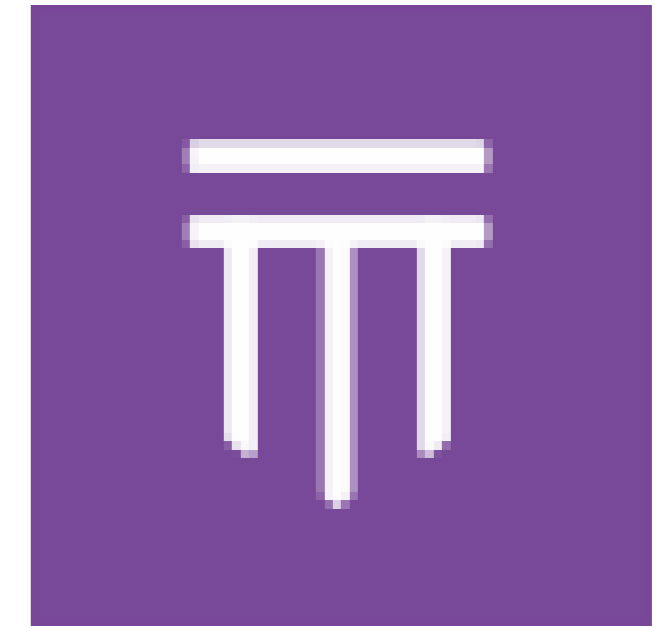


Brno, 17 November 2024

ECJ and Human Rights



JUSTIN
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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.

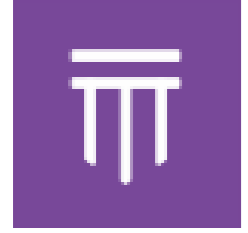
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union's law.**

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.



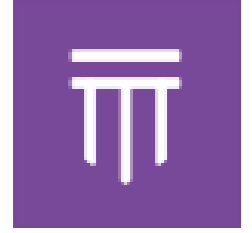
Where do EU fundamental rights constrain the states?

- 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
 - Judicial governance
- Foreign policy
 - FR of third country citizens?



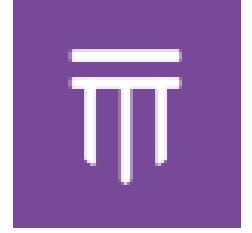
FR Beyond the Single Market

- 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

- Why the Charter?
 - Alternative strategy to the accession to ECHR
- Proclaimed in 2000
- Initiator: European Council, aiming to strengthen the protection of FR in Europe by making them more visible
- Until Lisbon: merely a source of inspiration, not binding force
- Since it draws on many sources -> Explanations!
 - Not legally binding
 - Due respect when interpreting the Charter...



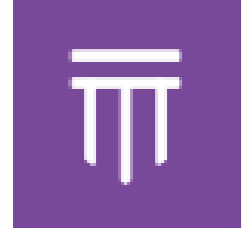
EU Charter of Fundamental Rights

- 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

- I. Dignity
- II. Freedoms
- III. Equality
- IV. Solidarity
- V. Citizens' Rights
- VI. Justice
- VII. General provisions on interpretation and application



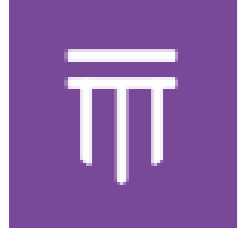
Application of Charter by MS?

- 4 general principles
- 1. It is addressed to the Union and applies to MS only **exceptionally**
- 2. Not all provisions in Charter are rights
- 3. Charter rights can be restricted by EU legislation
- 4. Harmony among Treaties, Convention and MS



Hard Rights vs Soft Principles

- What are rights?
 - Direct effect
 - Can be invoked before a court
- What are principles?
 - Title VII
 - To be implemented by legislative and executive acts
 - Judicially cognizable only when these acts are interpreted by courts
 - E.g. environmental protection A37
 - Not a limit on government, but stated aim of governmental action
 - Careful! Not source of objectives for EU institutional activity!



Application of Charter by MS?

- Article 51: implementation of EU law
 1. **MS as agents implementing and applying EU measures**
 - Minimum standards for refugees
 - Fransson case: implementation vs application [later narrowed down by Siragusa case]
 2. **MS derogating from EU rules**
 - A) MS's measures derogating from free market must comply with Charter [Sayn-Wittgenstein]
 - B) FR can justify derogation from the free market [Omega, Dynamic Medien]
 - 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.



