

WHEN IS THE EU CHARTER OF FUNDAMENTAL RIGHTS APPLICABLE AT NATIONAL LEVEL?

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Abstract. *Whilst the Charter of Fundamental Rights of the European Union, which became part of binding primary EU law on 1 December 2009, constitutes an important codification and clarification of fundamental rights as they exist in the European Union, the field of application of the Charter is limited in a significant way: the Charter only applies when EU law is at stake. When national courts and authorities in the EU Member States are confronted with problems of purely national law, they are not obliged to apply the Charter but should instead rely on the national constitutional Bill of Rights as well as the international human rights instruments which are binding on the Member State in question. The borderline between EU law and national law is not always easy to establish in a concrete case. This article discusses theoretical and practical problems arising out of the application and interpretation of Article 51(1) of the Charter, according to which the Charter is addressed to the Member States ‘only when they are implementing Union law’. It is suggested to adopt a pragmatic case-by-case approach, asking oneself if there is another norm of Union law than a Charter provision which is directly relevant to a case in concreto. If the answer is yes, also the Charter should be applied, supposing that there is a Charter provision which could influence the outcome of the case. If the answer is in the negative, national courts and authorities are only obliged to apply national law, including the constitutional Bill of Rights and the international human rights obligations of the Member State concerned.*

Keywords: *fundamental rights, EU Charter of Fundamental Rights, scope of application, EU law and national law, implementing Union law.*

Introduction

One of the sticking-points in the negotiations on the Charter of Fundamental Rights of the European Union¹ was the question of its applicability at national level. According to Article 51(1) of the Charter, whilst its provisions are addressed to the institutions, bodies, offices and agencies of the Union, they are also addressed to the Member States but then ‘only when they are *implementing* Union law’ (emphasis added). This formulation has already provoked a great deal of discussion and also controversy. Without analysing the already rich literature on this subject in any depth or detail,² the following contribution will suggest a way of looking at the field of application of the Charter of Fundamental Rights in the national context which may help to somewhat de-dramatise the question and also show that the real problem is not so much the applicability of the Charter as such but rather the applicability of *another* norm of Union law. Before entering into this specific question concerning the applicability of the Charter and EU fundamental rights more generally, I shall sketch out the main developments leading up to the adoption and entry into force of the Charter.

As is well known, the introduction of a fundamental rights regime into EU law is essentially a story of judge-made law.³ In 1969, the European Court of Justice (ECJ) recognised the importance of fundamental rights by holding that they form part of the

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- 1 The Charter was first proclaimed by the European Parliament, the Council and the Commission as an instrument of soft law, [2000] OJ C364/1. Article 6(1) of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon, refers to a slightly modified version (‘as adapted at Strasbourg, on 12 December 2007’), reprinted in [2010] OJ C83/389, and makes it clear that the adapted Charter ‘shall have the same legal value as the Treaties’, in other words, have the status of Union primary law.
 - 2 By way of example, reference can be made to Rosas, A.; Armati, L. *EU Constitutional Law: An Introduction*. Oxford: Hart Publishing, 2010, p. 147–151; Rosas, A.; Armati, L. *EU Constitutional Law: An Introduction*. 2nd rev edn. Oxford: Hart Publishing, 2012, p. 164–168 (forthcoming); Rosas, A.; Kaila, H. *L’application de la Charte des droits fondamentaux par la Cour de justice: un premier bilan. Il diritto dell’Unione Europea*. 2011, XVI: 19–20; Ladenburger, C. *European Union Institutional Report*. In: Laffranque, J. (ed.) *The Protection of Fundamental Rights Post-Lisbon, Reports of the XXV FIDE Congress Tallinn 2012*. Vol 1. Tallinn: Tartu University Press, 2012, p. 159–173; von Danwitz, T.; Paraschas, K. *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*. *Fordham International Law Journal*. 2012, 35: 1403–1413; Kaila, H. *The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States*. In: Cardonnel, P.; Rosas, A.; Wahl, N. (eds.) *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*. Oxford: Hart Publishing, 2012 (forthcoming).
 - 3 The foremost architect of this development was P. Pescatore, see his ‘Les droits de l’homme et l’intégration européenne’. *Cahiers de droit européen*. 1968, 4: 629. See also Rosas, A. *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?* In: Baudenbacher, C.; Bull, H. (eds.) *European Integration Through Interaction of Legal Regimes*. Oslo: Universitetsforlaget, 2007, p. 33.

general principles of Community law whose observance the Court ensures.⁴ Some landmark judgments of the early 1970s developed and refined this approach.⁵

Later developments include political declarations made by the then Community institutions and the gradual insertion of fundamental rights and human rights clauses in the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC).⁶ Especially through the further development and refinement of ECJ case law, there has also been a gradual *rapprochement* between Union law and the European Convention on Human Rights, although the EU is not directly bound by the Convention as a Contracting Party.⁷ Moreover, Article 6(2) TEU, as amended by the Treaty of Lisbon (which entered into force on 1 December 2009), provides that the Union ‘shall accede’ to the European Convention (although at the time of writing (July 2012), it is still an open question when, and under what precise modalities, the EU could become a Contracting Party).⁸

Despite these developments in case law as well as Treaty law, it was felt that the EU fundamental rights regime was in need of a single and authoritative document listing the main fundamental rights the EU holds dear, so that authorities and citizens would have at their disposal a true Bill of Rights instead of having to search through thousands of pages of court decisions and a variety of legal and political texts. In December 2000, the European Parliament, the Council and the Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union.⁹

The Treaty of Lisbon not only makes the Charter of Fundamental Rights of the European Union a legally binding document but also endows it with the status of Union primary law. According to Article 6(1) TEU, as amended by the Treaty of Lisbon, the Charter ‘shall have the same legal value as the Treaties’. It is noteworthy that Article 6(1) TEU also provides that the Charter shall be interpreted ‘with due regard’ to the Explanations which were drawn up as a way of providing guidance in its interpretation.¹⁰

4 Case 29/69 *Stauder* [1969] ECR 419.

5 See, in particular, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491.

6 See the preamble of the Single European Act of 1987 and Art. F of the TEU (later to become Art. 6 TEU), established by the Treaty of Maastricht of 1992.

