

Explanatory Screening
Chapter 23 – Judiciary and Fundamental Rights

Session 3 – Fundamental Rights

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3.2. "Basic Human Rights (Articles of the Charter of Fundamental Rights of the EU with particular importance).

- Article 1: Human dignity
 - Emphasise the fundamental importance of this provision.
 - Is not contained in the ECHR but recognised by case-law (e.g. *decision of European Court of Human Rights of 22 November 1995, C.R. v United Kingdom*).
 - Note that human dignity is implicitly or explicitly recognised as the fundamental right par excellence in all Member State constitutional orders.
 - The European Court of Justice has mentioned human dignity several times.¹ The Court, however, acknowledged human dignity expressively as an objective principle of Community law very late (2001). In its decision regarding the Directive on the legal protection of biotechnical inventions² the Court³ ruled: ‘It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.’ In the case *Omega* the Court, has pointed out that ‘the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law’⁴:

"Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity."
 - Human dignity is a horizontal principle that characterises the entire Charter.

¹ ECJ, Case C-36/98, *Arben Kaba*, [2000] ECR I-2623 (judgment of 11 April 2000), para. 20. Regarding the discrimination of a transsexual, see : ECJ, Case C-13/94, *P. v. S.*, [1996] ECR, I-2143 (judgment of 30 April 1996), para. 22: ‘To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.’

² Directive 98/44/EC of 6 July 1996 of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJ L 213 of 30.07.1998, p.13.

³ ECJ, Case C-377/98, *the Netherlands*, [2001] ECR I-07079 (judgment of 9 October 2001), para. 70.

⁴ ECJ, Case C-36/02, *OMEGA*, [2004] ECR I-9609 (judgment of 14 October 2004), para. 91.

- Article 2: Right to life
 - This is a right protected by the ECHR (Article 2(1)).
 - The European Court of Human Rights has defined the limits of this right in its case-law. In particular:
 - The right to life is "internationally, the supreme value in the hierarchy of human rights" (*ECHR case. Streletz, Kessler and Krenz v Germany, judgment of 22 March 2001*).
 - The right to life belongs to the non-derogable rights even in times of war and public emergencies. The only exception is provided for in Article 15(2) ECHR in respect of deaths resulting from lawful acts of war. Since human rights continue to apply in times of armed conflict, States may only resort to the exceptions provided for under international humanitarian law if they declare a state of war and notify the Secretary General of the Council of Europe of any measures they have taken derogating from their obligations under Article 2. In times of peace as well as internal disturbances not amounting to a state of war, security forces may kill a person intentionally or non-intentionally only in the three instances enlisted in Article 2(2) ECHR: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and c) in action lawfully taken for the purpose of quelling a riot or insurrection. But in all these cases force, and in particular fire arms, may only be used if absolutely necessary, and the European Court of Human Rights applies a fairly strict requirement of proportionality. In the case of *McCann v. UK*, which relates to the killing by British security forces of three IRA members, who were suspected of having planned a terrorist attack in Gibraltar, the Court found a violation of Article 2 on the ground that the British Government had wrongly assessed the situation and had provided the soldiers with inadequate information for the preparation of their action.⁵ A typical case, in which even intentional killings by the police in defence of a person from unlawful violence would be permitted, is the liberation of hostages, whose life is in acute danger.⁶ But to kill a person for the sole purpose of protecting property would be in violation of the principle of proportionality. Similarly, the use of firearms for the purpose of effecting a lawful arrest or of preventing the escape of a detainee is only permitted in case of very dangerous persons.

Abortion

Article 2(1) ECHR, do not contain any definition when protection of the right to life – on conception or after birth - should start. The European Court of Human Rights has not yet decided on this issue, but from the travaux préparatoires of Article 2 ECHR, from the practice of member States of the Council of Europe legalizing abortion and from the few decisions of the

⁵ Eur. Ct. H.R., *McCann v. United Kingdom* (Appl. No. 18984/91), judgment of 27 September 1995, *Ser. A*, No.324, para. 213.

⁶ Cf., e.g., Eur. Ct. H.R., *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997, *Rep.* 1997-VI, para. 194.

European Commission of Human Rights,⁷ one might conclude that the full protection of the right to life starts only with the birth of the child.

Until the European Court of Human Rights might decide differently, one can, therefore, conclude that any reasonable legalization of abortion does not amount to a violation of the positive obligation of States to protect the right to life. Whether a total criminalization of abortion, on the other hand, violates human rights, depends on the interpretation of other rights, such as the right to privacy and non-discrimination of the mother.

In any case, legalisation of the abortion is a question under the sole competence of the Member States.

Euthanasia and assisted suicide

In principle, the positive obligation to protect the right to life starts with birth and ends with the natural death of a human being. In view of recent discussions and legislation in EU member States aimed at the partial decriminalization of active voluntary euthanasia and assisted suicide, this question is becoming more and more important.

