

ANNA JURYK ■ ANNA KALISZ ■ AGATA NODŹAK ■ PIOTR UHMA

FUNDAMENTAL RIGHTS PROTECTION TOOLKIT

About

This Toolkit provides for didactic materials that can be employed by academic teachers and all those interested in protection of fundamental rights in European perspective. It was developed within a project “Protection of Fundamental Rights in the European Union” running from 2020 to 2023 as part of the Jean Monnet Module (Erasmus+ Programme) at the University of the Commission of National Education in Cracow (Poland). It aim was to develop a common platform for teaching about fundamental rights in the European Union and acquire knowledge and skills related to their protection. Project’s website: <https://eurights.up.krakow.pl/>

Disclaimer

The European Commission and the Institute of Law, Economics and Administration of the University of the Commission of National Education in Cracow support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the authors, and the Commission and Institute cannot be held responsible for any use which may be made of the information contained therein.

Copyright: Anna Juryk, Anna Kalisz, Agata Nodźak, Piotr Uhma

Composition: Kaja Kowalczewska

Reviewers:

Katarzyna Dunaj – Jan Kochanowski University in Kielce, Poland
Yuliia Volkova – Taras Shevchenko National University of Kyiv, Ukraine

ISBN 978-83-8084-974-7

Publishing

Wydawnictwo Naukowe UP 30-084 Kraków
ul. Podchorążych 2, Poland
tel./faks/fax: 12-662-63-83,
tel.: 12-662-67-57
e-mail: wydawnictwo@up.krakow.pl
<http://www.wydawnictwoup.pl>

Co-funded by the
Erasmus+ Programme
of the European Union



Table of contents

List of Abbreviations	6
-----------------------	---

Chapter 1 INTRODUCTION TO THE CHARTER OF FUNDAMENTAL RIGHTS

1. Objective of the Chapter 1	8
2. Basic concepts	8
3. Multi-level Protection of (Human) Fundamental Rights	8
3.1. Liaison „Rule of Law – (Human) Fundamental Rights”	9
3.2. The rule of law in the European legal space	10
4. Development and Protection of the (Human) Fundamental Rights in the EU	11
4.1. „Generations” of Human Rights	11
4.2. Development of HR regulations	11
5. The Role of the ECHR in EU law	12
5.1. The evolution in EU (EEC) Law	12
6. Charter of Fundamental Rights	12
6.1. Introduction	12
6.2. Content of CFR	13
6.3. A triple function of CFR	13
7. Review questions	14
8. Sources	14
8.1. Literature	14
8.2. Legal texts	15
8.3. Judgements	15
8.4. Online sources	16

Chapter 2 CFR RIGHTS’ GUARANTEES: RIGHTS AND THEIR EFFECTS IN PRACTICE

1. Objective of the Chapter 2	18
2. Respect for private and family life	18
2.1. Legal basis	18
2.2. Explanations relating to the CFR	18
2.3. No definition of the concept of “privacy”	19
2.4. Examples of personal goods subject to protection under the right to privacy	19
2.5. Surname and first name as an element of identity	19
2.6. Name in the case law of the CJEU	20
2.7. No definition of the term “family” and “family life”	20
2.8. Immigration policy and right to respect for family life	21

2.9. Right to respect for home and communications	21
2.10. No possibility to confirm the legal relationship between parents and children born to a surrogate mother.	21
3. Right to marry and right to found a family	22
3.1. Legal basis	22
3.2. Nature of the protection of the right to marry and found a family	22
3.3. Explanations relating to the CFR	23
3.4. Interpretation of Article 12 ECHR in the light of “today’s requirements”	23
3.5. No right to divorce under Article 9	23
3.6. Prerequisites for entering into a marriage	23
3.7. Right to found a family	24
3.8. Procreation	25
4. Review questions	25
4.1. Article 7 CFR	25
4.2. Article 9 CFR	25
5. Case-law & case-study	26
5.1. Case law	26
5.2. Case study 1	34
5.3. Case study 2	35
5.4. Case study 3	35
6. Sources	36
6.1. Literature	36
6.2. Legal texts	37
6.3. Judgements	37
6.4. Online sources	38

Chapter 3

JUDICIAL METHODS OF IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

1. Objective of the Chapter 3	40
2. Methods of applying the Charter by the judiciary	40
3. Review questions	41
4. Case-law & case-study	42
4.1. Case law	42
4.2. Case study	44
5. Sources	44
5.1. Literature	44
5.2. Judgements	45

Chapter 4
NON-JUDICIAL METHODS OF IMPLEMENTATION OF THE CHARTER
OF FUNDAMENTAL RIGHTS

1. Objective of the Chapter 4	47
2. Application of the CFR at Member State level	47
3. Implementation of the CFR by national legislative authorities	49
4. Application of CFR by the administrations of Member States	53
5. Other non-judicial mechanisms for applying the CFR	53
6. Review questions	53
7. Case-law & case-study	54
7.1. Case study 1	54
7.2. Case study 2	55
7.3. Case study 3	55
7.4. Case study 4	56
8. Sources	60
8.1. Literature	60
8.2. Legal texts	60
8.3. Judgements	60
8.4. Online sources	61

Chapter 5
RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT ELECTIONS

1. Objective of the Chapter 5	64
2. Passive and active electoral rights – Introductory subjects	64
2.1. Relationship of right to vote and to stand as a candidate at elections with other human rights conventions.	66
2.2. History	68
2.3. Field and the scope of application of Article 39	70
2.4. EU legislation / secondary sources of EU law	71
2.5. Major Limitations and Derogations	72
3. Review questions	73
4. Case-law & case-study	73
4.1. Case law	73
4.1. Case study	75
5. Sources	75
5.1. Literature	75
5.2. Legal texts	76
5.3. Judgements	77
5.4. Online sources	77

List of Abbreviations

CFR (Charter)	Charter of Fundamental Rightsw
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPFPLLL	Convention on the Participation of Foreigners in Public Life at Local Level
CRC	Convention on the Rights of the Child
EC	European Community
ECHR (Convention)	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECR	Reports of cases before the Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EP	European Parliament
EU (Union)	European Union
FRA	European Union Agency for Fundamental Rights
MEPs	Members of the European Parliament
OCTs	overseas countries and territories
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OSCE	Organisation for Security and Cooperation in Europe
RPEP	Rules of Procedure of the European Parliament
TEC	Treaty on European Community
TEEC	Convention on certain institutions common to the European Communities
TEECSC	Treaty Establishing the European Coal and Steel Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

Chapter 1

INTRODUCTION TO THE CHARTER OF FUNDAMENTAL RIGHTS

Anna Kalisz

Maria Curie-Skłodowska University
Faculty of Law and Administration

ORCID: 0000-0001-9855-0067

1. Objective of the Chapter 1

This chapter is intended to familiarise the student with the basic concepts of fundamental rights and the rule of law, to present the systematics and also to delineate the differences.

2. Basic concepts

domestic (constitutional law)	international law	EU Law
constitutional rights and freedoms / human rights	human rights	fundamental rights

rights	freedoms
<p>A legal claim that people are entitled to, primarily from their government</p> <p>In case of human rights – it is a state, that is obliged → the active role, <i>facere</i></p> <ul style="list-style-type: none"> – the obligation to respect – the obligation to protect – the obligation to fulfil (states must take positive action to facilitate basic human rights) 	<p>As the right (!), the space to conduct freely one's affairs without governmental interference</p> <p>States must refrain from interfering → the passive role, <i>non facere</i></p>

Human rights are entitlements and freedoms of all human beings, whatever nationality, place of residence, sex, age, national or ethnic origin, colour, religion, language, or any other status. Human rights are held by all persons equally and universally. They are based on core principles like **dignity**, fairness, equality, respect and autonomy → **common European values** (Article 2 TEU). They are **European/Western inheritance** as well as the basis for **European integration**.

3. Multi-level Protection of (Human) Fundamental Rights

- **Multicentric** → **intergovernmental** cooperation → Multicentric legal system (in terms of *fontes iuris* / in terms of legal decisions) → **Multi-level Constitutionalism** (domestic → European (→ not solely the EU!) → global).
- Constitutional approach to the EU law → **the European values** → the founding principles of the EU [humanistic world-view].
- European **unity** (→ the constitutional traditions common to the Member States) and **diversity** (→ autonomy principle).

unity	diversity
<p>The Preamble</p> <p>„DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.”</p> <p>Article 2 TEU (The Copenhagen criteria – the rules that define whether a country is eligible to join the EC/EU)</p> <p>„The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”</p>	<p>Autonomy principle is of unwritten nature, that derives from fundamental principle of EU law (laid down in Article 5 TUE), the EU acts only within the limits of the competences that EU countries have conferred upon it in the Treaties. These competences are defined in Articles 2–6 TFEU. Competences not conferred on the EU by the Treaties thus remain with EU countries</p> <p>Principle of conferral <i>a contrario</i></p>

3.1. Liaison „Rule of Law – (Human) Fundamental Rights”

The term rule of law is closely related to **constitutionalism**

- Rule of law:
 - a concept (idea);
 - a legal mechanism (law in books);
 - a practice (law in action).
- The rule of law **in the European legal space** → Multicentrism/ Multi-level Constitutionalism.
- Rule of law as a part of common European/Western inheritance.

Use of such term can be traced to 16th-century Britain (however, **Aristotle** already wrote before that: „It is more proper that law should govern than any one of the citizens” and **Cicero** that „We are all servants of the laws in order to be free”).

John Locke – Treatise of Government

Montesquieu – The Spirit of the Laws

Thomas Paine – Common Sense (“in America, the law is king”)

The influence of Britain, France and the United States contributed to spreading the principle of the rule of law to other countries around the world [In French and German the concepts of rule of law *etat de droit* and *Rechtsstaat*, respectively)

Rule of law requires:

- generality (general rules that apply to classes of persons and behaviours)
 - publicity (no secret laws);
 - prospective application (lex retro non agit);
 - consistency (no conflicts of laws);
 - equality (applied equally to all the society);
 - certainty (certainty of application for a given situation) [the formal view contains no requirements as to the content of the law];
- and last but not least...
- protection of individual rights (including minorities).

3.2. The rule of law in the European legal space

domestic law	EU	COE
<p>Article 2 of Polish Constitution</p> <p>„The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.”</p> <p>Article 7</p> <p>„The organs of public authority shall function on the basis of, and within the limits of the law.”</p>	<p>Article 2 TEU</p> <p>„The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”</p> <p>Article 6(3) TEU</p> <p>„Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”</p>	<p>The preamble of ECHR</p> <p>„...the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law.”</p>

4. Development and Protection of the (Human) Fundamental Rights in the EU

4.1. „Generations” of Human Rights

initially proposed in 1979 by Czech jurist, Karel Vasak

The HR are dynamic, living instrument (so is the **European integration**)

1 st -generation human rights	dealing essentially with liberty. They are, basically, civil and political in nature rights (→ participation in political and public life) civil-political: right to life, freedom of speech, freedom of religion, property rights, the right to a fair trial, and voting rights
2 nd -generation human rights	related to equality and began to be recognized by governments after the War World II socio-economic: right to be employed, right to education, right to health care, as well as social security
3 rd -generation human rights	known as solidarity human rights, they are rights that try to go beyond the framework of individual rights to focus on collective concepts, such as community or people collective-developmental: right to a healthy environment, right to cultural heritage, right to sustainability
4 th -generation human rights <i>in statu nascendi</i>	the new generation of human rights is emerging, which would include rights that cannot be included in the 1,2 and 3 generation – the new rights related to bioethics, especially in relation to technological development (biotech) and information and communication technologies and cyberspace (infotech) right to digital identity, e.g.

4.2. Development of HR regulations

- domestic constitutionalism;
- international law, UN (**UDHR** on 10 December 1948);
- European law (**ECHR** + **CFR**).