7 Since the mid-1970s, the ECJ has referred to provisions of the European Convention as an authoritative guideline for determining the content of fundamental rights as general principles of Community law. The Court later determined that the European Convention enjoys ‘special significance’ and also began to cite individual judgments of the European Court of Human Rights in its case law. See generally Rosas, A. Fundamental Rights in the Case-Law of the Luxembourg and Strasbourg Courts. In: Baudenbacher, C., *et al* (eds.) *The EFTA Court: Ten Years On*. Oxford: Hart Publishing, 2005, p. 163.

8 See, Rosas, A.; Armati, L. (2012), *supra* note 2, p. 170–171.

9 See *supra* note 1.

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

The Charter builds upon the European Convention on Human Rights, the European Social Charter and other human rights conventions as well as the constitutional traditions common to the EU Member States. Some of the provisions constitute refinements or even developments of existing human rights instruments. Examples include an absolute prohibition of the death penalty (Article 2), a prohibition on the reproductive cloning of human beings (Article 3) and a prohibition of discrimination on ‘new’ grounds such as disability, age and sexual orientation (Article 21).

Finally, it should be noted that Article 6(3) TEU, as amended by the Treaty of Lisbon, preserves the idea, expressed in the case law of the ECJ since 1969, that fundamental rights constitute general principles of Union law. This arguably will mean that the rather open-ended list of sources of inspiration which the Court has relied upon to ‘find’ the general principles of Union law, including other human rights conventions than the European Convention,¹¹ as well as the constitutional traditions common to the Member States, will not lose its relevance altogether. On the other hand, the Charter of Fundamental Rights will arguably be much more important in guiding both the Union legislator and the EU Courts.¹²

1. EU Fundamental Rights at National Level: General Considerations

As an important component of Union primary law, fundamental rights are, in principle, always applicable when Union institutions and other bodies act and that is why Article 51(1) of the Charter of Fundamental Rights states that the provisions of the Charter are addressed to the institutions, bodies, offices, and agencies of the Union.

The question of application of Union fundamental rights at Member States’ level has caused more discussion and concerns. When should national courts and authorities apply the Charter, and Union fundamental rights in general, rather than fundamental rights recognised in the national constitution and in international human rights instruments binding on the Member State in question?

11 On these sources see Rosas, A. The European Union and International Human Rights Instruments. In: Kronenberger, V. (ed.) *The European Union and the International Legal Order: Discord or Harmony?* The Hague: T.M.C. Asser Press, 2001, p. 53; Rosas, A. International Human Rights Instruments in the Case-Law of the European Court of Justice. In: *Law in the Changing Europe: Liber Amicorum Pranas Kūris*. Vilnius: Mykolas Romeris University, 2008, p. 363; Rosas, A. The European Union: In Search of Legitimacy. In: Jaichand, V.; Suksi, M. (eds.) *60 Years of the Universal Declaration of Human Rights in Europe*. Antwerp: Intersentia, 2009, p. 415.

12 The term ‘Union Courts’ refers, apart from the ECJ, to the General Court (previously the Court of First Instance) and the EU Civil Service Tribunal, which are all seated in Luxembourg. Here, the term does not refer to national courts of the EU Member States, although they may be viewed as EU courts in the large sense or at least as courts which are part of the EU judicial system (see at *supra* note 16 below).

As there is a great deal of common ground between the national Bills of Right, the international human rights instruments and the Charter,¹³ we should not, as far as the substance is concerned, overemphasize the importance of this question. In many cases, the result will be more or less the same, regardless of which specific text, the national Constitution, an international convention or the Charter, is applied to a given case. That said, the national constitutional Bills of Rights are far from identical, which seems to explain why the ECJ has not very often referred to the ‘constitutional traditions common to the Member States’ as a guideline for determining the fundamental rights which should be recognised as general principles of Union law.¹⁴ Nor do the national Bills of Rights simply reproduce the relevant international conventions. Moreover, the Charter, as noted above, also contains some new fundamental rights which are not necessarily to be found in the European Convention on Human Rights or other international human rights instruments or in national constitutional Bills of Rights. From a substantive point of view, it may thus matter whether one applies EU fundamental rights or national law.

There is also the question of competence: if the reach of EU fundamental rights at the national level is very wide, the scope of application of the national Bill of Rights becomes more limited, supposing that EU law on this point, too, enjoys primacy over national law, including the national constitution.¹⁵ That the question of competence is a sensitive one is obvious already from the wording of both Article 6(1) TEU and Article 51(2) of the Charter, which are at pains to stress that the provisions of the Charter are not intended to extend the competences and powers of the Union.

On the other hand, it should go almost without saying that Union fundamental rights have to be respected at the national level when Union law is applied. This is simply a function of the fact that fundamental rights are part of Union primary law and must, like any norm of Union law, be respected when this body of law is applied by courts or authorities, be they Union Courts or the courts and tribunals of the Member States. It should be recalled that Union law is implemented and applied primarily at the national level and that the national courts are important parts of the EU judicial system.¹⁶ Article 19(1) TEU, as amended by the Treaty of Lisbon, reminds us of the role of national courts and remedies by instructing the Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. The principle of effective judicial protection (but without being limited to the national judicial system) is recognised in somewhat greater detail in Article 47 of the Charter (‘Right to an effective

13 See also the Preamble of the Charter of Fundamental Rights, according to which the Charter ‘reaffirms’ the rights ‘as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [European Convention on Human Rights], the Social Charters adopted by the Union and the Council of Europe and the case-law of the [ECJ] and of the European Court of Human Rights’. See also Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 38, which refers to this part of the Preamble to the Charter.