The European Court of Human Rights, in the landmark case of *Pretty v. UK*, decided on the question whether the penal prohibition of assisted suicide by the British Suicide Act of 1961 constituted a violation of the rights to life, privacy and other rights of the ECHR. The applicant was a 43-year-old woman suffering from a progressive neuro-degenerative disease of motor cells which leads to a slow, fully conscious and very painful death, usually as a result of weakness of the breathing muscles. As she was paralyzed and not any more able to commit suicide, she asked the Director of Public Prosecutions to give an undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wishes. Her request was dismissed by the Director of Public Prosecutions, British courts (including the House of Lords) and the European Court of Human Rights.⁸ In relation to the right to life the Court concluded that ‘no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention’.⁹ In respect to the right to privacy, the Court accepted that the refusal of the Director of Public Prosecutions constituted an interference with Article 8(1), but finally held that that this interference was justified as necessary ‘for the protection of the rights of others’,¹⁰ without explaining, however, who was meant by the ‘others’ in the concrete case of Mrs. Pretty.

It follows from this case-law that a strict domestic criminal prohibition of euthanasia and assisted suicide is in accordance with the ECHR and, therefore, also with the EU Charter. Whether, on the other hand, such a criminal prohibition is required by the positive State obligation to protect the right to

⁷ See, e.g., the report of the European Commission of Human Rights in *Brüggemann and Scheuten v. Germany* of 12 July 1977, DR 10, 100.

⁸ Eur. Ct. H.R. (4th sect.), *Pretty v. United Kingdom* (Appl. No. 2346/02), judgment of 29 April 2002, Rep. 2002-III.

⁹ *Ibid.*, para. 40.

¹⁰ *Ibid.*, para. 78.

life was, however, not decided by the Court. There can be no doubt that all forms of non-voluntary euthanasia by State organs, such as those practiced in Nazi Germany, constitutes a violation of Article 2. Whether the partial decriminalization of active voluntary euthanasia and assisted suicide in the Netherlands and Belgium amounts to a human rights violation, depends, however, on a careful balancing of the positive obligation to protect the right to life and the obligation of States to respect the right of human beings to die with dignity, which can be derived from the right to privacy in Article 8 ECHR and Article 7 EU Charter as well as from the strong emphasis on the inviolability of human dignity in Article 1 of the Charter.¹¹

➤ Abolition of the death penalty

- Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

This provision – corresponding to Article 3 of the ECHR - prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.¹² It therefore does not allow any restrictions to the protection of the individual against the imposition of pain or suffering : the author of such prohibited treatment therefore may not seek to justify inflicting torture or an inhuman or treatment by the need to realize a legitimate purpose.

- The evolution of the concept of torture and ill-treatment. Example: the deliberate burning of homes by security forces was deemed to be inhuman treatment, i.e. the prohibition covers not only direct torture of the victims but also the ill-treatment of persons close to the victim and even the belonging to which they are very attached, such as a house (*European Court of Human Rights, 24 April 1998 and 16 November 2000*).
- No derogation is possible of this prohibition: Article 52(3) states that ‘Insofar 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.’ Article 4 of the Charter thus has to be interpreted in accordance with the ECHR, which does not allow for derogations to the prohibition against torture.

¹¹ See the Commentary on Article 1 of the Charter.

¹² See, for example, Eur.Ct. H.R. (GC), *Labita v. Italy* (Appl. No.26772/95), judgment of 6 April 2000, *Rep.* 2000-IV, para. 119.

- The State has a positive obligation to conduct a timely and thorough investigation into allegations of the use of torture, inhuman and degrading treatment or punishment whether applied by agents of the State or non-state actors.
- In order to prevent torture, capital punishment and other cruel, inhuman or degrading treatment or punishment in third countries, was adopted in 2005 the Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

This text establishes specific trade arrangements covering certain types of equipment and products which could be used for the purpose of torture, capital punishment and other cruel, inhuman or degrading treatment or punishment, and in related technical assistance.

This text will be more extensively screened in the chapter related to trade and external relations (chapter 30).

- Article 5: Prohibition of slavery and forced labour

- Remind the principles: slavery-servitude and refer to chapter 19....

- Article 7: Respect for private and family life

- Article 7 of the Charter of Fundamental Rights corresponds to Article 8 of the European Convention on Human Rights (ECHR) and it focuses primarily on individual autonomy. It provides: ‘Everyone has the right to respect for his or her private and family life, home and communications’. The phrasing of the provision (Article 7 of the Charter) is, however, different. The notion ‘correspondence’, which is an element of private life, has been replaced with the expression ‘communications’. This indicates an intention to take into account the contemporary technological development. In other words, the right to respect for communications is now guaranteed regardless of the means of the communications employed. It is noteworthy that the right to protection of personal data in the context of the Charter of Fundamental Rights (Article 8) is distinct from the right to respect for private life.

