THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND ITS APPLICATION BY THE COURTS OF EU MEMBER STATES*

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1. The recognition of human rights had a fundamental impact on the development of national legal systems in the period since the Second World War. "Limits of the legislative power have evolved: the legislation can only set rules without the infringement of the human rights," wrote the eminent German expert on public law, Dieter Grimm, of the new state of affairs.[1] The impact has been strong also because institutions have emerged to which aggrieved parties can turn to seek legal remedy. Those institutions often function as courts.

In some circles the operation of those new institutions has provoked heated responses. Let me illustrate the intensity of that animosity with some quotations. The Britons, more than others, opposed the setting up of the European Court of Human Rights. Some British experts went as far as referring to it as the end of civilised life as we know it.[2] The protests at establishing an international judicial forum to judge human rights violations was not restricted to the

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* The manuscript of the present paper was finalised in 2008. The essay is a revised version of a paper that I presented at a conference, organized by the Committee of Legal and Political Sciences of the Hungarian Academy of Sciences on 8 May 2008. It is related to some of my earlier writings, to which I repeatedly refer. They are as follows: "Az EU tagállamok közös alkotmányos hagyományai és a nemzeti polgári jog" (Common Constitutional Traditions of Member States of the EU), In: *Alkotmányosság a magánjogban* (Constitutionality in Private Law), (ed. A. Sajó), Budapest 2006, 17-41; "A tulajdonjog korlátozásáról" (On Restricting the Law of Property), In : *Tanulmányok Dr. Besenyei Lajos egyetemi tanár 70. születés-napjára* (Essays Marking Professor Lajos Besenyei's 70th Birthday), Szeged 2007. 237-245; "Alapjogi Charta – nemzeti alkotmánybíróságok" (Charter of Fundamental Rights – Constitutional Courts of the Member States of the EU), In: *Ünnepi kötet Sári János egyetemi tanár tiszteletére* (Festschrift for Professor János Sári) (ed. M. Dezső and I. Kukorelli), Budapest 2008, 121-130; "A tulajdonjog emberi jogi védelméről" (The Protection of the Right to Property as a Human Right), In: *Liber Amicorum, Studia Gyertyánfy P. dedicata* (ed. G. Faludi), Budapest 2008, 229-238.

[1] D. GRIMM: "Judicial Review in International Perspectives," In: *Constitutional Adjudication and Democracy,* (M. Andenas, D. Fairgrieve ed.), The Hague, Boston, London 2000, Vol. II. 107.

[2] The opinion is quoted in A. W. B. SIMPSON: *Human Rights and the End of the Empire*, Oxford, New York 2001, 7.

period when it was set up and was not limited to the United Kingdom. A recent French article describes the activity of that court as "tyrannical."[3] Even less critical observers have remarked that certain judgments of that Court have irritated the courts of the Member States.[4]

The above passionate responses to the work of the European Court of Human Rights aside, it can be stated that the very existence of the international treaties on human rights and especially the establishment of international forums to enforce the implementation of human rights have forcefully influenced the development of the law of the countries that had signed those treaties. The influence can be seen in legislation, the application of law and even in the system of the legal institutions of those countries. Certain aspects of that influence have recently come to the forefront of interest in international legal literature. Even a conference was devoted to the issue in Paris in March 2008. The British delegate to the conference observed that the application of law in the field of human rights had been a factor in the reform of the English judicial system, whose implementation will start on 1 October 2009.[5]

Hence the conclusion is that the rules appertaining to human rights are gaining in importance. The present essay of modest size discusses a special aspect of the application of the relevant law: topical issues in the reception of the Charter of Fundamental Rights of the European Union.

2. In December 2007 the Hungarian National Assembly adopted Act CLXVIII of 2007 on Promulgating the Treaty of Lisbon that Amends the Treaty on the European Union and the Treaty on the European Community. Article 4 of that law provides that the National Assembly shall promulgate the Charter of Fundamental Rights of the European Union (the Charter, in short) and related explanations. When that law enters into force will depend on the fate of the Treaty of Lisbon. The outcome of the referendum in Ireland has prevented the Treaty of Lisbon from becoming operative, and no decisions have been made about further steps.[6] That having said, the legal literature already indicates that the Charter, which will become legally binding after the Treaty of Lisbon enters into force, and the related explanations have already exerted an influence even transcending the scope of Community law.[7]

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3 B. EDELMAN: "La Cour européenne des droits de l'homme : une jurisdiction tyrannique?" *Recueil Dalloz* 2008/28. 1946-1953.

4 U. EVERLING: "Europäische Union, Europäische Menschenrechtskonvention und Verfassungsstaat," *Europarecht* 2005. 418.

5 Lord D. HOPE of CRAIGHEAD: "The Reform of the House of Lords," *Revue Internationale de Droit Comparé* 2008, 259-260.

6 In this connection see M. CSÖNDES and L. KECSKÉS: "Az ír 'nem'" (The Irish "No"), *Európai Jog* 2008/4. 8-14.

7 J. Ph. TERBHECHTE: "Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?" *Europarecht* 2008, 171.

Despite the uncertainties over the fate of the Treaty of Lisbon, the Charter poses several questions for those in charge of the application of law in Hungary. Below I will shed light on some of those questions.