14 Rosas, A.; Armati, L. (2012), *supra* note 2, p. 168.

15 *Ibid.*, p. 67–70.

16 Rosas, A. The National Judge as EU Judge: Opinion 1/09. In: Cardonnel, P.; Rosas, A.; Wahl, N., *supra* note 2. See also Opinion 1/09 of 8 March 2011 *Draft Agreement on the European and Community Patents Court* nyr.

remedy and to a fair trial'). As to the national judicial system in particular, Article 267 TFEU relating to references from national courts for preliminary rulings by the ECJ provides a long-standing and well-established mechanism which highlights the role of the national judge as the EU judge.¹⁷

2. ECJ Case Law Predating the Charter of Fundamental Rights

In the light of the above, it should not have come as a surprise to anyone when the ECJ, in *Wachauf*, confirmed that Union fundamental rights 'are also binding on the Member States when they implement Community rules'.¹⁸ In *ERT* and subsequently, the test was formulated as a requirement that the national measures 'fall within the scope of Community law'.¹⁹ Contrary to what some of the discussions at the Convention which prepared the Charter of Fundamental Rights appeared to assume,²⁰ the Court did not launch any radical new principle in these judgments but simply stated the obvious.

That said, it has not always been easy to draw the line separating those national rules that fall within the scope of Union law from those falling outside that scope. In some cases, the ECJ has concluded that the link between the national measures and Union law was not sufficiently direct or strong and that the national measure thus fell outside the scope of Union law (perhaps the most well-known case concerned a prisoner who attempted to invoke his Union law right to move and reside freely as a basis for contesting his prison sentence).²¹ A number of examples best illustrate the issues that can arise.

In *Carpenter*, a Union citizen who provided services to recipients in other Member States as 'a significant proportion of his business' could, invoking the freedom to provide services under Union law, rely on his right to family life in order to oppose the expulsion of his spouse, a third-country national, from his Member State of origin, despite the fact that the spouse had not travelled with her husband to the other Member States concerned and so had not herself exercised free movement rights.²²

In *KB*, the Court held that the refusal to grant a widower's pension to a couple on the basis that they were not married came in principle within the purview of Union law. The couple in question were not married as a result of the refusal under national law to recognise that gender reassignment could result in the classification of a couple as heterosexual (a condition for marriage). While the right to marry was a question for

17 See, e.g. Naomé, C. *Le renvoi préjudiciel en droit européen: Guide pratique*. 2nd edn. Bruxelles: Éditions Larcier, 2010.

18 Case 5/88 *Wachauf* [1989] ECR 2607, para 19. See also Case 36/75 *Rutili* [1995] ECR, 1219; Case 63/83 *Kent Kirk* [1984] ECR 2689; Case 249/86 *Commission v. Germany* [1989] ECR 1263.

19 Case C-260/89 *Elliniki Radiophonia Tileorassi (ERT)* [1991] ECR I-2925. See also Case C-159/90 *Grogan* [1991] ECR I-4605, para. 31.

20 See at *supra* notes 28-29 below.

21 Case C-299/95 *Kremzov* [1997] ECR I-2405. See also Case C-159/90 *Grogan*, *supra* note 19; Case C-306/96 *Annibaldi* [1997] ECR I-7493.

22 Case C-60/00 *Carpenter* [2002] ECR I-6279, paras 37-40.

national law, the case at hand concerned inequality of treatment as regards a necessary precondition for the grant of a pension, a matter of Union law. As this inequality of treatment resulted from a breach of the right to marry under Article 12 of the ECHR, the national legislation at issue was to be regarded as being, in principle, incompatible with the requirements of Article 141 EC (Article 157 TFEU) on equal pay.²³

In *Karner*, the ECJ was faced with the question as to whether certain advertising restrictions were compatible with the then Article 28 TEC on the free movement of goods. The Court held that the restrictions in question constituted selling arrangements which thus, in view of its *Keck* case law, could escape the prohibition laid down in Article 28.²⁴ The Court then went on to examine whether the selling arrangement fulfilled the conditions laid down in the *Keck* judgment, that is, that it did not discriminate between domestic and other traders and products. After having decided that there was no such discrimination the Court examined whether the advertising restrictions could also be seen as a provision of services (concluding in the negative, as the service element was seen as secondary in relation to the free movement of goods) and whether they posed a problem from the point of view of freedom of expression (this was held not to be the case). The Court thus examined a fundamental rights argument in a way which seemed to add to the conditions of *Keck* the requirement that the selling arrangements in question were not in contravention of EU fundamental rights.

In *Mangold* and *Küçükdeveci*, the Court, taking inspiration *inter alia* from Directive 2000/78 (mentioned above), concluded that non-discrimination on grounds of age had become a general principle of Union law.²⁵ However, in *Mangold* the deadline for the implementation of the Directive had not yet expired, and the Directive could not therefore be invoked to bring the matter within the scope of Union law. The Court relied instead on the fact that the national legislation at issue also constituted a measure implementing another directive.²⁶

While these and other cases suggest a fairly wide conception of what measures fall within the scope of Union law, it should be emphasised that the Union Courts have not considered themselves as human rights courts with general jurisdiction over the interpretation of the European Convention on Human Rights and other international human rights instruments. They have applied and interpreted fundamental rights in the context of their normal day-to-day activities relating to all substantive areas of Union

23 Case C-117/01 *KB* [2004] ECR I-541, paras 30–34. In the case of *Goodwin v UK* and *I v UK*, judgment of 11 July 2002, the European Court of Human Rights had held that the fact that it was impossible for a transsexual to marry a person of the sex to which he or she had belonged prior to gender reassignment was a breach of the right to marry.

