

ANSWERS TO THE COLLOQUIUM QUESTIONNAIRE: TURKEY

A– General

1. In how many cases before your court and other administrative courts in your country has the EU Charter been at issue since 1 December 2009?

Turkey is a negotiating country for the membership of the European Union. There are thirty-five chapters and one of them is judiciary and fundamental rights. Turkey has done many legal and practical reforms to strengthen fundamental rights and freedoms and the efficiency of judiciary over the candidateship and negotiation process. One of these reforms is the amendment of Article 90 of the Constitution that regulates conflicts between national laws and international treaties that Turkey takes party.

According to the new provision, In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. This provision gives courts a great opportunity on the protection of fundamental rights and freedoms against any violation.

On the other hand, as one of the founding member of the Council of Europe and a very first party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Turkey has a broad experience and case law to implement an international treaty on human rights. Throughout all stages of judging, the ECHR is applied and is taken into consideration. Alongside criminal courts, the Council of state and administrative courts are well-known courts that do not hesitate to apply international human rights documents.

However, Turkey is not yet a full member of the EU. Therefore, the Charter of Fundamental Rights of the European Union ('the EU Charter') whatsoever is not a legally binding text for Turkey. Still, courts may naturally apply the EU Charter as a reference norm in their jurisprudence concerning human rights. However, there is not any decision of the Council of State or administrative courts that refer to the EU Charter yet.

2. Which provisions of the EU Charter were at issue in these cases?

The EU Charter is a new generation human rights text that includes second (such as right to education, freedom to chose an occupation and right to engage in work, freedom to conduct business, the rights of elderly, health care) and third groups of human rights (such as

protection of personal data, environmental protection). Moreover, it is a supranational text that includes both general human rights and rights for the Union citizen (such as right to vote and stand as a candidate at elections to the European Parliament).

According to the statistics of the European Court of Human Rights, the main rights that rise before the Strasbourg Court are right to a fair trial, right to property, right to liberty and security and the length of proceeding respectively. If the EU Charter was binding legal text, the above said rights and Articles 6 and 17 of the EU Charter would probably come forward.

3. In which areas of law in particular does the EU Charter play a role?

The EU Charter targets public law that gives public authority a unique competence to affect human rights. The Charter will play a big role in criminal law, property law, labour law, election law etc, when Turkey becomes a full member of the Union. Administrative law somehow covers all legal area of public law and the Council of State will therefore take an active role in implementation of the Charter.

4. Has your court or another administrative court in your country recently asked the European Court of Justice (ECJ) for a preliminary ruling, which has not yet been published on the ECJ website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference.

Turkish courts are not yet allowed to apply to the European Court of Justice to clarify the interpretation of a provision of the EU Charter.

B– Scope *ratione temporis*

5. From what point can the EU Charter be invoked in your national administrative law proceedings, bearing in mind the date on which the decision in question was taken (ex tunc or ex nunc)?

As a general principle, administrative courts and the Council of State take into consideration laws, international treaties duly put effect and other legal regulations that are in force when they deliver their judgements. In other words, they do not base their judgements on law passed after administrative act or action took place. Therefore, the Council of State may probably reach the same results as the ECJ did.

6. Does the EU Charter of 2000 play any role in your national legal system even though it did not have the status of primary Union law? If so, in what way and with what result(s)?

As it is mentioned above, the EU Charter is not yet a norm that Turkish courts apply to. However, the ECHR and the Universal Declaration of Human Rights play a very important roles within the jurisprudence of Administrative Judiciary of Turkey.

C– Scope *ratione materiae*

7. How is the phrase ‘implementing Union law’ in article 51, paragraph 1 of the EU Charter interpreted in national proceedings? Can you give details of situations that have to date fallen within its scope? Do rulings explicitly state that a situation falls within the scope *ratione materiae* of the Charter?

Turkey is not a full member of the Union; therefore, the EU Charter is not a legally binding text for Turkey.

D– Review *ex officio* (on its own motion)

8. When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of those decisions with the EU Charter:

- a. only at the request of the parties, or
- b. also *ex officio* /through supplementation of the pleas in law ?

According to the Law 2577 on Procedure of Administrative Justice, administrative courts have competence to ex officio examine the compatibility of any administrative decisions and actions with the legal text. For this examination, there is not any need for request or application from parties.

E– Distinction between rights and principles

9. Does your national law make a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter? What implications does this have for review by the courts?

There are some rules in Turkish law that are not directly applicable by either administrative bodies or administrative courts. However, they include general principles that must be regarded in every step of executive and judiciary. In this case, the administrative

courts examine whether administrative bodies regard these principles or not. Administration in this case has a margin of appreciation to choose the way to apply these principles. Courts cannot force the administration to a single way. In this case, principles can be regarded less strong than rights. However, when it comes to the EU Charter, it is not a legally binding text for Turkey.

10. How do you determine whether a provision in the EU Charter can be deemed to constitute a ‘right’ or a ‘principle’ as referred to in article 52, paragraph 5 of the Charter?

The EU Charter is not legally binding text for Turkey.

