

Brno, 7 November 2021

ECJ and Charter

Accession to ECHR



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Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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

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

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a 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 that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

EU Charter of FR

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.



National Challenges II: Competences

Who should control the scope of EU law?

GCC Maastricht Decision & Honeywell

Maastricht (BVerfGe 89,155)

Since European Treaties adhere to the principle of conferred powers -> EU is not able to extend its own competences

There is a clear dividing line between legal development within the terms of the Treaties and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty Law

Ultra vires doctrine



National Challenges II: Competences

*Thus, if European institutions or agencies were to **treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession**, the resultant legislative instruments would **not be legally binding** within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany...*

*... in future, it will be noted as regards interpretation of enabling provisions by [Union] institutions ...that the Union Treaty as a matter of principle distinguishes between the **exercise of a sovereign power conferred** for limited purposes and **the amending of the Treaty**, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects in Germany.*



National Challenges II: Competences

*i.e. threat to disapply European law that has been adopted **ultra vires***

Honeywell 2011

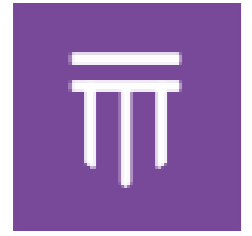
Relates to Mangold

Claimant argued that ECJ's discovery of a European principle that prohibited discrimination on grounds of age was ultra vires

GFCC confirmed **the relative supremacy doctrine**

Option to disapply it when the EU law is not considered to be covered by the principle of conferral

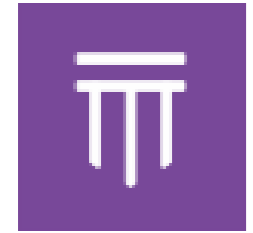
BUT: also presumption that Union would generally act within the scope of its competences



National Challenges II: Competences

*If each member state claimed to be able to decide through their own courts on the validity of legal acts by the Union, **the primacy of application could be circumvented in practice**, and the uniform application of Union law would be placed at risk. **If however, on the other hand the member states were completely to forgo ultra vires review, disposal of the treaty basis would be transferred to the Union bodies alone**, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or a expansion of competences...*

*The ultra vires review by the FCC can moreover only be considered if it is **manifest** that acts of the European bodies and institutions have taken place **outside the transferred competences**. A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral, the breach of competences is in other words sufficiently qualified.*



How does the ECJ react

- ECJ starts incorporating FR into its case law (general principles of Community/EU law)
- Examples?



Where do EU fundamental rights constrain the states?

- Common market:
 - principle of non-discrimination
 - Equal pay for men and women
 - General principles
- Migration & Asylum Law
 - Citizenship & Freedom of movement & Protection of rights of migrants
- Justice
 - Criminal law
- Foreign policy
 - FR of third country citizens?



Maastricht Pillars

- II. And III. Pillar
 - II. Pillar: principle of nondiscrimination
 - **Tanja Kreil**
 - **Alexander Dory**
 - III. Pillar
 - **Maria Pupino**
 - Accused of a crime (mistreating children). Prosecutor asked for evidence of children. Should the national law be interpreted in light of a Council's Framework Decision, or does the duty of harmonious interpretation relate only to the first pillar?
 - ECJ: the interpretative duty applies to pillar 3 decisions too.



EU Charter of Fundamental Rights

- What changes did the Charter bring?



EU Charter of Fundamental Rights

- What changes did the Charter bring?
 - No generations of rights
 - Innovative rights (rights of Child)
 - Some rights missing
- Codification of existing case-law: the problem of authority?
- Rights v principles
- What is the added value of the Charter?



EU Charter of Fundamental Rights

- What are principles?
 - To be implemented by legislative and executive acts
 - Judicially cognizable only when these acts are interpreted by courts
- I. Dignity
- II. Freedoms
- III. Equality
- IV. Solidarity
- V. Citizens' Rights
- VI. Justice
- VII. General provisions on interpretation and application



Application of Charter by MS?

- Article 51: implementation of EU law
 1. MS as agents implementing and applying EU measures
 - Minimum standards for refugees
 - Rutili: limitations states can impose on the free movement
 2. MS derogating from EU rules
 - Migration law
 - Extended CJEU's jurisdiction to review MS compliance with FR
 - Protection of FR – legitimate restriction of EU free movement
 3. MS actions within the scope of EU law

What is outside the scope?

- **Craig-De Burca:** Treaties do not provide any general power to enact rules on human rights (apart from anti-discrimination)
- Exclusive national competences and legislation
- A 4 TEU
- Residence permits e.g.

Article 6
(ex Article 6 TEU)

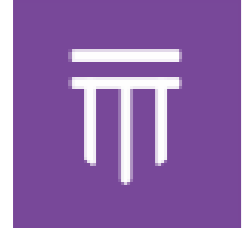
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Accession to ECHR – Opinion 2/13

- EU is not a state
 - Only states are member parties of the Convention (ECHR). The accession agreement (AA) treats the EU as a state, which is not adequate. **EU is a new legal order**
 - under international law, the EU is precluded by its very nature from being considered a State
- Autonomy of EU law



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Accession to ECHR – Opinion 2/13

1. Autonomy of EU law

- Needs to be protected
- Strasbourg interpretation of ECHR would bind the EU, but ECtHR cannot review interpretations and scope of EU law
 - A53 ECHR allows MS to lay down higher standards of HR protection than ECHR. But A53 Charter (Melloni): MS cannot have higher standards than EU Charter in fully harmonised area.
 - Principle of mutual trust would be compromised
 - Protocol 16 is a threat to autonomy of EU law (PR to Strasbourg instead of Luxembourg)



Accession to ECHR – Opinion 2/13

2. Treaty interpretation/application: CJEU.

- but, AA does not exclude the possibility of the ECtHR to settle such disputes

3. Co-respondent mechanism

- EU law implemented by MS – hence applicant will mostly go against the state. But MS have little discretion over EU actions.
- How to split responsibility between MS and EU?
 - C-R on request of the ECtHR or the contracting party
 - But, ECtHR would need to assess the rules of EU law governing the division of powers between EU and MS.