24 Case C-71/02 *Karner* [2004] ECR I-3025.

25 Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Küçükdeveci* [2010] ECR I-365. In *Küçükdeveci*, the problem did not arise in the same way as the deadline for the implementation of Directive 2000/78 had expired. These two cases also raise the question of horizontal application of Union fundamental rights. On this question see Rosas, A.; Armati, L. (2012), *supra* note 2, p. 179–180.

26 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP, [1999] OJ L175/43. See Case C-144/04 *Mangold*, *supra* note 24, para 75.

law and in the context of the normal procedural remedies available, including actions for annulment (Article 263 TFEU) and preliminary ruling procedures (Article 267 TFEU).

3. The Lisbon Treaty and the Charter

The Lisbon Treaty, although it did make the Charter of Fundamental Rights a part of Union primary law, did not fundamentally alter the status of fundamental rights in the EU constitutional order. The EU did not become a human rights organisation, with a human rights competence detached from the competences conferred upon the Union in the basic Treaties. Nor did the Union Courts not become human rights courts, with jurisdiction to adjudicate human rights matters regardless of the limitations imposed by Union law.²⁷ This reality, in accordance with what was already said above, is reflected notably in Article 6(1) TEU, which provides that the provisions of the Charter of Fundamental Rights ‘shall not extend in any way the competences of the Union as defined in the Treaties’, and in Article 51 of the Charter, which provides that its provisions are addressed to the Member States ‘only when they are implementing Union law’ and that 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’.

In the Convention which drafted the Charter, discussions on the application of fundamental rights at national level were not without difficulties.²⁸ The United Kingdom, in particular, resisted the application of the Charter at national level and, having failed in this objective, instead obtained inclusion of a separate Protocol relating to the application of the Charter to the United Kingdom. Poland joined this bandwagon and so Protocol No 30 annexed to the TEU and TFEU concerns the application of the Charter to both of these Member States.²⁹

As Article 51(1) of the Charter refers to a situation of ‘implementing’ Union law, there has been much discussion on whether this expression is more restrictive than the ‘scope’ or ‘field of application’ of Union law. In the Explanations relating to the Charter, reference is made both to the case law of the ECJ stating that the requirement to respect fundamental rights is binding on the Member States ‘when they act in the scope of Union law’ and to cases using the notion of ‘implementation’.³⁰ In any event, the

27 Rosas, A. *Is the EU a Human Rights Organisation?* *CLEER Working Papers 2011/1*. The Hague: T.M.C Asser Institute, 2011.

28 See, e.g. de Búrca, G. *The Drafting of the European Union Charter of Fundamental Rights*. *European Law Review*. 2001, 26: 126, 136; Eeckhout, P. *The EU Charter of Fundamental Rights and the Federal Question*. *Common Market Law Review*. 2002, 39: 945, 954.

29 Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom annexed to the TEU and the TFEU. See also Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, judgment of 21 December 2011 nyr, paras 116–122. It has been agreed at the political level that in the context of the next accession agreement (Croatia), the Czech Republic would be allowed to join Protocol No 30, Rosas, A.; Armati, L. (2012), *supra* note 2, p. 174.

30 As was noted in note 10 above, these Explanations were originally prepared under the authority of the

reference to implementation was not meant to exclude situations where Member States apply Union legal norms directly, including situations where they invoke derogations from such norms, in other words including situation where there is no separate national implementing act.³¹

It would in fact be quite extraordinary to apply a given norm ‘at the Union level’ (whatever that means) with due regard also to the Charter of Fundamental Rights whilst applying it directly at the national level without such regard. Such a constellation could lead to different interpretations of the same norm, depending on the level that it was applied, or to finding that the norm is valid when applied at one level but invalid when applied at the other. This again would run counter to the principle of uniform application and interpretation of Union law.

4. The Meaning of ‘Implementing’ Union Law in Article 51(1)

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

That said, it should be clear from the above that invoking a Charter provision will not suffice to convert a situation otherwise regulated by national law to one covered by Union law.³² The Charter is only applicable if the case concerns not only a Charter provision but also *another* norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case.

This, in fact, is the first conclusion to draw: the problem does not primarily concern the applicability of the Charter in its own right but rather the relevance of other Union law norms. To come back to the examples from case law already preceding the entry into force of the Charter,³³ the relevant EU norms concerned, in *Carpenter*, the freedom to provide services, in *KB* the principle of equal pay for men and women, in *Karner* the free movement of goods and, in this context, the *Keck* principle and in *Mangold* and *Küçükdeveci*, certain EU Directives that had been implemented at national level. If the

Præsidium of the Convention which drafted the Charter and were later updated under the responsibility of the Praesidium of the European Convention which drafted the Constitutional Treaty of 2004. It should also be recalled that according to Article 6(1) TEU, the Charter shall be interpreted ‘with due regard to the explanations referred to in the Charter, that set out the sources of those provisions’.

31 See, in particular, Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, *supra* note 29, nyr, paras 64–69, which concerned the application of a provision of a regulation at national level. See also Eeckhout, P., *supra* note 28, p. 977–79; Ladenburger, C. L’application pratique de la Charte des droits fondamentaux par la Commission européenne. *Revue européenne de droit public*. 2002, 14: 817, 828.