- In general terms, scope under Community law in principle equivalent to the protection provided by Article 8 of the ECHR (Case C-60/00 *Carpenter* [2001], paragraph 42, Case C-109/01 *Akrich* [2003], paragraph 60).

It should be reminded that Article 52 paragraph 3 of the Charter is intended to ensure the necessary consistence between the Charter and the ECHR by establishing the principle that, in so far as the Charter contains rights ‘which correspond’ to rights guaranteed by the ECHR, ‘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.’

- The European Court of HR has stated that ‘home’ can under certain circumstances extend to business premises. In *Niemietz v. Germany*¹³, which concerned the search of a lawyers’ office and seizure of documents, the Court ruled that state interference with such premises must be justified on the basis of Article 8(2) notwithstanding the fact that the state may have a wide margin of appreciation, which depending on the circumstances would be wider in the case of professional or business activities or premises than in the case for interference with a private home. Also, in *Sté Colas and Others v. France* the Court was of the opinion that under certain circumstances, the rights guaranteed under Article 8 may be interpreted as to include the right to respect for the registered office of a company, agency or business premises.¹⁴

While the ECJ in its earlier jurisprudence, e.g., the *Hoechst* case¹⁵ has taken the position that the protection of the home in Article 8 of the ECHR does not extend to business premises, in the *Roquette Frères* case¹⁶ the ECJ came to the conclusion that business premises are also covered by the protection of the home provided for in Article 8 of the ECHR, even though in such a case the interference may be more far-reaching.

- Increasing importance within Community law on free movement of persons and citizenship – “...the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty” (*Carpenter*, paragraph 38, Case C-459/99 *MRAX* [2002], paragraph 53).
- The questions related to the rights related to Citizenship will be screened in point 4.

- Article 8: Protection of personal data

- Just some general introductory remarks, this point will be treated under 3.6 and Chapter 24 for provisions related to police cooperation.

¹³ Eur. Ct. H.R., *Niemietz v. Germany* (Appl. No. 13710/88), judgment of 16 December 1992, *Ser. A*, No. 251-B, paras. 27-33.

¹⁴ Eur. Ct. H.R. (2nd sect.), *Stés Colas and Others v. France* (Appl. No. 37971/97), judgment of 16 April 2002 (final 16 July 2002), *Rep.* 2002-III, para. 41.

¹⁵ ECJ, Cases C-46/87 and 227/88, *Hoechst AG v. Commission*, (1988) ECR I-2859.

¹⁶ ECJ, Case C-94/00, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and the Commission of the European Communities*, (2002) ECR I-9011 (Judgment of 22 October 2002).

Article 8 of the Charter is an important added value of the Charter since the protection of personal data is not explicitly recognized as a specific right in the framework of existing international instruments on the protection of human rights. It mainly derives from Article 8 of the European Convention on Human Rights (ECHR), including the case law of the European Court on Human Rights, on the protection of privacy and private life, although the protection of personal data is not, as such, explicitly mentioned in the ECHR.

Furthermore, Article 8 of the Charter is inspired by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981). As with the ECHR, this Convention has been ratified by all the Member States of the EU. By virtue of amendments to the Convention, adopted by the Committee of Ministers on 15 June 1999, the European Communities have been allowed to accede to the Convention.

- Article 9: Right to marry and right to found a family

- Article 9 of the Charter contains particularly dynamic and variable concepts. Different societies have dissimilar views regarding marriage, the family and its functions. The European Court of Human Rights stated in *F. v. Switzerland* that ‘(m)atrimony is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit’. Nevertheless, since the European Convention on Human Rights (ECHR) is a ‘living instrument’, *i.e.*, it is interpreted in the light of present-day conditions, it may be inferred that the family as an institution is in a state of transition in structure, functions and values.

Article 9 provides that the right to marry ‘shall be guaranteed in accordance with the national laws’ governing its exercise. This provision is modeled on the corresponding Article 12 of the ECHR, but the reference to men and women has been sidelined.¹⁷ In other words, Article 9 of the Charter is formulated in a gender neutral manner, which is a contribution of the Charter to the relevant legal area since it provides more extensive protection than other human rights instruments. The scope of Article 9 may thus be extended to comprise other forms of marriage than the traditional, if these are established by national legislation. Domestic laws have consequently a crucial role under Article 9 and the national legislature is offered broad latitude in the elaboration of the domestic rules on marriage in accordance with the respective social and cultural concepts.

