discrimination
- Indirect discrimination
- Objective justification/proportionality
- Harassment
- Occupational requirements
- Positive action/discrimination

Issues around specific grounds of discrimination (eg age, disability)

How does the Charter affect this?

Sources of EU Equality Law

Article 19 TFEU (ex 13 TEC)

Article 157 TFEU (ex 141 TEC)

Framework Directive: 2000/78/EC (R & B, age, disability, SO)

Racial Equality Directive: 2000/43/EC

Equal Treatment Directive (recast): 2006/54/EC

EU Charter of Fundamental Rights Articles 20-26

Proposed (but stalled) Equal Treatment Directive from 2008

Direct Discrimination

1. Treated less favourably
2. Than another person is (or has been, or would be) treated
3. In a comparable situation
4. On the grounds of sex, race/ethnic origin, age, disability, religion or belief, or sexual orientation

-Can be by association (*Coleman v Attridge C-303/06)*

-No justification (except with age discrimination)

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Indirect Discrimination

1. A neutral provision, criterion, or practice (PCP)
2. Puts or would put people in a particular group at a particular disadvantage
3. Not an appropriate & necessary means to a legitimate aim

-Same protected characteristics as direct discrimination

-*Chez* (C-83/14): (a) need not be the claimant's group
(b) particular disadvantage not necessarily the same

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St Peter's Cathedral (Dom)

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Justification and the CJEU

Bilka (C-170/84): PCP must "correspond to a real need on the part of the undertaking, [be] appropriate with a view to achieving the objectives pursued, and [be] necessary to that end"

Chez: "assuming that no other measure as effective as the practice at issue can be identified . . the disadvantages caused. . . [must not be] disproportionate to the aims pursued and [the PCP must not] unduly prejudice. . . legitimate [protected] interests. . . (see C-499/08, C-581/10 and C-629/10)"

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Proportionality

Does the PCP pursue a legitimate aim (“real need”)?

Is it appropriate to achieve that end?

Is it necessary for the achievement of the objective?

-No more than necessary (ie, least discriminatory means)?

Are the negative effects intolerable, outweighing the objective (*Stricto sensu* proportionality)?

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Harassment

Unwanted conduct related to any of the protected grounds

With the purpose ***or*** effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment

Sexual Harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, ***in particular when creating*** an intimidating, hostile, degrading, humiliating or offensive environment

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Occupational Requirements 4(1)

Discrimination is not discrimination where: a [protected] characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate

Genuine

Determining

Strict application of proportionality?

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Example: Maximum Age Cases

Wolf (229/08) (2010)

Upper age limit of 30 for recruiting firefighters is justified under Articles 4(1) and 6(1), to ensure physical fitness for work

Vital pérez (416/13) (2014)

The same is not true of police, as the discriminatory effects are not necessary in the context of the demands of police work as compared to the work of firefighters

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Positive Action/Discrimination

"With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the [protected] grounds"

-Positive action (eg, training, encouragement, mainstreaming) focused on eliminating disadvantage is not prohibited

-Tie-breaks (non-systematic) in favour of underrepresented groups is positive action, not discrimination

-Positive discrimination is prohibited

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Porta Nigra (Roman “Black Gate”)

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Specific Grounds: Age

Article 6 of Framework Directive (2000/78/ec): ***direct*** age discrimination lawful if it is a proportionate means of achieving "employment policy, labour market and vocational training objectives".

-Are age discrimination exceptions essentially positive discrimination on the basis of age? Why is that OK with age?

-"Intergenerational balance" and age as a proxy for other concerns

-Mandatory retirement lawful in pursuit of intergenerational balance; avoiding humiliation or disputes over continuing capability; personnel planning

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Specific Grounds: Disability

The definition of disability: “a limitation which results . . . from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned ***in professional life*** on an equal basis with other workers

Reasonable accommodation: employers “shall take” appropriate measures to allow disabled workers “to have access to, participate in, or advance in employment, or to undergo training” unless this “would impose a disproportionate burden on the employer”

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Specific Grounds: Religion

Is it direct or indirect (or neither) discrimination to ban the wearing of clothes that indicate religion or other views?

Bougnaoui (C-188/15)—Employer sacked worker for wearing a hijab, citing (unwritten) policy to "require that discretion is used as regards the expression of the personal preferences of our employees." AG Sharpston argues that a ban on headscarves in the workplace is direct discrimination; notes that Charter does not mean that such issues must now be treated like Article 14

Achbita (C-157/15)—AG Kokott finds a ban to be indirect discrimination because it applies to all expressions of belief or views (thus not "on account" of religion), and also susceptible of being a genuine occupational requirement (!)

[The CJEU has not decided either case yet.]

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Kaiserthermen (Imperial Baths)

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The Role of the Charter

"Title III: Equality" has 7 articles, but only 21 (Non-discrimination) and 23 (Equality between women and men) are of practical relevance to employment disputes

Art 21: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

The Charter applies to EU institutions and to Member States "only when they are implementing Union law"

Article 51(2): "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

The Role of the Charter Applied

Åkerberg Fransson: scope of Charter=scope of EU law (VAT)

Melloni: MSs cannot apply "higher" rights standard so as to undermine the "primacy, unity, and effectiveness" of EU law

Siragusa:

(i) whether the national rule is intended to implement EU law;

(ii) the nature of the rule and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law;

(iii) whether there are specific EU law rules on the matter or whether there are EU law rules that are capable of having an effect on the matter.

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Does the Charter Change Anything?

Kücükdeveci (C-555/07) (2010): the Charter can require horizontal direct effect of directives

Test-Achats (c-236/09) (2011): the Charter can be used to find that a directive is contrary to a fundamental principle

AMS (C-176/12) (2014): horizontal direct effect will not apply where the Charter provision (Art 27) calls for further clarification through EU legislation

Glatzel (C-356/12): Article 26 does not grant a specific individual right (principle); analogy to 4(1) Framework Dir.

Conclusion

- The Charter can mean that, in cases between private individuals, national legislation that is in conflict with one of the equality directives must be dis-applied
- The Charter could be used to find, for example, that permitting the justification of direct age discrimination is in conflict with Article 21, and must be dis-applied
- For the most part, however, in the field of employment discrimination the Charter changes very little, because the directives are so extensive and detailed

Hotel Villa Hügel Veranda

Durham University

Equality and non-discrimination in employment

Case studies introduction

Aaron Baker, Durham University, UK

ERA, Trier, 16 September 2016

Durham University

Case Study 1

National law requires businesses to set aside a day of rest, but makes exceptions for certain kinds of business

The claimant (D Vout) works at an excepted business, and feels that his religious expression is thereby arbitrarily burdened

Claims that Article 21 of the Charter, read together with Articles 15 and 16, requires that the exceptions be dis-applied

Should the Charter apply? Can Mr Vout rely on Articles 15 and 16?

Case Study 2

A Spiring is denied a promotion as a result of an aptitude test that statistically places Afro-Caribbeans at a disadvantage

Mr Spiring believes that the same cultural bias that appears to affect Afro-Caribbeans affects him; he claims indirect discrimination

National tribunals have ruled that his claim cannot succeed because: (a) he is not part of the group demonstrated to suffer disproportionate disadvantage and (b) he cannot prove that he suffered disadvantage for the same cause as Afro-Caribbeans

Is such a claim allowed, and should National law be dis-applied?

Case Study 3

M Contrari has PDA (an autistic spectrum disorder) and, it now appears, has difficulty complying with direct instructions and commands in her specific job setting

She claims disability discrimination when denied a promotion, for which she was technically more qualified, because of “people skills”

National law only applies to disabilities that affect “normal day to day activities,” and the tribunal holds that her problem is not that

Is such a claim allowed, and should National law be dis-applied?

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Indirect Discrimination

1. A neutral provision, criterion, or practice (PCP)
2. Puts or would put people in a particular group at a particular disadvantage
3. Not an appropriate & necessary means to a legitimate aim

-Same protected characteristics as direct discrimination

-*Chez* (C-83/14): (a) need not be the claimant's group
(b) particular disadvantage not necessarily the same

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Equality Act 2010 s 19

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

* * *

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Equality Act 2010 s 6

A person (P) has a disability if—

(a) P has a physical or mental impairment, and.

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

* * *

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Specific Grounds: Disability

The definition of disability: “a limitation which results . . . from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned ***in professional life*** on an equal basis with other workers”

Case C-354/13 *Kaltoft v Municipality of Billund*

Reasonable accommodation: employers “shall take” appropriate measures to allow disabled workers “to have access to, participate in, or advance in employment, or to undergo training” unless this “would impose a disproportionate burden on the employer”

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ERA Case Study #1

D Vout vs 24/7 Enterprises (preliminary reference from the Rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp))

Facts:

Mr D Vout holds a position as assistant manager at a garden centre (shop selling plants and gardening equipment and supplies) owned and operated by 24/7 Enterprises. He objected to being required to work on Sundays, but he did not take any action until he learned of a national law that required businesses to set aside one day of rest per week. The law set out Sunday as a default rest day, but permitted establishments to choose a different day. The law also made exceptions for certain kinds of business. Mr Vout claims that Article 21 of the Charter, read in conjunction with Article 22 of the Charter (Cultural, religious and linguistic diversity) and Articles 15 and 16 (Freedom to choose an occupation and right to engage in work and Freedom to conduct a business) requires that the national law be dis-applied to the extent that it discriminates against those with strong religious beliefs in the need for a day of rest, and that it discriminates against those who work for certain kinds of business, in favour of those who work for the kinds that are not the subject of an exception.

An earlier preliminary reference to the CJEU (in the same case) established that there was no evidence to suggest that the national law amounted to indirect discrimination on the grounds of religious belief contrary to Directive 2000/78/EC. Now the national court refers to the CJEU the question of whether the distinction among types of businesses violates Article 21 read in conjunction with Articles 15 and 16.

Issue:

Does the CJEU have jurisdiction to rule on the question of whether a national law, which requires some businesses, but not others, to close for a day of rest, violates the principle of non-discrimination set out in Article 21 of the Charter read in conjunction with Articles 15 and 16? If so, must the national law be dis-applied?

Relevant law:

Article 8 of the Law of 10 November 2006 on opening hours in commerce, crafts and services (Belgisch Staatsblad, 19 December 2006, p. 72879, 'the LHO') is worded as follows:

'Access of consumers to a unit of an establishment, the direct sale of goods and services to consumers and home deliveries shall be prohibited during an uninterrupted period of twenty-four hours beginning on Sunday at 05.00 or at 13.00 and finishing at the same time on the following day.'

Article 9 of the LHO provides:

'Any trader or service provider may choose a weekly rest day other than that referred to in Article 8, beginning on the day chosen at 05.00 or at 13.00 and finishing at the same time on the following day.'

Article 16 of the LHO provides an extensive list of the kinds of business to which the prohibition in Article 8 does not apply.

Article 17(1) of the LHO provides inter alia:

'The prohibitions referred to in Article 6(a) and (b) and in Article 8 shall not apply in seaside resorts and communes or parts of communes recognised as tourist centres.'

EU Charter Articles 15, 16, & 21

ERA Case Study #2

A Spiring vs Shibboleth Ltd (preliminary reference from the UK Court of Appeal)

Facts:

Mr A Spiring works as a data entry assistant at Shibboleth Ltd. A post was advertised internally at Shibboleth which would represent a promotion for Mr Spiring, but it required that he achieve a competitive score on a test designed to assess the aptitude of applicants for the post. There has been a long history of Afro-Caribbean applicants doing poorly on this test. Afro-Caribbean applicants who have otherwise had a perfect work record have disproportionately had low results on the test, and many who have taken it report that it employs culturally biased questions. However, there is no reliable evidence to establish a particular reason for *why* the test appears to put Afro-Caribbeans at a disadvantage, even though the disproportionately negative effect is clear.

Mr Spiring also did poorly on the test, and did not receive the promotion. He found that the questions were difficult for him easily to understand, and he believes that a cultural bias in the test disadvantaged him as well. However, Mr Spiring is not Afro-Caribbean, but Albanian. There is no history of the test disadvantaging Albanians, and no way to demonstrate that Albanians disproportionately get poor results on the test. Nevertheless, Mr Spiring brought a claim of indirect race discrimination, on the ground that the test is clearly puts a particular racial group (Afro-Caribbeans) at a disadvantage, and he was placed at a disadvantage by this discriminatory test.

The lower tribunals in the UK held that (a) Mr Spiring's claim must fail because the test could not be said to discriminate against his racial group and (b) even if a claim on such a ground could proceed, he cannot demonstrate that he individually suffered the specific disadvantage that appeared to affect Afro-Caribbeans. The Court of Appeal sent the question to the CJEU on a preliminary reference.

Issue:

Does the EU Race Directive require that a member state prohibit, as indirect discrimination, any disadvantage in employment that results from indirect race discrimination against any group, regardless of whether the disadvantaged claimant is a member of that group? And if the answer is "yes", must the Member State dis-apply a national provision that defines indirect discrimination in terms of the claimant's racial characteristics?

Relevant law:

UK Equality Act 2010, section 19:

"19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim."

Racial Equality Directive 2000/43/EC

EU Charter Article 21

ERA Case Study #3

M Contrari vs Over Bearings Ltd (preliminary reference from the Employment Appeal Tribunal, Liverpool, UK)

Facts:

Ms Mary Contrari was employed as a code writer (computer programming) with Over Bearings Ltd. She was hired because she performed brilliantly in her University degree, where her final project was to develop a programme that was so advanced that it already had commercial value within the bearings industry. In other words, she was highly qualified and excellent at her job of writing code for use in modelling the reliability of steel bearings.