32 Rosas, A.; Armati, L. (2012), *supra* note 2, p. 167–168.

33 See at section 3 above.

EU Courts consider that they are called upon to apply and, as the case may be, interpret such norms, they cannot leave the Charter, or EU fundamental rights more generally, outside the equation.

This is not to say that it is always easy to decide whether an EU norm is sufficiently relevant to a case and require, if need be, an intervention by a Union Court. But this is an old problem which may also arise in situations where fundamental rights are not at issue. Should, for instance, the ECJ reply to a question concerning the validity or interpretation of an EU legal norm if there are doubts about the relevance of the answer for the litigation before the national court, including situations where the national court cannot apply the EU norm directly but requests a reply in view of the fact that a Union law interpretation could or would be relevant for the interpretation of a norm of national law in view of the fact that there is a specific link (such as an express reference) between the relevant national and Union norms.³⁴ It is obvious that the Court has a certain margin of appreciation as to whether to reply or not to such questions but this is a well-known problem which is not limited to the applicability of the Charter of Fundamental Rights.

If the Court decides to give an answer on the *interpretation* of a Union norm (other than a provision of the Charter or a fundamental right as a general principle of Union law), it is evident that the Charter should be taken into account as well to the extent that one or more of its provisions are of relevance for this interpretation. *A fortiori*, this also applies to the question as to whether a Union norm is *valid* in view of the Charter.³⁵ It would seem that it is situations of *application* rather than interpretation which cause bigger problems of demarcation. This includes the question as to whether a Union norm is applicable – or to put it differently, sufficiently relevant for the outcome of a case – in order to open the door for an application of Charter provisions as well.

To take an example from free movement rights, in *Kremzov* the ECJ held that a prison sentence based exclusively on national law did not constitute such a hindrance to the prisoner's right to free movement that the situation was caught by the then Article 8a TEC (now Article 21 TFEU), or to cite the Court, that the situation did not 'establish a sufficient connection with Community law to justify the application of Community provisions'.³⁶ Contrast this outcome with *Carpenter*, who provided services to recipients in other Member States as 'a significant proportion of his business'. As the Union legislator itself had in many ways recognised the importance of ensuring the protection of family life in order to eliminate obstacles to the exercise of fundamental Treaty freedoms, the decision to deport his wife, a third-country national, from the United Kingdom would, despite the fact that the spouse had not travelled with her

34 I am, of course, thinking about the *Dzodzi* case law, where the ECJ has accepted to interpret a Union norm in a purely national situation if national law makes a reference to this norm, see, e.g., Naomé, C., *supra* note 17, p. 124–125. For an example of a recent case see Case C-482/2010 *Cicala*, judgment of 21 December 2011.

35 In two recent cases, the ECJ has considered Union norms as invalid in view of the Charter, Case C-92/09 *Volker and Schecke*, judgment of 9 November 2010 nyr (Article 7 of the Charter on respect for private and family life and Article 8 on the protection of personal data); Case C-236/09 *Test-Achats*, judgment of 1 March 2011 nyr (Article 23 on equality between men and women).

36 Case C-299/95, *supra* note 21, para 16.

husband to the other Member States concerned and so had not herself exercised free movement rights, ‘be detrimental to their family life and, therefore, the conditions under which Mr Carpenter exercises a fundamental freedom’.³⁷

What is common to both cases is that what was primarily at issue was the applicability of a provision of Union law *other* than a fundamental right (free movement of Union citizens and the right to provide services, respectively) rather than of a fundamental right as such. What distinguishes these two cases is that family life was considered important for the exercise of free movement rights whereas the latter were not intended to protect persons against penal sanctions for crimes that were unrelated to free movement.

Despite a significant broadening of the field of application of Union law as a result of the evolving nature of Union citizenship, the fact that a situation may, if it implies restrictions on the right to move and to reside, come under Article 21 TFEU, does not mean that all violations of the fundamental rights of persons who have moved to another Member State and thus have already exercised their free movement rights constitute restrictions caught by Article 21 and secondary law.³⁸ Control by the ECJ thus continues to depend on a fundamental right (such as freedom of residence,³⁹ the right to family life⁴⁰ or the right to a name⁴¹) being read in combination with a national measure that affects in an appreciable manner a free movement right, rather than assessing the fundamental right standing alone.⁴²

It is sometimes argued that application of a derogation clause which expressly grants a margin of discretion to Member States or a right to opt for an alternative solution (including as a justification of measures which would otherwise be unlawful restrictions) somewhat puts the matter outside the reach of Union law.⁴³ The test should once again be whether the Union law clause is sufficiently relevant to be applied and, if need be, interpreted in the litigation at hand. I would submit that the outcome in *Karner*, that is, that freedom of expression as a fundamental right was relevant in a case concerning the question whether certain selling arrangements (advertising restrictions) were a violation of free movement of goods, is to be explained by the fact that the Court considered that the so-called Keck principle (that selling arrangements, and according

37 Case C-60/00, *supra* note 22, para 39.

38 The ECJ has not adopted in full the approach suggested by one of its Advocates General back in 1992 (Case C-168/91 *Konstantinidis* [1993] ECR I-1191, Opinion of Advocate General Jacobs of 9 December 1992, para 46. See also the Opinion of Advocate General Poiares Maduro of 12 September 2007, para 16, in Case C-380/05 *Centro Europa* [2008] ECR I-349.

