Speakers`Contribution

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE

TRAINING SEMINAR FOR LEGAL PRACTITIONERS FOCUS ON LABOUR LAW, EMPLOYMENT AND SOCIAL RIGHTS

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The Charter of Fundamental Rights of the EU in Practice

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Speakers' contributions 415DT105

Haris Tagaras

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THE ROLE OF THE CHARTER WITHIN THE EU LEGAL FRAMEWORK
AND
ITS RELEVANCE FOR NATIONAL LEGAL ORDERS

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OUTLINE OF THE PRESENTATION

Historical background and institutional framework

The European Convention of Human Rights (ECHR) of 1950 and the European Communities in the '50s

The absence of provisions on human rights in the EC Treaties

The *Stauder* case of the EC Court of Justice (ECJ), 29/69, EU:C:1969:57
"*Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court*"

International Handelsgesellschaft, 11/1970, EU:C:1970:114,[*] and subsequent ECJ case-law (e.g. Nold, 4/73, EU:C:1974:51, Johnston, 222/84, EU:C:1986:206), according to which :

[*] Under the title "The protection of fundamental rights in the Community legal system", paras.3 and 4 read as follows :
"3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of

"The Community judicature ensures the observance of general principles of law, of which fundamental rights form an integral part . In safeguarding such rights, the Court draws inspiration from constitutional traditions common to the Member States and from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the European Convention on Human Rights being particularly significant in that respect" .

The ingenuity and the weaknesses of the model

In particular on the weaknesses :

- Legal uncertainty as to the substantive contents of the rights protected
- Impossibility to sue the EC at the ECHR Court

The first attempt (and failure) of EC accession to the ECHR : *ECJ opinion 1/94*

Attempts to challenge EC law before the ECHR Court : from *CFDT* to *Bosphorus*, via *Matthews* :

- *CFDT (8030/77, ECHR Commission decision of 10.7.1978) :*
  Non admissibility of an action versus all EC Member States, related to the appointment of members of a ECSC committee, since "*by taking part in the decisions of the Council of European Communities, the Contrdcting Parties to the Convention do not exercise their 'jurisdiction' within the meaning of Article I of the Convention"*
- *Matthews (24833/94, ECHR Court 18.2.1999):*
  Admissibility of an action versus United Kingdom for not holding European Parliament elections in Gibraltar, on the basis of Annex II of the 1976 Act (on the Election of the Representatives of the European Parliament by Direct Universal Suffrage, signed by the respective foreign ministers and attached to the Council Decision 76/787), such Annex providing that "*The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom*" .
- *Bosphorus (45036/98, ECHR Court Grand Chamber 30.6.2005) :*

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national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.
4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system".

Quid for acts or omissions aiming solely at complying with international, including EU, obligations of the State ?

"155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see M. & Co., cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156. If such equivalent protection is considered to be provided by the 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.

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 cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (see Loizidou v. Turkey (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 27-28, § 75)".

The Charter of Fundamental Rights of the European Union of 7/12/2000, adapted in Strasbourg on 12/12/2007

Entry into force of the Lisbon Treaty, 1/12/2009

Article 6 of the Treaty on European Union (TEU) and general questions of principle

"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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

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

Par.1

- Binding effect of the Charter and its rang as primary law
- No extension of the EU competences
- Interpretation of the Charter : title VII and the "Explanations"

Par.2

The accession of the EU to the ECHR

Binding effect of the provision and the Protocol Nr. 8 on the requirements of preservation of the
>>> specific EU characteristics, in particular with regard to:
(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate
>>> EU competences or the powers of its institutions, including with regard to the prohibition to the Member States (according to Article 344 TFUE) to submit disputes on the interpretation or application of the treaties to other methods of settlement

The (second) attempt (and failure) : the *ECJ opinion 2/2013* and its motivation, related mainly to

a) the specific characteristics and the autonomy of EU law

b) Article 344 on the Treaty for the functionning of the European Union (TFEU)

c) the co-respondent mechanism

d) the procedure for the prior involvement of the Court of Justice

e) the specific characteristics of EU law as regards judicial review in matters of the Common Foreing and Security Policy

Par.3

Maintain of the old ECJ case-law concerning the recognition of fundamental rights as "general principles" of EU law, with sources of inspiration the ECHR and the constitutional traditions common to Member States

See also Protocol Nr.30 on the application of the Charter to Poland and the United Kingdom

In particular, Art.1.1:
"The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".
Does the reference to "laws, regulations … [etc.] ..." include also those implementing EU law ? If yes, is there any room left for the control of their compatibility with the Charter ?

The question of primacy of EU law and the rule of Article 53 of the Charter

General considerations on primacy

General considerations on conflict among legal acts/instruments providing for the protection of human rights, in particular the principle of the "higher protection"

The contents of Article 53 :
"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, the Community 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".

