

# The Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union

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## 1. The Right to Education in the Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights of the EU<sup>1</sup> accords a prominent place to the Right to Education. Situated in the Chapter about Freedoms, Article 14 enumerates several education-related rights: the right to education, the right to have access to vocational and continuing training, the ‘possibility’ to receive free compulsory education, the freedom to found educational establishments, and the right of parents to ensure the education and teaching of their children in conformity with their convictions; furthermore, Article 13 guarantees ‘Academic Freedom’. The social and economic importance of education seems to be properly reflected in the Charter.

At second glance though, these guarantees raise more questions than they answer. What shall we make of a ‘freedom’ in Chapter II of the Charter that is to a large extent phrased as a social right, not content with the citizen being ‘left alone’ and safe from infringement, but requiring the provision of a service? Is this different from the various ‘natures’ attributed to the Right to Education in international law?<sup>2</sup> How are the various rights in Article 14 related to other rights, like the freedom of expression or the freedom of profession? Can the exercise or enjoyment of the rights be limited, and if so, under which conditions? And what does the Right to Education mean in practice, considering that under Article 51 of the Charter, only the Union and the implementation of Union Law is bound, and not the member states in their autonomous sphere where they actually provide for and regulate education? And for the practical level: what should happen according to the Charter, if citizens demand basic education for their children from the Union, or from a member state?

To answer these questions, it is necessary to understand the premises on which the Charter rests (2.). As a second step, the relationship of the Right to Education with other rights has to be analysed (3.). Finally I will examine the ‘added value’, if any, that Article 14 of the Charter provides (4.).

## 2. The Right to Education in Context: The Legal Nature of the Charter of Fundamental Rights of the EU

### a) Visibility of Rights

Since its drafting by a body<sup>3</sup> appointed by the European Council and its solemn proclamation at the Nice summit in December 2000, the Charter of Fundamental Rights of the EU has been the focus point of the Union’s

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<sup>2</sup> Henceforth referred to as the ‘Charter’.

<sup>3</sup> See e.g. Bernsdorff, N. (2003) in: Mayer, J. (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos-Verlag, Baden-Baden, pp. 208-209, and for the broader context Delbrück, J. (1992), ‘The Right to Education as an International Human Right’, *GYIL*, 35, p. 92; Halvorsen, K. (1990), ‘Notes on the Realization of the Human Right to Education’, *Human Rights Quarterly*, 12, p. 341; Nowak, M. (1995), ‘The Right to Education’, in: Eide, A., Krause, C. and Rosas, A. (eds), *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht, p. 189.

<sup>3</sup> The body named itself ‘Convention’.

fundamental rights debate. The Charter's driving theme is making rights visible. Where those rights have been and still are based upon general principles of law, giving visibility to those unwritten rights in the form of a legal document approaches the quality of codification.

So even though the Charter itself is not legally binding, it can be treated like a legal text, notwithstanding that the law emanates from another, different source. With this context in mind, every legal analysis of the Charter has to consider that visibility of rights, not strict codification or thorough compilation, is the prime motive. The actual fundamental rights law of the EU still rests upon general principles of law and treaty provisions, namely Article 6 para. 2 EUT.

## b) Limited Scope

A further character trait of the Charter is its limited scope. According to Article 51, 'the provisions of this Charter are addressed to the institutions and bodies of the Union... and to the Member States only when they are implementing Union law'.<sup>4</sup> This is not a substantial problem for negative guarantees, like the property right, where the Union is prohibited from acting in a certain way. But for positive obligations that may *require* the Union to act in a certain way, the issue of powers takes a decisive role. As fundamental rights do not change the distribution of powers between the Union and the member states,<sup>5</sup> the positive obligation may find itself reduced to an empty shell if there is no power to act according to that obligation. Especially with regard to education, the scope of Union powers is quite limited; almost exclusively, education still resorts to the autonomous sphere of the member states.