3. This complex issue can be approached from various angles. One of the noteworthy aspects is the status the Charter will assume in the law of the European Union.

When the European Economic Community was founded, the human rights were not in the focus of interest. Although legal history shows that attempts were made to include human rights in the founding treaties, they failed. The situation was explained at the time by stating that the signatories did not agree on setting up a commonwealth of states, whereas human rights belong to the competence of states.[8] Valid as that explanation was, the fact remains that the protection of human rights did not feature in Community law for a long time. By focusing on economic freedoms in connection with the common market and being indifferent to human rights, Community law deviated from the mainstream of legal development. Note that the mainstream of legal development put the protection of political rights in the forefront and not only was less attention paid to the economic rights, their level of protection was lower than that of the political ones. (The economy-related welfare rights and the cultural rights are often defined as objectives rather than rights).[9] Economic freedoms have retained their central position in Community law down to these days.[10]

The Declaration on European Identity, adopted in Copenhagen on 14 December 1973 states that the Member States of the European Economic Community intended to establish a community of values. That having said, only the 1992 Treaty of Maastricht brought tangible progress at the level of a founding treaty in the protection of human rights. Article B of the Treaty sets the Union the objective, among other things, "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union." Article F stipulates that the "Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights … and as they result from the constitutional traditions common to the Member States, as general principles of Community law." In

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8 F. PICOD : "Les sources," In : *Réalité et perspectives du droit communautaire des droits fondamentaux*, (F. Sudre, H. Labayle eds.), Brussels 2000, 130.

9 RÁCZ, A.: "Vezérlő elvek az európai alkotmányfejlődésben" (Key Principles of Constitutional Development in Europe), *Jogtudományi Közlöny* 2007/12. 538.; R. UITZ: "Yet Another Revival of Horizontal Effect of Constitutional Rights," In: *The Constitution in Private Relations* (A. Sajó, R. Uitz, eds.) Utrecht 2005, 18.

10 J. SHAW, J. HUNT, C. WALLACE: *Economic and Social Law of the European Union*, London, New York 2007. 351.

1997 the Treaty of Amsterdam amended the wording of Article F. More importantly for the purpose of this essay, it complemented the Preamble by confirming the "Union's attachment to fundamental social rights as defined in the European Social Charter […] and in the […] Community Charter of the Fundamental Social Rights of Workers."

The fundamental rights appear in those treaties at the level of general principles rather than as concretely defined and enforceable rights. The proclamation of the Charter of Fundamental Rights in December 2000 meant an important step forward. However, it has not become legally binding. That is one of the areas where the Treaty of Lisbon, which is meant to amend treaties that founded the European Union and the European Community, is intended to bring about a change. The Treaty of Lisbon wishes to include in the Treaty of the European Union Article 1A, which refers to respect for human rights as a common fundamental value of the Union and it adds that it is among the shared values of the Member States. The proposed, new paragraph 1 of Article 6 provides that the Charter will become legally enforceable when the Treaty enters into force.

4. Originally the Treaty on the European Community lacked provisions on the protection of human rights. In fact, no detailed regulation of that area has been made in Community law ever since. That lends special significance to relevant judicial practice.

It is usually observed of the first period in the activity of the Court of Justice of the European Communities (referred to below as the Court or the ECJ) that it paid no attention to human rights, instead, focused on the market freedoms in compliance with the founding treaties of the Communities.[11] "A judgment rendered in 1960 shows the Court's practice perfectly well. As its starting point the Court stated that it is not its function to ensure respect for national law in force in the Member States. This principle applies even for rules set out in the constitution – since in most cases the protection of human rights has been included in the constitutions of the Member States. In its judgment the Court also stated that Community law does not contain any general principle guaranteeing the maintenance of vested rights."[12]

A slow change in the Court practice began only in the second half of the 1960s. A judgement passed in December 1970 reflected a new approach. Although it upheld the position that no provision of Community law may be revised on the basis of the constitution of a Member State, it acknowledged that the funda-

[11] Chr. TOMUSCHAT: *Human Rights between Idealism and Realism*, Oxford 2003, 215.

[12] *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH* and *I. Nold KG* v *High Authority of the European Coal and Steel Community*, Judgment of 15 July 1960, C-36, 37, 38, 40/59.

mental rights belong to the general principles that enjoy the protection of the Court. The protection of the fundamental rights – a requirement that has its origin in the common constitutional principles of the Member States – has to be ensured also by Community law. [13] Furthermore, it is necessary to take into account the international treaties that the Member States have either signed or helped to draft. It was a clear reference to the European Convention for the Protection of Human Rights.[14] Said parts of the Court's practice were later incorporated in the Treaties of Maastricht, Amsterdam and Lisbon, as well as in the Charter.

5. Although the Charter is not yet legally binding, it has been the subject of numerous articles. Some experts question whether it is needed at all or they challenge its content, while others praise its importance. Although an analysis of the circumstances under which the Charter was born is outside the remit of this essay, it is worth offering a brief discussion to help readers understand the content of the Charter.