The *Melloni* case of the ECJ (C-399/11, EU:C:2013:107), in particular on the third question asked by the national court :

55 *By its third question, the national court asks, in essence, whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.*

56 *The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.*

57 *Such an interpretation of Article 53 of the Charter cannot be accepted.*

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

59 *It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 61).*

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

61 *However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.*

62 *It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among*

the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted i

63 Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.

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

The particular situation of conflict among Charter provisions going in opposite directions (e.g. the Deutsches Weintor case, C-544/10, EU:C:2012:526, to be presented during the afternoon session)

EU remedies for violation of fundamental rights

Before national courts, in the framework of the preliminary review proceedings of Article 267 TFUE

Before the ECJ : mainly the action for annulment (Art.263 TFUE) and the action for damages (Art.268 and 340 TFUE) ; to a lesser extent the action for failure to act (Art.258 TFUE)

Excursus
for the problems arising out of the involvement in the decision taking of *sui generis* EU or non-EU entities, as the Eurogroup[**] and the ESM,

[**] According to para.1 of the Protocol Nr.14 on the Eurogroup "*The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be*

with reference of the Greek PSI case (the “haircut” of the State obligations), which will be dealt with more extensively in the framework of the afternoon presentation on social rights and the “Solidarity” title.

prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission” (emphassis added – the para.2 refers to the election of the President).

OVERVIEW OF THE SOCIAL RIGHTS AND PRINCIPLES PROTECTED BY THE CHARTER : SPECIAL FOCUS ON THE "SOLIDARITY" TITLE

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OUTLINE OF THE PRESENTATION

The substantive contents of the "Solidarity" Title

Distinction between "rights" and "principles"

According to Art.51.1 rights are to be "respected" and principles to be "observed"

Article 52.5 focuses on principles, providing that provisions containing principles may be "implemented" by EU and national acts and that they "shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality"

The *Explanations* on Art.52 contain a crucial distinction as regards principles : they only become significant as a tool of interpretation of EU or national law and they cannot "give rise to direct claims for positive action by the Union's institutions or Member States".
May we deduce, *a contrario*, that "rights" do give rise, and always, to such claims ? And is the sense of the above formulation equivalent to the concept of the so-called "enforceable rights', i.e. those that can be invoked before a court ?

Then, *quid* as to the non-discrimination provision of Art.21, which undoubtedly confers enforceable rights ? Do we (including ECJ) unduly call non-discrimination a "principle"

Inherent difficulties of distinction between "rights" and "principles"

The individual provisions of Title IV

Article 27

Workers' right to information and consultation within the undertaking

Article 28

Right of collective bargaining and action

Article 29

Right of access to placement services

Article 30

Protection in the event of unjustified dismissal

Article 31

Fair and just working conditions

Article 32

Prohibition of child labour and protection of young people at work

Article 33

Family and professional life

Article 34

Social security and social assistance

Article 35

Health care

Article 36

Access to services of general economic interest

Article 37

Environmental protection

Article 38

Consumer protection

The "Explanations"

Mere references to the origin of the provisions and to the link with the TFUE and the secondary law

The concept of "social" rights and principles and the "Solidarity" title

Rights and/or principles directly linked to the employment and social security matters and other "social" rights and/or principles of the "Solidarity" title.
The historical background of the former : from the European Social Charter of 1961 to Art.151 TFUE and to the numerous EU directives on employment matters

Rights and/or principles constituting expression of solidarity but being outside title IV
Examples : Article 25 on the rights of the elderly and Article 26 on the integration of people with disabilities

Rights and/or principles linked to *lato sensu* employment but being outside title IV
Examples : Article 12 on freedom of association and Article 15 on freedom to choose an occupation and right to engage in work (see also Article 16 on freedom to conduct a business)

The legal nature of the "Solidarity" provisions and their conditional character

Rights or principles ?

Conditionality with regard to EU law and to national law and practices :
Most of the provisions concerned, namely
Art.27, 28, 30, 34, 35

Conditionality with regard to the sole national law and practices :
Art.35 and 36

The use of terms lacking the precision required for the conferral of enforceable rights :
The vague character of the reference to "protection" (Art.33.1), even of "high" level (Art.37-38)

Provisions laying down *"solidarity" objectives to be integrated into EU policies :*
Art.37 and 38, for the environment and the consumer protection respectively (but with insufficiently precise terms – see above)

Examples of unconditional rules :

- Free access to placement services (Art.29)
- Fair and just working conditions (Art.31)
- Prohibition of child labour (Art.32.1)
- Protection from dismissal for a reason connected with maternity and right to paid maternity leave and to parental leave (Art.33)

However, with the exception of the first one (and possibly of the first limb of the fourth), the vague and general character of the terms used reduces their practical important and usefulness ; in purely legal terms, even those which can be classified as "rights", do not constitute "enforceable" rights

Some conclusions

<u>The UK and Poland exception – Protocol Nr.30</u>

Article 1[*]

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

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

[*] Article 2 reads as follows : "*To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom*".

