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EU CHARTER: ITS NATURE, INNOVATIVE CHARACTER AND HORIZONTAL EFFECT

The author offers a description of the European Union Charter of Fundamental Rights as innovative dynamic instrument which is necessary and useful in the process of modelling the future of the protection of fundamental rights by the Union. He concludes that the Charter will influence the whole acquis communautaire. The extent of this impact is still somewhat unpredictable. Much depends on the political direction Europe is taking and the boldness of European judges in both Member States and the CJEU. Potentially, it can be used as a powerful tool to strengthen EU influence in the social sphere (strikes, collective bargaining, working conditions, etc.).

The article also substantiates that the Charter applies to the activities of the EU institutions, but the extent to which it also applies to Member States, when implementing EU law, is unclear. The distinction will be a difficult one, taking into account the fact that most areas are regulated by both the EU and national legislation and it is sometimes complicated to distinguish one from another. The question of the EU turning into a rights-based union then has to do with the status of principles and values, namely, «are some of them turned into basic rights – protecting human rights and democratic procedures unconditionally?» Therefore, whether the Charter will open a new era in the development of the EU from limited economic cooperation to a full political, economic, and social union remains unclear. Future practice and, undoubtedly, emerging case law of the CJEU will provide more answers.

Keywords: human rights; European Union standards; European Union Charter of Fundamental Rights; Court of Justice of European Union; horizontal effect doctrine; European Court of Human Rights; Private Law Approach.

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Хартия ЕС: ее природа, инновационный характер и горизонтальный эффект

Характеризуется Хартия основных прав Европейского Союза как инновационный динамичный инструмент, который необходим и востребован в процессе моделирования будущей системы защиты фундаментальных прав человека в ЕС.

В центре внимания – вопросы влияния прав человека на правовой порядок ЕС, который первоначально формировался вокруг экономических интересов (свободное движение капиталов, товаров, людей). Обосновывается точка зрения, что Хартия повлияет на acquis communautaire в целом, однако степень такого влияния полностью не определена. Во многом она будет зависеть от политических настроений Европы и от решимости судей как в государствах-членах, так и в Суде Справедливости ЕС.

Рассмотрены возможные перспективы развития и практического применения доктрины горизонтального действия. Последняя считается противоречивой, поскольку основной целью фундаментальных прав является защита индивидов от нарушений их прав со стороны публичной власти. Ее смысл заключается в том, что фундаментальные права создают обязательства и выдвигают требования также и к другим (третьим) лицам, которые не наделены публично-властными полномочиями. В частности, обосновывается, что проявлением доктрины горизонтального действия является то, что директивы ЕС, адресованные государствам-членам, могут создавать обязанности по правам индивидов для негосударственных субъектов.

Ключевые слова: права человека; стандарты Европейского Союза; Хартия основных прав Европейского Союза; Суд Справедливости Европейского Союза; доктрина горизонтального действия; Европейский суд по правам человека; частноправовой подход.

Theoretical and Practical Pre-requisites to the EU Charter of Fundamental Rights. European Union law includes well-developed rules on the four fundamental economic freedoms (free movement of goods, workers, services, and capital), and for a while, these were the «rights» that the EU was aggressively safeguarding. However, as the EU legal order has matured to a fuller, more complete system, human rights could no longer be ignored. The intrinsic clash between economic interests and the protection of human rights became more apparent and required action on the part of both the European Court of Justice and other EU institutions[1].

It has long been an issue that, alongside the European Union, the Council of Europe's regional system of human rights protection has developed relatively effective jurisprudence under the European Convention of Human Rights and Fundamental Freedoms. All EU Member States are also parties to the Convention, which may place them in a difficult position, for example, if an alleged human rights violation arises from a legal act or an action undertaken by a Member State pursuant to the EU law[2].

The birth of the European Charter and its nature can be explained by two and interrelated important ambitions – first, somewhat ambivalent EU constitutional developments and, second, the emerging human rights case law of the European Court of Justice that has aimed to solve the potential conflict between dogmatic common market approach and dynamism of the EU as related to the citizens of Europe. The Charter is a great piece of compromise between desires and reasonably possible mechanisms that can be introduced in the area. While some wanted it to make the existing human rights more visible in the EU level, others preferred to extend the scope and include new rights and spheres that were not covered before but are of great importance and innovative character. This document resembles the long-standing differences between different philosophies and ideologies and the way

[1] Kerikmäe and Käsper (2008).
[2] Ibid.

to find a compromise in this complex situation and get to the outcome in the form of the Charter[1]. Human rights (beside criminal jurisdiction) have always been a symbol of independence and sovereignty of the statehood. This is the principal reason for a long-lasting discussion over the EU catalogue of fundamental rights, in particular regarding its form and content.

