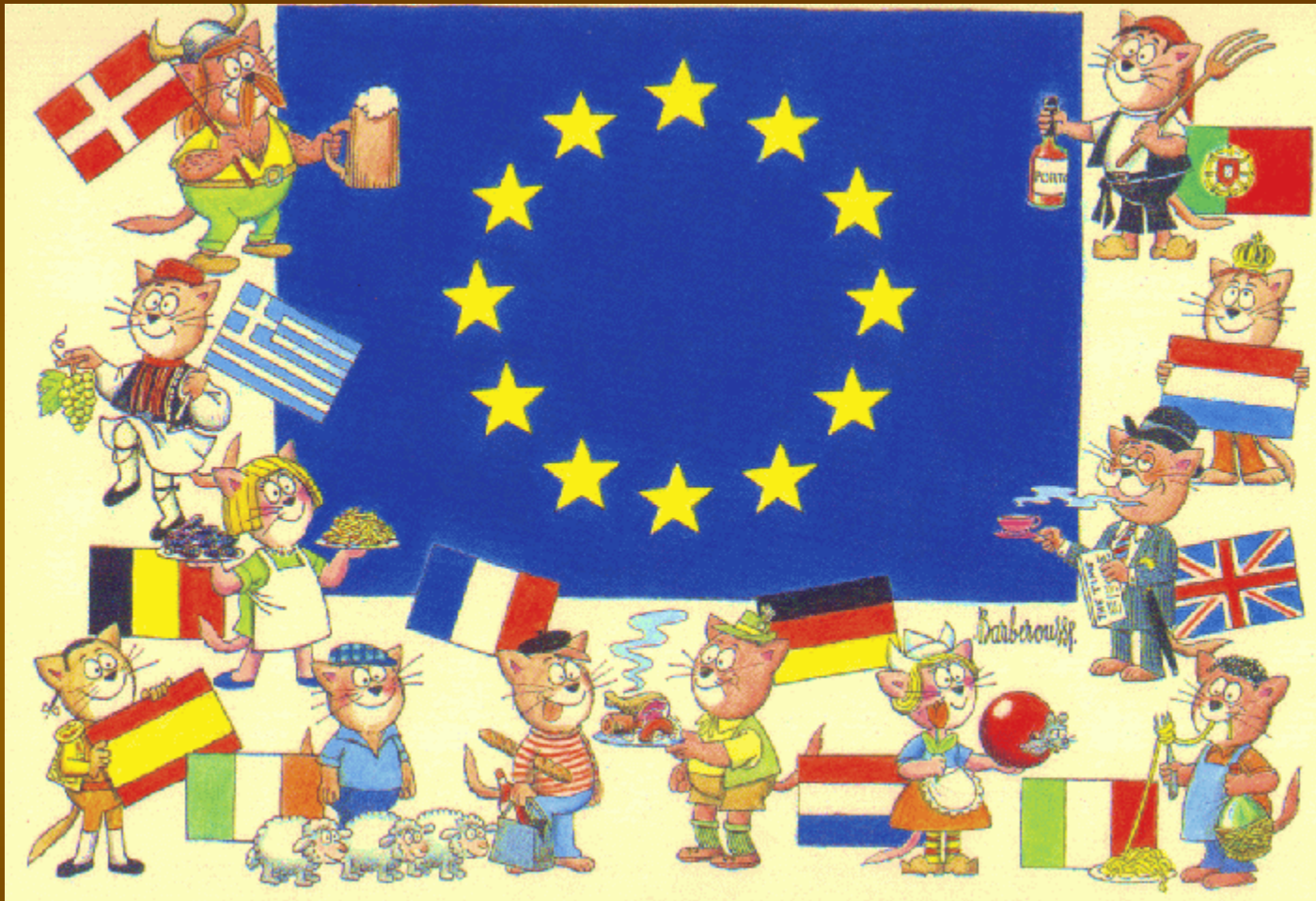


Human rights 3 - New level of  
protection: Civis europeus sum!

Pavel Molek

Human Rights in Europe - EU - New  
level of protection



Human Rights in Europe - EU - New level of protection

# Resume

- What are the levels of protection?
- New Kid on the Block
- Why should we have HRs protection in EU?
- ECSC 1951 was not about HRs....
- So why do we need them? What was EC about?
  - The more competences, the more limits on competences by MSs
  - The more competences, the more possibility of interference with HRs
  - Thousands of facets of non-discrimination....