## c) Rights and Principles

Another preliminary point concerns rights and principles in the Charter. The term 'principle' can take several distinct meanings, e.g. as a general principle of law (indicating the source of law) or just as the abstract, non-individual side of a right. In the context of the Charter, the term is of particular interest when juxtaposed with rights and (or) freedoms. The last paragraph of the Charter's preamble entails such a contrast by stating that the Union 'recognises the rights, freedoms and principles set out hereafter'. A similar reference to principles is made in Article 51 para. 2 of the Charter; another mentioning is introduced with the amendments Article 52 of the Charter has received in the process of drafting a Constitutional Treaty for the EU as Article II-112: an additional paragraph 5 states that 'the provisions of this Charter which contain principles may be implemented by legislative and executive acts...', while rights may be subject to limitations.

The legal effect of those principles is further diminished when the last sentence of the cited paragraph reads that they 'shall be judicially cognisable only in the interpretation of such [sc.: implementing] acts and in the ruling on their legality'. In other words, there is a class of norms of lesser quality than rights; the wording of the Charter provisions does not, however, explicitly differentiate between the two layers. Therefore, it is a matter of interpretation to establish which is which. In the given context, the question is how far the education guarantees are unconditional rights, or require implementation.

Several principles of the Charter seek to affect the relationships between citizens, especially those under the headline of 'Solidarity'. The limited scope of the Charter does, however, exclude any such effect as the provisions are not directed at citizens; in other words, the desired effect requires legislative<sup>6</sup> transmission. This confirms that principles aim for implementation, rather than application.

## 3. The Protection of the Right to Education: Intersecting Rights

### a) The Problem

Article 14 of the Charter combines several education-related rights which are intersecting or which are even identical with other rights. This raises two issues: first, are there conflicts between these rights, and how can they be resolved; and second, is there a normative content of Article 14 that goes beyond these rights?

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<sup>4</sup> As a matter of simplification, the addressees of the Charter will be referred to by the term 'Union' only.

<sup>5</sup> As explicitly stated in Art. 51 para. 2 of the Charter.

<sup>6</sup> The prime responsibility rests with legislative acts. Under certain conditions, the lack of a clear separation of powers in EU law can allow for executive (and maybe even judicial) acts to directly implement such principles. For reasons of simplification, the following will focus on legislative implementation.

## b) The Right to Education in Article 2 First Protocol to the ECHR

The Charter draws inspiration from the ECHR and shall (according to Article 52 para. 3) guarantee at least the standard of the ECHR. The Right to Education under Article 14 para. 1 of the Charter is also guaranteed in Article 2 first Protocol to the ECHR, although that provision is worded differently as ‘No person shall be denied the right to education’. The Charter, however, provides for a ‘right to education’, including the ‘possibility’ to receive free compulsory education. It is worthwhile to remember that besides being the key inspiration for Article 14 of the Charter, Article 2 first Protocol to the ECHR also constitutes a general principle of EU law according to Article 6 para. 2 EUT.

Article 2 first Protocol to the ECHR is phrased as a negative guarantee, and the European Court of Human Rights has been hesitant to acknowledge positive obligations.<sup>7</sup> Its scope in the strict negative sense is, however, quite limited. It would prohibit the exclusion from education by public authority, like a ban on certain ways of education or against a certain group of people seeking to gain education. That aspect is already covered by the Freedom of communication,<sup>8</sup> in this regard the Right to Education is only of clarifying value.

As far as positive obligations are concerned, the ECHR requires at most a minimum level of primary education.<sup>9</sup> It is unclear what the different wording in the Charter seeks to express. The explanations to the Charter drafted by the Convention’s Praesidium only state that ‘it was considered useful to extend this right [sc.: Article 2 first Protocol to the ECHR] to vocational and continuing training’ and that ‘the principle of free compulsory education’ (Article 14 para. 2) was added. Both, the extension and the addition, would leave the core of the right as it is in the ECHR, as a primarily negative guarantee where the ‘principle of free compulsory education’ has to be treated separately.

