

The Place and Role of Fundamental Rights in the EU Legal System

Krzysztof MASŁO

ABSTRACT

The protection of fundamental rights at European level has been one of the most important issues since the founding of the Communities. An important gap was filled by the Lisbon Treaty when it incorporated the Charter of Fundamental Rights into primary EU law. Its scope, interpretation, and relationship with national constitutions and legal systems has been the most controversial issue of the last decade. After a presentation of the historical development of the protection of fundamental rights in Europe, this chapter looks at the issues of application of the Charter of Fundamental Rights in the jurisprudence of the Eastern European countries.

KEYWORDS

Charter of Fundamental Rights, direct application of EU law, judicial cooperation in criminal matters, principle of mutual trust, protection of fundamental rights

1. Introduction

Fundamental rights are an extremely complicated issue in EU law. Under the Treaty on the functioning of the European Union, fundamental rights in the EU are based on three pillars: the Charter of Fundamental Rights (CFR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),¹ and fundamental rights resulting from the constitutional traditions common to the Member States.² There is no doubt that at present the CFR constitutes the main pillar of the protection of the EU's fundamental rights.

The CFR was developed by states constituting the European communities and at the beginning Central European countries did not participate in the formation the Charter. However, the decision to make the Charter binding was taken with the

1 Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS No. 005.

2 Art. 6(3) Treaty on the European Union.

Masło, K. (2022) 'The Place and Role of Fundamental Rights in the EU Legal System' in Oszto-vits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective*. Miskolc-Budapest: Central European Academic Publishing. pp. 55–71. https://doi.org/10.54171/2022.aobjb.poeucep_2

participation of these countries, and since 2009 the CFR has been applied in relation to all EU Member States.

2. Genesis and Legal Nature of the CFR

Initially, Central European countries did not participate in the formation of fundamental rights. The composition of the European Communities was limited only to Western European states, and Central European countries were not members of the Council of Europe, where the development of human rights began. It does not change the fact that in the 1970s, the process of shaping the fundamental rights began, however initially limited to the protection of those rights of individuals that were necessary for the establishment and development of economic freedoms. In the absence of a community document protecting fundamental rights, the CJEU established their existence in community law in the form of general principles of community law.³

In the judgment in *Internationale Handelsgesellschaft* case, the CJEU explained that the protection of fundamental rights in the community legal order is ‘inspired by the constitutional traditions common to the Member States’ and that protection of these rights must be ensured in the EEC.⁴ In the mid-1970s, the CJEU began to emphasize the importance of the European system of human rights protection in the Council of Europe for the understanding of fundamental rights in the EEC. One of the first CJEU rulings to refer to the ECHR and the case law of the European Court of Human Rights (ECHR) was the *Rutili* case.⁵ In this case, the CJEU used the ECHR to define the scope of the public order clause enabling the restriction of the free movement of persons.

The emergence of fundamental rights in the jurisprudence of the ECJ was noticed by the European Parliament, which proposed in 1975 the adoption of the Charter of Citizens’ Rights.⁶ The result of this proposal was the adoption in 1977 of a joint declaration by the European Parliament (EP), the European Commission (EC) and the Council on the Protection of Fundamental Rights and the ECHR.⁷ Although it was not a binding document, the three institutions undertook that they would abide by the ECHR in their activities. Together with the adoption of the declaration, the first ideas concerning the EEC accession to the ECHR and the cataloging of fundamental rights appeared.⁸ While the implementation of the first postulate turned out to be extremely

3 . Judgment of the CJEU of 12 November 1969, *Erich Stauder v. City of Ulm—Sozialamt*, Case 29-69 ECLI:EU:C:1969:57.

4 Judgment of the Court of 17 December. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, ECLI:EU:C:1970:1141970.

5 Judgment of the Court of 28 October 1975. *Roland Rutili v. Ministre de l’intérieur*, Case 36-75. ECLI identifier: ECLI:EU:C:1975:137.

6 Wieruszewski, 2008, p. 42.

7 Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, April 27, 1977, O.J. 1977/C 103/01.

8 Rincón-Eizaga, 2018, p. 129.

difficult and was blocked by the CJEU in 1994,⁹ the EU institutions were able to establish a set of fundamental rights fairly quickly. The first attempt to formulate a catalog of these rights was the EP resolution of 1989, called the Declaration of Fundamental Rights and Freedoms.¹⁰ The structure of the Declaration was based on the catalog of rights and freedoms contained in the ECHR. Among the fundamental rights, the declaration mentioned dignity (Art. 1), the right to life (Art. 2), equality under the law (Art. 3), freedom of thought and opinion (Arts. 4 and 5), the right to privacy and the protection of the family (Arts. 6 and 7), and freedom of assembly and association (Arts. 10 and 11). Among the fundamental rights that the European Parliament intended to defend, there were also rights related to European integration (freedom of movement of community citizens—Art. 8) and the right to preserve the environment (Art. 24) and such social rights as the right to fair working conditions (Art. 13), the right to social protection (Art. 15) and the right to education (Art. 16).