Unfortunately, even though her work was excellent, some problems emerged in the workplace. She applied for a promotion to "senior code writer" (a modest promotion, involving a slightly higher salary and a leadership role on some team projects) and was rejected. There was no question that she was the best code writer who applied for the post. However, the woman who was awarded the promotion was preferred because she had better "people skills". Ms Contrari apparently had a tendency, when told directly to do something, either to argue with her manager about the wisdom or correctness of the instructions, or to produce a result that would work, but was not actually what her manager asked her to do.

Many years ago Ms Contrari had been diagnosed with Pathological Demand Avoidance Syndrome (PDA), which is an Autistic Spectrum Disorder. It is characterised by, among other symptoms of high-functioning autism, a pathological resistance to compliance with demands from others (it has to do with difficulties processing external, as opposed to internal, promptings to act). This never created problems for her in the past because she was home-schooled and so brilliant that she could perform all of her University assignments without input from authority figures. The problem at work seems to have arisen because in her job her manager would walk up to her work-station and give her direct instruction which she was expected to follow. She told them that if they would just let her solve the problems the way she wanted, everything would be fine; but the management wanted her to follow their instructions.

Ms Contrari submitted a discrimination claim to the Liverpool Employment Tribunal alleging that the denial of promotion was discrimination based on her disability, PDA. The tribunal rejected her claim, on the ground that her condition did not satisfy the definition of "disability" in the UK Employment Act 2010. That definition requires a "substantial and long term adverse effect on [the] ability to carry out normal day-to-day activities," and the tribunal ruled that whatever problems she might face at work, these were not "normal day-

to-day activities" because, among other reasons, she had never had any problems until she took up this post. The tribunal viewed the situation as a simple personality conflict.

On appeal the Employment Appeal Tribunal (EAT) decided to make a preliminary reference to the CJEU on the question of whether this decision was correct under EU law.

Issue:

Does Directive 2000/78/EC require that national law treat PDA as a disability? If so, can the Equality Act 2010 definition of disability be interpreted consistently with the directive? If not, must the national law be dis-applied?

Relevant law:

Section 6 of the Equality Act 2010:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and.

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Section 15 of the Equality Act 2010:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Quinlan v B & Q plc (UK EAT 1386/97): an assistant at a garden centre was not disabled within the meaning of the Act because, although unable to lift heavy objects following heart surgery, he was capable of lifting everyday objects.

Directive 2000/78/EC

EU Charter Articles 21 & 26

Dr Anna Śledzińska-Simon (University of Wrocław)
Workshop on the application of selected substantive provisions of the EU Charter with relevance for social law

THE CHARTER OF FUNDAMENTAL RIGHTS IN PRACTICE: SEMINAR FOR LEGAL PROFESSIONALS

Academy of European Law, Trier, 15-16 September 2016

Case no. 1

Mr. Javier Mendoza was born in April 1953. He is a Spanish national and travelled to the UK in 1979 to start working in the banking sector. He has been permanently employed since then and lived in London with his partner. In 2007 he was diagnosed as suffering from gender dysphoria and decided to change his gender to female. For medical reasons he was not able to undergo reassignment surgery, but a hormonal treatment for two years. In 2010 Javier went to Spain to request the change of his name and gender in the public registry. Upon this change he also issued a new passport. In Spain the law provides for the rectification of gender in the public registry without the need to undergo the medical treatment.

Coming back to the UK as Bianca Mendoza, she claimed the right to state pension at the age of 63. Yet, the British authorities refused to recognize her entitlement with the justification that according to the national social security law she remained a male. In the UK individuals are free to use a name of their own choosing and may change their name or documents such as a driving license or a passport, but the full recognition of gender change requires surgical reassignment.

Please consult Mrs. Mendoza on her situation.

Questions:

1. Does the EU law apply to this case?
2. What is the connecting factor between national provisions and the EU law?
3. Does the Charter apply to the circumstances described above? If yes, which provisions?
4. Does the decision of the British authorities infringe upon fundamental rights of Mrs. Mendoza?
5. Does the EU law mandate the recognition of gender change pursued under the national law of another Member State for the purpose of social security law?

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EU law

Article 4(1) of Directive 79/7 provides:

The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- the scope of the schemes and the conditions of access thereto,

- the obligation to contribute and the calculation of contributions,

- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

Article 7(1) of Directive 79/7 provides that the directive is to be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits…

National law

On 1 July 2004, the Gender Recognition Act 2004 (hereinafter 'the 2004 Act'), which came into force on 4 April 2005, was adopted.

That Act permits persons who have already undergone gender reassignment or who intend to undergo gender reassignment surgery to apply for a gender recognition certificate, on the basis of which near-complete recognition of their change of gender can be obtained.

Under section 2(1) of the 2004 Act, a gender recognition certificate must be issued if the applicant fulfils, inter alia, the following conditions:

(a) [the applicant] has or has had gender dysphoria,

(b) [the applicant] has lived in the acquired gender throughout the period of two years ending with the date on which the application is made…

Section 3(3) of the 2004 Act provides that the conditions for gender recognition are not met unless:

(a) the applicant has undergone or is undergoing treatment for the purpose of modifying sexual characteristics, or

(b) treatment for that purpose has been prescribed or planned for the applicant…

Section 9(1) of the 2004 Act provides that:

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman).

Under section 9(2) of the 2004 Act, the gender recognition certificate does not affect things done, or events occurring, before the certificate is issued.

As regards retirement benefits, paragraph 7(3) of Part 2 of Schedule 5 to the 2004 Act provides:

… if (immediately before the certificate is issued) the person –

(a) is a man who has attained the age at which a woman of the same age attains pensionable age, but

(b) has not attained the age of 65,

the person is to be treated … as attaining pensionable age when it is issued.

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Case no. 2

Drone surveillance

Mr. Kuczma lives at the Hungarian-Serbian border. During the period from 5 August 2015 to 11 April 2016, at night time, Mr Kuczma used a drone to surveil trespassing of strangers on his property. He had a large family home, a fruit garden and agricultural field. The drone was circulating exclusively above his estate, surveying the ground, to record the entrance to his home, the public footpath and the field. The drone could take off and send out live video feed to its remote operation center. The missions could be even launched when Mr Kuczma and his family were away, from his mailbox.

In June 2016, the Hungarian parliament adopted a law that allows Hungarian border officials to summarily return asylum seekers and migrants apprehended up to eight kilometers inside Hungarian territory to Serbia. The law entered into effect on July 5 and was already used to catch and escort 151 irregular border crossers back to Serbia during the 12 first hours of the law being in force. The Office of the United Nations High Commissioner for Human Rights expressed concern that the law may result in law enforcement agencies not respecting the human rights of migrants and the violation of international law by expelling them by force without any legal procedure.

For Mr Kuczma only reason for operating the drone was to protect the property, health and life of his family and himself. Yet, as his family had for several months observed night marches of people trespassing his land and destroying his harvest, he started to hand over the video reports to the police. In result of his actions, several people have been arrested, detained for illegal border crossing or sent to Serbia without the possibility to submit their asylum applications.

By decision of 4 August 2016, following a request from one of the NGOs for confirmation that Mr Kuczma's surveillance system was lawful, the national Data Protection Office found that Mr Kuczma had infringed Law No 101/2000, since:

– as a data controller, he had used a camera system to collect, without their consent, the personal data of persons moving along the street or entering the house opposite;

– he had not informed those persons of the processing of that personal data, the extent and purpose of that processing, by whom and by what means the personal data would be processed, or who would have access to the personal data; and

– as a data controller, Mr Kuczma had not fulfilled the obligation to report that processing to the Office.

Please consult Mr. Kuczma on his situation.

Questions:

1. Does the EU law apply to this case?
2. What provisions of the Charter are relevant?
3. Is the operation of a drone surveying the farm to be classified as the processing of personal data as the processing of personal data "by a natural person in the course of a purely personal or household activity" for the purposes of Article 3(2) of Directive 95/46 …, even though such a system also monitors a public space?'
4. Is the national law that allows the police to expel a person from the territory of a Member State without any procedure in compliance with the Charter?

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EU law

Directive 95/46

Recitals 10, 12 and 14 to 16 in the preamble to Directive 95/46 state:

(10) … the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; … for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community; ...

(12) … there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses; ...

(14) … given the importance of the developments under way, in the framework of the information society, of the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons, this Directive should be applicable to processing involving such data;

(15) … the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question;

(16) … the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law.'

Under Article 2 of Directive 95/46:

For the purposes of this Directive:

(a) "Personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference … to one or more factors specific to his physical … identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) "personal data filing system" ("filing system") shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(d) "controller" shall mean the natural … person … which alone or jointly with others determines the purposes and means of the processing of personal data ...'.

Article 3 of that directive provides:

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.

Article 7 of Directive 95/46 is worded as follows:

Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or ...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for [sic] fundamental rights and freedoms of the data subject which require protection under Article 1(1).

Article 11 of Directive 95/46 provides:

1. Where the data have not been obtained from the data subject, Member States shall provide that the controller … must at the time of undertaking the recording of personal data … provide the data subject with at least the following information, except where he already has it:

(a) the identity of the controller ...;

(b) the purposes of the processing;

(c) any further information such as

– the categories of data concerned,

– the recipients or categories of recipients,

– the existence of the right of access to and the right to rectify the data concerning him

insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.'

Article 13(1) of the directive provides:

Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Article … 11(1) … when such a restriction constitutes a necessary [measure] to safeguard: ...

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions; ...

(g) the protection of … the rights and freedoms of others.'

Under Article 18(1) of Directive 95/46:

Member States shall provide that the controller … must notify the supervisory authority … before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

National law

Paragraph 3(3) of Law No 101/2000 Sb. on the Protection of Personal Data and the Amendment of Various Laws ('Law No 101/2000') provides:

This Law does not cover the processing of personal data carried out by a natural person solely for personal use.'

Paragraph 44(2) of that law governs the liability of the personal data controller, who commits an offence if he processes that data without the consent of the data subject, or if he does not provide the data subject with the relevant information or if he does not comply with the obligation to report to the competent authority.

Under Paragraph 5(2)(e) of Law No 101/2000, the processing of personal data is in principle only possible with the consent of the data subject. In the absence of such consent, personal data may be processed where doing so is necessary to safeguard the legally protected rights and interests of the data controller, recipient or other data subjects. However, such processing must not adversely affect the data subject's right to respect for his private and family life.

Please see also relevant provisions of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted)

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Case no. 3

Entry to a territory of a Member State with a same-sex partner

On November 14, 2011 the border guard at the Warsaw airport refused to allow entry into the territory of Poland to Mr. M.C., a citizen of the Philippines who travelled with his life partner, a Polish citizen. During the standard border control Mr. M.C. presented a valid passport and the residence permit of a family member of an EU citizen issued by the UK authorities in result of the conclusion of a civil partnership with a citizen of Poland. However, the border guard found that Mr. M.C. did not fulfill the conditions for entry into the territory of Poland.

According to the officer, due to the lack of recognition of same-sex partnerships under the Polish law, Mr. M.C. should have obtained a visa or another valid document entitling him to enter and stay on the territory of Poland. In result, the Commander of the Border Guards in Warsaw (the Commander) issued a decision refusing Mr. M.C. entry to the territory of the Republic of Poland (Decision No 9/2011/KGS).

Questions:

1) Is the EU law applicable in this case?
2) What is the problem related to the protection of fundamental rights?
3) How should the national court decide the case? If you consider the court should refer a preliminary question, what questions should it ask?
4) Should Mr. M.C be considered a family member in the light of the Citizens' Directive?
5) What are the obligations of a Member State towards same-sex partners accompanying EU citizens?
6) Should Mr. M.C. be considered a family member by a Member State which does not recognize same-sex partnerships or marriages?
7) Should Mr. M.C. be exempted from the duty to obtain visa?

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EU law

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Preamble

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (11) or, where appropriate, of the applicable national legislation.

(…)

Article 2

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:

   (a) the spouse;

   (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

   (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

   (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Article 5

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

Article 10

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

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Case no. 5

Destruction of an illegal Roma site

A group of Roma came to the town of X. in 2004, after the country accessed the European Union. It settled down on a plot of land belonging to the municipality X. in makeshift houses, with no access to water, electricity, or a sewage system. Their presence was tolerated by the local authorities for many years despite repeated complaints from the neighbours about littering, noise, and misbehaviour (begging). The local authorities began to provide the residents of the camp with water and mobile toilets.

The vast majority of the residents of the camp are citizens of another Member State of the European Union. Altogether there are around 30 families with children of different age, a total of 80 persons, living in the camp. Some of them do not avail of valid identity documents. The composition of the group is continuously changing. Some families temporarily leave the camp and go to other Member States for economic reasons. Some of them return to the camp or new Roma families come from their country of origin or other regions of the host country, and settle down.

In 2012, the local authorities ordered the immediate removal of Roma from the municipal plot, justifying this demand with the need to protect the property, public order (for prevention of criminal offences), natural environment (for protection of a safe environment), and the rights of other persons living in the neighbourhood. The authorities also stated that living with small children under the current conditions in the camp may lead to the breakout of epidemics.

Roma living in the camp do not have regular jobs and some of their children do not go to school. They earn a living by collecting scrap metal, undertaking odd jobs, and begging. They regularly pay fines for begging (petty offense) and for the lack of registration of the residence of a EU citizen over the period of 3 months (under the law implementing the Directive 2004/38/EC of the European Parliament and of the Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States).

In 2013 the local authorities filed a lawsuit seeking the removal of 25 Roma, including children, from the plot. The families moved from the indicated plot to another one in the same area.

In 2015 the local authorities warned the inhabitants of the camp about the plan to destroy their houses as illegal construction in pursuance to the decision of the Provincial Construction Site Inspector. In summer 2015 two houses on the disputed plot were destroyed and remnants of the settling removed.