Article 9 of the Charter does not refer to a supposed ‘right to divorce’, which is thus still governed by domestic laws. The European Court of HR

¹⁷ In fact, this alteration in the Charter has been invoked by the European Court of Human Rights in *Christine Goodwin v. United Kingdom* when arguing for the recognition of transsexuals’ right to marry (Eur. Ct. H.R. (GC), *Christine Goodwin v. United Kingdom* (Appl. No. 28957/95), judgment of 11 July 2002, para. 101). The Court argued in similar terms in the *I. v. United Kingdom* case (Eur. Ct. H.R. (GC), *I. v. United Kingdom* (Appl. No. 25680/94), judgment of 11 July 2002).

has, so far, refused to recognize a right to dissolve a marriage as included under the protection of the ECHR.¹⁸

- The actual scope of the right depends on national legislation (which may or not grant the status of marriage to unions between people of the same sex).
- It is for Member States to determine the conditions under which legal recognition is given to the change of gender of a person.

- Article 10: Freedom of thought, conscience and religion

- In protecting the right to freedom of thought, conscience and religion, Article 10 (1) corresponds to Article 9 (1) ECHR. (The explanations of the EU Charter confirm that the two provisions correspond).

It should be reminded that Article 52 paragraph 3 of the Charter is intended to ensure the necessary consistence between the Charter and the ECHR by establishing the principle that, in so far as the Charter contains rights ‘which correspond’ to rights guaranteed by the ECHR, ‘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.’

- This freedom is "one of the foundations of a 'democratic society' " (*judgment in Kokkinakis v Greece of 25 May 1993*) and "one of the most vital elements that go to make up the identity of believers and their conception of life" (*Otto-Preminger-Institut v Austria of 20 September 1994*).
- The right to have a conviction also holds for atheists, agnostics, sceptics and the unconcerned (*Kokkinakis* judgment).
- A religion or conviction does not have to be established or traditional but a simple opinion or an idea is not enough, (*Campbell and Cosans v United Kingdom, judgment of 25 February 1982*).
- The right to express one's convictions (*Kokkinakis*).
- It is clearly impossible to give an exhaustive list of all manifestations of religion or belief. By way of example it may be noted that the Strasbourg Court observed that ritual slaughter, as indeed its name indicates, constitutes a ‘rite’ (the word in the French text of the Convention corresponding to ‘observance’ in the English), and is covered by the right to manifest one's religion in

¹⁸ Eur. Ct. H.R., *Johnston and Others v. Ireland* (Appl. No. 9697/82), judgment of 18 December 1986, Ser. A, No. 112. Noteworthy is that Article 16 of the UDHR provides for the entitlement to ‘equal rights as to marriage, during marriage and its *dissolution*’ (italics added). Article 5 of Protocol No. 7 to the ECHR guarantees a few rights to spouses, including in the event of dissolution of marriage. Furthermore, the UN Human Rights Committee has established in its General Comment No. 28 that ‘States must also ensure equality in regard to the dissolution of marriage, and this excludes the possibility of repudiation’ (para. 26).

observance.¹⁹ Along the same lines the Court of Justice of the European Communities (ECJ) has held that the EU institutions must seek to avoid organising a *concoirs* on religious holidays, thereby preventing adherents of that religion to take part in it.²⁰

- If a religion is recognised as a State religion or if it is established as official or traditional or if its followers comprise the majority of the population, then this must not result in any discrimination against adherents to other religions or non-believers. The Parliamentary Assembly of the Council of Europe observed in this respect:
- Democratic states, whether secular or linked to a religion, must allow all religions that abide by the conditions set out in the European Convention on Human Rights to develop under the same conditions, and enable them to find an appropriate place in society. Problems arise when the authorities try to use religion for their own ends, or when religions try to abuse the state for the purpose of achieving their objectives.²¹
- **Conscientious objection: Article 10(2) of the Charter.**

- The right to conscientious objection to military service, which is recognised in Article 10 (2) of the EU Charter, has no equivalent in the ECHR but it is increasingly accepted in international human rights law. According to the explanations of the Charter, Article 10 (2) reflects national constitutional traditions and developments in domestic law.

The UN Human Rights Committee accepted the right already in 1993.²² Likewise the UN Commission for Human Rights has recognized the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion.²³

- In its Recommendation 1518 (2001) on “the exercise of the right of conscientious objection to military service in Council of Europe member states”, the Parliamentary Assembly of the Council of Europe noted that “*the right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights*”.

- In conclusion: the right of conscientious objection forms part of the *acquis* and must be applied by the candidate countries.

- Article 11 : Freedom of expression and information

¹⁹ Eur. Ct. H.R., *Cha'are Shalom Ve Tsedek v. France* (Appl. No. 27417/95), judgment of 27 June 2000, *Rep.* 2000-VII, 195, para. 73.

²⁰ ECJ, Case 130/75, *Prais*, [1976] *ECR* 1589 (judgment of 27 October 1976).