The fate of the Charter has been closely linked to the formulation of the Treaty establishing a Constitution for Europe (European Constitution). The German approach and initiatives have played an important role in the emergence of the Constitution and the Charter. Following the Second World War the issue of German identity was controversial. Germany had a Nazi regime before the war and the German state was partitioned after the war. Against such a background the questions of German national cohesion and self-identity attained special importance. Under such historical conditions the Constitution had an important role because it emphasized the citizens' belonging to a nation and a sense of self-identity. Von Bogdandy convincingly points out that, ever since the crisis of 1973, the search for German identity has been related to questions of European identity. It has become an important political issue in the whole of the European Communities that the citizens of the Member States should feel attachment to the Communities and that they should have a European consciousness of identity[15].

The importance of said aspiration is shown in the framework of the European integration also by the fact that the Treaty of Maastricht mentions among the key objectives of the Union the strengthening of identity and the introduction of the citizenship of the Union.[16] In a similar way to the German *Grundgesetz*, there

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[13] *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970, No. C-11/70, item 4.

[14] *J. Nold, Kohlen- und Baustoffgroßhandlung* c. *Commission des Communautés européennes*, Judgment of 14 May 1974, No. C-4/73, item 13.

[15] A. von BOGDANDY: Europäische und nationale Identität: Integration durch Verfassungsrecht? In: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 62, Berlin 2003, 163-164, 184-185.

[16] Title I, Article B.

was a demand both for the Union's principle of unity and rights for the Union's citizens. It seemed insufficient to say in that context that the citizens of the Union are entitled to the rights enshrined in the European Convention for the Protection of Human Rights because the protection guaranteed by that convention does not originate from Union citizenship. (That the Union is not among its signatories further complicates the picture.) Hence it follows that there was a need for another document that is suitable for influencing the general public. The first and second passages of the Preamble of the Charter create a link between the ever closer union between the people of Europe and shared values, like human dignity, freedom and equality. Standing on such a basis, the Charter places the individual into the centre and ensures the protection of the rights of the citizens of the Union. By doing so, the Charter ensures a background for the long-established and long-enforced economic freedoms: the free movement of persons, services, goods and capital and the freedom of establishment.

6. In light of the aforesaid passages it becomes clear why certain observers state right from the birth of the Charter that "the Charter does not define new rights; it is not a legal but rather a political document."[17] Indeed a debate followed on whether the Charter was a political or a legal document. The Advocates-General of the Court attempted to make the Charter more legal in character by referring to it as a part of the Member States' common constitutional legacy. That was how they attempted to pave the way for the Charter to be used in the practice of the Court. (As it has been mentioned, the Court was ready to extend protection to human rights with reference to the common constitutional principles.)[18] Let us add in this connection that for several years now the Court of First Instance occasionally makes references to the Charter. Moreover, the constitutional courts of some of the Member States also occasionally refer to provisions of the Charter.[19]

For several years the Court even refrained from mentioning the Charter. But then in a judgment of 2006 it made a reference to the Charter.[20] True, that reference only occurred because the Preamble of the directive that had been considered by the Court had mentioned the Charter as the basis for some ruling. Ref-

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[17] Editorial Comments, The EU Charter of Fundamental Rights still under discussion, *Common Market Law Review* 2001, 2.

[18] F. C. MAYER, La Charte européenne des droits fondamentaux et la Constitution européenne, *Revue Trimestrielle de Droit Européen* 2003, 192-193; Case T-193/04, Hans-Martin Tillack v. Commission, Judgment of the Court of First Instance (Fourth Chamber) of 4 October 2006, [2006] ECR II—3995, J. WAKEFIELD comment, *Common Market Law Review* 2008. 220.

[19] M. CLAES, The European Constitution and the Role of National Constitutional Courts, In: *The European Constitution and National Constitutions*, (A. Albi, J. Ziller, ed.), Alphen aan den Rijn 2007, 238.

[20] *European Parliament* v. *Council of the European Union*, Judgment of the Grand Chamber of the Court of 27 June 2006, No. C-540/03, item 38.

erence by the Court to the Charter was thus technically restricted. The reasoning of said judgement ignored the Charter.[21] In 2007 the Court took a further step. In the case of *Unibet*, no legal instrument of the Union could be found that had referred to the Charter. In that case then the Court referred to the Charter in order to confirm its established practice.[22] Thereafter the Court cited the Charter in several judgements but in none of those cases could those references be seen as crucial parts of the reasoning. It is fair to state that reference to the Charter was confined to confirming or complementing the judgements concerned.[23] It has yet to be seen to what length the Court is ready to go in recognizing the legal binding character of the Charter despite the fact that the Treaty of Lisbon, which is supposed to declare the Charter's binding force, has not entered into force yet.