Questions:

1. What is the problem related to the protection of fundamental rights in this case?
2. Is the EU law applicable to the above circumstances?
3. Does the CFR apply to the above circumstances? If yes, which provisions?
4. Does the European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States apply to the facts of the case concerning the removal order?
5. Does the Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin apply to this case?
6. Does the removal order amount to discrimination of Roma settlers?
7. Does the destruction of illegal construction amount to discrimination of Roma settlers?
8. What is the relevance of the jurisprudence of the European Court of Human Rights in this case?

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Relevant case-law:

European Court of Human Rights

Yordanova and Others v. Bulgaria (2012) – in this case the European Court of Human Rights in Strasbourg found that there had been a violation of Article 8 of the Convention (the right to protection of private and family life and the protection of home) with regard to the order against Roma who were Bulgarian citizens to vacate plots belonging to the city of Sofia, neighbouring with a land sold for residential investments. In this case the Roma camp existed for decades. The Court did not find violation of Article 1 of Protocol No. 1 (protection of property) in conjunction with Art. 14 (prohibition of discrimination) .

Winterstein v. France (2013) – in this case the ECtHR found that there had been a violation of Article 8 of the Convention with regard to the removal of Roma, mostly French citizens, from the forest area they had been occupying for a longer period, because the local authorities included it in the special protection zone. The execution of the removal order led to homelessness of the majority of persons concerned. As in Yordanova, the Court found no violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention.

In all the above cases, the Roma settlers occupied the municipal property without a legal title.

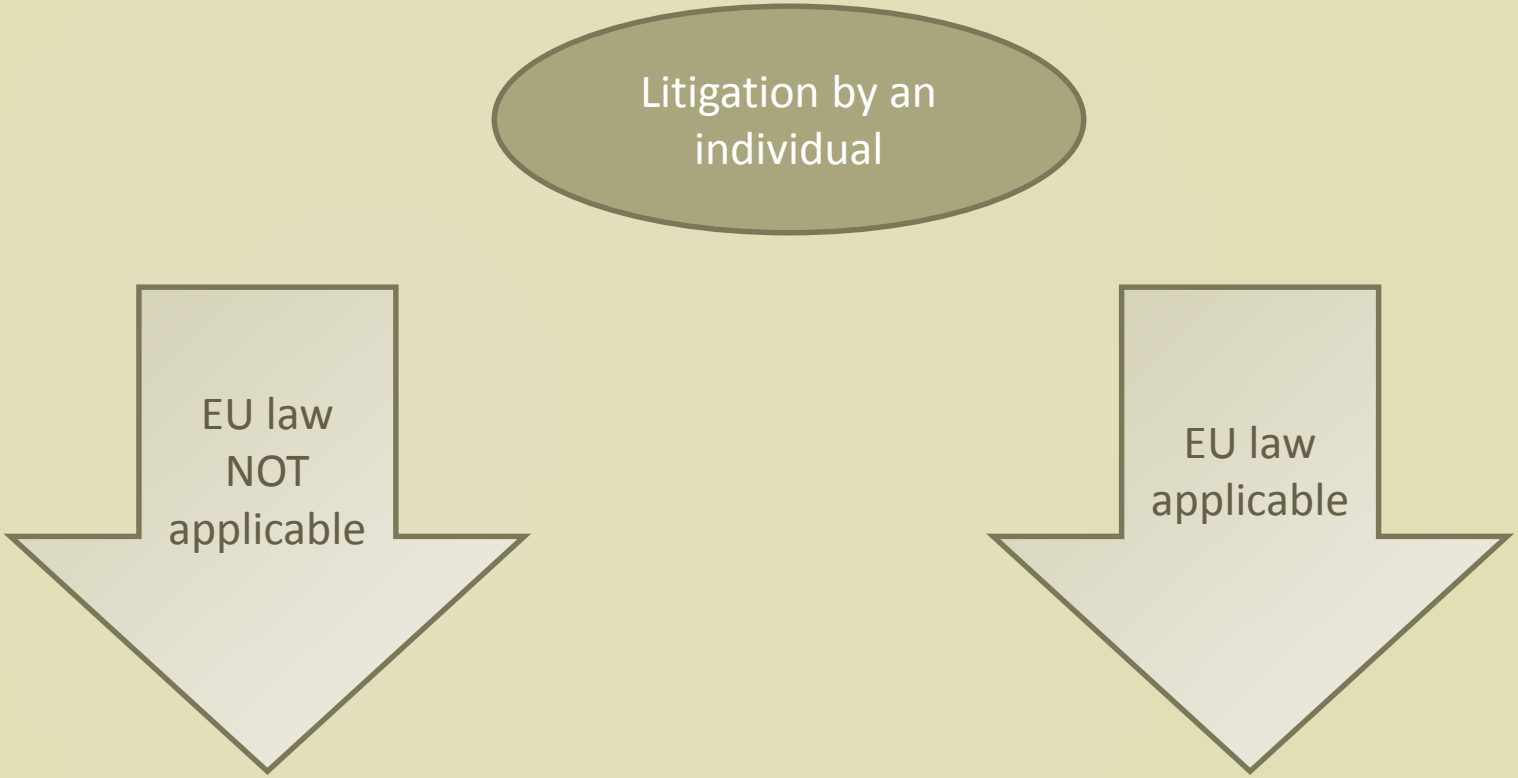
European Committee of Social Rights (a treaty body in the Council of Europe)

In a number of cases – i.e. in ECRR v. Italy, Application No. 27/2004, 12.07.2005; ECRR v. Bulgaria, Application no. 31/2005 , 18.10.2006; FEANTSA v. France, Application no. 39/2006, 12.05.2007; ECRR v. France, Application no. 52/2008, 26.10.2009 the Committee held a violation of provisions of the European Social Charter (the right to protection of the family, the right to housing and the prohibition of discrimination) with regard to the failure to take special measures to protect people at risk of social exclusion.

In more recent decisions – in Centre on Housing Rights and Evictions v. France, Application No. 63/2010, 28.06.2011, the Committee found the French policy of "O" tolerance for the Roma of Central and Eastern Europe living in illegal camps breaches the European Social Charter.

Fundamental Rights and their judges in Europe

Strasbourg or Luxembourg?



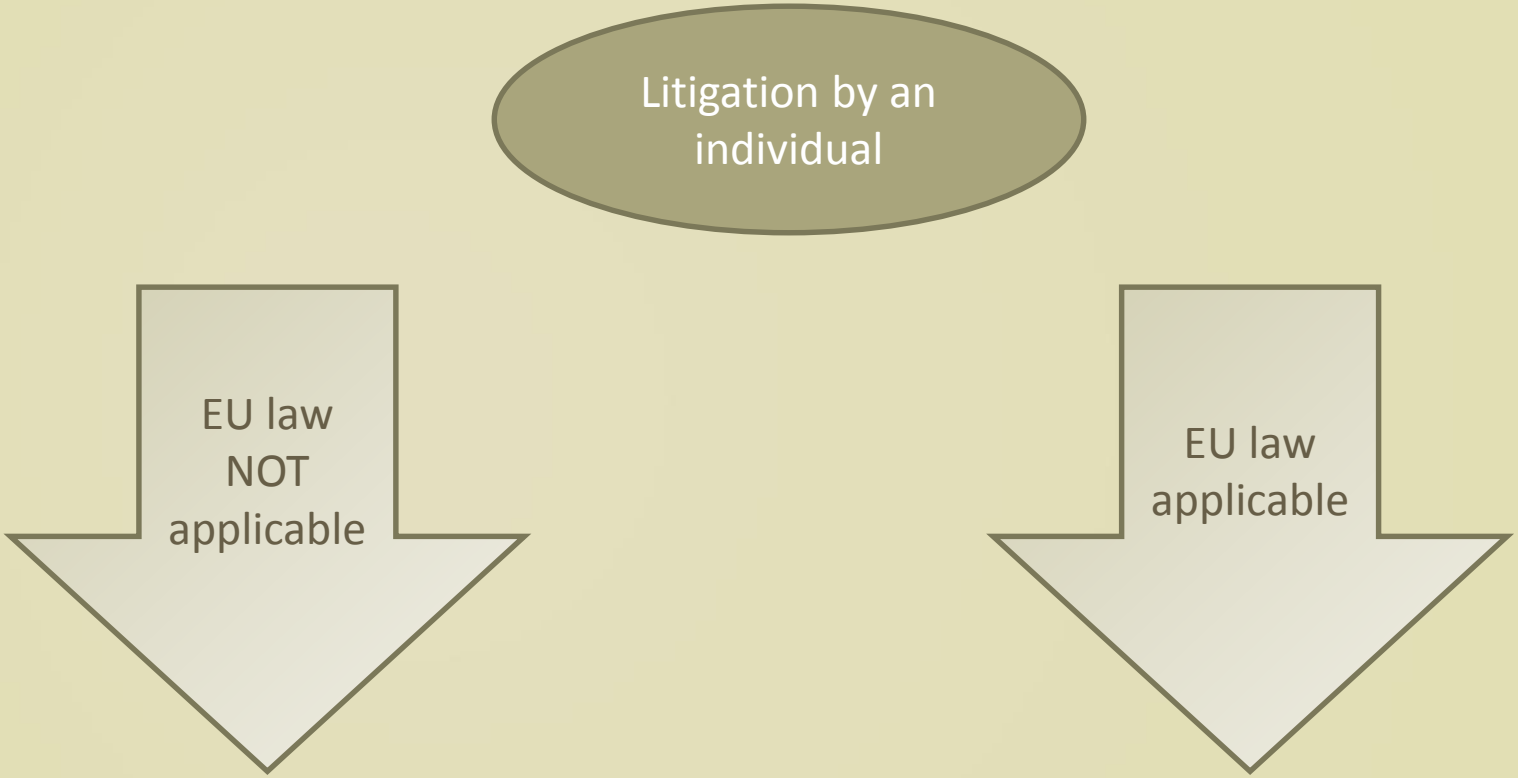
Appeal to the DOMESTIC COURTS which apply :

- **Their own domestic law**
- **The ECHR**

Application to the STRASBOURG COURT
(after exhaustion of domestic remedies) which applies :

- **Only the ECHR**

Strasbourg or Luxembourg?



EU law applicable

ACTS BY EU INSTITUTIONS

Direct appeal to EU COURTS (e. g. 263 § 4 TFEU) which apply :

- **The EU-Charter**
- **Other relevant EU legislation**
- **But also, indirectly, the ECHR:**
  - ✓ **52 § 3 EU-Charter**
  - ✓ **as part of the "general principles of the Union's law" (6§3 TEU)**

ACTS BY MEMBER STATES

Appeal to the DOMESTIC COURTS (acting as "Union Courts of ordinary jurisdiction") which apply:

- **EU law, including the Charter**
- **The ECHR (directly)**
- **Their own domestic (substantial and/or procedural) law**

Preliminary ruling by the ECJ (267 TFEU) which applies :

- **The EU-Charter**
- **Other relevant EU legislation**
- **But also, indirectly, the ECHR:**
  - ✓ **52 § 3 EU-Charter**
  - ✓ **as part of the "general principles of the Union's law" (6§3 TEU)**

DOMESTIC COURTS acting as "Union Courts of ordinary jurisdiction"

The STRASBOURG COURT (under the terms of the Bosphorus – jurisprudence[1])

[1] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Application no. 45036/98), ECtHR, 30 june 2005

SUMMARY

EU Law not applicable	EU law applicable	
DOMESTIC COURTS • Domestic law • ECHR	**EU COURTS** • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation	**DOMESTIC COURTS ("ordinary jurisdiction")** • EU law, including the Charter • ECHR • Domestic law
STRASBOURG COURT • ECHR		**ECJ** • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation
		DOMESTIC COURTS ("ordinary jurisdiction")
		STRASBOURG COURT Bosphorus - jurisprudence

The Charter of Fundamental Rights and the European Convention of Human Rights: complementing or competing systems of fundamental rights protection in Europe?

Prof. Johan Callewaert
Deputy Grand Chamber Registrar

Bosphorus v. Ireland (45036/98)

If … equivalent protection is considered to be provided by [an international] organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. (§ 156)

Bosphorus v. Ireland (II)

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights. (§ 156)

Bosphorus v. Ireland (III)

By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued. (§ 155)

Bosphorus v. Ireland (IV)

It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. (§ 157)

Michaud v. France (12323/11)

The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply. (§ 115)

Summing up the requirements of the Bosphorus presumption:

- Implementation of EU law
- No exercise of discretion by the domestic courts
- Relevant case-law of the CJEU
- No manifest deficiency

Art. 6 EU-Charter

Everyone has the right to liberty and security of person.