Fundamental rights also penetrated the treaties establishing the European Communities. The preamble to the Single European Act (SEA, 1986) states that one of the objectives of the European Community is

“to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.”¹¹

As the reference to fundamental rights was only included in the SEA’s preamble, it did not create any binding rights and obligations. However, the SEA indicated the direction of the interpretation of fundamental rights, pointing to two pillars of the protection of fundamental rights that had emerged in the jurisprudence of the CJEU: the constitutions and legal systems of the Member States and the ECHR. Only the Maastricht Treaty establishing the European Union included in Art. F the Union’s obligation to respect fundamental rights as guaranteed by the ECHR and rights resulting from the constitutional traditions common to the Member States.¹² These fundamental rights acquired the status of general principles of community law.

The mandate for the development of the CPP was given by the European Council at the 1999 summit in Cologne.¹³ The European Council stated that the European Union has reached a stage in its development which requires the rights of its citizens

9 Opinion 2/94 [1996] ECR I-1783.; Opinion of the Court of 28 March 1996 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECLI:EU:C:1996:140.

10 Resolution adopting the Declaration of Fundamental Rights and Freedoms, 12.04.1989, O.J.E.C. C 120/51.

11 Single European Act, O.J. L 169, 29 June 1987, pp. 1–28.

12 Treaty on European Union, O.J. C 191, 29 July 1992, (pp. 1–112).

13 Cologne European Council, 3–4 June.1999, Conclusions of the Presidency, Annex IV: European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union.

to be consolidated in the Charter (point 44). The conclusions did not prejudice the legal nature that the Charter should have. However, it was expressly stipulated that the Charter should contain those fundamental rights that are guaranteed by the ECHR and derived from the constitutional traditions of the Member States, and having the nature of general principles of Community law. In addition to these rights, the Charter should also contain fundamental rights that pertain only to EU citizens.

The Charter was elaborated by a special body composed of representatives of the heads of States and governments, a representative of the president of the Commission and representatives of the European Parliament and national parliaments. A representative of the CJEU could participate in the work of this body as an observer. Roman Herzog was elected chairman of the body. The first draft of the CFR was presented to the European Council in Santa Maria da Feira in June 2000.¹⁴ The CFR was solemnly proclaimed on December 7, 2000, in Nice by the three institutions—the Council, the EC, and the EP.

From the very beginning, the legal nature of the CFR aroused a lot of controversy. At the Biarritz summit on October 11, 2000, Great Britain firmly vetoed the inclusion of the CFR in the treaties because the inflated standards of economic and social rights were unsatisfactory.¹⁵ It is worth noting that the CFR was not a resolution of the European Council, nor it was attached to the Conclusions of the European Council. The Nice European Council only ‘welcomed the joint proclamation’ of the three institutions, stating that the question of the Charter’s force will be considered later.¹⁶

From the beginning, the works of the European institutions showed efforts to make the Charter binding character. It was already visible during the works on the EU reform treaty, adopted on February 23, 2001, in Nice. In the declaration on the future of the Union, attached to the Treaty of Nice, the Member States announced the continuation of the reform of the EU, which was to focus, *inter alia*, on the strengthening the protection of fundamental rights in the Union by agreeing on the status of the Charter. In the draft treaty establishing a constitution for Europe—prepared by the EU Convent—the CFR was included into Part II.¹⁷

Thus, the draft treaty establishing a constitution for Europe gave the CFR the status of primary law. The process of ratifying the Constitutional Treaty, however, collapsed in 2005, which meant that the draft never came into force. Therefore, in 2007, works started on a new EU reform treaty. During them, the CFR was excluded from the content of the future treaty and was subject to correction. Finally, in 2007, the three institutions re-adopted the text of the CFR in Strasbourg. Subsequently, the Charter was announced in the EU’s official journal.¹⁸ It is worth noting that this procedure preceded the signing of the Treaty of Lisbon, which took place on December 13, 2007. However, the application of the CFR was closely related to the entry into force

14 Santa Maria da Feira European Council, 19–20. June 2000, Presidency Conclusions.

15 Muszyński, 2009, p. 56.

16 Nice European Council, 7-9. December 2000, Presidency Conclusions, Chapter I para. 2.

17 Treaty establishing a Constitution for Europe, O.J. C 310, 16 December 2004, p. 1.

18 Official Journal of the European Union, 14 December 2007, C 303/1, p. 1.

of this treaty, because—in accordance with the wording of the Charter—the revised Charter replaced the wording of the Charter proclaimed on December 7, 2000, from the date of its entry into force of the Treaty of Lisbon.