²¹ Parliamentary Assembly of the Council of Europe, *Religion and democracy* (Recommendation 1396), paras. 6-7.

²² Human Rights Committee, General Comment 22, Article 18 (1993), CCPR/C/21/Rev.1/Add.4.

²³ See for instance UN Commission on Human Rights, Resolution 2002/45 of 23 April 2002.

- Scope under Community law equivalent to the protection provided by Article 10 of the ECHR - freedom of expression, *as embodied in Article 10 of the ECHR*, is recognised as a general principle of law the observance of which is ensured by the ECJ (Case C-260/89 *ERT* [1991]).
 - Derogations are permissible only if they are in accordance with law, pursue a legitimate aim and are necessary in a democratic society, that is to say be justified by a pressing social need and in particular, proportionate to the legitimate aim pursued (Case C-368/95 *Familiapress* [1997], paragraph 26, Case C-122/00 *Schmidberger* [2003], paragraph 79).
 - Commercial use of freedom of expression - freedom of expression may be limited to an examination of the reasonableness and proportionality of the interference when the exercise of the freedom does not contribute to a discussion of public interest and it arises in a context in which the Member States have a certain amount of discretion (e.g. in a field as advertising) (Case C-71/02 *Karner*, paragraph 51 [2004]).
 - Right to information - the right of access to documents of the institutions is guaranteed to any citizen of the Union and any natural or legal person residing or having its registered office in a Member State (Article 255 of the EC Treaty and Article 43 of the Charter, *Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*).
- Article 12: Freedom of Assembly and Association.

As concerns trade unions, this right will be screened under chapter 19 (social policy and employment).

- Article 12 (1) – corresponding to Article 11 of the ECHR - of the EU Charter protects the right to freedom of peaceful assembly and to freedom of association at all levels. Article 12 (2) of the EU Charter asserts that political parties at Union level contribute to expressing the will of the citizens of the Union. It corresponds to Article 191 EC Treaty.
- Already in the case of *Bosman* did the Court of Justice of the European Communities (ECJ) accept that the freedom of association, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which are protected in the Community legal order.²⁴
- Freedom of assembly and of association are among the paramount values in a democratic society. In its case-law, the European Court of Human Rights has

²⁴ ECJ, Case C-415/93, *Union royale belge des sociétés de football association a.o. v. Bosman a.o.*, [1995] ECR I-5065 (judgment of 15 December 1995), para. 79.

on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association.²⁵ The European Commission, in its White Paper on European governance, acknowledged the importance of the role of civil society organisations for opening up dialogue and for ensuring the representation of all interests.²⁶ Recently the Strasbourg Court recalled that

*"The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means".*²⁷

- The European Court of Justice, for its part, acknowledged in the case of *Schmidberger* that **the exercise of the right to freedom of assembly may pose obstacles to, for instance, the free movement of goods.** In this case the Austrian authorities had allowed a demonstration on the Brenner motorway, which as a consequence could not be used for international transports. The ECJ considered that the national authorities had a wide margin of appreciation when striking the balance between the free movement of goods and the freedom of assembly, and that in the circumstances of the instant case no breach of Article 30 EC Treaty (now Article 29 EC) had occurred.²⁸
- Article 14: Right to education

The right to education belongs to the group of economic, social and cultural rights. It is an 'empowerment right' which enables persons, adults and children alike, to participate fully in their communities.²⁹ Education forms an indispensable precondition for the enjoyment of many other human rights and freedoms. For example, individuals cannot benefit from economic rights such as the right to work and to choose one's occupation without the requisite education and training. Likewise, political rights such as the right to vote or the right of equal access to public service depend on a minimum of education, including literacy. The meaningful participation in civil society through freely expressing opinions, assembling and associating, or by exercising the right to be elected, also requires knowledge and skills which can only be acquired through education. Recognising the importance of education, the UN General Assembly identified the achievement of universal primary education by the year

²⁵ See, among many authorities: Eur. Ct. H.R. (GC), *United Communist Party of Turkey (TBKP) a.o. v. Turkey* (Appl. No. 19392/92), judgment of 30 January 1998, *Rep.* 1998-I, para. 42 et seq.; Eur. Ct. H.R. (GC), *Socialist Party a.o. v. Turkey* (Appl. No. 21237/93), judgment of 25 May 1998, *Rep.* 1998-III, para. 41 et seq.

²⁶ *European Governance: a White Paper*, Communication by the Commission of the European Communities of 25 July 2001 (COM (2001) 428).

²⁷ Eur. Ct. H.R. (1st sect.), *Stankov a.o. v. Bulgaria* (Appl. No. 29221/95), judgment of 2 October 2001, para. 97.

²⁸ ECJ, Case C-112/00, *Schmidberger*, [2003] ECR I-05659 (judgment of 12 June 2003), paras. 65-94.