European law <i>sensu largo</i>	European law <i>sensu stricto</i>
---------------------------------	-----------------------------------

laws and legal traditions that are either shared by or characteristic of the countries of Europe – e.g., COE, EU	supranational order of EU law (former EC) EEC → EC → EU (ever closer integration)
------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------

5. The Role of the ECHR in EU law

Article 6(3) TEU „Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

5.1. The evolution in EU (EEC) Law

The TEEC did not include any reference to fundamental or human right.

the case-law	the Charter as a soft law	the Charter – binding
Stork , case 1/58 Ruhrkohlen-Verkaufsgesellschaft , joined cases 36, 37, 38-59 and 40- 59 Stauder , 29/69 Internationale Handelsgesellschaft , case 11/70 Nold , case 4/73 Rutili , case 36/75	solemnly proclaimed by Parliament, the Council and the Commission in Nice on 7 Dec. 2000 A modified Charter formed part of the defunct European Constitution (2004)	The Lisbon Treaty (2007), also gave force to the Charter, so it enjoys the same legal value as the EU treaties (except for the opt-out Protocol). It came into force of the Lisbon Treaty on 1 December 2009 and enshrines certain political, social, and economic rights for the EU citizens as well as residents into EU law Monitoring: FRA

6. Charter of Fundamental Rights

6.1. Introduction

- declared in 2000, and came into force in December 2009 along with the Lisbon Treaty;
- based on ECHR;
- applies to the institutions of the EU and its Member States when implementing EU law;
- under the Charter, the EU must act and legislate consistently with the Charter and the EU’s courts will strike down legislation adopted by the EU’s institutions;

- brings together the most important personal freedoms and rights enjoyed by citizens of the EU into one legally binding document;
- sometimes confused with the ECHR, but operates within separate legal frameworks.

The European Communities (now the EU) were originally created as an organisation with an essentially economic scope of action. The fundamental rights, which for a long time were not mentioned in the Treaties, and were anyway considered as guaranteed by the ECHR, to which the Member States were signatories.

Some states raised their objections to such field of integration à **the opt-out Protocol (no 30)**.

6.2. Content of CFR

CFR contains 54 articles divided into seven titles. The first six titles deal with substantive rights, while the last title deals with the interpretation and application of the Charter.

- The first title (**Dignity**) guarantees the [right to life](#) and [personal integrity](#) and prohibits [torture](#), [slavery](#), the [death penalty](#), [eugenic practices](#) and [reproductive human cloning](#).
- The second title (**Freedoms**) covers liberty, [privacy](#), protection of [personal data](#), marriage, [thought](#), [religion](#), [expression](#), [assembly](#), [education](#), [work](#), property and [asylum](#).
- The third title (**Equality**) covers [equality before the law](#), prohibition of all discrimination including on basis of [disability](#), age and [sexual orientation](#), [cultural](#), religious and [linguistic diversity](#), the [rights of children](#) and the [elderly](#).
- The fourth title (**Solidarity**) covers social and [workers' rights](#) including the [right to fair working conditions](#), protection against unjustified [dismissal](#), and [access to health care](#), [social](#) and [housing assistance](#), [environmental protection](#) and [consumer protection](#).
- The fifth title (**Citizen's Rights**) covers the rights of the EU citizens such as the [right to vote](#) in election to the [EP](#) and to move freely within the EU. It also includes several administrative rights such as a right to good administration, to access documents and to petition the EP.
- The sixth title (**Justice**) covers justice issues such as the [right to an effective remedy](#), a fair trial, to the [presumption of innocence](#), the [principle of legality](#), [non-retrospectivity](#) and [double jeopardy](#).
- The seventh title (**General Provisions**) concerns the interpretation and application of the Charter.

6.3. A triple function of CFR

„**Living Instrument**” – a concept of living constitution („a constitution/ Convention/ Charter is **more than text**” – it is also a dynamic combination of extra-legal values and legal practice).

- as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter;
- as general principles, the Charter may also be relied upon as providing grounds for judicial review;
- operates as a source of authority for the ‘discovery’ of general principles of EU law.

Considering a triple function of the Charter:

- an aid to interpretation for, both EU secondary law and national law;
- providing grounds for judicial review;
- source of authority for the ‘discovery’ of general principles of EU law.

Article 19(1) TEU that states “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

- the core of the rule of law is effective judicial protection, which requires the independence, quality and efficiency of national justice systems.

7. Review questions

1. Explain the difference between the terms „right” and „freedom.”
2. List and describe the legal levels of human rights protection.
3. Describe 3 main aspects of rule of law as an European principle and common value.
4. List and describe the generations of human rights.
5. Describe the development of (human) fundamental rights in the ECC/EC/EU.
6. Explain a triple function of the CFR.

8. Sources

8.1. Literature

Buksiński T., Monocentrism and Multicentrism as Legal Theories in the Global Era, „[Archiwum filozofii prawa i filozofii społecznej](#), Journal of the Polish Section of IVR,” 2015, no. 1(10), 5–13.

Chelala P., A Europe of Values: From Shared History to Common Objectives [in:] M. Carballo, U. Hjelmars (eds.), Public Opinion Polling in a Globalized World, Springer Verlag: Berlin – Heidelberg 2008, 43–59.

Domaradzki S., Khvostova M., Pupovac D., Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse, „Human Rights Review” 2019, vol. 20 (4), 423–443.

Foret F., Calligaro O., European Values Challenges and Opportunities for EU Governance, Routledge, London 2020.

Loenarts K., Exploring the Limits of the EU Charter of Fundamental Rights, „European Constitutional Law Review,” 2012, no. 8, 375–403.

Neuman G.L., Human Rights And Constitutional Rights: Harmony And Dissonance, „Stanford Law Review” 2003, vol. 55 (5), 1863–1900.

Peerce S., Hervey T., Kenner J., Ward A., The EU Charter of Fundamental Rights. A Commentary, Bloomsbury Publishing, London 2020.

Tamanha B.Z., On the Rule of Law: History, Politics, Theory, Cambridge University Press, Cambridge 2004.

8.2. Legal texts

Consolidated version of the Treaty on the Functioning of the European Union – Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 115, 9.5.2008, p. 313–314.

The Constitution of The Republic of Poland of 2 April 1997, published in Dziennik Ustaw No. 78, item 483, www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

8.3. Judgements

Judgment of the Court of 4 February 1959. Friedrich Stork & Cie v High Authority of the European Coal and Steel Community. Case 1/58.

Judgment of the Court of 15 July 1960. Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community. Joined cases 36, 37, 38–59 and 40–59.

Judgment of the Court of 12 November 1969. Erich Stauder v City of Ulm – Sozialamt. Reference for a preliminary ruling: Verwaltungsgericht Stuttgart – Germany. Case 29–69.

Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany. Case 11–70.

Judgment of the Court of 14 May 1974. J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities. Case 4–73.

Judgment of the Court of 28 October 1975. Roland Rutili v Ministre de l'intérieur. Reference for a preliminary ruling: Tribunal administratif de Paris – France. Public policy. Case 36–75.

8.4. Online sources

Britannica, Rule of law, <https://www.britannica.com/topic/rule-of-law>

Citizens Information, Charter of Fundamental Rights, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html

COE, Evolution of human rights, <https://www.coe.int/en/web/compass/the-evolution-of-human-rights>

COE, Human Rights Protection and Development, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/human-rights-development-cddh>

EU, EU principles, https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en

OHCHR, Development of human rights, <https://www.ohchr.org/en/development/development-and-human-rights>

Stanford Encyclopedia of Philosophy, Rule of law, <https://plato.stanford.edu/entries/rule-of-law/>

Chapter 2

CFR RIGHTS' GUARANTEES: RIGHTS AND THEIR EFFECTS IN PRACTICE

Anna Juryk

Krakow University of Economics
College of Economics, Finance and Law
Institute of Law

ORCID: 0000-0002-5057-3734

1. Objective of the Chapter 2

The basic didactic objective is to familiarize the reader with the concept of fundamental rights of the EU regarding the protection of the family understood as a whole, as well as its individual members. In this regard, it is important to determine the scope of the concept of family and the areas in which it requires protection.

The second important objective is to present the evolution of family protection from the perspective of the fundamental rights of the EU. In this respect, the case law of the CJEU plays a very important role.

2. Respect for private and family life

2.1. Legal basis

Article 7 CFR	Article 8 ECHR
Everyone has the right to respect for his or her private and family life, home and communications.	<ol style="list-style-type: none">1. Everyone has the right to respect for his private and family life, his home and his correspondence.2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.2. Explanations relating to the CFR

These explanations were originally prepared by the Praesidium of the Convention which drafted the Charter. Explanations have no legal force, but they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

As Explanations relating to the CFR the rights guaranteed in Article 7 correspond to those guaranteed by Article 8 ECHR. To take account of developments in technology the word „correspondence” has been replaced by „communications.”

The right to privacy – pursuant to Article 8 ECHR – guarantees the individual protection not only against interference by public authorities, but also by private persons, institutions, including mass media.

2.3. No definition of the concept of “privacy”

Privacy is derived from the dignity of man, which is the basic law itself and the factual sources of other fundamental rights. Dignity is a feeling, self-awareness, self-respect, honour and pride.

Privacy is seen as the right to be left alone, the right to live as one chooses without interference or attack by others, except when justified by a clear social need. Sometimes privacy is seen as an opportunity for an individual to decide about his or her personal affairs without the interference of third parties.

Privacy	
internal aspect	external aspect
individual autonomy	the ability to freely shape the relationship of an individual with other people the ability to shape identity in relations with the environment

2.4. Examples of personal goods subject to protection under the right to privacy

Personal goods subject to protection under the right to privacy	personal data protection,
	physical and mental integrity
	the right to respect for the apartment (house)
	the right to identity
	right to sexual orientation

2.5. Surname and first name as an element of identity

An important component of private life is identity, known as the right to identity. It is understood as the right to have a name, family, mental and physical identity (or biological and gender identity).

Establishing a surname and first name is an element of private and family life and is protected by Article 8 ECHR.

2.6. Name in the case law of the CJEU

In the case C-169/91 of **Konstantinidis**, a Greek national whose name was transliterated by the German authorities from Greek into Latin alphabet, which, according to Mr. Konstantinidis, violated his personal dignity, causing difficulties in his personal life and professional. In turn, the CJEU stated that such transliteration is a violation of freedom of establishment.

In case C-148/02 of **Carlos Garcia Avello**, the CJEU stated that restrictions on the possibility of changing the name cannot be considered justified by the public interest, and the aim of the authorities should be to introduce such regulations that ensure the proper identification of persons in relations between an individual and the state and between an individual and society. In addition, the changing social situation means that there are fewer and fewer arguments for a child to inherit his father's surname. Therefore, nationals of a Member State who are legally residing in the territory of another Member State may, on the basis of Article 12 TEEC to demand protection against discrimination on the grounds of nationality in terms of the rules for changing a surname.

In the case C-353/06 of **Grunkin**, the authorities of a Member State cannot refuse to register a name under which a person has already been legally registered under the rules of another Member State, unless it would be contrary to public policy rules.

2.7. No definition of the term “family” and “family life”

- difficulties with defining this concept on the basis of the Charter, this also applies to Polish law;
- Proposed definition of the concept of “family life”;
- In turn, “family life” is expressed through certain functions of the family;
- economic function, consisting in meeting living needs; – educational and socializing function, preparing the young generation for independent life by passing on the basic values of culture, moral values and the ability to live with other people;
- caring function, providing care for dependent family members.

The family life “refers to a set of interpersonal relationships resulting from permanent ties of blood or law.”

The jurisprudence of the ECtHR shows that family life is a matter of fact and depends on the practical existence of close interpersonal ties. Family life takes place not only within marriage. It is about real and close contact between specific people. The mere fact of consanguinity or affinity is not decisive.

2.8. Immigration policy and right to respect for family life

The right to respect for family life includes: the right to live with close relatives, which means that Member States cannot expel such a person, or allow that person to enter and stay on their territory. The expulsion of a person from the country where his or her close relatives live may constitute an interference with the right to respect for family life (case C-540/03).

2.9. Right to respect for home and communications

According to Garlicki, the term home means “a permanent, basic place of residence of a given person or family, i.e. a place with which this person (family) has permanent physical and emotional ties, a place that this person (family) treats as their own.”

This concept has also been extended to the office of a person who works as a freelancer (**Roquette Frères**, case C-94/00). Violation of the right to respect for home can be any entering it by unauthorized persons and staying there without the consent of the authorized person. Most often, the right to respect for home will be violated by public authorities through unlawful searches or searches.

The jurisprudence of the ECHR has emphasized that permanent home deprivation constitutes a continuous interference with the right guaranteed by Article 8 ECHR. It is similar with the deliberate destruction of houses.

The term “communication” is understood very broadly.

Respecting the right to communicate is a guarantee of confidentiality of communication. Violation of the freedom of communication may occur both through its control by public authorities and unlawful familiarization with the content of correspondence by unauthorized persons.

2.10. No possibility to confirm the legal relationship between parents and children born to a surrogate mother.

ECHR, Mennesson v. France, app. 65192/11

The essence of the case: the impossibility in France for 2 children born in California following the conclusion of a surrogacy agreement and their intended parents to obtain confirmation of the relationship between parents and children legally established in the USA.