Another challenge continues to be a matter that basic rights can be related to any issue regulated by law, which makes the division of the powers in multilevel system rather sophisticated at first glance. Even in post-Lisbon EU, the borderline between exclusive, joint, and Member State competence is far from being clear due to different political and interest groups that still have distin- guishable aspirations of the Union's future.

It is still relevant to emphasise that both of the aforementioned ambitions are carefully taking into account the constitutional values of the Member States. Therefore, case law of the CJEU can also be seen as an achievement to the integration that prepares the next stage in the EU development.

CJEU Case Law and the Charter. At least through the CJEU case law, the EU has not shown that principles of EU law may have an impact also on the issues outside of the areas, however, within the competence of the EU. Thus, there is a «sneaking», secondary impact of the law that may be wider than the primary, explicit one. In the Mangold case[2], the CJEU found a common principle of prohibition of discrimination based on age, which is not easy to establish from reading the Constitutions of the Member States[3]. Nevertheless, such a principle potentially restricted the behaviour of Member States in areas outside the EU competence[4].

Another important aspect is that the CJEU has also referred to the European Convention of Human Rights[5] in its several judgments. In the 1990s, the Court had to consider the impact that human rights had on the EU rules. In one of the relevant landmark decisions, the Schmidberger case[6], the CJEU had to rule on a sharp conflict between human rights and one of the basic economic freedoms, the free movement of goods. In that case, an Austrian environmental organisation blocked part of a busy motorway as a form of political protest for environmental protection. The Court was asked to consider whether the failure of Austrian authorities to prevent this blockage constituted a specific justification for restrictions on the free movement of goods. In its judgment, the CJEU stated that «measures which are incompatible

[1] Bellamy and Schonlau (2012).

[2] See ECJ Case Mangold v. Helm (2005) C-144/04.

[3] Eriksson (2009), p. 736.

[4] See Kerikmäe and Nyman-Metcalf (2012b).

[5] A reference to the European Convention of Human Rights and Fundamental Freedoms was inserted into EU law by Art. 6(2) of Treaty of European Union (Maastricht Treaty) adopted in 1992, according to which the «Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law».

[6] See ECJ Case Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich (2003) C-112/00.

with observance of the human rights thus recognised are not acceptable in the Community». The Court went on saying that protection of human rights, namely the freedom of expression and the freedom to assembly, can outweigh even a fundamental community right, such as the right to free movement of goods[1].

In his paper Schermers concludes the following: «Already now violation of human rights will be a ground for annulment of a Community act. The CJEU applies fundamental human rights as general principles of law. Acceptance of the Charter will offer a clearer and more binding foundation to the existing case-law...»[2]. The Charter would weld the jurisprudence of the CJEU and relate it to the EU constitutional developments that were prepared more than a decade ago.

Charter-Relevant International Law and Practice. The EU proposed drafting of the Charter at the Cologne European Council in June 1999 based on the Commission's report from earlier that year[3]. The draft text was approved by the Biarritz European Council in October 2000 and subsequently by the European Parliament, Council, and Commission. It was drafted with a view to including it in the Treaty of European Union. Later, it was included as one of the main components of the Constitutional Treaty, which after that has become the Reform Treaty and then the Lisbon Treaty. As the idea of having a European Constitution was regarded as too elitist, the Charter was separated from the text of the Treaty and exists in the form of an independent legal act. Such an outcome also was affected by the results of the referenda in the Netherlands and France in 2005. In general, the Charter was well received, and right after its adoption some courts of the Member States have mentioned it as a subsidiary source of law[4]. In most cases, the European Court of Human Rights, for its part, is referring to the EU Charter descriptively in the part of a judgment called «relevant international law and practice».

Innovative and Intricate Character. The content of the Charter is manifold[5]. Some might consider that too many newly recognised rights have been introduced. The text includes «traditional» civil and political rights such as protection of human dignity (Art. 1), right to life (Art. 2), prohibition of torture and inhuman or degrading treatment or punishment (Art. 4), and prohibition of slavery and forced labour (Art. 5). It also contains traditional freedoms such as right to liberty and security (Art. 6), respect for private and family life (Art. 7), and freedom of thought, conscience and religion (Art. 10). The Charter lists the social and cultural rights: right to education (Art. 14), freedom to choose an occupation and right to engage in work (Art. 15). It also pays special attention to cultural rights in the form of freedom of the arts and sciences (Art. 13).

[1] Kerikmäe and Käsper (2008).

[2] Schermers (2001), p. 8.

[3] Report of the Expert Group on Fundamental Rights, the European Commission. Affirming Fundamental Rights in the European Union: Time to Act. Brussels, February, 1999.

[4] For example, the Estonian Supreme Court has stated in its decision on 17 February 2003 in Case No. 3-4-1-1-03 that the Charter is not legally binding but reflects certain principles of law that are common to all EU Member States; RTIII (7 March 2003) 5, p. 48.