Accession to ECHR – Opinion 2/13

4. Prior involvement of the CJEU

- CJEU must have a chance to interpret and rule on the issue of EU law before it reaches the ECtHR.
- But national courts sometimes might not refer PR to CJEU.
 - Costa and Skouris: joint communication that part of AA would be an internal procedure for indirect actions (allowing CJEU to make a ruling).
 - CJEU did not find the procedure sufficient:
 - CJEU has not reserved right to rule whether it already dealt with an issue (it allowed to do so for ECtHR)
 - Did not permit the CJEU to rule on the interpretation (only validity of EU law)

5. Specific characteristics of EU law as regards review in CFSP matters

- Limited powers of CJEU in CFSP => no interpretation of EU law prior to ECtHR ruling.
- E.g. HR violation due to EU military action -> exclusive JR for ECtHR



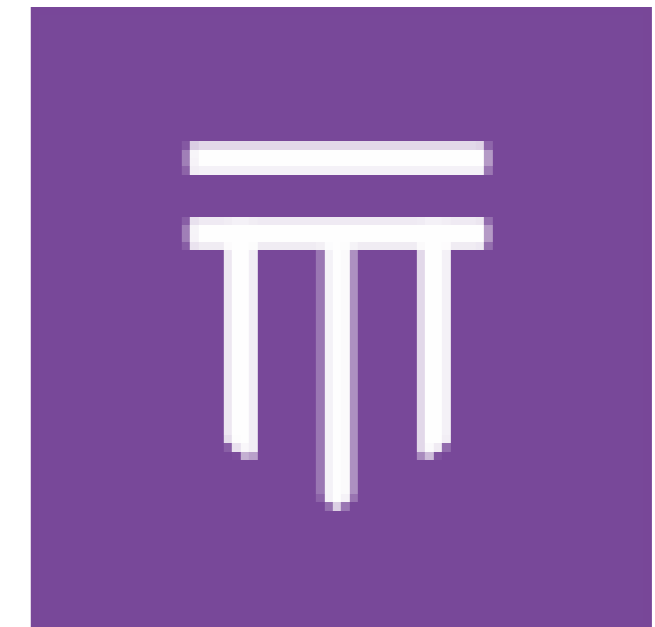
Accession to ECHR – Opinion 2/13

Repercussions:

- Commission can initiate infringement if the EU does not accede to ECHR
- Amendment of the Treaties: explicitly asking the EU to proceed notwithstanding A 6.2 TEU, Protocol 8 and Opinion 2/13?
- Courts try to engage more in a dialogue
- More considerations to application of some doctrines (mutual trust)
- Core issue: for EU, FR still only instrumental to achieving other policy goals
- Sn: how to solve the increasing caseload?

Brno, 24 November 2021

EU Citizenship



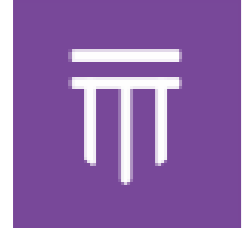
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Ruiz Zambrano C-34/09

- Reverse discrimination problem – rights derived from European citizenship
- Mr Zambrano, Columbian national
- Belgian authorities refused to grant him unemployment benefits, arguing that the relevant working period he relied on (2001-2006) had been completed in violation of Belgian legislation
 - His application for asylum was refused, he stayed in Belgium on the basis of non-refoulement decision
 - = no working permit for him or his wife
 - His 2 children were born in Belgium, and acquired Belgian nationality
 - Zambrano argued **derived right of residence**



Ruiz Zambrano C-34/09

- Children never lived outside of Belgium =/ never exercised their freedom of movement
- What does it mean for the applicability of Article 20 TFEU?



Ruiz Zambrano C-34/09

Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
 - (a) the right to move and reside freely within the territory of the Member States;
 - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
 - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.



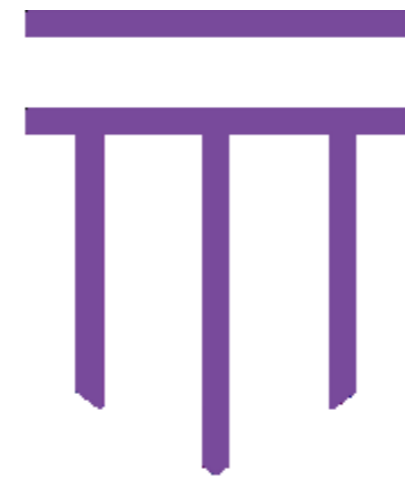
Ruiz Zambrano C-34/09

- Static citizens v citizens v external element
- CJEU does not mention Fundamental rights
- Instead, argues that the refusal to grant a **right of residence** to a third country national with **dependent minor children** in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has the effect of **depriving citizens of the Union of the genuine enjoyment of the substance of the rights** conferred by virtue of this status
- New interpretation of the enjoyment of such rights, which were previously linked to cross-border element in the person's situation



Ruiz Zambrano C-34/09

- AG Sharpston opinion
 - Much detailed reasoning
 - Stresses the important of bearing the political consequences of the creation of European citizenship
 - Distinction between persons who have interests in another MS and other was made problematic because of the success of the internal market
 - Citizenship should be distinguished from economic Freedoms
 - Contrary to A21 (workers) contains a separate right to reside, independent of the right to free movement.



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