

## REVIEWS AND ANNOTATIONS

**Mazák, Ján – Jánošíková, Martina et al. Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike.**

**Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2016, 254 s.**

**[The Charter of Fundamental Rights of the European Union in Proceedings before Courts of the Slovak Republic. Košice: Pavol Jozef Šafárik University in Košice, 2016, 254 pp.]<sup>1</sup>**

The Charter of Fundamental Rights of the European Union ('the Charter') has captured the attention of legal scholarship ever since its adoption as a non-binding instrument, not least due to its oft-cited innovative structure and content. Not surprisingly, this attention has but intensified after the Charter became part of EU primary law, and consequently part of the corpus of law that Member States' domestic courts must apply when conditions for its applicability are met. However, scant research has been done that would specifically focus on the extent to which, and the manner in which, the Charter has been present in domestic judicial proceedings. The book under review addresses this lacuna and offers a comprehensive and well-argued analysis of the role of the Charter in proceedings before Slovak courts.

This monograph is the product of research led by Professor Ján Mazák, a former Advocate General at the Court of Justice of the EU, who brought together a group of authors with ample experience of both the EU and Slovak judicial systems. Combining these two perspectives helped achieve the principal aim of the research, which was 'not only to identify the status, scope and effects of the Charter in proceedings before courts and other authorities providing legal protection, but also to ascertain how the Slovak Constitutional Court, and also general courts of Slovakia, determine the relationship which exists between the Charter on the one hand and other legal instruments such as the Slovak Constitution, the Convention on Human Rights and, if appropriate, other international human rights treaties on the other' (p. 13).

Part I of the monograph assembles all the key ingredients that are necessary for the Charter to be given full effect by domestic courts. It opens with a general discussion of the Charter followed by a detailed review of its 'horizontal provisions' that govern the Charter's interpretation and application.

In keeping with the focus of the research, and echoing the copious amount of existing scholarship on this issue, the authors carefully examine the implications of Article 51(1) of the Charter that limits the binding effect of the Charter on Member States 'only when they are implementing Union law'. They analyse the pertinent case law of the Court of Justice of the EU (CJEU) – which they assess as 'relatively well established' (p. 34) – and propose a checklist of five criteria of domestic application of the Charter (pp. 34–39). Admittedly, such a checklist cannot provide a definitive guide – the authors are careful to point out that the seemingly all-encompassing concept of 'implementing Union law' does not lend itself to generalisations. Nevertheless, the proposed checklist can serve as a useful tool for those domestic courts that have been called on to apply the Charter.

The subsequent discussion throws some light on a point of controversy that currently preoccupies all those trying to unpick the complexities of multi-level fundamental rights protection in the EU. In *Melloni*, the CJEU established a fundamental principle that the authors summarise as follows: 'in matters falling within the scope of EU law, a Member State is required by virtue of Article 51(1) of the Charter to respect the principles of primacy, unity and effectiveness of EU law. In such cases, the Charter takes primacy over the constitution of a Member State and when an EU legal act is not con-

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<sup>1</sup> A full English translation of the book is available at: <http://ssrn.com/abstract=2961156>. The pagination in references corresponds to this English translation.

trary to the Charter, then it cannot be disapplied only on the grounds that it is in conflict with the constitution of the Member State or its interpretation by the constitutional court' (pp. 42–43). With reference to two subsequent judgments of the Spanish and German constitutional courts, the authors show that these courts are unwilling to accept the full implications of the *Melloni* line of cases. Simply put, constitutional courts are not ready to abandon fundamental rights guaranteed by national constitutions insofar as these rights express national constitutional identity (pp. 43–46). It should be noted that the issues raised in *Melloni* go beyond simply revisiting the long-established resistance of constitutional courts to the principle of absolute primacy of Union law. As the authors go on to argue, the CJEU's approach established in *Melloni*, and developed in *Opinion 2/13* and *Taricco and Others*, also raises important questions about the relationship between Union law and international human rights law, namely the European Convention on Human Rights (p. 48). The discussion, however, concludes on an optimistic note, referring to hopes that the CJEU might still adjust the *Melloni* doctrine to make more space for the protection of national identity of Member States (p. 54).