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# 50s: The original EC Treaty

- Article 119 EEC Treaty

*„Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers. For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.*

*Equal remuneration without discrimination based on sex means:*

- (a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and*
- (b) that remuneration for work at time-rates shall be the same for the same job. "*

# 60s: founding case law principles

- Direct effect - Case 26/62 Van Gend & Loos [1963] ECR 1: *„...ACCORDING TO THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THE TREATY, ARTICLE 12 MUST BE INTERPRETED AS PRODUCING DIRECT EFFECTS AND CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT... ”*
- Primacy - Case 6/64 Costa v. ENEL [1964] ECR 614: *„THE TRANSFER BY THE STATES FROM THEIR DOMESTIC LEGAL SYSTEM TO THE COMMUNITY LEGAL SYSTEM OF THE RIGHTS AND OBLIGATIONS ARISING UNDER THE TREATY CARRIES WITH IT A PERMANENT LIMITATION OF THEIR SOVEREIGN RIGHTS, AGAINST WHICH A SUBSEQUENT UNILATERAL ACT INCOMPATIBLE WITH THE CONCEPT OF THE COMMUNITY CANNOT PREVAIL. ”*

# 70s: First HR cases – who is the defendor fidei?

- **Case 11/70 Internationale Handesgesellschaft [1970] ECR 1125:** The applicant, a German import-export company, obtained an export licence in respect of 20,000 metric tonnes of maize meal, the validity of which expired on 31 December 1967. Council regulation 120/67 had set up a system for the common organization of the cereal market, whereby a licence could be obtained by lodging a deposit, and that deposit would be forfeited if the goods were not exported within the period of time set. A part of the applicant's company's deposit was forfeited when the licence expired without the maize having been exported, and the company brought proceedings before the administrative court claiming the return of this sum and questioning the validity of the deposit system. The national court referred the case to the ECJ.



# 70s: First HR cases - who is the defendor fidei?

„3. IN FACT, 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. THEREFORE THE VALIDITY OF A COMMUNITY MEASURE OR ITS EFFECT WITHIN A MEMBER STATE CANNOT BE AFFECTED BY ALLEGATIONS THAT IT RUNS COUNTER TO EITHER FUNDAMENTAL RIGHTS AS FORMULATED BY THE CONSTITUTION OF THAT STATE OR THE PRINCIPLES OF A NATIONAL CONSTITUTIONAL STRUCTURE. HOWEVER, AN EXAMINATION SHOULD BE MADE AS TO WHETHER OR NOT ANY ANALOGOUS GUARANTEE INHERENT IN COMMUNITY LAW HAS BEEN DISREGARDED . IN FACT, 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 . IT MUST THEREFORE BE ASCERTAINED, IN THE LIGHT OF THE DOUBTS EXPRESSED BY THE VERWALTUNGSGERICHT, WHETHER THE SYSTEM OF DEPOSITS HAS INFRINGED RIGHTS OF A FUNDAMENTAL NATURE, RESPECT FOR WHICH MUST BE ENSURED IN THE COMMUNITY LEGAL SYSTEM.“

# 70s: First HR cases - discrimination

- ECJ judgment Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (1978) Case 149/77:

*„FUNDAMENTAL PERSONAL HUMAN RIGHTS FORM PART OF THE GENERAL PRINCIPLES OF COMMUNITY LAW , THE OBSERVANCE OF WHICH THE COURT HAS A DUTY TO ENSURE . THE ELIMINATION OF DISCRIMINATION BASED ON SEX FORMS PART OF THOSE FUNDAMENTAL RIGHTS . HOWEVER , IT IS NOT FOR THE COURT TO ENFORCE THE OBSERVANCE OF THAT RULE OF NON-DISCRIMINATION IN RESPECT OF RELATIONSHIPS BETWEEN EMPLOYER AND EMPLOYEE WHICH ARE A MATTER EXCLUSIVELY FOR NATIONAL LAW. ”*



# 80s: First HR cases – where are they?

Case 5/88 Wachauf [1989] ECR 2609

- „17. The Court has consistently held, ... that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court . In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community . International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law .*
- 22. The Community regulations in question accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively .*

# 80s: First HR cases: what do we have in common?

- Case C-260/89 ERT [1991] ECR I-2925:

ERT, a Greek radio station and television company, enjoyed exclusive broadcasting rights under a Greek statute. It sought an injunction against an information company and Mr. Kouvelas, the Mayor of Thessaloniki, who had set up a rival television station. The respondent argued that ERT's exclusive rights infringed the free movement and competition provisions of EC law. The Greek government invoked Articles 45 and 55 EC which allowed it to impose restrictions for reasons of public policy. ERT counter-argued that these could not be invoked as the conduct violated Article 10 ECHR relating to freedom of expression.

# 80s: First HR cases: what do we have in common?

- 41. With regard to Article 10 of the European Convention on Human Rights, ... it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories ... The European Convention on Human Rights has special significance in that respect (...).*
- 42. As the Court has held (...), 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."*

# 90s: let us be European citizens!

- Opinion of Advocate general Jacobs in Case C-168/91 Konstantinidis [1993] ECR I-1191 – what was it about?

*„46. In my opinion, a Community national who goes to another Member State as a worker or selfemployed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights.“*

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# 90s: let us be European citizens!

- Judgment in Case C-168/91 Konstantinidis [1993] ECR I-1191
- What remained of AG opinion?