ECHR conclusion of the Mennesson judgment:

There has been no violation of the right of the child or of the intended parents to respect their family life, but there has been a violation

of the children’s right to respect for private life! The failure of French law to recognize the legal relationship between children and legal parents has resulted in a serious breach of the right to respect for the private life of children born abroad by a surrogate mother, which is that everyone should be able to establish the essence of their identity, including the legal relationship between parents and children.

Transcription of a child’s foreign birth certificate

Resolution of the Supreme Administrative Court of December 2, 2019, II OPS 1/19

Polish law does not know the institution of “same-sex parents” and does not grant parental rights to partnerships. The Supreme Administrative Court, recognizing the contradiction with the basic principles of Polish family law, the transcription of a birth certificate in which persons of the same sex were entered as parents, takes into account the consequences that would arise in the Polish legal order as a result of its implementation. The cohesion of the Polish legal system would be at risk, in which Polish birth certificates would function, containing data that could not be included in the act registering the birth of a child in Poland.

Conclusion – it is not possible to enter a “parent” who is not a man in the Polish marital status record instead of the child’s father, as such transcription would be contrary to the basic principles of the Polish legal order.

3. Right to marry and right to found a family

3.1. Legal basis

Article 9 CFR	Article 12 ECHR
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.	Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right

3.2. Nature of the protection of the right to marry and found a family

Protection was granted only to the extent that the right to marry and found a family is guaranteed in the national system concerned. There is no uniform standard of protection in terms of the right to marry and the right to found a family. However, the national margin of appreciation is not unlimited. Firstly, the limitations of the law cannot touch its essence. Secondly, in the case of the right to marry, any limitation must

be defined with sufficient clarity by duly accessible national law, serve to protect a legitimate public or private interest and meet the requirements of proportionality and non-arbitrariness (ECtHR, **Frasik v. Poland**, app. 22933/02, paras. 88–90).

3.3. Explanations relating to the CFR

It is expressly emphasized that Article 9 CFR is based on Article 8 ECHR, but “The wording of the CFR Article has been modernized to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides” (ECtHR, **Frasik v. Poland**, app. 22933/02, paras. 88–90).

3.4. Interpretation of Article 12 ECHR in the light of “today’s requirements”

A transsexual person has the right under Article 12 to marry a person of the same sex to which she belonged before the end of the gender change (adaptation) process (ECtHR, **Goodwin v. The United Kingdom**, app. 28957/9511).

3.5. No right to divorce under Article 9

Article 9 CFR and Article 12 ECHR do not give the right to dissolve a marriage by divorce. The ECtHR found that the impossibility of dissolving a previous marriage cannot be treated as an obstacle to remarriage. The impossibility of dissolving a previous marriage cannot be treated as an obstacle to entering into another marriage. Therefore, there was no violation of Article 12, when the petition for divorce was filed by the person guilty of the breakdown of the marriage, and the refusal of the other spouse was not contrary to the principles of social coexistence (ECtHR, **Babiarz v. Poland**, app. 1955/10).

3.6. Prerequisites for entering into a marriage

Attention! The granting of the right to marry by persons of the same sex is left to the Member States of the EU.

Prerequisites for entering into a marriage	
appropriate age	majority, generally 18 years of age argument from Article 1 CRC “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

monogamous marriage	staying in a relationship recognized as marriage in your own or other legal system means that you do not have the right to enter into a new marriage.
close kinship and affinity	each State is free to determine the degree of closeness that is an obstacle to marriage
freedom and awareness when giving consent to enter into marriage	<p>the lack of intention to get married will occur if the marriage was concluded in order to obtain the right to enter or stay in a given country</p> <p>national legislation must verify the conditions required for marriage and the genuineness of the intention to marry</p> <p>Article 16 Council Directive 2003/86/EC</p> <p>“1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member’s residence permit (...) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship”</p> <p>Article 35 Directive 2004/38/EC</p> <p>“Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.”</p>
form of marriage	<p>It is not a deprivation of the right to marry that the obligation to marry in the form prescribed by law, and not in the form of religion.</p> <p>Article 2 Directive 2004/38/EC</p> <p>“Family member’ means:</p> <p>(a) the spouse;</p> <p>(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (...)”</p>

3.7. Right to found a family

Currently, the establishment of a family is not perceived only as consequence of marriage, but also when two people are in another relationship defined by law (partnership, cohabitation). The family is a social fact, it is the result of two people remaining in a permanent and lasting relationship. This is due to the realities of modern life, when more and more relationships are informal.

Article 2(2b) and Article 3(2a) Directive 2004/38/EC

“The right to enter and stay in an EU country was also granted to a partner with whom an Union citizen is in a lasting and duly certified relationship and “any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen.”

3.8. Procreation

State authorities cannot deprive or limit this ability (prevent having more children) by forced sterilization or abortion (ECtHR, *V.C. v. Slovakia*, app. 18968/07).

4. Review questions

4.1. Article 7 CFR

1. How to understand the concept of privacy in the context of the right to respect for private and family life?
2. Please indicate the difference between the regulation of Article 7 CFR and Article 8 ECHR
3. What role does the Convention play in the interpretation of the Charter?
4. How to understand the identity of an individual and what does it consist of?
5. How to understand the concept of family life in the context of the right to respect for private and family life?
6. What does the term home mean in the context of the right to respect for private and family life?
7. What is the importance of the protection of personal data in the context of the right to respect for private and family life?
8. Please discuss the jurisprudence of the CJEU on surnames as elements of the right to respect for private and family life.
9. Please discuss EU regulation of connecting family members and how they relate to the right to respect for private and family life?

4.2. Article 9 CFR

1. Please discuss contemporary family models.
2. Is the right to start a family dependent on getting married?
3. How is the concept of family understood in the light of Article 9 CFR?
4. How to understand the concept of a family member in the context of the EU entitlement to family reunification?
5. Does Article CFR implies the right to divorce?
6. How artificial procreation and surrogacy affect the interpretation of Article 9 CFR?

5. Case-law & case-study

5.1. Case law

Article 7 CFR	
<p>Hewitt and Harman v. United Kingdom, app. 12175/86, Report of the Commission on 9 May 1989, https://hudoc.echr.coe.int/eng?i=001-45372</p>	<p>The collection and storage of information on an individual's private life obtained as a result of telephone tapping and postal communications surveillance constitutes an interference with the exercise of the right to respect for private life</p>
<p>M.S. v. Sweden, app. 20837/92, Report of the Commission on 11 April 1996, https://hudoc.echr.coe.int/eng?i=001-45889</p>	<p>The protection of medical data is essential to the right to privacy and respect for private and family life (Article 8 ECHR). Confidentiality of this data guarantees the protection of the patient's privacy and trust in the health service. The right to respect for private life will not be violated if the patient's medical records are transferred from one institution to another and the data contained therein are effectively and properly secured against abuse</p>
<p>Judgment of the Court (Sixth Chamber) of 30 March 1993, Christos Konstantinidis v Stadt Altensteig – Standesamt and Landratsamt Calw – Ordnungsamt, case C-168/91</p>	<p>“Article 52 of the Treaty must be interpreted as meaning that it is contrary to that provision for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.”</p>
<p>Judgment of the Court of 2 October 2003, Carlos Garcia Avello v Belgian State, case C-148/02</p>	<p>“Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State”</p>

Judgment of the Court (Grand Chamber) of 27 June 2006, **European Parliament v Council of the European Union**, case C-540/03

“The right to respect for family life within the meaning of Article 8 ECHR is among the fundamental rights which, according to the Court’s settled case-law, are protected in Community law. This right to live with one’s close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory.

The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives.

The Convention on the Rights of the Child also recognises the principle of respect for family life. The Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9(1) CRC thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will and, in accordance with Article 10(1), it follows from that obligation that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification are to be dealt with by States Parties in a positive, humane and expeditious manner.

The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child’s best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

These various instruments stress the importance to a child of family life and recommend that States have regard to the child’s interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.”

<p>Judgment of the Court (Grand Chamber) of 25 July 2008, Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, case C-127/08</p>	<p>“1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.</p> <p>2. Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.”</p>
<p>Judgment of the Court (Fourth Chamber) of 2 October 2014, U v Stadt Karlsruhe, case C-101/13</p>	<p>“1. The Annex to Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009 must be interpreted as requiring the machine readable personal data page of passports issued by the Member States to satisfy all the compulsory specifications provided for by Part 1 of Document 9303 of the International Civil Aviation Organisation (ICAO).</p> <p>2. The Annex to Regulation No 2252/2004, as amended by Regulation No 444/2009, read in conjunction with International Civil Aviation Organisation Document 9303, Part 1, must be interpreted, where the law of a Member State provides that a person’s name comprises his forenames and surname, as not precluding that State from being entitled nevertheless to enter the birth name either as a primary identifier</p>

	<p>in Field 06 of the machine readable personal data page of the passport or as a secondary identifier in Field 07 of that page or in a single field composed of Fields 06 and 07.</p> <p>3. The Annex to Regulation No 2252/2004, as amended by Regulation No 444/2009, read in conjunction with the provisions of International Civil Aviation Organisation Document 9303, Part 1, Section IV, point 8.6, must be interpreted, where the law of a Member State provides that a person's name comprises his forenames and surname, as precluding that State from being entitled to enter the birth name as an optional item of personal data in Field 13 of the machine readable personal data page of the passport.</p> <p>4. The Annex to Regulation No 2252/2004, as amended by Regulation No 444/2009, read in conjunction with International Civil Aviation Organisation Document 9303, Part 1, must be interpreted, in the light of Article 7 of the Charter, as meaning that, where a Member State whose law provides that a person's name comprises his forenames and surname chooses nevertheless to include the birth name of the passport holder in Fields 06 and/or 07 of the machine readable personal data page of the passport, that State is required to state clearly in the caption of those fields that the birth name is entered there.”</p>
<p>Judgment of the Court (Fourth Chamber) of 17 October 2013 Michael Schwarz v Stadt Bochum, case C-291/12</p>	<p>“24 Article 7 CFR states, inter alia, that everyone has the right to respect for his or her private life. Under Article 8(1) thereof, everyone has the right to the protection of personal data concerning him or her.</p> <p>25 It follows from a joint reading of those articles that, as a general rule, any processing of personal data by a third party may constitute a threat to those rights.</p> <p>26 From the outset, it should be borne in mind that the right to respect for private life with regard to the processing of personal data concerns any information relating to an identified or identifiable individual (Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert [2010] ECR I-11063, paragraph 52, and Joined Cases C-468/10 and C-469/10 ASNEF and FECEMD [2011] ECR I-12181, paragraph 42).</p>

	<p>27 Fingerprints constitute personal data, as they objectively contain unique information about individuals which allows those individuals to be identified with precision (see, to that effect, in particular, European Court of Human Rights judgment in <i>S. and Marper v. United Kingdom</i>, §§ 68 and 84, ECHR 2008).</p> <p>30 In those circumstances, the taking and storing of fingerprints by the national authorities which is governed by Article 1(2) of Regulation No 2252/2004 constitutes a threat to the rights to respect for private life and the protection of personal data. Accordingly, it must be ascertained whether that twofold threat is justified.”</p>
<p>Judgment of the Court (Fourth Chamber) of 16 April 2015, W.P. Willems and Others v Burgemeester van Nuth and Others, cases C-446/12-C-449/12</p>	<p>“1. Article 1(3) of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009, must be interpreted as meaning that that regulation is not applicable to identity cards issued by a Member States to its nationals, such as Netherlands identity cards, regardless of the period of validity and the possibility of using them for the purposes of travel outside that State.</p> <p>2. Article 4(3) of Regulation No 2252/2004, as amended by Regulation No 444/2009, must be interpreted as meaning that it does not require the Member States to guarantee, in their legislation, that biometric data collected and stored in accordance with that regulation will not be collected, processed and used for purposes other than the issue of the passport or travel document, since that is not a matter which falls within the scope of that regulation.”</p>
<p>Mennesson v. France, app. 65192/11, 12 February 2012, https://hudoc.echr.coe.int/eng?i=002-9528</p>	<p>“As the Court has observed, respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned (see paragraph 80 above). As domestic law currently stands, the third and fourth applicants are in a position of legal uncertainty.</p>