Relation of para.2 of Article 1 with the rest of the Protocole :
A quasi "partial opt-out" with regard to the (few) title IV provisions which might be interpreted as conferring enforceable rights

The case-law

Introductory considerations, irrespective of the individual titles of the Charter

Numerous cases where the Charter is used to simply confirm existing case-law on interpretation and application of EU provisions
("…*such interpretation is now also corroborated by the Charter*…")

However, the ***crucial question*** is whether the Charter has also led to **re**consideration of **existing** case-law and/or whether it has provided **decisive arguments** in the consideration of **new** questions *(in the sense, in these latter cases, that in absence of the Charter, the replies might have been different)*

Some examples of failed attempts to rely on the Charter to this effect

- The Mandt, F-45/01, ECLI:EU:F:2010:79, and the Moschonaki, T-476/11 P, ECLI:EU:T:2013:567, cases

  To what extent Article 47 of the Charter (effective remedy and fair trial) may render more flexible the EU civil service law requirement of "correspondence" between the Plaintiff's legal grounds in the pre-judicial procedure and in the legal action itself; reply by the positive by the EUSCT, quashed by the General Court

- The Radu case, C-396/11, ECLI:EU:C:2013:39

  Purported requirement of prior hearing of the requested person by the authorities issuing a European arrest warrant (Framework Decision 2002/584/JHA) aiming at conducting a criminal prosecution in the issuing country; question raised before the executing authorities in the light of Articles 47 and 48 of the Charter (presumption of innocence and right of defence).
  (see also C-237/15 PPU, Lanigan)

- The Hörnfeldt case, C-141/11, ECLI:EU:C:2012:421
  The compulsory retirement age in the light of Art.15 ; interpretation of Directive 2000/78 and verification whether it precludes national law allowing the employer to automatically terminate the working relationship when the employee reaches the age of 67 (proportionality test)

Decisions going to the opposite direction, in particular findings of incompatibility with the Charter of EU provisions or of national law provisions implementing EU law

- The Volker & Schecke case, C-92 and 93/09 : ECLI:EU:C:2010:662
  Conflict of Charter with EU secondary law (Regulation 1290/2005):
  Wide publication of personal data of aid beneficiaries and easy access by third parties not in conformity with Articles 7 and 8 of the Charter (respect of private and family life and respect of personal data) ; failure to ensure a fair balance, between the various interests involved, due namely to absence of distinctions
  "*based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof*"

- The Alemo-Herron case, C-426/11, ECLI:EU:C:2013:521
  Article 16 of the Charter as a tool of interpretation of a EU secondary law provision, i.e. Directive 2001/23, in view of assessing the compatibility with the latter of a national implementing provision:
  the Directive cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business; therefore it precludes a Member State from providing, in the event of a transfer of an undertaking, that
  "*dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer*"

- The Akcyjna case, C-396/13, ECLI:EU:C:2015:86
  Again, reliance on the Charter for the interpretation of a EU secondary law provision in view of assessing the validity of a national law provision:
  According to Article 3(1) of Directive 96/71 on posted workers, questions

concerning 'minimum rates of pay' within the meaning of the directive, are governed, whatever the law applicable to the employment relationship, by the law of the Member State to whose territory the workers are posted (*host* country) in order to carry out their work; read in the light of Article 47 of the Charter, this Directive
"prevents a rule of the home Member State (where the assignment of claims arising from employment relationships is prohibited) from barring a trade union from bringing an action before a court of the host Member State, in which the work is performed, in order to recover for the posted workers, pay claims which relate to the minimum wage and which have been assigned to it, that assignment being in conformity with the law in force in the second Member State"

The particular questions
of the horizontal direct effect of directives (see below)
and
of the interpretation of the fourth indent of Art.263 TFUE

Selected cases on the "Solidarity" provisions

1. The AMS case, C-176/12, ECLI:EU:C:2014:2

National law not in conformity with a Directive provision, which (the Directive provision) appears capable of producing direct effect – dispute between individuals and possible impact of Article 27 of the Charter on the enforceability of the Directive provision in a such case, i.e. to produce horizontal direct effect

Reminder of the case-law on the non-discrimination principle (Mangold, Kücükdeveci etc.) :
It is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle,
>>> i.e. acceptance of horizontal effect

On the contrary, the Court refused the horizontal direct effect in the AMS ruling, the relevant extracts of which read as follows :