7. The adoption of the Charter – an instrument that is meant to strengthen the protection of human rights – is a cause that would deserve universal support. Much of the criticism that has been levelled at the Charter derives from that practice of the Court that reinterprets the competences that were originally defined by the treaties that founded the Community and the Union.[24] That Court practice has a long past and numerous ramifications. Below I will only discuss aspects that are relevant to the subject of this essay and are often mentioned in legal literature.

8. The Charter is a declaration of rights, freedoms and principles. Whenever the European Court of Justice and the courts of the Member States consider the Charter, they have to also take into account the updated Explanations attached to the Charter originally prepared under the authority of the Praesidium of the Convention which drafted the Charter. For instance, the Explanation attached

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[21] For an analysis of that judgment, *see* Case C-540/03, *Parliament* v. *Council,* Judgment of the Grand Chamber of 27 June 2006, [2006] ECR I-5769, M. BULTERMAN: Comment, *Common Market Law Review* 2008, 256. ff.

[22] *Unibet (London) Ltd, Unibet (International) Ltd.* v. *Justitiekanslern*, Judgment No. C-432/05, item 37, of the Grand Chamber of the Court.

[23] *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, Judgment No. C-341/05, item 91, 18 December 2007; *International Transport Workers' Federation, Finnish Seamen's Union* v *Viking Line ABP, OÜ Viking Line Eesti*, Judgment No. C-438/05, items 43 and 44, 11 December 2007; *Dynamic Medien Vertriebs GmbH* v *Avides Media AG*, judgment No. C-244/06, item 41, 14 February 2008; *Productores de Música de España (Promusicae)* v *Telefónica de España SAU***,** judgment No. C-275/06, item 64, 29 January 2008; *Varec SA* v *Belgian State*, Judgment No. C-450/06, item 48, 14 February 2008.

[24] T. C. HARTLEY: *The Foundations of European Community Law*, Oxford, New York 2003, 5th ed. 83; D. BRENNAN, The Future of the European Court of Justice – A British Perspective, In: *The Future of the European Judicial System in a Comparative Perspective*, (I. Pernice, J. Kokott, Ch. Saunders, ed.), Baden-Baden 2006, 80.

to paragraph 5 of Article 52 provides: “Paragraph 5 clarifies the distinction between ‘rights’ and ‘principles’ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed.” In other words, principles have less weight than rights.

Article 51 defines the scope of the Charter. Paragraph 1 provides: “The provisions of this Charter are addressed to the institutions and bodies of the Union […] and to the Member States only when they are implementing Union law.” Discussing the relevant obligations of Member States’ institutions that implement law, the Explanation attached to that paragraph refers to the principles that can be deduced from the relevant practice of the Court. Below I will discuss in some detail that court practice because it is of special significance to the subject of this essay.

9. Ever since its establishment, the Court has been seeking to ensure consistency in the implementation of Community law. As early as in 1963 it defined the principle (which is still regarded valid) that the treaty founding the Community has a broader scope than an international treaty that only defines obligations for states and not for their citizens. The Community represents a new system under international law. In this special new system the Member States have restricted their sovereignty in specific areas. Independently of the legislation of the Member States, community law imposes obligations on individuals and confers rights upon them.[25]

A 1978 judgment of the Court laid down that Community law has primacy over the law of the Member States. Given the directly applicable rules of Community law, rules of national law may not be taken into account irrespective of the fact whether or not they were enacted before or after the relevant piece of Community law entered into force. (In other words, inapplicable is the general rule that a legal instrument of a later date overrules another, earlier one.)[26] The Court took an important stand in 1986. It stated that the treaty founding the Community can be considered as the constitution of the Community and both the Member States and their institutions have to comply with it. In case a piece of national legislation runs contrary to Community law, legal action may be initiated against it in front of the national courts.[27] In a judgment of 1987 the Court ruled that the courts of the Member States do not have the right to challenge the validity of provisions of Community law; only the Court has the right

[25] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* c. *Administration fiscale néerlandaise*, Judgment No. C-26/62, 5 February 1963.

[26] *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, Judgment No. C-106/77, items 17 and 21, 9 March 1978.

[27] *Parti écologiste Les Verts* c. *Parlement européen*, judgment No. C-294/83, item 23, 23 April 1986.

to weigh the validity of rulings of Community law.[28] In opinion No. 1/91 the Court confirmed the above principles and added that, although an international treaty had founded the Community, that treaty served as the constitution of the Community. It reiterated that Community law had primacy over the legislation of the Member States and Community law is directly applicable to individuals of the Member States.[29]

Consistency in the implementation of the law is paramount for the Court. Accordingly, the uniform interpretation of law is required even in cases where the piece of legislation involved in a legal controversy is not part of Community law. A piece of national legislation has to be interpreted in compliance with Community law if there is reference to Community law either in a relevant national ruling or in a contract of the parties concerned.[30] The Court has the same approach if – although neither a piece of national legislation, nor the contract between the parties concerned refer to Community law – a piece of national legislation that is applicable to domestic legal relationships is identical in content with the relevant ruling of Community law.[31] Those judgments show that the Court construes its competence broadly in order to ensure the uniformity of law.

