

APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU IN THE UNITED KINGDOM AND POLAND ACCORDING TO THE LISBON TREATY

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Abstract

This paper deals with the impact of the Charter of Fundamental Rights of the European Union on the United Kingdom and Poland after the Lisbon Treaty comes into effect. The first part briefly describes the history of drafting the Charter and focuses on the current legal status of the Charter. Then the approach of the United Kingdom and Poland towards the Charter is examined. The final part discusses the provisions of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom and the possible role of the Court of Justice.

Key words

European Union, Lisbon Treaty, human rights, Charter of Fundamental Rights of the European Union, legal force, the United Kingdom, Poland, Protocol, European Court of Justice.

The Charter in General, its Legal Force and its Inclusion in the Lisbon Treaty

It is a well-known fact that the Charter of Fundamental Rights of the European Union¹ (hereinafter “the Charter”) was drafted by a body called the “Convention” on the basis of a decision of the European Union Heads of State or Government at the Cologne European Council adopted in June 1999. The Charter was then solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7th December 2000.²

¹ Charter of Fundamentals Rights of the European Union, 18th December 2000, CELEX: 32000X1218(01).

² For broader history of the Charter see McCrudden, Ch.: *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01, accessible from <http://www.jeanmonnetprogram.org/papers/01/013001.rtf>, pp. 1 – 7.

One practical reason for drafting the Charter was certainly the opinion³ of the European Court of Justice (ECJ), in which the Court held that the Community has no competence to join European Convention on Human Rights: first a revision of the fundamental Treaties has to be made. However, accession to the European Convention on Human rights was an important issue since the doctrine of supremacy of community law developed by the ECJ meant that even constitutional legal norms of the Member States (including human rights) were subordinate to Community legal rules of any type. A convention on protection of human rights binding on the Community could therefore effectively limit any unwanted actions of the Community in the field of human rights. Since the protection of human rights within the Communities (European Union⁴) was based only on more or less unforeseeable case law of the ECJ and accession to the European Convention was not on topic, the idea of own bill of rights was a natural step forward made by the European Union. Nevertheless, the Charter was not annexed to the fundamental Treaties⁵ and its legal force remained undetermined.

Many commentators took the view that the present legal status of the Charter is not clear.⁶ On the one hand, the Charter should not be legally binding, since it was only declared by presidents of three institutions of the European Union (EU), it is not a treaty and it was not even annexed to the existing Treaties. On the other hand, this could be perceived as too formal view and there are several reasons why the Charter should be legally binding. First, the Charter shall be binding at least on the European Parliament, European Commission and European Council due to the fact that the Charter was proclaimed by the presidents of these institutions. As the Commission put it nicely, “the institutions that have proclaimed the Charter, have committed themselves to

³ Opinion of the Court of 28th March 1996, 2/94. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court reports 1996, p. I-01759.

⁴ The term European Union (EU) is used to describe the broader European institution covering also the European Community (EC), following linguistic convention after the entry into force of the Maastricht Treaty in 1993.

⁵ Treaty Establishing the European Economic Community, 25th March 1957, CELEX: 11957E. Treaty Establishing the European Atomic Energy Community, 25th March 1957, CELEX: 11957A. Treaty on European Union, 7th February 1992, CELEX: 11992M. (As amended by subsequent Treaties).

⁶ See e. g. Craig, P., de Búrca: *EU Law. Text, Cases and Materials*, New York: Oxford University Press, 2008, pp. 417 – 418. Liisberg, J. B.: *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?*, Jean Monnet Working Paper 4/01, available from <http://www.jeanmonnetprogram.org/papers/01/010401.rtf>, p. 7. McCrudden, Ch.: *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01, available from <http://www.jeanmonnetprogram.org/papers/01/013001.rtf>, pp. 12 – 14.

respecting it".⁷ The Charter could be therefore regarded as a binding inter-institutional agreement. Second, certain provisions of the Charter must be considered as binding on all institutions of the EU and also on Member States. These are provisions that consolidate the existing law⁸ (mainly the case law of the ECJ). Moreover, we cannot hide the fact, that the Charter has been already used by the European Court of Human Rights in its decisions⁹ and also the ECJ mentioned the Charter (although very carefully).¹⁰ Using the Charter in court's decisions could signify that it has certain legal effect.