[5] See Kerikmäe and Käsper (2008).

Some of the rights are specific to the EU internal market, among them is freedom to conduct business (Art. 16), workers' right to information and consultation within the undertaking (Art. 27), and right to collective bargaining and action (Art. 28). An entire section is devoted to non-discrimination: equality before the law (Art. 20). The rights of children and the elderly (Arts. 24–25) are mentioned separately. Art. 33 on family and professional life declares that «the family shall enjoy legal, economic and social protection». Special attention is paid to social security and social assistance (Art. 34), health care (Art. 35), access to services of general economic interest (Art. 36), environmental protection (Art. 37), and consumer protection (Art. 38).

Chapter V is a catalogue of citizens' rights: the right to vote and to stand as a candidate at elections to the European Parliament (Art. 39), the right to vote and to stand as a candidate at municipal elections (Art. 40), the right to good administration (Art. 41), freedom of movement and of residence (Art. 45), and diplomatic and consular protection (Art. 46). Chapter VI concentrates on procedural rights such as fair trial, presumption of innocence, principles of proportionality, and legality.

The content of the Charter is a mixture of fundamental rights, principles and values, and ideas, some of which have clear frames and history of application, whereas others are novel concepts that have not yet found their clear place in the *espace juridique Europeren* (European legal space).

In Between Human Rights and EU Standards. In general, the universality of human rights might be in danger. As I recently stated with my colleague Prof. Metcalf: «Maybe it is so that fewer rights but stronger ones which furthermore are really universal actually could mean more rights? The rights and the understanding and interpretation of rights may have to be purist. This may be the way universal human rights as a concept can survive at all. In the modern world there are different trends that to some extent conflict, like the trend of globalisation but also the reemphasising in different parts of the world of traditional values, whether from a religious background or something else»[1]. However, the EU Charter, even in its complexity, has to be seen as a European regional set of «fundamental rights» that are legally allocated to be supervised by external authority – reliable human rights protection system established by the Council of Europe, the European Convention of Human Rights and Freedoms.

The main problem related to the Charter is most likely related to its normative structure. The Charter contains *rights* and *principles* that are to be treated differently and were drafted as a mechanism to achieve consensus on the broad range of rights included in the Charter[2]. Blackstock asks, «What is a right and what is a principle then?» and finds that, in many cases, this is not a «clear cut». By her, the explanations do in some places identify the distinction, e.g., the «rights» of the

[1] Kerikmäe and Nyman-Metcalf (2012a).

[2] Blackstock (2012), April 17. http://eutopialaw.com/2012/04/17/the-eu-charter-of-fundamental-rights-scope-and-competance/.

elderly (Art. 25 CFR) and environmental protection (Art. 27 CFR). However, here Blackstock's conclusion proves it again – it is not a «clear cut»: socio-economic rights can have as much importance as interference with civil liberties, e.g., the right to vote discourse. Furthermore, rights and principles may be expressed in the same article, e.g., right to family and professional life (Art. 33 CFR)[1]. Art. 52.5 of the Charter states that principles are justiciable only insofar as they are implemented by measures taken by Member States. The Explanations of the Charter clarify that principles do not «give rise to direct claims for positive action by the Union's institutions or Member States' authorities».

Some of the authors are straightforward in making reference to «the potential federal effect of the Charter». For example, by Groussot, Pech, and Petursson, "it is sometimes alleged that the new legally binding status of the Charter may eventually convince the CJEU to enforce common standards applicable right across the EU regardless of whether national measures fall within or outside the scope of application of EU law»[2].

A Charter is, from the perspective of international law, e.g., European Convention of Fundamental Rights and Freedoms, a set of constitutional rights and principles, a European national constitutional law. By de Sousa, «national measures applying to private relationships must be interpreted in accordance with the fundamental freedoms, or, if such '*interprertation conforme*' is not possible, those national measures must be disapplied»[3]. The Charter would be seen as a step forward to establish a direct horizontal effect, as the collisions between human rights and the EU standards of fundamental rights and principles can be furnished by constitutional legal culture of Member States.

New Perspective for Horizontal Effect? Lately, the phenomenon of the horizontal effect[4] has been intensively discussed in legal theory. The controversy in applying the horizontal effect doctrine is that the aim of fundamental rights was to protect individuals from violation of their rights by public authorities while exercising their powers. However, if an individual can invoke rights against another individual, fundamental rights become as a duty and requirement for the other person[5]. Tzevelekos finds that «with respect to human rights abuses by third parties the first-generation norm creates an affirmative 'quasihorizontal' effect which imposes an obligation upon the state to adopt – for the benefit of subjects under its jurisdiction – the necessary positive measures for prevention and prohibition of human rights abuses by third parties»[6]. He also adds that «the need for positive protection arises in situations where the enjoyment by citizens of their civil rights

[1] Blackstock (2012).