	<p>While it is true that a legal parent-child relationship with the first and second applicants is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society."</p>
<p>Advisory opinion of 10 April 2019 concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, https://hudoc.echr.coe.int/fre?i=003-6380464-8364383</p>	<p>"1. the child's right to respect for private life within the meaning of Article 8 ECHR requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";</p> <p>2. the child's right to respect for private life within the meaning of Article 8 ECHR does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests."</p>
<p>Resolution of the Panel of Seven Judges of the Supreme Administrative Court of Poland of 2 December 2019, case II OPS 1/19</p>	<p>"The provision of Article 104(5) and Article 107(3) of the Act of November 28, 2014. Law on civil status records (Journal of Laws of 2014, item 1741, as amended) in connection with Article 7 of the Act of 4 February 2011. Private international law (Journal of Laws of 2015, item 1792) does not allow the transcription of a foreign birth certificate of a child in which persons of the same sex are entered as parents."</p>

Article 9 CFR	
<p>Schalk and Kopf v. Austria, app. 30141/04, 24 June 2010, https://hudoc.echr.coe.int/eng?i=001-99605</p>	<p>“61. Regard being had to Article 9 ECHR, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.</p> <p>62. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see <i>B. and L. v. the United Kingdom</i>, cited above, § 36).</p> <p>63. In conclusion, the Court finds that Article 12 ECHR does not impose an obligation on the respondent Government to grant a same-sex couple such as the applicants access to marriage.”</p>
<p>Judgment of the Court of 23 September 2003, Secretary of State for the Home Department v. Hacene Akrich, case C-109/01</p>	<p>“1. In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.</p> <p>2. Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.</p> <p>3. Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the</p>

	<p>Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.</p> <p>4. Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine.”</p>
<p>Judgment of the Court (Grand Chamber) of 25 July 2008, Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, case C-127/08,</p>	<p>“1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.</p>
	<p>2. Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.”</p>

<p>Judgment of the Court (Grand Chamber) of 5 June 2018, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, case C-673/16</p>	<p>“1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.</p> <p>2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.”</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

5.2. Case study 1

Adam, an 8-year-old boy residing in the UK, was removed from his mother's care on suspicion of being sexually abused by her and placed in the care of a foster family. John, no mother of Adam, maintained close contact with the child from his birth. John applied many times for permission to maintain contact with the child throughout his stay in the foster family. Does within the meaning of Article 8 ECHR, close relatives other than the parents have the right to maintain contact with the child?

Comment and conclusion

According to the judgment of the ECHR – case of ECtHR, **Boyle v. The United Kingdom**, app. 16580/90, respecting the right to family life in not only parents, but also other close relatives (e.g. uncle) who have established a family relationship with the child. Therefore, denying such a relative access to a minor child constitutes a violation of his right to respect for family life and the family life of the child himself.

5.3. Case study 2

Anna runs a music shop on two floors of a building where her private apartments were also located (rented from the owner of the building). It turned out that a large part of the CDs were illegal. The police obtained a search warrant at Anna's house and seized several thousand illegal CDs. The police also searched Anna's bedroom, where they found Anna's private papers. Was there a violation of the right to respect for home within the meaning of Article 7 CFR?

Comment and conclusion

Commercial or rented premises may be considered a “house” within the meaning of Article 8 ECHR (ECtHR, **Chappell v. The United Kingdom**, app. 10461/83).

5.4. Case study 3

The son of Jan and Ewa Nowak, from Rome, was born with the genetic disease cystic fibrosis. His parents are carriers of this genetic disease, though they are healthy themselves. When Mrs. Ewa became pregnant again, the same disease was found in the foetus. Ewa had an abortion for medical reasons. The Nowaks want to have a child through in vitro insemination, but they want a genetic diagnosis before implantation. Italian law forbids it, although it allows in vitro insemination to couples who are infertile or where the man has a sexually transmitted disease, such as HIV or hepatitis B and C. The only way to have a healthy baby was to terminate the pregnancy for medical reasons each time the foetus was diagnosed, which was a painful experience for the parents. Can the ban on genetic diagnosis of an embryo in Italian law have negative consequences for the right to respect for private and family life of the Nowaks?

Comment and conclusion

The pain of losing a child through abortion. Inconsistency of Italian law: does not allow genetic diagnosis of the foetus, but allows abortion, allows genetic diagnosis of the foetus, for example, infertile persons and carriers of infectious diseases, but not carriers of genetic diseases. The Nowaks' right to respect for family and private life was violated (ECtHR, **Costa and Pavan v. Italy**, app. 54270/10).

6. Sources

6.1. Literature

Braciak J., The right to privacy [Prawo do prywatności] [in:] ed. B. Banaszak, A. Preisner, Civil rights and freedoms in the Constitution of the Republic of Poland [Prawa i wolności obywatelskie w Konstytucji RP], Warsaw 2002.

Children's rights in international law [Prawa dziecka w prawie międzynarodowym], ed. E. Karska, Warsaw 2014.

Freeman M., Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child, Leiden 2007.

Fundamental rights and best interests of the child in transnational family, eds. E. Bergamini, Ragni Ch., Deana F., Intersentia 2019.

Fundamental rights in the law and practice of the European Union [Prawa podstawowe w prawie i praktyce Unii Europejskiej], ed. C. Mik, K. Gałki, Toruń 2009.

Garlicki L. [in:] Convention for the Protection of Human Rights and Fundamental Freedoms [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności], ed. L. Garlicki, vol. I, 518.

Kamiński I.C. [in:] Charter of Fundamental Rights of the European Union. Commentary [Karta Praw Podstawowych Unii Europejskiej. Komentarz], ed. A. Wróbel, Warsaw 2020, Article 9, Legalis online.

Kański L., The right to privacy, the inviolability of the home and the secrecy of correspondence [Prawo do prywatności, nienaruszalności mieszkania i tajemnicy korespondencji] [in:] ed. R. Wieruszewski, Human rights. Legal Model [Model prawny], Wrocław–Warsaw–Kraków 1991.

Kopff A., The concept of the right to intimacy and to the privacy of personal life [Koncepcja prawa do intymności i do prywatności życia osobistego], SC 1972, vol. XX.

Krawiec G., Transcription of a foreign birth certificate of a same-sex child in a relationship [Transkrypcja zagranicznego aktu urodzenia dziecka osób tej samej płci pozostających w związku], „Studia Prawnicze. Rozprawy i Materiały” 2019, No. 2 (25), DOI: 10.34697/2451-0807-sp-2019-2-001.

Mik C., Charter of Fundamental Rights of the European Union. Basic issues [Karta Praw Podstawowych Unii Europejskiej. Zagadnienia podstawowe] [in:] ed. A. Podraza, Treaty of Nice [Traktat Nicejski], Lublin 2001.

Simonides J., *International Protection of Human Rights [Międzynarodowa ochrona praw człowieka]*, Warsaw 1977.

Sobczak J. [in:] *Charter of Fundamental Rights of the European Union. Commentary*, ed. A. Wróbel, Warsaw 2020, Article 7, Legalis online.

6.2. Legal texts

Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, OJ 1991 No. 120 item 526.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77–123.

Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.

6.3. Judgements

ECtHR, *Babiarz v. Poland*, Application no. 1955/10, 10 January 2017.

ECtHR, *Boyle v. The United Kingdom*, Application no. 16580/90, 28 February 1994.

ECtHR, *Chappell v. The United Kingdom*, Application no. 10461/83, 30 March 1989.

ECtHR, *Costa and Pavan v. Italy*, Application no. 54270/10, 28 August 2012.

ECtHR, *Frasik v. Poland*, Application no. 22933/02, 5 May 2010.

ECtHR, *Goodwin v. The United Kingdom*, Application no. 28957/9511, July 2002.

ECtHR, *Menesson v. France*, Application no. 65192/11, 26 June 2014.

ECtHR, *V.C. v. Slovakia*, Application no. 18968/07, 8 November 2011.

Judgment of the Court (Sixth Chamber) of 30 March 1993. *Christos Konstantinidis v Stadt Altensteig – Standesamt and Landratsamt*

Calw – Ordnungsamt. Reference for a preliminary ruling: Amtsgericht Tübingen – Germany. Case C-168/91.

Judgment of the Court of 22 October 2002. Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities. Reference for a preliminary ruling: Cour de cassation – France. Case C-94/00.

Judgment of the Court of 2 October 2003. Carlos Garcia Avello v Belgian State. Reference for a preliminary ruling: Conseil d'État – Belgium. Case C-148/02.

Judgment of the Court (Grand Chamber) of 27 June 2006. European Parliament v Council of the European Union. Case C-540/03.

Judgment of the Court (Grand Chamber) of 14 October 2008. Stefan Grunkin and Dorothee Regina Paul. Reference for a preliminary ruling: Amtsgericht Flensburg, Germany. Case C-353/06.

6.4. Online sources

CJEU, Jak działa Trybunał – podstawowe fakty, https://www.youtube.com/watch?v=j7KMKxeBaKw&ab_channel=CourtofJusticeoftheEuropeanUnion

ECHR – Film o Europejskim Trybunale Praw Człowieka (Polish version), https://www.youtube.com/watch?v=C4-R-__IKqj0&ab_channel=EuropeanCourtOfHumanRights

Mirocha Ł., Surrogacy (Leihmutterschaft) in the current jurisprudence of the European Court of Human Rights in Strasbourg, Warsaw 2017, <https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Mirocha-%C5%81.-Tzw.-macierzy%C5%84stwo-zast%C4%99pcze-surrogacy-Leihmutterschaft-w-bie%C5%BC%C4%85cym-orzecznictwie-Europejskiego-Trybuna%C5%82u-Praw-Cz%C5%82owieka-w-Strasburgu.pdf>

Chapter 3

JUDICIAL METHODS OF IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

Agata Nodzak

University of the Commission of National Education in Krakow
Institute of Law, Economics and Administration

ORCID: 0000-0003-4779-0030

1. Objective of the Chapter 3

The didactic objective is to acquire knowledge of the meaning of the Charter and the methods of its application in the activity of the courts.

2. Methods of applying the Charter by the judiciary

EU law is an integral part of the legal systems of individual Member States, which means that national courts are obliged to apply this law, including the CFR, in all matters that fall within its scope of application. Thus, national courts (e.g. administrative courts) acquire the status of EU constitutional courts, which have jurisdiction to examine the compatibility of national law with EU law, including the compatibility of national law with EU fundamental rights. Given this, it must be assumed that national courts are obliged to interpret national law in accordance with EU law, including fundamental rights.

The application of the CFR takes place:

1. in proceedings before the CJEU;
2. in proceedings before national courts.

According to Article 263 TFEU, anyone may bring an action before the CJEU against acts of secondary legislation provided that:

1. it relates directly to the complainant;
2. the individual brings an action against an EU legal act that does not require additional implementing measures and directly concerns him or her.

An indirect route is to bring a complaint before a national court, in proceedings before which there will be:

1. questions concerning the interpretation of EU rules and their compatibility with the CFR;
2. doubts as to the compatibility of the actions of national authorities with the CFR;
3. the question of the incompatibility of the provisions of the CFR with national law.

In addition to dealing with a complaint, the Court also has the power to take action in proceedings for violation of the Treaties, as provided for in Articles 258–260 TFEU. These proceedings are initiated by the EC

as part of its enforcement mechanisms when a Member State is in breach of its Treaty obligations.

Treaty infringement proceedings allow for the protection of fundamental rights in the EU and can apply when:

1. a Member State fails to implement parts of EU human rights law;
2. a Member State applies EU law in a manner contrary to fundamental rights, including those set out in the CFR.

For national courts, the court should first assess whether the case constitutes a matter of EU law pursuant to Article 51 CFR. On this topic, details are provided in the chapter: **Non-Judicial Methods of Implementation of the Charter of Fundamental Rights** of this study.

The qualification of a case by a national court as an EU law case determines the possibility/obligation for the national court to undertake further substantive actions (see Baran 2014, 476), and in particular the application of the CFR and the assessment of compliance with EU law.

The national court, in order to correctly apply the provisions of the CFR, is obliged in each case to determine the nature of the provision it intends to apply (see Grzeszczak & Szmigielski 2015, 15), for example, whether they are in the nature of rights or principles, whether it is possible to apply them indirectly or directly, what obligations arise for the court when applying a particular provision of the CFR.

Next, the national court should establish the relationship of a particular provision of the CFR to provisions arising from other sources of law (e.g. domestic legislation) and relevant to the case in question.

National courts are entitled to refer questions to the CJEU for a preliminary ruling under Article 267 TFEU:

1. when they have doubts about the interpretation of the rights contained in the CFR or their application;
2. when they have doubts as to the compatibility of an act of EU secondary legislation with the CFR.

3. Review questions

1. Can national courts apply the provisions of the CFR?
2. Can an individual invoke the provisions of the CFR in legal proceedings?

3. Does an individual have the right to bring an action before the CJEU against acts of EU derived law?
4. What action should a national court take in determining the application of the provisions of the CFR?