The adoption of the CFR as a joint declaration of three European institutions in 2000 initiated the application of this document by the CJEU. In the first place, only the advocates general applied the CPP. In the opinion on the TNT case of February 1, 2001, Advocate General Siegbert Alber referred to Art. 36 CFR, stressing that undertakings entrusted with the management of services of general economic interest are subject to the rules of the treaty only insofar as they legally or actually perform specific tasks.¹⁹ In the BECTU case, Advocate General Antonio Tizzano addressed the issue of the binding force of the CFR.²⁰ He emphasized that the CFR had no strictly normative meaning, but contained wording that was recognized in other legally binding documents. This allowed him to make the evaluation that in the dispute over the nature and importance of the fundamental rights, the relevant norms of the CFR could not be ignored because they served as an essential framework for the activities of all entities in the Community (para. 27). Advocate General M. Dámaso Ruiz Jarobo Colomer went even further in his opinion in the *Kaba* case.²¹ The advocate general noted that the CFR does not have autonomous binding force, but presents the main values of the Member States from which the general principles of Community law arise. Therefore, the CFR should be treated as a substance of the common European *acquis* in the area of fundamental rights.

The first case in which the CJEU referred to the CFR was the validity of Council Directive 2003/86 / EC on family reunification.²² The CJEU noted in the judgment of 2006 the non-binding nature of the CFR, but stressed that the Community legislator also recognized the importance of this document—confirming, in the second recital of the directive, that the directive complies with the principles recognized not only by Art. 8 of the ECHR, but also by the CFR.

Long before making the CFR binding, the Charter turned out to be so important for the practice of the functioning of EU courts that they tried to include CFR into the catalog of documents relevant to the interpretation of Community law. The thesis that the CFR helps to discover the positive and legal nature of Community norms and collects in one document the fundamental rights resulting hitherto from the constitutional traditions of the Member States and international agreements (especially the

19 Opinion of Advocate General Alber delivered on 01 February 2001, C-340/99, ECLI:EU:C:2001:74, para 94.

20 Opinion of Advocate General Tizzano delivered on 08 February 2001, C-173/99, ECLI:EU:C:2001:81.

21 Opinion of Advocate General Ruiz-Jarobo Colomer delivered on 11 July 2002, C-466/00, ECLI:EU:C:2002:447.

22 Judgment of the CJEU (Grand Chamber) of 27 June 2006, European Parliament v. Council of the European Union, Case C-540/03, ECLI:EU:C:2006:429.

ECHR, the European Social Charter and the international pact of civil and political rights) was emphasized in the early jurisprudence of EU courts.²³

The CFR became part of the EU law together with the entry into force of the Treaty of Lisbon, on December 1, 2009. Pursuant to Art. 6 sec. 1 TEU, ‘The Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of December 7, 2000, in the version adapted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties.’ However, the Charter has not been incorporated (including as an annex or declaration) into any of the treaties on which the Union is based, and therefore does not constitute the basis of the Union. The Charter is therefore not a treaty,²⁴ but a treaty-related document, although it enjoys the status of primary law. This unusual solution results from the arrangements made by the EU Member States during the European Council in Brussels in 2007.²⁵ However, the formal and legal status of the CFR is of secondary importance from the perspective of the Charter’s application by EU institutions and courts. Art. 6 sec. 1 shows that the CFR includes the effects assigned to primary law and, consequently, is subject to specific treaty procedures. First, it means that the CJEU has become the guardian of compliance with the Charter. Moreover, if a specific norm of the CFR meets the criteria of direct effectiveness, it will be possible to apply it directly, and in the event of a conflict between a national norm and a Charter norm, the principle of precedence of the Charter norms will apply.²⁶