²⁹ UN Committee on Economic Social and Cultural Rights, General Comment on the Right to Education (Art. 13) of 8 December 1999, 21st sess., UN Doc. E/C.12/1999/10 (1999), para. 1.

2015, meaning the completion of a full course of primary education by all boys and girls, as one of the Millennium Development Goals.³⁰

The Universal Declaration of Human Rights protects the right to education, as do the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (CESCR), the UNESCO Convention Against Discrimination in Education (CADE), and the European Convention of Human Rights (ECHR).³¹

The UDHR, the CESCR and the CRC stipulate certain aims of education. Article 26(2) of the UDHR regards the objective of education as ‘the full development of the human personality and [the] strengthening of respect for human rights and fundamental freedoms.’ Article 13(1) CESCR defines the goals of education as the development of the human personality and its dignity, the strengthening of respect for human rights and the promotion of peace and tolerance. Moreover, education shall enable individuals to ‘participate effectively in a free society.’³² In addition to the principles set out in the aforementioned treaties, the Convention on the Rights of the Child emphasises the ‘development of respect for the child’s parents, his or her own cultural identity, language and values,’ as important educational goals in Article 29(1).

Article 26(1) UDHR, Articles 13(2) and 14 CESCR, and Article 28(1) CRC further require States Parties to provide free and compulsory elementary education, as well as equal access to secondary education and equal access to higher education on the basis of merit, where possible free of charge.

The right to education further involves recognition of parents as the primary providers of care and education to their children,³³ and States’ respect for parents’ convictions of how their children will be educated when regulating education systems.³⁴

- Article 17: Right to property
 - The right to property – corresponding to Article 1 of the additional Protocol to the ECHR - has been recognized as a fundamental constitutional right in all Member States of the EU. As such, this right has been several times confirmed in the case-law

³⁰ See Art. 19 of the United Nations Millennium Declaration (UNMD) of 8 September 2000, UN General Assembly Res. 55/2, UN G.A.O.R., 55th Sess., UNDoc. A/Res/55/2 (2000).

³¹ See Article 26 of the Universal Declaration of Human Rights (UDHR) of 10 December 1948 ; UN General Assembly Resolution 217(III), G.A.O.R., 3rd Sess., Supp. No. 13 at 71 ; Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (CESCR) of 16 December 1966 ; Article 5 of the UNESCO Convention Against Discrimination in Education (CADE) of 14 November 1960 ; Article 29(1) of the Convention on the Rights of the Child (CRC) of 20 November 1989 ; Article 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950.

³² The UNESCO Convention Against Discrimination in Education in Article 5(1)(a) reproduces the objectives of education as set out in Article 13(1) of the CESCR almost word by word.

³³ See CRC Art. 14 (2) and 18(1).

³⁴ See UDHR Art. 26 (3); CESCR Art. 18 (3); CADE Art. 5 (1)(b); Art. 18 (4) of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, U.N.T.S. (entered into force 23 March 1976); second sentence of Art. 2 of Protocol 1 to the ECHR.

of the ECJ. The judgment *Nold* (1974)³⁵ implies a recognition of the right to property (as well as the freedom to conduct a business and the freedom to engage in work and other professional activities) as a fundamental right. It also stressed that it would be legitimate to set up certain limits to these rights, justified by goals of general interest pursued by the Community, provided that the substance of these rights was not affected.

- The first judgment dealing specifically with an alleged violation of the right to property was in case *Hauer* (1979)³⁶, concerning Regulation EC 1162/76. ECJ ruled that the right to property was guaranteed by common constitutional concepts of the Member States, which were also reflected in the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court made distinction between measures to the deprivation of property and to the restriction on the use of property. Although the Community could not be prevented from a possibility to control or restrict the use of property in a context of common market regulation, the Court examined whether the restrictions corresponded to the general interest and were not a disproportionate interference in the rights of owner. ECJ also found inadmissible disproportionate interference in the very substance of the property³⁷.

- Article 21: Non-discrimination

This point will also be screened under Chapter 19 (social policy and employment) as regards the relevant Community legislation and Court of Justice case-law in relation in particular to employment aspects.

- Equal treatment is a general principle of Community law.
- Scope – Paragraph 1 - a general prohibition of non-discrimination (“*Any discrimination base on any grounds such as...*”) addressed to EU institutions and bodies and to the Member States when they are implementing Union law (Article 51 of the Charter). Links to:

Article 14 of the ECHR – principle of non-discrimination as regards rights set forth in the ECHR, de facto amended by Protocol No. 12 to the ECHR setting up a general prohibition of discrimination, i.e. as regards enjoyment of *any right set forth by law*.

>>> Insofar as the scope of Article 21 corresponds to Article 14 of the ECHR, it applies in compliance with it.