The debate on legal force of the Charter shall be finished when the Lisbon Treaty comes into effect. The Lisbon Treaty (or Reform Treaty) amends current fundamental Treaties and expressly recognizes the rights, freedoms and principles set out in the Charter which shall have the same legal value as the Treaties.¹¹ After the ratification process is finished, the Charter shall be legally binding for institutions of the EU and for the Member States when they are implementing Union law.

The Approach of the United Kingdom and Poland towards the Charter

The Charter could be marked as a large bill of rights which joined together fundamental rights of every human being, citizen's rights and social rights. Such large legal work is of course full of ambiguities and vague provisions – as a result of compromise achieved by so many Member States. However, two countries (the United Kingdom and Poland) were so worried about the

⁷ Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, COM (2000) 644 final of 11th October 2000, CELEX: 52000DC0644.

⁸ See further Menéndez, A. J.: *Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union*. Journal of Common Market Studies, vol. 40, No. 3, 2002, pp 471–490.

⁹ See e. g. Judgment of the European Court of Human Rights (Grand Chamber) of 11th July 2002 (Application no. 28957/95) *Christine Goodwin v. the United Kingdom*; or very important Judgement of the European Court of Human Rights (Grand Chamber) of 30th June 2005 (Application no. 45036/98) *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*. Both available from www.echr.coe.int.

¹⁰ See e.g. Judgment of the European Court of Justice (Grand Chamber) of 27th June 2006, C-540/03 *European Parliament v Council of the European Union*, European Court reports 2006, p. I-05769; or Judgment of the Court (Grand Chamber) of 12th September 2006, C-13/03 *R.J. Reynolds Tobacco Holdings, Inc. and Others v Commission of the European Communities*, European Court reports 2006, p. I-07795.

¹¹ See Art. 6 par. 1 of the Treaty on European Union as amended by the Lisbon Treaty and Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the Final Act of the conference which adopted the Lisbon Treaty.

effect of the Charter that they put over a special protocol annexed to the Lisbon Treaty which should limit any unwanted impact of the Charter in their legal systems.

The United Kingdom expressed its general objection against a legal binding European bill of rights already during drafting the Charter. The British politicians were afraid that such bill of rights (administered by the ECJ) could mean more interference from Europe in British domestic affairs.¹² Particularly, the British opposed a large concept of the so called rights of solidarity¹³ (Title IV of the Charter) because of very liberal conditions and rules governing this area in the UK. An acceptance of this part of the Charter as legally binding would visibly change the legal system of the United Kingdom.

The “striking” example of a conflict between the legal system of the United Kingdom and the provisions of the Charter is the right to take a collective action including the right to strike (art. 28 of the Charter). The British see strikes as impediments to the rights of those whose lives would be hindered or endangered by the strikers.¹⁴ The right to strike has been restricted in the United Kingdom since the 1980s and there are also rules about ballots and picketing. However, none of these restrictions is mentioned in the Charter.¹⁵

Although United Kingdom did not want to preclude the ratification of the Lisbon Treaty, it was not willing to accept the Charter as a legally binding document. Therefore the UK decided to attach a special protocol to the text of the Lisbon Treaty in which an opt-out from the Charter was realized. Later on, Poland decided to join this protocol and furthermore it attached two declarations to the Lisbon Treaty clarifying its attitude towards the Charter.

¹² Verkaik, R. *Britain may veto EU's new human rights charter*. The Independent, 8th February 2000, available from <http://www.independent.co.uk/news/uk/politics/britain-may-veto-eus-new-human-rights-charter-726359.html>.