The Court's tendency of construing its competence broadly has been criticized in connection with a case that is mockingly referred to by some as the "pyjama case." In that case the Court felt obliged to take a stand on customs tariffs of women's underwear. The issue became controversial because there was no consensus whether a certain rule only applied to nightdresses or also to garments that are used outside of bed.[32] Although the Advocates-General considered it unnecessary to construe the Court's competence broadly in other similar cases, the judgment concerned was in line with the Court's practice.[33]

Construing the Court's competence broadly has much more serious consequences than that. An example is the judgment adopted by the Grand Chamber of the Court in 2007. The judgment referred to Italian rulings on issuing li-

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28 *Foto Frost* c. *Hauptzollamt Lübeck-Ost*, Judgment No. C-314/85, items 15-18, 22 October 1987.

29 ECR I-6079, item 21.

30 *Leur-Bloem* v. *Inspecteur der Belastingdients/Ondernemingen* Amsterdam 2, Judgment No. C-28/95, item 25, 17 July 1997.

31 *Bernd Giloy* v. *Hauptzollamt Frankfurt am Main-Ost*, Judgment No. C-130/95, items 26-29, 17 July 1997.

32 *Wiener S. I.* v. *Hauptzollamt Emmerich*, Judgment No. C-338/95, items 10-11, 20 November 1997.

33 K. LENAERTS: ECJ – "The System of Preliminary Rulings Revisited," In: *The Future of the European Judicial System in a Comparative Perspective*, (I. Pernice, J. Kokott, Ch. Saunders ed.), Baden-Baden 2006, 219-220, 222.

cences for gambling and for organizing gambling without a licence. The Court ruled that the relevant legislation restricted the free operation of the market and therefore violated Community law. Consequently, the Italian court concerned had to reconsider whether or not the restriction served public interest and whether or not it was proportional. In case that violation of Community law proved to be unjustified, the relevant penal law regulation is inapplicable.[34] Observers note that actually it was not this or that piece of Italian legislation that violated Community law but the composite effect of those national regulations could be considered as running contrary to Community law.[35] As a result of the Court's ruling, a penal law regulation was not applied with reference to Community law.

Let us add in connection with that judgment that, according to an earlier judgment of the Court, the violation of Community law always has to be examined in the context of its concrete conditions, which means it is insufficient to refer to an abstract danger that might be caused by a breach of law. Furthermore, the unobstructed operation of the market must not be the only consideration when a violation of Community law is considered. Other political objectives that Community law is meant to promote also need to be taken into account, such as for instance, health protection. The Court took a position about that in the Tobacco case.[36]

10. It is not the purpose of this study to offer an in-depth analysis of the Court's practice in any of the fields. Instead, the purpose is to outline a general tendency of Court judgments that the national application of law has to take into account in connection with the fundamental rights. The philosophy behind the above-mentioned judgments – which has also been elucidated in journal articles written by a former president of the Court and some of its judges – is that the Court operates also as the constitutional court of the Community.

In a speech, which was later published in a journal, a former president of the Court, Rodriguez Iglesias, has taken a stand in favour of the Court functioning as a constitutional court. It is worth considering that part of the article that relates to the topic at issue. According to Rodriguez Iglesias, in drawing the line between the competence of the EU and its Member States, the ECJ has been assuming the role of a constitutional court for a long time. In his opinion, the

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34 *Massimiliano Placanica, Christian Palazzese, Angelo Sorrichio*, combined judgements C-338/04, C-359/04 and C-360/04, items 42-48.

35 A. CUYVERS: Comment to Joined Cases C-338/04, C-359/04 and C-360/04, *Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica),* Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891. *Common Market Law Review* 2008, 516.

36 *Federal Republic of Germany* v. *European Parliament and Council of the European Union*, Judgment No. C-376/98, items 83, 84 and 88, 5 October 2000.

fundamental freedoms guaranteeing the functioning of the common market belong to the fundamental values of the community and have constitutional character; the protection of these freedoms belongs to an area of decisive importance of the Court's activity. Finally, should the Charter be accepted, he regards it as an important ground for the Court's activity.[37]

Koen Laenarts, a President of Chamber at the Court, also bases his conclusion on the Court's case law. In his opinion the ECJ is at the same time the Constitutional Court and the Supreme Court of the European Union. To its competence as a constitutional court belong decisions in questions of horizontal division of powers between the Union institutions, the vertical division of powers between the European Union and its Member States, and the protection of fundamental rights.[38] Günter Hirsch, a former judge of the Court, holds a similar opinion.[39]

For the purposes of this paper we concentrate on the protection of human rights, especially in relation to the Charter. Below I will only deal with relevant issues.

11. What the judges of the Court say about the European Constitution does not seem to have general acceptance. For example, well before it became clear that the legal process of adopting the European Constitution is doomed to failure, an observer remarked that many stakeholders of the political and business life oppose the idea that the Union should have a constitution.[40] It should also be borne in mind that the several Member States have different approaches to the constitution. The difference between the British and the German approach is especially striking.[41] Many experts are of the view that the Court plays too important a role in the process of integration.[42]

When it comes to the protection of fundamental rights in the European Union, it is a problem that the Member States differ in their interpretation of fundamental rights. The differences are greater than what the undeniable differences in their economic, social and cultural legislation would justify. To render the

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[37] G.C. RODRIGUEZ IGLESIAS: "The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication," *European Business Law Review* 2004, 1118-119, 1121.