39 Case 36/75 *Rutili*, *supra* note 18.

40 Case C-60/00 *Carpenter*, *supra* note 22.

41 Case C-148/02 *Garcia Avello* [2003] ECR I-11613. In this case, the matter was not explicitly approached as a question of a fundamental right (to a name). Such questions may, however, become human rights questions, covered by the right to private and family life recognised in Art 8 of the ECHR, see van Dijk, P., *et al.* (eds.) *Theory and Practice of the European Convention on Human Rights*. 4th edn. Antwerp: Intersentia, 2006, p. 685.

42 For a recent example of the ECJ denying the applicability of the Charter to a situation not (otherwise) covered by Union law see Case C-256/11 *Dereci*, judgment of 15 November 2011 nyr, paras 71–72.

43 This was, for instance, the argument of some Governments in the Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, *supra* note 29.

to more recent case law, rules regulating the use of products,⁴⁴ are not always caught by the prohibition on restrictions of free movement of goods) does not place the matter outside Union law but constitutes a kind of derogatory clause of Union law which was applied in the case, including verifying that the conditions for applying the clause (such as non-discrimination) were fulfilled.

In *N.S.*, the Court concluded that, whilst Article 3(2) of the so-called Dublin Regulation⁴⁵ granted Member States a discretionary power to depart from the principle of a single Member State responsible for the examination of asylum application in accordance with a list of criteria, as set out in Article 3(1) and Chapter III of the Regulation, this discretionary power ‘forms part of the mechanisms for determining the Member State responsible for an asylum application’ provided for under the Regulation and a Member State which exercises the discretionary power must thus be considered as implementing Union law. The outcome is in accordance with the test presented above, in other words that there be a norm of Union law other than the Charter which is applicable and directly relevant to the case.⁴⁶

I would submit that the test was also applied when in *McB*, the ECJ considered the Charter applicable in view of the fact that the Court had first embarked on an interpretation of the so-called Brussels IIbis Regulation⁴⁷ (ruling that the Regulation had to be interpreted as meaning that whether a child’s removal was wrongful for the purposes of applying the Regulation was entirely dependent on the existence of rights of custody, conferred by national law, in breach of which the removal had taken place) and then went on to examine whether any provision of the Charter precluded such an interpretation.⁴⁸

What seems important to underline is that in these situations, a norm of Union law other than a Charter provision was considered to be applicable *in concreto*, and not just considered to be of possible relevance *in abstracto*. In the former case, it is a situation of ‘implementing’ Union law, in the second case it is not.⁴⁹ This is a crucial delimitation which also relates to the possible difference between the notions of ‘implementing’ and

44 Case C-110/05 *Commission v Italy* [2009] ECR I-519, paras 33-37. See also Rosas, A. Life after Dassonville and Cassis: Evolution but No Revolution. In: Poiares Maduro, M.; Azoulai, L. (eds.) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*. Oxford: Hart Publishing, 2010, p. 433 at 445–446.

45 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

46 Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, *supra* note 29, paras 64-69 (citation para 68).

47 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1.

48 Case C-400/10 PPU *McB*, judgment of 5 October 2010 nyr, paras 44 and 51-52.

49 See also von Danwitz, T., *supra* note 2, p. 1412–1413. The possible relevance of a norm of Union law *in abstracto* may be the situation in Case C-617/10 *Fransson* pending, where a provision of Council Directive 2006/112 of 28 November 2006 on the common system of value added tax, [2006] OJ L347/1 is cited but does not seem to be directly relevant for the outcome of the case. In his Opinion of 12 June 2012, Advocate General Cruz Villalón proposes to declare that the Court is incompetent to give a ruling on the interpretation of the Charter.

‘scope’ (or ‘field’) of application when it comes to the applicability of the Charter and the interpretation of Article 51(1). If ‘scope of application’ refers to applicability of a norm of Union law *in concreto*, in the litigation at hand, the difference more or less disappears. If it, on the other hand, refers to a situation which is in one way or another covered (also) by a norm of Union law, without any need to apply, and if need be, interpret this norm in the actual case at hand, then ‘scope of application’ is a much wider notion than ‘implementing’. As it is becoming increasingly difficult to find areas where Union law is totally absent,⁵⁰ the wider approach could easily lead to a situation where the Charter is almost always applicable, with the further consequence that the Union Courts would become something close to human rights courts with an almost general competence to apply fundamental rights.

In the interest of avoiding this risk, it is preferable, as the ECJ did, for instance, in *N.S.*, to use the terminology of Article 51(1) of the Charter rather than that of some of the earlier case-law and Article 19(1) TEU (which refers to the ‘fields covered by Union law’, ‘scope of application of Union law’, or the like). In some instances, the Court (usually by giving an order instead of a judgment) has declined competence by observing that a national measure is not connected with Union law. Such formulations should probably be seen as more or less synonymous to ‘implementing’, although it is true that the Court sometimes, whilst mentioning that the national measures in question are not ‘implementing’ Union law, then has added somewhat incongruously that the national legislation is not ‘connected in any other way with Union law’ (‘ou present d’autres elements de rattachement au droit de l’Union’).⁵¹ In some other decisions, the Court has declined competence simply by noting that the measures did not constitute an implementation of Union law.⁵² The latter approach, in other words, keeping to the wording of Article 51(1) of the Charter, seems the one to be preferred.

5. EU Fundamental Rights and Human Rights Not Governed by the Charter

As was noted above, Article 6(3) TEU confirms the continuing relevance of fundamental rights as *general principles of Union law*. The provision essentially repeats a provision that was already included in the TEU by the Treaty of Maastricht. The question then arises as to the relation between Article 6(1) TEU, together with the

50 It should be recalled that especially with the amendments to the Treaties brought about by the Treaty of Lisbon, such matters as criminal law and military defence are increasingly affected by Union law. See, e.g. Rosas, A.; Armati, L., *supra* note 2, p. 194–197 (criminal or penal law) and 254–260 (security and defence).