¹³ In this paper, I do not examine the possible conflict between the solidarity rights and art. 51 of the Charter stating that 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. It is questionable whether the solidarity rights establish a new field of EU competence. See Eeckhout, P.: *The Proposed EU Charter of Fundamental Rights: Some Reflections on Its Effects in the Legal Systems of the EU and of Its Member States*, In: Feus K. (ed): *The EU Charter of Fundamental Rights: Texts and Commentaries*, London: Federal Trust for Education and Research, 2000, pp 109.

¹⁴ Berlin, J.: *Political Cause and Cost: Human Rights in the European Union*, The Brownstone Journal, vol. XII, 2005, pp 98, available also from <http://www.bu.edu/brownstone/issues/12/berlin.html>.

¹⁵ You, Europe and your rights. The Independent, 22nd June 2007, available from <http://www.independent.co.uk/news/europe/you-europe-and-your-rights-454139.html>.

The Polish reason to object the Charter is, one could say, a more political one. The Polish government led by the Prime Minister Jaroslaw Kaczynski was not satisfied with the provision of the Charter prohibiting discrimination on the grounds of sex and with the definition of the right to marry and the right to found a family. These provisions aim among others to the legal recognition of the same-sex union; however, the Polish government assumed that such recognition would violate the country's cultural heritage.¹⁶ The new government, formed after elections in October 2007, has no such objection and the new Prime Minister Donald Tusk told the Polish parliament that his party and its coalition ally were in favor of signing up to the Charter. Nevertheless, the Polish Parliament ratified the Lisbon Treaty with the opt-out from the Charter, because the new government needed the support of Jaroslaw Kaczynski's party in order to reach the two-thirds majority required to ratify the Lisbon Treaty as a whole.¹⁷

The Possible Practical Results

Article 1 paragraph 1 of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (hereinafter "the Protocol") states: "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". In General, this provision says that the Charter as a whole is not legally binding towards the respective countries. Although there is not any express ban on applying the Charter in Poland and the UK, the provision of the protocol does not allow the said courts to find out that some Polish or UK legal rules are incompatible with the Charter. This means that the provision in question simply forbids the ECJ and national courts to apply the Charter effectively in Poland and the UK.

¹⁶ *Poland Rejects EU Charter on homosexual rights*, Catholic World News, 29th June 2007, available from <http://www.cwnews.com/news/viewstory.cfm?recnum=52095>. Zoll, A. et al.: *Poland and the Charter of Fundamental Rights of the European Union*, available from <http://kj.org.pl>.

¹⁷ *No EU rights charter for Poland*, BBC News, 23. 11. 2007, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7109528.stm>. *Slovenian Presidency welcomes the adoption of the ratification bill on the Lisbon Treaty by Poland's Parliament*, Slovenian Presidency Press Realeases, 2nd April 2008, available from http://www.eu2008.si/en/News_and_Documents/Press_Releases/April/0402MZZ_ratifikacija_Poljska.html.

This ban, however, does not seem so clear when we look at the second paragraph of art. 1 of the Protocol: “In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law”. This paragraph rises a question whether it limits the application of the general rule stated in first paragraph only to Title IV of the Charter (the rights of solidarity). Does this mean that the Charter is applicable and legally binding towards both countries just with exception of Title IV? Such limitation would be justifiable in relation to the UK, since this country opposes just this solidarity rights. But why should the rights of solidarity make any problems in Poland where social rights have a long tradition? More over, if we accepted such limitation of the application of the Protocol, the same-sex unions would be enforceable in Poland under arts. 9 and 21 of the Charter which do not fall within the Title IV. Probably, this is why Poland annexed to the Final Act of the Conference which adopted the Lisbon Treaty two declarations. In the first one¹⁸ relating to the Protocol, Poland declares that it fully respects social and labour rights described in Title IV of the Charter. It apparently intends to say that, even if Title IV is not applicable in Poland (according to the Protocol), Poland will respect rights specified in Title IV. The legal effect of this declaration is not clear – it could be perceived either as an enforceable international obligation or as a mere political proclamation. Nevertheless, establishing a power of the ECJ or national courts to review the compatibility of Polish law with Title IV of the Charter on such declaration could be difficult. It is not a direct part of the Lisbon Treaty (it is annexed to the Final Act of the Conference that adopted the Lisbon Treaty), it does not expressly allow the ECJ or other courts to judicial review and moreover, the declaration is just one-sided (it is a declaration of Poland not of all Member States).