Art. 5 ECHR

1.Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a.the lawful detention of a person after conviction by a competent court;

b.the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c.the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d.the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e.the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f.the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2.Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3.Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4.Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5.Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Art. 52 § 3 EU-Charter

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Art. 52 § 3 EU-Charter

- Link between EU law and the Convention
- Necessary, especially in view of the fact that the EU-Charter borrowed a large number of Convention provisions while giving them a different, simplified wording.
- Double rule:
  - Convention standards as minimum protection standards under EU law
  - Possibility for EU law to raise this protection level

Interpretational integration of fundamental rights

- National fundamental rights to be applied only to the extent that they do not affect the efficiency of EU law (Akerberg Fransson, C-617/10, § 29)
- Secondary legislation to be interpreted in harmony with the Charter (J.N., C-601/15 PPU, § 48)
- Charter to be interpreted in compliance with the Convention (Art. 52 § 3)
- → Convention as common minimum standard on which a higher protection can be built

Avotins v. Latvia (17502/07)

In examining whether, in the case before it, it can still consider that the protection afforded by EU law is equivalent to that for which the Convention provides, the Court is especially mindful of the importance of compliance with the rule laid down in Article 52(3) of the Charter of Fundamental Rights given that the entry into force of the Treaty of Lisbon ... conferred on the Charter the same legal value as the Treaties. (§ 103)

Individual approach

- Fundamental rights apply to the whole of the jurisdiction of a State / the EU, including Constitutional law
  - *See Opinion 2/13: "Respect for fundamental rights being a condition of the lawfulness of EU acts, measures incompatible with those rights are not acceptable in the EU" (§ 169)*
- Respect for fundamental rights to be assessed on a case-by-case basis

Systemic approach

- Fundamental rights to be interpreted in light of the constitutional objectives of the EU (Opinion 2/13)
- → where required by those objectives:
  - restricted competence of some judges to assess respect for fundamental rights
  - global assessment of respect for fundamental rights ("systemic flaws")

Opinion 2/13

"Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above." (§ 177)

Effects of fundamental rights

Two key questions relating to the methodology of mutual recognition:

1) Does an executing judge have the competence to assess respect for the fundamental rights of the person concerned in the issuing State, at least if he has reasons to fear a breach of those rights?
2) If so, should he assess those rights on a case-by-case basis?

Opinion 2/13 (I)

"In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law." (§ 194)

Opinion 2/13 (II)

It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. (§ 191)

N. S. & M. E. (C-411/10 & C-493/10)

It cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights. (§§ 82-83)

M.S.S. v. Belgium and Greece (30696/09)

Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.
(§ 367)

Tarakhel v. Switzerland (29217/12)

Were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention,
(§ 122)

German Constitutional Court (15.12.15, 2 BvR 2735/14)

In the presence of factual elements indicating that in the event of a transfer of a person to the Member State which issued the EAW the requirements of respect of that person's dignity might not be met, the German Fundamental Law and Union law both impose on the executing German judge an obligation to enquire on a case-by-case basis about the situation in the issuing Member State and, if necessary, not to carry out the transfer. (§§ 74-83, non official summary)

Avotins v. Latvia (17502/07) (I)

[The Court] must verify that the principle of mutual recognition is not applied automatically and mechanically … to the detriment of fundamental rights. (§ 116)

Avotins v. Latvia (17502/07) (II)

In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient.

Avotins v. Latvia (17502/07) (III)

However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.

Avotins message

- The effective protection of fundamental rights calls for a case-by-case approach
- The standard Convention approach can be adapted to accommodate mechanisms designed to facilitate international or European cooperation, such as mutual recognition
- However, not to the point of replacing an individual assessment by quasi-irrebuttable presumptions

Aranyosi & Caldararu (C-404/15 & C-659/15 PPU)

Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant … must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.

Aranyosi & Caldararu (C-404/15 & C-659/15 PPU)

The Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter. (§ 83)

Aranyosi message

- The executing judge is under an obligation not to transfer if there are reasons to fear a violation of Art. 4 EU-Charter in the issuing State
- The standard has become individual again (no longer limited to "systemic flaws")

Conclusion

- Greater convergence towards an individual approach to fundamental rights
- Example of fruitful judicial dialogue between national Supreme Courts, the CJEU and the ECHR
- However, vigilance is still required: the temptation of a more systemic approach is still lurking, as it is more convenient, being less demanding

Thank you!

Analyse

Convergences et divergences dans la protection européenne des droits fondamentaux

Johan Callewaert(*)

- **On ne peut plus aujourd'hui s'arrêter au contenu des droits fondamentaux ; sans se demander comment ils sont appliqués**
- **Quand il s'agit pour le droit de l'Union d'appliquer les droits fondamentaux, il semble traversé par des tensions conceptuelles et méthodologiques fortes, à la recherche d'un point d'équilibre**
- **Les développements les plus récents consécutifs à l'avis 2/13 montrent qu'une certaine convergence entre le droit de l'Union et la Convention est possible**

Le législateur de l'Union a opté pour la cohérence et la convergence entre le droit de l'Union et la Convention européenne des droits de l'homme (« la Convention »), comme en témoignent à la fois le contenu de la Charte des droits fondamentaux de l'Union européenne (« la Charte »)[1], le principe d'homogénéité inscrit en son article 52, § 3, et l'injonction à l'Union européenne d'adhérer à la Convention[2]. Toutefois, l'avis 2/13 de la Cour de justice de l'Union européenne (« la C.J.U.E. »), qui rejette le projet de traité d'adhésion soumis pour avis par la Commission européenne, ignore l'article 52, § 3, et insiste au contraire sur l'autonomie du droit de l'Union[3], semble avoir mis en question cette orientation.

Face à ce coup d'arrêt, et avant de remettre l'ouvrage sur le métier, on peut donc légitimement se demander si la recherche de convergence entre droit de l'Union et Convention est encore pertinente aujourd'hui, si elle en vaut toujours la peine. Pourquoi ne pas tout simplement préférer l'autonomie et le pluralisme, y compris dans le domaine des droits fondamentaux, comme semble le préconiser l'avis 2/13 ? C'est la première série de questions à laquelle la présente étude s'attachera à donner des réponses. Dans un deuxième temps seront analysés les progrès enregistrés sur la voie de la convergence entre droit de l'Union et Convention mais aussi les divergences qui subsistent sur ce terrain. Quelques remarques finales clôtureront l'analyse.

1 La convergence comme nécessité

Les explications à l'article 52, § 3, de la Charte se réfèrent à la « cohérence nécessaire » entre la Charte et la Convention. Toutefois, cette cohérence est-elle bien si nécessaire ? Dans les considérations qui suivent, une réponse affirmative sera donnée à cette question, eu égard à la fois à la grande perméabilité des systèmes juridiques en Europe et à la nature propre des droits fondamentaux.

A. Une pluralité de systèmes juridiques aux frontières perméables

Il est aujourd'hui banal de constater que le paysage juridique européen se caractérise par la coexistence de trois types d'ordre juridique : les ordres nationaux, conventionnel et de l'Union. Chacun d'eux représente également une source de droits fondamentaux. Une des particularités de cette coexistence tient au fait que les frontières qui séparent ces ordres juridiques sont très perméables, sur le plan tant matériel que formel. Matériellement, les emprunts d'un système à l'autre sont fréquents, comme nous le verrons ci-dessous. Formellement, dans leur vie de tous les jours, les personnes et les États passent facilement d'un ordre juridique à l'autre et se retrouvent même souvent dans deux ou trois ordres à la fois, selon le type d'action qu'ils entreprennent, dessinant ainsi une forme de mobilité trans-systémique souvent ignorée mais bien réelle.

Cette perméabilité des systèmes juridiques entre eux résulte de la combinaison de plusieurs facteurs. Parmi ceux-ci, il y a d'abord le fait que les compétences de l'Union européenne sont des compétences d'attribution et donc par nature limitées[4], que les droits fondamentaux n'ont pas le pouvoir d'étendre[5]. Les États membres, en revanche, disposent de compétences générales, lesquelles sont toutes soumises à l'empire de la Convention, le champ d'application de celle-ci recouvrant *toute* la « juridiction » des États[6]. Par ailleurs, le droit de l'Union est un ordre juridique certes autonome mais intégré aux systèmes juridiques des États membres[7]. Là où il s'applique, il ne se substitue donc pas automatiquement à ceux-ci mais tolère au contraire une certaine co-existence, voire même une certaine complémentarité, entre droit de l'Union et droit national, selon des modalités variables en fonction des domaines. C'est le cas aussi en matière de droits fondamentaux, dans la mesure où le droit de l'Union accepte l'application de droits fondamentaux nationaux, pourvu qu'elle ne compromette pas le niveau

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de protection prévu par la Charte, ni la primauté, l'unité et l'effectivité du droit de l'Union[8].

Il en découle que le droit de l'Union ne « chasse » pas non plus la Convention. Même si la Convention ne s'applique pas comme telle aux institutions de l'Union, celle-ci n'étant pas partie contractante à la Convention, il est de jurisprudence constante que les États membres continuent de relever de la Convention, le cas échéant sous le bénéfice de la présomption d'équivalence, quand ils appliquent le droit de l'Union[9]. Ainsi le respect de la Charte à cette occasion ne dispense-t-il pas de respecter en même temps la Convention.

Tout cela produit une situation juridique caractérisée par un degré élevé d'enchevêtrement et d'interaction entre les trois ordres juridiques concernés, lequel donne lieu notamment à une grande proximité entre le droit de l'Union et le droit des États membres. Bien entendu, cette proximité se manifeste en premier lieu dans toutes les situations où les États membres *mettent en œuvre* le droit de l'Union. Mais là ne s'arrête pas le rôle du droit national à l'égard du droit de l'Union. Il n'est pas rare, en effet, que le droit des États membres vienne *compléter* le droit de l'Union dans des domaines non entièrement régis par celui-ci. Cela tient au fait que les compétences de l'Union, dont l'exercice obéit plus à des critères de subsidiarité et de proportionnalité[10] qu'à un souci d'homogénéité, recouvrent rarement des domaines parfaitement cohérents.

Dans ce genre de constellations, le droit de l'Union et le droit national des États membres se retrouvent côte à côte sur le terrain, où ils se partagent les mêmes domaines, découpés en fonction des compétences de l'Union. Le résultat, c'est une ligne de démarcation entre le droit de l'Union et le droit national qui traverse bien plus souvent les domaines régis qu'elle ne les englobe, laissant une part au droit de l'Union, l'autre au droit national des États membres. En pratique, il faut alors très peu pour entrer dans le champ du droit de l'Union, comme il faut très peu pour en ressortir. La conséquence d'un tel morcellement des compétences, c'est qu'il faut sans cesse « jongler » avec les trois ordres juridiques concernés. Il ne faudrait pas, cependant, que ces « jongleries » en matière de compétence soient l'occasion de « jongleries » concomittantes s'agissant du niveau de protection des droits fondamentaux applicables. Ceux-ci, en effet, sont d'un autre ordre : ils visent à satisfaire des besoins essentiels et ne devraient donc pas fluctuer au fil des compétences respectives des uns et des autres. Afin de pouvoir pleinement accomplir leur fonction, ils ont au contraire besoin de stabilité et c'est pourquoi ils se voient le plus souvent inscrits dans des textes de rang supérieur, plus difficilement amendables.

Quelques exemples tirés de la jurisprudence récente peuvent illustrer le propos. Un premier groupe concerne des domaines où le droit de l'Union régit les seules situations présentant une dimension transnationale, laissant les autres, de même nature mais dites « purement internes », au droit national des États membres. Un deuxième groupe comprend des cas où le droit national des États membres vient compléter les dispositifs instaurés par le droit de l'Union.

Dans le premier groupe, on trouve tout naturellement les cas qui mettent en jeu la liberté de circulation, notamment celle des personnes. Dans ce domaine, une même activité, selon qu'elle s'exerce à l'intérieur des frontières de l'État membre dont l'intéressé est un national ou également dans un autre, sera régie par le seul droit national — comme situation « purement interne » — ou par le droit de l'Union. L'exemple le plus éloquent de ce genre de distinction est sans doute la jurisprudence abondante et sophistiquée[11] sur le droit de séjour de ressortissants de pays tiers, membres de la famille de citoyens de l'Union[12]. Non sans peine, elle tente de combiner entre elles les dispositions relatives à la libre circulation des personnes (articles 45 et s. du Traité sur le fonctionnement de l'Union européenne ou TFUE), à la citoyenneté européenne (articles 20 et 21 TFUE), au droit à la vie familiale (article 7 de la Charte) et celles notamment de la directive 2004/38[13]. Le résultat, c'est une construction juridique selon laquelle l'applicabilité du droit de l'Union dépend de facteurs aussi techniques que l'usage, par le citoyen de l'Union, de son droit à la libre circulation ou sa « privation de la jouissance effective de l'essentiel des droits conférés par le statut de citoyen de l'Union ».

Pour autant, la perméabilité des frontières systémiques et la complexité des critères qui en déterminent le franchissement est un phénomène qui ne se limite pas au domaine de la liberté de circulation. Il touche aussi les situations où le droit national des États membres vient suppléer le droit de l'Union pour régir des situations qui sont certes générées par ce dernier mais qui, en raison de son champ d'application limité, ne sont pas entièrement gérées par lui. On songe ici bien sûr d'abord à toute l'autonomie procédurale que le droit de l'Union laisse au droit national dans la mise en œuvre du droit de l'Union[14]. Mais sur le fond aussi, on observe parfois une grande complémentarité entre droit de l'Union et droit national dans la gestion d'une matière.