41 *Accordingly, it is necessary to ascertain, thirdly, whether the situation in the case in the main proceedings is similar to that in the case which gave rise to Kükükdeveci, so that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, can be invoked in a dispute between individuals in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive.*

42 *In respect of Article 27 of the Charter, as such, it should be recalled that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law (see Case C-617/10 Åkerberg Fransson [2013] ECR, paragraph 19).*

43 *Thus, since the national legislation at issue in the main proceedings was adopted to implement Directive 2002/14, Article 27 of the Charter is applicable to the case in the main proceedings.*

44 *It must also be observed that Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.*

45 *It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.*

46 *It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.*

47 *In this connection, the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.*

48 *Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.*

49 *That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.*

50 *However, a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained (see Dominguez, paragraph 43).*

51 *It follows from the foregoing that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision*

Attempt of drawing conclusions :

- Some Charter provisions, e.g. Art.21 on prohibition of discrimination, are sufficient in themselves, because of their unconditional and precise formulation, to confer on individuals enforceable rights; some not, e.g. Art.27, and most of the "Solidarity" provisions belong to this latter category.
- When the Charter's provisions belong to the former category, and when there exists also a directive provision with direct effect, then the right concerned may also be invoked against individuals. In other words, the consecration of a right by the Charter remedies to the absence of horizontal direct effect by directives, leading to such effect.

2. The Kamberaj case, C-571/10, ECLI:EU:C:2012:233

Directive 2003/109 guarantees the right of equal treatment for third country nationals who are long-term residents, save in certain cases social assistance and social protection, but reserving explicitly the "core benefits" in these fields. The case concerned a national law providing for housing benefit for low income tenants and the Court was inter alia called to interpret the meaning of "core benefits"; it held that
"according to Article 34 of the Charter, 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. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. It is for the referring court to reach the necessary findings, taking into consideration the objective of that benefit, its amount, the conditions subject to which it is awarded and the place of that benefit in the Italian system of social assistance"

3. The Deutsches Weintor case, C-544/10, ECLI:EU:C:2013:39

In this case, Art.35 on health care offered an additional argument to prove the legality of the total prohibition of "health claims" (claims stating, suggesting or implying that a relationship exists between a food category, a food or one of its constituents and health) for alcoholic beverages by Regulation 1924/2006. At the same time, it was held that the prohibition of health claims for alcoholic beverages does not contravene Articles 15 and 16, since it does not impair the "very essence" of the rights protected by the latter

4. Cases related to reforms or measures affecting "Solidarity" rights, but required by EU/troika as part of bailout conditionality

Failed attempts to rely on the Charter, including the "Solidarity" title (e.g. Art.31.1 in the Portuguese case C-128/12) ; national referrals rejected as manifestly inadmissible for lack of jurisdiction by the Court

The Greek PSI case (the "haircut" of State bonds) :

- main features of the "haircut" (53,5% of the value of the bonds permanently deleted, 31,5% to be payed from 2023 to 2042, 15% reimbursed on the spot)
- the involvement of the U.N., through a report making particular reference to rights corresponding to those of the Charter's title IV,
- the refusal of the Council of State to refer the case to the ECJ and
- the pending proceedings before the ECHR Court

5. Varia

The scope of application and interpretation of the Charter in domestic legal proceedings

ERA 22-23 October 2015

Barcelona

Sophia Koukoulis-Spiliotopoulos

Attorney and Counsellor at Law

"[The Union] places the individual at the heart of its activities"

(Preamble to the Charter)

***

Aim of the Charter: "*To strengthen the protection of fundamental rights*"

(Preamble to the Charter)

***

"[The Union] is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasized in the Preamble to the Treaty".

(ECJ C-50/96 *Schröder* [2000] ECR I-774; C-270/97 *Sievers* [2000] ECR I-933; the passages referred to remain in the EU and TFEU Preambles)

The extent and limits of the scope of the rights guaranteed (Charter Title VII)

- **The general principles as forerunners and content of the Charter**

- **The Charter's personal scope:** "*everyone*"?

- **The Charter's material scope** (Article 51(1))
  - ***EU institutions, bodies, offices, agencies***:
    - even when they exceed their powers: Rule of Law requirement (C-362/14 *Schrems*);
    - Article 51(1): acting within the scope of their competences not a condition of accountability.
    - accountability for legal and material acts or omissions (C-362/14 *Schrems*)

The Charter's material scope

- ***Member States:***

-Article 51(1): "*only when they are implementing EU law*";

-ECJ: "*implementing EU law*"= acting "*within the scope of EU law*"

(this includes but is not limited to "*implementation*");

Charter's scope coincides with EU law scope

(C-617/10 *Åkerberg Fransson*);

-where is a "connecting factor" needed?