4. Case-law & case-study

4.1. Caselaw

<p>Judgment of the Provincial Administrative Court in Wrocław (Poland), case I SA/Wr 365/19</p>	<p>“The broad scope of application of the Charter of Fundamental Rights of the European Union (hereinafter: CFR/Carta) results in administrative courts acquiring the role of EU constitutional courts examining not only the compliance of national law with EU law, but also the compliance of national law with fundamental rights recognised in the EU system.</p> <p>The above means that the administrative judge is obliged to interpret the law and control the actions of the administration in accordance with fundamental rights. This also applies to procedural rights, as it is through them that the individual enforces his or her dignitary status. A key right is that arising from Article 47 CFR – the right to an effective remedy and access to an impartial tribunal. According to the aforementioned provision, everyone whose rights and freedoms guaranteed by Union law have been violated has the right to an effective remedy before a tribunal in accordance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law (second and third sentences of the provision).”</p>
<p>Miasto Łowicz v Skarb Państwa, cases C-558/18 and C-563/18</p>	<p>“It is clear from settled case-law that the preliminary ruling procedure provided for in Article 267 TFEU is a key element of the judicial system established by the Treaties, since, by establishing a dialogue between the courts, in particular between the Court and the courts of the Member States, it aims to ensure a uniform interpretation of Union law, thus making it possible to ensure its coherence, its full effectiveness and autonomy and, lastly, the distinctiveness of the law established by the Treaties (Opinion 2/13 of 18 December 2014. EU:C:2014:2454, paragraph 176; and judgment of 24 October 2018, XC and Others, C-234/17, EU:C:2018:853, paragraph 41). It is also settled case-law of the Court that</p>

	<p>Article 267 TFEU confers on national courts the broadest possible power to refer questions to the Court where they consider that questions relating to the interpretation or assessment of the validity of provisions of Union law have arisen in a case pending before them which require an answer in order to resolve the dispute before them. Furthermore, the national courts are free to exercise that power at any stage of the proceedings which they consider appropriate (judgments: 5 October 2010, Elchinov, C-173/09, EU:C:2010:581, paragraph 26; and 24 October 2018, XC e.a., C-234/17, EU:C:2018:853, paragraph 42 and the case law cited therein). A provision of national law cannot therefore prevent a national court from exercising that power, which is in fact an integral part of the system of cooperation between national courts and the Court established by Article 267 TFEU and inherent in the exercise of the functions conferred on national courts by that provision as courts applying European Union law.”</p>
<p>Åklagaren v Hans Åkerberg Fransson, case C-617/10</p>	<p>“Additional tax obligations and criminal tax proceedings, and thus measures of the kind applied to the accused in the main case because of the incorrect information he provided in relation to VAT, constitute the implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (formerly Articles 2 and 22 of the Sixth Directive) and Article 325 TFEU and therefore an act of application of Union law within the meaning of Article 51(1) CFR. The fact that the national provisions serving as a basis for those tax obligations and criminal proceedings were not adopted in order to transpose Directive 2006/112 does not undermine the above conclusion, since their application constitutes a sanction for infringement of the provisions of that directive and is therefore intended to fulfil the obligation imposed on Member States by the Treaties to sanction effectively actions liable to affect the financial interests of the Union. However, where a court of a Member State proceeds to a review of the compatibility with fundamental rights of a provision of national law or of an action by national authorities which constitutes an act of application of Union law within the meaning of Article 51(1) CFR – and this is the case where the action of the Member States is not determined in full by provisions of Union law – national authorities and courts are entitled to apply national standards for the protection of fundamental rights, in so far as the application of those standard</p>

	<p>s does not call into question the level of protection resulting from the Charter as interpreted by the Court or the primacy, uniformity and effectiveness of Union law (...). To that end, national courts, when interpreting the provisions of the Charter, have the possibility, and in some cases the obligation, to refer to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.”</p>
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

4.2. Case study

Using examples from the case law of national courts and the case law of the CJEU:

1. Characterise the grounds for application of the CFR by national courts.
2. Identify the grounds on which national courts make a preliminary reference to the CJEU.

5. Sources

5.1. Literature

Baran M., Stosowanie z urzędu prawa Unii Europejskiej przez sądy krajowe [Application of European Union law by national courts of their own motion], Warszawa: Lex a Wolters Kluwer bussines 2014, p. 476.

Barcik J., Problematyka stosowania Karty Praw Podstawowych UE przez sądy polskie [Application of the Charter of Fundamental Rights of the EU by Polish courts], „Iustitia,” 2015, vol. 3, p. 153.

Bojarski Ł., Schindlauer D., Wladasch K., Wróblewski M., Karta Praw Podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników [The Charter of Fundamental Rights as a Living Instrument. Manual. Handbook for legal practitioners], Instytut Prawa i Społeczeństwa INPRIS, Ośrodek Badań Studiów i Legislacji Krajowej Rady Radców Prawnych, Warszawa 2014, p.45-48].

Grzeszczak R., Szmigielski A., Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych [The judicial application of the Charter of Fundamental Rights of the EU in relation to Member States – reflections on the case-law of the Court of Justice and the practice of national courts], „Europejski Przegląd Sądowy” 2015, vol. 10, p. 13-15.

Wróbel A., Charter of Fundamental Rights of the European Union. Commentary, [Karta Praw Podstawowych Unii Europejskiej. Komentarz], C.H. Beck, Warsaw 2020.

5.2. Judgements

Judgment of the Provincial Administrative Court in Wrocław (Poland) of 22 July 2019, case I SA/Wr 365/19, <https://orzeczenia.nsa.gov.pl/doc/C6A0F6F041>

Judgment of the Court (Grand Chamber) of 26 February 2013 (request for a preliminary ruling from the Haparanda tingsrätt – Sweden) – Åklagaren v Hans Åkerberg Fransson. Case C-617/10.

Judgment of the Court (Grand Chamber) of 26 March 2020 (requests for a preliminary ruling from the Sąd Okręgowy w Łodzi and the Sąd Okręgowy w Warszawie – Poland) – Miasto Łowicz v Skarb Państwa – Wojewoda Łódzki (C-558/18) and Prokurator Generalny, represented by the Prokuratura Krajowa, formerly the Prokuratura Okręgowa w Płocku v VX, WW, XV (C-563/18). Joined Cases C-558/18 and C-563/18.

Chapter 4

NON-JUDICIAL METHODS OF IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

Agata Nodzak

University of the Commission of National Education in Krakow
Institute of Law, Economics and Administration

ORCID: 0000-0003-4779-0030

1. Objective of the Chapter 4

The didactic objective is to obtain knowledge of the meaning of the Charter and methods of its application in the activities of non-judicial State bodies. The knowledge thus obtained is intended to make it possible to assess whether, and to what extent, there is an application of the Charter to the creation of a specific regulation of national law.

2. Application of the CFR at Member State level

According to Article 51(1) CFR, Member States have an obligation to respect rights, uphold principles and promote the application of the Charter.

Article 6 TEU

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Therefore, when implementing EU law, Member States must respect and promote the application of the Charter. This obligation rests with all Member State authorities, including, inter alia, on national legislators, administration bodies, courts.

Examples of statements on the meaning and role of the CFR

“Reinforcing the EU Charter: Rights of people in the EU in the next decade,” 23 December 2020. <https://fra.europa.eu/en/video/2020/reinforcing-eu-charter-key-statements-panellists>

Speakers: Vera Jourova, Vice-President of the EC; Michael O’Flaherty, FRA Director; Koen Lenaerts, President of the CJEU; Francisca Van Dunem, Minister of Justice, Portugal.

The use of CFR in the law-making process in individual Member States ensures that national legislation is fully compliant with the Charter and thus with EU law, and contributes to the promotion of its provisions.

Article 51 CFR Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. 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.

According to Article 51(1) CFR, EU fundamental rights apply at the national level, only when Member States “implement EU law.”

“Implementing Union law” covers all kinds of national measures from all Member State authorities: it includes national legislative or policy acts from central and decentralised bodies, from higher and lower legislatures, from administrative bodies, etc. All national measures that can be traced to EU legal acts constitute the “implementation of Union law.” In scenarios in which EU legal acts are transposed by national legislation and further executed (on the basis of this national legislation) by other kinds of legislative or administrative measures, all levels of national measures qualify as “implementing Union law.” (FRA 2018)

In the science of law, explanations of the concept of “implementation of EU law” can be found.

“It is therefore necessary to depart from the linguistic and logical interpretation of this unfortunate term in Polish and, taking into account other language versions of the term, to assume that Member States are bound by the Charter’s provisions to the extent that they “implement” Union law, with the term implement being understood to include legislative implementation and jurisprudential implementation, i.e. both law making by Member States and the application of EU law by Member States and the application of Member State law in the context of EU law. Undoubtedly, the process of application of EU law referred to in the provision of the first sentence of Article 51(1) also includes the process of its interpretation, with the proviso that, with regard to domestic law, it is mandatory here to interpret it in accordance with the provisions of EU law. Accordingly, national courts within the limits of their jurisdiction are obliged, as far as possible, to interpret domestic law in accordance with the provisions of the Charter. This is consistent with the CJ’s well-established jurisprudence, according to which the courts should ascertain whether an interpretation of domestic law in accordance with the Directives does not, in a specific case, conflict with the fundamental rights protected by Community law or with other general principles of that law, such as, inter alia, the principle of proportionality.” (Wróbel 2020, 98).

This is a broad understanding of the concept of “implementing EU law.”

Article 52 CFR Scope and interpretation of rights and principles

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

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.

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Full account shall be taken of national laws and practices as specified in this Charter.

The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

The Charter makes, in Article 52(5), a distinction between “rights” and “principles.” Both these types of Charter provisions are binding.

National authorities and courts remain free to apply national standards of protection of fundamental rights. The level of protection provided by the Charter is a minimum standard for national measures that are a manifestation of the implementation of EU law.

The implementation of EU law, including the implementation of the, can take place not only on the grounds of the activity of national courts, but also by national legislative bodies and national public administration.

3. Implementation of the CFR by national legislative authorities

Implementation of the Charter by national legislatures can take place:

1. in order to transpose specific substantive or procedural requirements set forth in a legal act of the Union (Table 1);
2. outside the process of transposing EU legal acts (Table 2).

Table 1. (source FRA 2018)

Lp.	Types of legislative actions/measures	Description	Examples from practice
1.	Introduction of national law regulations to transpose specific substantive or procedural requirements set forth in an EU legal act.	The EU legal act provides for the introduction of new national measures transposing specific substantive and procedural requirements. These national measures qualify as „implementation of Union law.” EU fundamental rights are fully applicable.	Johan Piek v. Ministerie van Landbouw, Natuurbeheer en Visserij , case C-384/05
2.	Ensuring consistency of national law with an EU legal act based on pre-existing national legislation.	Existing national law implements EU law to the extent that it already reflects the EU legal act. It is necessary to check the full compatibility of these laws with the EU legal act in question and review their compliance with the Charter.	Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft , case 5/88
3.	EU acts (e.g., directives) leave discretion to the Member States, and the exercise of that discretion qualifies as the „exercise of Union law,” regardless of whether it is a mandatory or optional exercise of discretion.	Existing or newly introduced national legislation makes use of the discretionary power granted by the EU act. EU fundamental rights apply.	Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu , case C-276/12
4.	The introduction or application of national provisions on remedies, sanctions and enforcement measures that will apply	National measures applied to ensure the application and effectiveness of EU law (sanctions, remedies and enforcement measures) qualify as „implementation of Union law” within	

	to the EU legal act in question or to national legislation transposing the EU legal act.	the meaning of Article 51(1). EU fundamental rights apply to these national measures if they are applied in this context. This principle normally applies regardless of whether the Union act in question contains specific provisions on the effectiveness (sanctions, remedies and enforcement) of EU law.	
5.	National legal concepts are applied by the EU legislator.	Provisions of Union acts may refer to national law concepts – for example, in the absence of harmonization at the EU level. In this way, the EU legislator reaches for concepts of national law that fall under the competence of Member States. This creates a situation of exercising EU law within the meaning of Article 51 CFR, but only if these concepts are referred to within the framework of the EU law provisions under consideration. The national legislator should verify that these national concepts are „verified with the Charter” when they apply in the context of EU law.	Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa) , case C-442/00

Table 2. (source FRA 2018)

Lp.	Types of legislative actions/measures	Description	Examples from practice
1.	A national legislative measure falls within the scope of an EU act.	National legislation should fall within the scope of the EU legal act with respect to its subjective scope, its substantive scope, or its temporal scope.	Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo , case C-206/13

2.	A national legislative measure is prohibited under EU law and must therefore be based on an authorization (justification, derogation) under EU law	The implementation of CFR occurs in situations where a Member State uses an exception provided for in EU law to justify a national act that would otherwise be prohibited under EU law. These national measures require authorization under EU law and therefore EU fundamental rights apply. This form of enforcement is based on the understanding that EU law cannot authorize Member States to take measures in breach of CFR.	The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan et al. , case C-159/90
3.	National legal measures providing for remedies, sanctions or enforcement measures that may be applied in connection with EU legal acts.	National measures taken to ensure the application and effectiveness of EU law qualify as „implementing EU law” within the meaning of Article 51(1). EU fundamental rights apply to these national measures when used in this context.	
4.	A national remedy covers a legal concept that has been used in an EU legal act.	Sometimes an EU legal act refers to concepts of national law. EU fundamental rights apply to these national concepts when they are used in conjunction with EU legal acts or with national provisions transposing the EU legal act in question.	
5.	The national measure includes voluntary references to EU law.	The Charter does not apply in circumstances where the national legislator, when regulating purely internal situations, voluntarily refers to provisions or concepts of EU law.	Teresa Cicala v Regione Siciliana , case C-482/10

4. Application of CFR by the administrations of Member States

The application of the Charter, according to Article 51, applies to both central and regional or local authorities only insofar as they apply EU law, by which is meant any circumstance in which an authority of a Member State, implements EU law, e.g. when it applies national legislation that falls within the scope of application of EU law. With this in mind, an individual will be able to invoke the Charter of Fundamental Rights in relations with a public administration body, i.e. to raise an allegation of a violation of the Charter when provisions of EU law other than the Charter apply or should apply in a given case.