A positive obligation can be derived, however, from the right to *equal* access to education, in other words, from a prohibition of discrimination. Even without a positive obligation to provide for education, there is a right to access existing education services on non-discriminatory terms. In that sense, one can identify a derivative or secondary positive obligation.<sup>10</sup> In so far, the Right to Education can be seen as a specific right of non-discrimination which is a concrete expression of the general right to equality (Article 20 of the Charter).

## c) The Right to Education as an Aspect of the Freedom of Communication

Overall, education can also be seen as a process of communication that is protected under the broad umbrella of the freedom of expression and information (Article 9 of the Charter). This relationship is also present in the guarantee of ‘Academic Freedom’ in Article 13 of the Charter, the freedom to teach (express information) and learn (receive information), although it is not entirely clear whether the adjective ‘academic’ limits the right to higher education. The exercise of the right under Article 9 can be limited under Article 52 of the Charter.

## d) The Rights of Parents

The right of parents to ensure education and teaching (Article 14 para. 3 of the Charter) of their children in conformity with their convictions is also protected by Article 2 first Protocol to the ECHR. It is also relevant under the freedom of thought, conscience and religion (Article 10 of the Charter), and further protected by the right to respect for family life (Article 7 of the Charter).

This multiple guarantee as such does not pose a problem, but the right is not absolute. The Charter has added a specific limitation clause, as the right shall be respected ‘in accordance with the national laws governing the exercise of such freedom and right.’ Furthermore, there is an explicit counter balance in Article 24 of the Charter, requiring respect for the ‘Rights of the Child’.<sup>11</sup> Finally, the general limitation clause of Article 52 para. 1 of the Charter applies – constrained by the guarantee for the ECHR standard in Article 52 para. 3 of the Charter. And

<sup>7</sup> See e.g. Van Dijk, P. and Van Hoof, G.J.H. (1998), *Theory and Practice of the European Convention on Human Rights* (3rd ed.), Nijhoff, Den Haag, pp. 643-647.

<sup>8</sup> Cf. under c) below.

<sup>9</sup> Van Dijk, P. and Van Hoof, G.J.H. (1998), footnote 7 above, pp. 646-647.

<sup>10</sup> German doctrine has developed this figure as ‘derivative Teilhaberechte’ or ‘derivative Leistungsrechte’; cf. for various ways of construction for the Right to Education under the German Basic Law e.g. Jarass, H.D. (1995), ‘Zum Grundrecht auf Bildung und Ausbildung’, *DÖV*, p. 674; cf. also Bernsdorff, N. (2003), footnote 2 above, pp. 206-207.

<sup>11</sup> For the purpose of this paper, it is not necessary to investigate in how far Art. 24 is an actual right or a mere principle; the provision combines elements of both in a complex way.

beyond this intricate mixture of limitation clauses, the question arises how the intersecting ECHR-derived limitation clauses for Articles 7 and 10 of the Charter shall be treated – do they also apply, or do they yield to Article 14 para. 3 as *lex specialis*?

This puzzle is easy to solve by giving due consideration to the nature of the Charter. In seeking to make rights visible, the Charter will rather repeat a provision than derogate from it. And seen in the light of the limited scope of the Charter, Article 14 para. 3 appears as a bow to member states' autonomous power in that area. Leaving aside the intricate relationship between the general limitation clause and the guarantee for the ECHR standard in Article 52 of the Charter, limitations must be provided for by law and they must be proportionate.