[2] See Groussot et al. (2011), http://www.ericsteinpapers.eu/papers/2011-1.

[3] See De Sousa, http://www.academia.edu/2167103/Horizontal_Expressions_of_Verti-cal_Desires_-_Horizontal_Effect_and_the_Scope_of_the_EU_Fundamental_Freedoms.

[4] This part of the chapter is inspired by the last FIDE Congress in Tallinn. See KerikmaËe et al. (2012).

[5] Besselink (2012), p. 17.

[6] Tzevelekos (2010).

is threatened by something other than state acts»[1]. The text of the Charter itself, particularly Art. 51, refers only to the EU institutions and to the Member States, excluding private groups or individuals as addressees. Moreover, the majority of Member States do not allow direct horizontal effect under their national law, therefore putting an obligation only to public authorities to respect the fundamental rights and become the addressees of the Charter[2]. Does it mean that the horizontal character of the Charter is not possible? Some authors remain quite suspicious, making references to CJEU Case C-282/10.

Maribel Dominguez[3], Opinion of AG Trstenjak delivered on 8 September 2011, and British and Polish opt-out protocol to the Charter[4]. As an exception, some Member States do allow direct horizontal effect, however, only for a small list of certain fundamental rights, e.g., civil and political rights in Portugal[5].

However, it seems that when implementing human rights, *expressis verbis* reference to inter- or supranational law in the field (such as ECHR and EU Charter) are not formally required. Rather, teleological interpretation deriving from the international and supranational jurisprudence can be expected. Being excluded from the Lisbon Treaty, the Charter can still be regarded to be a part of EU constitutional law, its set of fundamental rights and freedoms. According to Alexy, there are two constructions of constitutional rights: the rule construction and the principles construction, both of them representing two opposing ideas on which the solution of the constitutional rights doctrine turns[6]. Thus, the horizontal effect of the Charter can be explained by the idea of Alexy, namely, the horizontal effect is a matter of constitutional review, behind which the tension between constitutional rights and democracy is found[7]. The Charter would, therefore, be a unique opportunity to establish a dialogue between national and supranational levels, fill the gap of legal *lacunae* that was restricted by blind dogmatism, protectionism, or technical collisions within multilevel legal system. The dialogue between two constitutional levels is inevitable for securing rule of law if we hope to build up the EU as a *Rechtstaat* that has legitimacy in decision-making. European legal identity cannot be seen as a final but as an ongoing process[8].

The horizontal effect of the Charter is a concept that is rather possible to develop further due to the constitutional traditions in the Member States. For example, the Federal Constitutional Court of Germany, when considering whether the basic law of Germany had horizontal effects, reasoned that rights have both subjective (existing to protect individuals) and objective aspects (effectuating

[1] Tzevelekos (2010).
[2] Besselink (2012), p. 18.
[3] See Groussot et al. (2011), p. 2.
[4] See pending Joined Cases C-411/10 and C-193/10 *N.S.* and Opinion of AG Trstenjak delivered on 22 September 2011.
[5] See Besselink (2012), p. 18.
[6] Alexy (2010).
[7] Ibid.
[8] See also Kerikmäe (2010).

values of the society)[1]. The latter aspect would justify the normative complexity of the Charter that clearly consists of rights and principles, reflecting the values and aspirations of European community. This is a decisive question of whether the Charter becomes an effective and applicable instrument. The opponents of the vision of constitutional dialogue are referring to the conflicts in the past. According to Kokott, the European integration is supranational; Community law is directly applicable and claims primacy in application over national law. She also claims that one of the fundamental principles, prohibition against age discrimination, deriving from case law and the Charter, has a direct horizontal effect and, in the legal orders of the Member States, constitutes an ultra vires act, violating national sovereignty[2]. However, some of the fundamental freedoms (which are the core elements of EU policy) have been given direct effect in the EU level and, consequently, in the Member States. According to the existing ECJ case law, free movement of workers, freedom to provide services, and freedom of establishment have direct horizontal effect and these rights are also incorporated and protected in the Charter[3].

Differences in Interpretation. Also, some authors refer to the inconsistencies between the CJEU's case law and that of the European Court of Human Rights. Van den Berghe states that «the Charter contains two provisions governing the relationship between the Charter and the Convention with a view to avoiding inconsistencies between both instruments. According to a number of Court of Human Rights judges, this recognition that the Convention's level of protection constitutes a minimum standard is 'a rule whose moral weight would already appear to be binding on any future legislative or judicial developments in European Union law»[4]. Again, human rights protection is not a novel area for the Member States of the EU as they have experiences with the ECHR system. The adjustment of their EU-related legal obligations with the