Parmi beaucoup d'autres, l'affaire *Lanigan*[15], qui concerne l'exécution d'un mandat d'arrêt européen, en fournit une première illustration éloquente. Elle posait notamment la question des conséquences de l'expiration des délais dont l'article 17 de la décision-cadre[16] assortit la prise d'une décision définitive sur l'exécution du

(8) C.J.U.E., *Akerberg Fransson*, aff. C-617/10, EU:C:2013:280, point 29 ; C.J.U.E., *PPU - F*, aff. C-168/13, EU:C:2013:358, points 53, 75. **(9)** C.E.D.H., 30 juin 2005, *Bosphorus c. Irlande*, n° 45036/98, § 137 ; 23 mai 2016, *Avotins c. Lettonie*, n° 17502/07, §§ 100-103. **(10)** Article 5 TUE. **(11)** Une observatrice avisée a parlé à cet égard de « contorsions jurisprudentielles » (Anne Rigaux, note sur l'arrêt *Alokpa* cité ci-dessous, *Europe*, 2013, commentaire n° 499). **(12)** Voy., parmi d'autres, C.J.U.E., *Zhu et Chen*, aff. C-200/02, EU:C:2004:639 ; C.J.U.E., *Ruiz Zambrano*, aff. C-34/09, EU:C:2011:124 ; C.J.U.E., *Dereci* e.a., aff. C-256/11, EU:C:2011:734 ; C.J.U.E., *Yoshikazu Iida*, aff. C-40/11, EU:C:2012:691 ; C.J.U.E., *O. et S. & L.*, aff. jointes aff. C-356/11 et aff. C-357/11, EU:C:2012:776 ; C.J.U.E., *Imeraga*, aff. C-87/12, EU:C:2013:291 ; C.J.U.E., *Alokpa*, aff. C-86/12, EU:C:2013:645 ; C.J.U.E., *O. et B.*, aff. C-456/12, EU:C:2014:135 ; C.J.U.E., *Singh* e.a., aff. C-218/14, EU:C:2015:476. **(13)** Directive 2004/38/CE du Parlement européen et du Conseil du 29 avril 2004 relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des États membres, *J.O.* L 158 du 30 avril 2004, pp. 77-123. **(14)** Voy., par exemple, C.J.U.E., *Mukarubega*, aff. C-166/13, EU:C:2014:2336, point 51 : « Lorsque, comme dans l'affaire au principal, ni les conditions dans lesquelles doit être assuré le respect des droits de la défense des ressortissants de pays tiers en situation irrégulière ni les conséquences de la méconnaissance de ces droits ne sont fixées par le droit de l'Union, ces conditions et ces conséquences relèvent du droit national pour autant que les mesures arrêtées en ce sens sont du même ordre que celles dont bénéficient les particuliers dans des situations de droit national comparables (principe de l'équivalence) et qu'elles ne rendent pas en pratique impossible ou excessivement difficile l'exercice des droits conférés par l'ordre juridique de l'Union (principe d'effectivité) ». **(15)** C.J.U.E., *PPU - Lanigan*, aff. C-237/15, EU:C:2015:474. **(16)** Décision-cadre 2002/584/JAI du Conseil, du 13 juin 2002, relative au mandat d'arrêt européen et aux procédures de remise entre États membres, *J.O.* L 190 du 18 juillet 2002, pp. 1-20, telle que modifiée par

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mandat. Dans son arrêt, la C.J.U.E. juge en substance que moyennant le respect de certaines conditions, l'article 12 de ladite décision-cadre, lu en combinaison avec l'article 17 de celle-ci et l'article 6 de la Charte, ne s'oppose pas au maintien en détention de la personne recherchée, conformément au droit de l'État membre d'exécution, même si la durée totale de la période de détention excède les délais fixés par la décision-cadre. Au cœur du dispositif du mandat d'arrêt européen, c'est donc le droit national qui sert ici de base juridique à la détention des personnes recherchées.

Dans le même registre, mentionnons l'affaire *Celaj*[17], qui concerne la « directive retour »[18], où la C.J.U.E. décide en substance qu'un État membre peut, à travers son propre droit national, pénaliser la violation par un étranger de l'interdiction d'entrée prononcée à son encontre, car « la directive 2008/115 ne porte que sur le retour de ressortissants de pays tiers en séjour irrégulier et n'a donc pas pour objet d'harmoniser dans leur intégralité les règles des États membres relatives au séjour des étrangers ». Ce faisant toutefois, l'État membre doit respecter à la fois la « directive retour », la Convention européenne des droits de l'homme et la Convention de Genève relative au statut des réfugiés. Se fondant sur des considérations similaires quant à la ligne de partage entre compétences de l'Union et compétences nationales, la C.J.U.E., dans l'affaire *Mahdi*[19], indique que si un juge national peut devoir libérer un ressortissant d'État tiers qui n'est pas en possession de documents d'identité au motif qu'il n'existerait plus de perspective raisonnable d'éloignement au sens de l'article 15, § 4, de la « directive retour », celle-ci n'oblige pas pour autant l'État membre concerné à accorder un droit de séjour à ce ressortissant, celui-ci relevant alors du seul droit national.

Dans un tout autre domaine, l'affaire *Willems* posait la question de la compatibilité avec les articles 7 et 8 de la Charte de l'utilisation des données rassemblées en vue de la délivrance de passeports biométriques à des fins autres que celles prévues par le règlement n° 2252/2004[20]. Après avoir constaté que cette question n'était pas régie par le règlement, la C.J.U.E. précise : « Les considérations qui précèdent sont sans préjudice d'un éventuel examen, par les juridictions nationales, de la compatibilité de toutes les mesures nationales liées à l'utilisation et à la conservation des données biométriques avec leur droit national et, le cas échéant, avec la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales »[21].

Citons enfin les cas où, dans la ligne de son arrêt *Melloni*[22], la C.J.U.E. juge qu'en accordant une protection des droits fondamentaux qui dépasse celle du droit de l'Union, un État membre fait sortir le bénéficiaire du champ de ce droit, entraînant la limitation des effets de cette protection au seul territoire de l'État membre concerné. Cette solution a été appliquée, par exemple, dans les arrêts *M'Bodj*[23], concernant la « directive qualification », et *Tahir*[24], à propos de la directive relative au statut des ressortissants de pays tiers résidents de longue durée. Elle a sans doute aussi inspiré l'approche suivie dans l'arrêt *Zaizoune*[25], qui porte sur la « directive retour », si on prend en considération l'article 6, § 4, de celle-ci[26].

On pourrait multiplier les exemples de ce type. Certes, il n'est pas exclu qu'une partie de ces situations régies par le droit national puisse être considérée comme entrant dans le champ du droit de l'Union, entraînant l'application de la Charte[27], voire même celle de la jurisprudence *Melloni*[28]. Il n'en demeure pas moins que le rattachement d'une situation au droit de l'Union ou au droit des États membres se fait en fonction des critères qui définissent les compétences de l'Union, lesquels sont en principe étrangers aux conditions d'exercice des droits fondamentaux en question. C'est là un argument en faveur d'une certaine continuité dans le régime des droits fondamentaux au passage des frontières systémiques. Sinon, on risque le *patchwork* de droits fondamentaux dont plus personne ne comprend la complexité, hormis quelques érudits, ce qui mine tout autant la sécurité juridique, la confiance des citoyens et, *last but not least*, comme nous le verrons ci-après, l'autorité des droits fondamentaux eux-mêmes. Si *Melloni* entend éviter le *patchwork* de droits fondamentaux à l'intérieur du droit de l'Union, il y a de bons arguments aussi pour éviter un tel *patchwork* dans les domaines dont le droit de l'Union et le droit national des États membres se partagent la gestion.

B. Des droits fondamentaux à portée trans-systémique

La pluralité de systèmes juridiques décrite ci-dessus engendre aussi une pluralité de droits fondamentaux qui, si elle n'est pas un tant soit peu ordonnée, risque d'entraîner une relativisation générale de leur portée. Pour éviter cela, il convient de distinguer les droits fondamentaux selon qu'ils ont une portée intra- ou trans-systémique. Les premiers sont ceux dont la portée, limitée à un système juridique particulier, n'a pas vocation à s'étendre au-delà des frontières de ce système, parce que les droits en question répondent à des préoccupations particulières à celui-ci. C'est le cas, par exemple, de droits tels que celui à la gratuité de l'enseignement que l'on retrouve dans la Constitution belge[29] mais aussi, s'agissant du droit de l'Union, de la plupart des droits dont la Charte réserve le bénéfice aux citoyens de l'Union, tel le droit de vote et d'éligibilité aux élections au Parlement européen et aux élections communales[30]. Même si leur champ recouvre tous les États membres, il ne dépasse pas les limites du système juridique de l'Union.

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la décision-cadre 2009/299/JAI du Conseil, du 26 février 2009. **(17)** C.J.U.E., *Celaj*, aff. C-290/14, EU:C:2015:640. **(18)** Directive 2008/115/CE du Parlement européen et du Conseil du 16 décembre 2008 relative aux normes et procédures communes applicables dans les États membres au retour des ressortissants de pays tiers en séjour irrégulier, *J.O.* L 348 du 24 décembre 2008, pp. 98-107. **(19)** C.J.U.E., *PPU - Mahdi*, aff. C-146/14, EU:C:2014:1320. **(20)** Règlement (CE) n° 2252/2004 du Conseil, du 13 décembre 2004, établissant des normes pour les éléments de sécurité et les éléments biométriques intégrés dans les passeports et les documents de voyage délivrés par les États membres, *J.O.* L 385 du 29 décembre 2004, pp. 1-6. **(21)** C.J.U.E., *Willems* e.a., aff. jointes aff. C-446/12 à C-449/12, EU:C:2015:238, point 51. Voy. aussi, dans le même sens, C.J.U.E., *Schwartz*, aff. C-291/12, EU:C:2013:670, points 61-62. **(22)** C.J.U.E., *Melloni*. aff. C-399/11, EU:C:2013:107. **(23)** C.J.U.E., *M'Bodj*, aff. C-542/13, EU:C:2014:2452. **(24)** C.J.U.E., *Tahir*, aff. C-469/13, EU:C:2014:2094. **(25)** C.J.U.E., *Zaizoune*, aff. C-38/14, EU:C:2015:260. **(26)** En revanche, la « directive accueil » (directive 2013/33/UE du Parlement européen et du Conseil du 26 juin 2013 établissant des normes pour l'accueil des personnes demandant la protection internationale, *J.O.* L 180 du 29 juin 2013, pp. 96-116) prévoit, en son article 4, que « Les États membres peuvent adopter ou maintenir des dispositions plus favorables en matière de conditions d'accueil des demandeurs et des parents proches du demandeur qui se trouvent dans le même État membre, lorsqu'ils dépendent de lui, ou pour des raisons humanitaires, dans la mesure où ces dispositions sont compatibles avec la présente directive ». Il est vrai que les conditions d'accueil dans un État membre sont en principe sans incidence sur le régime appliqué dans les autres États membres. **(27)** C.J.U.E., *Willems* e.a., EU:C:2015:238, point 49. **(28)** Cette jurisprudence, toutefois, ne se heurte pas comme telle à la Convention, dès lors que le niveau de protection en droit de l'Union correspond au moins à celui de la Convention. **(29)** Article 24, § 3, de la Constitution belge. **(30)** Articles 39 et 40 de la Charte.

En revanche, les droits fondamentaux trans-systémiques sont ceux dont la portée, en raison de leur importance, dépasse les frontières systémiques et qui se trouvent inscrits dans des instruments internationaux, universels et/ou régionaux, pour deux raisons. D'abord, parce qu'ils correspondent à des préoccupations communes aux populations d'une pluralité d'États ; les intérêts qu'ils protègent sont de l'ordre de l'universel plutôt que du particulier. Ensuite, pour permettre un contrôle international, c'est-à-dire un contrôle externe, juridictionnel ou autre, de leur respect, lequel contrôle se justifie précisément par la portée et l'importance des droits en question, pour éviter qu'ils ne soient « transformés » au niveau national. Comment, en effet, maintenir le caractère trans-systémique de ces droits, lequel suppose une interprétation unifiée de leur portée, sans une instance elle-même trans-systémique, c'est-à-dire internationale ? Cette catégorie comprend en premier lieu tous les droits fondamentaux à vocation universelle (le droit à la vie, à la liberté d'expression, à la vie privée, à la vie familiale, à un procès équitable, l'interdiction de la torture, de la détention arbitraire, etc.) que l'on retrouve dans les grands instruments juridiques internationaux et, en substance, sous des formulations variables, dans la plupart des Constitutions nationales. Avec leur champ d'application pan-européen, les droits de la Convention en font éminemment partie.

Respecter les droits fondamentaux trans-systémiques suppose donc de maintenir leur contenu, de préserver l'univocité de leur message, au-delà des frontières qui séparent les systèmes, en respectant, là où elle existe, l'interprétation authentique qu'ils ont reçue, sans préjudice toutefois de la possibilité de renforcer leur protection[31]. Il faut en quelque sorte en assurer la « libre circulation » d'un système à l'autre. Dans la gestion des droits fondamentaux trans-systémiques, le champ de vision ne peut pas s'arrêter aux frontières des systèmes individuels mais doit, au contraire, s'élargir aux dimensions des droits en question. Les plus universels d'entre eux font partie du patrimoine juridique de l'humanité dont l'importance dépasse de loin les intérêts particuliers des systèmes juridiques dans lesquels ils s'appliquent. C'est une responsabilité commune que d'agir en conséquence.

En Europe, une responsabilité particulière pèse à cet égard sur l'Union européenne, en raison notamment de l'autonomie de son ordre juridique. Il peut être tentant, en effet, d'étendre cette autonomie à tous les droits fondamentaux qui s'y appliquent. Pourtant, si cette autonomie, qui a été réaffirmée avec force dans l'avis 2/13, ne fait en principe aucun doute, elle paraît tout de même devoir être nuancée s'agissant des droits fondamentaux trans-systémiques que l'Union européenne entend protéger. Comme nous l'avons vu, le droit de l'Union s'insère dans un environnement juridique caractérisé par une pluralité de systèmes décloisonnés, par des droits fondamentaux dont la portée dépasse chacun d'eux et par une absence de tout contrôle externe quant à leur respect. L'autonomie du droit de l'Union à l'égard des droits fondamentaux trans-systémiques, et singulièrement à l'égard de ceux de la Convention, ne peut donc qu'être une autonomie relative et nuancée parce que contextualisée, une autonomie qui tient compte de la réalité juridique complexe et sensible dans laquelle elle s'insère, en respectant notamment la nature trans-systémique des droits qu'elle emprunte à la Convention et leur jurisprudence. Bref, une autonomie qui ne vire pas à l'insularité.