[38] K. LENAERTS, "The Rule of Law and the Coherence of the Judicial System of the European Union," *Common Market Law Review* 2007, 1651-1652.

[39] G. HIRSCH, "Choice of Models – Quo Vadis ECJ?" In: *The Future of the European Judicial System in a Comparative Perspective*, (I. Pernice, J. Kokott, Ch. Saunders, ed.), Baden-Baden 2006, 129-131.

[40] J. SCHWARZE: "Concept and Perspectives of European Community Law," *European Public Law*, 1999, 238.

[41] I. PERNICE: "Multilevel Constitutionalism in the European Union," *European Law Review*, 2002, 513.

[42] L. AZOULAI: "Le rôle constitutionnel de la Cour de Justice des Communautés Européennes tel qu'il se dégage de sa jurisprudence," *Revue Trimetrielle de Droit Européen* 2008, 36.

situation even more complicated, the Court has been pursuing its own legal philosophy, which sets it apart from the Member States.[43]

Several observers criticize the Court practice of protecting fundamental rights because in their view the market freedoms are overemphasized (the Court qualifies Community legislation that covers market competition as belonging to public policy[44]) By contrast, especially as regards the economic rights, the social policy of the Member States and the decisions of the ECJ do not reveal the same opinion.[45] The President of the Court resolutely rejected that often-repeated opinion. In his view there is no contradiction between the protection of fundamental freedoms and the protection of fundamental rights. He pointed out that fundamental freedoms and fundamental rights have a different scope of protection and that the ECJ essentially tries to strike delicate balances in this protection. There is no indication of a hierarchy between the two. He also pointed out that the ECJ not only tried striking delicate balances, he also refrained itself from judicial activism.[46]

12. In its judgments related to fundamental rights the Court keeps referring, in addition to the shared constitutional traditions of the Member States, to the European Convention for the Protection of Human Rights and even to the practice of the European Court of Human Rights. Yet it is doubtful that the protection of fundamental rights under Community law would be identical with that based on the European Convention for the Protection of Human Rights.[47]

Fundamental rights play a minor role in the practice of the Court, and indeed the theoretical foundation of that field is not especially elaborate. Some observers hoped that the Charter would help clarify the theoretical foundations and would offer a reliable guideline.[48] However, an attentive reader of the Charter

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[43] W. PAULY: "Strukturfragen des unionsrechtlichen Grundrechtsschutzes," *Europarecht* 1998. 253-254; É. PICARD : "L'émergence des droits fondamentaux en France," *L'Actualité Juridique, Droit Administratif* 1998. juillet-août, spécial 19.

[44] *Eco Swiss China Time Ltd.* v. *Benetton International NV*, Judgment No. C-126/97, items 36-39, 1 June 1999.

[45] G. de BÚRCA: "The constitutional challenge of new governance in the European Union," *European Law Review* 2003, 827.

[46] V. SKOURIS: "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance," *European Business Law Review* 2006, 226-239; almost the same text in German: V. SKOURIS: "Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht," *Die Öffentliche Verwaltung* 2006, 93-97.

[47] From the literature suffice it to refer at this point to the statements of the former president of the European Court of Human Rights: L. WILDHABER: Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte ? *Europäische Grundrechtezeitschrift* 2002. 573.

[48] M. P. MADURO: "The Double Constitutional Life of the Charter of Fundamental Rights of the European Union," In: *Economic and Social Rights Under the EU Charter of Fundamental Rights* (T. Harvey, J. Kenner, ed.) Oxford, Portland Oregon, 2003, 280.

can conclude that such expectation was not appropriately well founded. After all, the Charter was drafted to serve political rather than legal purposes. Early analyses have already pointed out that in numerous areas the Charter fails to provide firm guidance for law enforcement either in defining rights or in precisely defining the opportunities for restrictions.[49] It can be predicted therefore that the protection of fundamental rights will not get a firmer footing even after the Charter obtains a legally binding effect. As a consequence, the Court – whose judicial practice in the field of fundamental rights has been growing – is likely to play an even more important role. When the Charter obtains a mandatory effect, Rasmussen believes, there will be "tidal wave" of petitions pouring onto the Court.[50]

Partly connected with the Court's case law is the Protocol on the application of the Charter to Poland and to the United Kingdom attached to the Treaty of Lisbon. The Protocol set out that Poland and the United Kingdom wished to clarify certain aspects of the application of the Charter. According to Article 1 of paragraph 1 of the Protocol, 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 of these two Member States are inconsistent with the rights and principles reaffirmed by the Charter. Art. 1 par. 2 in turn says that 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 have provided for such rights in their national law.