Convention would be at least partly mediated by the EU Charter that can be seen as a highest constitutional text in protecting fundamental rights in the European Union. Furthermore, the aims of the principles deriving from the Charter can be implemented through the directives that also give certain margin of appreciation to the Member States. De Witte puts it as follows: «the European Union has conducted, during the last decade, an active policy of adopting anti-discrimination directives that aim at ensuring greater convergence between member-state laws in this domain. One aspect of this evolution is that the relevant EU legislation forces some states to reconsider their traditional view that fundamental rights should be binding and enforceable only against state authorities and not against private bodies and individuals. This Europe-driven 'horizontalisation' of anti-discrimination law is a major challenge for many national legal systems and contributes to the emergence of new but not uncontroversial conceptions of inclusive citizenship»[5]. Besides concrete

[1] See Schor (2010) and Ferreres Comella (2009), p. 238.
[2] Kokott (2010).
[3] Besselink (2012), p. 19.
[4] Van den Berghe (2010).
[5] De Witte (2009).

rights, also principles that are guidelines or frames for the EU institutions and the Member States in their legislative process both in supranational (directives) and national (implementation acts and measures) levels are set by the Charter.

In its Case C 555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, the Luxembourg court has developed a new doctrine. The CJEU safeguarded its case law with the Charter, stating that the Directive 2000/78 «does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States» but «has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age». At the same time, the Court also refers to the EU Charter of Fundamental Rights, which «prohibits any discrimination on the grounds of age».

Using a Private Law Approach? There are also particular approaches to clarify the horizontal effect of fundamental rights. Private law experts see the solution in applying canons of private law. Irene Kull says that «the catalogue of fundamental rights that follows not only the principle of the freedom of contract, but also the principle of protecting the weaker party, binds the implementer of law and they are exercised via the indirect horizontal effect of fundamental rights with the help of private law principles (good faith, good morals, reasonableness, etc.). These principles guide judges in the interpretation of contract law provisions and in the elaboration of rules»[1]. However, horizontal effect is different from the impact of rights on private law[2]. In addition, the horizontal effect has sometimes been analysed by the competence areas. As explained by Eurofound, «the impact of the doctrine of horizontal direct effect, when applied to provisions of the Treaties, has been limited in the fields of employment and industrial relations»[3]. The inclusion of fundamental rights concerning employment and industrial relations in primary EU law, as was the case with equal pay for women and men (Art. 157 TFEU), could lead the CJEU to attribute binding «direct effect», vertical and horizontal, to provisions of the Charter. Authors of the commentaries of the EU Charter are rather careful in describing the horizontal nature of the legal act, finding only that «Art. 4 of the Charter may therefore potentially also be recognised a horizontal effect, imposing on the Union an obligation to act in order to prevent acts prohibited under this provision from being committed. Whether the institutions of the EU may be held responsible for torture and related forms of prohibited treatment conducted by private parties, organisations or individuals within the member states (where such preventive measures have not been institutionalised or implemented otherwise), is an open question.

However, it cannot be excluded a priori»[4].

[1] See Kull (2007), http://www.juridicainternational.eu/unfair-contracts-of-suretyship-a-question-about-the-horizontal-effect-of-fundamental-rights-or-about-the-application-of-contract-law-principles.

[2] Krzeminska-Vamvaka (2009), http://centers.law.nyu.edu/jeanmonnet/papers/09/091101.pdf.

[3] See Eurofound; the European Foundation for the Improvement of Living and Working Conditions is a European Union body. http://www.eurofound.europa.eu/areas/industrialrelations/ dictionary/ definitions/horizontaldirecteffect.htm.

[4] See The EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter

De Sousa makes it clear that the terminology has often misunderstood that «the expression horizontal effect does not exclusively refer to relationships between private parties as horizontal effect can also be said to refer to the effect of Union law between Member States, while vertical effect also affects the relationship between the Union and individuals»[1]. Thus, the horizontal effect should not, in the case of the EU Charter, be seen in a limited or narrow way but rather vice versa – giving the term much broader sense. In general, the progressive direction of accepting human rights application horizontally by EU Member States is a prerequisite in effective implementation of the EU Charter of Fundamental Rights. Certainly, every member state has still its own peculiarities in implementing EU law and fundamental rights.

Experience in Estonia. Leaving aside the examples of the «old member states», Estonia could become an example of German-oriented, conservative jurisdiction in explaining the progress of horizontal effect. The general acceptance of horizontal effect of fundamental rights in Estonia is visible, and one can find several analytical reports related to the issue. Already in 1998, the expertise presented by a governmental expert commis- sion on constitutional issues[2] referred to the so-called construction problems related to horizontal legal relations, which could be solved by mechanisms of direct and indirect effect. Estonian experts were inspired by well-known German legal theorists Hans Carl Nipperdey and Günter Dürig.