3. Scope of the Charter of Fundamental Rights of EU

The structure of the CPP differs from the dichotomous division into civil and political rights as well as economic, social, and cultural rights adopted in classic international agreements.²⁷ The division of fundamental rights adopted in the CFR follows 6 values, which are: dignity (Arts. 1–5), freedoms (Arts. 6–19), equality (Arts. 20–26), solidarity (Arts. 27–38), citizens’ rights (Arts. 39–46) and justice (Arts. 47–50). The CFR has a preamble and is closed by the general provisions (Arts. 51–54). The above six values define the material scope of the CFR. It is worth emphasizing that the Charter contains a closed catalog of fundamental rights that may only be changed through the CFR amendment procedure. In the light of the preamble, the sources of fundamental rights formulated in the CFR are, first, the constitutional traditions of the Member States, but also the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case law of the CJEU and the ECHR (para. 5). The preamble also contains the important

23 Muszyński, 2009, p. 57.

24 Wróbel, 2020. See also: Szubska, 2018, p. 210.

25 Brussels European Council, 21–22. June 2007, Presidency Conclusions.

26 Wyrozumska, 2008, pp. 83–84.

27 Spaventa, 2017, p. 238.

principle of responsibility and obligations toward another person, the human community, and future generations (para. 6).

The CFR contains fundamental rights that have been granted the normative status of a right, freedoms, or principles. The Charter does not define the criteria for qualifying fundamental rights to one of these three categories.²⁸ According to the explanations to Art. 52 sec. 5 of the CFR, in some cases the provisions of the CFR may contain both elements of right and principle, e.g., Art. 23, Art. 33, and Art. 34 of the CFR. Therefore, in the opinion of the authors of the CFR, certain fundamental rights are hybrids—they are both a principle and right. Art. 51 sec. 1 of the CFR also suggests a different scope of obligations of the Member States and the Union—rights and freedoms are to be respected, and principles are to be observed. Second, not all fundamental rights are inherently and directly applicable. Some fundamental rights refer to other EU law or to national laws. For example, Art. 9 provides that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights, and Art. 37 states that a high level of environmental protection and an improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. These provisions are therefore general guidelines addressed to the EU and national law-making bodies.²⁹ These rights are also not suitable for direct investigation in court.

The fundamental rights contained in the CFR are addressed to the natural persons. The subjective scope of these rights, however, varies. Some of them are vested in every person (e.g., Art. 2—right to life, Art. 3—right to integrity, Art. 4—prohibition of torture, Art. 5—prohibition of slavery and forced labor). However, there is a group of rights whose addressees are limited. These include rights guaranteed to children (Arts. 24 and 32), the elderly (Art. 25), persons with disabilities (Art. 26), workers, employers, and their representatives (Arts. 27, 28, 30, 31) or citizens EU (Arts. 39–46). There is also a group of fundamental rights, the addressee of which has not been strictly determined by the provisions of the CFR; and to determine the group of addressees to whom the fundamental right is addressed, reference should be made to the normative systems (e.g., Art. 9, in which the right to marry and the right to found a family is conditioned on compliance with national laws). Some of the fundamental rights are conditioned on eligible EU citizenship, but the vast majority of the rights contained in the CFR are addressed to people regardless of their nationality, which means that the addressee of the right is not only a citizen of a Member State, but also every person residing in the territory of that country, including third-country nationals. There is also a group of fundamental rights in the CFR that is directed only to persons who belong to third-country or stateless persons, e.g., Art. 18 guarantees the right to asylum, and Art. 19 para. 2 prohibits collective expulsion.

28 Tridimas, 2000, pp. 2–3.

29 Gencaga, no date, p. 178.

Legal persons may also be an addressee of fundamental rights, if the nature of the right does not mean that it is granted only to a natural person.³⁰

The issues of obliged entities are regulated by Art. 51 sec. 1 CFR. According to this provision, the Charter applies to 1) institutions, bodies, offices, and agencies of the Union, 2) Member States. This provision also shows that the obligation to apply the CFR by the Member States has been limited to situations in which they apply EU law. This provision aroused numerous controversies, and its literal wording could suggest that the Member States—unlike the EU bodies—will be bound by the CFR only exceptionally. These doubts were deepened by the wording of this provision in the English and French language versions, which suggested that the Member States referred to the CFR only when they are implementing Union law (French: *lorsqu'ils mettent en oeuvre le droit de l'Union*). Advocate General Eleanore Sharpston, in her 2010 opinion in the *Zambrano* case, noted that the fundamental rights of the European Union may only be invoked if the contested measure falls in the scope of European Union law (para. 156).³¹ Therefore, while all measures adopted by institutions are subject to verification in terms of their compliance with EU fundamental rights, Member States are obliged to carry out such verification when taking actions related to the implementation of obligations provided for by European Union law or falling in the scope of European Union law (para. 156). According to the advocate general, the scope of application of EU law are situations in which the European Union has competence in a given area of law (exclusive or shared), even if that competence has not yet been exercised (para. 163). However, adopting the view of the advocate general would lead to the extension of the scope of application of the Charter to those areas to which EU law does not extend (or does not yet extend).