- accountability for legal and material acts or omissions (C-411/10 C-493/10 *N.S.: treatment of migrants;* C-362/14 *Schrems: personal data protection).*

The Charter's effect in the national legal order

- ***direct vertical effect***
- ***direct horizontal effect***

- none excluded, depending on the particular provision.

criterion of direct effect: the provision's wording

(ECJ C-144/04 *Mangold*; C-555/07 *Kücükdeveci*; C-176/12 *Association de médiation sociale*; C-362/14 *Schrems*)

Scope and interpretation of rights and principles (Article 52)

- **may all Charter rights be limited?**

- **Article 52(1):**

conditions of the lawfulness of limitations:

- *"provided by law";*
- *"respect the essence of the rights";*
- *observe the "principle of proportionality;"*
- ECJ*: fair balance of rights* (C-214/12 *Telekabel*);
- ECJ*: "in a democratic society"* (C-92/09 C-93/09 *Schecke*).

- **Article 52(2):**
  - **alignment of Charter rights with Treaty rights, but**
  - **more protective provisions prevail *(Article 53)***

- **Article 52(3):**
  - **alignment of Charter rights with ECHR rights, but**
  - **more protective provisions prevail**

- **Article 52(4):**
  - **Charter rights resulting from common constitutional traditions/ general principles drawn by the ECJ from such traditions, incorporated in the Charter.**

- **Article 52(5):**
  - **dissociation of principles from rights;**
  - ***a priori* reduction of the justiciability and exclusion of the direct effect of principles;**
  - **not corresponding to ECJ case law:**

"*fundamental rights form an integral part of the general principles of law whose observance the Court ensures*" (C-402/05 P C-415/05 P *Kadi*)

"*in the language of the Treaty, the term 'principle' is specifically used in order to indicate the fundamental nature of certain provisions" (43/75 Defrenne)*

- **assimilation of Charter provisions to Treaty provisions (Article 6(1) TEU)*;***
- **result: Charter provisions produce the same effects, under the same conditions, as Treaty provisions.**

- **Article 52(6): explanations:**

  ***"due regard"* by national and EU courts**

- **Article 6(1) TEU: *"with due regard to the explanations […] that set out the <u>sources</u> of the [Charter's] provisions."***

***

Thank you for your attention.

The scope of application and interpretation of the Charter in domestic legal proceedings

ERA 22-23 October 2015

Barcelona

Case studies on the application of the Charter (interactive exercise)

Sophia Koukoulis-Spiliotopoulos

Attorney and Counsellor at Law

I. The application of Article 50 of the Charter (*non bis in idem* principle)

Article 50
Right not to be tried or punished twice in criminal proceedings for the same criminal offence

"*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*."

***

Explanation on Article 50

Article 4 of Protocol No 7 to the ECHR reads as follows:

"*1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

The '*non bis in idem*' rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 *Gutmann v Commission* [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the '*non bis in idem*' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the '*non bis in idem*' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

****

The case

1. The plaintiff was convicted by final judgment of a penal court of an EU Member State (State A) to incarceration for drug trafficking (illegal purchase, possession, trafficking and importation in State A of a certain quantity of drugs). He was pursued and convicted in another Member State (State B) for the same act, regarding the same kind and quantity of drugs. He appealed against the latter judgment to the Supreme Penal Court of State B.

2. The Penal Code of State B contained the principle of *non bis in idem* regarding conviction or acquittal in any foreign State. However, certain criminal acts, among which was drug trafficking, were excepted. In these cases, the prosecution in State B was not excluded, but the sentence already served in the country where the perpetrator was convicted for the first time was deducted from the sentence eventually inflicted in State B.

3. Furthermore, State B had entered a reservation to Article 54 of the Schengen Convention which contained the *non bis in idem* principle, as allowed by Article 55 of that Convention. According to the reservation, State B was not bound by Article 54 of the Convention regarding drug trafficking.

4. The plaintiff invoked Article 50 of the Charter. He submitted that this provision embodies a general principle of EU law elaborated by the ECJ before the Charter entered into force. It also constitutes a particular expression of the more general EU law principle of "mutual recognition of judgments and judicial decisions" enshrined in Article 82 TFEU. He admitted that Paragraph 2 of Article 82 TFEU requires that the European Parliament and the Council adopt measures for the implementation of the principle of mutual recognition. He argued, however, that there is no need for executive measures aiming to implement the *non bis in idem* principle, as Article 50 of the Charter is clear and complete; the prerequisites for its application can be deduced from its text. Therefore, Article 50 of the Charter is directly applicable and produces direct effects in the domestic legal order.