However, the experts indicate another problem – collision – which leads to the contemporary discussion related to the norm hierarchy. The Commentaries to the Constitution of the Estonian Republic[3] do not add much to the discussion concerning horizontal effect, being just more open-minded and flexible when presenting the same theoretical doctrines. The parts that are related to the EU membership are praising the supranationality of the EU legal norms and values. Also, the well-known textbook on Estonian constitutionalism, written by the former head of the Supreme Court, former justice of ECtHR and current MP, describes the *Drittwirkung* only as a case when one of the private parties is having public functions deriving from State authority and violates the rights of another private party[4].

As the legal order in Estonia has been integrated into the EU legal system, the aspect of horizontal effect has been getting more practical importance, just as it has in the entire European *espace juridique*[5]. This issue is closely related to the question of possible collisions between norms in the multilevel legal system. Liina

of Fundamental Rights of the European Union, p. 45. http://llet-131-198.uab.es/catedra/ images/ experts/COMMENTARY%20OF%20THE%20CHARTER.pdf.

[1] De Sousa, p. 3.

[2] By request of Estonian Parliament (*Riigikogu*), the Government composed a special commission of constitutional expertise (members: Uno Lõhmus, Kalle Merusk, Heiki Pisuke, Jüri Raidla, Märt Rask, Heinrich Schneider, Eerik-Juhan Truuväli, Henn-Jü ri Uibopuu, Paul Varul). There were several experts included in the discussions, also the undersigned of the current report, Tanel Kerikmäe. http://www.just.ee/10725 (section 3).

[3] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Juura. Tallinn 2008, para 19.

[4] Maruste (2004), p. 305.

[5] Brems (2005), p. 301.

Kangur, analyst of the Supreme Court, refers to great challenges for Estonian courts that consist of «implementation of both EU law and domestic law in the light of aims established by EU law»[1]. Uno Lõhmus explains the ideology of CJEU that is generally accepted by Estonian judiciary, i.e., the court of an EU Member State in the process of applying a domestic legal norm must take into account the text and the goals of the EU law as much as possible[2]. It concerns mostly the EU secondary law where Member State has not only a certain margin of appreciation but also a certain part of the primary legislation, such as the regulations that require the establishment of special institutions and that require sanctions by the Member State[3].

It can be assumed that the horizontal effect reflects the approach to the Constitution in general. Robert Alexy provides that «the question of which construction: the rule construction or the principles construction is to be preferred is, therefore, by no means a problem of theoretical interest alone»[4]. It seems that Estonia is following the path of principles construction as the Supreme Court declared the undisputable harmonisation with the EU law, while lower courts are following the Supreme Court declarations. However, they are not taking the initiative to use EU law directly or even quasi-directly. The principle is also reflected by Estonian theorists: «... fundamental rights do not settle a specific legal dispute, but open themselves via the legal provisions regulating the relevant area of law. The direct horizontal impact of fundamental rights and constitutional principles implies the possibility to rely on them in private law claims»[5]. Assuming that the horizontal effect is effective only if there is a visible positive obligation[6], meaning enforceable rights, it is somewhat difficult to analyse whether the Estonian judiciary in general is inspired from ECHR and EU law or is just following the guidance of the Supreme Court. It seems that the Estonian Supreme Court likes the approach of the German Federal Court, where the horizontal effect of the Constitution itself is discussed[7] and not encouraging the lower courts to take action on the basis of higher norms than the Constitution. It has been deemed to be a good interpretation filter for the Supreme Court.

The Estonian judicial approach then corresponds to the idea of exceptionality of horizontal effect, thus used directly «only if there are no appropriate statutory means of protection. Because constitutional rights and freedoms are at the core of the legal system, there should be a presumption that private law adequately protects them»[8].

[1] See Kanger (2007), http://www.riigikohus.ee/vfs/776/Analyys%20EL%20oiguse%20kohaldamine%20HK%20praktikas%20%28L_Kanger%29.pdf.
[2] See Lõhmus (2007).
[3] Ibid.
[4] Alexy (2010).
[5] See Kull (2007), http://www.juridicainternational.eu/unfair-contracts-of-suretyship-a-question-about-the-horizontal-effect-of-fundamental-rights-or-about-the-application-of-contract-law-principles.
[6] See Wiesbrock Development Case Note, ECJ Case Seda Kücükdeveci V Swedex GmbH & Co. KG., Judgment of the Court (2010) C-555/07.
[7] Schor (2010), p. 238.
[8] Krzeminska-Vamvaka (2009), http://centers.law.nyu.edu/jeanmonnet/papers/09/091101.pdf.