The most essential for the interpretation of Art. 51 sec. 1 of the CFR is the judgment of the CJEU in the *Åkerberg Fransson* case.³² The case concerned the interpretation of the *ne bis in idem* principle regarding the possibility of imposing a criminal and administrative sanction for the same act of infringement of tax regulations. EU law harmonizes some taxes (including VAT) at the EU level, but does not require Member States to introduce specific criminal or administrative sanctions for violating the tax rules set out in EU law. In this judgment, the CJEU recalled its previous case law, according to which fundamental rights apply in all situations governed by EU law, but not outside such situations. For this reason, the Court does not have the power to assess the compliance with the Charter of domestic provisions that do not fall in the scope of application of EU law (paras. 19 and 21).

30 Spaventa, 2017, p. 244.

31 Opinion of Advocate General Sharpston delivered on 30 September 2010, C-34/09, ECLI:EU:C:2010:560.

32 Judgment of the CJEU (Grand Chamber) of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*. Case C-617/10, ECLI:EU:C:2013:105; Judgment of the CJEU (Second Chamber) of 30 June 2016, *Directia Generală Regională a Finanțelor Publice Brașov. (DGRFP) v. Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, Case C-205/15, EU:C:2016:499, para. 23.

Thus, the Tribunal adopted an extremely broad understanding of Art. 51 sec. 1 of the CFR, according to which the CFR is applicable whenever there is a certain connection, even a very general one, between a national law and EU law.³³ In my opinion, however, a provision of EU law that obliges a Member State to act should be indicated in every situation.³⁴ In the *Åkerberg Fransson* case, the CJEU did not limit itself to a general reference to situations governed by EU law, but sought legal grounds for the obligation of Member States to sanction VAT depletions. For the tribunal, the lack of such specific obligations of states under EU law was not a problem, nor was the general obligation arising from Council Directive 2006/112 / EC on the common system of value added tax and Art. 325 TEU to combat illegal activities affecting the financial interests of the Union by means of dissuasive and effective measures.

The basic value of this judgment is related to the equal application of the CFR and fundamental rights as general principles of law, which means that the pre-Lisbon jurisprudence concerning the scope of fundamental rights resulting from general principles of law may also be applied to the CFR. However, the CJEU did not indicate detailed criteria for examining whether a national provision falls in the scope of application of EU law. Therefore, the CJEU did not say anything new in this case than it results from the principle of conferral (Art. 5 secs. 1 and 2 TEU). Since the scope of application of the CFR and fundamental rights as general principles of EU law is the same, it indicates a gradual increase in the significance of the CFR. European and national judges, instead of an arduous search for fundamental rights in the constitutional traditions of the Member States and the ECHR, will apply the ready catalog of rights contained in the CFR.

When talking about the scope of the Charter, it is worth paying attention to Protocol No. 30 on the application of the CFR in relation to Poland and the United Kingdom. The Protocol was attached to the TEU and TFEU and pursuant to Art. 51 TEU belongs to the EU's primary law. The Protocol affects the application of the CFR to Poland and does not constitute an opting-out, as it does not include the obligation to comply with it by Poland and does not limit the binding force of the Charter. The Protocol affects the application of the Charter on two levels: in proceedings before EU courts in cases concerning Poland related to the application of the Charter of Civil Procedure; and at the legal and national level.

First, the Protocol prohibits the enlargement of the CJEU's competences, but does not prevent the lodging of complaints against Poland with EU courts regarding the violation of the Charter, as long as they fall within the existing competences of the Tribunal. This view is confirmed by the position of the CJEU itself contained in the judgment in cases C-411 and C-493/10. As clarified by the court, Art. 1(1) is of no legal significance, since the Charter codifies existing rights, rather than creating new ones.

33 Berramdane, no date, p. 7.

34 See Póltorak, 2014, p. 22.

Second, at the national level, it makes it impossible for individuals to invoke the provisions of the Charter before Polish courts to adjudicate the incompatibility of national law with the Charter. Moreover, the provisions of the Charter relating to national legislation or practices will apply to the countries covered by the Protocol only to the extent that the provisions are recognized by national law and practice (Art. 2 of the Protocol). Thus, the rights contained in the Charter can be invoked if they have been specified in domestic law and to the extent that they exist in Polish law.