It goes without saying that the protocol, which refers to Poland and the United Kingdom, elicited responses. The protocol forcefully challenges the position that the law of the Union enshrines common values on which the Court has based its judgments on fundamental rights for decades.[51]

13. It is not only the Charter's wording that will cause headaches for institutions that intend to implement the Charter in the Member States. An examination of the practice of the Court prompts the question what influence will the Community law interpretation of fundamental rights have on the application of legislation other than Community law? When applying national law, in case of the restriction or violation of law, the Member States apply the principles of necessity and proportionality – they are not motivated by the necessity to balance the market freedoms and fundamental rights. However, it follows from the

[49] D.TRIANTAFYLLOU: "The European Charter of Fundamental Rights and the 'Rule of Law', Restricting Fundamental Rights by Reference," *Common Market Law Review* 2002, 55-56, 63.

[50] H. RASMUSSEN: "Present and Future Judicial Problems After Enlargement and the Post 2005 Ideological Revolt," *Common Market Law Review* 2007, 1686.

[51] Éditorial, "L'Union, une communauté de valeurs?" *Reveue Trimestrielle de Droit Européen* 2008, 1; "Editorial comment," *Common Market Law Review* 2007, 1234.

above-discussed judgments of the Court that Community law is meant to have a decisive influence also in areas that are not governed by it. The institutions that apply law in the Member States have two options to choose from. They can adopt the principles that have been established in Community law. That would both mean that they give up their earlier practice and often find themselves with an approach to legal protection rather different to which they are accustomed. The other option is that in administering national law, they do not adopt the practice of the Court. As a consequence, two different approaches might coexist within the same country in the protection of fundamental rights. Neither of the two approaches seem to be satisfactory.

14. Although the Constitutional Courts of the Member States avoid open confrontation with the Court, they disagree with the Court's practice on numerous issues and continue relying on the national constitutions in their everyday work.[52] It is evident that this tendency will even become stronger when the protection of fundamental rights enters their agenda.[53] The legal literature discusses that issue also under the heading of hierarchy of norms. The question is as follows: are Community law and the practice of the Court on a higher level of the legal hierarchy than the national constitutions of the Member States?[54]

In the United Kingdom the above dilemma is exacerbated by the following consideration of constitutional law. "The sovereignty of the Parliament cannot be restricted, in constitutional questions the Parliament cannot reach decisions which he himself cannot alter later on, the Parliament cannot bind its successors by stipulating as to the manner of subsequent legislation." In a judgment of 2002 Lord John Justice Laws explicitly reiterated that traditional British legal principle.[55] In other countries this question, whether openly or implicitly, takes another form: is there a part in the national constitutional order that is untouchable, which may not be amended at all? [For instance, paragraph 3 of Article 79 of the German *Grundgesetz*, the controversial judgment of the German Constitutional Court that refers to the Treaty of Maastricht,[56] and the fourth and

[52] M. P. MADURO, "Der Kontrapunkt im Dienste eines europäischen Verfassungspluralismus," *Europarecht* 2007. 9; F. C. MAYER: "The European Constitution and the Courts," In: *Principles of European Constitutional Law* (A. von Bogdandy, J. Bart, ed.) Oxford, Portland Oregon, 2007, 306.

[53] M. CLAES, "The European Constitution and the Role of National Constitutional Courts," In: *The European Constitution and National Constitutions*, (A. Albi, J. Ziller ed.), Alphen aan den Rijn 2007, 242-244.

[54] U. WÖLKER, "Die Normenhierarchie im Unionsrecht in der Praxis," *Europarecht* 2007, 38-40.

[55] Quoted by the 6th Report of Session 2003-2004, House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 2004, 89.

[56] W. G. LEISNER, "Die subjektiv-historische Auslegung des Gemeinschaftsrechts," *Europarecht* 2007. 705.

fifth paragraphs of Article 89 of the French constitution – amended on 23 July 2008 – provide an itemized list of parts of the relevant constitutions that may not be amended.]

Although the Constitutional Courts honour Community law and refrain from qualifying it as "unconstitutional," they rely on the respective national constitutions when they carry out the constitutional analysis of the pieces of national legislation that implement the rulings of Community law.

15. In recent French and German national practice some judgments have been made that – although they are not based on the Charter but deal with the protection of fundamental rights – seek the road of constitutional analysis in the relation of Community law and national law.

The French decision concerned has been passed by a plenary session of the Conseil d'État – which functions as a constitutional court in relation to certain issues – about a petition of *Arcelor* and some other companies.[57] The Conseil d'État noted that the constitutionality of a statute was challenged which had been adopted to implement a Community directive in the field of reducing the emission of toxic gases. The directive granted the Member States the right to decide whether or not to implement it. The Conseil d'État set itself the task of clarifying whether there was a constitutional principle in Community law that would ensure the protection of a fundamental right. As it turned out, there was such a principle (the protection of the law of property). The Conseil d'État referred to the Court for a preliminary ruling the question whether the directive violated the principles of Community law and whether it should be abrogated. The Conseil d'État added that, if there were no such Community law principle, it would carry out the constitutional analysis of that French statute on the basis of French law. The legal literature discussing the decision of the Conseil d'État points out that the Conseil d'État took as its premise that, acting on the basis of the French constitution, the directive has to be transposed into French law. That conclusion coincides with the practice in recent years of the French Conseil constitutionnel. As could be seen, both institutions base their decisions on the national constitution.[58]

Soon after the French decision the German Constitutional Court also passed a judgment on the implementation of the same Union directive in the course of examining the unconstitutionality of the relevant German statute.[59] The judg-

[57] *Société Arcelor Atlantique et Lorraine et autres,* Resolution No. 287110 of 26 February 2007.