The second declaration states that “the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human

¹⁸ Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, CELEX: 12007L/AFI/DCL/62: “Poland declares that, having regard to the tradition of social movement of “Solidarity” and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.”

dignity and respect for human physical and moral integrity”.¹⁹ This declaration obviously aims at the issue of same-sex unions and the right of Poland to legislate on this matter without regard to the provisions of the Charter. Thus it is similar to art. 1 par. 2 of the Protocol since it describes the Polish reason for objecting the Charter. The question of legal binding force of this declaration has the same answer as in the case of the first declaration – it is unclear.

Nevertheless, we could conclude that the second paragraph of art. 1 of the Protocol just draws the attention to a part of the Charter which is (for the United Kingdom) the reason for the general ban set out in paragraph 1. Thus, this provision has just an illustrative or explanatory character. The same could be said about the two declarations in respect to Poland. Final word on this question then lies on national courts and, of course, on the ECJ.

According to article 2 of the Protocol “To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom”. This provision needs just two remarks. First, it is an unnecessary one regarding the fact that the Charter can not be applied as a whole to Poland and the United Kingdom according to art. 1 par. 1 of the Protocol. Second, it only repeats similar provisions contained in the Charter relating to all Member States (art. 52 pars. 4 and 6).

However, the idea of the Protocol that the Charter will not be applicable in Poland and the United Kingdom could be easily overcome by one important European actor – the ECJ. This statement does not mean that the ECJ would infringe the Protocol and apply the Charter directly to both states in question. But it can use another instruments to reach the same effect indirectly. As mentioned above, fundamental rights as a general principle of EU law are protected through the case law of the ECJ until now. This case law is then based on legal cultures and constitutional traditions of Member States, on European Convention on Human Rights and other international human rights instruments and of course on the case law of the European Court of Human

¹⁹ Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, CELEX: 12007L/AFI/DCL/61.

Rights.²⁰ One could easily raise a question, whether the ECJ can continue in protecting the human rights through its case-law independently on the provisions of the Charter. And can the ECJ go even beyond the Charter and create new human rights or freedoms not included in this text? Although it is presumable that the ECJ will respect the provisions of the Charter and apply them, nothing can possibly prevent the court from adopting an extensive interpretation of the Charter and rule beyond its provisions. The Charter does not annul the existing case-law of the EJ concerning the protection of human rights - the ECJ is free in further developing it. We must also bear in mind that the scope of application of the Charter is limited only to EU institutions and to the Member States when applying the EU law. However, the case law of the ECJ on the field of human rights has no such limitation. More over, the ECJ is a well-known protector of the single market and the four freedoms. Thus if some human rights (particularly the solidarity rights) are more restricted in one Member State than in others, the ECJ could regard it as a hindrance to the single market or infringement of the said freedoms and promote the protection of such rights only on the basis of the provisions of the fundamental Treaties without any regard to the Charter. Thus, it need not be hard for the ECJ to apply human rights contained in the Charter through its case law – even towards the United Kingdom and Poland.

In Conclusion, the United Kingdom and Poland will not be formally bound by the Charter provisions. However, if the ECJ decides that a certain human right (e.g. right to strike or right to live in a same-sex union) form a human right which is inherent with the EU or whose restriction could threaten the single market, the United Kingdom and Poland will be bound by this decision – and indirectly by the Charter. Nevertheless, such decision of the ECJ would be a political one and it is hard to say whether the ECJ finds courage to rule in this sense.

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