

Constitutional and institutional law of the European Union

**Section D: General principles of
European Union law**

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Contents

Chapter 1: Introduction	1
1.1 Constitutional and institutional law of the European Union	1
1.1.1 The structure of the course.....	1
1.2 Introduction to Section D	2
1.3 How to use this Study Guide.....	3
1.4 Other study resources	4
Essential reading	4
Useful further reading.....	5
Law reports	5
Academic journals	6
1.5 Keeping up to date	6
1.6 Preparing for the examination.....	6
Allocating your time	7
The examination.....	7
Chapter 2: Human rights	9
2.1 The early case law	9
2.2 The current principles.....	11
2.2.1 The common standard of protection	12
2.2.2 The scope of human rights in the EU	13
2.3 The Charter of Fundamental Rights	16
Chapter 3: Citizenship	21
3.1 The Treaties	21
3.2 The <i>Martínez Sala</i> case	23
3.3 Directive 2004/38.....	25
Chapter 4: Legal certainty	29
4.1 Legal certainty.....	29
4.2 Clarity	29
4.3 Non-retroactivity	30
4.4 Legitimate expectations.....	31
Chapter 5: Proportionality	35
Introduction	35
5.1 Proportionality and competences.....	36
5.2 Proportionality in EU action	38
5.3 Proportionality with regard to Member State action	39
Sample examination questions.....	43

Chapter 2: Human rights

Learning outcomes

Having studied this chapter and the relevant readings, you should be able to:

- discuss the provenance of human rights in EU law
- explain the significance of human rights in the European legal order
- state some examples of the recognition of these rights
- evaluate the Charter of Fundamental Rights.

Essential reading

- Hartley, pp.141–160.
- Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
- Case C-260/89 *ERT* [1991] ECR 2925.
- Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.
- Case C-60/00 *Mary Carpenter* [2002] ECR I-6279.
- Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.
- Case C438/05 *ITWF v Viking Line ABP* [2007] ECR I-10779.
- Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

Useful further reading

- Alston, P. (ed.) *The EU and human rights*. (Oxford: Oxford University Press, 1998) [ISBN 9780198298090].
- Tridimas, T. *General principles of EU law*. (Oxford: Oxford University Press, 2007) [ISBN 9780199227686].

2.1 The early case law

Human rights were not mentioned in the original Treaties. The main aims of the Community, as it then was, were originally economic. The freedoms – free movement of goods, workers, services and capital – were extended only to Member State nationals in their relations with the governments of other states. Such rights are narrow. They have to do with the achievement of a common market between the Member States – they do not, for example, create a right of free movement for a French national in France.

In that spirit the European Court of Justice declared that the Community had set up a ‘new legal order’ for the benefit of which the Member States had restricted their sovereign rights, albeit in limited fields (Case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 01125). The doctrine of supremacy of EC law, as it then was, was meant to help protect the uniformity and effectiveness of EC law. Human rights emerged when the supremacy doctrine ran into trouble. National courts such as the German Federal Constitutional Court have the power and the duty to review the compliance of all laws with national standards of human rights. For such courts the doctrine of

supremacy posed the following problem: what happened if an EC measure in some way violated a fundamental right protected in the national constitution? Supremacy would suggest that the national court should apply it nevertheless. The duty that these courts owed to their own constitution to protect fundamental rights would suggest that EC law would have to give way. The dilemma was acutely felt by the German Court, which has consistently held that it will always give preference to fundamental rights, rather than to the supremacy of EC/EU law.

The conflict was reasonable; it was not a protectionist reaction to the common market. Hence, the Court of Justice reacted by conceding that there was a problem and trying to fill the gap by setting up a scheme of fundamental rights principles appropriate for the Community (as it then was), despite the absence of a list of such rights from the Treaties. Fundamental human rights were first provided for in Case 29/69 *Stauder v City of Ulm* [1969] ECR 419. Mr Stauder complained that his name was unnecessarily mentioned on the coupons he used to secure cheap butter. He thought that the naming was humiliating. A reference was made by a Stuttgart administrative court to the ECJ. The Court accepted for the first time that fundamental rights could be a basis for reviewing the legality of Community measures and ruled that the EC Decision in question should be construed as not requiring the mention of the recipient's name: it concluded that 'interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court' (*Stauder*, para. 7).

After this first, short mention, the Court had an opportunity to expand on this issue in a further German Case a few months later. In Case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125 the Court examined the validity of an export licence system, under which an exporter would lose a pre-paid deposit if he failed to use the licence. The company claimed that the loss was disproportionate to the aims of the measure and violated the fundamental right to economic liberty provided for by the German Constitution. The Court first insisted that the doctrine of supremacy prevailed over any national law: 'the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question' (para. 3). However, it then stated that human rights were also an implicit part of the Community structure:

Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

(*Internationale Handelsgesellschaft*, para. 4).

This doctrine was confirmed in subsequent cases (see Hartley, pp.143–151) and is still valid today.

2.2 The current principles

Since these developments in the case law, the Treaties have been amended to include explicit references to fundamental rights, the EU has equipped itself with a Charter of Fundamental Rights and steps have been taken for the Union to accede the European Convention for the Protection of Human Rights.

Article 6 of the TEU states:

1. The Union 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.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The 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.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

In addition, Article 7 TEU provides for sanctions in case one of the existing Member States is guilty of a clear and serious breach of human rights. This provision has never been applied. Finally, the 'Copenhagen' criteria¹ agreed for accession to the EU also state that all future members must comply with human rights.

The Court has over the years recognised three kinds of rights: economic and property rights, civil and political liberties and rights of defence (see *Tridimas*, 2007, p.307). The rights have included the right to property (for example, Case 44/79 *Hauer* [1979] 3727), the freedom to choose and practise freely one's trade or profession (for example, Case 240/83 *ADHBU* [1985] ECR 531), religious equality (for example, Case 130/75 *Prais v Council* [1976] ECR 1589), freedom of expression (for example, Case C-260/89 *ERT* [1991] ECR I-2925; Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659) and many others. The main principle is that rights are not absolute but are limited by competing values. Of course, there is disagreement over these matters among the different Member States. A question immediately arises: what level of protection should be given to these rights, especially when different countries offer different levels of protection? This is the question of the **common standard** of protection. A second question, related to the first, is should these standards apply to national action rather than exclusively to actions of EU institutions, and, if so, in what fields? This is the problem of the **scope** of human rights in the EU.

¹ Criteria that determine whether a country is eligible for EU membership – so called because they were identified at a meeting of the European Council at Copenhagen in 1993.

2.2.1 The common standard of protection

The uniformity and supremacy of EU law requires that the ECJ use a common standard of review. It would be inconsistent with EU law, for example, if a directive and its implementing legislation constraining economic activity were to be assessed differently in Germany, where there is a constitutional right to economic liberty, and the UK, where there is not. If Member States were allowed to apply their own standards, the uniformity of EU law would be jeopardised.

But what should be the common standard? One possible answer would be to apply the highest standard among the Member States – so, for example, in this case follow the German rule. But this would not work. There are many areas where rights conflict with one another. In cases like this one could not follow the highest possible standard in the protection of one right without violating the protection of the other right. A classic example is Case C-159/90 *Society for the Protection of the Unborn Child Ireland Ltd v Grogan* [1991] ECR I-4685. In this case a group of university students in Ireland advertised British clinics where Irish women could secure abortions. Abortion is a criminal offence in Ireland, where a provision of the Constitution (Article 40.3.3) entrenches the 'right to life' of the unborn as a constitutional right. In earlier cases the Irish courts had found that it is illegal to assist pregnant women to travel abroad in order to receive medical termination of pregnancy. The Society for the Protection of the Unborn Child brought proceedings against the students. The Irish court noted that the freedom to receive medical services abroad was one of the Community freedoms and referred the case to the ECJ. Clearly, there was a conflict between the right to free expression and the right to life, as interpreted in Ireland. The conflict could not be resolved without lowering the standard of protection of some right somewhere in the Community. Allowing the Irish balance in favour of their version of the 'right to life' would violate the right to free speech as protected in the UK and elsewhere – as well as the right to privacy and the right to choose whether to have a child, if there is such a right elsewhere in the EU. Allowing the free speech standard to prevail would interfere with the Constitution of Ireland. The conflict of rights means that it is not possible to have the highest national standard as a common standard.

The answer given by the Court of Justice is that the standard is to be appropriate to EU law. It is not to be the national maximum or minimum:

[T]he question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community [EU] law, lead inevitably to the destruction of the unity of the common market and the jeopardising of the cohesion of the Community [EU].
(*Hauer*, para. 14).

The Court added (at para. 32) that 'although it is true that guarantees are given by the constitutional law of several Member States in

respect of the freedom to pursue trade or professional activities, the right thereby guaranteed, far from constituting an unfettered prerogative, must likewise be viewed in the light of the social function of the activities protected thereunder'. In other words, the Court will apply a flexible review, giving due weight to the objectives of the EU. As it happens, although the Court has often suggested the proper interpretation of an EU measure, it has never found that an EU law in itself violates standards of human rights.

Another important question is posed by the relation of fundamental rights to the Union freedoms (i.e. the free movement of goods, workers, services and capital). In a number of recent cases the two have conflicted. In Case C-112/00 *Schmidberger* [2003] ECR I-5659 the Court was asked to balance the right of free speech of environmental protesters who had secured permission to block a main Austrian motorway and the right of traders to use the motorway to transport their goods. The Court noted (para. 77) that the case raised 'the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter'. It found, however, that the exercise of the fundamental right limited but did not unjustifiably violate the free movement of goods.

But in the more recent Case C438/05 *ITWF v Viking Line ABP* [2007] ECR I-10779 the Court, while recognising (at para. 44) that the workers involved in a strike against the reflagging of a Viking Line ship from the Finnish flag to that of another Member State were indeed exercising a 'fundamental right which forms an integral part of the general principles of Community [EU] law', suggested that reflagging was an expression of the right to freedom of establishment protected under Article 49 TFEU and that 'restrictions on freedom of establishment resulting from such action cannot be objectively justified' (para. 88).

2.2.2 The scope of human rights in the EU

The question of the scope of application of the Court's review is related to the question of a common standard. It is instructive to look at the outcome of the *Grogan* case. What balance did the Court strike in the light of the *Hauer* judgment on a Community standard? The Court said that on its facts the case did not fall under EC/EU law at all. As the students were not being linked to the clinics in Britain, their activities were not economic in nature and were therefore not covered by the Treaties; they were outside the scope of EU law, which requires an economic link in such transnational activities.

What, then, is the scope of human rights protection? In principle it follows the field of EU law. However it is not always that simple. In some cases it applies when states derogate from EU law.

There are three possibilities that some measure that allegedly falls foul of human rights is under the province of EU law:

- The EU may impose duties on individuals directly (through a regulation or decision).
- A national measure may impose duties in the process of implementing an EU directive or regulation.
- In derogating from a Community law obligation, a national measure may impose unwarranted duties on persons.

In the first case the Community may impose a direct duty on individuals. This may happen a great deal in staff cases, but also in the case of regulations and decisions. In the second case, a national measure may implement a Community policy. Such was the case in *Stauder* or *Internationale Handelsgesellschaft*, as we saw above. In Case 5/88 *Wachauf* [1989] ECR 2609, for example, the Court had to review a milk quota scheme which confused ownership of land and entitlement to subsidies for milk production. As in the cases above, the Court of Justice ruled that fundamental rights were binding on the Member States and required that the measures be applied in compliance with these rights. It said (at para. 19) that requirements to protect fundamental rights in the Community legal order 'are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements'.

The third category is harder to place. In Case C-260/89 *ERT* [1991] ECR I2925 the Court said that even when a state is derogating from a Community obligation, it must respect human rights standards:

42. As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para. 25, and the judgment in Case C-12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719, para. 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

It follows that the Court of Justice will exercise review even in cases where Member States derogate from their obligations to respect EU freedoms. But why is this review to be exercised by the Court of Justice? All Member States have their own lists and interpretations of human rights. If they have a right to derogate from an EU obligation, they should also have the right to do so according to their own human rights standards.

ERT is a controversial case in EU law, and one that has not been applied again in later case law – although subsequent judgments have referred to it as ‘good law’. The Charter of Fundamental Rights of the EU takes a more nuanced stance, providing that ‘the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States **only when they are implementing Union law**’ (Article 51(1); emphasis added).

It must be evident by now how *Grogan* failed to fall under EU law. It applies to none of the case mentioned above – EU action, state action implementing EU law, or derogation from an EU freedom. Because the students were not exercising an EU freedom, the question fell outside EU law. So the rationale of *Grogan* has a solid basis. However, the problem posed by the facts of the case remains: what standard is to be applied when conceptions of rights differ among Member States?

Grogan was not the last word on purely internal situations. A very interesting case regarding the scope of human rights is Case C-60/00 *Mary Carpenter* [2002] ECR I-6279. In this case Mrs Carpenter, a Filipino national, was in the process of being deported from the UK on the grounds of certain violations of immigration law on her part. She claimed she derived EU law rights through her husband, a British national. Spouses of European nationals derive EU rights only when they move to another country, not in the country of origin, and so one could have assumed this was another purely internal situation. However, the Court found in her favour. It stated that, first, Mr Carpenter was engaged in providing services to other Member States’ nationals as a ‘significant proportion of his business’. Furthermore:

38. In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ), English Special Edition 1968

(II), p.475); Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p.485), and Articles 1(1)(c) and 4 of the Directive).

39. It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, para. 23).

The link between the plight of Mrs Carpenter and EU law was extremely tenuous. Neither she nor her husband had moved to another EU state. Still, EU law applied and human rights standards were invoked.

Finally, note that the ECJ takes a robust stance in protecting its own vision of EU human rights, not only from possible threats originating in national legal systems, but also from possible challenges deriving from international law. This attitude is clearly exemplified by the ECJ judgment in Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-06351. The Court of Justice, on appeal from the General Court, was called to review the legality of an EU regulation freezing the assets of Mr Kadi in accordance with a UN Security Council Resolution demanding such action against persons and organisations suspected of terrorist links. According to Mr Kadi, the EU regulation in question had been adopted in breach of his fundamental right to a fair trial and the right to property (for a more detailed analysis, see Hartley, pp.158–60). The Court of Justice reversed an earlier decision of the General Court (back then still called CFI) which in effect accepted UN Security Council obligations as overriding. The ECJ stated (at para. 285) that ‘obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty [now the TFEU], which include the principle that all [EU] acts must respect fundamental rights’.

2.3 The Charter of Fundamental Rights

As noted above, the Treaty of Lisbon introduced a provision (Article 6(1) TEU) explicitly recognising the Charter of Fundamental Rights of the European Union as legally binding. The Charter had been drafted and ‘solemnly proclaimed’ already in 2000, and since its ‘proclamation’ a number of Advocate Generals and ECJ judgments had referred to its provisions. In 2004 the Charter was incorporated in Title II of the Draft Treaty Establishing a Constitution for Europe. However, the rejection of the Constitutional Treaty by France and the Netherlands meant that it was not until the ratification of the Lisbon Treaty that the rights and principles contained in the Charter acquired ‘the same legal value as the Treaties’ (Article 6(1) TEU). In its current formulation ([2010] OJ C 83/389), the Charter provides a list of human rights, borrowing extensively from the European Convention, but also introducing some new rights.

The Charter addresses the problem of the standard of protection in Article 53, as follows:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

It seems that the Charter recognises that the common standard will not go beyond the minimum for any Member State. But how does this address the problem of conflicting rights that we saw in *Grogan*?

The Charter also addresses the question of scope, in Article 51:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The Charter takes great care not to increase the field of application of the Treaties, or of EU law in general. It leaves unaffected, it seems, the rationale of cases like *Grogan*: disputes of citizens with their own government without an external economic link are not covered by EU law, even if they have a remote causal link with it.

At the request of some Member States, notably the United Kingdom and Poland, the Charter displays a number of safeguard measures ostensibly providing further reassurances to Member States eager to protect their national constitutional traditions from excessive inroads by EU fundamental rights (see, for instance, Article 52). Some rights are granted in accordance with, or under the conditions provided for, Union law and 'national laws and practices' (see, for instance, Articles 27, 28, 30, 34 and 35). Last but not least, some Member States have sought to protect their national autonomy by demanding the adoption of ad hoc Protocols that exclude them from the scope of application of some of the rights contained in the Charter. For instance, Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom ([2010] OJ C 83/313) provides that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'.

At the time of writing it remains to be seen how the Court will interpret the provisions of the Charter and its accompanying Protocols in the aftermath of the ratification of the Lisbon Treaty.

Activities 2.1–2.3

2.1 Are EU human rights intended to replace national lists of human rights?

2.2 In what way is *Carpenter* different from *Grogan*? Why is it not a purely internal situation?

2.3 What is more important for the ECJ after *Viking*, human rights or Union freedoms?

Feedback: page 20.

Reminder of learning outcomes

By this stage you should be able to:

- discuss the provenance of human rights in EU law
- explain the significance of human rights in the European legal order
- state some examples of the recognition of these rights
- evaluate the Charter of Fundamental Rights.