Article 13 of the EC Treaty – authorisation of Community institutions to take appropriate actions to combat discrimination based on grounds listed in that Article.

>>> Different scope and purpose.

³⁵ ECJ, Case C-4/73, *Nold*, [1974] ECR 491 (judgment of 14 May 1974).

³⁶ ECJ, Case C-44/79, *Hauer*, [1979] ECR 3727 (judgment of 13 December 1979)

³⁷ cf. also Case T-280/93, *Gemeinsame Marktorganisation Bananen*, [1994] ECR 657.

- Paragraph 2 – a prohibition of discrimination on grounds of nationality corresponding to Article 12 of the EC Treaty.
- The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless differentiation is objectively justified, that is to say based on objective considerations and proportionate to the legitimate objective sought (Case C-148/02 *Garcia Avello* [2003], paragraph 31).
- ECJ gives a broad interpretation to the concept of non-discrimination. Direct and indirect discrimination.

- Article 23: Gender equality

This point will be screened under Chapter 19 (social policy and employment) as regards the relevant Community legislation and Court of Justice case-law in relation in particular to employment aspects.

- Enshrined in Article 23 of the Charter, the principle of gender equality - of paramount importance to the Community legal order - has a very broad material scope and is translated into Community law in a variety of ways. The text of the Article itself notes that the principle of equality applies and must be ensured “in all areas”. Article 23 of the Charter refers not just to equal rights between women and men but to *de facto* equality and equality of opportunity, which require “the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”. The principle of gender equality imposes positive obligations on States as it means that differences in the conditions, situations and needs of women and of men must be systematically taken into account in the formulation, interpretation and application of all Community policies. Consequently, this general principle of Community law can effectively be applied and observed only if its implementation is accompanied, provisionally and temporarily, by specific measures aimed at ensuring full gender equality in practice, in other words positive discrimination.
- Since the creation of the European Communities, the principle of gender equality has been protected and developed particularly in the areas of employment, pay and social welfare, but also in fields such as the promotion of women's equal representation in decision-making bodies, part-time work, equality in education and training, goods and services, and by mainstreaming the principle of equality in development cooperation policies and through the greater use of the Structural Funds in support of measures promoting gender equality. The European Union is also increasingly seeking to combat other forms of discrimination that obstruct equal opportunities, notably domestic violence and human trafficking.

- Article 25: The rights of the elderly

- Under Article 25 of the Charter of Fundamental Rights, the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.
- The prohibition of discrimination on the basis of age constitutes a general principle of Community law. The existence of this principle was confirmed on 22 November 2005 by the Court of Justice of the European Communities in *Mangold v Helm*,³⁸ which dealt with a reference for a preliminary ruling under Article 234 EC by the Arbeitsgericht München (Germany) relating in particular to the interpretation of Article 6 of Council Directive 2000/78/EC. In its judgment, the Court notes:

"Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found (...) in various international instruments and in the constitutional traditions common to the Member States.

The principle of non-discrimination on grounds of age must (...) be regarded as a general principle of Community law. (...) In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law" (paras. 74, 75 and 77).

- In the light of the resolution adopting the *United Nations Principles for Older Persons*, which enshrines eighteen principles addressing the independence, participation, care, self-fulfilment and dignity of the elderly,³⁹ the scope of Article 25 of the Charter can be interpreted as implying observance of the following: (1) the prohibition of any form of discrimination on the basis of age, (2) the right of the elderly to employment and training, (3) the right of access to sufficient resources, (4) the right to reside in familiar surroundings for as long as possible, and (5) the right of access to health care and services.

- Article 26: Integration of persons with disabilities

These rights will be screened under Chapter 19 (social policy and employment).

- Under Article 26 of the Charter of Fundamental Rights, the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

- Article 47: Right to an effective remedy and to a fair trial

³⁸ CJEC, 22 November 2005, *Mangold v Helm*, C-144/04, ECR I-9981.

³⁹ *United Nations Principles for Older Persons*, Resolution 46/91 of the United Nations General Assembly in pursuance of the International Plan of Action on Ageing and Related Activities, 16 December 1991.

(corresponding to Articles 13 and 6(1) ECHR).