Conscient de l'importance de ces enjeux, le législateur de l'Union a clairement opté pour la cohérence inter-systémique sur ce terrain, comme en témoignent les articles 52, § 3, de la Charte et 6, § 2, du Traité sur l'Union européenne (« le TUE »). Depuis l'avis 2/13, on sait cependant qu'il faudra encore un peu de temps avant que l'Union européenne n'adhère à la Convention, ce qui rend d'autant plus important l'article 52, § 3, de la Charte qui, s'agissant des droits empruntés à la Convention, interdit les reculs mais autorise les dépassements. Dans ce domaine, l'autonomie du droit de l'Union se voit ainsi ouverte vers le haut mais fermée vers le bas. Cela ressort aussi des explications à l'article 52, § 3, selon lesquelles, si l'application de cette disposition ne doit certes pas porter atteinte à l'autonomie du droit de l'Union et de la Cour de justice de l'Union européenne, « en tout état de cause, le niveau de protection offert par la Charte ne peut jamais être inférieur à celui qui est garanti par la [Convention] ».

On ne peut donc que s'étonner de voir que cette dispostion a été complètement ignorée dans l'avis 2/13 au bénéfice d'une insistance sur l'autonomie du droit de l'Union. Or, comme la Cour européenne des droits de l'homme (« la C.E.D.H. ») vient de le rappeler dans son arrêt *Avotins*[32], le respect effectif de l'article 52, § 3, de la Charte joue un rôle essentiel aussi dans le maintien de la présomption d'équivalence instituée dans l'arrêt *Bosphorus*[33].

2 La convergence comme horizon

Après ces considérations démontrant que la cohérence entre la Convention et le droit de l'Union correspond toujours à une nécessité, il est temps à présent de s'interroger sur la réalité de cette cohérence : à défaut d'être accomplie, sert-elle au moins encore d'horizon ? L'analyse se fera sous l'angle du contenu des droits, mais aussi sous celui de la méthodologie appliquée, laquelle peut en effet produire des résultats très variables sur un même droit.

A. Le contenu des droits fondamentaux

Assurer la « cohérence nécessaire » entre la Convention et le droit de l'Union est d'abord une question de contenu des droits. Sur ce terrain, la constatation qui s'impose est que cette cohérence a été largement assurée ces dernières années. Avec des résultats appréciables : aujourd'hui comme par le passé, il est rare de voir le contenu des droits fondamentaux protégés par le droit de l'Union descendre en-dessous du niveau de la Convention. Parmi les quelques cas isolés de ce type, citons l'arrêt *Spasic*[34] qui, en subordonnant l'application du principe *ne bis in idem* à la condition que la première peine ait été effectivement exécutée, s'écarte nettement de la jurisprudence *Zolotoukhine*[35].

(31) Traditionnellement, en droit international, le dépassement du niveau de protection d'un droit fondamental n'entraîne pas manquement à ce droit. C'est aussi la *ratio legis* des articles 53 de la Convention et 53 de la Charte. **(32)** C.E.D.H. 23 mai 2016, *Avotins c. Lettonie*, n° 17502/07, § 102. **(33)** C.E.D.H., *Bosphorus c. Irlande*, 30 juin 2005, 45036/98. Là où elle s'applique, cette présomption autorise le droit de l'Union à s'écarter du niveau de protection de la Convention, tant qu'il n'y a pas « insuffisance manifeste ». Voilà donc un champ que la Convention ouvre elle-même à l'autonomie du droit de l'Union. On peut toutefois se demander si, par l'effet de l'article 52, § 3, de la Charte, le droit de l'Union ne s'interdit pas lui-même d'en faire usage. **(34)** C.J.U.E., *PPU - Spasic*, aff. C-129/14, EU:C:2014:586. Pour un commentaire critique, voy. F. Gazin, *Europe*, 2014, n° 296. **(35)** C.E.D.H., *Sergueï Zolotoukhine c. Russie*, 10 février 2009, n° 14939/03, § 110.

Analyse

Cela étant, certains flottements apparaissent dans la jurisprudence quant à la méthode à suivre pour appliquer l'article 52, § 3. Ils concernent en particulier l'articulation de cette disposition avec l'article 52, § 1er, de la Charte. Alors que le paragraphe 1 fixe le régime général des limitations applicables aux droits et libertés reconnus par la Charte, le paragraphe 3 a pour effet de rendre applicables aux droits de la Charte qui sont issus de la Convention les limitations prévues par cette dernière. Or, le régime des limitations de la Convention diffère sur certains points de celui du droit de l'Union. Ainsi, par exemple, la liste des « buts légitimes » capables de justifier des limitations à certains droits de la Convention est-elle limitative[36], contrairement aux « objectifs d'intérêt général reconnus par l'Union », ces derniers pouvant même parfois donner lieu à un raisonnement circulaire[37], ce qui étend sensiblement les possibilités de limitation. Il n'est donc pas indifférent d'appliquer l'une ou l'autre de ces dispositions. Pourtant, on trouve dans la jurisprudence une variété d'approches différentes sur ce terrain : des arrêts qui examinent les limitations admissibles à l'aune tantôt de l'article 52, § 3, explicitement[38] ou implicitement[39], tantôt de l'article 52, § 1er[40], tantôt des deux à la fois[41]. D'autres se réfèrent à l'article 52, § 3, pour la définition de la portée du droit et à l'article 52, § 1er, pour en définir les limitations[42]. Tout ceci ne contribue guère à la lisibilité de la jurisprudence en la matière, sur une question pourtant essentielle pour la convergence des jurisprudences. À cet égard, il faut saluer les efforts des avocats généraux de la C.J.U.E. qui, en général, font preuve de plus de pédagogie sur cette question ainsi que sur la jurisprudence strasbourgeoise pertinente[43].

Quoi qu'il en soit, cela n'a pas empêché la jurisprudence luxembourgeoise de se montrer particulièrement protectrice dans certains domaines, dépassant même parfois le niveau de protection de la Convention, comme l'y autorise d'ailleurs l'article 52, § 3, deuxième phrase, de la Charte. Sans vouloir être exhaustif, parmi les domaines les plus emblématiques de cette tendance, on mentionnera en premier lieu la protection des données, laquelle a récemment donné lieu à trois arrêts remarqués de la C.J.U.E., rendus respectivement dans les affaires *Digital Rights*[44], *Google Spain*[45] et *Schrems*[46]. Citons également le haut niveau de protection accordée par la C.J.U.E. dans le domaine de la liberté de religion[47], de la protection de la dignité et de la vie privée et familiale des homosexuels[48], de la protection contre la discrimination en raison de l'origine ethnique[49], à l'égard des mesures prises par le comité des sanctions des Nations unies pour lutter contre le terrorisme[50] ou encore sur la question des limitations au droit à un recours effectif[51].

De son côté, dans la ligne de son arrêt *Christine Goodwin*[52], qui concernait notamment le droit au mariage d'une personne transsexuelle, la C.E.D.H. a continué de s'inspirer de la Charte et de la jurisprudence de la C.J.U.E.[53], quelques fois même en vue de relever le niveau de protection de sa propre jurisprudence. C'était le cas dans ses arrêts *Demir et Baykara*[54], au sujet des droits syndicaux des fonctionnaires, *Sergueï Zolotoukhine*[55], concernant le principe *ne bis in idem*, *Scoppola (nº 2)*[56], à propos de l'application immédiate de la peine plus légère, et *Schalk et Kopf*[57], au sujet de l'application de l'article 12 de la Convention aux homosexuels.

B. La méthodologie des droits fondamentaux

Toutefois, pour mesurer la protection des droits fondamentaux dans un système juridique donné, on ne peut plus aujourd'hui s'arrêter au contenu qu'ils y recoivent. Il faut se demander aussi comment, c'est-à-dire selon quelle méthode, ils y sont appliqués. En effet, selon la méthode utilisée, un même droit peut produire des résultats très variables. S'agissant de la cohérence entre la Convention et le droit de l'Union, deux questions paraissent essentielles du point de vue méthodologique : celle de la primauté des droits fondamentaux et celle de l'étalon de mesure applicable.

1. La primauté des droits fondamentaux

On s'accorde aujourd'hui à considérer qu'en sus de leur fonction de protection individuelle, les droits fondamentaux exercent également une fonction de légitimation et de validation du droit. Selon une formule désormais bien établie dans la jurisprudence de la C.J.U.E., le respect des droits fondamentaux constitue une « condition de la légalité des actes de l'Union, de sorte que ne sauraient être admises dans l'Union des mesures incompatibles avec ces mêmes droits »[58]. Ou, pour le dire avec les mots du Conseil européen de Cologne lorsqu'il décida de procéder à la rédaction de la Charte : « Le respect des droits fondamentaux est l'un des principes fondateurs de l'Union européenne et la condition indispensable pour sa légitimité »[59]. Il ne s'agit pas là d'une particularité du droit de l'Union mais d'une caractéristique essentielle des démocraties modernes, lesquelles acceptent aujourd'hui de soumettre l'entièreté de leur ordre juridique au test des droits fondamentaux et, en conséquence, de ne pas appliquer les règles

(36) C.E.D.H., *S.A.S. c. France*, 1er juillet 2014, nº 43835/11, §§ 133-134. **(37)** C.J.U.E., *PPU - N.*, aff. C-601/15, EU:C:2016:84, point 52. **(38)** C.J.U.E., *PPU - MCB.*, aff. C-400/100, EU:C:2010:582 ; C.J.U.E., *Abdida*, aff. C-562/13, EU:C:2014:2453 ; C.J.U.E., *PPU - Lanigan*, EU:C:2015:474 ; C.J.U.E., *Tall*, aff. C-239/14, EU:C:2015:824. **(39)** C.J.U.E., *Melloni*, EU:C:2013:107 ; C.J.U.E., *Deutsche Bahn AG* e.a., aff. C-583/13 P, EU:C:2015:404 ; C.J.U.E., *Taricco*, aff. C-105/14, EU:C:2015:555. **(40)** C.J.U.E., *ZZ*, aff. C-300/11, EU:C:2013:363 ; C.J.U.E., *PPU - Spasic*, EU:C:2014:586. **(41)** C.J.U.E., *PPU - N.*, EU:C:2016:84. **(42)** C.J.U.E., *Schecke et Eifert*, aff. jointes aff. C-92/09 et C-93/09, EU:C:2010:662 ; C.J.U.E., *Neptune Distribution SNC*, aff. C-157/14, EU:C:2015:823 ; C.J.U.E., *WebMindLicences*, aff. C-419/14, EU:C:2015:832. **(43)** Ainsi par exemple les conclusions de l'avocate générale Kokott dans *Schindler Holding Ltd* e.a., aff. C-501/11 P, EU:C:2013:248 ou la prise de position de l'avocate générale Sharpston dans *PPU - N.*, EU:C:2016:85. **(44)** C.J.U.E., *Digital Rights Ireland et Seitlinger* e.a, aff. jointes aff. C-293/12 et C-594/12, EU:C:2014:238. **(45)** C.J.U.E., *Google Spain SL*, aff. C-131/12, EU:C:2014:317. **(46)** C.J.U.E., *Schrems*, aff. C-362/14, EU:C:2015:650. **(47)** C.J.U.E., *Y & Z*, aff. jointes C-71/11 et C-99/11, EU:C:2012:518. **(48)** C.J.U.E., *X, Y, Z*, aff. jointes C-199/12 à C-201/12, EU:C:2013:720 ; C.J.U.E., *A, B et C*, aff. jointes C-148/13 et C-150/13, EU:C:2014:2406. **(49)** C.J.U.E., *Chez*, aff. C-83/14, EU:C:2015:480. **(50)** C.J.U.E., *Kadi et Al Barakaat International Foundation (« Kadi I »)*, aff. jointes C-402/05 P et C-415/05 P, EU:C:2008:461 ; C.J.U.E., *Yassin Abdullah Kadi (« Kadi II »)*, aff. jointes C-584/10 P, C-593/10 P et C-595/10 P, EU:C:2013:518. **(51)** C.J.U.E., *ZZ*, aff. C-300/11, EU:C:2013:363. **(52)** C.E.D.H., 11 juillet 2002, *Christine Goodwin c. Royaume-Uni*, nº 28957/95, § 100. **(53)** Notamment dans C.E.D.H., 7 juillet 2011, *Bayatyan c. Arménie*, nº 23459/03, §§ 106-107 ; C.E.D.H., 10 avril 2012, *Babar Ahmad* e.a. *c. Royaume-Uni*, nos 24027/07, 11949/08, 36742/08, 66911/09 et 67354/09, § 175 ; C.E.D.H., 26 novembre 2013, *X c. Lettonie*, nº 27853/09, § 97 et C.E.D.H., 8 septembre 2015, *Laurus Invest Hungary KFT* e.a. *c. Hongrie (déc.)*, nos 23265/13 *e.a.*, §§ 37-42. **(54)** C.E.D.H., 12 novembre 2008, *Demir et Baykara c. Turquie*, nº 34503/97, §§ 105 et 150. **(55)** C.E.D.H., 10 février 2009, *Sergueï Zolotoukhine c. Russie*, nº 14939/03, §§ 79-80. **(56)** C.E.D.H., 19 septembre 2009, *Scoppola c. Italie (nº 2)*, nº 10249/03, § 105. **(57)** C.E.D.H., *Schalk et Kopf c. Autriche*, nº 30141/04, §§ 60-61. **(58)** Avis 2/13, EU:C:2014:2454, point 169. Dans le même sens, parmi d'autres : C.J.U.E., *Kadi*, aff. jointes C-402/05 P et C-415/05 P, EU:C:2008:461, points 284 et 303. **(59)** Conseil européen de Cologne (3-4 juin 1999), Conclusions de la présidence, annexe IV.

et mesures qui les méconnaissent. Les droits fondamentaux se trouvent ainsi au fondement de tout ordre juridique démocratique.