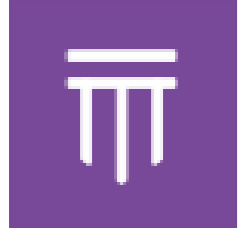
Limits of FR limitations in the Charter

- Article 52
 - *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be **provided for by the law** and **respect the essence of those rights and freedoms**.
Subject to principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*
 - i.e. 3 constitutional principles of limitations:
 - 1. provided by the law
 - IA of executive power?
 - 2. Proportionality principles -> necessary in light of general interests of Union or others
 - 3. independent existence of the absolute limit to public interferences: respect to the essence of the limited right. I.e. essential core doctrine



Opt-outs

- Same binding force as EU Treaties, although it is not in the Treaties
- But: Poland and UK: protocol related to the Charter's application
 - Czechia: President requests an opt-out at the very end of the ratification process
 - Other MS agree that Czechia will be able to enter the Protocol during the next treaties revision 😊
 - What is the Protocol about?
 - Social rights directly applicable (justiciable) before courts [UK]
 - Discrimination on the basis of sex [Poland]
 - Beneš decrees on return of property [Czechia]
- Relevance of Protocol 30?
 - Merely a political declaration. Vague, states that Charter does not extend the competence of the CJEU, or domestic or other courts, to state that actions of POL and UK are in violations of HR reaffirmed by the Convention
 - Not a real opt-out
 - Repetition of A51



Key post-Lisbon case

Case C-133/15, Chavez-Vilchez

Article 20 TFEU (mixed family)

- ✓ the Dutch parent is (partly) unable to take care of the children
- ✓ TCN-parent is able to take care of the children
- ✓ CJEU refers to the EU Charter

‘The fact that the other parent, an EU citizen, could assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but is not in itself a sufficient ground to refuse a residence permit. It must be determined that there is not, between the child and the third-country national parent, such a relationship of dependency that a decision to refuse a right of residence to that parent would compel the child to leave the EU.’

‘[...] the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.’



Mirin case (C-4/23) The refusal of recognition of a new gender identity

- FACTS of the case
- Recognition of a change of gender obtained in one MS in another MS (citizen of both states)
- Romanian citizen, registered as female at birth in Romania.
- Move to UK, British citizenship and then medically oriented gender transition process, 2020 obtained a Gender Recognition Certificate
- Requests Romanian authorities to record the change (change of gender and forename) in his birth certificate
- **However, competent authorities refused to recognise the change of the name and gender -> action leading to preliminary question on the compatibility of the EU law with the refusal based on Romanian law**
 - Which required the applicant to initiate a new JUDICIAL (not administrative) proceedings for change of gender in Romania
 - Was there a risk of contrary result?
 - ECtHR X. and Y. v Romania
 - Role of BREXIT?
 - What is this a case of?



Mirin case (C-4/23) The refusal of recognition of a new gender identity

- De la Tour: refusal would violate the right to move and reside freely within the Union (A21 FTEU, A 45 EU Charter) and right to respect for private and family life (A7 EU Charter)
- 1. BREXIT
 - 1. Applicant still has Romanian nationality, and as an EU citizen has a right to move freely with an ID issued by the MS of origin (a fortiori after Brexit)
 - 2. UK was a MS when the applicant exercised his freedom of movement, and when he obtained the change of gender and name
 - -> EU law is applicable, he seeks to enforce the consequence of a lawful change in one **former** MS (UK) in another MS (Romania)
- 2. RECOGNITION
 - First name might be sociologically associated with a different sex should not be taken into account
 - X classical recognition in PIL, but logic of effectiveness of the freedom of movement and residence



Mirin case (C-4/23) The refusal of recognition of a new gender identity

- 2. RECOGNITION
- A. CHANGE OF FIRST NAME
 - *Bogendorff case*
 - A refusal to recognise a change of the first name legally acquired in another MS constitutes a violation of the freedom of A21 TFEU
 - Romanian GOV did not offer any reason for non-recognition -> automatic recognition should be an option, that would extent to all entries in the civil register
 - Plus: no consequence for other family members (only a change of the first name)
- B. CHANGE OF GENDER
 - *Freitag case*
 - Gender is an essential element of personality = A7 EU Charter (and A8 ECHR)
 - Refusal: violation of the freedom of A21, non-existence of a procedure is not sufficient for the refusal
 - Incompatible with ECHR and ECtHR case-law
 - **Unlike the change of the first name, the change of gender affects other aspects of personal status -> has consequences for other members of family (WHY?) or on exercise of other rights (WHICH?)**
 - **Imposing rules on MS in those areas (exercise of other rights based on gender) is not within the competence of the EU -> de la Tour proposes limitation of the effect of recognition: only on birth certificate and documents derived from it (ID, passport)**



Mirin case (C-4/23) The refusal of recognition of a new gender identity

- Why does de la Tour propose this limited effect?
- **Do you find it leading to a fair balance?**

Mirin case (C-4/23) – CJEU judgment

- What was the original question?
- In what formation has the Court decided?
- Does the question fall under competence of MS? What does it mean for the freedom of movement? (see para 53)
- Obligation to **recognise the civil status** established in one MS (54-56) + what obstacles to free movement would two names pose?
- 62-67. Experiment: What if there was a legitimate objective behind the Romania's refusal to recognise the British LGR? Then, there would be a second condition next to legitimate objective and proportionality: a justification consistent with the fundamental rights guaranteed by the Charter.