*„15 Rules of that kind are to be regarded as incompatible with Article 52 of the Treaty only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article.*

*16 Such interference occurs if a Greek national is obliged by the legislation of the State in which he is established to use, in the pursuit of his occupation, a spelling of his name derived from the transliteration used in the registers of civil status if that spelling is such as to modify its pronunciation and if the resulting distortion exposes him to the risk that potential clients may confuse him with other persons. ”*

# 90s: let us be European citizens!

- Maastricht Treaty 1992:

„F2 TEU:

*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*

„Article 8 TEC

*1. Citizenship of the Union is hereby established.*

*Every person holding the nationality of a Member State shall be a citizen of the Union.*

*2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

Article 8a

*1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.*

*2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament."*



# 90s: let us be European citizens!

## ■ TEU after Amsterdam Treaty:

### *„Article 6*

- 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*
- 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*

# 2000: How to cooperate?

- Case C 402/05 P - Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities:
  - Mr Kadi is resident in Saudi Arabia. On 19 October 2001, he was included in the list in Annex I to Regulation No 467/2001 (later (EC) No 881/2002) as a person suspected of supporting terrorism. As a consequence, all his funds and other financial resources in the Community were to be frozen. The contested regulation was adopted on the basis of Articles 60 EC, 301 EC and 308 EC in order to give effect, within the Community, to Council Common Position 2002/402/CFSP. That Common Position, in turn, reflected Resolutions 1267(1999), (5) 1333(2000) (6) and 1390(2002) of the United Nations Security Council. Considering that the suppression of international terrorism is essential for the maintenance of international peace and security, the Security Council adopted those resolutions under Chapter VII of the UN Charter. The resolutions provide, inter alia, that all States are to take measures to freeze the funds and other financial assets of individuals and entities associated with Usama bin Laden, the Al Qaida network and the Taliban, as designated by the Sanctions Committee. On 8 March 2001, the Sanctions Committee published a first consolidated list of the persons and entities that were to be subjected to the freezing of funds. The name of the appellant was added to the list by the Sanctions Committee on 19 October 2001.

# 2000: How to cooperate?

- Kadi: AG question: *„When the Security Council has spoken, the Court must remain silent?!“* *„Or, to put it differently: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?“*
  - 22-23: *„the Community’s municipal legal order and the international legal order do not pass by each other like ships in the night. On the contrary, the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations. Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law....“*



# 2000: How to cooperate?

- Kadi AG opinion answer: „54. *Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.*
- *55. It follows that the appellant’s claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant.”*

# 2000: How to cooperate?

- Kadi JUDGMENT OF THE COURT (Grand Chamber) 3 September 2008 :
  - *„Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community. **The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.**“*

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# 2000: How to cooperate?

- Kadi JUDGMENT OF THE COURT (Grand Chamber) 3 September 2008 – Who has the last word?:
  - *„Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. If Article 300(7) EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part. The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.“*

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# 2000: How to cooperate?

- Kadi JUDGMENT OF THE COURT (Grand Chamber) 3 September 2008 :
  - *„The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.*
  - *Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.*
  - *Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed.*”

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# 2000: The Charter and her story

- Drafted by a body called the “Convention” on the basis of a decision of the Cologne summit adopted in June 1999.
  - Answer to whether the EU should accede to European Convention on Human Rights or should have its own Bill of Rights and how to solve the problem of ever more intensive interference of the ever-closer Union into human rights problemacy.
  - Solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7 December 2000. But it was not annexed to the fundamental Treaties (although it had been “drafted as if it were to have full legal effect” ) and its legal force remained undetermined (or left to the later political process) due especially to the UK reluctance to accept a binding fundamental rights catalogue on EU level
  - The first attempt to make the Charter legally binding done in the draft EU Constitution Treaty.
  - After the Lisbon Treaty, replacing EU Constitution Treaty, came into force on 1 December 2009, was the Charter made legally binding as proclaimed by Art. 6 para. 1 of the Treaty on European Union.

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# 2000: The Charter and her story

- Art. 6 para. 1 of the Treaty on European Union – recent version:

- *„Article 6*

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."*

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# 2000: The Charter and her story

- Charter building on ECHR and case-law (preamble):
  - *„This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.“*

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# 2000: The Charter and her story

- Structure:
  - Dignity
  - Freedoms
  - Equality
  - Solidarity
  - Citizen 's Rights
  - Justice



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# 2000: The Charter and her story

- Field of application:

- „Article 51

- Field of application*

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

- Explaining the scope of protection



# 2000: The Charter and her troubles

- Happy end? That was a good one....



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# 2000: The Charter and her troubles

- Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (and the Czech Republic?)

## *„Article 1*

- 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
- 2. In particular, and for the avoidance of doubt, 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.*

## *Article 2*

*To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."*

- Your opinion on HRs protection in EU – does it have legitimacy to do it (input, output, HR protection)?