Poland fortified the application of the provisions of the Charter in domestic law also by submitting two declarations (nos. 61 and 62) to the TEU and the TFEU. Declaration no. 61 has no formal impact on binding MPs by the Charter, and is an interpretative declaration. The second Polish declaration concerns the Protocol on the application of the Charter. The Polish government presented it as the exclusion of the operation of Art. 1 clause 2 of the Protocol in relation to Poland. It is also interpretative and cannot in any way change the primary law of the European Union.

The Czech Republic also tried to limit the scope of the CFR. In Declaration No. 53, the Czech Republic recalled that the provisions of the Charter are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States and that the provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law. The Czech Republic also emphasized that the CFR does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field. This declaration is only an interpretative statement, not a legally binding act, and has primarily a political, not a legal, value.

4. Impact of CFR on the Judicial System in the Member State

The CFR serves to fill the content of the values on which the EU is based, especially those indicated in Art. 2 TEU: democracy, the rule of law and human rights.³⁵ Recently, the CJEU has dealt with this issue several times, and one of the landmark decision of the Tribunal regarding the rule of law is the judgment in case C-64/16 on the reduction of the remuneration of judges in Portugal.³⁶ The judgment is a pattern for the other cases of this type, concerning Poland in particular.³⁷ In Polish cases, the Charter of Fundamental Rights has become a model for assessing the procedure for appointing

35 Lenaerts, 2012, p. 375.

36 Judgment of the CJEU (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117.

37 Judgment of the CJEU (Grand Chamber) of 24 June 2019. European Commission v. Republic of Poland, Case C-619/18, ECLI:EU:C:2019:531.

judges and members to the National Council of the Judiciary³⁸ and the Disciplinary Chamber of the Supreme Court, established in 2017.³⁹

For the tribunal, the values on which the Union is founded, enshrined in Art. 2 TEU, are common to all Member States. An important element of the rule of law principle is the obligation to provide individuals with effective judicial protection of the rights derived from EU law.⁴⁰ It is a fundamental right, resulting from the constitutional traditions common to the Member States and the ECHR (Arts. 6 and 13). The CJEU does not question the appointment of judges by heads of state. The mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.⁴¹ The case law of the CJEU has developed a uniform catalog of circumstances that should be considered when assessing whether a given body has the status of a 'court'. Importantly, these circumstances apply both at the EU level regarding judges and advocates general and at the level of the Member States with regard to national courts.⁴² These circumstances include the statutory legal basis of the authority, its permanent nature, the obligatory nature of its jurisdiction, the adversarial nature of the proceedings, the application of the provisions of law by the authority and its independence.⁴³ The most important—from the Polish perspective—is the independence of the court.

The requirement of judicial independence was developed in another Polish case, in which the tribunal stated that the requirement that courts be independent has two aspects.⁴⁴ The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have

38 Judgment of the CJEU (Grand Chamber) of 6 October 2021, Proceedings brought by W.Ż, Case C-487/19, ECLI:EU:C:2021:798.

39 Judgment of the CJEU (Grand Chamber) of 19 November 2019, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

40 Judgment of the CJEU of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Case C-64/16, ECLI:EU:C:2018:117, para. 32.

41 Judgment of the CJEU (Grand Chamber) of 19 November 2019, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 133.

42 Judgment of the CJEU (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Case C-64/16, ECLI:EU:C:2018:117, para. 43.

43 Judgment of the CJEU of 16 February 2017, *Ramón Margarit Panicello v. Pilar Hernández Martínez*, Case C-503/15, EU:C:2017:126, para. 27.

44 Judgment of the CJEU (Grand Chamber) of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586, paras. 63–67.

the task of adjudicating a dispute, such as guarantees against removal from office or a level of remuneration commensurate with the importance of the functions that they carry out (para. 64). The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests regarding the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (para. 65).

Much space in the jurisprudence of the CJEU is occupied by the judicial appointment procedure and the participation of the judicial council in it. The participation of such a judicial body may, in principle, be such as to contribute to making that process more objective.⁴⁵ In particular, the possibility of requiring the president of the Republic to appoint a judge to the Supreme Court to the existence of a favorable opinion of the KRS is capable of objectively circumscribing the president of the Republic's discretion in exercising the powers of his office. That is only the case provided that the judicial body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal. The CJEU indicated to the domestic courts the criteria based on which such an assessment of the National Council of the Judiciary should be carried out.

