

# § 5 The Charter of Fundamental Rights of the European Union

## I. The history of the Charter of Fundamental Rights

- a historical step of *expression of the own identity of the European Union* as a political entity and *concretisation of the European fundamental values*, on which it is founded
- 1999/2000 drafting of the Charter by a *pluralistic Convention* in a broad, multi-national public discourse with broad participation of the civil society
- 2000 proclamation as a political declaration (not legally binding - only "soft law")
- 2002/03 few adjustments by the European Convention
- 2007/09 upgrade to binding law by the Treaty of Lisbon (the last EU reform treaty)

## II. The legal significance of the Charter of Fundamental Rights

### 1) The field of application of the Charter (art. 51 ChFR)

- Charter binding for all Union institutions, bodies, offices and agencies
- *member states only bound when implementing Union law* or interfering with economic fundamental freedoms - Charter not a second European Convention!

### 2) The binding effect of the Charter

#### a) The Charter as part of primary Union law

- with the same legal value as the treaties (art. 6(1) sub-sect. 1 EU Treaty)
- directly applicable and enjoying primacy over secondary law
- interpretation of all secondary law in conformity with the Charter
- does not extend the Union's competences or the field of application of Union law (art. 6(1) sub-sect. 2 EU Treaty, 51(2) ChFR)
- interpretation "with due regard" to *explanations* prepared by the Presidium of the Charter Convention and updated by the Presidium of the European Convention (preamble and art. 52(7) ChFR, art. 6(1) sub-sect. 3 EU Treaty)
  - a helpful but non-binding aid to interpretation

#### b) The significance of the Charter for the European Court of Justice

- a starting point to finally build up a sophisticated and consistent but differentiated fundamental rights doctrine
  - like that developed by the constitutional courts in the member states
  - the far too vague old fundamental rights as general principles of law did not allow this important step

#### c) The significance of the Charter for the authorities and courts in the member states

- must consider the Charter whenever executing or enforcing Union law or domestic law that implements Union law, or interfering with economic fundamental freedoms
  - in this context also obligation to *interpret domestic law in the light of the Charter*

## III. The Charter as one of the most modern fundamental rights catalogues in the world

- rights modelled on European Convention and other (also recent) human rights treaties, advanced national constitutions, ECJ jurisprudence and other sources, taking into account newest developments and debates in human rights theory and policy and civil society

- distinct *anti-neoliberal approach* (social rights, rights with direct horizontal effect, restrictions on business activities etc.)
- *excellent editorial quality*, with modern, precise but clear and comprehensible wording
  - an appealing fundamental rights text for experts and ordinary citizens alike
- *clear structure* based on an *innovative categorisation of the fundamental rights*
  - something rare in constitutions and unique in intern. human rights treaties
  - the sometimes difficult categorisation is, however, not flawless:
    - rights concerning marriage and family allocated to three different categories (art. 9, 24, 33)
    - rights of the child to protection, care and contact with parents assigned to equality (art. 24(1, 3)), but protection of family life to solidarity (art. 33)
    - right to education, a classical participatory right, categorised as freedom (art. 14)
    - right to good administration open to everyone but categorised as citizens' right (art. 41)

## IV. The rights and categories of rights guaranteed in the Charter

### 1) Rights closely related to human dignity (title I)

- human dignity particularly emphasized as first-mentioned fundamental right
- right to life includes *strict prohibition of death penalty* (art. 2(2) ChFR)

### 2) Freedoms (title II)

- classical freedom rights, but also
  - explicit right to protection of personal data (art. 8 ChFR)
  - right to asylum (art. 18 ChFR; not guaranteed under the European Convention)
- problematic: right to marry and found a family only according to member states law
  - thus no EU guarantee of same-sex marriage or adoption by same-sex couples
- problematic: the missing general freedom of action
  - no comprehensive guarantee of freedom as under the German Basic Law

### 3) Equality rights (title III)

- in particular comprehensive non-discrimination clause (art. 21 ChFR)
- equality of women and men explicitly includes employment, work and equal salaries and allows positive discrimination (art. 23 ChFR; see already art. 157 FEU Treaty)