#### **e) Access to Vocational and Continuing Training**

This right is intimately related to the freedom of profession (Article 15 of the Charter) in the sense of preparing oneself for a profession, and staying competitive in the chosen profession. As a negative guarantee, Article 14 para 1 of the Charter has once again only clarifying character in this regard.<sup>12</sup>

#### **f) Freedom to Found Educational Establishments**

The freedom to found educational establishments as guaranteed in Article 14 para. 3 of the Charter can also be protected by the freedom of profession.<sup>13</sup> If said establishments are not run for a profit motive but rather on idealistic grounds, they can be protected by the freedom of thought, conscience and religion (Article 10 of the Charter). As far as limitations are concerned, the situation is similar to that concerning the Rights of Parents.

#### **g) Conclusion**

The conclusion from viewing the Right to Education in Article 14 of the Charter from the perspective of other rights is clear: these intersecting rights entail primarily negative guarantees that cover the scope of Article 14. In this regard, the provision is mostly concerned with visibility of education-related aspects of fundamental rights, and – as an accompanying effect – clarification of those aspects. Combining these rights in one Article and using the positive attribute of 'education' as a headline is perfectly in line with the Charter's prime purpose of making rights visible.

### **4. Beyond a 'Classic' Freedom – Positive Obligations?**

The question shifts, therefore, to positive obligations. Such a broad obligation to provide for access to education, especially the 'possibility' to receive free compulsory education, is neither covered by the underlying Article 2 first Protocol ECHR nor by the other intersecting rights.

#### **a) The Possible Scope of Positive Obligations: Access to Education**

The most promising candidate for a positive obligation is Article 14 para. 2 of the Charter, providing for access to 'free compulsory education'. The explanations of the Praesidium to the Charter state that free compulsory education implies that 'each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation.' In summary, the term 'possibility' clarifies that free compulsory education has to be possible, not that all compulsory education has to be free.

The exception for private establishments must be seen in the context of limited scope of the Charter. As the entire Charter, Article 14 applies exclusively to the Union. Therefore, positive obligations can not directly obligate anyone beyond the Union.<sup>14</sup>

<sup>12</sup> Contrast Caspar, J. (2001), 'Die EU-Charta der Grundrechte und das Bildungsrecht', *Rd/B*, p. 165 (171), for Article 14 of the Charter as *lex specialis*.

<sup>13</sup> The explanations of the Praesidium to the Charter state explicitly that the right is 'guaranteed as one of the aspects of freedom to conduct a business'.

<sup>14</sup> Contrast Caspar, J. (2001), footnote 12 above, p. 168.

Article 14 para. 2 of the Charter is phrased as a mere subset of para. 1, indicating that a positive obligation should be broader, reaching for education and vocational training. For that broader principle of access to education the same considerations apply, with the main difference that such further education does not have to be (partly) free.

### **b) Access to Education as a Right or a Principle**

The explanations of the Praesidium to the Charter refer to Article 14 para. 2 as ‘the principle of free compulsory education’. While the term ‘principle’ can be ambiguous, free compulsory education fits the definition of a mere principle in the Charter as it depends upon implementation.<sup>15</sup> The same is true for a potentially broader positive obligation of providing for access to education.

The legal nature of such a principle is much less clear than that of a fundamental right. A principle can guide interpretation of legislation, and secondary acts can be measured against it. But the crux of the matter is still the aspect of implementation, and here most issues are not settled yet. Do principles demand implementation, or do they just allow for it? And how does one measure implementation against the principle, namely, can a legislator ‘underperform’<sup>16</sup> in implementing and is this ‘underperformance’ judicially cognisable?

### **c) Positive Obligations under the Principle of Access to Education?**

Does the principle of access to education, as stated above, really entail positive obligations for the Union, although limited by the distribution of powers? The wording seems to support that,<sup>17</sup> but there are several structural problems lurking in the background of the Charter’s general provisions. First, the amended Article 52 para. 5 in the draft Constitution says that principles ‘*may*’ be implemented – not that they *have* to be implemented. The term ‘*may*’ also makes perfect sense when one considers that a positive obligation does require the Union to act, in other words to exhaust existing powers. Such a requirement would be at odds with the principle of subsidiarity.