Examples of such cases are tax law cases: in VAT cases, in excise duties, in tax proceedings or in criminal proceedings, to which EU law provisions apply, e.g. Directive 2011/16 on administrative cooperation in the field of taxation (see Franczak). In all of the above-mentioned cases, an individual acting as a taxpayer can invoke all the fundamental rights granted by the CFR.

5. Other non-judicial mechanisms for applying the CFR

In addition to the implementation and application of the Charter by the legislature and public administration, attention should be paid to other non-judicial mechanisms for applying the Charter. These are, in particular:

1. Complaint to the European Ombudsman – according to Article 228 TFEU and Article 43 CFR, any citizen of the EU and any natural or legal person residing or having its registered office in a Member State has the right to apply to the European Ombudsman.
2. Petition to the EP – according to Article 44 CFR, any citizen of the EU and any natural or legal person residing or having its registered office in a Member State has the right to petition the EP.

6. Review questions

1. When do EU fundamental rights apply at national level?
2. What does the implementation of EU law by Member States mean?
3. What are the requirements for using the Charter?
4. By what means can the national legislator implement EU fundamental rights?

7. Case-law & case-study

7.1. Case study 1

<p>Florescu et al. v Casa Județeană de Pensii Sibiu et al., case C 258/14</p>	<p>“The CJEU was asked whether Article 6 TEU and Article 17 („Property”) of the card preclude a regulation of national law which prohibits the pooling of net pensions with income related to activities performed for public institutions – when the amount of this pension exceeds the amount of the average national gross salary constituting the basis for establishing the state budget in the field of social security. The regulation of national law has been subject to adopted so that the national authorities can fulfill the commitments they have made to the Union in the framework of the economic program allowing that Member State to benefit from the balance-of-payments financial support mechanism, which were set out in Article 3(5) of Decision 2009/45920 and Memorandum of Understanding. Among the above The protocol provides for a reduction in overall public sector wages and a reform of the pension system. The CJEU held that when a Member State adopts measures under discretion conferred on it by an act of EU law, they must be regarded as applying it right within the meaning of Article 51(1) card. Objectives set out in Article 3(5) of Decision 2009/45920, and the objectives set out in the Memorandum of Understanding are sufficiently detailed and precise so as to make it possible to conclude that the prohibition resulting from the national law in question merger is intended to apply that Protocol and that Decision and, consequently, EU law within the meaning of Article 51(1) CFR.”</p>
<p>Daouidi, case C-395/15</p>	<p>“In this case, the legitimacy of dismissal was considered, in particular whether there was a violation of the principle of non-discrimination, the right to protection in the event of unjustified dismissal from work, the right to fair and fair working conditions, the right to social security benefits, and the right to health protection, as defined in Article 21(1), Article 30, 31, Article 34(1) and Article 35 cards. The applicant had been in a situation of temporary incapacity for work for an indefinite period due to an accident at work, and was dismissed on disciplinary grounds. In the case, the CJEU stated in particular that, as regards Directive 2000/7817, the fact that a person is in a situation of temporary incapacity for work within the meaning of national law for an indefinite period of time as a result of an accident at work does not in itself mean that the limitation of that person can be classified as „long-term” within the meaning of the term „disability” mentioned in directive.”</p>

1. Read carefully the content of the CJEU rulings listed above.
2. Based on reading the CJEU judgments explain the concept of application and implementation of the CFR by the national legislator.
3. Assess whether a citizen can rely on the provisions of the CFR in cases before national authorities.

7.2. Case study 2

AGET Iraklis v. Ergasias et al., case C-201/15	The ruling concerns the implementation under national law of the assumptions of Directive 98/59/EC, the aim of which was to approximate the laws of the Member States on collective redundancies.
----------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1. Read carefully the content of the CJEU ruling listed above.
2. Indicate which provisions of the CFR are referred to in the above-mentioned cases.
3. Indicate in which cases a Member State may use an exception provided for in EU law to justify a national act that would otherwise be prohibited under EU law.

7.3. Case study 3

Åklagaren v Hans Åkerberg Fransson, case C-617/10	The Åkerberg Fransson case involved a Swedish fisherman. The tax authorities in Sweden accused him of improperly reporting income that reduced the amount of VAT due. The fisherman was fined for tax offenses in an administrative proceeding, part of which involved VAT not being paid on time. At the same time, the prosecutor initiated criminal proceedings against Åkerberg for tax evasion for the same act. The Swedish court sent an inquiry to the CJEU to find out whether initiating administrative and criminal proceedings in the same case, the purpose of which is to punish the fisherman, is in compliance with Article 50 CFR establishing the ne bis in idem principle. The CJEU first determined whether the CFR applies at all in this case. It therefore made use of the Explanation on the Interpretation of Article 51(1) CFR. Article 51 CFR limits the scope of the Charter's application to Member States only to situations in which they apply Union law. With this interpretation, the Court ruled that in this case it was sufficient that the penalties imposed on the fisherman were at least partially related to VAT for the Charter to apply. According to the CJEU, it did not matter that the national
-------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

	<p>regulations under which the penalties were imposed did not explicitly refer to the relevant EU rules. The prejudicial argument for the need to apply the Charter in this case was that EU Member States are obliged to establish effective VAT collection measures on the basis of Council Directive 2006/112/EC on the common VAT system. In addition to this, the fact that the case concerns the financial interests of the EU itself, whose resources are partly based on VAT revenues, was important. According to the CJEU, the link between secondary EU law and national law safeguarding the EU's financial interests in VAT enforcement was sufficient to establish the application of the Charter in this case to the actions of an EU Member State.</p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1. On the basis of the CJEU ruling, identify the prerequisites for the application of the CFR by administrative authorities.
2. Determine when an individual can invoke the provisions of the CFR in proceedings before a public administration body.

7.4. Case study 4

<p>RPEP 2019–2024, Rule 226 : Right of petition</p>	<ol style="list-style-type: none"> 1. In accordance with Article 227 TFEU, any citizen of the EU and any natural or legal person residing or having its registered office in a Member State shall have the right to address, individually or in association with other citizens or persons, a petition to Parliament on a matter which comes within the EU's fields of activity and which affects him, her or it directly. 2. Petitions to Parliament shall show the name and the permanent address of each petitioner. 3. Submissions to Parliament that are clearly not intended to be a petition shall not be registered as petitions; instead, they shall be forwarded without delay to the appropriate service for further treatment. 4. Where a petition is signed by several natural or legal persons, the signatories shall designate a representative and deputy representatives who shall be regarded as the petitioners for the purposes of this Title. If no such representatives have been designated the first signatory or another appropriate person shall be regarded as the petitioner. 5. Each petitioner may at any time withdraw his, her or its signature from the petition. If all petitioners withdraw their signatures, the petition shall become null and void.
-----------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

	<ol style="list-style-type: none">6. Petitions must be written in an official language of the EU. Petitions written in any other language will be considered only if the petitioner has attached a translation in an official language. Parliament's correspondence with the petitioner shall employ the official language in which the translation is drawn up. The Bureau may decide that petitions and correspondence with petitioners may be drafted in other languages which, in accordance with the constitutional order of the Member States concerned, enjoy official status in all or part of their territory.7. Petitions can be submitted either by post or through the Petitions portal, which shall be made available on Parliament's website and which shall guide the petitioner to formulate the petition in a manner that complies with paragraphs 1 and 2.8. Where several petitions are received on a similar subject matter, they may be dealt with jointly.9. Petitions shall be entered in a register in the order in which they are received if they comply with the conditions laid down in paragraph 2. Petitions that do not comply with those conditions shall be filed, and the petitioner shall be informed of the reasons for this.10. Petitions entered in the register shall be forwarded by the President to the committee responsible for petitions, which shall first establish the admissibility of the petition in accordance with Article 227 TFEU. If the committee fails to reach a consensus on the admissibility of the petition, it shall, at the request of at least one-third of the members of the committee, be declared admissible.11. Petitions that have been declared inadmissible by the committee shall be filed. The petitioner shall be informed of the decision and the reasons for it. Where possible, alternative means of redress may be recommended.12. Petitions, once registered, shall become public documents, and the name of the petitioner, possible co-petitioners and possible supporters and the contents of the petition may be published by Parliament for reasons of transparency. The petitioner, co-petitioners and supporters shall be informed accordingly.
--	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

	<p>13. Notwithstanding paragraph 12, the petitioner, a co-petitioner or a supporter may request that his, her or its name be withheld in order to protect his, her or its privacy, in which case Parliament shall comply with the request. Where the petitioner's complaint cannot be investigated because of the petitioner's anonymity, the petitioner shall be consulted on the further steps to be taken.</p> <p>14. In order to protect the rights of third parties, Parliament may, on its own motion or at the request of the third party concerned, anonymise a petition and/or other data contained therein, if it sees fit to do so.</p> <p>15. Petitions addressed to Parliament by natural or legal persons who are neither citizens of the EU nor reside in a Member State nor have their registered office in a Member State shall be registered and filed separately. The President shall send a monthly record of such petitions received during the previous month, indicating their subject-matter, to the committee. The committee may ask to see those which it wishes to consider</p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>RPEP 2019–2024, Rule 227: Examination of petitions</p>	<p>1. Admissible petitions shall be considered by the committee responsible for petitions in the course of its normal activity, either through discussion at a regular meeting or by written procedure. Petitioners may be invited to participate in meetings of the committee if their petition is to be the subject of discussion, or they may ask to be present. The right to speak shall be granted to petitioners at the discretion of the Chair.</p> <p>2. With regard to an admissible petition, the committee may decide to submit a short motion for a resolution to Parliament, provided that the Conference of Committee Chairs is informed in advance and there is no objection by the Conference of Presidents. Such motions for resolutions shall be placed on the draft agenda of the part-session to be held no later than eight weeks after the adoption of those motions for resolutions in the committee. They shall be put to a single vote. The Conference of Presidents may propose to apply Rule 160, failing which those motions for resolutions shall be put to the vote without debate.</p> <p>3. Where, with regard to an admissible petition, the committee intends to draw up under Rule 54(1) an own initiative report dealing with, in particular, the application or interpretation of Union law or proposed changes to existing law, the committee responsible for the subject-matter shall</p>
-----------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

	<p>be associated in accordance with Rule 56 and Rule 57. The committee shall without a vote accept suggestions for parts of the motion for a resolution received from the committee responsible for the subject-matter where those suggestions deal with the application or interpretation of Union law or changes to existing law. If the committee does not accept such suggestions, the committee responsible for the subject matter may table them directly in plenary.</p> <ol style="list-style-type: none"> 4. Signatories may lend support to, or withdraw support from, an admissible petition on the Petitions Portal. That portal shall be made available on Parliament's website. 5. The committee may request assistance from the Commission particularly in the form of information on the application of, or compliance with, Union law and information or documents relevant to the petition. Representatives of the Commission shall be invited to attend meetings of the committee. 6. The committee may ask the President to forward its opinion or recommendation to the Commission, the Council or the Member State authority concerned for its action or response. 7. The committee shall report to Parliament annually on the outcome of its deliberations and, where appropriate, on the measures taken by the Council or the Commission on petitions referred to them by Parliament. 8. When consideration of an admissible petition has been concluded, it shall be declared closed by a decision of the committee. 9. The petitioner shall be informed of all relevant decisions taken by the committee and the reasons thereof. 10. A petition may be re-opened by committee decision, if relevant new facts relating to the petition have been brought to its attention and the petitioner so requests. 11. By a majority of its members, the committee shall adopt guidelines for the treatment of petitions in accordance with these Rules of Procedure.
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

On the basis of Articles 226 and 227 RPEP 2019–2024, determine:

1. what entities have the right to file petitions;
2. what formal conditions must be met;
3. write the procedure for consideration of petitions.