5. Moreover, the plaintiff argued that the reservations eventually entered by Member States to Article 54 of the Schengen Convention are not valid anymore. This is so because Article 50 of the Charter does not allow exceptions, as the Schengen Convention does, while the conditions under which Article 52(1) of the Charter allows limitations are not satisfied regarding this fundamental right. In particular, the exception provided by the Penal Code of State B regarding drug trafficking is not necessary and does not genuinely relate to an objective of general interest. Indeed, the criminal punishment of drug trafficking, in accordance with the legislation and the views prevailing in State B, cannot be considered a necessary objective of general interest recognised in the EU.

Discussion:

- Would State B in this case "implement EU law", within the meaning of Article 51(1) of the Charter, i.e. would it act "within the scope" of EU law?
- Is there a connecting factor with EU law?
- Might other Charter provisions apply to the case?
- Can the explanations of Articles 50, 51 and 52 of the Charter be given "due regard" within the meaning of Article 6(1) TEU and Article 52(7) of the Charter?
- Do the explanations on Article 50 help?
- What should the decision of the Supreme Court of State B be?

Relevant ECJ case law: C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; C-144/04 *Mangold* [2005] ECR I-9981; C-555/07 *Kücükdeveci* [2010] ECR I-365; C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2.

II. The application of Article 21 of the Charter (principle of non-discrimination)

Article 21

Non-discrimination

"1. 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.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

***

Explanation on Article 21

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

****

The case

1. The legislation of a Member State reduced the minimum wage for workers below the age of 25 to 68 % of the national minimum wage (*sub-minima*). A 23 year old worker claimed equal pay with his over 25 year old colleagues who were performing the same work or work of equal value in the same private undertaking. He invoked the EU principle of non-discrimination on grounds of age. He recalled that according to ECJ case law, this principle, which is enshrined in Article 21 of the Charter and is given specific expression in Directive 2000/78/EC,[1] has vertical and horizontal effect.[2] The Directive prohibits any discrimination in *'employment and working conditions, including dismissals and pay'* (Articles 2(2), 3 (1)(c)). He further argued as follows, also invoking ECJ case law:

2. Directive 2000/78 (Article 6(1)) allows differences of treatment on grounds of age *'if they are objectively justified by a legitimate aim, including legitimate employment policy,*

[1] Directive 2000/78/EC (equal treatment in employment and occupation) OJ L 303/16, 2.12.2000.
[2] ECJ C-144/04 *Mangold* [2005] ECR I-9981; C-555/07 *Kücükdeveci* [2010] ECR I-365.

labour market and vocational training objectives, and the means of achieving that aim are appropriate and necessary'. According to the ECJ, the means must '*genuinely reflect a concern to attain the aim in a consistent and systematic manner*'[3].

3. Allowing justifications is a mere option for Member States; the relevant provisions must be strictly interpreted as they constitute an exception to a fundamental right.[4] There can be no justification where age is '*the sole criterion'* of differentiation.[5] Moreover, Article 157 TFEU (equal pay for men and women) which also applies to other grounds of discrimination in pay besides gender,[6] allows no derogations.[7]

4. The case reached the national Supreme Court. The claimant contended that the issue fell within the scope of EU law and requested a preliminary reference to the ECJ. The Supreme Court ruled that the Charter did not apply, and it implicitly rejected the request.

Discussion:
- Does the above national legislation constitute "implementation" of EU law within the meaning of Article 51(1) of the Charter, i.e. does it fall "within the scope of EU law"?
- Is there a connecting factor with EU law?
- Can the courts give "due regard" to the explanation on Article 21 of the Charter (Article 6(1) TEU, Article 52(7) of the Charter)?
- Does this explanation reflect ECJ case law?
- What should the decision of the Supreme Court of State B be? Should it make a preliminary reference to the ECJ?

Relevant ECJ case law: the case law mentioned in the footnotes and C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; *Association de médiation sociale* ECLI:EU:C:2014:2.

Regarding the request for a preliminary reference: C-283/81 *CILFIT* [1982] ECR 3415; ECtHR *Ullens de Schooten and Rezabek v. Belgium,* 20.9.2011 (Applications Nos. 3989/07, 38353/07), paras. 58-62.

European Committee of Social Rights: Decision on the merits of 23.05.2012, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY)* v. *Greece:* The impugned legislation constitutes a violation of the European Social Charter.

III. The application of Article 31(2) of the Charter (paid annual leave)

Article 31

Fair and just working conditions

"*1. Every worker has the right to working conditions which respect his or her health, safety and dignity.*

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

***

[3] ECJ C-476/11 *HK Danmark* ECLI:EU:C:2013:590; C-159-160/10 *Fuchs* [2011] ECR I-6919.
[4] ECJ C-388/07 *Age Concern* [2009] ECR I-1569; C-447/09 *Prigge* [2011] I-8003.
[5] ECJ C-144/04 *Mangold* [2005] ECR I-9981; C-297-298/10 *Hennigs* [2011] ECR I-7965.
[6] ECJ C-67/06 *Maruko* [2008] ECR I-1757.
[7] Well established ECJ case law since C-262/88 *Barber* [1990] ECR I-1889.