Horizontal effect presupposes that the norm is directly applicable. There is no question about EU primary law. However, the discussion on direct effect of directives, considering their legal nature, has been intensive in European legal theory. As the conditions for direct applicability of directives has been agreed (Member State has failed the implementation, a directive is unconditional and gives certain rights to individuals), there exist diametrically different opinions on whether a directive can be horizontally effective[1]. Šipilov finds three categories of cases that can presuppose the horizontal effect of directives:

– Although a directive is addressed to an EU member state, right(s) of an individual deriving from State obligations may injure the right(s) of other individuals (case of public procurement);

– Disputes between private parties may entail indirect effect of the directives as they can be used as a basis for interpretation of domestic legal norm;

– Interpretation of domestic law in accordance with a directive (again, indirect effect).

This kind of test would well be applicable in the case of the EU Charter.

Conclusion. There is no doubt that the Charter will influence the whole *acquis communautaire*[2]. The extent of this impact is still somewhat unpredictable. Much depends on the political direction Europe is taking and the boldness of European judges in both Member States and, more importantly, the CJEU. Potentially, it can be used as a powerful tool to strengthen EU influence in the social sphere (strikes, collective bargaining, working conditions, etc.), which has to be taken into account by anyone who wishes to do business in or with Europe.

An open question is how the Charter will work in areas where the EU and Member States share competences. There is no doubt that the Charter applies to the activities of the EU institutions, but the extent to which it also applies to Member States, when implementing EU law, is unclear.

The distinction will be a difficult one, taking into account the fact that most areas are regulated by both the EU and national legislation and it is sometimes complicated to distinguish one from another. The question of the EU turning into a rights-based union then has to do with the status of principles and values, namely, «are some of them turned into basic rights – protecting human rights and democratic procedures unconditionally?»[3]. Therefore, whether the Charter will open a new era in the development of the EU from limited economic cooperation to a full political, economic, and social union remains unclear. Future practice and, undoubtedly, emerging case law of the CJEU will provide more answers. In any case, the significance of the Charter should not be underestimated.

[1] See Šipilov (2010) «Põhiõiguste kolmikmõju ja Euroopa Liidu õiguse horisontaalne kohaldatavus». Master thesis awarded by Estonian Ministry of Justice as the best research paper of 2010. http://www.just.ee/52952.

[2] Conclusion is inspired by Kerikmäe and Käsper (2008).

[3] See Fossum (2004), http://www.arena.uio.no/cidel/Reports/Albarracin_Ch2.pdf.

References:

Books and Articles

1. Alexy R. (2010). Rights, balancing and proportionality. The construction of constitutional rights. Law & ethics human rights. The Berkeley Electronic Press, Berkeley.

2. Bellamy R., Schonlau J. (2012). The normality of constitutional politics: an analysis of the drafting of the EU charter of fundamental rights. In: Corradetti C (ed). Philosophical dimensions of human rights. Some contemporary views. Springer, Dordrecht, pp. 231–252.

3. Besselink L.F.M. (2012). The protection of fundamental rights post-Lisbon the interaction between the EU charter of fundamental rights, the European Convention on Human Rights (ECHR) and National Constitutions. Report of 25th FIDE congress.

4. Blackstock J. (2012). The EU charter of fundamental rights. Scope and competence, Eutopia Law. http://eutopialaw.com/2012/04/18/the-eu-charter-of-fundamental-rights-scope-and-competance-2/ Brems E (2005). Conflicting human rights: an exploration in the context of the right to a fair trial in the European Convention for the protection of human rights and fundamental freedoms. Hum Rights Q 27:294–326.

5. De Sousa P.C. Horizontal expressions of vertical desires – horizontal effect and the scope of the EU Fundamental Freedoms. http://www.academia.edu/2167103/Horizontal_Expressions_of_Vertical_Desires_-_Horizontal_Effect_and_the_Scope_of_the_EU_Fundamental_Freedoms.

6. De Witte B. (2009). The crumbling public/private divide: horizontality in European anti-discrimination law. Citizenship Stud 13(5):515–525.

7. Eriksson A. (2009). European Court of Justice: broadening the scope of European non-discrimination law. Int J Constitut Law 7(4):731–753.

8. Ferreres Comella V. (2009). Constitutional courts and democratic values: a European perspective. Yale University Press, New Haven.

9. Fossum J.E. (2004). In: Closa C, Fossum JE (eds). Deliberative constitutional politics in the EU. Centre for European Studies, Oslo.

10. Groussot X., Pech L., Petursson GT (2011). The scope of application of EU fundamental rights on member states' action: in search of certainty in EU adjudication. Eric Stein Working Paper No. 1/2011.

11. Kanger L. (2007). Euroopa Liidu õiguse kohaldamine Eesti halduskohtute praktikas: põllumajandustoetuste ja üleliigse laovaru tasu kaasuste näitel. Estonian Supreme Court, Legal Information Department.

12. Kerikmäe T. (2010). Estonia as an EU state: lack of proactive constitutional dialogue. In: Topidi K, Morawa AHE (eds). Constitutional evolution in Central and Eastern Europe expansion and integration in the EU. Ashgate Publishing Ltd, Farnham, pp. 11–42.