Part I of the monograph continues by exploring several other aspects of the Charter's application with potential to create difficulties for domestic courts, be it the role of the Charter in national constitutional review (p. 59), the distinction between fundamental rights and principles (p. 71), or the relationship between the fundamental rights contained in the Charter and those enshrined as general principles of law (p. 78). It closes with a discussion of principal rules underpinning the relationships between the Charter, the European Convention on Human Rights and the Slovak Constitution. This analysis is rigorously substantiated but would benefit from a more nuanced approach on the issue of substantive constitutional review of national measures transposing EU directives. Here, a distinction is necessary between those measures whose content is fully necessitated (predetermined) by the directive in question, and those ones whose content is *not* fully necessitated by the directive as the latter leaves Member States a margin of discretion. In the first situation, constitutional courts are, in principle, excluded from applying higher national fundamental rights standards, while in the second one they are, in principle, free to do so.<sup>2</sup> Although this important distinction is implied in several places in the text, it calls for a more explicit treatment.

Part II of the book examines the role that the Charter has played in the decisional practice of the Slovak Constitutional Court (SCC). It should be noted at the outset that in the Slovak legal system – as in the Austrian one, but not the Czech one – the Charter can be invoked as a referential rule for the purposes of constitutional review, both in proceedings on compatibility of legislation and proceedings on constitutional complaints (pp. 121–135). Such positioning of the Charter in domestic law has far-reaching consequences and it demands, at the very least, a strictly methodical approach on the part of the constitutional court, if tensions between national and EU legal orders are to be reduced.

Yet, after a thorough review of the SCC's case law to date, the authors demonstrate that the SCC has not been coherent in applying the Charter. They stress that the question of the Charter's applicability should always be treated explicitly, as an independent step in the Court's reasoning, and that it should be answered within the preliminary stage of adjudicating the constitutional complaint, not in the decision on merits (p. 128). They are highly critical of the 'self-restraining approach' of the SCC based on the assumption that 'if the incompatibility of the contested legislation with the Constitution or the Convention on Human Rights is established, there is no need to decide on the incompatibility with the Charter in order to attain the objective pursued by the protection of constitutionality' (p. 180). They argue that such approach is susceptible of undermining the principle of primacy of Union law and direct effect of the Charter's provisions. Notwithstanding these observations, the

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<sup>2</sup> See, e.g., MILLET, F. X. How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice. *Common Market Law Review*. 2014, Vol. 51, No. 1, pp. 195–218.

authors remain cautiously optimistic, concluding that the SCC's case law 'is evolving in a positive direction' (p. 181).

Part III of the monograph completes the picture by reviewing the application of the Charter by the Slovak Supreme Court and other courts of general jurisdiction. It focuses on the role of the Charter in references for preliminary ruling (p. 186), the use of the Charter in view of its interpretative and review functions (p. 204) and the application of Article 47 of the Charter – the right to an effective remedy and to a fair trial – which is the provision most often cited by Slovak courts (p. 220). The analysis of the case law reveals that Slovak courts have been struggling to assess the applicability of the Charter, let alone giving full effect to Charter rights (see pp. 207–208). One is left with an impression that the difficulties stem from insufficient respect of Union law in general – rather than being Charter-specific – which is notably demonstrated by the Supreme Court's rather offhand attitude to the preliminary ruling procedure (pp. 222 *et seq.*). In brief, what emerges is a lack of method rather than principled resistance of Slovak courts to the Charter.

The outcomes of the research allowed the authors to formulate a set of specific and practice-oriented recommendations (Part IV) addressed not only to Slovak courts, but also to legal professionals in general. Regarding the latter, it is argued that part of the problem lies in the poor quality of their applications initiating proceedings: they often refer to the Charter only in passing, without justifying its applicability to the matter at hand (p. 250). This demonstrates well one of the strongest points of the monograph: the discussion pays due regard to practical considerations of judicial decision-making. The authors are also very successful in unravelling some of the complexities of fundamental rights protection in Europe and identifying many questions that remain unanswered, particularly the corrective – or disruptive – potential of national identity protection as enshrined in Article 4(2) of the Treaty on European Union.

All in all, the book under review offers us an insightful analysis of the Charter's application by Slovak courts, whose relevance is by no means confined to the Slovak judicial context. As it has been translated into English, the monograph will no doubt find a large international readership, and rightly so.

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**Larry Daniel. Cell Phone Location Evidence for Legal Professionals. Understanding Cell Phone Location Evidence from the Warrant to the Courtroom. Elsevier, 2017, 102 pp.**

As the title suggests, this book addresses needs of legal professionals to understand possibilities and constraints in acquiring evidence about whereabouts of a cell phone. The book was written by a computer forensic expert Daniel Larry who has a vast experience in working in the area of law and perceives the need non-technical specialists as well as general public to uncover the secrets behind communication technologies. He was able to simplify complex operation of telecommunication networks and reduce the important information into a few pages in each chapter. All of the chapters are easily readable as well as illustrative and practical.

The first four chapters provide a comprehensible overview of how a cellular phone network works. Initially, the functioning of a cell phone and a smart phone is introduced together with information

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