8. Sources

8.1. Literature

Bojarski Ł., Schindlauer D., Wladasch K., Wróblewski M., Karta Praw Podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników [The Charter of Fundamental Rights as a Living Instrument. Manual. Handbook for legal practitioners], Instytut Prawa i Społeczeństwa INPRIS, Ośrodek Badań Studiów i Legislacji Krajowej Rady Radców Prawnych, Warszawa 2014, p.109–118.

Franczak A., Ochrona praw podatnika. Diagnoza sytuacji [Protection of Taxpayers' Rights. Diagnosis of the situation], Wolters Kluwer 2021, p. 352.

Janicka I., Wiaderek G., Znaczenie Karty praw podstawowych jako zasady horyzontalnej w perspektywie finansowej Unii Europejskiej na lata 2021–2027 [The relevance of the Charter of Fundamental Rights as a horizontal principle in the European Union Financial Perspective 2021–2027], „Kwartalnik Trzeci Sektor,” 2022, vol. 58(2).

Wróbel A., O niektórych problemach sądowego stosowania Karty Praw Podstawowych [On some problems in the judicial application of the Charter of Fundamental Rights], [in:] Wróbel A., Charter of Fundamental Rights of the European Union. Commentary, [Karta Praw Podstawowych Unii Europejskiej. Komentarz], C.H. Beck, Warsaw 2020.

Wróbel A., Charter of Fundamental Rights of the European Union. Commentary, [Karta Praw Podstawowych Unii Europejskiej. Komentarz], C.H. Beck, Warsaw 2020.

8.2. Legal texts

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011, p. 1–12.

8.3. Judgements

Judgment of the Court (Third Chamber) of 13 July 1989. Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany. Case 5/88.

Judgment of the Court of 4 October 1991. The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others. Reference for a preliminary ruling: High Court – Ireland. Case C-159/90.

Judgment of the Court (Sixth Chamber) of 12 December 2002. Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa). Reference for a preliminary ruling: Tribunal Superior de Justicia de Castilla-La Mancha – Spain. Case C-442/00.

Judgment of the Court (Fourth Chamber) of 11 January 2007. Johan Piek v Ministerie van Landbouw, Natuurbeheer en Visserij. Reference for a preliminary ruling: Hoge Raad der Nederlanden – Netherlands. Case C-384/05.

Judgment of the Court (Third Chamber) of 21 December 2011. Teresa Cicala v Regione Siciliana. Reference for a preliminary ruling: Corte dei Conti – sezione giurisdizionale per la Regione Siciliana – Italy. Case C-482/10.

Judgment of the Court (Grand Chamber) of 26 February 2013 (request for a preliminary ruling from the Haparanda tingsrätt – Sweden) – Åklagaren v Hans Åkerberg Fransson. Case C-617/10.

Judgment of the Court (Grand Chamber), 22 October 2013. Jiří Sabou v Finanční ředitelství pro hlavní město Prahu. Request for a preliminary ruling from the Nejvyšší správní soud. Case C-276/12.

Judgment of the Court (Tenth Chamber), 6 March 2014. Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo. Request for a preliminary ruling from the Tribunale amministrativo regionale per la Sicilia. Case C-206/13.

Judgment of the Court (Third Chamber) of 1 December 2016. Mohamed Daouidi v Bootes Plus SL and Others. Request for a preliminary ruling from the Juzgado de lo Social de Barcelona. Case C-395/15.

Judgment of the Court (Grand Chamber) of 21 December 2016. Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis. Request for a preliminary ruling from the Symvoulío tis Epikrateias. Case C-201/15.

Judgment of the Court (Grand Chamber) of 13 June 2017. Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others. Request for a preliminary ruling from the Curtea de Apel Alba Iulia. Case C-258/14.

8.4. Online sources

Banaszak B., Opinia nt. zalet i wad Karty Praw Podstawowych UE, <https://bip.brpo.gov.pl/pliki/1190027113.pdf>

CJEU, Field of Application of The Charter of Fundamental Rights of The European Union, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_charte_-_en.pdf

FRA, Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance, 16 October 2018, <https://fra.europa.eu/en/publication/2018/applying-charter-fundamental-rights-european-union-law-and-policymaking-national>

FRA, Reinforcing the EU Charter: Rights of people in the EU in the next decade, 23 December 2020, <https://fra.europa.eu/en/video/2020/reinforcing-eu-charter-key-statements-panellists>

Franczak A., 044 – Karta Praw Podstawowych w sprawach podatkowych, [dziendobrypodatki.pl](https://dziendobrypodatki.pl/044-karta-praw-podstawowych-w-sprawach-podatkowych-agnieszka-franczak/), <https://dziendobrypodatki.pl/044-karta-praw-podstawowych-w-sprawach-podatkowych-agnieszka-franczak/>

Chapter 5

RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT ELECTIONS

Piotr Uhma

University of the Commission of National Education in Krakow
Institute of Law, Economics and Administration

ORCID: 0000-0002-0559-2151

1. Objective of the Chapter 5

The purpose of this section is to familiarize the reader with the two key provisions of the CFR relating to the right to vote, which are contained in Title V – Citizens' rights.

2. Passive and active electoral rights – Introductory subjects

The implementation of passive and active electoral rights is regulated in Article 39 and 40 CFR. They concern the right to vote and to stand as a candidate at elections to the EP (Article 39 CFR) and the right to vote and to stand as a candidate at municipal elections (Article 40 CFR). The Charter and other EU regulations do not refer to electoral rights in elections to State authorities, they only regulate the rights of EU citizens in elections at the local and supranational level. Both provisions should be considered in conjunction with the provisions on citizenship of the Union, which are regulated in Title II Provisions on Democratic Principles (TEU) and Part Two Non-Discrimination and Citizenship of the Union (TFEU). Both articles apply under the conditions laid down in the Treaties, in accordance with Article 52(2) CFR, which states that 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.

Article 39 CFR Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40 CFR Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 39 CFR is an elaboration of Article 10 TEU. Article 39(1) CFR corresponds to the right guaranteed in Article 20(2) TFEU (also compare the legal base in Article 22 TFEU for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) CFR corresponds to Article 14(3) TEU. Article 39(2) takes over the basic principles of the electoral system in a democratic State. Article 40 CFR reproduces partially Article 22

TFEU. It has to be remembered that the CFR only applies within the scope of EU law and does not prima facie extend or modify any rights already guaranteed under the Treaties.

Article 10 TEU

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. [...]
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 14 TEU

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

Article 20 TFEU

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (...)
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.

Article 22 TFEU

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.
2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and

after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2.1. Relationship of right to vote and to stand as a candidate at elections with other human rights conventions.

The issues of universal suffrage and participation in elections are, inter alia, subject to treaties and documents at the UN and the COE levels. These treaties regulate the possibility of participation in government or the obligation of general suffrage. Their regulations are often general and do not apply to the possibility of elections to a body of an international organization (the EP) or local government elections in another country.

Article 21 UDHR

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 ICCPR

Every citizen shall have the right and the opportunity [...] without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

Article 5(c) ICERD

[...] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service [...]

Article 29 CRPD

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others [...]

The ICERD is notable as at first sight, it appears to leave some normative space for the inclusion of non-citizens within the scope of the proffered undertakings (the right of everyone). However, in a 2004 report, the Committee on the Elimination of Racial Discrimination, responsible for monitoring the implementation of ICERD, noted that: “[S]ome of these rights [in the Convention], such as the right to participate in elections, to vote and to stand for election, may be confined to citizens [...]. Also the CRPD seems to grant political rights to people with disabilities on an equal footing with others, without mentioning anything about citizens (on an equal basis with others).”

However, it appears that for the time-being at least, it is entirely legitimate under the UN Treaties for States to exclude non-citizens from the protective umbrella of the principle of universal suffrage. It is therefore worth remembering that the non-discriminatory application of universal suffrage rights in the context of disability is gaining increasing currency as an issue in the EU.

Article 3 Protocol 1 of the ECHR

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 3 Protocol 1 of the ECHR was initially understood as merely recognising the principle of universal suffrage and creating an obligation on States to hold free elections (rather than conferring any substantive rights). In later years the EComHR began to interpret Article 3 as implying, within the framework of universal suffrage, “certain individual rights, such as the right to vote and the right to stand for election.” These rights, however, were never understood as absolute, as evidenced by early jurisprudence

In the X and Y v. the Netherlands, app. 6753/74, EComHR noted that: “[although] the Commission [...] has ruled that the undertaking of the Contracting Parties to hold free elections implies the recognition of universal suffrage [...] it does not follow that Article 3 accords the right unreservedly to every single individual to take part in elections. It is indeed generally recognised that certain limited groups of individuals may be disqualified from voting, provided that this disqualification is not arbitrary.”

In **Mathieu-Mohin and Clerfayt v. Belgium**, app. 9267/81, ECtHR made plain that:

“[t]he rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations [...] In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 [...] They have a wide margin of appreciation in this sphere.”

At the level of the COE, a sign that voting rights may be granted to foreigners to some extent is Article 6 CPFLLL. However, as of July 2015, it has been ratified by nine Member States (four states have signed, but not ratified it).

Article 6 CPFLLL

1. Each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.
2. However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession, that it intends to confine the application of paragraph 1 to the right to vote only.

2.2. History

In the long history of European integration, there can be discerned a laboured yet persistent drive towards the effective political representation of European citizens. The ideal of a EP which would be directly elected by universal suffrage can be traced back to the birth of the EP itself (or rather, the “Common Assembly” of the ECSC, as it was then known). Almost from the very beginning, the architects of the European Communities had envisaged the creation of a Parliament that would be directly elected by universal suffrage.

The original Article 21 TEECSC provided that the members of the Assembly would either be recruited from the delegates of national parliaments or be directly elected: “The Assembly shall consist of delegates who shall be designated by the respective Parliaments once a year from among their members, or who shall be elected by direct universal suffrage, in accordance with the procedure laid down by each High Contracting Party.” This provision was amended by Article 2(2) TEEC and read:

Article 21 TEECSC

1. The Assembly shall consist of delegates who shall be designated by the respective Parliaments from among their members in accordance with the procedure laid down by each Member State. (...)

3. The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

Yet, because of lack of political will and priority of economic integration over political integration such “uniform procedure” for elections never materialised throughout the 60s. The status quo changed in the 1970s. In 1974, at the summit in Paris, the heads of State and government of the Member States decided on direct and universal elections to the EP, and in 1978 the Council Act on Direct Elections to the European Parliament, signed in 1976, entered into force. In 1979, the first direct and universal elections to the EP took place. 410 deputies were elected. Since then, MEPs have been elected by universal and direct suffrage by the citizens of the Member States. There is no uniform electoral law to the EP. Elections are conducted using procedures established by the Member States.

In 1992, the Maastricht Treaty provided that elections had to be held in accordance with a uniform procedure and that the EP was to draw up a proposal to this effect, for unanimous adoption by the Council. However, since the Council was unable to agree on any of the proposals, the Amsterdam Treaty introduced the possibility of adopting “common principles.” Council Decision 2002/772/EC of 25 June and 23 September 2002 modified the 1976 Electoral Act accordingly, introducing the principle of proportional representation and a number of incompatibilities between national and European mandates.

The last amendments to the 1976 Electoral Act were adopted by Council Decision 2018/994 of 13 July 2018, which includes provisions on the possibility of different voting methods (advance voting, electronic, internet and postal voting); on thresholds; on the protection of personal data; on the penalisation of „double voting” by national legislation; on voting in third countries; and on the possibility of the visibility of European political parties on ballot papers.

With the Lisbon Treaty, the right to vote and to stand as a candidate acquired fundamental right status (Article 39 CFR).

