

# Introduction: EU Charter as a Dynamic Instrument

Tanel Kerikmäe

The wording of the European Union Charter of Fundamental Rights starts with an ambitious vision: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values”. The Charter, containing 54 articles, is not only often glorified but also severely criticised by its overwhelming character. It cannot be denied that, despite some doctrinal controversies and scholarly debates on the binding effect of the Charter, it has already a significant impact to the general policy of the European Union, including citizen’s Europe, common market, relations with third countries, enlargement, etc. The economic environment and legal environment are changing rapidly, and fundamental rights should be interpreted and protected in the light of these “changes in society, social progress, scientific and technological developments” as stated by the Charter. Therefore, the discussions related to the text of this innovative instrument are necessary and useful in the process of modelling the future of the protection of fundamental rights by the Union. The Charter cannot be static and rigid by its nature. It should rather be seen as a dynamic instrument that can never challenge the very core of the rights and values protected but must still be “living” legal text, i.e., allowing developments that are in correspondence with the aims of the Charter (stated by its preamble). This is a responsible task for implementators and interpretators of the text that is a part of European Union primary law. The authors of the book do not overemphasise the arguments that relate the Charter to the vision of federal Europe and constitutional patriotism or as a tool for readjusting nation-state based Europe to the citizen’s Europe. However, the Charter is inherently a phenomenon to strengthen still fragile democratic legitimization of policymaking in Europe.

European Union as an institutional framework has often been a good example for the rest of the world. Furthermore, Europe has already proven its dedication to

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T. Kerikmäe (✉)

Tallinn Law School, Tallinn University of Technology, Akadeemia tee 3, 12618 Tallinn, Estonia

e-mail: [tanel.kerikmae@ttu.ee](mailto:tanel.kerikmae@ttu.ee)

the protection of human rights and fundamental freedoms by several legal instruments, including constitutions of European states and intergovernmental conventions such as ECHR. The developments within the European Union related to the Lisbon treaty and the Charter are also very much followed by global thinkers. I was intensively questioned by the Cambodian professors and students in Phnom Pehn at the seminar on ASEAN declaration of human rights, a text that was adopted recently. I can assure that European practice and visions continue to be a pattern and a source for inspiration for many politicians and scholars in other regions. It was also visible in Mysore, at the 2013 conference of International Association of Law Schools that dedicated its annual meeting to human rights issues.

The book does not claim to be an exhaustive set of analysis of all challenges and problems deriving from the Charter. It would be quite an impossible task. However, main issues have been discussed. The first chapter, written by myself, is dedicated to the background, legal nature, and innovative character of the Charter. One of the peculiar topics relates to horizontal legal effect—a problem that is probably one of the most discussed among lawyers when the Charter becomes an issue. Besides the legal nature, one of the popular subject matters is certainly the question of balancing of universal and particular rights in the Charter. Besides being innovative, I also label the Charter as “intricate”. This is not even because there are many newly recognised rights introduced (some of them specific to EU internal market) but rather because of the normative character of the legal text. The Charter contains rights and principles that have different normative value and implementation mechanisms. Depending on the willingness of the beneficiaries, Member States and the EU itself ensure whether the “new perspective for horizontal effect” can be implemented in a way that would meliorate the dialogue within multilevel constitutional law.

As Prof. Metcalf points out in her chapter, the Charter contains “unusual rights” (such as the right to conduct business, the right of access to placement services, etc.) that cannot be found in other human rights instruments. The author suggests that the European Union is expected to act as a pioneer in providing new understanding of basic rights. She emphasises the relevance of contextuality of social developments and culture. Under developments issue, rights affected by technology have also been discussed in detail. Prof. Metcalf concludes with interesting remark on European exceptionalism: instead of limiting human rights, “the European version consists of adding a new layer onto existing rights and interpreting the ‘old’ rights through a new prism”. Prof. Metcalf, with her co-authors Pawan Kumar Dutt and Archil Chochia, is also contributing to another substantial chapter titled “The freedom to conduct business and the right to property”, where the EU technology transfer block exemption regulation and the relationship between intellectual property and competition law are discussed. The chapter is trying to find a ground for a debate on relationship between technology transfers, economic efficiencies, and fundamental rights possibly regulated by the EU Charter.