Or, légitimer et valider ne peuvent se faire que par rapport à une norme supérieure, plus importante et plus fondamentale que celle qui est à valider, car en cas d'incompatibilité, la norme validante doit pouvoir primer sur la norme ou la mesure à valider et, le cas échéant, l'écarter. Sans ce pouvoir, le maintien de cette dernière n'autorise pas à conclure à sa compatibilité avec la norme validante. Certes, s'agissant du droit de l'Union, la Charte a la même valeur juridique que les traités[60]. Il n'en demeure pas moins que dans toute la mesure où il est affirmé que les droits fondamentaux constituent une condition de légalité des actes de l'Union, il en résulte implicitement qu'ils doivent, en cas de conflit, prévaloir sur les autres étalons de mesure des actes de l'Union. Sans cette capacité, l'effet de validation reste factice.

Dans les systèmes juridiques nationaux, la fonction de légitimation des droits fondamentaux va le plus souvent de pair avec un rang supérieur dans la hiérarchie des normes, même si la Convention ne réclame pas pour elle un rang particulier dans les systèmes juridiques des États membres, ni même d'être incorporée dans le droit interne de ceux-ci[61]. La primauté des droits qu'elle consacre à l'égard du droit interne des États contractants est néanmoins assurée à travers une combinaison de deux règles : celle selon laquelle la Convention s'applique à toute la juridiction des États contractants[62] et celle qui veut que le respect de la Convention est une obligation de résultat plutôt qu'une obligation de moyens[63]. Cela ne fait pas des droits de la Convention des droits absolus, mais cela rend absolue l'obligation de les respecter, avec leurs limitations : ils priment sur tout autre droit dans la mesure où ils imposent un certain résultat à atteindre.

Sur ce terrain toutefois, le droit de l'Union est marqué par une forte ambiguïté. Tandis que, dans l'avis 2/13, les droits fondamentaux sont présentés comme une condition de légalité du droit de l'Union, il y est dit dans le même temps que « l'autonomie dont jouit le droit de l'Union par rapport aux droits des États membres ainsi que par rapport au droit international impose que l'interprétation de ces droits fondamentaux soit assurée dans le cadre de la structure et des objectifs de l'Union ». Au titre de ces objectifs, l'avis se réfère alors à « une série de dispositions fondamentales, telles que celles prévoyant la liberté de circulation des marchandises, des services, des capitaux et des personnes, la citoyenneté de l'Union, l'espace de liberté, de sécurité et de justice ainsi que la politique de concurrence »[64].

On ne peut que s'interroger ici sur la compatibilité de ces deux propositions. Les droits fondamentaux sont-ils vraiment une condition de légalité du droit de l'Union s'ils doivent eux-mêmes être interprétés à la lumière des objectifs de l'Union européenne, comme si la détermination de ces objectifs n'était pas, elle aussi, un acte soumis à la condition de sa conformité avec les droits fondamentaux ? Autrement dit, à moins d'admettre que les objectifs poursuivis par l'Union et la manière de les poursuivre soient soustraits aux effets des droits fondamentaux — ce qui contredirait la thèse selon laquelle les droits fondamentaux sont une condition de légalité de *tout* le droit de l'Union — comment pourraient-ils limiter les effets des droits fondamentaux appelés à les valider ? Quelle serait la crédibilité d'une telle validation ? Peut-on imaginer qu'un État plaide avec succès à Strasbourg que la Convention ne s'applique à lui que dans la mesure où elle se concilie avec un certain nombre d'objectifs — politiques, économiques, sociaux ou autres — qu'il s'est fixés ? Certes, le souci d'assurer un juste équilibre entre les exigences de l'intérêt général de la communauté et les impératifs de la sauvegarde des droits fondamentaux de l'individu est inhérent à l'ensemble de la Convention[65]. Mais dans le système de la Convention, la recherche de cet équilibre passe par une mise en balance des intérêts en présence *au cas par cas*, pas par une limitation générale et préalable des effets des droits fondamentaux, telle une dérogation du genre de celle prévue à l'article 15 de la Convention.

Le risque que comporte une telle approche, c'est une inversion des rapports traditionnels entre droits fondamentaux et objectifs, c'est une approche qui prend comme point de départ les exigences du système plutôt que celles des droits fondamentaux, une approche qui entend construire les droits fondamentaux autour du système plutôt que le système autour des droits fondamentaux, permettant ainsi une limitation des effets des droits fondamentaux au nom de la préservation de certains objectifs ou de certains mécanismes[66]. On trouve, par exemple, des traces de cette approche dans la jurisprudence relative à la « directive retour », selon laquelle les modalités d'exercice de certains droits fondamentaux — notamment le droit d'être entendu — sont à apprécier « à la lumière de l'objectif de la directive 2008/115 qui vise le retour efficace des ressortissants de pays tiers en séjour irrégulier vers leur pays d'origine »[67].

Toutefois, la concrétisation sans doute la plus forte de cette approche systémique est rappelée dans ce même avis 2/13 qui, s'agissant de la reconnaissance mutuelle, énonce qu'en vertu du principe de la confiance mutuelle entre les États membres, ceux-ci peuvent être tenus, sauf cas exceptionnels, « de présumer le respect des droits fondamentaux par les autres États membres, de sorte qu'il ne leur est pas possible non seulement d'exiger d'un autre État membre un niveau de protection national des droits fondamentaux plus élevé que celui assuré par le droit de l'Union, mais également, sauf dans des cas exceptionnels, de vérifier si cet autre État membre a effectivement respecté, dans un cas concret, les droits fondamentaux garantis par l'Union »[68].

À la lumière de toute la jurisprudence strasbourgeoise qui interdit d'expulser des personnes vers des États où elles risquent de subir une violation grave des droits qu'elles tirent de la Convention[69],

(60) Article 6, § 1er, TUE. **(61)** C.E.D.H., 18 janvier 1978, *Irlande c. Royaume-Uni*, nº 5310/71, § 239. **(62)** C.E.D.H., 30 janvier 1998, *Parti communiste unifié de Turquie* e.a. *c. Turquie*, nº 19392/92, § 29. **(63)** C.E.D.H., *Fabris c. France*, 7 février 2013, nº 16574/08, § 75. **(64)** Avis 2/13, EU:C:2014:2454, points 170-172. Il est vrai que cette considération se trouve déjà dans l'arrêt *Internationale Handelsgesellschaft* (C.J.U.E., aff. C-11/70, EU:C:1970:114) mais celui-ci n'affirme pas en même temps que les droits fondamentaux sont une condition de légalité du droit communautaire et, depuis lors, la Charte s'est vu élevée au rang de droit primaire. **(65)** C.E.D.H., 7 juillet 1989, *Soering c. Royaume-Uni*, nº 14038/88, § 89. **(66)** Ainsi, par exemple, la C.J.U.E. quand elle indique que « le législateur européen a assuré le respect du droit d'être entendu dans l'État membre d'exécution de façon à ne pas compromettre l'efficacité du mécanisme du mandat d'arrêt européen » (C.J.U.E., *Radu*, aff. C-396/11, EU:C:2013:39, point 41). **(67)** C.J.U.E., *Boudjlida*, aff. C-249/13, EU:C:2014:2431, point 45. Voy. aussi C.J.U.E., *PPU - G. et R.*, aff. C-383/13, EU:C:2013:533, points 36-44. **(68)** Avis 2/13, points 191-192. Sur cette présomption, voy. aussi C.J.U.E., 5 avril 2016, *Aranyosi et Caldararu*, aff. C-404/15 et C-659/15 PPU, point 78. **(69)** Voy., parmi d'autres, C.E.D.H., 7 juillet 1989, *Soering c. Royaume-Uni*, nº 14038/88 ; C.E.D.H., 28 février 2008, *Saadi c. Italie*, nº 37201/06 ; C.E.D.H., 21 janvier 2011, *M.S.S. c. Belgique et Grèce*, nº 30696/09 ; C.E.D.H., 10 avril 2012, *Babar Ahmad* e.a. *c. Royaume-Uni*, nºs 24027/07, 11949/08, 36742/08, 66911/09 et 67354/09 ; C.E.D.H., 4 novembre

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exclure tout contrôle à cet égard — et, ainsi, vouloir aussi suspendre les effets de la Convention — paraît pour le moins problématique[70]. Tout dépend naturellement de ce qu'il faut entendre par « cas exceptionnels ». On entend dire parfois que cette approche systémique et la part de rigidité qui l'accompagne servent à compenser une certaine fragilité inhérente aux mécanismes de reconnaissance mutuelle. Il est toutefois permis de se demander si la mise en veilleuse des droits fondamentaux et ses conséquences sur l'acceptabilité de ces mécanismes n'entraînent pas plutôt l'effet contraire, comme semble d'ailleurs l'indiquer la jurisprudence récente de certaines cours suprêmes, mentionnée ci-dessous.

La C.E.D.H., pour sa part, a récemment eu l'occasion de clarifier sa position en matière de reconnaissance mutuelle dans un arrêt de grande chambre rendu dans l'affaire *Avotins*, laquelle concernait l'exécution en Lettonie, sur le fondement de l'article 34 du règlement Bruxelles I[71], d'un jugement chypriote rendu par défaut[72]. La C.E.D.H. y a clairement exprimé son adhésion à la construction de l'espace de liberté, de sécurité et de justice et aux mécanismes de reconnaissance mutuelle fondés sur la confiance mutuelle entre les États membres. Toutefois, pour la C.E.D.H., les modalités de la création de cet espace ne peuvent se heurter aux droits fondamentaux des personnes concernées. Or, « limiter aux seuls cas exceptionnels le contrôle par l'État requis du respect des droits fondamentaux par l'État d'origine de la décision de justice à reconnaître pourrait, dans des situations concrètes, aller à l'encontre de l'obligation qu'impose la Convention de permettre au moins au juge de l'État requis de procéder à un contrôle adapté à la gravité des allégations sérieuses de violation des droits fondamentaux dans l'État d'origine afin d'éviter une insuffisance manifeste dans la protection de ces droits »[73].

Même si elle entend tenir compte, dans un esprit de complémentarité, du mode de fonctionnement des dispositifs de reconnaissance mutuelle et notamment de leur objectif d'efficacité, la C.E.D.H. estime devoir vérifier que le principe de reconnaissance mutuelle n'est pas appliqué de manière automatique et mécanique, au détriment des droits fondamentaux. Aussi, lorsque les juridictions nationales sont appelées à appliquer un mécanisme de reconnaissance mutuelle établi par le droit de l'Union, c'est en l'absence de toute insuffisance manifeste des droits protégés par la Convention qu'elles donnent à ce mécanisme son plein effet. En revanche, s'il leur est soumis un grief sérieux et étayé dans le cadre duquel il est allégué que l'on se trouve en présence d'une insuffisance manifeste de protection d'un droit garanti par la Convention et que le droit de l'Union européenne ne permet pas de remédier à cette insuffisance, elles ne peuvent renoncer à examiner ce grief au seul motif qu'elles appliquent le droit de l'Union[74].

Auparavant déjà, la C.E.D.H. avait clairement indiqué, dans les affaires *M.S.S.*[75] et *Tarakhel*[76], qui concernaient des cas d'application du règlement Dublin II[77], que l'automaticité des mécanismes prévus par ce règlement ne déliait pas les États membres de leur obligation conventionnelle de ne pas exposer des demandeurs d'asile à des traitements prohibés par l'article 3 de la Convention, sans pour autant que cela n'entraîne une automaticité dans le refus de transfert[78].

Très récemment cependant, dans son arrêt *Aranyosi et Caldararu*, lui aussi rendu par une grande chambre, la C.J.U.E. semble avoir infléchi l'approche systémique adoptée dans son avis 2/13. Après avoir rappelé le caractère absolu de l'article 4 de la Charte, auquel correspond l'article 3 de la Convention, elle admet que lorsque l'autorité judiciaire de l'État membre d'exécution d'un mandat d'arrêt européen dispose d'éléments attestant d'un risque réel de traitement inhumain ou dégradant des personnes détenues dans l'État membre d'émission (...), celle-ci est tenue d'apprécier l'existence de ce risque lorsqu'elle doit décider de la remise aux autorités de l'État membre d'émission de la personne concernée, l'exécution d'un tel mandat ne pouvant conduire à un traitement inhumain ou dégradant. En cas de confirmation de ce risque à l'égard de la personne faisant l'objet du mandat, l'exécution de celui-ci doit être reportée[79]. Pour agir en conformité avec la Charte et la Convention, il ne suffit donc plus au juge de l'État requis de se prévaloir de la possibilité pour un requérant d'introduire à Strasbourg une requête contre l'État d'émission.