13. Kerikmäe T., Käsper K. (2008). European charter of fundamental rights. Lexis Nexis Expert Commentaries. http://w3.nexis.com/sources/scripts/info.pl?326754.

14. Kerikmäe T., Nyman-Metcalf K. (2012a). Less is more or more is more? Revisiting universality of human rights. Int Comp Law Rev 12(1):35–51.

15. Kerikmäe T., Nyman-Metcalf K. (2012b). The European Union and Sovereignty: the sum is more than its parts? Temas de Integração, Junho, pp. 5–16.

16. Kerikmäe T., Nyman-Metcalf K., Roots L., Meiorg M., Popov A. (2012). Estonian report: protection of fundamental rights post-Lisbon: the interaction between the EU charter of fundamental rights, the European Convention on Human Rights (ECHR) and National Constitutions. In: Laffranque J (ed) Reports of the XXV FIDE congress Tallinn 2012. Tartu Ülikooli Kirjastus, Tartu, pp. 389–422.

17. Kokott J. (2010). The basic law at 60 – from 1949 to 2009: the basic law and supranational integration. German Law J 11:99–114

18. Krzeminska-Vamvaka J. (2009). Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU theories compared after Viking Line. Jean Monnet Working Paper No. 11/2009.

19. Kull I. (2007). Unfair contracts of suretyship – a question about the horizontal effect of fundamental rights or about the application of contract law principles. Juridica International: Law Review of the University of Tartu, Estonia I 2007.

20. Lõhmus U. (2007). Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime. Juridica (3)

21. Maruste R. (2004). Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. Juura, Tallinn.
22. Schermers H.G. (2001). Drafting a charter of fundamental rights of the European Union. In: Kellermann AE, de Zwaan JW, Czuczai J (eds). EU enlargement: the constitutional impact at EU and national level. T.M.C. Asser Press, The Hague.
23. Schor M. (2010). New thinking about National High Courts. Tulsa Law Rev 45(4) (University of Tulsa).
24. Šipilov V. (2010). Põhiõiguste kolmikmõju ja Euroopa Liidu õiguse horisontaalne kohaldatavus. Master Thesis.
25. Tzevelekos V. (2010). In search of alternative solutions: can the State of origin be held internation- ally responsible for investors human rights abuses that are not attributable to it? Brooklyn J Int Law 35:155–231.
26. Van den Berghe F. (2010). The EU and issues of human rights protection: same solutions to more acute problems? Eur Law J 16(2):112–157.
27. Wiesbrock A. (2010). Case Note – Case C-555/07, Kücükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010. German Law J 11:539–550.

Official Material

28. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Juura (Tallinn 2008).
29. Report of the Expert Group on Fundamental Rights, the European Commission, «Affirming Fundamental Rights in the European Union: Time to Act», Brussels (February 1999).
30. The EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union.

Case Law

European Court of Justice

31. Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (12 June 2003).
32. Case C-144/04.
33. Joined Cases C-411/10 and C-193/10 N.S. and Opinion of AG Trstenjak (22 September 2011).

Supreme Court of Estonia

34. Estonian Supreme Court Case No. 3-4-1-1-03 (17 February 2003).

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Хартія ЄС: її природа, інноваційний характер та горизонтальний ефект

Характеризується Хартія основних прав Європейського Союзу як інноваційний динамічний інструмент, який є необхідним і затребуваним у процесі моделювання майбутньої системи захисту фундаментальних прав людини в ЄС.

У центрі уваги – питання впливу прав людини на правовий порядок ЄС, який первісно формувався навколо економічних інтересів (вільний рух капіталів, товарів, людей). Обґрунтовується точка зору, що Хартія позначиться на acquis communautaire в цілому, але ступінь такого впливу залишається не визначеним повністю. Чималою мірою він залежатиме від політичних настроїв Європи і від рішучості суддів як у державах-членах, так і в Суді Справедливості ЄС.

Розглянуто можливі перспективи розвитку і практичного застосування доктрини горизонтальної дії. Остання вважається суперечливою, оскільки основною метою фундаментальних прав є захист індивідів від порушень їхніх прав з боку публічної влади. Її зміст полягає в тому, що фундаментальні права створюють зобов'язання і висувають вимоги також і до інших (третіх) осіб, які не є наділеними публічно-владними повноваженнями. Зокрема обґрунтовується, що проявом доктрини горизонтальної дії є те, що директиви ЄС, адресовані державам-членам, можуть створювати обов'язки щодо прав індивідів для недержавних суб'єктів.

Ключові слова: права людини; стандарти Європейського Союзу; Хартія основних прав Європейського Союзу; Суд Справедливості Європейського Союзу; доктрина горизонтальної дії; Європейський суд з прав людини; приватноправовий підхід.

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