51 See, e.g. Case C-27/11 *Vinkov*, judgment of 7 June 2012 nyr, para 59, and some non-reported orders of the ECJ, such as Case C-339/10 *Estov*, Order of 12 November 2010, para 14; Case C-457/09 *Chartry*, Order of 1 March 2011, para 25; Case C-314/10 *Pagnoul*, Order of 22 September 2011, para 24.

52 See, eg Case C-434/11 *Corpul National al Politistilor*, Order of 14 December 2011, paras 15–16; Case C-462/11 *Cozman*, Order of 14 December 2011, para 15; Joined Cases C-483/11 and C-484/11 *Boncea*, Order of 14 December 2011, para 34.

Charter, and Article 6(3) and as to the relevance of this question for the question of the scope of application of EU fundamental rights independently of the Charter.

In the case law following the entry into force of the Treaty of Lisbon, the ECJ has focused on the Charter and, if doubts have been raised as to its applicability, Article 51(1).⁵³ In some instances reference has also been made to fundamental rights as general principles of law, which may be explained by the fact that the cases in question covered events predating the entry into force of the Treaty of Lisbon and thus of the Charter.⁵⁴ Such references will probably become more and more exceptional at the expense of the Charter. On the other hand, it cannot be excluded that with time passing, the general principles of Union law could in the future become relevant as a means of supplementing the Charter in accordance with societal change, assuming that the Charter would not have been amended in the meantime.

Be that as it may, it seems preferable to maintain a parallelism between the scope of application of the Charter and that of general principles of Union law. I would thus advocate using the same test and the same terminology ('implementing') for the general principles as has been recommended above with respect to the Charter and its Article 51(1). Having a broader (or narrower) scope of application for the general principles as compared to the Charter would seem to be a recipe for confusion and legal insecurity.

In any case, and whatever exact formula is used, it is manifest that the applicability of the general principles of Union law, including fundamental rights (Article 6(3) TEU), requires a nexus between the principle and Union law more generally. Such a nexus is less relevant when it comes to the mechanism provided for in Article 7 TEU for sanctioning a Member State deemed to be guilty of serious human rights violations. If the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission, has determined the existence of 'a serious and persistent breach' of the values referred to in Article 2 TEU, the Council, acting by qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of the Member State in the Council.⁵⁵ The only nexus to Union law seems to be the reference to Article 2 TEU and the values enumerated therein (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities). In other respects, the applicability of Article 7 is not limited to national measures implementing Union law but the provision may be applied in situations of serious and persistent breaches of human rights in general. The provision, introduced by the Treaty of Amsterdam, has never been applied in practice.⁵⁶

53 Rosas, A.; Kaila, H., *supra* note 2.

54 See, e.g. Case C-555/07 *Kücükdeveci*, *supra* note 25.

55 This may be preceded by a decision of the Council, acting by a majority of four fifths of its members after having obtained the consent of the European Parliament, to determine that there is a 'clear risk' of a serious breach of the values referred to in Article 2.

56 Sanctions taken by the other Member States against the Austrian government in 2000 were of a purely political nature and were not based on Article 7 TEU, Rosas, A.; Armati, L. (2012), *supra* note 2, p. 168.

Another context where the application of fundamental rights – or to be more precise as regards this particular context, human rights – is not specifically contingent upon the parallel application of another norm of Union law is provided by the general trade and cooperation agreements the EU has concluded with a great number of third States.⁵⁷ These agreements normally include a so-called *human rights clause*, which states in very general terms that respect for fundamental rights and democratic principles, as laid down in the Universal Declaration of Human Rights (in a European context, reference has also been made to the Helsinki Final Act of 1975 and other Organization for Security and Cooperation in Europe instruments), inspire the internal and external policies of the parties and constitute an ‘essential element’ of the agreement. Another provision normally to be found among the final provisions of the agreement deals with the possibility of taking measures in cases of non-execution of the agreement (that is, of any provision of the agreement and not just of the human rights clause) by the other side, including suspension of the operation of the agreement, and requires each party to consult the other party before taking measures, save in cases of special urgency. Also EU legislation relating to financial assistance to third States often contains a human rights clause enabling suspension of assistance in case of serious human rights violations in the recipient country.⁵⁸

As has been recognised by the ECJ, an important reason for including the human rights clause in agreements with third countries is to spell out the right of the EU (and of the other Contracting Party concerned) to suspend the operation of the agreement or to take other countermeasures in case of non-respect of the clause.⁵⁹ The human rights clause thus does not seek to transform the basic nature of an agreement otherwise concerned with trade, development cooperation, and so on, nor to establish new standards in the international protection of human rights. The EU’s approach to these matters is based on the assumption that the basic terms of reference for the human rights clause, the Universal Declaration of Human Rights, largely reflects general international law on the subject. Its treaty practice, accepted by the third countries parties to these agreements, accordingly contributes to the reaffirmation of the Universal Declaration as an expression of general international law.⁶⁰

The human rights clause, which has directly or indirectly triggered a host of EU sanctions undertaken against third States (concerning, in most cases, suspension or limitation of development cooperation), is not, in itself, limited to situations where

57 See, eg Brandtner, B.; Rosas, A. Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice. *European Journal of International Law*. 1998, 9: 473–477; Hoffmeister, F. *Menschenrechts- und Demokratiklauseln in den vertraglichen Ausenbeziehungen der Europäischen Gemeinschaft*. Berlin: Springer Verlag, 1998; Bulterman, M. *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* Antwerpen: Intersentia, 2001; Fierro, E. *The EU’s Approach to Human Rights Conditionality in Practice*. The Hague: Martinus Nijhoff, 2003; Rosas, A. The European Union and Fundamental Rights/Human Rights. In: Krause, C.; Scheinin, M. (eds.) *International Protection of Human Rights: A Textbook*. Turku/Åbo: Åbo Akademi University Institute for Human Rights, 2009, p. 443 at 466–470; Ladenburger, C., *supra* note 2, p. 172.