With its position of 3 May 2022 on the proposal for a Council regulation on the election of the MEPs by direct universal suffrage, the EP launched a reform of the European Electoral Act, seeking to transform the 27 separate elections and their diverging rules into a single European election with common minimum standards. (European Parliament legislative resolution of 3 May 2022).

2.3. Field and the scope of application of Article 39

territorial scope	<p>While Article 39 CFR applies to all EU citizens, it is within the competence of Member States to limit the rights it guarantees by residence requirements;</p> <p>“There is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament <u>by reference to the criterion of residence in the territory in which the elections are held.</u>” (M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag, case C-300/04).</p>
jurisdictional scope	<p>Article 39 CFR will (generally) not apply in jurisdictions which fall out with TEU framework or where the EP cannot be characterised as a „legislature.” Since the provisions of the Treaty did not apply to OCTs, the EP could not be regarded as a “legislature” in such territories within the meaning of Article 3 Protocol 1 of the ECHR. This jurisprudence limits the scope of Article 39 CFR by reference to the legal reach of the TEU framework i.e. Union citizens who do not reside in jurisdictions that are bound by the Treaties will not have an absolute right vote and stand in EP elections and will only be enfranchised where the relevant Member State has determined to enfranchise them.</p>
vertical scope	<p>In the current state of EU law, it is for the Member States to determine who to include in the electorate for the purposes of the rights specified at Article 39 CFR and that they have a wide margin of appreciation in this respect. In absence of any further Treaty developments, it is for the Member States to determine the contours of the electorate for the purposes of the EP elections.</p>
personal scope	<p>Article 39 CFR applies to both static and mobile Union citizens and does not require the exercise of free movement rights in order to be activated</p>
protective scope	<p>On the basis of CJEU and ECtHR jurisprudence, it is prudent to view Article 39 CFR primarily as an EU law non-discrimination and equal treatment right and secondarily, as a guarantee against the irrational implementation or application by Member States of the electoral rights which Article 39 CFR guarantees.</p>

2.4. EU legislation / secondary sources of EU law

<p>Council Directive 93/109/EC</p>	<p>Detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the EP for EU citizens residing in a Member State of which they are not nationals.</p>
<p>On 25 November 2021, the EC submitted a proposal to modify Directive 93/109/EC</p>	<p>The directive defines the requirements a national of another EU Member State must satisfy to vote or to stand as a candidate in his/her country of residence. The person must:</p> <ul style="list-style-type: none"> – be an EU citizen – be resident in the EU country in which s/he proposes to vote or to stand as a candidate – satisfy the same conditions as a national of that EU country who wishes to vote or to stand as a candidate (the principle of equality between national and non-national voters). <p>EU citizens may exercise their right to vote and to stand as a candidate either in the EU country of residence or in their home country. No one may vote more than once or stand as a candidate in more than one EU country at the same election. Nothing in Directive 93/109/EC can affect each EU country's rules concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory.</p>
<p>Council Directive 94/80/EC</p>	<p>Detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the EU residing in a Member State of which they are not nationals.</p>
<p>On 25 November 2021, the EC submitted a proposal to modify Directive 94/80/EC</p>	<p>In addition, the directive establish, as general principles, that</p> <ul style="list-style-type: none"> – no one can vote more than once at the same election. – one cannot be a candidate in more than one Member State in the same election. – If an application to stand as a candidate, then, is subject to the same conditions applying to candidates who are nationals. – the directive recognize the states the possibility to directly reserve national citizens the access to certain functions (i.e. those of local government executives). <p>exercising voting rights may be subject to special conditions, related primarily to imposing a certain minimum duration of residence, in those countries where the proportion of foreign residents is greater than 1/5 of the total voting population.</p>

2.5. Major Limitations and Derogations

<p>Limitations and derogations from Article 39 CFR under the Charter.</p>	<p>Article 52(1) CFR</p> <p>Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.</p>
<p>Limitations and derogations from Article 39 CFR on grounds of EU law.</p>	<p>The Directives provide for exceptions to the principle of equal treatment between national and non-national voters where this is deemed to be justified by complications which are specific to a Member State. Such expectations are deemed to be justified where the proportion of EU citizens of voting age, resident in a Member State of which they are not a national, is much greater than the average within the EU as a whole.</p> <p>In such cases Member State may, by way of derogation from the Directives restrict the right to vote and/or restrict the right to stand as a candidate for a specific period of time, elaborated separately for each of the two directives.</p>
<p>Limitation of Article 39 CFR by virtue of the ECHR</p>	<p>Article 52(3) CFR</p> <p>“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent EU law providing more extensive protection.”</p> <ul style="list-style-type: none"> – Limitations to Article 3 Protocol 1 ECHR as expressed within the ECtHR case law (such as limitations on the basis of residence) would likely apply to Article 39 CFR (with the caveat that EU law may – although it does not currently – provide more extensive protection). The most common are: – Limitation on grounds of <u>criminal convictions/incarceration</u>: recent ECtHR cases have confirmed that it is within the competence of States to disenfranchise prisoners so long as there is no general and automatic disenfranchisement of all serving prisoners. – Limitation on grounds of <u>residence requirements</u>: both the ECtHR and the CJEU have determined that it is within the competence of States to apply residence requirements to electoral rights. – Limitation on grounds of <u>mental health problems</u>: persons suffering from mental impairments are legally disenfranchised in the majority of EU states, which still link the loss of legal capacity to disenfranchisement.

3. Review questions

1. How are the electoral rights in the CFR related to similar provisions in the EU Treaties?
2. What is the connection between the electoral rights regulated in the CFR and European citizenship and what does it imply?
3. How the electoral rights described in the CFR are related to similar regulations at the level of the UN and the COE?
4. What electoral rights does a European citizen have in a non-home EU Member State? Is there EU legislation in this area?
5. What are the most common derogations on the right to vote and to vote for European citizens?

4. Case-law & case-study

4.1. Case law

M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag, case C-300/04

“In the proceedings before the referring court, the appellants in the main proceedings challenge the refusal, on the ground that they are resident in Aruba, to enrol them on the register of electors for the election of members of the EP. They submit that under Article 17(1) EC they are citizens of the EU. They maintain that Article 19(2) EC, interpreted in the light of Article 3 of Protocol No 1 to the Convention, recognises their right to vote at elections to the EP even if they are resident in a territory whose name appears in the list of overseas countries and territories („OCTs”) in Annex II to the Treaty.

The questions referred for a preliminary ruling

The first question

By its first question, the Raad van State asks whether Part Two of the Treaty, relating to citizenship of the Union, applies to persons who possess the nationality of a Member State and who are resident or living in a territory which is one of the OCTs referred to in Article 299(3) EC.

The Court’s reply

The second sentence of Article 17(1) EC provides that ‘[e]very person holding the nationality of a Member State shall be a citizen of the Union’.

It is irrelevant, in that regard, that the national of a Member State resides or lives in a territory which is one of the OCTs referred to in Article 299(3) EC. In addition, Article 17(2) EC provides that citizens of the Union are to enjoy the rights conferred by the Treaty and be subject to the duties imposed thereby. It follows that the reply to the first question must be that persons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union in Part Two of the Treaty. (...)

The third question

By its third question, the Raad van State asks whether Article 19(2) EC, read in the light of Articles 189 EC and 190(1) EC, must be interpreted as meaning that a citizen of the Union resident or living in an OCT has the right to vote and to stand as a candidate in elections to the European Parliament. (...)

The Court's reply

It must be stated that the provisions of the Treaty contain no rule defining expressly and precisely who are to be entitled to the right to vote and to stand as a candidate for the European Parliament.

Article 190(4) EC refers to the procedure for those elections. According to that provision, the election of the members of the European Parliament is to take place by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

Article 1 of the 1976 Act provides that members of the European Parliament are to be elected on the basis of proportional representation and that elections are to be by direct universal suffrage and free and secret. Under Article 8 of the 1976 Act, subject to the provisions of that Act, the electoral procedure is to be governed in each Member State by its national provisions but those provisions, which may if appropriate take account of the specific situation in the Member States, must not affect the essentially proportional nature of the voting system.

However, neither Article 190 EC nor the 1976 Act defines expressly and precisely who are to be entitled to the right to vote and to stand as a candidate in elections to the European Parliament.

No clear conclusion can be drawn in that regard from Articles 189 EC and 190 EC, relating to the European Parliament, which state that it is to consist of representatives of the peoples of the Member States, since the term 'peoples', which is not defined, may have different meanings in the Member States and languages of the Union.

It follows from those considerations that, in the current state of Community law, the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State in compliance with Community law. It must, however, be ascertained whether that law precludes a situation such as that in the main proceedings, in which Netherlands nationals residing in Aruba do not have the right to vote and to stand as a candidate in elections to the European Parliament.

First, it should be noted that the OCTs are subject to the special association arrangements set out in Part Four of the Treaty (Articles 182 EC to 188 EC) with the result that, failing express reference, the general provisions of the Treaty do not apply to them (see Leplat, paragraph 10, and *Netherlands v Council*, paragraph 49).

It follows that Articles 189 EC and 190 EC do not apply to those countries and territories and that the Member States are not required to hold elections to the European Parliament there.

Article 3 of Protocol No 1 to the Convention does not preclude that interpretation. Since the provisions of the Treaty do not apply to the OCTs, the European Parliament cannot be regarded as their 'legislature' within the meaning of that provision. On the other hand, it is within the bodies created within the framework of the association between the Community and the OCTs that the population of those countries and territories can express itself, through the authorities which represent it.

Having regard to those matters, the criterion linked to residence does not appear, in principle, to be inappropriate to determine who has the right to vote and to stand as a candidate in elections to the European Parliament.”

4.2. Case study

Read carefully the content of the CJEU rulings listed above. Based on reading the CJEU judgments explain the concept of application and implementation of the right to vote at elections to the EPs by EU citizens resident in a territory whose name appears in the list of OCTs.

5. Sources

5.1. Literature

Besselink L.F.M., *Case C-145/04, Spain v. United Kingdom*, judgment of the Grand Chamber of 12 September 2006; *Case C-300/04, Eman and Sevinger*, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, *Oslin Benito Sevinger and Michiel Godfried Eman v. the Netherlands (Sevinger and Eman)*, *Common Market Law Review* 2008, vol. 3, 787–813.

d'Oliveira H.U.J., *European Citizenship: Its Meaning, Its Potential*, in R Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?*, Law Books in Europe, Munich, 1994.

Mény Y., (ed.), *Building Parliament: 50 years of European Parliament History*, Office for Official Publications of the European Communities, Luxembourg, 2009.

Pinder S., *Steps Towards a Federal European Parliament*, "International Spectator: Italian Journal of International Affairs," 2000, vol. 35, 13 – 20.

Pido F., *Towards direct elections to the European Parliament*, European Communities, 2009.

Reuter P., *La Communauté européenne du charbon et de l'acier*, Paris, 1953.2

Rubio–Marin R., *Transnational Politics and the Democratic Nation–State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, "New York University Law Review," 2006, vol. 81, 190.

Shaw J., *Citizenship: contrasting dynamics at the interface of integration and constitutionalism* [in:] *The Evolution of EU Law*, P. Craig and G. de Burca (eds), Oxford University Press, 2011, 575–609.

Shaw J., *Sovereignty at the Boundaries of the Polity* [in:] *Sovereignty in Transition*, N. Walker, Hart Publishing, Oxford, 2003, 461–500.

Shaw J., *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge, 2007.

Shaw J. and Day S., *European Union electoral rights and the political participation of migrants in host polities*, *International Journal of Population Geography*, 2002, vol. 8, 183–199.

5.2. Legal texts

Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ L 278, 8.10.1976, p. 5–11.

Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, OJ L 178, 16.7.2018, p. 1–3.

Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283, 21.10.2002, p. 1–4.

Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329, 30.12.1993, p. 34–38.

Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ L 368, 31.12.1994, p. 38–47.

European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) – 2022/0902(APP)).

UNGA, Convention on the Rights of Persons with Disabilities (CRPD): resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

UNGA, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 December 1965, United Nations, Treaty Series, vol. 660, 195.

UNGA, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, 171.

5.3. Judgements

EComHR, X and Y v. the Netherlands, Application no. 6753/74, 17 December 1974.

ECtHR, Mathieu–Mohin and Clerfayt v. Belgium, Application no. 9267/81, 2 March 1987.

Judgment of the Court (Grand Chamber) of 12 September 2006. M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag. Reference for a preliminary ruling: Raad van State – Netherlands. Case C-300/04.

5.4. Online sources

De Schutter O., Commentary of the EU Charter of Fundamental Rights, prepared by the EU Network of Independent Experts on Fundamental Rights, http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm