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BARRIERS TOWARDS EU CITIZENSHIP

Research paper on the legal framework for civil rights protection in national and international context

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List of abbreviations used

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of fundamental rights Of the European Union
ICCPR	International Convention of Civil and Political Rights
ICERD	International Covenant to the Elimination of All Forms of Racial Discrimination
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CAT	The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UDHR	Universal Declaration of Human Rights



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EXECUTIVE SUMMARY

The UU team, Dr. Hanneke van Eijken and Professor Sybe de Vries, in coordination with the CEU research group (Dr. Marie-Pierre Granger and Dr. Orsolya Salát), has prepared a synthetic report,¹ which provides a critical overview of the civil rights of EU citizens and third-country nationals in selected Member States (Belgium, the Czech Republic, Denmark, France, Germany, Hungary, Italy, Spain, the Netherlands and the United Kingdom and Ireland).²

The analysis carried out for Deliverable 7.1 focuses on the recognition and scope of civil rights of EU citizens and third-country nationals by national, European and international law. The national reports reveal that the main sources of civil rights in the different countries are the national constitutions and specific national legislation, the European Convention of Human Rights and the EU Charter. In substantial terms, the civil rights are quite similar and entail, for instance, the freedom of expression and the right to a fair trial, freedom of association and assembly. The scope and recognition of civil rights in the countries assessed is nonetheless dependent on the national legal system and its openness to international and European civil rights. The application of the EU Charter is increasing in national case law. The ECHR seems, however, to be the main source of reference for international civil rights by national courts. Awareness of the civil rights in the EU Charter could thus be improved. A particular difficulty with the Charter is that it is only applicable within the scope of EU law, with the consequence national courts may be inclined to rely on the ECHR when in doubt as to whether the EU Charter is applicable to a specific national case.

In terms of barriers to citizenship, it seems that, as a preliminary conclusion, the recognition of civil rights is much dependent on national legal systems and that judicial practice show a preference to refer to the ECHR over the EU Charter. There are, however, signs that this is slowly changing. In most countries, the national legislation lacks references to the EU Charter or the ECHR. Nevertheless, most of the international and European civil rights are recognized in national law, because these norms are directly applicable or because these norms are transposed into national law.

¹ The authors are grateful for the valuable comments and feedback provided by Marie-Pierre Granger and Orsolya Salát on earlier drafts of this report. The authors also want to thank Uwe Puetter and Clara I. Velasco Rico for reviewing the draft of this report and their valuable comments.

² The content of this report is heavily based on the national reports written by Henri de Waele, Ulla Neergaard, Catherine Jacqueson, Sílvia Adamo, Jan Komárek, Marie-Pierre Granger, Orsolya Salát, Elena Ioriatti, Paolo Guarda, Flavio Guella, Javier A. González Vega, Ignacio Villaverde Menéndez, Pilar Jiménez Blanco, Angel Espiniella Menéndez, Davide De Pietri, Raúl I. Rodríguez Magdaleno, Sionaidh Douglas-Scott, Hester Kroeze and Hanneke van Eijken. The national reports provide for more detailed information on the recognition of civil rights in the particular countries. For this report the information of the country reports is used to make a comparative analysis of important developments and state of affair in the countries.



1. INTRODUCTION

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights (the EU Charter) legally binding (2009). However, EU Treaty provisions, as expansively interpreted by the Court of Justice of the European Union (CJEU), already granted the nationals of the Member States and other residents on the territory of the Union, important civil rights, such as the right to move and reside freely in other Member States of the European Union, and the right not to be discriminated against, in particular based on nationality and gender. Moreover, based on specific or general legal bases, the EU adopted numerous legislative measures which guaranteed further rights, including non-discrimination based on a range of prohibited grounds (not only nationality and gender, but also religion ethnicity, sexual orientation, disability, age, etc), privacy and data protection, asylum, etc. In addition, starting already in the early 1970s, the CJEU recognised the protection of fundamental rights as general principles. These general principles are inspired by the European Convention of Human Rights (ECHR) and the national constitutional traditions (Article 6 (1) and (3) TEU); these were to be respected by the EU institutions and by Member States when they act within the scope of EU law. The main sources of civil rights in European Union law thus are the EU Treaties (TEU and TFEU) and the EU Charter (now part of primary EU law), general principles of EU law, and specific EU secondary legislation. In parallel, and in areas which do not fall clearly within the scope of application of EU law, the fundamental (civil) rights of EU citizens, and third country nationals, find recognition and protection in other sources, in particular international treaties, such as the International Convention on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and national constitutional and legislative provisions. Given the blurred and changing boundaries between what falls within and outside the scope of EU law, the hybrid nature of EU citizenship and its rooting in national citizenship, it is essential to include in an analysis of the civil rights EU citizens derived from these non-EU sources.

This first task of WP7 is to identify and assess the nature and scope of the civil rights citizens are entitled to, based on relevant legal frameworks for civil rights in selected Member States of the EU, namely Belgium, the Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Spain, the Netherlands and the United Kingdom. This report - the first deliverable (D 7.1) - consists in a synthetic report, in which the recognition of civil rights in the countries is assessed in a comparative approach.



It is based on a review of EU sources of civil rights based on secondary legislation, policy documents and academic sources, and structured country reports, which, based on primary sources as well as academic scholarship, answered a series of questions set out in a purposely designed questionnaire (annex 1).³ The main report presents an overview of EU law-based civil rights, as well as the key findings of the comparative analysis of the recognition and protection of civil rights in selected Member States, based on the country reports (annex 2). The emphasis of the report lies on the recognition, sources and scope of civil rights, access to and enforcement of these rights being addressed in a second report (Deliverable 7.2).⁴

2. IDENTIFICATION OF CIVIL RIGHTS – EU AND NATIONAL ASPECTS

The terminology and taxonomy related to civil rights vary across legal systems. The EU legal order and national legal systems rely on different categorisation and approaches. EU law currently recognises specific categories of persons, essentially EU citizens (nationals of any of the Member States of the European Union) and their family members, long term resident third country nationals, as well as refugees and other beneficiaries of international protection, and their family members, who are conferred particular status and associated civil rights (right to move and reside in another EU Member States, equal treatment, etc.) by EU Treaty provisions (in particular Article 20 to 25 TFEU) and specific EU legislative instruments and relevant case law of the Court of Justice of the European Union.⁵ Furthermore, amongst these recognised categories, mobile persons are privileged in that they are conferred special protection by EU law, in particular with regard to their right to family life, which national legal order may not offer ('reverse discrimination' phenomenon).⁶

³ This questionnaire was circulated in November 2013 to all WP participants, who were asked to answer the questions for the country which they agreed to cover.

⁴ Note however that in countries where the recognition of civil rights is case law based, it is more difficult to draw a clear distinction between recognition and enforcement.

⁵ Directive 2004/38/EC of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] PJ L158/77 and Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long term resident [2004] OJ L16/44, the application of which was extended to refugees and other beneficiaries of international protection by amending Directive 2011/51/EU of 11 May 2011 OJ [2011] L132/. Previously, EU legislation afforded mobility and residency right as well as equal treatment guarantees to specific categories of nationals of the Member States, ie workers, job-seekers privileged family members, service providers and recipients and their family members, students, retired persons and 'play-boys', etc.. For an overview of the status and rights conferred on these specific categories by EU provisions and case law, see Craig and De Burca, *EU Law: Texts, Cases and Materials* (Oxford: Oxford University Press, 2011), chapters 21, 22 and 23.

⁶ E.g. C-60/00, *Carpenter*, ECLI:EU:C:2002:434; Case C-459/99 *MRAX* ECLI:EU:C:2002:461; C-413/99, *Baumbast*, ECLI:EU:C:2002:493. For a critical analysis, see C. Dautricourt and S. Thomas, 'Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope?' (2009) *E. L. Rev.* 433.



In addition, the EU constitutional Bill of Rights, the EU Charter, projects a particular conception of citizenship and civil rights. Applicable to EU institutions and Member States when they act under the scope of EU law, the EU Charter has six substantive parts, and one final section including horizontal provisions related to the application and interpretation of the Charter. It however does not rely on the 'traditional' international distinction between political and civil rights on one hand and economic and social rights on the others. The substantive sections have the following titles: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights, and Justice.

The Citizens' Right section (Title V) largely reiterates rights granted to EU citizens (and in some cases, long term resident Third Country nationals) by the EU Treaties and EU legislation, in particular the right to move and reside freely in another member state (Article 45 EU Charter), diplomatic and consular protection (Art 46 EU Charter), the right to refer to the Ombudsman (Art 43 EU Charter) or to petition the European Parliament (Art 44 EU Charter), right of access to documents (Art 42 EU Charter), the right to good administration (Art 41 EU Charter), and the political right to vote and stand in local and EP elections (Art 39 Charter).

Other civil rights are 'covered' by the other titles, in particular Title 1 (Dignity) which recognises the principle of respect of human dignity (Art 1 EU Charter), the right to life (Art 2 EU Charter), the right to the integrity of the person (Art 3 EU Charter), the prohibition of torture and inhuman and degrading treatment (Art. 4), the prohibition of slavery and forced labour (Art. 5 EU Charter); Title 2 (Freedoms) which confers protection to the right to liberty and security (Art 6 EU Charter), the respect for private and family life (Art. 7 EU Charter), the protection of personal data (Art. 8 EU Charter), the right to marry and found a family (Art. 9 EU Charter), freedom of thought, conscience and religion (Art. 10 FCR), freedom of expression and information (Art. 11 EU Charter), freedom of assembly and association (Art. 12 EU Charter), freedom of the arts and sciences (Art 13 EU Charter), right to education (Art. 14 EU Charter), right to property (Art. 17 EU Charter), right to asylum (Art. 18 EU Charter), protection in the event of removal, expulsion and extradition (Art. 19 EU Charter); Title 3 (Equality) which guarantees equality before the law (Art. 20 EU Charter), non-discrimination (Art. 21 EU Charter), equality between men and women (Art. 23 EU Charter), the rights of the child (Art. 24 EU Charter), the elderly (Art. 25 EU Charter) and disabled people (Art. 26 EU Charter); Title 6 (Justice) covers the right to an effective remedy and a fair trial (Art. 47 EU Charter), the presumption of innocence and rights of the defence (Art. 48 EU Charter), the principle of legality and proportionality of criminal offences and penalties (Art. 49 EU Charter), and the principle of *non bis in idem* (Art. 50 EU Charter).

In most countries there is no clear distinction between what constitute civil, civic or citizenship rights. The country reports reveal that in the selected countries, there are different taxonomies to address civil,



civic and citizenship rights. The categories differ, but the substantive rights that are categorised are generally similar and concern the personal freedoms of individuals, be they citizens or non-citizens.

In **Belgium** the general term used for these civil rights is '*burgerlijke rechten*' / '*droits civils*'. In **Denmark**, civil rights are categorised as basic or fundamental rights. **Dutch** law makes a distinction between classic fundamental rights and social rights. Whereas classic fundamental rights protect the citizens/individuals from interference by public authorities, social rights lay down obligations for the government to ensure certain common goods, such as welfare redistribution or environmental issues. **French** law distinguishes between *civic* and *civil* rights or liberties (defined by legislative statutes), and *constitutional* rights and principles (derived from constitutional documents). The latter category is traditionally divided between *droits-libertés* and *droits-créances*, although this distinction is coming under increased challenge. The **German** constitution distinguishes between personal liberty rights or basic rights (which include civil rights) and rights similar to basic rights, equality rights, economic rights, cultural rights, and social rights. The law of **Hungary** distinguishes between personal civil freedoms (such as the right to life and the prohibition of cruel and inhuman treatment) and political freedoms (including the freedom of expression, press, assembly and association). In **Italy**, civil rights are considered to be those rights that are freedom rights. The rights in the Italian constitution are usually categorised as political, social and economic rights. The civil rights differ from those three categories and are united by the fact that they constitute a state obligation to refrain from invading spheres of freedom of individuals. The **Spanish legal order** distinguishes between fundamental rights and liberties and constitutional rights. There are also constitutional duties and obligations. There are also principles governing economic and social policy from where rights can be derived, even if this kind of rights must be developed by laws. The terminology is different in **the United Kingdom and Ireland**; there one usually distinguishes between civil liberties and human rights. Whereas civil liberties are rights that are developed by national courts, human rights include international civil rights.

Although all countries involved in this study have their own definitions and categorisations of civil, civic and citizenship rights, there are common grounds. One of the common grounds is that individual freedoms tend to belong to the core civil rights; liberties and freedoms are both qualifications that can be found in the definitions used in the different countries. In substantial terms, the recognised civil rights are similar and entail, for instance, the freedom of expression (amongst others in Belgium, the Netherlands, Hungary, Denmark, Spain, France), the right to a fair trial (for instance in Denmark, Spain), freedom of association and assembly (for instance in Denmark, Hungary, the Netherlands, Spain, the U.K., France). The right to free movement is also considered as a (civil) citizens' right (for instance in Hungary, Ireland, the U.K, France). Furthermore, the right to private and family life and the protection of



human dignity can be mentioned as examples. Moreover the right to private and family life and the protection of human dignity can be mentioned as examples. The concept of civil, civic and citizens' rights sometimes overlap and/or are used interchangeably in some of the legal systems covered. The term civil rights in this report is used as potentially including all three notions and covering all fundamental rights which are not political. All countries assessed are party to several international and European human rights instruments, in particular the ICCPR and the ECHR; they are also Member States of the EU, and as such are bound by EU human rights norms set out in the Treaties, secondary legislation, general principles of EU law and the EU Charter. Although these international and European norms often prevail over domestic legislations and other state measures, and are usually conferred direct effect, national constitutions and legislative instruments remain an important point of reference for domestic actors when it comes to the recognition and definition of the scope of civil rights. This is, in most cases, not so problematic, since in substantial terms, domestic, international and European instruments recognise and protect a similar set of civil rights, including, the freedom of expression, freedom of association and assembly, freedom of religion, the right to a fair trial, human dignity, non-discrimination.

There are significant differences, however, in how constitutional rights are upheld in some countries. The U.K and Ireland have a common law tradition of protection of civil liberties, while in other countries, civil rights are recognised in constitutional instruments, developed by constitutional or ordinary courts, and further defined or restricted through legislative measures. Some countries have strong centralised constitutional review mechanism, in which constitutional courts play a central role, while in others the control is diffuse and entrusted to ordinary courts, with certain implications for individual rights. This may also change over time.

The influence of international and European civil rights norms varies across national legal systems and their openness to international and European civil rights. In some countries, international and European civil rights instruments had to be transposed (transformed); in other countries these civil rights are recognised as such in the national legal order. Concerning the EU Charter and the ECHR, their authority is generally acknowledged, within their scope of application. The ECHR has come to play an important role in the elaboration and development of civil rights in some countries (e.g. the Netherlands, Hungary, France) whilst it remains marginal in others, in particular those which have a strong constitutional tradition of human rights protection (e.g. Germany). References to the Charter are increasingly in national cases, even though national courts appear still reluctant to use it on its own, and often rely on its provision together with the equivalent clauses in the ECHR or national constitutional provisions. The ECHR remains the main external reference in human rights matters, probably because of a lack of awareness about the Charter amongst EU citizens and residents, and confusion in the legal profession as



to when the Charter is applicable. Although in some countries, constitutional instruments confer civil rights only upon citizens, in most cases, most civil rights protection has been extended to foreigners.

In most countries, a number of public and private organisations contribute to raising awareness about civil rights, and work to support their recognition, development, respect, and promotion. It would be interesting to enquire whether these organisations have EU norms, in particular the EU Charter, in their radar. The economic rights, the social rights and the political rights of citizens are dealt with in WP 5, 6 and 8 respectively. The concepts of civil, civic and citizens' rights sometimes overlap and/or are used interchangeably in the legal systems covered. The term civil rights in this report is used as potentially including all three notions and covering all fundamental rights which are not political, economic and social. It focuses on freedom rights, and protection against discrimination.

3. EU SOURCES OF CIVIL RIGHTS

3.1 THE BROADER CONTEXT OF CIVIL RIGHTS IN THE EUROPEAN UNION

Even though, almost no civil rights were included in the founding Treaty,⁷ civil rights on EU level have been recognised from early on by the CJEU in its case law on general principles of EU law. As observed in the introduction to this report, fundamental rights are acknowledged as general principles of Union law, since the judgment of the Court in *Stauder*⁸ in 1969. In that case the CJEU mentioned for the first time “fundamental human rights enshrined in the general principles of Community law and protected by the court.”⁹ The inclusion of fundamental human rights in the general principles of Union law, can be seen as a reaction to the so-called *Solange decisions*¹⁰ of the German Constitutional court, in which the German constitutional court affirmed that the primacy of EU law should not undermine the protection of human rights.¹¹ The case law on fundamental rights within the framework of general principles of Union law has been significantly developed in subsequent case law. In the meantime, the Charter was adopted and entered into force by the Treaty of Lisbon in December 2009. On 7 December 2000, the EU Charter was initially solemnly proclaimed at the Nice European Council. The EU Charter at that time did not have binding force, until it has been given that effect by the Treaty of Lisbon in December 2009. Even before the EU Charter became a binding source of civil rights, those civil rights were already part of EU law, as the general principles of law. Moreover, in its' case law the CJEU already used the EU Charter

⁷ Non-discrimination may be qualified as a civil right that was included in the Treaty of Rome. Article 7 of the Treaty of Rome prohibited discrimination on grounds of nationality.

⁸ Case 29/68, *Stauder* [1969] ECR 419, ECLI:EU:C:1969:27.

⁹ Case 29/68, *Stauder* [1969] ECR 419, ECLI:EU:C:1969:27, par. 7.

¹⁰ *BVerfG* 37, 271 2 BvL 52/71 (*Solange I*), 29 May 1974 and *BVerfG* 73, 339 (*Solange II*), 22 October 1986.

¹¹ On this development of fundamental rights in EU law see furthermore A. Knook, 'The Court, the Charter and the Vertical Division of Powers', *CML Rev.* (2005), pp. 367-398 and K. Lenaerts, 'Fundamental Rights in the European Union', *EL Rev.* (2000), pp. 575-600.



as a source of fundamental rights. Nowadays the EU Charter is part of primary EU law, it has the same legal status as the Treaties and has binding effect. The EU Charter is applicable to all acts of EU institutions and to acts of the Member States, whenever they implement EU law or fall within the scope of EU law. Basically, the Member States are obliged to respect the EU Charter when they implement EU law in national law or when Member States derogate from one of the free movement provisions.¹²

The ECHR is a multilateral international agreement concluded in the Council of Europe, which entered into force on 3 September 1953. All countries assessed in this deliverable are contracting party to the ECHR and accept the jurisdiction of the European Court of Human Rights (ECtHR). Ever since the recognition of fundamental rights in the EU, the CJEU refers in its case law to the ECHR as a source of civil rights, including the norms of the ECHR in the scope of EU civil rights. In 1996, the CJEU, asked for advice as to whether the European Community at that time could accede to the ECHR, answered in the negative. At that time, it found the Community had no competence to accede to such Treaty. That changed with the Treaty of Lisbon, which entered into force in December 2009. Article 6 (2) TEU includes the possibility for accession of the EU to the ECHR, providing that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.” The draft agreement on the accession of the EU to the ECHR has been sent to the CJEU to assess its compatibility with EU law. On 18 December 2014 the CJEU delivered its opinion and identified problems with regard to its compatibility with EU law. Even though the CJEU considers in its opinion that the problem of a lack of competence to accede is solved, it identifies different other issues with regard to the accession. It held that on the basis of five substantive grounds that the draft accession Treaty did not comply to ensure the specific features of the European Union. For the moment, that means that the European Union will not, in a short term, accede to the ECHR. According to Article 218 (11) TFEU when the opinion of the CJEU is negative, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised. The EU Charter and the ECHR are and remain both autonomous sources of EU law, although the civil rights of the ECHR are recognized by the CJEU and the Treaty (Article 6(3) TEU) as part of the general principles of EU law. Moreover, Article 6(3) TEU acknowledges the fundamental rights as they result from the constitutional traditions of the Member States.

¹² Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114 and C-260/89, *Elliniki Radiophonia Tiléorassi*, ECLI:EU:C:1991:254. Nowadays also provided in the EU Charter (Article 51 (1)) and C-390/12, *Pfleger*, ECLI:EU:C:2014:281.



3.2 SOURCES OF CIVIL RIGHTS IN THE EUROPEAN UNION

As follows from above, there are multiple sources of civil rights in the European Union. The main sources of civil rights in the European Union are the Treaties, the EU Charter, the general principles of EU law, specific EU secondary legislation and the case law of the CJEU. These instruments and (unwritten) norms all have their own scope of application, which will be discussed in section 4. These instruments also have their own personal scope of application, as observed above under section 2

3.3. CIVIL RIGHTS IN THE EU

One of the main sources of civil rights is the EU Charter, which includes a list of civil rights that should be safeguarded in the context of the EU. The EU Charter includes various civil rights, as observed in section 2. These civil rights include the right to human dignity (Article 1), the right to life (Article 2), the right to the integrity of the person (Article 3), a prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery and forced labour (Article 5). Chapter II of the EU Charter protects “freedoms”, such as, amongst. other the right to right to liberty and security (Article 6), the right to data protection (Article 8) and freedom of thought, conscience and religion (Article 10).. Furthermore, a specific Chapter of the EU Charter includes various rights to equality/prohibitions of discrimination. The most important civil right in this section is Article 21, which prohibits discrimination on “any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (...)”. The section, moreover, includes rights of the child and elderly, as well as disabled persons (Articles 24, 25 and 26). Chapter 5 of the EU Charter recognises “Citizens’ rights”, including the right to move and reside freely (Article 45) as well as political rights (Article 39 and 40) and the right to access to documents (Article 42). As observed above, also the Treaties and EU secondary legislation recognise civil rights of citizens. Within the different sources of EU law, several civil rights can be revealed. The following rights belong to the important civil rights of citizens.

One of the core civil rights of EU citizens is *the right to move and reside freely* in the territory of the Member States (Article 21 (1) TFEU). That right has been developed further by the CJEU in its’ case law and forms the backbone of EU citizenship rights and shaped the development of EU citizenship significantly. The right to free movement of European Union citizens within the European Union first developed within the internal market. Since the CJEU interpreted the economic freedoms broadly, and included recipients of services in the scope of Union law.¹³ Hence, even before the formal introduction of EU citizenship, the free movement of persons was extended to those nationals that are not qualified as workers or self-employed persons and are not *per se* economically active. In 1993, three directives

¹³ Case 186/87, *Cowan* [1989] ECR 00195, ECLI:EU:C:1989:47.



that enhanced the free movement of persons in the European Union were adopted.¹⁴ These directives codified the right to reside in other Member States in European Union legislation. The beneficiaries of these directives were students, retired persons and those nationals who had sufficient means. . Not only the Treaty includes the right to free movement, but also the Charter in its Article 45. The right to free movement is, moreover, codified in Directive 2004/38, which replaced the three older directives on the free movement of persons and is broader in scope. The Directive guarantees to Union citizens, who migrate within the European Union, the right to enter and exit Member States without visas or equivalent formalities.¹⁵ In this sense, Member States are not allowed to restrict the free movement of their nationals to leave their Member State without a legitimate justification.¹⁶ This right to exit and enter may be seen as the minimum requirement to exercise the free movement rights: when the exit or entry to Member States is restricted, the effectiveness of the right to free movement is lost.

Articles 27 and 28 of the Directive provide for specific grounds of refusal of access and measures of expulsion, which both undermine the right to residence, as well as the right to free movement. According to Article 27 the right to reside and move freely may be restricted on grounds of public policy, public security or public health. Such measure should be based on the personal conduct of the person at stake and that conduct should pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Moreover, according to Article 28 of the Directive the host Member State is obliged to take into account the degree of integration and the period of residency of the person to which it wants to issue an expulsion measure. The grounds of expulsion provided for in Directive 2004/38 are based, therefore, on a mode of integration; the higher the degree of integration in a Member State, the narrower the grounds of expulsion become. Article 29 provides for a specific ground for derogation from the freedom of movement of Union citizens: when public health is at risk. The CJEU has interpreted derogations from the freedom to move for Union citizens very strictly. Besides the right to move and reside of Union citizens, the specific rights of EU citizens are largely related to mobility. The electoral rights of EU citizens, for instance, granted by Article 22 TFEU, assume free movement and residency in another Member State than the Member State of nationality. Third country nationals have a right to move and reside in the EU, for instance on the basis of their status as long-term resident, or refugees or based on an association agreement.

¹⁴ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13 July 1990, pp. 26-27, Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, OJ L 180, 13 July 1990, pp. 30-31 and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13 July 1990, pp. 28-29.

¹⁵ Articles 4 and 5 of the Directive. However, a Union citizen has the obligation to present an identity card or a passport upon entry into the territory of a Member State; C-378/97, *Wijsenbeek* [1999] ECR I-06207, ECLI:EU:C:1999:439.

¹⁶ C-33/07, *Jipa* [2008] ECR I-05157, ECLI:EU:C:2008:396 and C-249/11, *Hristo Byankov*, ECLI:EU:C:2012:608.



The right to reside is provided for in the Treaty as a EU citizen right. Moreover also the EU Charter and Directive 2004/38 provide that EU citizens have a right to reside in another Member State than the Member State of origin/ which they hold citizenship. In the first three months, any European citizen may reside on the territory of another Member State, without any conditions or restrictions.¹⁷ After these three months, a Union citizen has to comply with additional conditions. The European citizen must not become a burden on the finances in the host Member State and has to have comprehensive healthcare insurance and sufficient means after the three months of residence in the host Member State.¹⁸ The right to reside in another Member State, however, cannot be refused automatically when a European citizen applies for social benefits,¹⁹ neither is the condition to have a comprehensive healthcare insurance applied by the Court strictly.²⁰ After five years of residence, EU citizens have a right to permanent residence in the host Member State, based on EU law.²¹ The expulsion of Union citizens is regulated, as observed, along the same reasoning: the degree of integration (by length of residence) is decisive for the question if and on what grounds a Union citizen from another Member State may be expelled. For a long time, the right to reside in the territory of another Member State has been broadly interpreted by the CJEU. According to the CJEU the derogations to the right to reside in another Member State are narrow, and should comply with the principle of proportionality.²² However, in more recent case law the CJEU held a more strict interpretation.²³

In more recent case law, the right to reside in the European Union as a whole has been developed by the CJEU. In the case of *Ruiz Zambrano*²⁴ the CJEU ruled that Article 20 TFEU would preclude national measures that would impede the genuine enjoyment of the substance of the rights granted to EU citizens. In subsequent case law the CJEU explained further that the genuine enjoyment of the substance of EU citizenship rights is violated in situations in which a Union citizen is not only forced to leave the territory of the Member State of his/her nationality, but the territory of the European Union as a whole.²⁵ The question has been posed whether this right to reside in the territory of the Union as a

¹⁷ Article 6 of Directive 2004/38.

¹⁸ Articles 7 and 14 of Directive 2004/38.

¹⁹ C-456/02, *Trojani* [2004] ECR I-07573, ECLI:EU:C:2004:488.

²⁰ C-413/99, *Baumbast* [2002] ECR I-07091, ECLI:EU:C:2002:493.

²¹ Article 16 of Directive 2004/38.

²² See *Baumbast* as an interesting example in which the CJEU held that even though Mr. Baumbast did not fully comply with the conditions to reside in another Member State, on the basis of the principle of proportionality that right to reside could not be refused on that sole basis. C-413/99, *Baumbast* [2002] ECR I-07091.

²³ See C-140/12, *Brey*, ECLI:EU:C:2013:565 and C-333/13, *Dano*, ECLI:EU:C:2014:2358.

²⁴ C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

²⁵ The CJEU held in *Dereci* that “the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.” C-256/11, *Dereci and Others* [2011] ECR I-11315, par. 66.



whole is an actual right, or should be read more narrowly as the right not to be forced to leave, which might be more narrow than an actual right to reside.²⁶

Another civil dimension of citizenship rights may be found in *the right to family life* and *family reunification* in the European context. Based on European citizens' right to free movement, the Court of Justice has ruled on the right to family reunification as being ancillary to the right to migrate to another Member State. Examples of such cases are *Chen*²⁷ and *Metock*²⁸, in which, after establishing a cross-border link, the Court held that a derived residence right had to be granted to the third-country national as a family member of the Union citizen. The right to family life is recognised by the Court as a precondition to the right to move to and reside in another Member State. The Court emphasised in its case law that "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed."²⁹ Without a cross-border connection to EU law, the right to family life can be invoked under Article 20 TFEU, in very limited situations.³⁰ This limited scope of the right to family life results from the scope of application of the EU Charter and the general principles of law.

The right to family reunification is, moreover, also codified in EU secondary legislation. In Directive 2004/38, the right to family reunification is codified in Article 3(1). The Directive is applicable to Union citizens in a Member State other than that of their nationality, so it only benefits Union citizens that have exercised their right to free movement. The right to family reunification is also recognised in Directive 2003/86/EC. That Directive grants a right to family reunification to Third Country Nationals, not being family members of a EU citizen, who hold a residence permit, which is valid for at least one year in one of the Member States and who have the genuine option of long-term residence.

Also the right to privacy is one of the important civil rights in EU law. The EU Charter recognises the right to the protection of data (Article 8 EU Charter). In addition Article 8 ECHR has been interpreted to include also privacy in the right to family and private life. Extending that case law to the EU Charter, Article 7 EU Charter also protects the right to private life. Moreover, specific EU legislation aims to protect personal data and privacy. The two main EU legislative acts are Directive 95/46 on the

²⁶ N. Nic Shuibhne, '(Some of) The Kids Are All Right', *CML Rev.* (2012), p. 366.

²⁷ C-200/02, *Chen*, ECLI:EU:C:2004:639.

²⁸ C-127/08, *Metock*, ECLI:EU:C:2008:449, par. 62.

²⁹ C-127/08, *Metock*, ECLI:EU:C:2008:449, par. 62.

³⁰ G. Davies, 'The Right to Stay at Home: A Basis for Expanding European Family Rights' in D. Kochenov (ed.), *EU Citizenship Rights Shaping EU Federalism*, Cambridge University Press (2015), forthcoming.



protection of individuals with regard to processing of personal data and on the free movement of such data.³¹ The Data Retention Directive (Directive 2006/24) has been annulled by the CJEU, because it would run counter to the right to privacy.³² The case *Digital rights Ireland*³³ and the case *Google Spain*³⁴ of the CJEU shows the important role of the right to privacy in the context of the EU by case law.

3.4. THE SCOPE OF APPLICATION OF EU CIVIL RIGHTS

Civil rights in the EU context are, hence, recognised since decades as part of the general principles of EU law and are nowadays also recognised in a EU ‘bill of rights’, by the EU Charter. The EU Charter includes various civil rights. However, two important limitations to the EU civil rights should be noted. First of all, with regard to the EU Charter, not all provisions entail *rights*, but some of these civil right norms are recognised as *principles*. Second, the scope of application of the EU Charter has been limited by its drafters. Articles 51, 52 and 53 of the EU Charter specify the situations under which the Charter is applicable and may be invoked inter alia before the national courts.³⁵ As observed above, the EU Charter and the general principles of EU law are only applicable, when a given situation falls within the scope of EU law. Therefore the scope of application of these civil rights are dependent on the scope of EU law, which is defined importantly by the EU legislature and by the CJEU. The scope of application depends on the source of civil rights.

Provisions of the Treaties and secondary EU legislation are, unless provided for in that specific provisions, not limited in their scope of application and are governed by the principle of primacy of EU law. That means that if a given situation or national legislation is in conflict with a EU civil rights from the Treaties or secondary legislation, the EU norm prevails. In order to be able to rely on EU law, however, in front of a national court, the civil right should have direct effect. The situation for both the civil rights in the EU Charter and the civil rights recognised as general principles of EU law differs. The institutions of the Union are bound by the general principles of Union law whenever they act, since their acts fall within the scope of EU law. The Member States are bound by EU civil rights, only when their acts fall within the scope of EU law. In principal, there are two situations that activate the scope of Union law, resulting in an obligation for Member States to respect fundamental rights on account of Union law.

³¹ Data Protection Directive) [1995] OJ L281/31 and Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37

³² See more on the judgment of the CJEU in *Digital Ireland* M. Granger and K. Irion, *The Court of Justice and the Data Retention Directive in Digital Rights Ireland: telling off the EU legislator and teaching a lesson in privacy and data protection*, E.L.Rev. (2014), pp. 835-850.

³³ Joined Cases C- 293/12 and C- 594/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238.

³⁴ C-131/12, *Google Spain*, ECLI:EU:C:2014:317.

³⁵ K Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 376-377.



Only when there is a link with EU law the fundamental rights as part of general principles of EU law and those included in the EU Charter, come into play.³⁶

First of all, when Member States implement EU law, their act falls within the scope of EU law and therefore they are bound to respect the general principles of EU law, including civil rights. Also the EU Charter is applicable to situations in which Member States implement EU law. If a EU Directive provides for discretion for the national authorities, the acts of national authorities are bound by the EU civil rights as well.³⁷ In the case of minimum harmonisation, national requirements that are stricter than the Directive required fall outside the scope of Union law.³⁸ That means that Member States are obliged to ensure civil rights on account of EU law when a specific subject or issue are stake is falls under the scope of EU law, but only as far as this particular subject is regulated by the Union.³⁹

Secondly, when Member States derogate from one of the provisions on free movement the scope of EU law is triggered. In its case law, CJEU stated that although certain matters belong “within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Union law unless what is involved is an internal situation which has no link with Union law.”⁴⁰ Such a sufficient link with EU law is constituted by an infringement of the Treaty provisions on free movement of goods, persons, capital and services. The case *ERT*⁴¹ is the leading case of this line of case law. In the same sense, the CJEU ruled in *Pfleger* that the scope of application of the EU Charter is triggered by derogations to free movement: “The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded (...) as ‘implementing Union law’ within the meaning of Article 51(1) of the Charter.”⁴²

As observed, for a long time the general principles of Union law were the vehicle to include civil rights in EU law. Since the EU Charter has been adopted and finally entered into force two regimes applied to

³⁶ See as an example See C-309/96, *Annibaldi* [1997] ECR I-07493, par. 13.

³⁷ C-2/00 and C-64/00, *Stuyder Aquacultur* [2003] ECR I-07411. This was also the case with regard to third-pillar instruments, a distinction no longer made. When these framework decisions were implemented, the Member States also had to observe the free movement provisions because such a situation falls under the scope of Union law. According to the Court of Justice in *Wolzenburg*: “The Member States cannot, in the context of the implementation of a framework decision, infringe Union law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States.” C-123/08, *Dominic Wolzenburg* [2009] ECR I-09621, par. 45.

³⁸ C-2/97, *Borsana* [1998] ECR I-08597, ECLI:EU:C:1998:613.

³⁹ C-2/97, *Borsana* [1998] ECR I-08597, ECLI:EU:C:1998:613.

⁴⁰ C-353/06, *Grunkin and Paul* [2008] ECR I-07639, ECLI:EU:C:2008:559, par. 16, see also C-224/02, *Pusa* [2004] ECR I-05763, ECLI:EU:C:2004:273, par. 22.

⁴¹ C-260/89, *Elliniki Radiophonia Tiléorassi* [1991] ECR 2925, ECLI:EU:C:1991:254.

⁴² C-390/12, *Pfleger*, ECLI:EU:C:2014:281, par. 36.



civil rights in the EU. Article 51(1) of the EU Charter provides that the Charter rights 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.”⁴³ Settled case law and the explanations accompanying the Charter⁴⁴, however, define the scope of application of the EU Charter broader. According to the explanations the EU Charter “is only binding on the Member States when they act *in the scope of Union law*.”⁴⁵ The difference between Article 51 (1) EU Charter and its explanations was issue of much academic debate in the last decade. Nowadays it seems that the CJEU has adhered to the broader scope of application as set by the explanations to the EU Charter. In *Fransson*⁴⁶ the Court seems to have adopted a broader interpretation of the scope of application of the Charter. In that case the CJEU held that national law which aimed to achieve the goals of a Directive is qualified as implementing EU law. Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation. Even though the national provisions at stake, which were the legal basis for the fine, were not the result of implementation of the Directive, the CJEU held that the fact that these national provisions supported the effectiveness of the Directive on VAT was sufficient to trigger the scope of Union law in order to apply the Charter. The CJEU seems therefore to adhere to the broader explanation of the scope of the Charter, rather than the more limited interpretation of “implementation of Union law.” Such interpretation is in line with Article 52(7) of the Charter, which emphasis that the explanations are “drawn up as a way of providing guidance in the interpretation” of the Charter.⁴⁷

Although the scope of application of the EU Charter and the general principles of EU law are both interpreted broadly by the CJEU, in the sense that it also applies to derogations of EU law, there remain limitations. The more recent cases of *Križan*⁴⁸, *Siragusa*⁴⁹ and *Marcos*⁵⁰ reveal such limitations. It follows from this case law that in order to activate the EU Charter’s scope of application another provision of EU law needs to be applicable too. The Court stressed in *Marcos* that the provisions of the Charter cannot be invoked autonomously. Moreover, the Court stressed that the concept of implementation requires

⁴³ The text of the Charter was changed during the process. In a discussion document of May 2000, the scope of the Charter was defined as “The provisions of the Charter are addressed to the Member States exclusively within the scope of Union law.” See also Kaila (2012), pp. 296-297.

⁴⁴ Explanations relating to the Charter of Fundamental Rights, OJ, 14.12.2007, 2007/C 303/02.

⁴⁵ Italics HvE.

⁴⁶ C-617/10, *Fransson*, ECLI:EU:C:2013:105. See also B. van Bockel and P. Wattel, *New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson*, E.L.Rev. (2013), pp. 866-883.

⁴⁷ C-279/09, *DEB* ECLI:EU:C:2010:811, par. 32.

⁴⁸ C-416/10, *Križan*, ECLI:EU:C:2013:8.

⁴⁹ C 206/13, *Siragusa*, ECLI:EU:C:2014:126.

⁵⁰ C-265/13, *Marcos*, ECLI:EU:C:2014:187.



that these provisions have a “certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.”⁵¹

4. NATIONAL SOURCES OF CIVIL RIGHTS

In most of the countries under study, the national constitution tends to constitute the primary source of recognition of civil rights. The United Kingdom, characterised by judicial precedent and parliamentary sovereignty, differs in this respect. Whilst constitutions are the major source of national civil rights, these civil rights are then implemented through specific legislation and case law, which further define and give effect to specific guarantees. In most countries, particular laws for the protection of civil rights are, in practice, at least as important as constitutional norms when it comes to the actual recognition and effective protection of civil rights. The availability of judicial and non-judicial remedies, which vary depending on the country, policy area, and over time, also matters in determining the legal sources of references.

In **Belgium**, the main civil rights are laid down in the Belgium constitution. It contains a specific title, “the Belgians and their rights”, in which civil rights such as the freedom of expression, the freedom of thought, conscience and religion and the right for human dignity are guaranteed. Civil rights are also laid down in specific acts of parliament, such as the right to due process and equality rights.

In **the Czech Republic**, the constitution as well is the main source of civil rights. Many laws, codified in the Civil Code, or the Penal Code contain specific elements of civil rights. Furthermore, specific Acts guarantee the protection of civil rights, such as the Antidiscrimination Act, the Act on the right to petition, or legislation regarding the free access to information, or the protection of personal data.

In **Denmark**, the Constitutional Act (*Grundlov*) is the main source of civil rights. The Danish Constitutional Act has primacy over other legislative acts and is therefore a very important source. Other legislative instruments also protect civil rights in Denmark, such as the rights to equal treatment of men and women, a general right to equal treatment to all persons, the protection of personal data, the right to asylum and the right to protection in case of removal, expulsion or extradition. Some of these guarantees are laid down in an autonomous Act (Act on Processing of Personal Data), but others are integrated in national legislation (the Aliens Act).

⁵¹ C-265/13, *Marcos*, ECLI:EU:C:2014:187, par. 33.



In **France**, there has been a long tradition of legislative protection and limitation of civil rights (e.g. 1901 Act on the contract of association, 1905 Act on the Separation of State and Church, 1970 Act on the reinforcement of the individual rights of the citizens, 2004 Act framing the wearing of signs or outfits displaying one's religious belonging in public schools). It is even a constitutional prerogative of the Parliament. The Constitution itself lacks a Bill of Rights. However, since the mid-1970s, the Constitutional Council (*Conseil Constitutionnel*) has developed constitutional rights and principles for the protection of civil rights inspired or derived from historical constitutional documents, in the 1789 Declaration of the Rights of the Man and Citizen, and the Preamble of the 1946 Constitution, including principles to which it referred, such as principles recognised by laws adopted under French republican regimes. On these bases, civil rights such as freedom of expression, freedom of opinion, freedom of association, freedom of assembly, rights of the defence, equality, the respect for human dignity, the right to privacy have been up-graded to a constitutional status, and form part of the so-called *bloc de constitutionnalité*. Civil rights recognition and protection have therefore become increasingly constitutionalized. They have also become more judicialised, with the development of constitutional review: from a minimalist option which enabled only a small number of political personalities to submit legislation to a priori constitutional control, to the opening of this right to a parliamentary minority in 1974, and since 2010, the right for national courts to question, a posteriori, the compatibility of laws with the Constitution (*Question Prioritaire de Constitutionnalité*).

In **Germany**, the German Constitution (the Basic Law) is the main source of civil rights. The German constitution both safeguards fundamental rights in the Federal Republic of Germany, and constitutes its institutions. The constitution lays down a rule of law, both in the sense that the state is bound by the Constitution and therewith its power is delimited. Furthermore, fundamental rights are elaborated upon in specific laws, either at the level of the federation, or at the level of the *Länder*. An example of such more specific act is 'The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*)'.

In **Hungary**, the constitution (The Fundamental Law) is the primary source of fundamental rights, too. After the election of a new government in 2010, the constitution was changed and then a new constitution adopted by a constitution-amending majority of the governing parties. The new constitution, called the Fundamental Law, entered into force on 1 January 2012. This constitutional change raises questions with regard to the applicability of the case law based on the previous constitution in relation to this new constitution. In May 2012, the Hungarian Constitutional Court declared that it will take into account its earlier reasoning, unless the applicable constitutional provision



contradicts or departs from the relevant provision in the former constitution.⁵² In case of substantively equivalent provisions, the Hungarian constitutional court “shall provide justification not for following the principles laid down in previous jurisprudence but for departing from those principles.”⁵³ However, since then, a Fourth Amendment to the Fundamental Law was adopted, which “repealed” constitutional rulings handed down prior to the entry into force of the constitution, although “without prejudice” to their legal effect. This cast into doubt the status of the whole body of prior constitutional case law. The Hungarian constitutional court reacted by reversing its earlier approach, and claiming that the reference to previous case law in case of substantively equivalent provisions is still possible, but needs to be justified in detail.

In **Italy** too, the constitution is the core source of civil rights. Article 2 of the Italian constitution recognises ‘inviolable’ civil rights. These rights are absolute, inalienable, indispensable and imprescriptible. The scope of the rights that are recognised as inviolable is unclear, however. The Italian constitution also recognises different other civil rights, such as the right to liberty and the freedom of residence. Moreover, civil rights are occasionally recognised, even outside the specific context of the constitution, by the Supreme Court (*Corte di Cassazione*) and the Italian Constitutional Court (*Corte Costituzionale*). The State is responsible for defining and ensuring civil rights, which means that regional laws do not have a direct impact on civil rights in Italy.

Ireland is a common law country and much of the body of law is based on judicial precedent. Even though, judicial precedent is important, Ireland has a written constitution which serves as the main source of civil rights. Civil rights are recognised under the heading of ‘Personal Rights’ in the Irish constitution. These civil rights include the freedom of expression, assembly and association; the right to free movement; right to family life; and the right to private property. In addition to these enumerated rights, a doctrine of unremunerated, or unspecified, rights was developed by the Supreme Court of Ireland. These un-enumerated rights include civil rights such as the right to bodily integrity, and the right to privacy.

⁵² Decision Nr. 22/2012 (V. 11.) AB, ABH 2012/2, 94, 97, as translated in Miklós Bánkúti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, “Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary”, April 2013, available at http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf, p. 80, fn. 144.

⁵³ *Id.*



The primary source of fundamental rights in **the Netherlands** is the Dutch constitution. In addition, civil rights are also protected by specific legislation. The right to equal treatment is, for instance, more specifically laid down in the General Equal Treatment Act, but also in a specific Act on Equal Treatment on Grounds of Age (*Wet gelijke behandeling op grond van leeftijd*) and an Act on Equal Treatment on Grounds of Handicap and Chronic Illness (*wet gelijke behandeling op grond van handicap of chronische ziekte*). The right to privacy (Article 10 of the Dutch constitution) is also protected by specific legislation: the Personal Data Protection Act (*De Wet Bescherming Persoonsgegevens*), the Police registers Act (*Wet politieregisters*) and the Municipal Administration Act (*Wet gemeentelijke basisadministratie*). Moreover, general principles guarantee civil rights, such as the principles of sound administration (which protect the right to a fair trial).

In **Spain**, the most important source for civil rights is the Spanish Constitution. The Spanish constitution contains several domestic civil rights, but also incorporates international norms of the Universal Declaration of Human Rights (UDHR) and the ICCPR. The civil rights included in the Spanish constitution are considered core civil rights. Several legislative acts further regulate civil rights. Examples are the Law on the rights and freedoms of foreigners in Spain and their social integration, the Law on Freedom of Religion, the Penal Code (prohibiting crimes against liberty, crimes against privacy, crimes against the exercise of fundamental rights and public freedom, for instance). Fundamental rights and liberties are regulated by the so-called “organic laws” (*leyes orgánicas*) which are adopted by a qualified majority in the Parliament.

In **the United Kingdom**, the legal systems of England, Northern Ireland and Wales are based on the common law, which means that part of the body of law is derived from custom and judicial precedent. In contrast to Ireland, the UK does not have a written constitution. However, that does not mean that there are no constitutional instruments. There are several ‘constitutional written instruments’ in the U.K., such as the Magna Carta (1215), the Petition of Right (1628), the Bill of Rights (1689), EU Act (1972), Human Rights Act (1998) and the Constitutional Reform Act (2005). Despite a strong doctrine of parliamentary sovereignty, according to which a previous parliament cannot bind a future one, rights are not subject to ‘implied repeal’. Courts, although they cannot invalidate acts of parliament based on fundamental rights, will interpret legislative measure to comply with fundamental rights, unless the act itself explicitly directs otherwise.



5. INTERNATIONAL AND REGIONAL SOURCES OF CIVIL RIGHTS

All countries, assessed in this report, are party to major international treaties, conventions and protocols protecting civil rights. They are all party to the European Convention on Human Rights (ECHR) and in the International Covenant on Civil and Political Rights (ICCPR). For these Member States of the EU, the EU Charter of Fundamental Rights is also an important applicable source of civil rights, in situations which fall under the scope of EU law (see later); there are however differences in the way and circumstances in which the Charter is recognised and applied. The recognition of the civil rights of international and European sources of civil rights is dependent on the way international and European Union law is recognized in the various legal orders. In some countries transposition of international law into national law is necessary; in other countries these civil norms are directly applicable in the national legal order.

Belgium is party to several international law instruments for the protection of civil rights. Ever since a judgment of the Court of Cassation in 1871 (*Fromagerie-Franco-Suisse Le Ski judgment*), every self-executing (self-binding) international law provisions have primacy over (conflicting) national law. All these international self-executing provisions have direct effect in the Belgium legal order.

Denmark is party also to several international law instruments (amongst others to the ICCPR, the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Denmark has not incorporated these instruments into Danish law, but has ratified or accessed without ratification several Treaties and Conventions. Denmark has a dualistic system, meaning that any international provision needs to be incorporated in national law, after being ratified, before it becomes part of the Danish legal order. The primacy and impact of international civil rights is therefore dependent on incorporation of these norms into Danish law. A recent report of a Danish 'Committee on incorporation etc in the human rights area' of August 2014, recommends that six international conventions (such as the ICCPR, CAT, CEDAW) should be incorporated in Danish law in order to strengthen the protection of individuals, especially at local administrative level.

France has ratified the majority of international instruments for the protection of civil rights, except those related to protection of minority rights (for constitutional reason related to the unity and indivisibility of French people). It however did not always adopt the ratification instruments, or did so with significant delay or imposed reservations. Once international treaties are signed and ratified,



Article 55 of the Constitution confers them a supra-legislative value in the domestic hierarchy of norms. The *Conseil Constitutionnel*, however, declined competence to review the compatibility of laws with duly ratified international agreements (except for national measures implementing or applying EU law which if run counter to expressed provisions of the Constitution, or the constitutional identity of France). It is thus for domestic jurisdictions, in particular for the supreme courts, the Council of State (*Conseil d'Etat*, supreme administrative court) and the Court of Cassation (*Cour de Cassation*, supreme court in civil and criminal matters), to define the conditions of the applicability of the provisions of international treaties in the domestic legal order. French judicial courts (led by the *Cour de Cassation*) admitted early the primacy of international agreements over legislation adopted both before and after their ratification.⁵⁴ However, administrative courts, following the Council of State,⁵⁵ for long refused to admit the primacy of international agreements over posterior legislative acts. Both sets of French courts now accept the supremacy over national laws and the direct effect of the provisions of the ECHR, as well as those of the ICCPR.⁵⁶ In any case, even where international agreement provisions do not have direct effect or courts do not have the power to rely to them to invalidate domestic measures, they can still be used to set aside or dis-apply conflicting national measures, or as interpretative devices, often leading in practice to similar judicial outcomes for the parties.

The **German** constitution includes an obligation to contribute to the worldwide implementation of human rights. Hereto, Germany has ratified most fundamental international conventions for the protection of human rights. Germany has a mixed monistic/dualistic system. The international rules that follow from the ratified human rights instruments are categorized in two types. For each type, a different regime of incorporation applies. By virtue of Article 25 of the German constitution, general rules of international law (which include customary law and general principles of law) are an integral part of the federal legal system, and are ranked at the level of Federal Law, without the need for a national implementation measure. As a consequence civil rights norms included in these two international legal sources take precedence over national statutes (but not over the German constitution), and directly create rights and duties for the citizens of Germany. Although the international treaties do not prevail over the German constitution, the German constitution has to be interpreted in conformity with human rights instruments (*menschenrechtskonforme Auslegung*). By mandate of Article 59(2) of the German constitution, all other international instruments – especially treaties which regulate the political relations of the Federation, or which refer to objects of federal legislation – on the other hand, require the consent or participation of the competent authorities in the

⁵⁴ Cass. Ch. Mixte, 24 May 1975, *Societe des Cafes Jacques Vabre*.

⁵⁵ CE 1 March 1968 *Syndicat National des Fabricants de Semoule*

⁵⁶ CE 20 October 1989, *Civ 1er* 13 December 1989



form of a federal statute. In practice, the courts tend to interpret national law in conformity with Treaties even before implementation has taken place.

Hungary is a party to various international Treaties, including the ICCPR and the ECHR. Similarly to Germany, international human rights treaties are to be transformed by a formal legislative act of Parliament,⁵⁷ while customary international law and general principles of law are accepted by the Hungarian legal order without promulgation (Art. Q of the Fundamental Law). Currently, international human rights obligations might appear to be the only remaining safeguards against the constitution-amending majority of the governing parties, which they have had since 2010, and acquired again in the 2014 elections. Notably, since 2010, it happened several times that constitutional court judgments declaring statutes incompatible with the Fundamental Law were overwritten by subsequent constitutional amendments which incorporated the annulled provisions into the constitution to escape challenge. When asked to rule on the unconstitutionality of constitutional amendments, the Hungarian constitutional court declined competence. The court still noted, that under the Fundamental Law's mentioned provision, it has to interpret and apply the Hungarian constitution as a coherent system and must take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. However, it is questionable what would qualify as disregarding these values, if not the Fourth Amendment on which the court declined to pronounce unconstitutionality. Thus, the court at once pronounced a standard and omitted to apply it to a case most clearly falling under the standard. Hungary also enacted numerous laws (on equal treatment, media, freedom of information, freedom of religion, freedom of assembly, etc.) that protect civil rights. However, increasingly, some of these laws – similarly to the constitution itself – are sometimes more about limiting than about guaranteeing civil rights, as shown by international criticisms and recurring condemnations by the ECtHR.

Ireland is a party to the main human rights instruments The ECHR was incorporated into Irish law through the Human Rights Act 2003. The Human Rights Act 2003 was introduced with the aim of 'further incorporating' the ECHR into the Irish legal system. The Irish Human Rights Act has many similarities with the U.K. Human Rights Act. The Human Rights Act 2003 includes a duty to interpret legislation in so far as is possible in conformity with Convention rights, including civil rights. A

⁵⁷ Before 1989, some treaties were transformed not by Parliament, but by an organ called the Presidential Council of the People's Republic.



declaration of incompatibility may be issued when such interpretation is impossible. In case of a breach of the duty by organs of the state to discharge their functions in a manner compatible with the ECHR, an action under tort law is available. Such action could result in a duty to damage or equitable relief.

The **Netherlands** is one of the founding States of the Council of Europe, which established the ECHR. The Netherlands is, furthermore, party to several international treaties and conventions, such as the ICCPR, CEDAW, ICERD, and CRC. According to the Dutch constitution, international treaties, such as the abovementioned instruments that are general binding (*algemeen verbindend*) do not need to be transposed in Dutch law. On the basis of Article 93 of the Dutch constitution, provisions of international treaties and regulations of international organisations that according to their content may be binding on all persons are directly applicable after their publication in the Dutch Official Journal of the State. In addition, Article 94 of the Dutch constitution provides that national statutory provisions, that are binding on all persons, are not applicable when they are in conflict with international law provisions. It provides that “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.” The Dutch legal system thus displays, a considerable openness towards international law and consequently towards international and European civil right norms. These international and European civil rights norms do not need to be transposed into national law, but are ‘law of the land’, whenever the specific provisions are generally binding.

The ECHR and the ICCPR are both ratified by **Italian** laws and therefore the provisions of both international instruments are formally part of the Italian legal system. The treaties are ratified by the government, after the possible law authorising the ratification, assuming the obligation on an international level; at the same time an ordinary statute is usually needed to execute the dispositions inside the Italian legal system, to make them effective and binding also for the citizens (and not only for the Government). Even if such a process of execution is made by ordinary statutes, the effectiveness of the treaties is enhanced compared to the ordinary law in which they are incorporated.

Spain is a party to all Treaties and Conventions on civil rights adopted by the United Nations. Moreover, Spain is party to several other international law instruments protecting civil rights (the ICCPR, Convention on the Prevention and Punishment of the Crime of Genocide, ECHR, are examples). According to the Spanish constitution, Spanish fundamental and constitutional rights should be interpreted in accordance with international Treaties and Conventions protecting human rights (Art. 10.2 of the Spanish constitution). The Spanish constitution thus offers a legal basis for the primacy of



international human rights. Moreover, according to the Spanish constitution, international Treaties concluded by Spain become an integral part of the legal order after publication in the Official Journal. Therefore, rights contained in international instruments do not require specific transposition measures and can be freely invoked by individuals before administrative authorities and Spanish courts and tribunals. Notwithstanding this principle, some rights may require legislative implementation (*non self-executing* clauses). In fact, as Spain became party to most of treaties on civil rights. However, there has been no need to adopt specific legislation to incorporate the civil rights of the international instruments, since civil rights of the Spanish constitution already have been given effect in national lower legislation. Actually, Spanish national legislation – mainly in organic laws- provides a broader protection of these rights than required by international treaties. Examples of this specific Spanish legislation are laws which guarantee the Freedom of religion, the right to privacy and the protection of personal data.

The United Kingdom is a party to several international Treaties and Conventions. Not all of these international instruments are incorporated, however. Neither the UNDHR nor the ICCPR have been incorporated in their entirety into domestic law by any Act of Parliament. The civil rights from those instruments can be incorporated by an act of parliament or, more indirect, by judicial interpretation of these rights or interpretation of these civil rights by state agencies.

6. THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EU CHARTER

As described above, the EU Charter is primary EU law and binding since December 2009, after the Treaty of Lisbon entered into force. The EU Charter is thus a binding source of fundamental rights for the EU and Member States when they act under the scope of EU law, while the civil rights guaranteed by the ECHR are only indirectly binding, as general principles (Article 6(3) TEU). This report focuses on the manner in which the EU Charter and the ECHR are incorporated into national law, how these instruments are recognised and given effect, and how the civil rights provisions of the EU Charter and the ECHR interact in the national legal orders. The EU Charter has gained significance as a ‘foreign’ source of civil rights, since it became binding in 2009; however, even before that, many national courts referred to it as a source of inspiration for the protection of civil rights, even in situations which bore no relation to EU law. Nevertheless, the most important foreign source of civil rights in national case law is still the ECHR. National legislative instruments seem to make only few references to either the ECHR or the EU Charter. In all countries assessed, the ECHR as well as the EU Charter are applied, either because they are incorporated into national law (*e.g.* Denmark, the U.K.) or because they are directly applicable (*e.g.* Spain, the Netherlands, France).



As observed above, in **Belgium**, international self-executing civil rights, including the EU Charter and the ECHR, have direct effect in the Belgian legal order. National legislation and case law refer to the EU Charter and the ECHR abundantly. The Charter and the general principles of EU law have both been recognised and referred to by Belgian authorities in several cases (for instance by the Belgian Constitutional Court in the follow-up case of CJEU's ruling in *Test-Achats*⁵⁸). The Belgian courts still display a strong preference for applying the ECHR or other international instruments, rather than the EU Charter. That might reveal unawareness of Belgian courts of the value of the EU Charter. The relationship between the EU Charter and the ECHR are not perceived problematic, and are regarded as belonging to separate spheres. Both instruments need to be observed and the highest Belgian courts have embraced both the ECHR and the main tenets of EU law pertaining to civil rights.

According to **the Czech Constitution**, international treaties are incorporated into the Czech legal order after the consent of the parliament and which bind the Czech Republic are part of the legal order. According to Article 10 of the constitution promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, constitute a part of the legal order. These norms have primacy over conflicting national provisions. Whereas the general principles of EU law, which include civil rights, were used by the Czech Constitutional Court and other courts in the Czech Republic even before accession of the Czech Republic to the EU, reference to the EU Charter have been avoided by the Constitutional Court thus far, except for its two judgments which reviewed the compatibility of the Lisbon Treaty with the Czech constitutional order.

The ECHR is incorporated by a **Danish act** of April 1992. Consequently the norms of the ECHR are part of Danish law and these can be invoked before national courts. The ECHR has been given primacy over national conflicting law by case law. According to the Danish Supreme Courts' case law, the ECHR and the decisions of the ECtHR need to be observed. The Danish parliament has a strong position assuring that Denmark lives up to its obligations of the ECHR, which leaves not much discretion for national courts to assess infringements of civil rights. With regard to the EU Charter, it seems to be unclear how the entry into force of the EU Charter will affect the balance of powers between the Parliament and the Danish courts. Recently, Danish courts started to refer to the EU Charter and national courts are confronted with an increasing number of allegations based in the provisions of the Charter. However, that court practice does not necessarily mean that Danish courts will use the EU Charter as a benchmark for the interpretation of national law or the Constitutional Act.

⁵⁸ C-236/08, *Test Achats*, ECLI:EU:C:2011:100.



France signed the ECHR in 1950, but ratified it only in 1974, and accepted the individual applications to the European Commission of Human Rights in 1981. Domestic courts accepted that the ECHR produced direct effect for individuals after its ratification. National legislative measures do not make reference to the EU Charter of Fundamental Rights, but national courts make increasing mention of that text and its provisions. The Council of State had already found no difficulty in applying general principles of EU law to measures implementing EU law.⁵⁹ After the EU Charter was proclaimed in 2000, the Council of State was at first relatively keen to make references to it, and even to apply it in combination with the ECHR and the ICCPR, but it stopped doing so after the Draft Constitution for Europe was rejected. Since the Charter has been conferred binding force in 2009, the Council of State recognised its authority as primary EU law, which takes precedence and may be directly effective (depending on the nature of provisions invoked), but only in relation to measures implementing EU law, which it sometimes defined quite narrowly (*'mise en oeuvre'*). Based on a recent intervention of the vice-president of the Council of State, one would expect the French administrative court to align their position on the CJEU's extensive interpretation, based on its previous case law related to general principles.⁶⁰ Triggered by lawyers' more frequent reliance on the EU Charter in their arguments, references to the Charter by administrative courts increase year on year. Like with the ECHR, they tend to concern cases related to foreigners' rights and the right to a fair trial. The Court of Cassation also refers increasingly frequently to the EU Charter. The substantive impact of the EU Charter on the domestic protection of rights has however not yet been systematically assessed.

In **Germany** the civil rights of the ECHR come in via an act of implementation on the basis of Article 59(2) of the Basic Law. The civil rights of the ECHR consequently become German federal law and must be taken into account by the governmental institutions. The German constitutional court, the *Bundesverfassungsgericht*, monitors the case-law of the ECHR as a source of inspiration for the interpretation of the German constitution. The ECHR remains a preferred source of reference, rather than the EU Charter by German authorities. A closer look at the case-law of the *Bundesverfassungsgericht* shows that, in essence, the protection of the ECHR and the EU Charter are considered to be equivalent, in accordance with Article 52(3) of the Charter. When the EU Charter is mentioned, most of the times it is discussed together with the ECHR. The *Bundesverfassungsgericht*, in any case, generally considers both sources a secondary, additional source, to support argumentation which remains primarily based on the Basic Law and its own case-law. In a recent case, the *Bundesverfassungsgericht* invoked the EU Charter by itself, without referring to the ECHR; it however

⁵⁹ CE 17 February 1995, *Meyet et al. Lebon 79*.

⁶⁰ Available at: <http://www.conseil-etat.fr/Actualites/Discours-Interventions/L-application-de-la-Charte-des-droits-fondamentaux-de-l-Union-europeenne-par-les-juristes>



did so to exclude the applicability of the Charter, after the *Åkerberg Fransson*⁶¹ judgment of the CJEU, which had given an extensive interpretation of the scope of application of the Charter.

In **Hungary** the ECtHR plays an important role in setting the standards of civil rights, together with the Hungarian Constitutional Court. The ECHR and its protocols are ratified, *i.e.* promulgated in an act of Parliament, except for Protocols 12, 15, and 16. The Convention – as ratified – is itself applicable law, what that means exactly is not clear. Although the Supreme Court declared the ECHR needs to be observed and its rights need to be applied, there are debates as to whether this means direct applicability or rather that the ECHR rights serve as “additional arguments in the interpretation of domestic law, through which the Convention takes effect.”⁶² The Constitutional Court in one case declared it will follow ECtHR case law even if it diverges from its own interpretation;⁶³ in general, it stated that international obligations which violate the Hungarian constitution may not be enforced apart from *ius cogens*.⁶⁴ Moreover, national (ordinary) courts refer to the ECHR in their case law. The EU Charter is only implicitly recognised in the Hungarian constitution, which states that the law of the European Union lays down generally binding rules of conduct. The EU Charter is rarely referred to by national legislation (five times). National courts in Hungary do not often use EU law as a source of law, but that attitude might change in the future. The EU Charter has only be referred to in 19 cases since 2009. The ECHR is thus much more visible in the Hungarian constitutional legal order than the EU Charter is at the moment.

In **Italy**, the EU Charter is recognised in the legal system as a binding source of civil rights. Moreover the general principles of EU law, including civil rights, are similarly recognised as binding norms in the Italian legal order. The Charter is not explicitly recognised, but is binding based on the Italian Constitution, according to which Italy must respect its "international duties". The EU Charter does not prevail over the Constitution, but supersedes on ordinary statutes (*legge ordinaria*) and it is considered as a ‘parameter’ to evaluate the compatibility of the Italian statutes with the Constitution (*parametro interposto*). Italian courts already referred to the EU Charter, before the EU Charter was a binding instrument. Even the Parliament and Government take into account rights in the EU Charter to implement legislative directives and decisions and in the indirect administration of EU policies. The EU Charter has already contributed to the further elaboration of civil rights protection and the interpretation of constitutionally protected rights. The case law produced by the Strasbourg Court is

⁶¹ C-617/10, *Fransson*, ECLI:EU:C:2013:105.

⁶² See in more detail Mohácsi, *op.cit.*

⁶³ Dec. 61/2011. (VII. 13) AB.

⁶⁴ Dec. 30/1998. (VI. 25.) AB.



recognized as binding, and helps to define the content of civil rights. It should be noted that this special status does not extend up to the level of pervasiveness recognised for EU law: in fact, national court may not set aside internal rules which conflict with the ECHR, and must raise a question of constitutionality before the Constitutional Court.

Ireland was one of the original states, which signed the ECHR. The ECHR has been incorporated by the Human Rights Act (2003). After the adoption of the Human Rights Act 2003 the impact of the ECHR in national case law increased importantly. Where national courts approached the ECHR with scepticism, this changed after the adoption of the Human Rights Act. Similarly to the United Kingdom, the ECHR seems to be gradually accepted nowadays. One of the reasons seems to be increased familiarity with its provisions. Nonetheless, it was also argued that the ECHR would have a more limited impact in the Irish courts than in the UK due to the fact that there is already established rights protection in the Irish Constitution. The EU Charter has been recognised in Ireland by the constitution, as part of primary EU law. However, it seems that the EU Charter has a less obvious role in national case law, because of a lack of awareness. Moreover, since the scope of application of the EU Charter is limited, it seems that national courts prefer to refer to the ECHR.

In **the Netherlands**, the EU Charter and the ECHR are both very important sources of civil rights. Under Article 120 of the Dutch Constitution, national judges are not allowed to assess the compliance of statutory law with the Dutch Constitution (*'toetsingsverbod'*). The combination of the openness toward international civil rights and the prohibition of constitutional review give the ECHR and the EU Charter an important role in the civil rights protection in the Netherlands. The ECHR is, in fact, one of the main sources of civil, fundamental rights that is relied upon in Dutch legal proceedings by individuals. The Dutch constitution does not cover all the civil rights included in the ECHR and the Charter. However, civil rights protected under the ECHR or the Charter are definitely part of the Dutch legal system and applied by national courts. Noteworthy, For example, Article 7 and Article 47 of the Charter have no equivalent in the Dutch constitution, but they are relied upon the most in national proceedings. In the Dutch case law, the EU Charter and the ECHR are the most important yardsticks to assess civil rights protection. Mostly the case law of the ECHR is cited and used as a reference by Dutch courts. Since the ECHR has a considerable source of case law, and since there is more knowledge of the scope of the ECHR compared to the EU Charter, that role for Strasbourg case law is understandable. Nevertheless, in some cases the Dutch courts approach the Charter and the ECHR autonomously, both as independent sources of civil rights. There seems not to be a hierarchy between the Charter and the ECHR, so far. The EU Charter becomes more and more important in Dutch case law. Until the spring of 2014 in approximately 500 cases the EU Charter is referred to (in a quantitative sense). In Dutch legislation references to the EU



Charter or the ECHR are rare. References to the ECHR are found in some specific Acts. For instance a reference to the ECHR is found in the Surrender Act (*Overleveringswet*) (Article 11) and the Aliens Act (*De Vreemdelingenwet*) (Article 30). There are no references to the EU Charter in Dutch legislation at the time of writing (September 2014).

The ECHR did not have to be incorporated in **Spain**, since it is part of the Spanish legal order as such. As observed, according to the Spanish Constitution, international treaties concluded by Spain become an integral part of Spanish Law after publication in the State's Official Journal. The Spanish constitutional court has recognised the applicability of the ECHR since 1981. There are rarely references to the EU Charter in national or regional laws in Spain. Express references to the EU Charter tend to be in the preamble of different legislative acts, not in the substantive provisions. In fact, most of those references are brought in to back up and justify norms focused on social rights. From early on Spanish courts have frequently referred to the EU Charter in their case law. However, in most cases, the invocation of the Charter is a mere quote, usually accompanying references to other national and international texts, but on occasion the appropriate court looks to state that uses the Charter as an interpretive parameter.

In **the United Kingdom and Ireland**, the ECHR has been incorporated by the Human Rights Act 1998 (U.K.) and the Human Rights Act 2003 (Ireland). In the United Kingdom the principle of parliamentary sovereignty affects the protection of civil rights as described above, since according to the principle the will of parliament has supremacy over any other conflicting rule. However, the United Kingdom has become a Member State of the European Union and in that light, of primacy and direct effect of EU law, the doctrine has been modified. Moreover, since the ECHR is incorporated into the Human Rights Act (1998) that Act significantly affects the recognition of civil rights of the ECHR. According to the Human Rights Act public authorities may not breach any of the right of the ECHR. It also obliges national courts to interpret primary legislation in the light of the ECHR, as much as possible. There is therefore a clear obligation in national law for ECHR-consistent interpretation. If such consistent interpretation is impossible, the court may adopt a declaration of incompatibility. Also the EU Charter, as primary EU law, is given effect in the United Kingdom, by the European Communities Act 1972. Hence, both the EU Charter and the ECHR are recognised in U.K. law by an act of parliament. However, the scope of application of these instruments differs. Whereas the Human Rights Act 1998 is applicable to all areas of national law, the EU Charter applies only within the scope of EU law. Moreover, even though the ECHR has been recognised and incorporated in the Human Rights Act 1998, national measures cannot be invalidated by courts, when they conflict with the ECHR.



7. CONFLICTS BETWEEN CIVIL RIGHTS

Conflicts may arise between rights contained in one particular source (e.g. two rights protected by one country's constitution), or between rights protected between different sources (e.g. between a right protected under EU law and a right protected by a national constitution). If one of the sources prevails over the other in the hierarchy of norms, the right contained in that source would be given precedence over the other. Most rights are not absolute, and can be limited through constitutional or legislative measures, to pursue important public interest objectives or protect others' rights. Most potential conflicts are solved by balancing between rights or interpreting one right in a way which makes it compatible with others. Moreover conflicts can occur in the sense that there is a conflict between civil rights or in the sense that there is a conflict between laws that regulate civil rights. In this section, we highlight how conflicts of rights are addressed at domestic level

The civil rights in the **Belgian constitution** are similar to the civil rights deriving from international and European sources of EU law, although their scope may differ. On several accounts, the Constitution still offers more and more precise guarantees than their international and supranational counterparts, for example with regard to the freedom of education (Article 24 of the Constitution). For other fundamental rights, the limitation possibilities in the Belgian Constitution have been (more) strictly confined. These differences have called for the development of special techniques to sort out (potential) substantial or procedural contradictions. If there are substantial conflicts between civil rights, the Belgium courts are the main actors to balance these civil rights. The judges have basically three approaches to solve such a conflict: 1) the principle of uniform interpretation, 2) the principle of the most favourable clause, and 3) the principle of conditional monism. Pursuant to the principle of uniform interpretation, the national norms are to be read in close conjunction with the international and European standards.⁶⁵ The principle of the most favourable clause has taken its cue from inter alia Article 53 of the ECHR, indicating that in case of contradictions, when a uniform interpretation is not possible; preference is to be given to the norm that offers the most extensive protection.⁶⁶ When neither are possible (especially when the international or European rule does not allow for the national clause to take priority),⁶⁷ the principle of conditional monism dictates that then the international or European rule is to take priority. In practice however, the principle of uniform interpretation together with the principle of the most favourable clause usually allow for a smooth interplay between the different standards, without so far emerging serious clashes (at least with regard to the substance of the rights protected).

⁶⁵ Established case law since the judgment of the Court of Arbitration in judgment nr. 136/2004 of 22 July 2004.

⁶⁶ See e.g. Court of Arbitration, judgment nr. 33/1994 of 26 April 1994.

⁶⁷ See e.g. with regard to the EU Charter, the CJEU's recent curtailment in its judgment in Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.



In the **Czech Republic**, limitations of the civil rights protected in the constitution are only allowed by law and may only be limited according to the requirements set out in relevant constitutional provisions (Article 4 of the Czech Charter of Fundamental Rights and Freedoms). Conflicts of civil rights most likely could take place in the context of primacy of EU law and the Czech constitutional legal order, in terms of authority. Since the ECHR is part of the Czech legal order, conflicts between the ECHR and Czech law seem not to be an issue. The Czech constitutional court has to solve conflicts between constitutional civil rights. It developed a standard three-step test, qualified by the Czech constitutional court as 'a modern unwritten principle of interpretation of constitutional law'.⁶⁸ It includes a *Test of Suitability/Appropriateness* ("whether the institute restricting a certain basic right allows the achievement of the desirable aim (the protection of another basic right)"); a test of *Test of Necessity* ("means which most preserve the affected fundamental rights and freedoms") and the *test of Balancing* ("comparison of the importance of both conflicting basic rights", which suggests that "negative consequences may not outweigh positive elements").⁶⁹ That test is, however, not applied universally and the Constitutional Court 'has oscillated between treating the proportionality test as an optimization requirement and a "mere" elimination of excessive disproportionality'.⁷⁰

The civil rights contained in the **Danish constitution** ('*Grundlov*') having constitutional value take precedence over legislative acts. Nevertheless, the scope of application of the civil rights in the Danish constitution is interpreted narrowly, in the sense that these rights only apply when there is no doubt whether they should apply. That means whenever a situation is interpreted as conflicting with one of the civil rights of the constitution, the civil right will prevail, but this hierarchy is importantly dependent on whether a situation indeed falls within the scope of application of the Danish constitution. That limited interpretation of the Danish constitution can be explained by the role of the legislative power in creating law, and from the view that the constitutionally protected rights in fact restrict the democratic Parliament's sphere of action. There are different ways to solve a conflict. Some civil rights expressly contain limitations and one solution to a conflict of rights is to apply the limitation provided for in the law. Another option is to balance the conflicting rights in a relative manner. Finally a conflict can be solved by prioritizing the civil/fundamental right taking precedence in relation to the other sources of law, without quantifying the importance of either of the two. The scope of protection afforded to civil rights under the ECHR is broader than the one granted under the Danish constitution. National courts are expected to work under the presumption that a national legislative act is in line with the ECHR. The

⁶⁸ Kosař, n 49, 8, referring to the CCC's judgment Pl. ÚS 33/97 of 17 December 1997 (N 163/9 SbNU 399; 30/1998 Coll.), ECLI:CZ:US:1997:PI.US.33.97.

⁶⁹ Kosař, n 49, 8, with further references.

⁷⁰ Ibid, 9, referring to Pavel Hölländer, *Filozofie práva* (Aleš Čeněk, 2006)170-173. Hölländer was one of the two justices of the CCC who served two full terms (from 1993 to 2003) and is generally considered the most influential member of the CCC.



courts however cannot refrain from applying a clear national rule. Moreover, up until now, the courts have not carried out independent interpretations of the ECHR that did not have a clear support in the case law of the ECtHR.

In **France**, ratified international agreements, including the ECHR and EU law (and thus the Charter) prevail now over legislative acts, but they must respect the Constitution, which remains the highest norm in the French legal order. In case of conflicts between rights based on the ECHR or EU law, and other receiving legislative recognitions, those contain in European instruments will prevail and national courts will set aside conflicting legislative norms, but they cannot invalidate them, nor refer them to the *Constitutional Conseil*, which can create difficulties with regard to legal certainty. In situations where national legislative provisions recognise rights which are alleged as incompatible with constitutional protected rights, since 2010, French supreme courts can call upon the *Conseil Constitutionnel* to invalidate them. Before that, the *Conseil Constitutionnel* could only invalidate these provisions if it had been called to examine it by the competent political personalities or members of the opposition, but could not do anything once legislation had been promulgated. National courts would nonetheless attempt to interpret and apply these measures in conformity with constitutional protected rights, where possible. French courts, including the *Conseil Constitutionnel*, will also interpret rights in the light of ECHR and EU provisions, including increasingly the EU Charter, in order to avoid incoherence and inconsistencies (eg on freedom of religion and secularism). Where conflicts occur, as it happen in relation to the rights of the defence, French courts normally adjusted their case law to the decision of the ECtHR. There is no hierarchy of rights within the French *bloc de constitutionnalite* (block of constitutionality, *i.e.* the norms which are interpreted as belonging to the constitutional level). Most civil rights are not absolute, and can be limited through legislative measures in order to protect others' rights or constitutional objectives such as the safeguarding of the public interest, public order, or the continuity of public service, although there is no general provision to that effect. Courts, including the *Conseil Constitutionnel*, use various techniques in order to conciliate between different rights or interests (*e.g.* freedom of religion, freedom of conscience and laïcité (the French version of secularism); right to family life and non-discrimination; freedom of expression and human dignity; freedom to create and right to privacy; general freedom and right to safety and security, right to work, human dignity, right to housing, property rights). In order to define the scope of protection of a civil rights and its relationship with conflicting ones, they do not follow a universal, single test, such as strict proportionality. Sometimes they apply elements of adequacy, necessity, or strict proportionality testing; at other times, they exercise control over whether the substance of a right is protected, or that the legislation provides sufficient legal guarantees to protect constitutional requirements.



The **German** constitutional court is very clear on the fact that it considers the German constitution to be the primary source of fundamental rights. Any other sources of any other level must comply with the standards of the German constitution and can be overruled by it. This stance has been consistently shown, especially with regard to the relationship between the German Constitution and the European Union (e.g. the *Solange*, *Maastricht Treaty*, *Lisbon Treaty decisions*, *Honeywell decisions*). Moreover, any instrument of international law acquires the status of a federal statute, either by virtue of Article 25, or after its implementation on the basis of Article 59 of the Basic Law. Thus the Constitution will always be of a higher rank than any international instrument (excluding customary law and general principles of law). The German Constitutional court nonetheless aims for coherence, and interprets the German Constitution in accordance with international law – especially in accordance with the case-law of the ECtHR.

In **Hungary** the civil rights are stipulated in the constitution, and the constitution is clearly at the top of the hierarchy of norms. Consequently conflicts arising out of different sources are not theorised as such, but as non-conformity of a lower level source with a higher legal source (unconstitutionality). As for conflicts between rights originating in the Constitution itself, Hungarian law, in line with the continental legal tradition, considers that rights can be limited by other rights, and relies on the idea of institutional protection or objective dimension of a right. Such conflicts are to be settled ultimately by the interpretation of the Constitutional Court, by way of balancing and proportionality analysis.

In **Italy**, the issue of conflicts between civil rights is topical, since the ECHR and the EU Charter have both a different status in Italian law. It is therefore important to define which source of civil rights is applicable in which situation. There is a different scope of protection available in the event of a conflict between supranational or international law in the protection of these rights and domestic law. Depending on the origin of the right in question, indeed, the possible behaviour for the court changes: if the law is laid down in the EU, the national ordinary judge will override the incompatible internal provision; if it is provided for in the ECHR (or in other international instruments), the ordinary courts cannot override it, but have to raise the question of constitutionality for breach of Article 117 co. 1. In any case, however, the national courts have to attempt – where possible – an interpretation in accordance with international law, to save the apparently conflicting domestic law. With regard to the EU Charter and EU law, both primary law (treaties), and the derived law (regulations, directives and decisions), enjoy the supremacy principle, and therefore prevail over domestic law (including constitutional). In addition, sources of primary law, general principles, and derived law enjoy – as appropriate – direct applicability or direct effects, and are therefore often directly productive of rights for the people. This means when the national courts find a conflict between EU rights and rights based



on national provisions, it has to override national law. Conflicts between civil rights on national level and international law are solved largely by an interpretation aimed at achieving compatibility between domestic and international provisions (*interpretazione adeguatrice*).

In **Ireland**, similar to the position in the UK, many civil rights are not absolute and will be qualified subject to other considerations. For example, the freedom of expression, and freedom of association are qualified and subject to public order and morality. In terms of conflict between rights, the courts will balance rights against other considerations, or other rights. In some cases, the courts will favour specific or narrow rights (the protection of marriage) over more general rights (for example, the guarantee of equality before the law). In the event of a conflict between the constitutional rights of the individual and actions of the State, the State is entitled to argue the necessity of other's rights, and the common good to justify any apparent interference with individual rights.⁷¹

In **the Netherlands** legal order there is, basically, no hierarchy between civil rights. The only hierarchy that can be assumed is that between civil and social fundamental rights, in the sense that the authorities are obliged to take the classic civil rights into account while achieving the aims of social fundamental rights. Since there is no hierarchy between classic civil rights, in case of conflict, national courts need to balance the different rights. The Supreme Court (*De Hoge Raad*) has affirmed the non-hierarchical order of civil rights in early case law.⁷² According to its extensive case law, the Dutch judge is required to balance civil rights, taking into account the specifics of the particular case.⁷³ Another method used by the courts is to assess which of the conflicting civil rights is affected in its core, giving preference to the protection of that core. In the weighing of two civil rights, Dutch courts seem to have a preference to apply European and international standard of review. The courts refer to the case law of the ECHR and the CJEU, also in cases outside the (strict) scope of these instruments. The Dutch legislature is required to take the civil rights into account, ensuring that there is no unjustified interference with a civil right. If a piece of legislation does interfere with a fundamental right, the legislature is required to justify this interference in an explanatory memorandum attached to the legislation. Administrative bodies apply legislation, including the balance struck by the legislature. In some situations, legislative acts leave some discretion to administrative bodies. In exercising their discretion, these bodies are required to respect civil rights. One example of conflict between civil rights concerns the freedom of religion versus non-discrimination. According to Article 5(2) of the Equal Treatment Act, religious schools could under certain circumstances refuse to hire a homosexual teacher. The European Commission initiated an

⁷¹ See for example *People v. Shaw* [1982] 1 I.R. 1; *O'B v. s.* [1984] 1 I.R. 316. See further Forde & Leonard.

⁷² HR 4 March 1988, "Privé"/deBorbon Parma c.s., NJ 1989, 361.

⁷³ A.J. Nieuwenhuis and A.W. Hins, p. 192.



infringement procedure under Directive 2000/78/EC. Following advice from the Council of State, a proposal to amend the Act on Equal Treatment was adopted (adoption still pending).⁷⁴

In **Spain** the content of the constitutional rights must be integrated with those of international conventions and relevant international case law. All conventional rights that have no equivalent in the Spanish Constitution are considered as having only legal, and not constitutional, status. There are two areas in which there are tensions between the constitutional and conventional rights: the right to effective judicial protection and criminal law penalties. Possible conflicts between civil rights are resolved by the Spanish constitutional court and by the ordinary judges and courts. One of the most prominent is the conflict between freedom of expression and information and the rights to honour and personal and family privacy, in the context of journalistic news reporting of public figures.

In **the United Kingdom**, rights which could be identified as common law rights have been to some extent superseded by the ECHR jurisprudence under the Human Rights Act 1998. The majority of civil rights are not absolute and instead qualified and subject to other considerations. Civil rights including the freedom of expression, the right to respect for a private and family life, and the freedom of thought, conscience and religion are qualified, and must be balanced against other rights and public interests. Any interference with a right must be (a) lawful, (b) for a legitimate purpose or aim, (c) necessary, and (d) proportionate to that aim, or go no further than is necessary. If a public authority interferes with a right and does not match these four criteria, it would have acted unlawfully.⁷⁵ With regard to the territorial scope there are two main issues in the United Kingdom. In the first place the question arises in case law whether the U.K. should extradite or deport persons to another country when there is a risk that their civil rights would be harmed. These issues arise mostly in asylum cases. In the second place, questions are whether and to what extent the U.K. is to be held to account for actions taken extra-territorially. Case law of the Supreme Court suggests that the Human Rights Act is applicable in those situations, when 'whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction'.⁷⁶ Moreover, in the United Kingdom certain specific acts protecting civil rights are limited in territorial scope in the sense that the scope of application is confined to England and Wales, Scotland or Northern Ireland.

⁷⁴ <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ev0/viifhan43ruu> (accessed August 2014).

⁷⁵ See further P. Craig, 'Proportionality, Rationality and Review' *New Zealand Law Review* (2010): 265.

⁷⁶ *Al-Skeini v. United Kingdom* (2011) 53 E.H.R.R. 18; this case resolved the conflict between *Issa v. Turkey* (2005) 41 E.H.R.R. 27 and *Bankovic v. Belgium* (Admissibility) 11 B.H.R.C. 435, in favour of the test of authority and control (*Issa*) rather than mere territory (*Bankovic*).



8 JURISDICTIONAL ISSUES

There are many differences in the countries under study with regard jurisdictional scope related to the civil rights. While the personal scope of application of civil rights distinguishes between nationals, EU citizens, long term third country nationals and others, there are also particularities within the countries. The material, territorial and temporal scope differs even more, since the countries have their own history and background with regard to their constitutional structures and civil rights protection.

In **the Czech Republic**, the personal scope of some rights guaranteed by the Czech Charter can be problematic in the light of barriers to EU citizens, since the Charter distinguishes between citizens and aliens. While most of the Charter rights are conferred on all, including aliens, other are limited to citizens (Article 42(2) of the Czech Charter). These are: the right to civil resistance (Article 23), the right to property (‘certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic’, Article 11(2)), the freedom of movement and of residence (‘every citizen is free to enter the territory of the Czech and Slovak Federal Republic’; ‘no citizen may be forced to leave her homeland’ (Article 14(4)), as well as a number of economic, social, and cultural rights. These limitations could conflict with EU law (and in some instances also with the ECHR). There would be three solutions (beyond the possibility to interpret the limitations so restrictively that no conflict with the requirements of EU law ultimately emerges): extension through legislative provisions; through interpretation suggesting that a ‘Czech citizen’ means after the Czech Republic’s accession to the EU also ‘a EU citizen’; or through considering conflicting provisions of EU law (or possibly ECHR) as de facto amendments to the Czech Constitution (or the Czech Charter). The issue has not come up yet in practice though. With regard to the temporal scope, the Czech Charter was incorporated into the Czech constitutional order by a decision of the Presidency of Czech National Council No. 2/1993 Coll. It had however been in force from its inception during the existence of the Czechoslovak federation (8 February 1991). The Czech and Slovak Federative Republic ratified the ECHR, including its protocols on 18 March 1992 and the Czech Republic acceded to the Convention from 30 June 1993.

In **France**, the Preamble of the 1958 Constitution refers to the “French people”, “made up of all French citizens regardless of origin, race or religion”. The 1958 Constitution distinguishes between French people and overseas people (“the overseas populations within the French people in a common ideal of liberty, equality and fraternity”). Except for the right to self-determination, which is explicitly conferred unto oversea peoples, there is no difference between the status of the “overseas people” and the “French people”. Core political rights, such as the right to vote is reserved to citizens (Art 8). Most of the civil rights, however, are conferred upon “any person”, regardless of citizenship. Foreigners who have “a



stable and regular residence” in France have the right to conduct a normal family life, which includes the right to family reunification. The freedom to leave the territory of France, a component of the freedom of movement, is also guaranteed to all persons residing in France. Foreigners without legal right to stay, and people who do not have documentation (*Sans-Papiers*) are also recognised a number of civil rights (e.g. right to marriage or contract a civil partnership, education, legal aid). As for the territorial dimension, the Constitution allows for laws and regulations to be adjusted to fit overseas communities, saved where these concern “nationality, civic rights, and the guarantees of civil liberties”, which guarantees the uniform application of fundamental freedoms throughout the national territory. As to the material jurisdiction, the Constitution and legislative measures allows for adjustments which can undermine the regular exercise of civil rights in crisis situation (*‘legalite de crise’*). Regarding temporal jurisdiction, civil rights are enjoyed by persons from the moment of the creation of the relevant legal relation (eg entry into the territory of France for foreigner, the establishment of residence in France or by the acquisition/loss of citizenship).

In **Germany**, all individuals can rely on the general basic rights. Some civil rights, e.g. freedom of assembly, on the other hand, can only be relied on by German nationals on the basis of the text of the Basic Law. For non-German nationals, Article 2(1) of the Basic Law is interpreted to grant a general freedom of action, and thus functions as a substitute for civil rights. In the Basic Law, this distinction is explicitly worded (‘everyone’ or ‘all Germans’), however, the distinction is largely eliminated in the interpretation of the Constitutional Court.

The **Hungarian constitution** grants civil rights to everyone, without restriction based on citizenship or other status, including legal persons to the extent possible (Art. I(4)). Courts have however considered that legal persons do not have a right to human dignity. Given the Court’s current lack of competence to review fiscal measures, the effect is to deprive legal persons from the ability to challenge them. With regard to the material scope, the exercise of fundamental rights may be suspended or may be restricted beyond the extent specified in Article I(3), which requires restrictions to be necessary and proportionate to the aim pursued, when there is a “special order”, because of situations as war or state of emergency. The fundamental rights to human dignity and the right to life; prohibition of torture, of inhuman or degrading treatment or punishment, of servitude, of human trafficking, of experimentation on humans without their consent, of eugenics, and of human cloning; and fair trial rights with the exception of right to remedy (right to a fair trial, presumption of innocence, right to defence, *nullum crimen, nulla poena sine lege, ne bis in idem*) cannot be suspended even under special legal orders, neither may the application of the Fundamental Law suspended, nor the operation of the Constitutional Court restricted.



In **Ireland**, personal rights including core civil rights are guaranteed to all citizens of the Republic. The 'personal rights' guaranteed by the Irish constitution are framed as rights of 'citizens. However, except for purely 'citizenship' rights, such as the right to vote, these rights have been extended by case law to non-nationals. In terms of territorial limitations, the scope of constitutional civil rights is confined to the territory of Ireland. The risk that someone may become subject to torture or capital punishment is a reason not to extradite or export someone from Ireland to another country. However, Ireland has been criticized with regard to its treatment of asylum seekers, which have no full access to the protection of civil rights.

In the **Italian** constitutional system, most of the civil rights are not limited to citizens, but address all individuals. The Constitutional court interprets the personal scope of civil rights broadly. Where the Constitution refers only to "citizens", the Court still may extend it to foreigners, although it may admit restrictions or distinctions about the actual enjoyment of a subjective situation (for example, in the case of freedom of movement). In relation to the territorial scope of civil rights, as the Italian Republic is not a federal State, regional governments do not normally have competence on issues related to civil rights. There are, however, specific provisions with regard to linguistic minorities tied to the territory of residence. With regard to the material scope of civil rights in Italy, any civil rights provided by the Italian Constitution may be restricted to allow for the protection of public order, security, health and safety, general morality, etc. Limitations to civil rights may be restricted only by law; furthermore, the identification of cases and the related rules is reserved to the Parliament, but the Constitution itself provides acceptable justifications, considered as mandatory justification: thus, for example, domicile may be subject to inspections, for reasons of public health and safety or for economic and tax purposes (Article 14); restriction of freedom of movement can only be done for reasons of health and safety (Article 16).

In **the Netherlands** there are not many jurisdictional limitations to civil rights as regard the personal, material and territorial scope of civil rights. With regard to the personal scope, the Dutch constitution addresses in most civil rights everyone (*een ieder or ieder*), or individuals residing in the Netherlands. The personal scope of protection of the Dutch constitution is, therefore, quite broad. The right to non-discrimination is, for instance, addressed to all individuals who reside in the Netherlands. The right to freedom of religion is addressed to everyone, as does the right to privacy. Nevertheless, some rights are specifically granted to Dutch nationals. For example, aliens may be expelled based upon a regulation of the parliament (Art 2), implying that Dutch nationals may not be expelled. With regard to the territorial scope, one must mention the overseas countries and island that are part of the Netherlands. The territorial scope of application of the Dutch constitution is the Netherlands, as well as the Bonaire, St.



Eustatius and Saba Islands, in principal. The independent states (*e.g.* Aruba, Curacao and St. Maarten) have their own specific ‘State regulations’ (*Staatsregeling*) in which civil fundamental rights are laid down. These civil rights are similar to the civil rights included in the Dutch constitution. Included in the State regulations are, *inter alia*, the right to equal treatment, the right to assembly, freedom of religion. European law (and therefore also the EU Charter) is only partly applicable to the Dutch overseas territories (see Article 198 TFEU and Annex 2 to the Treaty). That means that the protection of fundamental rights by the Charter has no or a very limited role in the countries Aruba, Curacao and St. Maarten.

In **the United Kingdom**, there are no significant differences with regard to civil rights protection between citizens and non-citizens, especially in the Human Rights Act era. Procedurally, only ‘victims’ of an unlawful act have standing to bring proceedings violations of one of the civil rights of the ECHR or the Human Rights Act. In order to be able to have legal standing a victim has to prove that direct harm is caused by an act or omission. ‘Victims’ is broadly interpreted and it includes any persons (include children, and others who might lack capacity according to domestic law),⁷⁷ non-governmental organisations,⁷⁸ or a group of individuals.⁷⁹ With regard to the material scope of civil rights, the recent concerns of internal security have impacted the scope of civil rights importantly. The right to free speech (for example, though the creation of the offence of ‘glorification’ of terrorism⁸⁰), the protection against loss of citizenship,⁸¹ and the right to effective judicial protection have been limited in this sense

9. NON-LEGISLATIVE ACTORS RELEVANT IN THE SETTING OF CIVIL RIGHTS NORMS

In this section the focus lies on non-legislative actors that are important in the Member States for setting norms of civil rights, that contribute to public debates and that have an impact on civil rights on domestic level. These actors are included in this report, since these actors amount to civil rights outside the judicial and legislation scope, but may be very important for civil rights.

In **Belgium** the Centre for Equal Opportunities and Opposition to Racism has a prominent role in setting civil rights. It has been reformed in 2014 into the Interfederal Centre for Equal Opportunities and the

⁷⁷ See for example, *Covezzi and Morseli v. Italy* Judgment 9 May 2003; and *Winterwero v. Belgium* (1979) E.H.R.R. 387.

⁷⁸ These organisations on its own account only, and cannot challenge a measure on behalf of its members: *Ahmed v. United Kingdom* (2000) 29 E.H.R.R. 1.

⁷⁹ Art. 34 ECHR.

⁸⁰ Terrorism Act 2006.

⁸¹ Immigration Act 2014.



Federal Centre of Migration, focussing on migration and equal treatment issues. It performs three tasks: 1) processing individual reports, mainly on issues relating to allegedly discriminatory situations and issues relating to the basic rights of foreigners; 2) informing, training and raising awareness about its fields of competence, through publications, campaigns, press releases, meetings, training sessions, and so on; 3) drafting opinions and recommendations, mostly for public authorities, at all levels of government. These recommendations relate to improving legislation as well as the implementation of wider action plans. It has over time built partnerships with many grassroots organisations, both public and semi-public bodies or institutions, or associations active in different sectors. It also instigated litigation, and is involved as a member, observer, or in an advisory capacity with international organisations sharing the same goals. Other important actors are the special commission for the Protection of Privacy and the NGOs Amnesty International and Human Rights Watch.

Important actors in the recognition and scope of civil rights in **the Czech Republic** are the Czech Constitutional Court and ordinary courts. As mentioned, the Czech Republic has a concentrated system of constitutional review. The Czech constitutional court exercises both abstract review on petitions lodged by various privileged applicants, including particular chambers and concrete review on individual complaints against decision of public bodies, including ordinary courts. Other important actors in the field of civil rights are the Government, particularly the Government Council for Human Rights, the Public Defender of Rights (the Ombudsman) and NGOs, particularly The Human Rights League (*Liga lidských práv*).

The Parliamentary Ombudsman has an important role in **Denmark** with regard to civil rights protection. It investigates complaint regarding public administration of citizens. There is a specific ombudsman for Greenland. Another important actor in defining and setting civil rights is the Danish Institute for Human Rights. It promotes human rights protection and is often involved in debates on the implementation of the civil rights stemming from the ECHR in Denmark. There are many other relevant institutes and bodies in Denmark: NGO but also equality bodies and the Danish Data Protection Agency are important in the field of civil rights.

In **France**, in addition to courts and the legislature, a number of important *independent administrative authorities* play an important role in the setting as well as the application of civil rights. Different authorities may be mention. Among those are first of all the *Commission nationale consultative des droits de l'homme* (CNCDH), the national consultative committee for human rights, which ensures that France complies with its international human rights obligations, advises the governments and



parliament on the compatibility of laws and regulations with human rights and fundamental freedoms, and performs educational and awareness raising functions. Also the Rights Defender (*Defenseur des Droits*) can be mentioned. Besides dealing with individual complaints, he/she makes proposals for legal or regulatory amendments and recommendations to both public and private authorities. He/she also conducts and coordinates studies and research.⁸² There is also the Commission *Nationale Informatique et Libertés* (CNIL), which ensures that information technology do not undermine the fundamental rights and freedoms of individuals (in particular the right to privacy). In addition to information and awareness-raising activities, it has advisory functions and can also impose administrative sanctions. Moreover, a number of NGOs are also active in the field of human rights protection. The oldest and best-known is the *Ligue française pour la défense des droits de l'homme et du citoyen*, referred to as the *Ligue des Droits de l'Homme* (LDH), set up in 1898. It monitors the respect of international and European human rights norms in France.

In **Germany** the legislature is an important actor in setting civil rights norms. Moreover, the German constitutional court is the main player for the interpretation of fundamental rights that are laid down in the German constitution, but also with regard to their relationship with international human rights instruments. The German constitution is a living document and it is the *Bundesverfassungsgericht* that determines its development. In addition to governmental and the judicial actors, several other state bodies were set up for the promotion of human rights. First of all, in accordance with Article 17 of the Basic Law, there are Petition Committees at Federal and a State level, which are competent to invest the complaints they receive. When a Committee considers a complaint to be valid, it may refer it to the Federal government, which is then given the opportunity to restore the flaw in law. Another important actor is the German Institute for Human Rights. Moreover, different commissioners have been established, in the field of inter alia non-discrimination, human rights and data protection.

In **Hungary**, apart from intra-governmental consultation involving the respective bodies (ombudsman, equal treatment authority, freedom of information authority, etc.), civil society participation in the legislative process is regulated by law. It makes social consultation mandatory in the case of legislative acts, and cabinet and ministerial ordinances. Consultation is either done with designated “strategic partners” or with anybody expert or affected by the planned legislation or ordinance. In case of mandatory consultation, the plan of ordinance or the bill is to be displayed on the website of the ministry, and anyone (with name) can send in his or her or their organisation’s view on the plan. However this obligation to involve actors in the preparation seems to be often circumvented in various

⁸² Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic report, France, UN Doc. CCPR/C/FRA/5 (31 January 2013), paras. 11-13.



ways, thus it fails to be an effective instrument to enhance the role of other actors in the field of civil rights. In addition, prior to the 2012 constitution, human rights NGOs contributed to the interpretation of civil rights, as under the system of *actio popularis*, anyone, without showing personal interest, could initiate a posteriori constitutional review. Under the Fundamental Law, *actio popularis* was abolished.

In **Ireland**, there are different non-State, and independent State bodies aiming to affect the way civil rights are dealt with in legislation, regulation and case law. One of these bodies is the Equality Authority, which is an independent State body, mandated with monitoring equality. In 2014 the Irish Human Rights and Equality Commission has been established. The Commission promotes civil rights through drafting legislation, issuing public policy statements, and making recommendations to the government. It also has active engagement with process of review of human rights standards by the United Nations and the Council of Europe.

In **Italy**, NGO's are important actors in the field of civil rights. More recently independent administrative authorities and agencies have come up in the field of civil rights, such as the Data Protection Authority. That authority is concerned with respect to the application and implementation of the rules regarding the right to privacy. It has a whole range of tasks, among others duly recognized and described in the Italian Data Protection Code. It is an independent administrative authority established by the so-called Privacy law.

Since 2011, **the Netherlands** has a specific institute for human rights: The Netherlands Institute for Human Rights. It plays an important role in the field of human rights, including civil rights. The Institute explains, monitors and protects human rights; it promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands. The decisions the Institute are not binding, but are important sources of equality/fundamental rights. Worth mentioning are, moreover, specific independent bodies, such as the Dutch Data Protection Supervisor (*College Bescherming Persoonsgegevens*). The most important actors are the national courts in the protection and balancing of fundamental rights, since there is no hierarchy of fundamental civil rights. Therefore, courts also have an important role in shaping the scope of civil right norms. The Advisory Division of the Council of State is, moreover, an important actor in setting civil right norms, since the government has to ask the Advisory Division for advice on all legislative proposals that are submitted to the national parliament. Individual members of the parliament may also request for advice. In the advices of the Advisory Division a legislative proposal is reviewed from several angles, including fundamental rights protection.



In **Spain**, the Permanent Observatory for Immigration (*El Observatorio Permanente de la Inmigración*), has various functions which have impact on civil rights. These functions include: a) to act as a permanent body of collection, analysis and exchange of quantitative and qualitative information gathered from the bodies of the General Administration of the State concerning immigration matters and asylum; b) to collect, promote and guide the diffusion of information obtained; c) to promote, develop, spread and distribute research, surveys, studies and publications; d) to prepare an annual and periodic reports on immigration situation; and e) to create and maintain a statistical database. The Office of the United Nations High Commissioner for Refugees (UNHCR) is another important actor in Spain. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees.

In **the United Kingdom** a new body, the Equality and Human Rights Commission (EHRC) was set up in 2007. This body has powers to promote and monitor human rights, and to publish codes of practice on equality legislation. As part of this body, from 2013, an Equality Advice and Support Service provides information and support to individuals with equality concerns, or human rights complaints. The EHRC is responsible for England, Wales, and Scotland. Wales and Scotland additionally have statutory committees. Northern Ireland has its own body, the Equality Commission. The EHRC provide information and advice, and can use statutory powers to enforce duties under equality legislation. The body also seeks to influence the legislature, and endeavour to ensure that government takes account of human rights and equality. There are also numerous civil rights campaigners in the UK, including the National Council for Civil Liberties ('Liberty') which promotes civil rights through test case litigation, lobbying, campaigning and the provision of free advice. They do not appear to be actively involved in the setting of civil rights standards, but rather aim to influence their development. There are also national ombudsmen to whom it is possible to make a complaint. These are in some cases also country-based, in Scotland, for example, there are a number of different ombudsmen and commissioners with relation to civil rights protection. These include the Scottish Public Services Ombudsman; the Scottish Legal Complaints Commission; and the Commissioner for Ethical Standards in Public Life in Scotland. In terms of data protection, an independent body, the Information Commissioner's Office, was set up to 'uphold information rights in the public interest'.

10. CONCLUSION: THE RECOGNITION AND SCOPE OF CIVIL RIGHTS OF CITIZENS AND THIRD COUNTRY NATIONALS

All countries assessed are party to several international and European human rights instruments, in particular the ICCPR and the ECHR; they are also Member States of the EU, and as such are bound by EU human rights norms set out in the Treaties, secondary legislation, general principles of EU law and the EU Charter. Although these international and European norms often prevail over domestic legislations



and other state measures, and are usually conferred direct effect, national constitutions and legislative instruments remain an important point of reference for domestic actors when it comes to the recognition and definition of the scope of civil rights. This is, in most cases, not so problematic, since in substantial terms, domestic, international and European instrument recognised and protect a similar set of civil rights, including, the freedom of expression, freedom of association and assembly, freedom of religion, the right to a fair trial, human dignity, non-discrimination.

There are significant differences, however, in how constitutional rights are upheld in some countries. The U.K and Ireland have a common law tradition of protection of civil liberties, whilst in other countries, civil rights are recognized in constitutional instruments, developed by constitutional or ordinary courts, and further defined or restricted through legislative measures. Some countries have strong centralised constitutional review mechanism, in which constitutional courts play a central role, while in others the control is diffuse and entrusted to ordinary courts, with certain implications for individual rights. This may also change over time.

The influence of international and European civil rights norms varies across national legal systems and their openness to international and European civil rights. In some countries, the transposition of the International and European civil rights instruments was required, in other countries these civil rights are recognized as such in the national legal order. Concerning the EU Charter and the ECHR, their authority is generally acknowledged, within their scope of application. The ECHR has come to play an important role in the elaboration and development of civil rights in some countries (*e.g.* the Netherlands, Hungary, France until 2010) whilst it remains marginal in others, in particular those which have a strong constitutional tradition of human rights protection (*e.g.* Germany). References to the Charter are increasingly in national cases, but national courts appear still reluctant to use it on its own, and often rely on its provision together with the equivalent clauses in the ECHR or national constitutional provisions. The ECHR remains the main external reference in human rights matters, probably because of a lack of awareness about the Charter amongst EU citizens and residents, and confusion in the legal profession as to when the Charter is applicable.

Although in some countries, constitutional instruments confers civil rights only upon citizens, in most cases, most civil rights protection has been extended to foreigners, even in some cases to those in irregular situations.



In most countries, a number of public and private organisations contribute to raising awareness about civil rights, and work to support their recognition, development, respect, and promotion. It would be interesting to enquire whether these organisations have EU norms, in particular the EU Charter, in their radar.





ANNEX 1: QUESTIONNAIRE WP7

Introduction

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding. However, already before the Treaty of Lisbon, the civil rights of EU citizens, in particular that of free movement and non-discrimination, had gained legal recognition in EU law through the case law of the European Court of Justice (ECJ).

Reports

The aim of the first task and deliverable of WP7 is to identify and critically assess the nature and scope of the civil rights citizens are entitled to on the basis of, essentially, the relevant legal frameworks for civil rights in selected Member States of the EU, including the Charter of Fundamental Rights, the ECHR, the national constitutional traditions, the general principles of EU law and binding international instruments. For the purpose of drawing up country reports, the following questionnaire has been drafted. The country reports will then serve as a basis for the general EU report.

The text of country reports should give a general overview, and should be clear, easily accessible and easy to read.

Please note that language editing is the responsibility of each author.

Annexes

National provisions

Please provide a list of the most important national legal provisions (constitutional acts, legislation, regulations, etc) and a list of cases for your Member State (name, date and publication reference).

Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.



Practical information and guidelines

Task leaders: Marie-Pierre Granger & Sybe de Vries

Please use the headings below for the structure of your answer.

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents.

The national and final reports should be written in English. However, if certain concepts or notions do not translate well in English,⁸³ we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either languages.

Please use the Kluwer author guidelines for references and citations: <http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf>).

Deadline for the report: 1 May 2014

Question 1 : Identification of civil rights

- ✓ Which rights are considered in your country as civil, civic and citizenship rights?⁸⁴
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) civil rights in EU Member States.

Please specify whether there are disagreements/developments in the notion of civil, civic or citizens' rights and liberties, and their core elements.

Question 2: National sources of civil rights

- ✓ Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

⁸³ For example, the French concept of 'laïcité', which is often translated as secularism in English, although this translation does not fully carry the legal meaning of 'laïcité'.

⁸⁴ The concept of civil, civic and citizens' rights overlap and/or are used interchangeably in many legal systems. In this questionnaire, we will use the term civil rights as potentially including all three notions and covering all fundamental rights which are not political, social and economic. Please indicate how these three notions fare in your legal systems, and which one is more commonly used to refer to the rights under consideration (if any), Please use original language as well as the most accurate English translation of the term.



The idea here is to present the legal and policy framework which forms the basis of national civil rights protection in your country.

- Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);
- Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);
- Please indicate whether significant developments have recently taken place in this respect.

Question 3: International and European sources of civil rights

- ✓ To which international instruments for the protection of civil rights is your country a party?
- ✓ How are relevant international and European civil rights norms being incorporated in your country?
- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?
- ✓ How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)
- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.

Question 5 : Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?
- ✓ Territorial



- What is the territorial scope of the protection of civil rights afforded by your member states? Are there **territorial** limitations to such protection? Which?
- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)?
- ✓ Temporal
 - What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?
- ✓ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time?**

Question 6 : Actors

- ✓ What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights' standards (influencing legislative, regulatory, administrative or judicial processes) . Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.

Question 7 : Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?
- ✓ Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?

Please give examples, and illustrate how these conflicts are dealt with and resolved.



ANNEX 2: LIST OF COUNTRY REPORTS

Country:

Researcher(s):

Belgium:

Henri de Waele

The Czech Republic:

Jan Komárek

Denmark:

Ulla Neergaard, Catherine Jacqueson, Silvia Adamo

Germany:

Hester Kroeze

France:

Marie-Pierre Granger

Hungary:

Orsolya Salát

Italy:

Elena Ioriatti, Paolo Guarda, Flavio Guella

The Netherlands:

Hanneke van Eijken

Spain:

Javier A. González Vega

Ignacio Villaverde Menéndez

Pilar Jiménez Blanco

Angel Espiniella Menéndez

Davide De Pietri

Raúl I. Rodríguez Magdaleno

The United Kingdom and Ireland:

Sionaidh Douglas-Scott



BELGIUM

Contributor: UA

Question 1 : Identification of civil rights

- ✓ Which rights are considered in your country as civil, civic and citizenship rights?
- ✓ Amongst those rights, which are considered 'core'?

In Belgium, the general term used for this category of rights is 'burgerlijke rechten' / 'droits civils'. This category exists within the Belgian legal order alongside, firstly, political rights, secondly, economic, social and cultural rights, and thirdly, collective rights. The term 'burgerlijke rechten' / 'droits civils' is the semantic equivalent of 'civil' as well as 'civic' rights. A possible alternative, but entirely synonymous indication is 'burgerrechten' / 'droits des citoyens'. In contrast, a literal translation of 'citizenship rights' would be 'burgerschapsrechten' / 'droits de la citoyenneté', yet this term is not normally used in Belgian domestic legal parlance, except in reference to the rights flowing from EU citizenship ('Europees burgerschap' / 'La citoyenneté européenne').¹

Corresponding with the classic sense, in Belgium civil rights are considered to be those rights that protect persons against unlawful exercises of governmental authority.² They comprise:

- The freedom of expression, information and publication;
- The freedom of thought, conscience and religion;
- The freedom of assembly and association;
- The right to due process and access to the judiciary;
- The right to human dignity;
- The right to non-discrimination and equality before the law
- The right to free movement and security;
- The right to privacy;
- The right to protection of personal data;
- The right to inviolability of the home;
- The right to moral, physical, mental and sexual integrity;
- The right to property;

¹ See e.g. Parliamentary question No. 99 of Mme J. Galant to the State Secretary for Budget, Migration, Asylum Policy, Family Policy and Federal Cultural Institutions, 53rd session, 2010-2011, DO 2010201102790, < <http://www.dekamer.be/QRVA/pdf/53/53K0028.pdf> > accessed 1 May 2014.

² See e.g. J. Vande Lanotte & G. Goedertier, *Overzicht Publiekrecht*, Brugge: Die Keure 2013, nr. 444; A. Alen & K. Muylle, *Compendium van het Belgisch staatsrecht*, Mechelen: Kluwer 2012, nr. 72.



- The right to language;
- The right to access public information;
- The right only to be persecuted on a legal basis established beforehand and in conformity with established legal procedures.

The above rights are generally considered as equally fundamental, with none of them possessing a 'core' status more than any other. Linguistic rights (though arguably perhaps being more of a cultural or collective, rather than civil right character) would appear to stand out though, and are considered to belong to the state's constitutional identity.³ As article 4 of the Belgian Constitution sets out, the country is divided in four language regions: the Dutch, the French, the bilingual capital of Brussels, and the German. The boundaries between these domains can only be changed or corrected by a law passed with a two-thirds majority of votes from every language group in each of the Chambers, on the condition that the majority of those groups' members are present. The language regime is predicated on a principle of territoriality (further elaborated upon below). The central right protected in article 30 of the Constitution encompasses the freedom to use the language of one's choice as well as a prohibition on discrimination on the basis of language (subject to the application of said principle).

In addition, it may be noted that in the original proceedings culminating in the *Ruiz Zambrano* reference, the Belgian Council of State and Constitutional Court attached primordial value to the principle of equality that was believed to be violated by the denial of a worker's permit to the applicant.⁴ This in turn sparked the CJEU to promulgate its controversial 'substance of rights' doctrine, premised however on the right to residence and protection against removal from the territory of a Member State.⁵

Question 2: National sources of civil rights

- ✓ Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

³ Cf. L. Besselink, 'General Report', in: J. Laffranque (ed.), *Reports of the FIDE Congress Tallinn 2012 - Vol. 1: The protection of fundamental rights post-Lisbon: the interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions = Põhiõiguste kaitse pärast Lissaboni lepingu jõustumist: Euroopa Liidu põhiõiguste harta, Euroopa inimõiguste konventsiooni ja liikmesriikide põhiseaduste vastasmõju*, Tallinn: Tartu University Press, p. 8.

⁴ Council of State, judgment nr. 193.348 of 15 May 2009 and judgment nr. 196.294 of 22 September 2009; Constitutional Court, judgment nr. 174/2009 of 3 November 2009.

⁵ CJEU, Case C-34/09, *Ruiz Zambrano*, par. 42-44.



The idea here is to present the legal and policy framework which forms the basis of national civil rights protection in your country.

- Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);
-
- Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);

At national level, most of the abovementioned civil rights are laid down in Title II of the Belgian Constitution, entitled 'De Belgen en hun rechten' / 'Les Belges et de leurs droits' (the Belgians and their rights). Their exact location is as follows:

- The freedom of expression, information and publication: articles 19, 25, 148 and 150
- The freedom of thought, conscience and religion: articles 19, 20, 21, 181
- The freedom of assembly and association: articles 26 and 27
- The right to due process and access to the judiciary: articles 13, 31, 144, 145, 146, 148, 149, 152, 154, 155
- The right to human dignity: article 23
- The right to non-discrimination and equality before the law: articles 10, 11, 11bis, 172, 191
- The right to free movement and security: articles 12 and 13
- The right to privacy: articles 15, 22, 29
- The right to inviolability of the home: article 15
- Children's rights to moral, physical, mental and sexual integrity: article 22bis
- The right to property: article 16
- The right to language: articles 4, 30, 129
- The right to access public information: article 32
- The right only to be persecuted on a legal basis established beforehand and in conformity with established legal procedures: articles 12 and 14

The freedom of expression, information and publication, the freedom of thought, conscience and religion and the freedom of assembly and association principally flow from the Constitution, and are not as such laid down in other special or ordinary laws, regulations, decrees, etc.

The right to due process and access to the judiciary is further detailed in the civil, administrative and criminal procedural code. The organisation of the courts is regulated in the 'Gerechtelijk Wetboek' / 'Code judiciaire'. Specific rights in criminal procedures, amongst which the *non bis in idem* and *nulla poena sine lege* principle, are laid down beyond the Constitution in the Belgian Criminal Code ('Strafwetboek' / 'Code pénal').



On the right to non-discrimination and equality before the law, there exists a rich case law at every level of the judiciary, particularly at the highest courts.⁶ The right is further worked out in the ‘Wet ter bestrijding van discriminatie en tot oprichting van een Centrum voor de gelijkheid van kansen’ / ‘Loi pour la lutte contre le racisme et créant un Centre pour l'égalité des chances’ (Non-Discrimination Act) of 25 February 2003, extending the right to govern relations between private persons.⁷ Before, there already existed laws threatening criminal prosecution in cases of racism and xenophobia.⁸

The right to inviolability of the home is most prominently safeguarded in the Criminal Procedural Code (‘Wetboek van Strafvordering’ / ‘Code de procedure pénale’), protecting against unlawful entry in absence of a reasonable suspicion. The exact competence and exceptions are regulated by the regions (‘gewesten’ / ‘régions’) and the language communities (‘gemeenschappen’ / ‘communautés’), in accordance with article 11 of the ‘Bijzondere Wet tot Hervorming van de Instellingen’ / ‘Loi spéciale de réforme institutionnelle’.⁹

The right to data protection is not safeguarded in the Constitution but in an act of parliament (‘Wet voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens’ / ‘Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel’) first established on 8 December 1992,¹⁰ as amended in 1998¹¹ and 2003.¹²

Article 30 of the Constitution recognises an individual’s right to freely use the language of his choice, and the right not to be discriminated on the basis of language. As remarked, it is most singular, having no written equivalent in any international treaty.¹³

⁶ See e.g. Vande Lanotte & Goedertier, op. cit., nrs. 571-608; Alen, op.cit., nrs. 760-764.

⁷ *Belgisch Staatsblad / Moniteur Belge* 17 March 2003.

⁸ Wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden / Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, *Belgisch Staatsblad / Moniteur Belge* 8 August 1981.

⁹ *Belgisch Staatsblad / Moniteur Belge* 15 August 1980

¹⁰ *Belgisch Staatsblad / Moniteur Belge* 18 March 1993.

¹¹ *Belgisch Staatsblad / Moniteur Belge* 3 February 2001.

¹² *Belgisch Staatsblad / Moniteur Belge* 26 June 2003.

¹³ With articles 5(2) and 6 ECHR only serving to protect arrested and/or criminally prosecuted persons.



As article 129 of the Belgian Constitution instructs, the Parliaments of the Flemish and the French community are to regulate by degree the use of language for administrative affairs, education, social relations between employers, employees and documentation concerning undertakings.¹⁴ These decrees enjoy binding force of law in, respectively, the Dutch and the French language community (except where it concerns municipalities, bordering on the territory of a different community where the use of another language is prescribed or permitted; services operating across the borders between the different language communities; and common federal and international institutions).

On the basis of article 23 of the Constitution, several further acts and decrees have been established, amongst which the Federal Law on transparency of administration of 11 April 1994,¹⁵ the Federal Law of 12 November 1997 on transparency of administration in the provinces and municipalities,¹⁶ the Flemish decree of 26 March 2004,¹⁷ and the Brussels ordinance of 30 March 1995.¹⁸

Despite the harrowingly arcane federal architecture of the Belgian state, a general strength of the domestic system would appear to be the multiple interlocking legal orders which provide for a seamless web of protection of civil rights. Besides being solidly entrenched, the relevant rights and principles also guarantee citizens a high level of protection, compensation for possible deficits at the international and supranational planes. Considering the amount of detail added in secondary acts, decrees and ordinances, and the repeated adjustments or ameliorations of the applicable standards in case law, the various documents and clauses protecting civil rights can very much be qualified as ‘living instruments’ in this country.¹⁹

Conversely, conspicuously absent in the Belgian legal order are, at first blush, classic civil rights such as the one protecting against torture, the prohibition on slavery and forced labour, and the right to marry. However, in so far as any true risks exist to their infringement, these are easily accommodated at said

¹⁴ The German community only holds the competence to regulate the use of language in education.

¹⁵ *Belgisch Staatsblad / Moniteur Belge* 30 June 1994.

¹⁶ *Belgisch Staatsblad / Moniteur Belge* 19 December 1997.

¹⁷ *Belgisch Staatsblad / Moniteur Belge* 1 July 2004.

¹⁸ *Belgisch Staatsblad / Moniteur Belge* 23 June 1994.

¹⁹ Equally testified by e.g. the fact that in 2013, Belgium committed to publish an interim report on all 88 recommendations it received within the framework of the Universal Periodic Review under the ICCPR.



international and supranational levels. A potentially more damaging weakness resides in the growing divide between the Flemish and French speaking part of the country. This has provoked repeated constitutional complaints on the basis of open-ended rights, such as the right to equality, in attempts to limit the ambit of the rights granted to the other constituencies in the federation. A prominent case in point forms the saga on the Flemish healthcare insurance, which led to protracted litigation spanning nearly a decade, in which the complaints were varyingly dismissed, culminating in a reference to the CJEU and final verdict of the Constitutional Court.²⁰

Among the other significant developments that have recently taken place in this respect, we may point to the drafting of a Flemish Charter of fundamental rights, containing most of the abovementioned civil rights. For now, its value is mostly symbolical.²¹ Yet, the mere compiling of this text – even when not yet embraced by the Flemish Parliament – offers another poignant illustration of the incremental corrosion permeating the Belgian state. It curiously suggests, despite the solidly entrenched civil rights of the linguistic communities, that there exists a pervasive need to buttress these, and makes worryingly little mention of the levels of protection that have been attained long ago.

Finally, taking a broader perspective, it deserves mentioning that in 2012, the incumbent federal government (di Rupo I) prioritised a number of civil rights in its foreign policy agenda, *viz.* the right to non-discrimination, the prohibition on capital punishment, and worldwide enhancement of the position of women and children.²²

Question 3: International and European sources of civil rights

- ✓ To which international instruments for the protection of civil rights is your country a party?

Belgium is a party to the following international instruments for the protection of civil rights:

- The European Convention on Human Rights, since 14 June 1955, and the following protocols:

²⁰ CJEU, Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government*; Belgian Constitutional Court, Judgment nr. 11/2009 of 21 January 2009.

²¹ For an assessment, see e.g. S. Lambrecht, 'Handvest voor Vlaanderen', *Tijdschrift voor Constitutioneel Recht* 2013, pp. 360-371.

²² Belgium is also one of the largest contributors to UNICEF, to the tune of EUR 18.8 million in 2012.



- The First Protocol, since 14 June 1955
- The Fourth Protocol, since 21 September 1970
- The Sixth Protocol, since 1 January 1999
- The Thirteenth Protocol, since 1 October 2003

(Belgium has also signed, but not yet ratified, the Seventh and Twelfth Protocol)

- The International Covenant on Civil and Political Rights, since 21 July 1983 (including the first optional protocol, since 23 June 1994, and the second optional protocol, since 29 March 2000)
- The International Covenant on the Elimination of All Forms of Racial Discrimination, since 11 December 1975 (including the collective complaint mechanism contained in article 14, since 28 November 2000)
- The International Convention on the Elimination of All Forms of Discrimination against Women, since 5 November 1983 (including the individual complaint procedure contained in the optional protocol, since 3 September 2004)
- The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since 28 October 1999
- The International Convention on the Rights of the Child, since 17 December 1992 (including the optional protocol on children in armed conflicts, since 17 September 2002, and the optional protocol on sexual exploitation of minors, since 27 March 2006)
- The International Convention on the Rights of Persons with Disabilities, since 1 August 2009
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, since 29 January 1992
- ✓ How are relevant international and European civil rights norms being incorporated in your country?

Ever since the 1971 judgment of the Court of Cassation in the *Fromagerie Franco-Suisse Le Ski* case,²³ Belgium is characterised by a monist system whereby self-executing (directly binding) international law enjoys primacy over national law.²⁴ Interestingly, in doing so, this Court took its cue from the CJEU's

²³ Court of Cassation 27 May 1971, *Arr.Cass.* 1971, 959; [1972] CMLR 230.

²⁴ Under the current case law of the Belgian courts, the threshold here is that the rule concerned should require, in light of its spirit, terms and contents, no further national regulation to specify it or render it more complete ("dat de regel op zichzelf beschouwd, wat de geest, inhoud en bewoordingen ervan betreft, geen verdere nationale reglementering behoeft met het oog op precisering of vervollediging"). For an illustration, see e.g.



Costa/ENEL judgment: it extended the *Costa/ENEL* imperative to all self-executing international law, thus completely reversing its earlier position on the matter. Since then, the monist approach has been repeatedly confirmed by the Court of Cassation, and further enhanced by decisions proclaiming the supremacy of international law over the Constitution.²⁵ Dependent on their self-executing character, the abovementioned international and European civil rights norms (the ECHR and its additional protocols, the ICCPR, etc.) also enjoy direct effect within the national legal order.²⁶

- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

The ECHR has been fully incorporated into the Belgian legal system, though not in the sense of transposition or implementation, but rather by virtue of the abovementioned monistic system, which allows for a liberal influx and general accessibility of the rights guaranteed in said document. The ECHR is also amply referred to by the legislator and advisory bodies (notably the Council of State) in the process of preparing legislation, as well as governments and administrations at the federal, community and regional level. In legal practise, it is equally abundantly invoked before and applied by Belgian courts.²⁷

In the context of this question it may be noted that in the view of the Constitutional Court (at the time still called 'Arbitragehof' / 'Cour d'arbitrage', Court of Arbitration), public authorities can actually also lay claim to fundamental rights themselves – despite the ECtHR having denied this possibility with

Council of State, judgment nr. 63.473 of 10 December 1996. Deviating from this general 'objective' approach, the Court of Cassation normally also adds a 'subjective' element, requiring that the parties to the treaty intended for the rule concerned to be self-executing.

²⁵ At the same time, it should be added that the latter doctrine has not yet been explicitly endorsed by the Constitutional Court. See further e.g. M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing 2006, p. 199. Besselink, *op. cit.*, p. 9, also refers to Belgium as one of the stronger monist traditions.

²⁶ In a landmark judgment of 17 January 1984, *Arr. Cass.* 1984-85, 559 (published in the *Rechtskundig Weekblad* 1984-85, p. 1147), the Court of Cassation established that provisions of the ICCPR could be considered self-executing even when the contrary intention could be inferred from the preceding parliamentary documents.

²⁷ See e.g. P. Popelier, 'Belgium: The Supremacy Dilemma', in P. Popelier, C. Van de Heyning, P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts*, Cambridge: Intersentia 2011, p. 149-155. For a rich, though slightly dated overview of the most salient rulings, see O. De Schutter & S. Van Drooghenbroeck, *Droit international des droits de l'homme devant le juge national*, Bruxelles: Larcier 1999.



regard to the Strasbourg system.²⁸ Per consequence and by analogy, through the clauses in the Belgian Constitution that link applicable national standards to those in the ECHR (see below), the rights contained in the latter document can in fact be materially relied upon by Belgian public authorities.

- ✓ How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?

The International Covenant on Civil and Political Rights, International Convention on Racial Discrimination, International Convention on Women's Discrimination, UN Torture Convention, International Convention on the Rights of the Child and European Torture Convention are given effect on the basis of the monistic system outlined below: once the relevant provision is recognised as self-executing, it can be considered directly effective, in the sense that individuals can effectuate the conferred rights before national courts and public authorities, and request that the applicable standards be upheld. Should doubt arise with regard to the status of a particular provision, preliminary questions may be referred to the Belgian Constitutional Court. Meanwhile, this has already been considered to be the case for the civil rights contained in the ICCPR and a number of rights contained in the International Convention on the Rights of the Child.

To determine which court is competent to enforce the civil right at stake when an infringement thereof has occurred, it needs to be checked which institution has committed that infringement. Where it concerns a legislative act, the Constitutional Court may be approached in an action for annulment ('vernietigingsberoep' / 'recours en annulation'). On the basis of the mandate conferred in the *Le Ski* judgment, all district courts and courts of appeal may disapply the legislative norm for alleged violation of an international fundamental right standard. Where the infringement results from an act of the executive or a decentralised body, the Council of State is rendered competent to annul the act; district courts and courts of appeal may disapply the rule on the basis of the so-called exception of illegality ('exceptie van onwettigheid' / 'exception d'illegalité'). This may be coupled with a claim for financial compensation.

As noted, Belgium has accepted the collective complaint mechanism contained in article 14 of the International Convention on Racial Discrimination and subscribed to the individual complaint procedure

²⁸ See inter alia Court of Arbitration, judgment nr. 13/91 of 28 May 1991, and judgment nr. 115/2004 of 30 June 2004.



contained in the optional protocol to the International Convention on Women's Discrimination. The country has also subscribed to the first and second optional protocols to the ICCPR, allowing for individual petitions with regard to alleged violations of civil rights contained therein to the Committee on Human Rights.

Horizontal effect of norms contained in international instruments for the protection of civil rights is not generally accepted. The concept of 'Drittwirkung', whereby the state is held responsible by an individual for a violation of civil rights committed by another individual is however known, and has resulted in successful claims. Some instances have been noted in which Belgian courts even acknowledged direct forms of 'Drittwirkung'.²⁹

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)

The EU Charter on fundamental rights and general EU law principles protecting civil rights have been recognised and referred to by national authorities in the following cases:³⁰

- In the 2005-2009 period, the Belgian Constitutional Court (then still called 'Arbitragehof' / 'Cour d'arbitrage') referred on different occasions to the fact that the Charter did not constitute a binding source of law, so that no complaint with regard to its violation could be submitted, but that the rules included therein could play a role in its assessment to the extent that they reflect common values in the EU;³¹

²⁹ See e.g. the Brussels Civil Court in its judgment of 23 November 1967, *Journal des Tribunaux* 1967, p. 741; Court of Cassation, judgment of 1 June 1966, *Pasicrisie* 1966, p. 1251-1252.

³⁰ The search has been carried out in mid-April 2014 through the JURIDAT portal, which encompasses Belgian courts at all levels of decision-making as well as equality bodies and the national ombudsmen (but does not include every single judgment delivered in Belgium). Scant information on domestic precedents from before the year 2005 has been made available digitally either through this channel or any other, but a cross-verification in the '*Belgisch Staatsblad*' / '*Moniteur Belge*', which publishes highest courts' decision and stretches back further in time, yielded no additional matches.

³¹ Constitutional Court, judgment nr. 167/2005 of 23 November 2005; judgment nr. 81/2007 of 7 June 2007; judgment 10/2008 of 23 January 2008; judgment nr. 101/2008 of 10 July 2008; judgment nr. 17/2009 of 12 February 2009; judgment nr. 58/2009 of 19 March 2009.



- In 2007, the Belgian Constitutional Court (then still called ‘Arbitragehof’ / ‘Cour d’arbitrage’), in the salient follow-up judgment to the CJEU’s ruling in *Advocaten voor de Wereld*,³² referred to the legality principle in criminal affairs and the principle of equality and non-discrimination contained in articles 49, 20 and 21 of the Charter;³³
- In 2009, the Belgian Council of State underlined on two different occasions that the Charter does not constitute a binding source of law, so that no complaints can be submitted with regard to its violation;³⁴
- In 2011, the Belgian Constitutional Court remarked in obiter that the free movement of persons in the internal market possesses the status of a fundamental freedom, as confirmed in article 45 of the Charter;³⁵
- In 2011, the Belgian Council of State proclaimed that under circumstances, on the basis of article 47 of the Charter, courts may be prohibited from ruling that a preliminary reference to the Constitutional Court is of no pertinence to the case at hand;³⁶
- In 2011, the Belgian Constitutional Court, in follow-up to the CJEU’s ruling in *Test-Aankoop*,³⁷ referred to the general principle of equality, the principle of non-discrimination, and the principle of equal treatment of men and women, as codified in articles 20, 21 and 23 of the Charter;³⁸
- In 2012, the Belgian Court of Cassation recognised the right to due process within proper time-limits, with reference to article 47 of the Charter, but otherwise dismissed the complaint as unfounded *in casu*;³⁹
- In 2012, the Belgian Council of State rejected a complaint that the inability to respond in writing to the position taken by the commissioner-general for refugees and stateless persons constitutes an infringement of article 47 of the Charter, since comments could still be proffered at the oral stage;⁴⁰
- In 2013, the Labour Court of Tongeren, concerning the issue of wearing a headscarf to work, referred to the freedom of religion as protected in article 10(1) of the Charter; it however rejected the claims of the applicant while pointing to the possibility granted by article 52(1) to limit the application of the rights contained in the Charter;⁴¹
- In 2013, the Constitutional Court referred *in obiter* to the principle of effective judicial protection contained in article 47 of the Charter, and on another occasion, to article 8 of the Charter on the protection of personal data;⁴²
- In 2014, the Court of Appeal in Brussels applied the *ne bis in idem* principle contained in article 50 of the Charter to prevent an undertaking from being punished twice (both in Belgium and the Netherlands) for the same infringement of the EU competition law rules.⁴³

³² CJEU, Case C-303/05, *Advocaten voor de Wereld Vzw v Leden van de Ministerraad*.

³³ Constitutional Court, judgment nr. 128/2007 of 10 October 2007.

³⁴ Council of State, judgment nr. 189.244 of 5 January 2009 and judgment 195.241 of 14 July 2009.

³⁵ Constitutional Court, judgment nr. 50/2011 of 6 April 2011.

³⁶ Council of State, judgment nr. 212.557 of 7 April 2011.

³⁷ CJEU, Case C-236/09, *Belgische Verbruikersunie Test-Aankoop VZW and Others v Ministerraad*.

³⁸ Constitutional Court, judgment nr. 116/2011 of 30 June 2011.

³⁹ Court of Cassation, judgment nr. P.12.0709.F of 3 October 2012.

⁴⁰ Council of State, judgment 221.445 of 21 November 2012.

⁴¹ Labour Court of Tongeren, judgment A.R. 11/2142/A of 2 January 2013.

⁴² Constitutional Court, judgment nr. 145/2013 of 7 November 2013 and judgment nr. 117/2013 of 7 August 2013.

⁴³ Court of Appeal of Brussels, judgment nr. 2014710686 of 12 March 2014.



As may be surmised from this overview, so far neither the EU Charter nor the general principles of EU law protecting civil rights have played a starring role in Belgian court practice; a broader inquiry reveals a keen preference for more well-known international treaties and the ECHR (and in particular also the European Social Charter), pointing to a still widespread lack of awareness of the (potential) importance of the Charter, and even of Union law in general.⁴⁴

A quickscan reveals that references to the Charter and EU civil rights are nowadays fairly frequent in documents issued by the Belgian legislator, but seemingly still more occasional in those of regional and community governments.⁴⁵ Considering that the Charter applies to Member States when they are implementing EU law, this either suggests (implausibly) that they are not so often engaged in the business of implementing EU law, or rather (more plausibly) that EU fundamental rights standards are not always awarded a proper place in this process. As regards administrative bodies, some visible references can be found though, e.g. in decisions of the Belgian Competition Council.⁴⁶

Consultation of the annual reports of the 'Federale Ombudsman' / 'Médiateur fédéral', the 'Vlaamse Ombudsdienst', 'Médiateur de la Wallonie et de la Fédération Wallonie-Bruxelles', and the 'Ombudsmann der Deutschsprachigen Gemeinschaft' suggests that the civil rights contained in the Charter nor the underlying general EU principles pertaining so far did not play a noticeable role in the decisions that these offices have adopted.⁴⁷

- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.

⁴⁴ In passing, it should be noted that the searches revealed no greater attention being paid to the social and economic rights in the Charter or general EU law in that context.

⁴⁵ Various searches were performed in mid-April 2014 through the 'Belgiëlex' website <<http://www.belgielex.be/nl/index.html>>, yielding entries stretching back to 1995. Mention was made of the Charter in Belgian legislation, parliamentary resolutions, written questions and plenary debates on several dozens of occasions, with a sharp rise in the current (2010-2014) legislature – in stark contrast to the situation as regards the Flemish, French and Walloon governments and parliaments, where only a handful of references in decrees, resolutions, questions and debates are to be found.

⁴⁶ E.g. Competition Council, decision nr. 2013-I/O-06 of 28 February 2013, case MEDE-I/O-08/0009.

⁴⁷ Available at respectively <<http://www.vlaamseombudsdienst.be>>, <<http://le-mediateur.be/>> and <<http://dg-ombudsmann.be>> (accessed 1 May 2014).



In case law as well as legal doctrine, the EU Charter and the ECHR are regarded as belonging to formally separate spheres, though they of course relate to an identical subject matter (fundamental rights). Overall, the relationship between the two documents is perceived as relatively unproblematic. In keeping with the primacy accorded to both the ECHR and EU law, all domestic courts are bound to interpret constitutional rights in conformity with the standards set in both systems, even when this results in limitations to (the exercise of) civil rights guaranteed in the Constitution. The highest courts have embraced both the ECHR and the main tenets of EU law pertaining to civil rights.

The systems have even become further intertwined by virtue of the Constitutional Court's sudden acceptance in 1989 that when a plea calls for judicial review against the domestic standard, on the basis of articles 10 and 11 of the Constitution, it may also proceed to consider a possible violation of the identical ECHR/EU norm.⁴⁸ In this way, rules of Belgian constitutional law may be 'merged' with the analogous supranational standards.⁴⁹ This immediately placed the ECHR in a pivotal position, and gradually, a similar role has come to be occupied by the rights guaranteed in the EU legal order.

A fuzzy type of split has however emerged recently between the Constitutional Court on the one hand and the Court of Cassation and Council of State on the other. The Court of Cassation and Council of State still adhere to the traditional monist view whereby all international law takes precedence over the Constitution. Yet, in 2008, the Constitutional Court seemingly modified its position in the *Money Laundering* case, where rules of secondary EU law (the money laundering directive) were considered to impinge too severely on national constitutional standards (in particular the right to professional secrecy, violated by the directive's requirement to provide information on payment received).⁵⁰ The upshot was

⁴⁸ Court of Arbitration, judgment nr. 23/90 of 13 October 1989. Article 10 reads: "There are no class distinctions in the State. Belgians are equal before the law", and article 11: "Enjoyment of the rights and freedoms recognized for Belgians should be ensured without discrimination". The underlying rationale has been that national rules may not make random distinctions between persons holding Belgian nationals and foreigners; hence the need to scrutinize whether the rights conferred to members of the latter category under the ECHR and EU law have not been violated. Since 2003, a special law has extended the Court's competence to the articles 170, 172 and 191 of the Constitution, which relate respectively to the principle of legality, the principle of equality in tax matters, and the equality of Belgians and strangers where it concerns the protection of persons and goods.

⁴⁹ In so doing, the Constitutional Court managed to circumvent its official lack of competence to directly test the legality of Belgian statutes against international and European law (article 142 only allows for such testing against the Belgian Constitution). See further on this e.g. T. Vandamme, 'Prochain arrêt: La Belgique!', *EUConst* 2008, p. 127-148, and Popelier, *op.cit.*, p. 149-151. There exists no such limitation on the competence of the Court of Cassation and the Council of State, who may freely test national rules against treaty standards.

⁵⁰ Constitutional Court, judgment nr. 10/2008 of 23 January 2008.



a limitation of the requirements contained in the directive concerned that lay manifestly at odds with a previous ruling from the CJEU.⁵¹ Thus, in effect, the Constitutional Court might well have placed Belgian constitutional rights on an equal footing to EU norms, and if push comes to shove, even above rules of EU secondary law.⁵² In the absence of subsequent guidance, the precise ambit of this pronouncement still has to be established; the presumed divide may turn out a mirage.

As regards the identification of the scope of application of both documents, Belgian courts and other public bodies seem to faithfully take their cue from article 51 of the EU Charter, regarding the standards contained therein relevant when authorities are implementing EU law.⁵³ The ECHR is considered relevant whenever litigants stake a credible claim to its possible violation (either by statute, decree, or any other act), whereby the national rules can be tested against the applicable supranational standard. By virtue of articles 10 and 11 of the Belgian Constitution, the domestic civil rights can then also be enforced in direct conjunction with their equivalents included in the ECHR. Since the references of the Belgian Constitutional Court in *Advocaten voor de Wereld* and the *Flemish Healthcare Insurance*, a similar conjunction with the equivalents in EU law has been wrought, nowadays also stretching out to the norms included in the Charter.⁵⁴

Finally, in the public perception, the delineation between the EU Charter and the ECHR is not always properly grasped, with the media frequently giving evidence of the related, more widely-spread confusion between the Court in Strasbourg and the Court in Luxembourg.⁵⁵

Question 5 : Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?

⁵¹ CJEU, Case C-305/05, *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres*.

⁵² See further E. Cloots, 'Grondwettelijk Hof plaatst grondrechten boven secundair EU-recht', *Juristenkrant* 2008/165, p. 15.

⁵³ See e.g. Court of Cassation, judgment nr. P.12.0709.F of 3 October 2012.

⁵⁴ See already Vandamme, op.cit., p. 140-144.

⁵⁵ A quickscan through Belgian newspapers in the database of LexisNexis reveals that such confusion has cropped up more often in the 'lower end' media (i.e. 'Het Laatste Nieuws' and the 'Gazet van Antwerpen', rather than 'De Morgen' and 'The Standaard').



As will not be surprising, the civil rights protection in Belgium extends first of all to natural persons holding Belgian nationality. Title II of the Belgian Constitution, entitled ‘De Belgen en hun rechten’ / ‘Les Belges et de leurs droits’, may however convey the erroneous impression that only Belgians are entitled to (core) fundamental rights. Article 191 of the Constitution proclaims that every foreigner residing on Belgian territory enjoys the protection granted to persons and goods, save for exceptions provided for by law.⁵⁶ Article 7 of the civil code (‘Burgerlijk Wetboek’ / ‘Code civil’) has similarly decoupled the capacity to exercise of civil rights from the holding of Belgian citizenship.⁵⁷ Article 11 of the civil code adds that foreign nationals enjoy the same rights as Belgian nationals, save for exceptions made by law. Foreign nationals that have obtained permission to establish themselves in Belgium and have been included in the public registry enjoy all civil rights that have been granted to Belgian nationals so long as they reside in Belgium.⁵⁸ Though exceptions may be made for those that have yet to obtain permission to reside in Belgium permanently, the distinction between Belgians and foreigners (EU citizens as well as third country nationals, including family members, long term residents and tourists) is thus principally absent *ab initio*.⁵⁹ Moreover, as noted earlier, in Belgium, the way has been cleared for public authorities to also lay claim to civil rights, despite the ECtHR having strenuously denied this possibility with regard to the Strasbourg system.⁶⁰

Particular exceptions that have been laid down are e.g. the limitation in article 10 of the Constitution with regard to appointment to civil and military functions, unless specified otherwise (and by special

⁵⁶ “Iedere vreemdeling die zich op het grondgebied van België bevindt, geniet de bescherming verleend aan personen en aan goederen, behoudens de bij de wet gestelde uitzonderingen” / “Tout étranger qui se trouve sur le territoire de la Belgique jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi.”

⁵⁷ “De uitoefening van de burgerlijke rechten is onafhankelijk van de hoedanigheid van staatsburger, die alleen overeenkomstig de Grondwet wordt verkregen en behouden.” / “L'exercice des droits civils est indépendant de la qualité de citoyen, laquelle ne s'acquiert et ne se conserve que conformément à la loi constitutionnelle.”

⁵⁸ “Een vreemdeling heeft in België het genot van alle aan de Belgen verleende burgerlijke rechten behoudens de uitzonderingen door de wet gesteld. Een vreemdeling die gemachtigd is zich in het Rijk te vestigen en die in het bevolkingsregister is ingeschreven, heeft het genot van alle aan de Belgen verleende burgerlijke rechten zolang hij in België verblijf houdt.” / “L'étranger jouit en Belgique de tous les droits civils reconnus aux Belges, sauf les exceptions établies par la loi. L'étranger autorisé à s'établir dans le Royaume et inscrit au registre de la population jouit de tous les droits civils reconnus aux Belges aussi longtemps qu'il continue de résider en Belgique.”

⁵⁹ In addition, already in the mid-2000s, the Constitutional Court (at the time still the ‘Arbitragehof’ / ‘Cour d'arbitrage’) allowed for unlawfully residing parents to exercise rights accruing to their lawfully resident children – see Court of Arbitration, judgment nr. 32/2006 of 1 March 2006.

⁶⁰ See inter alia Court of Arbitration, judgment 13/91 of 28 May 1991, and judgment nr. 115/2004 of 30 June 2004.



decrees, EU citizens have been rendered eligible for those civil and military functions not related to the public service *sensu stricto*⁶¹). Article 97 adds that foreigners cannot be appointed government minister.

Pursuant to the particular EU rules regulating their position, civil rights (e.g. of residence and equal treatment, albeit not without the qualifications those particular rules themselves allow for) have been granted to citizens of other Member States (tourists or otherwise), as well as third country nationals (family members of EU citizens, refugees and asylum seekers, long term residents).⁶²

The earlier mentioned international treaties to which Belgium is party extend the scope of protection of civil rights to foreigners residing on the territory. This holds e.g. for the protection against torture and other cruel, inhuman or degrading treatment or punishment, on the basis of the UN Convention, or the right of article 8 ECHR to private life, including family life and inviolability of the home.⁶³

✓ Territorial

- What is the territorial scope of the protection of civil rights afforded by your member states? Are there **territorial** limitations to such protection? Which?

Despite the convoluted federal make-up of the Belgian federation and the sixth state reform that has been instigated recently (increasing the competences of the various constituent parts), the Belgian Constitution still extends its protection across the entire territory of the state (i.e. encompassing all the different regions and communities).

With regard to linguistic rights, this has been particularly different in the past, whereby the main laws (further discussed below) were for a long time limited to French-speaking citizens in Flanders, and not to Dutch-speaking citizens in Wallonia.⁶⁴ Today, linguistic rights continue to form the exception to the rule that civil rights in Belgium apply across the board; for these are based on a principle of territoriality

⁶¹ Mainly the army, police, judiciary, internal revenue service and *corps diplomatique*. Compare the earlier condemnations in CJEU, Case 149/79, *Commission v Belgium*, Case C-173/94, *Commission v Belgium*, and Case C-47/08, *Commission v Belgium*; see further e.g. B. Weekers, 'De toegang van niet-Belgen tot de Belgische publieke sector', *Tijdschrift voor Gemeenterecht* 2005(1), p. 5-16.

⁶² In accordance with, above all, Directive 2004/38/EC, Directive 2003/109/EC and Directive 2004/83/EC.

⁶³ With regard to the rights accorded to victims of criminal offences, regardless of their nationality, see e.g. <http://www.belgium.be/nl/justitie/slachtoffer/klachten_en_aangiften/basisrechten/fundamentele_rechten/> accessed 1 May 2014.

⁶⁴ This only changed *de iure* as well as *de facto* in the early 1960s.



determining that Dutch is the language to be used in the Dutch language community, French in the French language community, German in the German language community, and both Dutch and French in Brussels. The language law of 1962 made exceptions for the so-called 'faciliteitengemeenten' / 'communes à facilités' in Brussels, where rights to the use of one's native language accrue to linguistic minorities in the municipalities designated as such⁶⁵; this arrangement was cemented in 1988 in article 129 of the Constitution. This fairly byzantine regime, the product of a protracted political-cultural struggle that defined the country, has particular significance for the language of instruction in primary, secondary and higher education, as well as courts and other public institutions.⁶⁶

Since the grant of independence to Zaire in 1960 (now the Democratic Republic of Congo), the constitutional rights and guarantees no longer apply to any overseas countries or territories.

The concept of extraterritorial protection is not intrinsic to Belgian constitutional law. However, under the doctrine of extraterritorial protection accepted by the ECtHR, Belgians residing in countries not forming part of the Council of Europe may still benefit from the civil rights included therein, or be subjected to the duty to respect those.⁶⁷ Similarly, should civil rights of Belgian nationals be violated abroad, the Belgian state reserves the possibility to instigate criminal persecution against the perpetrators on the basis of the passive nationality principle, recognised under general international law.

- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)?

⁶⁵ *Belgisch Staatsblad / Moniteur Belge* 22 November 1962. More precisely, in these municipalities, a language other than that of the province to which the 'gemeente' / 'commune' belongs can be used to deal with local and federal government and for teaching in some primary schools. The language of the province must nevertheless be used for dealing with provincial and regional authorities and secondary school teaching. French-speakers in Flanders and on the territory of the German language community, as well as Dutch- and German-speakers in Wallonia, can obtain administrative documents from local authorities and some federal authorities in their mother tongue. In the Flemish region, a circular has established that citizens must ask for translated documents on a case-by-case basis. Legislation in these municipalities provides for equal public funding for primary schools for the local language, as well as information in the local language from the NMBS (the national railway company). For public services and documents from decentral authorities (such as provincial and regional authorities) such rights do not exist (although on a voluntary basis, certain summary information is provided in the 'facilities language').

⁶⁶ The arrangement was cleared by the ECtHR in the *Belgian linguistics case*, *Series A, No. 6*, judgment of 23 July 1968, and in *Mathieu-Mohin and Clerfayt v Belgium*, judgment of 2 March 1987, *Series A No. 113*.

⁶⁷ ECtHR, *Al Skeini and Others v United Kingdom*, Application No. 55721/07, judgment of 7 July 2011. See further M. Milanovic, *Extrerritorial Application of Human Rights Treaties*, Oxford: Oxford University Press 2011.



In general, there is no provision for different standards of protection to apply in different policy areas. However, the manner in which limitations may be imposed can of course still vary in practice, depending on the circumstances in the case at hand. The Belgian Constitution allows for so-called regulatory measures that may be adopted to guarantee the orderly exercise of a right or freedom (e.g. in article 26 paragraph 1), or repressive measures that penalise crimes committed in the exercise of right or freedom (e.g. in articles 19 and 24). Preventive measures are principally prohibited, save where it concerns public gatherings that should remain subject to the extant policing laws (article 26 paragraph 2). Where simultaneously ECHR standards are encroached upon, restrictions to the civil rights concerned should be, in accordance with vested ECtHR prescriptions, determined by law, necessary in a democratic society, and serve to protect particular goods, such as the rights and freedoms of other citizens. Any attempted exceptions, predicated on alleged security ground or overriding (foreign or otherwise) policy reasons, should therefore always comply with those standards.

✓ Temporal

- What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?

The Belgian Constitution was enacted in 1831, and has since then begun to extend its protection of civil rights up to the present day. The rights that have been added in subsequent modifications, or through special acts, decrees or statutes, acquired force of law from the moment of their official enactment. The civil rights protected in the international treaties to which Belgium has subscribed have extended their scope of the protection from the date of ratification onwards.

In principle, civil rights can be exercised for an indefinite duration, save for any exercises whereby the civil rights of others are impinged upon, and any other restrictions imposed by law that comply with the domestic and supranational criteria outlined above.

Despite the consecutive reforms of the federal setup (and of the original unitary state, placed in an incremental process of dismemberment since 1970), no changes to the temporal range and reach of civil rights protection guaranteed in the Constitution have been enacted recently. In terms of substance though, over a longer stretch of time, one may point to the progressive broadening of the package of rights pursuant to the different international treaties (including the ECHR) that Belgium has become a party to, as well as the widening range and reach of civil rights protected within the Union legal order,



binding the country as a full EU Member State. Moreover, as pointed out above, particularly the Belgian Constitutional Court has been responsible for a gradually ever more comprehensive system of protection, by allowing for judicial review of domestic rules in light of constitutional rights, but simultaneously also their equivalents protected in the supranational legal orders.

- ✓ Please offer details as to how different rights are afforded to different **categories of persons in different location and policy contexts over time?**

The following different categories of persons may be distinguished:

- Children were originally not considered as a special group deserving a dedicated set of rights, though this situation has by no means been unique to Belgium. Only in the last part of the second half of the previous century, the need was recognised to craft a particular set of rights for their benefit, largely consisting of civil rights within the meaning of the present analysis (leaving aside their economic, social and political rights, likely to be addressed in other work packages). On 23 March 2000, on the recommendation of the National Commission against sexual exploitation of minors,⁶⁸ for the very first time, a provision was inserted in the Constitution with regard to the rights of the child, article 22bis. Substantively, this article addresses their right to have their moral, physical, spiritual and sexual integrity respected. This right can be considered as a more explicit elaboration of the right to private life, protected in article 22 of the Constitution. Of course, one should not infer *a contrario* from this *lex specialis* that children cannot lay claim to other constitutional rights. Article 22bis however does not apply to adults, who are, conversely, expected to cling to article 22 itself. Besides article 22bis, it should be noted that children also find those same rights recognised in articles 2, 3 and 8 of the ECHR, also applicable in Belgium, as well as the UN Convention on the Rights of the Child, to which Belgium acceded in 1992.
- Women have been able to profit from specific recognition in the Constitution since 21 February 2002, when article 10 on the right to equality was amended to explicitly guarantee the equality of men and women. Simultaneously, an article 11bis was inserted, handing the legislator a competence to adopt dedicated legislation in this regard. This has fuelled the adoption of the anti-discrimination law of 25 February 2003.⁶⁹ As with children however, women could already lay claim to the protection of the ECHR (article 14 ECHR⁷⁰), the International Convention on the Elimination of All Forms of Discrimination against Women (since Belgium's accession in 1983), and for those employed, the relevant provisions in primary and secondary EC law which were already operationalised in the 1970s.
- Here too, inescapably, mention should be made of the protection of the language rights of the Dutch-, French- and German-speaking communities. The highly complex arrangements were progressively enacted from the second half of the 19th century onwards. In the Constitution of 1831, article 30 set down the freedom to use one's language, though *de facto* French remained the dominant language in the public sphere. 1873 saw the adoption of a law on the use of

⁶⁸ Established in the wake of the infamous 'Dutroux-affair'.

⁶⁹ *Belgisch Staatsblad / Moniteur Belge* 17 March 2003.

⁷⁰ As noted above, Belgium has not acceded to the Twelfth Protocol.



Dutch in criminal proceedings, enhancing the position of suspects with no or insufficient mastery of French;⁷¹ 1878 the adoption of the law on the use of Dutch in administrative affairs;⁷² 1883 the adoption of the law on the use of Dutch in secondary education;⁷³ 1889 the general equality law prescribing that all legislation was henceforth to be published both in Dutch and in French.⁷⁴ It was not until the early 1960s that the ‘taalgrens’ / ‘frontière linguistique’ was established, in conjunction with the principle of territoriality. In 1970, this regime was codified in article 4 of the Constitution, indicating the different language communities in the country, and providing a solid guarantee for the priority of one language on the territory of the language community concerned.⁷⁵

- Neither the elderly nor the handicapped have been singled out as beneficiaries of dedicated constitutional rights. They may nevertheless enjoy the protection of particular legislation, including the general non-discrimination law of 2003, designated social security regulations securing rights of the disabled, articles 24 and 25 of the EU Charter, as well as the International Convention on the Rights of Persons with Disabilities, to which Belgium has been a party since 1 August 2009,
- As noted, EU citizens can benefit from the civil rights of equal treatment, residence and free movement on the basis of the regime established under EU law, as implemented in Belgian national law, and subject to the conditions outlined therein.
- The same holds for third country nationals in Belgium, be they family members of EU citizens, long term residents, refugees or asylum seekers in Belgium, who may seek the protection of the EU laws established for their benefit, from the moment of their enactment, as implemented in domestic law, and subject to the conditions outlined therein.

Question 6 : Actors

- ✓ What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights’ standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.

⁷¹ *Belgisch Staatsblad / Moniteur Belge* 26 August 1873.

⁷² *Belgisch Staatsblad / Moniteur Belge* 24 May 1878; nowadays succeeded by the comprehensive law of 2 August 1963, *Belgisch Staatsblad / Moniteur Belge* 2 August 1966.

⁷³ *Belgisch Staatsblad / Moniteur Belge* 17 June 1883, replaced in 1932 by a new and more comprehensive law, *Belgisch Staatsblad / Moniteur Belge* 3 August 1932.

⁷⁴ *Belgisch Staatsblad / Moniteur Belge* 24 15 May 1898. Up to the present day, there is no requirement to publish federal legislation in German, though since Belgium became a federation, that requirement does apply to the legislation enacted by the parliament of the German community and of the Walloon region.

⁷⁵ See in greater detail J. Clement, *Taalvrijheid, bestuurstaal en minderheidsrechten. Het Belgische model*, Antwerpen: Intersentia 2003.



Though this survey can only be non-exhaustive, the following private and public actors may be mentioned that play a – varyingly influential – role in the defining and setting of civil rights standards in Belgium:⁷⁶

- A most prominent place is occupied by the Centre for Equal Opportunities and Opposition to Racism, which has been reformed in 2014 into the Interfederal Centre for Equal Opportunities and the Federal Centre of Migration ('Interfederaal Gelijkekansencentrum-Federaal Migratiecentrum / 'Centre Interfédéral pour l'égalité des chances-Centre fédéral migration'). It was created in 1993, and (re)accredited as a National Human Rights Institution (status B) for Belgium by the UN in 2010. Its statutory roles are based on two pillars. The first of these, discrimination & equal opportunities, covers its efforts to combat discrimination and the promotion of equal opportunities. The second, migration, seeks to ensure respect for the fundamental rights of foreigners, to inform the authorities about the nature and scale of migration flows and to stimulate the fight against human trafficking. Within these pillars, the Centre performs three tasks: 1) processing individual reports, mainly on issues relating to allegedly discriminatory situations and issues relating to the basic rights of foreigners; 2) informing, training and raising awareness about its fields of competence, through publications, campaigns, press releases, meetings, training sessions, and so on; 3) drafting opinions and recommendations, mostly for public authorities, at all levels of government. These recommendations relate to improving legislation as well as the implementation of wider action plans. In July 2011, the Federal State, the Communities and Regions decided to designate the Centre as the independent mechanism responsible for promoting and monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities. It has over time built partnerships with many grassroots organisations, both public and semi-public bodies or institutions (public social welfare centres, university research centres, regional integration centres, etc.), or associations active in different sectors (associations defending the rights of disabled people, associations representing homosexuals, etc.). Incidentally, it has instigated litigation (e.g. in the case that led to the prohibition of the 'Vlaams Blok', pursued together with the 'Liga voor de mensenrechten'; see further below). The Centre is also involved as a member, observer, or in an advisory capacity with international organisations sharing the same goals. At EU level, these include Equinet (the European Network of Equality Bodies), the EU Fundamental Rights Agency, the Network of National Contact Points on Integration (NCP-I) of the European Commission, the European Migration Network, and the informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings; at Council of Europe level, it has established links with the European Commission against Racism and Intolerance; at OSCE level, it participates in the activities of the Office for Democratic Institutions and Human Rights.
- In 1992, a special commission for the Protection of Privacy was established, officially known as the 'Commissie voor de bescherming van de persoonlijke levenssfeer' / 'Commission de la protection de la vie privée', but better known as the Privacy Commission, which functions as Belgium's Data Protection Agency. This Commission is an independent body that aims to ensure the protection of privacy when personal data are processed. Its legal basis resides in the general privacy act of 8 December 1992.⁷⁷ Since 2009, this federal body is supplemented by the Flemish Supervisory Commission for Electronic Administrative Data Flows, which enjoys similar powers, but only at Flemish level. Both agencies participate actively in the elaboration of relevant standards for information security and privacy protection, particularly in the development, refining and supervision of those standards, as well as their correct application.

⁷⁶ In-depth scrutiny offers S. Sottiaux, J. Vrieling, *Institutionalisering van gelijkheid en mensenrechten. Gelijkeheidsorganen en mensenrechteninstellingen in Vlaanderen en België*, Antwerp: Intersentia 2012.

⁷⁷ *Belgisch Staatsblad / Moniteur Belge* 18 March 1993; as amended in in 1998 and 2003 (latest version published in *Belgisch Staatsblad / Moniteur Belge* 26 June 2003).



They also undertake concerted efforts with some regularity to underline the importance of the protection of privacy, e.g. to youngster, their parents and teachers.⁷⁸

- As flagged above, the Belgian state knows several different renditions of the Ombudsman phenomenon: the 'Federale Ombudsman' / 'Médiateur fédéral', the 'Vlaamse Ombudsdienst', 'Médiateur de la Wallonie et de la Fédération Wallonie-Bruxelles', and the 'Ombudsmann der Deutschsprachigen Gemeinschaft'. Their individual complaint-handling with regard to alleged infringements of civil rights, in combination with the (occasionally scathing) annual reports, have been known to carry a sizeable weight with regard to minor or major adjustments of public policy, in the legislative, regulatory, administrative as well as the judicial sphere.
- An Institute for the Equality for Women and Men was created in December 2002, which aims to guarantee and promote the equality of women and men and to fight against any form of discrimination and inequality based on gender in all aspects of life. This it seeks to do through the development and implementation of an adequate legal framework, appropriate structures, strategies, instruments and actions; by undertaking, developing, supporting and co-ordinating **studies, statistics and data compilations in the field of gender and equality of women and men**, as well as to assess the impact in terms of gender, of policies, programmes and government measures. It regularly addresses **recommendations to the public authorities as well as individuals and private institutions** with a view to improving the relevant laws and regulations. Moreover, it busies itself to organise **support to associations** working in the field, help any persons requesting advice on the scope of his/her **rights and obligations, and if it sees fit, take legal action** in the case of disputes resulting from the application of criminal and other laws, specifically aimed at guaranteeing the equality of women and men.
- As elsewhere, Belgium features local subsidiaries of the non-governmental organisations Amnesty International and Human Rights Watch, concerned with the upholding of civil rights; these activities extend to promotional and lobbying work with all sectors of government, as well as targeted campaigns aimed to enhance the protection of designated groups (migrants, refugees, LGBTI, etc.)
- A similar role, but with a more academic pedigree, is played by the 'Liga voor de mensenrechten' / 'Ligue des droits de l'homme' (League for Human Rights), which aims to combat injustice and discrimination in all forms. In particular, its stated objective is to influence Flemish and Belgian public policy in a constructive manner, create a greater human rights awareness, and disseminate information amongst the public in Flanders and Belgium. Its focal points currently lie in four domains: detention, privacy, non-discrimination, and 'freedom versus security'. As the litigation which led to the prohibition of the 'Vlaams Blok' in 2004 illustrates, it does not shirk from initiating court action against perceived gross violations of civil rights.
- The somewhat shady interest group 'Advocaten voor de Wereld' is a non-profit organization staging occasional campaigns for the enhancement of civil rights. It is most famously known for sparking a reference to the CJEU, resulting in a high-profiled judgment with the same name as the organization.⁷⁹
- It should lastly be noted that Belgium is bound to establish a National Human Rights Institution (NHRI) in accordance with the 'Paris Principles'.⁸⁰ At present, the decision has been taken to draw up a draft cooperation agreement on the creation of an overarching Human Rights Institute, which is to consist of the 'Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination', the 'Federal Centre for the Analysis of Migration Flows, the Protection of the Basic Rights of Foreigners and the Fight Against Human Trafficking', and the 'Institute for the Equality of Women and Men'.

⁷⁸ Producing the website <<http://www.ikbeslis.be>> accessed 1 May 2014.

⁷⁹ CJEU, Case C-303/05, *Advocaten voor de Wereld Vzw v Leden van de Ministerraad*.

⁸⁰ Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris in October 1991, as adopted by the UN Human Rights Commission in resolution 1992/54 of 3 March 1992, and the UN General Assembly in resolution A/RES/48/134 of 20 December 1993.



Question 7 : Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?

As could already be deduced from the observations made above, in Belgium, the same civil rights are protected across different national and international catalogues. Title II of the Constitution on 'the Belgians and their rights' overlaps considerably with the norms contained in the international and European human rights documents the country has subscribed too. The various sources may thus be regarded considerably intertwined. Differences between the rights in wording, scope and limitations abound however. On several counts, the Constitution still offers more and especially more precise guarantees than their international and supranational siblings, for example with regard to the freedom of education (article 24 of the Constitution), the freedom of worship (articles 19-21 Constitution), and the protection against disownment (article 16 Constitution). For other fundamental rights, the limitation possibilities in the Belgian Constitution have been (more) strictly confined. These differences have called for the development of special techniques to sort out (potential) substantial or procedural contradictions.⁸¹

With regard to (potential) substantial contradictions, Belgian courts take their resort to either 1) the principle of uniform interpretation, 2) the principle of the most favourable clause, and 3) the principle of conditional monism. Pursuant to the principle of uniform interpretation, the national norms are to be read in close conjunction with the international and European standards, so that in a case wherein e.g. by virtue of the latter, the protection of civil rights is more extensive, that same standard should be adhered to in the interpretation of the scope of the domestic right.⁸² The principle of the most favourable clause has taken its cue from inter alia article 53 of the ECHR, indicating that in case of contradictions, when a uniform interpretation is not possible, preference is to be given to the norm that offers the most extensive protection.⁸³ When neither uniform interpretation proves possible, nor the most favourable clause may be applied (especially when the international or European rule does not

⁸¹ J. Velaers, 'De samenloop van grondrechten in het Belgische rechtsbestel', in A. Nieuwenhuis et al., *Samenloop van grondrechten in verschillende rechtsstelsels, multiculturaliteit in het strafrecht & schuldsanering en collectieve schuldenregeling*, Den Haag: Boom Juridische uitgevers 2008, p. 100.

⁸² Established case law since the judgment of the Court of Arbitration in judgment nr. 136/2004 of 22 July 2004.

⁸³ See e.g. Court of Arbitration, judgment nr. 33/1994 of 26 April 1994.



allow for the national clause to take priority⁸⁴), an insoluble conflict looms; yet the principle of conditional monism dictates that then the international or European rule is to take priority (unless the law with which the international/European standard was originally approved did not tally with the Belgian Constitution). In practice however, the principle of uniform interpretation together with the principle of the most favourable clause already allow for a smooth interplay between the different standards, without there so far emerging any serious clashes (at least with regard to the substance of the rights protected).

Procedurally, pursuant to the *Le Ski* doctrine, all domestic judges are entitled to disapply national rules (laws, decrees, ordinances) for clashing with contrary international or European civil rights standards. They are however to relay any alleged complaints for infringements of the civil rights contained in Title II of the Belgian constitution to the Belgian Constitutional Court via the national preliminary reference procedure. In keeping with the CJEU's ruling in *Melki and Abdeli*, this is not to impinge upon their discretion to refer questions on a possible violation of EU law (especially the rights contained in the EU Charter) to the Court in Luxembourg.⁸⁵ On the merits though, as noted, the Belgian Constitutional Court pits the domestic norms alleged to infringe domestic civil rights against the relevant international and European fundamental rights standards *through* the norms contained in the Belgian Constitution – thus merging the applicable constitutional norms with the analogous supranational ones and minimising the risk of divergences. Moreover, in keeping with the principal primacy accorded to both the ECHR and EU law, all Belgian courts are bound to interpret domestic civil rights in conformity with the standards set in both systems, even when this results in limitations to (the exercise of) those civil rights guaranteed in the Constitution.

As remarked above, things have become more murky in the wake of the *Money Laundering* case, with the positions of the Constitutional Court on the one hand and the Court of Cassation and Council of State on the other seemingly drifting apart with regard to the hierarchy between secondary EU law and the Belgian constitution where it concerns potential violations of civil rights guaranteed by the latter.

⁸⁴ See e.g. with regard to the EU Charter, the CJEU's recent curtailment in its judgment in Case C-399/11, *Stefano Melloni v Ministerio fiscal*.

⁸⁵ CJEU, joined cases C-188/10 and C-189/10, *Criminal proceedings against Melki and Abdeli*. Belgian legal doctrine assumes that the current Belgian system, which allows for a priority reference to the Constitutional Court before the CJEU is approached, chimes with the minimum requirements imposed in the latter's case law; for further reflections, see e.g. P. Gérard, 'De hoeder van de meerlagige Europese Constitutie tussen Unierecht en grondwet in Frankrijk en België', *SEW – Tijdschrift voor Europees en economisch recht* 2011, pp. 152-165; J. Velaers, 'Het arrest *Melki-Abdeli* van het Hof van Justitie van de Europese Unie: een voorwaardelijk "fiat" voor de voorrang van de toetsing aan de Grondwet op de toetsing aan het international en het Europese recht', *Rechtskundig Weekblad* 2010-2011, pp. 770-794.



This inconsistency may only be flagged, since its exact ambit can at the current time not yet be pinpointed.

- ✓ Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?

Please give examples, and illustrate how these conflicts are dealt with and resolved.

Mention may be made in this context of a notable discrepancy with regard to the ambit of article 29 of the Belgian Constitution, which guarantees the confidentiality of written correspondence. This protection has been regarded as more absolute than that under article 8 ECHR, since it allows for no derogation whatsoever, whereas article 8 ECHR can give way to overriding public interests.⁸⁶ In a judgment in 2004, the Court of Arbitration was able to defuse the tension in this regard by linking in with the supranational standard, allowing for (proportional) restrictions on the constitutional right.⁸⁷

Article 148 provides that court proceedings are open to the public, save for public order or public morality concerns. In contrast, article 6 ECHR and article 14 of the ICCPR allow for a greater variety of circumstances under which a trial may be conducted behind closed doors. The Council of State has succeeded in mitigating a potential clash by pointing to the possibility to interpret 'public order' in article 148 in a way that takes account of the other grounds recognised in the ECHR and ICCPR (public security, interests of minors, etc.).⁸⁸

It was noted earlier that the growing divide between the Flemish and French Community is increasingly sparking litigation on the basis of civil rights, if necessary deployed to the background of EU law (e.g. the Flemish healthcare insurance saga). In similar vein, mention can be made of a case dating from the mid-1990s where article 27 of the ICCPR was relied upon by the French Community in order to stave off a challenge of the Flemish government to a budgetary decree. To its dismay, the Court of Arbitration eventually ruled that the decree could not be justified on the basis of the protection of the interests of a

⁸⁶ Popelier, *op.cit.*, p. 167.

⁸⁷ Court of Arbitration, judgment nr. 202/2004 of 21 December 2004.

⁸⁸ Council of State, advice nr. 4-203/2 of 2 June 2008.



cultural minority, secured in article 27 ICCPR, as that particular objective lay not within the reserve of competences of the French Community.⁸⁹

In a high-profile case ultimately decided by the CJEU, widely reported in the media, the linguistic rights of the Flemish have recently been held to collide with the free movement rights of workers, as the requirement in the Flemish Language Decree ('Vlaams Taaldecreet') that cross-border employment contracts drafted in Flanders are exclusively drawn up in the Dutch language, was regarded as presenting a disproportional obstacle to the recruitment of employees from other Member States.⁹⁰ This has, begrudgingly, resulted in a modification of the Flemish Language Decree.

Lastly, a long-running conflict that cannot escape mention pertained to the exercise by the extremist right-wing 'Vlaams Blok' party of its right to freedom of speech and freedom of association on the one hand, and domestic public order, equality and non-discrimination concerns on the other. Belgian courts eventually outlawed the three private institutions buttressing the party in 2004 for having infringed the Anti-Racism Law, which condemns the support of an association that evidently and repeatedly engages in discriminatory practices.⁹¹ These verdicts triggered the collapse of the party – yet, the latter reconstituted itself immediately after under a slightly amended name ('Vlaams Belang'), abandoning its most overt standpoints, at least on the surface.

⁸⁹ Court of Arbitration, judgment nr. 54/96 of 3 October 1996.

⁹⁰ CJEU, case C-202/11, *Anton Las v PSA Antwerp NV*.

⁹¹ Ghent Court of Appeal, judgment of 21 April 2004, confirmed by the Court of Cassation in its judgment nr. P.04.0849.N of 9 November 2004.



Annexes

Most important national provisions

Constitution of the Kingdom of Belgium, articles 4, 10, 11, 11bis, 12, 13, 14, 15, 16, 19, 20, 21, 22, 22bis, 23, 25, 26, 27, 29, 30, 31, 32, 129, 144, 145, 146, 148, 149, 150, 152, 155, 170, 172, 181, 191

Belgian Procedural Code, Civil (Procedural) Code and Criminal (Procedural) Code

Bijzondere Wet tot Hervorming van de Instellingen / Loi spéciale de réforme institutionnelle, *Belgisch Staatsblad / Moniteur Belge* 15 August 1980

Wet betreffende de openbaarheid van bestuur of 11 April 1994 / Loi relative à la transparence de l'administration, *Belgisch Staatsblad / Moniteur Belge* 30 June 1994

Wet ter bestrijding van discriminatie en tot oprichting van een Centrum voor de gelijkheid van kansen / Loi pour la lutte contre le racisme et créant un Centre pour l'égalité des chances, *Belgisch Staatsblad / Moniteur Belge* 17 March 2003

Wet voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens / Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (as amended), *Belgisch Staatsblad / Moniteur Belge* 26 June 2003

Salient case law

Constitutional Court

Constitutional Court, judgment nr. 167/2005 of 23 November 2005

Constitutional Court, judgment nr. 81/2007 of 7 June 2007

Constitutional Court, judgment nr. 128/2007 of 10 October 2007

Constitutional Court, judgment nr. 10/2008 of 23 January 2008

Constitutional Court, judgment nr. 101/2008 of 10 July 2008

Constitutional Court, Judgment nr. 11/2009 of 21 January 2009

Constitutional Court, judgment nr. 17/2009 of 12 February 2009

Constitutional Court, judgment nr. 58/2009 of 19 March 2009

Constitutional Court, judgment nr. 174/2009 of 3 November 2009



Constitutional Court, judgment nr. 50/2011 of 6 April 2011

Constitutional Court, judgment nr. 116/2011 of 30 June 2011

Constitutional Court, judgment nr. 145/2013 of 7 November 2013

Constitutional Court, judgment nr. 117/2013 of 7 August 2013

Court of Arbitration

Court of Arbitration, judgment nr. 23/90 of 13 October 1989

Court of Arbitration, judgment nr. 13/91 of 28 May 1991

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Court of Arbitration, judgment nr. 115/2004 of 30 June 2004

Court of Arbitration, judgment nr. 136/2004 of 22 July 2004

Court of Arbitration, judgment nr. 202/2004 of 21 December 2004

Court of Arbitration, judgment nr. 32/2006 of 1 March 2006

Court of Cassation

Court of Cassation, judgment of 27 May 1971, *Arr. Cass.* 1971, 959

Court of Cassation, judgment of 17 January 1984, *Arr. Cass.* 1984-85, 559

Court of Cassation, judgment of 9 November 2004, nr. P.04.0849.N

Court of Cassation, judgment of 3 October 2012, nr. P.12.0709.F

Council of State

Council of State, judgment nr. 189.244 of 5 January 2009

Council of State, judgment nr. 193.348 of 15 May 2009

Council of State, judgment nr. 195.241 of 14 July 2009



Council of State, judgment nr. 196.294 of 22 September 2009

Council of State, judgment nr. 212.557 of 7 April 2011

Council of State, judgment 221.445 of 21 November 2012

Other

ECtHR, case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium, judgment of 23 July 1968, *Series A, No. 6*

ECtHR, Mathieu-Mohin and Clerfayt v Belgium, judgment of 2 March 1987, *Series A No. 113*

Labour Court of Tongeren, judgment A.R. 11/2142/A of 2 January 2013

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P. Gérard, ‘De hoeder van de meerlagige Europese Constitutie tussen Unierecht en grondwet in Frankrijk en België’ [‘The protector of the multilevel European constitution between Union law and constitution in France and Belgium’], *SEW – Tijdschrift voor Europees en economisch recht* 2011, pp. 152-165

S. Lambrecht, ‘Handvest voor Vlaanderen’ [‘Charter for Flanders’], *Tijdschrift voor Constitutioneel Recht* 2013, pp. 360-371

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S. Sottiaux, J. Vrielink, *Institutionalisering van gelijkheid en mensenrechten. Gelijkheidsorganen en mensenrechteninstellingen in Vlaanderen en België* ['Institutionalisation of equality and human rights. Equality bodies and human rights institutions in Flanders and Belgium'], Antwerp: Intersentia 2012

T. Vandamme, 'Prochain arrêt: La Belgique!', *EUConst* 2008, p. 127-148

J. Vande Lanotte & G. Goedertier, *Overzicht Publiekrecht* ['Overview of Public Law'], Brugge: Die Keure 2013

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J. Velaers, 'Het arrest *Melki-Abdeli* van het Hof van Justitie van de Europese Unie: een voorwaardelijk "fiat" voor de voorrang van de toetsing aan de Grondwet op de toetsing aan het international en het Europese recht' ['The *Melki-Abdeli* judgment of the Court of Justice of the European Union: A provisional "fiat" for the priority of judicial review on the basis of the Constitution over judicial review based on international and European law'], *Rechtskundig Weekblad* 2010-2011, pp. 770-794

B. Weekers, 'De toegang van niet-Belgen tot de Belgische publieke sector' ['The access of non-Belgians to the Belgian public sector'], *Tijdschrift voor Gemeenterecht* 2005(1), p. 5-16



CZECH REPUBLIC

CIVIL RIGHTS AND LIBERTIES IN AREAS WHICH FALL WITHIN THE SCOPE OF EU LAW: REPORT ON THE CZECH REPUBLIC

Jan Komárek*

bEUcitizen - WP7: Civil rights of citizen

30/04/2014

This Report seeks to identify and critically assess the nature and scope of civil rights to which citizens are entitled on the basis of, essentially, the relevant legal frameworks for civil rights in the Czech Republic, including national, EU and international sources. The relevant work package description defines 'civil rights' in the following way:

The civil rights that are studied here concern the set of rights that are necessary for the exercise of individual freedoms, whose exercise encounters significant legal, practical or policy difficulties. These include the right to free movement and the right to equal treatment (non-discrimination), the right to family life, the freedom of expression, the right to privacy, the freedom of religion, the right to property and freedom of contract, the right to an effective judicial remedy and the protection against loss of citizenship. The right to gain access to travel documents, which is essential to the freedom of movement and of residence, will also be included.

Naturally, the understanding of the notion of 'civil rights' differs across jurisdictions (as noted in the Questionnaire),¹ and also within different philosophical and theoretical frameworks developed by political and constitutional theorists.² This variety is well illustrated by the approach to the protection of civil rights in the Czech Republic, as this Report documents. I take it as a preliminary material and would welcome further questions from the work package leaders, as our work proceeds.

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¹ The Questionnaire thus proposes to use the following general definition: 'In this questionnaire, we will use the term civil rights as potentially including all three notions 'civil, civic and citizens' rights'] and covering all fundamental rights which are not political, social and economic'.

² See e.g. Donnelly, "Human Rights" in Dryzek, Honig and Phillips (Eds.), *The Oxford Handbook of Political Theory* (Oxford 2006), 601-620, 609, who notes how problematic it can be to try to distinguish different categories. Altman, "Civil Rights" in Zalta et al (Eds.), *Stanford Encyclopedia of Philosophy* (Summer 2013), <<http://plato.stanford.edu/archives/sum2013/entries/civil-rights/>> (last visited 16 April 2014) gives a good contemporary example of how difficult it is to get a universal understanding of the concept of 'civil rights', when he states: 'In contemporary political thought, the term 'civil rights' is indissolubly linked to the struggle for equality of American blacks during the 1950s and 60s. ... Civil rights are the basic legal rights a person must possess in order to have such a status. They are the rights that constitute free and equal citizenship and include personal, political, and economic rights'.



THE REPORT:

QUESTION 1: THE IDENTIFICATION OF CIVIL RIGHTS

a) Which rights are considered in your country as civil, civic and citizenship rights?

The principal framework for classifying fundamental rights recognized and protected in the Czech Republic is provided by the Charter of Fundamental Rights and Freedoms (hereinafter ‘the Czech Charter’), adopted on 9 January 1991 (see further Question 2).³ The Czech Charter is divided into six chapters. While the first and the sixth chapter contain general and final provisions respectively, the four substantive chapters are divided into what can be considered the four basic categories of fundamental rights as conceived by the Czech constitutional order:

- Chapter 2: human rights and fundamental freedoms; this chapter is further divided into two ‘divisions’:
 - fundamental human rights and freedoms;
 - political rights.
- Chapter 3: the rights of national and ethnic minorities;
- Chapter 4: economic, social, and cultural rights;
- Chapter 5: the right to judicial and other legal protection.

It is difficult to define which rights would correspond to the Project’s definition of ‘civil rights’ when the definition itself is rather murky, but the following can be said in that regard:

(1) Firstly, there are some foundational provisions, most importantly the general proclamation that ‘all people are free and equal in their dignity and rights’ and that ‘their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable’ (Article 1). This guarantee of freedom and equality to all human beings is further specified in Article 3(1), according to which ‘Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status’.

(2) There are also provisions concerning the authority of the State and the limitations thereof based on the individual autonomy and the general right to freedom. According to Article 2(1), ‘democratic values

³ Constitutional Act No. 23/1991 Coll., promulgated in the Czech Republic as No. 2/1993 Coll. The English translation is available at <<http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/>> (30 April 2014). In this Report, I use this translation although it is sometimes rather awkward.



constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith', whereas 'state authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law' [Article 2(2)].

These provisions are mirrored in Article 2(3), which concerns the general right to liberty: 'Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law'. The Charter also contains the recognition of everyone's capacity to have rights (Article 5).

Article 4 further specifies both the prescriptions on the authority of the State and the liberty of citizens and contains general provisions concerning statutory limitations on fundamental rights: Firstly, 'limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in [the] Charter', secondly, '[a]ny statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions' and thirdly and finally, '[w]hen employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted'.⁴

(3) Most probably all rights listed in Chapter 2, Division 1 would belong to 'civil rights' as conceived by our Project: the right to life (Article 6), the inviolability of the person and of her privacy (Article 7), the right to personal liberty (Article 8), the prohibition of forced labour or service (Article 9), the right to demand that one's human dignity, personal honour, and good reputation be respected, and that one's name be protected, the right to be protected from any unauthorized intrusion into one's private and family life, the right to be protected from the unauthorized gathering, public revelation, or other misuse of one's personal data (Article 10), the right to own property (Article 11), the inviolability of a person's dwelling (Article 12), the protection of the confidentiality of letters or the confidentiality of other papers or records (Article 13), the freedom of movement and of residence (article 14), the freedom of thought, conscience, and religious conviction, the freedom of scholarly research and of artistic creation (Article 14) and the right freely to manifest her religion or faith (Article 15).

(4) Some provisions contained in Chapter 2, Division 2 entitled 'political rights' will also probably correspond to the Project's definition of civil rights: the freedom of expression and the right to information (Article 17), the right of petition (Article 18) and the right of peaceful assembly (Article 19).

(5) Chapter 3 on the rights of national and ethnic minorities also includes relevant provisions guaranteeing the basic autonomy to national and ethnic minorities in the Czech Republic. Depending on the actual definition of 'civil rights' in our Project these can fall within that category too.

⁴ On limitation see also Section 7 below.



(6) If the right to judicial protection is conceived as part of the broader notion of civil rights, the Czech Charter then specifies it in the following way: Article 36 concerns the right to fair trial, Article 37 provides for the fundamental guarantees of the equality of arms and the protection against self-incrimination, Article 38 concerns the publicity of trials and the right to stand before a court, Article 39 specifies the principle *nullum crimen sine lege* together with Article 40, containing further guarantees of fair trial in the context of criminal prosecution.

(7) One caveat that may hamper the understanding of the notion of ‘civil rights’ needs to be added: The Charter makes a distinction between ‘citizens’ and ‘aliens’ in Article 42 (see Question 5 point a) on this issue). Citizens rights could therefore also be understood as the ‘rights of citizens’, that is rights guaranteed exclusively to them.

b) Amongst those rights, which are considered ‘core’?

(1) Some commentators derive from the text of the Preamble to the Czech Charter a ‘supra-positive status’ of three rights: human dignity, freedom and equality.⁵ This was confirmed by a series of decisions of the Czech Constitutional Court (hereinafter also ‘CCC’ or simply ‘Constitutional Court’), which were all however delivered by a three-member chamber (senate) of the CCC with Eliška Wagnerová as the reporting judge, which somewhat undermines the authoritativeness of this conclusion, particularly as it concerns the central status of human dignity in the framework of fundamental rights protection in the Czech Republic.

It is true, however, that the primacy of an individual over the state is a well established principle of the Czech constitutional law, continuously confirmed since the Constitutional Court firstly postulated it in 1994.⁶ It informs all interpretation of law in the form of the interpretive maxim “*in dubio pro libertate*”, firstly explicitly pronounced by the Constitutional Court in 2007.⁷

(2) All commentators also agree that the Czech Charter is based on the ‘natural law foundations’, meaning that fundamental rights are not constituted by the state. The state only recognizes fundamental rights and acknowledges the duty to protect them.⁸ The combination of the attempts to

⁵ See commentary by Jiří Baroš in Wagnerová et al, *Listina základních práv a svobod: komentář* (Prague, 2012), 60-70.

⁶ Judgment Pl. ÚS 43/93 of 12 April 1994 (N 16/1 SbNU 113; 91/1994 Coll.), ECLI:CZ:US:1994:PI.US.43.93.

⁷ Judgment I. ÚS 643/06 of 13 September 2007 (N 142/46 SbNU 373), ECLI:CZ:US:2007:1.US.643.06.1. It will not surprise that the reporting judge was Eliška Wagnerová.

⁸ See commentary by Vojtěch Šimíček in Wagnerová, n 5, 50. See also (for example) Jan Wintr, *Principy českého ústavního práva*, 2nd Ed. (Aleš Čeněk 2013), 132 or Jan Filip, *Vybrané kapitoly ke studiu ústavního práva* (Masarykova universita 2003), 50. This understanding is derived from the Preamble to the Czech Charter, some provisions of its Chapter 1, but also from the text of the oath of the judges of the Constitutional Court (Article 85(2) of the CC), which reads: ‘I pledge upon my honor and conscience that I will protect *the inviolability of*



put human dignity at a hierarchically higher position, the consensus on the natural law foundations of fundamental rights and the recent decision of the Constitutional Court, which reviewed the compatibility of a constitutional amendment with the ‘material core’ of the Constitution,⁹ open up the question whether the Constitutional Court would be willing to review amendments to the Charter for their alleged incompatibility with human dignity. These are, at the moment, only theoretical questions, however, also because there has been only one amendment to the Charter in the whole history.¹⁰

(3) There is another possible element of hierarchization of fundamental rights contained in the Charter: apart from the distinction between the rights of citizens and aliens mentioned above the Czech Charter adopts another distinction: Article 41(1) provides that certain rights (enumerated in the same provision) can be ‘claimed only within the confines of the laws implementing’ these rights. Among them, the following can be potentially considered as falling within the scope of the definition adopted by the Project, although legally, they all form part of chapter 4 of the Czech Charter - economic, social, and cultural rights:¹¹

natural human rights and of the rights of citizens, adhere to constitutional acts, and make decisions according to my best convictions, independently and impartially’ (emphasis added).

⁹ Judgment Pl. ÚS 27/09 of 10 September 2009 (N 199/54 SbNU 445; 318/2009 Coll.), ECLI:CZ:US:2009:PI.US.27.09.1. See Roznai, “Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act” (2014) 8(1) *Vienna Journal on International Constitutional Law* 29.

¹⁰ Constitutional Act No. 162/1998 Coll., which amended Article 8 on the right to personal freedom. The amendment extended the time limit on detention by the Police from 24 to 48 hours.

¹¹ The other provisions mentioned in Article 41(1) of the Czech Charter are:

Article 26:

- the right to the free choice of one’s profession and the training for that profession,
- as well as the right to engage in enterprise and pursue other economic activity;

Article 27(4):

- the right to strike;

Article 28:

- employees’ right to fair remuneration for their work and to satisfactory work conditions;

Article 29:

- the right to increased protection of their health at work and to special work condition of women, adolescent, and persons with health problems;

Article 30:

- citizens’ right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider,
- the right to such assistance as is necessary to ensure a basic living standard to everyone who suffers from material need;

Article 31:

- the right to the protection of one’s health,



- *Article 32(1)*: ‘Parenthood and the family are under the protection of the law. Special protection is guaranteed to children and adolescents’.
- *Article 32(3)*: ‘Children, whether born in or out of wedlock, enjoy equal rights’.

These rights are sometimes considered weaker in that they cannot be enforced as such but need further measures adopted by the legislator. At the same time, however, the Constitutional Court has controlled the implementation of these rights through Article 4(4) of the Czech Charter, according to which

When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.

The intensity of the Constitutional Court’s scrutiny differs and various tests were applied by the Constitutional Court.¹² More importantly, Eliška Wagnerová suggested in one of her dissents that these rights form “constitutional soft law” and questioned that they were put into the horizontal relationship to other, “classical” fundamental rights.¹³ There seems to be no consensus on this question, however.

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

(1) The Czech Charter¹⁴ is the primary “national” source of civil rights in the Czech Republic. It was adopted on 9 January 1991 by the Federal Assembly of the Czech and Slovak Federative Republic and later incorporated into the legal order of the Czech Republic. The specific manner of this incorporation was controversial at the time, since formally the Czech Charter is not a constitutional act. It however forms part of the ‘constitutional order’, the concept enshrined in Article 112 of the Czech Constitution, which authoritatively defines the content of the ‘composite constitution’ of the Czech Republic. The notion of ‘constitutional order’ in fact defines the frame of reference for constitutional review by the CCC.

(2) It is in my view difficult to list other sources of civil rights, broadly understood, since they can include the Civil Code, Penal Code, all procedural codes etc. – many laws actually implement or at least concern

-
- citizens’ right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.

¹² In details see commentary by Jan Winter, in Wagnerová, n 5, 833-839.

¹³ See Dissent of Judge Eliška Wagnerová to Judgment Pl. ÚS 16/04 of 4 May 2005 (N 98/37 SbNU 321; 265/2005 Coll.), ECLI:CZ:US:2005:PI.US.16.04.

¹⁴ See n 3.



in some important sense civil (or fundamental) rights. Still, one could mention the following as related to the core of civil rights in the Czech Republic:

- Act No. 198/2009 Coll., antidiscrimination act;
- Act No. 84/1990 Coll., on the right to peaceful assembly;
- Act. No. 85/1990 Coll., on the right to petition;
- Act No. 106/1999 Coll., on the free access to information;
- Act No. 349/1999 Coll., on the public defender of rights [ombudsman];
- Act No. 46/2000 Coll., on the press;
- Act 101/2000 Coll., on the protection of personal data;
- Act No. 231/2001 Coll., on the radio and television broadcasting;
- Act No. 273/2001 Coll., on the rights of national minorities;
- Act No. 115/2006 Coll., on the civil partnership.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

a) To which international instruments for the protection of civil rights is your country a party?

(1) Similarly to national sources it is difficult to establish such list, since it will depend on how one conceives the notion of an international instrument for the protection of civil rights. This question was controversial before the adoption of the so-called Euro-amendment (see below ad b)), since the Czech Constitution then distinguished a category of ‘ratified and promulgated international agreements on human rights and fundamental freedoms’ (in the following I use the term ‘human rights treaties’), which were given direct effect and precedence before ordinary laws by the (then) Article 10 (the rest of international law did not have such effects and had to be incorporated through ‘dualistic’ means). The Constitutional Court had to deal with the delimitation of this category in several decisions that preceded the Euro-amendment.¹⁵

As I explain below, the distinction is still important, as the ‘human rights treaties’ have more intensive effects in the national legal order than other norms of international law, due to a restrictive (and most probably *contra legem*) interpretation of the Euro-amendment by the Constitutional Court.

¹⁵ Judgment Pl. ÚS 13/94 of 23 November 1994 (N 56/2 SbNU 135; 3/1995 Coll.)ECLI:CZ:US:1994:PI.US.13.94 is the most important in that respect.



(2) At present, the official list of international treaties, composed by the Ministry of Foreign Affairs, which has also classified them, includes 36 'human rights treaties'.¹⁶ The following can be understood as those concerning 'civil rights' in the sense of our Project:¹⁷

- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, New York (32/1955);
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, New York (53/1974);
- International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, New York (95/1974);
- International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, New York (116/1976);
- International Covenant on Civil and Political Rights, 16 December 1966, New York (120/1976);
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966, New York (120/1976);
- Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, New York (62/1987);
 - Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, 6 October 1999, New York (57/2001);
- International Convention against Apartheid in Sports, 10 December 1985, New York (84/1988);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York (143/1988);
 - Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, New York (78/2006);
- Convention on the Rights of the Child, 20 November 1989, New York (104/1991);
 - Amendment to article 43 (2) of the Convention on the Rights of the Child, 12 December 1995, New York
 - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, New York (45/2003);
 - Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, New York (74/2013);

¹⁶ See [http://www.mzv.cz/inp/cz/vyhledavani_smluv/index\\$45924.html](http://www.mzv.cz/inp/cz/vyhledavani_smluv/index$45924.html) (23 April 2014).

¹⁷ I use the official title of the international instrument and provide the date when it was signed. The number in brackets refers to the number of the instrument in the Collection of Laws – until 31. December 1999 or the Collection of International Treaties – for international instruments published since 1 January 2000.



- Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, New York (169/1991);
- Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], 4 November 1950, Rome (209/1992);
 - Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, Paris (209/1992);
 - Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give Advisory Opinions, 6 May 1963, Strasbourg (209/1992);
 - Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those included in the Convention and in the first Protocol thereto, 16 September 1963, Strasbourg (209/1992);
 - Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983, Strasbourg (209/1992);
 - Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, Strasbourg (209/1992);
 - Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, Strasbourg (243/1998);
 - European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, 5 March 1996, Strasbourg (85/2009);
 - Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in all Circumstances, 3 May 2002, Vilnius (114/2004)
 - Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention, 13 May 2004, Strasbourg (48/2010);
- Convention relating to the Status of Refugees (208/1993);
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, Strasbourg (9/1996);
- European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights, 6 May 1969, London (106/1996);
- Framework Convention for the Protection of National Minorities, 1 February 1995, Strasbourg (96/1998);
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981, Strasbourg (115/2001);
 - Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, 8 November 2001, Strasbourg (29/2005);



- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989, New York (100/2004);
- European Charter for Regional or Minority Languages, 5 November 1992, Strasbourg (15/2007);
- Convention on the Rights of Persons with Disabilities, 13 December 2006, New York (44/2010);
- Convention on the International Protection of Adults, 13 January 2000, Haag (68/2012).

b) How are relevant international and European civil rights norms being incorporated in your country?

(1) International treaties are incorporated into the Czech legal order through Article 10 of the Czech Constitution, which reads:

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

This provision, incorporated into the Czech Constitution by the so called Euro-amendment of 3 July 2001,¹⁸ guarantees that international treaties, which comply with the three basic requirements of Article 10 (the Czech Republic is a party to such treaty, the Parliament gave its consent to the ratification of that treaty, and the treaty was officially promulgated), are capable of application domestically and have precedence over conflicting national laws. Article 1(2) of the Constitution, which provides that ‘the Czech Republic shall observe its obligations resulting from international law’, further underlines the importance of international law.¹⁹

(2) As already mentioned, before the Euro-amendment the Czech Constitution recognized a separate category of international treaties – ‘human rights treaties’.²⁰ The main objective of the Euro-amendment was the opening-up of the Czech legal order to EU and international law. Part of this effort was to ‘de-constitutionalise’ the ‘human rights treaties’, while at the same time giving ordinary courts

¹⁸ Constitutional Act No. 395/2001 Coll. , which came into force on 1 June 2002.

¹⁹ The Constitutional Court however reserved its power to review the application of international treaties after they come into force for their compliance with the Czech constitutional order in its judgment II. ÚS 405/02 of 3 June 2003 (N 80/30 SbNU 245), ECLI:CZ:US:2003:2.US.405.02. This reservation however will not (most probably) concern international treaties on fundamental rights (unless they contradicted the standard of protection already achieved in the Czech Republic.

²⁰ The full reference would be to ‘ratified and promulgated international agreements on human rights and fundamental freedoms’.



the power to set aside conflicting domestic ordinary laws without referring the matter to the Constitutional Court. Before the Euro-amendment ordinary courts were obliged to refer such conflicts to the Constitutional Court, similarly to conflicts between ordinary laws and the norms of the constitutional order of the domestic origin.

The relevant provision concerning constitutional referrals by ordinary courts was therefore amended and it does not mention international treaties anymore:

Should a[n ordinary] court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.²¹

This corresponded to another amendment, concerning the Constitutional Court's power of judicial review, where the reference to 'human rights treaties' was also deleted.²²

The Constitutional Court however apparently did not agree with this reading of the constitutional amendment and in a prelude to its later decision, where it actually annulled a constitutional amendment,²³ it in fact rewrote the amendment through a rather imaginative interpretation:

The constitutional basis of a general incorporative norm, and thereby the overcoming of the dualistic concept of the relationship between international and domestic law, can not be interpreted in terms of removing the reference point of [' human rights treaties'] for the evaluation of domestic law by the Constitutional Court with derogative results. The scope of the constitutional order concept [which defines standards of constitutional review] can not be interpreted only with regard to Article 112 (1) of the Constitution, but must be interpreted in view of Art. 1 (2) of the Constitution and must include [' human rights treaties'].

For these reasons Art. 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to present to the Constitutional Court for interpretation a matter in which it concludes that a law which is to be used in resolving the matter is in conflict with a [' human rights treaty'].²⁴

²¹ Article 95(2) of the CC.

²² Article 87(1) a) of the CC.

²³ See n 9.

²⁴ Judgment Pl. ÚS 36/01 of 25 June 2002 (N 80/26 SbNU 317; 403/2002 Coll.), ECLI:CZ:US:2002:PI.US.36.01. Quoted from the English translation available at <<http://www.usoud.cz/en/decisions/>> (17 April 2014).



The ruling came under a heavy criticism from the academic circles, but is now firmly entrenched in the Czech constitutional doctrine and was applied in a number of Constitutional Court's decisions.²⁵

In consequence, at least in theory ordinary courts must continue referring conflicts between 'human rights treaties' and domestic norms to the Constitutional Court, which thus retained its exclusivity as regards judicial review of ordinary statutory law – with the exception of conflicts with EU law, where the Constitutional Court accepted the basic principles established by the ECJ in *Simmenthal*.²⁶ The ruling also meant that the CCC kept 'human rights treaties' as part of its framework of reference in abstract constitutional review.

c) To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

(1) Unsurprisingly, the CCC is the most prominent institution, which quite regularly relies on the ECHR in its decision-making, sometimes in a rather expansive fashion, which was noted by various commentators.²⁷

Apart from the legal provisions concerning the incorporation of international law – including the ECHR and other instruments for the protection of civil rights – there is a procedure for the re-opening of proceedings before the Constitutional Court in criminal matters, if the ECtHR found them in violation of the ECHR.²⁸ Since its adoption,²⁹ there were only 14 petitions for re-opening. The Constitutional Court rejected 5 of them, 9 were upheld.

(2) Regardless the CCC's efforts to preserve the special status of the ECHR and other 'human rights treaties', the other highest jurisdictions in the Czech Republic also rely on the ECHR in their decisions. As Bobek and Kosař note in their report, ordinary courts have in principle three options:

²⁵ In more detail, with references to the relevant literature see Michal Bobek and David Kosař, "Report on the Czech Republic" in Martinico and Pollicino (Eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) available at <http://ssrn.com/abstract=1591370>, 135-136. Michal Bobek, "Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions - National Report for the Czech Republic" in Laffranque (ed), *Reports of the XXV FIDE Congress Tallinn 2012. Volume 1* (Tartu University Press, 2012) 355-387 [available at <http://ssrn.com/abstract=2119965>], is another very useful source.

²⁶ Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629. The relevant CCC's decision is Order Pl. ÚS 12/08 of 2 December 2008 (U 12/51 SbNU 823), ECLI:CZ:US:2008:PI.US.12.08.1, available in English at <http://www.usoud.cz/en/decisions/> (17 April 2014).

²⁷ For details see Bobek and Kosař, n 25, 138-141.

²⁸ §§ 119-119 of the Act No. 182/1993 Coll., on the Constitutional Court.

²⁹ The Constitutional Court Act was amended by Act No. 83/2004 Coll., which came into force on 1 April 2004.



1. They can adopt an interpretation of national law that conforms to the requirements of the ECHR (and thus change the previously established, but conflicting interpretation);
2. They can refer the conflict between a provision of a statute and the ECHR to the CCC;
3. They can set aside a statutory provision for its conflict with the ECHR without referring the matter to the CCC.

All options can be found in the case law of both the Supreme Court and the Supreme Administrative Court, although strictly speaking, the third option is against the principle established by the CCC in the decision discussed above.³⁰ Yet, the SAC once went so far to explicitly deny its willingness to follow this principle.³¹ Since the Minister of Justice was on the losing side, the CCC did not have an option to quash this decision.

On the application of the ECHR and other international instruments by non-judicial actors see section concerning question 6 below.

d) How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?

At least in theory there is no distinction between the ECHR and other international instruments for the protection of civil rights. In practice, however, any institution mentioned in the section concerning question 6 rarely invokes those other instruments.

QUESTION 4: THE EU FUNDAMENTAL RIGHTS

a) To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?

(1) Whereas the general principles of EU law, which include civil rights as conceived by our Project, were used by the CCC and other courts in the Czech Republic even before the accession of the Czech Republic to the EU, the EU Charter seems to have been avoided by the Constitutional Court thus far, except for its two judgments which reviewed the compatibility of the Lisbon Treaty with the Czech constitutional order. In the following I will therefore firstly briefly discuss the use of general principles of EU law and then turn to the domestic status of the EU Charter.

³⁰ See text to n 24.

³¹ SAC, Judgment of 11 July 2007, Case No. 6 As 55/2006 as reported by Bobek and Kosař, n 25, fn. 124.



(2) The general principles of EU law were never used as *the sole* standard of review: they were always used only as a supportive source of interpretation of a domestically grounded right.³² There was a debate whether EU law can serve as a standard of constitutional review through the ‘integration clause’ of the Czech Constitution (its Article 10a),³³ the matter was authoritatively resolved by the Court in a judgment of 16 January 2007.³⁴ The case concerned the compatibility of certain provisions of the Act on Public Health Insurance, which excluded any review of the decisions of the Ministry of Health setting the level of reimbursement from public health insurance for medicinal preparations, with the right to judicial protection (Article 36 of the Czech Charter), but also Directive 89/105.³⁵

The Court rejected to review the contested provisions in the light of the Directive as such:

[T]he Constitutional Court explained that Community law could not serve as a referential criterion for its adjudication of the constitutionality of domestic enactments. On the other hand, the European Communities, just the same as is the Czech Republic, are law-based communities. The European Communities are constructed on the respect and esteem for the essential attributes of a law-based state. As can be deduced from the jurisprudence of the European Court of Justice, its interpretation of general legal principles corresponding to the fundamental rights contained in national constitutional catalogues, is quite similar to the Constitutional Court’s approach. Moreover, the issue under adjudication concerns the establishment and functioning of the internal market including interferences with the free movement of goods, one of the four fundamental freedoms, or the very foundations of the European Communities; it is therefore necessary to pay careful attention as to whether the adopted restrictions are balanced by a sufficient guarantee of the participating subjects’ fundamental rights, in the case under adjudication, above all the right to due process and fair proceedings. The Constitutional Court also dealt, in this spirit, with the petitioners’ objection that the contested provision of the Act on Public Health Insurance is in conflict with the directive. Even were such conflict actually to be ascertained, that could not, in and of itself, result in the derogation either of the statutory provision at

³² The leading decision in this respect is Judgment in Case Pl. ÚS 39/01 of 30 October 2002 (N 135/28 SbNU 153; 499/2002 Coll.), ECLI:CZ:US:2002:Pl.US.39.01, where the CCC used (among other sources) the ECJ’s case law to determine the content of the right to own property and the freedom to conduct business. In details see e.g. Kühn and Bobek, “What About that ‘Incoming Tide?’ The Application of EU Law in the Czech Republic” in Lazowski (Ed), *The Application of EU Law in the New Member States - Brave New World* (TMC Asser Press, 2010), available at < <http://ssrn.com/abstract=1442496>> (22 April 2014), 326-327.

³³ See Bobek and Kosař, n 25, 129-132.

³⁴ Judgment in Case Pl. ÚS 36/05 of 16 January 2007 (N 8/44 SbNU 83; 57/2007 Coll.), ECLI:CZ:US:2007:Pl.US.36.05.1.

³⁵ Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems, O.J. 1989 L 40/8.



issue or of the regulations implementing it; nonetheless, the arguments justifying one in ascertaining conflict with the directive could support the substantiation of unconstitutionality.³⁶

The Court however used the Directive as a source of interpretation of the right to judicial protection enshrined in Article 36 of the Czech Charter. Formally it therefore kept EU law separate, while substantively it use it indirectly as a standard of its review.

(3) As regards the EU Charter, the question whether it belongs to the category of ‘human rights treaties’ was raised. Some commentators argued that the EU Charter should be kept separate, especially as it is not addressed to states but the EU.³⁷ Others argued that in the interest of consistency the EU Charter should be given the same status as the ECHR and thus form part of the Czech constitutional order.³⁸ The CCC has not explicitly addressed the matter yet.

b) How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights?

There has been neither a substantial debate concerning the relationship between these two instruments as regards their application in the Czech Republic, nor a decision by a public authority that would raise this question.

QUESTION 5: JURISDICTIONAL ISSUES

a) Personal

(1) From the point of view of our Project, the personal scope of some rights guaranteed by the Czech Charter can be problematic, since the Charter distinguishes between citizens and aliens. Article 42(2) of the Czech Charter provides that ‘while in the [Czech Republic], aliens enjoy the human rights and fundamental freedoms guaranteed by this Charter, *unless such rights and freedoms are expressly extended to citizens alone*’. The limitation highlighted in the preceding quote applies to the following rights:

- the right to civil resistance (Article 23);

³⁶ Paragraph 35 of the English translation of the judgment, available at < <http://www.usoud.cz/en/decisions/>> (22 April 2013).

³⁷ Including the author of this Report: Bobek, Břıza and Komárek, *Vnitrostátní aplikace práva Evropské unie* (CH Beck 2011), 391. See also Kühn, “Listina základních práv EU a český ústavní pořádek” in Klíma and Jirásek (Eds), *Pocta Jánu Gronskému* (Aleš Čeněk, 2008).

³⁸ See Bobek, n 25 and also his commentary in Wagnerová et al, n 5, 38-39.



- the right to property, whereby ‘the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic’ (Article 11(2));
- the freedom of movement and of residence, whereby ‘every citizen is free to enter the territory of the Czech and Slovak Federal Republic’ and ‘no citizen may be forced to leave her homeland’(Article 14(4));
- other rights that do not seem to fall within the scope of the Project’s definition of civil rights (mostly contained in Chapter 4 - economic, social, and cultural rights).

The recent commentary of the Czech Charter criticizes these limitations as incompatible with EU law (and in some instances also with the ECHR) and offers three possible solutions (beyond the possibility to interpret the limitations so restrictively that no conflict with the requirements of EU law ultimately emerges):³⁹

1. Through legislative means, in other words that the rights granted by the Czech Charter only to Czech citizens would be provided by ordinary legislation;
2. Through expansive interpretation that would imply that a ‘Czech citizen’ means after the Czech Republic’s accession to the EU also ‘an EU citizen’;
3. To conceive the conflicting provisions of EU law (or possibly ECHR) as *de facto* amendments to the Czech Constitution (or the Czech Charter).

In practice no such question have however appeared yet.

(2) One can also distinguish between the potential holders of rights guaranteed by the Czech Charter:⁴⁰

1. Natural persons – with the distinction between citizens and aliens discussed above ad (1);
2. Legal persons – the Czech Charter does not explicitly mention legal persons, their protection is nevertheless guaranteed on the basis of § 72 (1) of the Act on the Constitutional Court, which expressly allows lodging constitutional complaints also to legal persons. This was confirmed by the Constitutional Court in its early jurisprudence.⁴¹ The Charter does not distinguish between legal persons established in the Czech Republic or abroad with the only exception concerning the right to property. As already mentioned, ‘the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic’ (Article 11(2));
3. Public authorities – if they are part of horizontal legal relationships (entering into contracts, for example), public authorities are holders of certain rights guaranteed by the Charter;⁴² Moreover, Article 8 of the Czech Constitution guarantees the right of autonomous territorial units to self-

³⁹ See commentary on Article 42 by Michal Bobek, in Wagnerová et al, n 5, 845-850.

⁴⁰ In details see Filip, n 8, 60-70.

⁴¹ Judgment Pl. ÚS 15/93 of 19 January 1994 (N 3/1 SbNU 23; 34/1994 Coll.), ECLI:CZ:US:1994:PI.US.15.93.

⁴² Opinion Pl.ÚS-st. 9/99 of 9 November 1999 (ST 9/16 SbNU 372), ECLI:CZ:US:1999:PI.US-st.9.99.1.



government, which they can assert before the CCC. Similar right was recognized by the CCC to professional chambers;⁴³

4. Certain subject with no formal legal personality – in some instances, the CCC recognized the right to lodge a constitutional complaint also to subjects with no formal legal personality – for example to a committee on the preparation of a local referendum.⁴⁴

b) Territorial

In principle the Czech Charter binds the public authorities of the Czech Republic. It should therefore be possible to claim such rights outside the territory of the Czech Republic, if the public authority exercises its power there. No such instance is however known to me.⁴⁵

c) Material

As mentioned above, there are distinctions made between economic, social, and cultural rights and other categories of rights. Within the category specified as ‘civil rights’ by our Project no distinction between different rights (corresponding to different policy areas) is formally made, however.

d) Temporal

As already mentioned, the Czech Charter was incorporated into the Czech constitutional order by a decision of the Presidency of Czech National Council No. 2/1993 Coll. It has been in force from its inception during the existence of the Czechoslovak federation – since 8 February 1991.

The Czech and Slovak Federative Republic ratified the ECHR, including its protocols on 18 March 1992 and the Czech Republic acceded to the Convention from 30 June 1993.⁴⁶

QUESTION 6: ACTORS

The relevant actors include:

- The Czech Constitutional Court and ordinary courts; as mentioned above, the Czech Republic has the concentrated system of constitutional review. The CCC exercises both abstract review on petitions lodged by various privileged applicants, including particular chambers of the CCC (Article 87 of the Czech Constitution and §§ 64 et seq. of the Constitutional Court Act) and concrete review on individual complaints against decision of public bodies, including ordinary courts.

⁴³ Judgment I. ÚS 86/99 of 5 September 2000 (N 128/19 SbNU 187), ECLI:CZ:US:2000:1.US.86.99.

⁴⁴ Judgment IV. ÚS 223/04 of 9 February 2005 (N 27/36 SbNU 319), ECLI:CZ:US:2005:4.US.223.04.

⁴⁵ This issue is discussed by Filip, n 8, 71-73.

⁴⁶ Bobek, n 25, text to fn 4.



- The Government, particularly The Government Council for Human Rights: <http://www.vlada.cz/en/ppov/rlp/government-council-for-human-rights-50632/>;
- The Public Defender of Rights (the Ombudsman): <http://www.ochrance.cz/en/>;
- NGOs, particularly Liga lidských práv (The Human Rights League), <http://www.ochrance.cz/en/>.

QUESTION 7: CONFLICTS BETWEEN RIGHTS

a) Conflicts between various sources

(1) As regards conflicts between civil rights guaranteed by 'domestic sources' (primarily the Czech Charter) and the ECHR, it was already said that the ECHR forms part of the Czech 'constitutional order' even after the Euro-amendment. All fundamental rights contained in the ECHR are also guaranteed by the Czech Charter, so potential conflicts can arise at the level of practical application. If they do, there is the procedure for re-opening the proceedings before the CCC, as described also above.

(2) When it comes to potential conflicts with the EU Charter, they would most probably concern conflicts between the authority of EU law as such (in the EU's perspective imbued with direct effect and primacy) and the Czech constitutional order, which reigns supreme in the perspective of the CCC, as formulated in its 'EU law doctrine'.⁴⁷

b) Conflicts between rights

As already mentioned,⁴⁸ The Czech Charter contains a general provision concerning possible limitations of fundamental rights in its Article 4:

(2) Limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Freedoms (hereinafter "Charter").

(3) Any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions.

(4) When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.

⁴⁷ See Bobek and Kosař, n 25 or Zemánek, "The Emerging Czech Constitutional Doctrine of European Law" (2007) 3 *European Constitutional Law Review* 418.

⁴⁸ Section concerning Question 1, part a) (2).



It was suggested that this is not a ‘general limitation clause’ that would apply to all rights guaranteed by the Charter. As argued by David Kosař,⁴⁹ it applies only to those rights, which explicitly allow for their limitation. The same author however concedes that the CCC has nevertheless allowed for limitations of other fundamental rights due to a conflict with another right,⁵⁰ but also with a public good.⁵¹

The CCC applies a standard three-step test, which was even called by the CCC ‘a modern unwritten principle of interpretation of constitutional law’.⁵² It was summarised as follows:

Test of Suitability/Appropriateness: “whether the institute restricting a certain basic right allows the achievement of the desirable aim (the protection of another basic right)”;

Test of Necessity: “comparison of the legislative means restricting ... [a] basic right ... with other provisions allowing to achieve the same objective ... without impinging upon fundamental rights and freedoms”, or in other words the “means which most preserve the affected fundamental rights and freedoms”;

Test of Balancing: “comparison of the importance of both conflicting basic rights”, which suggests that “negative consequences may not outweigh positive elements”.⁵³

It was also noted, however, that the test is not applied universally and that the Constitutional Court ‘has oscillated between treating the proportionality test as an optimization requirement and a “mere” elimination of excessive disproportionality’.⁵⁴ A detailed analysis however exceeds the scope of this Report.

⁴⁹ “Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic”, in Brems (Ed), *Conflicts Between Fundamental Rights* (Intersentia 2008), available at <<http://ssrn.com/abstract=1689259>> (22 April 2014). This section draws heavily on this work.

⁵⁰ Judgment Pl. ÚS 4/94 of 12 October 1994 (N 46/2 SbNU 57; 214/1994 Coll.), ECLI:CZ:US:1994:PI.US.4.94.

⁵¹ Judgment Pl. ÚS 15/96 of 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.), ECLI:CZ:US:1996:PI.US.15.96.

⁵² Kosař, n 49, 8, referring to the CCC’s judgment Pl. ÚS 33/97 of 17 December 1997 (N 163/9 SbNU 399; 30/1998 Coll.), ECLI:CZ:US:1997:PI.US.33.97.

⁵³ Kosař, n 49, 8, references omitted.

⁵⁴ Ibid, 9, referring to Pavel Hölländer, *Filozofie práva* (Aleš Čeněk, 2006)170-173. Hölländer was one of the two justices of the CCC who served two full terms (from 1993 to 2003) and is generally considered the most influential member of the CCC.



ANNEXES:

NATIONAL PROVISIONS

All important sources can be found on the website of the Czech Constitutional Court, <http://www.usoud.cz/en/legal-basis/> (30 April 2014). The website states:

In the Czech Republic, the constitution is not formed by one document, a constitutional act, rather it comprises several enactments, constitutional acts. According to Art. 9 para. 1 of the Constitution of the Czech Republic of 16 December 1993, the Constitution (in the broad sense) may be supplemented or amended only by constitutional acts. A constitutional act in the formal sense is an act which has been designated and is later promulgated as “constitutional” and which is approved by both chambers of the Parliament, by a qualified majority of three-fifths of all Deputies and a qualified majority of three-fifths of all Senators present (Art. 39 para. 4 of the Constitution of the Czech Republic).

Apart from the Constitution of the Czech Republic proper, promulgated as Constitutional Act No. 1/1993 Coll., the constitution in the broader sense comprises the Charter of Fundamental Rights and Freedoms, adopted in the period of the Federation as Constitutional Act No. 23/1991 Coll., then newly promulgated in the Czech Republic as No. 2/1993 Coll.

The particular legal acts relevant for our Project are:

- The Constitution of the Czech Republic of 16 December 1992, constitutional act No. 1/1993 Coll. as amended by constitutional acts No. 347/1997 Coll., No. 300/2000 Coll., No. 395/2001 Coll., No. 448/2001 Coll., No. 515/2002 Coll., No. 319/2009 Coll., No. 71/2012 Coll. and No. 98/2013;
- Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of fundamental rights and freedoms as a part of the constitutional order of the Czech Republic, No. 2/1993 Coll.;
- Constitutional Court Act No. 182/1993 Coll. of 16 June 1993 as amended by Acts No. 331/1993 Coll., 236/1995 Coll., 77/1998 Coll., 18/2000 Coll., 132/2000 Coll., 48/2002 Coll., 202/2002 Coll., 320/2002 Coll., 114/2003 Coll., 83/2004 Coll., 120/2004 Coll., 234/2006 Coll., 342/2006 Coll., 227/2009 Coll., 404/2012 Coll. and 275/2012 Coll.

Relevant decisions include:⁵⁵

- Judgment Pl. ÚS 15/93 of 19 January 1994 (N 3/1 SbNU 23; 34/1994 Coll.), ECLI:CZ:US:1994:Pl.US.15.93;
- Judgment Pl. ÚS 43/93 of 12 April 1994 (N 16/1 SbNU 113; 91/1994 Coll.), ECLI:CZ:US:1994:Pl.US.43.93;
- Judgment Pl. ÚS 4/94 of 12 October 1994 (N 46/2 SbNU 57; 214/1994 Coll.), ECLI:CZ:US:1994:Pl.US.4.94.;

⁵⁵ All of them have been translated into English. See <<http://www.usoud.cz/en/decisions/>> (17 April 2014).



- Judgment Pl. ÚS 13/94 of 23 November 1994 (N 56/2 SbNU 135; 3/1995 Coll.) ECLI:CZ:US:1994:PI.US.13.94;
- Judgment Pl. ÚS 15/96 of 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.), ECLI:CZ:US:1996:PI.US.15.96.;
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- Judgment Pl. ÚS 36/05 of 16 January 2007 (N 8/44 SbNU 83; 57/2007 Coll.), ECLI:CZ:US:2007:PI.US.36.05.1;
- Order Pl. ÚS 12/08 of 2 December 2008 (U 12/51 SbNU 823), ECLI:CZ:US:2008:PI.US.12.08.1;
- Judgment Pl. ÚS 27/09 of 10 September 2009 (N 199/54 SbNU 445; 318/2009 Coll.), ECLI:CZ:US:2009:PI.US.27.09.1.

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Kosař, “Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic”, in Brems (Ed), *Conflicts Between Fundamental Rights* (Intersentia 2008) [available at <http://ssrn.com/abstract=1689259>];

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DENMARK

Contribution towards Deliverable D7.1: answers to questionnaire on the categorization of civil rights

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INTRODUCTION

The objective of the report is to give a general overview of the status of civil rights and freedoms in Denmark.¹ The report starts by defining civil rights by introducing the Danish legal terms; the national sources of law and the international sources of law that Denmark has ratified.

Denmark is generally perceived as a country that respects and promotes human rights – hereby including also civil rights – at home and abroad.² It may thus be surprising to some to discover that only the European Convention on Human Rights has been incorporated into Danish law, while a number of other international conventions have been ratified, but not yet incorporated. In light of the dualist approach to international law, it is discussed whether the distinction may have an impact on the protection of civil rights in Denmark.

The report also addresses the diligent use of EU law (including the Charter of Fundamental Rights) by the Danish courts, and gives an overview of the numerous institutions, associations and administrative bodies involved in the promotion and support to the protection of civil rights in Denmark.

QUESTION 1: IDENTIFICATION OF CIVIL RIGHTS

- ✓ ***Which rights are considered in your country as civil, civic and citizenship rights?***³
- ✓ ***Amongst those rights, which are considered 'core'?***

The idea is to get an overview of what are considered (core) civil rights in EU Member States. Please specify whether there are disagreements/developments in the notion of civil, civic or citizens' rights and liberties, and their core elements.

The identification of **civil** rights in the Danish legal system needs the implication of different legal concepts, depending on which legal source we are dealing with. The rights contained in the Constitutional Act ('Grundlov') were traditionally characterised as 'civic rights/liberties guaranteed by

¹ The report has primarily been elaborated by Silvia Adamo, but supervised and/or commented upon throughout the process by Ulla Neergaard and Catherine Jacqueson. We all wish to thank Assistant Professor Kristian Lauta for having commented on an earlier draft.

² Christoffersen, J. and Madsen, M. R. (2011) The End of Virtue? Denmark and the Internationalisation of Human Rights, *Nordic Journal of International Law* 80, pp. 259-262.

³ Footnote from questionnaire: "The concept of civil, civic and citizens' rights overlap and/or are used interchangeably in many legal systems. In this questionnaire, we will use the term civil rights as potentially including all three notions and covering all fundamental rights which are not political, social and economic. Please indicate how these three notions fare in your legal systems, and which one is more commonly used to refer to the rights under consideration (if any). Please use original language as well as the most accurate English translation of the term."



the Constitution'⁴ and called in Danish 'frihedsrettigheder'.⁵ However, the term that translates human rights, 'menneskerettigheder' can also be used to refer to a catalogue of civil rights in a constitutional analysis that comprises, alongside the Constitutional Act, also EU-derived fundamental rights and international sources of law - hereby including also economic and social rights (not at focus in this report).⁶

Another expression that is gaining footing in the Danish legal discourse is that of 'grundrettigheder', which can be translated into '**basic rights**' or '**fundamental rights**' in English. This expression derives from German constitutional law⁷ and its content is still disputed in academia.⁸ 'Fundamental rights' is also translated into 'grundlæggende rettigheder' in Danish, for example in connection with the EU Charter of Fundamental Rights.

For some scholars, it is their normative status in the legal order, as being part of its constitutional fabric that categorises rights as 'grundrettigheder', and not their material scope.⁹ The term 'grundrettigheder' is thus at times preferred over the notion of human rights, since it can more explicitly separate from each other the national and international legal context, as 'grundrettigheder' often are used as referring to rights in the Danish Constitutional Act, while the notion 'menneskerettigheder' often is seen in a Danish context as referring to international human rights conventions and treaties.¹⁰ The notion of human rights is also found by some commentators to be a value-laden expression, while 'grundrettigheder' often is seen as more neutral, containing contains both fundamental rights and those rights covered by the somewhat blurred human rights label 'rights and freedoms'.¹¹ Other legal scholars have instead opted to use 'grundrettigheder' as a sort of umbrella-notion for human rights, constitutionally protected rights, and EU provisions on fundamental rights, also as interpreted in the case law of the European Court of Justice.¹²

⁴ This is the translation in the Gyldendals Store Røde Dansk-Engelsk Ordbog [Danish-English largest vocabulary, covering also scientific, professional, technical and literary language] by Vinterberg, H. and Bodelsen, C. A., 4th Edition, Gyldendalske Boghandel, Nordisk Forlag A/S.

⁵ Rytter, J. E. (2000) *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* [Fundamental Rights. The Courts' interpretation and control with the legislative power], Thomson Jura, p. 32, n. 11.

⁶ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag.

⁷ Rytter, J. E. (2000), *ibid.*, p. 31.

⁸ Rytter, J. E. (2001) Grundrettigheder som almene retsprincipper [Fundamental rights as general principle of laws] *Juristen* no. 4 2001, pp. 121-133; Københavns Universitet, Retsvidenskabeligt Institut B (2000) *Grundrettigheder* [Basic/fundamental rights] Retsvidenskabeligt Institut B's Årsskrift 2000, Jurist- og Økonomforbundets Forlag. See also Heide-Jørgensen, C. (2008) *Reklameret. Konkurrenceret og kommerciel ytringsfrihed*, Jurist- og Økonomforbundets Forlag, pp. 32 et seq.

⁹ Rytter, J. E., (2000), *ibid.*, p. 32.

¹⁰ Rytter, J. E., (2000), *ibid.*, p. 33.

¹¹ Werlauff, E. (2010) *Europæiske Menneskerettigheder – en praktisk indføring* [European Human Rights – a practical introduction], Gjellerup, p. 13.

¹² E.g. Heide-Jørgensen, C. (2013) *Advertising Law. Marketing Law and Commercial Freedom of Expression*, Jurist- og Økonomforbundets Forlag.



The notion of **civic/civil rights** is also translated in Danish into ‘borgerrettigheder’, an expression stemming from the introduction of the Danish Constitutional Act in 1849, where in part VIII (Articles 71-85) it assumed the meaning of a set of rules granting individual rights to the State’s citizens, e.g. right to personal freedom and the right to the inviolability of the home.¹³

The notion of **citizens’ rights** can refer to two very different legal concepts, and they should not be confused with the concept of civil rights. On the one side, the notion can refer to the rights stemming from citizenship status intended as nationality (in Danish ‘statsborgerskab’ or ‘indfødsret’). These rights are not at focus in this report. On the other side, the concept of citizenship in a broader societal context denominated ‘medborgerskab’ leads to the notion of ‘active citizenship’ which is not a legal notion per se in Danish law, but it is an integration requirement for immigrants from third countries (non EU) who want to obtain a permanent residence permit.¹⁴

Our impression is that there is no universally-accepted understanding of ‘core’ civil rights vis-à-vis other civil rights in Danish law. However, the case law of the Danish courts in recent years might be said to point to a sort of ‘doctrine of preferred position’ for certain rights that are necessary conditions to democracy and particularly fundamental to the individual, e.g. the freedom of expression and freedom of the media in areas of public interest, the freedom of association, but also the legal guarantees (‘retsgarantier’) for fair trial in criminal proceedings and administrative imprisonment.¹⁵ When these rights are at stake, the measures interfering with their enjoyment will be under a strict scrutiny, and public intervention on these rights would have to be grounded in serious concerns.¹⁶ The Supreme Court will proceed to a more ‘intensive’ judicial review when fundamental freedoms (‘grundlæggende frihedsrettigheder’) are involved in the case.¹⁷

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

- ✓ **Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?**

¹³ Zahle, H. (2003), *ibid.*, p. 17.

¹⁴ Aliens Consolidation Act (‘Bekendtgørelse af udlændingeloven’, LBK no. 863 of 25.06.2013) Art. 11, section 3, nr. 6. See the document/declaration of intent to integrate in the Danish society required to be signed at <<http://www.nyidanmark.dk/da-dk/Ophold/permanent-ophold/integration-og-aktivt-medborgerskab.htm>> (last visited Sept. 01, 2014).

¹⁵ Rytter, J. E. (2000) *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* [Fundamental Rights. The Courts’ interpretation and control with the legislative power], Thomson Jura, pp. 357-358.

¹⁶ See e.g. U1999.1798H on restrictions on the freedom of assembly and U2010.2248H on the collision between the right to privacy and the freedom of expression, and the relative discussion in Rytter, J.E. and Lauterbach, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, p. 13.

¹⁷ As happened for example in case U2008.2394H, where a decision on imprisonment and expulsion taken administratively by the Immigration Service and the then Ministry of Integration was overruled in order to be evaluated by the court, as discussed in Melchior, T. (2011) Hvem bestemmer: Folketinget eller domstole? [Who decides: the Parliament or the courts?], *Ugeskrift for Retsvæsen* U.2011B.43.



The idea here is to present the legal and policy framework which forms the basis of national civil rights protection in your country.

- **Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);**
- **Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);**
- **Please indicate whether significant developments have recently taken place in this respect.**

The main source of civil rights in Denmark is the Constitutional Act or 'Grundlov' (which could be translated into 'the fundamental law'). It was adopted on 5 June 1849, and most recently amended in 1953. The primary categories of rights therein are civil and political rights, thus the 'Grundlov' is not a comprehensive catalogue of all fundamental rights.

Being a dated, 'non-modern' Constitutional Act, there is no mention or influence by contemporary formulations of human rights or fundamental values¹⁸ especially of economic, social and cultural character. Notable civil rights gaps are the protection of human dignity and human integrity; the equality between men and women; the right to life and prohibition of death penalty; the prohibition of torture, slavery and forced labour; and the prohibition of criminal laws with retroactive application.¹⁹ However, with a pragmatic look one may discover protection elsewhere in the Danish legal system, and therefore a vaster range of civil rights may indeed be provided via other legislative means.²⁰

The civil rights comprised in the Danish Constitutional Act could then be said to be²¹:

- The right to fair trial, Article 63, Article 64 and Article 65;
- The freedom of thought, conscience and religion, Article 67 and non-discrimination on the basis of religion, Article 70;
- The right to physical personal freedom, Article 71;
- The right to the inviolability of the home and privacy of correspondence, Article 72;

¹⁸ Ketscher, K. (2007) Contrasting legal concepts of active citizenship: Europe and the Nordic countries. In Hvinden, B. et al. eds., *Citizenship in Nordic welfare states*, Routledge, New York, p. 141-154, p. 143.

¹⁹ Lehmann, T. (2006) Den internationale beskyttelse af menneskerettighederne – og grundloven [The international protection of human rights – and the Constitutional Act], in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p.13.

²⁰ Lehmann, T. (2006), *ibid.*

²¹ See also Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group.



- The right to free primary education and freedom to receive instruction, Article 76;
- The freedom of expression, Article 77;
- The freedom of association, Article 78; and
- The freedom of assembly, Article 79.

In terms of strengths and weaknesses of the substantial standards for civil right protection afforded by the Danish legal system, since the Constitutional Act takes precedence over national law, its provisions are granted supremacy in the national legal order.²² This is, however, not the case for international legal instruments protecting civil rights; as further explained in question 3, only the European Convention on Human Rights has been incorporated in Danish legal system assuming force of law – but not constitutional status. Nevertheless, the catalogue of civil rights in the Constitutional Act is so limited, that the well-developed international standards set by the European Convention on Human Rights may have a more relevant role to play in the concrete protection of civil rights.²³ The same can with a lot of right also be assumed as far as the standards set in the framework of the EU Charter of Fundamental Rights are concerned.

As regards developments in the area, it is worth noticing that the civil rights protected by statutory law mentioned in the following are all deriving from the reception of EU law instruments and/or international instruments. The Constitutional Act can only be revised following a very difficult path as set up by Article 88; therefore the realistic future developments can only arise by other sources of law, so far mostly of international derivation.

²² Rytter, J. E. (2013), *ibid.* pp. 41 et seq.

²³ Rytter, J. E. (2013), *ibid.*, p. 23.



Via legislative acts²⁴ the citizens are protected with regard to e.g. the following rights:

- Right to equal treatment of men and women (Consolidated Act on Gender Equality);
- Right to equal treatment of all people irrespective of their ethnic origin (Act on Ethnic Equal Treatment, and Article 266b of the Danish Criminal Code);
- Protection of personal data (Act on Processing of Personal data);
- Right to asylum (Article 8 in the Aliens Consolidation Act); and
- Right to protection in the event of removal, expulsion or extradition (Article 31 in the Aliens Consolidation Act).

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

- ✓ **To which international instruments for the protection of civil rights is your country a party?**

The European Convention on Human Rights (henceforth: ECHR) that Denmark ratified in 1953 is the only international human rights instrument that has been incorporated in Danish law (in 1992).²⁵ The ECHR is therefore part of the Danish legal system. However, it is worthy to mention that the Additional Protocol 12 on the principle of equality was not incorporated along with the convention.

A committee established by the Ministry of Justice in 1999 recommended that a number of human rights treaties among the ones already ratified (viz. the International Covenant on Civil and Political Rights and relative protocols; the International Covenant on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) should also be incorporated in Danish law.²⁶ This recommendation has however not been followed, and as such, the international conventions ratified so far do not have direct effect for the citizens, who can only complain as regards the non-incorporation of these conventions (see the next section on the dualist approach in Danish law). The influence that the civil rights included in the other human rights conventions can have is on the interpretation of Danish law, but this is a very partial protection offered.

Denmark has thus ratified (but not incorporated) a number of international treaties regarding the protection of civil rights, including e.g. some of the core UN treaties. These are in particular the following:

²⁴ For full references see the list in the Annex.

²⁵ Act no. 285 of 29 April 1992 on the European Convention on Human Rights ('Lov om Den Europæiske Menneskerettighedskonvention') entered into force the 1st of July 1992.

²⁶ Ministry of Justice, 'Justitsministeriet' (2001), Udvalgsrapport om 1407/2001 om inkorporering af menneskerettigheder i dansk lovgivning [Report 1407 on the Incorporation of Human Rights Conventions into Danish Legislation].



- The International Covenant on Civil and Political Rights (henceforth: ICCPR), since 1972 (including the first optional protocol, since 1972 and second optional protocol aiming at the abolition of the death penalty, since 1994);
- The International Covenant on Economic, Social and Cultural Rights (henceforth: ICESCR), since 1972;
- The International Covenant on the Elimination of All Forms of Racial Discrimination (henceforth: ICERD), since 1971;
- The Convention on the Prevention and Punishment of the Crime of Genocide, since 1951;
- The Convention relating to the Status of Refugees, since 1952;
- The Convention relating to the Status of Stateless Persons, since 1956;
- The Convention on the Nationality of Married Women, since 1959;
- The Convention on the Elimination of All Forms of Discrimination against Women (henceforth: CEDAW), since 1983, including the individual complaint procedure contained in the optional protocol, since 2000;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth: CAT), since 1987, and the optional protocol, since 2004;
- The Convention on the Rights of the Child (henceforth: CRC), since 1991, including the optional protocol on children in armed conflicts, since 2002, and the optional protocol on the sale of children, child prostitution and child Pornography, since 2003; and
- The Convention on the Rights of Persons with Disabilities (henceforth: CRPD, in 2009).

Denmark has also accessed but not ratified The Convention on the Reduction of Statelessness (in 1977).

Within the framework of the Council of Europe, Denmark has e.g. ratified the following conventions related to civil rights protection:

- The European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, since 1972, and its protocol from 1977, since 1979;
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, since 1989;
- The Framework Convention for the Protection of National Minorities, since 1997;
- The European Charter for Regional or Minority Languages, since 2000; and
- The European Convention on Nationality, since 2002.

It is possible to complain about Denmark's non-compliance of international obligations to the UN Human Rights Committee, the UN Committee for Racial Discrimination, the UN Torture Committee and UN Women Committee for breaches to comply with the ICCPR and its protocols, ICERD, CAT, CRPD and



CEDAW. The protocols that give access to complain to UN committees on breaches of the ICESCR and CRC have not been accessed.

As regards future international commitments it can be noted that in December 2012, the Ministry of Justice decided to establish an expert committee in order to review Denmark's compliance with its human rights obligations. The Committee on incorporation etc. in the human rights area ('Udvalget om inkorporering mv. inden for menneskeretsområdet') had the task to provide with recommendations to the Parliament regarding the following issues:

- Incorporation of the human rights instruments already ratified;
- Access the individual complaint system for more UN-committees and
- Ratification of the 12th protocol to the ECHR on a general discrimination ban. As regards this last point, the committee was expressly requested to take into account the entry into force of the Lisbon Treaty in 2009 and the provision on non-discrimination in Article 21 of the now legally binding EU Charter of Fundamental Rights.²⁷

The committee has very recently delivered its report²⁸ on the 14th of August 2014, where a minority of committee members (six out of fifteen) recommended the incorporation of six international conventions (ICCPR, CRC, CRPD, CAT, ICERD, and CEDAW).²⁹ The members in favour of incorporation found that the clear, precise and unconditional provisions in the six conventions would strengthen the protection of individuals' rights especially at the local administrative level, providing a legal basis for proceedings in courts and making more explicit the obligation for authorities in general to apply the conventions.³⁰ The incorporation would also increase the attention about the conventions and function as a means of symbolic value abroad (as Denmark has been various times encouraged to incorporate the instruments). The incorporation of the ICESCR was though not recommended as its provisions are found to be formulated in a vague manner that does not provide a sufficiently clear legal basis for the rights

²⁷ Danish Government, Regeringen (2012) Kommissorium for Udvalget om inkorporering mv. inden for menneskeretsområdet [Terms of Reference for the Committee on Incorporation etc. in the area of Human Rights], p. 3.

²⁸ Ministry of Justice ('Justitsministeriet') (2014) Betænkning nr. 1546. Betænkning om inkorporering mv. inden for menneskeretsområdet [Report on Incorporation etc. in the area of Human Rights].

²⁹ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 9-14. The committee comprised a Supreme Court Judge (as president of the committee), two professors (as experts), two Appeal Court Judges (one nominated by the Association of Judges and one nominated by the Danish Disability Council), two lawyers (one appointed by the The Danish Bar and Law Society Council and the other by the Equality of Treatment Board), the Director of the Human Rights Institute, a presiding judge (nominated by the National Council for Children), a consultant appointed by the Local Government Denmark – interest group and member authority of Danish municipalities) and five civil servants from various ministries (Ministry of Finance, Ministry of Children, Gender Equality, Integration and Social Affairs, Ministry of Foreign Affairs and Ministry of Justice). It is worth noticing that these civil servants abstained from presenting recommendations on the incorporation as the government did not wish to relate itself to the question at stake before the Committee had delivered its report, see e.g. pp. 14 and 19.

³⁰ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 9-11 and chapter 7 of the report, pp. 256-263. See also Danish Institute for Human Rights (2014) Policy Brief. Inkorporering inden for Menneskeretsområdet [Incorporation in the area of Human Rights].



there contained to be applied in concrete cases; therefore the relevance for their practical application was evaluated to be 'more or less illusory'.³¹

Another dissenting minority of the committee (four out of fifteen) was concerned about an eventual shift of balance between the Parliament and the courts in case of incorporation, leaving room for judges to decide also on issues of redistributive justice which traditionally in Denmark are left to the discretion of the legislative power.³² Similar objections were put forward as regards the ratification of the 12th protocol to the ECHR, adding that it was not possible to foresee the consequences of a ratification in terms of shift of power from the Parliament to the national courts but also to the European Court of Human Rights.³³ A minority of six members of the committee also recommended accessing the protocol on the individual complaint procedure under the CRC. Five members of the committee decided not to sustain any recommendation on any of the issues presented.³⁴

The report is now sent into parliamentary hearing.

✓ **How are relevant international and European civil rights norms being incorporated in your country?**

Denmark follows a dualist approach or tradition, which considers the national legal system as a separate entity from the international legal system.³⁵ By virtue of this, any international rule, treaty or convention that is ratified does not automatically enter into force or becomes part of the Danish legal order, but must be incorporated first within the national legal system before assuming force of law. This can happen, as it was the case with the ECHR, by means of adopting an act that allows the international treaty or convention to become a part of the Danish legal system.³⁶ International treaties can be accessed via a simple majority vote in the Parliament in light of the procedure in Article 19 of the Constitutional Act. International cooperation that requires a transfer of sovereignty of some degree to supranational authorities – such as the EU – is entered in virtue of another, more complicated legislative

³¹ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 263. The formulation of the provisions in the ICESCR would also entail a more active role in the interpretation by the Danish courts, colliding with the sphere of action normally reserved to the Parliament.

³² Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 12-13 and chapter 7 of the report, pp. 264-267.

³³ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 17-18 and chapter 9 of the report.

³⁴ See note 28 *supra* on the composition of the committee on incorporation in the human rights area.

³⁵ Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], 3rd edition, Jurist- og Økonomforbundets Forlag, p. 130 et seq.

³⁶ Lorenzen, P. (2006) Den Europæiske Menneskerettighedskonventions retlige stilling i Danmark [The legal position of the European Convention on Human Rights in Denmark] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 33.



procedure, as stated in Article 20 of the Constitutional Act (requiring 5/6 of the majority in the Parliament, or a referendum).³⁷

Compliance with international law derived instruments in Denmark can happen by means of incorporation by reference ('henvisning')³⁸ or by rewriting ('omskrivning')³⁹ and at times by merely ascertaining that the national law is already in line with the international obligations ratified ('normharmonis').⁴⁰ Especially EU-directives that regulate economic issues are implemented by a combination of rewriting and incorporation, while in relation to other international conventions the practice of implementation by incorporation has not been used very often.⁴¹

The consequences of incorporation entail an increased impact for the international rule in the national legal system, as in a case of conflict between the two an incorporated convention will be considered as a source of law and independent rule.⁴² When incorporated, international conventions may take precedence over national law and therefore national rules not complying with international obligations can be overridden; however this does not imply that the incorporated conventions have a constitutional status.⁴³

As regards the impact of non-incorporated international conventions, they can only be employed by the national courts as elements of interpretation of national law and treaty obligations.⁴⁴ The literature on this topic has not come to a definitive result, but it has nonetheless developed three notions that can help in describing the use of non-incorporated international instruments in the Danish legal system: the interpretation-rule ('fortolkningsregel'); the presumption rule ('formodningsregel') and the instruction rule ('instruktionsregel').⁴⁵

³⁷ On Article 20 and Denmark's participation in the EU see Spiermann, O. (2008) Grundlovens § 20 og det danske medlemskab, in Olsen, B. E. and Sørensen, K. E., *Europæiseringen af dansk ret* [Europeanisation of Danish Law], Jurist- og Økonomforbundets Forlag. On the different constitutional procedures and their interpretation in the aftermath of the Supreme Court case ruling on Denmark's accession to the Lisbon Treaty, see Krunke, H. (2013b) Lissabon-sagen – Med magt følger ansvar [The Lisbon-case – Power comes with responsibility], *Juristen* no 5, 216–225.

³⁸ Act no. 285 of 29 April 1992 that incorporated the ECHR into Danish law is an example of incorporation via reference.

³⁹ Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], 3rd edition, Jurist- og Økonomforbundets Forlag, pp. 152 et seq. Rewriting can necessitate that a national rule is repealed and replaced with a new one. An example of re-writing presented by Spiermann is the formulation of Article 60, section 2 of the Danish Criminal Code on the inability of judges in criminal cases, rewritten after the ECtHR judgement in the Hauschildt v. Denmark-case, ECtHR Series A no. 154 (1989).

⁴⁰ Taksøe-Jensen, P. (2006) Kommentar til § 19 [Commentary to Article 19] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, pp. 186-188.

⁴¹ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 34.

⁴² Spiermann, O. (2006), *ibid.*, p. 154.

⁴³ On the legal status of the ECHR in the Danish legal system see Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, p. 50; Spiermann, O. (2006), *ibid.* pp. 152 et seq.

⁴⁴ Spiermann, O. (2006), *ibid.*

⁴⁵ Spiermann, O. (2006), *ibid.*, pp. 159 et seq., Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 34 et seq.



The interpretation rule dictates that in case of doubt, a national rule can be interpreted to maximum possible extent in conformity with Denmark's international obligations, whether older or newer than the rule itself.⁴⁶ Following the presumption rule the national courts and other authorities that apply the law shall take as a starting point that the legislator cannot be presumed to having acted in contradiction of Denmark's international obligations. Thus the courts and other authorities have to apply national rules so that a breach of international obligations is avoided.⁴⁷ Finally the instruction rule is aimed at administrative authorities that have to make a decision on a discretionary basis in an area where an international convention may have relevance. In these cases the national rules applied shall be interpreted to a maximum possible as being in conformity with Denmark's international obligations.⁴⁸

In case of conflict between a non-incorporated convention and a national rule, when this latter was in fact meant to contradict the international rule, the international convention will not be employed by the courts as taking precedence over the national rule.⁴⁹ Also, a non-incorporated convention cannot constitute a legal basis for a public authority's decision over an individual case.

The issue of incorporation is therefore especially delicate when the international conventions create positive obligations for Denmark, e.g. concerning granting of benefits that the citizens could then seek fulfilled in the courts.⁵⁰

- ✓ **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

The ECHR was incorporated in Danish law by Act no. 285 of 29 April 1992.⁵¹ As such, it has become part of the Danish legal system, and citizens and companies can invoke its protection in courts, administrative organs etc. The ECHR was not incorporated to have constitutional status, but it nevertheless takes precedence over national law; this fact and the development of the framework of the convention via the case-law of its court give rise to many legal and political discussions about the convention's position in the Danish scheme of sources of law.⁵²

⁴⁶ Spiermann, O. (2006), *ibid.*, p. 160.

⁴⁷ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*

⁴⁸ Spiermann O. (2006), *ibid.*, p. 161.

⁴⁹ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, pp. 39-45.

⁵⁰ Ministry of Justice ('Justitsministeriet') (2014), *ibid.* Chapter 4 in the report presents a number of cases where non-incorporated conventions have been employed in the case law of the national courts.

⁵¹ The act was based on report 1220/1991 on the European Convention on Human Rights and Danish law.

⁵² Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* [The European Human Rights Convention – and Danish Law], Forlaget Thomson, 2. udg., pp. 34 et seq.



The incorporation act is built on the assumption that the legislative power will play a major role in ensuring that Danish law is in line with the ECHR. The national legislator has therefore adopted new regulations in respect of Denmark's human rights commitments, and the statutory laws and administrative orders are revised on a continuous basis in case of amendment of acts, complaint cases or decisions made by the organs of the convention (this happens also as regards obligations stemming from non-incorporated conventions).⁵³

The jurisdiction of the European Courts of Human Rights (henceforth ECtHR) was recognized long before this had been made obligatory.⁵⁴ As a matter of fact already before its incorporation the Danish Supreme Court ('Højesteret') in three judgements from 1989 established that the national courts and other authorities had the duty to apply the convention (as interpreted and applied in the case law of ECtHR) in the interpretation of national law.⁵⁵

Nevertheless, the government is at times challenged as regards compliance with human rights treaties that Denmark has ratified. This has often happened as regards the status of rights of third country nationals permanently living in Denmark, who have challenged e.g. the strict family reunification rules for spouse and children in light of the ECHR or the CRC. In these cases usually the Ministry of Justice in its own evaluation of its administration does not find that any infringement has been taken place.⁵⁶

The very strong position assumed by the Danish Parliament in ensuring that Denmark lives up to its international obligations leaves very little space to the courts' own interpretation of the convention; in the scholarly discussion many authors have criticized the practice of leaving a very narrow interpretation freedom to the courts in their proceedings.⁵⁷ The ECHR may not be applied only in cases where a particular legal issue is considered as exhaustively regulated in the national law.⁵⁸ In fact, after 1992, even if the Supreme Court has provided for ample room for the application of international human rights in Danish law, some commentators evaluate the use of international conventions as

⁵³ Ministry of Justice ('Justitsministeriet') (2014), *ibid.*, p. 5.

⁵⁴ Lorenzen, P. (2006), *ibid.*

⁵⁵ Cases U1989.928H, U1990.181H, and U1990.13H.

⁵⁶ Cf. the concerns expressed in the Report by Mr. Alvaro Gil-Robles on his visit to Denmark, p. 6-12. The consequent Memorandum by the Ministry of Refugee, Immigration and Integration Affairs from 22 September 2004 concluded that Danish law did not violate international obligations on human rights issues.

⁵⁷ Among others Christoffersen, J. (2000) Højesteret og Den Europæiske Menneskerettighedskonvention [The Supreme Court and the European Human Rights Convention], *Ugeskrift for Retsvæsen* U.2000B.593, and Christoffersen, J. (2002) Højesterets prøvelse af folkeretlige diskriminationsforbud [The Supreme Court's verification of the international prohibition of discrimination] *Ugeskrift for Retsvæsen*, U.2002B.407; Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, p. 43; Spiermann, O. (2002) Tilbageholdenhed i anvendelsen af internationale menneskerettighedskonventioner [Restraint in the application of international human rights conventions], *Ugeskrift for Retsvæsen* U.2002B.412 and (2009) Om ikke at fortolke internationale menneskerettigheder – med negativ foreningsfrihed som eksempel [On the non-interpretation of international human rights – with the negative freedom of association as an example] in Christoffersen, J. and Madsen, M. R., *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik* [The Court of Human Rights – 50 years of interaction with Danish law and politics], Thomson Reuters Professionals.

⁵⁸ See U1990.13H, mentioned also in Christoffersen, J. (2006a) Internationale menneskerettigheder i dansk ret [International human rights in Danish law] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 18.



'extraordinary cautious'⁵⁹ or even 'reluctant'.⁶⁰ Thus in the national case law one can observe a wary use of both the ECHR case law and of the preliminary reference procedure to the ECtHR, but again viewed as 'very reluctant'.⁶¹

In the academic debates regarding the interpretation of the ECHR by the national courts, there is a notable scholarly view which advocates that the courts should interpret the Constitutional Act in light of the ECHR.⁶² Another reader takes distance from this standpoint and sustains that the case law of the Danish Supreme Court ('Højesteret') does neither indicate that the interpretation of the Danish Constitutional Act shall be in accordance with the ECHR, nor that the interpretation by the ECtHR shall 'automatically calibrate' the interpretation of the Danish Constitutional Act.⁶³ The Constitutional Act has to be interpreted on its own (albeit dated) preconditions, but this does not prevent that the Supreme Court may indeed perform an up-to-date interpretation.⁶⁴ The influence of international conventions on the interpretation of the Constitutional Act was described recently by a Supreme Court judge as 'none', as the ECHR and the Constitutional Act are kept 'keenly separated' in the court's decisions.⁶⁵ According to another scholarly opinion the ECHR suffers the signs of the time and its interpretation should therefore be supplemented by a reference to more recent UN conventions, such as the CEDAW or the CRC.⁶⁶

As regards the application of the interpretation of the ECHR as deriving from the case law of the ECtHR, this is also a controversial topic in Danish academic legal studies. The ECtHR is viewed by some as being more a political organ rather than a traditional court, with a dynamic interpretation style and case law which seems to exceed its original mandate.⁶⁷ In the Danish legal tradition this is found to be in contradiction with the strong support for ensuring the principle of division of powers, where the Parliament assumes a more relevant role than courts in protecting democracy.⁶⁸ Some legal scholars advocate for another methodical approach, which acknowledges that an international court cannot and

⁵⁹ Rytter, J.E. and Lauterbach, K. (2012), *ibid.*, p. 7.

⁶⁰ Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge.

⁶¹ Rytter, J. E. and Wind, M. (2011) In need of juristocracy? The silence of Denmark in the development of European legal norms, *International Journal of Constitutional Law*, Vol. 9 No. 2, p. 471.

⁶² Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* [The European Human Rights Convention – and Danish Law], Forlaget Thomson, 2. udg., p. 36.

⁶³ Christoffersen, J. (2004b) Anmeldelse af Jens Elo Rytter: *Den Europæiske Menneskerettighedskonvention - og dansk ret* (2003), Forlaget Thomson [Review of Jens Elo Rytter: The European Human Rights Convention – and Danish Law], *Ugeskrift for Retsvæsen* U.2004B.38.

⁶⁴ Christoffersen, J. (2004b), *ibid.*

⁶⁵ Christensen, J. P. (2013) Internationale konventioners betydning for Højesterets grundlovsfortolkning [The relevance of international conventions for the Supreme Court interpretation of the Constitutional Act]. *Ugeskrift for Retsvæsen*, U.2013B15, at 15-16.

⁶⁶ Ketscher, K. (2007) Contrasting legal concepts of active citizenship: Europe and the Nordic countries. In Hvinden, B. et al. eds., *Citizenship in Nordic welfare states*, Routledge, New York, p. 141-154, p. 145.

⁶⁷ Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, pp. 82-84.

⁶⁸ Krunke, H. (2013a), *ibid.*



should not pass the same legitimacy tests that are normally applied to national courts.⁶⁹ Others find that the preliminary works to the bill on incorporation of the ECHR in Denmark clearly state that the intention of the legislator with the incorporation was to ensure the necessary adjustment of Danish law to the interpretation of the ECHR given by the organs of the conventions, today the ECtH.⁷⁰

- ✓ **How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?**

As mentioned above, following a dualist approach, international instruments such as the ICCPR and other international instruments that have been ratified but not incorporated in Danish law can in principle not be considered in courts as sources of law that can take precedence over national law, although they can be part of the legal material and thus be used as elements for interpretation of national legislation. In practice, they may offer limited protection as the courts will be very cautious in referring to them and finding the national regulation in breach of international law (this follows the separation of powers' theory as applied to the judiciary in the Danish legal system⁷¹).

However, Denmark has of course an obligation to follow the international conventions that it has ratified. This means that regulations and acts adopted in Danish law have to comply with the international obligations stemming from the ratified treaties.⁷²

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

- ✓ **To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)**

⁶⁹ See the debates in part 2 of Christoffersen, J. and Madsen, M. R. (2009) *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik* [The Court of Human Rights – 50 years of interaction with Danish law and politics], Thomson Reuters Professionals; Spiermann, O. (2006) *Moderne Folkeret* [Modern International Law], Jurist- og Økonomforbundets Forlag.

⁷⁰ E.g. Vedsted-Hansen, J. (2013) *Menneskerettighedskonventioner som bestanddel af landets indre retsorden* [Human rights' conventions as a component part of the country's internal legal system], in Danielsen, J. H. (ed) *Max Sørensen 100 år* [Max Sørensen 100 years], Jurist- og Økonomforbundets Forlag, p. 273.

⁷¹ Melchior, T. (2002) *The Danish Judiciary*, in Dahl, B. Melchior, T. and Tamm, D. eds. *Danish Law in a European Perspective*, 2nd edition, Forlaget Thomson.

⁷² Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, p. 40.



- ✓ **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.**

The EU Charter of Fundamental rights is addressed to the Member States when they are implementing EU law (Article 51, 1 of the Charter) and it is now legally binding (Article 6 TEU); furthermore, ‘the requirement to respect fundamental rights ... is only binding ... when they act in the scope of Union law’.⁷³ In the Danish context it seems to be still unclear how its entry into force will affect the balance of powers between the Parliament and the courts in the future; as the Charter also covers fundamental rights of social and economic character that traditionally are left to the competence of the Parliament, the Danish courts may be called upon to decide on issues that were so far precluded to them.⁷⁴

The opinions on the range of the protection afforded by the Charter are various. The official view of the Ministry of Justice is that the Charter is a mere compilation of existing fundamental rights that does not affect the competences or the jurisdiction of the Union.⁷⁵ Others view the Charter’s guarantees of fundamental rights as adding to the list of rights contained in the ‘Grundlov’ or in other instances going further than these.⁷⁶ This point relates especially to the general discrimination ban in Article 21 (1) which may expand the area of the equality of treatment.⁷⁷ Various Danish governments have refused along the years to ratify the 12th protocol to the ECHR, but since Article 21 reflects the protocol’s range of protection, it is now open to speculation how this will affect the realisation of a general principle of non-discrimination in Danish law.⁷⁸ Also, the Charter (taking precedence over national law after Lisbon) has given ‘constitutional status’ to some administrative and procedural legal principles in a way that was unknown in classic Danish public law.⁷⁹

⁷³ Explanations relating to the Charter of Fundamental Rights, EUT 2007 C303/17, at Art. 51 referring to the EU Court of Justice case law.

⁷⁴ Melchior, T. (2011) Hvem bestemmer: Folketinget eller domstole? [Who decides: the Parliament or the courts?], *Ugeskrift for Retsvæsen*, U.2011B.43.

⁷⁵ See the description in Rytter, J. E. and Lauta, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, p. 17.

⁷⁶ Fenger, N. (2010) Den forvaltningsretlige teorier udfordringer i starten af det 21. århundrede [The challenges to the theory of administrative law in the beginning of the 21. century], *Juristen* no. 10 2010, pp. 275-284

⁷⁷ Rønsholdt S. and Abkenar, A. T. (2013) Om den almindelige lighedsgrundsætning i dansk ret og EU-ret [On the general equality principle in Danish and EU law], *Juristen* 1, 2013, p. 12-23.

⁷⁸ Fenger, N. (2012) Unionens Charter om grundlæggende rettigheder og dets betydning for dansk offentlig ret [The Unions Charter on fundamental rights and its meaning for Danish public law] in Baumbach, T. and Blume, P. eds., *Retskildernes kamp. Forholdet mellem national offentlig ret og udefra kommende ret* [The battle of the sources of law. The relationship between national public law and the law coming from outside], Jurist- og Økonomforbundets Forlag, pp. 120-126.

⁷⁹ Fenger, N. (2012), *ibid.*, p. 106 et seq.



The Danish courts have started to refer to the Charter in recent case law.⁸⁰ Moreover, the national courts are presented with an increasing number of allegations based on the provisions of the Charter, although no infringement of the Charter was proven in the judgements decided so far.⁸¹

In a decision from 2011 the Supreme Court affirmed that the competences of the Union were not broadened by either the Charter or the European Union's accession to the ECHR.⁸² Thus, the application of the Charter by the national courts is not necessarily a sufficient indication of the fact that the Danish Courts will from now on use the Charter as a 'benchmark' for the interpretation of the national law or Constitutional Act, in the same way as the ECHR has not influenced the interpretation of the Constitutional Act.⁸³ However, for some commentators the Danish courts can still be 'somewhat vaguely' inspired by CJEU's case law on the Charter, in the same way a foreign source of law can inspire the development of national law.⁸⁴

After the entry into force of the Lisbon Treaty, the legal status of the protection of fundamental rights is seen as being constituted by three sources: The EU Charter, the ECHR and the EU law general principles on fundamental rights. However, their mutual interaction is not yet completely clear, thus more CJEU's case law is auspicated in order to clarify, what measure will be applied to the evaluation of national legislation and courts' decisions.⁸⁵

So far and to our knowledge, the Danish courts have never made a reference to the EU Court of Justice for a preliminary ruling about the EU Charter.

In the context of protection of EU law-derived rights by the Ombudsman, on the one hand scholarly analysis has pointed out that the Ombudsman has adopted a narrow interpretation of EU-derived rights, rarely (if ever) engaging with the question on whether the authorities were acting in compliance of EU-law, and thereby in practice limiting the protection of EU citizens.⁸⁶ On the other hand another commentator finds that it is possible to verify that international rules have little relevance in the majority of the cases, while EU-law is directly applicable and therefore it has been intensively reviewed

⁸⁰ E.g. U.2007.1519H (Art. 21 of the Charter); U2009.504Ø (Art. 1 and Art. 3 of the Charter); U2011.184V (Art. 7 of the Charter), U.2011.1788H, U2011.1794H, U2011.1800H (all of them regarding Art. 47 of the Charter), U2013.3098H (Art. 21 of the Charter), [U.2014.2286Ø \(Art. 21 and Art. 23 of the Charter\)](#).

⁸¹ To the knowledge of a commentator from the Legal Adviser to the Danish Government, see Holdgaard, R. (2012) EU-charteret – en fodlænke eller nyt konstitutionel brændstof? [EU charter – a fetter or new constitutional fuel?], *Advokaten* 7 2012, 18 Sept. 2012.

⁸² U2011.984H, referred to in Rytter, J. E. and Lauta, K. (2012), *ibid.*

⁸³ Fenger, N., (2012), *ibid.*, pp. 133-134.

⁸⁴ Fenger, N. (2012), *ibid.*, p. 134.

⁸⁵ Holst-Christensen, N. (2013) EU-Domstolens anvendelse af EU's Charter om grundlæggende rettigheder efter Lissabon-Traktatens ikrafttræden [EU Court of Justice's application of the EU Charter of Fundamental Rights after the entry into force of the Lisbon Treaty] in Danielsen, J. H. (ed) *Max Sørensen 100 år* [Max Sørensen 100 years], Jurist- og Økonomforbundets Forlag.

⁸⁶ Gøtze, M. (2009) Ombudsmandens inddragelse af EU-rettigheder [The Ombudsman's inclusion of EU-rights], *Juristen* no. 4 2009, and (2010) The Danish ombudsman. A national watchdog with selected preferences, *Utrecht Law Review*, volume 6, Issue 1 (January). Gøtze remarks that up until 2009, the Danish Ombudsman only took up 4 cases relating to European Union law (Gøtze 2010, p. 44).



since the middle of the 1980'es.⁸⁷ In the last five years (from 2009-2014) the Ombudsman has been more proactive in controlling the authorities' respect for Union citizens' rights.⁸⁸ This can be the result of an adjustment of the Ombudsman's practice pointing towards a more intensified control of the respect of EU-law. The 'development potential' of this control could be sustained by a more accessible register over the Ombudsman's decisions that could better inform the citizens about their rights.⁸⁹ The Ombudsman has recently mentioned the EU Charter as part of the legal basis in one of its reports on the inspections to the public institutions in 2013 – 2014.⁹⁰

QUESTION 5: JURISDICTIONAL ISSUES

✓ **Personal**

- **Who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?**

As a starting point, the civil rights protection in the Constitutional Act is valid for all persons, although the text uses different notions: some of the rights are valid for 'all' (e.g. Article 70, Article 71, Article 72, Article 73) while others only for 'citizens' (e.g. Article 78 and Article 79), although even these last provisions are found to be covering foreigners as well.⁹¹ The only article that for historic reasons is exclusively valid for 'Danish citizens' is Article 71 (section 1, subsection 2).⁹²

As regards the ECHR, the protection afforded in the convention covers all 'persons' including legal persons, civil servants, military personnel, inmates etc. Also asylum seekers, long and short term residents and family members are in principle under the personal scope of the convention. Nonetheless, some of the rights there included are only valid for citizens of the state, e.g. the right not to be expelled

⁸⁷ Andersen, J. (2013) Ombudsmandens anvendelse af internationale regler [The Ombudsman's application of international rules], *EU-ret og Menneskeret*, 6.2013, p. 241.

⁸⁸ Gøtze, M. (2012) På sporet af den tabte EU-ret i dansk ombudsmandspraksis [Tracking of the lost EU law in the Danish Ombudsman's case law] in Baumbach, T. and Blume, P. eds., *Retskildernes kamp. Forholdet mellem national offentlig ret og udefra kommende ret* [The battle of the sources of law. The relationship between national public law and the law coming from outside], Jurist- og Økonomforbundets Forlag.

⁸⁹ Gøtze, M. (2012), *ibid.*, p. 152.

⁹⁰ See Rapport om Folketingets Ombudsmands tilsynsbesøg, Dok.nr. 12/02887-113 [Report on the Parliamentary Ombudsman's inspection visit], <http://www.ombudsmanden.dk/om/formidling_og_viden/publikationer/tilsynsrapport1/> (last visited Sept. 01, 2014).

⁹¹ Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, pp. 65 et seq.

⁹² Rytter, J. E. (2013), *ibid.* p. 66.



from the country in the optional protocol 4, Article 3. Legal persons (companies, organisations, religious communities, etc.) are also covered, as long as the protection is relevant for these subjects.⁹³

As a point of departure, the ECHR only creates obligations for states, so the convention does not have legal force among privates; nevertheless the state has a kind of positive obligation to make sure that the rights in the convention are also protected from private's intervention.⁹⁴ As regards the possibility of extending the protection of other human rights in a horizontal relationship (e.g. the freedom of expression of private employees), the issue is not *whether* that is possible, but *how* – though this follows from a careful analysis of the particular situation at stake and not assuming that the human rights protection is automatically extended to the private sphere.⁹⁵

✓ **Territorial**

- **What is the territorial scope of the protection of civil rights afforded by your member states? Are there *territorial* limitations to such protection? Which?**

A special note regards the territorial scope of civil rights for Greenland and the Faroe Islands, which both have a particular position in the Danish realm. Their status is that of autonomous provinces, regulated by the Self Government and Home Rule Acts⁹⁶ ('Selvstyrelø' and 'Hjemmestyrelø') and by the Danish Constitutional Act. The constitutional unity of the realm comprehends therefore three equally standing parts: Denmark, Greenland and the Faroe Islands ('Grundloven', Article 1). As such, the civil rights and freedom laid down in the Constitutional Act are also applicable in Greenland and the Faroe Islands.⁹⁷ Also important to be noted is that neither Greenland nor the Faroe Islands are part of the European

⁹³ Rytter, J. E. (2006) *Den Europæiske Menneskerettighedskonvention - og dansk ret* (2003), Forlaget Thomson, p. 51.

⁹⁴ Rytter, J. E. (2013) *Individets grundlæggende rettigheder* [The Individual's Fundamental Rights], Karnov Group, p. 70 and p. 70 et seq.

⁹⁵ Zahle, H. (1995) Ytringsfrihed for private ansatte [Freedom of expression for private employees], *Ugeskrift for Retsvæsen* U.1995B.361.

⁹⁶ Act on Greenland's Self Government ('Lov om Grønlands Selvstyre') no. 473 of 12/06/2009; Act on the Faroe Islands' Home Rule Government ('Lov om Færøernes Hjemmestyre') no. 137 of 23/03/1948. See also Spiermann, O. (2007) *Danmarks Rige i forfatningsretlig belysning* [The Danish Realm in a constitutional perspective], Jurist- og Økonomforbundets Forlag.

⁹⁷ In virtue of the Self Government and Home Rule systems, Greenland and the Faroe Island have exclusive competence to legislate and administer only on the matters listed in the acts: these can be municipal issues; healthcare; the social security system; the education system; territorial and fishing matters; labour market organisation; social policies; tax regulations and other subjects listed in the Acts. The Home Rule was introduced in 1979, while the introduction of self-government on 21 June 2009 allowed additional fields of responsibility to be assumed by the Greenland Self-Government authorities, excluding e.g. citizenship, foreign, security and defence policy as well as exchange and monetary policy.



Union and thus not subject to EU law.⁹⁸ However Greenland has had the associated status of Overseas Countries and Territories (OCT) since 1985.⁹⁹

It follows from being a part of the realm of Denmark that the Danish parliament in light of Article 19 of the Constitutional Act can undertake international obligations stemming from its competence in foreign affairs that are also valid in its autonomous provinces. Foreign affairs are namely excluded from the Self Government and Home Rule systems.

The ICCPR, ICERD, CAT, CEDAW, ICESCR, CRC and CRPD were all ratified in Greenland at the same time they were ratified in Denmark, as this is also the case for the European Convention on Nationality, The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the European Charter for Regional or Minority Languages. The ECHR was incorporated in Greenland in 2001 and in the Faroe Islands in 2000.¹⁰⁰

✓ **Material**

- **Are rights protected differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)?**

In the area of security, the 'terrorism package' ('terrorpakke') of laws adopted in 2002 and 2009 may have influenced the civil rights of aliens, in particular the rights to asylum and protection in case of expulsion. The amendments are contained in Article 45b in the Aliens Consolidation Act and give competence to the Ministry of Justice to evaluate whether an alien has to be considered a threat to national security, based on the information provided by the Danish Intelligence Agency ('PET'). This recommendation has to be followed in every case handling or decision regarding foreigners under the Aliens Consolidation Act, for example in applications for a visa or a permission to stay, or in a judgement on expulsion. The Ministry of Justice can decide that the security information that constitutes the basis for the decision may not be communicated to the foreigner or their legal representative. In the scholarly

⁹⁸ Spiermann, O. (2007), *ibid.*, p. 121.

⁹⁹ Harhoff, F. (2006) Kommentar til § 1 [Commentary to Article 1] in Zahle, H. ed., *Danmarks Riges Grundlov med kommentarer* [The Danish Constitutional Act with commentaries], Jurist- og Økonomforbundets Forlag, p. 119.

¹⁰⁰ See Royal Decree no. 814 of 18. September 2001 on coming into force for Greenland of the act on the European Convention on Human Rights; and Royal Decree no. 136 of 25 February 2000 on the coming into force for the Faroe Island of the European Convention on Human Rights. Furthermore, there are a number of ILO conventions that Denmark has ratified and that are also valid in Greenland: see Question to the Minister of Employment by the Parliamentary Employment Committee <<http://www.ft.dk/samling/20121/almindel/beu/spm/252/svar/1044520/1236430/index.htm>> (last visited Sept. 01, 2014).



debates the rule has been found at the limits of breaching the ECHR, especially Article 13, Article 5 and Article 8, sustaining that the Courts will be reluctant not to follow the Ministry's security evaluation.¹⁰¹

Nevertheless, the question of the respect of Denmark's international obligations stemming from ECHR and the Refugee Convention was discussed (as well as the exceptions from the national law on data treatment and the principle of review of administrative decisions) in the preparatory works for the bill introducing Article 45b.¹⁰² Since the rule was adopted to protect the State security and its foreign policy, it was deemed in line with international regulations. The case law has followed the guidelines and thus applied the regulation, not basing the decisions based on the article in breach of human rights obligations.¹⁰³

✓ **Temporal**

- **What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?**

The trend in Danish law in the range and reach of civil rights protection is influenced by the general evolution of civil rights in the European context.

The Danish Constitutional Act is only rarely amended and there is no plan in the future of changing it.¹⁰⁴ In fact, as aforementioned, the last time it was revised was in 1953, and the highly complicated constitutional procedure for amendments discourages the thought about imminent future amendments. Therefore, the only developments possible are those coming from the European level, e.g. stemming from the Charter of Fundamental Rights or from the future incorporation into Danish law of international treaties and conventions that Denmark has ratified (see above).¹⁰⁵

¹⁰¹ Christoffersen, J. (2004a) Domstolsprøvelse i terrorsager m.v. [Courts' review of terrorism cases etc.], *Ugeskrift for Retsvæsen* U.2004B.97.

¹⁰² Bill no. L 32 of 13 December 2001 ('Lovforslag nr. L 32 af 13. december 2001') and White Book regarding Act no. 362 of 6 June 2002 ('Hvidbog vedrørende lov nr. 362 af 6. juni 2002').

¹⁰³ In the case law related to this section, see U.2008.1490Ø on the detention of a foreigner, who had been expelled after Art. 45b in conjunction with Art. 25 in the Aliens Consolidation Act. The detention was not in breach of Art. 5 in the ECHR; and U.2011.2673H, on the expulsion of a foreigner considered a threat to the state security, where the Appeal Court considered both the ECHR and the case law of the ECtHR.

¹⁰⁴ Although efforts in this direction have been repeatedly made in recent years, see Krunke, H. (2013a) Formal and informal methods of constitutional change in Denmark, in Contiades, X. ed., *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, pp. 88-90.

¹⁰⁵ Christoffersen, J. and Madsen, M. R. (2011) The End of Virtue? Denmark and the Internationalisation of Human Rights, *Nordic Journal of International Law* 80 (2011) 257-277.



Some notable developments can also be traceable in a recent case judged by the Supreme Court.¹⁰⁶ The case regarded the processing and refusal of an application for naturalisation, which in Denmark is handled jointly by the Ministry of Justice and the Parliament and therefore excluded by the control of the courts. In this case, the Supreme Court took into consideration inter alia the intervention of the Danish Institute for Human Rights that highlighted the possibility to seek remedy due to the Danish accession to international convention, viz. the ECHR, the Council of Europe Convention on Nationality and the ICCPR.¹⁰⁷ This is the first time that the national courts decide to review the set-up for the preparatory work for naturalisation cases, and particularly remarkable is the fact that the Supreme Court referred to Denmark's possible breach of international obligations.¹⁰⁸ The court admitted that an appellant can have their case reviewed to seek effective remedy if Denmark did not respect its international obligations.

This case proves that albeit a general, traditional reluctance to use international sources of law¹⁰⁹, the national courts do indeed engage also with fundamental rights stemming from international conventions, even in areas that up to now were excluded from judicial review.

✓ **Please offer details as to how different rights are afforded to different *categories of persons* in different location and policy contexts over time?**

In general one could say with a lot of right that different categories of citizens have experienced different protection of their civil rights in different policy contexts over time. Consequently, EU citizens have been granted a more favourable legal position following the pace of the adoption of EU legal instruments protecting their Union citizenship rights. By means of example, the legislative acts introducing the right to equal treatment of men and women, the right to equal treatment of all people irrespective of their ethnic origin and the protection of personal data all derive from the implementation of European directives in Danish law. They now though cover all individuals residing in Denmark, and not only EU citizens.¹¹⁰

Another example can be shown by the protection afforded to immigrant children and their family life in light of the obligations stemming from the international conventions protecting their rights. In the

¹⁰⁶ Supreme Court case U2013.3328H.

¹⁰⁷ Supreme Court case U2013.3328H at 3335-3336.

¹⁰⁸ See also Jacqueson, C. (2014) Citizenship *within* Directive 200/38/EC – stability of residence for Union Citizens and their family members. National report: Denmark, in Neergaard, U., Jacqueson, C. and Holst-Christensen, N. eds., *Union Citizenship: Development, Impact and Challenges*. The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 2, DJØF Publishing, pp. 471-472.

¹⁰⁹ Spiermann, O. (2002) Tilbageholdenhed i anvendelsen af internationale menneskerettighedskonventioner [Restraint in the application of international human rights conventions], *Ugeskrift for Retsvæsen* U.2002B.412.

¹¹⁰ Union citizens have a distinctively favourable legal status vis-à-vis third country nationals in the field of social right that are not examined in this report.



legislation, though not explicitly mentioning the CRC or the ECHR, Article 9 (subsections 11 and 17) in the Aliens Consolidation Act states that the decisions affecting a child's residence permit must be made in respect of the 'family unity' and 'best interest of the child'.¹¹¹ These subsections, introduced in 2005 (subsection 11) and 2004 (subsection 17) are thus said to be introducing provisions in respect of Article 8 ECHR (and its relative case law), and a direct quotation of the phrasing in Article 3 CRC, increasing the level of protection than earlier versions of the act.

QUESTION 6: ACTORS

- ✓ **What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.**

In what follows, the main public and private actors involved in defining and setting civil rights' standards will be presented.

The Parliamentary Ombudsman ('Folketingets Ombudsmand')¹¹² is elected by the 'Folketing' (i.e. the Parliament) to carry out investigations regarding complaints from citizens about the public administration. Within its powers, the Ombudsman may state criticism and recommend that the authorities reopen a case in view of a possible change of the outcome of the decision. The Ombudsman may also take up cases on his own initiative, if for example a particular issue has been the focus of media attention. Moreover, the Ombudsman's Inspection Division visits a large number of public institutions, such as prisons, psychiatric institutions and social care homes, to check how the public authorities take care of individuals who are, for one reason or another, deprived of their liberty for a period of time. These visits are done in order to check that the institutions respect the UN rules against torture and other cruel, inhuman or degrading treatment, and they are carried out in collaboration with the Danish Institute for Human Rights and the Danish Institute against Torture (see more in the following sections). The Ombudsman's Children's Division visits institutions for children, both public and private, and also processes complaints from both children and adults about conditions for children. Finally the Ombudsman also monitors deportations of aliens and accessibility of public building for disabled persons. In 2012, a 'Children's Office' at the Ombudsmand and a relative webpage for complaints was set up, in order to control inter alia that the administration complies with international obligations concerning children, especially the CRC.¹¹³

¹¹¹ Act no. 863 of 25 June 2013, Aliens Consolidation Act, 'Bekendtgørelse af udlændingeloven'

¹¹² See <<http://www.en.ombudsmanden.dk>> (last visited Sept. 01, 2014).

¹¹³ See the webpage for the Ombudsman's Children's Office at <<http://boernekontoret.ombudsmanden.dk>> and <<http://beretning2012.ombudsmanden.dk/artikler/boernekontor/>> (last visited Sept. 01, 2014).



Within the Danish realm we also find the Greenland's Parliament's Ombudsman ('Ombudsmanden for Inatsisartut')¹¹⁴, that monitors that the public administration under the Self Government and in the Greenlandic municipalities work within the administrative rules for good practice. Citizens can complain about the decisions of a public authority or about the treatment received during the handling of their case. Equally, the Faroese Parliament's Ombudsman ('Lagting Ombudsmand')¹¹⁵ for the Faroe Island can take up cases regarding the administrative authorities in the Home Rule, while the Danish Ombudsman can investigate issues of handling of cases by Danish authorities in their respective areas of administration.

The Danish Institute for Human Rights (henceforth: DIHR) is often involved in the discussion of implementation of the rights stemming from the ECHR in Danish law. The DIHR works to 'further and promote human rights in Denmark and abroad', and this is carried out by a series of different activities.¹¹⁶ In the national context, the DIHR monitors Danish legislation to ensure that it is in accordance with human rights. This is done by contributing to the media debate but also providing expertise during implementation of international conventions and EU legislation. In practice, the DIHR serves as advisor to the government and parliament by writing legal briefs and recommendations (ca. 150 a year) and by being heard e.g. during the adoption of new legal acts or at times intervening in court.¹¹⁷ The DIHR is also by law the designated institute to provide assistance to victims of discrimination in pursuing their complaints about discrimination; the institute is also designated to 'conducting independent surveys concerning discrimination and publishing reports and making recommendations on any issue relating to such discrimination'.¹¹⁸ The key areas for the DIHR's work in Denmark are equal treatment regardless of gender, race or ethnic origin; promotion of the implementation of the UN convention on rights for people with disabilities in Denmark; human rights education; and counselling in discrimination cases.

As regards NGOs, the organisations presented in what follows are regarded as having relevance in either setting the agenda or disseminating information about the protection of civil rights in Denmark.

The Danish Refugee Council ('Dansk Flygtningehjælp', henceforth: DRC)¹¹⁹ carries out work not only for refugees but also for immigrants, EU nationals and their family members, providing legal aid for asylum seekers and free legal, social and psychological counselling for all immigrants. The DRC delivers also legal opinions and recommendations as part of the hearing process when a bill on the position of aliens is being debated in the parliament.

¹¹⁴ Established by the Greenlandic Parliament's Act no. 7 of 13 June 1994 ('Landstingslov nr. 7 af 13. juni 1994 om Landstingets Ombudsmand'), see also <<http://www.ombudsmand.gl/>> (last visited Sept. 01, 2014).

¹¹⁵ Lagting's Act no. 60 of 10. May 2000 on the Lagting's Ombudsman ('Løgtingslóg nr. 60 frá 10. Mai 2000 um Løgtingsins Umbodsmann, sum broytt við Løgtingslóg nr. 157 frá 20. December 2013'). For a description of the Faroese Parliament see <<http://www.logting.fo/>> (last visited Sept. 01, 2014).

¹¹⁶ See <humanrights.dk and <http://humanrights.dk/our-work/our-work-denmark>> (last visited Sept. 01, 2014).

¹¹⁷ As it happened in the case U2013.3328H, mentioned in the previous question.

¹¹⁸ Art. 10 in the Act on Ethnic Equal Treatment, Act no. 438 of 16 May 2012 ('Bekendtgørelse af lov om etnisk ligebehandling').

¹¹⁹ See <<http://www.flygtning.dk> and <http://www.frivillignet.dk/aktiviteter/raadgivning/>> on the free counselling for immigrants (last visited Sept. 01, 2014).



The National Council for Children ('Børnerådet')¹²⁰ is an independent national institution committed to safeguarding the rights of children in Denmark. The Council delivers reports for the UN Committee on the Rights of the Child on the measures taken to implement the rights recognized in the CRC. Moreover, the National Council for Children works in connection with the Ministry of Children, Gender Equality, Integration and Social Affairs (which appoint the council's chairperson), and provides consultation during legislative work regarding the conditions of children in the Danish society. The council also provides advice and consultancy to other authorities on issues concerning children's rights.

The Danish Institute against Torture ('Dansk Institut mod Tortur' aka 'DIGNITY')¹²¹ is a self-governing institution that apart from treatment and rehabilitation of torture survivors, also disseminates knowledge and research about torture and carries out advocacy to prevent the use of torture and violence in the future. As above mentioned, the institute works in collaboration with the DIHR in assisting the Ombudsman's visits to places of detention in Denmark.

The Danish Disability Council ('Det Centrale Handicapråd')¹²² is a Government-funded body that monitors the situation of disabled people in Denmark and the implementation of the UN Convention on Rights for Persons with Disabilities (CRPD) together with the Ombudsman and the DIHR. Moreover, the Danish Disability Council acts as an advisory body to Government and Parliament on issues relating to disability policy, including accessibility, and it can also propose changes in areas affecting the life of disabled people and their living conditions in order to promote inclusion in the society and to combat stereotyping and harmful practices in relation to persons with disabilities.

The Documentation and Advisory Centre on Race Discrimination ('Dokumentations- og rådgivningscentret om racediskrimination')¹²³ is an independent private institution which offers advice and legal counselling to victims of racial discrimination and also helps in formulating individual complaints, also to the ECtHR.¹²⁴

The Greenland's Council for Human Rights ('Grønlands Råd for Menneskerettigheder')¹²⁵ is an independent council whose task is to promote human rights in Greenland. It was very recently constituted (March 2013), and although it cannot handle individual complaints, it aims at spreading knowledge about human rights, focussing on particular human rights challenges of actual interest in Greenland, and sustaining capacity-building within the Greenlandic society.¹²⁶ The Greenland's Council for Human Rights works also in collaboration with the DIHR.

Finally, on the topic of gender issues, the Danish Centre for Information on Gender, Equality and Diversity ('KVINFO')¹²⁷ provides research and disseminates information and findings knowledge about

¹²⁰ See <<http://www.boerneraadet.dk/english>> (last visited Sept. 01, 2014).

¹²¹ See <<http://www.dignityinstitute.org>> (last visited Sept. 01, 2014).

¹²² See <<http://www.dch.dk/>> (last visited Sept. 01, 2014).

¹²³ See <<http://www.drcenter.dk>> (last visited Sept. 01, 2014).

¹²⁴ See <<http://www.drcenter.dk/en/drc-forer-sag-om-statsborgerskab-ved-den-europaeiske-menneskerettighedsdomstol/>> (last visited Sept. 01, 2014).

¹²⁵ See <<http://humanrights.gl/da/>> (last visited Sept. 01, 2014).

¹²⁶ See <<http://humanrights.gl/da/hvordan-arbejder-vi/>> (last visited Sept. 01, 2014).

¹²⁷ See <<http://www.kvinfo.dk/side/661/>> (last visited Sept. 01, 2014).



gender, equality and ethnicity (in Denmark but also abroad). The Women's Council in Denmark ('Kvinderådet')¹²⁸ is a NGO and umbrella organization for 45 organizations (women's organizations, the equal status committees of the political parties, trade unions, professional women's groups, migrant- and refugee women's groups, women's studies researchers, youth organizations, and religious and humanitarian women's organizations) which is working to strengthen women's rights and influence in society and create real equality between women and men, at all levels. The Women's Council represents the various organizations' interests in dealing with the Parliament, administrative authorities, and national and international organizations. The council also provides responses during the hearing' process when a bill concerns the interests covered by its action. The Danish National Organization for Gay Men, Lesbians, Bisexuals and Transgender persons ('Landsforeningen for bøsser, lesbiske, biseksuelle og transpersoner')¹²⁹ works with issues of gender identity and sexual orientation in Denmark, as a national section of the global organization of the same name. Its support for human rights of the LGBT's community is expressed by political work, counselling and information, and social activities.¹³⁰ The organization also supports victims of hate-crimes based on gender discrimination.¹³¹

As regards equality bodies, there are a number of boards and councils in Denmark devoted to the various aspects of protection of civil rights.

The Equality of Treatment Board ('Ligebehandlingsnævnet')¹³² treats complaints of discrimination on the labour market on grounds of sex, race, colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social, and ethnic origin. Outside the labour market the board hears the complaints of discrimination based on sex, race, and ethnicity. The board incorporated the Complaint Committee for Ethnic Equality of Treatment ('Klagekomitéen for Etnisk Ligebehandling'), which closed in December 2008. As the legal basis for the decisions of the board is derived by EU directives, the board has a special focus on EU law and its interpretation, and is among other things member of the European Network of Equality Bodies ('Equinet').¹³³

The Immigration Board ('Udlændingenævnet')¹³⁴ is an independent, quasi-judicial administrative body that functions as an administrative appeal instance on a variety of cases that fall under the Aliens Consolidation Act. The composition of the court comprises judges and a number of other members appointed by the Ministry of Justice, the Council of the Danish Bar and Law Society, and the Ministry of Employment. The Immigration Board deals with complaints on immigration matters, inter alia complaints on decisions on family reunification; permanent residency; and decision on expulsions, all made by the Immigration Service as first instance. The Immigration Board deals also with complaints on decisions made by the Danish Agency for Labour Market and Recruitment (agency under the Ministry of Employment) on work and residence permits for students, workers and au-pairs.

¹²⁸ See <<http://www.kvinderaad.dk/english/english>> (last visited Sept. 01, 2014).

¹²⁹ See <<http://www.lgbt.dk>> (last visited Sept. 01, 2014).

¹³⁰ See more at <<http://lgbt.dk/wp-content/uploads/Our-organisation-1.02.pdf>> (last visited Sept. 01, 2014).

¹³¹ See <<http://lgbt.dk/radgivning/hadforbrydelser/>> (last visited Sept. 01, 2014).

¹³² The current act regulating its work is Act no. 905 of 03 September 2012, 'Bekendtgørelse af lov om Ligebehandlingsnævnet'. See <<http://ast.dk/naevn/ligebehandlingsnaevnet>> (last visited Sept. 01, 2014).

¹³³ See <<http://www.equineteurope.org/>> (last visited Sept. 01, 2014).

¹³⁴ See <<http://udln.dk/>> (last visited Sept. 01, 2014).



The Refugee Appeals Board ('Flygtningenævnet')¹³⁵ is the second instance in the appeal system in asylum cases, the Immigration Service being the first instance. The Refugee Appeals Board is a quasi-judicial body whose members are independent and cannot receive instructions from other authorities. The chairman of the Board must be an appointed judge, while one member is appointed by the Ministry of Justice and one member is appointed upon nomination from the Council of the Danish Bar and Law Society.¹³⁶

The Press Council ('Pressenævnet')¹³⁷, established pursuant to the Danish Media Liability act, is an independent, public tribunal which deals with complaints about the mass media. It handles complaints about radio, TV, magazines, weekly and daily newspapers and other mass media. The press council can rule in cases where a publication is made contrary to the press ethical rules¹³⁸, or whether a mass media shall be under an obligation to publish a reply. The Press Council can express criticism in these cases, but it cannot impose a sentence on the mass media or assure the complainant financial compensation. As regards public service, that also has to respect freedom of expression¹³⁹, the Radio and TV board ('Radio- og TV nævnet'¹⁴⁰) has also among its duties to monitor whether the national media offer a varied supply of programs. The board cannot decide whether a breach of public service duty has occurred, but it states and communicates its opinion to the Ministry of Culture.¹⁴¹

Last but not least, the Danish Data Protection Agency ('Datatilsynet')¹⁴² ensures the respect of the legislation on data protection, i.e. The Act on Processing of Personal Data¹⁴³, implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The agency provides guidance and advice to authorities, companies and citizens; it can control some sensitive processing of personal data that is performed by authorities and companies; it can make decisions in case of citizens' complaints on whether certain processing is in accordance with the regulations of the Act on Processing of Personal Data; if it suspects a violation of the regulations of the Act on Processing of Personal Data, the agency can take up own-initiative cases – if, e.g. due to a citizen enquiry or newspaper article; and it can issue criticism in its decisions if the controller has violated the regulations of the Act on Processing of Personal Data. Finally the Danish Data

¹³⁵ See <http://www.fln.dk/da-dk/English/General_information_regarding_fln.htm> (last visited Sept. 01, 2014).

¹³⁶ For the Order on Rules of Procedure for the Danish Refugee Appeals Board see <http://fln.dk/da-dk/English/Legislation/rules_and_procedures_fln.htm> (last visited Sept. 01, 2014).

¹³⁷ See <<http://www.pressnaevnet.dk/Information-in-English.aspx>> (last visited Sept. 01, 2014).

¹³⁸ For the press ethical rules, see <http://www.pressnaevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx> (last visited Sept. 01, 2014).

¹³⁹ See Art. 10 in the Act no. 255 of 20.03.2014 on radio and television broadcasting ('lovbekendtgørelse om radio- og fjernsynsvirksomhed').

¹⁴⁰ See <<http://www.kulturstyrelsen.dk/medier/radio-og-tv-naevnet/>> (last visited Sept. 01, 2014).

¹⁴¹ See Art. 40-44 in the Act on radio and television broadcasting and order no. 1527 of 16.12.2013 on the rules of procedure for the Radio and TV board, which implements some of the rules laid down in European Parliament and Council Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

¹⁴² See <<http://www.datatilsynet.dk/english>> (last visited Sept. 01, 2014).

¹⁴³ Act No. 429 of 31.05.2000 on the Processing of Personal Data, 'Lov om behandling af personoplysninger (persondataloven)', entered into force on 1 July 2000 and latest amended in 2012.



Protection Agency conducts an annual series of inspections of public authorities and private companies that have received the agency's authorization to process personal data, and if it discovers punishable violations of the Act on Processing of Personal Data in connection with handling a complaint or an inspection, the Agency is authorized to issue a ban or enforcement notice or report the violation to the police.

QUESTION 7: CONFLICTS BETWEEN RIGHTS

- ✓ **How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?**
- ✓ **Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?**

Please give examples, and illustrate how these conflicts are dealt with and resolved.

The civil rights contained in the 'Grundlov', having constitutional value/power, take precedence over legislative acts. However, traditionally, the interpretation of the civil rights protected by the Constitutional Act has been restrictive, as to say only invoked when there was no doubt for their application. This follows from the central role that the legislative power plays in Denmark in creating law, and from the view that the constitutionally protected right in fact restricts the democratic Parliament's sphere of action.¹⁴⁴ This is valid for proving the constitutionality of acts but also for administrative and judicial acts.

In case of inconsistency or conflict of civil rights deriving by the Constitutional act, which may indeed happen, the clash can be resolved by imposing limits or clarifications laid down in the law (an occurrence foreseen in the Constitutional Act); by considering in a relative manner one civil right against another and balancing the different rights at stake (the one expanding while the other is reduced); and finally by prioritizing the civil/fundamental right taking precedence in relation to the other sources of law, without quantifying the importance of either of the two.¹⁴⁵

The protection afforded by especially the ECHR covers more areas than the Constitutional Act, but where there is overlap, the national courts in their rulings may resort to either as supporting one another. In practice, also due to the very stringently formulated Supreme Court judgments, it is very difficult to ascertain in legal research if there was a ranking, or what procedure was set into place to overcome the inconsistencies. It might be that the Danish courts' approach consists in weighing the

¹⁴⁴ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret 3* [Human Rights. Danish Constitutional Law 3rd volume], Christian Ejlers' Forlag, pp. 52 et seq.

¹⁴⁵ Zahle, H., (2003), *ibid.*, pp. 33 et seq.



rights against each other and in light of the circumstances of the cases, arrive to a decision that does not significantly impinge on any of the two.¹⁴⁶

As mentioned before, the national courts are expected to work under the presumption that a national law is in line with the ECHR, so there would normally be a case where the courts investigate whether the international obligations are complied with. The parts in a civil case must point out that there can be a conflict.¹⁴⁷ The court cannot proceed to an independent interpretation of the ECHR and refrain from applying a clear national rule; moreover, up until now the courts have not carried out an independent interpretation of the ECHR that does not have a clear support in the case law of the ECtHR.¹⁴⁸

A couple of recent cases of political and legal character can provide examples for notorious clashes of civil rights in Denmark. The content of these will thus be described in the following.

The infamous 'cartoon controversy' in September 2005 put Denmark at the top of the newsflash of the world. What happened was that a Danish newspaper published a series of twelve cartoons depicting the Muslim prophet Mohammed. The publication was meant to draw attention to the case of a Danish writer on Islam, who could not find illustrators for his book. Since the Muslim religion condemns the representation of the prophet as iconoclastic, in the optic of the newspaper 'Jyllands-Posten' the illustrators were limited in their freedom of expression. The Muslim community and the ambassadors from Muslim countries in Denmark expressed their discontent with the choice to portray the prophet, while the Danish government, the chief editor of the newspaper and the culture editor of the article defended their right to freedom of expression.¹⁴⁹ The tension created by a general wariness and distrust of third country nationals, palpable in the public debate as in the legislation on immigrants from third countries and especially Muslim countries¹⁵⁰ ignited the fire of the discussion on what seemed to be an unreachable balance between fundamental values of freedom of religion and freedom of expression, that resonated in Europe and North America.¹⁵¹ Particularly the depiction of the prophet with a turban resembling a bomb, equating Muslim to terrorists, was the most unlucky vehicle for a democratic discussion on these basic civil rights. A city court judgement (later confirmed by the Appeal Court) dismissed the claims of breach of penal law on defamation and insult of religious faith/blasphemy

¹⁴⁶ Rytter, J. E. and Lauts, K. (2012) Report for the XXV FIDE Congress: Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions.

¹⁴⁷ Christoffersen, J. (2008) Kommentar til Den Europæiske Menneskerettighedskonvention [Commentary to the European Convention on Human Rights], *Karnovs lovsamling*, vol.1, Thomson Reuters (updated 2010).

¹⁴⁸ Christoffersen, J. (2008), *ibid.*

¹⁴⁹ On the international scene the cartoon crisis was dubbed as one of the worst crisis in Danish foreign affairs since World War two, with attacks on Danish embassies in various Muslim countries and a boycott of Danish products, substantially affecting the foreign revenue of a number of national industries.

¹⁵⁰ Adamo, S. (2007) The Legal Position of Migrants in Denmark: Assessing the Context around the "Cartoon Crisis". *European Journal of Migration and Law* 9 (2007) 1-24.

¹⁵¹ See the comment by Ronald Dworkin: The Right to Ridicule, *The New York Review of Books*, nr. 5, 23 May 2006, <<http://www.nybooks.com/articles/archives/2006/mar/23/the-right-to-ridicule/>> (last visited Sept. 01, 2014).



against the newspaper's editors¹⁵², and also the State Advocate (drawing also on Article 10 in the ECHR) did not find that criminal proceedings could be initiated against the newspaper.¹⁵³

Another notorious example of conflict of rights regards the right to family life, substantiated in the differentiated system for family reunification with spouses from third countries (non EU countries). The rules on family reunification are very complex in Denmark and follow different paths depending on whether the reference person is Danish, EU citizen or third-country national. This has created many different layers of legislation and accordingly, very different degrees of protection.

Without going into too much detail, the system for family reunification that follows EU-law and the Citizenship directive has eased the way in which EU-citizens can bring their family members to Denmark. Conversely though, this has created a reverse discrimination scenario for Danish citizens, who cannot invoke EU-law if they are 'static' citizens.

The legal system for family reunification applied to Danish citizens and permanent residents who want to be family reunited with a third country national does not follow the EU directive for family members from third countries (thanks to Denmark's opt-out in this area of Justice and Home Affairs) and it is instead extremely complicated and highly regulated in detail.¹⁵⁴ The rules, strictly enforced since 2002 with a focus on integration, require applicants to meet a long list of self-sufficiency requirements, and also prove 'attachment' to the country if the spouse residing in Denmark is not Danish national or has not resided in the country for at least 28 years.

The peculiarity of this set-up derived in part by frequent ad-hoc amendments to the legislation, its approach to the limits of breaching Article 8 in the ECHR and the non-transparency of the administration¹⁵⁵ have inflamed the Danish political and legal debates on family reunification for years. A tentative final full stop to this discussion was set by the Danish Supreme Court, which stated in 2010 that the attachment requirement and the 28 years rule do not constitute a breach of either ECHR or the European Convention on Nationality.¹⁵⁶ In 2014 the Second Section of the ECtHR arrived to the same conclusion in the same case, stating that there had been no violation of Article 8 of the Convention (unanimously) or of Article 14 in conjunction with Article 8 of the Convention (by four votes to three).¹⁵⁷

¹⁵² Aarhus City Court ('byret') judgement of 26.10.2006, Court of Appeal in Viborg, Jutland ('Vestre Landsret') judgement of 19.06.2008.

¹⁵³ Decision of 15 March 2006.

¹⁵⁴ The relative Article in the Aliens Consolidation Act, Art. 9, has at the time of writing no less than 37 subsections.

¹⁵⁵ Christoffersen, J. (2006b) Forvaltningsretlig transparens: Om familiesammenføring i praksis [Transparency in administrative law: On family reunification in practice], *Juristen* no. 2, pp. 37-45.

¹⁵⁶ U2010.1035H.

¹⁵⁷ Case of Biao v. Denmark, Judgment of 25 March 2014 (Request for referral to the Grand Chamber pending).



ANNEXES

Relevant national provisions

- The Constitutional Act of Denmark of June 5th 1953, 'Danmarks Riges Grundlov af 5. Juni 1953' <http://www.thedanishparliament.dk/Publications/The_Constitutional_Act_of_Denmark.aspx> (last visited Sept. 01, 2014)
- Act no. 429 of 31 May 2000 on the Processing of Personal Data, 'Lov om behandling af personoplysninger (persondataloven)'. The act implements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- Act no. 438 of 16 May 2012 on Ethnic Equality of Treatment, 'Bekendtgørelse af lov om etnisk ligebehandling'. The act implements parts of the European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Act no. 1678 of 19 December 2013, Consolidated Act on Gender Equality, 'Bekendtgørelse af lov om ligestilling af kvinder og mænd (ligestillingsloven)'. The act implements the European Council's Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- Act no. 863 of 25 June 2013, Aliens Consolidation Act, 'Bekendtgørelse af udlændingeloven'
- Consolidated Act no. 871 of 04 July 2014 on the Danish Criminal Code, 'Bekendtgørelse af straffeloven'

Case law

The Danish case law is mainly accessed via the 'Ugeskrift for Retsvæsen' [Danish weekly law gazette]. Selected human rights case law (national and international) is commented in legal journals such as 'EU-ret og Menneskeret' [EU-law and human rights law], 'Juristen' [The Jurists' Journal], 'Advokaten' [The Lawyers' Journal], etc.

The website of the Supreme Court also offers the possibility to research its case law with the search terms 'EU-law' and 'Human Rights' (in Danish) in its online database.¹⁵⁸

Examples to be mentioned are:

U.1989.928H

U.1990.13H

U.1990.181H

U.1999.1316H

¹⁵⁸ 'Højesterets afgørelsesdatabase' [Supreme Court case law database] available via <<http://www.hoejesteret.dk/hoejesteret/Pages/default.aspx>> (last visited Sept. 01, 2014).



U.1999.1496H
U.1999.1675H
U.1999.1798H
U.2000.1728H
U.2002.1789H
U.2002.2591Ø
U.2004.382H
U.2004.715H
U.2004.1047H
U.2005.602H
U.2008.1490Ø
U.2008.2394H
U.2010.1035H
U.2010.1547H
U.2010.2448H
U.2011.1800H
U.2013.3098H
U.2013.3328H

Selected Parliamentary Ombudsman's decisions

FOB 2003.309
FOB 2005.507
FOB 2005.621
FOB 2006.379
FOB 2006.529
FOB 2007.289
FOB 2008.238
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GERMANY

bEU Citizenship Project – WP 7: Civil rights and liberties in and beyond EU law Report on Germany *Hester Kroeze*

QUESTION 1 : IDENTIFICATION OF CIVIL RIGHTS

Which rights are considered in your country as civil, civic and citizenship rights?

The principle legal instrument in which fundamental rights are laid down in Germany is the German Basic Law (BL)/Constitution/*Grundgesetz*.¹ This document both safeguards fundamental rights in the Federal Republic of Germany, and constitutes its institutions. In other words, it lays down a rule of law in the sense that the state is bound to the Constitution and therewith its power is delimited. And in the sense that arbitrariness of the state in the treatment of its citizens is prevented by establishing that each citizen of Germany enjoys the rights in the Basic Law. This notion is very important for the understanding of the German fundamental rights' regime, since it has developed as it has, as a consequence of the world wars in the first half of the twentieth century, and the subsequent division of Germany, as well as the chaos that the wars left over. Therefore, when the Basic Law was designed, the need to prevent future repetition of these events was of great importance and influence on the text of the Constitution. Since Germany had negative experiences with exploitation of the freedoms in a manner that undermines the democratic institution that created them – the experience of two world wars initiated by democratically chosen leaders – it designed safeguards to protect the democracy from such possibility in the future.² These safeguards are reflected by a strong presence of the rule of law in the Basic Law.³ This rule of law is recognizable in several provisions of the Basic Law: Article 1(3) states that all three governmental powers (legislator, executive and adjudicator) are bound to the limits in the Basic Law for the exercise of their competences. Article 28 of the Basic Law states that 'the

¹ The German term is *Grundgesetz*, and the English term is Basic Law. This name was chosen in 1949 in order to emphasize the provisional character of the law at that point, as it was then only valid for West Germany and through the provisionary status the drafters expressed their hope to be reunited with East-Germany – then it would become a Constitution. In the end, the two countries were reunited, but the name was not changed. Still, the Basic Law functions as a Constitution, so I will use the terms interchangeably. See Zekoll & Reimann 2005.

² Thomson 2005.

³ Friedrich 1949.



constitutional order in the *Länder* shall conform to the principles of the republican, democratic and social State governed by the rule of law in accordance with the Basic Law'. Article 20(3) explicitly states that '[t]he legislature is bound by the constitutional order, the executive power and the judiciary by law and justice'. Article 93(1) of the Basic Law lays down the competence for the *Bundesverfassungsgericht* to review the law on compatibility with the Basic Law. Article 80 decides that delegated powers need to be exercised in a restrictive manner. And article 33(4) considers that the exercise of state authority is governed by public law.⁴

The fact that the human rights catalogue is placed at the beginning of the German Constitution makes clear that they enjoy a special status. The formulation of these rights is derived from the German perception of humanity, which puts emphasis on the values of personal liberty, independence, self-determination, responsibility, and individuality.⁵ The provisions aim to do justice to both the individualistic, and the social characteristics of humanity.

With regard to the definition of different types of rights, the German Basic Law distinguishes between *personal liberty rights* or *basic rights* – where the *civil rights* are part of – then *rights similar to basic rights*⁶, *equality rights*, *economic rights*, *cultural rights*, and *social rights*. Below, this categorization of the rights in the German Basic Law is displayed.⁷ In some cases, however, there is an overlap.

⁴ Zekoll & Reimann 2005, p. 57-59.

⁵ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 364, *Lisbon Urteil*.

⁶ These rights are included in the Basic Law, only not in the primary fundamental rights chapter.

⁷ United Nations 2009.



Personal liberty rights or basic rights:

Art. 1(1) BL : Human dignity is inviolable and inalienable.

Art. 2(1) BL : The right to free development of the personality.

Art. 2(2) BL : The right to life, physical integrity and individual freedom.

Art. 4(1-2) BL : The right to freedom of faith, of conscience, and freedom to profess a religion. Art.

4(3) : The right to refuse to perform military service on grounds of conscience.

Art. 5(1) BL : The right freely to express and disseminate opinions and freely to inform oneself, including the guarantee of freedom of the press.

Art. 6 BL : Marriage and family are places under the special protection of the state.

Art. 7 BL : The entire school system is placed under the supervision of the state.

Art. 8 BL : The right to assembly.

Art. 9(1) BL : The right to association.

Art. 9(3) BL : The right to form associations for the promotion of working and economic conditions – ensured for everyone and for all professions.

Art. 10(1) BL : The privacy of correspondence as well as the privacy of mail and telecommunications are inviolable.

Art. 11(1) BL : The right to freedom of movement on German territory.

Art. 12 BL : The right freely to choose an occupation and place of work.

Art. 12a BL : Equal access of men and women to the Armed Forces.

Art. 13(1) BL : The home is inviolable.

Art. 14(1) BL : The right to property and the right of inheritance.

Art. 15 BL : The right to compensation in case of expropriation.

Art. 16 BL : Protection of citizenship and against extradition of Germans.

Art. 16a BL : The right to asylum for those who are politically persecuted.

Art. 17 BL : The right to address petitions to the authorities.



Rights similar to basic rights

- Art. 20(4) BL : The right to resist any person seeking to abolish the constitutional order.
- Art. 38 BL : The active and passive right to elect.
- Art. 101 BL : The right to a lawful judge (jo. art. 19(4) BL).
- Art. 103(1)BL : The right to a hearing.
- Art. 103(2)BL : The prohibition of retroactive punishment (principle of legality).
- Art. 103(3)BL : The prohibition of multiple punishment for the same crime (ne bis in idem).
- Art. 104 BL : The right to legal safeguards in the event of deprivation of liberty.

Equality rights

- Art. 3(1) BL : All people are equal before the law.
- Art. 3(2) BL : Men and women have equal rights.
- Art. 3(2) BL : No-one may be disadvantaged or preferred because of his sex, his descent, his race, his language, his homeland and origin, his faith, his religious or political views. No-one may be disadvantaged because of his disability.
- Art. 33(1) BL : Every German has the same citizenship rights and obligations in all States.
- Art. 33(2) BL : Every German has equal access to every public office.
- Art. 33(3) BL : No-one may be subject to disadvantage due to his adherence or non-adherence to a conviction or a world view.

Economic rights

- Art. 2(1) BL : Everyone has the right to the free development of his personality.
- Art. 12 BL : The right freely to choose an occupation and place of work.
- Art. 14(1) BL : The right to property and the right of inheritance.
- Art. 15 BL : The right to compensation in case of expropriation.



Cultural rights

Art. 5(3) BL : Arts, science, research and teaching are free.

Art. 7(4) BL : The right to establish private schools.

Social rights

Art. 1(1) BL : Human dignity is inviolable and inalienable.

Art. 3(2) BL : The state promotes the implementation of equal rights for women and men and takes measures to remove existing disadvantages (2nd sentence).

Art. 3(3) BL : No-one may be disadvantaged because of his disability (2nd sentence).

Art. 6(1) BL : Marriage and family are placed under the special protection of the state order.

Art. 6(4) BL : Every mother is entitled to the protection and care of the community.

Art. 6(5) BL : Legislation is to provide children born outside wedlock with conditions for their physical and mental development and their position in society equal to those of children born within wedlock.

Art. 9(3) BL : Agreements that limit or seek to hinder the rights to form associations for the promotion of working and economic conditions are void, measures taken with a view thereto are illegal (2nd sentence).

Amongst these rights, which are considered the core ones?

The rights in the first chapter of the Basic Law are considered to be the core fundamental rights in Germany, together with the other rights that are directly enforceable in court, which include articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law. Primus inter pares, though, are the inviolable right to human dignity (article 1) and the democratic foundation of the German state (article 20), since these rights are protected by the 'eternity clause' in article 79(3), which decides that these provisions can never be amended. In the *Lisbon Urteil*, in which the *Bundesverfassungsgericht* reviews the compatibility of the Lisbon Treaty with the Basic Law, it confirms this view and repeatedly emphasizes the importance of articles 79(3), 1, and 20 of the Basic Law to be part of the constitutional identity of Germany under article 4(2) of the TEU. In addition the Court mentions article 23(1) third sentence, which specifically declares the importance of observing the eternity clause in the European integration process. Furthermore it considers the right to freedom (article 2), the right to equality (article 3), and



the right to vote (article 28(1)) to be inherently linked to these core values of the German state, and for this reason they can also be classified as core rights.⁸

*The elaboration of the principle of democracy by the Basic Law allows for the objective of integrating Germany into an international and European peace order. (...) The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (Völkerrechtsfreundlichkeit) (see BVerfGE 31, 58 <75-76>; 111, 307 <317>, 112, 1 <26>; Chamber Decisions of the Federal Constitutional Court (Kammerentscheidungen des Bundesverfassungsgerichts - BVerfGK 9, 174 <186>).*⁹

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

Legislation

The most important national source of civil rights is the German Basic Law which functions as a Constitution. These rights are directly applicable and enforceable by all citizens in all courts (at least the rights in the first chapter of the Basic Law, as well as articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law).¹⁰

In addition, all *Länder* have their own Constitution. These Constitutions should be in accordance with the Federal Constitution, but may still differ in emphasis, extent of protection, personal scope, etc. International human rights instrument to which Germany is a party play a role as well, among which the International Convention for Civil and Political Rights, the Convention for Economic, Social and Cultural

⁸ BVerfG, 2 BvE 2/08 vom 30.6.2009.

⁹ Ibid, par. 290.

¹⁰ Zekoll & Reimann 2005, p. 76; United Nations 2009, p. 55.



Rights, and the European Convention of Human Rights. Under question three of this report, an overview of the international instruments to which Germany is a party is given.¹¹ Lastly, some fundamental rights are elaborated upon in specific laws, either at the level of the federation, or at the level of the *Länder*. It is not possible to give a complete oversight of these laws, but a short list of examples is given:

- The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz 2006*);
- The Life Partnership Act (*Lebenspartnerschaftsgesetz*);
- The Act on Equal Rights of Persons with Disabilities (*Behindertengleichstellungsgesetz*);
- The Federal Data Protection Act (*Bundesdatenschutzgesetz*);
- The Federal Education Promotion Act (*Bundesausbildungsförderungsgesetz*);
- The Social Code (*Socialgesetzbuch*);
- The (Political) Parties Act (*Parteiengesetz*);
- The German Immigration Act (*Zuwanderungsgesetz*);
- Some rights are codified in the Civil Code (*Bürgerliches Gesetzbuch*);
- Some rights (of the defence) are codified in the Criminal Code (*Strafgesetzbuch*);

Case-law

An important additional source of law with regard to fundamental rights is formed by the case law of the Federal and the Regional Constitutional Courts. Each *Land* has its own Constitutional Court which enforces its Constitution (*Verfassungsgerichte der Länder*). In addition there is a Federal Constitutional Court, which is the watchdog of the Federal Constitution (*Bundesverfassungsgericht*). This Court enjoys prevalence over all the German *Länder*, but also over the other Federal Courts (see figure I). The interpretation of the German Basic Law by the *Bundesverfassungsgericht* is decisive in the German legal order.¹²

General Principles of Law

General principles of law also form part of the constitutional identity of the German legal order. Most of these principles were developed in case-law – mainly from the *Bundesverfassungsgericht* – after the Second World War, when the formal rule of law which bound the exercise of legislative power was complemented by a substantive rule of law, which added a notion of justice to the democratic institution.¹³ Most principles that create civil rights for German citizens are implemented in the *Grundgesetz*, as well as the most important principles of the rule of law, on which the contemporary

¹¹ United Nations 2009.

¹² United Nations 2009, 54-56. Zekoll & Reimann 2005.

¹³ Nolte 1994.



German Republic is founded. A non-exhaustive list of the most important of these principles is displayed below¹⁴ (in a non-hierarchical order):

1. The principle of representative democracy, art. 20(1-2) *Grundgesetz*;
2. The principle of the separation of powers, art. 20(2-3) *Grundgesetz* (*Gewaltenteilung*);
3. The principle of the rule of law, art. 1(3) jo. 20 jo. 28(1) *Grundgesetz* (*Rechtsstaatsprinzip*)¹⁵;
4. The principle of federalism, art. 28-32 *Grundgesetz*;
5. The principle of social justice, art. 20(1) *Grundgesetz* (*Sozialstaatlichkeit*);
6. The principle of proportionality;
7. The principle of good administration;
8. The principle of the protection of legitimate expectations (*Vertrauensschutz*);
9. The principle of legal certainty;
10. The principle of no retroactive force of legislation;
11. The principle of equality, art. 3 *Grundgesetz*.

From the current research it appears that there are different types of principles that play a role in the case-law of the *Bundesverfassungsgericht*.¹⁶ The first type of general principles constitute the fundamentals on which the German *Bundesstat* is built, among which the principle of the rule of law and the principle of the social justice (no. 1-5 of the list). These principles do not create civil rights, but still are relied on by the *Bundesverfassungsgericht* every now and then, when a case is of a very principal nature.¹⁷

Most of the other general principles listed follow from the first fundamental five. For instance, the principle of proportionality (no. 6) is part of the principle of the rule of law.¹⁸ Although this principle does not constitute a civil right, it is very prominent in the German legal order and frequently relied on by the *Bundesverfassungsgericht* (see table I: 1048 hits on its website).

Another category of principles, albeit less important in German legal practice, consists of the principles of good administration, among which the principle of the protection of legitimate expectations¹⁹, the principle of legal certainty, and the prohibition of issuing retro-active legislation²⁰ (no. 7-10 of the list). These principles can create civil rights, but the *Bundesverfassungsgericht* is not very generous in establishing a breach of these rights by the administrative authorities. Consequently, the meaning of these principles in the German legal order differs from their meaning in other European

¹⁴ Zekoll & Reimann 2005, p. 56-58; Nolte 1994.

¹⁵ See Zekoll & Reimann 2005, p. 57.

¹⁶ Categorization made on the basis of the current research – interpretation of the author.

¹⁷ Zekoll & Reimann 2005, 56-66;

¹⁸ United Nations 2009, p. 37.

¹⁹ Nolte 1994.

²⁰ Zekoll & Reimann 2005, 56-60;



countries, such as the Netherlands or the United Kingdom, where they are more prominent.²¹ This difference can be explained from a legal-historical perspective. In the countries in which general principles take a more prominent role, the legislative power is assumed to have an inherent administrative discretion, not only where this is explicitly provided for, but also when norms are imprecise or general and need an assessment of a complex set of facts. Consequently, the legislator is due to take any decision with substantive safeguards in order to use its discretion proportionately (principle of proportionality). In Germany, though, the courts only assume administrative discretion when this is explicitly granted, whilst for all other situations it is upheld that there can only be one correct solution. In accordance with this view, when a certain procedure has not been sufficiently safeguarded, this is frequently repaired by the notion that the 'right decision' has been taken, so having applied more safeguards would not have made a difference. Therefore the importance of the general principles of administrative law in mediating such a situation between citizens and the government has always remained marginal.²² This practice for instance came to light in a case of the *Bundesverfassungsgericht*, in which it considers that administrative law is a concretization of the Constitution.²³ In literature there is quite some criticism on this stance of the highest German Court, though, and in addition it is said that these observations were made several years ago (1994/2005), so the situation may already have somewhat been changed.

There are also general principles of law effective in the German legal order which do create civil rights, such as the principle of equality (no. 11 of the list). However, (most of) these principles are codified in the Basic Law, so they most notably become effective through that instead of through being invoked separately by parties or by the courts. Thus, although their counterparts in the Basic Law are of importance in the German legal practice, these principles as such do not have much significance.

In conclusion, although general principles of law are important for the constitutional character of the German state, their practical role in case-law is limited. This can be explained by two main reasons. Firstly, most of these principles are embodied in substantive norms, and therefore they do not require a separate application. Secondly, the approach of the German courts towards the duty of governmental institutions to respect general principles (of good administration) precludes granting them an extensive application. Nevertheless, the principles are invoked every now and then, especially when the case at stake is of a principal nature. To illustrate these findings, the results of a quick search to the amount of 'hits' on the input of the most important German principles on the website of the

²¹ Nolte 1994, p. 196-198.

²² Nolte 1994, p. 196-198.

²³ Consequently, applying administrative law correctly cannot easily be held to be contrary to the substantive rights in the Constitution. F. Werner 1959, '*Verwaltungsrecht als konkretisiertes verfassungsrecht*' DVBl,

p. 527, cit. in: Taskovska, p. 4.



Bundesverfassungsgericht are presented in table I. In order to put the results in perspective, a similar search was conducted for the case-law of the Dutch Council of State (the highest Administrative Court in the Netherlands), which use of general principles is quite different – more concentrated on some central principles, and more in quantity. These findings are in accordance with the constitutional traditions of the respective countries. In Germany, the Basic Law is the starting point and handgrip for fundamental rights protection, rather than abstract principles. In the Netherlands, on the other hand, where constitutional review is prohibited, general principles are more important in order to offer effective legal protection by the courts.

Table I: The use of general principles in German and Dutch case-law of the highest Courts

Principles (and search terms in German and Dutch)	<i>Bundesverfassungsgericht</i>	Dutch Council of State (<i>Raad van State</i>)
Representative Democracy <i>Repräsentative Demokratie/ Representatieve Democratie</i>	37	0
Separation of Powers/Democracy <i>Gewaltenteilung/ Scheiding der Machten</i>	69	5
Rule of Law <i>Rechtsstaatsprinzip/ Rechtsstaat</i>	676	82
Federalism <i>Bundesstaatlichkeit/ Niet van toepassing</i>	95	
Social Justice <i>Sozialstaatlichkeit/ Verzorgingsstaat</i>	83	1
Proportionality <i>Verhältnismäßigkeit/ Proportionaliteit</i>	1048 results	475
Good administration <i>Ordnungsgemäßen Verwaltung/ Goed</i>	94	1498



<i>bestuur</i>			
Legitimate Expectations <i>Vertrauensschutz/ Opgewekt vertrouwen</i>	237		191
Legal Certainty <i>Rechtssicherheit/ Rechtszekerheid</i>	263		3946
Prohibition of retroactive application of the law <i>Rückwirkenden Anwendung/ Retro-actieve toepassing</i>	206		0
Equality <i>Gleichstellung/ Gelijkheidsbeginsel</i>	159		4044



QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

1. *To which international instruments for the protection of civil rights is your country a party?*²⁴

The German belief in human rights is not only expressed in the Basic Law, but also through an obligation to contribute to the worldwide implementation of human rights. Hereto it has ratified most of the international conventions for the protection of human rights. Below, a list of these conventions is provided.

International agreements and protocols involving human rights aspect, ratified by Germany:

1. International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (including the amendment to article 8);
2. International Covenant on Civil and Political Rights of 1966;
3. Optional Protocol to the International Covenant on Civil and Political Rights of 1966, on communications from individuals;
4. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty of 1989;
5. International Covenant on Economic, Social and Cultural Rights of 1966;
6. Convention on the Elimination of All Forms of Discrimination against Women of 1979 (including amendment of article 20, paragraph 1);
7. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 1999, regarding complaints by individuals and investigation procedures;
8. Convention of 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (including amendment of article 17, paragraph 7, and article 18, paragraph 5);
9. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 2002, regarding regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty;
10. Convention on the Rights of the Child of 1989 (including amendment of article 43, paragraph 2);
11. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 2000;
12. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000;
13. Convention on the Rights of Persons with Disabilities of 2006;
14. Optional Protocol to the Convention on the Rights of Persons with Disabilities of 2006.

United Nations Human Rights Conventions to which Germany is a contracting party:

15. Slavery Convention in the version of the Protocol amending the Slavery Convention signed at Geneva on 25 September 1926;
16. Convention on the Prevention and Punishment of the Crime of Genocide of 1948;
17. Convention relating to the Status of Refugees of 1951 and its Protocol of 1967;

²⁴ Source of oversight: United Nations 2009.



18. Convention relating to the Status of Stateless Persons of 1954;
19. Convention on the Reduction of Statelessness of 1961;
20. Rome Statute of the International Criminal Court of 1998;
21. United Nations Convention against Transnational Organized Crime and its Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and against the Smuggling of Migrants by Land, Sea and Air of 2000.
22. The Convention for the Protection of All Persons from Enforced Disappearance of 2006 was signed on 26 September 2007. The Federal Government adopted a draft Act on the Convention on 4 February 2009. The ratification process is likely to be concluded in 2009.

Other relevant international Human Right Conventions to which Germany is a contracting party:

Conventions of the International Labour Organisation:

23. Convention (No. 29) concerning Forced or Compulsory Labour, 1930;
24. Convention (No. 81) concerning Labour Inspection in Industry and Commerce, 1947;
25. Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, 1948;
26. Convention (No. 97) concerning Migration for Employment, 1949;
27. Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949;
28. Convention (No. 100) concerning Equal Remuneration, 1951;
29. Convention (No. 102) concerning Minimum Standards of Social Security, 1952;
30. Convention (No. 105) concerning the Abolition of Forced Labour, 1957;
31. Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, 1958;
32. Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, 1962;
33. Convention (No. 122) concerning Employment Policy, 1964;
34. Convention (No. 129) concerning Labour Inspection in Agriculture, 1969;
35. Convention (No. 132) concerning Annual Holidays with Pay (Revised), 1970;
36. Convention (No. 138) concerning Minimum Age for Admission to Employment, 1973;
37. Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999;

Convention of the United Nations Educational, Scientific and Cultural Organization:

38. Convention against Discrimination in Education of 1960;

Conventions of the Hague Conference on Private International Law:

39. Convention on the Law Applicable to Maintenance Obligations towards Children of 1956;
40. Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children of 1958;
41. Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants of 1961;
42. Convention on the Law Applicable to Maintenance Obligations of 1973;



43. Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 1973;
44. Convention on the Civil Aspects of International Child Abduction of 1980;
45. Convention on International Access to Justice of 1980 (signed but not yet ratified);
46. Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993;
47. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996 (signed but not yet ratified);
48. Convention on the International Protection of Adults of 2000.

Geneva Conventions and other conventions in the field of the humanitarian international law:

49. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949;
50. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949;
51. Geneva Convention relative to the Treatment of Prisoners of War of 1949;
52. Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949;
53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 1977 (Protocol I);
54. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 1977 (Protocol II);
55. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction of 1997 (Ottawa Convention).

Regional Human Right Conventions to which Germany is a contracting party

56. European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;
57. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952;
58. Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions of 6 May 1963;
59. Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention of 6 May 1963;
60. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto of 16 September 1963;
61. Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention of 20 January 1966;
62. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty of 28 April 1983;
63. Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 19 March 1985;
64. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 11 May 1994;
65. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances of 3 May 2002;



66. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention of 13 May 2004;
67. European Social Charter of 18 October 1961;
68. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981;
69. Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows of 8 November 2001;
70. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987;
71. Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 4 November 1993;
72. Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 4 November 1993;
73. European Charter for Regional or Minority Languages of 5 November 1992;
74. Framework Convention for the Protection of National Minorities of 1 February 1995;
75. European Convention on the Exercise of Children's Rights of 25 January 1996;
76. European Agreement relating to persons participating in proceedings of the European Court of Human Rights of 5 March 1996;
77. Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 1949 of 5 March 1996.



International Human Rights Instruments which Germany has explicitly not ratified:

1. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families of 1990.

The reason that Germany gives for not ratifying this Convention is that the rights of migrant workers are already sufficiently protected by national law and other international human rights instruments, such as the ICCPR, and the CESCR. Moreover, it does not agree with the broad definition of the term of migrant worker, which also includes illegal migrants. It considers that this definition is incompatible with the German policy aim to combat illegal migration.

Reservations are made with regard to the following instruments:

1. International Covenant on Civil and Political Rights, and its optional protocol on communications from individuals;
2. The International Convention on the Elimination of All Forms of Racial Discrimination;
3. The International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.
4. Convention on the Rights of the Child, and its optional protocol on the involvement of children in armed conflict 2000.

- II. *How are relevant international and European civil rights norms being incorporated in your country?*

For the incorporation of international Treaties in the German legal order, Germany relies on a fairly dualist system, which means that all Treaties need to be implemented before they can become effective in the national legal order. Examples of such implementation acts are the national law on the implementation of the ECHR, and the national law on the implementation of the ICCPR.²⁵ These Treaties only become effective in the national legal order after their implementation in an act of national law. They are implemented by a statute, and therefore in the hierarchy of rules they rank at the same level as the other national statutes. Consequently, normally, international rules and the laws that implement them cannot override other statutes of national law. The exception to this general rule is that by virtue of article 25 of the Basic Law 'general rules of international law are an integral part of Federal law. They take precedence over statutes [so not over the Basic Law] and directly create rights and obligations for the inhabitants of the territory of the Federation.' Consequently, *general rules* of international law rank higher than the statutes and prevail over them, albeit not over the Basic Law. This rule is the expression

²⁵ Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 (BGBl. 1952 II S. 686); Gesetz zu dem Internationalen Pakt vom 19. Dezember 1966 über bürgerliche und politische Rechte vom 15. November 1973 (BGBl. 1973 II S. 1533).



of the *Völkerrechtsfreundlichkeit der Bundesrepublik*, which encompasses that the German state is not only committed to national human rights protection, but also to international human rights protection, which urges it also to contribute to the worldwide implementation of human rights.²⁶ This *Völkerrechtsfreundlichkeit* comes about via the preamble of the Basic Law that postulates the role of Germany in the world as part of a united Europe, in article 24 of the Basic Law, which provides for the transfer of sovereignty to international organization. And via the at the time of the conclusion of the Treaty of Maastricht introduced article 23 of the Basic Law, which explicitly provides for transfer of sovereignty to the European Union and the obligation for the Federal Republic of Germany to participate in further European integration, as well as the limits thereto (article 79(2-3) of the Basic Law is applicable).²⁷ With regard to this last provision, in the past decades the *Bundesverfassungsgericht* seemed to be especially concerned with the *limits* that the Basic Law puts to European integration, and with the status of the Basic Law as the final authority. On the other hand, if the described openness towards international – and especially European law – is part of the constitutionality of the German republic as it was founded after the Second World War, a too restrictive anti-European attitude of the *Bundesstat* in general and its highest Court in particular, would also be unconstitutional.²⁸ The task of the *Bundesverfassungsgericht* is therefore twofold, as it consists of both being open towards European integration and international regulation of human rights, and preserving the value and the primary status of the German Basic Law as the core source of human rights in Germany. The *Bundesverfassungsgericht* is aware of this twofolded task, and the *Lisbon Urteil* is the expression of its positioning with regard to both ends. Because although – once again – it demanded the European Union to respect the sovereignty of the Member States – especially those aspects in which their national identity is expressed – it also recognized the obligation of Germany to cooperate in a united Europe by stating that '[t]he constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration.'²⁹

Back to the significance of article 25 of the Basic Law for the incorporation of international norms in the German legal orders. By virtue of this provision, general rules of international law are directly effective in the German legal order and prevail over national statutes. How to recognize these 'general rules' is not defined in the Basic Law itself, which leaves it to the courts to interpret which international rules fall within the scope of article 25 of the Basic Law. When they are not certain about its applicability to a specific rule of international law, article 100(2) of the Basic Law obliges them to consult the *Bundesverfassungsgericht* to decide. Consequently, the applicability of article 25 of the Basic Law is established on a case by case basis. For instance, in *Görgülü* the *Bundesverfassungsgericht* decided that the rights in the ECHR fall within the scope of article 25 and therefore are an integral part of federal law and take prevalence over national statutes.³⁰ And in line with this notion it decided that for the limitation of fundamental rights, the limitation clauses in the ECHR should be taken into account in addition to the limitation clauses in the Basic Law.³¹ Thus, the *Bundesverfassungsgericht* aims to align its case-law with the case-law of the ECHR.³² Furthermore, it decided that the ICCPR falls within the scope of article 25.³³ So the functioning of article 25 is not merely illusionary, but also effective in

²⁶ United Nations 2009, p. 54; Payandeh 2009.

²⁷ Kokott 2010, p. 104; Kommers et al. 1999, p. 9.

²⁸ Kokott 2010, p. 105.

²⁹ BVerfG, 2 BvE 2/08 vom 30.6.2009 - Citate extracted from Kokott 2010, p. 101.

³⁰ Praxke & Kortmann 2004; BVerfGE 111, 307 vom 14.10.2004, par. 315-318, *Görgülü*.

³¹ BVerfGE 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07, vom 26.02.2008, par. 49, *Von Hannover*.

³² Zekoll & Reimann 2005.

³³ Zekoll & Reimann 2005, p. 422.



practice - mostly for political participation rights and individual liberty rights that are formulated in general terms.³⁴

The application of article 25 of the Basic Law does not liberate the legislator from its obligation to implement international Treaties in the national legal order. Consequently, the ECHR and the ICCPR are also implemented by a statute (see note 25). Normally, however, these implementation measures merely have the status of a statute, whilst the rules that fall under article 25 of the Basic Law are considered to be of such an importance that they overrule other statutes. Thus they rank (almost) at the same level as the Basic Law itself, and therefore the *Bundesverfassungsgericht* seeks to interpret these norms in coherence with each other (*menschenrechtskonforme Auslegung*).³⁵ Nonetheless, the *Bundesverfassungsgericht* is competent to review the compatibility of any international Treaty with the Basic Law on request of the Parliament (*Bundestag*) or on the request of an individual (art. 93 Basic Law).³⁶ So in the end, the Basic Law and the *Bundesverfassungsgericht* always remain the final say on the validity of international norms in Germany.

³⁴ United Nations 2009, p. 54.

³⁵ Zekoll & Reimann 2005, p. 422.

³⁶ This has also been done several times, especially with the EU-Maastricht Treaty, and the Lisbon Treaty.

BVerfGE 89, 155 vom 12.10.1993, *Maastricht Urteil*; BVerfG, 2 BvE 2/08 vom 30.6.2009, *Lisbon Urteil*.



- III. *To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?*
- IV. *How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?*

The rules of the European Convention of Human Rights, and the International Convention for Civil and Political Rights come in via an act of implementation.³⁷ For the ECHR this act was issued on the seventh of August, in 1952.³⁸ For the ICCPR this was on the fifteenth of November 1973.³⁹ They thus became federal law and since then need to be taken into account by the governmental institutions.⁴⁰ Moreover, both instruments fall within the scope of article 25 of the Basic Law, which means that they enjoy prevalence over national law (see former question). Furthermore, the Bundesverfassungsgericht especially monitors the case-law of the ECHR as a source of inspiration for the interpretation of the Basic Law.⁴¹ In table II, a quantitative oversight is given from the mentioning of these instruments by the most important German institutions at a federal level. From this overview it becomes apparent that both instruments are mostly used by the legislator, less by the executive power, and to a varying extent by the Federal Courts. The Bundesverfassungsgericht (Federal Constitutional Court), the Bundesverwaltungsgericht (Federal Administrative Court), and the Bundesgerichtshof (Federal Court) mainly use the ECHR, but not the ICCPR, whilst the Bundesfinanzhof (Federal Court of Finances), the Bundesarbeitsgericht (Federal Labour Court), and the Bundessozialgericht (Federal Court for Social Security) in practice use neither instrument. An explanation for these differences is lacking. It may have to do with the type of complainants/lawyers that appear before the respective Courts, with a personal preference of the judges, or with the substance of the cases. It should be noted though, that no qualitative analysis is made, so nothing can be said with certainty about the manner in which these Courts use or do not use these instruments, or about explanations for the differences in use between them.

³⁷ Hoffmeister 2006.

³⁸ Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 (BGBl. 1952 II S. 686)

³⁹ Gesetz zu dem Internationalen Pakt vom 19. Dezember 1966 über bürgerliche und politische Rechte vom 15. November 1973 (BGBl. 1973 II S. 1533)

⁴⁰ BVerfGE 111, 307 vom 14.10.2004, par. 36, *Görgülü*.

⁴¹ United Nations 2009.



QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

- I. *To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognized and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsman, etc.)?*

The Charter of Fundamental Rights of the European Union enjoys the same status as the EU Treaties (article 6(1) TEU), and the EU Treaties are directly effective in the legal orders of the EU Member States and enjoy prevalence over national law. This follows from the early case-law of the European Court of Justice, which decided that the

'The Community [now European Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights [...]. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights [...]'⁴²

From this case it followed that European law was directly effective in the national legal orders of the Member States. Later on, from a second case, it followed that EU law also prevails over national law:

'It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.'⁴³

In Germany this case-law is codified in article 23 of the Basic Law, and moreover accepted – to a certain extent – by the Bundesverfassungsgericht. Consequently, also in Germany, the Charter of Fundamental Rights of the European Union enjoys the status of an EU-Treaty, which means that it is directly effective in the national legal order without the need of an implementation act, that citizens can rely on the rights

⁴² ECJ 5 February 1963, Case 26/62, *Van Gend & Loos*.

⁴³ ECJ 15 July 1964, Case 6/64, *Costa v. Enel*.



that it provides before the national courts, and that it enjoys prevalence over national law. Moreover, it may be expected that the substance of the Charter is welcomed in the German legal order, as it shows remarkable similarities with the German Basic Law. Especially the first article of the Charter is very obviously inspired by the German Constitution and states 'Human dignity is inviolable. It must be respected and protected.' Considering the strong role of the *Bundesverfassungsgericht* in the European human rights debate, and the importance of human dignity for the German human rights conception (article 1 of the Basic Law, which is protected by the eternity clause in article 79(3)), some argue that it is no coincidence that the European Charter of Fundamental Rights starts with the same provision.⁴⁴

It is thus observed that the status of the European Charter in Germany is or is supposed to be quite strong. In practice, however, its significance is still quite limited. To illustrate this observation a quantitative overview of the reliance on the Charter by the most important governmental institutions and by the Federal Courts is provided in table II, together with a justification on the origins of the data that were used for this oversight. In order to put this data into perspective and in order to evaluate them, the same quantitative exercise was carried out for the use of the ECHR and the ICCPR by the selected institutions. This table shows that in general the Charter is much less invoked by (almost) all governmental institutions than the other two human rights instruments that were discussed in the above. An explanation for this observation could be that the Charter only recently became binding (2009), whilst the other instruments already exist for decades. However, it is also observed that especially the non-constitutional Federal Courts do not refer very much to the other human rights instruments either, so for them there is not much difference between the use of the Charter and the other instruments. Although for most of the Courts the information is only online available over the last 5-10 years, so it is not clear to what extent they used these instruments in earlier years. Furthermore it is observed that the *Bundesarbeitsgericht* is most progressive in its use of the Charter, with 44 references. And from a closer study of the case-law of the *Bundesverfassungsgericht* it appears that this pro-active use of the Federal Labour Court several times also has been the trigger for the Federal Constitutional Court to review the significance of the Charter in the underlying case and for the German legal order in general.⁴⁵ From an analysis of the case-law of the highest Court it is furthermore observed that when the Charter was firstly introduced, the *Bundesverfassungsgericht* did make a few efforts to explore its significance. However, it only used the Charter as an additional argument for the cases in which it was invoked, never as a primary argument, and in all cases it connected its content with the content of the ECHR. In the opinion of the author it seems as if the *Bundesverfassungsgericht* was thus seeking to find its significance for the German legal order, without daring to fully rely on it yet. In accordance with this view, the Court then neglected to assess the applicability of the Charter on the

⁴⁴ Craig & De Búrca 2011.

⁴⁵ For instance in BVerfG, 1 BvR 1215/07 vom 24.4.2013; BVerfG, 1 BvR 3185/09 vom 26.3.2014.



basis of its article 51.⁴⁶ Nevertheless, in the end it did not seem to be very convinced of its value, because between 2001 and 2007 it only relied three times on the Charter and then stopped to invoke it.

Subsequently, when the Lisbon Treaty was concluded, the *Bundesverfassungsgericht* issued a case in which it reviewed the Lisbon Treaty, and in which it also mentioned the status of the Charter in Germany.⁴⁷ However, for as far as it used the Charter in some of its subsequent case-law, the *Lisbon Urteil* did not substantially alter the Court's approach, which it had used in the three cases before 2007.⁴⁸ This changed when *Åkerberg Fransson*⁴⁹ was handed down by the European Court of Justice, in which the scope of the Charter rather was interpreted rather broad. This seems to have set the highest German Court on the edge, as from then on it has started to discuss the applicability of the Charter in its cases more explicitly, but only in order to exclude its applicability on the basis of its article 51 – something that it earlier did not attach much value to.⁵⁰ Consequently – at least from the surface – it appears that the extensive interpretation of the Charter by the European Court has had an adverse effect on its significance in German case-law.

For the evaluation of this change in attitude towards the Charter from the *Bundesverfassungsgericht*, it is interesting to note that recently the European Court of Justice has refined its case-law and has taken a more restrictive stance on the applicability of the Charter, for instance in *Dano*.⁵¹ It may be that this reformulation of the European Court pleases the *Bundesverfassungsgericht*, and this might lead to another change in its attitude towards a broader acceptance of the Charter. Time will tell whether this will be the case or not.

In order to verify this analysis, an oversight with cases of the *Bundesverfassungsgericht* in which the Charter is mentioned is added to this report in table III. Furthermore, a case-by-case analysis is added in Annex I.

⁴⁶ BVerfG, 2 BvB 1/01 vom 22.11.2001; BVerfG, 1 PBvU 1/02 vom 30.4.2003; BVerfG, 1 BvR 1892/03 vom 4.5.2004.

⁴⁷ BVerfG, 2 BvE 2/08 vom 30.6.2009.

⁴⁸ Such as: BVerfG, 1 BvR 1164/07 vom 7.7.2009; BVerfG, 2 BvR 2661/06 vom 6.7.2010; BVerfG, 1 BvR 1916/09 vom 19.7.2011.

⁴⁹ ECJ 26 February 2013, C-617/10, *Åkerberg Fransson*.

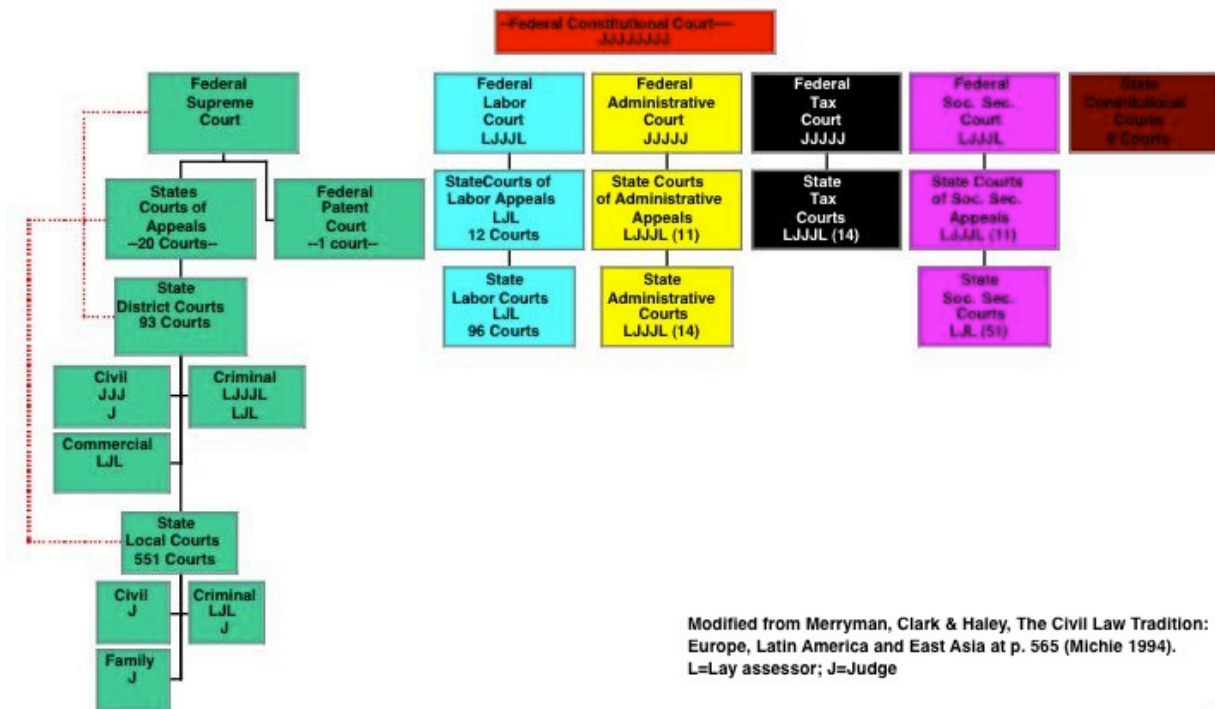
⁵⁰ BVerfG, 1 BvR 1215/07 vom 24.4.2013; BVerfG, 2 BvR 909/06 vom 7.5.2013; BVerfG, 1 BvR 3185/09 vom 26.3.2014.

⁵¹ ECJ 11 November 2014, C-333/13, *Dano*.



German Courts

The German Court System



5

Figure I: The German Court System⁵²

Table II: The use of international human rights instruments by German institutions – explanation

A superficial quantitative overview is given of the amount of ‘hits’ that appear on the websites of the most important German institutions in response on the search terms of the several human rights instruments that were inquired,. These hits may give an idea of the absolute and relative (in comparison with each other) importance of the legal instruments in the German legal order. In addition, where possible, it is indicated in which year the first mentioning of each instrument occurred, so those data can be compared as well. For some institutions – especially the judiciary institutions – however, the database only goes back 4 to 6 years, so here the first occurrence of the instruments is not mentioned,

⁵² The image was borrowed from the UF Levin College of Law – University of Florida website, from the Comparative Law Notes (5) of Professor Pedro A. Malavet: <http://nersp.osg.ufl.edu/~malavet/comparat/notes/new05.htm>



because it does not have any added value. The amount of hits is measured for the ECHR, the ICCPR, and for the European Charter of Fundamental Rights.

It is noted, however, that only the number of ‘hits’ is registered and no qualitative analysis with regard to relevancy or accuracy has been carried out. Also, the overview is not comprehensive, because only the authorities and judiciaries at the federal level are taken into account, whilst it may be that a similar count at the level of the *Länder* leads to a slightly or largely different picture. Moreover, the search terms that were used, have not been entirely consistent. For instance, for the legislative and executive branches of government, generally the full terminology of the human rights instruments was used. The ICCPR was the only one that was put between brackets, though, because not putting it into brackets lead to many false hits, and putting the other two between brackets lead to the loss of real hits. For the judiciary, for the ECHR mainly the short version (EMRK) was used, because it is more commonly used in the adjudication. For the Charter, different terms were used, dependent on whether also UN Charter hits would appear, and on the specific terminology that each Court uses. Again, for the ICCPR the full term was used, between brackets. Thus, the numbers may be indicative, but must be interpreted very carefully.

Table II: The use of international human rights instruments by German institutions - explanation

	EMRK (Europäische Menschen rechts- konvention)	ICCPR (Der Internationale Pakt über Bürgerliche und Politische Rechte)	Charta (Europäische Grundrechte charta)
Bundestag (Parliament)	1905	2176	373
- Analysis and advice	10 (1:2008)	4 (1:2008)	7 (1:2008)
- Parliament Newspaper	35 (1:2009)	1 (1:2013)	13 (1:2009)
- Documents	1439(1:1954)	1190 (1:1952)	269 (1:1999)
- Parliamentary Assembly Reports	421 (1:1951)	981 (1:1950)	84 (1:1998)
Bundesrat (Representation of Länder)			



- Press releases	177	112	49
- Downloads	4 (1:2000)	0	1 (1:2014)
- Documents	13 (1:2013)	0	3 (1:2003)
- Council Assembly Reports	147 (1:2002)	112 (1:2003)	42 (1:2002)
	13 (1:2000)	0	3 (1:2000)
Bundespräsident (President)	0	0	0
Bundesregierung	99	38	35
- Press releases	7 (1:2010)	8 (1:2011)	8 (1:2009)
- Information for citizens	41 (1:2000)	24 (1:1999)	12 (1:2002)
- Speeches	51 (1:1987)	6 (1:1989)	15 (1:2005)
Bundeskanzlerin	3	4	7
- Press releases (+ conferences)	0	4 (1:2013)	5 (1:2009)
- Speeches	3 (1:2009)	0	2 (1:2012)
Bundesverfassungsgericht (Federal Constitutional Court) (Available from 1998)	207 (1:2000) (7 are not displayed)	4 (1:1998)	13 (1:2001)
Bundesverwaltungs- gericht (Federal Administrative Court) (Available from 2002)	200-250 (1:2002)	1 (1:2003)	3 (1:2011)
Bundesgerichtshof (Federal Court of Justice) (Available from 2000)	460	23	0
Bundesfinanzhof (Federal Finance			



Court) (Available from 2008)	17	1	11
Bundesarbeitsgericht (Federal Labour Court) (Available from 2010)	16	0	44
Bundessozialgericht (Federal Social Court) (Available from 2010)	17	0	9



Table III: Oversight of cases of the *Bundesverfassungsgericht* in which the Charter is mentioned

Case	Article	In- voked by	Times men- tioned	Auton- omous Appli- cability test?	ECHR?	Remarks
1. BVerfG, 2 BvB 1/01 vom 22.11.2001	51	Court	1		No	Court declared general principles inapplicable through analogy of the Charter. Parties asked for preliminary questions.
2. BVerfG, 1 PBvU 1/02 vom 30.4.2003	47	Court	1	No	Art. 6	
3. BVerfG, 1 BvR 1892/03 vom 4.5.2004	47	Court	1	No	Art. 6	
4. BVerfG, 2 BvE 2/08 vom 30.6.2009	Whole Charte r		20		See remar ks	Lisbon Urteil ECHR is mentioned in context of article 6 TEU and a European human rights tradition.
5. BVerfG, 1 BvR 1164/07 vom 7.7.2009	21	Court	1	No	Only case- law	Conclusion was that behaviour was unconstitutional. Parties asked for preliminary questions. Article 18 TFEU was also mentioned.
6. BVerfG, 2 BvR 2661/06 vom 6.7.2010	21	Court	5	No	No	Honeywell judgment



7. BVerfG, 1 BvR 1916/09 vom 19.7.2011	Whole Charter	Court	1	No	6 TEU	Repetition <i>Solange</i> doctrine
8. BVerfG, 1 BvR 1248/11 door 15.12.2011	11 & 17	Parties & Court	5	By lower Court	6 TEU	Follow up of the foregoing case (19-7-11) with regard to copyright
9. BVerfG, 2 BvR 148/11 vom 15.12.2011	50	Party	36	Yes	Yes, but subsidiary	Charter is applicable but argument fails.
10. BVerfG, 1 BvR 3201/11 vom 29.5.2012	21	Party	8	By lower Court	No	Follow up of the cases of 19-7-2011 with regard to preliminary questions. Charter is applicable, but breach can be justified.
11. BVerfG, 1 BvR 1215/07 vom 24.4.2013	51		7	Yes	No	Response to <i>Åkerberg Fransson</i> . Charter not applicable.
12. BVerfG, 2 BvR 909/06 vom 7.5.2013,		Court	1	Yes	Art. 14	Charter not applicable.
13. BVerfG, 1 BvR 3185/09 vom 26.3.2014	28 & 51		4	Yes	No	Charter not applicable.

II. *How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified in particular in respect of civil rights?*

An analysis of the case-law of the *Bundesverfassungsgericht* shows that, in accordance with article 52(3) of the Charter, it considers the protection of the ECHR and the EU Charter to be equivalent. This is the reason that when the Charter is mentioned in the case-law of the highest Court, most of the times it is discussed together with the ECHR. No more far-reaching protection on the basis of the Charter as provided for by the third sentence of article 52(3) of the Charter is observed in Germany. Although it is worth mentioning that in general both instruments are only used as a secondary, additional source to



rely on to construct an extra argument for the judgment of the Court which it primarily bases on the Basic Law and on its own case-law. Therefore, a pattern in when the *Bundesverfassungsgericht* relies on the ECHR and/or on the Charter has not been found in the current research. When lower courts or the parties invoke it, this can be an indication for its use by the *Bundesverfassungsgericht*, but in general it seems to be rather arbitrary when the highest Court relies on it and when it doesn't. Thus, the German perception in general seems to be that the protection that is provided by either instrument is (more or less) equal, just as the manner and quantity in which they are used – frequently together, and never self-standing, but always in addition to reliance on the rights in the Basic-Law.

Subsequently, however, it is noted that in more recent case-law, the *Bundesverfassungsgericht* has started to invoke the Charter more autonomously as well, without also relying on the ECHR. This points to a slight change in perception with regard to the relation between both instruments in the sense that their respective value becomes more disconnected. However, a closer look shows that when it relies solely on the Charter, it mostly does so to exclude its applicability on the basis of its article 51(1), which determines that the Charter is only applicable when implementing Union law. It started to do so after *Åkerberg Fransson* (see former question).⁵³ In the opinion of the author this confirms the earlier observation that the *Bundesverfassungsgericht* sees the international human rights instruments mainly as secondary sources of human rights – after the Basic Law. Only, as a consequence of the case-law of the European Court of Justice, it apparently considers that it should explicitly exclude the applicability of the Charter, whereas it can simply ignore the ECHR without a justification, when it desires so. This may be an explanation – although also a speculation – for this most recent trend in case-law. Clashes between the instruments are not known to the author.

QUESTION 5: JURISDICTIONAL ISSUES

1. *Personal: who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?*

In answer to the first question it was stated that the German Basic Law distinguishes between different categories of rights, among which between personal liberty rights, similar to basic rights, social rights and cultural rights. For the purpose of the current question, only the first category of personal liberty rights is discussed. In the Basic Law, this category differentiates between general basic rights and civil rights. All individuals can rely on the general basic rights. The civil rights, on the other hand, can only be relied on by Germans nationals. For non-Germans, article 2(1) of the Basic Law which concerns a general freedom to act, functions as a substitute for civil rights.⁵⁴ In the Basic Law this distinction is explicitly

⁵³ ECJ 26 February 2013, C-617/10, *Åkerberg Fransson*.

⁵⁴ United Nations 2009, p. 52.



worded by the terms of ‘everyone’ and ‘all Germans’. How this distinction works in practice is not clear, however. Below, an enumeration is given of the provisions that apply to each category.

Articles 1-5, 10, 13-15, and 17 are addressed to ‘everyone’.

Articles 8-9, 11-12, and 16 are addressed to ‘all Germans’.

The unmentioned provisions are not directly enforceable.

Asylum seekers can rely on article 16a of the Basic Law: ‘Those politically persecuted enjoy the right to asylum’, although this right is bound to many reservations. Furthermore they can rely on the provisions that apply to ‘everyone’. It is observed that the law does not differentiate between short- or long term residents, tourists, family members, and so on. The only differentiation is between Germans and non-Germans. The status of European citizens from other Member States than Germany is not entirely clear. On the basis of European law – especially article 18 TFEU which codifies the principle of non-discrimination on the basis of nationality – it can be argued that with regard to the entitlement to rights in the Basic Law they *should* enjoy the same rights as Germans. The Basic Law itself, however, makes no explicit mentioning of their status, so whether this is indeed the case is uncertain. Equally uncertain is the extent in which a differentiation in the substantive position between Germans and other EU-citizens could conflict with European law. Up until now, though, no concrete problems with these definitions and differentiations are known to the author.

The Basic Law is also applicable to legal persons. Although this is not made explicit in the Basic Law itself, this stems from the case-law of the *Bundesverfassungsgericht*.⁵⁵ From this case-law, it not only becomes clear that the Basic Law is also applicable to legal persons, but it also shows that its applicability can be extended to legal persons that are established in other Member States of the EU.

II. Territorial: what is the territorial scope of the protection of civil rights afforded by your member state? Are there territorial limitations to such protection? Which?

The preamble of the Basic Law considers that ‘the German people, by virtue of its constituent power, has adopted for itself this Basic Law. Germans in the States of [all sixteen German *Länder*] have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.’

Two observations can be made. First, the Basic Law applies in all the German *Länder* and is thus fully applicable internally. This has not always been the case, since after the Second World War, East- and West Germany have been separated for 40 years. After the iron curtain fell in 1989 and Germany was

⁵⁵ For instance in case BVerfG, 1 BvR 1916/09 vom 19.7.2011.



reunited, the territorial scope of the Basic Law was extended from only being applicable in West-Germany to be applicable in all the 16 *Länder*.⁵⁶

Secondly, the preamble states that the Basic law is applicable to the entire German people. The problem is that 'the people' is not defined, and may even differ in different contexts. It is presumable that for the purpose of the general basic rights, the 'German people' also extends to citizens of Germany without German nationality. If not, then it would not be necessary to reserve the applicability of the civil rights to German nationals. With regard to the applicability of civil rights, though, the 'German people' is restricted to German citizens.

III. Material: are rights protected differently in different policy areas (e.g. security exceptions, foreign policy exclusion, etc.)?

The core rights of the Basic Law are inviolable and thus no interference of the state with these rights is possible in any situation or in any policy area. However, some rights can be limited for certain specific purposes. For instance, article 2(2) states that the freedom of the person is inviolable, but also that, pursuant to a statute, this right can still be interfered with, more specifically by the criminal code. Thus in the area of criminal law the protection of this right can be altered. Similarly, article 9(1) codifies the right of association, but this right can be limited for as far as it concerns associations that run counter to criminal law or which are aimed against the constitutional order or the understanding between nations. And article 10(1) codifies the right to privacy, unless limitation (by a statute) serves the protection of the liberal-democratic fundamental order or the integrity or security of the Federation or a state. The most notable restriction of fundamental rights by policy, however, can be found in article 17a jo. 12a of the Basic Law.

Article 12a(1) of the Basic Law states that 'men from the age of eighteen onwards can be obliged to serve in the armed forces'. Subsequently article 12a(3) states that during a state of defence, the addressees of paragraph 1 may be called upon to perform civilian services for defence purposes. In that context article 12a(6) states that if this need cannot be met by voluntary entries of citizens, 'the freedom of Germans to give up a profession or a place of work may be limited, in order to meet this demand'. In addition, article 17a(1) states that 'for the duration of the military or alternative service, the fundamental right to freely express and disseminate one's opinion in speech, writing and picture (article 5(1)), the fundamental right of freedom of assembly (article 8), and the right of petition (article 17) in as far as it grants the right to submit petitions or complaints together with others in a group, [may] be

⁵⁶ Zekoll & Reimann 2005. The speech of Richard von Weizsäcker which it held upon the coming into force of the reunited Basic Law of 1990 is attached as annex II to this report.



limited.’ Similarly, article 17a(2) states that the ‘the fundamental rights of free movement (article 11) and the inviolability of the home (article 13) [may] be limited’ in these circumstances. Consequently, the need for military intervention and the need for individuals to assist in that has the potential to legitimately limit several basic rights in the Constitution. In the impression of the author, this possibility is typically for Germany.

No other material restrictions to the applicability of the Basic Law are known to the author.

IV. Temporal: what is the temporal scope of protection afforded to civil rights? Have there been recent changes in the range and reach of civil rights protection?

The Basic Law was firstly introduced on 23 May 1949, just a few years after the Second World War. It then only applied to West-Germany, but it was symbolically called the Basic Law, which implied a wish to reunite the two parts of Germany before establishing a common Constitution. In 1989 the iron curtain fell, and Germany was reunited. Therefore in 1990, the territorial scope of the Basic Law was extended also to include East Germany, although there were still much transitional provisions in order to give East-Germany the chance to adapt its polity to the West-German model.⁵⁷ Most recently, the Basic Law has been amended in 2008, in order to facilitate the conclusion of the Lisbon treaty, and hereafter in 2009, 2010 and 2012. Consequently, it can be said that the German Basic Law is a living document.

Today, the only temporal restriction to the applicability of the Basic Law that is known to the author is the military defence restriction which was mentioned under the former question, as this restriction can only endure for a limited period, ‘for the duration of the country’s state of defence’. And furthermore, article 146 considers that ‘[t]his Basic Law, which since the completion of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a Constitution enters into force which has been freely adopted by the German people’. Hence, it seems that the goal of replacing the Basic Law by an official Constitution is still strived after. When this day will come, the Basic Law will cease to exist. However, whether and when it comes is unknown.

V. Please offer details as to how different rights are afforded to different categories of persons in different location and policy contexts over time?

The most important changes of the Basic Law over time have already been mentioned in the foregoing paragraphs, and include the reunification of East and West Germany, and the facilitation of the European Treaties.

⁵⁷ Zekoll & Reimann 2005.



QUESTION 6: ACTORS

What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGO's, etc. – in defining and setting civil rights' standards (influencing legislative regulatory, administrative or judicial processes), especially with regard to the drafting or setting of civil rights norms.

The main actors in the German fundamental rights playing field were already identified in answer to questions 3 and 4. However, this list is not complete. In the following most of the other actors in the field will be enumerated.⁵⁸

For any amendment to the Basic Law, a qualified majority of the *Bundestag* and the *Bundesrat* (Federal Parliament and Council) is required. Articles 1 and 20 of the Basic Law, however, cannot be amended at all on the basis of article 79(3) – the eternity clause. As was shown in the discussion of the material scope of the rights, however, some of them can be amended by ordinary statutes as well, but only if this is explicitly allowed by the Basic Law. Article 19(2) delineates the extent of this legislative competence by imposing a prohibition of encroaching the essence of the rights that are delimited.

Furthermore, the legislator, the executive, and the judiciary should take the Basic Law into account in all their activities. If they do not do so, any person is entitled to file a complaint in the courts on the basis of article 19(4) of the Basic Law. All the statutes that are drafted by the legislator must take the Basic Law into account. Their interpretation by the courts must also be done in the light of the Basic Law. Thus respect for basic rights finds itself both at the core of the German Constitution, and at the core of state activity in practice.

As mentioned, courts should always take the Basic Law into account and must apply it *ex officio*. When a court doubts the compatibility of a statute or a governmental act with the Basic Law, it must refer a question to the *Bundesverfassungsgericht* on the basis of article 100(2) of the Basic Law. So the compatibility of statutes with the Basic Law can come before the *Bundesverfassungsgericht* by an individual complaint, or by an *ex officio* question of a lower court. Furthermore it can be on the request of one of the *Länder* or on the request of the *Bundestag*. Thus, the Constitution plays a very important law in every day law making.

Individuals may complaint when their rights in the first chapter of the Basic Law, or articles 20(4), 33, 38, 101, or 103 are interfered with by a public authority (article 93(4a) Basic Law). In principle they first must exhaust all other remedies before their complaint is admissible for the *Bundesverfassungsgericht*, but when there is no other legal remedy, exceptionally a constitutional complaint may be immediately

⁵⁸ United Nations 2009.



admissible. The *Bundesverfassungsgericht* itself decides on admissibility before judging the complaint on its merits. Moreover, although the Basic law is primarily meant as a protection of citizens against the states, conflicts between private parties should also be dealt with in accordance with the constitutional provisions (indirect effect). The Basic Law then comes in through the open norms in the legislation. It has no horizontal direct effect, however.

The *Bundesverfassungsgericht* is the main player for the interpretation of fundamental rights that are laid down in the Basic Law, and with regard to their relationship with international human rights instruments, to which I will return under question 7 of the questionnaire. As was observed, the Basic Law is a living document and the *Bundesverfassungsgericht* determines its interpretation and development. For instance, from the right to free development of the personality (article 2(1)) in conjunction with the inviolability of human dignity (article 1(1)), it derived the right to self-determination with regard to information and the power of individuals to decide for themselves about when, and within what limits, they want to disclose information about their lives.⁵⁹

In addition to the governmental and the judicial actors, several other state bodies were called into life for the promotion of human rights. First of all, in order to facilitate the right to petition that is granted by article 17 of the Basic Law, Petition Committees were brought to life at a Federal and State level as part of the respective parliaments. These Committees are competent to invest the complaints they receive. When a Committee considers a complaint to be valid, it may refer it to the Federal Government, which is then given the opportunity to restore the flaw in law.

Similarly, a Commission has been established in order to monitor the basic right in article 10 with regard to privacy of letters, post and telecommunications, especially with regard to the behaviour of intelligence services. This commission investigates alleged breaches by these services of citizen's rights. This Commission is called the Commission in accordance with the Act relating to article 10 of the Basic Law.

In 1998, the Committee of the Federal Parliament for Human Rights and Humanitarian Aid was established. This committee oversees the human rights aspects of a broad range of policy fields, among which foreign policy, foreign economic policy, development policy, and domestic policy.

Similarly, there is the Commissioner for Human Rights Policy and Humanitarian Aid in the Foreign Office, who is assigned to observe the development in the field of human rights worldwide, and to participate in the bilateral and multilateral human rights dialogue. This Commissioner is also the head of the German delegation to the United Nations Human Rights Council, and she represents the German government in the European Court of Human Rights in Strasbourg. In addition she is responsible for

⁵⁹ United Nations 2009, p. 54.



several of the State reports on human rights that are submitted to the United Nations, and she is involved in some intergovernmental committees of the Council of Europe, in order to improve human rights protection.

On the basis of article 45b of the Basic law, the Defence Commissioner of the Federal Parliament is established, whose duty it is to safeguard the basic rights of soldiers.

For the adherence of public agencies, the Deutsche Telekom AG, and the Deutsche Post AG, to the provisions of the Federal Data Protection Act (*Bundesdatenschutzgesetz*) and other provisions concerning data protection, the Federal Commissioner for Data Protection and Freedom of Information has been established. This Commissioner is selected by the Federal Parliament and submits a report every two years. The Commissioner is completely independent. Similarly, observance of the data protection provisions by the authorities of the *Länder* is controlled by the *Länder* Commissioners.

Also with regard to the protection of the rights of Migrants, Refugees, and Integration, a Commissioner is installed, who supports the Federal Government in designing its policy in this field, and tries to reconcile the tension between Germans and foreigners. Thereto she is occupied with initiatives for integration in the *Länder*. Mutual understanding is the goal.

There is also a Federal Government Commissioner for Repatriation Issues and National Minorities in Germany. This Commissioner is concerned with minorities in Germany, among which Danes, Frisians, Sorbs, Sinti and Roma, but also with the German minorities in other countries – especially in Eastern Europe – and with repatriate Germans who come back to Germany.

Furthermore there is a Commissioner for the Interests of the Disabled, who monitors the state's obligation to ensure equivalent living conditions for people with and without disabilities, in accordance with article 3(3) of the Basic Law.

Following is the Anti-discrimination Agency of the Federation. This agency is an independent Federal Agency that is established on the basis of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz 2006*). Its main tasks are informational, and furthermore it conducts and coordinates research on the issue, and it receives individual complaints of people who experienced discrimination (article 3(1) of the Basic Law).

In 2003, the German Institute for Human Rights was established as an independent national human rights institutions. The Institute is occupied with research, with issuing reports, with advising the government, and with providing educational services. The Institute is also involved in strengthening the European and international human rights mechanisms.

Additionally, non-governmental organizations, the European Court of Human Rights, and the media play a role in German human rights protection.



QUESTION 7: CONFLICTS BETWEEN RIGHTS

1. *How are the different sources of rights interrelated? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?*

The *Bundesverfassungsgericht* is very clear on the fact that it considers the German Basic Law to be the primary source of fundamental rights. Any other sources of any other level must comply with the standards of the Basic Law and can be overruled by it. This stance has been consistently shown, especially with regard to the relationship between the German Constitution and the European Union – in particular the case law of the European Court of Justice. Most clearly this was done in the *Solange cases*⁶⁰, in the *Maastricht Urteil*⁶¹, in the *Lisbon Urteil*⁶², and the *Honeywell judgment*.⁶³ Moreover, any instrument of international law acquires the status of a federal statute. Thus the Constitution will always be of a higher rank than any international instrument. International norms that fall within the scope of article 25 of the Basic Law, however, rank higher than statutes and therefore the *Bundesverfassungsgericht* aims to interpret the application of the Basic Law and these international human rights instruments in coherence with each other. Especially the ECHR is very important and the German highest Court closely monitors its case-law. Although at the same time, as was shown, the Basic Law remains the final authority and international instruments can be declared invalid by the *Bundesverfassungsgericht* on the basis of incompatibility with the Basic Law.

Besides the relationship between the German Basic Law and international human rights instruments, there is an overlap between the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. In the answer on questions 3 and 4 it was already considered how much each of these instruments is used by the relevant authorities. A closer look into the case-law of the *Bundesverfassungsgericht* tells that they are frequently used together. If not, then only the ECHR is invoked. In most recent years, the Constitutional Court has also started to rely exclusively on the Charter, although it then mainly considers that it is not applicable in the underlying case. In any case, all these instruments are only of secondary importance for the

⁶⁰ BVerfGE 37/271 2 BvL 52/71 vom 29.05.1974, *Solange I-Beschluß*; BVerfGE 73/339 2 BvR 197/83 vom 22.10.1986, *Solange II- Beschluß*.

⁶¹ BVerfGE 89/155 vom 12.10.1993.

⁶² BVerfG, 2 BvE 2/08 vom 30.6.2009.

⁶³ BVerfG, 2 BvR 2661/06 vom 6.7.2010.



Bundesverfassungsgericht, because for this Court, the Basic Law is and remains the primary source of fundamental rights protection.⁶⁴

II. *Are there, in your country, notorious or problematic clashes between particular civil rights and important public interests? Please give examples, and illustrate how these conflicts are dealt with and resolved.*

When there are clashes between fundamental rights it is first observed whether one or both of these belong to the core rights that are protected by the Basic Law. If one of them enjoys a stronger position than the other, for instance when article 1 regarding human dignity is involved, the former prevails.⁶⁵ When the rights have a similar level in the hierarchy of norms, the Court balances them against each other in order to decide which one should prevail in the underlying case. This was done, for instance, in a case in 2011, in which the *Bundesverfassungsgericht* weighed intellectual property rights against the right to freedom of expression.⁶⁶

⁶⁴ BVerfG, 1 BvR 1916/09 vom 19.7.2011.

⁶⁵ For instance in the *Maastricht Urteil*, the Court considered that: 'The principle of democracy may not be balanced against other legal interests; it is inviolable', BVerfGE 89/155 par. 182. And in the *Lisbon Urteil*, the Court repeated this consideration, BVerfG, 2 BvE 2/08, par. 216.

⁶⁶ BVerfG, 1 BvR 1248/11 vom 15.12.2011.



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ANNEX I: The Use of the Charter in the Case-Law of the German Bundesverfassungsgericht

[The numbers 1-13 concur with the numbers of the cases in table III]

1. The first time that the *Bundesverfassungsgericht* mentioned the Charter was in 2001 when it elaborated on the limited applicability of general principles of Union law by referring to the applicability rules of the Charter in its article 51 and applying those by analogy to the applicability of the general principles. It is striking that it chose article 51 to assess, since this is the article that restricts the Charter. This act stands model for the restrictive attitude of the German Constitutional Court towards the European Union in general, and for the type of subsequent cases in which the Charter has been applied.⁶⁷

2-3. Until the Treaty of Lisbon was signed in 2007, the Charter was only mentioned two times more. Both these cases concerned the right to defence and both mentioned the applicable provision (article 47) in conjunction with its counterparts in the ECHR (article 6) and in national law.⁶⁸

4. Then two judgments were handed down between the conclusion and the coming into force of the Lisbon Treaty. The first judgment was the famous Lisbon Urteil, which concerned the constitutionality of the Lisbon Treaty. In this case the *Bundesverfassungsgericht* did elaborate on the significance of the Charter, but this was mainly an abstract exercise, in which it positioned the different sources of fundamental rights with respect to each other. Thus, on the basis of this judgment, there is not much that can be said on the way in which the *Bundesverfassungsgericht* actually applies the Charter on a national level.⁶⁹

5. The next case is more similar to the earlier cases and concerns the prohibition of discrimination on the basis of sexuality. As the *Bundesverfassungsgericht* did in the article 47 cases before 2007, it assessed the case on the basis of national law, and obiter mentions article 21 of the Charter, in conjunction with article 13 EG (now article 18 TFEU), in which the European principle of non-discrimination is laid down. The European Convention of Human Rights plays a more discrete role here, but is still mentioned.⁷⁰

6. After the coming into force of the Lisbon Treaty, the famous Honeywell judgment is handed down, in which the *Bundesverfassungsgericht* reviews *Mangold and Kucucdeveci*. It considers the argument that the introduction of a Union principle of non-discrimination on the basis of age by the European Court of Justice could be justified by the existence of article 21 of the Charter, which codifies this principle, and refutes it. Nevertheless, it does not go as far as to declare the cases unconstitutional, because they can be justified on the basis of article 13 EG/18 TFEU, which is another non-discrimination provision which was already in force when the mentioned cases were decided.⁷¹

7. From then on, the *Bundesverfassungsgericht* starts to elaborate more on the conditions under which the German courts are obliged to refer preliminary questions to the European Court of Justice, and which sources of law they may use for the interpretation and application of Union law. In short it considers that in the case of exhaustive harmonization, the courts should stick to Union law sources, and they should refer questions to the European Court when these sources are not sufficiently clear, or when they suspect that a Union instrument may be contrary to the Charter. Hence, the *Bundesverfassungsgericht* recognizes the primacy of Union law, and the value of the Charter in safeguarding the constitutionality of Union acts. When the Union act leaves discretion, though, assessment on the basis of national law is permitted. Subsequently, the *Bundesverfassungsgericht*

⁶⁷ BVerfG, 2 BvB 1/01 vom 22.11.2001.

⁶⁸ BVerfG, 1 PBvU 1/02 vom 30.4.2003; BVerfG, 1 BvR 1892/03 vom 4.5.2004.

⁶⁹ BVerfG, 2 BvE 2/08 vom 30.6.2009.

⁷⁰ BVerfG, 1 BvR 1164/07 vom 7.7.2009.

⁷¹ BVerfG, 2 BvR 2661/06 vom 6.7.2010.



repeats its *Solange* formula which regards that Union law must offer the same fundamental rights standard as the German *Grundgesetz*.⁷²

8. In a subsequent case, the *Bundesverfassungsgericht* elaborates on this view. The case concerns an appeal against the Federal Supreme Court. It is remarkable (much more than in earlier cases) that the *Bundesverfassungsgericht* only applies a marginal test of acceptability for the assessment of the constitutionality of the judgment. The judgment is furthermore important, because the Federal Supreme Court lets a Charter right (article 21) prevail over the substance of a directive, even though the latter one aimed at full harmonization. Thus, the appeal to the courts to consider the compatibility of Union acts with the Charter gets body through this case.⁷³

9. The following case concerns an appeal on the *ne bis in idem* principle in the Charter (article 50), but the argument fails. The case is interesting though, because it is the first time that the *Bundesverfassungsgericht* itself executes a self-standing test of applicability of the Charter, before it continues with a substantive assessment of compliance with it.⁷⁴ 10. Hereafter, this pattern is repeated in a case in which a party relied on article 21 of the Charter with regard to discrimination on the basis of age. The Court determined that the facts indeed could be classified as discrimination, but this could be justified, so the complaint failed. Moreover, in the latter case the *Bundesverfassungsgericht* reiterates its doctrine on preliminary questions (see case 7).⁷⁵

11. Then, the European Court of Justice issued the *Åkerberg Fransson* judgment, to which the *Bundesverfassungsgericht* responded very clearly. The case concerned a newly introduced law for the combat of terrorism, and in that context the *Bundesverfassungsgericht* explicitly considered that the Charter was not applicable, and that the European *Åkerberg Fransson* judgment could not change this conclusion. Moreover the judgment implied that if the European Court would continue this line of case-law, that the *Bundesverfassungsgericht* would consider this an *ultra vires* act. Thus, the *Bundesverfassungsgericht* gave a very clear signal to the European Court about its opinion with regard to the applicability of the Charter.⁷⁶

12-13. After the terrorism case, two more cases in which the Charter was mentioned were handed down, which confirmed the stance of the *Bundesverfassungsgericht* in the foregoing case. In both cases the *Bundesverfassungsgericht* explicitly considered that the Charter could not be applicable, despite the existence of a minor link with Union law. It is not clear whether this case-law is simply a consequence of a more consistent application of article 51 of the Charter by the *Bundesverfassungsgericht*, of that it simply refuses to apply the Charter any longer as a signal towards the European Court.⁷⁷

Line in Case-Law⁷⁸

When going through the case-law, several observations can be made with regard to the approach of the Charter by the *Bundesverfassungsgericht*, and the way in which it is applied. The first observation is that all in all, the *Bundesverfassungsgericht* invokes, nor elaborates very actively on the Charter. In the 13 years that the Charter exists, it has only mentioned it 13 times, which – although the intensity is increasing – is an average of only once a year. If this amount is compared, for instance, with the mentioning of the ECHR in its case-law, the difference is remarkable, as the latter is mentioned in at least 10-25 cases a year (see table). It may be that lower/other German courts use the Charter more extensively, but there is no empirical evidence for this suggestion yet.

⁷² BVerfG, 1 BvR 1916/09 vom 19.7.2011.

⁷³ BVerfG, 1 BvR 1248/11 door 15.12.2011.

⁷⁴ BVerfG, 2 BvR 148/11 vom 15.12.2011.

⁷⁵ BVerfG, 1 BvR 3201/11 vom 29.5.2012.

⁷⁶ BVerfG, 1 BvR 1215/07 vom 24.4.2013.

⁷⁷ BVerfG, 2 BvR 909/06 vom 7.5.2013; BVerfG, 1 BvR 3185/09 vom 26.3.2014.

⁷⁸ All findings are according to the subjective interpretation of the author of this report.



Year	ECHR	Charter
2014	10	1
2013	25	2
2012	21	1
2011	14	3
2010	16	1

A second observation is that when the *Bundesverfassungsgericht* invokes the Charter, it frequently seems to mainly do so because it happens to be convenient, for instance, when there is an act that needs to be declared unconstitutional. Furthermore it has used it as some sort of *Grundgesetz* of the European Union. For that matter it also calls upon the other national courts to ask questions to the European Court when they suspect that a Union act is contrary to a right in the Charter (7-8;10). A concrete example of such a situation can be found in the case of 15 December 2011, in which the Federal Court (*Bundesgericht*) let a right from the Charter prevail over a right in a directive (8). The *Bundesverfassungsgericht* considered this act not to be unconstitutional and therefore acceptable. At the same time, though, the *Bundesverfassungsgericht* still reserves the right to review the Union protection of fundamental rights, whereto it continues to repeats its *Solange* doctrine. Also, after the issuing of the *Åkerberg Fransson* judgment, the *Bundesverfassungsgericht* declared the Charter inapplicable in several cases and implicitly warned the European Court of Justice that it could not continue with this line of case-law or it would declare it to be an ultra vires act (11). My interpretation of all this is that the *Bundesverfassungsgericht* does see the advantages of the existence of the Charter, and it especially seems to approve those situation in which it may function as a constitutional check on the exercise of competences of the Union legislator and the European Court of Justice. However, its stance about the primary status of the *Grundgesetz* remains, and it still does not accept a too large interference in the national order by the Union – not even by the Charter. This stance may be explained by some theory of constitutional pluralism. The Charter may function as some sort of constitution in the legal order of the European Union, but the *Grundgesetz* remains to be the highest authority in the German legal order, also as a source for review of Union acts.

A third issue concerns the way in which the *Bundesverfassungsgericht* uses the Charter. It is observed that it has taken quite a long time before the *Bundesverfassungsgericht* started to apply a self-standing test of applicability of the Charter on the basis of its article 51, before continuing with the assessment of the Charter's substance and its significance for the case at hand. The first case in which it did so was handed down on 15 December 2011, and the reason for doing so seems to stem from the example of lower/other courts in Germany which seem to have already started earlier to perform this test, prior to the substantive assessment (9). In that context it is interesting to remark that from the summaries of the proceedings in earlier instances in the judgments of the *Bundesverfassungsgericht* itself, it seems that the lower courts did not start to use the Charter until after it became binding. (It may be that they did use it before, but this did not come forward from the case-law of the *Bundesverfassungsgericht*.) So despite all the considerations on the substantive significance of the Charter in Germany, there is some increase in the quantity with which it is invoked, both in the lower courts, and in the *Bundesverfassungsgericht*. Furthermore it is noted that the applicability test got quite some body after the *Åkerberg Fransson* judgment, and is now applied consistently in order to exclude the applicability of the Charter (11-13). For that matter it may be questioned whether the consistent application of this test has actually benefited the effectiveness and meaning of the Charter in Germany – from the terrorism case up until now it only seems to have nullified its meaning.

Two more additional observations are worth mentioning. The first one is the fact that in the earlier cases in which the Charter was invoked, this was mainly done on the initiative of the *Bundesverfassungsgericht*. As was stated earlier, it tended to do so out of reasons of convenience, but it is still quite pro-active that it already started so early to experiment with the new Union instrument. The first case from which it becomes clear that the Charter is firstly invoked by the parties, on the other hand, did not occur until 15 December 2011 (9). Even though it is not ascertained that they did not invoke it earlier, whilst this was simply not taken over or not assessed by the Court, *casu quo*, was not mentioned in the publication, it may be assumed that indeed the *Bundesverfassungsgericht* was earlier in 'discovering' the Charter than the parties.



The last observation concerns the autonomous meaning of the Charter. In most of the cases it is mentioned in conjunction with national law and/or the ECHR. However, over time, a shift can be observed, on the basis of which the position of the Charter becomes more and more prominent, and a more autonomous assessment is applied by the courts. This shift appears from the fact that the ECHR and national law are mentioned less and elaborated upon less intense (that is, in the few cases in which the Charter is discussed), whilst the Charter is increasingly mentioned and elaborated upon. Although the last few judgments slowed down this development, because the applicability of the Charter is consistently excluded, time will tell how this development continues.



ANNEX II: The speech of Richard von Weizsacker which it held upon the coming into force of the reunited Basic Law of 1990.

The following is a letter from President Richard von Weizsacker concerning the Basic Law for the Federal Republic of Germany.

Foreword by the Federal President

For more than forty years, the Basic Law has determined the development of the polity of the Federal Republic of Germany. In its area of application, it has bestowed on the citizens a life in liberty, democratic self-determination and personal responsibility, protected by law and justice.

This political order is the freest the Germans have enjoyed in their history to date. For decades, the division of Germany prevented the entire German people from living in such freedom.

On October 3, 1990, we accomplished the unity and liberty of Germany in free self-determination. Thus all Germans now live under a constitution which protects the dignity and basic rights of man, regulates public life and facilitates peaceful change. No constitution, of course, can endow us with the ability to achieve such things. We ourselves must give life to it. We are the ones who must recognize and address new challenges, not least when it comes to forging human links between east and west in a united land.

For the first time in centuries, we Germans are no longer a source of strife on the agenda of Europe. Our unification was not forced on Europe; rather, it was achieved in peaceful agreement. It is part of a common historical development, one which assures nations their liberty and which can overcome the division of our continent. We Germans in particular want to contribute resolutely to this process and have a special obligation to do so. Our unity



is dedicated to it. In doing so, we fulfill the mandate of our constitution together.

Richard von Weizsacker





FRANCE

REPORT ON FRANCE

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THE INSTITUTIONAL FRAMEWORK OF CIVIL RIGHTS PROTECTION IN FRANCE : PRELIMINARY REMARKS

In order to provide meaningful answers to the questionnaire, we feel it necessary to give a short introduction to the evolving institutional context in which civil rights have been legally protected in France.

French constitutional history has been a tormented one, which has seen 15 constitutions since the fall of absolute monarchy following the 1789 revolution. The current constitution, which marked the birth of the Fifth Republic, was adopted on 4 October 1958 (hereinafter the 1958 Constitution, or Constitution), with the return to power of the General De Gaulle. It broke away with the parliamentary regime tradition, which had prevailed since the 1870s, and created instead a “semi-presidential” system. It however continued to follow a “legicentrist” model in which legislation was central to civil rights protection, as constitutional review was originally very limited. Overtime, as a combined result of constitutional amendments⁴ and constitutional case law, the protection of civil rights has become both constitutionalised and judicialised, as a unique constitutional review system, in between the US and European models, took shape.⁵

The 1958 Constitution created a new institution, the *Conseil Constitutionnel*, composed of politically appointed personalities, and entrusted it with the task of controlling, in abstracto and a priori (i.e. before promulgation), the conformity of most laws with the Constitution.⁶ The initial purpose of the constitutional control mechanism was, by and large, aimed at curtailing the parliament’s interference with governmental action, and limit governmental instability, a problem which had plagued the previous

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⁴ It was amended 18 times.

⁵ M.A. Rogoff, *French Constitutional Law* (Durham: Carolina Academic Press, 2011), 167.

⁶ For limits, see answer to the question on “Jurisdictions”.



regimes.⁷ The right to submit legislative measures to the Council was, therefore, restricted to a limited number of political personalities, namely the President of the Republic, the Prime Minister, and the presidents of the National Assembly and the Senate, and only concerned institutional matters, since the Constitution did not contain any Bill of Rights.

Two important developments, which occurred in the 1970s, radically changed the institutional context of civil rights protection in France. In a 1971 revolutionary decision, the *Conseil Constitutionnel*, relying on the preamble of the 1958 Constitution (hereinafter the 1958 Preamble) expanded the scope of the constitutional norms of reference (the so-called *bloc de constitutionnalité*) to include fundamental rights protected in previous constitutional instruments, notably, as regards civil rights, the 1789 Declaration of the Rights of the Man and Citizen (hereinafter 1789 Declaration), and “fundamental principles recognised in the laws adopted under republican regimes” referred to in the Preamble to the 1946 Constitution (hereinafter 1946 Preamble).⁸ Moreover, in 1974, an important constitutional amendment granted members of the parliamentary opposition (60 members of the Senate or the General Assembly) the right to refer laws to the *Conseil Constitutionnel*.⁹ These two significant constitutional transformations, combined with political circumstances, such as a more frequent political *alternance*, meant that legislative acts became much more routinely checked for compatibility with constitutional norms for the protection of civil rights.¹⁰

Finally, in 2008, another significant constitutional revision brought the French system of judicial review closer to some of its European counterparts; it introduced, alongside the a priori control system, a new a posteriori review mechanism (new Article 61-1 of the Constitution), the “Priority Question on Constitutionality” (in French the *Question Prioritaire de Constitutionnalité*, commonly referred to by its acronym QPC).¹¹ The QPC is subject to conditions¹² and filtering¹³ by the supreme judicial and

⁷ It was designed as a “weapon against parliamentary deviance” (M. Debré, “Discours devant le *Conseil d’Etat*, 27 Aout 1958” in Document pour servir à l’histoire de l’élaboration de la Constitution du 4 Octobre 1958 (Documentation Française, Volume III, 1991, 260), cited by J.-E. Gicquel “La dimension constitutionnelle des droits et libertés fondamentales” in R. Cabrillac (ed), *Libertés et Droits Fondamentaux* (20th ed., Dalloz, 2014), 95, 96. See also James E. Beardsley, “The Constitutional Council and Constitutional Liberties in France” (1972) *American Journal of Comparative Law* 431.

⁸ Decision No 71-44 DC, 16 July 1971 [freedom of association].

⁹ Constitutional Law No 74-904 of 29 October 1974, JORF du 30 October 1974 p. 11035.

¹⁰ Alec Stone, *The Birth of Judicial Politics in France* (New-York: Oxford University Press, 1992)

¹¹ Constitutional Law No 2008-724 of 23 July 2008, JORF No 171 of 24 July 2008 p.11890; Organic Law No 2009-1523, 10 December 2009 (relating to the application of Article 61-1 of the Constitution), JORF No 0287 of 11 December 2009 p.21379.

¹² The law must be relevant and applicable to the case before the ordinary court; the legislative provision in question should not have been already declared in conformity with the Constitution (except where constitutional norms of reference have changed in the meanwhile, or other relevant changes in fact or law); and the question “must not be deprived of a serious nature.” Article 23-2, Ordinance of 7 November 1958, JORF 9 November 1958 p. 10129.



administrative courts (namely the *Cour de Cassation*, and the *Conseil d'Etat*). Since the QPC came into force (2010), the *Conseil Constitutionnel* has decided on 384 such requests, which questioned the constitutional conformity of legislative provisions.¹⁴ The *Conseil Constitutionnel* found total or partial incompatibility with the Constitution, or imposed interpretative reservations, in more than one third of them,¹⁵ although it often modulates the effects in time of its decisions. The introduction of the QPC in 2008 also transformed the two supreme courts into “negative” constitutional judges, in that they must decide whether a question is novel or serious enough to be referred to the *Conseil Constitutionnel*.¹⁶

In less than half a century, the *Conseil Constitutionnel*, together with the two supreme courts, have displaced the legislator to become central institutions for the protection of civil rights. The *Conseil Constitutionnel's* decisions are, nowadays, eagerly expected and commented upon (e.g. recent decision on gay-marriage law, fracking legislation, etc). Constitutional review based on fundamental rights has also been gradually consolidated. It is also worth noting that, in France, constitutional review procedures are fast. The *Conseil Constitutionnel* deliver its decision within one month in the context of a priori control (eight days in case of emergency) and three months in the a posteriori procedure (QPC).

The absence of a more fully-fledged constitutional review system prior to 2010 did not mean that fundamental rights were not effectively protected. Ordinary courts could generally annul sub-legislative public or private measures which conflicted with constitutional or legislative rights and freedoms, as well as with international or European instruments for the protection of civil rights, or at least interpret domestic provisions in line with those external or internal civil rights norms.

Ordinary courts would, first of all, annul such acts where these conflicted with legislative provisions (generally codified), which conferred protection to particular civil rights.¹⁷ Administrative courts could also, save for a few exceptions exposed later in the report,¹⁸ invalidate regulatory (ie secondary legislation adopted by the government or ministries) or administrative measures where these failed to comply with fundamental rights (which were often also protected as general principles of administrative law by the *Conseil d'Etat*), as long as legislative provisions did not stand explicitly “in the way” (the *loi-*

¹³ Within 3 months, the supreme courts must assess whether the question is novel or serious (Article 23-4, 7 November 1958 Ordinance, *ibid.*)

¹⁴ These had gone unchallenged in the past for either political reasons, the non-anticipation of their impact on protected rights, or simply the fact they had been adopted before the constitutional recognition of the relevant rights.

¹⁵ For a list of QPC decisions, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-type/les-decisions-qpc.48300.html>.

¹⁶ Jean-Eric Gicquel “La dimension constitutionnelle des droits et libertés fondamentales” in R. Cabrillac (ed), *Libertés et droits fondamentaux* (20th ed, Dalloz, 2014) 95, 108-110. Before deciding to send a QPC, the Supreme Courts often carry out substantial review of the contested legislation.

¹⁷ For example on equal access to public service jobs, CE 2 March 1988 *Blet et Sabbiani* No 61534.

¹⁸ See answer to question on “Jurisdictions”.



écran doctrine).¹⁹ The introduction in 2000 of the *référé-liberté*,²⁰ a special judicial procedure allowing the administrative judge to adopt, in emergency, any measures against administrative acts which interfere in a manifest and grave manner with fundamental rights, offered an effective and dynamic instrument for the protection of fundamental rights, even if the success rate of such claims is low (1/10).²¹ Where the administrative judge finds in favour of the applicant, she can order effective measures to preserve fundamental freedoms. For example, under this procedure, a judge could order particularly intrusive searches on prisoners to be stopped,²² or pest eradication measures in prisons infested by rats,²³ in order to protect the human dignity of prisoners. Judicial courts would also sanction private law measures, such as contracts, which did not respect constitutionally protected rights and freedoms.²⁴ Furthermore, as developed later in this report, ordinary courts could invalidate non-legislative acts and even set aside the application of legislative measures which conflicted with international or regional human rights instruments, as well as EU law norms for the protection of civil rights. In any case, courts would normally seek, wherever possible, to interpret domestic measures in compliance with constitutional, international and European EU civil rights norms. These modalities of control will be developed later in this report, in the relevant sections.

At this stage, it is important to realise that, until the introduction of a posteriori constitutional review mechanism, invoking and relying on ECHR and EU law were the most effective way to “disable” national legislative measures, which undermined fundamental rights, as the *loi-écran* doctrine did not apply to them, whilst it continued to operate with regard to constitutional norms.²⁵ The so-called *contrôle de conventionalité*, operated by ordinary national courts, was thus an important avenue to secure the protection of civil rights against legislative provisions which contradicted fundamental rights norms.

Because of the peculiarities of the French system of human rights protection, in particular the largely judicial mode of recognition of constitutional norms for the protection of civil rights, we found it more

¹⁹ CE ass. 11 April 2012 *G.I.S.T.I.* No 322326; CE sect. 6 November 1986 *Arrighi*, Lebon 966; CE 1 July 2010 *Mme Djamilla D.* No 319993.

²⁰ Law 2000-597 of 30 June 2000 relating to the emergency procedure (*référé*) before administrative courts, JORF No 151 of 1 July 2000 p. 9948.

²¹ Louis Favoreu et al., *Droit constitutionnel*, 16th ed., (Dalloz, 2013), 201.

²² JRCE, 6 June 2013, *Section française de l'observatoire international des prisons*, No 368816 et *M.B. A.*, NO 368875.

²³ JRCE, 22 December 2012, *Section française de l'observatoire international des prisons et autres*, No 364584 ss.

²⁴ Cass. soc. 28 June 1951, *Société d'impression sur étoffes du Grand Lemps c/ Geoffroy et Maiseries de la Méditerranée c/ Dame Roth*, D.S. 1951, 532. The *Cour de Cassation* develops its own “constitutional” case law, with or without reference to constitutional documents (eg freedom to work, Cass. soc 19 November 1996, *Sté Auto Service 34*, No. 94-19.404,.)

²⁵ CE sect., 6 November 1936, *Arrighi*, *Rec.* p. 966.



judicious to change the order of question 1 and 2, so as to provide meaningful and non-repetitive answers.

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

[NOTE THE CHANGE OF ORDER OF THE QUESTION]

- ✓ *Where are civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?*

Except for Article 2, which refers to the equality of citizens without discrimination, and Article 66, which prohibits arbitrary detention, the 1958 Constitution, unlike some of its predecessors, does not contain provisions for the protection of fundamental rights. Its preamble however specifies that “the French people declares its commitment to the rights of the man ... as defined in the 1789 Declaration, confirmed and completed by the preamble of the 1946 Constitution”. On this basis, the *Conseil Constitutionnel* expanded the constitutional norms of reference beyond the formal text of the 1958 Constitution, to include fundamental rights protected by instruments to which the preamble referred. The “*bloc de constitutionalité*”, as scholars call it (L. Favoreu), thus now includes the 1958 Constitution and its preamble, the Declaration of the Rights of the Man and Citizen of 1789 (1789 Declaration), the Preamble to the 1946 Constitution (1946 Preamble), and the rights and principles to which it refers, as well as, since 2004, the Charter for the Environment; it also includes judge-made rights, principles or objectives of constitutional value which do not have a clear or explicit textual basis. We expose below the main sources of civil rights in French law, and the gradual process of constitutionalization and judicialization of this their recognition and protection.

First, as a consequence of the “legicentrist” nature of the successive French constitutional regimes, the protection of fundamental rights, including civil rights and liberties, was for long a matter for the legislator.²⁶ Previous constitutions did contain civil rights provisions; however, because of the absence of constitutional review mechanisms, the legislator was the one which actually defined applicable civil rights and liberties norms. Important laws were adopted under French republican regimes, notably during the Third Republic (1870-1940), which defined the basis and scope of protection of civil rights. Amongst these we find, in particular, the 1875 Freedom of Higher Education Law, 1881 Freedom of Assembly Law, 1901 Association Law, or 1905 Law on the Separation of State and Church. Part of this Republican legislative heritage has now been “constitutionalized”. In 1971, in the landmark “Freedom of

²⁶ Cédric Roulhac, “Les droits de l’homme sans la loi ?”, 5 *La Revue des droits de l’homme* (2014) 01 June 2014 <http://revdh.revues.org/741> (last visited 30 October 2014).



Association” ruling, the *Conseil Constitutionnel* confirmed the positive constitutional value to the 1958 Preamble, and the historical texts to which the 1958 Preamble referred, namely the 1789 Declaration of the Rights of the Man and Citizen and the 1946 Preamble.²⁷ In that decision, it conferred constitutional value to “fundamental principles recognised by the laws of the Republic”, to which the 1946 granted protection.²⁸ The concept refers to fundamental rights and freedoms codified in historical legislative statutes, mostly during the early period of the Third Republic.²⁹ Only those constitutional principles can be recognized as “fundamental principles recognised by the laws of the Republic”, which have never had exceptions and have a sufficiently absolute character. They include fundamental rights and freedoms not expressly recognized in the Constitution, the 1789 Declaration or the Preamble of the 1946 Constitution.³⁰ The constitutional rights derived from the laws of the Republic include, notably, the freedom of conscience, freedom of association, freedom of education, the independence of university professors, or the respect of the rights of the defence.³¹ However, the scope of this category has been modified over the years by constitutional case law: certain civil rights which were originally considered as “fundamental principles recognised in the laws of the Republic”, are now more readily based on provisions of the 1958 Constitution or the 1789 Declaration. This is the case for individual liberty, now linked with Article 66 of the Constitution;³² freedom of religion, now related to Article 10 of the 1789 Declaration³³ and paragraph 5 of the Preamble of the 1946 Constitution;³⁴ the right to a fair trial and the rights of the defence, now grounded in Article 16 of the 1789 Declaration.³⁵ There are inconsistencies between courts too. For example, the principle of “*laïcité*” was considered by the *Conseil d’Etat* as a

²⁷ Decision No 71-44 DC, 16 July 1971 [freedom of association].

²⁸ See also Decision 77-87 DC, 23 November 1977 [freedom of education and conscience]. On how to “recognize” such republican principles, see Decision No 88-244 DC, 20 July 1988 [amnesty].

²⁹ Michel Lascombe, Xavier Vandendriessche, Christelle de Gaudemon, *Code constitutionnel et des droits fondamentaux 2014, commenté*, 2nd ed. (Daloz, 2013), 334.

³⁰ *Ibid.* 328.

³¹ See answer to Question 1 below.

³² Decision No 76-75 DC, 12 January 1977 [vehicle searches], paras. 1-2; Decision No 83-164 DC, 29 December 1983 [finance law], para. 25.

³³ Decision No 77-87 DC, 23 November 1977 [freedom of education], para. 5 ; Decision No 2001-446 DC, 27 June 2001 [abortion law], para. 13.

³⁴ Decision No 2001-446 DC, 27 June 2001 para. 13.

³⁵ Decision No 76-70 DC, 2 December 1976 [prevention of accidents at work], para. 2; Decision No 2006-535 DC, 30 March 2006 [equality of opportunities], para. 24.



“fundamental principle recognised in the laws of the Republic”,³⁶ whilst the *Conseil constitutionnel* derived it from Article 1 of the Constitution.³⁷

The advent of the constitutional protection of civil rights has not totally marginalised legislative measures, which recognise, define and delimit the scope of civil rights. The legislator continues to adopt such measures (e.g. **1970 Act on the reinforcement of the individual rights of the citizens; the controversial** 2004 Act framing the wearing of signs or outfits displaying one’s religious belonging in public schools; the 2010 Act prohibiting the dissimulation of one’s face in public spaces, or the currently debated possibility of a law on the legalization of euthanasia). The *Conseil Constitutionnel* is often deferential to legislative choices.³⁸

Second, going back to the XIXth century, the protection of civil rights has strong roots in the case law of the *Conseil d’Etat*. Indeed, the French supreme administrative court “discovered” important general principles of administrative law for the protection to civil liberties. Many of them have since been constitutionalised by the *Conseil Constitutionnel*. General principles of administrative law, as identified by the *Conseil d’Etat*, have sub-legislative, but supra-regulatory status.³⁹ Whilst inspired by the “legal consciences of the times” and “rule of law” requirements,⁴⁰ they were also grounded in “superior” norms (i.e. Constitution, laws, international agreements, etc.). Originally, the *Conseil d’Etat* was mostly inspired by legislative norms; for example, it found inspiration in the 24 April 1905 Law on access to their files by civil servants, to recognize the general principle protecting the rights of the defence.⁴¹ However, increasingly, it looks into historical constitutional texts to elaborate these principles (e.g. principle of equality).⁴² In contrast, the dense legislative codification of civil law did not allow the *Cour de Cassation* to develop similar principles.⁴³ Over the last few decades, the *Conseil d’Etat* increasingly applies constitutional principles directly, whilst the *Conseil Constitutionnel* has “upgraded” various

³⁶ CE, 6 April 2001, *Syndicat national des enseignants du second degree*, No 219379, 221699, 221700.

³⁷ Decision No 2004-505 DC, 19 November 2004 [treaty establishing a Constitution for Europe], para. 18.

³⁸ See answers to question 1 for specific instances.

³⁹ Maurice Letourneur, “Les principes généraux du droit dans la jurisprudence du *Conseil d’Etat*” (1951) EDCE 195.

⁴⁰ René Chapus, *Droit Administratif general*, 15th ed., (Montchretien, 2001), 95.

⁴¹ CE sect., 5 May 1944 *Dame Veuve Trompier-Gravier*, Rec. 133, and CE ass., 26 October 1945 *Aramu*, Rec 213). See also CE 2 Octobre 1974 *Dame David*, on the publicity of judicial deliberations.

⁴² CE, 30 November 1930 *Couiteas* Leb. 789

⁴³ The principle of prohibition of unjust enrichment, Cass ch. Req., *Julien Patureau contre Boudier*, 15 June 1892, DP 1892.



formerly general principles of administrative law to constitutional status (e.g. the rights of the defence).⁴⁴

Third, substantively, the protection of human rights, and civil rights in particular, owes much to the revolutionary movement, and in particular the 1789 Declaration of the Rights of the Man and the Citizen. This document has become one of the most important sources for the identification and recognition of civil rights by the *Conseil Constitutionnel*, as well as ordinary courts. As already noted, the 1958 Preamble refers to past constitutional instruments, including the 1789 Declaration and the 1946 Preamble. In the *Liberté d'Association* case, the *Conseil Constitutionnel* conferred constitutional value to the 1958 Preamble (and this indirectly to the historical constitutional provisions to which it referred).⁴⁵ In 1982, in a decision related to the law on nationalization and its compatibility with the right to property, it explicitly conferred constitutional value to the 1789 Declaration, and the rights it contains.⁴⁶ An individualistic and liberal document, the Declaration recognises a range of civil rights, such as the principle of equality (Art 1), the right to freedom, property, security and resistance to oppression (Art.2), the presumption of innocence and right to an impartial tribunal (Art. 7-9), the freedom of opinion (Art 10), the freedom of expression (art 11), the right to security (Art 12), etc.

Fourth, the *Conseil Constitutionnel* also recognises “principles of constitutional value” such as, for example, the protection of human dignity,⁴⁷ or the respect for private life,⁴⁸ without relying explicitly on specific written sources.

In addition, civil rights must be reconciled with other, more solidarity-type rights, which are also constitutionally protected. Indeed, the *Conseil Constitutionnel* granted constitutional status of the “political, economic and social principles necessary to our times”,⁴⁹ to which the 1946 Preamble refers, and which include the right to health, asylum, strike, etc. The 2004 Charter for the Environment,

⁴⁴ Decision No 76-70 DC, 2 December 1976 [prevention of accidents at work]; Decision No 77-83 DC, 20 July 1977 [service obligation for civil servants].

⁴⁵ Decision No 71-44 DC of 17 July 1971 [freedom of association].

⁴⁶ Decision No 81-132 DC of 16 January 1982 [nationalisations].

⁴⁷ Decision No 94-343/344 DC, 27 July 1994 [respect for the human body, use of body parts, assisted reproduction]; Decision No 2013-674 DC, 1 August 2013 [bioethics].

⁴⁸ Decision No 94-352 DC, 18 January 1995 [security].

⁴⁹ Decision No 74-54 DC, 15 January 1975 [abortion].



adopted as a constitutional instrument in 2005,⁵⁰ is also a recognised sources of constitutional rights, which may require some accommodation with civil rights.⁵¹

Finally, traditionally, civil rights, whether recognised in legislative or constitutional sources, are considered as including a strong social (or solidarity) dimension; consequently, their exercise may be limited by the need to protect other rights, but also an extensive range of public interest objectives. The *Conseil Constitutionnel* has, in fact, identified objectives which have constitutional value (*objectifs à valeur constitutionnelle*), with which individual freedoms must be reconciled. For example, the freedom of movement must be reconciled with “what is necessary for the safeguard of general interests objectives which have constitutional value”, such as public order.⁵²

ANNEX 1 PROVIDES A TABLE WHICH SUMMARISES CIVIL RIGHTS AND THEIR (DIVERSE) LEGAL BASES IN FRENCH LAW.

QUESTION 1: IDENTIFICATION OF CIVIL RIGHTS

- ✓ Which rights are considered in your country as civil, civic and citizenship rights?

French law distinguishes between “civic” and “civil” rights (or liberties), as defined by legislative statutes, and “constitutional” rights and principles, derived from constitutional sources. The latter category is traditionally divided between *droits-libertés* and *droits-créances*.

Article 34 of the Constitution, which determines the domain of exclusive legislative competence, lists issues which can only be regulated through legislative statutes: these include “civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties”. The main commentary on the Constitution interprets this provision as including the right of access to justice; the freedom of association; the freedom of expression and of communication; the freedom of trade and of industry; the right to work; the right to access to administrative documents; the freedom of religion; the right to private life; and the freedom of movement.⁵³ The *Conseil Constitutionnel* has nonetheless placed limits on the legislator’s discretion on the matter, stating that legislative measures can only regulate civil rights in order to make them more effective, or reconcile them with other fundamental rights or objectives pursuing general interests.⁵⁴

⁵⁰ Constitutional Law No 2005-205, 1 March 2005 on the Charter of Environment (JORF No 0051 of 2 March 2005, 3697).

⁵¹ e.g. Decision No 2008-564 DC, 19 June 2008, [GMO].

⁵² Decision No 80-127 DC, 19-20 January 1981 [security and liberty].

⁵³ Code constitutionnel et des droits fondamentaux (2014) op. cit., 733-736.

⁵⁴ Decision No 84-181 DC, 11 October 1984 [press enterprises].



Legislation defines “civic rights” as political rights attached to French citizenship.⁵⁵ The legislative definition is endorsed by French legal scholarship⁵⁶ and courts, including the *Conseil constitutionnel*.⁵⁷

The Civil Code defines “civil rights” (*droits civils*) as a group of rights different from political rights,⁵⁸ which French persons enjoy.⁵⁹ It classifies the following rights as “civil rights”: the right to respect for one’s private life (Art. 9); the right to respect of the presumption of innocence (Art. 9-1); and the right to human dignity (Art. 16), to which scholarship and case law add freedom of conscience and of religion, freedom of movement, or individual liberty.

Civil rights are further divided into “rights related to moral integrity” and “rights related to physical integrity”.⁶⁰ In the former category, one finds the right to one’s honour, the respect of human dignity and of reputation, and the right to the respect of private life (including the protection of all its aspects: emotional life, health, personal assets, religion, belief and conscience, domicile, personal address, personal correspondence, professional secrecy, protection of one’s image, protection of one’s voice, respect for private life in the professional life, respect for the presumption of innocence, investigation/surveillance, protection of one’s surname). Into the latter category, we find the right to life, or the right to respect of one’s body (with various bioethical rights and patients’ rights).

In addition to civic and civil rights to be defined and protected through legislative means, French law increasingly offers effective constitutional guarantees for the protection civil rights and liberties, as constitutional/fundamental rights. As exposed above, the *Conseil Constitutionnel* has judicially expanded the *bloc de constitutionnalité*. The “rights and freedoms guaranteed by the Constitution”, against which legislation can be tested,⁶¹ thus include all instruments to which the Preamble of the 1958 Constitution refers, or any other provisions of the Constitution guaranteeing rights and freedoms, as well as rights or principles of constitutional value. The *Conseil d’Etat* held, for example, that the freedom of movement

⁵⁵ An important sanction under the French criminal code consists in the interdiction of civic, civil and family rights (Article 131-26). See answer to question 5 on jurisdiction for further elaboration.

⁵⁶ See Brigitte Hess-Fallon, Anne-Marie Simon and Marthe Vanbremeersch, *Droit civil*, 11th ed.(Paris, Sirey, 2013), 78.

⁵⁷ See e.g. Decision No 84-177 DC, 30 August 1984 [French Polynesia status], para. 7; Decision No 2011-211-QPC, 27 January 2012 Eric M. [regulations governing notaries]; Decision No 2012-279 QPC, 5 October 2012, Jean-Claude P. [regulation of the movement of travelers] para. 28-30.

⁵⁸ Article 7 of the Civil code: “The exercise of civil rights is unrelated to the exercise of political rights which are acquired and kept in accordance with constitutional and electoral statutes.”

⁵⁹ Article 8 of the Civil Code : “Every French person enjoys civil rights.” Aliens may also exercise the same civil rights as those that are or would be granted to French persons by the treaties with the nation to which that alien belongs.

⁶⁰ Hess-Fallon et al, *Droit civil* , op. cit. 78, 79-83, 83-91.

⁶¹ Article 1 of Organic Law No 2009-1523, 10 December 2009 (relating to the application of Article 61-1 of the Constitution), JORF No 0287 of 11 December 2009 p. 21379.



constitutes one such fundamental right,⁶² and is part of the rights and freedoms that could be invoked in the framework of the *Question prioritaire de la constitutionnalité* (QPC)⁶³. The freedom to marry also belongs to the group of rights and freedoms that could be invoked in the framework of the QPC,⁶⁴ but the restriction of marriage to heterosexual couples has been denied recognition as a “fundamental principle acknowledged in the laws of the Republic”.⁶⁵ Consequently, the Parliament adopted, in 2013, a Law recognising same sex-marriage that the *Conseil constitutionnel* considered conform to the Constitution.⁶⁶

French constitutional scholars and judicial actors, like others in Europe, distinguish between *droits-libertés* (or negative rights, or 1st generation rights) and *droits-créances* (or positive rights, or 2nd generation rights).⁶⁷ The distinction corresponds to the material scope of the two 1966 UN Covenants (the ICCPR and the ICESCR).⁶⁸ Scholars long stressed that while *droits-libertés* were justiciable rights, *droits-créances* were only “programmatic”.⁶⁹ The dominant academic view was that the *droits-libertés* contained in the 1789 Declaration contained subjective rights which could be relied on in courts, whilst the economic and social *droits-créances*, such as those listed in the 1946 Preamble, did not have such effect, unless implemented through legislation (the so-called *concrétisation législative*).⁷⁰ The former required an abstention of the state from certain harmful actions, whilst the latter demanded positive action by the State. However, this traditional binary classification is contested by contemporary scholars.⁷¹ Many now highlight the “composite” nature of each fundamental right, which requires a mix

⁶² CE, 9 January 2001, *Deperthes*, No. 228928; CE 9 July 2001, *Préfet du Loiret* No 253638, cited by Favoreu, *op. cit.*, 236.

⁶³ Olivier Dutheillet de Lamothe, “A French legal success story : the ‘*Question prioritaire de constitutionnalité*’”, September 14, 2012, article available on the website of the *Conseil constitutionnel*, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/documentation/contributions-et-discours/2012/a-french-legal-success-story-the-question-prioritaire-de-constitutionnalite.115542.html>(visited on 14 March 2014).

⁶⁴ Favoreu, *op. cit.*, 251.

⁶⁵ Decision No 2013-669 DC 17 May 2013 [same-sex marriage], para. 25; *Code constitutionnel et des droits fondamentaux* (2014), *op. cit.*, p. 334.

⁶⁶ Law No. 2013-404 of 17 May 2013 on marriage for same sex-couples; Decision No 2013-669 DC 17 May 2013 [same-sex marriage].

⁶⁷ Laurent Pech, “France: Rethinking ‘*Droits-Créances*’”, in Malcolm Langford (Ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008), 267.

⁶⁸ Stephani Hennette-Vauchez and Diane Roman, *Droits de l'homme et libertés fondamentales* (Dalloz, 2014), 14.

⁶⁹ Pech, *op. cit.*, 267.

⁷⁰ Pech, *op. cit.*, 272.

⁷¹ Hennette-Vauchez and Roman, *op. cit.*, 18; Pech, *op. cit.*, 267, 269.



of non-intervention and action by public and private actors.⁷² We thus observe a repositioning of discussions around the notions of *objective* rights and *subjective* rights, and the recognition by some that it is often possible to derive specific subjective (individual) rights from *droits-créances* (or even objectives of constitutional value).⁷³

✓ *Amongst those rights, which are considered “core”?*

There is no explicit material hierarchy in French constitutional law. No rights are considered core or superior or inalienable. There is however a formal hierarchy between the sources of law. The Constitution and the *bloc de constitutionnalité* are positioned above all other norms, followed by ratified international instruments (including ICCPR, ECHR and EU law), legislative acts, general principles of administrative law, regulatory acts, administrative decisions, contracts, etc). This formal hierarchy may affect the recognition and protection of certain rights, depending on which basis they are protected, since it will determine their importance in relation to other rights protected under other sources, as well as the type of remedies available. In most cases nonetheless, courts try to reconcile potentially conflicting rights and principles, using various balancing and accommodation techniques. A close analysis of the case law nonetheless reveals that some rights seem to carry more weight than others.⁷⁴ Moreover, as noted above, the French tradition regarding human rights protection is characterized by the “extreme importance of public order, a notion that covers the totality of social values considered as essential and which for this reason are withdrawn from the free will of the individuals and entrusted exclusively to the State”.⁷⁵

Annex 1 provides a list of civil rights and the source of law from which they originate. In the rest of this section, we provide a necessarily selective analysis of some of the most relevant civil rights, which receive constitutional protection.

The right to life

Article 16 of the Civil code states that “legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life.” In 2007, the Constitution was amended to include a constitutional prohibition on the death penalty

⁷² Roulhac, *op. cit.*; Jean Rivero and Hughes Moutouh, *Libertés publiques*, Vol 1, (Paris, PUF, Thémis. Droit public, 2003), 90-91.

⁷³ Roulhac, *op. cit.*, Rivero and Moutouh *op. cit.* 90-91.

⁷⁴ See below, explanations related to importance of specific rights.

⁷⁵ Pierre-Henri Prétot, *Droit des libertés fondamentales* (2007), 20-23; quoted and translated in Rogoff, *op. cit.*, 279.



(Art. 66.1),⁷⁶ which had already been outlawed by the 1981 Badinter Law.⁷⁷ The *Conseil d'Etat* considers the prohibition of the death penalty a an element of the French public order;⁷⁸ consequently, relevant authorities must receive sufficient guarantees before extraditing someone to a country where the death penalty exists.⁷⁹ The *Conseil constitutionnel* requires “respect for the human being from the inception of life, without clearly defining when life starts, thus allowing legislation to legalize abortion.”⁸⁰ The *Cour de cassation* considered that homicide does not apply to a foetus *in vitro*.⁸¹

French law however does not recognise a right to death. Suicide is no longer criminalised,⁸² but from it cannot be derived a right to suicide.⁸³ Euthanasia is criminalised, as homicide (Criminal Code Art. 221-2), assassination (Art. 221-3 of the Criminal Code) or poisoning (Criminal Code Art 221-5), even when the person consented to it and her living conditions amounts to inhuman and degrading treatment.⁸⁴ The 2005 Leonetti Law on the rights of patient in end of life nonetheless acknowledges a right to let die, under strict conditions. In the recent case of Vincent Lambert, a man in vegetative state, in which family members opposed each other as to whether he should be kept in life artificially, the *Conseil d'Etat* eventually allowed the hospital staff to stop artificial life maintenance.⁸⁵ On the same day as the *Conseil d'Etat* released its decision, family members referred the case to the ECtHR, which called for the suspension of the decision and required to keep the man alive. The final decision of the ECtHR Grand Chamber is still pending.⁸⁶

⁷⁶ Constitutional Law No 2007-239 of 23 February 2007 relating to the abolition of the death penalty, JORF n°47 of 24 February 2007 p.3355.

⁷⁷ Art. 1, Law No 81-908 of 9 October 1981 relating to the abolition of the death penalty, JORF of 10 October 1981 p.2759.

⁷⁸ CE sect, 27 February 1987 *Fidan, Lebon* 81.

⁷⁹ CE ass., 15 October 1993, *Aylor, Lebon* 283.

⁸⁰ Decision No 94-343/344 DC, 27 July 1994 [respect for the human body, use of body parts, assisted reproduction], para. 2, 18.

⁸¹ Cass. ass. Plèn., 29 June 2001, no. 99-85.973.

⁸² Cass, crim., 23 April 1971, Bull crim No 116.

⁸³ E. Terrier, “La personne humaine, vie et mort” in R. Cabrillac (ed), *Libertés et Droits Fondamentaux* (20th ed., Dalloz, 2014), p. 182-186.

⁸⁴ CE, 29 December 2002, *Duffau, Lebon* 1025.

⁸⁵ CE, 24 June 2014, Applications No 375081, 375090, 375091, *Mme F..., I ... eta utres*,

⁸⁶ Application 46043/14. *Pierre Lambert and others*.



Human dignity

The principle of human dignity is not mentioned in any constitutional texts. In 1994, in the context of the constitutional examination of the Law on Bioethics, the *Conseil Constitutionnel*, relying the first sentence of the 1946 Preamble,⁸⁷ established that the protection of human dignity against all forms of enslavement and degradation of humanity, was a “principle of constitutional value”.⁸⁸ The right to human dignity is considered as a “sacred and inalienable right”.⁸⁹ However, like all rights, it may be balanced against other considerations. For example, the *Conseil constitutionnel* considered that the criminalization of soliciting in public places is constitutional, in that it reconciles public order with human dignity.⁹⁰

In French administrative law, human dignity is conceptualised as a component of “public order”, rather than an individual right. This was first established by the *Conseil d’Etat* in rulings concerning the interdiction of dwarf-throwing shows.⁹¹ It stated that public authorities could take measure to prevent *troubles à l’ordre public*, and that the protection of human dignity is one of the components of such public order. A public authority may thus, even in the absence of specific circumstances, prohibit shows which undermine the respect of human dignity. The French position was endorsed by the United Nations Human Rights Committee.⁹² In 2007, the *Conseil d’Etat*, deciding in emergency (*référé*) annulled an order of the Paris Administrative Court which had suspended a decision by the state local representative (*préfet*) who had banned the distribution by an extreme right wing organization (*Solidarité des Français*) of a *soupe au cochon* (pig soup) to homeless people, given the discriminatory nature of these distributions (which would exclude muslims) and its interference with the dignity of persons in needs. A recent controversy around the *quenelle*, a gesture invented by the French comedian Dieudonné, considered as being of antisemitic nature, and which has been replicated by other celebrities like football player Nicholas Anelka, further expose the nature of the protection of human dignity in the French legal context. On 9 January 2014, the *Conseil d’Etat*, deciding again in emergency (*référé*), annulled an interim order from the Administrative Court of Nantes which had suspended the

⁸⁷ « In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.”

⁸⁸ Decision No 94-343/344 DC, 27 July 1994 [respect for the human body, use of body parts, assisted reproduction], para. 2.

⁸⁹ Decision No. 2009-593 DC, 19 November 2009 [prisons], para. 3.

⁹⁰ Decision No. 2003-467 DC, 13 March 2003 [internal security], para. 61.

⁹¹ CE, 27 October 1995, Commune de Morsang sur Orge; No 136727; CE 27 October 1995, Commune d’Aix en Provence, No 143578,.

⁹² *Wackenheim v. France*, Human Rights Committee, Communication No 854/1999, 26 July 2002, UN Doc. CCPR/C/75/D/854/1999 (2002).



prefect's prohibition order against Dieudonné's show. The administrative court had considered that "with regard to the planned show, as it had been announced and scheduled, allegations according to which statements which could be criminally sanctioned made during the Paris show would not be made in the Nantes show, did not suffice to remove the serious risk that there would again be violations of values and principles, in particular human dignity, which is recognised by the [1789] Declaration and the republican tradition."⁹³

One thus notices a jurisprudential trend which consists in giving precedence to human dignity (in its public order dimension) against conflicting individual freedoms (e.g. the freedom of enterprise or freedom to work in the dwarves-throwing case, freedom to demonstrate in the pork soup case, freedom of expression in the comedian case). Some of the civil rights organisations have been critical of this approach, which they consider a threat on individual freedoms and civil liberties.⁹⁴

Furthermore, in addition to making up the notion of public order, the right to human dignity is also often combined with other fundamental rights and freedoms such as the right to decent housing, the right to work or the rights of detainees, in order to improve living conditions.⁹⁵ The rights of detainees, in particular, which is loosely regulated under domestic law whilst standardized under international and European law, was recently interpreted from the point of view of human dignity. The *Conseil d'Etat* indeed held that it is incumbent on the legislative power to elaborate the rules concerning criminal law and criminal procedure and the conditions of detention while respecting human dignity.⁹⁶ Subsequently, a law on prison was adopted which made an explicit reference to the protection of human dignity.⁹⁷

The right to private and family life

Following a press campaign against the President of the Republic, a law was adopted in 1970, the main provision of which was codified into Article 9 of the Civil Code (Article 9). This provision provides that everyone has the right to the respect of his/her private life. The *Conseil Constitutionnel* was, at first, reluctant to confer it constitutional value.⁹⁸ A 1993 proposal for constitutional revision, which suggested to amend Article 66 of the Constitution to include the respect of the right to private life, did not go

⁹³ JRCE 9 January 2014, *SARL Les Productions de la Plume et par M. B...D.*, No 374508.

⁹⁴ e.g. Ligue des Droits de l'Homme.

⁹⁵ See in details Code constitutionnel et des droits fondamentaux (2014), *op. cit.*, 332-333.

⁹⁶ Decision No 2009-593 DC, 19 November 2009 [prisons], paras. 3-5.

⁹⁷ Law No 2009-1436 of 24 November 2009 on prisons, JORF No 273 of 25 November 2009 p.20192, Article 22.

⁹⁸ Decision No 93-325 DC, 13 August 1993 [Immigration management].



through. Eventually, in a decision of 1995, the *Conseil Constitutionnel* recognized that the lack of respect for private life could undermine the individual freedom protected by Article 66 the Constitution.⁹⁹ In 2010, it further linked the protection of private life to the 1789 Declaration.¹⁰⁰ The right to private life must however be balanced with constitutional objectives, in particular public security. Both the judicial and administrative courts, inspired by the ECHR, are nonetheless giving increased weight to the right to private life.¹⁰¹

Concerning the right to family life, a number of issues came up recently in the context of gay marriage and polygamy. The *Conseil constitutionnel* held in 2011 that the principle of equality, as provided for in Article 6 of the 1789 Declaration, did not exclude that legislation rule on different situations in a different manner.¹⁰² It deferred to the legislator, which considered that the difference between the situation of same-sex couples and that of heterosexual couples justified a difference in treatment in family law. A few years later, examining a legislative act authorizing civil marriage for same-sex couples, the *Conseil constitutionnel* held that, as a general rule, the principle of equality does not oblige the legislator to treat differently persons being in different situations either.¹⁰³ Again, it deferred to the choice of the legislator.

However, the *Conseil constitutionnel* endorsed the refusal to recognise polygamous marriages since “the conditions of a normal family life” are those prevailing in France, which prohibit polygamy.¹⁰⁴ This decision contrasts, however, with a previous decision of the *Conseil d’Etat* in which the administrative court had held that a polygamous marriage is not in itself contrary to the French public order and that polygamous foreigners could enjoy the right to family reunification.¹⁰⁵

The *Conseil constitutionnel* stresses in its case law that it is for the legislative power to reconcile the right to private life and other constitutional requirements, such as the prosecution of criminals or the

⁹⁹ Decision No 94-359 DC, 19 January 1995[security law].

¹⁰⁰ Decision No 2010-25 QPC of 16 September 2010, Jean-Victor C. [genetic prints files].

¹⁰¹ Bernard Beigner and Jeremy Antippas, “La protection de la vie privée” in R. Cabrillac (ed), *Libertés et Droits Fondamentaux* (20th ed., Dalloz, 2014), 215, 222.

¹⁰² Decision No 2010-92 QPC, 28 January 2011, *Corinne C. et al.* [prohibition of same-sex marriage], para. 9.

¹⁰³ Decision No 2013-669 DC, 17 May 2013 [same sex marriage] , para. 15.

¹⁰⁴ Decision No 93-325 DC, 13 August 1993 [immigration and stay and residence of foreigners], para. 77.

¹⁰⁵ CE, 11 July 1980, *Montcho*, No. 16596.



prevention of violations of public order which are both necessary to the protection of rights and principles of constitutional value.¹⁰⁶

The right to equality and the principle of non-discrimination

The 1789 Declaration, **the 1946 Preamble and the 1958 Constitution all recognise the right to equality** of all citizens before the law. The French constitutional provisions prohibit five grounds of discrimination: origin, race, religion, beliefs and sex. The *Conseil constitutionnel* invoked these provisions related to the principle of equality for the first time in its decision of 16 March 2006 on the Act on the equality of payment between men and women.¹⁰⁷

The “core” nature of the right to equality is confirmed by the fact that the *Conseil constitutionnel* usually does not invoke concrete constitutional provisions, but the “principle of equality” or the “constitutional principle of equality”.¹⁰⁸ The content of the principle is relatively stable in the case law: it “does neither oppose that the legislation regulates different situations in a different way nor that it derogates from the equality by reason of general interest provided that in both cases, the resulting difference of treatment is related to the object of the law which it established.”¹⁰⁹

French constitutional law distinguish between three types of discrimination.¹¹⁰ First, certain discriminations, such as discrimination based on race, even though they may seek to secure the enjoyment of other rights, such as linguistic minority rights,¹¹¹ are expressly prohibited by the Constitution. Although this approach suggests that positive discrimination is not compatible with the Constitution, there are doubts as to all type of positive discrimination would fall under this logic. The *Conseil constitutionnel* considered that the system of quotas in favour of women in electoral matters was contrary to the principle of equality, but it limited this conclusion to “a particularly sensitive domain which is the right to eligibility in political elections”.¹¹² Thus, it seems that positive discrimination may be

¹⁰⁶ Decision No 2010-604 DC, 25 February 2010 [fight against group violence], para. 22 ; Decision No 2012-652 DC, 22 March 2012, [identity protection], para. 7.

¹⁰⁷ Decision No 2006-533 DC, 16 March 2006 [pay equality between men and women], para. 12.

¹⁰⁸ Decision No 88-248 DC, 17 January 1989 [freedom of communication], para. 9.

¹⁰⁹ Decision No 87-232 DC, 7 January 1988, [mutualization], para. 10; Decision No 96-375 DC, 9 April 1996, [economic and finance law], para. 8.

¹¹⁰ Favoreu, op. cit., 421.

¹¹¹ Decision No 99-412 DC, 15 June 1999 [European Charter on regional or minority languages], para. 10.

¹¹² Favoreu, op. cit., 425.



constitutional in matters other than the sensitive issues of electoral matters or criminal law.¹¹³ For example, the *Conseil constitutionnel* found that the legislative intention to allow access to public service jobs only to certain groups of professionals is a positive discrimination which is conform to the Constitution.¹¹⁴

Second, discriminations which hinder the effective exercise of fundamental rights and freedoms, are only acceptable if duly justified and if they do not amount to a denial of a fundamental right or liberty. For example, a French law amending the Law on criminal procedure denied the right to consult an lawyer during custody for persons accused of certain crimes, whereas it recognized such rights for persons accused of other crimes entailing similar sanctions. The *Conseil Constitutionnel*, recognizing a denial of the rights of the defence through discrimination, found the provision unconstitutional.¹¹⁵

Finally, simple differentiations of law or of fact which are not expressly prohibited by the Constitution and do not hinder the effective exercise of fundamental rights and freedoms, would be considered lawful.¹¹⁶

Individual liberty (including right to liberty)

Individual liberty has different sources in French constitutional texts. Article 66 of the 1958 Constitution states that “nobody shall be arbitrarily detained. The judicial authority, who is the guardian of individual liberty, ensures the respect of this principle in the conditions provided by the law.” The 1789 Declaration proclaims in Article 1 that “men are born free and equal in rights” and in Article 2 that “the aim of every political association is the preservation of the natural and *imprescriptible* rights of man. These rights are liberty, property, security, and resistance to oppression.” Article 4 of the 1789 Declaration further adds that “liberty consists in being able to do everything which does not harm others; thus, the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.”

There were discussions as to which of these sources should serve as the basis for constitutional recognition. The *Conseil constitutionnel*, at first, proclaimed that individual liberty is one of the “fundamental principles recognized by the laws of the Republic” and proclaimed by the Preamble of the

¹¹³ Favoreu, op. cit., 425-426.

¹¹⁴ Decision No 82-153 DC, 14 January 1983 [status of civil servants].

¹¹⁵ Decision No 93-326 DC, 11 August 1993 [reform of the criminal procedure code], para. 15.

¹¹⁶ Favoreu, op. cit., 423.



1946 Constitution.¹¹⁷ Since then, the *Conseil* changed its stance and relies on both Article 66 and the provisions of 1789 Declaration.¹¹⁸

There are two main conceptions of individual liberty. The narrow notion understands individual liberty in terms of *habeas corpus*, or freedom from arbitrary detention (which boils down to “freedom of safety” [*liberté de sûreté*], or right to liberty and physical integrity).¹¹⁹ The other, more extensive conception, embraced by the *Conseil constitutionnel*, considers individual liberty as a concept, which includes in addition to the right to liberty a number of “derived freedoms”: such as the freedom of movement¹²⁰ (*liberté d’aller et venir*), the principle of respect for the inviolability of the home,¹²¹ the right to respect for private life,¹²² and the freedom of marriage.¹²³ Individual liberty thus performs functions similar to the general personality right in Germany, or the liberty clause of the 14th Amendment in the United States. It also runs similar risks, noted by French legal scholarship. These include a fear of dilution of rights protection as a result of an overly broad (and constantly broadening) scope of individual liberty,¹²⁴ and anomalies to division of competences, since Article 66 is also a competence norm.¹²⁵ A complicated jurisprudence can be summarized as saying that the competence of administrative authority over decisions affecting the right to liberty are not per se unconstitutional, but must be subject to judicial review as regard their necessity.¹²⁶

Although the freedom of movement is a recognized constitutional right, a recent Law aimed at the fight against terrorism, does curtail it significantly. The new act, adopted under an accelerated procedure, and promulgated without having been submitted to the *Conseil Constitutionnel* for prior review, allows administrative authorities to prohibit French citizens from leaving the French territory, to stop them from going to Syria or Lybia to fight for the Jihad. This prohibition to leave the territory can be imposed “where there exists serious reasons to believe that the individual plans to go abroad in order to participate in terrorist activities, war crimes, or crimes against humanity, or on a site where terrorists are gathered, in conditions which are susceptible to threaten public security upon his/her return” (new

¹¹⁷ Decision No 76-75 DC, 12 January 1977, para 212.

¹¹⁸ Ibid.

¹¹⁹ Favoreu, op. cit., para 212.

¹²⁰ Decision No 79-109 DC, 9 January 1980, decision no. 80-127 DC, 20 January 1981.

¹²¹ e.g. Decision No 83-164 DC, 29 December 1983.

¹²² e.g. decision No 95-352 DC, 18 January 1995.

¹²³ Decision No 93-325 DC, 13 August 1993.

¹²⁴ Favoreu, op. cit, para 213.

¹²⁵ When stating that the judicial authority is the guardian of liberty. See *ibid*.

¹²⁶ Decision no. 92-307 DC, 25 February 1992, *Transit Zones*.



Article L. 224-1 of the Code of Internal Security).¹²⁷ The prohibition can be up imposed for six months, and includes the withdrawal of the passport (exchanged for a special status document). Violation of the prohibition could be sanctioned by a three year jail sentence and 45 000 EUR fine. Its application decree was adopted a few days after the deadly attacks on the editorial team of Charlie Hebdo in January 2015.¹²⁸

Rights of the defence

The rights of the defence are protected under French constitutional law (Articles 8 and 9 of the 1789 Declaration). They include, notably, the adversarial principle (*principe du contradictoire*) or the right to be heard. The rights of the defence are also protected as a general principle of (administrative) law,¹²⁹ which public authorities must respect. The *Conseil d'Etat* defined the procedural elements of this right, i.e. the right to be informed about the decision and reasons for its adoption, and the duty of public authorities to receive relevant views of the person concerned.¹³⁰ The rights of the defence can nonetheless be limited by a legislative act, as in the context of procedures against foreigners or in emergency situations. Increasingly, the definition of its scope is influenced by EU law (general principles and the Charter), in particular in the context of policies governed by EU law, notably those concerning the stay and residency rights of EU citizens, asylum procedures, the removal of third country nationals, or family reunification. French lower administrative courts have asked the CJEU for clarifications concerning the scope of the right to be heard.¹³¹

Right to property

The right to property is guaranteed in Article 2 of Declaration of the 1789 Declaration. It is a *droit-liberté*, similarly to other rights protected by Article 2, from which the right to private life, personal liberty and others individual freedoms are derived, and has the same legal value as other constitutionally protected right.¹³² French law offers strong protection against expropriation, in that it

¹²⁷ Legislative act No 2014-1353 du 13 November 2014 reinforcing provisions relating to the fight against terrorism, JORF No 0263 du 14 November 2014 page 19162.

¹²⁸ Decree No 2015-26 du 14 Janvier 2015 relating to the prohibition to leave the territory for French citizens planning to participate in terrorist activities abroad, JORF No 0012 of 15 January 2015 page 629.

¹²⁹ CE, 5 May 1944, *Dame veuve Trompier-Gravier*, No 69751; CE 11 July 2012, *Massol*; No 343866; CE 14 March 2001, *Gossein*, No 206288; CE 27 October 1999, *Ministre de la défense c. Recart*, No 129538; CE 20 October 1976, *Greenberg*, No 95051.

¹³⁰ CE 9 January 1970, *Cohn-Bendit*, No 76714; CE 8 October 1976, *Hill*, No 96871, and CE, 8 October 1976, *Holzappel*, No 96872.

¹³¹ TA Lyon, 28 February 2013, *Mme Ancuta Dumitru*, No 1208055, TA de Lyon, 28 February 2013, *Mme Lunda Makiese*, No 1208057,

¹³² Decision No 81-132 DC, 16 January 1982 [nationalization].



requires that the compensation be equivalent to the market price, not to a “reasonable price”.¹³³ Still, compared with other rights in French law, the right to property does not benefit from a system of “reinforced protection”, with the result that preliminary authorization regimes may apply which regulate the exercise of the right to property.¹³⁴ Furthermore, local authorities may regulate the essential conditions of the exercise of the right to property.¹³⁵ The margin of appreciation of the legislative power is also wider in regulating the right to property than in case of other rights since it can “limit the content of the right and not only enhance or reinforce its legal protection”.¹³⁶ Scholars thus tend to consider it a second rank right.¹³⁷

Overall, the *Conseil constitutionnel* tends to be deferential to the determination of public interest objectives by the legislator. It limits itself to verifying whether the restriction imposed on the right to property does not have a “denaturing” effect (i.e. removing the essence).¹³⁸ It held for example that a system of preliminary authorization for the control of agricultural exploitation did not reach such a gravity that it would distort the meaning and scope of the right to property.¹³⁹ It considered that the possibility for the Economy Minister to oppose the increased participation of one or several persons in a privatised company does not reach such a gravity that would distort the ordinary sense and the scope of the right to property.¹⁴⁰ However, it did, on occasion, sanction legislative acts undermining the essence of the right to property.¹⁴¹ For example, it declared contrary to the Constitution hunting legislation affecting property rights which did not pursue a clearly identified public interest.¹⁴²

¹³³ Favoreu, op. cit., 297.

¹³⁴ Decision No 84-172 DC 26 July 1984 [agricultural exploitations status].

¹³⁵ Decision No 85-189 DC, 17 July 1985 [territorial management], paras. 17-18.

¹³⁶ Favoreu, op. cit., 298.

¹³⁷ Favoreu et al. 353.

¹³⁸ Favoreu, op. cit., 302.

¹³⁹ Decision No 84-172 DC, 26 July 1984, [agricultural exploitations status] para. 3. See also Decision No 98-403 DC, 29 July 1998 [fight against exclusion], paras. 7, 31.

¹⁴⁰ Decision No 89-254 DC, 4 July 1989 [privatizations], para. 10.

¹⁴¹ See Decision No 94-346 DC, 21 July 1994 [public domain]; Decision No 96-373 DC, 9 April 1996 [French Polynesia autonomy status]; Decision No 98-403 DC, 28 July 1998 [fight against exclusion].

¹⁴² Decision No 2000-434 DC, 20 July 2000 [hunting law].



One must note, furthermore, that civil law, despite its emphasis on owner's right, also allows for limitations to the exercise and use of one's property, as well as considerations related to the social context of property.¹⁴³

The *Conseil constitutionnel* considers property as including private property, State property and the property of public entities.¹⁴⁴ It also extended its scope beyond real estate, to other properties such as movable (e.g. shares) or immaterial property,¹⁴⁵ including brands of commercial products or services,¹⁴⁶ and intellectual property rights.¹⁴⁷ However, taxi drivers licences,¹⁴⁸ licences granted for the exploitation of public transport services,¹⁴⁹ or pension rights for retired public servants are not considered as property.¹⁵⁰ Similarly, constitutional case law did not apply the right to property to the following economic regulations: the suppression of a tax benefit which entailed a tax increase,¹⁵¹ the extension of a tax for taxpayers who were exempted from that tax before;¹⁵² the suppression of a professional privilege;¹⁵³ the substitution of a contractual insurance regime by a social security system prescribed by law,¹⁵⁴ etc.

In other words, the *Conseil constitutionnel* refuses to extend the guarantee of the right to property to claims and debts, avoiding an interpretation which would treat any "right of economic character" as

¹⁴³ See second part of Article 544 of the Code Civil, and also Article 545 of the same code which provides for the possibility to force someone to sell property for a public utility cause, or Articles 640, 643, 642, 645 related to the duties of owners). For further analysis, see Rémy Libchaber, "La propriété, droit fondamental" in R. Cabrillac (ed), *Libertés et Droits Fondamentaux* (20th ed., Dalloz, 2014), 783, 797-798.

¹⁴⁴ Decision No 86-217 DC, 18 September 1986 [freedom of communication], para. 47.

¹⁴⁵ Decision No 81-132 DC, 16 January 1982, [nationalizations] para. 20; generally on this extension in the constitutional case law, see Decision No 90-283 DC, 8 January 1991 [fight against tobacco and alcohol addition], para. 7; Decision No 2006-540, 27 July 2006 [copyright and related rights], para. 15; Decision No 2006-541 DC, 27 July 2006, [implementation of the London Agreements on European Patent] para. 15 etc.

¹⁴⁶ Decision No 90-283 DC, 8 January 1991, [fight against tobacco and alcohol addition], paras. 7, 9; Decision no. [consumer protection], 25 January 1992, para. 7.

¹⁴⁷ Decision No 2006-541 DC, 28 September 2006, [implementation of the London Agreements on European Patent] para. 8; Decision no. 2009-580 DC, 10 June 2009 [HADOPI I].

¹⁴⁸ Decision No 82-125 L, 23 June 1982 [repatriated taxi drivers].

¹⁴⁹ Decision No 82-150 DC, 30 December 1982, [internal transports] para. 3.

¹⁵⁰ Decision No 85-200 DC, 16 January 1986 [pensions and activity incomes].

¹⁵¹ Decision No 89-268 DC, 29 December 1989 [finance law], para. 41.

¹⁵² Decision No 91-302 DC, 30 December, [finance law] para. 14.

¹⁵³ Decision No 2000-440 DC, 10 January 2001, para. 5 [compliance with Community law in the field of transport]; Decision No 2010-624 DC, 20 January 2011, [representation before appeal courts] para. 16.

¹⁵⁴ Decision No 2001-451 DC, 27 November 2001 [social security for agricultural workers], para. 16.



property, as the ECtHR does.¹⁵⁵ However, the influence of the ECHR is triggering an evolution, at least in the administrative court system. The *Conseil d'Etat* applied Article 1 of Protocol no. 1 to the ECHR on the protection of property to pension rights.¹⁵⁶ It held that “pension is a financial, personal and life annuity allowance, granted for civil and military public servants and, after their death, for their heirs designated by the law, as a remuneration of the services completed until the regular termination of their functions”.¹⁵⁷ Moreover, the *Conseil d'Etat* recognized that “reversion pensions constitute claims which must be regarded as possession in the sense of Article 1, cited above, of the Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms”.¹⁵⁸ Similarly, an invalidity pension granted for militaries was considered a “possession” to which Article 1 of Protocol no. 1 was applied.¹⁵⁹ Among other material property rights, the *Conseil constitutionnel* considered electricity as an asset with a special nature to which it applied the constitutional guarantees of property.¹⁶⁰

The recognition of immaterial property rights, especially literary and artistic works or technical inventions such as industrial property, have led to the recognition of real enjoyment rights by their “owner” and his or her power to dispose of the property.¹⁶¹ Within the category of immaterial things, one should make a distinction between objectively created things and things woven from the personality of the right holder, such as the right to one’s name, to one’s image or to one’s sound, one’s labour force and works of art or even one’s customer base. The property of such personalized things is characterized by two features: their inaccessibility for others without the consent of the right holder and a kind of moral right of the concerned person to revise the contracts of which object is the given right.¹⁶²

As for intellectual property rights, they are defined as follows: “the author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons. This right shall include attributes of an intellectual and moral nature as well as attributes of an economic nature, as determined by Books I and III of this Code.”¹⁶³ The *Conseil constitutionnel* considers they as property rights protected under Articles 2 and 17 of the 1789

¹⁵⁵ *Code constitutionnel et des droits fondamentaux 2014* (Dalloz, 2014, 3^e éd.), 310.

¹⁵⁶ CE ass. , 27 May 2005, M. X. , No 277975.

¹⁵⁷ CE, 6 December 2006, *Mme Roselyne A.*, No 262096.

¹⁵⁸ *Ibid.* ; see also CE, 29 October 2012, *M. Kaddour B.*, No 329649, paras. 11-12.

¹⁵⁹ CE, 17 March 2009, *M. Mohammed A.*, No 307596.

¹⁶⁰ Decision No 2013-666 DC, 11 April 2013 [transition to sustainable energy, water and solar panel tariffs], paras. 23-24.

¹⁶¹ Libchaber, *op. cit.*, 804.

¹⁶² *Ibid.*, 789-790.

¹⁶³ Code of intellectual property, Article L111-1(1)-(2).



Declaration.¹⁶⁴ The *Conseil constitutionnel* thus considered that copyright holders and holders of related rights enjoy their intellectual property rights.¹⁶⁵ Authors enjoy copyright over their works, whilst neighbouring rights on copyright benefit performers, phonogram producers, videogram producers, audiovisual communication companies (neighbouring rights relate to the satellite broadcasting of a performer's performance, a phonogram, a videogram or the programs of an audiovisual communication enterprise).¹⁶⁶

Intellectual property rights benefit from a particular protection in eventual clashes with other economic rights and freedoms, due to their personalized character. When the *Conseil constitutionnel* had to decide on the constitutionality of a legislative act transposing an EU directive, it held that the restriction of the copyright or related rights in the interest of "interoperability" of materials and software, a measure promoting the harmonisation of certain aspects of copyright and related rights, shall respect the strict constitutional conditions of expropriation, under Article 17 of the 1789 Declaration ("only on condition that the owner shall have been equitably compensated in advance").¹⁶⁷ When intellectual property rights clash with civil rights and liberties, such as the right to private life, it is for the domestic authorities to ensure a reconciliation that is not "manifestly unbalanced". For example in the case of copyrights and related rights, the societies for the collection and distribution of authors' royalties and the royalties of performers and phonogram and videogram producers and bodies for professional defence have the right to participate in the treatment of personal data on offences, convictions and security measures related counterfeiting practices – the *Conseil constitutionnel* held that this provision reflected a general interest related to the protection of intellectual property which the legislation did not reconcile with the right to private life in a "manifestly unbalanced" manner.¹⁶⁸

Concerning internet domain names, the *Conseil constitutionnel* held that even the "supervision, both as regards private individuals and commercial concerns, of the choice and use of internet domain names affects intellectual property rights, freedom of communication and freedom of enterprise".¹⁶⁹ It held that Article 45 of the Postal and Electronic Communications Code was unconstitutional, since it had entirely delegated the power to supervise the conditions under which domain names were assigned, refused or withdrawn, without providing for guarantees against any infringement of freedom of

¹⁶⁴ Decision No 2009-580 DC, 10 June 2009, [HADOP] para. 13.

¹⁶⁵ Decision No 2006-541 DC, 27 July 2006, [implementation of the London Agreements on European Patent] para. 40; Decision no. 2009-580, 10 June 2009, para. 13.

¹⁶⁶ Code of intellectual property, Part I, Book I and Book II.

¹⁶⁷ Decision No 2006-541 DC, 27 July 2006, [implementation of the London Agreements on European Patent].

¹⁶⁸ Decision no. 2004-499 DC, 29 July 2004 [protection of personal data].

¹⁶⁹ Decision No 2010-45 QPC, 6 October 2010, M. Matthieu P. [internet domain names]



enterprise and Article 11 of the Declaration of 1789.¹⁷⁰ Although the *Conseil constitutionnel* referred to intellectual property rights, it did not invoke property as such and thus, left open the legal nature of internet domain names. It was satisfied to conclude that the choice and the use of an internet domain name “affect” intellectual property rights that the legislative power must protect.¹⁷¹

In an interesting case before the *Conseil constitutionnel* on the constitutionality of the Act transposing the Biotechnology directive,¹⁷² the authors of the petition claimed that the provision according to which “the human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions” was contrary to Article 11 of the 1789 Declaration (“the free communication of ideas and opinions”).¹⁷³ They argued that the exclusion of elements of the human body from the scope of patentable inventions ran against the requirement of pluralism, in particular that of scientific knowledge. Although the *Conseil constitutionnel* did not rule finally on the question since the disputed provisions merely drew the necessary conclusions from the unqualified and precise provisions of Article 5 of the EU Directive, it is remarkable that it cited a relevant CJEU decision, which held that the provisions of the Directive “d[id] not allow the discovery of a DNA sequence to be patentable “as such”; the protection of inventions envisaged by the Directive cover[ed] only the result of inventive, scientific or technical work, and extends to biological data existing in their natural state in human beings only where necessary for the achievement and exploitation of a particular industrial application”.¹⁷⁴ In this case the definition of patentable works was inspired by the case law of the CJEU, according to which work on the sequence is patentable, but not the mere partial sequence of human genes.

Freedom of conscience and opinion (including religion and laïcité)

Article 10 of the Declaration proclaims that no one shall be threatened [*inquiété*] for his opinions, including religious ones, provided that their manifestation does not disturb public order as established by the law. The 1946 Preamble affirms that “every human being, without distinction of race, religion or belief, possesses inalienable and sacred rights,” and that “no one shall be burdened in his work or

¹⁷⁰ Ibid., para. 6.

¹⁷¹ Manara “« Tout citoyen peut parler, écrire, imprimer librement », ainsi qu'enregistrer et utiliser des noms de domaine ! Décision rendue par Conseil constitutionnel” Recueil Dalloz (2010) 6 October 2010, 2285.

¹⁷² Legislative Act No 2004-800 of 6 August 2004 on the bioethics (transposing Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions).

¹⁷³ Decision No. 2004-498 DC, 29 July 2004 [bioethics].

¹⁷⁴ Case C-377/98, *Netherlands v European Parliament and Council* [2001] *ECR* I-7079, as cited by Decision no. 2004-498 DC, 29 July 2004, para. 5.



employment for reason of his opinions or his beliefs.” Article 1 of the 1958 Constitution proclaims that the Republic is laic, and that equality before the law is due to every citizen without regard to origin, race, or religion, and France respects all beliefs.¹⁷⁵ The *Conseil constitutionnel* declared freedom of conscience a “fundamental principle recognized by the laws of the Republic” in 1977.¹⁷⁶ Freedom of conscience and opinion encompasses freedom of religion, but also goes beyond. It also includes the right to conscientious objection, be it to the (now abolished) military service or performing abortions.¹⁷⁷

While the internal aspect of the freedom must be unrestricted, its external manifestation can be limited. The *Conseil constitutionnel* held that notwithstanding the intact freedom of conscience of teachers, public servants in public schools have a “duty of reserve”, to protect the freedom of conscience of the pupils.¹⁷⁸ It is in relation to the external expression of the freedom of religion that limits, based on the principle of *laïcité*, have been the most controversial.¹⁷⁹

Freedom of expression and communication

Article 11 of the 1789 Declaration proclaims that the “free communication of thoughts and of opinions is one of the most precious rights of the man [or one of the most precious human rights]; and thus every citizen shall speak, write, and publish freely except for the reactions to the abuse of this freedom in cases determined by law.” Constitutional protection extends to audiovisual communication,¹⁸⁰ the press,¹⁸¹ and the internet.¹⁸² Freedom of expression is to be effectively guaranteed, irrespective of the medium¹⁸³ and the content¹⁸⁴ of expression.

The freedom of the press is a “freedom with dual content,” meaning the press has a status on the one hand as the medium of freedom of expression as intellectual freedom, and on the other hand, as an industry making use of the freedom of enterprise, as an economic freedom.¹⁸⁵ The first aspect is

¹⁷⁵ Favoreu, op. cit., para. 248.

¹⁷⁶ Decision No 77-87 DC, 23 November 1977 [freedom of education].

¹⁷⁷ Decision No 74-75 DC, 15 January 1975 [abortion].

¹⁷⁸ Decision No 84-185 DC, 18 January 1985 [relations between the State and local authorities].

¹⁷⁹ See answer to Question 7, “Conflicts of Rights”.

¹⁸⁰ Decision No 82-141 DC, 27 July 1982 [audiovisual communication].

¹⁸¹ Decision No 84-181 DC, 11 October 1984 [merger, transparency and pluralism of press enterprises].

¹⁸² Decision No 2009-580 DC, 10 June 2009 [diffusion and protection of creation on the Internet].

¹⁸³ Claude-Albert Colliard and Rosaline Letteron, *Libertés Publiques* (Dalloz, 2006), para 603.

¹⁸⁴ *Ibid.* para 604.

¹⁸⁵ *Ibid.* para 608.



subject to limits, which are necessary for the maintenance of public order, but must be narrowly interpreted. The second aspect must comply with the requirements of transparency and pluralism, which are principles of constitutional value.¹⁸⁶ The principle of pluralism authorizes the legislator to limit the maximum market share a press owner can have, subject to the control of the *Conseil constitutionnel*.

The freedom of audiovisual communication is different from freedom of the press in its second aspect. Audiovisual communication can be subject to a system of prior administrative authorization, and is, in general, much more regulated also with regard to guaranteeing pluralism. As the *Conseil constitutionnel* puts it, Article 11 of the 1789 Declaration “would not be effective if the public to whom the means of audiovisual communication are addressed did not have readily available, in both public and private sectors, programs which guaranteed the expression of different ideas so as to respect the imperative of honest information; that, in fact, the objective to be realized is that listeners and viewers, who are among the core beneficiaries of the freedom proclaimed by article 11 of the Declaration of 1789, be able to exercise their free choice without either private interests or public authorities being able to substitute their own decisions for those [of listeners and viewers], or make them into commercial objects.”¹⁸⁷

Freedom of assembly (réunion and manifestation)

The 1958 French constitution does not spell out a right to freedom of assembly, and it is not mentioned explicitly in any of the norms of the *bloc de constitutionalité*.¹⁸⁸ Meetings and demonstrations are protected in French law, although according to different legal regimes, and with different legal status. Meetings (*réunions*) are protected through legislation: an 1881 Act declares that public meetings are free, while a 1907 Act specifies that they can be held without advance notice. Demonstrations (*manifestations*) were granted constitutional protection in 1995 by the *Conseil Constitutionnel*, as collective expression of opinions or ideas, falling under Article 10 of the 1789 Declaration.¹⁸⁹

French law, in line with international standards, does not protect non-peaceful, violent or armed assemblies. Gatherings (*atroupements*) which are capable of disturbing public order are criminalized (Article 431-1 *Code Pénal*). Wearing guns at a manifestation or *réunion publique* is sanctioned by three years imprisonment or 45000 euros fine according to Article 431-10 of the *Code Pénal*. The *Conseil constitutionnel* confirmed the constitutional compatibility of a law enabling the *préfet* to prohibit the

¹⁸⁶ Decision No 84-181 DC, 11 October 1984, [merger, transparency and pluralism of press enterprises]. .

¹⁸⁷ Decision No 86-217 DC, 18 September 1986 [freedom of communication].

¹⁸⁸ For further analysis, see Orsolya Salát, *The Right to Freedom of Assembly. A Comparative Study* (Hart, forthcoming 2015).

¹⁸⁹ Decision No 94-352 DC, 18 January 1995 [security].



bringing or wearing of arms and objects capable of being used as arms to and at a demonstration; it however struck down a provision which would enable the imposition of a similar ban with regard to objects capable of being used as *projectiles*, for being too indeterminate.¹⁹⁰ The 2010 Act against “group violence”,¹⁹¹ punishing the knowing participation at a gathering with a view to prepare voluntary violent acts, was also found constitutional in its aspects relevant for freedom of assembly.¹⁹²

Case law recognizes that meetings and demonstrations are events which are held together by a common goal. Legal commentary and decisions differ as to the exact nature of the common goal, and this divergence relates to the uncertainty of the notions of *réunion* and *manifestations*. Bernard Stirn, for instance, defines *réunion* as “a momentary gathering organized with regard to a determinate objective”.¹⁹³ The objective is more closely defined by the *commissaire du gouvernement* Michel in his conclusions¹⁹⁴ in the landmark Benjamin judgment of the *Conseil d’Etat*.¹⁹⁵ In this case, the possibility of a dialogue between the speaker and listeners transformed a mere show into a *réunion*. For the *Cour de Cassation*, a gathering of mass attendees, who had stayed to listen to an improvised speech of a delegate, does not qualify as a *réunion*.¹⁹⁶ As for the *Conseil d’État*, it declared that the gathering of consumers in a café is not a *réunion*. The common goal implies an active common interest, beyond that of theatre-goers, in that it implies an exchange ideas or the defence of interests.¹⁹⁷

Both meetings and demonstrations thus have communicative purposes, but their nature is different. Participants of a *réunion* come together in order to listen to a message, whilst demonstrators express a message by their presence. Boyer therefore relates freedom of demonstration to freedom of expression, and not to freedom of reunion.¹⁹⁸ Léon Duguit, for his part, links both freedom of opinion, in

¹⁹⁰ Ibid.

¹⁹¹ Law No 2010-201, 2 March 2010, on the fight against group violence and protection of persons fulfilling public service, JORF of 3 March 2010, p. 4312.

¹⁹² Decision No 2010-604 DC, 25 February 2010 [finance].

¹⁹³ Bernard Stirn, *Les libertés en Question*, 6th ed. (Montchrestien, 2006), para.36.

¹⁹⁴ Marceau Long, Prosper Weil, Guy Braibant, Pierre Delvolvé, Bruno Genevois, *Les grands arrêts de la jurisprudence administrative*, 15th ed. (Daloz, 2005) 290.

¹⁹⁵ CE, 19 May 1933, *Benjamin*, No 17413 17520, Lebon 541.

¹⁹⁶ Cass., 14 March 1903, *du Halgouët*.

¹⁹⁷ Claude-Albert Colliard & Rosaline Letteron, *Libertés publiques*, (Daloz, 2006) 493.

¹⁹⁸ Alain Boyer, “La liberté de manifestation en droit constitutionnel français”, 44 *Revue française de droit constitutionnel* 675 (2001)685.



that it implies the freedom to demonstrate, to communicate one's thoughts to others, and thus, "the freedom to convene meetings of men where these thoughts will be exposed publicly."¹⁹⁹

The *Conseil constitutionnel* interpreted the freedom to demonstrate as falling under Article 10 of the 1789 Declaration on freedom of opinion.²⁰⁰ It has, however, not recognised constitutional status to the freedom to hold a meeting (and neither has *Conseil d'Etat*).

Meetings on public ways are prohibited in French law,²⁰¹ but authorities can authorize the use of public ways for the purposes of a public meeting.²⁰² In this sense, it is more difficult to hold a meeting in public spaces than to have a demonstration. There is, however, no obligation to give advance notice in the case of public meetings. Demonstrations on public ways are considered as posing higher threats on public order than meetings,²⁰³ and therefore organizers must give advance notice about the demonstration between the 15th and the third day before the planned date.²⁰⁴ Authorities must provide immediate receipt of the submission of the notice. Holding a demonstration without prior notification is sanctioned by a fine or six month jail under the Penal Code (Article 431-9).²⁰⁵ French law is silent about spontaneous demonstrations (where it is not possible to give notice), or demonstrations of an urgent nature (where the three day deadline cannot be observed). Art. L211-1 of the Code of internal security dispenses with the notice requirement for processions conforming to local usage, such as religious processions.²⁰⁶ The exemption is quite generous as even a seventy year interruption does not prevent a procession to qualify as conforming to local usage,²⁰⁷ and these processions are also exempt from the ban on disguising the face.²⁰⁸

The freedoms of meeting and demonstration can be limited, similarly to other European jurisdictions, where it is necessary and proportionate to the protection of the rights of others, or in pursuance of

¹⁹⁹ Léon Duguit, *Traité de droit constitutionnel*, Volume 5, *Les libertés publiques*, 2nd ed. (1925, Fontemoing-Boccard), 339.

²⁰⁰ Decision No 94-352 DC, 18 January 1995 [security].

²⁰¹ Article 6 of the law of 30 June 1881 on freedom of meeting, reaffirmed by the decree-law of 23 October 1935, and Article L211-1 Code of internal security, replacing the decree law by Ordinance no. 2012-351, 12 March 2012.

²⁰² CE, 3 May 1974, *Mutuelle Nationale des étudiants de France*, No 83702.

²⁰³ *Ibid.* 499.

²⁰⁴ Art. L211-1 and Art. L211-2, Code of internal security.

²⁰⁵ Art- 431-9, Criminal Code.

²⁰⁶ Colliard & Letteron, *Libertés Publiques*, op. cit. 503.

²⁰⁷ CE, 11 February 1927, *Abbé Veyras*, No 585, Rec. 176, as cited by Colliard & Letteron, op. cit, 503, note 2.

²⁰⁸ Criminal Code, Art. R. 645-14



some important public interest or objectives of constitutional value. In particular, they can be limited to prevent the disturbance of public order (*troubles a l'ordre public*).

Since the 1933 *Benjamin* decision, police authorities can only impose measures which are strictly necessary to prevent troubles in relation to assemblies. The *Conseil d'Etat*, relying on a strict interpretation, thus reversed bans on assemblies by the extreme right wing party, the Front National, since it found no such troubles were expected, which could not have been prevented by appropriate policing.²⁰⁹ In another case, the *Conseil d'État* adopted a more lenient approach, and found that previous intimidating and threatening conduct of anti-abortion protestors invading clinics could justify a preventative ban of their demonstration.²¹⁰

Apart from disorder or anticipated disorder in the usual sense of aggressive or intimidating physical acts, freedom of assembly can also be limited to prevent discrimination and protect human dignity, which is considered by the *Conseil d'Etat* as a component of public order.²¹¹ In the so-called “Pig soup” case,²¹² already discussed, the *Conseil d'Etat* held that the ban on discriminatory food distribution organized by an extreme right-wing group did not violate freedom of assembly.²¹³

In 2009, a decree was adopted which banned the concealing of the face in demonstrations.²¹⁴ It was inserted into the criminal code as a fifth class (most serious) offense (*contravention*). As noted before, it nonetheless allows for exemptions in case of assemblies conforming to local usage and when the covering of the face is justified by a legitimate reason. The *Conseil d'Etat* interpreted the scope of the ban narrowly, so as to keep in line with the ECHR and constitutional requirements. Accordingly, the provision is to be understood as not targeting masked demonstrators as long as their masking does not aim at preventing identification by police forces in a context where their conduct constituted a threat to public order that their identification could prevent.²¹⁵

²⁰⁹ CE, 29 December 1995, Maugendre, No 129759, CE, 29 December 1997, *Pierre X*. No 164299.

²¹⁰ CE, 30 December 2003, *Association SOS TOUT PETITS*, No 248264

²¹¹ See above, section on “human dignity”.

²¹² JRCE, 5 January 2007, No 300311, Lebon 307.

²¹³ See the discussion above on human dignity.

²¹⁴ Decree No 2009-724, 19 June 2009 JORF, No 0141, 20 June 2009, p.10067.

²¹⁵ CE, 23 February 2011, *Syndicat national des enseignants de second degree*, No 329477 .



Freedom of association

Freedom of association is not explicitly protected in the 1958 Constitution. It was, however, in relation to this right that the *Conseil constitutionnel* established that instruments to which the 1958 Preamble referred, in this case the 1946 Preamble and its mention of “general principles recognized in the laws of the Republic”, constituted a source of constitutional rights.²¹⁶ Association is defined the well-known 1901 Law as the agreement by which two or more persons put together, on a permanent basis, their knowledge or activity for a purpose different than sharing profit.²¹⁷ Associations can be formed freely, subject at most to a regime of advance notification. Their creation cannot be subject to prior control, either administrative or judicial. The non-declaration of the formation of an association only means that the state does not grant legal personality and accompanying status to it.²¹⁸ The non-profit nature as stipulated in the 1901 law does not prevent the associations from securing resources necessary for achieving their aims.²¹⁹

The constitutionalization and judicialization of the protection of civil rights, which in some cases led to an altering of traditional balancing between different rights, or rights and public interests objectives, is taking place in the context of cross-diffusion between international, European and national orders of human rights protection. We already noted, in the above review of the constitutional protection afforded to specific civil rights, that the ECHR and the case law of Strasbourg influenced the national definition of civil rights and of their scope (eg rights of the defence, right to private life, right to property, freedom of assembly, etc.). In the next question, we will address the mechanisms through which international and European Union instruments come to formally and informally influence the protection of civil rights at national level.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

- ✓ *General considerations concerning the signature, ratification, status and effects of international and European human rights instruments in France*

²¹⁶ Decision No 71-44 DC, 16 July 1971 [association].

²¹⁷ Art. 1, Loi du 1er juillet 1901 relative au contrat d'association

²¹⁸ Favoreu, op. cit, § 230.

²¹⁹ Decision No 84-176 DC, 25 July 1984 [audiovisual communication].



France is a monist system. Article 55 of the 1958 Constitution confers supra-legislative value to duly ratified international treaties.²²⁰ However, French ordinary court's subordination to legislative acts and the *Conseil constitutionnel's* refusal to check the compatibility of legislative acts with international agreements at first undermined the effective respect of international and European human rights obligations. The situation improved from the 1980s, with the effect that international, and in particular European, human rights obligations, as they result either from the ICCPR, ECHR or EU law, have proved increasingly constraining on national legislative and executive authorities.²²¹

France has ratified the majority of international instruments for the protection of civil rights adopted under the auspices of the United Nations, the Council of Europe or the European Union, except those for the protection of minority rights. Indeed, for constitutional reasons related to the unity and indivisibility of French people,²²² France did not sign nor ratify Protocol No. 12 to the ECHR, the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities, or the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. It also maintains its reservation to Article 27 of the ICCPR on the rights of minority members.²²³

Whilst France signed most relevant treaties, it has not always adopted the ratification instruments (i.e. legislative authorization to ratify and the actual ratification by decree of the President of the Republic) or done so with significant delay. For example, the 1948 Universal Declaration on Human Rights is not considered as "ratified" because it was only published in the Official Journal.²²⁴ Furthermore, France has imposed reservations to some of the treaties.²²⁵ Annex 2 provides a list of such treaties, which France has signed up to, and information on ratification status.

²²⁰ Article 55 of the 1958 Constitutions. Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

²²¹ Helen Keller & Alec Stone Sweet, (Eds.), *A Europe of rights: The impact of the ECHR on national legal systems* (OUP, 2008), 683.

²²² Decision No 99-412 DC, 15 June 1999 [European Charter on regional or minority languages], para. 10.

²²³ For the French view: Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic report, France, UN Doc. CCPR/C/FRA/5 (31 January 2013) [hereinafter: ICCPR, Fifth periodic report], paras. 23-33. However, in the domain of linguistic minority rights, Article 75-1 of the Constitution has been introduced on 23 July 2008, providing that: "The regional languages are part of the heritage of France. On the policy on teaching regional languages, see ICCPR, Fifth periodic report, paras. 42-58.

²²⁴ CE, 18 April 1951, *Elections de Nolay*, Lebon 189.

²²⁵ For example, it has placed a reservations aimed at preserving emergency powers under Article 16 of the Constitution; it has also placed reservation to Protocol 7 to protect the special status of New Caledonia, Mayotte, and Wallis-and-Futuna, and the application of Muslim law to family relations (e.g. polygamy, and inheritance rights). It specified that the ECHR could not affect the right to abortion. It also excluded the application of Article 30 ECHR related to minor children because it conflicted with the Constitution.



Once international treaties are signed and ratified, according to Article 55 of the 1958 Constitution, they prevail over legislative measures (normally subject to a reciprocity condition, to which human rights agreements and EU law are, however, exempt).²²⁶ France signed the European Convention on Human Rights (ECHR) in 1950, but ratified it only in 1974, and accepted individual applications to the European Commission of Human Rights only in 1981.

The *Conseil constitutionnel* can review acts adopted for the authorization of ratification or approval of international instruments (Article 61-2) for compatibility with the Constitution.²²⁷ If it holds that an international instrument contains clauses contrary to the Constitution, the instrument can be ratified only after amending the Constitution (Article 54). European integration, for example, required a number of such constitutional revisions.²²⁸

A particular difficulty with ensuring the effective respect of international and European human rights norms is that the *Conseil constitutionnel*, since its famous *Abortion* decision,²²⁹ constantly refuses to control the compatibility of laws with duly ratified international agreements.²³⁰ The *Conseil constitutionnel's* determination not to review laws in light of international and European human rights norms meant that it is for ordinary courts, in particular the *Conseil d'Etat* and the *Cour de Cassation*, to determine the effect and control the respect of international agreements in the domestic legal order (*contrôle de conventionnalité*). These courts, whilst they can usually annul sub-legislative measures, do not have constitutional review powers and cannot invalidate legislative acts which conflict with international instruments. They nonetheless gradually recognised privileged status and important legal effects to international and European human rights instruments, as well as EU law, and relied on them to deprive of effects legislative measures which undermined civil rights.

The positioning of international instruments in the domestic hierarchy of norms was, until the late 1980s, a particular problematic issue, which undermined the effective respect of international instruments. French judicial courts (led by *Cour de Cassation*) admitted early the primacy of international agreements, including European Union²³¹ (secondary) law, over legislation, but

²²⁶ Decision No 98-408 DC, 22 January 1999 [statute of the International Criminal Court].

²²⁷ Relying on Article 55 of the Constitution, it however refuses to check *a posteriori* the compatibility of international agreements with the Constitution. See Decision no. 70-39 DC, 19 June 1970 [Community merger treaties], Decision No 92-308 DC, 9 April 1992 [EU treaty], para 7 and 8)

²²⁸ See below.

²²⁹ Decision No 75-54 DC [abortion]; see also Decision no. 2006-535 DC [equality of opportunities]; Decision No. 2010-605 DC, 12 May 2010 [online gaming].

²³⁰ For a confirmation of this position, as applicable in the context of the QPC, see Decision 2010-4/17 QPC, 22 July 2010, *M. Alain C.*, Rec. 156,

²³¹ For the sake of convenience and expediency, the term European Union law, or EU law, will be used to refer both to what is now Union law and used to be European (Economic) Community law.



administrative courts, led by the *Conseil d'Etat*, long refused that international agreements, including EU legislation, could prevail and be invoked against posterior legislative acts.²³² Eventually, in its famous *Nicolo* decision of 1989,²³³ the *Conseil d'Etat* accepted that EU primary law prevailed over all legislative acts adopted before and after EU membership, thereby disabling the so-called *loi-écran* doctrine which blocked the way to the application of EU law wherever legislative provisions explicitly stood in the way. This supremacy, which is also accepted in relation to the ECHR, only concerns legislative measures (including organic and referendums laws) but not constitutional provisions, which remains at the apex of the domestic hierarchy of norms.²³⁴

The *Conseil d'Etat* rejects the idea that human rights treaties have a special status, by which they could benefit from a direct effect presumption.²³⁵ International provisions can create directly applicable rights, when these are sufficiently precise, clear and unconditional, so that they can be invoked by litigants before domestic courts.²³⁶ The mere circumstance that the provision designates States parties as subjects of the obligation which it enshrines should, however, not imply a lack of direct effect.²³⁷ In the recent *GISTI* case, the *Conseil d'Etat* described direct effect (or applicability) as follows: “a treaty provision must be considered by the administrative judge as of direct application when, considering the expressed intention of the parties and the general object and purpose, the content and the terms of the treaty, it does not aim at the regulation of the relationship between States and does not require any further complementary act for producing effects for individuals”.²³⁸

French courts recognised the direct effect of the provisions of the ECHR, even before accepting the right of individual petition,²³⁹ as well as those of the ICCPR.²⁴⁰ The ECHR has been mostly invoked in cases related to foreigners and prisoners rights. The provisions of the ECHR most involved before administrative courts are Articles 2, 3, 6 and 8 ECHR, and Protocol 1 Article 1.

²³² CE, 1 March 1968, *Syndicat National des Fabricants de Semoule*. No 62814.

²³³ CE, 20 October 1989, *Nicolo*, No. 108243,

²³⁴ CE, 30 October 1998 *Sarran et Levacher*, No. 200286, Cass. ass. , 2 June 2000, *Melle Fraisse*, *Gaz Pal.* No 359-363. See slight inflection in Cass, ass. 15 April 2011, *Mme X.*, No. 10-30316.

²³⁵ CE, 11 April 2012 *GISTI and FAPIL*, No. 322326, See Aude Rouyère, “Le juge administrative et les règles garantissant les libertés” *J.-Cl Liberté* fasc 250, No.26, cited in J.-E. Gicquel “La dimension constitutionnelle des droits et libertés fondamentaux” in R. Cabrillac (ed), *Libertés et droits fondamentaux* (20th ed, Dalloz, 2014) 46..

²³⁶ *Ibid.*, para. 13.

²³⁷ *Ibid.*

²³⁸ CE, 11 April 2012, *GISTI et FAPIL* , No 322326; CRC, Fifth periodic report of France, para. 15.

²³⁹ Tavernier, “L'influence de la CEDH sur le droit français”, conference paper of the Centre d'excellence Jean Monnet, University of Grenoble, available at <http://cejm.upmf-grenoble.fr/> (visited on 15 March 2014), p. 3.

²⁴⁰ Cass. Civ, 1er 13 December 1989, *Mme X.*, No 88-16305,



If provisions of international and European instruments cannot be invoked before a court to seek annulment of interfering national measures, they may still deploy other types of effects. First, national judges may simply set aside the application of domestic (legislative) norms which conflict with international agreements (*invocabilité d'exclusion*). Second, where there is room for interpretation of domestic measures, they will interpret them in the light of provisions of relevant international instruments (*invocabilité d'interprétation conforme*, or indirect effect, in EU law terminology). Third, they can engage state liability for violation of international human rights norms, including by the legislator, and impose compensation.²⁴¹ It is however doubtful that this liability regime would apply to the lack of adoption of legislative provisions to implement international and European human rights standards.²⁴²

Although enforcement matters will be covered in a second questionnaire (Deliverable 7.2), we highlight below a few cases which expose the impact of international and European human rights instruments on French civil rights protection.

In 2008, the Human Rights Committee was concerned about Law No 2006/64 of 23 January 2006 which permitted the initial detention of persons suspected of terrorism for four days, with extensions up to six days, in police custody (*garde à vue*), before they were brought before a judge to be placed under judicial investigation or released without charge. It also took issue with the fact that terrorism suspects in police custody were guaranteed access to a lawyer only after 72 hours, and this could be further delayed till the fifth day when custody was extended by a judge. The Committee also noted that the right to remain silent during police questioning was not explicitly guaranteed in the Code of Criminal Procedure.²⁴³ France adjusted its case law through the adoption of the a Custody Law on 14 April 2011 which strictly limited the use of police custody, a measure that by its nature infringes the freedom of movement, and brought French legislation into line with constitutional and treaty-related requirements concerning the right to a defence and the right to a fair trial. It also aligned as far as possible the different police custody arrangements existing under French law.²⁴⁴

France does not, however, systematically follow the recommendations of the Human Rights Committee. The Committee had criticised French legislation concerning long-term pre-trial detention in terrorism and organized crime cases, extending for periods up to four years and eight months, or with the placement of criminal defendants under renewable one-year terms of civil preventive detention

²⁴¹ CE ass., 28 February 1992, *Rothmans Internationale France*, No 87753; CE 28 February 1992 *Arizona Tobacco*, No. 87753; CE 8 February 2007 *Gardedieu*, No 279522

²⁴² Gicquel, *op. cit.*, 48.

²⁴³ Concluding observations of the Human Rights Committee, France, UN Doc. CCPR/C/FRA/CO/4 (31 July 2008), para. 14.

²⁴⁴ ICCPR, Fifth periodic report, paras. 173-203.



(*rétenion de sureté*) based on their “dangerousness”, even after they have completed their original prison sentence. France however maintained that they were strictly limited and thus complied with the ICCPR provisions.²⁴⁵

Similarly, concerning freedom of religion and the French conception of secularism (*laicité*) concept, the Human Rights Committee strongly criticised the 2004 Law prohibiting the conspicuous wearing of religious symbols in State schools.²⁴⁶ The Government, however, disagreed, and argued that the reasons which led to the adoption of the act, were constitutionally justified.²⁴⁷

The *Conseil d’Etat* mentions the ECHR frequently in its case law. The ECHR was cited 1913 times in 2003, with however a gradual decrease in the yearly citations down to 259 in 2014.²⁴⁸ The drop over the recent years may be linked to the introduction of the QPC, which refocuses fundamental rights litigation in France on constitutional norms. Indeed, until the introduction of the posteriori review mechanism, the ECHR was playing the role of substitute constitution. Indeed, following the acceptance of the supremacy of international agreements over EU law, the ECHR could be relied on to deprive of legal effects legislation which undermine civil rights, whilst the *loi-écran* doctrine, which continued to apply in relation to the Constitution, meant that the Constitution could not produce such effect. The introduction of the QPC, which makes it possible to seek the invalidation of legislative acts which conflict with civil rights norms, has in that sense triggered a process of « re-domesticisation » or « re-nationalization » of human rights law and litigation.

The *Cour de Cassation* seems less inclined to refer to the ECHR. Based on its case law classification, it referred or relied on the ECHR in just over 20 decisions since 1978, with only ten of them concerning challenges to legislation.²⁴⁹ Still, the ECHR case law has inflected the *Cour de Cassation’s* approach. For example, in 2010, in line with concerns brought up by the Human Right Committee already exposed, the ECtHR condemned the French custody procedure in that it did not guarantee the intervention of a lawyer from the very beginning of the detention²⁵⁰ and because it considered intervention of the public prosecutor contrary to Article 5(3) of ECHR, the prosecutor not having the required independence *vis-à-*

²⁴⁵ ICCPR, Fifth periodic report, paras. 204-237.

²⁴⁶ Concluding observations of the Human Rights Committee, France, UN Doc. CCPR/C/FRA/CO/4 (31 July 2008), para. 23.

²⁴⁷ ICCPR, Fifth periodic report, paras. 400-433.

²⁴⁸ Figures based on a search in the Ariane database, available at <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/ArianeWeb>.

²⁴⁹ The website does not offer a key word search system.

²⁵⁰ *Brusco v. France*, Application no. 1466/07, judgment of 14 October 2010.



vis the executive power.²⁵¹ When matters were brought before it, the *Court de Cassation* followed the Strasbourg court, instead of the *Conseil constitutionnel's* lead, in assessing judicial independence and impartiality. The *Conseil constitutionnel* had, indeed, earlier considered that ordinary judges (*juges du siege*) and investigating judges (*juges du parquet*), constituted one corps to assure the respect of individual liberty under Article 66 of the Constitution.²⁵² The ECtHR, however, refused to consider investigating judges as judicial authority under Article 5 (3) of the ECHR, since they did not satisfy the criteria of independence and impartiality.²⁵³ The *Cour de Cassation* adjusted its case law in line with the ECtHR position.²⁵⁴

The *Conseil constitutionnel* itself increasingly takes on board the case law of the ECtHR when defining constitutional rights and principles.²⁵⁵ Although it does not rely directly on the ECHR or EU law to invalidate legislative measures, since these are not “constitutional norms”, it increasingly seeks inspiration in the ECHR in order to define the scope of constitutional norms protecting civil rights.²⁵⁶ The *Conseil constitutionnel* thus mentioned the ECHR in the “dossier” of around 200 of its decisions. It drew, for example, on the ECHR notion of pluralism of thought and opinion.²⁵⁷

The Convention has been particularly influential on the protection of the rights of the defence and right to a fair trial as well as the rights of detainees. Judicial, legislative and governmental organs often followed suits by adjusting legal frameworks to comply with ECtHR rulings. Still, there are instances where French law is at odds with the Convention’s case law, which may lead to France’s condemnation. The judgments of the ECtHR concerning France, decided between 18 December 1986 and 19 July 2012,

²⁵¹ *Medvedyev and Others v. France*, Application no. 37104706, judgment of 29 March 2010; *Moulin v. France*, Application no. 37104/06, judgment of 23 November 2010.

²⁵² Decision No 93-326 DC, 11 August 1993 [criminal procedure code reform], para. 5 ; Decision No 97-389 DC, 27 April 1977 [immigration] para. 61; Decision No 2003-466 DC, 20 February 2003 [proximity judge], paras. 3-4; Decision No 2003-484 DC, 20 November 2003, [immigration, foreigners’ stay, nationality] , para. 75; Decision No 2004-492 DC, 2 March 2004, [adaptation of justice to criminality], 98; Decision No 2010-14/22 QPC, 30 July 2010 M. *Daniel W. et al* [custody] para. 26; Decision No 2011-125 QPC, 17 December 2010, *M. Abderrahmane L.* [deferral to the public prosecutor] para. 8.

²⁵³ *Medvedyev v. France* [GC], Application No. 37104/06, Judgment of 29 March 2010; *Moulin v. France*, Application No. 37104/06, Judgment of 23 November 2010.

²⁵⁴ Cass. crim. 15 December 2010, M. P.X., No 7177.

²⁵⁵ Marc Guillaume, “Question Prioritaire de Constitutionnalité et la CEDH” *Nouveaux Cahiers du Conseil constitutionnel* n° 32 (Dossier : Convention européenne des droits de l’homme) July 2011; Joël Andriantsimbazovina, “La prise en compte de la Convention européenne des droits de l’homme par le Conseil constitutionnel, continuité ou évolution ?” *Les Nouveaux Cahiers Constitutionnels* No 18 (2005).

²⁵⁶ B. Genevois, “Protection constitutionnelle et protection internationale des droits de l’homme: concurrence ou complémentarité?”, Rapport présenté par la délégation française à la 9e conférence des cours constitutionnelles européennes”, (1993) RFDA, pp. 849-869.

²⁵⁷ Decision No 86-217 DC, 18 September 1986 [communication]; Decision No 89-271 DC, 11 January 1990 [financing of political activities]



amounted to almost 650 judgments (annual average of 30 judgments).²⁵⁸ 90 % of these cases condemned France for the violation of Article 6 (right to fair trial), and often led to reform of the judicial system; but other cases have called for reforms in other areas too.

The ECtHR sometimes gave clear guidelines as to how France should reform its legal system to bring it in line with the Convention: this was the case, for example, in the *Krüslin v. France* and the *Hudvig v. France* judgments, where the Court expressly analysed how to enhance the degree of precision required of the “law” concerning telephone tapping in order to conform to Article 8 of the ECHR.²⁵⁹

Whilst usually the ECHR produces effect on its own, it may be combined either by the ECtHR or domestic courts with EU law to define civil rights protection. In a case originating in France and concerning EU citizenship, the ECtHR considered that the applicant, as an EU citizen, derived from EU law the right to stay in France and thus to receive an residency card for EU citizens valid for 5 years. It thus interpreted Article 8 ECHR (privacy) in the light of EU law and considered that the non-issuance of such document to the applicant whilst she had been a resident in France for more than 14 years constituted an intrusion in her private and family life.²⁶⁰

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS AND GENERAL PRINCIPLES OF EU LAW

- ✓ *To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)*

Before addressing the impact of the Charter on the protection of civil rights in France, it is necessary to describe the status and effect of EU law in France, in that they may, in some cases, differ from those of international or European instruments for the protection of civil rights. This is essential not only because the Charter is part of the EU primary law since 2009, but also because many civil rights are also conferred, implemented or limited in EU Treaties provisions, general principles of EU law or EU secondary law.

As noted in the previous section, based on Article 55 of the 1958 Constitution, international instruments, including the EU Treaties, are applicable in the French legal order, and they prevail over

²⁵⁸ Jean-Pierre Marguénaud, *La Cour européenne des droits de l'Homme* 6th ed. (Daloz, 2012), 163.

²⁵⁹ *Krüslin v. France*, Application no. 11801/85, judgment of 24 April 1990, paras. 32-36; *Huvig v. France*, Application no. 11105/84, judgment of 24 April 1990, paras. 31-35.

²⁶⁰ *Aristimuno Mendizabal v. France*, Application No. 51431/99, judgment of 17 January 2006.



conflicting legislative and sub-legislative norms. This provision for long served as a basis for the recognition of the legal effects of EU law in the French legal order. In 1992, the Constitution was nonetheless amended to give an explicit constitutional basis for participation in the European Union (Article 88-1).²⁶¹ It was further amended to allow EU citizens to vote and be elected in local and EP elections, and enabled the creation of a common visa policy, the incorporation of the *Schengen acquis*, the transfer of competence to the EU relating to immigration and asylum, the implementation of the European Arrest Warrant, etc.²⁶²

As exposed earlier, French courts have eventually accepted the supremacy international law, including EU primary law, over national legislative and sub-legislative measures. Moreover, EU secondary laws, and their transposition measures, are to a large extent immune to constitutional compatibility checks. The *Conseil Constitutionnel*, indeed, refuses to examine the compatibility of EU Regulations with the Constitution;²⁶³ it nonetheless reserves the right to control national legislative measures implementing or applying EU law,²⁶⁴ but only to check that these measures are first, faithfully implementing the source Directive²⁶⁵ (because of the constitutional duty to transpose EU Directives stated Article 88-1) and second, that they do not run counter to expressed provisions of the Constitution²⁶⁶ or the constitutional identity of France.²⁶⁷

The *Conseil d'Etat* accepts the primacy of EU Regulations and would annul conflicting regulatory measures;²⁶⁸ the same goes in relation to EU Directives.²⁶⁹ However, in a manner which was particular

²⁶¹ Article 88-1 (current version): The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

²⁶² Joël Rideau, "La construction européenne et la Constitution de 1958 ?", <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/documentation/dossiers-thematiques/2008-cinquantenaire-la-constitution-en-20-questions/la-constitution-en-20-questions-question-n-12.17359.html>

²⁶³ Decision No 77-89 DC, 30 December 1977 [financial law] para 6 ; Decision No 77-90 DC, 30 December 1977, [financial law], para 4.

²⁶⁴ Decision no. 76-71 DC 30 December 1976 [European elections]; Decision No 78-93 DC, 29 April 1978 [increase of French financial participation in the International Monetary Fund]; Decision No 91-293 DC, 23 July 1991 [public service]; Decision No 93-325 DC, 13 August 1993 [immigration, conditions of entry, residence and stay of foreigners].

²⁶⁵ Decision No 2006-540 DC, [copyright] para. 18, confirmed by Decision No 2006-543 DC, 30 November 2006 [energy].

²⁶⁶ Decision No 2004-496 DC, 20 June 2004 [e-Commerce] .

²⁶⁷ Decision No 2006-540 DC, 27 July 2006 [copyright]. On these issues, see Marie-Pierre Granger, "France is 'Already' Back in Europe: The Europeanization of French Courts and the Influence of France in the EU"¹⁴ *European public law* (2008), 335-75.

²⁶⁸ CE, 24 September 1990, *Boisdet*, No 58657.



detrimental to the preservation of individuals' rights, the *Conseil d'Etat* for long refused that individuals could invoke an EU Directive to challenge individual administrative measures. In the 1970s, it famously ruled against the possibility for the German student leader of May 1968 protests, D. Cohn-Bendit, to challenge an expulsion measure against him by invoking a EU Directive.²⁷⁰ It only reversed this position recently, thereby now making it possible for individuals to challenge individual administrative measures taken against them for violation of a Directive²⁷¹ (even when it has not been transposed in due time).²⁷²

When confronted with a challenge to a French regulatory measure which transposes word-for-word the content of a Directive (a so-called *décret-miroir*) based on violation of constitutional norms, the *Conseil d'Etat* has two alternatives. Following a *translation* (Guyomar) process, which consists in checking whether the constitutional norm invoked against the French regulatory measure transposing the Directive has an "equivalent" in primary EU law, it may either find that there is no conflict between the contested measure and the constitutional norm (and thus its EU equivalent), and reject the challenge; or, if it considers that there is a contradiction between the regulatory measure and rights which are protect in an equivalent manner by EU primary law and French constitutional norms, send a preliminary ruling to the CJEU questioning the Directive's validity in the light of equivalent EU primary law norms (including the Charter). If the CJEU considers the provisions of the Directive compatible to superior norms of EU law, the *Conseil d'Etat* would then uphold the "mirror" national regulatory provisions; if the CJEU finds it contrary to EU human rights norms, the *Conseil d'Etat* would annul the "mirror" regulatory act. If, however, the regulatory measure conflicts with a constitutional principle which does not have an EU equivalent (e.g. secularism), the *Conseil d'Etat* would, in such case, check the compatibility of the national regulatory measure with the Constitution, and if it would find it incompatible, annul the national regulation, notwithstanding the fact that it faithfully implements a Directive.²⁷³

When asked to assess the compatibility of the Treaty of the Draft Constitution on Europe with the French Constitution prior to its ratification, the *Conseil constitutionnel* considered that the Treaty clause on the requirement of respect for human rights, as protected under general principles and the ECHR (now Article 6 TEU), and the incorporation of the European Union Charter of Fundamental Rights, were not contrary to the French Constitution and that their ratification did not necessitate any constitutional

²⁶⁹ CE, 7 December 1984, *Fédération française des sociétés de protection de la nature*, No 41971, 41972; CE ass. 28 February 1992, *Rothmans Internationale France*, No 56776, 56777; CE ass., 3 February 1989, *Cie Alitalia*. No 74053.

²⁷⁰ CE ass., 22 décembre 1978, *Minister of the Interior v D. Cohn Bendit*, No 11604.

²⁷¹ CE, 8 July 1991, *Palazzi* No 95461.

²⁷² CE ass., 30 October 2009, *Mme Emanuelle P.*, No 298348.

²⁷³ See for example the Arcelor saga. CE 8 February 2007, *Société Arcelor Atlantique et Lorraine*, No 287110. Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895; CE 3 June 2009, *Société Arcelor Atlantique et Lorraine*, No 287110..



amendment.²⁷⁴ This, it was understood, provided that the CJEU, like the ECtHR, would interpret certain provisions of the Charter, like freedom of religion or the right to a fair trial, in line with the French constitutional vision.²⁷⁵ Indeed, in that decision, the *Conseil constitutionnel* was adamant that the freedom of religion guaranteed under the Charter (Article 10) must be interpreted in the same manner as Article 9 ECHR: thus, when applying the Charter, the Union shall interpret this right in conformity with French constitutional traditions just like the European Court of Human Rights which has “given official recognition to the principle of secularism recognized by various national constitutional traditions and leaves States considerable leeway to define the most appropriate measures, taking into account their national traditions, to reconcile the principle of freedom of religion and that of secularism.”²⁷⁶ The *Conseil constitutionnel* also took note that the Charter’s provision on the right to an effective remedy and a fair trial (Article 47) “were wider than that of Article 6 of the European Convention, since it concern[ed] not only disputes involving civil rights and obligations or the grounds for a criminal prosecution”.²⁷⁷ Still, it considered, calling upon Article 9 ECHR, that they should be understood as allowing restrictions on public access to court hearings.²⁷⁸ Finally, the *Conseil constitutionnel* stated that the general limitation clause contained in Article 52(1)) of the Charter, according to which “general interests recognised by the Union”, can justify limitations on the rights and freedoms enshrined in the Charter, “include in particular interests protected by the first paragraph of Article 4(2) TEU whereby the Union shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.²⁷⁹ Regarding the nature and effects of the Charter’s provisions, the *Conseil constitutionnel* held that the provisions of the Charter, in addition to “rights” directly enforceable before national courts, “principles” which constituted aims, which might only be invoked in relation to acts of a general scope pertaining to their implementation.²⁸⁰ The *Cour de Cassation* recently sent a preliminary reference to the CJEU asking for clarifications related to the distinction between rights and principles in the Charter’s principles, and the enforceability (direct

²⁷⁴ Decision No 92-308 DC, 9 April 1992 [EU Treaty]; Decision No 92-312 DC, 2 September 1992 [EU treaty] ; Decision No 2004-505 DC, 19 November 2004 [draft treaty establishing a Constitution for Europe]; Decision No 2007-560 DC, 20 December 2007 [Lisbon Treaty];

²⁷⁵ Joël Andriantsimbazovina, “La prise en compte de la Convention européenne des droits de l'homme par le Conseil constitutionnel, continuité ou évolution ?” Les Nouveaux Cahiers Constitutionnel No 18 (2005).

²⁷⁶ Decision No 2004-505 DC. 19 November 2004, [draft treaty establishing a Constitution for Europe]; para. 18.

²⁷⁷ *Ibid.*, para. 19.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*, para. 21.

²⁸⁰ *Ibid.*, para. 15.



effect) of such principles (in that case Article 27 on workers' right to information and consultation) in horizontal situations (disputes between private parties).²⁸¹

French courts, responding to parties and their lawyers, are slowly getting accustomed to using the Charter. Prior to adoption of the Charter, the *Conseil d'Etat* had found no difficulty in controlling that measures falling under the scope of application of EU law complied with general principles of EU law.²⁸² The Charter was cited by the *Conseil d'Etat* for the first time in 2003, before it had become legally binding. At the time, the *Conseil d'Etat* had appeared quite keen to refer to it, and even apply it in combination with the ECHR and the ICCPR.²⁸³ However, after the Draft Constitution for Europe was rejected, it refused to consider it applicable.²⁸⁴ Since the Charter has been conferred binding force (2009), the *Conseil d'Etat* has recognised its authority as primary EU law, which takes precedence over conflicting national measures and may be directly effective (depending on the nature of provisions invoked). The *Conseil d'Etat* mentioned the Charter in 11 cases in 2011, 10 in 2012, 18 in 2013, and 16 in 2014. Between January 2013 and November 2014, the Charter was mentioned in 1264 decisions of administrative courts.²⁸⁵

There have nonetheless been judicial controversies as to the scope of application of the Charter's provisions, and lower administrative courts came up with inconsistent conclusions.²⁸⁶ In 2012, the *Conseil d'Etat* distinguished between the scope of application of the Charter and that of general principles of EU, considering the latter one broader.²⁸⁷ It considered the Charter only applicable to

²⁸¹ Cass, 11 April 2012, *Association de médiation sociale / Union locale des syndicats CGT e.a.*, No 11-21.609.

²⁸² CE ass. 17 February 1995, *Meyet et al.*, No 159308, *Lebon* 79; CE, 3 December 2001, *Syndicat national de l'industrie pharmaceutique*, No. 226514, *Lebon* 624.

²⁸³ e.g. CE, 25 April 2003, *Syndicat national des praticiens hospitaliers anesthésistes réanimateurs (SNPHAR)*, No 240139.

²⁸⁴ It considered it lacked, in the present state of law, the legal effect possessed by a treaty once it has entered the internal legal order and [was] not among the acts of secondary Community law that [could] be invoked before national courts" CE 5 January 2005, *Deprez et Baillard*, No. 257341

²⁸⁵ Jean-Marc Sauve, « La Charte des droits fondamentaux de l'Union européenne : évaluer et répondre aux besoins de formation des juristes et des autorités publiques », Colloque organised by the European Commission, Brussels, 17 December 2014.; text of the intervention available at http://www.conseil-etat.fr/content/download/37733/327534/version/1/file/2014-12-17_La%20Charte%20des%20droits%20fondamentaux%20de%20l%20Union%20européenne.pdf

²⁸⁶ E.g. the Paris Administrative Court considered that a provision of the Foreigners and Asylum Code relating to the expulsion of illegal migrants is a domestic norm which do not fall with the scope of application of the Charter and does not have to comply with Article 41 of the Charter (good administration and in particular, the right to a hearing), even though the provision was adopted in transposition of the Directive 2008/115/EC. CAA Paris, No 12PA04396. A local administrative tribunal sent a preliminary ruling to the CJEU on this point: TA Melun, *Mme Mukarubega*, No. 1301686/12, In its ruling, the CJEU endorsed a restrictive understanding of the scope of Article 41, as only applicable to EU institutions (C-166/13 *Sophie Mukarubega*, [2014] ECR I-2336). For a commentary, see A. Jaureguiberry, "L'influence des droits fondamentaux européens sur le control a posteriori" RFDA (2013), 10.

²⁸⁷ CE, 4 July 2012, *Confédération française pour la promotion sociale des aveugles et des amblyopes*, No 341533.



national acts strictly implementing EU law, whilst general principles applied when a situation was governed by EU law. Based on a recent intervention of the vice-president of the *Conseil d'Etat*, which took stock of the recent case law of the CJEU related to the scope of application of the Charter, one would expect French administrative court to align their position on the CJEU's extensive interpretation, based on its previous case law related general principles.²⁸⁸

The *Cour de Cassation* was called to determine whether the Charter's social rights provisions ("principles") could apply horizontally, in disputes between private parties.²⁸⁹ It applied "principles" provisions of the Charter, notably Articles 27 and 28, in disputes between individuals in the employment field, to condemn employers' practices.²⁹⁰ It also relied on Article 49 of the Charter on the legality of crimes and penalties to quash a lower courts decision which had sanctioned an employer for a violation of employment law which was not qualified as such under EU law.²⁹¹ In the *Association de Mediation Sociale* (AMS) case, which concerned the validity of labor law provisions in the light of social rights, the *Cour de Cassation* sent a request for preliminary ruling to the CJEU, asking about the effect of Article 27 of the Charter on the right to information and consultation of workers, and its implementation in Directive 2002/14/EC.²⁹² It had also sent a QPC to the Conseil Constitutionnel, which declared the provisions conform with the Constitution.²⁹³ In its request to the CJEU, the *Cour de Cassation* asked whether Articles 51 and 52 of the Charter precluded the horizontal effect of the Charter and prevented that certain types of contracts (e.g. apprenticeships) be excluded from the calculation of the employment rates of a company.²⁹⁴

Triggered by lawyers' more frequent reliance of the Charter in their arguments, references to the Charter by ordinary courts are increasing year on year. Like with the ECHR, they tend to concern mostly cases related to foreigners' rights and the right to a fair trial, but also employment, tax, administrative procedure and non-discrimination matters. The substantive impact of the Charter on the domestic protection of rights has however has yet to be systematically assessed; some of the cases described further below may give an indication of its impact, but they should not be assumed to be representative.

²⁸⁸ Sauve, "La Charte des droits fondamentaux de l'Union européenne", op.cit.

²⁸⁹ See A. Siefert, "L'effet horizontal des droits fondamentaux. Quelques reflexions de droit europeen et de droit compare" RTDE (2013), 801.

²⁹⁰ Cass, soc, 17 May 2011, No 10-12.852, and Cass. soc. Decision, 11 April 2011, No 11-21.609 [AMS].

²⁹¹ Cass. crim., 5 June 2012, No 11- 83.319, Bull. Crim., n° 143.

²⁹² Cass. soc., 11 April 2012, No 11-21609.

²⁹³ Decision No. 2011-122 QPC [CGT trade union; calculation of employees numbers]; Cass., 16 February 2011, No 10-40062.

²⁹⁴ The CJEU, when deciding on the reference, declined to confer horizontal effects (between private parties) to Charter's "principles" provisions. C-176/12 *Association de Mediation Sociale* [2014] ECR I-2.



General principles of EU law and the Charter are not the only sources of civil rights in the EU. The Treaty confers important free movement rights and equal treatment upon nationals of the member states and their family members (Article 18 TFEU), as well as long-term resident and refugee third country nationals, which are further implemented by specific EU legislation. There is also an extensive legislative framework prohibiting discrimination in the EU. It is thus important to check how these provisions are taking into account in domestic cases. The second deliverable (D7.2) on enforcement which look into the application and implementation of these EU norms more closely, but we found it useful at this stage to offer a few highlights on the situation on the ground.

In 2010, the CJEU condemned France for carrying out, within 20 kilometres from its Schengen land border, checks on the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to verify whether the legal obligations to hold, carry and produce papers and documents were fulfilled.²⁹⁵ The CJEU found this policy violated the *freedom of movement guaranteed by Article 67(2) TFEU*, since French law did not provide the necessary framework for that power to guarantee that its practical exercise did not have an effect equivalent to border checks. Following the CJEU ruling, the *Cour de Cassation* interpreted the provision as requiring to take account of the concrete behaviour and specific circumstances giving rise to a risk of breach of public order.²⁹⁶ The *Cour de Cassation* also found Article L. 611-1, para. 1 of the Code of entry and of residence of foreigners and of the right to asylum (CESEDA) as being incompatible with Article 67(2) TFEU and Article 21a) of Regulation 562/2006/EC.²⁹⁷

In a case concerning age discrimination, the *Conseil d'État* heard an appeal brought by a music teacher who had a local civil servant status. The case concerned the refusal to grant him an authorisation to work during three more years, above the 65 statutory age limit. Taking into account Directive 2000/78/EC, notably its article 6, and CJEU rulings,²⁹⁸ the *Conseil d'État* considered that the statutory age limit did not constitute *discrimination under the Directive*, because it pursued intergenerational job distribution objectives. It did not refer a question for preliminary ruling to the CJEU.²⁹⁹

In a case where an applicant asked for a review of a jail sentence imposed for interference with a regulated market, whilst he had already been condemned to pecuniary sanctions by the French financial market authority for the same facts, the *Cour de Cassation*, considering the case fell under the scope of

²⁹⁵ CJEU, Joined Cases C-188/10 & C-189/10, *Aziz Melki and Sélim Abdeli*, [2010] ECR I-5667.

²⁹⁶ Cass. ass., 29 June 2010, No 10-40.002; Cass. civ. 1er, 23 February 2011, No 09-70.462; Cass. Civ. 1er., 18 May 2011, No 10-30776. See also Cour de Paris, 23 March 2011, No 11/01406; Favoreu, *op. cit.*, 200.

²⁹⁷ Favoreu, *op. cit.*, pp 200-201.

²⁹⁸ C-411/05, *Palacios de la Villa* [2007] ECR I-8531; C-159/10 and C-160/10, *Fuchs e.a.*, [2011] ECR I-6919.

²⁹⁹ CE, 22 May 2013, M.B. No 351183.



EU law, examined whether the sanctions were contrary to the *nem bis in principle* of Article 40 CFR. It found that the Charter did not prevent the addition of penalties, as it guaranteed the effective, proportionate and deterrent nature of the sanction (Art 14, Directive 2003/6/EC) and as the total amount of fines was not higher than the ceiling of the highest possible penalty.³⁰⁰

In a series of cases concerning the transfer of asylum seekers to Hungary, under *EU asylum legislation (Dublin II convention)*, the *Conseil d'Etat* had to address arguments raised by asylum seekers, based on the N.S case decided earlier by the CJEU,³⁰¹ and the parallel M.S.S. decision by the ECtHR,³⁰² that their rights would not be protected if transferred back to Hungary for determination of their asylum status. In a first case, it issued an order that the asylum seeker did not bring proofs, but only allegations about his detention conditions in Hungary, or as to why he thought its request for asylum would not be properly examined in conformity with asylum rules, and therefore there was no manifest violation of the *right to asylum*.³⁰³ However, in two other orders, it concluded that readmission would constitute a serious violation of the right to asylum.³⁰⁴ It based its decision on information provided regarding the conditions of detention in Hungarian centres, and the risk that their requests would not be examined in respect of procedural guarantees. It also noted the weakness of the argument of the French administration, which only brought forward that Hungary was a EU member state and party to the Convention on Refugees,³⁰⁵ or had not asked from the Hungarian authorities further relevant information.³⁰⁶ Finally, in a last case concerning readmission, it decided that there was no manifest violation of the right to asylum, since Hungary had transposed the 2013/33/EU Directive establishing norms for receiving asylum seekers, and the French minister had requested from the Hungarian authorities that they treat the application as required under Dublin II Regulation.³⁰⁷

In a case related to asylum seekers, and which concerned, this time, the *right to a hearing* in the context of a return decision under the *Returns Directive* (Directive 2009/115/EC), the CJEU endorsed French administrative proceedings. A third country national, having been denied asylum in France, had been placed in administrative detention pending removal. She complained she had not been able to present

³⁰⁰ Cass. crim., 22 January 2014, No. 12-83579.

³⁰¹ C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others* [2011] ECR I-865.

³⁰² *MSS v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011.

³⁰³ CE, 3 March 2013, No. 366340.

³⁰⁴ CE, 29 August 2013, No. 371572, and CE, 16 October 2013, No. 372677.

³⁰⁵ CE, 29 August 2013, No. 371572.

³⁰⁶ CE, 16 October 2013, No. 372677.

³⁰⁷ CE, 6 November 2013, No. 373094.



specific observations before the adoption of the return decision. The Melun Administrative Tribunal decided to stay proceedings and refer questions to the CJEU. It asked whether the right to be heard in all proceedings, enshrined in Article 41 of the Charter required, where the administrative authority intends to issue a return decision in respect of an illegally staying foreign national, that the interested party be able to present observations specifically on the return decision. The CJEU referred to Articles 41 (good administration), 47 (effective remedy) and 48 (rights of the defence of the Charter) and held that the right to a hearing was an integral part of a general Union principle of the respect of rights of the defence, which the Member states must respect when adopting measures which fall the scope of application of Union law. The Court however found that it had not been violated, since the applicant had been heard twice before her refugee status had been refused and a return decision was made, that her submissions had been effectively presented and she had had the opportunity to be heard throughout the procedure.³⁰⁸

✓ *How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.*

The question of the relationship between the national fundamental rights frameworks, the ECHR and the Charter is a complex one which requires a detailed and nuanced assessment. We can however identify a few interesting aspects of these interactions.

As noted before, administrative and judicial courts have not always been clear and consistent as to which situations the Charter is applicable; however, as noted before, steering coming from the leadership of the *Conseil d'Etat*, which reviewed recent CJEU ruling, should lead to a more consistent approach. Increasingly, French courts have displayed a readiness to apply the Charter in situations which concerns the application of EU regulation or the implementation of EU Directive.

Where national regulatory measures transposing EU Directives are not literal copies of the EU instrument and make use of discretionary powers allowed by the Directive, the *Conseil d'Etat* would control the use of discretion by governmental or regulatory authorities to make sure that not only EU norms, including the Charter, but also constitutional norms and ECHR, are respected.³⁰⁹

³⁰⁸ CASE C-166/13 *SOPHIE MUKARUBEGA V PREFET DE POLICE, PREFET DE LA SEINE-SAINT-DENIS* [2014] ECR I-2336.

³⁰⁹ CE, sect., 10 April 2008, Conseil National des Barreaux. No 296845.



As exposed earlier, however, the *Conseil constitutionnel* has used (some would say ‘manipulated’)³¹⁰ references to the ECHR and the ECtHR case law to limit pre-emptively the scope of some of the Charter provisions notably on freedom of religion and the rights of the defence.

The ECtHR, in a recent case concerning France, released an important decision as to the articulation and sequencing of remedies before the CJEU and the ECtHR. The case dealt with the confidentiality of lawyer-client relationship and the compatibility of French rules implementing a Directive with the right to private life protected under Article 8 ECHR. In this case, the ECtHR decided not to apply its presumption of equivalent protection (the so-called “Bosphorus principle”) because the *Conseil d’Etat* had failed to refer questions regarding the interpretation and validity of the Directive to the CJEU, which thus had not been given the opportunity to check French implementation measures or the Directive itself against fundamental rights protected at EU level by the Charter.³¹¹

✓ *Conflicts of rights*

Conflicts between rights recognised in the same or different sources, as well as between rights and public interests objectives, and their legislative or judicial resolution, have already been exposed throughout this report. Whilst there is little need to repeat such presentation here, it is nonetheless important to expose briefly the framework in which these conflicts occur and are addressed, as well as relevant judicial conflict resolution techniques.

In case of conflicts between rights protected under ECHR and EU law and constitutional rights, the latter should formally prevail, in line with the principle of constitutional supremacy. However, in most cases, courts would attempt, where possible, to reconcile these provisions and interpret constitutional rights in light of ECHR or EU law.

In case of conflicts between rights based on the ECHR or EU law, and other receiving legislative recognition, those contained in European instruments will prevail and national courts will set aside conflicting legislative norms. They cannot, however, remove the legislative act from the national legal order, or asked the *Conseil constitutionnel* to invalidate them for incompatibility with the ECHR or EU law, unless they can invoke, and rely on, an « equivalent » constitutional norms. In situations where national legislative provisions recognize rights which are alleged as incompatible with constitutionally protected rights, since 2010, French supreme courts can call upon the *Conseil Constitutionnel* to invalidate them through the QPC. Before that, national courts could only try to interpret and apply these legislative measures in conformity with constitutionally protected rights, where possible. French courts, including the *Conseil Constitutionnel*, will also interpret rights in the light of ECHR and EU law, including

³¹⁰ Joël Andriantsimbazovina, “La prise en compte de la Convention européenne des droits de l’homme par le Conseil constitutionnel, continuité ou évolution ?” Les Nouveaux Cahiers Constitutionnel No 18 (2005).

³¹¹ *Michaud v. France* Application No. 12323/11, judgment of 6 December 2012.



increasingly the EU Charter, in order to avoid incoherence and inconsistencies (e.g. on freedom of religion and secularism). Where conflicts occur, as it happened in relation to the rights of the defence, French courts would normally adjust their case law to the decisions of the ECtHR.

There is no hierarchy of rights within the French *bloc de constitutionnalité*. Most civil rights are not absolute, and can be limited through legislative measures in order to protect others' rights or constitutional objectives such as the safeguarding of the public interest, public order, or the continuity of public service, although there is no general provision to that effect.

Courts, including the *Conseil Constitutionnel*, use various techniques in order to conciliate between different rights or interests (e.g. freedom of religion, freedom of conscience and *laïcité*; right to family life and non-discrimination; freedom of expression and human dignity; freedom to create and right to privacy; general freedom and right to safety and security, right to work v human dignity, right to housing v property rights, etc.). In order to define the scope of protection of a civil rights and its relationship with conflicting ones, they do not follow a strict proportionality test. Sometimes they apply elements of adequation, necessity, or strict proportionality testing; at other times, they control that the substance of a right is protected, or that the legislation provides sufficient legal guarantees to protect constitutional requirements.

QUESTION 5 : JURISDICTIONAL ISSUES

✓ *Personal*

- *Who* is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?

The Preamble of the 1958 Constitution refers to the “French people”, made up of “all French citizens regardless of origin, race or religion”.³¹² The 1958 Constitution distinguishes the French people from the overseas people, whose right to self-determination is recognised.³¹³ As a result of the constitutional amendment of 28 March 2003, the “overseas people” are recognised as “the overseas populations within the French people in a common ideal of liberty, equality and fraternity”.³¹⁴ From the point of view of civil rights other than the right to self-determination, there is no difference between the status of the “overseas people” and that of other persons constituting the “French people”. Some authors argue that the unitary concept of citizen in the French constitutional tradition fails to reflect the status

³¹² Decision no. 91-290 DC 9 May 1991, para. 13.

³¹³ Decision no. 91-290 DC, 9 May 1991, para. 12.

³¹⁴ Article 72-3 (1) of the Constitution ; Decision no. 2000-428 DC, 4 May 2000, para. 6.



of various categories of people, and call for more detailed analyses of the ‘peoples’, their rights and duties, in French constitutional law, so as to contribute to the renewal of citizenship.³¹⁵

As a main rule, Article 3 of the 1958 Constitution provides that “[a]ll French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute”. As in all countries, the core of political rights such as the active and passive right to vote is dependent on citizenship. However, many of the civil rights are conferred upon “any person”, without regard to citizenship, such as the right to petition of victims of a serious crime committed by a member of the Government;³¹⁶ the right of referral to the Defender of Rights;³¹⁷ the right to have access to any information pertaining to the environment;³¹⁸ etc.

Under French law, individuals may lose their French citizenship, and as such, lose all associated rights. It applies to those who had acquired French citizenship through naturalization. According to Article 15 of the Civil Code, persons who have been naturalized French may be deprived of French nationality for the following reasons: 1) if they have been condemned for a crime or an offence which threatens the fundamental interests of the nation; 2) if convicted for a crime or an offence under Chapter 2, Title III, Book IV of the Penal Code (activities against public administration by persons exercising a public function); 3) if convicted for refusing to respect obligations under the National Service Code; 4) if they have acted for the benefit of a foreign state in a way which is incompatible with their French nationality and against in the interests of France; 5) if they have been convicted, in France or abroad, for a crime subject to a jail period of at least five years.

In 1944, following the end of the WWII, a new criminal offense was created with retroactive effect entitled *indignité nationale*.³¹⁹ Those guilty of it would be sanctioned by a *dégradation nationale*. It was aimed at sanctioning those who had closely collaborated with the German occupant, for example by participating in the Vichy Cabinet; holding executive posts in the Vichy propaganda or the Commissariat for Jewish Affairs; actively participating in pro-collaboration demonstrations; or being a member of pro-collaboration organizations. Those found guilty of *indignité nationale*, more than 50 000 persons from 1944 until 1951, would be deprived for a period going from five years to a lifetime, of the following rights: right to vote and be elected, right to work as a public servant, right to engage in trade union, education, banking or media activities, the right to hold a managerial position in semi-public enterprises, or to act as a lawyer, the right to hold firearms. Moreover, the courts could order the confiscation of

³¹⁵ S. Boyron, *The Constitution of France – A contextual Analysis* (Hart Publishing, 2013), 205.

³¹⁶ Art. 68-2 of the Constitution.

³¹⁷ *Ibid.*, Art. 71-1.

³¹⁸ *Ibid.*, Art. 7.

³¹⁹ Government order of 26 December 1944.



their property, and prohibition to move or reside in certain departments, and deprive them from pension rights. *indignité nationale* was removed from the range of criminal offences in 1951,³²⁰ and those who had been convicted were acquitted through amnesty in 1954.³²¹ However, following the terrorist attacks in January 2015 in Paris, the government is considering re-introducing this offence.

Certain rights are guaranteed, by definition, only to foreigners such as the right to asylum. Moreover, since 1993, “foreigners having a stable and regular residence in France have the right to conduct a normal family life”.³²² [T]his right includes, notably, the possibility for foreigners be joined by their spouse and minor children. The legislator must respect this right and reconcile it with other constitutional requirements, such as the safeguard of public order or public health objectives”.³²³ The *Conseil constitutionnel* held that the condition of a previous and regular residence in France for two years is an admissible criterion for family reunification, provided that the request is submitted before the expiration of the delay.³²⁴ Foreigners without a legal right to stay, and people who do not have documentation (*Sans-Papiers*) can exercise some civil rights (such as the right to marriage or to contract a civil partnership, the right to education, the right to legal aid, etc). The freedom to leave the territory of France, a sub-right of the freedom of movement, is guaranteed to all persons residing in France.³²⁵

The ECHR norms apply to natural and legal persons, as well as groups of persons, who fall within the jurisdiction of a state party, provided they qualify as victims (Article 34 ECHR); as for the Charter, some of its rights are conferred on all, whilst other (notably those listed in the citizenship section) are reserved to nationals of the member states. EU Treaty law as well as EU secondary legislation also confer different sets of civil rights to different categories of persons with nationals of the member states, long term residents, refugees and their families benefitting from the most extensive range of rights.³²⁶

✓ *Territorial*

- What is the territorial scope of the protection of civil rights afforded by your member states? Are there *territorial* limitations to such protection? Which?

³²⁰ Law No 51-18 du 5 January 1951 relating to the amnesty, setting up a regime of anticipated liberation, and sanctioning anti-national activities.

³²¹ For an overview, see Anne Simonin, *Le Déshonneur dans la République, une histoire de l'indignité 1791-1958* (Grasset, 2008).

³²² Decision no. 93-32513 August 1993, para. 70.

³²³ *Ibid*, para. 70.

³²⁴ *Ibid*., para. 71.

³²⁵ Decision no. 97-389, 22 April 1997 para. 10.

³²⁶ For further details, see general report.



The Constitution of 1958 provides that “[i]n the overseas departments and regions, statutes and regulations shall be automatically applicable”, but “may be adapted in the light of the specific characteristics and constraints of such communities.”³²⁷ This adaptation may however not concern “nationality, civic rights, and the guarantees of civil liberties”,³²⁸ thus guaranteeing the uniform application of fundamental freedoms throughout the national territory.³²⁹

Beyond the above provisions related to overseas territories, French constitutional law does not determine its application to extra-territorial situations. However, since the ICCPR, as well as the ECHR,³³⁰ have been interpreted by their respective control organs as applying to extraterritorial activities of state actors, to troupes posted abroad, activities on the high sea, or torture centres in foreign countries, for example, it also brings up the question of the applicability of constitutional norms, and the EU Charter of Fundamental Rights to the activities of state actors outside of the national, and even EU, territory.

✓ *Material*

- Are rights protected differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)?

Certain acts of public authorities remain unchallengeable. For example, the *Conseil constitutionnel* can control the constitutionality of ordinary laws, as well as organic laws, budget laws, regulatory laws, social security financing laws, laws ratifying international agreements, authorization laws and ordinances; however, it cannot review constitutional laws (unless the ‘republican form of the government’ is at stake)³³¹ or referendums law.³³² Moreover, until the introduction of the QPC in 2010, the *Conseil constitutionnel* could not review already adopted laws, although it, at times, controlled them by checking amending laws.³³³ This lacuna is now filled, and all legislative measures can potentially be scrutinised by the *Conseil constitutionnel*, through the QPC, provided they pass the supreme courts’ filter.

³²⁷ 1958 Constitution, Art. 73(1).

³²⁸ Ibid., Art. 73(4).

³²⁹ Gilles Armand and Maud Fouquet-Armand, “L’uniformité territoriale dans la jouissance et l’exercice des droits de libertés fondamentaux en France”, Cahiers de la recherche sur les droits fondamentaux (University of Caen), 2003, no. 2, available at : <https://www.unicaen.fr/puc/images/crdf0201armand.pdf> (last visited 2 February 2014), 26.

³³⁰ See cases listed in the ECHR factsheet on the extraterritorial jurisdiction of state party to the ECHR. http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf.

³³¹ Decision No 2003-469 DC, 26 March 2003 [Decentralized Organization],

³³² Decision No 62-20 DC, 6 November 1962 [President of the Republic Election].

³³³ E.g. Decision No 85-187 DC, 25 January 1985 [Emergency State in New Caledonia Law].



Moreover, certain government or administrative measures, such as *actes de gouvernement* (“government acts”)³³⁴ or *mesures d’ordre interieur* (“internal measures”) are not subject to judicial control. *Actes de government* are measures related to the relationship between constitutional powers³³⁵ or external relation measures.³³⁶ However, under the influence of the ECHR, the scope of these immune acts is shrinking. The *Conseil d’Etat* is making an increased use of the technique of *actes détachables du gouvernement* in order to subject such measures to review.³³⁷ It will, for example, control extradition decisions.³³⁸

✓ *Temporal*

- What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?

Generally speaking, the identified civil rights are enjoyed by persons from the moment of the creation of the relevant legal relation, i.e. entry into the territory of France, the establishment of the residence in France, or acquisition of citizenship, for foreigners.³³⁹ Most of them cease to be guaranteed after the

³³⁴ For a detailed review of the case law, see *Les grands arrêts de la jurisprudence administrative* (GAJA) under the commentary on CE 19 February 1875, *Prince Napoleon* [acte de government]. Available online at http://fiches.dalloz-etudiant.fr/fileadmin/contenu_fiches/Public/Acte_adm_unilateral_definition/GAJA_2009_16_Napoleon_19_fevr_1875.pdf

³³⁵ Such as the action or refusal to propose a bill to parliament (CE, sect., 18 July 1930, *Rouché, Lebon* 771; CE ass., 19 January 1934, *Compagnie marseillaise de navigation à vapeur Fraissinet, Lebon* 98); the refusal by the President to promulgate a law (CE, 29 November 1968, *Tallagrand, Lebon* 607); the decision to promulgate a law (CE sect., 3 November 1933, *Desreumeaux Lebon* 993); the refusal to make a proposal for a constitutional amendment (CE, 26 February 1992, *Allain, Lebon* 659); the decision to submit a bill to referendum (CE ass., 19 October 1962, *Brocas, Lebon* 553, but the *Conseil Constitutionnel* admitted its competence to control it, Decision 2000/2 REF, 25 July 2000, Hauchemaille); the decision to dissolve the national assembly (CE, 20 février 1989, *Allain*); the refusal to defer a law to the *Conseil Constitutionnel*, CE ord., 7 November 2001, *Tabaka, Lebon* 789, etc

³³⁶ Such as the protection of French persons and goods abroad (CE, 2 mars 1966, *Dame Cramencel, Lebon* 157); the refusal to submit a dispute to the International Court of Justice (CE, 9 June 1952, *Gény, Lebon* 19); the order to disrupt a foreign radio broadcasting (TC, 2 February 1950, *Radiodiffusion française, Lebon* 652); the creation of a safety zone in international waters during nuclear tests (CE, Ass., 11 July 1975, *Paris de Bollardière, Lebon* 423); the decision to restart nuclear testing before the conclusions of an international agreement prohibiting such testing (CE, ass., 29 September 1995, *Association Greenpeace France, RFDA* 1996.833), the decision to send troops in former Yugoslavia (CE, 5 July 2000, *Mégret et Mekhantar, Lebon* 291), the decision not to publish a treaty (CE, 4 November 1970, *de Malglaive, Lebon* 635); the vote of a French minister in the Council of the EU (CE, Ass., 23 November 1984, *Association “Les Verts” Lebon* 383); the decision to suspend the implementation of a treaty (CE, Ass., 18 December 1992, *Préfet de la Gironde c. Mahmedi, Lebon* 446); the decision of the President to authorize English and US plan to fly over France to attack Irak (CE, 10 April 2003, *Comité contre la guerre en Irak, Lebon* 707); the proposal of a candidate for the position of judge at the International Criminal Court (CE, Sect., 28 March 2014, *Groupe français de la Cour permanente d’arbitrage*).

³³⁷ CE, 5 February 1926, *Dame Caraco, Lebon* 125; CE sect., 22 December 1978, *Vo Thanh Nghia, Lebon* 523.

³³⁸ CE ass., 28 May 1937, *Decerf, Lebon* 534; CE ass., 15 October 1993, *Royaume-Uni de Grande-Bretagne et d’Irlande du Nord et gouverneur de la colonie royale de Hong Kong, Lebon* 267.

³³⁹ Article 22 of the Civil code: “A person who has acquired French nationality enjoys all the rights and is bound to all the duties attached to the status of French, from the day of that acquisition.”



end of human life, although the right to human dignity is also guaranteed for the human body of the deceased,³⁴⁰ or, for those reserved to citizens, when they loose or renounce their French citizenship.

Furthermore, as already noted, individuals may be temporarily deprived of some of their civil rights, as a consequence of a criminal sanction, or as a result of criminal or administrative sanctions or measures. The so-called *interdiction des droits civiques, civils et de famille* can be imposed, since 1994, on a temporary basis (before, it could be permanent). According to Article 136-26 of the Criminal Code, it includes a prohibition for a maximum of five years in the case of offences or ten years in the case of crimes, to exercise (some of) the following rights: the right to vote and be elected, the right to act as a judge or jury, or as an expert before the court, the right to represent or assist a party in court, the right to testify before a court, the right to act as a guardian (except of one's own children, following a judicial decision). Recent anti-terrorist legislation, presented above, also allows for temporary restriction on the freedom of movement, by introducing an administrative prohibition to leave the territory for French citizens suspected of planning to leave the country to participate in terrorist activities.³⁴¹

The Constitution and legislative measures also allow for temporary “restrictions” on the regular exercise of civil rights in crisis situations (the so-called *légalité de crise*). First, Article 36 concerning *l'état de siège* in situation of imminent threats, allows the transfer of powers to military authorities (including military courts). It has not been used in recent times. Second, Article 16 of the Constitution allows, in situations in which French institutions or France territorial integrity are under threat, or public functions are severely disrupted, for the conferral of exceptional powers to the President to act alone (although under constitutional supervision). It has been applied once in 1961 following the Algiers coup. Third, *the Conseil d'Etat* has elaborated a doctrine of exceptional circumstances, which justifies restrictions to freedom of movement, or administrative due process rules. Finally, a 1955 law related to the state of emergency (*état d'urgence*) allows state authorities to restrict fundamental freedoms (such as freedom of movement). Adopted during the Algerian crisis, it was used more recently in 2005 following riots in French suburbs (but not after the Charlie Hebdo attacks in January 2015).

- ✓ Please offer details as to how different rights are afforded to different *categories of persons in different location and policy contexts over time?*

See above.

³⁴⁰ Article 16-1-1 of the Civil code; Cass. civ. 1er, 16 September 2010, No 09-67.456.

³⁴¹ Legislative act No 2014-1353 du 13 November 2014 reinforcing provisions relating to the fight against terrorism, JORF No 0263 du 14 November 2014 page 19162.



QUESTION 6: ACTORS

- ✓ *What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.*

The elaboration and definition of civil rights, after having been mostly based on general principles elaborated by the *Conseil d'Etat* and legislative instruments, is increasingly determined by the case law of the *Conseil constitutionnel*, under the combined influence of the ECHR and EU law. Until 2010, the parliamentary opposition played an important role in referring bills for constitutional review, relaying the arguments and concerns of public or private interests groups. Since the introduction of the QPC, ordinary courts and the “filtering” supreme courts, and those who argue before them, are expected to play a stronger role in such framing processes.

In addition to courts and the legislature, a number of important *independent administrative authorities* play a role in the setting as well as the application of civil rights standards. First of all, since 1947, the *Commission nationale consultative des droits de l'homme* (CNCDH), the national consultative committee for human rights, ensures that France complies with its international human rights obligations, advises the governments and parliament on the compatibility of laws and regulations with human rights and fundamental freedoms, and performs educational and awareness raising functions. Second, the *Défenseur des Droits* (Rights Defender), established by a recent constitutional amendment, takes over the previously separated functions of the Ombudsman (*Médiateur de la Republic*), the Children's Ombudsman, the High Authority to Combat Discrimination and Promote Equality (HALDE) and the National Security Ethics Committee (CNDS). Besides dealing with individual complaints, he/she makes proposals for legal or regulatory amendments and recommendations to both public and private authorities. He/she also conducts and coordinates studies and research.³⁴² Third, the *Commission Nationale Informatique et Libertés* (CNIL) ensures that information technology does not undermine the fundamental rights and freedoms of individuals (in particular the right to privacy). In addition to information and awareness-raising activities, it has advisory functions and can also impose administrative sanctions. Further, the *Conseil supérieur de l'audiovisuel* (CSA), which regulates broadcasting communication in France, monitors program to check that fundamental principles, in particular human dignity, freedom of expression and pluralism of opinion, diversity and non-discrimination, accessibility by hearing or visually impaired persons, or the protection of consumers, are respected, thereby contributing to their elaboration. The *Contrôleur général des lieux de privation de*

³⁴² Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Fifth periodic report, France, UN Doc. CCPR/C/FRA/5 (31 January 2013), paras. 11-13.



liberté (CGLPL), the general prison controller, guarantee that the fundamental rights of prisoners are respected. It carries out inspections and writes report. The *Commission nationale de contrôles des interceptions de sécurité* (CNCIS) controls that interception of telephone communications respect the right to private life. The *Commission d'accès aux documents administratifs* (CADA) seeks to facilitate and control individuals' access to administrative documents. It decides on individual cases, and has released a guide to help civil servants determine when and how to give access to requested documents. Recently, a new controversial authority was created for the protection of copyright on the Internet called the *Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet* (HADOPI).

A number of NGOs are also active in the field of human rights protection. The oldest and best known is the *Ligue française pour la défense des droits de l'homme et du citoyen*, referred to as the *Ligue des Droits de l'Homme* (LDH), set up in 1898. It monitors the respect of international and European human rights norms in France. A funding member of the International Federation of Human Rights Organizations (FIDH), it is also active in bringing or supporting legal actions before both administrative and judicial courts, thereby contributing to the judicial elaboration of civil rights. Alongside the LDH, one finds the national branches of international human rights organization, such as Amnesty International-France, or Human Rights Watch – France, but there is also great range of “associations” which seek to promote and defend specific human rights, or the rights of particular groups. For example, a number of organizations are active in the field foreigners rights, such as the *Groupe d'information et de soutien des immigrés* (GISTI), *Avocats pour la Défense des Droits des Etrangers* (ADDE), *Federation des Associations de Solidarité avec Tou-te-s les Immigré-e-s* (FASTI), *the Comité médical pour les exiles* (COMEDE), etc.

QUESTION 7 : CONFLICTS BETWEEN RIGHTS

- ✓ *How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?*
- ✓ *Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?*
Please give examples, and illustrate how these conflicts are dealt with and resolved.

Many conflicts and clashes between rights, or between rights and public interests objectives, have already been exposed. In this section, we present a further few notorious examples of such clashes and how they have been resolved. They concern clashes between freedom of conscience , freedom of religion and other civil rights interests



In 1975, the *Conseil constitutionnel* did not find unconstitutional the Act on voluntary interruption of pregnancy and stressed the act's declared respect for the human being from the beginning of the life.³⁴³ In a 2001 decision about the constitutionality of the Act on the voluntary interruption of pregnancy and on contraception, the *Conseil constitutionnel* took account the intention of the legislator and balanced between the freedom of conscience of the medical staff and the freedom of the pregnant woman to decide on the abortion.³⁴⁴ It held that staff refusing to carry out abortion could not be sanctioned for it and that the head of a public health institution cannot oppose the execution of voluntary abortions in his or her institution, but has the right to refuse to execute himself or herself the operation.

As exposed earlier, the *Conseil d'Etat* held that civil servant in the public (State-run) education sector, who expresses his or her religious belief by wearing a religious sign, violates his or her duty of reserve (whereas the same does not hold for professors in higher education institutions).³⁴⁵ This position was confirmed by the *Conseil constitutionnel*, notwithstanding the freedom of conscience of teachers in public schools.³⁴⁶ Legislation also played a strong role in reconciling these rights. For example, the *Debré* Act on relations between the State and private educational institutions obliges teachers of private educational institutions to respect a duty of reserve while expressing their own opinions and beliefs.³⁴⁷ The *Cour de Cassation* held that this obligation could even justify the dismissal of a divorced and re-married teacher by the direction of a religious private educational institution.³⁴⁸

However, in a recent case which attracted a lot of media attention, the *Chambre Sociale* of the *Cour de Cassation* first overturned an appeal court decision which had confirmed the dismissal, for serious misconduct, of an employee of a private crèche, who had refused to take off her Islamic veil.³⁴⁹ However, in a later decision in plenary, the *Cour de Cassation* reversed its conclusions, and confirmed the dismissal, considering, without further elaboration, that the restriction of the freedom of religion imposed by the internal regulation "was not general, but sufficiently précised" and "justified by he

³⁴³ Decision No 74-54 DC, 15 January 1975, [abortion], para. 9.

³⁴⁴ Decision No 2001-446 DC, 27 June 2001, [abortion and contraception] para. 5; *ibid.*, para. 14.

³⁴⁵ CE 3 May 2000, *Demoiselle Marteaux*, No 217017.

³⁴⁶ Decision No 84-185 DC, 18 January 1985 [relationship between the State and local authorities; decentralization].

³⁴⁷ Law No 59-1557 of 31 December 1959 on the relation between the State and private school, JORF du 3 January 1960 p. 66.

³⁴⁸ Cass. ass. 19 May 1978, *Association Sainte-Marthe*, No 76-41.211.

³⁴⁹ Cass. soc., 19 March 2013, No 536 .



nature of the tasks carried out by the employee of the [crèche] and proportionate to the objective sought”.³⁵⁰

As for the pupils’ freedom of religion, the *Conseil d’Etat* has held that the wearing of religious signs or clothes was not incompatible with the principle of *laïcité* where it did not constitute an act of pressure, provocation, proselytism or propaganda.³⁵¹ The flexibility of the legal framework led to disagreements between teachers, school leadership, parents and pupils, which ended up in courts, with inconsistent outcomes. The legislator thus clarified the framework in favour of a restriction of the exercise of one’s right to manifest one’s religion. Article 1 of the Act of 17 March 2004, adopted by a large political consensus, provides that “[t]he wearing of symbols or articles of clothing by which students ostensibly display religious affiliations is forbidden in public schools through high school”. Violations led to disciplinary procedure, to be preceded by a dialogue with the pupil. As noted before, this legislative position has been criticised by the Human Rights Committee.

³⁵⁰ Cass, ass. 25 June 2014, No 612, 13-28.369. For a contrasted assessment, see Nicolas Hervieu, “Entretien croisé des Professeurs Gwénaële Calvès et Emmanuel Dockès sur le retentissant arrêt Baby Loup”, *La Revue des droits de l’homme - Actualités Droits-Libertés* [01 July 2014],. URL : <http://revdh.revues.org/848> .

³⁵¹ CE 27 November 1989, No 346893; CE 2 November 1992, *Kherouaa*.



Annex 1

Right	Domestic Source – constitutional level	Domestic source – infra-constitutional level	Qualification
The right to human dignity	1946 Preamble, para. 1 of the	Civil code Art. 16	Fundamental principle guaranteed by the Constitution;
Equality + non-discrimination	Declaration of the Rights of Man and of the Citizen of 1789, Art. 1 and 6; 1946 Preamble, para. 11958 Constitution, Art. 1		Constitutional principle.
Personal liberty	1789 Declaration, Arts. 1, 2 and 4; 1958 Constitution, Art. 66.		Derived freedom.
Rights of the defence	1946 Preamble, para. 1; 1789 Declaration Arts. 8 and 9, .	General principle of administrative law	Fundamental principle recognized by the laws of the Republic.; derived freedom.
Freedom of movement	1789 Declaration, Art. 12; 1958 Constitution, Art. 66.	Criminal Code, Art. 78-1 identity control);	Constitutional right.
Freedom to marry	Declaration of the Rights of Man and of the Citizen of 1789, Art. 2 and 4		Derived freedom.
Right to private life	1789 Declaration, Art. 2.	Civil code, Art. 9; Criminal code;, Arts. 226-1, 226-15, 432-9	Derived freedom . Subcategories: the right to protection of personal data; the inviolability of domicile; the inviolability of correspondence.
Freedom of association	1946 Preamble, para.1		Fundamental principles recognized by the laws of the Republic.
Freedom of education	1946 Preamble, para. 1..		Fundamental principle recognized by the laws of the Republic.



Freedom of conscience and of opinion	1946 Preamble, para 1; 1789 Declaration, Art. 10; 1958 Constitution, Art. 1;		Fundamental principle recognized by the laws of the Republic” Derived freedom.
Freedom of expression and of communication	1789 Declaration, Art. 11;	Act of 1 August 2000 on the freedom of communication	Derived freedom. Media pluralism as objectives of constitutional value;; the freedom of press = “ essential guarantees of the respect of other rights and of national sovereignty.
Right to property	1789 Declaration, Art. 2;		Derived freedom.
The right to asylum	1946 Preamble, 1946 Constitution, Para. 4; 1958 Constitution, Art. 53(1)		
The right to family life	1946 Preamble, Para. 10		



Annex 2

Instrument	Adoption	Ratification by France
		Abbreviations : n.s., n.r. – not signed, not ratified signed, n.r. – signed, not ratified
UN instruments:		
International Convention on the Elimination of All Forms of Racial Discrimination	New York, 7 March 1966	28 July 1971
International Covenant on Civil and Political Rights	New York, 16 December 1966	4 November 1980
Optional Protocol to the International Covenant on Civil and Political Rights	New York, 16 December 1966	17 February 1984
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	New York, 15 December 1989	2 October 2007
Convention on the Elimination of All Forms of Discrimination against Women	New York, 18 December 1979	14 December 1983
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	New York, 10 December 1984	18 February 1986
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	New York, 18 December 2002	11 November 2008
International Covenant on Economic, Social and Cultural Rights	New York, 16 December 1966	4 November 1980
Optional Protocol to the International Covenant on Economic, Social and Cultural	New York, 10 December 2008	11 December 2012



Rights		
Convention on the Rights of the Child	New York, 20 November 1989	7 August 1990
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	New York, 25 May 2000	5 February 2003
Optional Protocol to the Convention on the Rights of the Child on a communications procedure	New York, 19 December 2011	- n.s., n.r.
Convention on the Rights of Persons with Disabilities	New York, 13 December 2006	18 February 2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities	New York, 13 December 2006	18 February 2010
International Convention for the Protection of All Persons from Enforced Disappearance	New York, 20 December 2006	23 September 2008
Council of Europe instruments :		
Convention for the Protection of Human Rights and Fundamental Freedoms	Rome, 4 November 1950	3 May 1974
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	Paris, 20 March 1952	3 May 1974
Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions	Strasbourg, 6 May 1963	2 October 1981
Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention	Strasbourg, 6 May 1963	3 May 1974



Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto	Strasbourg, 16 September 1963	3 May 1974
Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention	Strasbourg, 20 January 1966	3 May 1974
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty	Strasbourg, 28 April 1983	17 February 1986
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg, 22 November 1984	17 February 1986
Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms	Vienna, 19 March 1985	9 February 1989
Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms	Rome, 6 November 1990	- Signed, n.r.
Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg, 25 March 1992	- Signed, n.r.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby	Strasbourg, 11 May 1994	3 April 1996
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental	Rome, 4 November 2000	-



Freedoms		n.s., n.r.
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances	Vilnius, 3 May 2002	10 October 2007
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention	Strasbourg, 13 May 2004	7 June 2006
Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg, 24 June 2013	- signed, n.r.
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg, 2 October 2013	- signed, n.r.
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Strasbourg, 26 November 1987	9 January 1989
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Strasbourg, 4 November 1993	19 August 1998
Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Strasbourg, 4 November 1993	14 August 1998
European Charter for Regional or Minority Languages	Strasbourg, 5 November 1992	- signed, n.r.
Framework Convention for the Protection of National Minorities	Strasbourg, 1 February 1995	- n.s., n.r.
Council of Europe Convention on Action against Trafficking in	Warsaw, 16 May 2005	9 January 2008



Human Beings		
European Union instruments:		
Charter of Fundamental Rights of the European Union	Charter proclaimed on 7 December 2000, and replaced as a binding instrument from the date of entry into force of the Treaty of Lisbon, 1 December 2009	14 February 2008



HUNGARY

*Answers to Questionnaire – Hungary*¹

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QUESTION 1 : IDENTIFICATION OF CIVIL RIGHTS

- ✓ **Which rights are considered in your country as civil, civic and citizenship rights?**

A textbook on human rights in Hungary classifies first generation rights into personal and political freedoms (freedom rights, as in *Freiheitsrechte* in German), procedural rights, political participatory rights, and equality rights, and uses personal and civil interchangeably. Personal (civil) freedoms in this categorization include right to life, prohibition of cruel and inhuman treatment, right to the secrecy of correspondence, the inviolability of home, and, in traditional understanding, the right to property as securing the material basis of personal autonomy.² Political freedoms include freedom of expression of opinion, press, assembly, and association.³

Therefore, what is considered civil rights for the purposes of this report, include both personal and political freedoms in the Hungarian understanding. Apart from this conceptual difference, and more importantly, Hungarian fundamental rights law is organized along the line of a logic centred on human dignity. On the one hand, this central right is inviolable (together with the right to life), meaning that any interference automatically amounts to a violation. Furthermore, it is considered the mother right of many other, often unnamed rights, which are however not inviolable (they can be restricted according to the general test on rights restriction). Such derived rights include the right to self-determination (e.g. of the woman in case of abortion, or the informational self-determination related to personal data, etc.).

On this basis, a Hungarian lawyer would understand the coverage of this WP to include all rights except for (i) procedural rights, (ii) political rights in the narrow sense, i.e. participatory rights like right to vote

¹ The research for the report was carried out by Orsolya Salat, who also wrote this report, under the advice, guidance and supervision of Marie-Pierre Granger. Any remaining errors are ours. The views expressed in the reports are those of the authors, and do not necessarily represent the view of their institution.

² Gábor Halmai & Gábor Attila Tóth, I. Alapvetés in Gábor Halmai & Gábor Attila Tóth eds., *Emberi Jogok [Human Rights]*, Osiris, 2003, Budapest 82.

³ Id.



and referendum, (iv) social and economic rights (except for property), and (v) third generation rights. The list will thus include human dignity, right to life, prohibition of torture, slavery, servitude, degrading and inhuman treatment and punishment, right to liberty and security of the person, right to bodily integrity, equality rights, communicative freedoms of opinion, press, assembly, petition, and association, freedom of art, science and teaching, freedom of conscience and religion, right to private and family life.

Citizens' rights in the post-1989 usage are understood to cover political participatory rights (right to vote and participate in referendums) only. Earlier, the socialist state proclaimed some rights under the name citizens' rights, but these were never guaranteed in practice, so the name has a negative connotation and is thus used in only the narrow sense.

✓ **Amongst those rights, which are considered 'core'?**

Human dignity is a subsidiary mother right of all other rights, especially the general personality right which is a fallback for rights developed in interpretation, and otherwise builds the "essential content" of any right. That is why the essential content of any right is inviolable, just as human dignity is.

Although afforded less weight, the second most important right is freedom of expression of opinion, which is considered the mother right of all communicative freedoms, including press, assembly, freedom of information and association, and in one interpretation, even freedom of religion. All of these are "core rights," as they are closely connected to either human dignity (freedom of opinion and freedom of religion especially), and/or because they are indispensable for maintaining democracy.

However, the "core" terminology is not very useful here: certainly the right to private and family life protects the core values of personality, just the right to liberty and security, or right to bodily integrity are of no little importance, even if politically not so contested in every aspect.

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

- ✓ ***Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?***

2.1 Introductory remarks highlighting significant recent developments on Hungarian constitutional framework and system



From 1989 until 2012, Hungary has a written, democratic constitution, nominally Act 20 of 1949 (the Stalinist “constitution”), which was nonetheless completely rewritten during the regime change. Before 1949, Hungary had a “historical” uncodified/unwritten constitution with a debated and changing content, and scope of application, and in any case not including a fully fledged formal bill of rights.

After the 2010 election, a new government backed by a two-third majority in the Parliament, which formed a constitution-amending majority, adopted a new constitution, the Fundamental Law (FL), as well as hundreds of new laws, thus profoundly transforming the Hungarian legal order. This major constitutional and legislative overhaul is not without effect on the protection of civil rights rights. Certain characteristics of the new constitutional text and recent constitutional case law cast doubts as to the effective protection of fundamental rights and the respect of the rule of law in Hungary.

The Fundamental Law which entered into force on 1 January 2012 contains a chapter entitled Freedom and Responsibility, which includes a catalogue of rights. It covers economic rights, and forms the general framework of rights protection in Hungary. Other legal norm must not conflict with the FL (Art. T (1)).

Art. I proclaims that “the inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.”⁴ Paragraph (2) adds that Hungary shall recognise the fundamental individual and collective rights of man.

Fundamental rights are therefore conceptualized as human rights. They are not created by the stipulation of the FL, but exist independently of the state which has a duty of recognition and protection. Some of the constitutional judges, the more positivist, pro-executive or in favour of parliamentary supremacy, do however not endorse this understanding.⁵

The FL calls for the further adoption of numerous so called cardinal laws, to be adopted by an enhanced majority, i.e. two-third of Members of Parliament present. “Two-third laws” were an inherent part of the previous constitutional system, to regulate the exercise of many fundamental rights and for other matters where a broader political consensus was perceived as necessary. A law adopted by two-third majority can only be amended by a two-third majority, but it does not enjoy a higher position in the hierarchy of norms.

⁴ Note that Hungarian is a gender-neutral language which differentiates between persons and things, but not between he and she. The noun translated here as ‘man’ is in Hungarian ‘ember’, without gender connotation. The translation of the FL provided by the foreign ministry uses the male form to refer to the Hungarian gender-neutral noun, but uses ‘he or she’ for the third person singular pronoun. This report follows the terminology used in this quasi-official translation, in particular as it is the only one which has all the five amendments consolidated in the text. Available here: <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>

⁵ See, e.g., Imre Juhász’s concurring opinion to the decision on the Fourth Amendment, or regularly Béla Pokol’s view on the global constitution-oligarchy which should not be let put a limit on the per definitionem unlimited power of the constitutional majority (2/3) to amend the constitution. See the opinions of Imre Juhász and Béla Pokol in 12/2013. (V. 24.) AB határozat.



The new FL, in contrast to the previous constitution, does not impose the use of cardinal laws adopted by an enhanced majority to regulate the exercise of certain fundamental rights, such as freedom of assembly and association. The laws on the media, freedom of information, religion and churches, election and right to vote, and on parties, must nonetheless still go through a two-third adoption. Furthermore, most institutional laws (related to Parliament, status of MPs, President of the Republic, courts, including the constitutional court, Ombudsman, local governments, freedom of information authority, Audit Court, National Bank, police, prosecution, national security etc.) are also entrenched in the two-third system.⁶ In some fields, such as *family law* or the bases of tax and pension regulation, traditional parliamentary competences are now entrenched in cardinal laws. The Venice Commission argued that this extensive use of cardinal laws puts “the principle of democracy itself at risk”.⁷

The current political context needs to be outlined, in order to understand the actual functioning of the constitutional order. Since 2010, the governing coalition has a two-third majority in Parliament. The system thus contributes to the entrenchment of the current government’s policy and value preferences, as these could not be changed even if the current majority would lose later elections, unless the winning party or coalition secures a two-third majority. The new constitution, and all new (cardinal and ordinary) legislation, as well as significant office holders – constitutional justices, Supreme court justice and chief administrator of justice, chief prosecutor, members of Audit Court, members of Budget Council, Ombudsman, President of National Bank, President of the Republic – were the result of government decision backed by a two-third in this term,⁸ and not the result of consensual decision-making. In that context, the two-third majority requirement for constitutional amendments and the adoption of important legislation did not fulfil its original function of forcing opposing political sides to consensus. This is particularly problematic with regard to situations in which the governmental majority should be subject to monitoring by independent bodies.

In May 2012, the Hungarian Constitutional Court (HCC) ruled on the relationship between its jurisprudence under the old constitution and the FL. It declared that it will take into account its earlier reasoning, unless the applicable FL provision contradicts or departs from the relevant provision in the former constitution.⁹ In case of substantively equivalent provisions, the HCC “shall provide justification

⁶ A list can be found here: <http://www.parlament.hu/fotitkar/sarkalatos/sarkalatosstvekjegyzeke.pdf>

⁷ Par. 24, OPINION ON THE NEW CONSTITUTION OF HUNGARY Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

⁸ One -- telling -- exception is one constitutional justice, Imre Juhász, who was supported also by the extreme right wing Jobbik Party -- to the lesser pride of constitutionalism and human rights.

⁹ Decision Nr. 22/2012 (V. 11.) AB, ABH 2012/2, 94, 97, as translated in Miklós Bánkuti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, “Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental



not for following the principles laid down in previous jurisprudence but for departing from those principles.”¹⁰

However, since then, a Fourth Amendment to the FL was adopted, which “repealed” constitutional rulings handed down prior to the entry into force of the FL, though “without prejudice” to their legal effect.¹¹ This cast into doubt the status of the whole body of prior constitutional case law. The HCC reacted by reversing its earlier approach, and claiming that the reference to previous case law in case of substantively equivalent provisions is still *possible*, but needs to be justified in detail. Earlier arguments, legal principles and established constitutional logic might be – though need not necessarily be – relied upon, if (i) the two constitutional texts are substantively overlapping, and this overlap is spoiled by (ii) neither different context in the FL, (iii) nor by that of the specific interpretative rules contained in the FL, (iv) nor by the particular circumstances of the case.¹² In the future, the influence of previous jurisprudence on the present one might loosen even further, as judges elected solely with the votes of the current government parties are now in the majority.¹³

The Fourth Amendment continues and widens this trend of “superconstitutionalization”, i.e. the writing into the text of the constitution rules previously found unconstitutional. It also threatens the rule of law and fundamental rights protection in many other regards. According to the Venice Commission’s observations, the measures included in the Fourth Amendment “amount to a threat for constitutional justice”. It endangers the constitutional system of checks and balances”, and is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics.”¹⁴

While most civil rights provisions are in the chapter entitled Freedom and Responsibility (articles numbered by Roman numbers), some of them are spelled out in the foregoing chapter “Foundation”

Law of Hungary”, April 2013, available at http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf, p. 80, fn. 144.

¹⁰ Id.

¹¹ Art. 19 of the Fourth Amendment to the FL, point 5 of the Closing and Miscellaneous Provisions, effective from 1 April 2013. In English translation available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)014-e).

¹² Decision Nr. 12/2013. (V. 24.) AB határozat.

¹³ In one case with the support of the extreme right wing: <http://www.politics.hu/20130326/mps-in-secret-vote-approve-new-top-court-judge-endorsed-by-fidesz-jobbik/>. But that will not affect the point here on the generally deferential approach of the new judges (except maybe one judge regularly) towards the current government.

¹⁴ Conclusions 145-147 of OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)



(articles designated by capital letters), and again other relevant provisions in the chapter on the state (articles with Arabic numbers).

2.2. Provisions affecting civil rights in the part “Foundation”

2.2.1. The National Avowal as mandatory tool of interpretation

Art. R. obliges to take into account the National Avowal (i.e. the preamble) and achievements of the historical constitution in the interpretation of the FL. This is problematic for the preamble considers the subject of the constitution is the cultural nation, not the political one, thereby leaving out nationalities living in Hungary, and it enounces a – more or less conservative and Christian – world view which is not shared by many (if not most) Hungarians.¹⁵ Such is the idea that “the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love,” or that “the strength of community and the honour of each man are based on labour, an achievement of the human mind.” Other, more technical improprieties (such as the inapplicability of statute of limitations to “inhuman crimes”, a notion certainly deliberately not overlapping with crimes against humanity or war crimes) also question how the National Avowal can perform as a mandatory tool in interpretation.

The historical constitution – apart from being a wholly uncertain concept – certainly included anti-constitutionalist traditions as well,¹⁶ and what its achievements might be depends on arbitrary interpretation.

2.2.2. Responsibility for him- or herself

Art. O proclaims that:

Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities.

This provision is notable for its very individualistic start (by which everyone is responsible for herself), and etatist or at least communitarianist continuation. The inconsistent blending of strong individualism (whereby the state is supposedly not “paternalistic”) and obliging individuals with service to the state and community is present in other places of the FL as well. E.g. the FL obliges adult children to provide

¹⁵ See Andrew Arato and Gábor Halmai eds., Amicus Brief to the Venice Commission on the Fundamental Law of Hungary, <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxhbWljdXNlcmllZmhhbmRhcml8Z3g6NjVjYzBmNjg3NzRmOThhMA>.

¹⁶ See Gábor Schweitzer, **Fundamental Law – Cardinal Law – Historical Constitution: The Case of Hungary since 2011**, *Journal on European History of Law*, 2013/1. 124-128



for their needy parents (Art. XVI (4)), while there is no right to social security, it is only a state aim (Art. XIX.).

2.2.3. Family and marriage

Art. L provides that:

(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children.

(2) Hungary shall encourage the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act.

Apart from its strongly ideological character, this provision in para. (1) prevents a future recognition of gay marriage. It is also contrary to the notion of family in Art. 8 ECHR as interpreted by the ECtHR,¹⁷ and was added to the constitution after the HCC in Dec. 43/2012. (XII. 20.) AB¹⁸ annulled the provision in the law on the protection of families.

In relation to personality rights of employees, the HCC recently struck down the Labour Code's rule which only granted protection against dismissal during pregnancy if the woman had declared the pregnancy to the employer before dismissal. The HCC annulled this provision for violation of the right to private and family life, but it also took into account Art. L in the reasoning, saying it forms the basis for the state's obligation to institutional protection of family (and marriage).¹⁹

2.3. Provisions in the Chapter on 'Freedom and Responsibility'

2.3.1. Human dignity and right to life

Article II

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.

2.3.1.1. General considerations

¹⁷ Schalk and Kopf v. Austria, Appl. Nr. 30141/04, decision of the Court of June 24 2010.

¹⁸ An analysis of the decision is provided by Tamás Dombos and Eszter Polgári, „Zavaros progresszió. Az Alkotmánybíróság a családok védelméről szóló törvényről”, *Fundamentum*, 2013/1, 55.

¹⁹ Case nr. II/3716/2012, decision not yet numbered, decision of the HCC of 27 May 2014. <http://mkab.hu/download.php?h=842>



Hungarian law has traditionally given the right to human dignity a privileged constitutional position. It constitutes an inviolable right, which trumps every other conflicting interest. The HCC interpreted the right to human dignity together with the right to life, considering their inviolability as inherent to the human status,²⁰ therefore it interpreted it to mean a general personality right.

Any interference with the right to human dignity is automatically unconstitutional, without even having to perform a proportionality analysis. Furthermore, human dignity is also situated at the core of every other fundamental right, with the consequence that the essential content of rights must not be limited by statute either (Art. I (3) FL, Art. 8 (2) of the 1989 constitution).

Human dignity, as general personality right, is also the source of a number of derived rights. It is the anchor for the right to self-determination, understood as an individual right (e.g. the right to marry,²¹ protection of personal data, right to medical self-determination including the right to refusing medical treatment,²² in vitro fertilization,²³ abortion, etc), or the right to physical integrity,²⁴ the right to private sphere²⁵, the right to know your origin²⁶, right to name²⁷ or the general freedom of action.²⁸ It also provides a basis for the protection of contractual freedom (also covered by the freedom to conduct a business/entrepreneurial freedom, as an element of the right to choose an occupation). Unlike the mother right of human dignity, derived rights may be subject to necessary and proportionate limitations.

The state is bound by the so-called ‘institutional protection’ of the subjective right to dignity and the associated right to life. Consequently, every fundamental right receives institutional protection for at least its ‘dignity core’. Such ‘institutional protection’ is less extensive than the one accorded to the subjective right, and varies depending on the right at stake. For example, the institutional protection of the right to property requires that the system of private property shall not be abolished, but that does not prohibit impose the nationalization of particular firms or sectors, as long as the conditions of

²⁰ 23/1990. (X. 31.) AB határozat abolishing the death penalty.

²¹ 22/1992. (IV. 10.) AB határozat.

²² 64/1991. (XII. 17.) AB határozat, 48/1998. (XI. 23.) AB határozat, 56/2000. (XII. 19.) AB határozat.

²³ 75/B/1990. AB határozat

²⁴ 75/1995. (XII. 21.) AB határozat.

²⁵ 46/1991. (IX. 10.) AB határozat.

²⁶ 57/1991. (XI. 8.) AB határozat.

²⁷ 58/2001. (XII. 7.) AB határozat.

²⁸ 24/1996. (VI. 25.) AB határozat, 27/1990. (XI. 22.) AB határozat. In general see Kinga Zakariás – Miklós Szirbik, “Commentary to Art. 54 [right to human dignity]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009) 1904-1905, [8]-[25].



expropriation are observed. In contrast, media freedom is of such importance that it requires a strict and elaborate institutional protection framework.

Some rights only possess an institutional dimension. This is the case of the right to a healthy environment. Provisions formulated as state objectives (e.g. “Hungary shall strive...”) might be understood as realizations of the objective side or institutional side of a right whose subjective side is not under constitutional protection: this is the case with what are commonly called social rights.²⁹

Human dignity has a further function; it serves as the anchor for the principle of equal treatment and non-discrimination. The equality of human dignity is considered as a conceptual element of human dignity.³⁰

2.3.1.2. Abortion and in vitro fertilization

The second part of the second sentence about the protection of life from conception needs special attention. This is a new provision, not present in the 1989 constitution. Some fear that it is now in the constitution because the government wishes to restrict the possibility of abortion. Others, however, point to the jurisprudence of the HCC under the 1989 constitution which in fact contends that the right to life’s institutional protection obliges government to protection of life from conception. The HCC’s abortion jurisprudence is particular in that it starts out from the assumption that whether a foetus is a person or not is for the legislature to decide. In case it is not a person, the foetus does not have a subjective (and unlimitable) right to life, but the state is still obliged to protect life (institutional protection). However, the institutional protection of life needs to be put in balance with the pregnant woman’s right to self-determination (a right derived from human dignity, though not unlimitable). Thus, the law which allows abortion in case it has some indication (including “severe crisis of the woman”, an indication which is declared by the woman, cannot be examined by the authorities, but taken on face value), but also takes into account the gradually growing interest of the state in protecting foetal life in terms of time, realizes the right balance. As long as the foetus is not considered a person, thus not having a subjective right to life, the state is bound to protect life within its institutional obligation. That is why (and because the pregnant woman’s claim was constructed to mean only right to self-determination, not right to human dignity) abortion can be limited, but not banned entirely. However, according to this jurisprudence, if the legislature deems the foetus is a person, then the foetus’ right to life (as inviolable) is superior to the right to self-determination of the woman, and abortion can only be allowed in cases of necessary choice between the right to life of the woman and the right to life of the foetus (i.e. the pregnancy can only be terminated if bringing it to term would endanger the life of the

²⁹ It is not always clear if a state aim is an institutional obligation of a right, or a simple institutional obligation.

³⁰ 23/1990. (X. 31.) AB határozat, 9/1990. (IV. 25.) AB határozat, 61/1992. (IX. 20.) AB határozat.



woman).³¹ Thus, if the legislator decides the foetus is a person, then the previous jurisprudence of the HCC, now elevated to the level of constitutional text, would authorize, and in fact, requires the legislator to severely restrict abortion. So far no such plans were seriously discussed in the public sphere.

Secondly, the provision is problematic as it might undermine the permissibility of in vitro fertilization.

2.3.1.3. Euthanasia, refusal of medical treatment, informed consent

Euthanasia in its “active” form, i.e. assisted suicide, is prohibited in Hungary, according to the previous jurisprudence, while the right to self-determination protects the right to refuse medical treatment. Again, the reason for the prohibition of euthanasia is the institutional obligation to protect the right to life.³² Note that such a strong function of institutional protection is even more problematic here than in case of abortion, as in the case of euthanasia, the right to life is protected against the will of the person whose life (or death) is at stake.

As mentioned, under the jurisprudence of the 1989 constitution, the right to self-determination and the implied right to refuse treatment presuppose a general right to informed consent in medical decisions. The general right to informed and voluntary consent to medical decisions could have been put in the new constitution of a country which was found violating the CEDAW for forced sterilization,³³ especially that a right to informed consent is mentioned in a particular aspect (with regard to ‘experiments’) as discussed next.

2.3.2. Prohibitions related to (bodily) integrity, bioethics: torture, inhuman or degrading treatment or punishment, human experimentation, eugenics and cloning

Article III

(1) No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited.

(2) It shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent.

(3) Practices aimed at eugenics, the use of the human body or its parts for financial gain, as well as human cloning shall be prohibited.

³¹ 64/1991. (XII. 17.) AB határozat,

³² 22/2003. (IV. 28.) AB határozat.

³³ A.S. v. Hungary, Communication No.: 4/2004, CEDAW/C/36/D/4/2004, <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf>.



The prohibition of torture, inhuman or degrading treatment or punishment, servitude and trafficking, and the conditions of experiments are in line with international trends (though specifically forced labour is missing from the list, this is implied by either the prohibition of servitude or the right to self-determination and human dignity.)

In relation to the provisions on bioethics, a few critical points were raised. In general, the constitution-maker arbitrarily selected some bioethical norms and elevated them at the constitutional level while leaving out others.³⁴

In particular, in para. (2), the formulation “experiment” is not precise, because experiments on humans are as such impermissible according to modern understanding, and instead the expression “research” should be used, which might include experiments which are however based on proper scientific method and plan.³⁵

Para. (3) is problematic for its cumbersome formulation which is not necessarily in line with the Oviedo convention on bioethics (ratified by Hungary).³⁶

As to eugenics, the original Hungarian for “eugenics” implies (even more than the English) that the human race can be improved (“race ennoblement”). This idea is clearly unacceptable today, and accordingly, the choice of language is mistaken. What is more, the provision does not cover all possible abuses in medical biology. Furthermore, international law prohibits not only the “practice”, but also related research.³⁷

As to organ trafficking: it is not only the use, but also the acquisition of the human body or its parts for financial gain is impermissible under international law, thus the FL provides less than Hungary is obliged to ban by treaty.³⁸

2.3.3. Right to liberty and security of the person

Article IV

(1) Everyone shall have the right to liberty and security of the person.

(2) No one shall be deprived of liberty except for reasons specified in an Act and in

³⁴ Judit Sándor, “Bioetika az Alaptörvényben” [Bioethics in the Fundamental Law], April 14, 2011 <http://szuveren.hu/vendeglap/sandor-judit/bioetika-az-alaptorvenyben>.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.



accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.

(3) Any person suspected of having committed a criminal offence and taken into detention shall, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall forthwith take a decision with a written reasoning to release or to arrest that person.

(4) Everyone shall have the right to compensation, whose liberty has been restricted without a well-founded reason or unlawfully.

The right to liberty under the 1989 constitution was interpreted to mean not a general liberty right (as this function is performed by human dignity, contrary to the Anglo-saxon tradition), but the narrower right to physical liberty, freedom from detention (similarly to the German doctrine). In this narrower range it is however a general right: it covers not only criminal procedure, but any measure affecting personal freedom.³⁹

As to the limit of the right to personal liberty, the similar text of the 1989 constitution was explicitly interpreted to not to be a comprehensive set of limits: the procedural requirements in this provision therefore do not override the general substantive limits (i.e. necessity and proportionality, as currently required by Art. I (3) FL) of restriction of fundamental rights.⁴⁰

Furthermore, not only deprivation – as it is stated in the text, clearly referring to all sorts of detention, be they in criminal or administrative procedure – but any kind of restriction of personal freedom affects the right, and is to conform to constitutional standards. These range from detention at home to such drastic measures as deportation and forced labour.⁴¹ Detention of the mentally ill also falls within the scope of the right to liberty.⁴²

According to previous jurisprudence, deprivation of liberty is constitutional if it fulfils three criteria: i. it has to conform to the procedural requirements laid down in the constitution (now in Art. IV (2)), ii. It has to conform to general substantive standards of rights restriction (currently Art. I (3)), and (iii) it has to

³⁹ 36/2000. (X. 27.) AB határozat, Gábor Attila Tóth, “55. § [A személyi szabadsághoz való jog] [Right to personal liberty]” in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 1947-1995, 1951,

⁴⁰ 723/B/1991. AB határozat, 5/1999. (III. 31.) AB határozat.

⁴¹ 1/1995. (II. 8.) AB határozat.

⁴² 36/2000. (X. 27.) AB határozat.



comply with the additional requirements of a court hearing and compensation (for unlawful detention.)⁴³

The right to personal security has not gained a distinct interpretation in the jurisprudence of the 1989 constitution, except that it does not mean a right to guarantee the social-economic security,⁴⁴ neither a right to public security.⁴⁵

The current provision is most problematic for its authorization of life imprisonment without the possibility of parole, i.e. that in some cases no court can ever review whether a convict can be released after having served 20-25 years in prison. As it could be expected, Hungary was found violating the ECHR's Art. 3 for having whole life sentence without eligibility to parole.⁴⁶

Another recent measure (not put however directly in the FL, only in ordinary legislation) which was strongly criticized is the possibility of incarceration for juveniles for administrative offenses.⁴⁷ The Ombudsman initiated norm control for in his view the incarceration disproportionately restricts the right to personal freedom of children (Art. IV), and the right of the child to protection (Art. XVI), and it also violates the Convention on the Rights of the Child (Art. 1, 3, 37, 40). The HCC found⁴⁸ – with four dissenting opinions – that with regard to recent trends of juvenile offenses, the previous system proved ineffective, and thus incarceration is though an ultimate, but proportionate measure in some cases. The HCC considered the measure has no connection to Art. XVI on the rights of the child, neither is directly related to the provisions on the Convention on the Rights of the Child. As dissenting justice Lévy (joined by four other justices) pointed out, the Convention and other international instruments only allow incarceration of juveniles in cases of the most severe violent *crimes*, and even then only as the last resort. Therefore, in his view, incarceration for administrative offenses clearly violates international human rights norms and as such is contrary to Art. Q, proclaiming Hungary's obligation to bring its legal order in conformity with international law (see below).

2.3.4. Right to self-defense

Article V

Everyone shall have the right to repel any unlawful attack against his or her person or

⁴³ Gábor Attila Tóth, „A személyi szabadsághoz való jog az Alkotmányban” *Fundamentum*, 2005/2. 8.

⁴⁴ 1419/B/1995. AB határozat.

⁴⁵ Tóth, op. cit, 1952.

⁴⁶ László Magyar v. Hungary, application no. 73593/10, judgment of the Court of 20 May 2014.

⁴⁷ Act II/2012. on administrative offences.

⁴⁸ 3142/2013. (VII. 16.) AB határozat.



property, or one that poses a direct threat to the same, as provided for by an Act.

This is a new provision, which is also not an incorporation of previous jurisprudence. Though it is largely concretized in accordance with the traditional (Roman law) understanding in private and criminal law, the symbolic elevation of this rule into the constitution still raises concerns. As it is known even abroad (see the issue of the Hungarian Guard), vigilant movements, in symbiosis with the extreme right wing, have been mushrooming lately in Hungary, and the now constitutional right to self-defense appears to sanction their activity.⁴⁹ Furthermore, this provision can also be read as a concession that the state has failed to uphold order and rule of law in many places, especially in poor rural areas in the country, where basically all social strata are struggling to survive, often at the expense of each other. Note that 25 % of the population lives in severe material deprivation according to the OECD,⁵⁰ and 47 % of families raising children under 15 could at times not buy the food necessary in the last year.⁵¹

2.3.5. Right to private and family life, home, communications, and good reputation

Article VI

(1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected.

Right to private and family life was not explicitly protected, but the rest of specific rights (home, correspondence, reputation) were. As mentioned above, a general right to private sphere was derived from the right to human dignity as general personality right.⁵² This included the protection of private and family life as well.

The protection of the home (inviolability of home in the 1989 constitution) was interpreted to cover not only dwelling (home in the narrow sense), but - in line with ECHR jurisprudence - also the office, or the

⁴⁹ A branch of the New Hungarian Guard calls itself 'For a Better Future Hungarian Self-Defense' <http://theorangefiles.hu/the-new-hungarian-guardfor-a-better-future-self-defense/>

⁵⁰ See OECD's 2014 survey on Hungary, http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-hungary-2014_eco_surveys-hun-2014-en#page20 at page 18.

⁵¹ Gallup's research result in OECD countries: <http://www.gallup.com/poll/170795/families-struggling-afford-food-oecd-countries.aspx>.

⁵² 46/1991. (IX. 10.) AB határozat, 56/1994. (XI. 10.) AB határozat.



car.⁵³ In previous jurisprudence, surveillance of intimate activity in a place not falling under the scope of home is to be judged under the right to private sphere derived from the general personality right.⁵⁴

As to reputation, earlier jurisprudence was somewhat inconsistent in delineating it from honour which is related to dignity, and would thus fall in theory under a different provision of the previous constitution (and would by analogy fall under a different provision of the FL as well).⁵⁵ Reputation appears mean an objectified view of the community about a particular person (which the person might strive to change through her behaviour), while honour is attributed to everyone. In any case, the most important issue around reputation/honour has been its conflict with freedom of expression, notably to what extent reputation/honour is an acceptable limit on free speech. It seems settled that officials and other persons taking up a role in public have honour, but are required to tolerate more criticism and intrusion into their private life than others who do not play a role in the public sphere.⁵⁶ A currently litigated issue is whether police officers have a right to have their faces made unrecognizable in the media. The Kúria decided they have,⁵⁷ and the constitutional complaint is in front of the HCC.⁵⁸ For other recent developments about the relation of honour and freedom of expression, see the part on freedom of expression below (Art. IX.).

The – at least textually new -- right to private and family life was interpreted in a recent decision. The HCC struck down the Labour Code's rule which only granted protection against dismissal during pregnancy if the woman had declared the pregnancy to the employer before dismissal. The provision was annulled for violation of the right to private and family life.⁵⁹

In another recent decision summarizing the relation of the old and new constitutional status of the right to private sphere, the Court declared that the FL's text appears to grant a more comprehensive right to private sphere than the 1989 constitution, and previous jurisprudence on the right to private sphere is still applicable⁶⁰ (as that was an extensive interpretation). Accordingly, it stated that “the essential conceptual element of the right to private sphere is that others cannot penetrate or even look inside it

⁵³ 26/2004. (VII. 7.) AB határozat.

⁵⁴ 36/2005. (X. 5.) AB határozat. See András Jóri, “Az 59. § kommentárja [magánszférájogok]” (commentary to Art. 59 of the 1989 constitution, rights of the private sphere) in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009) 2167-2193, 2175.

⁵⁵ Id.

⁵⁶ 36/1994. (VI. 26.) AB határozat.

⁵⁷ 1/2012. BKMPJE számú jogegységi határozat (“decision on unity of law”).

⁵⁸ <http://public.mkab.hu/dev/dontesek.nsf/0/0E56D3CAD2A42323C1257B91001BAA15?OpenDocument>

⁵⁹ 17/2014. (V. 30.) AB határozat.

⁶⁰ 32/2013. (XI. 22.) AB határozat



against the will of the person affected.”⁶¹ The right to private sphere is particularly closely connected to the right to human dignity. Art. II FL (on dignity) thus secures the area of private sphere which is fully excluded from state intervention. Beyond this innermost or intimate sphere lies, in the interpretation of the HCC, the private sphere in the broader sense (“communications” – or keeping contacts as in the original Hungarian) and the spatial sphere where private and family life flourishes (i.e. the “home”).⁶² Furthermore, the right to good reputation is understood to merit separate protection as the image about the individual according to the HCC.⁶³ Still, in the particular case, the HCC found the possibility of secret surveillance without judicial authorization does not violate Art. VI as long as the minister is required to give reasons for the decision to order the surveillance of a private person.⁶⁴

2.3.6. Data protection and freedom of information

Article VI

(2) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.

(3) The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.

Data protection used to be a particularly important – and in the view of many, well-developed – field of human rights law in Hungary after the regime change. There was a separate ombudsman with strong competences overseeing data protection and freedom of information. The HCC also had a remarkable jurisprudence, starting with the annulment of the general personal number, which would allow the government to connect different databases, and thereby establish a full profile of anyone including their health and other data.⁶⁵ The Court in essence transposed the German doctrine⁶⁶ of informational self-determination. This means that the right to the protection of personal data goes beyond a simple protective right (*status negativus*), and extends to the protection of the “active side” (*status activus*) as well, thus being in fact about informational self-determination. Informational self-determination means first of all that personal data can be acquired, stored, disseminated (or in any way “handled”) in general only with the consent of the person. Exceptionally, a law ordering the collection and handling of

⁶¹ 36/2005. (X. 5.) AB határozat.

⁶² This again reminds of German jurisprudence (“Sphärentheorie”, BVerfGE 6, 32.)

⁶³ 32/2013. (XI. 22.) AB határozat.

⁶⁴ Id.

⁶⁵ 15/1991. (IV. 13.) AB határozat.

⁶⁶ E.g. BVerfGE 100, 313.



personal data might be constitutional if it conforms to standards of rights restriction, i.e. it is provided by law, and is necessary and proportionate to the pursuance of the protection of another right or constitutional value.⁶⁷

The collection and procession of personal data have to be transparent. Everyone has a right to control each step of such a process (thus also being informed of the steps), and withdraw consent at any time, requesting eventually the deletion of her personal data.⁶⁸

Furthermore, processing of personal data shall always be connected to a purpose (to which the data subject consents), i.e. data processing is only constitutional as long as the purpose originally consented to still applies. The Hungarian law implementing – the now defunct-⁶⁹ Data Retention Directive (Directive 2006/24/EC) thus might be unconstitutional,⁷⁰ but the issue is pending since 2008⁷¹ (for reasons also of the change of the competences and procedure of the HCC under the Fundamental Law).

Furthermore, in 2011 a new law on data protection (and freedom of information) was adopted.⁷² Most significantly, in the new system, the previous function of data protection ombudsman was abolished, and its place was given to a so-called independent freedom of information authority (with a head nominated by the prime minister and appointed by the president of the republic for nine years. Note that the president of the republic was elected solely by the votes of the – two-third – governing majority.). The previous ombudsman's term thus prematurely expired, in violation of EU law,⁷³ as it did not conform to the requirement of independence.⁷⁴ The way the current authority was established thus already raises doubts about its independence.

Apart from this, the current regulation is largely in line with the previous one.⁷⁵ The act on freedom of information differentiates between five sorts of data in Section 3:⁷⁶

⁶⁷ Jóri, op. cit., 2185., referring to 15/1991. (IV. 13.) AB határozat.

⁶⁸ 15/1991. (IV. 13.) AB határozat.

⁶⁹ Judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others [2014] nyr.

⁷⁰ See <http://tasz.hu/en/data-protection/constitutional-complaint-filed-hclu-against-hungarian-telecom-data-retention>.

⁷¹ See <http://tasz.hu/en/freedom-information/state-too-can-access-my-phone-records>.

⁷² Act CXII/2011.

⁷³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

⁷⁴ C-288/12, Commission v. Hungary.

⁷⁵ See e.g. László Majtényi, "A képmutatás a bűn tisztelgése az erény előtt." Az információs jogok a nemzeti együttműködés rendszerében, Fundamentum, 2011/4, 106-115.



Section 3.

...

2. 'personal data' shall mean data relating to the data subject, in particular by reference to the name and identification number of the data subject or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity as well as conclusions drawn from the data in regard to the data subject;

3. 'special data' shall mean:

a) personal data revealing racial origin or nationality, political opinions and any affiliation with political parties, religious or philosophical beliefs or trade-union membership, and personal data concerning sex life,

b) personal data concerning health, pathological addictions, or criminal record;

4. 'criminal personal data' shall mean personal data relating to the data subject or that

pertain to any prior criminal offense committed by the data subject and that is obtained by organizations authorized to conduct criminal proceedings or investigations or by penal institutions during or prior to criminal proceedings in connection with a crime or criminal proceedings;

5. 'data of public interest' shall mean information or data other than personal data,

registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts;

6. 'data public on grounds of public interest' shall mean any data, other than public

information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public.

In line with the so-called "synoptic view", freedom of information has two intertwined sides: the right to protection of personal data, with enhanced protection of special or sensitive data, and the freedom of

⁷⁶ A (not fully up-to-date) version of the law is available in English here naih.hu/files/Privacy_Act-CXII-of-2011_EN_201310.pdf.



information in the narrow sense, which guarantees the transparency of state life. The life of the private person is invisible or impenetrable for the government, while the government is transparent for the individuals. Exceptions on both side are to be judged in theory by the strictest standards of necessity and proportionality.

2.3.7. Right to freedom of religion, thought and conscience, state-church relations

Article VII

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practise or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life.

(2)⁷⁷ People sharing the same principles of faith may, for the practice of their religion,

establish religious communities operating in the organisational form specified in a cardinal Act.

(3)⁷⁸ The State and religious communities shall operate separately. Religious communities shall be autonomous. (4)⁷⁹ The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established (incorporated -- OS)⁸⁰ churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals.

(5)⁸¹ The common rules relating to religious communities, as well as the conditions of

cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act.

The new constitutional regulation of freedom of religion belongs to the most controversial issues of the FL, as it is visible from the long provision and its four amendments.

⁷⁷ Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013)

⁷⁸ Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013)

⁷⁹ Supplemented by Article 4(2) of the Fourth Amendment to the Fundamental Law (25 March 2013), amended by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

⁸⁰ Legal literature and the ECHR uses the term incorporated when translating this provision.

⁸¹ Supplemented by Article 1(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).



The first paragraph proclaiming the liberty right (*status negativus*) to freedom of thought, conscience and religion conforms to international standards. It still is different from the previous constitution in that it does not anymore require that the law regulating the individual liberty right be adopted by two-third of MPs present (i.e. in a “cardinal law”).

As to the associational aspect (para. 2, 4, 5), recognition rules for churches and religious communities are still required to be regulated in a cardinal law. However, the procedure of recognition is entrenched in the constitution in a very unusual way: it makes parliament responsible for the recognition of churches. With the entering into force of the new constitution and new law⁸² (which was adopted among scandalous circumstances including e.g. when the annulment of the previous bill by the HCC was leaked, it was withdrawn, and then re-introduced on 23 December, adopted on 31 December 2011, and entered into force on 1 January 2012⁸³), around 300 previously recognized churches lost their status and accompanying benefits. Some previously recognized churches which were listed in the appendix of the law continued to be recognized as churches, and others who wished to regain the status had to request parliament to grant it.

The Venice Commission strongly criticized the rules on churches in both its opinion on the church act, and on the Fourth Amendment to the FL.⁸⁴ The latter constitutional amendment was enacted because the HCC found the deregistration and the process of re-registration unconstitutional for violation of due process, right to remedy, equal treatment and freedom of religion.⁸⁵ Thus, this was again an instance of “superconstitutionalization.” Though the constitution-amending power might feel it circumvented the HCC this way, later the ECtHR also found the law – and now implicitly the FL itself – constituted a violation of Art. 9 and Art. 11 ECHR.⁸⁶

2.3.8. Right to peaceful assembly

Article VIII

⁸² Act CCVI/2011 on freedom of conscience and religion, and the legal status of churches, religious congregations, and religious communities. English translation available on the Venice Commission’s website [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2012\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)009-e).

⁸³ A detailed description of the turbulent history of the adoption of the law is provided by Renáta Uitz, Hungary’s New Constitution and Its New Law on Freedom of Religion and Churches: The Return of the Sovereign, 2012 BYU L. Rev. 931 (2012).

⁸⁴ *CDL-AD(2012)004-E, OPINION ON ACT CCVI OF 2011 ON THE RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION AND THE LEGAL STATUS OF CHURCHES, DENOMINATIONS AND RELIGIOUS COMMUNITIES OF HUNGARY ADOPTED BY THE VENICE COMMISSION AT ITS 90TH PLENARY SESSION (VENICE, 16-17 MARCH 2012)*, [HTTP://WWW.VENICE.COE.INT/WEBFORMS/DOCUMENTS/CDL-AD\(2012\)004-E.ASPX](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)004-E.ASPX),

⁸⁵ 6/2013. (III. 1.) AB határozat.

⁸⁶ Magyar Keresztény Mennonita Egyház And Others V. Hungary (Application nos. [70945/11](#), [23611/12](#), [26998/12](#), [41150/12](#), [41155/12](#), [41463/12](#), [41553/12](#), [54977/12](#) and [56581/12](#)) judgment of 8 April 2014.



(1) Everyone shall have the right to peaceful assembly.

The right to freedom of assembly and association precedes the right to freedom of expression, guaranteed in Art. IX. This order is quite unusual, if not unheard of in international comparison. Furthermore, it goes counter to the logic of constitutional interpretation which in Hungary – similarly to Germany, and in line with the ECtHR's view that Art. 11 is *lex specialis* to Art. 10 – considers freedom of expression a mother right of communicative freedoms, among them freedom of assembly.⁸⁷

The scope of freedom of assembly has only changed in the text of the guarantee in the Fundamental Law in that Art. VIII does not contain a reference to the guarantee of free exercise of the right as it used to be from 1989 till 2012. However, the general rights provision in Art. I (1) stipulates that the protection of fundamental rights is the primary obligation of the state, i.e. as if the specific obligation to guarantee freedom of assembly would be now covered by the general duty to protect fundamental rights. Thus, freedom of assembly is logically interpreted the same way as before. Accordingly, the HCC stated in 2012 that statements in its previous jurisprudence on freedom of assembly are considered guidelines in the interpretation of the FL's assembly provision.⁸⁸ However, there is no decision on freedom of assembly from after the Fourth Amendment “repealed” constitutional rulings handed down prior to the entry into force of the FL (see above), thus some uncertainties remain.

The jurisprudence, strongly under German influence, interpreted freedom of assembly as “part of freedom of expression of opinions in the broad sense, which guarantees the peaceful, common expression of opinion with regard to public issues. Constitutional protection is thus accorded to events aimed at participating at the public debate on matters political, which help gathering and distributing information on issues of public interest and their common expression.”⁸⁹ Thus, an event qualifies as assembly when it affects a public matter, which depends on the “content, form and context” of the expressed opinion. The HCC embraces the so-called narrow (or maybe enlarged) concept of assembly in that it does not grant constitutional protection to events unrelated to public discussion, such as sport events.⁹⁰

Only peaceful assemblies are protected, there is a general obligation to notify an assembly three days in advance. As to spontaneous assemblies, the HCC reversed its earlier stance after Hungary was found

⁸⁷ E.g. 55/2001. (XI. 29.) AB határozat, ABH 2001, 442, 449.

⁸⁸ Decision 3/2013. (II. 14.) AB határozat, [38].

⁸⁹ Id. at [39] referring to 55/2001. (XI. 29.) AB határozat, ABH 2001, 442, 449.; 75/2008. (V. 29.) AB határozat, ABH 2008, 651, 662–663.

⁹⁰ The latter would be the wide notion of assembly, advocated by Judge András Bragyova in his dissent to Decision 75/2008. (V. 29.) AB.



violating the ECHR in *Bukta v Hungary*,⁹¹ and grants spontaneous, and urgent assemblies, and flashmobs constitutional protection.⁹² Though the Act on the right to freedom of assembly from 1989 established a largely very liberal framework for exercising this important democratic right, there are some worrying trends in the recent decades at the level of practice.⁹³

Hungarian police were infamously unprepared during the riots and waves of demonstrations in the fall of 2006, and used excessive force against peaceful protesters or even non-participants in many cases. Domestic human rights organizations (Hungarian Helsinki Committee, Hungarian Civil Liberties Union, etc.) and the Committee against Torture expressed concerns over police brutality which often remained unpunished, not even investigated.⁹⁴

More recently, police were criticized, this time, for not using force to disperse an anti-Roma demonstration.⁹⁵ After listening to virulently racist speeches about genetically coded criminality and that “we will trample down the phenomenon which needs to be exterminated from our Lebensraum [this latter one in Hungarian is the exact translation of the German original]”, participants threw stones, pieces of concrete and bottles into the yard of Roma inhabitants in Devecser.⁹⁶ Police stood by passively. Since then, one person was prosecuted for hate crime (violence against member of a community), but as to the speeches, police closed the investigation for not having found any crimes committed, not even incitement to hatred.⁹⁷

⁹¹ *Bukta and Others v. Hungary*, Application no. 25691/04, Judgment of 17 July 2007

⁹² 75/2008. (V. 29.) AB határozat.

⁹³ The examples follow closely my study (Orsolya Salát) prepared for the Max-Planck Institute and the Venice Commission. For more detail, see the part on Hungary in Anne Peters & Isabelle Ley, *Comparative Study: Freedom of Peaceful Assembly in Europe*. Study requested by the European Commission for

Democracy through Law – Venice Commission, With contributions by Elif Askin, Melina Garcin, Prof. Dr. Rainer Grote, Jannika Jahn, Dr. Steven Less, Esq., Dr. Halyna Perepelyuk, Dr. Orsolya Salát, Maria Stożek, Evgeniya Yushkova, Friederike Ziemer http://www.venice.coe.int/files/Assemblies_Report_12March2014.pdf

⁹⁴ See [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.HUN.CO.4.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.HUN.CO.4.En?Opendocument)

⁹⁵ <http://tasz.hu/node/2812>

⁹⁶ In English see Amnesty International’s report at <http://www.amnesty.org/en/news/hungary-must-protect-roma-communities-attack-2012-08-15>.

⁹⁷ The Hungarian Helsinki Committee lodged a complaint against this: <http://helsinki.hu/ha-ez-nem-uszitas-akkor-semmi-sem-az>



In 2012, the police did not intervene when extreme right wing counter-protestors attacked journalists in the immediate vicinity of an anti-government demonstration.⁹⁸ Police neither dispersed the evidently unpeaceful (and unnotified) assembly, nor were the attackers (clearly identifiable) arrested.⁹⁹

Furthermore, the regime established by the Assembly Act is often circumvented by several techniques. For example, the law allows prior ban of a notified assembly if traffic cannot be rerouted. This might look like a content-neutral, technical ban, but is sometimes used to cover up for other, content-based concerns. Recurring advance bans on the Budapest Pride,¹⁰⁰ and a 2005 ban on demonstrating in front of the Prime Minister's residence¹⁰¹ are examples of that reasoning.

A further way to circumvent the narrow scope of the Assembly Act is to recurrently disallow demonstration in "operational zones" around the residence of the Prime Minister and the official residence of the President of the Republic imposed by police¹⁰² or the Counter-Terrorism Centre,¹⁰³ despite almost consistent court reversals in such cases.¹⁰⁴

⁹⁸ See the video ("Death onto you, Jews!") http://index.indavideo.hu/video/Ferenciek_tere?utm_source=flash&utm_medium=watchoninda&utm_campaign=videoplayer

⁹⁹ http://index.hu/belfold/2013/12/19/barna_orfk/ or <http://helsinki.hu/mulasztott-a-rendorseg-az-osszevert-videos-ugyeben>

¹⁰⁰ The Budapest Pride was banned for alleged impossibility of diverting traffic in 2011, and, despite quick court reversal, the police banned the event again the following year, again reversed in court. See 39-41 in http://tasz.hu/files/tasz/imce/full_report_-_english.pdf Other marches, e.g., pro-government rallies on basically the same route were not banned, thus the ban was clearly viewpoint-discriminatory, too. (Cf. e.g. the so-called Peace March for Hungary, <http://www.bbc.co.uk/news/world-europe-16669498>.) The Metropolitan Court found that this way police not only discriminated against, but even harassed Pride marchers because of their sexual identity. Decision of 16 January 2013 (not available), see <http://helsinki.hu/zaklato-modon-diszkriminalt-a-rendorseg-2012-pride>

¹⁰¹ Impossibility of rerouting traffic was the alleged reason to ban a few person demonstrating on the wide pavement in front of the residence of the prime minister on the afternoon of 24 December when there is no public transport. ECtHR found an evident violation of Art. 11. *Patyi v. Hungary*, Application no. 5529/05, Judgment of 7 October 2008.

¹⁰² E.g. A place restriction independent of the Assembly Act was applied in 2006, when Kossuth square around parliament was blocked for demonstrations because the police declared it a „security operational zone” with regard to the Fall 2006 riots. According to the police, declaring a site a „security operational zone” changes the quality of the public area which is normally accessible by all, and excludes the possibility of holding assemblies in the zone. Years later domestic courts found the declaration unlawful. In English see §§ 8-18, *Szerdahelyi v. Hungary*, Application no. 30385/07, Judgment of 17 January 2012. Subsequently, the ECtHR for this reason considered it a measure not prescribed by law, and thus found a violation of Art. 11 without examining legitimate aim or proportionality. *Szerdahelyi v. Hungary*, Application no. 30385/07, Judgment of 17 January 2012, *Patyi v. Hungary* (No. 2.), Application no. 35127/08, Judgment of 17 January 2012.

¹⁰³ Despite domestic and ECtHR condemnations of the 2006 “security operational zone”, in March 2013, the Counter-terrorism Centre declared the area in front of the home of the president an “operational zone.” On this basis police disallowed ten activists of the Hungarian Helsinki Committee from demonstrating in front of the presidential residence urging the president not to sign the 4th Amendment to the FL. The court reversed (Decision Nr. 20.KpK.45.258/2013 of the Metropolitan Court, available at <http://helsinki.hu/wp-content/uploads/szentgyorgy-ter-lezaras-hatalyon-kivul-helyezes-anonim.pdf>) referring also to the Venice Commission's opinions (Venice



A further technique preventing demonstrations at certain places came from the mayor of Budapest. The local self-government of Budapest issued a so called “public area use license” for some central public places, to the mayor’s office for 15 March 2012, a national holiday celebrating the revolution 1848.¹⁰⁵The HCC ruled that the Assembly Act cannot be circumvented this way.¹⁰⁶

In a recent decision, the HCC ruled that judicial review extends in every case to the merits. Not only in case of ban, but also in case police refuses to decide about the notice for reason of lack of competence, the court has to review the merits, justification and reasoning of the police fully.¹⁰⁷ Limited review violates due process rights including the right to effective judicial protection,¹⁰⁸ and freedom of assembly.

2.3.9. Freedom of association, freedom of political parties and trade unions

Art. VIII.

(2) Everyone shall have the right to establish and join organisations.

(3) Political parties may be formed and may operate freely on the basis of the right to

association. Political parties shall participate in the formation and expression of the will of the people. Political parties shall not exercise public power directly.

(4) The detailed rules for the operation and management of political parties shall be laid down in a cardinal Act.

Commission's Opinions concerning Freedom of assembly, Strasbourg, 04October 2012, CDL(2012)014rev2,5.2. at p. 6 of the decision.)

¹⁰⁴ The Counter-terrorism Centre and the police repeated this same cooperation two more times with regard to the residence of the *prime minister* later, leading courts to basically scold law enforcement for observing neither ECHR case law, nor even domestic decisions http://ataszielenti.blog.hu/2013/09/04/a_mihez tartas_vegett_rendorsegi_visszaeles_es_a_biroi_jogorvoslat In December 2013, however, when a max. 50 person demonstration was banned in front of the residence by police relying on the Counter-terrorism Centre’s security measure, the court upheld the ban for it is applicable in a residential area, and protects the “quiet of the neighbours” who would be a “captive audience” of the assembly. The HCLU turns to HCC in this case arguing inter alia that it is a disproportionate restriction on political speech. <http://tasz.hu/gyulekezesi-jog/alkotmanybirosag-elott-tamadtuk-meg-gyulekezesi-jogot-serto-biroi-dontest>

¹⁰⁵ When an party, LMP, wanted to demonstrate that day on Heroes’ Square, police refused to receive the advance notice for lack of competence. They reasoned that the square does not – after it had been quasi-reserved by the public area license -- any more qualify as public area, thus the Assembly Act does not apply. Ordinary courts affirmed, the HCC reversed.

¹⁰⁶ Decision 3/2013. (II. 14.) AB.

¹⁰⁷ 3/2013. (II. 14.) AB határozat

¹⁰⁸ Id. at [76]-[77], citing *Golder v UK*, *Zborovsky v Slovakia* from the ECtHR and three decisions of the ECJ.



(5) Trade unions and other interest representation organisations may be formed and may operate freely on the basis of the right to association.

Freedom of association belongs to the communicative freedoms, of which freedom of expression is the “mother right”. Freedom of association also derives from the general freedom of action and the free development of personality as essential elements of the right to human dignity.¹⁰⁹ Voluntary association furthers the formation and expression of collective opinion, and it helps not only individual self-expression, but also contributes in important ways to the formation of public opinion independent of the government.¹¹⁰ Freedom of association is closely related not only to freedom of expression, but to other fundamental rights as well, such as the right to private sphere (which covers associations of not a public nature), or to freedom of assembly, from which association is distinguished by its continuous or permanent nature, often in a legally recognized organizational form. Freedom of religion protects associations established for the purposes of exercising religion, but as we have seen, its current Hungarian regulation is particularly problematic.

Both the old and the new constitution specifically protect the right to establish and operate parties and trade unions and other organizations of interest representation. The 1989 constitution required a two-third majority for both the act on parties,¹¹¹ and the act on the right to freedom of association,¹¹² while for the latter the two-third requirement was abolished in the Fundamental Law.

The operation of associations is free, though supervised for their legality by the prosecutor. It is also this institution which might initiate the dissolution of illegal associations by ordinary courts. According to Art. 3 (2) of the Act on freedom of associations, the exercise of the right to association cannot aim at violating Art. C (2) of the FL, which provides that “no one shall act with the aim of acquiring or exercising power by force, or of exclusively possessing it.” Also, the exercise of freedom association must not realize a crime or call for the commission of crimes, and must not violate the rights and freedoms of others (Art. 3. (3)). The Act also requires that the activity of the association be in accordance with the constitution and the laws. Armed organizations are banned, just as performing activities exclusively belonging to the authorities (Art. 3 (4)), this latter clearly referring to vigilante activities questioning the monopoly of the use of force of the state.

¹⁰⁹ Kriszta Kovács, “Commentary to Art. 63 [right to association]” in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the 1989 Constitution]* (Századvég Kiadó, Budapest, 2009), 2318-2336, 2319.

¹¹⁰ Id.

¹¹¹ Act XXXIII/1989 on the operation and management of parties.

¹¹² Act CLXXV/2011 on the right to association, on non-profit public interest legal status, and the operation and support of civil society organizations.



This has been the case with the “Hungarian Guard” which was dissolved for its intimidating marches and other activities violating equal human dignity of Roma people. The dissolution was found being in conformity with the ECHR.¹¹³ Newer guards, such as e.g. the “New Hungarian Guard”, were not dissolved.

2.3.10. Right to freedom of expression, media

Article IX

(1) Everyone shall have the right to freedom of speech [“expression of opinion” in the original].

(2) Hungary shall recognise and protect the freedom and diversity of the press, and shall

ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.

(3) In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political

advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.¹¹⁴

(4) The right to freedom of speech [expression of opinion in the original -- OS] may not be exercised with the aim of violating the human dignity of others.¹¹⁵

(5) The right to freedom of speech [expression of opinion -- OS] may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act.¹¹⁶

(6) The detailed rules relating to the freedom of the press and the organ supervising media services, press products and the communications market shall be laid down in a cardinal Act.¹¹⁷

¹¹³ Vona v. Hungary, Application no. 35943/10, judgment of the 9 July 2013.

¹¹⁴ Supplemented by Article 2 of the Fifth Amendment to the Fundamental Law (26 September 2013)

¹¹⁵ Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).

¹¹⁶ Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).

¹¹⁷ Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).



Similarly to the provision on freedom of religion, the guarantee of freedom of expression also bears the signs of weariness: it is unusually long and has four footnotes signalling amendments within less than two years.

Though the issue of the media laws in Hungary has been the most present in international media over the recent years, this report will not discuss that in detail (there will be a separate case study on this aspect later in the project).¹¹⁸

Of no lesser importance are however the questions of political advertising, hate speech, and political criticism where again the preferences of the current parliamentary majority were entrenched in the text of the constitution, not without an eye to the electoral campaign.

As to restrictions on political advertising in para (3): after the HCC found¹¹⁹ unconstitutional that political advertising was only allowed in electronic media free of charge, and during campaign only in public media, the regulation was elevated to the text of the FL by the Fourth Amendment (superconstitutionalization). When that move was widely criticized both domestically and internationally, including by the Venice Commission,¹²⁰ the Fifth Amendment abolished the restriction during parliamentary election campaigns, paying lip-service to critiques, but in fact not changing the status quo ante. Thus, currently political advertising is possible, but only for free of charge in any electronic (both public and private) media. This meant that in commercial media (which reaches a larger audience than public media) there was basically no campaign before the 2014 parliamentary and European parliamentary elections, as the OSCE also found.¹²¹ This organization also found that “the use government advertisements that were almost identical to those of the Fidesz-Hungarian Civic Union (Fidesz) contributed to an uneven playing field and did not fully respect the separation of party and state, as required in paragraph 5.4 of the 1990 OSCE Copenhagen Document,”¹²² and that¹²³

Increasing ownership of media outlets by businesspeople directly or indirectly associated with Fidesz and the allocation of state advertising to certain media undermined the pluralism of the media market and resulted in self-censorship among journalists. Furthermore, a lack of political balance within the

¹¹⁸ For a very comprehensive monitoring in English see the materials at <http://medialaws.ceu.hu/>.

¹¹⁹ 1/2013. (I. 7.) AB határozat.

¹²⁰ OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

¹²¹ See OSCE interim report on Hungary, <http://www.osce.org/odihr/elections/116757?download=true> p 8.

¹²² OSCE Hungary, Parliamentary Elections, 6 April 2014: STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS. <http://www.osce.org/odihr/elections/117205?download=true> p. 2.

¹²³ Id.



Media Council combined with unclear legal provisions on balanced coverage created uncertainty for media outlets. The Public Service Broadcaster followed its legal obligation to allocate free airtime for contesting parties albeit with limited impact. The OSCE/ODIHR media monitoring results showed that three out of five monitored TV stations displayed a significant bias towards Fidesz by covering nearly all of its campaign in a positive tone while more than half the coverage of the opposition alliance was in a negative tone.

Constitutional jurisprudence on freedom of expression under the FL is of varying quality. Under the 1989 constitution, freedom of expression enjoyed a special status among fundamental rights, and was considered basically only limitable by human dignity as an external limit. Content-neutrality was also strongly embedded in the jurisprudence. Hungary also gave constitutional protection to what in many countries in Europe would be considered regulable hate speech.¹²⁴ Public officials, politicians, and other public persons were constitutionally obliged to tolerate more criticism, even slander, under the previous jurisprudence.¹²⁵

An exception where the HCC allowed content-based limits on expression came in 2000 when the Court did not annul the provision on the protection of national symbols¹²⁶ and the prohibition on displaying symbols of totalitarianism.¹²⁷ Even this latter one was however overruled by the HCC¹²⁸ after the ECtHR had found the Hungarian ban on displaying the red star amounted to a violation of Art. 10 ECHR.¹²⁹

The new text of expression guarantee in the FL -- specifically mentioning dignity of individuals, and especially communities as limits on expression -- could have been easily interpreted to aiming at derogating from this earlier, in general very speech-protective jurisprudence.¹³⁰

¹²⁴ The decision 30/1992. (V. 26.) AB határozat famously struck down a provision of the Criminal Code punishing derogatory statements against members of a racial, religious etc. group. It affirmed the constitutionality of criminalizing incitement to hatred in the same decision, giving a narrow scope to the concept of 'hatred'.

¹²⁵ 36/1994. (VI. 24.) AB határozat.

¹²⁶ 13/2000. (V. 12.) AB határozat.

¹²⁷ 14/2000. (V. 12.) AB határozat.

¹²⁸ 4/2013. (II. 21.) AB határozat.

¹²⁹ *Vajnai v. Hungary*, Application no. 33629/06, Judgment of 8 July 2008 and *Fratanoló v. Hungary*, Application no. 29459/10, Judgment of 3 November 2011.

¹³⁰ In more detail on this see my discussion in Miklós Bánkúti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppelle, Péter Sólyom, "Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary", April



Especially in relation to para. (4), the HCC so far appears not to have taken this route, but largely upheld its previous stance. In an important decision on the new Civil Code, the HCC reinforced that public persons have to tolerate more criticism and annulled the most problematic part of the rule on the personality rights of public persons. According to original provision, § 2:44 of the new Civil Code (entitled: “The protection of personality rights of public figures”), exercise of rights securing the free discussion of public affairs can limit personality rights of public figures in pursuance of a considerable public interest, to the extent necessary and proportionate, without violating human dignity. The HCC annulled from the text the bit on “considerable public interest” for being too vague to form a constitutional limit on expression. Exercise of freedom of expression par excellence, always serves an outstanding constitutional interest, there can be no need to prove that a further, specific “considerable public interest” exists in a particular case.¹³¹ According to this 8-7 ruling, published on 3 March 2014, earlier jurisprudence applies notwithstanding the change in the constitutional text, and thus public persons enjoy limited personality rights in relation to their public activities, but still can rely on human dignity within their private and family life. The HCC also reaffirmed the distinction (common to many other jurisdictions, such as the ECHR or the German Basic Law) between value statements and factual statements, the first being more strongly protected than the latter, and even public persons can have protection against derogatory false statements if made knowing their falsity or by serious disregard for the rules of the profession (e.g. by journalists).

A further recent decision confirmed this approach when it annulled the condemnation for criminal libel/defamation of a local representative in writing his own journal an article critical of the mayor.¹³²

To the contrary, however, the HCC seems to have stepped back from this traditional liberal interpretation in another recent case: it ruled that a local public TV station legally refused to air a political advertisement depicting the current, and a previous prime minister as monkeys wearing uniforms. The HCC found the depiction dehumanized the politicians, and that affected the inviolable core of their human dignity.¹³³

As to para. (5) of Art. IX which proclaims that the dignity of the Hungarian nation and other ethnic or religious groups also form a limit to the exercise of freedom of expression, there was no authoritative constitutional ruling yet. The Venice Commission criticized the vagueness of the wording as not being able to fulfil the criterion of prescribed by law in Art. 10 ECHR, and especially with regard to the

2013, available at http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf at 31-37.

¹³¹ 7/2014. (III. 7.) AB határozat.

¹³² 13/2014. (IV. 18.) AB határozat.

¹³³ 3122/2014. (IV. 24.) AB határozat.



protection of the “dignity of the Hungarian nation” it pointed to dangers that it might curtail criticism of the government.¹³⁴

2.3.11. Freedom of scientific research and artistic creation, the freedom of learning and teaching

Article X

(1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge, and, within the framework laid down in an Act, the freedom of teaching.

(2) The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research.

(3)¹³⁵ Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act. The Government shall, within the framework of an Act, lay down the rules governing the management of public higher education institutions and shall supervise their management.

The first two paragraphs of the guarantee of freedom of art, science and teaching are in accordance with international standards. Scientific research and scientists in Hungarian refer to both the hard sciences and social sciences and humanities.

Paragraph (3) is however somewhat unusual. Firstly, it specifically protects the Hungarian Academy of Sciences, but also the “Hungarian Academy of Arts”, an institution recently founded by government as a counter-institution to other (civil) artistic academies. The Hungarian Academy of Arts has a predecessor civil society organization with the same name, and the law basically elevated that institution to the constitutional level when proclaimed a continuity of its membership. The HCC found that the founding was therefore not in accordance with the freedom of art as a civil society organization does not have to be neutral, while an academy proclaimed in the constitution and disposing of various supporting grants and other avenues for artists has. As new members can only be allowed to the Academy if previous members suggest them, the Academy does not fulfil requirements of neutrality of the state. The HCC reaffirmed its previous jurisprudence that freedom of art, science and teaching belonged to communicative freedoms.¹³⁶ Furthermore, it also confirmed that the state is bound by an institutional

¹³⁴ [52]-[53] OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

¹³⁵ Supplemented by Article 6 of the Fourth Amendment to the Fundamental Law (25 March 2013).

¹³⁶ 30/1992. (V. 26.) AB határozat, reaffirmed in 18/2014. (V. 30.) AB határozat.



obligation to protect the freedom of artistic life which requires that the state show a neutrality in artistic questions, and it has to facilitate and secure the diversity of artistic creations, and cannot regard any one direction or approach exclusive.¹³⁷ Curiously, however, the HCC did not annul the Academy as the Court considered it would violate legal certainty, but called for the Academy and the legislature to amend the conditions of membership in a way that it becomes neutral (i.e. a so-called constitutional requirement – similar to French constitutional interpretative reserve -- was added, which in traditional doctrine means that the HCC determines the scope of interpretation of a legal rule which is within the constitutionally permissible meaning. This case is special in that the constitutional requirement cannot be realized without further steps by the government and the Academy, thus it remains to be seen if they will follow lead or not.)

The second problem in Art. X concerns the long provision on university autonomy. Its second sentence was included in the text by the Fourth Amendment, and wishes to give constitutional authorization to a new system of university governance and management, which is part of a fundamental restructuring of the entirety of higher education. The provision basically nullifies university autonomy in the area of their own finances and management, and authorizes direct governmental steering in this regard. This is likely contrary to previous constitutional jurisprudence which held a scheme with limited governmental interference (veto power) unconstitutional.¹³⁸ Though this earlier jurisprudence might have struck the balance between accountability and autonomy too much in favour of the latter, the current regulatory trend is certainly contrary to European trends where institutional autonomy of higher education institutions increases rather than drastically decreases.¹³⁹

2.3.12. Right to education

Article XI

(1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising public education, by

¹³⁷ 18/2014. (V. 30.) AB határozat.

¹³⁸ 39/2006. (IX. 27.) AB határozat.

¹³⁹ Rates of return and funding models in Europe. Final report to the Directorate-Generale for Education and Culture of the European Commission, January 2007, as cited by Miklós Bánkúti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppelle, Péter Sólyom, "Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary", April 2013, available at http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment4.pdf, 39.



providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.

(3) An Act may provide that financial support of higher education studies shall be subject to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.¹⁴⁰

The right to education is protected in the constitution only as a citizen's right, somewhat in tension with Art. 13 of the International Covenant on Economic, Social, and Cultural Rights.

Apart from this, it is especially the third paragraph which diverges from usual standards, and it especially goes counter to the ECOSOC obligations to "the progressive introduction of free education". It notably constitutionalizes a duty to repay the support gained through free higher education by working in the country for a definite period of time after university as established in a law (the so-called "student contract" or being "bound to the land"). The government drastically decreased even those places in higher education which the state supports in exchange of the duty to work in the country, and the rest of the students pay tuition.

The scheme instituting the student contract was previously found unconstitutional once, albeit only for formal reasons (as it was regulated in an ordinance of government, not in an act of parliament.)¹⁴¹ Since then, when the scheme was moved into the Act on "National Higher Education,"¹⁴² (and still before it was moved to the constitution), the ombudsman initiated abstract norm control, but the HCC has not decided the case yet.¹⁴³ The ombudsman claimed not only violation of the right to education, but also violation of free movement of persons under EU law. Thus, theoretically, even if the HCC rejected competence with regard to the right to education after the text of the constitution was changed, it still could proclaim the scheme violated Art. E or Q (on European integration and international law). Exactly in the decision rejecting the competence to review alleged unconstitutional amendments (in the form of the Fourth Amendment), the HCC notably noted that "it will take into consideration the obligations

¹⁴⁰ Supplemented by Article 7 of the Fourth Amendment to the Fundamental Law (25 March 2013).

¹⁴¹ 32/2012. (VII. 4.) AB határozat

¹⁴² Act CCIV/2011 on national higher education.

¹⁴³ See case nr. II/03349/2012, pending since 31. August 2012, <http://public.mkab.hu/dev/dontesek.nsf/0/A1F2671A01F8C424C1257ADA005248ED?OpenDocument>



Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. These rules constitute a unified system of values which are not to be disregarded in the course of framing the constitution or legislation or in the course of constitutional review.”¹⁴⁴ It seems, the HCC rather ignores the request than draw the consequences from its own jurisprudence (which many thought anyway was only a weak attempt at saving face, see below under Question 3).

2.3.13. Right to property and inheritance

Article XIII

(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility.

(2) Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

2.3.13.1 General characteristics

The right to property has been among the core rights in the jurisprudence of the HCC before the new constitution, and, especially, before the limitation of its competences on reviewing financial/budget legislation (see below under jurisdictional issues). According to this jurisprudence, property is understood to guarantee the material bases of personal autonomy, thus it is in essence a freedom right. The “constitutional property protection”¹⁴⁵ is a notion different from property in the private law in two senses. Firstly, it includes not only *ius reale/ius in rem*, but might also extend to all kinds of entitlements stemming from contractual and tort relations, and also to public law entitlements.¹⁴⁶ Secondly, the constitutional property protection, unlike the real right in private law, is not absolute, and can be limited.

2.3.13.2 Applicable test

Property is different from other fundamental rights in that the test applicable to its limitations is a looser one: property can be limited also in pursuance of a simple public interest, subject to a

¹⁴⁴ 12/2013. (V. 24.) AB határozat. Summary available in English
<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

¹⁴⁵ Elaborated in 64/1993. (XII. 22.) AB határozat.

¹⁴⁶ See Orsolya Salát-Pál Sonnevend, “Commentary to Art. 13 [the right to property]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485.



proportionality test.¹⁴⁷ thus suggesting a socially bound concept of property, similarly to the German doctrine.¹⁴⁸

The proportionality test was always understood to fall within the review jurisdiction of the HCC,¹⁴⁹ but there were uncertainties as to the power of the HCC to review the material existence of a public interest.¹⁵⁰

2.3.13.3 Scope of protection

On the doctrinal basis outlined above, the HCC extended the scope of property protection to all kinds of material interests to which a particular subject has a “doubtless entitlement.” This means especially a relation to either one’s own property (wealth) or work which creates value. Social security benefits,¹⁵¹ if they are based on insurance,¹⁵² such as the pension,¹⁵³ are also protected by the property right. Similarly, permits required to practice professions, e.g. architects¹⁵⁴ or public notaries,¹⁵⁵ the so called “practice right” of the family doctor, or concessions qualify as property. Non-insurance based social benefits – i.e. where there is no consideration - do however not fall under property right protection, but are subject to the requirement flowing from the rule of law, i.e. legal certainty, whereby a transitional period is required to allow preparation for the change.¹⁵⁶

The legislator is is entitled, although not required, to compensate for past injustices (e.g. killings or expropriations) by way of ex gratia benefits. These ex gratia benefits do not create a property right .In

¹⁴⁷ 64/1993. (XII. 22.) AB határozat.

¹⁴⁸ Drinóczi, op.cit.

¹⁴⁹ E.g., Pál Sonnevend, “A tulajdonhoz való jog [The right to property]” in Gábor Halmai-Gábor Attila Tóth, eds., *Emberi Jogok [Human Rights]* (Osiris, Budapest 2003).

¹⁵⁰ See 42/2006. (X. 5.) AB határozat.

¹⁵¹ The HCC has been criticized for its activist judgments in relation to the 1995 austerity package which affected redistributive systems. In English, see András Sajó, “How the Rule of Law Killed Hungarian Welfare Reform” *East European Constitutional Review* 5 (1), 31-41, András Sajó, “Social Welfare Schemes and Constitutional Adjudication in Hungary” in Jiří Přibáň and James Young eds., *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Ashgate, 1999).

¹⁵² 43/1995. (VI. 30.) AB határozat, Orsolya Salát-Pál Sonnevend, “Commentary to Art. 13 [the right to property]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485, 468, [54].

¹⁵³ 56/1995. (IX. 15.) AB határozat.

¹⁵⁴ 40/1997. (VII. 1.) AB határozat.

¹⁵⁵ 27/1999. (IX. 15.) AB határozat.

¹⁵⁶ 43/1995. (VI. 30.) AB határozat, 56/1995. (IX. 15.) AB határozat.



the selection of the groups of persons to be compensated, the legislator is bound by simple reasonableness standards and not a proportionality test.¹⁵⁷

A specific question of property protection relates to legitimate expectations. In this regard, the old HCC ruled that maternity benefits cannot be curtailed unless they enter into force more than 9 months (the period of the pregnancy) later than the publication of the law.¹⁵⁸

However, the new HCC considered that the government imposed early repayment scheme, by which banks were obliged to allow debtors to pay remaining loans taken in foreign currency at a fixed exchange rate in one sum, did not violate property rights (legitimate expectations) of banks; the HCC argued that the significant drop in the value of the Hungarian forint vis-à-vis the Swiss franc in which many were indebted had not been foreseeable, thereby not creating a property-like legitimate expectation on the part of banks.¹⁵⁹

The tobacco retail sale was recently completely re-regulated. All previously held permits were revoked, and new permits issued under questionable circumstances and based on unclear criteria.¹⁶⁰ This measure deprived many people from their main source of income. The ombudsman (who only issues recommendations) found that the re-regulation in itself did not violate either the right to property or the freedom of enterprise, as their limitation is justified by the state interest in protecting children. However, he considered that the procedure for issuing the concession was capable of violating the right to fair procedure.¹⁶¹ The tobacco regulation is currently under consideration by the European Commission.¹⁶²

A recent case which might have been earlier decided under property rights involved gambling machines. A law which provided for the immediate termination of the operation of gambling machines elsewhere than in casinos was found constitutional by a divided Constitutional Court. The majority found no property issue involved as the legislator is free to regulate the gambling market (the dissenting judges

¹⁵⁷ This can be quite dysfunctional for coming into terms with the past, see András Sajó, "Legal Consequences of Past Collective Wrongdoing after Communism" 6 *German Law Journal* 425-437 (2005), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=566>

¹⁵⁸ 43/1995. (VI. 30.) AB határozat.

¹⁵⁹ 3048/2013. (II. 28.) AB határozat.

¹⁶⁰ The conditions under which the new retail shop would operate were not clearly defined (eg what kind of products they could sell, margin levels, etc); they were serious allegations that licences were attributed based on political affiliation (only to supporters of the governmental party), etc.

¹⁶¹ Report of the ombudsman in case AJB-3466/2013, <http://www.ajbh.hu/documents/10180/111959/201303466.pdf>

¹⁶² http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/bycountry/index_en.htm#hungary



understood the measure as interfering with acquired rights). The fact that the legislator did not provide any transitional period in which the operators could prepare for the termination of the source of their living could have been “problematic” from the point of view of legal certainty. It was however found justified for reasons of urgency due to national security concerns (which remained unrevealed by government...).¹⁶³

Finally, under both the old and new jurisprudence, acquisition of property is not included in the scope of constitutional protection. This is one reason why limitations on acquiring land property (e.g. by foreign companies) were ruled constitutional.¹⁶⁴

2.3.13.4 Limitation of property

The (“old”) HCC, whilst it expanded the scope of proaction afforded to constitutional property, also accepted a broader scope of limitations. In the modern regulatory state, more limits are imposed on property owners on the exercise on this right than was previously the case. As mentioned earlier, property can be limited in pursuance of a simple public interest. What is more, the public interest can not only mean an interest or utility for the community, but can also directly benefit individuals, in order to solved specific social problems.¹⁶⁵

Whether a specific restriction is constitutional, depends on all circumstances of the case, thus it is a casuistic inquiry.¹⁶⁶ Generally, providing compensation will not make a limitation constitutional, but such compensation might be necessary for the measure to be proportionate.¹⁶⁷

Similarly to international trends, taxation is not perceived in general as a limit on property rights. It was addressed (before the HCC’s competence to address tax matters was largely taken away) on the basis of the clause on taxation.¹⁶⁸

2.3.13.5 Expropriation

Expropriation is only possible according to both the old and the new constitution if it is exceptional, required by public interest, and accompanied by immediate compensation.

¹⁶³ 26/2013. (X. 3.) AB határozat.

¹⁶⁴ 35/1994. (VI. 24.) AB határozat.

¹⁶⁵ 64/1993. (XII. 22.) AB határozat.

¹⁶⁶ Salát-Sonnevend op.cit.

¹⁶⁷ Id. and Salát-Sonnevend op. cit. [99]

¹⁶⁸ E.g. 61/2006. (XI. 15.) AB határozat.



If a restriction burdens the enjoyment of property to an extent that its use becomes economically empty, if only *nudum jus* remains with the owner, then such a limitation (according to traditional interpretation) qualifies as expropriation and needs be compensated.¹⁶⁹

2.3.14. Non-refoulement and right to asylum

Article XIV

(1) Hungarian citizens shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners staying in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.

(2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment.

(3) Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country.

The constitutional text regarding non-refoulement and asylum does not cover all the cases where the ECtHR requires protection. As McBride pointed out, Art. XIV notably does not include the risk of being subjected to degrading treatment, nor provides protection against expulsion where there is risk of an unjustified deprivation of liberty, an unfair trial or a violation of the right to freedom of thought, conscience and religion (though this latter one likely can be subsumed under para. (3) Art. XIV.)¹⁷⁰

Hungarian asylum policy and practice have been in poor shape, even beyond the problems common to many European countries. At the regulatory level, administrative detention of asylum seekers was found violating Art. 5 ECHR.¹⁷¹ Since then the legal framework¹⁷² was changed, also in preparation for the new EU directives, especially the Reception Conditions Directive, allowing detention only as a last resort.¹⁷³

¹⁶⁹ Salát-Sonnevend, *op. cit.*

¹⁷⁰ Jeremy McBride, *Trees in the Wood in Constitution for a Disunited Nation* (ed. Gábor Attila Tóth, CEU Press, 2012), 370.

¹⁷¹ *Lokpo and Touré v. Hungary*, Application No. [10816/10](#), Judgment of 20 September 2011

¹⁷² Act LXXX/2007 on Asylum was modified by Act CXXXV/2010 on amending migration related laws for reasons of legal harmonisation.

¹⁷³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29/06/2013, p. 96–116



Austria was condemned by the ECtHR for it wanted to forcefully transfer an asylum seeker to Hungary under the Dublin regulation,¹⁷⁴ after the first ever interim measure stopping the transfer was granted by the ECtHR. The Court however found on the merits that in the period between the interim measure (January 2012) and the decision (June 2013) the conditions in Hungary improved.

2.3.15. Right to equality

Article XV

(1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

(3) Women and men shall have equal rights.

(4)¹⁷⁵ By means of separate measures, Hungary shall promote the achievement of equality of opportunity and social inclusion [“closing up” -- OS].

(5)¹⁷⁶ By means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities.

The previous constitution did not have a general, comprehensive equality provision, but the HCC elaborated a “general equality rule” which requires that every person be treated with equal respect and concern.¹⁷⁷ The interpretation of the “general equality rule” has been close to the Dworkinian “right to treatment as an equal”, and equality of resources.¹⁷⁸

The HCC confirmed a close link between human dignity and equality, and thus considered some violations of equality violate equal human dignity. This is the case with all arbitrary distinctions, regardless of whether they affect a fundamental right or some other right or interest. This meant in practice that discrimination in general was to be measured by a rationality standard or reasonableness

¹⁷⁴ Mohammed v. Austria, *Application no. 2283/12*, judgment of 6 June 2013.

¹⁷⁵ Amended by Article 21(1)e) of the Fourth Amendment to the Fundamental Law (25 March 2013)

¹⁷⁶ Amended by Article 21(1)f) of the Fourth Amendment to the Fundamental Law (25 March 2013)

¹⁷⁷ 9/1990. (IV. 25.) AB határozat.

¹⁷⁸ Kriszta Kovács, „Equality: The Missing Link” in *Constitution for a Disunited Nation* (ed. Gábor Attila Tóth, CEU Press, 2012) at 174.



test. For the cases when discrimination affects a fundamental right, the HCC pronounced an even stronger standard, in that in such cases it had to be shown that the measure is strictly necessary and proportionate to a legitimate aim pursued. Earlier jurisprudence was quite progressive in a few regards, and conspicuously silent in others. The HCC included sexual orientation,¹⁷⁹ age,¹⁸⁰ and disability¹⁸¹ among the grounds of discrimination, and allowed in principle far reaching measures to provide for equality of opportunities¹⁸² and affirmative action (including, for example, the theoretical permissibility of quotas, or additional points at the university entry exams for especially disadvantaged social status¹⁸³), and was able to accommodate both direct and indirect discrimination, at least in some decisions.¹⁸⁴ However, quite curiously in a country with a significant and significantly discriminated Roma population, the HCC never pronounced a finding on racial discrimination, but resolved such cases on the basis of other constitutional provisions.¹⁸⁵ The ECtHR, in contrast, easily found violation of Art. 14 in connection with Art. 2 Protocol 1 for Hungary operated a segregated school (which is a widespread practice and major obstacle to mobility in most countries of CEE).¹⁸⁶

The equality provision of the new constitution does not much to improve the situation, in fact it can be criticized for lowering protection against discrimination. Para. (2) conspicuously omits to include sexual orientation and gender identity in the list of specific grounds of discrimination, though it can arguably be included in the last ground “any other status.” Still, if read together with the provision on family and marriage (Art. L, see above), then the omission of sexual orientation in Art. XV. might be not only symbolic or negligent, but purposeful.

Furthermore, para. (4) aims at authorizing segregated schools, and other measures which do not aim at integration, as in the view of the minister for human resources that would better help Roma children to “close up”¹⁸⁷ – which is in fact the word used in para. (4), and not inclusion, implying a value judgment about the minority who has to be improved to the level of the majority.

¹⁷⁹ 20/1999. (VI. 25.) AB határozat, 37/2002. (IX. 4.) AB határozat, 154/2008. (XII. 17.) AB határozat.

¹⁸⁰ 1596/B/1990. AB határozat.

¹⁸¹ 36/2000. (X. 27.) AB határozat.

¹⁸² E.g., 7/1998. (III. 18.) AB határozat, 462/B/2002. AB határozat, 36/2000. (X. 27.) AB határozat.

¹⁸³ 635/B/2007. AB határozat.

¹⁸⁴ E.g., 176/2011. (X. 12.) AB határozat as cited by Kriszta Kovács, op. cit., 182.

¹⁸⁵ See the discussion by Kovács, op. cit, 177-180.

¹⁸⁶ Horváth and Kiss v. Hungary, application no. 11146/11, judgment of 29 January 2013.

¹⁸⁷ The HCLU translates this as „closing the social gap”, see <http://tasz.hu/en/romaprogram/hungarian-government-creates-legal-framework-segregating-roma-children-schools>.



Finally, para. (5) delineates in a problematic way the potential beneficiaries of affirmative action: it notably leaves out vulnerable minorities, such as racial, ethnic, religious or sexual groups. This is nonetheless in line with the rest of the text.

2.3.16. Rights of the child, obligation of parents and adult children towards each other

Article XVI

- (1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development.
- (2) Parents shall have the right to choose the upbringing to be given to their children.
- (3) Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children.
- (4) Adult children shall be obliged to take care of their parents if they are in need.

Para. (1) Art XVI grants a general right of the child to protection and care. The HCC argued recently that this provision was exclusively about *positive* obligations of the state (therefore, arguably, this right is not a civil right in the usual Hungarian understanding). Thus, the incarceration of juveniles for administrative offences does not affect Art. XVI in any way, but as a negative measure, is to be judged under Art. IV, right to personal freedom (and even that is not violated by the incarceration).¹⁸⁸

Para. (2) affirms right of the parents to choose the upbringing of the child, including in particular the religious or ideological upbringing, as it was settled in the jurisprudence of the 1989 constitution as well.

Para. (3) and (4) are more unusual in a constitutional text, as they state obligations of private persons vis-à-vis each other, and no obligation on the part of the state. The obligation of parents to “provide schooling” to their children is to understand not as home-schooling, but as an obligation to guarantee that the child regularly visits the school. As such, it is likely meant to provide a constitutional basis for reduction of social benefits of families whose children do not visit school, i.e. it affects families and, importantly, children in the most vulnerable situation at the edges of society.

¹⁸⁸ 3142/2013. (VII. 16.) AB határozat.



Para. (4) adds a rule traditionally present in continental *Civil Codes* about adult children's obligation to provide for their needy parents, in accordance with the value order of the Fundamental Law (fidelity, faith, and love).

2.3.17. Right to impartial, fair, and timely process and treatment by authorities

Article XXIV

(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act.

(2) Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act.

This provision echoes almost verbatim, though in an abbreviated form, Art. 41 of the Charter of Fundamental Rights of the European Union. As such, Art. XXIV belongs to the few provisions of the FL which merit acclaim and not critique. Art. XXIV is to be delineated from Art. XXVIII in that the latter specifically deals with criminal law guarantees, while the former covers all official processes and measures.

In recent relevant jurisprudence, this provision was interpreted to require that parliament give reasons about its decision on refusing to recognize a church (see above under Art. VII). The HCC attached particular importance to the requirement of reasoned decision because that is the only way to ascertain whether parliament respected its obligation to neutrality and equal treatment flowing from Art. XV (2) as well.¹⁸⁹

2.3.18. Right to petition

Article XXV

Everyone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power.

¹⁸⁹ 6/2013. (III. 1.) AB határozat.



The right to petition has not given rise to any specific jurisprudence under either the old or the new constitution so far.

2.3.19. Right to freedom of movement

Article XXVII

(1) Everyone staying lawfully in the territory of Hungary shall have the right to move freely and to freely choose his or her place of stay.

(2) Every Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad.

In earlier jurisprudence, the right to freedom of movement was interpreted as *lex specialis vis-à-vis* the right to personal liberty, and it covered the freedom of movement, the free choice of the place of residence and the rights of migration.¹⁹⁰

Under the new constitution, the HCC has not yet ruled on any issue necessitating the interpretation of Art. XXVII.

2.3.20. Fair trial rights and other criminal law guarantees

Article XXVIII

(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

(2) No one shall be considered guilty until his or her criminal liability has been established by the final decision of a court.

(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

(4) No one shall be held guilty of or be punished for an act which at the time when it was

¹⁹⁰ 35/2002. (VII. 19.) AB határozat, 13/2003. (IV. 9.) AB határozat, Tóth, op. cit., 1951.



committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.

(5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for any act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.

(6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.

Fair trial rights have been at the core of Hungarian fundamental rights protection ever since the regime change. The previous constitution had some lacunae in this regard, but they were filled in by interpretation. For instance, the requirement of reasonable time, or the exception based on international law from *nulla poena/nullum crimen sine lege* were to be found in the jurisprudence only,¹⁹¹ and the death penalty was also abolished by the HCC in a famous early ruling.¹⁹²

Art. XXVIII of the FL has in some regards improved the fair trial and criminal procedure guarantee, in others it has not.¹⁹³

Para. (1) contains the right to fair trial: the requirement of reasonable time, of impartial, and independent court established by law, and of a fair and public trial. It omits the previous constitution's proclamation of equality before the court, but that flows from the fairness requirement. These requirements apply to any procedure, be they criminal, private or administrative with no distinction.

Para. (2) spells out the presumption of innocence, and para. (3) the right to defence, though it does not mention legal aid. Para. (4) incorporates the *nullum crimen* principles (including openness to European and international law in this regard). It does not include 'nulla poena' in the sense that only such

¹⁹¹ 53/1993. (X. 13.) AB határozat.

¹⁹² 23/1990. (X. 31.) AB határozat.

¹⁹³ Zsolt Szomora, „Büntetőjogi garanciák az Alkotmányban és az Alaptörvényben”

In: Drinóczi Tímea, Jakab András (eds.), *Alkotmányozás Magyarországon 2010–2011.*. Pázmány Press, 2013. pp. 257-274.



punishments can be inflicted which were duly legislated at the time of commitment of the crime, but that can be resolved in interpretation. The international law exception from domestic *nullum crimen* is now included in para. (5). Para. (6) contains *ne bis in idem*, also taking into account international and European law. Para. (7) grants the right to remedy.

It has to be noted that despite Art. XXVIII's relatively detailed and rather unproblematic text, the independence and impartiality of justice have suffered several blows in the last years in Hungary, mostly on the occasion of the reorganization of the judiciary.¹⁹⁴

The first (which actually contributed to the second) relates to the 2006 riots and protest. In 2011, a law¹⁹⁵ was introduced which nullified all judicial rulings which brought a condemnation for certain public order offences in relation to the 2006 riots solely on the basis of testimonies of police officers or police reports (so called "Nullification Act"). 20 judges referred the law to the HCC, claiming that the overwriting of *res iudicata* by the Nullification Act violated, inter alia, the independence of judiciary. The HCC found in a divided opinion that it did not.¹⁹⁶

A further problematic issue which might undermine the appearance of an independent judiciary, was the premature removal of the chief justice of the Supreme Court (who was by the way previously ECtHR judge with regard to Hungary for 16 years). András Baka was removed for his critical views on government policy (including the nullification act mentioned above, and the early retirement scheme discussed below) affecting the judiciary, which he was statutorily mandated to voice. This was found violating Art. 10, and also Art. 6 (1) ECHR, for he was denied the right to a court.¹⁹⁷ Nonetheless, the ECtHR obviously could not pronounce on, let alone provide a remedy for the effect of the removal on the overall independence of judiciary in Hungary.

Another element of the reorganization reaching a (different) European court was the sudden decrease of mandatory retirement age of judges from 70 to 62, thus removing hundreds of mostly senior judges, also acclaimed international attention. After the HCC found it unconstitutional,¹⁹⁸ the ECJ also found it violated EU law, notably Council Directive 2000/78/EC (equal treatment in employment) as it realized a

¹⁹⁴ See Act CLXI/2011 on the Organisation and Administration of the Courts, and Act CLXII/2011 on the Legal Status and Remuneration of Judges, and the (highly critical) opinions by the Venice Commission: Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

¹⁹⁵ Act XVI/2011.

¹⁹⁶ 24/2013. (X. 4.) AB határozat.

¹⁹⁷ Baka v. Hungary, Application No. 20261/12, judgment of 24 May 2014.

¹⁹⁸ 33/2012. (VII. 16.) AB határozat.



discrimination based on age.¹⁹⁹ Though as a result of these two findings of illegality, exempted judges can request their reinstatement, nonetheless not to their previous (often leading) position.

Finally, perhaps the element of the reorganization mostly undermining at least the appearance of independent judiciary was the saga of the case reassignment or transfer powers. The HCC struck down a 2011 provision entitling the Supreme Prosecutor in some cases to select the court for violation of the right to an independent judiciary under the 1989 constitution.²⁰⁰ Still, the same power was given to the President of the (newly established) National Judicial Office, which -- together with other extremely wide-ranging powers centralized in the hand of this single person elected by two-third -- was repeatedly strongly criticized by the Venice Commission.²⁰¹ The transferral powers were even put into the text of the Fundamental Law by the Fourth Amendment. After repeated criticism,²⁰² the power of transfer of cases was revoked by the Fifth Amendment.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

- ✓ **To which international instruments for the protection of civil rights is your country a party?**

ICCPR, ECHR

- ✓ **How are relevant international and European civil rights norms being incorporated in your country?**

The FL contains the foundation for Hungary's participation in the international community in Art. Q in the following way.

¹⁹⁹ Case C-286/12, judgment of the CJEU of 6 November 2012.

²⁰⁰ 166/2011. (XII. 20.) AB határozat.

²⁰¹ CDL-AD(2012)001-e, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), and CDL-AD(2012)020-e Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e).

²⁰² OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)



Article Q

(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.

(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.

Generally recognised rules of international law include customary law and general principles of law. The HCC interpreted²⁰³ the previous constitution's similar provision as having realized a "general transformation" of such rules, while for other sources, such as treaties, the constitution has foreseen a "special transformation" in law or ordinance. Under both the old and the new constitution, the HCC has a competence to rule – before and after – about the harmony of an international treaty and the constitution.

International human rights treaties are to be transformed by law, a formal legislative act of Parliament.²⁰⁴ Before 1989, some treaties were transformed not by Parliament, but by an organ called Presidential Council of the People's Republic. The ICESR was promulgated in such a legal norm.²⁰⁵ These so called "ordinances having the force of law" remained in effect after the new (1989) constitution came into force; their being formally in a legal source not anymore acceptable in a rule of law state was not considered fatal, unless invalidated by the HCC for substantive unconstitutionality.

The government majority since 2010 is notorious for its disregard for international standards for human rights and constitutionalism, and the HCC was hardly able to counter this trend, especially that many judgments of the HCC were disregarded in that the provision found unconstitutional was subsequently put in the constitution. When asked to rule on the unconstitutionality of constitutional amendments, the HCC declined competence. However, it emphasized that limits stemming from the system of mutually intertwined fundamental rights, furthermore, Hungary's international and European obligations as noted in Art. E and Art. Q entitled the Court "to interpret and apply the FL as a coherent system and will consider and measure against one another, every provision of the Fundamental Law

²⁰³ Dec. 53/1993. (X. 13.) AB.

²⁰⁴ Art. 7. (3) of Law L/2005 on the procedure relating to international treaties.

²⁰⁵ 1976. ÉVI 9. TÖRVÉNYEREJŰ RENDELET



relevant to the decision of the given matter. The Court will also take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. These rules constitute a unified system of values which are not to be disregarded in the course of framing the Constitution or legislation or in the course of constitutional review.”²⁰⁶ However, it is questionable what would qualify as disregarding these values, if not the Fourth Amendment. Thus, the HCC at once pronounced a standard and omitted to apply it to a case most clearly falling under the standard.²⁰⁷

- ✓ **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

The 1950 Convention and its protocols are ratified, i.e. promulgated in an act of Parliament, except for Protocols 12, 15, and 16.²⁰⁸

Though the Convention – as ratified – is itself applicable law, what that means exactly is unclarified. Though the Supreme Court declared the Convention “to be applied, its provisions to be observed”,²⁰⁹ it

²⁰⁶ 12/2013. (V. 24.) AB határozat. Summary available in English

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

²⁰⁷ Similarly, Attila Vincze, “Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az alkotmánybíróság esetjogában”, *MTA Law Working Papers*, 2014/23, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_23_Vincze.pdf at 8.

²⁰⁸

1993. ÉVI XXXI. TÖRVÉNY

az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről,

1998. ÉVI XLII. TÖRVÉNY

az emberi jogok és alapvető szabadságok védelméről szóló Egyezmény tizenegyedik jegyzőkönyvének kihirdetéséről

2004. ÉVI III. TÖRVÉNY

az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény tizenharmadik, a halálbüntetés minden körülmények között történő eltörlésére vonatkozó jegyzőkönyvének kihirdetéséről

2005. ÉVI CXXIV. TÖRVÉNY

az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezménynek az Egyezmény ellenőrző rendszerének módosítására vonatkozó 14. jegyzőkönyve kihirdetéséről.



is still questionable if it means direct applicability or rather the Convention rights only serve as “additional arguments in the interpretation of domestic law, through which the Convention takes effect.”²¹⁰ The Constitutional Court in one case declared it will follow ECHR case law even if it diverges from its own interpretation;²¹¹ in general it stated that international obligations which violate the Hungarian constitution may not be enforced apart from *ius cogens*.²¹² It is more precise to locate the Convention – and other international treaties – at the level between the constitution and ordinary statutes, i.e. it has an infraconstitutional, but suprastatutory rank in the hierarchy of norms.²¹³ The HCC has however traditionally interpreted the constitution in conformity with the Convention (and ECtHR case law) as much as possible,²¹⁴ though often not basing the decision clearly or exclusively on ECtHR case law.²¹⁵ Ordinary courts are also in principle influenced by ECtHR rulings, but courts used to notoriously disregard or ignore European human rights law.²¹⁶ This might be changing in recent years,²¹⁷ though no exact data and detailed analysis are available.

Nonetheless, until recently, courts were helpless in the face of a domestic law provision clearly conflicting with ECtHR interpretation,²¹⁸ and in case of clash, they “invariably apply Hungarian law”²¹⁹ as very much attested by the red star controversy.²²⁰ Though the courts have only needed to

²⁰⁹ Judgment Pfv.V.20.485/2008/4. (15 May 2008) of the Supreme Court and the judgment Kfv.VI.37.232/2011/13. (6 February 2012) of the Curia as cited by Máté Mohácsi, “Enforceability of the European Convention on Human Rights by Ordinary Courts in Hungary” in *1 Hungarian Yearbook of International and European Law* (2014), 433.

²¹⁰ See in more detail Mohácsi, op.cit.

²¹¹ Dec. 61/2011. (VII. 13) AB.

²¹² Dec. 30/1998. (VI. 25.) AB.

²¹³ Dec. 161/2011. (XII. 20.) AB annulled statutory provisions for violation of the Convention.

²¹⁴ Examples (to the contrary as well) are provided in English by Gábor Halmai, *Perspectives on Global Constitutionalism*, Eleven, 2014, 92-94.

²¹⁵ See, e.g., 75/2008. (V. 29.) AB, overruling previous jurisprudence after the decision of the ECtHR in *Bukta v. Hungary* appl. Nr. 25691/04, without relying solely on the ECtHR ruling, in fact treating the ruling as a new fact which mandates the admissibility of the request which otherwise were barred for reasons of *res iudicata*.

²¹⁶ See Balázs D. Tóth, Krisztián Enyedi, Gábor Halmai, Attila Németh, Eszter Polgári, Péter Sólyom, “Alkotmányos és nemzetközi emberi jogi követelmények a rendes bíróságok gyakorlatában” In: Zoltán Fleck ed., *Bíróságok mérlegén* Vol. II. (Pallas Kiadó, 2008) 75-184.

²¹⁷ This is the impression e.g. of Mohácsi, op.cit. supra note 210.

²¹⁸ The situation would be clear if judgments of the ECtHR, with regard Hungary, were to be published in the Official Journal. This is, however, only the case with regard to international judgments in inter-state procedures. See Pál Sonnevend, “Report on Hungary” in Martinico Giuseppe, Pollicino Oreste eds., *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen; Amsterdam: Europa Law Publishing, 2010) 251-269, 253.

²¹⁹ Gábor Halmai, *Perspectives on Global Constitutionalism*, Eleven, 2014, 92.

²²⁰ See *Vajnai v. Hungary* and *Fratanoló v. Hungary*.



“complement” a criminal law provision with a specific animus, thereby narrowing its reach to conducts proscribable under ECtHR case law, this interpretation was perceived *contra legem*, and thus impermissible by ordinary courts, and the legal situation could not be righted until the HCC annulled the provision and legislator introduced a new one.

The new Act on the Constitutional Court has somewhat improved this situation in that it made possible for courts to suspend procedure and turn to the HCC in case a provision conflicts with international law too²²¹ (i.e. not only in case of perceived unconstitutionality of an applicable norm as used to be the case, and for which it would have been needed to be established that conflict with international law amounted to unconstitutionality.)

- ✓ **How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?**

The ICCPR does not exert such an important role as the ECHR in Hungarian law. Still, at least 74 decisions of the HCC (out of which 65 were „repealed” by the 4th Amendment, as they preceded the FL) at least mention the ICCPR. A recurring mention is when declaring that “in case of some fundamental rights, the Constitution formulates the essence of the fundamental right the same way as some international treaties (e.g. the ICCPR and the ECHR). In these cases the level of rights protection provided by the Constitutional Court may certainly not be lower than the level of international rights protection (typically as developed by the European Court of Human Rights).”²²² Thus, it is in general the view of the HCC that domestic constitutional law should provide a higher or at least equal protection of rights than international law, but also that the ECtHR is considered more important in setting standards than e.g. the HRC. This does not mean, however, that the HCC would be able or willing to annul constitutional amendments which violate international human rights standards.

As to ordinary courts, there the search engine yields only 39 results for ICCPR between 2009 and 2013.

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

- ✓ **To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred**

²²¹ Art. 32, Law on the Constitutional Court, also Art. 155/B. of the Law III/1952. about the Code of Civil Procedure.

²²² 61/2011. (VII. 13.) AB, ABH 2011, 290, 321.



to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)

The FL contains in Article E the foundation for Hungary's participation in the European Union:

Article E

(1) In order to enhance the liberty, well-being and security of the peoples²²³ of Europe, Hungary shall contribute to the creation of European unity.

(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.

(3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.

(4) For the authorisation to recognise the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.

The Charter was ratified and promulgated in the law ratifying the Lisbon Treaty.²²⁴ According to a search in an up-to-date legal database (CompLex legal database published by Wolter Kluwers), the Charter is referred to only in 5 normative acts: in the act ratifying the Lisbon Treaty, in the act ratifying Ireland's opt-out from the Charter,²²⁵ in an act ratifying a convention between Bulgaria, Croatia, Hungary, and Austria on road safety,²²⁶ and two government ordinances on the National Education Plan.²²⁷

²²³ The translation by the Ministry of Foreign Affairs (<http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>) uses „people” here, but in the original, it is European peoples.

²²⁴ 2007. évi CLXVIII. Törvény az Európai Unióról szóló szerződés és az Európai Közösséget létrehozó szerződés módosításáról szóló lisszaboni szerződés kihirdetéséről

²²⁵

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az ír népnek a Lisszaboni Szerződéssel kapcsolatos aggályairól szóló jegyzőkönyv kihirdetéséről

²²⁶ http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200170.TV&celpara=#xcelparam

²²⁷ http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200110.KOR&celpara=#xcelparam 110/2012. (VI. 4.) Korm. Rendelet a Nemzeti alaptanterv kiadásáról, bevezetéséről és alkalmazásáról, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300243.KOR&celpara=#xcelparam 243/2003. (XII. 17.) Korm. Rendelet a Nemzeti alaptanterv kiadásáról, bevezetéséről és alkalmazásáról



General principles of community law, Union law, or European law are not referred to in any normative acts according to the same database.

The Ombudsman (previously, the ombudsmen) has traditionally been actively referring to international and European instruments of rights protection, including the Charter, in every case and report possible.²²⁸

Courts used to notoriously disregard or ignore European law, including human rights case law,²²⁹ but this might be changing in the last few years, though exact data and profound analysis from the last six years are not available. The search engine of Hungarian courts displays between 17 and 19 decisions (depending on search terms) from 2009 till 2013 referring to the Charter of Fundamental Rights.²³⁰

- ✓ **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.**

There has not been any litigation or much scholarly or other public discourse related to this specific issue.

QUESTION 5 : JURISDICTIONAL ISSUES

- ✓ **Personal**
 - **Who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?**

²²⁸ See, e.g., the results of a search for „charter of fundamental rights of the Union” on the website of the Ombudsman’s office at http://www.ajbh.hu/kezdolap?p_p_id=3&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_3_struts_action=%2Fsearch%2Fsearch&_3_redirect=%2F&_3_keywords=uni%C3%B3+alapjogi+chart%C3%A1ja&_3_groupId=0&x=0&y=0

²²⁹ See D. Tóth Balázs, Enyedi Krisztián, Halmai Gábor, Németh Attila, Polgári Eszter, Sólyom Péter: Alkotmányos és nemzetközi emberi jogi követelmények a rendes bíróságok gyakorlatában. In: Bíróságok mérlegen II. (szerk. Fleck Zoltán), Pallas Kiadó, 2008, 75-184.

²³⁰ <http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>



Fundamental rights are granted to everyone in the FL, without restriction to citizenship or other status. Art. I (4) adds that “Fundamental rights and obligations which by their nature apply not only to man shall be guaranteed also for legal entities established by an Act,”²³¹ thus legal persons also have fundamental rights in as much as possible. In interpretation, however, legal persons do not have a right to human dignity, which means in effect they cannot claim unconstitutionality in any way in case fiscal legislation violates their right to property in a discriminative manner (see below under Material scope).²³²

✓ **Territorial**

- **What is the territorial scope of the protection of civil rights afforded by your member states? Are there *territorial* limitations to such protection? Which?**

There are no explicit territorial limitations, i.e. the territorial scope of civil rights equals with the jurisdiction of the Hungarian state.

✓ **Material**

- **Are rights protected differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)?**
 - Emergency powers

Emergency powers are regulated in the last part of the new constitution about special legal orders. “Special legal order” is a comprehensive term including three concepts: (i) national crisis meaning war or danger of war; (ii) state of emergency (internal armed conflict,), (iii) state of preventive defence; (iv) unexpected attack; (v) state of danger.

According to Art. 54, under a special legal order, the exercise of fundamental rights may be suspended or may be restricted beyond the extent specified in Article I(3), the provision requiring the restriction be necessary and proportionate to the aim pursued. Fundamental rights provided for in Articles II and III, and Article XXVIII(2) to (6) -- i.e. human dignity and the right to life; prohibition of torture, of inhuman or

²³¹ FL Art. I (4) <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>

²³² 807/B/2007. AB határozat; 361/B/2008. AB végzés; 821/B/2009. AB határozat; 3/B/2008. AB végzés, see also Péter Tilk’s contribution to Fórum, forthcoming in Fundamentum 2014/1 (manuscript on file with the author).



degrading treatment or punishment, of servitude, of human trafficking, of experimentation on humans without their consent, of eugenics, and of human cloning; and fair trial rights with the exception of right to remedy (right to a fair trial, presumption of innocence, right to defence, nullum cimen, nulla poena sine lege, ne bis in idem) – cannot be suspended even under special legal orders, neither may the application of the Fundamental Law suspended, nor the operation of the Constitutional Court restricted.

As McBride notes, this provision is problematic in two regards. Firstly, that the possibility of limiting rights beyond the measure foreseen in Art. I (3) also collides with Art. 15 ECHR as it allows for limitation beyond what is strictly necessary.²³³

■ Limited HCC competence in the field of tax and budget legislation

The enjoyment of rights, especially property, are affected by Art. 37(4) about the limitation of the competence of HCC in reviewing tax and budget legislation, which – in a significant area – basically nullifies the protection given to property:

Art. 37 (4)

As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. [...] ²³⁴

In the quote above, affected legislative topics are highlighted, which cannot be reviewed unless the initiator of constitutional review claims a violation of particular rights (similarly highlighted above). Unsurprisingly, you find neither the right to property, nor legal security on that list, exactly because these two used to be most frequent grounds on which the HCC invalidated such laws.²³⁵ The HCC interprets provisions narrowing its competences in a narrow sense, and the exceptional grounds which allow for review broadly or extensively.²³⁶ For instance it ruled that discrimination is a violation of

²³³ Jeremy McBride, “Trees in the Wood” in *Constitution for a Disunited Nation* (ed. Gábor Attila Tóth, CEU Press, 2012), 367.

²³⁴ The paragraph continues by allowing the HCC to review such legislation for formal unconstitutionality: „The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.”

²³⁵

²³⁶ **1/2011. (VI. 21.) számú Tü. állásfoglalás (as cited by Tilk)**



human dignity, thus it can review fiscal laws for discrimination between natural persons²³⁷ but not between legal persons. (This provision allows the government to levy extra taxes on banks, and the telecom business, but also the nationalization of private pension funds which led many such service providers close to economic collapse.)

✓ **Temporal**

- **What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?**

The FL in Art. II. proclaims after granting human dignity and the right to life, that “the life of the foetus shall be protected from the moment of conception.” This does not mean the foetus is considered to have equal status as born persons, however, it might be understood as authorizing a stricter abortion regime than it used to be the case so far.

- ✓ Please offer details as to how different rights are afforded to different *categories of persons* in *different location and policy contexts over time?*

QUESTION 6 : ACTORS

- ✓ **What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights’ standards (influencing legislative, regulatory, administrative or judicial processes) . Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.**

Participation is regulated on the law on social participation in the preparation of legal rules.²³⁸ This makes a sort of social consultation mandatory in the case of acts (statutes of parliament), and cabinet and ministerial ordinances. Consultation is either done with designated “strategic partners” or with anybody expert or affected by the planned legislation or ordinance. In case of mandatory consultation, the plan of ordinance or the bill is to be displayed on the website of the ministry, and anyone (with

²³⁷ 1132/D/2007. AB határozat.

²³⁸ 2010. évi CXXXI. Törvény a jogszabályok előkészítésében való társadalmi részvételről



name) can send in his or her or their organization's view on the plan. The deadline during which the plan is open for such consultation is not set in the law, however. Thus, it happens that the deadline is on the same day as the day of publication of the bill on the website, or only a few days are allocated for the consultation. *E.g.* a 45 pages bill amending the law on misdemeanours (administrative offenses) was open for 3, the 95 pages bill on the prosecution for 1 day for consultation.²³⁹ Both of these laws affect civil rights significantly.

Even in case the government explicitly invites for a consultative meeting some organizations, sometimes too little time is left for forming the opinion or it is obvious from other signs that the ministry does not take the legislative duty to consult in any sense seriously.²⁴⁰

In other cases, such as – importantly – with the media laws, the obligation to consult (Art. 8 of the law) was simply ignored: the media laws were not open at all to “general consultation”, their bills were not displayed at all on the governmental website where such bills are to be published inviting comments from the general public.²⁴¹

Some legislative acts and ordinances are per default taken out of the scope of the law. These include payment obligations (e.g. taxes), state subsidies, the state budget and its implementation, subsidies from EU and international funds, the promulgation of international treaties, the establishment of new organizations or institutions (Art. 5. (3)). Though civil society suggested to only exempting state subsidies under a certain amount (HUF 50 millions), it was not taken into account in the final law.²⁴²

The regulatory conceptions and the general legislative plan of the government can, but do not have to be opened for general consultation, despite the fact that this was requested by civil society organizations before the law on participation was adopted.²⁴³

Similarly problematic might be that consultation *cannot be held* if the consultation “endangered particularly important interest of national defense, national security, financial, foreign affairs, or protection of nature, environment or national heritage of Hungary.” (Art. 5 (4)). Consultation *does not*

²³⁹ <http://helsinkifigyeló.hvg.hu/2013/04/09/torvenygyari-capriccio-1-ora-hatasvizsgalatra-72-egyeztetesre/>

²⁴⁰ An infamous incident came during the preparation of the act on land acquisition, when the ministry called a consultative meeting for a Monday in an email sent out on Friday at 5 pm. When representatives of agrarian organizations appeared, it turned out the bill was changed in the meantime, but the official present did not have authorization to disclose the new plans to the participants. Then a new meeting was called for Friday 9 a.m. (consider that this is the „ministry for rural development” which puts the burden on farmers and others to get to Budapest by 9 a.m in the morning.) This meeting was again held without the minister having sent a person authorized to negotiations. http://lmv.hu/foldtv_VM_civil_egyeztetes_botrany

²⁴¹ http://tasz.hu/files/tasz/imce/tasz_mediav_modositas_allaspont110228.pdf

²⁴² http://www.niok.hu/allasmutat.html?all_azon=18

²⁴³ http://www.niok.hu/allasmutat.html?all_azon=18



have to be held if the *urgent adoption* of the law or ordinance furthers a significant public interest. (Art. 5 (5)).

Thus, though there is a law which allegedly seeks to get input from civil society and all actors affected, it is in itself problematic in some regards (which was pointed out by affected actors, but their views were ignored), mal-implemented in others, and simply violated in again other cases.

Furthermore, the law on participation is completely circumvented by a technique regularly applied lately, notably, that the bill is not introduced by the government, but in the form of a private member's bill. This is how the previous constitution was amended in 2010 and 2011 seven times out of nine, and the FL was also amended this way since it came to force, *e.g.* in relation to the media laws. Many laws, including, *e.g.*, the nationalization of private pension funds, were initiated by private members.

Instead, the government makes use of a so-called "national consultation", whereby short questionnaires – with often populist, directed, misleading or irrelevant questions -- are sent out to citizens.²⁴⁴ Though the (later removed) ombudsman for data protection found the way the consultation handled sensitive data (political opinion) unconstitutional,²⁴⁵ his legal successor, the head of the newly formed freedom of information authority stopped court proceedings which would have finally set the dispute in this regard,²⁴⁶ amended and partly vacated the decision of the ombudsman.²⁴⁷

QUESTION 7 : CONFLICTS BETWEEN RIGHTS

- ✓ **How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?**
- ✓ **Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?**

Please give examples, and illustrate how these conflicts are dealt with and resolved.

²⁴⁴ To get a glimpse on the nature of the questions, see the translated consultation questions on the new constitution here: <http://hungarianspectrum.wordpress.com/2011/03/02/national-consultation-questions-on-the-constitution/>.

²⁴⁵ http://abi.atlatszo.hu/index.php?menu=aktualis/allasfoglalasok/2011&dok=ABI-1642-9_2011_H

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7.1 Conflicts in general

As rights are stipulated in the constitution, and the constitution is clearly at the top of the hierarchy of norms, conflicts arising out of different sources are in principle not likely. As for conflicts between rights originating in the Constitution itself, Hungarian law, in line with the continental legal tradition, considers rights as being potentially limitable by other rights, and relies on the idea of institutional protection or objective dimension of a right. Such conflicts are to be settled ultimately by the interpretation of the Constitutional Court, by way of balancing and proportionality analysis.

7.2 Mechanisms

Under the FL, since 1 January 2012, the HCC has a new competence in that it can review and annul ordinary court decisions under the new (ie “real”) constitutional complaint mechanism. Earlier, it could only annul the underlying legal norm if it itself was unconstitutional, and could only step up against the unconstitutional interpretation of an in itself constitution-conform legal norm if the interpretation was so settled – generally petrified in practice -- that it could be considered “living law” [see analogous doctrine of “*diritto vivente*”]]. Thus, no constitutional remedy was open for cases when ordinary courts gave a legal norm an unconstitutional interpretation, unless the norm itself was unconstitutional. Under the FL, complaint is possible also against an alleged unconstitutional interpretation or application of a law (which is in itself not unconstitutional). Such a complaint comes from a private person party to a legal proceeding.

Furthermore, ordinary courts are obliged to suspend proceedings and refer matters to the HCC if they perceive that applicable laws are unconstitutional. Furthermore, the Government, a quarter of MPs and the ombudsman can request abstract a posteriori constitutional control if they perceive any unconstitutionality.

Hungarian law traditionally granted a conflict-solving function to the Supreme Court (renamed Curia in the FL), in the so-called ‘decision on the unity of law’ (‘jogegységi határozat’) in which the highest ordinary court (earlier Supreme Court, now Curia) declares which of the competing interpretations of a given legal rule is to be adopted. Theoretically, such a mechanism could help resolve conflict between rights incidentally; however, it is meant to resolve issues of private, criminal or administrative law and not fundamental rights. If the resolution by the Curia is not conform to the interpretation of the Constitutional Court, the latter has the final say, under both the old and new constitution.

In line with the lack of a “real constitutional complaint”, under the old constitution, this was only possible with regard to a “decision on unity of law,” as that was considered to be a “normative act”. Under the new constitution, the HCC can also review any ordinary court decisions through the constitutional complaint mechanism. The interpretation of the admissibility criteria in this new



competence are however widely criticized for being narrow, thus not providing a suitable remedy for fundamental rights violations.

7.3. Examples of conflicts

Conflicts between civil rights, civil rights and other rights, and civil rights and other interests naturally abound in Hungarian law as well. Here only a few classic and notorious examples can be addressed.

1. The issues in abortion cases are currently classified as involving a conflict between the pregnant woman's right to self-determination and the state's interest in protecting foetal life. As the previous jurisprudence reserved the authority to decide whether a foetus is a person to the legislature,²⁴⁸ it is in theory possible that the legislature – introducing a concept of person which includes the foetus – will in the future restrict abortion. Such a situation would entail a clear clash of two subjective rights: the right to life of the foetus and the right to self-determination of the woman, in which case the former would prevail as that is inviolable. Consequently, then, only a life-threatening pregnancy could be terminated. Equally, the recognition of foetal life as subjective personal right would also imply a ban on in vitro fertilization procedures

2. The clash between freedom of expression and human dignity or the right to reputation also belongs to the most problematic ones. Traditionally, Hungarian law resolves this conflict by way of balancing, and accords more weight to expression if a public person's reputation is affected. As mentioned above,²⁴⁹ the new text of the FL might be problematic in this regard, but as the HCC annulled the provision of the Civil Code which would enhance personality rights protection of public persons,²⁵⁰ the interpretation of the FL will hopefully remain in accordance with international standards.

3. Similarly to freedom of expression, freedom of information and the right to private life and data protection may clash in theory. Rarely should such a conflict result in the priority of private life, however, because people exercising public power or doing business with the state are understood to act within the public sphere when it comes to data related to such activities. In contrast, the Hungarian legislature has been – since 1989 – incapable and unwilling to adopt a law adequately addressing the issue of access to archives of the Communist state security agents. This trend continues during the current government despite strong anti-Communist rhetoric in the Fundamental Law.

²⁴⁸ See 2.3.1.2.

²⁴⁹ See 2.3.10.

²⁵⁰ Id.



4. Freedom of assembly (demonstration) was in one decision of the HCC seen as being in conflict with freedom of movement. This, however, resulted from an understanding that freedom of movement extends to vehicular traffic. Later, the HCC withdrew from this interpretation.²⁵¹

5. Freedom of association was found being in conflict with, and limited by, the interest of the state to protect rights of the child. In a highly criticized 1996 decision, the HCC found constitutional that an LGBT association was denied registration for it was to allow minors to become members.²⁵²

6. Sometimes arguments for reasons of the transitional nature of the Hungarian political system were also accepted as justifying limitation of freedom of association. In relation to political activities of policemen, the ECtHR found a ban proportionate expressly because the Hungarian police used to be overly politicized and loyal to the Communist party in the pre-1989 regime.²⁵³ A similar argument was however expressly denied by the ECtHR a decade later in relation to the ban of displaying the Red Star in public.²⁵⁴

7. Freedom of religion is currently in a complete turmoil in Hungary. As discussed above, the church law was found both unconstitutional and violating the ECHR. The government claims that the reregulation was necessary in order to prevent the abuse of benefits of church status by “business sects”.²⁵⁵ This is therefore a case conceptualized as a conflict between a right and a public interest, but the way in which the legislature attempted to solve the conflict was found impermissible.²⁵⁶

8. The right to property is subject to a weaker test than other rights in the Hungarian understanding. It can be limited by any public interest, i.e. neither a conflicting fundamental right, nor a constitutional value is required.²⁵⁷ Still, until recently, the HCC has given protection to property at around the level usual in international comparison. Recently, however, the HCC accepted the termination of gambling machines permits as being necessary and proportionate to the pursuance of national security interests which remained unrevealed to the HCC itself by the government. This is certainly a turn-away from previous standards where the HCC reserved the right to actually look into what interest is at stake.²⁵⁸ It

²⁵¹ See 2.3.8., 55/2001. (XI. 29.) AB határozat.

²⁵² 21/1996. (V. 17.) AB határozat.

²⁵³ Rekvényi v. Hungary, Application No. 25390/94, Judgment of 20 May 1999.

²⁵⁴ Vajnai v. Hungary, Application No. 33629/06., Judgment of 8 July 2008.

²⁵⁵ See 2.3.7.

²⁵⁶ Id.

²⁵⁷ See 2.3.13.

²⁵⁸ 26/2013. (X. 3.) AB határozat.



has to be mentioned here as well that the constitution-making power decided to withdraw from constitutional property scrutiny financial and budget laws by Art. 37.²⁵⁹

²⁵⁹ See *supra* under 5. Jurisdictional Issues.



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ITALY

QUESTIONNAIRE'S ANSWERS

Deliverable D7.1 "Report with a critical overview of the civil rights of EU citizens and third-country national"

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QUESTION 1: IDENTIFICATION OF CIVIL RIGHTS

Question 1: Identification of civil rights

- ✓ Which rights are considered in your country as civil, civic and citizenship rights?*
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) civil rights in EU Member States.

Please specify whether there are disagreements/developments in the notion of civil, civic or citizens' rights and liberties, and their core elements.

The basis of the system of fundamental rights of the Italian legal system is art. 2 of the Constitution: *"The Republic recognizes and guarantees inviolable rights of man, for the individual, and for social groups where personality is expressed, and demands the fulfilment of the fundamental duties of political, economic, and social solidarity"*¹.

The rights established by art. 2 Const. are, usually, defined as absolute, inalienable, indispensable and imprescriptible. They do not coincide, however, with the "classic" number of political and civil rights and freedoms, since they refer to individuals, so even non-citizens (see Const. Court, no. 245/2011), nor can they be limited to the single subjective situations that the Constitution expressly mentions as inviolable. In this regard, the term "inviolable" means the legal impossibility for anyone (and therefore for public authorities too) to determine the elimination or even substantial compression of the rights designated as such².

A profile of this article that is often debated in legal literature is its scope; particularly the knot of the question is whether art. 2 is to be considered an "open" or a "closed" clause. In this regard, scholars are divided among those who believe that art. 2 refers to the rights already present in the Constitution and those who, instead, identify in it the possible foundation of any rights that emerge over time in relation to the changing social and political context, finding constitutional protection, although not explicitly

1 The concepts of civil, civic and citizens' rights overlap and/or are used interchangeably in many legal systems. In this questionnaire, we will use the term civil rights as potentially including all three notions and covering all fundamental rights which are not political, social and economic. Please indicate how these three notions fare in your legal systems, and which one is more commonly used to refer to the rights under consideration (if any). Please use original language as well as the most accurate English translation of the term.

This translation of the Italian Constitution, and the others that will be quoted in this document, are taken from 'The Constitution of the Italian Republic', edited and annotated by C. Casonato and J. Woelk, Faculty of Law – University of Trento, 2013.

² However, always taking into account the principle of balance of interests, which, in the constitutional system implies that every right - even if critical - can always be compressed when it is reasonably necessary to protect other meritorious legal positions.



recognized. The discussion can also be resized since the Constitutional Court has played the role of a “lung” breathing changes of social consciousness and, over time, allowed the reception of a list of “new” rights, through a broad interpretation of the constitutional requirements.

Article 2 shall be used and interpreted in close connection with art. 3 Const.: *“All citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition. It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country”*.

Art. 3 provides a distinction between “formal equality” and “substantive equality”. Equality is formal when a simple prohibition of discrimination is prescribed: this is the bourgeois-liberal notion of equality, that was conceptualized in the rule of law view of the XIX century, developing an approach in which all citizens shall be treated formally in the same way. With the evolution of the constitutional system, and the new system of welfare state, the concept of equality shifts to a substantial approach: paragraph 2 of art. 3 obliges the legislature and the government to grant equal treatment (to be intended as an equal starting points for disadvantaged citizens) by introducing the so called “positive actions”, in order to correct disadvantaged situations. Moreover, solidarity is worth for attention. Although there is no hierarchy of rights in the Italian Constitution, in case a balance among constitutional rights is required, the dimension of solidarity often prevails (and the criterion is reasonableness - art. 3 – according to the Constitutional Court case law). The balance, however, is carried on case by case and a civil right is not “core” with respect to another kind of rights. However, there are principles and rights which have been qualified as founding and pivotal for the republican legal order by the Constitutional Court (1146/1988). As consequence, these kind of rights cannot be changed even by constitutional amendment (see art. 138). From this point of view, to a certain extent, thank's to the case law of the Constitutional Court, almost all civil rights are part of this catalog, and then they are “core” with respect to other rights (eg. economic ones). It is anyway hard to determine which civil rights are more or less important; the only criterion for establishing an “internal hierarchy” is the existence of legal reserves in the Constitution, which usually qualify and guarantee better protected rights.

Part I (Rights and duties of citizens) of the Italian Constitution provides several titles that actually list, by categories, and establish the main rights enjoyed by citizens: Title I – Civil Rights; Title II – Ethical and Social Relations; TITLE III – Economic Relations; Title IV – Political Rights.



In order to follow an ordered and easily understandable approach, we will adopt this presentation mode and list the following “civil rights” as identified by our fundamental law³.

- Personal liberty. Art. 13: *“Personal liberty is inviolable.*

No form of detention, inspection or personal search is admitted, nor any other restrictions on personal freedom except by warrant which states the reasons from a judicial authority and only in cases and manner provided for by law.

In exceptional cases of necessity and urgency, strictly defined by law, the police authorities may adopt temporary measures which must be communicated within forty-eight hours to the judicial authorities and if they are not ratified by them in the next forty-eight hours, are thereby revoked and become null and void.

All acts of physical or moral violence against individuals subjected in any way to limitations of freedom are punished.

The law establishes the maximum period of preventative detention”.

In judicial practice and in scholarly interpretation, the scope of the concept of personal freedom has undergone a significant expansion in the direction of extending the protection against arrests and other forms of physical limitation of the individual. The Constitutional Court has, *inter alia*, extended its application to other areas, together with the interpretation given to Articles 2 and 32 Const., in order to establish the right to self-determination and informed consent in the medical and health care field (Const. Court 438/2008)

- Freedom of residence. Art. 14: *“The home is inviolable.*

Inspections or searches or seizures may not be carried out except in cases and manner prescribed by law in accordance with the guarantees prescribed for safeguarding personal freedom.

Controls and inspections for reasons of public health and safety or for economic and fiscal purposes are regulated by special laws.”

The home is the spatial projection of the person. Defining the term “home” (*domicilio* in the Italian version) within the meaning of the Constitution is not a simple task, since in the legal system there are at least two different definitions: one in civil and one in criminal matters, with a prevalence of the latter. The Constitutional Court has, however, shown a willingness to extend the notion of “home”: *“any*

3 The term commonly used is precisely that of “civil rights”. There may be some differences in doctrine. The category of “civic rights” seems to be obsolete, and in any case refers only to possible rights related to municipalities. The category of “citizens’ rights” is indeed covered by that of civil rights: it is distinguished only when it is necessary to identify the political rights for which citizenship takes on a distinctive value.



isolated space from the external environment which the private person has legitimately" (see Const. Court no. 88/1987).

- Freedom and secrecy of correspondence and communication. Art. 15: *"The freedom and secrecy of correspondence and of every other form of communication is inviolable.*

Restriction thereto may be imposed only by warrant which gives the reasons issued by a judicial authority with the guarantees established by law".

- Freedom of movement and residence. Art. 16: *"All citizens may travel or sojourn freely in any part of the national territory, except for general limitations which the law establishes for reasons of health and safety. No restrictions may be made for political reasons.*

All citizens are free to leave and reenter the territory of the Republic, provided the legal obligations are fulfilled".

This article, although formally aimed only at citizens, has been extended by the Constitutional Court to foreigners, as these treatments were seen as legitimate, since they are reasonable and proportional (Const. Court 104/1969).

- Freedom of assembly. Art. 17: *"Citizens have the right to assemble peaceably and unarmed.*

No previous notice is required for meetings, even when in places open to the public.

For meetings in public places previous notice must be given to the authorities, who may forbid them only for proven motives of security and public safety".

- Freedom of association. Art. 18: *"Citizens have the right to form associations freely, without authorization, for ends which are not forbidden to individuals by criminal law.*

Secret associations and those which pursue, even indirectly, political ends by means of organizations of a military character, are forbidden".

- Freedom of religion and conscience. Art. 19: *"All have the right to profess freely their own religious faith in whatever form, individual or associate, to propagate it and to exercise it in private or public cult, provided that the rites are not contrary to morality"; and art. 20: "The ecclesiastical nature and the purpose of religion or worship of an association or institution may not be a cause for special limitations in law, nor for special fiscal impositions in its setting up, legal capacity and any of its activities".*
- Freedom of expression. Art. 21: *"All have the right to express freely their own thought by word, in writing and by all other means of communication.*



The press cannot be subjected to authorization or censorship.

Seizure is permitted only by a detailed warrant from the judicial authority in the case of offences for which the law governing the press expressly authorizes, or in the case of violation of the provisions prescribed by law for the disclosure of the responsible parties.

In such cases, when there is absolute urgency and when the timely intervention of the judicial authority is not possible, periodical publications may be seized by officers of the criminal police, who must immediately, and never after more than twenty-four hours, report the matter to the judicial authority. If the latter does not ratify the act in the twenty-four hours following, the seizure is understood to be withdrawn and null and void.

The law may establish, by means of general provisions, that the financial sources of the periodical press be disclosed.

Printed publications, shows and other displays contrary to morality are forbidden. The law establishes appropriate means for preventing and suppressing all violations.

- *Art. 22: "No one may be deprived, for political reasons, of legal status, citizenship, name".*
- *Art. 23: "No services of a personal or a capital nature may be imposed except on the basis of law".*
- Jurisdictional protection. *Art. 24: "Everyone can take judicial action to protect individual rights and legitimate interests.*

The right to defence is inviolable at every stage and moment of the proceedings.

The indigent are assured, through appropriate institutions, the means for action and defence before all levels of jurisdiction.

The law determines the conditions and the means for the reparation for judicial errors"; and art. 25: "No one may be moved from the normal judge pre-established by law.

No one may be punished except on the basis of a law already in force before the offence was committed.

No one may be subjected to security measures except in those cases provided for by law.

- Safeguards in extradition. *Art. 26: "Extradition of a citizen is permitted only in cases expressly provided for in international conventions.*

In no case may it be permitted for political offences.

- Safeguard in criminal responsibility. *Art. 27: "Criminal responsibility is personal.*



The defendant is not considered guilty until final judgment is passed.

Punishment cannot consist in treatment contrary to human dignity and must aim at rehabilitating the condemned.

The death penalty is not permitted, except in cases provided for in martial law”.

The notion of “civil right”, however, can be considered an undefined legal concept, which may be specified from time to time, according to the evolution of the socio-cultural context. In this perspective, the Constitution would be an “organism” capable of regulating the relationship between the community and the legal system.

In the absence of a specific recognition rule, the Supreme Court (*Corte di Cassazione*) itself has, for example, affirmed for the first time, the existence of an inviolable right to privacy, even outside the sphere of the so-called "domesticity" (*intimità domestica*) (see Court of Cassation n. 2129/1975): this by referring to art. 2 of the Constitution and deriving from that a more general right to personal self-determination.

Even the Italian Constitutional Court (*Corte Costituzionale*) is no stranger to this practice. Several other important rights have been recognized, such as the right to sexual freedom (Const. Court no. 561/1987), the right to personal identity (Const. Court no. 13/1994) and the fundamental rights pertaining to status or biological identity (Const. Court nos. 50/2006, 226/2006).

Thus, the concept of “civil rights” is deduced from the positive law, at the constitutional level: in the first part of the Constitution are found all the legal claims that can be defined as civil rights.

Actually, the same first part of the Constitution lists a further variety of different kinds of rights, differently classified as social, economic or political. This classification is the result of the scholarly elaboration, the criteria of subdivision varying from author to author. Anyway, these rights are more or less stable since they are now consolidated in legal tradition; the Constitution, as we have noted above, divides the first part in further sections, depending on the nature of the good or interest that the rights granted are intended to protect.

Then, “economic rights” are those which have as their object relations of appreciable capital base, political rights are those that deal with institutions with which citizens actively participate in the democratic processes: differently, “social rights” are those through which individuals can claim a benefit from the same public authority (in a welfare state).

On the other side, “civil rights” are a diverse set of rights, but united by the fact that they constitute the core of the active original legal claims invoked against public authorities: they relate to goods and core



values (not of an economic or political nature, but strictly in relation to the existence of human life: this is the true difference between economic and political rights), and they do not consist in a claim of direct provision by the State but in a state obligation to refrain from invading spheres of freedom of individuals (therein lies the difference with social rights).

Thus, they are that rights of “freedom”, in the strict sense, so-called “negative freedoms”, which represented - in the history of constitutionalism - the so-called rights of the first generation, for their emergence with the very first bills of rights issued by sovereigns to their subjects.

QUESTION 2 : NATIONAL SOURCES OF CIVIL RIGHTS

Question 2: National sources of civil rights

- ✓ Where are these civil rights laid down at a national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

The idea here is to present the legal and policy framework which forms the basis of national civil rights protection in your country.

- Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);
- Please, already indicate at this stage what you consider to be the strengths and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);
- Please indicate whether significant developments have recently taken place in this respect.

The legal framework of civil rights in the Italian legal system is, basically, represented by the provisions of the Constitutional Charter (as described above).

Thus, we refer, as general points of reference, to articles 2 and 3 and to the Title I - Civil Rights, articles 13-27.

It is not possible to list here, with a claim to being exhaustive, any civil rights that the interpretation given by the courts (the Constitutional Court as the courts of merit) to art. 2 Const. determined



(furthermore, for a brief overview see above point.). A number of specific rights have been derived by the liberties explained in Title I.

Therefore, the ordinary legislation, of course, listed and profiled the principles incorporated in the Constitution within different application scenarios.

Finally, for the purposes of this questionnaire, there is not a direct relevance of the regional legislation on these issues. It is important to recall that the Italian Republic does not have a federal structure. From a general point of view, it is worth mentioning that in Italy the involvement of regional statutes in the field of fundamental rights is under discussion, even if the issue has a limited impact on the scientific debate. The issue, however, when relevant, relates to social rights (expressly excluded from this study): healthcare, social welfare, etc.

In Italy regional law does not have any direct influence on the protection of civil rights, as letter m) of art. 17 establishes exclusive competence to the State in the definition of the basic level of benefits relating to civil rights.

Nevertheless it is important to take into account that regional law (and related administrative tasks) helps to fill those basic levels of content, and to specify the protection in a whole series of areas in which the regions, instead, have competence.

Regarding the list of matters of regional competence, please refer to the list in art. 117, par. 3 (competence). Under par. 4 any matters not reserved to the state belong to the regions: this solution, however, gives rise to many cases of interference (albeit at the margins, and for special cases) between regional policies and civil rights.

With regard to administrative practice in the protection of civil rights, it should be stressed that this particular category of rights represents the most traditional and longstanding core of legal positions for the benefit of individuals. As a result, the approach of the administration of the protection instruments has been extremely classic, since in these cases the State is not required to offer particular participatory institutions (such as in the case of political rights) or social performances (as in the case of the welfare rights); on the contrary, the typical instruments for the protection of civil rights are represented by the system of courts (see title IV of Part II of Const - art. 101 ff. - where there is a clear system of protection based on ordinary courts and an exhaustive list of cases with special jurisdiction, the most significant of which is administrative justice), and by the police force set up to protect the order and safety of citizens (dependent on the ordinary ministerial structures). There are also less traditional administrative tools established even in the field of civil rights; compared to the general trend, they represent marginal experiences (e.g. the activities of the Italian Communications Authority (AGCOM), typically avoiding the emergence of monopolies in the communications sector, also guarantees the freedom of thought and expression, art. 21).



The strength of the legal protection of civil rights in Italy is the fact that they are all covered, directly or indirectly, by the Constitution and therefore enjoy the guarantees that we outlined above, albeit briefly, that characterize fundamental rights. They are therefore inalienable, non-waivable, imprescriptible, protected by legal reserves, etc.

The weakness can be found instead in the fact that, although in fact rights covered by the Constitution, not all of them are explicitly included in the text of the Constitution itself. The Italian Fundamental Law can be considered as a first-generation law and, as we have seen, many new rights have been the result of evolving case law and established recently (see the personal status related to the sexual sphere, the right to privacy, etc.). This, in theory, could be a weakness of the system.

In addition, through judicial interpretation, in Italy we are witnessing a direct application of constitutional principles that leads to a strengthening of the protection and its enlargement to legal positions not formally planned (for example, we start to talk about a right to parenthood – procreation). All protection of informed consent is in fact guaranteed at the case law level, through the interpretation of the constitution. The extension of rights to non-citizens is often at this level, especially in the application of the principle of non-discrimination.

Anyway, there are some problems in this system. Since Italy is a typical civil-law country, the *stare decisis* principle does not exist; in general judges are inclined to follow former decisions, but they are not obliged to. This system generates unpredictability and reduces legal certainty. In addition, there are limitations due to the different functions played: judicial decision cannot, in fact, predict everything (see for example the issue of same- sex marriage, where the Court held that the right exists, but it is up to the legislature to predict whether and how to derogate it, excluding the possibility of extending the institution of marriage by judicial decision (Const. Court 138/2010)).

Finally, no significant developments have recently taken place in this respect, apart from constant adaptation and update, at the case law level, of the Constitution in accordance with the shifting economic and social contexts.

Regarding the list of national provisions and cases related to civil rights see the annexes at the end of this document.



QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

Question 3: International and European sources of civil rights

- ✓ To which international instruments for the protection of civil rights is your country a party?
- ✓ How are relevant international and European civil rights norms being incorporated in your country?
- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?
- ✓ How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?

The issue of fundamental rights and their definition is inevitably intertwined with the so-called "multi-level system of protection". There are, of course, international conventions or agreements that seek to oblige signatory countries to protect a specific catalogue of rights, most often defined as human or fundamental. The Constitution itself, in some cases, expressly refers to international law: this happens, for example, with reference to the definition of the "legal status of foreigners", which, pursuant to art. 10, par. 2, "is regulated by law in conformity with international norms and treaties".

The prototype of the supranational texts is the *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly on 10 December 1948; however, as everybody know, this text is not binding.

For our purposes, references must be made especially to: the *European Convention on Human Rights* (ECHR) (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*), which was drawn up in the context of the Council of Europe, signed in Rome on 4 November 1950 and entered into force on 3 September 1953 and, finally, ratified by Italy by Law 4 August 1955, no. 848; and to the International Covenant on Civil and Political Rights (ICCPR), adopted within the UN, which was signed in New York on 16 December 1966 and entered into force on 23 March 1976, finally ratified by Italy with Law 25 October 1977, no. 881. These provisions are legally binding, since they are formally part of the Italian legal system.

A problematic aspect is the relationship of these charters with other sources of the law, especially with the constitutional provisions and particularly with the guarantee provided in art. 2 of the Italian Constitution. It is quite evident that certain formulas – having evident protective nature - of the subjective legal situations tend to perform a synergic function. In fact they "*are integrated, complementing each other in the interpretation*" (see Const. Court, no. 388/1999).



In other cases, however, doubts may arise about a possible friction between the internal guarantees and other guarantees required by other parameters. A paradigmatic case is represented by the ECHR. First of all, this international convention establishes a plurality of rights and freedoms that "converge" with those already provided by the Italian Constitution, often strengthening them and directing their physiognomy according to precise coordinates, even outside the ranks of so-called inviolable rights (see the provisions relating to the protection of the right of defence or to religious freedom). Secondly, the effective enforcement of the constraints imposed on the Member is guaranteed by a court, the European Court of Human Rights, based in Strasbourg, to which any citizen (and non-citizens too) of the Member States of the Council of Europe can apply directly, once they have unsuccessfully exhausted all remedies available under their national law.

Finally, the Convention and its interpretations, made by the European Court of Human Rights, tend to assume, in terms of the system of sources of law, a privileged position (recognized by Const. Court itself, judgment 347/2007). For some time, the Constitutional Court has recognized the ECHR, although it was introduced into our legal order by an act having the force of ordinary law and the status of "*source bringing back to an atypical competence*", whose rules would be "insusceptible to repeal or modification by part of the provisions of ordinary law" (see Const. Court no. 10/1993). In more recent times, the Court took note of the amendment of art. 117, co 1, Const.⁴, which, in its current version, obliges the Italian legislator to respect, in addition to the Constitution, the constraints arising, among others, from "*international obligations*". The Constitutional Court has qualified those rules, as reported by the case law of the European Court of Human Rights, which "*interposed parameters*" of constitutional legitimacy: under certain conditions, i.e., the Italian law that does not provide the rights and freedoms guaranteed by the ECHR and an adequate standard of protection may be declared unconstitutional. In practice, the law, in violation of the ECHR, infringes art. 117, co 1, Const. (see the famous "twin judgments" of Const. Court nos. 347 and 348/2007).

About the need that certain rights or freedoms must be respected, even in addition to those set by the national regulation, it is worth remembering the importance progressively assumed by the European Union sources. For a long time, the European Institutions have not frequently dealt with the subjective situations related to humans or to the person as such. The strong core of subjective situations covered by Community law has always been characterized by the so called "fundamental freedoms": the freedom of movement of workers, goods, services and capital, freedom of residence and the right of establishment of companies.

The Court of Justice, however, has begun to consider as part of the general principles of European law also the fundamental rights, and that "*in accordance with the constitutional traditions common to the*

4 Art. 117, par. 1, Const.: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations*".



Member States and the international instruments which the Member States have signed or cooperated" (see C-97/87, 98/87, 99/87, *Dow Chemical Ibérica SA*). The Court has, thus, recognized as fundamental: the right to a fair remuneration (C-305/05, *Ordre des barreaux franchophones et germanophones*), the right to family reunification (C-540/03, *European Parliament*), the right to respect for private life (C-465/00, *Rechnungshof*), etc.

The activism of the Court of Justice is now potentially reinforced by the fact that, especially from the innovations introduced by the Treaty of Amsterdam (1997), although the primary law of the Union has over time explicitly contemplated the protection of fundamental rights. The Treaty on European Union (TEU), at art. 2, expressly states that the EU "*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*"; and 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*".

Of course, the right to a fair trial under art. 6 ECHR is relevant; it is worth mentioning that there is an identity of object of protection with art. 24 of the Italian Constitution, of which it specified the scope before the reform of the art. 11 of the Constitution on fair trial, which took place only in 1999. Therefore one could say that the ECHR, from this point of view, has also played an influential role on the process of revision of the Italian constitution, favouring the insertion within art. 111 of more precise provisions on fair trial (deriving from the case law of the Strasbourg Court and in reaction to a restrictive interpretation of the principles of adversarial process contained in the Code of Criminal Procedure of 1988, which was critiqued under the ECHR).

The regime of incorporation of rights of international or supranational origin inside the Italian legal system follows different rules, depending on the nature of the source of international law in question.

For customary international law article 10 of the Constitution provides for a system of automatic adjustment, without need for any formal act. Moreover, as recognized by the Constitutional Court in judgment 48/1979 (Russell), the ranks of the customary international law are hierarchically prevalent inside the system, and take precedence over any other provisions of national law (and the Constitution itself).

As for the civil rights that arise from international treaties, article 117 co. 1 of the Constitution (as introduced by Constitutional Law 3/2001) recognizes them as prevailing over other sources of national law (in this sense, the Constitutional Court 10/1993 had already followed this solution, even if only by way of interpretation). The treaties are ratified by the government, after the possible law authorizing the ratification (for the most sensitive matters: article 80 of the Constitution), assuming the obligation



on an international level; at the same time an ordinary statute is usually needed to execute the dispositions inside the Italian legal system, to make them effective and binding also for the citizens (and not only for the Government). Even if such a process of execution is made by ordinary statutes, the effectiveness of the treaties is enhanced compared to the ordinary law in which they are incorporated, because they have the rank of article 117 of the Constitution.

Finally, EU law benefits from special status. Both the primary law (treaties), and the derived law (regulations, directives and decisions), enjoy the supremacy principle, and therefore prevail over domestic law (including constitutional). In addition, sources of primary law, general principles, and derived law enjoy – as appropriate – direct applicability or direct effects, and are therefore often directly productive of rights for the people. This means when the national courts find a conflict between EU rights and national law, it has to override national law (as stated in the judgment of the Constitutional Court 170/1984, Granital).

Furthermore, the adjustment of a national legal system to international law also takes place largely by an interpretation aimed at achieving compatibility between domestic and international provisions (*interpretazione adeguatrice*).

In the framework of international treaties, ECHR enjoys a special status. In fact, beyond the characteristics mentioned in the previous paragraph for all the international agreements, for the ECHR system the case law produced by the Strasbourg Court is also recognized as binding, and helps to define the content of civil rights: the European Court of Human Rights (ECtHR) produces a lot of judgments in all the abovementioned fields.

It should be noted that this special status does not extend up to the level of pervasiveness recognized for EU law: in fact, it is impossible to have non-application of internal rules in contrast with the ECHR, but in such cases the ordinary courts must raise a question of constitutionality before the Constitutional Court (and the parameter is the abovementioned article 117, co. 1, of the Constitution, of which the ECHR is an “interposed parameter”).

This attitude was reinforced by two key judgments of the Constitutional Court that recently focused on issues of economic rights: the decisions 348 and 349/2007 on the amount of compensation for expropriation and the *occupazione acquisitiva* (or *accessione invertita*).

With regard to *occupazione acquisitiva* the Constitutional Court in the past had permitted public power to come into unlawful possession of a private property and convert it to public use, without setting up a full public responsibility for the damage caused to the owner. Initially, in the ECHR system the case was not considered as conflicting with the principles concerning the protection of ownership, as enshrined in the Protocol 1 to the aforementioned Convention.



More recently, however, the Constitutional Court, acknowledging the case law of the Strasbourg Court (*Scordino* case: judgments of 29 July 2004 and 29 March 2006), recognized that the *occupazione acquisitiva*: (a) does not provide adequate protection of property rights, because ECHR requires that the damages will be paid out automatically in such cases, (b) does not qualify itself as expropriation (for it can be considered legitimate, with simple payment of fair compensation), but has to be qualified as untitled dispossession, contrary to article 42 Constitution as interpreted in the light of the findings of the ECHR, (c) does not guarantee compliance with the principle of legality (article 1 of the Protocol) in the absence of sufficient requirements of accessibility, accuracy and predictability of the procedural regime.

As mentioned in the previous paragraphs, to which we are referring here in detail, there is a different scope of protection available in the event of a conflict between supranational or international law in the protection of these rights and domestic law. Depending on the origin of the right in question, indeed, the possible behaviour for the court changes: if the law is laid down in the EU, the national ordinary judge will override the incompatible internal provision; if it is provided for in the ECHR (or in other international instruments), the ordinary courts cannot override it, but have to raise the question of constitutionality for breach of article 117 co. 1.

In any case, however, the national courts have to attempt – where possible – an interpretation in accordance with international law, to save the apparently conflicting domestic law.

As far as remedies activated at the international and supranational level are concerned, the most significant is an individual person's right to apply to the Strasbourg Court. The ECHR, indeed, as a subsidiary remedy has the competence to judge also on violations of civil rights once all domestic remedies have been exhausted. The Member State must comply with pecuniary reparation measures committed by ECHR, but also with individual or general measures provided to eliminate the human rights violation (and the Committee of Ministers of the Convention supervises the implementation of the decisions by the Court in Strasbourg). Italy allows for the implementation of such supranational decisions through the Government, which promotes collaboration between Parliament and the judiciary power: l. 12/2006 (execution of ECHR Judgments) which modified article 5 l. 400/1988 (on the activity of the Government).



QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognized and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)
- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect to civil rights?

Another pivotal source of fundamental rights is represented by the *Charter of Fundamental Rights*, which recognizes a range of personal, civil, political, economic and social rights of EU citizens and residents, enshrining them into EU law.

In June 1999 the European Council considered that it was appropriate to combine in a single declaration the fundamental rights enshrined in the European Union (EU), in order to give them greater visibility. The Heads of State and Government aspired to include in the Charter the general principles recognized in the European Convention on Human Rights of 1950 and those which result from the common constitutional traditions of the EU countries. In addition, the Charter had to include the fundamental rights granted to EU citizens, as well as economic and social rights set out in the *Council of Europe Social Charter* and the *Community Charter of Fundamental Social Rights of Workers*, as well as the principles derived from the case law of the Court of Justice and the European Court of Human Rights.

The Charter was drawn up by a Convention composed of one representative from each EU country and a representative of the European Commission, as well as members of the European Parliament and the national parliaments. It was officially proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission.

In December 2009, with the entry into force of the *Lisbon Treaty*, the Charter was granted the same legally binding effect of treaties. To this end, the Charter was amended and proclaimed a second time in December 2007.

Compared to the experience gained within case law, the solemn proclamation of the Charter of Nice in 2000 by the Community institutions represented the first attempt to arrive at a more precise formalization of the model of protection practiced in previous years. The catalogue of the rights of the Charter (grouped under six separate headings: dignity, freedoms, equality, solidarity, citizens' rights, justice) presents some new aspects compared to the corresponding catalogues contained in national constitutions. In particular, following the development of new technologies in the field of



communications or biology, there have emerged subjective positions that the most recent economic and social developments have left particularly in need of greater protection.

The failure of the EU to incorporate the Charter of Fundamental Rights of the EU within the text of the Treaty of Nice, left open the question of its legal effect, and divided scholars between supporters of the negative thesis (the Charter was to be understood only as a political act, which committed the EU institutions to ensure respect for the rights enshrined therein) and supporters of the opposite thesis of the legal value of the Charter (which, thus, could be used as a parameter by the Court of Justice). The so-called European Constitutional Treaty tried to overcome this uncertainty (signed in Rome in 2004, but then stranded throughout the course of ratification by the Member States). Now, following the approval of the so-called *Reform Treaty* (formerly called the *Lisbon Treaty*), which, as is known, has introduced a number of significant changes in earlier treaties, the problem has found its solution in art. 6, par. 1, of the new text of the TEU. It states that *“it recognises 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”*.

Thus, there is no doubt now that the Charter has acquired a secure legal status and it should be the main parameter for the Court of Justice in the resolution of disputes that concern an alleged breach of a fundamental right.

In order to complete the picture of the protection of fundamental rights by the EU, it is necessary to mention that art. 6, par. 2, TEU states that the Union accedes to the EU Charter, thereby anticipating a further and endemic issue of potential overlapping between different standards of protection.

In fact, these issues should not be overly exaggerated. The same Treaty, at art. 6, par. 2, precisely states that, with regard to the EU Charter, the rights, freedoms and principles enshrined by the latter always apply with respect to the powers of the Union, and that the fundamental rights should always be interpreted “in harmony” with the common constitutional traditions of the Member States (see art. 52, par. 4, of the Charter of Nice); regarding the ECHR, it is confirmed (Section 6.3) that the fundamental rights “are part of the Union's law as general principles” according to the interpretation that emerges in the case law of the Court of Justice.

The Charter of Fundamental Rights of the EU is peacefully recognized in the Italian legal system as binding, as well as the general principles of the EU.

The domestic case law in fact used the Charter already when it had only value as soft law; after the Treaty of Lisbon, with the recognition of the normative value of the fundamental rights (also) in the EU treaties system, also the Charter civil rights are considered – formally and in the substance – as binding. Even the Parliament and Government take into account rights in the EU Charter to implement legislative



directives and decisions (with the annual Community law: cf. l. 234/2012) and to develop the activity of indirect administration of the EU policies.

With specific regard to civil rights, the EU Charter has therefore contributed to the scope of a lot of articles in the Italian Constitution: the formalization of EU civil rights inside the Charter gives new reference to the evolutionary process in the interpretation of the Italian constitution (using new EU rights with art. 2 Const., or interpreting art. 13 et seq. on the ground of EU rights).

The relevant EU charter dispositions in such a civil rights perspective are: 1-12 and 48-50.

- Art. 1: Human dignity
- Art. 2: Right to life
- Art. 3: Right to the integrity of the person
- Art. 4: Prohibition of torture and inhuman or degrading treatment or punishment
- Art. 5: Prohibition of slavery and forced labour
- Art. 6: Right to liberty and security
- Art. 7: Respect for private and family life
- Art. 8: Protection of personal data
- Art. 9: Right to marry and right to found a family
- Art. 10: Freedom of thought, conscience and religion
- Art. 11: Freedom of expression and information
- Art. 12: Freedom of assembly and of association
- Art. 47: Right to an effective remedy and to a fair trial
- Art. 48: Presumption of innocence and right of defence
- Art. 49: Principles of legality and proportionality of criminal offences and penalties
- Art. 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Such a role played by the Charter in the interpretation of the Italian Constitution, it should be noted, is limited by the so-called horizontal dispositions of the same Charter of Fundamental Rights: it has to be applied in respect of the EU competences and only inside the boundaries of EU attributions.



The question of the relationship between the ECHR and the EU Charter of Rights is topical, and perceived as central in the Italian legal system: as already seen, indeed, two different statuses to the EU and ECHR rights are provided by the Italian legal order, and so it is essential to define where it is a question of application of ECHR law and not of EU law. Such a problem, despite some attempts to extend the disapplication also to the ECHR system (Council of State 1220/2010; *contra*, see Constitutional Court. 80/2011): in fact, only the rights provided for by the Charter of fundamental Rights of the EU benefit from the un-application power.

For the civil rights, the cases of overlap between the EU and ECHR provisions do not arise on the literal level (or they are very rare, due to the usual analogy of formulations), but on the interpretative one: the question is to which system it is to give preference if the ECJ and the Strasbourg Court follow different solutions to protect the same civil right (e.g. to what extent the family life ex art. 29 et seq. Constitution is corresponding or not to family life of art. 9 of the Charter on the one hand, and to the art. 8 ECHR, and what extent its effects also reflect on families founded not by marriage).

In all these cases the Italian legal system does not assume an original position in the European framework, but it follows the well-established set of *Bosphorus* (30 June 2005). It is then assumed (without specific demonstration case by case) that EU law respects the rights of the ECHR, if the possible conflict arises in an area of EU competence, and – therefore – the Strasbourg Court will refrain in all those cases from further checks (unless the member state had no discretion in adapting its legal system to the rights provided by the EU: in such a hypothesis a second check by ECHR will be possible).

Moreover, now the accession of the EU to the ECHR is pending, and a draft of the treaty to accession is already available.



QUESTION 5 : JURISDICTIONAL ISSUES

Question 5 : Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?
- ✓ Territorial
 - What is the territorial scope of the protection of civil rights afforded by your member states? Are there **territorial** limitations to such protection? Which?
- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)?
- ✓ Temporal
 - What is the temporal scope of protection afforded to civil rights? Have there been recent changes in the range and reach of civil rights protection?
- ✓ Please offer details as to how different rights are afforded to different **categories of persons in different locations and policy contexts over time?**

For clarity, we decided to answer this question, following the proposed layout. For the sake of brevity, we have tried to give a precise answer, though schematic, to the issues that might otherwise require several pages of elaboration.

Personal

From a general point of view all people are protected by civil rights, except for the possibility for ordinary law to establish some differences with respect to the effective exercise of the right, due to the peculiarities of the environment. Referring, for example, to the case of foreigners, their legal status is governed by law, in accordance with the provisions of international law (art. 10, par. 2, Const.). Hence the extension that, on the basis of articles 2 and 3 Const., the Constitutional Court has, for a long time, made to foreigners of the enjoyment of the inviolable rights. International law contemplates, indeed, many cases of “rights” that must be guaranteed to all. In any case, we can assert that the Constitutional Court takes a different reasonable attitude. For example, with respect to “rights” or “freedoms” that the Constitution grants to any person, the extension is automatic (see the case of the right of defence or the freedom of expression). The same is true with regard to those fundamental “classic” freedoms that are not textually referred only to “citizens” (i.e. personal liberty or the right to family unity). Conversely, where the Constitution refers only to “citizens”, the Court distinguishes the cases: in particular, it tends to favour the extension to foreigners even in these cases, but it sometimes admits the possibility of



restrictions or distinctions about the actual enjoyment of a subjective situation (see, for example, in the case of freedom of movement).

The Constitutional Court established that, when we are dealing with fundamental rights (among which it also refers to health, housing, education and right to marry) a distinction based on nationality is not legitimate, with regard to the entitlement of rights (see, for instance, Const. Court judgment 61/2011). With respect to the enjoyment of these rights, the legislature can differentiate, but only when it is necessary to protect other equivalent rights and when it is not unreasonable / arbitrary or disproportionate. This consideration also applies to illegal aliens (with respect to fundamental rights, see Const. Court 61/2011, 269/2010, 252/2001).

Territorial

If the term "territorial" is understood in a geographical sense: there are no differences or limitations in the application with reference to the coverage of civil rights within the country. It is worth recalling that the Italian Republic is not a federal State and so regional governments have not normally competence on issues related to civil rights. There are, however, specific provisions with regard to linguistic minorities tied to the territory of residence. See, for example, the case of Trentino-Alto Adige, Friuli, Valle d'Aosta (as well as some other Italian regional areas) and the use of language and its special protection. The Constitutional Court stated that this special protection enjoyed by the recognized minority languages follows the territorial criterion and not the personal one: it can be exercised only in the geographic areas established by the law of reference (areas of historic settlement of minorities: see Autonomous Province of Trento law 6/2008 and the Const. Court judgment 159/2009).

Material

Even civil rights, like any rights provided for in the Constitution, are subject to a necessary balance, defined as a technique by which the legislator (and possibly administration) in the first place, and the Constitutional Court in the second round (checking balances identified in the several acts), determines how much and how individual rights can and shall be limited to allow the pursuit of other interests. From this perspective, any civil rights provided by the Italian Constitution may be restricted to allow for the protection of public order, security, health and safety, general morality, etc.

What is important to remember is that civil rights, unlike most of the social rights, enjoy – in the case of need for these compressions - the special guarantee of the “*riserva di legge*”⁵ and - in more detail - of so called “reinforced” legal reserves. Articles 13 and following, in fact, explicitly establish that rights therein guaranteed may be restricted only by law; furthermore, the identification of cases and the related rules

⁵ It is not so easy to find a correct translation for this term in the English legal language. So we decided to use the Italian version. It refers to that portion of the regulative legislative power which can only be exercised by a legislative level source of law under the Italian Constitution.



is reserved to the Parliament, but it is even the Constitution itself that provides eligible justifications, which are to be considered as mandatory justification: thus, for example, domicile may be subject to inspections, but for reasons of public health and safety or for economic and tax purposes (article 14); the restriction of freedom of movement can only be done for reasons of health and safety (article 16); meetings can be prohibited only for reasons of security and public safety (article 17); associations may be prohibited only if they are secret, as well as those organized, even indirectly, for political purposes by military organizations (article 18); freedom of religion and worship is permitted, provided that the rites are not contrary to morality (article 19); freedom of press can be limited only if contrary to morality (article 21), etc.

Obviously even the special legislation, except in cases of reinforced legal reservation with respect to the civil rights strictly provided in articles 13 ff. (and particularly in the civil rights directly arising by Article 2, or by broad and evolutionary interpretations of articles 13 ff.), may impose limitations, provided for constitutionally valuable interest, and therefore typically for the protection of public order, security, morality, etc. There are numerous cases of criminal justice, for which we make reference to the annexes listing legislation and case law at the end of this report (noting art. 13, where we reported the provisions for the fight against terrorism and illegal immigration). With respect to the immigration issue, it is worth mentioning the special case of centres for identification and expulsion (*Centri di identificazione ed espulsione* (CIE)): established by art. 12 of Law 40/1998, they are structures in which the freedom of movement of aliens, pending measures related to their status, is limited, since they are lacking a regular residence permit; art. 14 of T.U. 286/1998 (as amended by law 189/2002 and 94/2009 and Decree transposing the Repatriation Directive, law 129/2011) provides that detention within this “CIE” is ordered by the Police for a period of 30 days, renewable for a maximum of 18 months, “*when it is not possible to immediately put in place the expulsion by escorting to the border or the refoulement, due to temporary situations that hinder the preparation of return or the performance of removal ...*”.

On these assumptions, which have no direct anchor in reinforced legal reserves, we can make reference to a case relating to the treatment of personal data. There could be possible compressions of rights in particular with reference to situations of national security (see regulations on data retention with reference to the protection of personal data (art. 132 Italian Data Protection Code)) or an emergency.

To conclude on the material profiles of civil rights, it is important to remember the Italian distinction between *diritti soggettivi* and *interessi legittimi* (subjective rights and legitimate interests). Indeed, judicial control is realized by both ordinary judges (*giudice ordinario*) and administrative judges (*giudice amministrativo*), who respectively protect the rights or legitimate interests. Civil rights are usually, by their constitutional nature, *diritti soggettivi* because the public administration discretion do not change the nature of individual rights; nevertheless, sometimes their limitation for public interest can determine a so called degradation to the level of *interesse legittimo*, and this means that the protection is less strong because the public administration is able to evaluate as prevalent the public interest



sacrificing the legitimate interest of the person, even if in origin it was a civil right (e.g. for public security reasons the freedom of information can be reduced and public administration can prohibit the distribution of some periodical publications – seizing them – and in this case the editor has only an *interesse legittimo* against the public administration act, and not a right).

Temporal

From a temporal point of view, the development of civil rights reports the aforementioned trends described with reference to ordinary legislation implementing the constitutional provisions. In particular, in order to reconstruct a common perspective, it should be noted that civil rights means a catalogue of legal claims that - even if listed in the constitution - can never be exhaustive. From this perspective, all the changes that have occurred over time can be seen as the adaptation of that catalogue of rights to the new demands posed by the changing realities in which those legal positions must be invoked: the scientific, technological and social developments caused problems, hitherto never experienced (assisted procreation, privacy on the Internet, etc.), that needed an answer and a discipline from the law.

In this sense, two series of cases must be identified in which civil rights, even if provided with precise provisions in the Constitution, have undergone significant changes.

First of all, on the one hand, there were some necessary changes in the ways in which the legal positions provided for in articles 13 ff. of the Constitution have been put forward in the course of time, in reliance on the fact that new problems arose: for example, the personal freedom of art. 13 has experienced an application in conjunction with art. 32 in order to adjust invasive diagnostic tests (eg. drug testing); domicile under art. 14 justified special protections on the regulation of internet service providers; freedom of religion had to deal with new immigrant communities; the needs of trial defence led to regulation of forms of interceptions that were not possible in the past and to extend these investigative opportunities even to the defence, etc. Those referred to in articles 13 ff., however, still remain freedoms largely due to the original approach, and these changes - needed to respond to the changing reality - do not upset the classic approach.

Alongside these changes over time, however, it is worth mentioning a few cases in which on the basis of article 2 of the Const. (cited above) truly new fundamental rights have been developed, in order to respond to new demands. In this area there are the more radical developments, such as in the area of privacy, as asserted with increasing force in the information society, or, for example, in all matters pertaining to the so-called bio-law, with respect to the more ethically sensitive issues that the medical sciences pose to law, on the regulation of early and late stages of human life (medically assisted procreation, abortion, euthanasia, etc.). In all these areas, also in the Italian legal system, the most



radical changes are reported in relation to how civil rights are understood (see, for instance, the Law 194/1978 on abortion, first considered a crime until the Constitutional Court judgment 27/1975, or the law 40/2004 on medically assisted procreation, on which further developments must be report as imposed by the Constitutional Court in the judgment 151/2009).

QUESTION 6 : ACTORS

1. Question 6 : Actors

- ✓ What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc., in defining and setting civil rights standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or establishment of civil rights norms.

2.

The role that the private and especially public actors play with reference to the definition and establishment of civil rights standards is certainly crucial. This activity is structured in a series of interventions aimed at giving concrete implementation of those principles which are laid down, in a necessarily general and abstract way, in constitutional and/or in ordinary provisions.

As we mentioned above, the civil rights area usually involves negative freedoms, with respect to which any subjects different from the entitled person of the rights are essentially carriers of a mere obligation to refrain from interfering. From this perspective, the real and leading actor of civil rights seems to be the beneficiary of the same.

The section of our legal order devoted to civil rights is, in fact, characterized by a very classic approach to protection. These freedoms, understood in a strict sense (negative freedoms), are rights which require a protective intervention of the State, carried out by its traditional apparatus: the judiciary system and law enforcement. Nevertheless, as seen in the reconstruction of the legislative framework, there have been more actual changes in the direction of promotion and protection of civil rights. In these cases, the extent of legal positions related to civil rights gave occasion to the emergence of promotional activities also by private actors (NGOs and - in general - the associations and the so-called third sector, often active together with co-operatives and NGOs not only in the field of social rights, but also of civil ones). Furthermore, the administrative activities, traditionally oriented to an external



perspective of the protection of civil rights, have recently taken even more modern organizational forms, working also through the activities of independent administrative authorities and agencies outside the traditional ministerial team (on this point, data protection authority is an example).

With respect to this latest point, the work done by the “Data protection authority” could be taken as a paradigmatic example, with respect to the application and implementation of the rules regarding the right to privacy. This administrative actor has a whole range of tasks, among others duly recognized and described in the Italian Data Protection Code. It is an independent administrative authority established by the so-called Privacy law (Law 31 December 1996, no. 675) - which has implemented into Italian law the EU Directive 95/46/EC - and today governed by the already mentioned Italian Data Protection Code (legislative decree 30 June 2003, no. 196). The Authority is responsible for all areas, public and private, where we need to ensure the correct processing of data and respect of the rights of persons connected with the use of personal information.

It is concerned, among others, with:

- checking that the processing of personal data complies with laws and regulations and, where appropriate, prescribing to data controllers and data processors for the measures to be taken to properly carry out the treatment;
- investigating complaints and allegations and deciding appeals under article 145 of the Code regarding the protection of personal data;
- prohibiting, in whole or in part, or stopping the processing of personal data which, by their nature, by the manner or by the effects of their treatment, may represent a significant injury to the person concerned;
- adopting the measures envisaged by the legislation on personal data, including, in particular, general authorizations for the treatment of sensitive data;
- promoting the signing of ethics and good conduct codes in various areas (consumer credit, journalism, etc.);
- reporting, when appropriate, to the Government of the need to adopt specific regulatory measures in economic and social life;
- joining the discussion on regulatory initiatives with hearings held in Parliament;
- delivering opinions requested by the Chairman of the Board or by each minister on regulations and administrative measures likely to affect matters covered by the Code;



- preparing an annual report on its activities and on the implementation of privacy legislation to be submitted to Parliament and the Government;
- participating in community activities and international trade, as well as a member of the Article 29 Working Party and the common control authorities provided by international conventions (Europol, Schengen, Customs Information System);
- ensure the maintenance of the register of the treatments formed on the basis of the notifications referred to in article 37 of the Code regarding the protection of personal data;
- ensuring the information and public awareness with regard to the processing of personal data and on the security measures of the data;

involving citizens and all stakeholders in the results of the public consultations, taking them into account in the preparation of measures in general.

QUESTION 7 : CONFLICTS BETWEEN RIGHTS

Question 7 : Conflicts between rights

- ✓ How are the different sources of rights interrelated? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place to determine how they should be addressed?
- ✓ Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?

Please give examples, and illustrate how these conflicts are dealt with and resolved.

In a practical application, cases of conflict between civil rights can arise. The body charged with solving this type of issue is the Constitutional Court (although in the first instance the ordinary courts also play a role). In this context, the so-called “balancing test” certainly plays a pivotal role. Without any claim of completeness, the issue will be briefly described as following: it consists in a technique used generally by all the constitutional courts to resolve questions of constitutionality when a conflict between the rights or interests is reported. The rights and constitutional freedoms are expressed as principles. The principles are a type of rule of law, which is distinguished by the rules, since they have a high degree of



generality and unsubstantiated. Considered in the abstract, the principles do not ever collide; the conflicts between them systematically occur in the concrete application. In many cases the Constitution itself indicates in the name of what interests the constitutional right may be limited (i.e. the morality that limits the freedom of worship and the expression of thought). In this way the constituents primarily intended to limit the discretion of the legislator or public authorities in bringing those specific restrictions to freedom. We can identify at least three cases of conflict between interests (or rights): a) competition between different subjects in the enjoyment of the same right; b) competition between not homogeneous individual interests (see the abortion conflict that sees heterogeneous interests claimed by different parties: Const. Court, judgment n. 27/1975); d) competition between individual interests and collective interests. In order to solve these issues, the Constitutional Court proceeds with assessments, some of which resemble and partly overlap with those typical of the judgment of reasonableness. First of all, it reconstructs the rationale and assesses the legitimacy of the purpose of the law in question; then it evaluates the appropriateness of the means to the end; finally, it proceeds to judgment of proportionality: it estimates the cost of the protection afforded to an interest. The trial balance is an art, something that is based on criteria of reasonableness and common sense rather than on the strict interpretation of the Constitution.

The conflict, however, may also arise between constitutional principles and European regulation. The Italian Constitutional Court admitted that European regulation may involve derogations from some constitutional norms, but not from the fundamental principles of the Constitution (this is the so-called "theory of counter-limits: v. Const. Court, Judgment n. 30 and 31/1971). In practice, to date, the detailed rules waived by European legislation affect all divisions of power between the state and the regions, but in perspective, the series may become more complex. The Court has thus paved the way for making further and very significant progress towards the EU without having to carry on a constitutional amendment. The real problem, however, especially from our perspective, is when the European regulation infringes a "fundamental principle" of the Constitution. If this happens, the only way forward is to challenge the only provision having the force of law in our legal system, under which all European regulation must be applied in Italy: that is the order of execution of the Treaty. This is an "empty formula" that may be contested an unlimited number of times "to the extent to which" it allows entry into our law of that specific European rule that is incompatible with the principles of our Constitution.

With reference to European law, the Constitutional Court has embraced the so-called "dualistic theory" as a basis for understanding the relationship between European and national legal order. This theory has its roots in a traditional view of the "nature" of the EU: a common organization created by sovereign states with instruments of international law. In its rapid growth, however, the EU has developed tools, reports, authorities often similar to those typical of federal states. In light of this, the dualistic theory is inadequate in describing the real relations between the two jurisdictions. The paradox is that we have two "independent and distinct" systems with regard to the legislation, but united with regard to the



application of the law: this leads to an overlap of the two systems of courts, which multiplies and crosses procedural instruments. A judge, therefore, faced with a conflict between internal and European norms, should follow a logical series of decisions. First of all, he/she must decide whether the "matter" is the responsibility of the State or the EU; but if the Union has enacted the norm, that means that it is supposed to have the power. So if the judge believes the opposite, he/she may challenge the act in front of the European Court of Justice of the European Union ("*rinvio pregiudiziale di validità*"). He/she must then determine whether the European norm has or has not "direct effect". In case of doubt he/she suspends the trial and to raise a question of interpretation before the Court of Justice. When the European norm is not self-executing, but it expresses a principle, the court may be in doubt about the compatibility of the Italian legislation with it. Such doubt must be solved by raising a question of interpretation before the Court of Justice. If the rule that the Court of Justice derives from the interpretation of the European provisions has characteristics sufficient to produce "direct effects", the Italian judge shall then apply it or not apply according to the internal norm. If the Italian court directly determines that the European norm is not self-executing, it challenges the contrasting Italian law before the Constitutional Court. Finally, if the court doubts the compatibility of the European norm with "supreme principles" of the Constitution, it challenges before the Constitutional Court the order of execution of the Treaty, as we saw above. Given that, after the Treaty of Maastricht, the recognition of fundamental rights as a "constitutional" limit to European legislation has become explicit, the court may, instead, prefer to directly challenge the norm before the European Court of Justice.

Below are three notorious cases regarding clashes among rights.

The case of the crucifix in classrooms

A case of particular friction between the guarantees laid down by the Constitution for certain freedoms, and the existence of rules that seem to contradict them, is related to the exposure of the crucifix in classrooms. The problem concerned the possible doubt about the current validity of an old provision, of a regulatory nature, which established the compulsory display of this symbol, despite the express constitutional recognition of religious freedom and the supreme principle of state secularism (defined as such by the Constitutional Court: case n. 203/1989). The administrative judges, interested in the matter by the parents of some pupils, decided that the obligation was still in force. They have, in fact, qualified the crucifix as a symbol confirmatory and affirming the republic's secularism, since it refers to a "culture" of solidarity and equality that would be implied even in articles 2 and 3 of the Constitution (TAR Veneto, no. 1110/2000; the State Council, n. 556/2006). The parents then turned to the European Court of Human Rights (*Lautsi* case) that at first (Second Chamber, 3 November 2009) "condemned" the Italian government for having violated the right of parents to educate their child according to their beliefs, and then (Grand Chamber, 18 March 2011) backtracked, arguing, inter alia, that the State has a certain margin of discretion in this matter and that in the majority of the Member States of the Council



of Europe the simple display of the symbol would not be unambiguously considered as detrimental to the fundamental rights of students and parents.

Jehovah's Witnesses and blood transfusion

From the few cases provided by law, anyone can refuse to be subjected to medical treatment. Then the individual will prevail. And what if the individual freely chooses to refuse medical treatment, essential for his or her survival? The problem arises quite often. For example, for religious reasons, Jehovah's Witnesses are obliged to refuse blood transfusions. The (legal) problem does not arise where the refusal is from an adult capable of discernment: instead it becomes dramatic when parents refuse permission to transfusions for their minor child. The right and duty to maintain and educate their children, that art. 30 Const. imposes on the parents, is here in competition with the right to religious freedom of the parents themselves: to what extent can their religious choices affect the life of the child? The Supreme Court (*Corte di Cassazione*, section I pen., judgment 13 December 1983) solved the problem by stating that: a) the religious profession cannot be taken on the basis of a declaration of incapacity of parents (which would allow a replacement intervention by the public bodies), but that b) you are out of the exercise of religious freedom when it is expressed in behaviours contrary to obligations and prohibitions that "*in the context of a civilization everybody considers as needed to an orderly civil life*". The parents, who denying the permission caused the death of their daughter, were convicted of manslaughter.

Personal liberty (self-determination): Englaro case

A famous case that kept all of Italy in suspense is that of Eluana Englaro. She was a twenty-year-old woman, victim of a car accident on 18 January 1992 and reduced after this to a permanent vegetative state. Once the irreversibility of the prognosis was established, her family sadly asked doctors to suspend artificial nutrition and hydration (as, "unfortunately", Eluana was able to breathe by herself). None of their demands was heard, mainly because of the total lack of legal protection for physicians who might have agreed to cooperate in suspending these vital treatments. Eluana's parents also argued that, by reconstructing the lifestyle and beliefs of her strong and independent daughter (expressed, inter alia, shortly before the accident, during a hospital visit to a friend who suffered the same fate) she would never have wanted to live in those conditions, irreconcilable with her bright personality and her will.

In 1999 a troubled legal battle began, carried out by Eluana's father, Mr. Beppino Englaro, who was also her legal guardian. Different parties intervened in the "management" of the case: the Court of Cassation (16 October 2007, n. 21748), the Milan Court of Appeal (sec. I – Civil, decree 9 July 2008, which granted the interruption of vital treatment), the Government (which worked frantically to a specific bill), the Catholic Church and the whole country; but, while all of these parties were scrambling to find a fair solution to the "Englaro case", Eluana died on 9 February 2009. An autopsy was conducted on her body



after her death, which showed that the cause of her death was a cardiac arrest brought on by dehydration.

On 27 February 2009, the Public Prosecutor of Udine placed under investigation Beppino Englaro, the head physician Dr. De Monte, and the nurses who participated in the implementation of the Court of Appeal judgment on charges of aggravated murder, but at the beginning of 2010 the case was filed.

The “Englaro” case sums up the eternal conflict between the public interest in the protection of private life and the individual right to therapeutic self-determination. The issue becomes even thornier where such a subjective legal situation must be recognized in a person incapable of discernment, who no longer has a way to communicate outside her own choices in life. Indeed, the problematic nature of this case lies in the main subject of the story: a human person whose will is reconstructed through the use of the so called “advanced directives” for medical treatment.

Freedom of information and freedom of thought in the mass media system: the Europa 7 case:

“Europa 7” (an Italian television company) is the title of an important case law on freedom of thought decided by the Italian Constitutional Court, the Court of Justice and the European Court of Human Rights.

Herewith, a short summary of the case: Europa 7 participated in the public tender for the allocation of national television frequencies, under Law 249/1997; in 1999 it won some television frequencies. The legislature and the government, however, extended the concessions to existing societies (for example, the one that used the frequency for Rete 4), so that Europa 7 could not start its own business.

The Constitutional Court (decision 466/2002), confirmed that no private person can own more than 20% of television frequencies: then Rete4 would have to stop broadcasting in analogue-terrestrial. The Court, however, considered partially not unconstitutional the extensions.

Pursuant to Law Decree n. 352/2003 the "excess networks" were expected to be able to continue broadcasting on frequencies already in use by them; by Law no. 112/2004 the reassignment of the spectrum of analogue licenses was blocked, pending the complete switchover to digital terrestrial with a different assignment of frequencies.

In July 2005, the Consiglio di Stato of Italy (State Council), urged by Europa 7, asked the European Court of Justice for a preliminary, and the judgment of 31 January 2008 in Case C-380/05, offered an interpretation favorable to Europa 7, based on the directives and on the right to information on free and plural bases, recognized as a general principle in Union law,.

The judgment of the European Court of Justice of 31 January 2008 stated that the television system in Italy is not in conformity with European legislation requiring objective, transparent and non-discriminatory allocation of frequencies.



The Council of State in judgment 242/2009 thus established for a compensation of over € 1 million, but later the matter was closed by a ruling of the Strasbourg Court of 7 June 2012 (Application no. 38433/09), through which – also recalling the art. 11 of the Charter of Nice – it was decided for a compensation of € 10 million for injury: among other things, there was an injury to freedom of information as related to the right to express thoughts.

As it is clear from the brief summary of the case, the point at issue was the exclusion of a company from a TV broadcast, in order to benefit – by means of such exclusion – the existing oligopoly in the Italian TV enterprises system. Even the right to freedom of thought (which the media are instrumental) has been applied: the Constitutional Court could also invoke art. 21 of the Constitution in order to declare the unconstitutionality of the existing situation (but the constitutional adjudication in Italy did not challenge the transitional application of the law, and therefore Europa 7 was anyway not able to start its activity).

Similarly, also the super national courts in Europe had to decide this case and the decision was based also on the freedom of expression rights. The Court of Justice of the European Union, in particular, in addition to EU directives on concentrations in the television industry applied – as a general principle of EU law – the principle of pluralism of sources of information stated in art. 10 of the ECHR (it must be noted that at the time the Charter of Nice had not yet binding). Conversely, even the Strasbourg Court was asked to rule on a compensation for the benefit of Europa 7, and as part of this complex story could also rely – for its role, in fact, even outside the context of the European Union – the art. 11 (2) of the Charter of Fundamental Rights of the European Union on freedom of expression and information.



ANNEXES

National provisions⁶

Personal liberty:

Relevant legislation:

- Codice di procedura penale (1988, modello accusatorio)
- r.d. 773/1931 (Approvazione del testo unico delle leggi di pubblica sicurezza);
- l. 1423/1956 (Misure di prevenzione nei confronti delle persone pericolose per la sicurezza e per la pubblica moralità);
- l. 327/1988 (Norme in materia di misure di prevenzione personali);
- d.lg. 286/1998 (Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero);
- l. 189/2002 (Modifica alla normativa in materia di immigrazione e di asilo);
- d.l. 241/2004 (Disposizioni urgenti in materia di immigrazione);
- l. 354/1975 (Norme sull'ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà);
- d.l. 144/2005 (misure urgenti per il contrasto del terrorismo internazionale);
- d.l. 249/2007 (Misure urgenti in materia di espulsioni e di allontanamento per terrorismo e per motivi imperativi di pubblica sicurezza);
- l. 38/2009 (Conversione in legge, con modificazioni, del decreto-legge 23 febbraio 2009, n. 11, recante misure urgenti in materia di sicurezza pubblica e di contrasto alla violenza sessuale ed introduzione del c.d reato di stalking);
- l. 94/2009 (Disposizioni in materia di sicurezza pubblica)

Relevant Constitutional Court case law:

- Constitutional Court case law on personal liberty:
- nozione di libertà personale: l. 2 e 11/1956; 45/1960; 30/1962; 72/1963; 68/1964; 52/1967; 68/1964; 144/1970; 13/1972; 62 e 419/1994; 210/1995; 194/1996; 105/2001;
- forme di restrizione della libertà personale, e relative garanzie: 21/1957; 29/1962; 26/1966; 512/2002;
- misure di prevenzione: 27/1958; 23 e 68/1964; 144/1997;
- espulsione dello straniero: 105/2001; 222 e 223/2004;
- diritti dei detenuti: 349/1993; 351/1996; 526/2000;

⁶ We decided to keep the Italian (official) terminology when referring to national legislation and case law.



- limiti massimi della carcerazione preventiva: 1/1980, 15/1982, 292/1998; ord. 397/2000;
- misure cautelari: 265/2010; 231/2011, 233/2011, 331/2011, 110/2012; 57/2013; 213/2013.
- ingiusta detenzione cautelare: 219/2008

Home inviolability:

Relevant legislation:

- Codice di procedura penale (1988, sistema accusatorio, in particolare le disposizioni su ispezioni e sequestri: titolo III, mezzi di ricerca della prova, artt. 244 ss.)
- r.d. 773/1931 (Approvazione del testo unico delle leggi di pubblica sicurezza);
- l. 98/74 (Interferenze illecite nella vita privata);
- l. 152/1975 (Disposizioni a tutela dell'ordine pubblico);
- l. 547/1993 (Modificazioni ed integrazioni alle norme del Codice penale e del codice di procedura penale in tema di criminalità informatica);
- l. 63/2001 (Modifiche al codice penale e al codice di procedura penale in materia di formazione e valutazione della prova in attuazione della legge costituzionale di riforma dell'articolo 111 della Costituzione).
- l. 397/2000 (Disposizioni in materia di indagini difensive);
- limitazioni imposte per motivi di sanità ex art. 14, 3° co., Cost.: l. 283/1962 (Disciplina igienica della produzione e della vendita delle sostanze alimentari e delle bevande);
- limitazioni imposte per motivi economici e fiscali art. 14, 3° co., Cost.: d.p.r. 520/1955 (Riorganizzazione centrale e periferica del Ministero del lavoro); d.p.r. 633/1972 (Istituzione e disciplina dell'Imposta sul valore aggiunto);
- limitazioni imposte per motivi di incolumità pubblica ex art. 14, 3° co., Cost.: d.lg. 286/1998 (t.u. delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero)

Relevant Constitutional Court case law:

- nozione costituzionale di domicilio: 104/1969; 56/1973; 106/1975;
- estensione della nozione di privata dimora: 88/1987;
- limiti posti dalla Costituzione alla tutela del diritto alla libertà di domicilio: 45/1963; 61/1964; 10/1971;
- limiti oggettivi alle limitazioni della libertà domiciliare: 8/1956; 26/1961; 4/1977;
- garanzia della riserva di giurisdizione e sulle forme di tutela della libertà domiciliare: 173/1974; 110/1976;
- compatibilità delle riprese vive a fini investigativi con la disciplina costituzionale del domicilio, sentenza 135/2002



Freedom and secrecy of communication and correspondence:

Relevant legislation:

- codice penale: artt. 615-bis ss. e 616 ss. (fino al 623-bis)
- codice di procedura penale: artt. 266 ss. in materia di intercettazioni
- D.Lgs 196/2003 (codice per la protezione dei dati personali)
- d.P.R. 156/1973 (testo unico postale)

3. Relevant Constitutional Court case law:

- Judgments: 173/2009; 127/2005; 275/2004; 267/2002; 128/2000; 281/1998; 420/1994; 81/1993; 366/1991; 1030/1988; 34/1973

Freedom of movement and residence:

Relevant legislation:

- codice penale, artt. 215, 1° co., e 233 (misure di sicurezza limitative della libertà di circolare sul territorio nazionale);
- legislazione limitativa della libertà di espatrio: l. 1185/1967; c.p.p., art. 281;
- legislazione limitativa della libertà di circolazione per motivi di sicurezza: l. 1423/1956, art. 2; l. 327/1988; c.p.p., art. 283.

4. Relevant Constitutional Court case law:

- nozione di libertà di soggiorno: 53/1957;
- differenza tra le misure limitative della libertà personale e quelle incidenti sulla libertà di soggiorno: 105/2001;
- divieto di restrizioni determinate da ragioni politiche: 19/1959;
- nozione di sicurezza idonea a limitare la circolazione: 2/1956, 161/1980;
- limitazione alla circolazione tra regioni sentenze: 12/1963, 51/1991, 264/1996,
- limitazione amministrativa alla libertà di circolazione per soddisfare l'esigenza di buon uso delle strade: 12/1965;
- libera circolazione delle persone all'interno della UE: 2/2013



Freedom of assembly:

Relevant legislation:

- disposizioni generali: artt.18, 25, 26, 27, 28, t.u.l.p.s.;
- scioglimento delle riunioni in luogo pubblico: artt. 22, 23, 24, t.u.l.p.s.;
- divieto di portare armi nelle riunioni in luogo pubblico o aperto al pubblico: art. 19, t.u.l.p.s.; art. 4, l. 110/1975 (Norme integrative della disciplina vigente per il controllo delle armi, delle munizioni e degli esplosivi);
- rapporti tra libertà di manifestazione del pensiero e libertà di riunione in luogo pubblico: artt. 20 e 21, t.u.l.p.s.; art. 654, c.p.; art. 5, l. 645/1952 (Norme di attuazione della XII disposizione transitoria e finale, 1° co., della Costituzione - fascismo); artt. 1, 2, 5, d.l. 122/1993 (Misure urgenti in materia di discriminazione razziale, etnica e religiosa);
- riconoscibilità dei soggetti partecipanti alle riunioni in luogo pubblico: art. 5, l. 152/1975 (Disposizioni a tutela dell'ordine pubblico);
- spettacoli e i trattenimenti pubblici: artt. 68 ss. e 82, t.u.l.p.s.;
- diritto di assemblea: art. 20 Statuto dei lavoratori (l. 300/1970).

Relevant Constitutional Court case law:

- questione della legittimità delle riunioni in luogo pubblico non preavvisate: 9/1956, 54/1961; (ord.) 27/1956;
- questione della punibilità degli oratori nelle riunioni in luogo pubblico non preavvisate: 90/1970, 11/1979;
- non irragionevolezza del termine di preavviso di tre giorni per le riunioni in luogo pubblico sentenza 160/1976;
- incostituzionalità del preavviso nelle riunioni in luogo aperto al pubblico: 45/1957, 27/1958;
- nozione di armi e di oggetti atti ad offendere: 79/1982.

Freedom of association:

Relevant legislation:

- codice penale: artt. 270-270 bis;
- codice civile: artt. 11-42, 2500 septies, 2500 octies;
- legislazione speciale: d.l. 43/1948; l. 17/1982; artt. 10, 13 bis, 108-111 ter, d.p.r. 917/1986; artt. 14, 28, 30, l. 49/1987; l. 266/1991; l. 381/1991; l. 67/1992; d.l. 337/1996; d.l. 460/1997; d.l. 153/1999; l. 383/2000; l. 152/2001; d.l. 207/2001; d.l. 374/2001; l. 206/2003; d.lg. 155/2006

Relevant Constitutional Court case law:

- judgments: 69/1962; 114/1967; 11/1968; 40/1982; 239/1984; 193/1985; 417/1993; 248/1997; 365/1997; 50/1998; 243/2001; 300/2003; 301/2003.



Freedom of religion and conscience:

Relevant legislation:

- Codice penale: artt. 402-406;
- Chiesa Cattolica: l. 810/1929 (Esecuzione dei Patti lateranensi); l. 121/1985 (Legge di ratifica ed esecuzione dell'Accordo di Villa Madama); l. 222/1985 (Disposizioni sugli enti e beni ecclesiastici in Italia e per il sostentamento del clero cattolico in servizio nelle diocesi);
- culti ammessi l. 1159/1929 (Legge sui culti ammessi);
- obiezione di coscienza: l. 772/1972 e l. 695/1974 (Norme per il riconoscimento dell'obiezione di coscienza);
- singole intese: l. 449/1984 (Legge di approvazione intesa lo Stato e Chiese rappresentate dalla Tavola Valdese); l. 516/1988 (Legge di approvazione intesa tra lo Stato e l'Unione delle Chiese cristiane avventiste del 7° giorno); l. 517/1988 (Legge di approvazione intesa tra lo Stato e le Assemblee di Dio in Italia); l. 101/1989 (Legge di approvazione intesa tra lo Stato e l'Unione delle Comunità ebraiche italiane); l. 409/1993 (Legge di approvazione modifiche l. 449/1984 relativa all'intesa tra lo Stato e la Tavola valdese); l. 116/1995 (Legge di approvazione intesa tra lo Stato e l'Unione Cristiana Evangelica Battista); l. 520/1995 (Legge di approvazione intesa tra lo Stato e la Chiesa Evangelica Luterana).

Relevant Constitutional Court case law:

- judgments 45/1957; 58/1960; 195/1972; 27/1975; 117/1979; 203/1989; 409/1989; 470/1989; 13/1991; 467/1991; 195/1993; 422/1993; 149/1995; 440/1995; 334/1996; 35/1997; 43/1997; 329/1997; (ord.) 221/1998; 223/2000; 271/2000; 508/2000; (ord.)34/2001; 327/2002; 168/2005.

Freedom of expression:

Relevant legislation:

- limitazioni classiche: reati di opinione nel Codice penale (artt. 594 ss. – ingiuria e diffamazione, nelle loro diverse manifestazioni)
- modalità di espressione della libertà e Mass-media; in materia di radiotelevisione e telecomunicazioni: d.lg. 31.7.2005, n. 177 (Testo unico della radiotelevisione); l. 3.5.2004, n. 112 (Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI - Radiotelevisione italiana S.p.a., nonché delega al Governo per l'emanazione del testo unico della radiotelevisione); l. 22.2.2000, n. 28 (Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica); l. 31.7.1997, n. 249 (Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo); l. 6.8.1990, n. 223 (Disciplina del sistema radiotelevisivo pubblico e privato); l. 14.4.1975, n. 103 (Nuove norme in materia di diffusione radiofonica e televisiva); d.lg. 15.3.2010, n. 44 (attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive); l. 26.5.2011, n. 75 (Conversione in legge, con modificazioni, del decreto-legge 31 marzo 2011, n. 34, recante disposizioni urgenti in favore della cultura, in materia di incroci tra settori della stampa e della televisione); d.lg. 28.6.2012, n. 120 (Modifiche ed integrazioni al d.lg. 15 marzo 2010, n. 44, recante attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative,



regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive);

- modalità di espressione della libertà e Mass-media; in materia di stampa e di editoria: l. 7.3.2001, n. 62 (Nuove norme sull'editoria e sui prodotti editoriali); l. 5.8.1981, n. 416 (Disciplina delle imprese editrici e provvidenze per l'editoria); l. 3.2.1963, n. 69 (Ordinamento della professione di giornalista); l. 8.2.1948, n. 47 (Disposizioni sulla stampa); in materia di cinema: l. 21.4.1962, n. 161 (Revisione dei film e dei lavori teatrali);
- la disciplina del segreto: l. 3.8.2007, n. 124 (Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto).

Relevant Constitutional Court case law:

- sul passaggio dal monopolio radiotelevisivo al sistema misto pubblico-privato e sul principio del pluralismo (e la garanzia del servizio pubblico radiotelevisivo): 59/1960, 11 e 98/1968, 71/1991, 224/1974, 225/1974, 202/1976, 148/1981, 231/1985, 826/1988, 348/1990, 420/1994, 466/2002.

Legal status of people (art. 22 Cost):

Relevant legislation:

- capacità: codice civile, artt. 1, 2, 414-432;
- cittadinanza: l. 555/1912; l. 123/1983; l. 91/1992;
- disciplina dello stato civile: r.d. 1238/1939 ; artt. 6, 7, 8, 9, 10, 143-bis, 156-bis, 262, 299, 449-455 c.c.; d.p.r. 396/2000.

Jurisdictional protection:

Relevant legislation:

- Codice di procedura civile (1940); cfr. anche l. 69/2009 (Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile); l. 51/2010 (Disposizioni in materia di impedimento a comparire in udienza); d.lg. 28/2010 (Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali); d.lg.150/2011 (disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'art. 54 della legge 18 giugno 2009, n. 69);
- Codice di procedura penale (1988); cfr. anche l. 124/2008 (Disposizioni in materia di sospensione del processo penale nei confronti delle alte cariche dello Stato); l. 51/2010 (disposizioni in materia di impedimento a comparire in udienza);
- Codice del processo amministrativo (DLgs 104/2010); cfr. anche l. 2248/1865, all. E, art. 2; r.d. 3282/1923, artt. 1, 15, 31 e 32; r.d. 267/1942, art. 15; l. 1034/1971, art. 19, 2° co.; l. 241/1990.

Relevant Constitutional Court case law:

- Judgments: 234/1985, 82/1996, 492/1991, 248/1992, 107/1994, 419/1995, 175/1996,



135/1998, (ord.) 165/1998, (ord.) 210/1998, (ord.) 253/1998, 327/1998, 328/1998, 123/1999, (ord.) 231/1999, (ord.) 461/1999, (ord.) 95/2000, 198/2000, (ord.) 355/2000, (ord.) 339/2000, 394/2000, 485/2000, (ord.) 483/2000, (ord.) 79/2001, (ord.) 142/2001, 165/2001, (ord.) 183/2001, 139/2002, (ord.) 179/2002, (ord.) 186/2002, 335/2002, (ord.) 411/2002, 204/2004; 85/2008, 144/2008, 181/2008, 305/2008, 336/2208, 351/2008; 207/2009; 262/2009; 3/2010; 26/2010; 106/2010; 139/2010; 279/2010; 237/2012; 258/2012; 272/2012; 143/2013; 186/2013.

Safeguards in extradition:

Relevant legislation:

- artt. 4, 8-10 e 13 c.p.; artt. 697 ss. c.p.p.; l. 69/2005.

Relevant Constitutional Court case law:

- judgments: 54/1979, 220 e 280/1985, 128/1987, 223/1996, 58/1997, 231/2004.

Safeguards in criminal responsibility:

Relevant legislation:

- giudice naturale:
 - artt. 1-49, 279, 516, 517, 521 e 521-bis c.p.p.;
 - artt. 1-54, 413, 433, 444, 637, 645, 661, 669-bis, ter, quater, quinquies, terdecies, 688, 693, 703, 704, 706, 712, 736 bis, 747, 810, 828, 830, 839 e 840 c.p.c.;
- principio di legalità nel diritto penale: artt. 1, 2 e 199-215 c.p.; art. 14 disp. preliminari al c.c.

Relevant Constitutional Court case law:

- principio del giudice naturale: 41/2006; 393/2002; 419/1998; 327/1998; 272/1998; 268/1987; 6/1975; 274/1974; 139/1971; 29/1958; 80/1988
- riserva di legge e il principio di legalità in materia penale: 56/1967; 88/1962; 237/2007; 452/1997; 460/1994; 168/1976; 174/1975; 71/1975; 414/1995, 36/1964; 364/1988; 131/1970; 299/1992; 26/1966 (e sull'esclusione di potestà legislativa regionale sentenza 273/1995);
- norme penali in bianco: 282/1990; 132/1986;
- principio di offensività: 263/2000; 360/1995;
- principio di determinatezza: 34/1995; 247/1989; 96/1981; 188/1975; 20/1974;
- principio di irretroattività della legge penale: 51/1985;
- applicazione della legge penale più favorevole al reo: 394/2006; 393/2006; 250/2010.
- principio di personalità della responsabilità penale: 3/1956; 107/1957; 79/1963; 42/1965; 364/1988; 1085/1988; 322/2007;



- presunzione di non colpevolezza: 64/1970; 370/1996; 48/1994; 206/1999;
- funzione rieducativa della pena: 12/1966; 67/1963; 179/1973; 167/1972; 264/1974; 50/1980; 274/1983; 255/2006; 179/2013;
- principio di proporzionalità della pena: 251/2012

Home inviolability:

Relevant legislation:

- Codice di procedura penale (1988, sistema accusatorio, in particolare le disposizioni su ispezioni e sequestri: titolo III, mezzi di ricerca della prova, artt. 244 ss.)
- r.d. 773/1931 (Approvazione del testo unico delle leggi di pubblica sicurezza);
- l. 98/74 (Interferenze illecite nella vita privata);
- l. 152/1975 (Disposizioni a tutela dell'ordine pubblico);
- l. 547/1993 (Modificazioni ed integrazioni alle norme del Codice penale e del codice di procedura penale in tema di criminalità informatica);
- l. 63/2001 (Modifiche al codice penale e al codice di procedura penale in materia di formazione e valutazione della prova in attuazione della legge costituzionale di riforma dell'articolo 111 della Costituzione).
- l. 397/2000 (Disposizioni in materia di indagini difensive);
- limitazioni imposte per motivi di sanità ex art. 14, 3° co., Cost.: l. 283/1962 (Disciplina igienica della produzione e della vendita delle sostanze alimentari e delle bevande);
- limitazioni imposte per motivi economici e fiscali art. 14, 3° co., Cost.: d.p.r. 520/1955 (Riorganizzazione centrale e periferica del Ministero del lavoro); d.p.r. 633/1972 (Istituzione e disciplina dell'Imposta sul valore aggiunto);
- limitazioni imposte per motivi di incolumità pubblica ex art. 14, 3° co., Cost.: d.lg. 286/1998 (t.u. delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero)

Relevant Constitutional Court case law:

- nozione costituzionale di domicilio: 104/1969; 56/1973; 106/1975;
- estensione della nozione di privata dimora: 88/1987;
- limiti posti dalla Costituzione alla tutela del diritto alla libertà di domicilio: 45/1963; 61/1964; 10/1971;
- limiti oggettivi alle limitazioni della libertà domiciliare: 8/1956; 26/1961; 4/1977;
- garanzia della riserva di giurisdizione e sulle forme di tutela della libertà domiciliare: 173/1974; 110/1976;



- compatibilità delle riprese visive a fini investigativi con la disciplina costituzionale del domicilio, sentenza 135/2002

Freedom and secrecy of communication and correspondence:

Relevant legislation:

- codice penale: artt. 615-bis ss. e 616 ss. (fino al 623-bis)
- codice di procedura penale: artt. 266 ss. in materia di intercettazioni
- D.Lgs 196/2003 (codice per la protezione dei dati personali)
- d.P.R. 156/1973 (testo unico postale)

Relevant Constitutional Court case law:

- Judgments: 173/2009; 127/2005; 275/2004; 267/2002; 128/2000; 281/1998; 420/1994; 81/1993; 366/1991; 1030/1988; 34/1973

Freedom of movement and residence:

Relevant legislation:

- codice penale, artt. 215, 1° co., e 233 (misure di sicurezza limitative della libertà di circolare sul territorio nazionale);
- legislazione limitativa della libertà di espatrio: l. 1185/1967; c.p.p., art. 281;
- legislazione limitativa della libertà di circolazione per motivi di sicurezza: l. 1423/1956, art. 2; l. 327/1988; c.p.p., art. 283.

Relevant Constitutional Court case law:

- nozione di libertà di soggiorno: 53/1957;
- differenza tra le misure limitative della libertà personale e quelle incidenti sulla libertà di soggiorno: 105/2001;
- divieto di restrizioni determinate da ragioni politiche: 19/1959;
- nozione di sicurezza idonea a limitare la circolazione: 2/1956, 161/1980;
- limitazione alla circolazione tra regioni sentenze: 12/1963, 51/1991, 264/1996,
- limitazione amministrativa alla libertà di circolazione per soddisfare l'esigenza di buon uso delle strade: 12/1965;
- libera circolazione delle persone all'interno della UE: 2/2013



Freedom of assembly:

Relevant legislation:

- disposizioni generali: artt.18, 25, 26, 27, 28, t.u.l.p.s.;
- scioglimento delle riunioni in luogo pubblico: artt. 22, 23, 24, t.u.l.p.s.;
- divieto di portare armi nelle riunioni in luogo pubblico o aperto al pubblico: art. 19, t.u.l.p.s.; art. 4, l. 110/1975 (Norme integrative della disciplina vigente per il controllo delle armi, delle munizioni e degli esplosivi);
- rapporti tra libertà di manifestazione del pensiero e libertà di riunione in luogo pubblico: artt. 20 e 21, t.u.l.p.s.; art. 654, c.p.; art. 5, l. 645/1952 (Norme di attuazione della XII disposizione transitoria e finale, 1° co., della Costituzione - fascismo); artt. 1, 2, 5, d.l. 122/1993 (Misure urgenti in materia di discriminazione razziale, etnica e religiosa);
- riconoscibilità dei soggetti partecipanti alle riunioni in luogo pubblico: art. 5, l. 152/1975 (Disposizioni a tutela dell'ordine pubblico);
- spettacoli e i trattenimenti pubblici: artt. 68 ss. e 82, t.u.l.p.s.;
- diritto di assemblea: art. 20 Statuto dei lavoratori (l. 300/1970).

Relevant Constitutional Court case law:

- questione della legittimità delle riunioni in luogo pubblico non preavvisate: 9/1956, 54/1961; (ord.) 27/1956;
- questione della punibilità degli oratori nelle riunioni in luogo pubblico non preavvisate: 90/1970, 11/1979;
- non irragionevolezza del termine di preavviso di tre giorni per le riunioni in luogo pubblico sentenza 160/1976;
- incostituzionalità del preavviso nelle riunioni in luogo aperto al pubblico: 45/1957, 27/1958;
- nozione di armi e di oggetti atti ad offendere: 79/1982.

Freedom of association:

Relevant legislation:

- codice penale: artt. 270-270 bis;
- codice civile: artt. 11-42, 2500 septies, 2500 octies;
- legislazione speciale: d.l. 43/1948; l. 17/1982; artt. 10, 13 bis, 108-111 ter, d.p.r. 917/1986; artt. 14, 28, 30, l. 49/1987; l. 266/1991; l. 381/1991; l. 67/1992; d.l. 337/1996; d.l. 460/1997; d.l. 153/1999; l. 383/2000; l. 152/2001; d.l. 207/2001; d.l. 374/2001; l. 206/2003; d.lg. 155/2006

Relevant Constitutional Court case law:

- judgments: 69/1962; 114/1967; 11/1968; 40/1982; 239/1984; 193/1985; 417/1993; 248/1997; 365/1997; 50/1998; 243/2001; 300/2003; 301/2003.



Freedom of religion and conscience:

Relevant legislation:

- Codice penale: artt. 402-406;
- Chiesa Cattolica: l. 810/1929 (Esecuzione dei Patti lateranensi); l. 121/1985 (Legge di ratifica ed esecuzione dell'Accordo di Villa Madama); l. 222/1985 (Disposizioni sugli enti e beni ecclesiastici in Italia e per il sostentamento del clero cattolico in servizio nelle diocesi);
- culti ammessi l. 1159/1929 (Legge sui culti ammessi);
- obiezione di coscienza: l. 772/1972 e l. 695/1974 (Norme per il riconoscimento dell'obiezione di coscienza);
- singole intese: l. 449/1984 (Legge di approvazione intesa lo Stato e Chiese rappresentate dalla Tavola Valdese); l. 516/1988 (Legge di approvazione intesa tra lo Stato e l'Unione delle Chiese cristiane avventiste del 7° giorno); l. 517/1988 (Legge di approvazione intesa tra lo Stato e le Assemblee di Dio in Italia); l. 101/1989 (Legge di approvazione intesa tra lo Stato e l'Unione delle Comunità ebraiche italiane); l. 409/1993 (Legge di approvazione modifiche l. 449/1984 relativa all'intesa tra lo Stato e la Tavola valdese); l. 116/1995 (Legge di approvazione intesa tra lo Stato e l'Unione Cristiana Evangelica Battista); l. 520/1995 (Legge di approvazione intesa tra lo Stato e la Chiesa Evangelica Luterana).

Relevant Constitutional Court case law:

- judgments 45/1957; 58/1960; 195/1972; 27/1975; 117/1979; 203/1989; 409/1989; 470/1989; 13/1991; 467/1991; 195/1993; 422/1993; 149/1995; 440/1995; 334/1996; 35/1997; 43/1997; 329/1997; (ord.) 221/1998; 223/2000; 271/2000; 508/2000; (ord.)34/2001; 327/2002; 168/2005.

Freedom of expression:

Relevant legislation:

- limitazioni classiche: reati di opinione nel Codice penale (artt. 594 ss. – ingiuria e diffamazione, nelle loro diverse manifestazioni)
- modalità di espressione della libertà e Mass-media; in materia di radiotelevisione e telecomunicazioni: d.lg. 31.7.2005, n. 177 (Testo unico della radiotelevisione); l. 3.5.2004, n. 112 (Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI - Radiotelevisione italiana S.p.a., nonché delega al Governo per l'emanazione del testo unico della radiotelevisione); l. 22.2.2000, n. 28 (Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica); l. 31.7.1997, n. 249 (Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo); l. 6.8.1990, n. 223 (Disciplina del sistema radiotelevisivo pubblico e privato); l. 14.4.1975, n. 103 (Nuove norme in materia di diffusione radiofonica e televisiva); d.lg. 15.3.2010, n. 44 (attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive); l. 26.5.2011, n. 75 (Conversione in legge, con modificazioni, del decreto-legge 31 marzo 2011, n. 34, recante disposizioni urgenti in favore della cultura, in materia di incroci tra settori della stampa e della televisione); d.lg. 28.6.2012, n. 120 (Modifiche ed integrazioni al d.lg. 15 marzo 2010, n. 44, recante attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative,



regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive);

- modalità di espressione della libertà e Mass-media; in materia di stampa e di editoria: l. 7.3.2001, n. 62 (Nuove norme sull'editoria e sui prodotti editoriali); l. 5.8.1981, n. 416 (Disciplina delle imprese editrici e provvidenze per l'editoria); l. 3.2.1963, n. 69 (Ordinamento della professione di giornalista); l. 8.2.1948, n. 47 (Disposizioni sulla stampa); in materia di cinema: l. 21.4.1962, n. 161 (Revisione dei film e dei lavori teatrali);
- la disciplina del segreto: l. 3.8.2007, n. 124 (Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto).

Relevant Constitutional Court case law:

- sul passaggio dal monopolio radiotelevisivo al sistema misto pubblico-privato e sul principio del pluralismo (e la garanzia del servizio pubblico radiotelevisivo): 59/1960, 11 e 98/1968, 71/1991, 224/1974, 225/1974, 202/1976, 148/1981, 231/1985, 826/1988, 348/1990, 420/1994, 466/2002.

Legal status of people (art. 22 Cost):

Relevant legislation:

- capacità: codice civile, artt. 1, 2, 414-432;
- cittadinanza: l. 555/1912; l. 123/1983; l. 91/1992;
- disciplina dello stato civile: r.d. 1238/1939 ; artt. 6, 7, 8, 9, 10, 143-bis, 156-bis, 262, 299, 449-455 c.c.; d.p.r. 396/2000.

Jurisdictional protection:

Relevant legislation:

- Codice di procedura civile (1940); cfr. anche l. 69/2009 (Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile); l. 51/2010 (Disposizioni in materia di impedimento a comparire in udienza); d.lg. 28/2010 (Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali); d.lg.150/2011 (disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'art. 54 della legge 18 giugno 2009, n. 69);
- Codice di procedura penale (1988); cfr. anche l. 124/2008 (Disposizioni in materia di sospensione del processo penale nei confronti delle alte cariche dello Stato); l. 51/2010 (disposizioni in materia di impedimento a comparire in udienza);
- Codice del processo amministrativo (DLgs 104/2010); cfr. anche l. 2248/1865, all. E, art. 2; r.d. 3282/1923, artt. 1, 15, 31 e 32; r.d. 267/1942, art. 15; l. 1034/1971, art. 19, 2° co.; l. 241/1990.

Relevant Constitutional Court case law:

- Judgments: 234/1985, 82/1996, 492/1991, 248/1992, 107/1994, 419/1995, 175/1996,



135/1998, (ord.) 165/1998, (ord.) 210/1998, (ord.) 253/1998, 327/1998, 328/1998, 123/1999, (ord.) 231/1999, (ord.) 461/1999, (ord.) 95/2000, 198/2000, (ord.) 355/2000, (ord.) 339/2000, 394/2000, 485/2000, (ord.) 483/2000, (ord.) 79/2001, (ord.) 142/2001, 165/2001, (ord.) 183/2001, 139/2002, (ord.) 179/2002, (ord.) 186/2002, 335/2002, (ord.) 411/2002, 204/2004; 85/2008, 144/2008, 181/2008, 305/2008, 336/2208, 351/2008; 207/2009; 262/2009; 3/2010; 26/2010; 106/2010; 139/2010; 279/2010; 237/2012; 258/2012; 272/2012; 143/2013; 186/2013.

Safeguards in extradition:

Relevant legislation:

- artt. 4, 8-10 e 13 c.p.; artt. 697 ss. c.p.p.; l. 69/2005.

Relevant Constitutional Court case law:

- judgments: 54/1979, 220 e 280/1985, 128/1987, 223/1996, 58/1997, 231/2004.

Safeguards in criminal responsibility:

Relevant legislation:

- giudice naturale:
 - artt. 1-49, 279, 516, 517, 521 e 521-bis c.p.p.;
 - artt. 1-54, 413, 433, 444, 637, 645, 661, 669-bis, ter, quater, quinquies, terdecies, 688, 693, 703, 704, 706, 712, 736 bis, 747, 810, 828, 830, 839 e 840 c.p.c.;
- principio di legalità nel diritto penale: artt. 1, 2 e 199-215 c.p.; art. 14 disp. preliminari al c.c.

Relevant Constitutional Court case law:

- principio del giudice naturale: 41/2006; 393/2002; 419/1998; 327/1998; 272/1998; 268/1987; 6/1975; 274/1974; 139/1971; 29/1958; 80/1988
- riserva di legge e il principio di legalità in materia penale: 56/1967; 88/1962; 237/2007; 452/1997; 460/1994; 168/1976; 174/1975; 71/1975; 414/1995, 36/1964; 364/1988; 131/1970; 299/1992; 26/1966 (e sull'esclusione di potestà legislativa regionale sentenza 273/1995);
- norme penali in bianco: 282/1990; 132/1986;
- principio di offensività: 263/2000; 360/1995;
- principio di determinatezza: 34/1995; 247/1989; 96/1981; 188/1975; 20/1974;
- principio di irretroattività della legge penale: 51/1985;
- applicazione della legge penale più favorevole al reo: 394/2006; 393/2006; 250/2010.
- principio di personalità della responsabilità penale: 3/1956; 107/1957; 79/1963; 42/1965; 364/1988; 1085/1988; 322/2007;



- presunzione di non colpevolezza: 64/1970; 370/1996; 48/1994; 206/1999;
- unzione rieducativa della pena: 12/1966; 67/1963; 179/1973; 167/1972; 264/1974; 50/1980; 274/1983; 255/2006; 179/2013;
- principio di proporzionalità della pena: 251/2012

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THE NETHERLANDS

Civil rights in the Netherlands – WP 7, national report deliverable 7.1.

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QUESTION 1 : IDENTIFICATION OF CIVIL RIGHTS

Which rights are considered in your country as civil, civic and citizenship rights? And which are considered the core?

There are different rights that can be considered civil, civic and citizenship rights in the Netherlands, although it is difficult to categorise these rights in a strict way. Much depends on the definition that is held of the different categories. The primary source of civil, civic or citizenship rights in the Dutch legal order is the Dutch constitution (*de Grondwet*¹). The Dutch constitution is established in 1814. At that time the constitution included only limited civil rights (*e.g.* freedom of religion and protection against imprisonment without a legal ground). Since 1983 the civil rights have a major place in the Dutch constitution. Nowadays civil rights are placed right at the beginning of the constitution (Article 1 to Article 23 of the Constitution). Moreover, over the years the civil rights have been extended and include nowadays many civil rights.

In the Netherlands there is a distinction made between classic fundamental rights and social rights. Whereas classic fundamental rights protect the citizens/individuals from interference by the government, social rights lay down obligations for the government to ensure certain common goods, such as division of welfare but also environmental issues.

In the Dutch constitution the following civil rights are found:

¹ The text of the Dutch constitution can be found on: <http://www.denederlandsegrondwet.nl/9353000/1/f9vviHlf299q0sr/vi3ak47ajhgk> (also available in English, French, German and Spanish).



- Equal treatment and non-discrimination on grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever of all persons in the Netherlands (Article 1);
- Electoral rights for Dutch nationals for the national parliament (Article 4);
- The right to submit petitions (Article 5);
- Freedom of religion or belief (Article 6);
- Freedom of expression (Article 7);
- The right of association (Article 8);
- The right to assembly and demonstration (Article 9);
- The right to respect for his privacy (Article 10);
- The right to inviolability of his person (Article 11);
- The prohibition to entry a home (Article 12);
- The right to privacy of correspondence, telephone and telegraph (Article 13);
- Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament (Article 14).
- The right to liberty (Article 15);
- The principle of *nulla-poena* is laid down in Article 16: No offence shall be punishable unless it was an offence under the law at the time it was committed (Article 16);
- The right to be heard by a court/access to justice (Article 17);
- The right to legal representation (Article 18);
- The freedom to education and the financial equality of public and special schools (Article 23) might be considered a classic civil right and a social right.

Article 19 (the duty of the government to provide a sufficient degree of employment), Article 20 (the duty of the government to divide the means of subsistence), Article 21 (protection of the environment and a duty to ensure that the country is habitable) and Article 23 (the duty of the government to protect



the health of the population) are all rights that belong to the category 'social civil rights', in the sense that these provisions lay down an obligation for the state to act, rather than grant an entitlement to civil rights to individuals. These rights are, however, of course also of importance for the civil rights of individuals.

Article 4 of the Dutch constitution grants electoral rights for Dutch nationals for the national parliament (these electoral rights are elaborated on in WP 8 and will be left aside in this analysis).

Besides the Dutch constitution also general principles of law are important in the Dutch legal order for the protection of civil rights. In the context of criminal law, for instance, the *nulla poena* principle (no one shall be punished for acts that are not prohibited by law) and unwritten principles of sound criminal procedure can be mentioned.² In the sphere of administrative law, the principles of sound administration are essential for the discretion of administrative authorities.

The fundamental rights that are considered the core fundamental rights are probably the rights that are guaranteed by the Dutch constitution, as mentioned above. Moreover, since international law is, mostly, direct applicable, also rights derived from the EU Charter, the ECHR and other international treaties are important in the Dutch legal order. The right to family life is one of those important civil rights in the Netherlands coming from international law. There is not a hierarchy of civil rights in the Netherlands, so it is difficult to define which rights belong to the core.

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

² M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 627.



The primary source of fundamental rights in the Netherlands is the Dutch constitution. Other important sources of fundamental rights are the European Convention of Fundamental Rights and the Charter of Fundamental Rights of the European Union. Fundamental rights are, moreover, protected by specific legislation. The right to equal treatment is, for instance, more specifically laid down in the General Act Equal Treatment (*Algemene wet gelijke behandeling*), but also in a specific Act of Equal Treatment on Grounds of Age (*Wet gelijke behandeling op grond van leeftijd*) and an Act on Equal Treatment on Grounds of Handicap and Chronicle Illness (*wet gelijke behandeling op grond van handicap of chronische ziekte*). The Act Public Manifestations (*Wet Openbare Manifestaties*) is a further elaboration of the right to assembly as provided for in Article 9 of the Dutch constitution. The right to privacy (Article 10 of the Dutch constitution) is also protected by specific legislation: the Act Protection Personal Data (*De Wet Bescherming Persoonsgegevens*), the Act Police registers (*Wet politieregisters*) and the Municipal Administration Act (*Wet gemeentelijke basisadministratie*). As observed, also general principles guarantee civil rights, such as the principles of sound administration (which protect the right to a fair trial).

Most of the civil rights guaranteed in international instruments are also included in the Dutch constitution, but not all. The right to life (Article 2 ECHR and Article 2 of the Charter), the right to a fair trial (Article 6 ECHR and Article 47 Charter), the prohibition of *refoulement* and of torture and inhuman and degrading treatment (Article 3 ECHR and Article 4 Charter) and the right to family life (Article 8 ECHR and 7 of the Charter) are not included in the Dutch constitution.³

Case law is an important source of civil rights in the Netherlands, as will be discussed further on.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

- I. *To which international instruments for the protection of civil rights is your country a party?*

³ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 618.



The Netherlands was one of the founding States of the Council of Europe, which established the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. The Convention entered into force on 3 September 1953.

Another instrument of civil rights to which the Netherlands is a party is the International Covenant on Civil and Political Rights, which entered into force on 11 March 1979 (signed in June 1969 and ratified in December 1978).

The Netherlands is also a party to the Optional Protocol to the International Covenant on Civil and Political Rights, which entered into force on 11 March 1979 as well. On the same date the International Covenant on Economic, Social and Cultural Rights entered into force in the Netherlands. On 11 July 1991, moreover, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty entered into force.

In 1966 the Netherlands signed the International Convention on the Elimination of All Forms of Racial Discrimination, it was ratified on 10 December 1971 and entered into force on 9 January 1972.

Since 22 August 1991 the Convention on the Elimination of All Forms of Discrimination against Women entered into force in the Netherlands. On 22 August 2002 the Optional Protocol to CEDAW entered into force as well.

The Convention against torture and other cruel, inhuman or degrading treatment or punishment was signed by the Netherlands on 4 February 1985 and entered into force on 20 January 1989. The Optional Protocol to this Convention, moreover, entered into force on 28 October 2010.

The Convention on the Rights of the Child was signed in 1990, ratified on 6 February 1996 and entered into force on 8 March 1995. The Netherlands is, moreover, party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (entered into force in October 2009) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (entered into force: September 2005).



The Convention on the rights of persons with disabilities was signed by the Netherlands on 30 March 2007, but the Convention has not been ratified yet.

The Netherlands is, moreover, a party to the EU Treaties and therefore the Charter of Fundamental Rights of the EU is a binding source of civil rights in the Netherlands since the Treaty of Lisbon (Article 6 (1) TEU).

II. How are relevant international and European civil rights norms being incorporated in your country?

According to the Dutch constitution international Treaties, such as the abovementioned instruments that have a general binding (*algemeen verbindend*) do not need to be transposed in Dutch law. On the basis of Article 93 of the Dutch constitution provisions of international Treaties and regulations of international organisations that according to their content may be binding on all persons are directly applicable after their publication in the Dutch Official Journal of the State (*Staatscourant*). In addition, Article 94 of the Dutch constitution provides that national, Dutch, statutory provisions, that are binding on all persons, are not applicable when they are in conflict with international law provisions. Article 94 of the Dutch constitution provides that “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.”

Hence, the Dutch legal system has a considerable openness towards international law and consequently towards international and European civil right norms. These international and European civil rights norms do not need to be transposed into national law, but are ‘law of the land’, whenever the specific provisions have a general binding.

As observed, the Dutch constitution does not cover all the civil rights included in the ECHR and the Charter. However, since provisions of international treaties are directly applicable on the basis of the Dutch constitution, these civil rights are definitely part of the Dutch legal system and are applied by national courts. Noteworthy, Article 7 and Article 47 of the Charter are both not included in a similar



provision in the Dutch constitution, but they are relied upon the most in national proceedings.⁴ It shows the important role of the Charter and the Convention in the Dutch legal order, in particular in the Dutch case law.

III. *To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?*

National judges are not allowed to assess the compliance of statutory law with the Dutch Constitution. This prohibition of judicial constitutional review (*'toetsingsverbod'*) is provided for in Article 120 of the Dutch Constitution. It prohibits the review the constitutionality of Acts of parliament and Treaties by Dutch courts. National measures not being acts of parliament are excluded in this prohibition, meaning that court may assess, for instance, local and provincial regulations on their constitutionality.

The prohibition of judicial constitutional review is known since 1848 and it is grounded on the principle that the constitution may only be interpreted by the Dutch legislature, not by courts. Judges are neither allowed to review whether international Treaties are in accordance with the Dutch constitution. The prohibition is interpreted broadly, meaning that the substance of the law nor the procedural context of the specific measure may be assessed on its constitutionality.⁵ Moreover, Dutch judges may not assess Acts of parliament with regard to their compatibility with *general principles* of Dutch law. However, in such a case the Dutch judges can review the compatibility of such an Act with the ECHR.⁶

The Dutch legal system is rather open to international law instruments, based on Article 93 as well as Article 94 of the Dutch constitution, as described above. That means that international civil rights instruments, such as the European Convention on Human Rights, as well as the Charter of Fundamental Rights of the European Union are, mostly, directly applicable in the Dutch legal context. As a consequence the ECHR is one of the main sources of civil, fundamental rights, that is relied upon in Dutch legal proceedings by individuals.

⁴ Van Harten & Grootelaar, *Doorwerking van het Handvest van de Grondrechten van de Europese Unie in de Nederlandse rechtspraak: Een kwantitatieve stand van zaken*, NTM/NJCM-Bull. (2014).

⁵ HR 9 January 1924 and HR 27 January 1961, referred to in the FIDE report on Fundamental Rights with regard to the Dutch legal system. FIDE report, the Netherlands 2010, p. 617.

⁶ See for instance, Hoge Raad, 20 March 2009, ECLI:NL:HR:2009:BG9951.



In legislation references to the ECHR are found in some specific Acts. For instance a reference to the ECHR is found in the Surrender Act (*Overleveringswet*) (Article 11) and the Aliens Act (*De Vreemdelingenwet*) (Article 30). However, references to the ECHR are not made very often.

IV. *How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?*

As observed above, provisions of international Treaties that are binding to all persons are directly applicable in the Dutch legal order and do not have to be transposed specifically. In that perspective international instruments, such as the ICCPR, are directly applicable and can and are used as a source of civil rights in national case law.

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

I. *To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)*

Dutch courts have applied the Charter in national case law from early on. In the first year after the Charter became a binding instrument, in 2010, around 20 cases have been decided on the basis of the Charter.⁷ In the year 2013 even more cases have been decided on the basis of the Charter. In the spring of 2014 approximately 490 Dutch judgments referring to the Charter are published on the Dutch website 'rechtspraak.nl.' Not all judgements are published on that website, but at least in those cases the Charter has been referred to. There are, therefore, probably, more judgments referring to the Charter.

⁷ A. Pahladsingh and Th. M. van Roosmalen, *Het Handvest van de Grondrechten van de Europese Unie één jaar juridisch bindend: rechtspraak in kaart*, NtER (2011), pp. 54-61.



One of the major issues in Dutch case law has been the scope of applicability of the Charter, taking into account the limitations set in Article 51(1) of the Charter. According to that provision the Charter is binding on Member States when they 'implement' EU law. However the Explanations to the Charter suggest that the scope of application of the Charter is broader and encompasses all actions by a Member State which fall within the scope of Union law. The question what exactly falls within that definition is far from clear and has been topic of academic debate and in the case law of the Court of Justice. Similar, this debate had an impact on Dutch case law.

Generally, the Dutch courts examine the question whether the situation at stake falls in the scope of application of the Charter in the light of the Explanations to the Charter. It seems that Dutch courts are lenient applying the Charter, even if there is no actual or obvious connection with EU law present.⁸ Nevertheless, the case law is not coherent on this point. Other judgments imply an actual assessment of the link with the case at stake and the Charter.⁹

With regard to the Dutch legislation and references to the Charter, the advisory opinions of the Council of State can be mentioned. The Council of State is composed of two divisions: the Administrative Judicial Division and an Advisory Division. While the first Division is the highest administrative court in the Netherlands, the Advisory Division has as a mandate to advise the government and parliament on legislation and governance. In its capacity of advisory body, the Council of State referred to the Charter from early on (ever since December 2000, when the Charter was proclaimed).¹⁰

A quick scan of Dutch legislation shows that the EU Charter is not referred to as such in Dutch legislation, up until June 2014. The references to the Charter are mostly found in Dutch case law. The

⁸ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 653. *Gerechtshof Arnhem*, 13 May 2011 is an example: ECLI:NL:GHARN:2011:BQ4476.

⁹ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 654.

¹⁰ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 656.



lack of references in Dutch legislation seems not to have a specific meaning. Since the EU Charter is accepted in the Dutch legal order as directly applicable, since it constitutes primary EU law, the Charter does not have to be transposed and is applicable anyway. Moreover, the Charter as a relatively new source of civil rights could gain more awareness perhaps. In case law a trend to apply the Charter more and more is, at least, visible.

II. How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.

The Dutch case law reveals that the relation between the Charter and the ECHR is interpreted by Dutch judges as equivalent sources of civil rights. That approach is in line with Article 52 (3) of the Charter, which provides that “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.”

The Council of State (*Raad van State*) ruled, for instance, in a case regarding the deportation of a Bulgarian national in 2010 that Article 6 ECHR was not infringed. It held, subsequently, referring to the Explanations to the Charter as well as Article 52 (3) of the Charter, Article 47 of the Charter was not breached either, since the substance of protection of these provisions (Article 6 ECHR and 47 of the Charter) should be equal.¹¹

Also in other cases the Dutch courts examine the fundamental rights of the Charter and the ECHR as having an equal level of protection. For instance, the right to respect family life is examined by the District Court, as if the Charter and the ECHR have a similar level of protection.¹² Therefore the reliance of the individual in that particular case, in the national proceedings, on the ECHR has to be interpreted to include reliance on the Charter. In that same sense, the Council of State examines Article 7 of the

¹¹ Raad van State, 19 April 2012, ECLI:NL:RVS:2012:BW4915.

¹² Rechtbank Den Haag, ECLI:NL:RBDHA:2013:18606.



Charter in the light of the case law of the Court of Human Rights, since the level of protection should be equal, on the basis of Article 52 (3) of the Charter.¹³

Mostly the case law of the ECHR is cited and used as a reference by Dutch courts. Since the ECHR has a considerable source of case law, and since there is more knowledge of the scope of the ECHR compared to the Charter, that role for Strasbourg case law is understandable.¹⁴

Nevertheless, in some cases the Dutch courts approach the Charter and the ECHR autonomously, both as independent sources of civil rights.¹⁵ There seems not to be a hierarchy between the Charter and the ECHR, so far.

QUESTION 5 : JURISDICTIONAL ISSUES

✓ *Personal*

- *Who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?*

✓ *Territorial*

- *What is the territorial scope of the protection of civil rights afforded by your member states? Are there **territorial** limitations to such protection? Which?*

✓ *Material*

- *Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)?*

✓ *Temporal*

¹³ Council of State, 29 August 2012, ECLI:NL:RVS:2012:BX5932.

¹⁴ M. Claes & J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), pp. 654-655.

¹⁵ Rechtbank 's-Gravenhage, 10 May 2012, ECLI:NL:RBSGR:2012:BW5387.



- *What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?*
- ✓ *Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time?***

The personal scope

With regard to the personal scope, the Dutch constitution addresses in most civil rights everyone (*een ieder or ieder*), or individuals residing in the Netherlands. The personal scope of protection of the Dutch constitution is, therefore, quite broad. The right to non-discrimination is, for instance, addressed to all individuals who reside in the Netherlands. The right to freedom of religion is addressed by the Dutch constitution to everyone. The right to privacy also refers to everyone as well. Nevertheless, some rights are specifically granted to Dutch nationals. According to Article 2 of the Dutch constitution aliens may be expelled based upon a regulation of the parliament, implying that Dutch nationals may not be expelled.¹⁶ Article 3 of the Dutch constitution provides that “All Dutch nationals shall be equally eligible for appointment to public service.” Moreover, social rights, such as the right to state allowances (Article 20 of the Dutch constitution) are addressed to Dutch nationals. Also political rights are granted to Dutch nationals in Article 4 of the Dutch constitution (outside the scope of this WP). Hence, even though the Dutch constitution has a broad personal scope, there is a distinction between civil rights and citizens’ rights.

There is no distinction made between natural and legal persons in the Dutch constitution. In principal, civil rights are therefore also granted to legal persons.

In the past it has been assumed that military, civil servants and prisoners could not invoke civil rights against the government.¹⁷ The idea was that these persons have such a specific relation with the state that not all civil rights would be granted to them. The amendment of the Dutch constitution in 1983 made clear that, despite possibilities for limitation, all persons are entitled to these civil rights. However, there remain specific limitations for these categories of persons. Article 15 (4) of the Dutch constitution

¹⁶ A.J. Nieuwenhuis and A.W. Hirsch, *Hoofdstukken Grondrechten Ars Aequi Libri* (2011), p. 48.

¹⁷ Struycken (1929), p. 167.



provides that “A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights in so far as the exercise of such rights is not compatible with the deprivation of liberty.”¹⁸ Also the right of assembly of prisoners may be limited on the basis of Article 15 (4) of the Dutch constitution according to the Dutch Supreme Court.¹⁹ Moreover, also civil servants may be restricted in specific civil rights. The Civil Servants Act (*de Ambtenarenwet*) provides for restrictions (Article 125 a) with regard to the freedom of speech and the freedom of assembly, in situations in which the exercise of these civil rights would harm his or her public function.

The territorial scope

The Kingdom of the Netherlands consists of the Netherlands, Aruba, Curacao, St. Maarten and the BES-Island (Bonaire, St. Eustatius and Saba). The territorial scope of the Dutch constitution is the Netherlands, as well as the BES Island, in principal. The independent countries (Aruba, Curacao and St. Maarten) have their own specific ‘State regulations’ (*Staatsregeling*) in which the civil fundamental rights are laid down. These civil rights are rather similar to the civil rights included in the Dutch constitution. Included in the State regulations are, *inter alia*, the right to equal treatment, the right to assembly, freedom of religion.²⁰ Almost all civil rights (except for political rights) in the independent oversee countries refer to everyone (*ieder*).

European law is only partly applicable to the Dutch oversee territories (see Article 198 TFEU and Annex 2 to the Treaty). That means that the protection of fundamental rights by the Charter has no (or within the specific context of title four a very limited) role in the countries Aruba, Curacao and St. Maarten.

The material and temporal scope

There is no distinction in Dutch civil rights with regard to different policy areas, to the authors knowledge.

¹⁸ Translation from <http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vgrnbo5bvfqo>.

¹⁹ Hoge Raad, 25 June 1982, NJ 1983, 296 (Arrest Vereniging gedetineerden De Schans.)

²⁰ Staatsregeling Curaçao, Staatsregeling Aruba and Staatsregeling St. Maarten.



With regard to the material scope the allowed limitations to Dutch civil rights can be mentioned. Some civil rights are absolute and can not be limited. Examples are the right to petition (Article 5 of the Dutch constitution), but also the prohibition of inhuman or degrading treatment or punishment (Article 3 ECHR). These civil rights may never be restricted. Other civil rights may be limited according to the specific limitation grounds that are mentioned in specific civil rights in the constitution. Article 8 of the Dutch constitution guarantees the freedom of assembly. According to that same article the freedom of assembly may be restricted by Act of Parliament in the interest of public order. Also the right to religion has such a limitation clause, providing that the freedom of religion can be regulated by rules outside buildings and enclosed areas in the interest of traffic and to combat or prevent disorders (Article 6 of the Dutch Constitution).

Moreover, restrictions to civil rights have to be in accordance with the ECHR. That means that Dutch courts have to perform a double test: whether a civil right can be limited by the Dutch constitution or by the Dutch specific legislation that lays down a particular civil right and whether that same right can be limited according to the ECHR and the case law of the EctHR. That means for instance that the freedom of assembly can be limited only when the restriction is provided for by law, has a legitimate aim and is necessary in a democratic society, according to Article 11 ECHR. At the same time such restriction needs to be in accordance with Article 9 of the Constitution, which provides that the freedom of assembly may be limited in the interest of the public order.²¹

In addition, the Dutch constitution provides for restrictions to civil rights in case of a state of emergency in order to guarantee internal and external security (declared by a royal decree) grounded in Article 103 of the constitution.

QUESTION 6 : CONFLICTS BETWEEN RIGHTS

- ✓ *How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?*

²¹ See for more detailed information A. Nieuwenhuis, *Vrijheid van vereniging, vergadering en betoging*, in J. Gerards (ed.), *Grondrechten, de Nationale, Europese en Internationale Dimensie*, Ars Aequi Libri (2013), pp. 69-102.



- ✓ *Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?*

Please give examples, and illustrate how these conflicts are dealt with and resolved.

In the Dutch legal order there is, basically, no hierarchy between civil rights. The only hierarchy that can be assumed is that between civil and social fundamental rights, in the sense that the authorities are obliged to take the classic civil rights into account while achieving the aims of social fundamental rights.²² Some civil rights are absolute, in the sense that they may not be restricted by reasons of public interest. An example is Article 5 of the Dutch constitution: the right to submit petitions to the competent authorities and Article 16, which provides that no offence shall be punishable unless it was an offence under the law at the time it was committed. Other civil rights may be restricted under certain conditions. Article 7 (3) of the Dutch constitution provides for a closed ground of justification of a restriction to the freedom of press. It provides the following: “The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.” As observed some civil rights may be limited according to a specific clause within the provision that ensures that civil right. That might also create a guidance for balancing civil rights. Technically speaking these limitation clauses are not seen as *restriction* to the civil right, but rather as limitations to the *scope* of the civil right at stake. As observed above, the freedom of assembly may be limited under certain circumstances, so as to ensure the right to security for instance (in the interest of the public order). In that sense two civil rights may be reconciled, by using the limitation clause of one civil right in order to take into account another civil right at stake.

Due to the fact that the classic civil rights have no hierarchy, national courts need to balance the different rights, in case of conflict. The Supreme Court (*De Hoge Raad*) has affirmed the non-hierarchical order of civil rights in early case law.²³ According to its vast case law the Dutch judge is required to balance the civil rights, taking into account the specifics of the particular case.²⁴ Another method used by the courts is to assess which of the conflicting civil rights is affected in its’ core, giving preference to the protection of that core of the civil right at stake. Basically, it is the national judge that needs to balance the civil rights in conflict. In that weighing of two civil rights Dutch courts seem to have a

²² Van der Pot (2006), p. 297.

²³ HR 4 March 1988, “Privé”/deBorbon Parma c.s., NJ 1989, 361.

²⁴ A.J. Nieuwenhuis and A.W. Hins, *Hoofdstuk Grondrechten*, Ars Aequi Libri (2011), p. 192.



preference to apply European and international standard of review. The courts refer to the case law of the ECHR and the CJEU, also in cases outside the (strict) scope of these instruments.

The Dutch legislature is required to take the civil rights into account, ensuring that there is no unjustified interference with a civil right. If a piece of legislation does interfere with a fundamental right, the legislature is required to justify this interference in an explanatory memorandum attached to the legislation. The administrative bodies apply the legislation and the balance that is struck by the legislature. In some situations the specific legislation provides discretion to the administrative bodies. In exercising competences within that discretion, the administrative bodies are required to respect civil rights.

One of the issues more concrete, particular, issues with regard to conflicting civil rights in the Netherlands is the conflict between the freedom of religion versus non-discrimination. According to the Equal Treatment Act religious schools could under certain circumstances refuse to hire a homosexual teacher. Article 5 (2) of the Equal Treatment Act provided that institutions based on their belief may derogate from the prohibition to discriminate on grounds of, amongst others, sexual orientation, only when the derogation is not solely based on the fact that a person is homosexual. The European Commission initiated an infringement procedure to urge the Netherlands to comply with Directive 2000/78/EC. After requested advice of the Council of State, a proposal to amend the Act on Equal Treatment was adopted. The proposal is, at the moment of writing, still pending.²⁵

In terms of EU citizenship and civil rights in the Netherlands, the case of *Jeunesse*²⁶ is noteworthy. Recently, in October 2014, the Netherlands has been condemned by the ECtHR for breaching Article 8 ECHR, in the case of *Jeunesse*. That case concerned a Surinam national, who lost her Dutch citizenship. The question rose whether she could have a right to residence in the Netherlands based on a derived right of residence of her children, who all three have the Dutch nationality, and are therefore EU citizens. She invoked therefore the Ruiz Zambrano ruling of the CJEU, in which the CJEU held that EU citizens may not be deprived of their genuine enjoyment of their rights as EU citizens. However, the Dutch court did not accept her argument and ruled that the children were not deprived of the right to reside in the European Union. *Jeunesse* went to the ECtHR and held that her right to respect for family

²⁵ <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/viifhan43ruu> (accessed August 2014).

²⁶ *Jeunesse v. the Netherlands*, Application no. 12738/10, 3 October 2014.



life has been breached by the Netherlands refusal to grant her a residence right in the Netherlands. The ECtHR ruled that “... insufficient weight was given to the best interests of the applicant’s children in the decision of the domestic authorities to refuse the applicant’s request for a residence permit.”²⁷ Even though this case is not specifically on a conflict of rights, it shows how civil rights may be ensured from different sources in the Netherlands. In most of the cases on Article 20 TFEU and the (derived) right to reside for family members is restrictively applied by Dutch courts. The case of *Jeunesse*, however, reveals, that Dutch courts should not only assess whether the right to reside of EU citizens is at stake, but also take into account the right to family life of Article 8 ECHR. In that sense civil rights of residence and the right to family life may come together.

QUESTION 7 : ACTORS

- ✓ *What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights’ standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.*

The Advisory Division of the Council of State is an important actor in setting civil right norms, since the government has to ask the Advisory Division for advice on all legislative proposals that are submitted to the national parliament. Individual members of the parliament may also request for advice. In the advices of the Advisory Division a legislative proposal is reviewed from several angles, including fundamental rights protection. As observed, the Advisory Division has referred to the Charter as a source of fundamental rights, even before the Charter became a binding instrument.

Worth mentioning are, moreover, specific independent bodies, such as the Dutch Data Protection Supervisor (*College Bescherming Persoonsgegevens*). Since 2011 the Netherlands has a specific institute for human rights: The Netherlands Institute for Human Rights. The Netherlands Institute for Human Rights plays an important role in the field of human rights, and consequently, also with regard to civil

²⁷ *Jeunesse v. the Netherlands*, Application no. [12738/10](#), 3 October 2014, par. 120. See also H. van Eijken Blog BEUcitizen: Family life & European citizenship: The Strasbourg Court Decision in *Jeunesse v. the Netherlands*, <http://beucitizen.eu/family-life-european-citizenship-the-strasbourg-court-decision-in-jeunesse-v-the-netherlands/>. On the application of the right to reside on the basis of Article 20 TFEU in the Dutch case law see in more detail H. van Eijken, EU citizenship and the constitutionalisation of the European Union, Europa Law Publishing (2015), pp. 222-226.



rights. The Institute explains, monitors and protects human rights, it promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands. Previously, the Equal Treatment Commission (*College Gelijke Behandeling*) was the most important equal treatment body. That Commission has been replaced by the Institute for Human Rights. The decisions of the previous Equal Treatment Commission and the Netherlands Institute for Human Rights are not binding, but are important sources of equality/fundamental rights.

As mentioned, national courts are most important in the protection and balancing of fundamental rights, since there is no hierarchy of fundamental civil rights. Therefore courts also have an important role in shaping the scope of civil right norms.



SPAIN

***CIVIL RIGHTS: INTERNATIONAL AND EUROPEAN SOURCES,
JURISDICTIONAL ISSUES AND ACTORS***

(UNIOVI Draft Report 28/04/2014)

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QUESTION 1: IDENTIFICATION OF CIVIL RIGHTS

Question 1 : Identification of civil rights

- ✓ Which rights are considered in your country as civil, civic and citizenship rights?¹
- ✓ Amongst those rights, which are considered 'core'?

The idea is to get an overview of what are considered (core) civil rights in EU Member States.

Please specify whether there are disagreements/developments in the notion of civil, civic or citizens' rights and liberties, and their core elements.

- ✓ **Which rights are considered in your country as civil, civic and citizenship rights?**

Within Spanish Law, there are many different rights, which include civil rights, constitutional rights, and within them, nuclear rights, the fundamental rights (derechos fundamentales y libertades públicas, Title I, Chapter II, Section I Spanish Constitution –CE-). This is because in the Spanish legal dogmatic, the "civil rights" are individual rights in the Spanish legal system which define the status of "citizen", although a good portion of them recognize every human who can found, circumstantial, temporarily or permanently, in the State territory regardless of nationality.

According to a generalized point of view, the term 'civil rights' is often used with reference to the rights set out in the first eighteen articles of the UDHR, almost all of which are also set out as binding treaty norms in the ICCPR. From this group, a further set of 'physical integrity rights' has been identified, which concern the rights of life, liberty and security of an individual, and which offer protection from physical violence against the individual, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one's privacy and right of ownership, restriction of one's freedom of movement, and of freedom of thought, conscience and religion. The difference between 'basic rights' (see below) and 'physical integrity rights' lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership. Although not strictly an integrity right, the right to equal treatment and protection in law certainly qualifies as a civil right. Moreover, this right plays an essential role in the realisation of economic, social and cultural rights. Another group of civil rights is referred to under the collective term 'due process rights'. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the



'presumption of innocence', the ne bis in idem principle (freedom from double jeopardy) and legal assistance (see, e.g., Articles 9, 10, 14 and 15 ICCPR).

The Spanish Legal System has incorporated a good part of the rights contained within the UDHR and the ICCPR, providing the majority with a constitutional rank for being recognized under the 1978 Spanish Constitution (CE). However, the constitutionalised rights have been, in general, known, in the DoW, as political rights. ("Political rights refer to the rights of citizens in their relation to the state"), with the others having found recognition in infra-range standards (such as nationality, asylum, birth, marriage, divorce and having children, property rights, deception, fraud, theft and aggression). Of course, all of these contribute to the personal, social, political and economical development of the citizens of each state and they define the European standard of basic citizen rights, forming a common legal denominator of basic freedom and equality status of the European citizens who find themselves within the European Union, as stated by the TJUE in relation to the assumption made by the UE of the guarantees of the European Convention on HR and its incorporation to the ECFR, or the ECHR when speaking of "equal protection" (ECHR Judgements *Mathews Case*, on the 18th February 1999 and the *Bosphorus Case*, on the 30th June 2005, and CJEU Judgement of the 12th September 2006, *Spain v. United Kingdom*, C-145/04), as has also been confirmed by the Spanish Constitutional Court in its declaration 1/2004, of FJ 6).

Those constitutional rights are covered by articles 14 to 38, both inclusive, of the CE, and also the rights to health protection (art. 43 CE), to access culture (art.44 CE) to enjoy an environment suitable for per-quality of personal life development (art. 45 CE), to a decent and adequate housing (art. 47 CE), to a hearing in administrative proceedings and to access archives and public records of Article 105 CE and the right to exercise popular criminal prosecution and be part of a jury of Article 125 CE.

The distinction between fundamental rights and plain constitutional rights (the Spanish constitutional dogmatic does not know or use the categories "citizen rights " or "civic rights") is not merely topographical. Although the TC7 that has identified the first ones presented in Section I Chapter II Title I CE, has always stated that the status of a fundamental right cannot be extracted only from its location in the Constitution (STC 160/1987, of 27 October, FFJJ 2 y 3; and AATC 201/2000 FJ 3 and 202/2000 FJ3). This is the case of the equality rights (art. 14 EC), the right to conscientious objection for exemption from compulsory military service (art. 30 CE) or right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements (art.37 CE). All these rights

⁷ With this abbreviation we refer to the Spanish Constitutional Court, "Tribunal Constitucional Español". The Constitutional Court decisions are cited as follows: STC decision number/year, and the paragraph number. There is another decision type to be used to reject applications and its name is "Auto", and it is being cited as ATC decision number/year, and the paragraph number. Finally, there is another one: "Declaración". This is jurisdictional decision about the prior control of the constitutionality of international conventions and treaties. It is being cited as DTC decision number/year, and the paragraph number.



have been considered by TC just as fundamental rights, although they are not allocated in that Chapter and Section.

The distinction between fundamental rights and constitutional rights is highlighted in this standard: it is a fundamental right if the rights are not available to the legislature (its existence and content direct effect does not depend on a legislative decision, although its development - fulfilment - is reserved to the “Ley Orgánica”). If the existence of the right depends on a legislature decision, it’s a merely constitutional (not fundamental) right.

Out of those, there are a several “legal rights” contained in the international conventions and treaties of human rights which have been incorporated or regulated in infra range standards, as is the case of:

- The right to nationality
- The right to asylum and to protection for all refugees.
- The right to get married and to form a family
- The right to the name and the interdiction of the state
- Prohibition of slavery, servitude and of forced labour
- Protection and legal guarantees and procedural safe guards in cases of removal, expulsion and extradition
- Protection and equal treatment of ethnic, cultural or religious minorities
- Right of underage persons, elderly people and people with disabilities
- Protection and guarantees of working conditions, occupational risk prevention and conciliation of work and private life.
- Consumer protection.
- Right to a good administration
- Right to diplomatic and consular protection.

✓ **Amongst those rights, which are considered as ‘core’?**

In the Spanish legal system, those rights recognized in the Spanish Constitution are considered as “core” rights. Those are:

Fundamental rights:

Equality before the law and no discrimination due to birth, origin, race, sex, religion, opinion nor any other personal or social condition (with specific guarantees in filiation art. 39 CE and marriage art. 32 CE)

Right to life, to personal integrity, and prohibition of torture and inhuman or degrading treatment or punishment



Freedom of thought, conscience and religion

Right to liberty and security. *Habeas Corpus*

Right to honour, to personal and family privacy, data and own image protection

Right to home inviolability

Right to secrecy of communications

Freedom of movement and of residence

Freedom of Expression and Information

Right to literary, artistic, scientific and technical production and creation

Right to academic freedom;

Freedom of assembly and meeting

Right of association

Right to participate in public affairs and to access on equal terms to public office

Right to obtain the effective protection of the Judges and the Courts, to a fair trial (rights of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves as guilty; and to be presumed innocent)

Right to no punishment without law and to legality and proportionality of criminal offences and penalties

Right to education

Right to freely join a union trade

Right to strike

Right to petition

Rights to conscientious objection for exemption from compulsory military service

Right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements

Constitutional (and “social”) rights:



Right to defend Spain

Right to private property and inheritance

Right to set up foundations for purposes of general interest

Right to employment, to free choice of profession or trade, to advancement through their work, and to sufficient remuneration for the satisfaction of their needs and those of their families; moreover, under no circumstances may they be discriminated against on account of their gender

Right of workers and employers to adopt collective labour dispute measures is hereby recognised.

Freedom of enterprise

Right to health protection

Right to access to the culture opportunities

Right to enjoy an environment suitable for per-Quality of personal life development

Right to decent and adequate housing

Right to hearing in administrative proceedings and to access archives and public records

Right to exercise popular action and to be part of a jury

QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

Question 2: National sources of civil rights

- ✓ Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

The idea here is to present the legal and policy framework which forms the basis of national civil rights protection in your country.

- Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);
- Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);
- Please indicate whether significant developments have recently taken place in this respect.



- ✓ **Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?**

In Spanish law "core" rights are recognized in the CE.

In the case of fundamental rights, as required by the CE in its Article 53.1, 81.1 and 149.1.1, the realization of their purpose, content and limits is reserved to the Organic Law (a form of state law and reinforced as required by approval absolute of majority). The regulation of the exercise (regulation about time, manner and place of the exercise of these rights) is reserved to the ordinary law (or the Legislative Decree, which is a form of legislative parliamentary delegation of the Government), which can be a State law or a law of the Autonomous Communities in response to the distribution of competence for matters between them by the Constitution and the respective Statute of Autonomy. Regulation also reserves the ordinary law of the State by those rules guaranteeing the basic conditions of equality in the exercise of constitutional rights throughout the country. No other norm or act can regulate or affect the fundamental rights in any way.

Constitutional rights, however, are characterized just by those that exist only to the extent of that the law, and the terms in which this law states. This Act may be a State law or a law of an Autonomous Community. In cases of "social" rights (recognized in Chapter III of Title I CE, Articles 39 to 52) it is neither necessary to have law, just as the Constitution directs all Public Powers to ensure those rights (for example, the rights to adequate housing or a job, access to culture, health or the environment,...).

- ✓ **Please describe the main legal sources of civil rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or at a local level, where relevant);**

The laws that regulate the fundamental rights are:

In general:

Organic Law 4/2000, of 11th of January, on the rights and freedoms of foreigners in Spain and their social integration.

Organic Law 10/1995, of the 23rd of November, of the Penal Code (Book I, crimes against persons: Title I, II, III, IV and V; crimes against liberty: Title VI; crimes against privacy, the right to self-image and the inviolability of the home: Title X; crimes against honour: Title XI; crimes against patrimony: Title XIII;



crimes against workers rights: Title XV; crimes against foreign citizens: Title XVI; crimes against the exercise of fundamental rights and public freedom: Title XI, Chapter IV)

Royal Decree of the 14th of September, 1882, with the approval of the Criminal Procedure Act (specifically: Title VI, Chapter III, of provisional imprisonment; of the right to defence, Chapter IV; Title VII, of the provisional freedom of the accused; Title VIII, of the of the entrance and register of enclosed places, of books and paper and of the detention and opening of written and telegraph letters).

Organic Law 4/1981, of the 1st June, of the states of alarm, exception and siege.

Organic Law 1/1992, of the 21st of February, on the Protection of Public Safety.

Organic Law 2/1986, of the 13th of March, of Security Forces and Bodies

Royal Legislative Decree 1/1995, of the 24th March, through which the revised text of the Law on Workers Statute is approved.

In particular:

Organic Law 7/1980, of the 5th of July, on Freedom of Religion

Organic Law 6/1984, of the 24th of May, regulator of the procedure of «Habeas Corpus»

Organic Law 1/1982, of the 5th of May, on the civil protection of right to honour, the right to personal and family privacy and the right to self-image.

Organic Law 15/1999, of the 13th of December, on the Protection of Personal Data.

Law 34/2002, of the 11th of July, of services of information and electronic commerce for the society.

Organic Law 2/1984, of the 26th of March, regulator of the right to rectification.

Law 7/2010, of the 31st of March, Audiovisual General Communication

Law 32/2003, of the 3rd of November, General Telecommunication

Law 17/2006, of the 5th June, on state owned radio and television.

Royal Decree 1624/2011, of the 14th November, through which the Regulation of the development of the Law 7/2010, of the 31st of March, Audiovisual General Communication is approved, in relation to the commercial communication



Law 8/1984, of the 11th of December, on Radio and Television Broadcast in the Canary Islands, amended by the Law 4/1990, of the 22nd of February.

Law 10/1983, of the 30th of May, on the creation of the Ente Público Corporació Catalana de Ràdio Televisió and the regulation of Radio and Television Broadcasting services in Catalonia.

Law 2/2000, of the 4th of May, on the Consell de l'Audiovisual of Catalonia.

Law 2/2001, of the 18th of April, on the Audiovisual Contents and Additional Services.

Foral Law 18/2001, of the 5th of July, through which the audiovisual activity in Navarra is regulated and the Audiovisual Council of Navarra is created.

Organic Law 9/1983, of the 15th of July, regulator of the right to meeting.

Organic Law 5/1985, of the 19th of June, on the General Electoral Regime.

Organic Law 6/2002, of the 27th of June, on Political Parties.

Organic Law 8/2007, of the 4th of July, on financing of the political parties.

Organic Law 3/1984, of the 26th of March, regulator of the popular legislative initiative.

Organic Law 1/2002, of the 22nd of March, regulator of the Right to Association.

Law 7/2007, of the 22nd of June, on the Associations of Euskadi

Law 7/2012, of the 15th of June, on the modification of the third book of the Civil Code of Catalonia, in relation to legal persons.

Law 14/2008, of the 18th of November, on the Generalitat, of Associations of the Comunitat Valenciana

Law 4/2006, of the 23rd of June, on the Associations of Andalusia.

Law 4/2003, of the 28th of February, on the Associations of the Canary Islands.

Organic Law 8/1985, of the 3rd of July, regulator of the Right to Education.

Organic Law 8/2013, of the 9th of December, for the improvement of the educational quality

Organic Law 6/2001, of the 21st of December, on Universities

Organic Law 11/1985, of the 2nd of August, on freedom to Trade Union's affiliation

Organic Law 4/2001, of the 12th of November, regulator of the Right to Petition.



Royal Decree-Law 17/1977, of the 4th of March, on working relationships

The fundamental constitutional rights are not well established in the CE and their regulation is reserved for ordinary law or other legal forms with the force of law, state or regional function of the corresponding division of competence.

They have issued the following laws for the regulation of non-fundamental constitutional rights:

Organic Law 5/2005, of the 17th of November, on National Defence

Law 14/1986, of the 25th of April, on General Health Care

Law 5/2003, of the 9th of October, on the voluntary declaration of vital anticipation of Andalusia.

Foral Law 8/2011, of the 24th of March, on rights and guarantees of dignity for persons in the process of death of Navarra.

Law 21/2000, of the 29th of December, on the right to information concerning health and the autonomy of a patient, and to the clinical documentation.

Law 3/2001, of the 28th of May, regulator to the informed consent and of the clinical history of patients.

Law 50/2002, of the 26th of December, on Foundations.

Law 10/2005, of the 31st of May, on Foundations of the Autonomic Community of Andalusia.

Law 2/1998, of the 6th of April, on Foundations of the Canary Islands.

Law 13/2002, of the 15th of July, on Foundations of Castilla y León

Law 4/2008, of the 24th of April, on the Third Book of the Civil Code of Catalonia, in relation to Legal Persons.

Law 12/2006, of the 1st of December, on Foundations of Galician interest.

Law 1/2007, of the 12th of February, on the Foundations of the Autonomic Community of La Rioja

Law 1/1998, of the 2nd of March, on the Foundations of the Community of Madrid.

Law of the Basque Parliament 12/1994, of the 17th of June of 1994, on Foundations.

Law 8/1998, of the 9th of December, on Foundations of the Community of Valencia.

Law 18/2007, of the 28th of December, on the right to housing in Catalonia.

Law 8/2012, of the 29th of June, on housing in Galicia



Law 1/2010, of the 8th of March, Regulator of the Right to Housing of Andalusia.

Law 4/2013, of the 1st of October, on measures to ensure the fulfilment of the social function of housing in Andalusia.

Law 8/2004, of the 20th of October, of the Generalitat, on Housing in the Community of Valencia.

Organic Law 5/1995, of the 22nd of May, on Court Jury.

Law 30/1992, of the 26th of November, on the Legal Regime of the Public Administrations and of the Common Administrative Procedure (Title III of the books).

Royal Decree of the 14th of September of 1882, which approved the Law on Criminal Judgement (Title IV, of the persons to whom the exercise of these actions that are born from crimes and faults correspond)

We cannot forget the Article 10.2 CE. Under that provision, constitutional and fundamental rights should be interpreted in accordance with the provisions of international treaties and conventions on human rights. The TC has interpreted the purpose, content and limits of the rights of the CE taking into account the provisions of the applicable international standards and case-law in their application, especially the European Convention on HR and the European Court of Human Rights case-law. The object, content and limits of the Spanish constitutional rights have incorporated the content and protection standard of the conventional rights whenever there is parity. When international standards establish rights not provided in the CE, they are considered Statutory rights and not constitutional rights. The TC has held that it is the ECHR who corresponds specifically to the content of the rights declared in the Convention, that TC has recognized this as a "minimum" of fundamental rights of the CE (STC 91/2000, FJ 7). The TC has ruled in the same sense about the EU Charter of fundamental rights (DTC 1/2004, FJ 6).

- **Please, indicate at this stage what you already consider to be the strength and/or weaknesses of the legal protection of civil rights in your country, in terms of framework and substantial standards (not enforcement);**

The Spanish system is reasonably consistent and complete. The TC normally use the European Convention and the European Charter of Fundamental Rights in their decisions, as well as their jurisprudence (ECHR and CJEU), and other human rights conventions and treaties, for interpretation and to complete the Spanish constitutional rights. This way, the TC adjudicates the Spanish constitutional rights as a guarantee of a "European" standard of equal and free personal status. That has been the case of the right to an impartial opinion of judges and courts (STC 62/1999, of 27 September, with repeated references to the decisions of the ECHR), the right to privacy and inviolability of the home and nuisance by noise (ECHR *Lopez Ostra* Case, December 9, 1994; and *Moreno Gomez* Case, November 16,



2004, and the SSTC 119/2001 of 24 May, FJ 6 and 150/2011, of 29 September, FJ 4; ATC 37/2005), or recognized new rights such as the right to protection of personal data (STC 290 and 292/2000). Other examples of this incorporation and, in its case, correction of the jurisprudence of the TC, endorsing the interpretation that the ECHR have given the right of the European Convention, have been:

- Incorporation of the ECHR doctrine on the maximum preventive custody time in the case of terrorist crimes by the STC 199/1987

- On the lack of precision and clarity in the law that regulates the telephone wiretaps and the right to privacy of communications (ECHR Judgements *Valenzuela Contreras* Case, of the 30th of July of 1998; and *Prado Bugallo* case, of the 18th of February of 2003; *Coban* Case, of 2006; STC 184/2003, of the 23rd of October, FJ 4). The TC endorses the doctrine on the minimum content that must be held by law that regulates the interventions in personal communications as to not damage that stated in articles 6 and 8 of the European Convention, establishing the form in which the Spanish Law on this subject should be interpreted (article 579 LECrim).

- Extension to the right to privacy and to self-image in the photographs taken of persons of public importance whilst carrying out personal activities (ECHR Judgement *Von Hannover* Case, of the 24th of June of 2004; STC of the 18th of February of 2014).

Notwithstanding, there are areas in which the dialogue between courts and their interpretation of the content of certain rights has not been fluid nor easy.

- Right to legal resource (legal doctrine of dual degree), that the TC has limited only to criminal action. The ECHR has considered that the right to resource is applicable to all legal orders and that, in Spain, the resource of appeal before the TS is not always a true second instance when unable to view the facts found (ECHR Judgement *Krombach* Case, of the 13th of February of 2001; SSTC 42 /1982, of the 5th of July, FJ 3; 76/1982, of the 14th of December, FJ 5; 70/2002, of the 3rd of April, FJ 9).

- Need of public hearing on second appeal in criminal processes and the right to effective legal protection and to a process with full guarantees (ECHR Judgement *Bernardino Gómez-Valera* case, of the 26th of August of 2005; *Coll* Case, of the 10th of March of 2009; STC 167/2002, of the 18th of September, FJ 9 and 10; STC 170/2005, of the 20th of June, FJ 2). The TC changes its law and incorporates the right to a process with all of the guarantees of the ECHR doctrine, reinterpreting the article 791.1 of the Criminal Procedure Act to be able to consider, guaranteed by article 24 CE, the right to a public audience in the second instance of a hearing (Criminal Procedure *Lae/LECrim*). However,



there are still differences of interpretation between the two courts⁸ (*Serrano Contreras Case*, of the 20th of March of 2012; *Vilanova Goterris and Llop García*, of the 27th of November of 2012; *Nieto Macero case*, of the 8th of October of 2013; *Román Zurdo Case and others*, of the 8th of October of 2013).

- The ECHR has considered that the violation of the presumption of innocence rejects the petition of compensation of those who had been on remand and who had subsequently been acquitted. The Supreme Court (TS), however, does not consider this, as in all of the cases in the application of the article 294 LOPJ (ECHR Judgements *Panella Case*, of the 25th of April of 2006; *Tendam Case*, of 2010; STS, Criminal Chamber, of the 23rd of November of 2010).

- Despite there being no convictions in this material in the Kingdom of Spain, the TC consider that the use of evidence that has been obtained illegally, violates the article 24 CE, however, the ECHR is not as strict in this matter (ECHR Judgement *Bykov Case*, of the 16th of April of 2009; SSTC 81/1998, of the 2nd of April FJ 4; 49/1999, of the 5th of April FJ 14).

- There is also an interpretative disagreement over the assumptions of Sentences given *in absentia* of the accused and the enforcements of criminal sentences handed down in absentia of the accused. CJEU Judgement in *Melloni Case*, C-399/11, of the 26th of February of 2013; STC 199/2009 and ATC 86/2011, of the 9th of June. STC of the 13th of February of 2014. Modification of the doctrines STC 91/2000⁹.

⁸ Otazua Zabala, G. (2013), 'Desencuentro en la interpretación del derecho a la defensa entre tribunales españoles y TEDH (a propósito de la STEDH de 27 de noviembre de 2012)', *Revista Vasca de Administración Pública. Herri-Arduralaritzako Euskal Aldizkaria*, 97:284.

⁹ The case deals with the execution of a European order of arrest and surrender (Framework Decision 2002/584/JAI of the Council, of the 13th of June of 2002 and Framework Decision 2009/299/JAI of the Council, of the 26th of February; and Law 3/2003, of the 14th of March, and Organic Law 2/2003, of the 14th of March), issued by Italy on one of its nationals, Mr. Melloni, resident in Spain and sentenced in absentia in Italy. The Spanish High Court (*Audiencia Nacional*) agreed on the delivery without conditioning the celebration of a second criminal hearing, and this court decision was challenged before the TC arguing that the right to a process with all guarantees for Mr. Melloni was damaged upon being extradited without the guarantee that the condemning sentence could be challenged in his absence. The TC, in its Auto 86/2011, of the 9th of June, asks the CJEU if it is possible to interpret the regulatory Framework Decisions of the order of arrest and surrender in a way that it is fitting that, without refusing surrender, the celebration of a second criminal hearing could be conditioned; if said order is not contrary to the European system of guarantee of the right of defence (articles 47 and 48 ECFR); and, lastly, if it cannot be understood in application to the article 53 ECFR that the protection that is to be given is that of article 24 CE which, in this case, is larger than that offered by the European system (in the sense of the STC 91/2000). The CJEU replied that the surrender of the framework could only be conditioned under the provisions of the Framework Decisions, something which did not occur in the case because Mr. Melloni knew of the existence of the criminal proceedings open against him and that he appointed a lawyer to represent him in said proceedings; that the order of arrest and surrender regulated in these is perfectly compatible with the European system of fundamental process rights; and that it is also not permissible that a State excuses compliance of these Framework Decisions, appealing that their system of constitutional guarantees is higher than the European standard. The TC delivered 26/2014, of the 13th of February, dismissing the resources of Mr. Melloni and confirming the decision of the High Court in view of the answer given by the CJEU.



- **Please indicate whether significant developments have recently taken place in this respect.**

Currently, the initiatives of the Government of the Nation to reform the existing legislation in matters such as the voluntary abortion and enacting a new legislation on matters of public order and citizen safety which gives for severe restrictions to the rights of information, meeting and of manifestation, and the sanctioning of administrative legality, are matters that are subject to live political, social and legal debate. Equally, the Government of the Nation has changed the non university educational legislation, with great controversy and social rejection, and it intends to do the same with university education. It has also raised the issue of the possibility of reforming the immigration law to deal more effectively with cases of massive assaults carried out by immigrants to Spanish borders and to regulate the intervention of the Spanish authorities in these cases.

The last issue has been the approval of the reform of the Judicial Power Organic Law by the Organic Law 1/2014, of the 13th of March, of the amendment of the L.O. 6/1985, of the 1st of July, on Judiciary, concerning the Universal Justice (SOJ 14th of March), through the amendment of article 23 sections 4 and 5 repealing the so-called “universal jurisdiction over crimes against humanity” of the Spanish courts, causing a live legal debate on the scope and effectiveness of this legal revision in respect to the criminal subjects in process in the Spanish criminal jurisdiction in exercise of said universal jurisdiction. The last episode has been the decision of a Spanish judge to not apply the Spanish law, understanding that it could not contradict that stated in articles 146 and 147 of the IV Geneva Convention, in relation to the protection of civil persons in time of war (Order of the Central Court of Instruction number 1. of the High Court of the 17th of March of 2014).

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

Question 3: International and European sources of civil rights

- ✓ To which international instruments for the protection of civil rights is your country a party?
- ✓ How are relevant international and European civil rights norms being incorporated in your country?
- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?
- ✓ How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?



✓ **To which international instruments for the protection of civil rights is your country a party?**

Since the restoration of democracy, Spain acceded to the majority of international –universal and European- conventions on human rights, namely those related to civil rights¹⁰. However, nowadays there is a wide participation of Spain in international instruments on the topic.

1.- Firstly, Spain is participating in all the treaties on the matter concluded at the *United Nations*. Certainly, in 1976, Spain became party at the International Covenant on Civil and Political Rights (1966) and its Optional Protocol (1966). But, even previously (during the dictatorship of Franco) it was party to some other treaties related to civil rights promoted by the United Nations. Also, attention must be paid to the fact that the rights proclaimed in the UN Universal Declaration on human rights (1948) –not an international treaty- are binding for Spanish authorities according to the wording of Spain’s Constitution (1978), that states in its section 10.2: “Provisions relating to the fundamental rights and liberties recognised by the Constitution *shall be construed in conformity with the Universal Declaration of Human Rights* and international treaties and agreements thereon ratified by Spain.” (italics added).

Then, on the other hand, in the United Nations framework, according to the rights concerned, Spain’s participation is as follows:

*Nationality*¹¹: Convention on the Nationality of Married Women, New York, 20 February 1957; International Covenant on Civil and Political Rights, New York, 16 December 1966_(art. 24.3, concerning children)¹²; Convention on the Rights of the Child, New York, 20 November 1989 (art. 7.1)¹³.

Human dignity: There are not conventional commitments concerning this right¹⁴.

¹⁰ At the time of reporting, there is an increasing uncertainty surrounding Catalonia and its possible secession from Spain. The question could have a deep impact on the future application of international conventions considered here and may result in transitional arrangements through a *de facto* regime, as expressly suggested by Cullen, A., Wheatley, S. (2013), ‘The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights’, *Human Rights Law Review*, 13:691(693), although this solution would be controversial from a political or legal view.

¹¹ Universal Declaration states the individual’s right to nationality in its art. 15.1 and its interpretative force in Spanish Law was previously outlined.

¹² SOJ no. 103, 30 April 1977.

¹³ SOJ, no. 313, 31 December 1990. Spain is also party to the Amendment to article 43 (2) of the Convention on the Rights of the Child, done at New York, 12 December 1995 (SOJ, no. 9, 10 January 2003) and to the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, New York, 19 December 2011 (ratified by Spain in 3 June 2013), it shall be in force the 14th April 2014 (SOJ, no. 27, 31 January 2014).



Right to life: Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948¹⁵; International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 6); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, New York, 15 December 1989¹⁶.

Right to the integrity of the person: There are not conventional undertakings concerning this right¹⁷.

Prohibition of torture and inhuman or degrading treatment or punishment: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 7); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984¹⁸.

Prohibition of slavery and forced labour: International Agreement for the suppression of the "White Slave Traffic", Paris, 18 May 1904; International Convention for the Suppression of the White Slave Traffic, Paris, 4 May 1910; International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September 1921; Slavery Convention, Geneva, 25 September 1926; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success, New York, 21 March 1950; Protocol amending the Slavery Convention signed at Geneva on 25 September 1926, New York, 7 December 1953; Slavery Convention, signed at Geneva on 25 September 1926 and amended by the Protocol, New York, 7 December 1953; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956; International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 8); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000; Protocol to Prevent, Suppress and Punish

¹⁴ Although the Universal Declaration on Human Rights is founded in human dignity (art. 1), references to it –with the notorious exception of the European Charter on Fundamental Rights– are scarce in international and constitutional texts (Lehners, J.P., 'La dignité humaine. Une notion dépassée?', in Weitzel, L. (ed)(2013), *Mélanges en Hommage à Albert Weitzel. L'Europe des droits fondamentaux*, (Paris: Pedone):293(296-297). Notwithstanding, Section 10.1 of Spanish Constitution expressly quotes it.

¹⁵ SOJ no. 34, 8 February 1969.

¹⁶ SOJ no. 164, 10 July 1991.

¹⁷ At universal level, there is not any development similar to those on biotechnology adopted at the framework of the Council of Europe (see 3.2). However, Spain is party to those Conventions related to non-human biotechnology: the Convention on Biodiversity (since its ratification on 21th December 1993), the Cartagena Protocol on Biosafety of 29th January 2000 (since its ratification on 11th September 2003, SOJ, no. 181, 30 July 2003; *corrig. SOJ*, no 284, 27 November 2003) and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (since its ratification on 4th December 2012; *BOCG, Sección Cortes Generales*, A, no. 38, 16 April 2012).

¹⁸ SOJ no. 268, 9 November 1987. It is also party to the Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 8 September 1992 and to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, SOJ no 148, 22 June 2006.



Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000¹⁹.

Right to liberty and security: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 9); International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006²⁰.

Respect for private and family life: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art.17).

Protection of personal data: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art.17).

Right to marry and right to found a family: Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10 December 1962²¹; International Covenant on Civil and Political Rights, New York, 16 December 1966 (art.23).

Freedom of thought, conscience and religion: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 18).

Freedom of expression and information: Convention on the International Right of Correction, New York, 31 March 1953; International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 19)²².

Freedom of assembly and of association: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 22).

Right to asylum: Convention relating to the Status of Refugees, Geneva, 28 July 1951²³; Convention relating to the status of Stateless Persons, New York, 28 September 1954²⁴; Protocol relating to the Status of Refugees, New York, 31 January 1967²⁵.

¹⁹ Obviously, Spain is also party to the main treaty, the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000 (r 1 March 2002), and to other developments linked to it, namely the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000 (r 1 March 2002).

²⁰ SOJ no. 42, 18 February 2011.

²¹ SOJ, no. 128, 29 March 1969.

²² Spain is party in the Agreement for the Repression of Obscene Publications, done in Paris, 4 May 1910, but its content is now probably outstripped.

²³ SOJ no. 252, 21 October 1978.

²⁴ SOJ no. 159, 4 July 1997.



Protection in the event of removal, expulsion or extradition: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art.12).

Equality before the law: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 26).

Non-discrimination: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 26); International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966²⁶.

Cultural, religious and linguistic diversity: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 27).

Equality between women and men: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 26); Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979²⁷.

The rights of the child: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 24); Convention on the Rights of the Child, New York, 20 November 1989; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000²⁸; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000²⁹.

The rights of the elderly: actually, there are not conventional commitments concerning this right³⁰.

Integration of persons with disabilities: Convention on the Rights of Persons with Disabilities, New York, 13 December 2006³¹.

²⁵ SOJ no. 252, 21 October 1978.

²⁶ SOJ no. 118, 17 May 1969. It participates also in the Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 15 January 1992.

²⁷ SOJ no. 69, 21 March 1984. Spain is also party to the Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, New York, 22 December 1995 and to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999 (SOJ no. 190, 9 August 2001). Also, in connection with this issue it must be remembered that –since the 70s– Spain was party to the Convention on the Political Rights of Women, New York, 31 March 1953 (SOJ no. 97, 23 April 1974).

²⁸ SOJ, no. 92, 17 April 2002.

²⁹ SOJ, no. 27, 31 January 2002.

³⁰ Works in progress at the UN; A mention could be made to Spain's participation thereof.



Freedom of movement and of residence: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art.12).

Diplomatic and consular protection: There are not conventional commitments concerning this right³².

Right to an effective remedy and to a fair trial: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 14).

Presumption of innocence and right of defence: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 14).

Principles of legality and proportionality of criminal offences and penalties: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 15).

Right not to be tried or punished twice in criminal proceedings for the same criminal offence: International Covenant on Civil and Political Rights, New York, 16 December 1966 (art. 14.7).

2.- On the other hand, as a member of *Council of Europe* –since 1977- Spain has become party to the main treaties concluded thereon and related to civil rights, as it follows:

Nationality: Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963³³; Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, 24 November 1977³⁴.

Human dignity: Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, 4 April 1997 (in force since 1999)³⁵.

Right to life: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 2)³⁶; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental

³¹ SOJ no. 96, 21 April 2008. Spain is also party to the Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (SOJ no. 97, 22 April 2008).

³² According to some authors attention must be paid to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts as a tool to secure the diplomatic protection of this specific modality of legal personality (Tournier, A. (2013), *La protection diplomatique des personnes morales*, (Paris:LGDJ):174-175. However, Spain is not party to this treaty and Spanish Supreme Court has constantly refused to acknowledge any legal effect to this institution. See e.g. Spanish Supreme Court (Civil Chamber) Sentence 30 April 2008.

³³ SOJ, no. 203, 25 august 1987, in force since August 1987.

³⁴ SOJ, no. 257, 26 October 1989, in force since October 1989.

³⁵ SOJ no. 251, 20 October 1999. Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, 24 January 2002, was signed in 2006 by Spain, albeit not yet ratified.



Freedoms concerning the Abolition of the Death Penalty, 28 April 1983³⁷; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3 May 2002³⁸.

Right to the integrity of the person: Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, 4 April 1997 (in force since 1999); Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, 12 January 1998 (in force since 2001)³⁹.

Prohibition of torture and inhuman or degrading treatment or punishment: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 3); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987⁴⁰.

Prohibition of slavery and forced labour: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 4); Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005⁴¹.

Right to liberty and security: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 5); Protocol No. 4 to the Convention for the Protection of Human

³⁶ In force in Spain since 1979. Be aware of the modifications to this treaty introduced successively by the Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 may 1994 (in force since 1998) and by the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 may 2004 (in force since 2010).

³⁷ In force in Spain since 1985. *SOJ* no. 92, 17 April 1986.

³⁸ In force in Spain since 2010. *SOJ* no. 77, 30 March 2010. Surprisingly, Spain acceded belatedly to this protocol (signed in 2003), albeit an absolute prohibition of death penalty was established by Organic Law 11/1995, 27 November, on the abolition of death penalty in time of war (*SOJ* nº 284, 28 November 1995), going further the provision contained in Spanish Constitution (section 15.2). Accordingly, at this time, a modification of Spanish reservation to the Second Optional Protocol to the ICCPR (see before) was submitted by Spain to the United Nations.

³⁹ *SOJ* no. 52, 1 March 2001.

⁴⁰ In force since 1989. *SOJ* no. 159, 5 July 1989. Spain is also party to two other agreements amending this treaty: the Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4 November 1993 (in force since 2002) and the Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4 November 1993 (in force since 2002), *SOJ*, no. 35, 9 February 2002.

⁴¹ In force in Spain since 2009. *SOJ* no. 219, 10 September 2009.



Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963 (art. 1)⁴².

Respect for private and family life: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 8)⁴³.

Protection of personal data: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981⁴⁴; Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and trans-border data flows, 8 November 2001⁴⁵; Convention on Cybercrime, 23 November 2001⁴⁶.

Right to marry and right to found a family: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 12).

Freedom of thought, conscience and religion: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 9).

Freedom of expression and information: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 10).

Freedom of assembly and of association: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 11).

Right to asylum: European Agreement on the Abolition of Visas for Refugees, 20 April 1959⁴⁷; European Agreement on Transfer of Responsibility for Refugees, 16 October 1980⁴⁸.

⁴²In force in Spain since 2009. *SOJ* no. 247, 13 October 2009.

⁴³ The enlargement of the content of this right to provide protection against unreasonable restrictions by State concerning new practices on genetics (e.g., preimplantation and prenatal genetic testing) has been recognized by the ECHR on its ruling of 28 August 2012, *Costa Pavan v. Italy*. See Poli, L. (2013), 'La diagnosi genetica pre-impianto al vaglio della Corte europea dei Diritti dell'Uomo', *Rivista di Diritto Internazionale*, 96:119

⁴⁴ In force in Spain since 1985. *SOJ* no. 274, 15 November 1985.

⁴⁵ In force in Spain since 2010. *SOJ* no. 228, 20 September 2010.

⁴⁶ In force in Spain since 2010. *SOJ* no. 226, 17 September 2010. Although not yet in force, we must be take into account the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003, signed by Spain in 27 November 2013 and pending parliamentary approval.

⁴⁷ In force in Spain since 1982. *SOJ* no. 174, 22 July 1982.

⁴⁸ In force in Spain since 1987. *SOJ* no. 176, 24 July 1987.



Protection in the event of removal, expulsion or extradition: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 5); European Convention on Extradition, 13 December 1957⁴⁹; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963 (arts. 3 and 4); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984 (art. 1)⁵⁰.

Equality before the law: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 14); Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000⁵¹.

Non-discrimination: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 14); Framework Convention for the Protection of National Minorities, 1 February 1995⁵²; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000.

Cultural, religious and linguistic diversity: European Charter for Regional or Minority Languages, 5 November 1992⁵³; Framework Convention for the Protection of National Minorities, 1 February 1995.

Equality between women and men: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 14); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984 (art. 5).

The rights of the child: European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, 20 May 1980⁵⁴; Council of Europe

⁴⁹ In force in Spain since 1982. *SOJ* no. 136, 8 June 1982. Attention must be paid to some agreements to which Spain is party and that are connected with this treaty: namely, Additional Protocol to the European Convention on Extradition, 15 October 1975 (in force since 1985; *SOJ*, no. 139, 11 June 1985); European Convention on the Suppression of Terrorism, 27 January 1977 (in force since 1980; *SOJ*, no. 242, 8 October 1980); Second Additional Protocol to the European Convention on Extradition, 17 March 1978 (in force since 1985; *SOJ*, no. 139, 11 June 1985) and Council of Europe Convention on the Prevention of Terrorism, 16 May 2005 (in force since 2009; *SOJ*, no. 250, 16 October 2009).

⁵⁰ In force in Spain since 2009. *SOJ* no. 249, 15 October 2009.

⁵¹ In force in Spain since 2008. *SOJ* no. 64, 14 March 2008.

⁵² In force in Spain since 1998. *SOJ*, no. 20, 23 January 1998.

⁵³ In force in Spain since 2001. *SOJ* no. 222, 15 September 2001.

⁵⁴ In force in Spain since 1984. *SOJ* no. 210, 1 September 1984. Although Spain signed in 1997 the European Convention on the Exercise of Children's Rights, done the 25 January 1996 (in force since 2000), it is not yet a party to it.



Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007⁵⁵; European Convention on the Adoption of Children (Revised), 27 November 2008⁵⁶.

Freedom of movement and of residence: European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, 13 December 1957⁵⁷; European Agreement on Travel by Young Persons on Collective Passports between the Member Countries of the Council of Europe, 16 December 1961⁵⁸; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1963 (art. 2); European Agreement on Au Pair Placement, 24 November 1969⁵⁹; European Agreement on continued Payment of Scholarships to students studying abroad, 12 December 1969⁶⁰; European Convention on the Legal Status of Migrant Workers, 24 November 1977⁶¹.

Diplomatic and consular protection: European Convention on Consular Functions, 11 December 1967⁶².

Right to an effective remedy and to a fair trial: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 5, 6 and 13)⁶³; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984 (art. 2).

Presumption of innocence and right of defence: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 6).

⁵⁵ In force in Spain since 2010. *SOJ* no. 274, 12 November 2010.

⁵⁶ In force in Spain since 2011. *SOJ*, no. 167, 13 July 2011.

⁵⁷ In force in Spain since 1982. *SOJ* no. 156, 1 July 1982.

⁵⁸ In force in Spain since 1982. *SOJ* no. 161, 7 July 1982.

⁵⁹ In force in Spain since 1988. *SOJ* no. 214, 6 September 1988.

⁶⁰ In force in Spain since 1975. *SOJ* no. 156, 1 July 1975.

⁶¹ In force in Spain since 1983. *SOJ* no. 145, 18 June 1983.

⁶² In force in Spain since 9 June 2011. *SOJ*, no. 84, 8 April 2011. According to some authors attention must be paid to the *European Convention* on the Recognition of the Legal Personality of International Non-Governmental Organisations, done at Strasbourg on 24 April 1986, as a tool to secure the diplomatic protection of this specific modality of legal personality (Tournier, A. (2013), *La protection diplomatique des personnes morales*, (Paris: LGDJ):174-175). However, Spain is not party to this treaty, confirming the reduced impact of this convention and its related developments (On this matter see Ben-Ari, R.H. (2013), *The Legal Status of International Non-Governmental Organizations. Analysis of Past and Present Initiatives (1912-2012)*, (Leiden: Martinus Nijhoff):35).

⁶³ Complementary to these provisions and specifically linked with the procedure before the European Court of Human Rights, Spain is also party to the European Agreement relating to persons participating in proceedings of the European Court of Human Rights, 5 March 1996 (in force since 2001; *SOJ*, no. 47, 23 February 2001).



Principles of legality and proportionality of criminal offences and penalties: Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (art. 7).

Right not to be tried or punished twice in criminal proceedings for the same criminal offence: Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984 (art. 4).

3.- Finally, attention must be paid to particular developments on human rights –including civil rights- promoted by specific organizations established by the so called *Ibero-American Community of Nations*, with the participation of Spain as a founding member. In this way, we must take into account the Ibero-American Young People Rights Convention, 11 October 2005, in force since 2008, where civil rights proclaimed are specially oriented to the needs of young people⁶⁴. In this circle, a most controversial issue is the affirmation of a right to “citizen security” –supposedly based on the right to the “security of person” proclaimed by the article 3 in fine of the UDHR – and developed –but not formalised- through the work of FIO- Ibero-American meetings of Ombudsmen⁶⁵.

Also in this area, in the specific realm of a *right to a nationality*, we must pay attention to specific developments concerning Dual Nationality, as Spain’s practice has been, during a long period of time, generously conceived as a way to enhance the links with the countries pertaining to this historical community⁶⁶.

✓ **How are relevant international and European civil rights norms being incorporated in your country?**

According to the Spanish Constitution (Section 96.1) international treaties concluded by Spain become an integral part of Spanish Law only with its publication in the State’s Official Journal (*SOJ*)(*Boletín Oficial del Estado, BOE*). In line with this proviso, Spanish Civil Code (Article 1.5) states that international treaties shall be applied directly since its publication in the *SOJ*. Then, rights contained in international instruments do not need any specific way of transposition and can be freely invoked by individuals before administrative authorities and Spanish courts and tribunals.

⁶⁴ *SOJ*, nº 67, 18 March 2010. Among the rights guaranteed are: non discrimination (section 5), gender equality (section 6), right to life (section 9), personal integrity (section 10), protection against sexual abuse (section 11), conscientious objection (section 12), right to justice (section 13), right to identity and own personality (section 14), right to honour, personal and family privacy and own image (section 15), liberty and security (section 16), freedom of expression, assembly and association (section 17), right to become member of a family (section 18) and to create a family (section 19).

⁶⁵ See Federación Iberoamericana del Ombudsman, “Derecho internacional universal”, in *VIII Informe sobre Derechos Humanos, Seguridad Ciudadana*, (G. Escobar, ed.), Madrid, Trama, 2011, pp. 25 ss. (text accessible in <http://www.portalfio.org/inicio/repositorio/informes-fio/informe_seguridad_ciudadana.pdf>

⁶⁶ A more specific development concerns the recent proposal of the Ministry of Justice –not yet implemented- to grant Spanish nationality to all descendants of Sephardic Jews expelled from Spain in 1492.



Notwithstanding this principle, some rights could need a legislative implementation, due to its structural characteristics (*non self-executing* clauses). In fact, as Spain became party of most of treaties on civil rights immediately after the legislative implementation of civil rights enshrined in Spanish Constitution (SC) hence there has been no real need to adopt additional legislative measures to ensure the observance of its international obligations according to these treaties. Indeed, Spanish internal legislation –mainly Organic Laws⁶⁷- provided a larger protection on these rights than that offered by international treaties.

A particular case has arisen in the case of the United Nations Convention on disability. It is clearly a *non self executing* treaty, stated in a timely legislative, regulative and financial development. Its initial implementation, however, was facilitated by the adoption of a Spanish legislation which anticipated and even exceeded the content of the Convention even before its conclusion: the Law 39/2006, of the 14th of December, on the Promotion of Personal Autonomy and Attention for people in situations of dependency⁶⁸. Notwithstanding, in its later development, once the obligations of the Convention had been assumed, it has been frozen due to the deep economic crisis that has affected Spain: thus, the access to Justice, the inclusive education, personal freedom or the inclusion into the community and independent living have been identified as major pending development issues of the development of equality in eyes of the Law.

- ✓ **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

As previously stated, the application of ECHR did not need specific acts of incorporation in the Spanish Law after its publication in the SOJ⁶⁹.

⁶⁷ By way of example Freedom of religion proclaimed by section 16.1 SC was developed by Organic Law 7/1980, 5 July, SOJ no. 177, 24 July 1980; Right to privacy enshrined in Section 18.1 SC was implemented by Organic Law 1/1982, 5 May, SOJ no. 115, 14 May 1982; Protection of Personal Data set forth by Section 18.4 SC was achieved by Organic Law 5/1992, 29 October, SOJ no. 262, 31 October 1992...

⁶⁸ SOJ no. 299, 15 December 2008

⁶⁹ SOJ, no. 243, 10 October 1979. Subsequently published in SOJ, no. 108, 6 May 1999 –as a revised text according to the modifications introduced by Protocol no. 11th- and in SOJ, no. 130, 28 May 2010, including the modifications introduced by Protocol no. 14th.



However, there are limitations on the enjoyment of the rights afforded by ECHR; namely, those concerning members of the Army, according to the reservation made by Spain, when it became party to the European Convention (1979) and subsequently modified (1986 and 2007)⁷⁰. On the contrary, the powers exercised by military jurisdiction does not present special problems according to the European Court of Human Rights, notwithstanding the fact that sometimes violations attributed to Spain were linked with the activities –in fact, the procedure- of military jurisdiction⁷¹.

In any case, the plain application of ECHR and other International treaties has been recognized by Constitutional Court, the Supreme Court, Judges and Tribunals since 1981. Even recently, the Constitutional Court stated that:

“Thus, under the constitutional doctrine on indirect violations of the right to defence and a process with full guarantees (art. 24.2 CE), the canon of control that must be applied to judge the constitutionality of the Auto of the First Criminal Section of the High Court of the 12th of December 2008, through which the delivery of the accused to the Italian authorities was authorised, they must be delivered due to the treaties and international agreements on the protection of fundamental rights and the public liberties ratified by Spain. In such treaties we can find both the European Convention for the Protection of Human Rights and Fundamental Liberties and also the Letter of the Fundamental Rights of the European Union, which form, together with the interpretation of these give the bodies of the guarantees established by these same treaties and international agreements, in elements that are essential when interpreting the full content of the right recognised in the article 24.2 CE. Content whose ignorance determines the indirect violation of the fundamental right on behalf of the Spanish legal bodies.

We must examine, therefore, the interpretation that the European Court of Human Rights and the Court of Justice of the European Union have carried out on the content of the right to an equal process stated both in the European Convention for the Protection of Human Rights and Fundamental Liberties as well as the Letter of the Fundamental Rights of the European Union.”⁷²

Notwithstanding this “openness” of the Constitutional Court concerning international obligations on human rights, the assimilation of ECHR to the ECFR purported in this Judgement has been hardly criticized⁷³.

⁷⁰ SOJ no. 234, 30 September 1986; SOJ no. 267, 7 November 2007.

⁷¹ See ECHR, Sentence 28 October 1998, *Castillo Algar v. Spain*; ECHR, Sentence 25 July 2002, *Perote Pellón v. Spain*.

⁷² CC, Judgement 26/2014 of 13 February 2014, Melloni; see <
http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_016/2008-06922STC.pdf>. A different question lies on the “clash among Tribunals” that this Judgment enhances, according to SC Magistrate A. Asúa Batarrita. See Separate Opinion <
http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_016/2008-06922VPS.pdf>.

⁷³ See Separate Opinion of Magistrate E. Roca i Triás <
http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_016/2008-06922VPS1.pdf>. Unlike, for Magistrate A. Ollero Tassara, the European influx reduced the level of protection previously accorded by



A particular problem lies in the enforcement of decisions of ECHR. There are no provisions on Spanish Law concerning implementation of ECHR awards. Then, in 1988 –where the first ECHR Sentence against Spain was issued (ECHR, Sentence 6 December 1988, *Barberá, Messegué, Jabardo v. Spain*) Spanish Constitutional Court needed to overturn the previous Supreme Court sentence questioned by ECHR ruling. Although after this episode no real problems were perceived on the implementations of ECHR rulings. In this regard, even recently a very sensitive ECHR ruling on release of terrorist offenders (ECHR, *Del Río Prada v. Spain* (Great Chamber) of 24 October 2013) was promptly implemented by Spanish judicial organs, as ECHR speakers acknowledged.

✓ **How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in your country?**

A singular exception relates to civil rights regarding remedies before the courts. This is the case for the right of review of criminal sentences by a higher tribunal -granted by section 14.5 of ICCPR. In fact, albeit since 1976 Spain is a party to this treaty, current legislation on criminal procedure does not guarantee yet this right⁷⁴. Pending this legislative reform, the UN Human Rights Committee (HRC) regularly finds that Spain is in violation of its obligations according to ICCPR⁷⁵.

Spanish Law and the “imposition” of EUCJ jurisprudence denies the desirable dialogue among Tribunals, commonly sustained. See <
http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_016/2008-06922VPS2.pdf>

⁷⁴At the 80’s Spanish Constitutional Court and Spanish Supreme Court together decided that there was no contradiction between art. 14.5 of International Covenant on CPRs. After the reversal of this appreciation by the (UN) HRC (see below) the Supreme Court put forth an extensive interpretation of criminal review (“casación”) before it as to embrace the second instance claimed by HRC (see e.g. SC Sentence 436/2005 (Criminal Chamber) 8 April 2005. However, more recently, Spanish Supreme Court admits that a legislative reform is needed to put Spain’s criminal procedure in accordance with the requirements of art. 14.5 ICCPR (see SC Sentence 128/2009 (Criminal Chamber) 11 February 2009). (On these questions see Iglesias Velasco, A.J. (2013), ‘On the Implementation of International Treaties by Domestic Courts: Special Reference to Spain’, *Anuario Español de Derecho Internacional*, 29:165 (191)). In spite of this, no legislative proposal has been submitted hitherto on this issue.

⁷⁵Since HRC Views of 20 July 2000 concerning the Communication No. 701/1996, *Gomez v. Spain*.



QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)
- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.

- ✓ **To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)**

A) Legislation. To begin with, the Spanish legislative body is articulated on an axis comprising both national and regional organs, both of them have passed different acts concerning some rights of the Charter. Following this track, not many norms have quoted expressly the Charter of Fundamental Rights, in fact, we can state that its invocation is rather scarce. First of all, every express reference to the Charter appears in the preamble of different norms, in the view of this, it has to be retrieved that, as known, the juridical value of a Preamble is very limited and above all plays a role in revealing the intentions of the legislator, however, this is countered by the fact that references in the preamble are not concrete norms that can be invoked by particulars before courts or administration organs. Secondly, most of those references are brought in to back and justify norms focused on social rights:

1. The Valencia Charter of Social Rights, Law 4/12, 15-10-2012, *SOJ nº268, 7-11-2012*. Here, the reference in the Preamble is aimed at setting up the rationale and the guidelines and principles of social policy, generally speaking, and also focusing on the social protection of family. The Charter is quoted amongst other international texts, which are given precedence. Article 3 of this Act refers expressly to the general principle of the performance of such policies and subjects the action of public administration to the principles contained in international texts, mentioning verbatim the European Social Charter and including a final proviso referring to any other relevant instrument ratified by Spain, what casts doubts whether the EU Charter is included or not.

2. The Castile La-Mancha Law on Social Services, 14/2010, 16-12-2010, *SOJ nº38, 14-2-2011*. The preamble mentions the EU Charter in combination with other international and European texts in order to set up the guiding principles of social policies that inspire the Act.



3. The Navarra Law on rights and duties of persons in matter of health within the Foral Navarra Community, Law 17/2010, 8-11-2010, *SOJ nº315, 28-12-2010*. The preamble includes a reference to the EU Charter that is brought in together with other international relevant texts concerning the right of the patient in its relation to sanitary administration, therefore including social and civil rights to personal integrity.

4. The Castile-Leon Law against gender-based violence, Law13/2010, 9-12-2010, *SOJ nº317, 30-12-2010*. The preamble refers to the Charter as a foundation for the protection of women both in the social policies field and concerning civil rights such as personal integrity and life.

5. The La Rioja Law on the prevention, protection and institutional coordination in the field of gender-based violence, Law 3/2011, 1-3-2011, *SOJ nº66, 18-3-2011*. It approaches both the social and civil rights perspective, concerning personal integrity, life and fair trial, so far it is tied up with victim protection.

6. The Extremadura Law on gender equality and against gender-based violence in Extremadura, Law 8/2011, 23-3-2011, *SOJ nº88, 13-4-2011*. The reference to the Charter in the preamble is made only to equality and equality policies.

7. The Asturias Law on gender equality and on the eradication of gender-based violence, Law 2/2011, 11-3-2011, *SOJ nº106, 4-5-2011*. The EU Charter is mainly quoted as a means to set up a public social policy on equality, but to some minimal extent the preamble also considers, briefly, its importance as personal integrity and victim protection are concerned.

8. At the level of hierarchical inferior legislation it is to be counted on the Resolution of 20 May 2011 of the Secretary of State for Civil-Service, thereby it is published the Decision of the Council of Ministers of 28 January 2011 that approves of the I Gender Equality Plan within the frame of the State Public Administration and of the Public Organizations thereto appertaining, *SOJ nº130, 1-6-2011*.

The Charter has also been brought in concerning other areas where the European Union has been pioneer, such as consumer protection, transparency or open governance:

1. The Catalanian Consumer's Code, Law 22/2010, 20-7-2010, *SOJ nº196, 13-8-2010*. In the preamble, it is to be found a reference to the great importance that EU has attached to consumers protection policies, pointing out that it has been enshrined as one of the rights of the EU Charter.

2. The Canarias Law on the promotion of citizen's participation, Law 5/2010, 21-6-2010, *SOJ nº168, 12-7-2010*. This Law considers the rights of the Charter affecting this issue as fundamental and recalls them as inspiration for the Act, stressing the paramount of EU in the field of citizens participation rights.

3. The Castile-Leon Law on the rights of Citizens within their relationship with the public Administration of the Castile-Leon Community and of Public Procurement, Law 2/2010, 11-3-2010, *SOJ nº100, 26-4-2010*. The origin of this Law is to be found in the Statute of Castile-Leon, according to the preamble, the EU Charter of Fundamental Rights is the basis of such article and, thus, also the basis of this Law, which is a mere development of the former. Article 12 of the Statute of Castile-Leon (Organic



Law 14/2007, 30-11-2007, *OJ n°288, 1-12-2007*) proclaims the right to good administration, however, neither the articles nor the preamble do refer to EU Charter.

From the point of view of the Charter being used as a foundation for civil rights, the preamble of the following norms contains reference to them:

1. The Navarra Law on rights and duties of persons in matter of health within the Foral Navarra Community (ut supra). Right to personal integrity and human dignity are affected so far the medical treatment and tests may impair, tackle or impinge those values.

2. The Castile-Leon Law against gender-based violence (ut supra), as far as it is conceived of as a means to protect personal integrity and life, and also familiar rights.

3. The La Rioja Law on the prevention, protection and institutional coordination in the field of gender-based violence (ut supra), again, dealing with personal integrity, life, familiar rights and rights of the victim, including fair trial.

4. The Asturias Law on gender equality and on the eradication of gender-based violence, repeating the protection of personal integrity, life and protection of the victim.

With a view to the previous comments, it is clear that the Charter is not yet used as a foundation for the legislative action of the state as far as civil rights are concerned. This is clearly backed by the fact that profuse national legislation has been passed concerning civil rights, especially on issues such as protection of personal data, fair trial, rights of disabled people, etc. A swift glance at the preambles immediately reveals that, in spite of profuse references to EU legislation, international Human Rights Treaties and, even, EU or UN political documents, no reference is made to the Charter, although materially there is a clear identity between the rights encompassed in the Charter of EU Fundamental Rights and the Acts passed by the different Spanish legislative bodies.

B) Courts. The analysis of the case law since its proclamation confirms that it has been given legal force to the Charter from the very beginning. For example, a judgment of the Superior Court of Justice of the Community of Valencia of 2002 expressly states that the Charter of Fundamental Rights of the European Union despite her lack of binding legal force in itself is used as an interpretative parameter both by the Court of Justice as the highest domestic courts⁷⁶. For example, the obligation for the state of reasoning for administrative acts has come to establish even as a fundamental right within the broader right to good administration enshrined in Article 41 of the Charter.⁷⁷ Moreover, the references made to the Charter in the Spanish jurisprudence are favoured by the general principle contained in Article 10.2 of the Constitution which states that "the rules relating to fundamental rights and freedoms recognized by the Constitution will be interpreted in accordance with the Universal

⁷⁶ Judgment of the Chamber of for Contentious Administrative, Section 1ª, 1095/2002, of 5 July 2002.

⁷⁷ Judgment 1924/2002, of de 4 December 2002 from the same judge.



Declaration of Human Rights and the international treaties and agreements on the same subjects ratified by Spain”⁷⁸.

Not only have the courts been citing frequently the Charter of Fundamental Rights of the European Union, also the Constitutional Court in a case concerning the right of asylum has referred the provisions of the Charter in relation to the right not to be expelled, extradited or returned to a State where there is serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment⁷⁹.

Among the articles cited by the jurisprudence we found article 41 on "good governance" in connection with the duty to give reasons for decisions of public authorities and the right to property and the guarantee against uncompensated confiscation of property contained in the 17.1⁸⁰.

The Criminal Chamber of the Supreme Court has recognized importance to the Charter by means of the principle of proportionality of punishment. Other quotes of the Charter by the criminal jurisprudence concerning the right to the presumption of innocence⁸¹. Very many are also invocations of civil jurisprudence of Article 3.2 of the Charter⁸² with respect to the patient's informed consent and the consequences of medical interventions that do not take into account stating that informed consent is a fundamental human right, just one of the last contributions on the theory of human rights, a necessary consequence or explanation of classical rights to life, physical integrity and freedom of conscience. Right to personal liberty, to decide for yourself as it pertains to one's own person and life itself.

The following articles have also been cited; article 11 concerning freedom of expression and information⁸³, Article 15 on the right to freely practice a profession⁸⁴, Article 47 on the right to effective judicial protection and Article 30 on protection in the event of unjustified dismissal

In conclusion, the analysis of the Spanish practice shows a significant consideration of the Charter in particular by our courts says⁸⁵. Indeed, in the case there has been an abundant resource in the Charter

⁷⁸ Vid. to this respect M. Carmona Ruano (2006), 'Aplicación de la Carta de Derechos Fundamentales en la Unión Europea por la jurisprudencia española', paper presented at the Seminar on the jurisprudential application of the Charter of Fundamental Rights of the European Union held in Seville on November 3, 2006, available at <http://www.juecesdemocracia.es/fundacion/ponenciassevilla/ponencias.htm>.

⁷⁹ Judgment 53/2002, of 27th February of 2002.

⁸⁰ From the judgment of the Chamber 3rd for Contentious Administrative, Section 6, of the Supreme Court of April 3, 2001, during one of the many processes arising from the expropriation of Rumasa group to the Supreme Court.

⁸¹ From the Judgment 627/2001, of June 8, 2001 of the Section 2nd of the Provincial Court of Santa Cruz de Tenerife.

⁸² From the Judgment 447/2001 of the 1st Chamber, Civil Division, Supreme Court of May 11, 2001.

⁸³ Judgment of February 18, 2003 Section 7th, Contentious Administrative Chamber of the Supreme Court.

⁸⁴ Judgment 1232/2005, of October 21, 2005 of the 3rd Section of Chamber Contentious Administrative of the Superior Court of Justice of Madrid.



so as to present can be enumerated almost thousand sentences that appear in quotes to it. However, given the scope of the provisions, the Charter is varied. Indeed, in most cases the invocation of the Charter is a mere quote, usually accompanying references to other national and international texts, but on occasion the appropriate court looks to state that uses the Charter as a parameter interpretive.

After the entry into force of the Lisbon Treaty, the Constitutional Court has stated that among the hermeneutical elements are, first, the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and recognized - was adapted as the December 12, 2007 in Strasbourg, with the same legal value as the Treaties art. 6.1 of the Treaty on European Union⁸⁶. However, in another decision he said with some surprise that our Constitution does not recognize a right to family life in the same terms as the European Court of Human Rights has interpreted Art. 8.1 Convention. However, as has been noted this in no way implies that the living space protected by the right to family life derived from the arts. 8.1 ECHR and 7 of the Charter of Fundamental Rights of the European Union, and in what concerns us here, the standalone configuration of affective, family relationships and cohabitation, lack of protection within our constitutional system⁸⁷. In an another occasion the Court has cited the Charter along with other acts of derivative rights to speak of normative action developed by the European Union, among which stands out the purposes of this case, in addition to the recognition of the right to the protection of personal data by the art. 8 of the Charter of Fundamental Rights of the European Union, Directive 2002/58/EC of the European Parliament and Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector⁸⁸.

Moreover, in a recent judgment of the Constitutional Court judges Fernando Valdés Dal- Ré and Dona Adela Asua Batarrita formulated an interesting dissenting opinion in which it is recalled that as stated by the Court Declaration 1/ 2004 of 13 December the interpretative value , to that extent , would the Charter on fundamental rights in our legal system would not cause major difficulties which currently originates and the Rome Convention of 1950, simply because both our own constitutional doctrine (on

⁸⁵ Andrés Sáenz de Santa María, P. (2008), 'La Carta de los Derechos Fundamentales de la Unión Europea en la práctica española', *Revista de Derecho de la Unión Europea*, 15:233.

⁸⁶ Judgment 37/2011, of 28 March 2011. In this regard see also the judgment of the Supreme Court 3083/2013 , Litigation Division of 13 May which states that matters little to these effects than when the original act occurred (September 6, 2007) was issued , yet it was in force of the new Treaty on European Union and , therefore, the scope attributed to the Charter, as it can not forget that this text, proclaimed in Nice in 2000 , as stated in its preamble, codified and reaffirmed the fundamental rights and public freedoms recognized by the constitutional traditions and international obligations common to the Member States , as well as certain regulatory texts. Its content is, in short, emanation shared by these States *acquis* and commitments they have made admissions, including the European Convention for the protection of human rights and fundamental freedoms , so that the Union was obliged to respect and its courts (the Justice and national) to safeguard them.

⁸⁷ Judgment 60/2010, of 7 October 2010.

⁸⁸ Judgment 173/2011, of 7 November 2011.



the basis of art. 10.2 CE) as the same Article II -112 (as shown in the 'explanations' that as a way of interpretation are incorporated through the Treaty of paragraph 7 of article) operate with a set of references to the European Convention eventually build to the jurisprudence of the Strasbourg Court common denominator for establishing an interpretation shared their minimum content . Especially when the art. I- 9.2 determines in mandatory terms that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. And then adds that otherwise cannot be overemphasized that Article II- 113 of the Treaty states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized , in their respective scope, by Union law , international law and international agreements that are part of the Union or all the Member States, and in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the constitutions of the Member States. Consequently, as has been said , both the European Court of Human Rights as a common denominator, as the said Charter, are to guarantee us a minimum content relating to fundamental rights, from which shall be determined in the order domestic content secured by the law itself , without, in any case, you may be subject to rebate that minimum content protected by the rules of the European Convention on Human Rights, as interpreted by the same hits the European Court of Human Rights and by the Charter of Fundamental Rights of the European Union. Therefore reduce those minimum guarantees defined by the European Court of Human Rights in the matching rights consecrated in our Constitution is precisely what so resounding in relation to art. 18.2 EC on the privacy and inviolability of the home, in the judgment of the case which we disagree⁸⁹. Meanwhile the High Court has held that the doctrine of *res judicata* has its roots in the *ne bis in idem* principle and is enshrined in Article 14.7 of the International Covenant on Civil and Political Rights, and Article 50 of the Charter of Fundamental Rights the European Union but our Constitution does not expressly stated this principle, but it includes the constitutional doctrine between guarantees of Art. 25.1⁹⁰.

C) *Ombudsmen*. The Reports of the Spanish national Ombudsman have brought in the EU Charter when approaching the complaints of citizens.

1. As means of setting standards for the protection and rights of foreigners in Spain and as a background against which to assess the new Spanish Law on rights and duties of Foreigners and asylum, as part of a general retrospective of the EU policy on human rights (*Spanish Ombudsman Report 2010*, pp.1473 and 1478).

2. As a means of assessing the delay of justice, (*Spanish Ombudsman Report 2011*, p.135).

⁸⁹ Judgment 188/2013, of 4 November 2013

⁹⁰ Judgment of Criminal Chamber 4956/2013 of 27 November 2013.



3. As a means of setting standards of medical treatment of long-terms patients, (*Spanish Ombudsman Report 2012*, p.41).

In the face of these references a negative assessment can be made, due to the fact that the Reports and different recommendations of the Ombudsman are really profuse and a mere quotation or reference to the Charter puts forward the low level of use of this text.

The Asturias Ombudsman, one of the Spanish regional Ombudsmen, has brought in the Charter in order to analyze the right of gender equality and its enforcement (*Asturias Ombudsman Report, 2010*, p. 731). This is really a poor employ of the Charter especially in the light of the mission thereto appertaining and reveals the trend in Spain not to incorporate the EU Charter of Fundamental Rights to the analysis of human rights enforcement, whereas other international and EU texts are profusely quoted and used.

The Aragón Ombudsman has also brought in references to the Charter in its annual reports, beginning with the one corresponding to year 2012, where the Charter is used as the international framework of the right to participate in public administration, quoting specifically article 41 (*El Justicia de Aragón (Aragón Ombudsman) 2012 Annual Report*, p. 2048). On this footing, the Charter has been used in 2013 Report in order to define the legal obligation of Aragón, as part of Spain, towards Childhood, it expressly quotes article 24 (*El Justicia de Aragón (Aragón Ombudsman) 2013 Annual Report*, p. 911), however it is a tantalizing reference so far when it comes to issue the Annual Reports on Childhood that the Aragón Ombudsman produces there is no reference at all to the EU Charter, depriving it from an optimal chance of enforcement. Quite close to this approach is the one appertaining to the Basque Ombudsman (*Ararteko*), due to the references and consideration paid to the Charter in its reports, but it improves this incorporation as far as the Charter and EU Agency for Rights of Child are taken into consideration when assessing the behaviour of national institutions (*Annual Report of the Basque Ombudsman. Childhood and Youth Office, 2010*, p. 29; *Annual Report of the Basque Ombudsman. Childhood and Youth Office, 2011*, p.23; *Annual Report to Basque Parliament. Childhood and Youth Office, 2012*, p. 17).

This Ombudsman, the Basque, has incorporated article 8 of the Charter as framework for the right to personal data (*Annual Report of the Basque Ombudsman, 2012*, p. 144), and also article 41, right to good administration as a means to define the guarantees of administrative procedure (*Annual Report of the Basque Ombudsman, 2010*, p. 542; *Annual Report of the Basque Ombudsman, 2011*, pp. 258 and 575, 585; *Annual Report of the Basque Ombudsman, 2012*, p. 154). Finally it is worth highlighting that the Basque Ombudsman has referred to the Charter as a foundation to apply EU Citizenship rights when it comes to gipsy minority, stressing the need for inclusion programs (*Annual Report of the Basque Ombudsman, 2011*, p. 513) or the rights encompassed in articles 20-21 of the Charter on linguistic and minority rights as a part of the legal framework of these rights (*Annual Report of the Basque Ombudsman, 2010*, p. 397). There are also references to the right to non-discrimination on different basis (*Annual Report of the Basque Ombudsman, 2010*, p. 600).



The Valencia Ombudsman has considered that discrimination against women violates the Charter and used it as means to control the public administration policies and also has employed article 41 in order to assess the right to good administration (*Valencia Ombudsman Report 2010*, p. 319; *Valencia Ombudsman Report 2011*, p. 109) As far as poverty and right to social assistance is concerned this body has brought in also the EU Charter, article 34 (*Valencia Ombudsman Report 2011*, p. 432) and has used the Charter as a juridical basis for its recommendations to the public administration in order to be bettered (*Valencia Ombudsman Report 2010*, p. 415).

Also the Catalanian Ombudsman has mentioned the Charter as a means of systematic interpretation of laws, concretely the right to annual period of paid leave, article 31.2 (*Sindic dels Greuges (Catalonian Ombudsman) Report 2013*, p. 166).

The Andalusia Ombudsman has referred to the Charter in the frame of a quotation of the Constitutional Court, being this part of the document integrating a file, and therefore reproduced verbatim in the report, concerning the right to fair trial, art. 47 (*Andalusia Ombudsman Report, 2012*, p. 1276).

The Ombudsman of Navarra has also used the right to non discrimination as a means to assess the response of the health administration concerning the request of a woman to be artificially inseminated, given that she was married to another woman, considering this as an unjustified discrimination (*Navarra Ombudsman Report 2012*, p. 336).

- ✓ **How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of civil rights.**

The TC has endorsed the content of the CEDF and of the CEDH naturally. In fact, the appointment of the CEDH and the case law of the TEDH is normal since their first SSTC. The appointment of the CEDF is also common and they have already used it as an interpretive criteria when it was a project of the standard in the SSTC 141/2000, of the 29th of May, FJ 4; 292/2000, of the 30th of November, FJ 8. Since its entry into the Law, its use is common, some of the example of a certain case are worthy as well as others, jointly using conventions to interpret the fundamental rights, see the SSTC 53/2002, of the 27th of February, FJ 2; 138/2005, of the 26th of May, FJ 4; 41/2006, of the 13th of February, FJ 3; 183/2008, of the 22nd of December, FJ 3; 60/2010, of the 7th of October, FJ 8; 186/2013, of the 4th of November, FFJJ 6 and 7; and the recent STC 26/10214, of the 13th of February; and, of course, in the DTC 1/2004, of the 13th of December, FFJJ 2, 4, 5.

Currently, Spain is living through a major dogmatic debate on what is called the “dialogue between jurisdictions”. The relationship between the EU Law and the national Law has passed through three



phases. Initially, the dogmatic discussion focused on the nature of the cession of competence in the CEE and is this was or not a cession of sovereignty. After the Treaty of Maastricht, the debate focused on the inter-regulation relationships between the CE and the EU Treaties (and, in consequence, on the legal relationship derived by the EU and the internal Spanish Law). With the Lisbon Treaty, they have entered into a third stage in which the doctrine and jurisdictions have taken care of the necessary cooperation and dialogue between national and European jurisdictions in the integrative interpretation of the internal law and the EU law, to build a common European law, and, particularly, a European standard of European citizenship rights applicable in all of the Member States⁹¹.

QUESTION 5 : JURISDICTIONAL ISSUES

Question 5 : Jurisdictional issues

- ✓ Personal
 - **Who** is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?
- ✓ Territorial
 - What is the territorial scope of the protection of civil rights afforded by your member states? Are there **territorial** limitations to such protection? Which?
- ✓ Material
 - Are rights protected differently in different **policy areas** (e.g. security exceptions, foreign policy exclusion, etc.)?
- ✓ Temporal
 - What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?
- ✓ Please offer details as to how different rights are afforded to different **categories of persons** in **different location and policy contexts over time?**

In the Spanish Law, the article 53.2 CE states that the legislator must regulate a specific system of legal guarantee of the fundamental rights, organised in two levels: protection resource before the TC and the so called *ordinary protection* given by the judges and ordinary courts of the Spanish Legal system. The first is a specific procedure before the TC of the fundamental rights which can be accessed once the opportunity has been given by the ordinary judges and courts to repair the alleged fault. The second can be of two types. The first, which is that stated in the abovementioned article 53.2 CE: a

⁹¹ *Per omnia*, Various Authors (2013), *Tribunal Constitucional y diálogo entre tribunales* (XVIII Jornadas de la Asociación de Letrados del Tribunal Constitucional), (Madrid:Centro de Estudios Políticos y Constitucionales).



specific procedure, summary and judicial protection of fundamental rights; the other is that which every ordinary judge or court can dispense in any legal procedure in which there is a trial and in which evidence of the possible fault of a fundamental right is reported.

Each court procedural law provides a special procedure for the protection of rights in the civil, criminal, administrative and social orders. In addition, there are also specific procedures for certain rights:

To this type of judicial protection that which results from the international conventions must be added, especially the TEDH and the TJUE, which extends to other rights as well as the fundamental rights. And the institutional which, in the Spanish case, is being handled by the Ombudsman and the similar institutions of the Autonomous Communities.

The non fundamental constitutional rights do not have any special protection that the protection resources dispense before the TC and the Ordinary Law. However, they can be object to protection in the ordinary judicial proceedings and some of them have specific procedures:

Here, we must also add the set of criminal guarantees of the constitutional rights established in the Organic Law 10/1995, of the 23rd of November, of the Penal Code (Book I, crimes against humanity: Title I, II, III, IV and V; crimes against freedom: Title VI; crimes against privacy, the right to self-image and the inviolability of the home: Title X; crimes against honour: Title XI; crimes against patrimony: Title XIII; crimes against worker rights: Title XV; crimes against foreign citizens: Title XVI; crimes against the exercise of the fundamental rights and the public liberties: Title XI, Chapter IV).

The article 55 CE establishes a specific regime for the exercise of the constitutional rights in cases of declaration of states of emergency and place and in the fight against terrorism or against organised crime:

1. The rights recognised in the articles 17, 18, sections 2 and 3, articles 19, 20, sections 1, a) and d), and 5, articles 21, 28, section 2, and article 37, section 2, could be suspended when a state of emergency or of place is declared, in the terms foreseen in the Constitution. That established above of section 3 of the article 17 becomes an exception for the supposed declaration of a state of emergency.
2. An organic law could determine the manner and the circumstances in which, individually and with the necessary judicial intervention and the proper parliamentary scrutiny, the rights recognised in the articles 17, section 2, and 18, sections 2 and 3, can be suspended for certain people, in relation with the corresponding investigations of armed bands or terrorist groups.

Both cases have been respectively regulated in the Organic Law 4/1981, of the 1st of June, of the states of alarm, emergency and siege; and respecting the armed bands and terrorist groups, the Organic Law 4/1988, of the 25th of May, which amended the article 579 LECrim was enacted, on which the TC issued in their STC 71/1994, of the 3rd of March, reiterating the doctrine of the STC 199/1987 which analysed



the Spanish anti-terrorist legislation of 1984 in the light of the jurisprudence of the TEDH declaring in one of its ends, against the EC.

✓ **Personal**

- **Who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?**

According to Spanish Law, the scope of protection depends on the SC provisions (exceptionally, Laws implementing it) where the civil rights are enshrined.

The fundamental rights have a dual ownership. Most of them are of universal ownership with the exception of those which are considered to be linked to the ownership of a national sovereignty (political participation rights, articles 23, 29 and 30 EC) or the foreign regime (rights to reside and move freely through national territory, article 19 EC) which are reserved for Spanish Nationals. Even though the article 14 EC on the right of equality refers to the Spanish, the TC has interpreted that, in application to international conventions, this right and the prohibition on discrimination on grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance also extends to people of foreign origin. The TC has also recognised the ownership of certain basic rights to legal persons and the extension of the constitutional protection of the fundamental rights of deceased people.

Among the foreigners, the legislature and the TC have distinguished the citizens of the European Union and similar relations with the right of political participation in the European and municipal elections, and in the exercise regime of the fundamental rights which are treated as those of the Spanish citizens under the provisions of the Foreigners Law and confirmed by the TC in its Judgements.

In respect to the non fundamental constitutional rights, the EC only reserves the rights of objection of consciousness and of work for the citizens of Spain.

In respect to the ownership of the rights, the condition of refugee or asylum does not alter that stated above.

*** 1. Personal Scope according to the Constitutional Court**

According to the Constitutional Court (SSTC 107/1984, 236/2007, 237/2007), the personal scope of the fundamental rights can be made on the basis of the following criteria:

1.1. Inherent rights to human dignity as universal rights: Among them the right to life, to physical and moral integrity, to privacy, to effective judicial protection, to ideological and religious freedom, honour, personal liberty and security can be included.



1.2. Rights exclusively granted to Spanish citizens- Political rights, except voting in municipal elections (Articles 23, 13.2 CE) and the right of suffrage to the European Parliament in terms of Article 39 of the EU Charter of Fundamental Rights).

1.3. Essential rights to ensure human dignity whose exercise shall be regulated respecting their essential core: Among them, the rights of assembly, strike, manifestation or free association, or the right to education) .

4. Rights neither granted to foreigners by the Constitution nor linked to human dignity: freedom of movement and residence (Article 19), right to work (art. 35).

*** 2. Personal Scope according to the EU citizenship (and assimilated)**

Apart from the civil rights based on the condition of human being granted by the Spanish Constitution and the EU Charter of Fundamental Rights, the status of EU citizenship or similar situation provides certain rights:

2.1. For the citizens of the EU (Articles 20 and 21 TFEU):

-The right to freedom of movement and residence in Spain (Royal Decree 240/2007, 16th February), including nationals of third countries members of the family.

-Political rights to vote in European Parliament elections.

-Prohibition of discrimination on grounds of nationality within the scope of the EU Treaties.

2.2. For nationals from the European Economic Area (Art. 18 EEA):

- Freedom of movement and residence in relation with workers.

- Prohibition of discrimination based on nationality between workers.

2.3. For Swiss nationals (Agreement of the EU and Switzerland on free movement of persons):

- Right of entry into Spain .

- Right of residence linked to carrying out economic activity.

*** 3. Personal Scope according to the administrative situation of third country nationals**

3.1. Regular residents: they have recognized the political rights in municipal elections, rights of assembly, manifestation and association, right to work, right to unionize and strike, and the right to education.

3.2. EU long term residents: additionally they have the right of entry and free movement in Spain .



3.3. Persons in irregular situations: they have recognized the right to effective judicial protection and legal aid, rights of assembly, manifestation and association, right to organize and strike, the right to education if they are minors

✓ **Territorial**

- **What is the territorial scope of the protection of civil rights afforded by your member states? Are there *territorial* limitations to such protection? Which?**

At first understanding, there are no territorial limitations to the enjoyment of civil rights in Spain. The transit areas in airports are a good example: even prior to the ECHR rulings on the matter (e.g. ECHR Judgement 26 June 1996, *Amuur v. France*), Spanish Constitutional Court denied restrictions on rights (e.g. asylum applications) for individuals remaining in these areas (see Spanish Constitutional Court, Order ATC 55/1996 (1st Chamber, 2nd Section), 6 March 1996).

In first place, the territorial scope of application of the constitutional rights is that of the State territory. The doctrine of the TC also maintains that the guarantee of the fundamental rights binds all of the Spanish public powers wherever they act, which extends its protection to borders and international spaces under the dependence of the Spanish authorities (STC 53/2002, of the 27th of February). They also bind the foreign public powers that act in Spanish territory. As has been expressed by the TC in its SSTC 107/1992, of the 1st of July, 292/1994, of the 27th of October, and 18/1997, of the 10th of February)

*** Although there are not limitations to the territorial scope of the civil rights, the implementing regulations of the civil rights contain some territorial limitations:**

1-Development of personality (Art. 10 CE) and right to own image (Art. 18 CE): the civil aspects of this right and in particular, the Spanish legislation on name, linked to the right to own image (STC 20/1992 , STC 117/1994) apply to Spanish nationals (principle of personality) , in accordance with Article 9.1 of the Civil Code.

2-Right to honour and reputation (Art. 18 CE) in relation to the exercise of freedom of expression (Art. 20 CE, Article 10 ECHR, Art. 11 EUCFR): Spanish rules on compensation of damages to the right to honour and reputation apply where the harmful event occurred in Spain (art. 10.9 Civil Code).

3-Right to honour and personal and family privacy (art. 18.1 CE) regarding data protection (art. 18.4 CE; Art 8 ECHR): The law implementing data protection applies : a) when the process of data is made in Spanish territory in the framework of the activities of an establishment; b) when public international law establishes this application; c) when the tortfeasor, not established in the EU, uses means located in Spanish territory without transit purposes. This application is without prejudice to the international transfer of data (Arts. 33 and 34 of Organic Law 15 /1999 of the 13th of December, on the Protection of Personal Data).



4-Right to literary, artistic, scientific and technical production (Article 20 CE): the implementing regulations of this right are based on the territoriality principle. According to that, the rights of intellectual property will be protected within the territory Spanish in accordance with the Spanish law (Art. 10.4 Civil Code and Art. 8 Reg (EC) 864/2007) .

5-Right to an effective judicial protection (Article 24 CE, Article 6 of the ECHR, Article 47 EUCFR): A effective judicial protection is provided when the dispute arises before Spanish judicial authorities. In these cases, the Spanish law governs the process. In this sense, effective judicial protection is ensured through international jurisdiction grounds, in addition to the EU law and international conventions (Articles 22-25 Organic Law 6/1985 on Judiciary). Particularly Spanish lawmaker has just adopted an amendment of the universal jurisdiction in criminal matters in absence of effective investigation and prosecution by foreign courts or by an international tribunal. In practice, the reform extremely reduces the criteria of universal jurisdiction over genocide and crimes against humanity, terrorism, trafficking of persons.

6- Right to marriage in civil manner (Article 32 CE, Article 12 ECHR , Art 9 EUCFR)

Territorial restrictions are observed depending on the competence of the Spanish authorities:

6.1. With respect to the Spanish Consuls, they conclude the marriage if at least one of the spouses is Spanish, none of them is a national of the receiving State and this State does not preclude the conclusion of consular marriage (Article 13 of European Convention on Consular Functions, made in Paris on December 11, 1967) .

6.2. With respect to civil authorities, domicile of one of the spouses shall be within Spanish territory (Art. 57 Civil Code). This general rule admits two exceptions. First, if one spouse is Spanish and the State where he resides precludes consular marriage, the Spanish authorities may conclude the marriage . Second, if it is a same-sex marriage, and in order to avoid "matrimonial tourism", the residence of the spouses shall be in Spain [RDGRN of October 26, 2005 (Spanish and Indian); of April 7, 2006 (Spanish and Portuguese); of June 1, 2006 (British); of June 2, 2006 (British); of November 10, 2006 (British); of November 23, 2006 (Swiss); and of May 2, 2008 (British)] .

7- Right to marry in religious rite (Article 32 CE, Article 12 ECHR in relation to the religious freedom of art. 16 CE, Article 19 ECHR, Art 10 EUCFR): The spatial scope of this right is configured differently according to religious rites. Firstly, the Spanish system recognizes canonical marriage concluded in Spain and outside Spain. It also recognizes evangelical Jewish or Islamic marriage concluded within Spanish territory or in another state that also accepts this marriage (*lex loci celebrationis*). Marriage by any other rite celebrated in Spanish territory has no effect and, if that marriage is concluded in another state, the marriage is only recognized in Spain when it is effective in the State of conclusion.



8-Incidence of civil rights in marital crisis: Spanish authorities extend the Spanish law on marital crisis if they observe that foreign applicable law does not provide for divorce or does not grant equal access to divorce or separation based on sex [art. 10 Reg (EU) 1259/2010]

9-Right to property and inheritance (art. 33 CE; art. 1 Additional Protocol ECHR; art 17 EUCFR): The Spanish legislation implementing property rights applies to property located in Spanish territory , in accordance with Article 10.1 of the Civil Code (principle of territoriality). On the other hand, the Spanish legislation implementing inheritance rights applies if the deceased has habitual residence in Spain at the moment of death, or if Spanish law is the most closely connected law, or if the Spanish deceased chose Spanish law. In this regard, it should be noted that the scope of the Spanish inheritance law is governed by EU law [arts. 21 and 22 Reg. (EU) 650/2012] .

10- Freedom of enterprise in a market economy (Article 38 CE, Article 16 EUCFR): The Spanish and EU rules on the market system will be applied when the relevant market is the Spanish and EU one. On the other hand, the Spanish regulations implementing the rules for corporations and entrepreneurs will be applied when the person or entity have Spanish nationality (art. 9.11 Civil Code and art. 15 Commercial Code) .

Currently, protection afforded by Spanish Law includes extraterritorial application of Spanish Legislation.

✓ **Material**

- **Are rights protected differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)?**

In the Spanish system of fundamental rights, different to those stated in article 55 EC for the cases of declaration of a state of emergency and siege and the fight against terrorism or against organised crime, have specific and unique restrictions:

1. The rights recognised in articles 17, 18, sections 2 and 3, articles 19, 20, sections 1, a) and d), and 5, articles 21, 28, section 2, and article 37, section 2, could be **suspended** when there is an agreed **declaration of state of emergency or siege** in the terms foreseen in the Constitution. An exception to the aforementioned provisions of section 3 of the article 17 in the event of a supposed declaration of state of emergency.

2. An organic law could determine the manner and the circumstances in which, individually and with the necessary judicial intervention and the proper parliamentary scrutiny, the rights recognised in the articles 17, section 2, and 18, sections 2 and 3, can be suspended for certain people, in relation with the corresponding investigations of armed bands or terrorist groups.



A) *National and Citizen Safety*. The TC consider that both the defence as well as national security and the prevention and prosecution of crimes are property of the constitutional protection (STC 341/1993, of the 18th of November). The EC itself provides the first three expressly as limit of the constitutional rights (case of the article 105 b) EC, access to public archives and records). However, the TC has expressly rejected that the maintenance of “public order” is a limit of the fundamental and constitutional rights, as it considers that the protection of the fundamental rights is precisely the core of this public order (SSTC 62/1982, of the 15th of October, FFJJ 2 and 3; 19/1985, of the 13th of February, FJ 1; 160/1987, of the 27th of October, FJ 4; 51/2011, of the 14th of April, passim; 20/1990, of the 15th of February, FFJJ 5; 120/1990, of the 27th of June FJ 10). An idea that is also used by the TC to redefine the concept of “public order of the forum” binding it to respect the fundamental rights of the EC (STC 43/1986, of the 15th of April of 1986, FFJJ 4 and 5; 199/1987, of the 16th of December FJ 5). Only in the case of the article 16, ideological and religious freedom, the EC expressly provides the public order as a specific limit to the freedom of worship (and has been used in the case of some judgements concerning the prohibition of wearing headscarves in schools). The TC usually handles the idea of a “procedural public order” to refer only to the sanctity of the judicial process and the unavailability of parts of the judicial process as a guarantee of rights of the article 24 of the EC.

In Spain, the State secrets and classified materials are governed by a pre-constitutional rule, the Law 9/1968, of the 5th of April, on official secrets. The problems that this legislation raised at the time regarding the effective judicial protection (SSTS, 3rd Chamber, of the 4th of April of 1997) led to the revision of the legal regime of the intelligence of the State, which turned over to depend on the civilian and not military command, upon subjecting their actions to that stated in the Law 11/2002 of the 6th of May, regulator of the National Intelligence Centre, and in the Organic Law 2/2002, of the 6th of May, regulator of the previous judicial control of the National Intelligence Centre.

A curious case in the Spanish case law has been the exception of the principle of equality and the prohibition of discrimination on grounds of sex in the case of the lines of succession to the titles of nobility. The TC considers that the succession to nobility from male to male does not violate the article 14 CE (STC 126/1997, of the 3rd of July).

Other exceptions related to internal security. Spanish law concerning the right to nationality and asylum, therefore delving into EU Charter rights, foresees a role to be played by national security. In fact, articles 21 and 22 of Spanish Civil Code, when subjecting the grant of nationality impinges on two different kinds of conditions according to case-law: those clearly defined by the Code and those that are undetermined and must be assessed on a case-by-case approach. National security is one of the second category and may be invoked in these procedures on nationality, in fact the Spanish Intelligence Service may well step into Administrative-Law processes in order to support or encourage the rejection of the granting. Case-law shows that Spanish Intelligence Service (CNI) has intervened when the person requesting Spanish nationality is suspected to have links with terrorism, what is done by means of a report issued by the



CNI. When examining the scope of this report the High Court (*Audiencia Nacional*) has considered that it must be motivated and that a clear nexus between the claimant and the terrorist organization must be put forward (See High Court, Administrative Law Chamber, Section 3, Judgment 12 May 2011).

Spanish Courts have also had the opportunity to reject the granting of refugee condition to a former Saddam Hussein General, concretely Spanish Supreme Court has clearly stated that article 1.F of 1951 Geneva Convention expressly refers to the denying of the invocation of the Convention when it happens to be invoked by someone who has perpetrated crimes against peace or crimes against humanity, which has been the case at stake (See Spanish Supreme Court, Administrative Law Chamber, Section 3, 30 June 2011).

The Islamic veil has also been problematic in Spanish case-law. The root of the question is to be found in the Order of the Lleida City-hall that prohibits the use of any robe that may hide the face of the person dressing it. This has resulted in the fining of Muslim women who wore the burka, in the light of these facts the Watani Association for Freedom and Justice set up a judicial process in order to get the annulations of the order. The Superior Court of Justice of Catalonia has found in the way that it has rejected that there is a true conflict between rights, but only a mere limitation on grounds of public order and security, thus in the contrary, people wearing in such way may avail themselves of this robe in order to commit crimes, therefore, the Tribunal has concluded that there are no religious basis or conflicts at stake, but merely norms regulating public order, and furthermore the prohibition is written in such a way that it is general and applies to any other dressing that may hide the face of any person (Superior Court of Justice of Catalonia, Administrative Law Division, Section 2, ST. 489/2011, 7 June 2011).

Fair trial rights are also limited on grounds of security, Spanish Supreme Court on Judgment of 4 April 1997 has pinpointed different cases in which the rights of the parties to access document can be cut on account of: a) when the security of the nation, may be affected in such a degree that it is not admissible, b) when it conveys a discredit of Spanish reputation in international affairs, especially when it may be detrimental for exchanges of intelligence information, c) when it may endanger means, sources and operation of Spanish Intelligence Service (CNI), d) when disclosing information may reveal the personal data of parties to a criminal judicial process. This has been invoked by the High Court in order not to reveal the information concerning the presumed ransom paid by Spain to Somali pirates in the *Alakrana* case, where the defence was prevented from acceding secret files and documents (High Court Judgment 10/2011, 3 May 2011).

B) Foreign Policy. Certainly, questions related to foreign policy issues can have a serious incidence over the enjoyment of civil rights but an assessment of Spanish practice need to draw a clear distinction between administrative and judicial bodies.



In the first case, according to section 149.1.3^a SC, State's exclusive powers on foreign relations imposes a real subordination of administrative organs, central and regional (ACs), to guidelines issued by Foreign Affairs Ministry.

Quite differently, from a judicial perspective, those limitations are clearly irrelevant. Spanish Courts and Judges do not accept any interference from Government supposedly based on foreign policy considerations. Spanish case law does not include legal constructions (Act of State, *acte du gouvernement*, etc.) conceived to limit judicial powers over foreign relations. Even, Courts and Tribunals are aware of their self-reliance on those matters: queries addressed to Government by judges on questions concerning foreign policy issues had been unusual, and, sometimes, such moves were expressly disavowed by Constitutional Court as an outrage to judicial independence.

Notwithstanding, there are some definite issues where the activities of Courts are seriously limited by foreign policy reasons, according to general norms of International Law that must be abide by Spanish judges (SC, section 96.1 *in fine*),

1.- *Diplomatic Protection*. Government's Discretionary powers on diplomatic protection of Spanish nationals abroad can hamper the enjoyment of civil rights by these citizens⁹². However, according to a sustained doctrine of the Supreme Court, even in such cases there is a possibility to obtain a compensation where there is a clear link between the abstention of Spanish foreign organs to protect and the damage suffered by Spanish nationals.

2.- *Sovereign Immunities*. Certainly, there is a narrow link between foreign policy considerations and foreign State judicial immunities. In spite of this, coming from the 80's Spanish Courts built a case law intended to reduce foreign immunities based upon the dichotomy *acta jure imperii/acta jure gestionis*.

⁹² Certainly, the new Law 2/2014, of the 25th of March, of the Foreign Service and Action of the State (*SOJ*, nº 74, of the 26th of March 2014) states that the "Spanish Exterior Politics has inspiring principles in respect to human dignity, freedom, democracy, the State of Rights and The Human Rights." (art. 2.1) and that it places within its objectives "The assistance and protection of its citizens" (art. 2.2). Moreover, among its guiding principles, it postulates the "Service to the public interest" which it defines as orientated "to the assistance and protection of the Spanish citizens and to the support of the Spanish community and to the Spanish companies in foreign countries." (art. 3.2.g). Elaborating on these ideas, it states that the "exterior actions in matters of human rights will promote the extension, recognition and effective compliance of the fundamental principals defined by the international community of Democratic States and recognised in the Spanish Constitution, in the Universal Declaration of Human Rights and in the rest of the covenants and treaties ratified by Spain on this matter, especially the Guidelines of Human Rights of the European Union. (art. 16.1). Also, it assigns to the permanent diplomatic missions with the function of "Protecting the interests of the receiving States ... of their nationals within the limits allowed by international law." (art. 42.b). Moreover, there are other provisions - in particular the Law 40/2006, of the 14th of December, on the Statute of the Spanish Citizen abroad (*SOJ*, no. 299, of the 15th of December 2006) that specifically address the situation of the Spanish expats and their rights. Notwithstanding, despite appearances, none of these provisions set a right to diplomatic protection on behalf of Spain.



Those orientations were confirmed by Constitutional Court (e.g. SCC Judgements STC 107/1992, 1 July 1992, STC 292/1994, 27 October 1994 and STC 18/1997, 10 February 1997). The late accession to the United Nations Convention on Jurisdictional Immunities of States and Their property of 2 December 2004 and recent developments on these issues by international Courts, at first sight, did not alter those trends⁹³.

3.- *Universal jurisdiction*. Under the previous regulation of art. 23.4 Organic Law 6/1985 on Judiciary (LOPJ) there was a wide discretion to engage criminal proceedings against aliens –even foreign authorities- presumably responsible of serious criminal offences according to International Law (genocide, war crimes, crimes against humanity, torture, piracy, drug traffic, female mutilation, etc.) through Spanish High Court (*Audiencia Nacional*). However, a very recent amendment of the LOPJ⁹⁴ restricted dramatically the power of Spanish Courts to adjudicate in these cases.

C) *Aliens*. Detention Centres for Foreigners is a restriction of personal freedom of movement (Article 17 CE, Art. 5 ECHR, Art. 6 EUCFR).

1.- Cases of detention: very serious infraction related to national security or the organization of non-criminal illegal immigration (art. 54.1.a) and b) Organic Law of Immigration); serious infraction related to stay irregularly in Spain, to public order or to public security (article . 53.1 a, d and f); and expulsion for intentional crime punished with more than 1 year of imprisonment (art. 57.2, when the crime was made in Spain and the police record has not been cancelled).

2.- Judicial review of detention: the habeas corpus is applicable and a judicial review prior to detention is required (SSTC 172/2008, 84/2009, 14/2009). Furthermore, a control of the stay of foreigners in the detention centre is required.

D) *Nobility*. Spanish Constitutional Court has also determined that the right to equality is not enforceable as far as nobility titles succession are concerned, SCC Judgment 126/1997, 3 July 1997, confirms that the right of male descendents prevails over the right of the elder female descendents. Bastard sons and daughters of noble people have a right to succession on an equal footing with other sons and daughters when a posterior marriage has taken place, according to Spain's Constitutional Court Order 142/2000, 12 June 2000, thenceforth Spanish Courts have treated bastards and other sons and daughters equally.

⁹³ Spain acceded to the New York Convention on Immunities on 2011 (21th September); this Convention is not yet in force. On these questions see Nigro, R. (2013), 'Immunità degli Stati esteri e diritto di accesso al giudice: Un nuovo approccio nel diritto internazionale'[Immunity of Foreign States and Right of Access to a Court: A New approach I International Law], *Rivista di Diritto Internazionale* (96:812).

⁹⁴ Organic Law 1/2014, 13 March, concerning the modification of the Organic Law 6/1985, 1 July, on Judiciary, related to the universal justice, *SOJ* no. 63, 14 March 2014.



✓ **Temporal**

- **What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?**

Con carácter general, no existen restricciones.

But, in the specific area of *Aliens*, three stages can be distinguished with regard to the treatment of civil rights for foreigners:

1.1. Original version: the first stage corresponds to the entry into force of Organic Law 4/2000 on foreigners, which broadly recognized civil rights to foreigners, regardless of their administrative status in Spain.

1.2. Amendment: the second stage was a result of the reforms introduced by the Organic Law 8/2000, which restricted many civil rights and limited the application to foreigners in regular situation in Spain.

1.3. Counter-Amendment: the third stage is the current result of the reforms introduced by the Organic Law 2/2009 which adapted the legislation on immigration to the judgments of the Constitutional Court (236/2007 and 237/2007), which declared unconstitutional various restrictions imposed by the previous reform.

QUESTION 6: ACTORS

Question 6 : Actors

- ✓ What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. – in defining and setting civil rights' standards (influencing legislative, regulatory, administrative or judicial processes) . Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of civil rights norms.

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El Observatorio Permanente de la Inmigración (Permanent Observatory for Immigration), dependent on the Ministry of Employment and Social Security , through the Directorate General of Migration (art. 9.3 of Royal Decree 343 /2012, of 10 February, concerning the basic structure of the Ministry of Employment and Social Security) has various functions, regulated in Royal Decree 345/2001 of 4 April. That includes: a) to act as a permanent body of collection, analysis and exchange of quantitative and qualitative information gathered from the bodies of the General Administration of the State concerning immigration matters and asylum; b) to collect, promote and guide the diffusion of information obtained; c) to promote, develop, spread and distribute research, surveys, studies and publications; d) to prepare an annual and periodic reports on immigration situation; and e) to create and maintain a statistical database

The Office of the United Nations High Commissioner for Refugees (UNHCR).- The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum. According to Law 12/2009, of 30 October, on the right of asylum and subsidiary protection, UNHCR takes part in the application procedure of the qualification of third-countries nationals as refugees or as persons who otherwise need international protection. (See also the Annex: IV. Other Actors).

QUESTION 7: CONFLICTS BETWEEN RIGHTS

Question 7 : Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?
 - ✓ Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?
Please give examples, and illustrate how these conflicts are dealt with and resolved.
-
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The possible conflicts between rights are resolved by the TC through the constitutional protection resource, and by the ordinary judges and courts through the proceedings described in question 5.



Perhaps the most prominent is the conflict between freedom of expression and information and the rights of honour and personal and family privacy, usually by reason of journalistic news reporting of public figures. The TC has a long and continuous case that makes the protection of one right or another depend on the protection, depending on the relevance that the divulged information holds, provided it is true, or the opinion express, whenever it is not formally injurious, for the formation of a free and pluralistic public opinion (by all STC 19/2014, of the 10th of February).

- ✓ **Are there, in your countries, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?
Please give examples, and illustrate how these conflicts are dealt with and resolved.**

The content of the constitutional rights must be integrated with those that the international conventions and their jurisprudence give to right of a similar bill which can be found in their writings. All conventional right that does not find a similar right in the Spanish Constitution (CE) is considered a right of legal range and not constitutional. In this area, there are two areas in which there are tensions between the constitutional and conventional rights: right to effective judicial protection and criminal law penalties. Here, the case that can be used as an example is that relative to the double judicial body and the right to resource. And the recognition of certain conventional rights to foreigners that are not considered, in Spain, as constitutional rights or contents of the constitutional rights enshrined in the CE. As an example of correction and integration, we can cite the case of noise and the right to intimacy and to inviolability of the home.

Nevertheless, some conflicts are observed in the regulations implementing these civil rights:

1. Conflicts between civil rights

-Economic compensations by violations of the right to honour and reputation: some "inconsistencies" are seen in the legal characterization of these violations. Some operators interpret that the rights of the injured party are affected (personal status and art. 18 CE) and apply the law of nationality (art. 9.1 Civil Code). However, other operators interpret that the exercise of freedom of expression is affected (art. 20 CE) and, for these reasons, the law where the harmful event occurs is applied (art. 10.9 Civil Code).

2. Conflicts between "civil rights" and "other rights"

2.1. Healthcare for irregular foreigners: the irregular foreigners are not entitled to free healthcare, unless that they have made a special agreement with the Social Security, they are minors, they are pregnant women or they require urgent care for serious illness or accident. The regulation is pending a



ruling by the Constitutional Court and probably the Court will determine the delimitation between right to life (art. 15 CE; Art 2 ECHR = civil right) and the right to protection health (art. 43 CE = Principle governing social and economic policy; art 35 EUCFR).

2.2. Rights of foreigners to family reunification: the foreigner with a residence permission in Spain may reunify his family fulfilling certain legal requirements. Delimitation arises between the right to family privacy (art. 18 CE= civil right) and the right to family life, such as legal protection of the family (art. 39 CE = Principle governing the social and economic policy). The Spanish Constitutional Court has understood that the right of reunification is outside the scope of "civil right" (STC 236/2007) .

3. Conflicts between relevant individual civil rights and public interests

3.1. Name with a foreign element: the right to the name and surname of foreigners, framed in the development of personality (art. 10 CE) and the right to own image (art. 18 CE and STC 20/1992 , STC 117/1994), shall respect public policy. In particular, if the foreign national law established that the wife will be designated with the surname of her husband, in addition her name at birth shall be included (art. 137 Regulation of Civil Register). Similarly, the foreign woman transmitted her birth surname to children who have Spanish nationality .

3.2. Right of marriage and polygamous marriage: men and women have the right to marry with full legal equality (Article 32 CE). In order to implement this right, bridal capacity is governed by the national law of the spouses (art. 9.1 Civil Code). However, the personal law which allows polygamous marriage violates public policy, in particular the full legal equality between men and women. But also it is true that is possible the attenuation of the public policy in order to protect the family (article 39 EC as Principle governing social and economic food) or to obtain maintenance or inheritance or even widowhood pensions for successive spouses [Res. DGRN of March 8, 1995 and (2nd) of 14 May 2001; Social Court of A Coruña of 13 July 1998, Social Court of Barcelona of 10 of October of 2001, dissenting opinion in Superior Court of Justice of Catalonia of 30 July of 2003] . It is also admitted "potential polygamous", in other words, the first marriage of both spouses (Res. DGRN of April 23, 1998). The attenuated effect of public order against the polygamous marriage is also present on the right to family reunification [art. 17.1.c) Organic 4/2000] .

3.3. Right of marriage and repudiation: there is a case of apparent conflict between public interest and the right to marry (Article 32 CE), which is resolved in favour of the fundamental right. This is the case of remarriage in case of repudiation. In principle, the foreign is not recognized in Spain under public order grounds, due to the discrimination of women and the damage of honour. However, Spanish authorities mitigate the impact of the Spanish public order if the repudiated woman invokes such repudiation in order to conclude a second marriage.

Oviedo, 28 April 2014



THE UK AND IRELAND

QUESTION 1: IDENTIFICATION OF CIVIL RIGHTS

✓ ***Which rights are considered in the UK and Ireland as civil, civic and citizenship rights?***

1. There are significant conceptual difficulties in discerning what are considered civil, civic and citizenship rights in the United Kingdom, and, to a different degree, in the Republic of Ireland. The terms 'civil' or 'civic rights' have had a relatively recent introduction into the legal discourse of both jurisdictions, although the legal systems of both have a long history of the protection of personal liberty at common law. The difficulties faced in identifying which rights are considered to be civil rights are first, semantic and, second, rooted in the type of legal systems present in the UK and Ireland.

² The first difficulty is the diversity of terminology in the area of rights — i.e. human rights, fundamental rights, constitutional right, civil liberties, and civil rights. The general position has been that, while human rights and civil liberties have overlapping considerations, the two terms cannot be used interchangeably.¹ Human rights have an international dimension, found in documents such as the UN Declaration of Human Rights, and the European Convention on Human Rights. The term 'civil liberties' is more common in the academic discourse of the UK. Civil liberties are understood as 'those freedoms which relate specifically to a persons' position as a "citizen" within a democratic society',² alternatively defined as the 'law and practice of political freedom'.³ The diversity of terminology in the area of rights can be explained as a result of the historical development of rights protection in the UK and in Ireland, and reflect the different justifications for guarantees of rights. In the UK, the traditional values of liberty and freedom are considered to be consequences of the rule of law, rather than as basic human entitlements.⁴

3. In the Republic of Ireland, there has been a similar debate as to the meaning and scope of civil liberties and human rights. In academic discourse, there is a similar distinction to that made in the UK between civil liberties as personal freedoms guaranteed by the state (such as liberty and freedom of expression), and 'human rights' which are taken to mean the 'inalienable moral entitlements that attach to all persons equally by virtue of their humanity'.⁵ Additionally, the concept of natural law has historically gained wide credence in Irish legal and judicial circles,⁶ and there are also references to 'natural rights'. These are basic entitlements of an individual 'by virtue of his rational being' which are

¹ R. Stone, *Civil Liberties and Human Rights* (Oxford: Oxford University Press, 2012), 3.

² *Ibid.*, 4.

³ D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford: Oxford University Press, 2002), 3. In academic literature, civil liberties is the term most often used in the context of the UK.

⁴ B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013).

⁵ M. Forde & D. Leonard, *Constitutional Law of Ireland*, 3rd ed. (London: Bloomsbury, 2013), 285.

⁶ *Ibid.*; see also A. Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice* *Irish Jurist* 48 (2012): 71; and cf the debate between G. Hogan and R. Humphreys, G. Hogan, 'Constitutional Interpretation' in ed. F. Litton, *The Constitution of Ireland 1937-1987* (Dublin: Institute of Public Administration, 1988); G. Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-evaluated', *Irish Jurist* 25-27 (1990-1992): 95; R. Humphreys, 'Constitutional Interpretation', *Dublin University Law Journal* (1993): 59; and R. Humphreys, 'Interpreting Natural Rights', *Irish Jurist* 28-30 (1993-1995): 221.



‘antecedent to positive law’.⁷ These rights include equality and private property, rights which can be identified as civil rights. The focus on ‘natural law’ and ‘natural rights’ in Ireland is a point of contrast to the ‘rule of law’ inspired civil liberties in the UK, and it has sometimes led to judgments concerning rights imbued with Christian values.⁸

4. The adoption of the concept of human rights through the ratification of the Universal Declaration of Human Rights, and the incorporation of the European Convention on Human Rights [ECHR] in the British and Irish legal systems has also influenced the conception of rights and has additionally introduced the term ‘human rights’ into general legal discourse.

5. The incorporation of the ECHR in the UK and Ireland highlighted a second cause for difficulty in identifying civil rights in the UK. There is that there is no national Bill of Rights which enumerates civil rights in the UK, nor is there a single constitutional document which accounts for a source for civil rights or liberties, or determines the relationship between state powers in the UK. The British constitution is considered to be either ‘unwritten’ or ‘uncodified’.⁹ It is accounted for in several sources, however, and there are a number of ‘constitutional instruments’. According to the Supreme Court, these constitutional instruments include: the Magna Carta, the Petition of Right 1628, the Bill of Rights 1689, and the Claim of Rights Act 1689 (Scotland), the Act of Settlement 1701 and the Act of Union 1707, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005.¹⁰ An additional complication is the fact that the UK is constituted of four countries – England, Scotland, Wales and Northern Ireland, three of which exercise devolved powers through a national Parliament (Scotland) or Assembly (Wales and Northern Ireland).

6. As a point of contrast, the Republic of Ireland has a written constitution. The 1937 *Bunreacht na hÉireann*, or Constitution of Ireland, guarantees a certain number of civil and political rights, including freedom of association, expression and thought. These rights were enumerated under the banner of ‘Personal Rights’, and have been interpreted by the Supreme Court to include other rights including bodily integrity and the right to travel. The term ‘Fundamental Rights’ also features in the Irish Constitution, and is the umbrella term for the articles concerning personal rights, the family, education, private property and religion. The debates over the impact of ‘human rights’ have similarly only entered general discourse in Ireland in the last few decades with the increase of cases against Ireland in the European Court of Human Rights in Strasbourg, and the incorporation of civil rights norms into Irish law with the Human Rights Act 2003.

7. It is important to understand in the context of the legal systems of the UK and Ireland, that the legal framework of rights protection is shaped both by legislation (for example, the Human Rights Acts which incorporate the ECHR into UK and Irish law) and by the jurisprudence of the courts.

⁷ Art. 43.1.1 Constitution of Ireland. This Article guarantees private property.

⁸ See for example, *People v. Shaw* [1982] 1 I.R. 1, 63. See further A. Kavanagh, ‘The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice’, *Irish Jurist* 48 (2012): 71.

⁹ For introduction and analysis of constitutional law in the UK, see N. Parpworth, *Constitutional and Administrative Law*, 7th ed. (Oxford: Oxford University Press, 2012), Ch. 1; P. Leyland, *The Constitution of the United Kingdom: A contextual analysis* Constitutions of the World, 2nd ed. (Oxford: Hart. Publishing, 2012); and C. Turpin & A. Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge: Cambridge University Press, 2007).

¹⁰ *R. (HS2 Action Alliance) v. Secretary for State for Transport* [2014] U.K.S.C. 3, [2014] 1 W.L.R. 324, [207]. Of these, the Human Rights Act 1998 was intended as a means to incorporate rights under the European Convention on Human Rights.



✓ ***Amongst those rights, which are considered 'core'?***

8. Despite confusion over the identification of civil rights norms in the UK and Ireland, it is still possible to discern core 'civil' rights guaranteed and protected in both jurisdictions. In the UK, the essential, or core, civil liberties are considered to be: liberty¹¹ and due process,¹² freedom of expression,¹³ freedom of assembly and association, and the right to vote.¹⁴ Case law in the UK indicates that there is a strong presumption against parliamentary interference with these core rights.¹⁵ The right to vote is considered a right of citizenship, and an essential feature of a democratic state, in both the UK and Ireland, however, it is considered to be at the fundamental to the concept of citizenship.¹⁶ However, as it is otherwise considered a political right, it will not be considered in this Report.

9. In the Republic of Ireland, certain personal rights which are identified as 'inviolable and sacred' in the Constitution. These core rights include equality before the law, liberty and due process, and the right to private property.¹⁷ By way of contrast, the Constitution also enumerates the freedom of expression, and freedom of association as personal rights, but they are, however, qualified and subject to public order and morality.¹⁸ Interestingly, the right to vote is not included in the Fundamental or Personal Rights articles of the Irish Constitution.¹⁹

¹¹ *R. v. Hallstrom, ex p W (No 2)* [1986] Q.B. 1090; see also F. Bennion, *Statutory Interpretation*, 5th ed. (London: Butterworths, 2008), pt. XVII.

¹² *Attorney General v. Guardian Newspapers* [1974] A.C. 373; *R. v. Secretary of State for Home Department, ex p Leech (No 2)* [1994] Q.B. 198; and *R. v. Lord Chancellor, ex p Lightfoot* [1998] 4 All ER 764.

¹³ *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] A.C. 339; and *R. v. Secretary of State for the Home Department, ex p Simms* [2000] 2 A.C. 115.

¹⁴ Gearty, *Civil Liberties*; and C.A. Gearty & K.D. Ewing, *The Struggle for Civil Liberties* (Oxford: Oxford University Press, 2001), Ch. 1.

¹⁵ R. Clayton & H. Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2009), Ch. 1.

¹⁶ Gearty, *Civil Liberties*.

¹⁷ Art. 40.3 Constitution of Ireland.

¹⁸ Art. 40.6 Constitution of Ireland. The right of association is further qualified so as not to contain political, religious or class discrimination.

¹⁹ The right to vote for all citizens and any others as determined by law, is guaranteed by Art. 16.1, as part of the articles concerning the constitution and election of Dáil Éireann, or the Irish Parliament.



QUESTION 2: NATIONAL SOURCES OF CIVIL RIGHTS

- ✓ *Where are these civil rights laid down at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, or other legal documents, policy instruments, other sources)?*

10. The framework of protection of civil rights in the UK and Ireland has developed significantly over the past two decades in light of the incorporation of European civil rights norms into the national legal frameworks. Both the UK and Ireland are common law legal systems, and have incorporated human rights with a similar method in recent years, and so have significantly common elements in the discussion of civil rights. The law is not codified in either Ireland or the UK in a manner which is as clearly recognisable as in the rest of Europe.

11. The following sections provide an introduction to the main sources of civil rights at national level, followed by an overview of the law relating to individual civil rights in the UK and in Ireland. The focus is placed on the laws of England and Wales, while the laws of Northern Ireland and Scotland are considered where they significantly diverge from the law in the rest of the UK. A consideration of the protection of civil rights in the Republic of Ireland follows consideration of the law in the UK. The legal framework for civil rights is complicated by its source and interpretation, but the following aims to provide guidance on civil rights protection in both Ireland and the UK.

Introduction to the Main Sources of Civil Rights: United Kingdom

12. The most immediately identifiable legal source of civil rights in the UK is found in the Human Rights Act 1998, which has incorporated the European Convention on Human Rights into UK Law. The incorporation of the Human Rights Act 1998 was not intended to restrict other rights or freedoms conferred 'by or under any law having effect in any part of the United Kingdom',²⁰ and additional sources of rights protection can be found in legislation and the common law.

13. In order to appreciate the constitutional significance of the Human Rights Act 1998, it is important to understand the doctrine of parliamentary sovereignty. This doctrine dictates that the will of Parliament, as expressed through legislation, is supreme over any other contrary law or measure. Parliament is permitted to make and unmake any law, and is immune from any higher authority or order. A bill of rights, or other constitutional document, which implies a possibility of immunity from any legislative change, is a concept which runs contrary to the doctrine of parliamentary sovereignty. On the same account, it is not possible for any court to invalidate primary legislation (Act of Parliament) on constitutional grounds,²¹ and the doctrine has been employed to justify limiting the incorporation of the ECHR into UK law. However, the doctrine has been modified significantly since accession to the EU, and

²⁰ Human Rights Act 1998, s. 11.

²¹ The classic definition of Parliamentary Supremacy which has shaped UK constitutional discourse is A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th rev. ed. (Indianapolis: Liberty Fund Classics, 1985), Ch. IV, pt. 2.



in light of case law concerning the direct effect and primacy of Union law.²² Additionally, there has been devolution of certain executive and legislative powers from Parliament in Westminster, to the Scottish Parliament, and the Northern Irish and Welsh Assemblies, which has impacted on the powers of Parliament.²³

14. In response to the doctrine of parliamentary sovereignty, the courts have adopted certain approaches to protect rights. For example, it is not possible for rights to be subject to implied repeal by Parliament, and so a statute will not be construed by the courts so as to abrogate fundamental rights unless there is express wording to that effect. An alternative explanation of this principle is that fundamental rights cannot be overridden 'by general or ambiguous words'.²⁴ The justification for this is that Parliament is subject to political (and not legal) restraints,²⁵ and so should be subject to democratic accountability by the electorate. It is important to note that methods of statutory interpretation guided by precedent in the common law have also changed in recent years due to the Human Rights Act 1998, which has given direction on the interpretation of legislation in light of Convention Rights. This will be discussed below.

15. A further feature of the UK is that the legal systems of England, Northern Ireland and Wales are based on the common law, whereby part of the body of law is derived from custom and judicial precedent. The law is in this sense not codified. The legal system of Scotland has mixed elements of common and civil law. In addition, the court systems of Northern Ireland, and Scotland are separate from that of England and Wales.

16. There has been a wealth of discourse and development in the area of civil liberties over the centuries of the common law,²⁶ and some civil rights have existed as legal customs or principles in the common law prior to enumeration in a statute. One example of this is the concept of procedural fairness (an aspect of the right to a fair trial) which is a customary feature of a common law legal system. The traditional values of the common law have been property, the enforcement of agreements, reputation and fair procedures²⁷ – all of which are elements of civil rights. However, the common law has traditionally been associated with *negative* liberties (or the freedom of interference from others), and has not developed an account of positive rights.²⁸

17. The call for a UK-based bill of rights resulted in political and popular reluctance for the introduction of justiciable rights which would impact on parliamentary sovereignty.²⁹ There was also judicial

²² See *R. v. Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 A.C. 603; *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1991] A.C. 603 (HL); and *R. (HS2 Action Alliance) v. Secretary for State for Transport* [2014] U.K.S.C. 3, [2014] 1 W.L.R. 324

²³ It is important also to note that a referendum on the independence of Scotland will be held in September 2014.

²⁴ *R. v. Secretary of State for the Home Department, ex p (Simms)* [2000] 2 A.C. 115, 131 (Lord Hoffman); *R. v. Secretary of State for the Home Department, ex p Pierson* [1998] A.C. 539, 575 (Lord Browne-Wilkinson).

²⁵ *R. v. Secretary of State for the Home Department, ex p (Simms)* [2000] 2 A.C. 115, 131 (Lord Hoffman).

²⁶ See further, Clayton & Tomlinson, *The Law of Human Rights*, 37 et seq.; and T. Allen, *Constitutional Rights and the Common Law: Law, Liberty and Justice* (Wotton-under-Edge: Clarendon Press, 1993), Ch. 6.

²⁷ H. Davis, *Human Rights and Civil Liberties* (Milton: Willan Publishing, 2003), 16.

²⁸ F. Klug, K. Starmer & S. Weir, *The Three Pillars of Liberty* (Routledge 1998), though please note this publication is prior to the Human Rights Act 1998. See also: Gearty, *Civil Liberties*.

²⁹ See eg, K. Ewing, 'The Futility of the Human Rights Act' *Public Law* (2004): 829.



opposition to the introduction of a UK Bill of Rights, as it was argued that it would impact on judicial independence and the reputation for impartiality of the courts, and so public confidence in the judicial system.³⁰ The introduction of the Human Rights Act 1998, was welcomed as a popular alternative, which incorporated Convention rights into UK law, while respecting the unique constitutional arrangement of the State.³¹

The Human Rights Act 1998 (UK)

18. The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 has led to direct engagement with human and civil rights norms by the Parliament and the courts.³² However, the scheme of the Human Rights Act 1998 (UK) is both 'complicated and unique'.³³ The central principle of the Act is that it is unlawful for public authorities to act in a manner which is incompatible with convention rights.³⁴ However, these rights, including civil rights, have only been indirectly incorporated into UK law.

19. The Human Rights Act creates an obligation on the courts to interpret primary legislation in a manner which is compatible with Convention rights in so far as is possible.³⁵ In the event that this is not possible, the courts may issue a declaration of incompatibility.³⁶ This declaration does not affect the validity, operation or enforcement of the legislation.

20. The Human Rights Act 1998 imposes a duty on public authorities to act in accordance with Convention rights, unless it is impossible to do so under the current legislative schema. A failure to act in accordance with convention rights give a public law right of action to an aggrieved party, and they can seek damages or other relief in the courts.³⁷ A victim of a breach of convention rights may also rely on these right in legal proceedings.³⁸ The process of judicial review in the UK enables claimants to challenge the decision of a body performing a public function in the High Court. The grounds upon which the decision may be challenged are either that the body has acted or illegally (including for breach of human rights), or not reached using the correct procedures, or that the decision was reached unfairly or irrationally.

³⁰ Lord Denning, 269 H.L. Deb., 25 March 1976, cols. 797–98.

³¹ Clayton & Tomlinson, *The Law of Human Rights*, ch. 2.

³² The judicial function of the House of Lords was separated from legislative function in October 2009, becoming the Supreme Court of the United Kingdom.

³³ S.H. Bailey, N.W. Harris & ors., *Bailey, Harris & Jones civil liberties: cases, materials, and commentary*, 6th ed. (Oxford: Oxford University Press, 2009), 33.

³⁴ Art. 6(1) Human Rights Act 1998.

³⁵ s. 3 Human Rights Act 1998.

³⁶ s. 4 Human Rights Act 1998.

³⁷ s. 8 Human Rights Act 1998.

³⁸ s. 7 Human Rights Act 1998.



21. A potential weakness in the method of incorporation of civil rights is the limited possibility of judicial review under the current legal framework, compared with other Member States of the EU. The UK courts have the power to strike down subordinate legislation on the basis that it is *ultra vires* the primary legislation.³⁹ However, the courts do not have the power to strike down primary legislation. The suggestion of strengthening the justiciability of rights to include the power to strike down primary legislation has caused concern and objection for a number of reasons. One objection is that it involves the courts in political and social matters to a greater extent than ought to be the case in a democracy.⁴⁰ Cases which involve positive rights could also call upon the court to consider matters of government spending, which is considered to be solely a matter for the Government.⁴¹ An argument against this position is that the courts are often called upon to rule on matters of sensitive political or social issues, and is furthermore better placed to adjudicate on issues concerning minorities or individuals, as it is insulated from government directed by majoritarian politics.

Introduction to the Sources of Civil Rights: Republic of Ireland

22. Ireland is also a common law country and much of the body of law is based on judicial precedent. However, in distinction to the UK, Ireland has a written constitution which serves as the main source of civil rights. The civil rights are enumerated in the Constitution under the heading of 'Personal Rights'. They include the freedom of expression, assembly and association; the right to free movement; right to family life; and the right to private property. In addition to these enumerated rights, a doctrine of unenumerated, or unspecified, rights was developed by the Supreme Court of Ireland. These are rights which 'result from the Christian and democratic nature of the State', however, the jurisdiction to identify them should 'be exercised with caution'.⁴² These unenumerated rights include civil rights such as the right to bodily integrity,⁴³ and the right to privacy.⁴⁴ It has been suggested that modern identification of unenumerated rights which flow from the guarantee of the personal rights of citizens in Art. 40.3.1 should be inspired by international human rights standards.⁴⁵

23. In further distinction to the UK system of rights protection, judicial review of primary legislation and the possibility to it down on the basis of constitutional invalidity is a feature of the Irish legal system. The higher courts have the power to invalidate measures which are not consistent with the Constitution. This is stated both explicitly and implicitly in the Irish Constitution.⁴⁶ The Oireachtas, or Irish Houses of

³⁹ This is the case in which a statutory instrument acts beyond the powers or scope given to it by the primary legislation.

⁴⁰ Bailey, & Harris, *Civil Liberties*, ch. 1.

⁴¹ cf the Irish context, the series of cases concerning the reluctance of the Court to impose positive duties on the government in light of the right to education based on the separation of powers: *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20; *TD v. Minister for Education* [2000] 3 I.R. 62; and *Sinnott v. Minister for Education* [2001] 2 I.R. 545.

⁴² *Ryan v. Attorney General* [1965] 1 I.R. 294 (per Kenny J.).

⁴³ See *Ryan v. Attorney General* [1965] I.R. 294; and *McGee v. Attorney General* [1973] I.E.S.C. 2, [1974] I.R. 284.

⁴⁴ *McGee v Attorney General* [1973] I.E.S.C. 2, [1974] I.R. 284. See generally D. M. Clarke, 'Unenumerated Rights in Constitutional Law' (2011) 34 I.R. Jur 101.

⁴⁵ Forde & Leonard, 299.

⁴⁶ Art. 50 states that all laws which are in force before the enactment of the Irish Constitution in 1937 are still in force so long as they are not inconsistent with Constitutional provisions.



Parliament, are not permitted to enact any law which contravenes the Constitution.⁴⁷ There are, however, some unreviewable acts, including EU measures,⁴⁸ emergency laws,⁴⁹ bills which have already been referred by the President to the Supreme Court,⁵⁰ and referenda.⁵¹

24. As many civil rights are counted as constitutional rights in the Irish Constitution, it is possible to challenge primary legislation on the basis of a violation of these rights. In the case of a constitutional challenge, there is a strong presumption of the constitutionality of the legislation, reflecting both a deference in the courts for the separation of powers, and concerns for the legal uncertainty that would arise for individuals and government.⁵² There is also a principle of ‘double construction’ in Irish constitutional law, which has similar aspects as the interpretative duties on the UK courts in the context of human rights. Where it is possible for a provision to be construed in two ways, one of which is constitutionally valid and the other which is not, then the courts are obliged to read the provision in a way in which it is valid.⁵³ This also is a feature of interpretation of EU legal measures, called ‘conforming interpretation’,⁵⁴ and part of the interpretative obligations under the Human Rights Act 2003 (Ireland).

A finding of unconstitutionality renders the offending section of the legislation or legal measure void *ab initio*. However, the implication of retrospective application was tested in the Supreme Court in the *A. v. Governor of Arbour Hill Prison*.⁵⁵ The Supreme Court held that retrospective application was neither express nor implied by the Constitution, and the principle *res judicata* dictated that once finality had been reached, judicial decisions must be deemed valid. In assessing whether retrospective application of the law was justified, the Supreme Court held it must take account of public order and whether the common good required the application to succeed. The majority of the Court also added that it was a common law principle that ‘a decision which effectively changed the law did not confer any right to reopen previous court decisions.’⁵⁶ It was determined that it was in the common good for convictions and sentenced deemed lawful to be reopened would be against the common good.

The human rights act has changed the scope of human rights significantly, as courts have gradually become familiar with its provisions. While it was initially treated with some scepticism by the courts, there is an increasing trend in case law for the court to take account of the Convention.⁵⁷

⁴⁷ Art. 15.4.1°.

⁴⁸ Art. 29.4.10° states that measures adopted under Ireland’s obligations to the EU cannot be declared unconstitutional.

⁴⁹ Art. 28.3.

⁵⁰ Art. 26 provides for the President of Ireland to refer bills to the Supreme Court to judge their constitutional validity. Art. 34.3.3° does not permit any subsequent challenge to the constitutional validity of these bills.

⁵¹ *Curtain v. Dáil Éireann* [2006] 2 I.R. 556. In matters of constitutional amendments, it was held that the people of Ireland should decide, not the courts. See further, Forde & Leonard, ch. 21.

⁵² Forde & Leonard, 40.

⁵³ *Grimes v. Owners of SS Bangor Bay* [1948] 1 UR 350; *In re JH* [1985] 1 I.R. 375.

⁵⁴ C-105/03 *Pupino* [2005] ECR 5285.

⁵⁵ *A v. Governor of Arbour Hill Prison* [2006] I.E.H.C. 169, [2006] 4 I.R. 88.

⁵⁶ *A v. Governor of Arbour Hill Prison* [2006] I.E.H.C. 169, [2006] 4 I.R. 88, 89.

⁵⁷ See G. de Búrca, ‘The Domestic Impact of the EU Charter of Fundamental Rights’, *Irish Jurist* (2013): 49.



The Human Rights Act 2003

25. The Human Rights Act 2003 incorporated the ECHR into Irish law. The schema for protection of civil rights in the UK under the Human Rights Act 1998 can be contrasted with the Irish method for the incorporation of the ECHR. The Human Rights Act 2003 (Ireland) was introduced with the aim of ‘further incorporating’ the ECHR into the Irish legal system. The Human Rights Act 2003 drew heavily upon the UK Human Rights Act 1998, but adapted the legislation to suit the written Irish constitution. The method of incorporation was also an interpretative obligation on the courts, but at sub-constitutional level.⁵⁸ Section 2 of the Act also creates an interpretative duty to interpret legislation in so far as is possible with Convention rights, including civil rights. Echoing the UK Act, if this is not possible, a declaration of incompatibility may be issued. It is also possible that a declaration of incompatibility may lead to an *ex gratia* award of damages. Under Section 3, a new action in tort is created for breach of statutory duty by organs of the state to discharge their functions in a manner compatible with the ECHR, which may lead to damages or equitable relief.

An Overview of Civil Rights Protection in the UK and Ireland

26. As common law states, the laws of the UK and Ireland have been shaped by judicial precedent, and many protections of civil rights can be found in the case law of the courts. In both the Irish and British jurisdictions, the case law of the European Court of Human Rights is highly persuasive, but not binding, precedent in the national courts. As will be illustrated below, in many instances the law has developed in light of the decisions of the European Court of Human Rights, however, in other cases there has been noticeable divergence between the decision of the European Court of Human rights and the jurisdictions of Ireland and the UK. It is important to remember that while case law in the area of civil rights has fundamentally changed with the adoption of the Human Rights Act 1998 (UK) and the Human Rights Act 2003 (Ireland), the scope of protection in both jurisdictions is determined by national constitutional norms. The legal framework of rights protection in both jurisdictions is both framed and understood by reference to civil rights case law. In some instances there is no clear legal framework, or legislation, and so reference must be made to any indications of the court.

Right to Free Movement (Migration and Residence Rights)

United Kingdom

27. There is no constitutional provision for the freedom of movement in the UK, however it is protected at common law for UK citizens. The movement and residence of non-UK citizens is governed by either EU law (for EU citizens and their dependants)⁵⁹ or immigration legislation for non-UK and non-EU

⁵⁸ Human Rights Act 2003, Ireland; see further D O’Connell, ‘Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003’ in ed. U. Kilkelly, *ECHR and Irish Law*, 2nd ed. (Jordans Publishing, 2009).

⁵⁹ Directive 2004/38. The Directive was incorporated into UK law through the Immigration (European Economic Area) Regulations 2006. It was incorporated in Ireland under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.



citizens. There has been some reported concern over potential challenges to EU citizens exercising their rights to free movement and residence in the UK.⁶⁰

28. Foreign nationals (other than those to whom EU rights apply) must make a formal application to the Home Office to be granted leave to enter and remain in the UK, this may be limited by time or other conditions. A new Immigration Act 2014 was enacted in May 2014, and contains an assessment on ECHR compatibility as an addendum. The act is intended to make it difficult for those who have no entitlement to remain in the UK by making access to services and benefits of legal residents difficult.⁶¹ The Act was assessed for its compliance with the Human Rights Act 1998, and this assessment was included as a memorandum to the Act. A supplementary memorandum was published by the Home Office in light of the proposed amendment to the Immigration Act 2014, which would allow for the deprivation of citizenship. Considerations of this provision are still ongoing, but are considered further in this Report under the section on the Right to Protection against loss of Nationality.

Republic of Ireland

29. In addition to the same obligations under the EU Treaties to the guarantee of the fundamental right of free movement, the right to move and travel is a constitutionally recognised right in Ireland. The cases which ultimately led to the constitutional amendment which guarantees the right to travel concerned whether it was constitutionally permissible to prevent a pregnant woman to travel to the UK with the intention of seeking an abortion. The Supreme Court held that, though the right to travel was not then explicitly stated within the Constitution, it is an essential right in a democratic country.⁶² This right is now enshrined in the Constitution as part of Article 40.3.

30. The rights of refugees to move and reside within the state are governed by the Refugee Act 1996, which guarantees the same entitlements to reside and travel in, to and from the state as Irish Citizens. However, the entitlement to a travel document for a refugee is subject to public policy and national security interests.

Right to Equal Treatment

31. The main source of protection for the right to equal treatment in both the UK and in Ireland is the recent Equality Acts. These Acts identify protect categories of persons, against which discrimination is prohibited. They both further clarify the contexts in which discrimination is prohibited. The Equality Act 2010 (UK) identifies 'protected categories' as:

- Age
- Disability
- Marriage and Civil Partnership

⁶⁰ For further consideration, see T. Horsley & S. Reynolds, 'Union Citizenship: Development, Impact and Challenges; National Report on the United Kingdom' (FIDE XXVI Congress Copenhagen 2014).

⁶¹ Immigration Bill: European Convention on Human Rights Memorandum by the Home Office (London: Home Office, October 2013), 1.

⁶² *Attorney General v. X* [1992] 1 I.R. 1.



- Gender reassignment
- Pregnancy and Maternity
- Race
- Religion and Belief
- Sex
- Sexual Orientation

32. The Act sets out the different prohibited forms of discrimination, including both direct and indirect discrimination, harassment, and failing to make a reasonable adjustment for a disabled person. It prohibits discriminatory or unfair treatment in employment, provision of goods and services, education, in public function, management of premises and by associations.

33. The Equality Act 2010 has been supplemented by additional legislation. The Equality Act 2010 (Specific Duties) Regulations 2011 which sets out certain equality duties which public sector authorities must comply with. A general duty of equality requires public bodies in the exercise of their functions to have due regard to the elimination of discrimination, harassment and victimisation. In practice, this is the requirement to take positive steps to meet the needs of protected groups, to encourage their participation and to minimise or remove disadvantages suffered by protected groups due to their protected characteristics.

34. The National Assembly for Wales has regulated specific duties under the Equality Act 2010, with the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. These duties include a statutory obligation to report Equality Impact Assessments on all policies, processes and practices (including the Budget) of the public sector in Wales. Similarly, in Scotland, the Scottish Parliament enacted the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These regulations creates duties including the publication of equality progress reports every two years, impact assessments, reports of positive actions.

35. In addition to these measures across the UK, the Human Rights Act 1998 has incorporated relevant rights for equal treatment under the ECHR. Article 14 also covers a prohibition on discrimination based on political opinion, economic or social status as well as ‘any other status’.

Republic of Ireland

36. In Ireland, the concept of equality was historically narrowly construed, based on the guarantee of equality before the law in the Irish Constitution.⁶³ This position changed, following accession to the European Communities, and the assertion of the primacy of Community law. As equality was long recognised as a fundamental principle of European Law, a more meaningful concept of equality has been recognised in Ireland.⁶⁴

37. Equality law in Ireland is now governed by the Employment Equality Acts 1998-2011, and the Equal Status Acts 2000-2012 which set out the entitlements of equality, and the grounds upon which

⁶³ Article 40.1, Bunreacht na hÉireann.

⁶⁴ See further, M. Bolger, C. Bruton & C. Kimber, *Employment Equality Law* (Dublin: Round Hall Publishing, 2012), ch. 2.



discrimination is prohibited. These Acts prohibit discrimination in the contexts of employment, advertising, collective agreements, professional or trade services, health services, access to accommodation and education, banking, transports and cultural activities. The grounds on which discrimination are prohibited, are almost identical to the UK counterpart legislation, prohibiting discrimination on the grounds of sexual orientation, religion, race and disability. However, the legislation additionally prohibits discrimination on the grounds of membership of the Traveller community,⁶⁵ and allows discrimination based on age for those under 16. The Acts do not mention gender reassignment; and 'family' and 'civil status' feature instead of the categories of 'pregnancy and maternity', and 'marriage and civil partnership'.⁶⁶

Right to Privacy

United Kingdom

38. There has traditionally been an antipathy in the UK towards the protection of the right to privacy,⁶⁷ and no general right to privacy exists in the common law.⁶⁸ In *Wainwright v. Home Office*,⁶⁹ the House of Lords declined to develop a general tort of breach of privacy, concluding that existing actions gave specific and effective remedies. It has been argued in the UK that there is indirect protection of privacy under different categories of law. For example – the law regarding defamation can protect reputation; the privacy of the home and property can be protected under laws of property and the tort of trespass; and bodily integrity can be protected under criminal law or the tort of trespass on the body. In some instances, the higher courts have not considered actions to fall under the Right to Privacy. In *Wainwright*, it was held by the House of Lords that there is no obligation to justify strip searches under Article 8(2) ECHR, as they would not constitute a violation of the right to privacy under Article 8(1) ECHR. Similarly, the legality of the power to stop and search was not considered substantively addressed under the right to privacy;⁷⁰ a decision which was criticised by the European Court of Human Rights.

39. The position of the House of Lords, and then Supreme Court of the UK has been criticised by the European Court of Human Rights, and both Courts have often arrived at opposing positions in regards the right to privacy.⁷¹ For example, the retention of data including fingerprints and DNA material by the

⁶⁵ There have been similar concerns for the rights of traveller and gypsy communities in the UK: see e.g. *Buckley v. UK* (1997) 23 E.H.R.R. 101; *Chapman v. UK* (2001) 33 E.H.R.R. 18; and *Coster v. UK* (2001) 33 E.H.R.R. 20.

⁶⁶ 'Marriage' has historically had a special significance in the Irish constitution, which has previously been grounds for the Court to discriminate in favour of the institution, see *Murphy v. Attorney General* [1978] 1 I.R. 241.

⁶⁷ R. Clayton & H. Tomlinson, *Privacy and Freedom of Expression* (Oxford: Oxford University Press, 2010); and J. Wadham, H. Mountfield, E. Prochaska, & C. Brown, *Blackstone's Guide to the Equality Act 2010*, 6th ed. (Oxford: Oxford University Press, 2011), 196.

⁶⁸ *Kaye v. Robertson* [1991] FSR 62.

⁶⁹ *Wainwright v. Home Office* [2003] U.K.H.L. 53, [2003] 3 W.L.R. 1137.

⁷⁰ *R. (Gillan) v. Commissioner of Police for the Metropolis* [2006] U.K.H.L. 12, [2006] 2 A.C. 307. It was held unanimously by the House of Lords that it did not constitute a violation of Art. 5 ECHR.

⁷¹ For example, the House of Lords denied that the right to a private life was applicable in situations concerning individuals wishing to end their lives, *R. (on application of Pretty) v. DPP* [2001] U.K.H.L. 61, [2002] 1 A.C. 800. See also *ADT v. UK* (2001) 31 E.H.R.R. 33.



police were unanimously held by the House of Lords not to constitute a violation of a right to privacy;⁷² whereas the European Court unanimously held that retaining data pertaining to the private life of an individual constitutes a clear interference within the meaning of Article 8 ECHR.⁷³ In response to the judgment of the European Court, the Protection of Freedoms Act 2012 was enacted, limiting retention of biometric information to a period of 3 years, though this period may be extended on grounds of national security.

40. The right to privacy is closely related to the right to family life, and must also often be balanced against the conflicting right to freedom of expression. Many cases concerning privacy have involved the media. The recent phone-hacking scandal has resulted in investigations by the Leveson enquiry.

41. The legal test for the misuse of private information, as affirmed in *Murray*,⁷⁴ is whether, first, there is a reasonable expectation of privacy, and, if yes, the court must then balance the competing rights of the freedom of expression and the right to privacy. In terms of confidential information, it has been established that a duty of confidence arises where a person has notice that the information is confidential.⁷⁵ Similarly, while it has been reaffirmed that there is no general tort for breach of privacy in the UK, the development of law in breaches of confidence can provide a remedy where the information is private. This has been echoed in case law in Scotland,⁷⁶ and there is reason to believe that the law of confidentiality may also be used to protect individuals from unwanted press publicity.⁷⁷

Republic of Ireland

42. In Ireland, the Constitution does not expressly protect individual privacy as a personal or fundamental right. It was, however, held to be an unenumerated right protected under Article 40.3 of the Constitution.⁷⁸ This protection, however is not absolute, and will be outweighed by other concerns including the public interest,⁷⁹ the right to a public trial,⁸⁰ and the common good.⁸¹ In light of the

⁷² *R. (S) v. Chief Constable of the South Yorkshire Police* [2004] U.K.H.L. 39, [2004] 1 W.L.R. 2196.

⁷³ *s. and Marper v United Kingdom* [2008] ECHR 1581. Measures limiting data retention were introduced in the Protection of Freedoms Act 2012, based partly on the Scottish approach in the Criminal Procedure (Scotland) Act 1995, amended by the Police, Public Order and Criminal Justice (Scotland) Act 2006. The Data Protection Act 1998 (UK) gives effect to the European Data Protection Directive 95/46/EC, on the protection of individuals with regard to the processing personal data and the free movement of such data.

⁷⁴ *Murray v Express Newspapers Plc* [2008] E.W.C.A. Civ. 446, [2008] 3 W.L.R. 1350.

⁷⁵ *Attorney General v. Guardian newspapers Ltd (No 2)* [2004] U.K.H.L. 22, [2004] 2 A.C. 457.

⁷⁶ *Martin v. McGuinness* [2003] SLT 1424 (Lord Bonomy).

⁷⁷ *Campbell v. MGN Ltd* [2004] U.K.H.L. 22, [2004] A.C. 457.

⁷⁸ *McGee v. Attorney General* [1973] I.E.S.C. 2, [1974] I.R. 284; and *Kennedy v. Ireland* [1987] I.R. 587.

⁷⁹ *D.P.P. v. Kenny* [1992] 2 I.R. 141. Police surveillance was justified, even if there is a right to privacy in public.

⁸⁰ *Re Ansbacher (Cayman) Ltd* [2002] I.E.H.C. 27.

⁸¹ *Redmond v. Mr Justice Flood* [1999] 1 I.L.R.M. 241.



incorporation of the ECHR indirectly into Irish law, it has been argued that the right to privacy has been strengthened at the expense of the right to free expression.⁸²

Right to Family Life

43. There are many facets to the right to family life, such as marriage, partnerships, children and privacy of the home, which have gained different levels of attention and protection in the jurisdictions under consideration in this report. While the European Court of Human Rights has emphasised the high degree of autonomy of states on how they may guarantee the right to a family life,⁸³ the Supreme Court of the UK have strengthened the protection of family life in light of the ECHR.⁸⁴ There have been significant developments in the context of the related right to marry. The Marriage (Same Sex Couples) Act 2013, and the Marriage and Civil Partnership (Scotland) Act 2014 has legalised marriage for homosexual couples in England, Wales, and Scotland.

Republic of Ireland

In a contrasting position, the Irish Constitution explicitly directs the state to protect the ‘family’ based on marriage.⁸⁵ The concept of the family in Irish law has been interpreted by the Supreme Court to mean a married, heterosexual couple with a child. In some instances of conflicting rights, the Supreme Court has held that the primacy of a married family superseded other rights, including equality under the law.⁸⁶ The Civil Partnership Act 2010 in Ireland introduced the option of legally recognised status for same-sex couples in Irish, however, it did not change the law relating to children, in terms of adoption, guardianship, access and maintenance.

Freedom of Speech and Expression

United Kingdom

⁸² See P. Dillon-Malone, ‘Freedom of Expression, Privacy and the Media’ in ed. U. Kilkelly, *ECHR and Irish Law*, 2nd ed. (Dublin: Jordans, 2009).

⁸³ See e.g. *L., H. and A. v. UK* App No 9580/81, 13 March 1984; *M-F. v. UK* App No 11758/85, 16 May 1986. See also Dickson, *Human Rights and the United Kingdom Supreme Court*, 239 et seq.

⁸⁴ For example, ruling that a homosexual partner can qualify as a member of the family of a deceased tenant for the purposes of the Rent Act 1977 in *Fitzpatrick v. Sterling Housing Association Ltd* [2001] A.C. 27 (HL); *Ghaidan v. Godin-Mendoza* [2004] U.K.H.L. 30, [2004] 2 A.C. 557. See also *In re G.*, in which the House of Lords ruled that a child could be adopted jointly by an unmarried couple, despite the prohibition in the Adoption (NI) Order 1987.

⁸⁵ Art. 43, Constitution of Ireland.

⁸⁶ For example, *O’B. v. S.* [1984] 1 I.R. 316: the Supreme Court held that in the case of intestate succession under the Succession Act 1965, a non-marital child could not inherit before a living sibling or aunt or uncle of the deceased. The priority of Art. 43 regarding a family based on marriage could not be superseded by the equality guarantee.



44. There is a strong tradition of free speech in the UK: it is considered essential to the practice of democracy.⁸⁷ It has been described in the House of Lords as ‘the primary right in a democracy’, without which ‘an effective rule of law is not possible’.⁸⁸ In some academic discourse it has acquired status as a ‘quasi-constitutional principle’.⁸⁹ There are, however, exceptions to the guarantee of the right of free expression, including the law of defamation (restricting damage to the reputation of a person); obscenity and censorship (regulating the media on grounds of public morality or broadcasting); criminal law (prohibition on expression of religious or racial hatred, or incitement to violence); and national security (civil and criminal restraints on the disclosure of confidential or sensitive information).⁹⁰

Section 12 of the Human Rights Act 1998 contains provision specific to the freedom of expression, responding to concerns for press freedom but also potential conflicts with privacy rights. One way in which this is balanced in the section is a raise of the threshold of proof for the grant of an interim injunctions against the media, and directs the courts to have ‘particular regard’ to the freedom of expression in cases concerning conflict with other rights (notably, breaches of privacy). In terms of defamation, there is an apparent wariness in the courts of the ‘chilling effect’ on the media by excessive litigation. The Courts have provided defences to an action for defamation, including justification (or substantial proof that the publication is true); fair comment on a matter of public interest;⁹¹ and absolute privilege.⁹²

Republic of Ireland

45. The Irish position is in contrast to the UK position, with the advent of the ECHR, the right to privacy has been strengthened at the expense of the right to free expression. It has been held that the constitutional protection of privacy extends beyond actions against state agents to the process.⁹³ In terms of the protection of civil rights in private actions, the Defamation Act 2009 aims to balance the competing rights between freedom of expression, and the right to reputation: both constitutional and ECHR rights. It aimed to respond to developments both in the Irish courts and the European Court of Human Rights.

46. One element of the Defamation Act 2009 which has received a high degree of criticism was the creation of a new offence of blasphemous libel into Irish law. According to the Government, this was required under the provisions of the Constitution. According to Section 36, ‘a person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on

⁸⁷ See further E. Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005); F. Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge: Cambridge University Press 1982); and the highly influential J.S. Mill, *On Liberty* (Cambridge: Cambridge University Press, 1989).

⁸⁸ *McCattan v. Turkington Breen v. Times Newspapers* [2001] 2 A.C. 277, at 297 (Lord Steyn).

⁸⁹ E. Barendt, ‘Libel and Freedom of Expression in English Law’ [1993] PL 449, 450. See also Clayton & Tomlinson, *Privacy and Freedom of Expression*, 186.

⁹⁰ See also Clayton & Tomlinson, *Privacy and Freedom of Expression*, 187.

⁹¹ *Reynolds v. Times Newspapers Ltd* [2001] 2 A.C. 127; *Silken v. Beaverbrook Newspapers Ltd* [1958] 1 W.L.R. 743.

⁹² For example, statements made by witnesses in a trial, or statements made in Parliamentary proceedings. See further Clayton & Tomlinson, *Privacy and Freedom of Expression*, 205 et seq.

⁹³ *Herrity v. Associated Newspapers* [2008] I.E.H.C. 294, [2009] 1 I.R. 316.



indictment to a fine not exceeding €25,000'. However, to date, there have been no convictions under this provision.

Freedom of Religion

United Kingdom

47. The characterisation of the UK as a 'Christian country' by the Prime Minister, David Cameron, has caused some political controversy and public debate into the multicultural and multi-denominational Britain.⁹⁴ It is possible to argue that the relative lack of divisive case law in the UK Supreme Court on the freedom of belief has been taken to indicate the religious tolerance characteristic of Britain.⁹⁵ The protection of religious practice in 'domestic' and 'foreign' cases will be discussed below in terms of the territorial jurisdiction of the Supreme Court. Legislation seeks to balance competing interests, for example, the Equality Act 2010 aims to strike a balance between workers' rights to manifest their religious preferences, and the requirements of the business of the employer.

48. There have been some cases, however, concerning education and the freedom of religious expression. Freedom of religion under Article 9 ECHR will not enable parents to allow the mild use of corporate punishment in schools.⁹⁶ The Supreme Court has held that in order for a belief to fall under the protection of Article 9, it must 'be consistent with basic standards of human dignity or integrity', 'relate to matters more than merely trivial', 'possess an adequate degree of seriousness and importance', 'be a belief on a fundamental problem', and 'be coherent in the sense of being intelligible and capable of being understood.'⁹⁷ In a case concerning a student refusing to abide by school uniform policy on religious grounds, the House of Lords held that while there was an interference with the student's right to freedom of religious belief, it was justifiable. In the proportionality analysis, the court was influenced by the fact the student had chosen the school outside her area, that there were alternatives nearby, and that she had abided by the policy for two years previously.

49. In Scots Law, the Courts have emphasised the right of the Church of Scotland to regulate its own affairs.⁹⁸ It maintains a special significance in Scotland, while there have also been measures to respect the religious freedom of other beliefs, for example, protection against religious discrimination in employment now falls under the Employment Equality (Religion or Belief) Regulations 2003 (Scotland). In the criminal law, offences aggravated by religious prejudice now fall under the Criminal Justice (Scotland) Act 2003. The Education (Scotland) Act 1980 requires all independent schools to be registered with Scottish Ministers and makes no distinction between faith and non-faith schools in terms of requirements.

⁹⁴ P. Wintour, 'David Cameron Accused of Fostering Division in 'Christian' UK' (The Guardian, 21 April 2014).

⁹⁵ Dickson, *Human Rights and the United Kingdom Supreme Court*, 261–62.

⁹⁶ *R. (Williamson) v. Secretary of State for Education and Employment* [2005] U.K.H.L. 15, [2005] 2 A.C. 246.

⁹⁷ *R. (Williamson) v. Secretary of State for Education and Employment* [2005] U.K.H.L. 15, [2005] 2 A.C. 246 [23].

⁹⁸ *Logan v. Presbytery of Dumbarton* [1995] SLT 1228; *Percy v. Board of National Mission of the Church of Scotland* [2000] SLT 475.



Republic of Ireland

50. In the Irish context, Article 44.1 explicitly concerns the guarantee of freedom of conscience and practice of religion. Historically, the Roman Catholic Church has been given a 'special position' in the Irish Constitution, however, references to this favoured position and to other Christian churches were removed in 1973.⁹⁹ The Supreme Court of Ireland has since held that one religion does not enjoy greater protection over another, and is read in light of the Article 40.1 guarantee of equality.¹⁰⁰ However, the protection is limited to those with a religion conscious,¹⁰¹ and is subject to public order and morality.

51. The guarantee of non-discrimination between religions is subordinate to the provision guaranteeing the free practice of religion, and the State may discriminate if necessary.¹⁰² A concern often voiced regarding the right to freedom of religion, is in context of the educational provisions in Ireland. In numerous reports, it has been noted that while the population of Ireland is increasingly diverse, 96% of schools in Ireland are still denominational (90% Roman Catholic). There have been efforts by the Department of Education to increase the number of non-denominational schools. This is especially a concern for LGBT parents and single parent families, as under the Employment Equality Act 1998, there is an exemption allowing religious orders providing public services (such as schools or hospitals) to discriminate against current or prospective employees on the basis of religious or moral ethos.

Right to Property

Property rights in the UK

52. Property rights has a long-standing history in the common law, and may have its origins in the Magna Carta.¹⁰³ Blackstone, a highly influential 18th century jurist, ranked private property as '[t]he third absolute right inherent in every Englishman [...]'.¹⁰⁴ The right to property guaranteed by Article 1 of Protocol 1 ECHR, was incorporated into UK law by the Human Rights Act 1998. Similarly, property rights are guaranteed under Art 7(1) of the EU Charter, and Art 345 of the Treaty on the Functioning of the European Union. Property rights have been defined and defended in the British courts on the basis of agreements, inheritance and, in some cases, mere possession. It is, however, strange to consider property rights as *human* rights in the legal discourse in the UK. It also has been commented that English

⁹⁹ 5th Amendment to the Irish Constitution.

¹⁰⁰ *Corway v. Independent Newspapers (Ireland) Ltd* [1999] 4 I.R. 484; the protection is not limited to Christianity, *Quinn's Supermarket v. Attorney General* [1972] I.R. 1; however, the interpretation of Article 44 is informed by 'pluralistic Christian values' *McNally and Reilly v. Ireland* [2009] I.E.H.C. 573.

¹⁰¹ *McGee v. Attorney General* [1974] I.R. 284.

¹⁰² *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321.

¹⁰³ Clause 39 of the Magna Carta states: *Nullus liber homo ... disseisatur, ... nec super cum ibimus, nec super cum mitemus, nisi per legale iudicium parium suorum vel per legem terre* (no freeman shall be ... deprived of his freehold ... nor shall we take any order or action against him, except by the lawful judgment of his equals and by the law of the land).

¹⁰⁴ *Commentaries on the Laws of England* (1768) vol 3, at 138.



legal textbooks have limited coverage of the interactions between human rights under the ECHR, and property law.¹⁰⁵

Republic of Ireland

53. The right to property has constitutional protection under three articles of the Irish Constitution. Art 43 states that the State ‘acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods’ and furthermore guarantees ‘to pass no law attempting to abolish the right of private ownership...’.¹⁰⁶ The Right is then qualified to be regulated by the ‘principles of social justice’,¹⁰⁷ and as occasion requires, delimit the exercise of the rights ‘with a view to reconciling their exercise with the exigencies of the common good.’¹⁰⁸ Property rights are also protected within the personal rights guarantees of Art 40.3.2, which imposes a duty on the State, so far as it can, to ‘prevent [property rights] from unjust attack’ and ‘vindicate the ... property rights of every citizen’. The property rights of religious and educational bodies are protected in Art 44.2.6. The Supreme Court has stated that the substantive test on whether or not a legal measure interferences with the right of property does not differ from the European Court of Human Rights.¹⁰⁹

Right to Effective judicial protection

United Kingdom

54. Protection of the rights of the accused concomitant with the right to effective judicial protection has a long history in the UK. For example, the right to silence and the right against self-incrimination has existed since the early 17th century.¹¹⁰ Looking further back into English history, the Magna Carta in 1215, an act to limit the arbitrary power of the King, is considered the basis in English law for the principle that no person should be arrested, detained or punished unless ‘by lawful judgment of his peers and by the law of the land’.¹¹¹ It is clear that access to the courts is essential protection of civil

¹⁰⁵ Dickson, Human Rights and the United Kingdom Supreme Court, ch. 12.

¹⁰⁶ Art. 43.2. of the Constitution. The Supreme Court have clarified that the provision in Art. 43 is protection of the right to property in extreme circumstances, where there are moves by government to abolish property ownership. For most situations, the guarantees under Art. 40.3 are suitable: *Blake v. Attorney General* [1982] 1 I.R. 117.

¹⁰⁷ Art. 43.2.1°.

¹⁰⁸ Art. 43.2.2°.

¹⁰⁹ *Re Part V of the Planning and Development Bill 1999* [2000] 2 I.R. 321, 356. The case concerned the partial expropriation of land so that affordable housing could be developed on the site, it also referred to *James v. United Kingdom* (1986) 8 E.H.R.R. 123.

¹¹⁰ See J.H. Langbein, ‘The Historical Origins of the Privilege Against Self-Incrimination at Common Law’, *Michigan Law Review* 92 (1994): 1047.

¹¹¹ Clause 39 Magna Carta.



rights in a legal system, and so the realisation of effective judicial protection in the UK is a fundamental one. However, the term 'effective judicial protection' is more often found in context of European Union law, than national UK law. The most clearly related concepts to the right to effective judicial protection are the twin principles of fair trial and due process. These principles cover a wide body of related issues to effective judicial protection, including access to the courts, and fair trial rights including, for example, the presumption of innocence.

55. The common law does not provide an explicit framework for the rights related to fair trial and effective judicial protection. Instead, there has been a number of elements identified as 'fair trial rights' and aspects of due process in the UK. These elements include the right of access to the courts,¹¹² and judicial independence. The doctrine of natural justice has also guided the development of due process rights, requiring a 'fair trial'.

56. The application of Art 6 ECHR on the right to a fair trial has further influenced the development of the law. It has been interpreted to require procedural, rather than substantive, fairness and so has not been a source of any obligation on the State to recognise any particular civil right in a case.¹¹³ An essential aspect of these principles is the right to a public hearing before an independent and impartial tribunal. This aspect of effective judicial protection is currently perceived as under threat, as concerns for national security have resulted in an application to hold Britain's first fully-secret trial in the modern legal history of the country.¹¹⁴ Campaigners have argued that the decision to allow an entirely secret trial is contrary to the principle of open justice, and are 'inconsistent with the rule of law and democratic accountability.'¹¹⁵ In June 2014, the Court of Appeal expressed 'grave concerns' for the effect of anonymising the accused, and holding the hearings completely in secret. The core of the trial will remain in secret, but opening remarks, the swearing in of the jury, any verdicts and sentencing, as well as the identities of the accused will be available to be published by the Media.¹¹⁶

Republic of Ireland

57. The right to a fair trial in due course of law for the accused in criminal proceedings is a constitutionally protected right under Article 38.1 of the Constitution. In civil proceedings, there is no comparable constitutional provision. However, it is argued that there is an implicit guarantee of procedural fairness in Article 40.3. Identical to the UK position, the common law has provided many principles related to the right to procedural fairness, and effective judicial protection. For example, the

¹¹² The right of access to the courts has been described as 'constitutional' see *Attorney General v. Guardian newspapers* [1974] A.C. 373; and *R. v. Secretary of State for Home Department, ex p Leech (No 2)* [1994] Q.B. 198, 210 (Steyn LJ). See further A. Le Sueur, 'Access to Justice Rights in the United Kingdom', *European Human Rights Law Review* (2000): 457.

¹¹³ See Clayton & Tomlinson, *Fair Trial Rights*, 7.

¹¹⁴ S. Laville, 'Secret terror trial is threat to open justice, human rights campaigners warn' (*The Guardian*, 4 June 2014); and T. Whitehead and D. Barnett, 'Secret terror trial "assault" on British Justice' (*The Telegraph*, 4 June 2014).

¹¹⁵ Comments by Anthony Hudson, representing the Media as reported in S. Laville, 'Secret terror trial is threat to open justice, human rights campaigners warn' (*The Guardian*, 4 June 2014).

¹¹⁶ D. Casciani, 'Fully secret terror trial blocked by Court of Appeal' (*BBC News*, 12 June 2014).



maxim, *nemo iudex in sua causa* has been determinative of the case law relating to potential and actual bias.¹¹⁷

58. Some rights, however, have been sourced in other areas of the law. For example, the entitlement against self-incrimination was interestingly held by the Supreme Court to be an aspect of the right to free speech, and not the under the Art 38.1 guarantee of a trial 'in due course of law'. Due to this interpretation, it is not an absolute right, and is subject to a qualified guarantee and could be subject to legitimate and proportionate interference.

Right to Protection against loss of Nationality

United Kingdom

59. Under the 2006 Immigration, Asylum and Nationality Act, the Home Office or the Home Secretary has the power to revoke British citizenship. Under the legislative provisions, any dual national can be stripped of their citizenship if it is deemed in the public interest to do so. This represents a lowering of the standard of proof necessary for the Home Secretary to strip citizenship, from the standard of 'seriously prejudicial to the vital interests of the UK' to simply if the Home Secretary believes it 'conducive to the public good'. Orders for the deprivation of citizenship can be made without judicial approval and have immediate effect. They can only be challenged in court after the fact. However, as has been highlighted, access to justice to challenge a public order is difficult, if not impossible, where the affected person is not permitted to return to the UK for judicial proceedings.¹¹⁸

60. Currently, the Supreme Court has ruled that it illegal to strip citizenship where the consequence would leave the individual stateless.¹¹⁹ This action is also prohibited under Art. 8 ECHR.¹²⁰ However, in light of the Syrian crisis, and the involvement of British citizens, there has been indications of significant development in terms of the protection against loss of nationality. The Home Secretary, Theresa May, announced plans in late 2013 to expand the powers of the Home Office to strip British citizenship, even in cases where the result would be statelessness for the individual. Though there are International Conventions to which the UK is signatory, including the UN Convention on Statelessness, which forbid the removal of citizenship where the consequence would be statelessness, there have been efforts to avoid the international obligations. It has been numerously reported that the position of the Home Office is that British citizenship is a 'privilege, not a right'.¹²¹ This statement has been echoed by the Immigration Minister, Mark Harper, A proposed amendment to the Immigration, Asylum and Nationality

¹¹⁷ See for instance *Dublin Well-Woman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408; and ***Goode Concrete v. CRH PLC*** [2013] I.E.S.C. 39. See further F. O'Brian, 'Nemo Iudex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies', *Irish Journal of Legal Studies* 2 (2011): 26.

¹¹⁸ K. Bennhold, 'Britain Increasingly Invokes Power to Disown its Citizens' (New York Times, 9 April 2014).

¹¹⁹ *Secretary of State for the Home Department v. Al-Jedda* [2013] U.K.S.C. 62, [2014] A.C. 253.

¹²⁰ However, upon accession to the ECHR, the UK declared that this article did not change a long standing position whereby the Government could strip British citizenship for actions 'seriously prejudicial to the vital interests' of the UK.

¹²¹ 'Government using 'sinister powers' to strip British citizenship' (The Telegraph, 28 February 2013); A Travis, 'Theresa May plans new powers to make British terror suspects stateless' (The Guardian, 12 November 2013); and A. Ross, P. Galey & N. Morris, 'Exclusive: No way back for Britons who join the Syrian fight, says Theresa May' (The Independent, 23 December 2013).



Act 2006 providing for the removal of citizenship of naturalised British citizens, even in cases where the consequence would be statelessness, was rejected by the House of Lords. Criticising the lack of scrutiny of the Bill, and the speed with which it was passed, it was returned to the House of Commons.

Republic of Ireland

61. Similar to the UK position, under the Irish Nationality and Citizenship Act 1956, the Minister for Justice is empowered to revoke a certification of naturalisation if it is obtained in fraudulent circumstances; the individual has shown a failure in the duty of fidelity to the state; or if, as a dual citizen of another country at war with the State. In distinction to the UK position, the Minister for Justice must first issue notice of intention to revoke citizenship and include a statement of the reasons for doing so. The individual has a right of inquiry after the notice is issued. While this covers the loss of citizenship gained through naturalisation, there are ostensibly no clear national guidelines on loss of citizenship acquired by birth, or where it would render the individual stateless. According to the Irish constitution, Article 9.1.2, 'acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law'. While there are strong statements of support for stateless persons, and provision in the Irish nationality and Citizenship Act 1956 for the Minister to grant Irish citizenship to any such person, there is no similar debate in Ireland as there is in the UK about the revocation of Irish citizenship in cases where it would render the individual stateless.

Right to Diplomatic and Consular Protection in Third Countries

United Kingdom

62. In the UK, there is a technical distinction between diplomatic protection, and consular assistance. Persons afforded diplomatic protection is as a matter of published policy, and is not a right of citizenship.¹²² Similarly, according to the Foreign and Commonwealth Office, there is no legal right to consular assistance. It is, instead, discretionary. In *Abassi*,¹²³ it was held by the Court of Appeal that the UK was not under a duty to provide diplomatic or any other protection to a British national even in instances where a British national is threatened with injury from a foreign state.¹²⁴

63. The position that the UK has no legal obligation to provide consular assistance to its nationals is echoed in public information and travel advice provided by the Foreign and Commonwealth Office. In the guide for British nationals abroad, there is an absence of the language of citizenship rights or

¹²² Provision of diplomatic protection in cases of - can be judicially reviewed: see *R. (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76; *R. (Al-Rawi) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279; [2008] Q.B. 289; and *R. (Rahmatullah) v. Secretary of State for Foreign and Commonwealth Affairs* [2011] EWHC 2008 (Admin); [2011] 4 All ER 926.

¹²³ *R. (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76.

¹²⁴ The judgment regarding the territorial effect of the Human Rights Act made in this case, will be discussed below.



entitlements, instead – it is directed at the British national as a ‘customer’, beginning with a ‘customer charter’.¹²⁵ It is emphasised that consular protection in third countries is not a legal right. UK embassies in third countries may offer assistance to non-British, EU-nationals, but this is premised on the absence of their own embassy. As a note to British nationals who find themselves in a country without British diplomatic representation, the guide states that there is an entitlement¹²⁶ to help from any other EU Member State which is represented, and the embassy or consulate must provide whatever assistance that would be given to their own nationals. The same statement of equality is not presented earlier in the context of British and other EU-nationals.

64. There is some argument that this position may conflict with obligations that the UK owes to the international agreements which it is signatory to, including the Vienna Convention on Consular Protection. However, these instruments have not been incorporated at national level. More pertinently, the EU obligations of consular protection, specifically under Art. 35 TEU, and Arts. 20(2)(c) and 23 TFEU, and Art. 46 of the Charter of Fundamental Rights, are directly effective in the UK. However, these articles have been interpreted to mean that there is no legal duty to provide consular assistance to British or other EU-nationals.¹²⁷

Republic of Ireland

65. Ireland is, by comparison, a small country with limited diplomatic representation and resources. There is no systematic framework with regard to the provision of consular assistance, and only limited legislation. The extent of the legal framework in the area includes incorporation of EU law and the Vienna Convention,¹²⁸ in addition to information booklets and a website for public access to information.¹²⁹ The Department of Foreign Affairs advises, in instances of difficulty in a third country, contact with the nearest Irish embassy or consulate, where there is entitlement to consular assistance.¹³⁰ If access to an Irish embassy or consulate is not possible, it informs citizens of their right under EU law of access to the services of an embassy or consulate of any of the other EU Member States.

¹²⁵ Foreign and Commonwealth Office, *Support for British Nationals Abroad: a Guide* (Foreign and Commonwealth Office, 2013).

¹²⁶ This is the only instance of ‘entitlement’ to assistance in the guide.

¹²⁷ See further C.R.G. Murray, ‘In the shadow of Lord Haw Haw: Guantanamo Bay, Diplomatic Protection and Allegiance’ *Public Law* (2011): 115; and reply, C. Trann, ‘Revisiting Allegiance and Diplomatic Protection’, *Public Law* (2012): 197; and the CARE Project - Citizens Consular Assistance Regulation in Europe (<http://www.careproject.eu/>).

¹²⁸ Vienna Convention on Consular Protection, incorporated into Irish Law in the Diplomatic Relations and Immunities Act 1967.

¹²⁹ <www.dfa.ie>.

¹³⁰ It is interesting to note that the Irish term is ‘consular assistance’ rather than consular protection.



QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF CIVIL RIGHTS

- ✓ *To which international instruments for the protection of civil rights is the UK and Ireland a party?*

66. The following table illustrates the main international instruments for the protection of civil rights to which the UK and Ireland are party.

International Conventions concerning Civil Rights	Year	United Kingdom of Great Britain and Northern Ireland		Republic of Ireland	
		Ratified	Notes	Ratified	Notes
United Nations Declaration of Human Rights [UNDHR]	1948	Yes	Not incorporated	Yes	Not incorporated
European Convention for the Protection of Human Rights [ECHR]	1950	Yes	Incorporated into UK law by the Human Rights Act 1998	Yes	Incorporated into Irish law by the Human Rights Act 2003
United Nations Covenants on Statelessness	1954	Yes	Not incorporated	Yes	Not incorporated
International Convention on the Elimination of All Forms of Racial Discrimination	1966	Yes	Not directly incorporated No individual right of petition to UN Committee Duty to report every 2 years	Yes	Not directly incorporated
International Covenant on Civil and Political Rights [ICCPR] (and Optional Protocol)	1966	Yes	Not incorporated No individual right of petition to UN Committee Some articles have been incorporated into UK law: i.e. 'miscarriage of justice' Art 133 Criminal Justice Act 1988 (based on Art 14(6) ICCPR)	Yes	Not incorporated Reservations under Art. 10 (2), Art. 14 and Art. 20 (1) However – UN Committee has jurisdiction to adjudicate on individual complaints
Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol)	1979 (2004)	Yes	Not incorporated UK accepted right of individual petition to UN Committee Duty to report every 4 years	Yes	Not incorporated
Convention on the Rights of the Child	1989	Yes	Not incorporated Reports submitted to the	Yes	



			UN committee every 5 years		
Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union (as amended in Lisbon)	2010	Yes	Incorporated into UK law by virtue of the European Communities Act 1972	Yes	Incorporated into Irish law by virtue of the 28 th Amendment to the Constitution

- **How are relevant international and European civil rights norms being incorporated in your country?**

67. Incorporation of international and European civil rights norms in the UK and Ireland is either direct – by an act of Parliament, or indirect through acknowledgment by the courts and government agencies of their commitment to international or European civil rights norms. In terms of the direct engagement with international and European civil rights norms, it is important to note that the UK and Ireland are both dualist states: it is not possible for the courts to give effect to international treaties which have not been incorporated into the law by an Act of Parliament or the Oireachtas (Irish Parliament).

68. The two notable international civil rights instruments which have been incorporated into both UK and Irish law are the ECHR, and the Charter of Fundamental Freedoms, through obligations to the EU under the Treaties. Neither the UNDHR nor the ICCPR has not been incorporated in their entirety into domestic law by any Act of Parliament in either Ireland or the UK. However, there are references to the civil rights enumerated within these documents in the courts, most often within context of aiding interpretation or the scope of rights. The UK courts, for example, have made reference to civil rights under the UNDHR including Art 9 (arbitrary arrest and detention);¹³¹ Arts 10 and 11 (fair trial, and the presumption of innocence);¹³² Art 12 (privacy);¹³³ and Art 15 (right to nationality).¹³⁴ However, it has been emphasised that the UNDHR has not played ‘a decisive role’ in the decisions of the court.¹³⁵

- **To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?**

69. The incorporation of the ECHR into both UK and Irish law has already been introduced in **Question 2**, in this section there is further focus on the impact of the European Convention on Human Rights, and the reliance upon it by national authorities.

¹³¹ *R. (Al-Jedda) v. Secretary of State for Defence* [2008] A.C. 332, 122.

¹³² *R. v. Khan* [1997] A.C. 558; and *R. v. Lambert* [2002] 2 A.C. 545, 33.

¹³³ *R. v. Secretary of State for the Home Department, ex p Ruddock* [1987] 1 W.L.R. 1482.

¹³⁴ *E.B. (Ethiopia) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 1188, 29.

¹³⁵ Clayton & Tomlinson, *The Law of Human Rights*, 86-90.



Impact of the ECHR in the United Kingdom

70. The Human Rights Act has created a duty on the courts to interpret primary legislation¹³⁶ in a manner which is compatible with Convention rights in so far as is possible.¹³⁷ In the event that this is not possible, the courts may issue a declaration of incompatibility.¹³⁸ However, this declaration does not affect the validity, operation or enforcement of the primary legislation. It is important to understand that this method of incorporation, and the extent to which it is relied upon by state organs, is reflective of the attitude to rights protection and the doctrine of the separation of powers in the UK. The design of this method of incorporation was 'to give courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament ... it maximises the protection of human rights without trespassing on parliamentary sovereignty.'¹³⁹

71. It has been noted that although *formally* there is no obligation on Parliament to respond to declarations of incompatibility, in most cases there has been a response by parliament to address the sections in violation.¹⁴⁰ There is some scope to argue that a lack of remedial action is the 'first step towards an application to the European Court of Human Rights',¹⁴¹ and so the Parliament has been receptive to declarations of incompatibility issued by the courts. While in the Act, there is only an obligation on the courts or tribunals, to 'take account of' the decisions¹⁴² of the European Court of Human Rights, there are signs of increasing reliance on Convention rights in the Courts and in administrative decisions.¹⁴³ In *R (Alconbury Developments Ltd) v. Environment Secretary* the House of Lords held that they would (and so the lower courts should) follow clear and consistent jurisprudence of the Court of Human Rights 'in the absence of some special circumstances'.¹⁴⁴ This has been repeated in subsequent decisions, highlighting not only an increasing acceptance of Strasbourg jurisprudence into the British courts,¹⁴⁵ but also an effort to enable Convention rights to be remedied in domestic courts (without recourse to Strasbourg).¹⁴⁶

¹³⁶ Primary legislation is any legislation which is passed by Parliament, and not through delegated powers.

¹³⁷ s. 3 Human Rights Act 1998.

¹³⁸ s. 4 Human Rights Act 1998.

¹³⁹ Lord Irvine of Lairg, H.L. Deb. 3 November 1997, vol.582, cols. 1128-29.

¹⁴⁰ See further Clayton & Tomlinson, *The Law of Human Rights*, 215–21.

¹⁴¹ *Ibid.*, 222.

¹⁴² s. 2(1) Human Rights Act 1998.

¹⁴³ It is likely that the position of administrative bodies, such as immigration officers at airports, has moved on since the decision of Lord Denning MR that it was too much to expect them to have knowledge of the convention: *R. v. Chief Immigration Officer, Heathrow Airport, ex p Bibi* [1976] Q.B. 198. However this case did create the principle that the Secretary of State was not obligated to take account of Convention rights in his decisions.

¹⁴⁴ *R. (Alconbury Developments Ltd) v. Environment Secretary* [2003] 2 A.C. 295.

¹⁴⁵ For example, *R. (Ullah) v. Secretary of State for the Home Department* [2004] 2 A.C. 323, 20; and *N v. Secretary of State for the Home Department* [2005] 2 A.C. 296.

¹⁴⁶ *R. (SB) v. Denbigh High School* [2007] 1 A.C. 100, 29 (Lord Bingham); and *R. (Greenfield) v. Secretary of State for the Home Department* [2005] 1 W.L.R. 673, 18-19.



72. In their engagement with the ECHR, there are two principles employed by the Supreme Court. The first is the 'mirror' principle:¹⁴⁷ the British courts will protect Convention rights to the same degree as the European Court of Human Rights. The second principle is the 'outcome not process' – or, so long as the compliance of the ultimate outcome with Convention rights is the important aspect, not the process by which the authority or administration arrived at that decision.¹⁴⁸ Another important impact that the ECHR has made on the British legal system is the integration of a proportionality analysis into cases of judicial review or statutory interpretation.

73. There has been a positive impact made by the Human Rights Act 1998 on the strengthening of rights protection in the UK, as there is an increasing 'rights awareness' in legal discourse and judicial rhetoric.¹⁴⁹ This has been matched by an effort to increase 'rights awareness' in public authorities. The Ministry of Justice has produced a multiple guides and handbooks for public authorities to understand the impact of the Human Rights Act 1998.¹⁵⁰ These have included simple explanations of the rights contained in the ECHR, and how they impact on local administration.¹⁵¹

Impact of the ECHR in Ireland

74. Ireland was one of the original signatories to the ECHR in 1950, and it has since acquired a 'quasi-constitutional status' in the State.¹⁵² However, real impact by the ECHR in the Irish courts came only after the adoption of the 2003 Human Rights Act which incorporated Charter rights into Irish Law. Prior to the incorporation of the ECHR, the courts treated Convention rights initially with some scepticism.¹⁵³ However, similar to the UK position, there is evidence of a gradual acceptance of the ECHR by the courts over time, which is considered to be directly related to an increased familiarity with its provisions.¹⁵⁴

¹⁴⁷ The principle, though not termed such, was first identified in the case of *R. (Ullah) v. Special Adjudicator* [2004] U.K.H.L. 26, [2004] 2 A.C. 323.

¹⁴⁸ This principle has its origins in the decision of *R. (SB) v. Governors of Denbigh High School* [2006] U.K.H.L. 15, [2007] 1 A.C. 100; confirmed in *R. (Nasseri) v. Secretary of State for the Home Department* [2009] U.K.H.L. 23, [2010] 1 A.C. 1.

¹⁴⁹ Davis, *Human Rights and Civil Liberties*.

¹⁵⁰ Available at <http://www.justice.gov.uk/human-rights>.

¹⁵¹ For example, 'When it comes to decision making, the rights of one person often have to be balanced against the rights of others or against the needs of the broader community ...But if you have to restrict somebody's rights, you must make sure that you are not using a sledgehammer to crack a nut. Any restriction must be no greater than is needed to achieve the objective. This is called "proportionality".' Ministry of Justice, *Human Rights: Human Lives* (London: Ministry of Justice, 2006), 6. Available at <http://www.justice.gov.uk/human-rights>.

¹⁵² Forde & Leonard, 291. The ECHR is part of the provisions of the 'Good Friday' Agreement 1998 which in turn was recognised in the 19th Constitutional Amendment.

¹⁵³ C. Murphy, "Ireland and the UK in the European Union and European Convention on Human Rights: A Tale of Two Island Legal Systems?" in eds. G. Martinico & Pollicino, *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing, 2010).

¹⁵⁴ G. de Búrca, 'The Domestic Impact of the EU Charter of Fundamental Rights', *Irish Jurist* (2013): 49.



However, it was also argued that the ECHR would have a more limited impact in the Irish courts than in the UK due to the fact that there is already established rights protection in the Irish Constitution.¹⁵⁵

75. Submissions based on Convention rights are now pleaded alongside Constitutional rights, and there is evidence that the High Court and Supreme Court of Ireland are engaging seriously with Convention rights.¹⁵⁶ One commentator has summarised the mode of reliance in the Irish legal system upon the Convention as

‘an additional resource for enhancing or strengthening certain rights, bringing other neglected or missing protections into Irish cases, informing the interpretation of the Constitution, and, in some cases, pointing out the incompatibilities of domestic legislation.’¹⁵⁷

76. Local authorities have also a duty to act in compliance with the Convention under the 2003 Act, and there has been commentary into the effectiveness of this duty. There have only been a limited number of cases where local authorities have been found in breach of Convention rights.¹⁵⁸ However, it is uncertain the extent to which this is indicative of general compliance by local authorities, rather than a continuing uncertainty in the ambit of protection afforded by the ECHR. It has been noted that there is no similar Human Rights Assessments, as is in place in the UK.

- **How and to what extent are international instruments for the protection of civil rights (i.e. ICCPR) given effect in the UK and Ireland?**

77. International instruments for the protection of civil rights are given effect either directly through incorporation into the national law, or indirectly through the court to the interpretation of human rights obligations. With the exception of the ECHR, the main international instruments for the protection of civil rights have not been incorporated in their entirety into either the British or Irish legal systems.

78. Case law in the jurisdictions of both the UK and Ireland does not indicate a reliance on international instruments for the protection of civil rights, other than those of the ECHR which have been formally incorporated. However, there are instances in which the courts have made references to international instruments (such as the UN Declaration on Human Rights) in the interpretation of legal measures. Although the jurisprudence of the UK courts would indicate a strong reluctance to categorise references to international treaties as ‘incorporation’,¹⁵⁹ there is a canon of construction which dictates that in the case of ambiguity in the law, where there are two possible interpretations, the court may take account of international and European civil rights norms to adopt the interpretation which is compliant with the civil rights norms.

¹⁵⁵ S. Egan, “The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation”, *Dublin University Law Journal* 25 (2003): 230

¹⁵⁶ de Búrca, citing *F. v. Judge Murphy* [2009] I.E.H.C. 497; *Meadows v. Minister for Justice Equality and Law Reform* [2010] I.E.S.C. 3; *Neville v. South Dublin County Council* [2010] I.E.H.C. 67; *Donegan v. Dublin City Council* [2012] I.E.S.C. 18; *Moore v. Dun Laoghaire* [2010] I.E.H.C. 466; *Rodenhuis and Verloop BV v. HDS Energy Ltd* [2010] I.E.H.C. 465.

¹⁵⁷ de Búrca, 58.

¹⁵⁸ For example, P. Kenna, ‘Local Authorities and the European Convention on Human Rights Act 2003’, *Irish Human Rights Law Review* (2010): 1.

¹⁵⁹ *J.H. Rayner (Mincing Lane) v. Department of Trade and Industry* [1990] 2 A.C. 418 (Lord Oliver).



79. Similarly, while courts are not permitted to rely on international treaties, they are able to consider their provisions in the application of domestic law,¹⁶⁰ especially in the interpretation of the ECHR and the EU Charter, or where the measure is intended to implement treaty obligations.¹⁶¹ For example, the House of Lords in their interpretation of 'miscarriage of justice' in the s 133 of the Criminal Justice Act 1988 (intended to give effect to Art 14(6) ICCPR), explicitly disregarded English law and precedent and gave regard instead to the *travaux préparatoires* of the ICCPR, communications of the UN Human Rights Committee, and similarly-worded provisions in the ECHR.¹⁶²

80. Effect is also given to international instruments for the protection of civil rights indirectly through engagement by the governments of the UK and Ireland with the relevant human rights bodies. Reports have stated that UK intends to take its obligations under the ICCPR very seriously, but has no plans to incorporate the Convention into domestic legislation.¹⁶³ The Ministry of Justice produces periodic reports for the United Nations, under its obligations to the ICCPR, and the latest report being submitted in 2012. Ireland has similarly produced its 4th Periodic Report in 2012. There is a similar duty of submitting reports to the relevant UN Committee under other international instruments including the Rights of the Child, the Elimination of All Forms of Discrimination against Woman, and the Elimination of Racial Discrimination.

81. However, in terms of the ICCPR, the UK has not accepted an individual right to petition to the UN Committee on Civil and Political Rights to adjudicate in complaints of a violation of the ICCPR. Ireland has, however, accepted this jurisdiction. It has also been noted in terms of the ICCPR that there is a lack of awareness among the legal profession and the courts of the ICCPR,¹⁶⁴ and this had had an impact on the limited influence of international civil rights norms on the development of rights jurisprudence in the UK and Ireland.

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

- ✓ ***To what extent have the EU Charter of fundamental rights (and the civil rights it includes) as well as general principles of EU law protecting civil rights so far been recognised and referred to by the national authorities?***

¹⁶⁰ For example in *Matthew v. State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 A.C. 433; and *Lewis v. Attorney General of Jamaica* [2001] 2 A.C. 50, 78.

¹⁶¹ Clayton & Tomlinson, *The Law of Human Rights*, 76 et seq.

¹⁶² *R. (Mullen) v. Secretary of State for the Home Department* 1993] 1 A.C. 593.

¹⁶³ UN Human Rights Committee, *Replies to the list of issues (ccpr/c/GBR/q/6) to be taken up in connection with the consideration of the sixth periodic report of the Government of the United Kingdom of Great Britain and Northern Ireland* 18 June 2008.

¹⁶⁴ Clayton & Tomlinson, *The Law of Human Rights*, 97-100.



United Kingdom

82. A recent Government Report has highlighted the state of confusion in which the applicability of the EU Charter of Fundamental Rights in the UK.¹⁶⁵ References to the Charter in by national authorities have been very limited. It has been difficult to find information on the application or scope of the Charter at a local level. This may be linked to the fact that, unlike the clear introduction of the Human Rights Act 1998, the domestic legal implications of the Charter have not been clearly communicated.

83. From a legislative stand point, there has been considerable scepticism of the introduction of the EU Charter into UK law. Under the initial Charter negotiations, the UK agreed with what was considered to be an 'opt out' provision under Protocol 30 to the Treaty of Lisbon.¹⁶⁶ The UK was concerned that the Charter would have a greater impact on domestic legislative practices, notably on British Labour Laws. There was an expectation that the addition of Protocol 30 would be a guarantee to the UK that its laws would not be changed. However, as was recently concluded in a joint report by both Houses of Parliament, Protocol is not an opt-out provision, and the Charter is directly effective in the UK by virtue of the European Communities Act 1972. It has been established that national measures within the scope of Union law must be in compliance with rights standards, and the rights contained in the Charter are supreme over inconsistent national law or decisions of authorities.

84. In further distinction to the Convention, incorporated through the Human Rights Act 1998, there has been limited information given to local authorities and ombudsmen on the application of the Charter. It is difficult to find information about protection of civil rights under the EU Charter as local levels. Similarly, it is difficult to find published material on the Charter aimed at informing the general public on their rights under the Charter.

Republic of Ireland

85. The Charter, as part of primary EU law, has effect in Ireland by virtue of Art. 49 of the Constitution. The position of the Irish courts echoes that of the UK courts. While there is an increasing recognition of civil rights under the ECHR, there is still an apparent wariness in the reception of Charter rights by the courts. However, there is some suggestion that this reluctance to interpret and apply the EU Charter is not based on institutional scepticism of the Charter, but rather a lack of familiarity with the scope of the Charter.¹⁶⁷

86. Of the dozens of references made to the Charter in the superior Courts of Ireland, a large proportion have focussed on Art. 47 of the Charter (right to fair trial, and effective remedy), and Art. 24 on the Rights of the Child.¹⁶⁸ Writing in 2013, Gráinne de Búrca noted that the Courts only applied a cursory reference to the provisions of the Charter when it was raised by one of the parties, and have not based

¹⁶⁵ House of Commons European Scrutiny Committee, *The Charter of Fundamental Rights in the UK: a state of confusion* 43rd Report, Session 2013-2014 (House of Commons, 2 April 2014), 12.

¹⁶⁶ However, there are indications from the CJEU that when the UK is implementing EU law, any public body must comply with Charter rights, and such compliance is justiciable: Joined Cases C-441/10 and C-493/10 *NS v. Secretary of State for the Home Department* [2012] 2 C.M.L.R. 9.

¹⁶⁷ See de Búrca, 49.

¹⁶⁸ *Ibid.*



substantively any of their decisions on Charter Rights. An overview of case law from the higher courts since then confirms this proposition.¹⁶⁹

87. In the recent case of *D.F.*,¹⁷⁰ the High Court went to great lengths to emphasise that the scope of protection of rights contained in the Charter was limited to situations where a Member State was implementing Union law. The Court, also emphasised that the *Fransson* case¹⁷¹ represented the ‘outer limits of the “implementing Union law” principle’.¹⁷² It is likely that the Court will only accept the application of civil rights protected by the Charter in cases with a strong link to Community Law. It is likely that this is the best reference to be found to the implication of the Charter in Ireland, as it is difficult to find published official material relating to its impact.

- **How is the relationship between the EU Charter and the ECHR being perceived in the UK and Ireland? How is their respective scope of application identified, in particular in respect of civil rights?**

United Kingdom

88. The EU Charter is given effect in UK law through the European Communities Act 1972, whereas the ECHR, as an instrument of the Council of Europe, is given effect by the Human Rights Act 1998. Although both have been incorporated into UK law through acts of Parliament, they each differ in their scope of application and how they are perceived in political and judicial discourse.

89. As has been noted above, there is still a great deal of uncertainty surrounding the implementation and application of the Charter in the UK. It was also noted that, even in the event of a repeal of the Human Rights Act 1998, the Charter would remain part of UK law under its Treaty obligations. In terms of the scope of application, civil rights review under the Human Rights Act 1998 can apply to all areas of national law. The application of the EU Charter is limited to areas concerning obligations under EU law. However, measures conflicting with rights under the ECHR cannot be invalidated under the Human Rights Act 1998. In this way, ECHR rights have at once a broader and narrower scope of application than Charter rights.

90. A further point of contrast between the application of the Charter and the ECHR is that every courts would be obligated to dis-apply primary UK law if it were found to be incompatible with the Charter, whereas any declaration of incompatibility under the Human Rights Act 1998 could only be issued by the higher courts.

Republic of Ireland

91. The characterisation of the relationship between the EU Charter and the ECHR in Ireland is markedly similar to that in the UK. First, the scope of protection afforded by the Charter in Ireland is limited to

¹⁶⁹ For example, see *Lahyani v Minister for Justice & ors* [2013] I.E.H.C. 176.

¹⁷⁰ *D.F. v. Garda Commissioner & ors* (No.3) [2014] I.E.H.C. 213.

¹⁷¹ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000 (26 February 2013).

¹⁷² *D.F. v. Garda Commissioner & ors* (No.3) [2014] I.E.H.C. 213, [47].



areas *only* within scope of the application of EU law. This limitation has been emphasised by the courts.¹⁷³ For the ECHR, the scope of application is much wider, applying to all national measures, actions of public authorities, and to the interpretation of primary legislation by the courts. Similarly, while it is possible for the Court to dis-apply national law in favour of the primacy of EU law (including the Charter), it is not possible for the courts to strike down primary law in Ireland based on Convention rights.

It should be remembered that the Convention has potentially a weaker position in Irish law than the Charter. The Convention is incorporated into Irish law by virtue of the Human Rights Act 2003, whereas the Charter has become a part of Irish law by virtue of Article 29 of the Constitution. It is likely that both the Charter and the Convention will become increasingly familiar to the Irish Courts leading to a more active engagement with the civil rights contained within them, and it is possible that the Irish courts will echo the approach taken in the Court of Justice of the European Union and employ the Convention as an aid to the interpretation of the rights contained in the Charter.

QUESTION 5: JURISDICTIONAL ISSUES

- ✓ ***Personal: Who is covered by (core) civil/civic rights protection? Are both natural and legal persons covered? Are citizens of the UK and Ireland, EU citizens, third country national (refugee, long term resident, family members, tourists, etc.) given protection?***

United Kingdom

92. Under the Human Rights Act 1998, only ‘victims’ of an unlawful act have standing to bring proceedings for a breach of Convention rights.¹⁷⁴ The test for standing is the same for the Act as under the Convention, and direct harm caused by an act or omission must be shown.¹⁷⁵ ‘Victims’ can include any persons (include children, and others who might lack capacity according to domestic law),¹⁷⁶ non-governmental organisations,¹⁷⁷ or a group of individuals.¹⁷⁸

93. It is possible for a legal person (as opposed to a natural person) to bring proceedings in a claim for a breach of civil rights including the freedom of expression, freedom of assembly and association, the right to a fair trial, the right to property and freedom from discrimination. In the UK courts, there has also been recognition of the right of privacy for legal persons under Art 8.¹⁷⁹ In this way, there is a limit

¹⁷³ *D.F. v. Garda Commissioner & ors* (No.3) [2014] I.E.H.C. 213.

¹⁷⁴ s. 7(1) Human Rights Act 1998.

¹⁷⁵ See *Klaus v. Germany* (1979-80) 2 *E.H.R.R.* 214.

¹⁷⁶ See for example, *Covezzi and Morseli v. Italy* Judgment 9 May 2003; and *Winterwero v. Belgium* (1979) *E.H.R.R.* 387.

¹⁷⁷ These organisations on its own account only, and cannot challenge a measure on behalf of its members: *Ahmed v. United Kingdom* (2000) 29 *E.H.R.R.* 1.

¹⁷⁸ Art. 34 ECHR.

¹⁷⁹ *Office of Fair Trading v. X* [2004] *I.C.R.* 105.



scope of protection for the civil rights of legal persons. This can be contrasted with the position of other non-natural bodies. The House of Lords has held that convention rights cannot be extended to public authorities, including local councils.¹⁸⁰ This is a position which is consistent with Strasbourg case law.¹⁸¹

94. The difficulty faced by potential claimants, such as refugees, UK residents and non-British family members, even if they qualified as 'victims' under the Convention, is access to the Courts. As we have seen above, this is especially concerning in the case of individuals stripped of their British citizenship abroad. As they have no legal right to return to the UK, it is difficult, if not impossible to bring proceedings to appeal the decision of the Home Secretary. There also may be practical issues related to gaining access to the courts, including finding information and advice. There may also be great impact on the protection of civil rights in the UK due to the recent cut-backs in legal aid provision in the UK.

Republic of Ireland

95. In Ireland, personal rights including the core civil rights are guaranteed to all citizens of the Republic. There has been some debate as to the extent to which non-citizens of Ireland can rely on Irish constitutional rights, including civil rights. The 'personal rights' guaranteed by the Irish constitution are framed as rights of 'citizens. However, except for purely 'citizenship' rights, such as to vote, these rights have been extended in case law to non-nationals.¹⁸² It has been noted in Irish constitutional law, of which the ECHR and the EU Charter now forms a part, that rights that are not otherwise qualified as 'citizenship rights' are not confined solely to the protection of nationals or EU citizens only, and can be extended to non-EU citizens.¹⁸³

96. Corporations and other legal persons cannot enjoy many ECHR or constitutional rights including the right to life, or to vote – however, there is scope to conclude that corporations have rights to private property, and a qualified right to privacy.¹⁸⁴

- ✓ ***Territorial: what is the territorial scope of the protection of civil rights afforded by the UK? Are there TERRITORIAL limitations to such protection? Which?***

United Kingdom

¹⁸⁰ For example, a defamation case cannot be brought by a public authority: *Derbyshire County Council v. Times Newspapers* [1993] A.C. 534. See also *Aston Cantlow v. Wallbank* [2004] 1 A.C. 246.

¹⁸¹ See for example *Province of Bari, Sorrention and Messeni Nemagna v. Italy* Decision of 22 March 2001; and *Ayuntamiento de Mula v. Spain* Decision of 1 February 2001.

¹⁸² *Rederij Kennemerland BV v Attorney General* [1989] I.L.R.M. 821. See also E Dewhurst, 'Exclusionary or inclusionary constitutional protection: protecting the rights of citizens, non-citizens and irregular migrants under articles 40-44 of the Irish Constitution', *Irish Jurist* 29 (2012): 98.

¹⁸³ For further discussion see E Dewhurst, 'Exclusionary or Inclusionary Constitution Protection: Protecting the Rights of Citizens, Non-Citizens and Irregular Immigrants', *Irish Jurist* (2012): 98.

¹⁸⁴ See for example, *Pine Valley Developments Ltd v. Ireland* (1991) 14 E.H.R.R. 319. See further Forde & Leonard, 301; and A O'Neill, *The Constitutional Rights of Companies* (Thompson 2007).



97. In the UK, the territorial scope of protection of civil rights can be considered under two categories, first so-called ‘foreign’ cases – where UK courts are called to consider whether someone should be extradited or deported to another country from the UK, and this should be disallowed on the basis of human rights. A second category of cases concerns the circumstances in which the UK will be held to account for actions taken extra-territorially. Case law has often directed the territorial scope of civil rights norms, especially in terms of the application of the Human Rights Act outside of British territory. There is an indication from the Supreme Court¹⁸⁵ that the test for the circumstances in which the state can be held to account for its actions concerning citizens (in this case, soldiers) extraterritorially are ‘whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction’.¹⁸⁶ However, the scope of protection guaranteed for convention rights is contextual on the circumstances – the same degree of expectation may be impossible.

98. The consideration of ‘foreign’ cases is most clearly seen in the context of asylum seekers to the UK. The right to asylum when a person is in fear of persecution is protected by the Convention on the Status of Refugees 1950, incorporated in UK law by virtue of the Immigration Act 1971. In cases concerning convention rights for asylum seekers, fearing persecution in the event of a forced return to their home countries, the House of Lords has held that “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.¹⁸⁷

99. In the interests of clarity, it is important to note that the scope of territorial protection for Acts depends on the legislation in question. It is often the case that the scope of protection of civil rights contained in an Act will be confined to either England and Wales, Scotland or Northern Ireland due to the devolution of legislative powers. For example, in terms of the Equality Act 2010, the Act governs the laws of England and Wales, and (with two exceptions) also applies to Scotland,¹⁸⁸ and with further qualifications to Northern Ireland.¹⁸⁹

Republic of Ireland

100. The ambit of constitutional protection of civil rights extends to the territory of the Irish State. Additionally, there is a prohibition on the deportation or extradition of any person to any place where they are likely to face torture or capital punishment. However, Ireland has been criticised for its procedural mechanisms for the determination of asylum, and the lack of an independent complaints mechanism, or access to effective remedies for those aggrieved under the system. It is not possible for an asylum seeker to fall within the ambit of the Office of the Ombudsman to make a complaint.

- ✓ ***Material: are rights protected differently in different POLICY AREAS (e.g. security exceptions, foreign policy exclusion, etc.)?***

¹⁸⁵ Smith v. Ministry of Defence [2013] U.K.S.C. 41, [2014] A.C. 52.

¹⁸⁶ *Al-Skeini v. United Kingdom* (2011) 53 E.H.R.R. 18; this case resolved the conflict between *Issa v. Turkey* (2005) 41 E.H.R.R. 27 and *Bankovic v. Belgium (Admissibility)* 11 B.H.R.C. 435, in favour of the test of authority and control (*Issa*) rather than mere territory (*Bankovic*).

¹⁸⁷ *R. (Ullah) v. Special Adjudicator* [2004] U.K.H.L. 26, [2004] 2 A.C. 323, (Lord Bingham).

¹⁸⁸ Equality Act 2010, s. 217(2).

¹⁸⁹ Equality Act 2010, s. 217(3).



United Kingdom

101. As has been discussed in the preceding sections, concerns for national security have had an unprecedented impact on civil rights in the UK. This impact can be seen in civil rights protection including the right to free speech (for example, though the creation of the offence of ‘glorification’ of terrorism¹⁹⁰); the protection against loss of citizenship,¹⁹¹ and the right to effective judicial protection.¹⁹² Policy regarding police powers is informative in this area, to illustrate how rights have different material protection in the UK.

102. Police powers of surveillance and search have been examined in light of the right to privacy. The use of CCTV video surveillance is regulated by the Data Protection Act 1998, and the Code of Practice for users of Closed Circuit Television. In terms of covert surveillance, the Police Act 1997, PT III regulates powers to authorise entry and surveillance of property. The Act provides immunity from civil and criminal liability for any acting under it. In England and Wales, the Regulation of Investigative Powers Act 2000 aims to provide a comprehensive code for surveillance. In terms of police powers regarding entry, search and seizure – there is some divergence between Scots law and the law of England and Wales.

103. In Scots law, there is uncertainty as to when warrants must be issued, and where it is necessary, and the right to privacy is not determinative of the inviolability home.¹⁹³ There has been commentary to suggest that the incorporation of the ECHR is ‘unlikely to be the catalyst for radical reform’,¹⁹⁴ and recent concern has been highlighted over police powers to stop and search minors.¹⁹⁵ The scope of protection of rights in the policy area of security and policing in the UK is notably different from the protection afforded to civil rights in the context of other areas as illustrated above.¹⁹⁶

- ✓ ***Temporal: What is the temporal scope of protection afforded to civil rights? Have they been recent changes in the range and reach of civil rights protection?***

United Kingdom

104. The temporal limitations of claims for breach of civil rights are dictated by the relevant legislation in the UK. Under the Human Rights Act 1998,¹⁹⁷ cases against a public authority for a breach of rights must be brought within a year of the beginning of the offending action. This time limit is also subject to any stricter time limits, and so may be shorter. Judicial review proceedings must be taken within three

¹⁹⁰ Terrorism Act 2006.

¹⁹¹ Immigration Act 2014.

¹⁹² For example, in the recent effort to hold the first fully-secret trial in modern British legal history.

¹⁹³ *Birse v. H.M. Advocate* [2000] SLT 869.

¹⁹⁴ K.D. Ewing & K. Dale-Risk, *Human Rights in Scotland* (Edinburgh: W. Green Publishers, 2004), 310.

¹⁹⁵ M. Ellison, ‘Police Scotland stopped and searched thousands of children’, available at <http://www.bbc.co.uk/news/uk-scotland-27627154>.

¹⁹⁶ See above **Question 2**.

¹⁹⁷ s. 7(5) Human Rights Act 1998.



months. There is scope for the court, on equitable consideration of the circumstances, to extend the one-year time limit. The Court has identified factors in any decision to extend the time limits, which have included the conduct of the public authority after the claim arose, the reasonable action of the claimants, and the cogency of their claim.¹⁹⁸ In this regard, the Court interpreted the limitation section of the Human Rights Act 1998 to contain the directions on equitable considerations within the Limitation Act 1980.¹⁹⁹

105. As the EU Charter has been incorporated into UK law by virtue of the Communities Act 1972, there is no clear domestic legislation outlining the temporal limitations of claims that can be brought for civil rights violations under the Charter. The continuing uncertainty as to the scope and impact of the Charter in the UK also creates some uncertainty as when proceedings must be initiated. Neither the Limitation Act 1980, nor the Human Rights Act 1998 contain reference to limitations on proceedings under the Charter.

Republic of Ireland

106. The temporal limitations of protection to civil rights in Ireland are also contained within the Human Rights Act 2003. Rights guarantees under the ECHR only apply to situations that have occurred since the entry into force of the Act. Under the Act, and similar to the UK provisions, proceeding against a public body must be taken within one year of the offending action,²⁰⁰ but the court may extend this time limit 'in the interests of justice'.²⁰¹ Constitutional rights are not qualified in that way, and there is no strict time limit to challenge the constitutionality of legislation for violation of rights.²⁰²

107. Time limits for applications for judicial review of administrative decisions are dictated by the relevant legal framework, most pertinently those contained within the Rules of the Superior Court 1986. It should be noted that some of these time limits are relatively short, for example a 14 day period for judicial review of asylum applications. In a recent case of April 2014, the Supreme Court overturned a decision to grant leave to a family seeking asylum, who had applied outside of the 14 day legal time limit. The Court held that the time limit did not breach the EU principles of effectiveness or equivalence.²⁰³ The Charter served as a basis in this case for the principle of effectiveness, however, this did not influence the Court's decision. Beyond this, and similar to the UK position, it is difficult to find information on time limits regarding Charter violations in Ireland, as there was no direct incorporation of the Charter through domestic legislation. Arguments based on the Charter have arisen in context of other rights arguments, and so it is likely that time limits are dictated by other elements of the proceedings – as evidenced by the *T.D.* case.²⁰⁴

¹⁹⁸ *Rabone v. Pennine Care NHS Foundation Trust* [2012] H.R.L.R. 10, [2012] 2 A.C. 72.

¹⁹⁹ s. 33(3) Limitation Act 1980.

²⁰⁰ s. 3(5)(a) Human Rights Act 2003.

²⁰¹ s. 3(5)(b) Human Rights Act 2003.

²⁰² This is qualified however, as noted in **Question 2**, para. [23].

²⁰³ *T.D. v Minister of Justice, Equality and Law Reform* [2014] IESC 29.

²⁰⁴ *Ibid.*



✓ ***Please offer details as to how different rights are afforded to different CATEGORIES OF PERSONS in different LOCATION AND POLICY CONTEXTS OVER TIME.***

108. While the first four sub-sections related to different categories, including women, children and the disabled, who may likely suffer disadvantage to the protection of their civil rights in the UK and in the Republic of Ireland.

United Kingdom

109. Discrimination on the basis of gender is prohibited in the UK, however, there are still many issues facing women and the protection of their civil rights in the UK. Women's advocacy groups focus on access to justice, legal aid, and family rights, as well as tackling the legal issues surrounding sexual and domestic violence. It might be considered that civil rights such as freedom of expression, or the practice of religion, do not hold the same resonance or importance with women's issues as equality, and access to effective judicial protection.

110. Children's rights in the UK are recognised under the Human Rights Act 1998, the Equality Act 2010, as well as the international conventions on rights to which the UK is signatory. There have been recent cases in which the best interests of the child were considered, and the obligations of the UK towards children were considered in light of their signatory status to the UN Declaration on the Rights of the Child.²⁰⁵ In a further example of the impact of international conventions to the protection of the civil rights of children, in Wales, the 'Rights of Children and Young Persons (Wales) Measure 2011 places an obligation on Welsh Ministers to have due regard to the Rights under the United Nations Convention on the Rights of the Child [UNCRC] in decisions regarding policies or legislation. A similar legislative measure was enacted in Scotland, the Children and Young People (Scotland) Act 2014. The Act also places an obligation on Scottish Ministers to have regard for the rights of children under the UNCRC. There is also provision in the Act for a duty to report on the advancement of UNCRC rights by the wider public sector and Ministers. The Commissioner for Children and Young People in Scotland is also given extended powers to investigate individual children and young people.

Republic of Ireland

111. Women are guaranteed equal protection and status before the law in the Republic of Ireland. However, the legal framework concerning woman has not been without censure in Ireland. There has been much criticism of Art. 41.2 of the Constitution as continuing to perpetuate traditional and outmoded attitudes restricting the participation of women in work and public life. The Article states that the Irish State "recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved"²⁰⁶ and that the State should endeavour "to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home".²⁰⁷ While the guarantee of equality of women is a recognised feature of the Irish legal system, these articles have been criticised for their apparent direction towards inequality, and have not

²⁰⁵ B.H. & anor v. The Lord Advocate & anor (Scotland) [2012] U.K.S.C. 24; R. (on the application of H.H.) v Westminster City Magistrates' Court [2012] U.K.S.C. 25.

²⁰⁶ Art. 41.2.1°.

²⁰⁷ Art. 41.2.2°.



served to aid female litigants in cases before the Supreme Court, for example, in the guarantee of property rights.²⁰⁸

112. The rights of the child in Ireland but it has changed in light of a recent constitutional amendment. It is now a constitutional requirement that the ‘best interests’ of the child are considered first in every decision concerning its welfare, and must be a primary consideration in the event of a conflict between different rights. The legal age of majority in Ireland is 18, at which point an individual may vote, drink alcohol, and get married without the permission of parents or guardians. The minimum age for criminal responsibility in Ireland is 12. There is, however, an exception to this rule where by a child as young as 10 or 11 can be charged with the offences of murder, manslaughter, rape, or aggravated assault. Children charged with crimes come before the Children’s Court, and while they can be sentenced to a period of detention, this will be at a child detention school. If the child is aged 16 or 17, then the child will be detained at a children’s detention centre.

113. There has been concern that the rights of the disabled in Ireland are not adequately recognised or protected, despite the legal prohibition on discrimination based on a disability within the Equality Acts of Ireland. For example, judges have directed juries to disregard testimony of victims with intellectual disabilities,²⁰⁹ as there is no provision in many criminal law statutes for mental impairment.

QUESTION 6: ACTORS

- ✓ ***What is the involvement of private or public actors, such as human rights institutes, equality bodies, data protection agencies, national Ombudsmen, NGOs, etc. in defining and setting civil rights’ standards (influencing legislative, regulatory, administrative or judicial processes).***

United Kingdom

114. A new body, the Equality and Human Rights Commission (EHRC) opened in 2007. This body has powers to promote and monitor human rights, and to publish codes of practice on equality legislation. As part of this body, from 2013, an Equality Advice and Support Service provides information and support to individuals with equality concerns, or human rights complaints. The EHRC is responsible for England, Wales, and Scotland. Wales and Scotland additionally have statutory committees already mentioned. Northern Ireland has its own body, the Equality Commission. The EHRC provide information and advice, and can use statutory powers to enforce duties under equality legislation. The body also seeks to influence the legislature, and endeavour to ensure that government takes account of human rights and equality.

115. There are also numerous civil rights campaigners in the UK, including the National Council for Civil Liberties (‘Liberty’) which promotes civil rights through test case litigation, lobbying, campaigning and the provision of free advice. They do not appear to be actively involved in the setting of civil rights standards, but rather aim to influence their development.

²⁰⁸ See for instance *L v L* [1992] 2 I.R. 77.

²⁰⁹ J. McEnroe, ‘Family want archaic law overhauled’ (Irish Examiner, 30 March 2010) available at <<http://www.irishexaminer.com/ireland/icrime/family-want-archaic-law-overhauled-115886.html>>.



116. There are also national ombudsmen to whom it is possible to make a complaints. These are in some cases also country-based, in Scotland, for example, there are a number of different ombudsmen and commissioners with relation to civil rights protection. These include, the Scottish Public Services Ombudsman; the Scottish Legal Complaints Commission; and the Commissioner for Ethical Standards in Public Life in Scotland.

117. In terms of data protection, an independent body, the Information Commissioner's Office, was set up to 'uphold information rights in the public interest'.²¹⁰ The duties of this Office concern the enforcement of the relevant data protection Acts: Data Protection Act 1998, the Privacy and Electronic Communications Regulations 2003, the Freedom of Information Act 2000, the Environmental Information Regulations 2004, and the INSPIRE Regulations 2009.

Republic of Ireland

118. In Ireland, there are numerous non-State, and independent State bodies which aim to influence the legislative, regulatory and judicial processes of protection of civil rights in the country. The Equality Authority is an independent State body, tasked with monitoring equality. In 2014, a bill was passed to merge the two bodies, to establish the Irish Human Rights and Equality Commission. The Commission promotes civil rights through drafting legislation, issuing public policy statements, and making recommendations to the government.²¹¹ It also has active engagement with process of review of human rights standards by the United Nations and the Council of Europe.

119. There are targeted bodies which accept complaints of abuse by public bodies. For example, the Office of the Ombudsman has statutory power to accept complaints against public bodies, and to recommend redress where appropriate. Similarly, the Data Protection Commissioner is responsible for enforcing obligations and protecting rights under the Data Protection Acts. There is no clear indication that the Commissioner has influence in shaping data protection legislation and policy in Ireland, however the Commissioner does have a statutory power to approve and encourage codes of practice in business sectors.²¹² There is no indication that either of these offices have a statutory power to actively engage in influencing policy in their respective areas.

120. Additional involvement in civil rights protection in Ireland arises from Non-Governmental Organisations. For example, and similar to their British counterparts, the Irish Council for Civil Liberties aims to promote civil rights and liberties in Ireland through campaigning, but does not have an official role in proposing or influencing legislation.

²¹⁰ Further information is available from the Information Commissioner's Office website, <<http://ico.org.uk>>.

²¹¹ Further information is available from the Irish Human Rights and Equality Commission website, <<http://www.ihrc.ie>>.

²¹² Further information is available from the Data Protection Commissioner website, <<http://www.dataprotection.ie>>.



QUESTION 7: CONFLICTS BETWEEN RIGHTS

- ✓ ***How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?***

United Kingdom

121. Rights which can be identified at common law have been to some extent superseded by the ECHR jurisprudence under the Human Rights Act 1998. The majority of civil rights are not absolute, and are instead qualified and subject to other considerations. Civil rights including the freedom of expression, the right to respect for a private and family life, and the freedom of thought, conscience and religion are qualified, and must be balanced against other rights and public interests.

122. Any interference with a right must be (a) lawful, (b) for a legitimate purpose or aim, (c) necessary, and (d) proportionate to that aim, or go no further than is necessary. If a public authority interferes with a right and does not match these four criteria, it will have been acting unlawfully.²¹³

Republic of Ireland

123. Similar to the position in the UK, many civil rights are not absolute and will be qualified subject to other considerations. For example, the freedom of expression, and freedom of association are qualified and subject to public order and morality. In terms of conflict between rights, the courts will balance rights against other considerations, or other rights.

124. In some cases, the courts will favour specific or narrow rights (the protection of marriage) over more general rights (for example, the guarantee of equality before the law). In the event of a conflict between the constitutional rights of the individual and actions of the State, the State is entitled to argue the necessity of other's rights, and the common good to justify any apparent interference with individual rights.²¹⁴

- ✓ ***Are there, in the UK and Ireland, notorious or problematic clashes between particular civil rights, or between civil rights and other rights, between individual civil rights and important public interests?***

125. While there has been a notorious and long-standing conflict between the freedom of expression and the right to privacy, it has come into sharp relief in light of the recent series of high profile cases involving the media. As has been considered above,²¹⁵ the right to privacy was not a feature of the British legal system prior to the incorporation of the EHCR. The right to freedom of expression, on the other hand, has a long history in the British legal system, and is considered an essential element of a

²¹³ See further P. Craig, 'Proportionality, Rationality and Review' *New Zealand Law Review* (2010): 265.

²¹⁴ See for example *People v. Shaw* [1982] 1 I.R. 1; *O'B v. s.* [1984] 1 I.R. 316. See further Forde & Leonard.

²¹⁵ The Right to Privacy, **Question 2**, paras. [38]–[40]



democratic society. Although there is an emphasis on the ‘balancing’ of rights in judicial discourse, and the right to the freedom of expression is in the ECHR a qualified right, it seems that the Courts will often favour the media’s arguments founded on the freedom of expression, giving a broad interpretation of ‘public interest’.²¹⁶ A strong conception of the right to privacy does not find widespread support in the UK, even in light of the endemic abuse by many members of the press uncovered in the Leveson Inquiry, despite the continuing conflict in the courts.

126. Significantly in recent years, national security has become a determining factor in the public interest to curtail rights, and has been the source of much litigation in the area of civil rights in the UK. National security has been a justification in cases alleging interference with rights including the right to a fair trial, the freedom of speech and privacy. For example, the right to freedom of expression is qualified, most heavily under legislation concerning national security. The Terrorism Act 2006 has created new offences in the UK, which criminalise the encouragement or ‘glorification’ of terrorism. It has been reported by the UK government,²¹⁷ that the act does not seek to curtail political debate, and will not apply in situations where there was no intent to encourage terrorism. This is an example of how public policy concerning national security has often come into conflict with civil rights in the UK.

ANNEX 1: RELEVANT NATIONAL PROVISIONS

UNITED KINGDOM

Data Protection Act 1998

European Communities Act 1972

Freedom of Information Act 2000

Human Rights Act 1998 (incorporating the European Convention on Human Rights)

Immigration Act 2014

Limitations Act 1980

Royal Charter on

REPUBLIC OF IRELAND

Constitution of Ireland 1937

²¹⁶ P. Wragg, ‘Leveson’s Vision for Press Reform: One Year On’, *Communications Law* (2014): 6.

²¹⁷ ICCPR 7th Periodic Report from the United Kingdom (12 December 2012).



Defamation Act 2009

Human Rights Act 2003 (incorporating the European Convention on Human Rights 1950)

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