Finally, the explanations of the Praesidium to the Charter speak against a positive obligation: ‘Insofar as the Charter applies to the Union, this [sc.: principle] means that in its training policies the Union must respect free compulsory education’ – respect, not enact. What remains is an obligation for the Union to respect the principle when it acts. The principle guides Union action, but does not require the Union to take action. In other words, it amounts to a mere negative obligation.

### **d) The Relevance of the Principle of Access to Education as a Negative Obligation for the Union**

Can a principle of free compulsory education, or in broader terms, of access to education, be of any relevance as a mere negative obligation? To answer the question, one has to take a look at the actual activities of the Union (more precisely, the Community) concerning education.

Under Articles 149 and 150 ECT, the Community can fund training programs and take some other measures short of regulatory activity. As the explanations of the Praesidium to the Charter state, the Community has to respect member state systems of free compulsory education and, more broadly, the access to education provided by member states.<sup>18</sup>

Hence, access to education can be regarded as a recognised value of EU law. This is relevant with regard to the freedoms of the internal market. Education is also a service, but the principle of access to education can justify member state measures that reflect the broader role of education, mainly prevent education from being treated like any other commodity. Given the existing possibilities for member states to justify measures that restrict or entail a negative effect on the internal market freedoms, this does not add much more than another clarification. Education may thereby gain a slightly privileged quality, similar to that of services of general interest under Article 16 ETC.

<sup>15</sup> Cf. the explanations of the Praesidium to Article 14; further Caspar, J. (2001), footnote 12 above, p. 168; Bernsdorff, N. (2003), footnote 2 above, pp. 214-215.

<sup>16</sup> Namely German doctrine has developed this as ‘Untermaßverbot’ as a kind of watered down proportionality principle to measure inter alia the implementation of positive obligations.

<sup>17</sup> For the controversial (and inconclusive) Convention debate about positive obligations under Art. 14 of the Charter cf. Bernsdorff, N. (2003), footnote 2 above, pp. 210-213.

<sup>18</sup> For the education-related powers of the Community from a fundamental rights perspective cf. Caspar, J. (2001), note 12 above, pp. 175-177.

Another effect may be seen in the recognition of qualifications gained in another member state. Those rules relate, however, to qualifications held, not how they have been or can be achieved. Hence, respect for the access to education can only play a very limited role here.

More important is the matter of specific protection against discrimination. EU citizens must not be discriminated against on the basis of citizenship, which entails non-discriminatory access to education, from free compulsory education over equal access to other forms of education<sup>19</sup> to financial support for education as benefits.<sup>20</sup> To a certain extent, students can even rely upon social assistance.<sup>21</sup> The principle of access to education confirms the well established case law of the European Court of Justice.

This short overview shall suffice to establish that the principle of access to education is not void of any relevance, but that it is of very limited importance in EU law. As the burden of education rests upon the member states, the Union's positive obligations are only conditional and of little practical impact.

## 5. Summary

Article 14 of the Charter provides for the visibility of education in a constitutional context. The provision is opening an education perspective on fundamental rights, rather than entailing specific or additional guarantees. Its legal importance rests mostly with clarifications. As a principle of access to education, Article 14 of the Charter also allows to see the activities of the Union in the light of education, but barely more. The Charter's answer to a citizen demanding basic education for a child is: the Union will respect your request, but it will not fulfill it.

Still, one should not underestimate the importance of human rights rhetoric, of the appeal that a broadly phrased Right to Education can unfold. In this regard, the Charter has confirmed the Right to Education and made it visible as a fundamental right and principle protected by EU law.

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<sup>19</sup> ECJ Case 293/83, *Gravier*, ECR 1985, 593.

<sup>20</sup> ECJ Case 9/74, *Casagrande*, ECR 1974, 773.

<sup>21</sup> ECJ Case C-184/99, *Grzelczyk*, ECR 2001 I-6193.