

The Charter and the Court of Justice of the European Union

Notable Cases from 2016-2018



**ANIEL PAHLADSINGH &
RAMONA GRIMBERGEN (EDS)**

FUNDAMENTAL RIGHTS PROTECTION IN EUROPE SERIES

THE CHARTER AND THE COURT OF JUSTICE
OF THE EUROPEAN UNION

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Aniel Pahladsingh & Ramona Grimbergen (eds)

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Preface

With the publication of the first edition of this bundle with commentaries on the Charter of Fundamental Rights of the European Union (Charter), we aim to give a further impetus to the discussion and developments concerning fundamental rights protection in the European Union and national legal practice. With this book we continue to follow the developments in the Luxembourg-Brussels-Strasbourg triangle and practice in the Member States. We also would like to provide the Charter exposure for its 10 year anniversary. On 1 December 2019, the Charter will be legally binding for 10 years.

In these 10 years, several questions about the Charter have been clarified, such as the new status of the Charter and its significance in the national legal order. There is already a vast amount of case law from the Court of Justice of the European Union concerning the interpretation of the Charter and national courts are also applying it in their national proceedings. Although many questions have been addressed, the Charter is still evolving and questions remain about for instance its scope, the interpretation of new fundamental rights provisions, the possible limitations of fundamental rights and the relationship between the Charter and the European Convention on Human Rights (ECHR).

In autumn of 2018, we, the editorial board, and Wolf Legal Publishers, pronounced the intent to publish a bundle, with selected landmark judgments on the Charter, and to have those judgments commented by lawyers from different EU Member States, with the very purpose to providing a guide on the Charter. Those lawyers can shed light on the Charter using their academic background, judicial or practical experience concerning the significance of the Charter in their field and sometimes beyond. You now have the result of this exercise in your hands.

The book contains (in retrospect) annotated judgments of the Court of Justice of the European Union over the period of 2016-2018. It contains comments

on judgments in which the Charter is addressed spread over different jurisdictions, including constitutional law, customs law, equal treatment law, privacy law, criminal law, asylum and migration law and procedural administrative law. This publication aims to provide guidance to lawyers, practitioners and academics, on the omnipresent Charter.

The contributions provide a summary of the case in relation to the Charter, a comment on the relevant Charter provision(s) and when relevant, provide commentary on the relation between the Charter and ECHR and the constitutional traditions of the Member States. The contributions also provide discussion on the development of the relevant Charter provision(s) and they provide analyses on how the commented judgment will affect domestic legal orders, legislation and practice.

Annexed are also the preamble and the text of the Charter, as well as the Explanations from 2007. The relevant provisions of the ECHR are included too, for the sake of completeness.

Without the contributors, this book would not have existed. It remains inspiring to read how the writers from different Member States interpret case law on the Charter. And without the publishing house Wolf Legal Publishers and their editors and typesetters, and in particular Arvind Rattan the book would not have seen the light of day either. We are also grateful to Mr Spielmann for providing a foreword for this ambitious publication. We thank them all for the pleasant and inspiring cooperation.

The Hague, June 2019,

Aniel Pahladsingh and Ramona Grimbergen

The Editors

Foreword

The year 2019 marks the 10th anniversary of the Treaty of Lisbon, which conferred binding force to the Charter of Fundamental Rights. The elevation of the Charter to the status of primary European Union (EU) law was the apogee of a long process through which the protection of fundamental rights gradually became one of the cornerstones of the EU legal order. Before Lisbon, the Treaty of Maastricht had included, in 1992, a reference to the European Convention of Human Rights (ECHR) and the common constitutional traditions of Member States as general principles of EU law. In 1997, the Treaty of Amsterdam affirmed the ‘principles’ of liberty, democracy, respect of human rights and fundamental freedoms upon which the EU is founded. It also enabled the EU to suspend the rights foreseen by the Treaties in cases of serious and persistent violations by a Member State of these principles. Finally, in 2000, at the Nice European Council, the Charter was proclaimed by the Presidents of the European Parliament, the Commission and the Council, as guidelines in the area of human rights protection.

The status of the Charter within the EU law is somewhat paradoxical. On the one hand, it is one of the most complete and innovative documents enshrining fundamental rights on the international level. It contains a comprehensive list of fifty rights, including traditional civil and political rights but also expanding to socioeconomic rights. “Modern rights” pertaining to bioethics, data protection and the protection of cultural or ecological interests have also found their place in the Charter. It could be argued that the Charter is the result of the combination of the most prominent international texts on the protection of civil, political and social rights, such as the ECHR, the European Social Charter and international conventions of the Council of Europe and the International labour Organisation. In this respect, the Charter itself refers in its Article 52(3) to the element of continuity and the necessity of coherence in the interpretation of fundamental rights on European level by explicitly proclaiming that the meaning of the rights enshrined in the Charter shall have the same meaning and

scope of the rights guaranteed by the ECHR, the leading international instrument on the protection of fundamental rights. In other words, the Charter may be regarded as the culmination of more than fifty years of intense international cooperation in Europe on the field of fundamental rights protection.