Explanation on Article 31

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

The case

1. The legislation of a Member State provides that young persons aged 15-18 who are employed under a 'special apprenticeship contract' are not entitled to paid annual leave. A 17 year old worker employed under such a contract in a private undertaking claimed his right to paid annual leave. He alleged that the ECJ has recognized this right as a principle of EU social law of particular importance, expressly laid down in Article 31(2) of the Charter and referred to by Directive 2003/88/EC.[8] He further alleged that this principle entitles every worker to at least four weeks paid annual leave; it allows no derogations – hence it is not liable to any limitation - and it has vertical and horizontal direct effect.

Discussion:

- Does the above national legislation constitute "implementation" of EU law within the meaning of Article 51(1) of the Charter?
- Might other Charter provisions, besides Article 31(2), apply to this case?
- Does the explanation on Article 31 of the Charter "set out the sources" of Article 31(2), so that the courts give it "due regard" (Article 6(1) TEU, Article 52(7) of the Charter)?
- Does this explanation reflect ECJ case law?

Relevant ECJ case law: C-173/99 *BECTU* [2001] ECR I-4881; C-78/11 *ANGED* EU:C:2012:372; C-579/12 RX-II, *Strack* EU:C:2013:570.

European Committee of Social Rights: Decision on the merits of 23.05.2012, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY)* v. *Greece:* The impugned legislation constitutes a violation of the European Social Charter.

[8] Directive 2003/88 on the organisation of working time, OJ L 299/9, 18.11.2003, replaced and codified Directive 93/104/EC which is mentioned in the explanation.

Equality and non-discrimination in employment

Does the Charter matter?

Aaron Baker, Durham University, UK

ERA, Barcelona, 22 October 2015

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?

Sagrada Família

Durham University

Sources of EU Equality Law

Article 19 TFEU (ex 13 TEC)
Article 157 TFEU (ex 141 TEC)

Framework Directive: 2000/78/EC

Racial Equality Directive: 2000/43/EC

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

EU Charter of Fundamental Rights Articles 20-26

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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 basis 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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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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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)"

Park Güell

Durham University

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

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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Rambla del Mar

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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”

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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The Role of the Charter

"Title III: Equality" has 7 articles, but arguably only 21 (Non-discrimination) and 23 (Equality between women and men) are of practical relevance to employment disputes (25 and 26?)

The Charter applies to EU institutions and to Member States "only when they are implementing Union law" (Art 51(1))

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."

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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 of EU law

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

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

Banker's Bar, Mandarin Oriental

Durham University

Equality and non-discrimination in employment

Case studies introduction

Aaron Baker, Durham University, UK

ERA, Barcelona, 22 October 2015

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?

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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

The protection of Fundamental Rights in Europe: Where do we stand?

The Charter of Fundamental Rights and the ECHR: Complementing or Competing Systems of Fundamental Rights Protection in Europe?

Christiaan Timmermans

Barcelona, 23 October 2015

Introductory Remark

The EU and ECHR systems of fundamental rights protection considered on a more general level are neither complementing nor competing systems, already in view of their respective origins. More particularly, the relationship between the ECtHR and the EU Court of Justice (EUCJ) at least in a historical perspective not characterized by antagonism, but by cooperation. The Convention system even already now partly integrated into the EU system (Article 52 (3) Charter).

Judicial remedies before the EUCJ and the ECtHR

Both systems of remedies highly different.

General access to the ECtHR once national remedies exhausted (subsidiarity principle).

Only fairly limited direct access for natural and legal persons to the EU General Court (Article 263 (4) TFEU: decisions addressed to them or decisions of direct and individual concern to them, restrictively interpreted by the EUCJ, see cases Plaumann, 25/62, Pequenos Agricultores, C-50/00 P; access somewhat enlarged by the Lisbon treaty: now also included regulatory acts of direct

concern which do not require implementing measures, see Inuit, C- 583/11 P).

The EU system of legal protection is a two pillar system: fundamental role of the national courts (see also Article 19 (1) TEU). Legal redress normally to be obtained through the national courts, the preliminary procedure (Article 267 TFEU) enabling the necessary cooperation with the EUCJ.