58 See Rosas, A., *supra* note 57, p. 468–470.

59 See Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

60 See, e.g. *European Union Annual Report on Human Rights 1990-1999*, adopted by the EU Council in October 1999. Brussels: Council of the European Union, 1999, p. 2. See also Rosas, A. (2009), *supra* note 11, p. 426–431.

another norm of Union law is being applied or implemented. The clause is in principle binding not only on the EU institutions but also the EU Member States⁶¹ and, of course, the third States parties to the relevant trade and cooperation agreements. Any human rights violations of a serious character may trigger sanctions, including sanctions which could be undertaken by the third State party to the agreement (there is no reported case of sanctions undertaken against the EU, however).

Concluding Remarks

The main summary and conclusion to be drawn from the above discussion is that, in approaching the question of the applicability of the Charter of Fundamental Rights, as well as fundamental rights as general principles of Union law, at the national level, it is recommended to:

- take as a point of departure Article 51(1) of the Charter and its reference to the implementation of Union law
- examine whether there is a norm of Union law other than a provision of the Charter which is applicable *in concreto* – in other words directly relevant for the case at hand; the test is *not* satisfied by the simple fact that it is possible to cite a norm of Union law which on substance covers the same subject area as is at issue in the actual case.

This ‘pragmatic’ conclusion does not, of course, solve all problems. It has to be admitted that it may be seen as containing an element of circular reasoning: to judge whether it is a question of implementing Union law, one has to examine whether Union law is being implemented. This does not seem to be an insurmountable problem, however. In any case before the Union Courts or national courts, determining at least in a preliminary way the applicable law is a normal starting point. If this preliminary analysis shows that at least one norm of Union law other than a Charter provision is directly relevant, there should be an equally preliminary assessment of whether an application of a Charter provision could affect the application (including questions of interpretation and validity) of the norm of Union law. These determinations can, of course, be reassessed in the course of the proceedings.

It is true that this approach requires a case-by-case analysis *in concreto* rather than simply applying some general and clear criteria. Given the fluidity of the scope of application of Union law and the intertwinement between Union law and national law, such a case-by-case approach seems not only possible but also necessary. It is, in this respect, also recommended to follow a rather strict line in determining whether a norm of Union law is directly relevant in a case or not. This is called for not only

61 According to Article 216(2) TFEU, agreements concluded by the Union are binding upon not only the institutions of the Union but also its Member States.

because of the affirmation, in Article 6(1) TEU and Article 51(2) of the Charter, that the Charter is not intended to increase the competences of the Union but also – quite frankly speaking – taking into account the increasing work load of the Union Courts, which have their hands full with the current – and, it seems, ever increasing – remit of Union law and could not simply cope with the task of becoming an additional layer of human rights courts in Europe.

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KADA EUROPOS SAJUNGOS PAGRINDINIŲ TEISIŲ CHARTIJA YRA TAIKOMA NACIONALINIŲ LYGMENIU?

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Santrauka. *Europos Sąjungos pagrindinių teisių chartija (toliau – Chartija) nuo 2009 m. gruodžio 1 d. tapo Europos Sąjungos (toliau – ES) privalomos pirminės teisės dalimi. Nors Chartija kodifikuoja ir aiškina Europos Sąjungoje garantuojamas pagrindines teises, tačiau Chartijos taikymas yra gana reikšmingai apribotas. Chartija taikoma tik tuo atveju, kai grėsmė kyla ES teisės normoms. Kai valstybių narių nacionaliniai teismai ir kitos institucijos susiduria vien tik su nacionalinės teisės problemomis, jos neprivalo taikyti Chartijos nuostatų, bet turėtų remtis nacionalinėmis konstitucinėmis normomis, kurios garantuoja pagrindinių žmogaus teisių apsaugą, bei tarptautinėmis žmogaus teisių sutartimis, pagal kurias valstybė narė yra prisiėmusi įsipareigojimus. Tačiau konkrečiose situacijose ne visada yra paprasta atskirti ES ir nacionalinės teisės taikymo sritis.*

Šiame straipsnyje analizuojamos teorinės ir praktinės problemos, kylančios taikant ir aiškinant Chartijos 51(1) straipsnį, pagal kurį Chartijos nuostatos yra skirtos valstybėms narėms tik „tais atvejais, kai šios įgyvendina Sąjungos teisę“. Siūloma laikytis pragmatiško požiūrio ir vertinti kiekvieną situaciją atskirai. Todėl turėtų būti analizuojama, ar konkrečioje byloje, be Chartijos nuostatų, dar galima taikyti ir kitas ES teisės normas. Jei atsakymas yra teigiamas, tai tokioje byloje turėtų būti taikoma ir Chartija, preziumuojant, kad Chartijoje įtvirtintos nuostatos gali būti reikšmingos bylos baigčiai. Jei atsakymas yra neigiamas, nacio-

naliniai teismai ir kitos institucijos turėtų taikyti nacionalinius teisės aktus bei tarptautines sutartis, garantuojančias pagrindines žmogaus teises ir laisves.

Reikšminiai žodžiai: *pagrindinės teisės, Europos Sąjungos pagrindinių teisių chartija, taikymo tikslas, Europos Sąjungos teisė ir nacionalinė teisė, Europos Sąjungos teisės įgyvendinimas.*

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