La C.J.U.E. se rapproche ainsi des positions plus nuancées sur la question adoptées par la C.E.D.H. mais aussi par la Cour de cassation française et la Cour constitutionnelle allemande[80]. On peut raisonnablement s'attendre à ce qu'elle étende cette nouvelle approche aux autres domaines où s'applique le principe de reconnaissance mutuelle, notamment ceux du règlement Dublin et du règlement Bruxelles II*bis*[81], d'autant plus que la doctrine en la ma-

2014, *Tarakhel c. Suisse*, n° 29217/12. Cette jurisprudence a d'ailleurs été reprise à l'article 19, § 2, de la Charte. **(70)** Pour une critique de cette approche, voy. parmi d'autres V. Mitsilegas, « The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice : From Automatic Inter-State Cooperation to the Slow Emergence of the Individual », *Yearbook of European Law*, 31, 2012, p. 319 ; W. Weiß, « The EU Human Rights Regime Post-Lisbon : Turning the CJEU into a Human Rights Court ? », *in* J. Morano-Foadi et L. Vickers, « Fundamental Rights in the EU - A Matter for Two Courts », Oregon, Oxford-Portland, 2015, p. 69, spécialement pp. 83 et s. Sur cette problématique en général, voy. également O. De Schutter et F. Tulkens, « Confiance mutuelle et droits de l'homme - La Convention européenne des droits de l'homme et la transformation de l'intégration européenne », *in Mélanges en hommage à Michel Melchior*, Limal, Anthemis, 2010, p. 939 ; S. Neveu, « Reconnaissance mutuelle et droits fondamentaux : quelles limites à la coopération judiciaire pénale ? », *R.T.D.H.*, 2016, p. 119. **(71)** Règlement (CE) n° 44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale. **(72)** C.E.D.H. 23 mai 2016, *Avotins c. Lettonie*, n° 17502/07. **(73)** § 114. L'« insuffisance manifeste » représente le niveau d'intervention obligatoire de la C.E.D.H. dans les cas où, comme en l'espèce, la présomption d'équivalence s'applique (C.E.D.H., 30 juin 2005, *Bosphorus c. Irlande*, n° 45036/98, § 156). **(74)** § 116. **(75)** C.E.D.H., 21 janvier 2011, *M.S.S. c. Belgique et Grèce*, n° 30696/09. **(76)** C.E.D.H., 4 novembre 2014, *Tarakhel c. Suisse*, n° 29217/12. Voy. aussi, dans le même sens, C.E.D.H., 21 octobre 2014, *Sharifi* e.a. *c. Italie et Grèce*, n° 16643/09. **(77)** Règlement (CE) n° 343/2003 du Conseil du 18 février 2003 établissant les critères et mécanismes de détermination de l'État membre responsable de l'examen d'une demande d'asile présentée dans l'un des États membres par un ressortissant d'un pays tiers, *J.O.* L 50 du 25 février 2003, pp. 1-10. **(78)** *Cfr* C.E.D.H., 13 janvier 2015, *A.M.E. c. Pays-Bas*, (déc.), n° 51428/10 et *A.S. c. Suisse*, 30 juin 2015, n° 39350/13. **(79)** C.J.U.E., *Aranyosi et Caldararu*, aff. jointes C-404/15 et C-659/15 PPU, EU:C:2016:198, points 85-88 et 98. **(80)** Crim. 12 avril 2016, FR:CCASS:2016:CR02480. Dans un arrêt retentissant du 15 décembre 2015 portant sur l'exécution d'un mandat d'arrêt européen rendu après une condamnation par défaut (2 BvR 2735/14), la Cour constitutionnelle allemande a souligné qu'en présence d'indications factuelles donnant à croire qu'en cas de transfert d'une personne vers l'État membre d'émission les exigences tenant au respect de la dignité de cette personne ne seraient pas remplies, tant la loi fondamentale allemande que le droit de l'Union imposaient au juge allemand de s'enquérir de la situation dans l'État d'émission et, le cas échéant, de renoncer au transfert, l'examen devant se faire au cas par cas. Sur cet arrêt, voy. M. Guiresse, « Quand le juge constitutionnel allemand encadre la confiance mutuelle : réflexions sur le juge européen des droits fondamentaux », http://www.gdr-elsj.eu/2016/02/08 (consulté le 18 avril 2016). **(81)** Règlement (CE)

tière — notamment au sujet du degré d'automaticité exigé pour la reconnaissance de décisions judiciaires étrangères — n'apparaît pas très unifiée[82]. Un vrai rapprochement, toutefois, suppose qu'il s'étende aussi à l'étalon de mesure utilisé pour vérifier le respect des droits fondamentaux.

2. L'étalon des droits fondamentaux

L'étalon de mesure est en effet la deuxième grande question que la jurisprudence récente de la C.J.U.E. a mise au centre du débat sur la méthodologie des droits fondamentaux. Elle se pose quand il s'agit de savoir si l'appréciation du renversement de la présomption du respect des droits fondamentaux par les États membres doit se faire selon un étalon individuel ou collectif. Dans son arrêt *N. S.*, en effet, qui concernait un cas d'application du règlement Dublin II, la C.J.U.E. avait estimé que si cette présomption était bien réfragable, il ne pouvait pas pour autant en être conclu que toute violation d'un droit fondamental par l'État membre responsable affecterait les obligations des autres États membres de respecter les dispositions du règlement Dublin II. Il y allait, en effet, de la raison d'être de l'Union et de la réalisation de l'espace de liberté, de sécurité et de justice et, plus particulièrement, du système européen commun d'asile. Seules des « défaillances systémiques » de la procédure d'asile et des conditions d'accueil des demandeurs d'asile dans l'État membre responsable, impliquant un traitement inhumain ou dégradant, au sens de l'article 4 de la Charte, étaient susceptibles de rendre ce transfert incompatible avec cet article[83]. Par la suite, cette approche a été confirmée dans l'arrêt *Abdullahi*[84] et l'avis 2/13[85].

On ne peut que s'étonner ici du remplacement de l'étalon individuel par un étalon collectif, lequel en effet représente un changement de paradigme par rapport à toute la philosophie du système de la Convention, axée sur une approche individuelle au cas par cas, comme en témoigne le droit de recours individuel, pierre d'angle du système. Ici aussi donc, on assiste à un glissement méthodologique guidé par une approche systémique qui, dans le doute, fait prévaloir la stabilité du système sur le respect des droits fondamentaux individuels. Ce glissement est d'autant plus inquiétant qu'il concerne une des dispositions les plus essentielles de la Convention et de la Charte, celle qui, entre toutes, mérite sans doute le plus de faire l'objet d'un examen individuel, en raison de son caractère absolu : l'interdiction des mauvais traitements. Alors pourtant que dans d'autres domaines, la C.J.U.E. se montre au contraire très soucieuse de garantir un examen individuel[86].

Aussi, à un moment où la doctrine des défaillances systémiques, sans doute en raison de sa commodité, s'apprêtait déjà à s'étendre à d'autres domaines[87], on ne peut que se réjouir de constater que le récent arrêt *Aranyosi et Caldararu* semble vouloir infléchir la position de la C.J.U.E. sur cette question-là aussi. Après avoir pris soin de préciser qu'il s'agit d'abord pour l'autorité judiciaire d'exécution d'examiner l'existence éventuelle de « défaillances soit systémiques ou généralisées, soit touchant certains groupes de personnes, soit encore certains centres de détention » dans l'État d'émission, la C.J.U.E. ajoute immédiatement que « le constat de l'existence d'un risque réel de traitement inhumain ou dégradant en raison des conditions générales de détention dans l'État membre d'émission ne saurait conduire, comme tel, au refus d'exécuter un mandat d'arrêt européen. (...) Encore faut-il, ensuite, que l'autorité judiciaire d'exécution apprécie, de manière concrète et précise, s'il existe des motifs sérieux et avérés de croire que la personne concernée courra ce risque en raison des conditions de sa détention envisagées dans l'État membre d'émission ». Si ce risque se trouve confirmé à la suite d'informations complémentaires obtenues de l'État d'émission en vertu de l'article 15, § 2, de la décision-cadre, l'exécution du mandat d'arrêt européen doit être reportée[88].

Ce qui frappe dans cette nouvelle approche, c'est non seulement que la C.J.U.E. assouplit le critère des défaillances systémiques pour y inclure des défaillances limitées à certains groupes de personnes ou à certains centres de détention, mais qu'elle n'en fait plus non plus le point d'aboutissement de l'analyse. Centré sur le cas concret de la personne à transférer, le critère décisif est redevenu individuel et les défaillances plus générales ne semblent plus qu'un passage destiné à faciliter son maniement. L'arrêt ne dit pas, toutefois, s'il s'agit d'un passage obligé, comme condition, ou d'un passage facultatif, comme simple présomption. Quoi qu'il en soit, la C.J.U.E. se rapproche donc, ici aussi, de la méthode suivie par la C.E.D.H. dans les affaires *M.S.S.* et *Tarakhel* précitées, ainsi d'ailleurs que de celle adoptée par la Cour suprême du Royaume-Uni[89] et la Cour constitutionnelle allemande[90]. L'arrêt *Aranyosi et Caldararu*, toutefois, concerne le mandat d'arrêt européen. La C.J.U.E. suivra-t-elle cette nouvelle approche aussi dans le domaine du règlement Dublin III[91], lequel reprend en effet le critère des défaillances systémiques en son article 3, § 2 ? L'avenir le dira.

3 La convergence comme conclusion ?

Malgré des évolutions encourageantes qu'il convient de saluer, la convergence ne saurait être la conclusion générale de cette étude. Un de ses principaux enseignements, en effet, c'est que quand il s'agit pour le droit de l'Union d'appliquer les droits fonda-

n° 2201/2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale, *J.O.* L 338 du 23 décembre 2003, pp. 1-29. Voy. par exemple C.J.U.E., *PPU - Povse*, aff. C-211/10, EU:C:2010:400. **(82)** Ainsi, par exemple, la reconnaissance mutuelle semble-t-elle laisser plus de place aux droits fondamentaux dans les domaines régis par le règlement Bruxelles I (voy. C.J.U.E., *Trade Agency Ltd*, aff. C-619/10, EU:C:2012:531, point 62). Quant à la directive n° 2014/41/UE du Parlement européen et du Conseil du 3 avril 2014 concernant la décision d'enquête européenne en matière pénale (*J.O.* L 130 du 1er mai 2014, pp. 1-36), elle contient, en son article 11, § 1er, f), un motif de refus d'exécution explicite s'il existe « des motifs sérieux de croire que l'exécution de la mesure d'enquête (...) serait incompatible avec les obligations de l'État d'exécution conformément à l'article 6 du Traité sur l'Union européenne et à la Charte ». Voy. aussi le considérant 19 de la directive. **(83)** C.J.U.E., *N. S. et M. E.*, aff. jointes C-411/10 et C-493/10, EU:C:2011:865, points 82-83, 86. **(84)** C.J.U.E., *Abdullahi*, aff. C-394/12, EU:C:2013:813. **(85)** Dans son arrêt *MA, BT et DA* (aff. C-648/11, EU:C:2013:367), la C.J.U.E. a cependant porté une attention particulière au cas des demandeurs d'asile mineurs non accompagnés. **(86)** Ainsi dans C.J.U.E., *PPU - Mahdi*, EU:C:2014:1320 ; C.J.U.E., *Z Zh*, aff. C-554/13, EU:C:2015:377 ; C.J.U.E., *H. T.*, aff. C-373/13, EU:C:2015:413. **(87)** Voy. les conclusions de l'avocat général Bot dans l'affaire *Schrems*, EU:C:2015:627, points 101-105. **(88)** Points 89-98. **(89)** Arrêt du 19 février 2014 ([2014] UKSC s.c. 12), reproduit par extraits au paragraphe 52 de l'arrêt *Tarakhel*. **(90)** Dans son arrêt du 15 décembre 2015 (2 BvR 2735/14) ; voy. ci-dessus. **(91)** Règlement (UE) n° 604/2013 du Parlement européen et du Conseil du 26 juin 2013 établissant les critères et mécanismes de détermination de l'État membre responsable de l'examen d'une demande de protection internationale introduite dans l'un des États membres par un ressortissant de pays tiers ou un apatride, *J.O.* L 180 du 29 juin 2013, pp. 31-59.

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mentaux, il semble traversé par une série de tensions conceptuelles et méthodologiques fortes, comme le révèlent les nombreuses oscillations observées tout au long de l'analyse : oscillations entre l'affirmation de son autonomie et le respect de la portée trans-systémique des droits de la Convention ; entre l'insularité et l'ouverture au contrôle externe ; entre l'attention portée au seul contenu des droits fondamentaux ou également à leur méthodologie ; entre des droits fondamentaux qui limitent les objectifs poursuivis par l'Union ou ces objectifs qui limitent les droits fondamentaux ; entre la mention de l'article 52, § 3, de la Charte et son « oubli » ; entre la pédagogie et le mutisme dans l'application de cet article ; entre le paragraphe 1 et le paragraphe 3 de l'article 52 comme fondement des limitations ; entre les dépassements de la Convention et certains reculs par rapport elle ; entre une approche individuelle ou systémique ; entre l'application ou la suspension des droits fondamentaux dans l'État requis ; entre un étalon individuel ou un étalon collectif. Cela donne une jurisprudence qui, considérée dans son ensemble, paraît inconstante, sans cesse à la recherche d'un point d'équilibre, tiraillée entre plusieurs pôles, entre plusieurs types de préoccupations apparemment contradictoires et dont le poids respectif dans les arrêts varie selon une logique parfois claire et parfois obscure. Bref, une jurisprudence qui, selon les domaines et les époques, « souffle le chaud et le froid ».

Eu égard au poids politique et juridique de l'Union européenne, une telle inconstance n'est pas sans danger pour l'avenir des droits fondamentaux en Europe car elle est source d'insécurité juridique et de relativisme. Le contrôle externe qu'aurait dû permettre l'adhésion de l'Union européenne à la Convention aurait pu contribuer à stabiliser la situation à cet égard, mais la C.J.U.E. en a décidé autrement. Les développements les plus récents consécutifs à l'avis 2/13 sont néanmoins encourageants et montrent qu'une certaine convergence est possible, mais au prix d'une vigilance accrue. Il faut espérer que cette tendance se confirme, car au milieu de toutes les graves crises qu'elle traverse actuellement, l'Europe se doit de rester unie et ferme sur l'essentiel. Les droits fondamentaux européens, repères et balises dans les tempêtes politiques, en font certainement partie. Il est plus facile de les préserver aujourd'hui que de devoir les reconquérir demain.