In this context, however, it should be considered whether the jurisprudence of the CJEU has not gone too far and has not led to a situation where the areas previously included in the exclusive competence of the Member States have not been assessed from the perspective of EU law. The organization of the judiciary is an area that has remained with the Member States.⁴⁶

5. Influence of the CFR on the Functioning of Cooperation between Member States in Criminal Matters

Using the CFR for the temporary postponement of the application of criminal cooperation mechanisms between the Member States, in particular instruments based on mutual recognition, is of great practical importance. It was the first time that the CJEU pointed out such a role to the CPP in the *Aranyosi and Căldăraru* case.⁴⁷ The CJEU answered a question for a preliminary ruling by a German court concerning the possibility of executing a European arrest warrant (EAW) in a situation where, in the issuing

45 Judgment of the CJEU (Grand Chamber) of 19 November 2019, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 137.

46 Judgment of the CJEU (Grand Chamber) of 24 June 2019 *European Commission v. Republic of Poland*, Case C-619/18, ECLI:EU:C:2019:531, para. 52.

47 Judgment of the CJEU (Grand Chamber) of 05 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

state, the fundamental rights of the prosecuted person may be violated (in this case, it was about the conditions in a prison). The CJEU recalled that the execution of the EAW mechanism may be suspended only in the event of a serious and persistent breach of European values by a Member State and in accordance with the procedure provided for in Art. 7 TEU. Nevertheless, the Court inferred possibility ‘in exceptional circumstances’ of introducing restrictions on the principles of mutual recognition and mutual trust between Member States from the obligation to respect fundamental rights enshrined in the CFR (paras. 82–83). Therefore, if a judicial authority of the executing Member State has data that shows that there is a real danger of inhumane or degrading treatment of a person deprived of his/her liberty in the issuing member state, in light of the standard of protection of fundamental rights guaranteed by EU law, the execution of the order in question should be postponed, but the mechanism cannot be suspended *in abstracto*.

This line of CJEU case law has been confirmed by the Court in subsequent judgments, wherein the CJEU has clarified that a decision to temporarily postpone the surrender of a prosecuted person to a Member State should be taken only in exceptional circumstances, where the executing judicial authority determines, after a specific and thorough assessment of a given case, that there are serious and proven grounds for considering that the subject of a European arrest warrant will be exposed, after surrender to the issuing judicial authority, to a real risk of a breach of his fundamental right.⁴⁸

The above case law of the CJEU should be considered correct and in line with the already functioning ECHR standard developed based on Art. 3 of the ECHR (prohibition of torture), although it is not known how far the jurisprudence of the CJEU will go in this respect. Until now, the CJEU has allowed the temporary postponement of the execution of the EAW only when there are concerns that the issuing member state would violate the prohibition of torture (Art. 4 of the CFR) and the right to a fair trial (Art. 47 of the CFR). It is not clear whether the justified fear of violating other fundamental rights recognized in the CFR (e.g., the right to environmental protection) can be treated as a justified ground for suspending the EAW mechanism. The CJEU inferred the possibility of temporary postponement of surrender due to violation of fundamental rights only in ‘exceptional circumstances’. In my opinion, this means that only non-derogatory rights, the significance of which is comparable to the prohibition of torture and the right to a fair trial, could justify suspending the execution of EAW in an individual case.

6. Conclusions

During the last few decades, the protection of human rights has become the basic mechanism protecting an individual against the supremacy of the state. The development of European integration has indicated the need to create an internal document in the EU, which would become the main mechanism protecting an individual against

48 Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586.

the arbitrariness of EU institutions, the vast majority of which do not come from direct elections. The CFR is therefore an important argument for greater democratization of the EU. Unfortunately, until now it has not been possible to create a mechanism external to the EU for controlling the fundamental rights in the EU. The Charter is also an expression of the EU's aspirations to achieve independence in the field of protection of human rights and freedoms, particularly in relation to another European international organization, which is the Council of Europe.

The Charter is also an expression of efforts to constitutionalize the EU. The unclear scope of application of the CFR to the Member States may raise legitimate concerns that the CJEU will excessively interfere with national law, blurring the boundaries between the competences of the EU and the exclusive competences of the Member States even further.