Professors Gruodyté and Kirchner deal with effective access to the judicial system and right to legal aid—core issue of any legal system and rule of law in general. By them: “nowadays States should guarantee access to justice as a human

right which requires the state to take a positive action, a *status positivus* obligation". The principle of fair trial is a litmus for ensuring the human rights and freedoms in real life and demonstrates the capacity to ensure the right to legal aid protecting any other human rights. The authors make comprehensive comparative overview and interlink the practice of EU member states with case law on the issue of legal aid under Article 47 of the Charter.

Several of the chapters are devoted to the fields, directly influenced by the Charter: issues related to the impediment of marriage are covered by Kristi Joamets. This issue is a perfect example of a rapidly changing society. As the author herself puts it: "this is the character of our society today – quick changes in society have put policy-makers and implementers of law in a rather difficult situation" related to same-sex marriages. The chapter is focusing on an element inherent to European integration—free movement and its linkage to marriage. The author indicates that there are visible principles that develop the area, but it is still unclear whether the rights can be implemented at national level, especially in the context of "social and cultural differences of member states" in the field of regulation. The further guidelines would be derived from the CJEU case law that should also take account of the changing nature of "marriage".

Marco Botta and Alexandr Svetlicinii are discussing the enforcement of EU competition law, the freedom to conduct business, and the right to property. By them, there is a growing relevance of fundamental rights protection in competition law enforcement. Again, the principle of fair trial is having a central role, especially in the light of "progressive criminalization of competition law enforcement". Mainly, the case of Menarini, adjudicated by ECtHR, is taken as a model for further developments in EU competition law and the interpretation of the EU Charter.

Some of the parts of the current collection of articles are bound to the specific target groups or beneficiaries of the regulation such as asylum seekers and refugees. Dr Lehte Roots screens the possible interpretative development of the EU Charter through the jurisprudence of both CJEU and ECtHR and finds that "after the accession of EU to the European Convention of Human Rights and the development of the case law there might emerge a need for the review of the situation". The complicated interrelationship between the EU Charter, ECHR, and the constitutions of the Member States is very much obvious here as in some other fields of regulation of fundamental rights.

This is also evident in case of free movement of students in the EU, a topic presented by Kari Käsper. As the author indicates, education is "the area which Member States have wanted to exclude from harmonisation". That is why the "soft measures" have been preferred. The issue is still very much related to the EU Charter as the right to education and the anti-discrimination policy are concerned. The author points out that the area (and the free movement of students) is "under intense debate in the EU" and one possible development would be the shift of Luxembourg court ideology from economic to fundamental rights-based arguments. The Charter would be a good basis to clarify and detail the rules in the field.

Katarina Pijetlovic is addressing the new competences of the EU concerning the rights of athletes as specific target group of the EU Charter. Sports law as developing area of regulation is increasingly inevitably bound with aspects of fundamental rights. However, the concept of “specificity of sports” places the rights of athletes into context that differentiates them from other beneficiaries rights. The author creates a hypothetical example to prove that the EU Charter can be used as an innovative tool to counterbalance against the aforementioned concept and makes reference to several regulation areas of the Charter that can be used to protect athletes’ rights such as right to representation, fair trial, and privacy. The last author, Ondrej Hamulák, gives a synoptic insight to the constitutional nature of fundamental rights at supranational level.

The current book is an outcome of excellent research cooperation. Most of the contributors are my colleagues from Tallinn Law School, Tallinn University of Technology. I am also happy that several of our academic friends joined us to design an academic research book that would be a helpful tool for professionals, academics, and students in various fields, especially legal science, human rights and constitutional law, political science, international relations, and European integration.

I would like to express my great gratitude to all of the contributors and hope that the current collection of articles will find many readers and commentators.

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