### 4) Social rights (title IV)

- a whole chapter on solidarity
- some rights drawn from social legislation and specialised treaties but so far not common in fundamental rights catalogues
- problematic: the *limited legal essence of the social rights*
  - social rights require implementation and concretisation by legislation, with wide margin of appreciation of the legislator (due to economic & budgetary restraints)
  - difficult to clearly establish violation in the course of judicial review
  - some rights are only a "normative shell", referring in substance to other sources

### 5) Citizens' rights (title V)

- mostly confirming union citizens' rights already anchored in the Treaties
- in particular: *right to good administration* (art. 41 ChFR)
  - a compilation of rights recognised in the Treaties or jurisprudence under the umbrella of one integrated fundamental right

## 6) Justice rights (title VI)

- classical rights deriving from the principle of the rule of law and anchored in the European Convention and the constitutions of the member states

## V. Innovations in the Charter of Fundamental Rights

- fundamental restrictions on biomedicine that are very topical today (art. 3(2) ChFR):
  - the prohibition of eugenic practices
  - the prohibition on making the human body and its parts as such a source of financial gain
  - the prohibition of the reproductive cloning of human beings
- prohibition of trafficking in human beings (art. 5(3) ChFR)
- freedom to conduct a business (art. 16 ChFR)
- respect for cultural, religious and linguistic diversity (art. 22 ChFR)
- rights of the child (art. 24 ChFR)
- rights of the elderly (art. 25 ChFR)
- rights of persons with disabilities (art. 26 ChFR)
- problematic: principles of environmental protection and consumer protection (art. 37, 38 ChFR)
  - objective principles, not subjective rights of the citizens: should be anchored in the Treaties, not the Charter
  - revised Charter of 2007 strongly limits their legal significance and scope (cf. art. 52(5) ChFR and explanations)

## VI. The poorly conceived system of fundamental rights limits under the Charter

### 1) An undifferentiated *general limitation clause* for most rights (art. 52(1) ChFR)

- no well-conceived specific limitation clauses for the individual rights, as they are standard in advanced fundamental rights regimes
  - thus *no preliminary abstract weighting of the individual rights* with regard to frequent collisions with conflicting values, as it would be the task of a fundamental rights catalogue
- moreover, the limitation clause confines itself in substance to *reflect the often criticised old ECJ jurisprudence*, without further elaborating the individual requirements for limitations and the limits of limits
  - in particular: poor formulation of the principle of proportionality (art. 52(1) phrase 2)
- requirements for the justification of limitations of fundamental rights:
  - must be based on law
  - must serve the public interest or to protect the rights of others
  - must be proportional for their purpose (suitable, necessary, proportionate [not excessive]), in particular respect the essence of the restricted right

### 2) Problematic transfer of the archaic limits from the European Convention to corresponding Charter rights (art. 52(3) ChFR)

- archaic limits that allow far-reaching restrictions, designed as intern. minimum standards for the basic protection in a second safety net, but unsuitable for the full fund. rights protection in a state-like organisation, where the standards must be higher
  - restrictions of freedom for the protection of "morals" - acceptable in the EU?
- problem: can the passage that "the meaning and scope ... shall be the same" as in the European Convention be interpreted as "... *at least the same*"?
  - would allow higher standards under the Charter but ignore the generally recognized methodological rule that the wording of a provision is the *absolute limit for legal interpretation*

## **VII. The relation between the Charter of Fundamental Rights and the European Convention on Human Rights**

- before formal accession, the European Union is not directly bound to the ECHR and cannot be brought before the European Court of Human Rights, but the member states are fully accountable, even when they just execute Union law
- where Charter rights are involved that correspond to rights guaranteed in the ECHR and its protocols, the Union institutions, including the European Court of Justice, are indirectly bound to the jurisprudence of the European Court of Human Rights that elucidates the "meaning and scope" of the ECHR rights (cf. art. 52(3) ChFR)
- the ECHR and its protocols, in particular new protocols, can serve as source of inspiration for the "discovery" of new unwritten fundamental rights as general principles of Union law that may complement but not weaken or relativise the Charter rights