Nonetheless, on the other hand, despite its broad character, the function and the scope of the Charter should not be conceived outside its context of application, namely the principles of primacy and autonomy of EU law. In fact, the Charter does not have the vocation, like the ECHR, to apply in every situation of a violation by a Member State of the rights enshrined therein. Indeed, and pursuant to Article 51, the Charter binds EU institutions, with due regard for the principle of subsidiarity, and it applies to Member states only when they are implementing EU law.

The Court of the European Union (CJEU) has opted for a broad interpretation of Article 51 of the Charter holding in *Åkerberg Fransson*¹ that “the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations”. More recently, in *Egenberger*² and *Bauer and others*,³ it admitted that the Charter may be relied upon, under specific circumstances, in a dispute between individuals and that Article 51 does not preclude such a finding. However, one should not overlook the specific environment in which the Charter is applied: as it is explicitly ruled out in Article 52(2), “rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”.

Whereas before Lisbon, the CJEU has during a long period considered fundamental rights as a source of inspiration and as principles enshrined in the general principles of EU law, it was the accession of the Charter to the status of primary law that allowed the Court to use it as a sole benchmark to judge the validity of acts adopted by EU institutions. *Schecke*⁴ and *Digital Rights Ireland*⁵ are excellent examples where the Court invalidated provisions of a Regulation or a Directive as being in violation of specific Articles of the Charter. It would not be an overstatement to assert that the Charter is today omnipresent in the case law of the CJEU. As an example, in 2018, it was invoked in cases

1 Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, at para. 19.

2 Case C-414/16 *Vera Egenberger* EU:C:2018:257.

3 Joined Cases C-569/16 and C-570/16 *Bauer and Others* EU:C:2018:871.

4 Joined Cases C-92/09 and C-93/09 *Schecke* EU:C:2010:662.

5 Case C-293/12 *Digital Rights Ireland* EU:C:2014:238.

stretching from animal slaughtering without stunning (*Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*)⁶ to the dismissal of a Catholic doctor from a Catholic hospital due to his remarriage after a divorce (*IR v JQ*)⁷ and the validity of psychological tests to which an asylum seeker might be subjected in order to determine his sexual orientation (*F v Bevándorlási és Állampolgársági Hivatal*).⁸ Moreover, the expansion of EU competencies to areas directly connected to fundamental rights, such as justice and home affairs and the area of freedom, security and justice enhances the role of the Charter and its judicial supervision by the CJEU.

It is because the Charter applies to all issues pertaining to EU law that the commentaries included in the present bundle cover a wide array of subjects. Through the examination of specific cases, general issues of the application of the Charter are being addressed. Moreover, interesting questions such as the implementation of the Charter by Member States and the application of the principle of proportionality in EU Citizen law are examined. In addition, issues regarding the applicability of the Charter are being explored, like the principle of legality in criminal matters, data protection standards and border surveillance and the current interplay between the principle of mutual trust and fundamental rights protection in the context of the European Arrest Warrant.

The commentaries aim at contributing to the academic discourse in the field of the relationship between the Charter and the case-law of the CJEU where legal literature needs to be enhanced. They also aspire to serve the practitioner who is seeking for guidelines in a field as diverse and expanding as the application of fundamental rights in EU law.

Dean Spielmann

Judge of the General Court of the European Union
President of the European Court of Human Rights (2012-2015)

6 Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* EU:C:2018:335.

7 Case C-68/17 *IR v JQ* EU:C:2018:696.

8 Case C-473/16 *F v Bevándorlási és Állampolgársági Hivatal* EU:C:2018:36.

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Biographies

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Petra Jeney is an associate professor at ELTE Law School and a senior lecturer at the European Institute of Public Administration. She has published extensively on general EU law and in relation to the Area of Freedom Security and Justice.

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- *Rapporti tra fonti nel diritto dell’Unione Europea: Il diritto primario* (Giappichelli: 2010);
- ‘Il rispetto dello Stato di diritto: “affari interni” o questione europea? I nuovi meccanismi di controllo dell’Unione alla prova della Polonia’, *www.Federalismi.it* (28 December 2016);

- ‘Quelques reflexions sur la confiance reciproque entre les Etats membres : un principe essentiel de l’Union europeenne’ in *Liber amicorum en l’honneur de M. le Vice-President de la CJUE Antonio Tizzano* (Giappichelli: 2017);
- ‘Gli strumenti della codificazione nel diritto dell’Unione europea’, in A. Annoni, S. Forlati, F. Salerno (eds) *La codificazione nell’ordinamento internazionale ed europeo: Codification in International and European Union Law*, XXIII Convegno annuale della SIDI-ISIL (Editoriale Scientifica: 2019).

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