[58] F. C. MAYER, E LENSKI, M. WENDEL, Der Vorrang des Europarechts in Frankreich — zugleich Anmerkung zur Entscheidung des französischen Conseil d'Etat vom 26. Februar 2007 (*Arcelor* u.a.) *Europarecht* 2008, 71, 74.

[59] Resolution No. 1BvF 1/05 of the Bundesverfassungsgericht, 13 March 2007.

ment deserves attention for several reasons but suffice it to say here that the German Constitutional Court, making reference to the famous *Solange* judgment, did not examine the constitutionality of the Union directive. The judgment also stresses that Member States had a free hand in deciding how to implement that directive. However, the German Constitutional Court did not refer the case to the Court for a preliminary ruling; it resolved that an ordinary court could handle such a task. As in that case constitutionality had to be examined as based on Union principles, the German Constitutional Court did not examine the constitutionality of the German statute on implementation.

16. As for the application of law as illustrated by the above examples, evident is the question to what extent are the Union principles about fundamental rights identical with the principles, on the one hand, of the practice of the European Court of Human Rights and, on the other hand, with the principles on which the constitutional law practice of the EU Member States is based. Although the European Court of Justice has for many years been referring in its judgments to the practice of the European Court of Human Rights, the practice of the two courts is far from being identical. The same conclusion can be drawn if we compare the Court's practice with that of the constitutional courts of the EU Member States. One of the experts on this issue was justified to remark that there has been a pluralistic system for the protection of fundamental rights.[60] An institution that applies law in any of the Member States may thus easily find itself in the embarrassing situation that a formula that would comply with the Community law practice could not be found acceptable if perused on the basis of the practice that derives from the European Convention for the Protection of Human Rights.[61]

17. What has been said so far indicates the difficulties those applying law in the EU Member States face when they analyse constitutionality: they have to collate the principles that emanate from the national constitution with the constitutional principles of Community law; moreover, they are supposed to avoid legal collisions and they also have to approximate national constitutional principles to the practice of the European Court of Human Rights. If those efforts fail, the Member State concerned might be called to account. When the Charter, which was drafted with political considerations in mind, enters into force, that task is likely to become even more daunting.

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60 N. KRISCH, "The Open Architecture of European Human Rights Law," *The Modern Law Review* 2008, 201.

61 J. F. LINDNER, "Grundrechtsschutz in Europa, System einer Kollisionsdogmatik," *Europarecht* 2007. 170.

SUMMARY

The Charter of Fundamental Rights of the European Union and its Application by the Courts of EU Member States

ATTILA HARMATHY

The Charter is not yet legally binding; nevertheless, a lot of questions have been put concerning its application. The present paper gives a short overview of the slow development of the protection of human rights in the practice of the European Court of Justice and later on in the Treaties. The elaboration of the Charter is considered as an important step although it has mainly a political character and a lot of critical opinions have been published. It is clear that many problems will arise when the Charter will be applied. Some of the problems are closely connected with the case law of the European Court of Justice. The Court functions as the constitutional court of the European Union and the main principles applied by it do not always correspond to those applied by the courts (mainly constitutional courts) of the Member States. The importance of the differences will be greater if the Court will apply the rules of the Charter.

RESÜMEE

Die Charta der Grundrechte der Europäischen Union und ihre Anwendung in den Mitgliedstaaten

ATTILA HARMATHY

Obwohl die Charta der Grundrechte noch nicht in Kraft getreten ist, sind bezüglich ihrer zukünftigen Anwendung bereits zahlreiche Fragen gestellt worden. Der Aufsatz gibt einen kurzen Überblick darüber, wie sich der Schutz der Grundrechte in der Rechtsprechung des Europäischen Gerichtshofs sich langsam entwickelt hat. Die Entstehung der Charta kann auch dann als wichtiges Ereignis angesehen werden, wenn ihre Funktion in erster Linie eine politische ist und in der Fachliteratur bereits mehrere kritische Meinungen über sie geäußert wurden. Voraussichtlich wird es viele Probleme geben, wenn die Charta

einmal angewendet werden soll. Ein Teil dieser Probleme steht im engen Zusammenhang mit der Rechtsprechung des Europäischen Gerichtshofs. Dieser Gerichtshof ist auch als Verfassungsgericht der Europäischen Union tätig, und die Prinzipien seiner Rechtsanwendung sind nicht in jedem Fall mit den Prinzipien der Rechtsanwendung der mitgliedstaatlichen Verfassungsgerichte identisch. Die Bedeutung dieser Differenzen wird durch die Anwendung der Charta noch bedeutender sein.