Relationship between the ECtHR and the EUCJ before Opinion 2/13

ECtHR case law has from the start been an important source of inspiration for the EUCJ; during the period preceding the Charter ever more detailed references to that case law; increasing dialogue between both Courts through their case law. Examples of cases in which these Courts have followed each other's case law: ECtHR Scoppola (2009), nr. 10249/03; EUCJ Roquette Frères (2002), C-94/00. The ECtHR has also been instrumental in reinforcing the EU legal system: non- execution of a judgment of the EUCJ may be contrary to Article 6 ECHR (Hornsby (1997), nr. 18357/91); a refusal by a last instance court to refer preliminary questions may be contrary to the right to a fair trial under Article 6 ECHR; such refusals must be motivated (Ullens de Schooten (2011), nr. 3989/07, Dhahbi (2014), nr. 17120/09). A pregnant example of this cooperative relationship: the ECtHR Bosphorus case law accepting the protection granted by the EUCJ as being in principle equivalent to the protection ensured under the Convention justifying a more remote control by the ECtHR as to respect of fundamental rights by the EU (Bosphorus Airways (2005), nr. 45036/98, Nederlandse Kokkelvisserij (2009), nr. 13645/05, more restrictive Michaud (2012), nr.12323/11).

This cooperation through the case law matched by an informal cooperation between both Courts (see also Joint Communication of the Presidents of both Courts of January 2011).

Since the entering into force of the EU Charter as a binding instrument the Charter has become the first and main source of reference in the case law of the EUCJ (e.g. DEB, C-279/09). Less references to the ECtHR case law (e.g. Google (the right to be forgotten), C-131/12; Schrems (transfer of data to the US), C-362/14, decision of 6 October 2015).
At the same time the Charter has strengthened the relationship with the ECHR by its Article 52 (3) (supra).

Accession of the EU to the ECHR and Opinion 2/13

Lisbon treaty imposes obligation for the EU to accede (Article 6 (2) TEU). Why? Not because present level of fundamental rights protection by the EU to be regarded as insufficient. Anomaly that the EU remains outside the pan- European system of human rights protection established by the Council of Europe, the more so since competences on human rights sensitive issues have been increasingly transferred by the Member States to the EU (e.g. Area of Freedom, Security and Justice); moreover need of solving possible conflicts between the case law of both Courts.

Draft treaty of accession agreed after laborious negotiations in April 2013. July 2013, the European Commission requested an Opinion of the EUCJ on the compatibility of the draft treaty with the TEU and TFEU under Article 218 (11) TFEU. Negative Opinion 2/13 of 18 December 2014 decided by the Full Court.

Thrust of the Court's objections: autonomy of EU law and its specific characteristics insufficiently respected. Risks of the interpretation of Union law being determined by the ECtHR. A number of more technical objections in that regard, which are not so difficult to be resolved. Two major, much more complex objections: the possible interference with the EU principle of mutual trust and the lack of full jurisdiction of the EUCJ with

regard to EU measures within the framework of the Common Foreign and Security Policy (CFSP). See infra.

Opinion 2/13 highly critically received. Fairly general reaction: the Court is not willing to be subject to the jurisdiction of the ECtHR. That reaction probably also due to the unnecessary harsh tone of the Opinion; however in my view ill founded. The Court explicitly accepts to be submitted to the jurisdiction of the ECtHR as a consequence of accession.

What now? Possible consequences and scenario's

Reparation of the draft accession treaty?

Difficult exercise both technically and politically. The European Commission promised to submit proposals on how to proceed but still is reflecting. Renegotiation in any event cumbersome and time consuming; will the other negotiation partners (Russia) be willing? The mutual trust objection might perhaps be solved with a Declaration. However, the CFSP objection (unacceptable that, in so far the EUCJ would lack jurisdiction regarding CFSP measures, the ECtHR would by accession acquire an exclusive jurisdiction in that regard) is much more difficult to solve. Obviously, the Court cannot accept that one of the essential responsibilities of the EU judiciary– to ensure respect of fundamental rights – could be outsourced to a foreign court or be entrusted to the national courts alone. If that reading is correct, this objection could only be met by amending the EU treaties so as to grant the Court full jurisdiction on CFSP matters.

Consequences of Opinion 2/13 in the immediate future

Not to be excluded that Opinion 2/13, more particularly the objection regarding mutual trust, might affect the relationship

between both Courts, more particularly induce the ECtHR to reconsider its Bosphorus case law.

p.m. One of the more technical objections raised by Opinion 2/13 concerns the absence of any provision in the draft treaty regulating the relationship between the preliminary procedure of Article 267 TFEU and the preliminary procedure provided by the new Protocol 16 of the Convention (not yet entered into force) allowing highest Courts of Contracting Parties to ask the ECtHR for advice. Leaving aside accession, how will this new procedure under Protocol 16, once entered into force, relate to the EU preliminary procedure, more particularly in cases where a national last instance court would be obliged to refer according to Article 267 (3) TFEU?