Introductory remarks

- By means of the first paragraph of Article 47, access to justice becomes a constitutional right in the Community law context. Thus the principle of the rule of law requiring judicial review of an act interfering with a right of an individual and the corresponding need for grant of an effective remedy, in cases of unjustified infringement is guaranteed by the Charter. This principle is required by the notion of respect of effective rights of individuals and constitutes an essential aspect of democratic accountability.
- The Court of Justice has attributed special importance to the principle guaranteed by Article 47 from an early stage, in demanding that individuals should enjoy the opportunity to assert their rights through the courts as indeed required by the notion of judicial control of the executive that underlies the constitutional traditions common to the Member States.⁴⁰ ‘Individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law.’⁴¹
- The reference to ‘everyone’ in the first and second paragraph of Article 47 specifies the jurisdictional scope of Article 47; it is a right guaranteed for everyone within the jurisdiction of a Member State of the European Union, in accordance with the right to equality.
- The right to ‘access to court’ guaranteed by Article 47 is applicable in relation to the ‘rights and freedoms guaranteed by the law of the Union’. It has been consistently stated by the Court of Justice that: ‘Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.’⁴² The possibility for redress in the event of unjustified interference is thus envisaged whenever such rights or freedoms are violated, as a result of a failing of one of the duties generated by such rights on the part of another private party, a Member State or the Community institutions.
- The general rule is that rights and freedoms guaranteed by the law of the Union are to be exercised in accordance with national procedural rules. Such rules cannot be interpreted or applied in a way as to deny obligations generated by such rights. As such the right of access to justice is inherent in the doctrine of direct effect that holds Member States responsible to ensure effective judicial control as regards compliance

⁴⁰ ECJ, Case 222/84, *Johnston*, [1986] ECR 1651 (judgment of 15 May 1986); ECJ, Case 222/86, *Heylens*, [1987] ECR 4097 (judgment of 15 October 1987); ECJ, Case C-97/91, *Oleificio Borelli*, [1992] ECR I-6313 (judgment of 3 December 1992); ECJ, Case C-224/01, *Kobler v. Republik Österreich*, [2003] ECR I-10239 (judgment of 30 September 2003).

⁴¹ ECJ, Case C-222/84, *Johnston*, [1986] ECR 1651 (judgment of 15 May 1986), para. 18; ECJ, Case C-50/00 P, *Union de Pequenos Agricultores v. Council*, [2002] ECR I-6677 (judgment of 25 July 2002), para. 39; ECJ, Case C-263/02 P, *Commission v. Jago-Quere & Cie SA*, [2004] ECR I-3425 (judgment of 1st April 2004), para. 29.

⁴² ECJ, Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1 (judgment of 5 February 1963).

with the applicable provisions of Community Law and of national legislation intended to give effect it. In *Van Gend en Loos* ... the Court stated that the Community constitutes a 'new legal order' that confers rights on individuals. Ever since then the Court has consistently held that Community law creates rights 'which national courts must protect' but the content of that principle has been progressively developed, and once again the principle of effectiveness has been brought into play.'

- Since the discretion of a Member State, on whose territory an exercise is to be carried out, forms part of a procedure which leads to the adoption of a Community decision, that Member State is obliged to comply with the aforesaid requirement of judicial control. Therefore, any decision taken by the various national authorities that may affect the effective protection of fundamental rights conferred by the Treaty on Community subjects, must be capable of being made the subject of judicial proceedings in which its legality can be reviewed and the person concerned must be able to ascertain the reasons for the decision taken in this regard.⁴³
- The principle of effective judicial protection may require national courts to review all legislative measures and to grant interim relief where appropriate even when there is no relevant national provisions on which such relief may be based. 'Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law...the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief, if it were not for a rule of national law, is obliged to set aside that rule.'⁴⁴
- In the absence of measures of implementation of a right conferred by Union law, it is for the domestic legal system to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights in question, including for example applicable limitation periods. In such a case the principles of equivalence and effectiveness must be respected. It is clear however that such domestic conditions cannot be less favourable than those relating to similar actions of a domestic nature.⁴⁵
- It is for the national courts, where appropriate after obtaining a preliminary ruling, to rule on the lawfulness of a national measure on the same terms on which they review any definite measure adopted by a national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose

⁴³ ECJ, Case C-340/89, *Vlassopoulou v. Ministerium für Justiz*, [1991] ECR I 2357 (judgment of 7 May 1991).

⁴⁴ ECJ, Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame and Others (Factortame I)*, [1990] ECR I-2433 (judgment of 19 June 1990), paras. 19 to 22.

⁴⁵ ECJ, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (preliminary ruling requested by the Bundesverwaltungsgericht)*, [1976] ECR 1989 (judgment of 16 December 1996); ECJ, Case C-63/01, *Evans v. The Secretary of State for the Environment, Transport and the Regions*, op. cit.

as admissible even if the domestic rules of procedure do not provide for this in such a case.⁴⁶

⁴⁶ ECJ, Case C-312/93, *Pertbroeck v. Belgian State*, *op. cit.*, para. 23; ECJ, Case C-326/96, *Levez*, *op. cit.* para. 18; ECJ, Case C-120/97, *Upjohn v. Licensing Authority*, *op. cit.*, para. 32; ECJ, Case C-97/91, *Oleificio Borelli SpA v. Commission of the European Communities*, *op. cit.*