Mirin case (C-4/23) – CJEU judgment

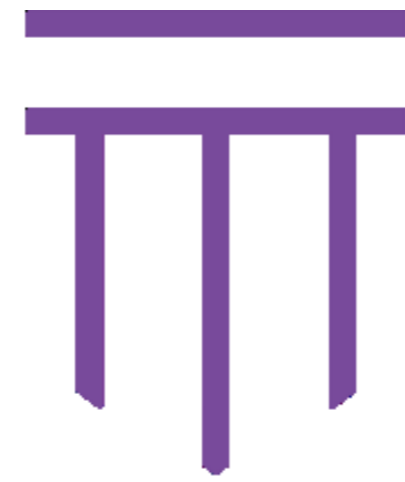
- 59. “...such as that at issue in the main proceedings, which restricts the exercise of that right, enshrined in Article 21 TFEU, can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions.”
- 60. “In the present case, neither the referring court nor the Romanian Government has provided any information concerning the objectives pursued by the national legislation at issue.”
- 62. “...even if that national legislation pursues a legitimate objective, it can, in any event, be regarded as justified only where it is consistent with the fundamental rights guaranteed by the Charter....”
- A7 of the EU Charter has the same content as A8 ECHR. Ref. to X. and Y. v Romania ...
- 68. “Nor can that procedure constitute an effective means of enabling a Union citizen who, while residing in another Member State and, therefore, when exercising the right guaranteed in Article 21 TFEU and Article 45 of the Charter, has already lawfully acquired the change of his or her first name and gender identity pursuant to the procedures laid down for that purpose in that Member State, effectively to assert his or her rights conferred by those articles, read in the light of Article 7 of the Charter, especially since that procedure exposes that citizen to the risk that it may lead to an outcome contrary to the outcome before the authorities of the Member State which lawfully granted that change of first name and gender identity.”

Mirin case (C-4/23) – CJEU judgment

- 69. “...in order for national legislation such as that relating to the entry in civil registers.....to be ...regarded as compatible with EU law, it is necessary that the provisions or national procedure ...do not render impossible or excessively difficult the implementation of the rights conferred by Article 21 TFEU...” ...” The exercise of that right may be called into question by the discretion enjoyed by the competent authorities in the context of the procedure for recognition and recording of an entry of a first name and gender identity, to which persons who have lawfully acquired the change of that first name and that identity in another Member State are subject. The existence of such discretion is liable to lead to a divergence between two names and two genders used for the same person as evidence of his or her identity and to the ‘serious inconvenience’ at administrative, professional and private levels referred to in paragraphs 54 and 55 of the present judgment.”
- 70. “Therefore, national legislation, such as that at issue in the main proceedings, which does not permit a first name and gender identity, lawfully acquired in another Member State, to be registered and which obliges the person concerned to bring new judicial proceedings for a change of gender identity in the Member State of origin, which disregard the fact that the Union citizen has already lawfully acquired the change of his or first name and gender identity in his Member State of residence and has been subject to the procedures laid down for that purpose in that Member State, infringes the requirements under Article 21 TFEU.”

Mirin case (C-4/23) – CJEU judgment

- Why is it important?
- 1. Focus on EU citizens' rights instead of fundamental rights
 - Up to § 62: freedom of movement
 - 62 and up: hypothetical exercise on HR to LGR
 - CJEU protects A20 and A21: freedom of movement and residence, hence citizens' rights, not trans rights. It is just the case that some citizens happen to be trans.
 - Who is protected: **those trans individuals that have exercised their right to move across borders, hold dual nationality of 2 EU MS and obtained LGR in one of them**
 - **Fundamental rights are triggered only if states attempt to limit the freedom of movement. Nothing new. A51/2. IT IS NOT ABOUT A7 CFR. AG gave more space to fundamental rights, referring to "twofold requirement of personal autonomy and freedom of movement of Union citizens (A92)"**
- 2. It leaves silent the question of same-sex marriages and parentage
 - E.g. even less than AG did, CJEU did not endorse AG's compromise: a dissociation btw travel documents and the civil registry.
- 3. Signal of a willingness to work toward the coherence of European human rights with the ECtHR
 - Goes out of its way to explicitly claim A7 and A8
 - ECHR is the minimum standard



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