Bibliography

- Lenaerts, K. (2012) 'Exploring the Limits of the EU Charter of Fundamental Right,' *European Constitutional Law Review*, 8(3), pp. 375–403; <https://doi.org/10.1017/S1574019612000260>.
- Muszyński, M. (2009) 'Polska Karta Praw Podstawowych po Traktacie Lizbońskim. Charakter prawny i granice związania,' *Przegląd Sejmowy*, 17(1), pp. 56–62.
- Półtorak, N. (2014) 'Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej' [Scope of binding force of the EU Charter of Fundamental Rights on Member States], *Europejski Przegląd Sądowy*, 2014/9, pp. 17–28.
- Rincón-Eizaga, L. (2008) 'Human rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of Article 8 of the European Convention on Human Rights,' *Int. Law: Rev. Colomb. Derecho Int.*, 2008(11) pp. 119–154.
- Spaventa, E. (2017) 'Fundamental rights in the European Union' in Barnard, C., Peers, S. (eds.) *European Union Law*. 2nd edn. Oxford: Oxford University Press, pp. 238–244.
- Szubska, M. (2018) 'Geneza i znaczenie dla unijnego porządku prawnego Karty Praw Podstawowych Unii Europejskiej' [The Genesis and the Meaning of the Charter of Fundamental Rights of the European Union for the European Union Legal], *Polski Rocznik Praw Człowieka i Prawa Humanitarne*, 2018(9), pp. 205–219; <https://doi.org/10.31648/prpc.3778>.
- Tridimas, T. (2000) *The General Principles of EC Law*. Oxford: Oxford University Press.
- Wieruszewski, R. (2008), 'Rola i znaczenie Karty Praw Podstawowych UE dla ochrony praw człowieka,' *Przegląd Sejmowy*, 16(2), pp. 42–50.
- Wróbel, A. (ed.) (2020) *Karta Praw Podstawowych Unii Europejskiej. Komentarz*. 2nd edn. Warsaw: C.H.BECK.
- Wyrozumska, A. (2008) 'Inkorporacja Karty do UE: status Karty w prawie UE. Zakres obowiązywania i stosowania, główne problemy interpretacyjne z uwzględnieniem stanowiska polskiego' in Barcz, J. (ed.) *Ochrona w Unii Europejskiej*. Warsaw: C.H. BECK pp. 83–84.

Legal Sources

- Brussels European Council, 21–22 June 2007, Presidency Conclusions.
- Cologne European Council, 3–4 June 1999, Conclusions of the Presidency, Annex IV: European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union.
- Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, ETS No. 005.
- Declaration of Fundamental Rights and Freedoms, 12.04.1989, O.J.E.C. C 120/51.

- Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, April 27, 1977, O.J. 1977/C 103/01.
- Judgment of the CJEU of 12 November 1969, Erich Stauder v. City of Ulm—Sozialamt, Case 29-69, ECLI:EU:C:1969:57.
- Judgment of the Court of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70, ECLI:EU:C:1970:114.
- Judgment of the Court of 28 October 1975, Roland Rutili v. Ministre de l'intérieur, Case 36-75, ECLI:EU:C:1975:137.
- Judgment of the CJEU (Grand Chamber) of 27 June 2006, European Parliament v. Council of the European Union, Case C-540/03, ECLI: ECLI:EU:C:2006:429.
- Judgment of the CJEU (Grand Chamber) of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, ECLI:EU:C:2013:105.
- Judgment of the CJEU (Grand Chamber) of 05 April 2016, Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.
- Judgment of the CJEU (Second Chamber) of 30 June 2016, Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v. Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, Case C-205/15, EU:C:2016:499.
- Judgment of the CJEU of 16 February 2017, Ramón Margarit Panicello v. Pilar Hernández Martínez, Case C-503/15, EU:C:2017:126.
- Judgment of the CJEU (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117.
- Judgment of the CJEU of 27 February 2018, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117.
- Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM., Case C-216/18 PPU, ECLI:EU:C:2018:586.
- Judgment of the CJEU (Grand Chamber) of 24 June 2019 European Commission v. Republic of Poland, Case C-619/18, ECLI:EU:C:2019:531.
- Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.
- Nice European Council, 7–9 December 2000, Presidency Conclusions, Chapter I.
- Official Journal of the European Union, 14 December 2007, C 303/1.
- Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 July 2002, Arben Kaba v. Secretary of State for the Home Department, Case C-466/00, ECLI:EU:C:2002:447.
- Opinion of Advocate General Sharpston delivered on 30 September 2010, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Case C-34/09, ECLI:EU:C:2010:560.

- Opinion of the Court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECLI:EU:C:1996:140.
- Opinion of Advocate General Alber delivered on 01 February 2001, TNT Traco SpA v. Poste Italiane SpA and Others, Case C-340/99, ECLI:EU:C:2001:74.
- Opinion of Advocate General Tizzano delivered on 08 February 2001, The Queen v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), Case C-173/99, ECLI:EU:C:2001:81.
- Santa Maria da Feira European Council, 19–20 June 2000, Presidency Conclusions.
- Single European Act, O.J. L 169, 29 June 1987.
- Treaty establishing a Constitution for Europe, O.J. C 310, 16 December 2004.
- Treaty on European Union, O.J. C 191, 29 July 1992.