11. How do the national administrative courts examine for compatibility with principles such as that contained in the second sentence of article 52, paragraph 5 of the EU Charter? (full review/limited scope of judicial review/etc.)?

The EU Charter is not legally binding text for Turkey.

12. What are the legal consequences of a violation of a principle in national proceedings with no European dimension? Are these different from those that follow from the violation of a right?

In national law, when administrative courts find a violation of a principle, its results are almost the same as rights. There is not any difference between these two violation types. Ultimately, the violation of a principle is regarded as a violation of rights itself.

F- Scope and interpretation of rights and principles

13. How do you interpret the general limitation clause of Article 52, paragraph 1, of the Charter? In accordance with the limitation clauses of the Convention for the Protection of Human Rights and Fundamental Freedoms? In accordance with the case-law of the European Court of Justice that restrictions may be imposed in the context of the economic freedoms, provided that those restrictions correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights? Or otherwise?

The EU Charter is not legally binding text for Turkey.

G– Direct effect

14. Has the EU Charter been transposed into your national law, in full or in part, or via reference? If so, please state whether this also applies to the ECHR.

Since Turkey is not a member of the European Union, the EU Charter has not been transposed into our national law. However, the ECHR is a privilege part of the Turkish legal system. First of all, after the ratification by of the Parliament, it became a national statute. Moreover, the Constitution precisely accepts the human rights' provision of the ECHR. Besides, as it is mentioned above, Article 90 of the Constitution regulates and set privileges to human rights and basic freedoms conflicts between national statutes and international treaties that Turkey is a party. According to the new provision, In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. This gives courts a great opportunity to protect fundamental rights against any violation. Therefore, the administrative courts can annual administrative acts, when it finds any incompatibility with the ECHR.

15. Are the rights contained in the EU Charter directly applicable in your country? If so, which provisions already have direct effect?

The EU Charter is not legally binding text for Turkey.

16. What criteria do your national administrative courts apply in determining whether a provision of the EU Charter has direct effect?

The EU Charter is not legally binding text for Turkey.

17. In what way do your national administrative courts examine for compatibility with a provision of the EU Charter that has direct effect (full review/limited scope of judicial review/etc.)?

The EU Charter is not legally binding text for Turkey.

18. If a case involves incompatibility with a provision of the EU Charter that has direct effect, what legal consequences do you attach to this?

The EU Charter is not legally binding text for Turkey.

H– Interpretation methods

19. In interpreting the EU Charter, do your national courts make use of the Explanation? If so, is this mentioned in the judgment?

The EU Charter is not legally binding text for Turkey.

20. Which interpretation methods (linguistic, systematic, teleological, historical, treaty-compliant, dynamic) are applied by your national administrative courts in interpreting the provisions of the EU Charter?

Turkish administrative courts traditionally apply to linguistic, systematic, historic and teleological interpretation method respectively. It would apply to the same methods, When Turkey becomes full member of the EU and consequently, a party to the EU Charter.

I– Relationship between EU Charter and ECHR

21. In cases where the text of the ECHR and the EU Charter is identical, do your national administrative courts apply the ECHR and/or the Charter?

The EU Charter is not legally binding text for Turkey.

22. What role does the case law of the European Court of Human Rights (ECtHR) play in the interpretation of the EU Charter?

The ECtHR has legal competence in the evaluation of national laws and international legal texts that respondent states are party to. Therefore, to some extent the ECtHR might interpret the EU Charter when applications have links to the EU Charter and when respondent states are members of the EU. However, the ECtHR cannot go so far that may restrict the authority of the ECJ. Its level of interpretation will be restricted to concern legal issues and limited to understand the scopes and contents of the EU Charter.

J– Relationship between the EU Charter and the ‘constitutional traditions’ of the member states

23. Do you refer to the common constitutional traditions of the member states in interpreting the EU Charter? If so, how do your national courts determine whether a provision of the EU Charter also recognises rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?

The EU Charter is not legally binding text for Turkey.

24. Could there be a role here for the ACA-Europe Forum? Which?

The ACA-Europe is a fruitful platform to exchange national and international legal experiences between participants. The Forum can be seen as a unique chance to understand different approaches on the implementation of the EU Charter’s provisions. So, the Forum may play an important role to clarify matters regarding to the EU Charter.

25. Would you consider it useful for ACA-Europe to set up a central register containing judgments handed down by the national courts concerning their constitutions which members of the Association could consult?

A central database containing judgments of national jurisdiction of ACA-Europe's members may be useful for other members to see different approach to the same provisions. It can be valuable, if the database is continuously updated and if it is easy to upload and download judgments by members. Besides, original language of the judgments may cause linguistic problems; judgments must thus be translated into one of the common language of ACA-Europe by national authorities.

K– Relationship between the EU Charter and other instruments

26. If a provision of the EU Charter is derived from an instrument other than the ECHR, what consequences does this have for the interpretation of the provision by your national administrative courts?

For the implementation of an international legal instrument, the first condition is that Turkey must be a party to. If our national administrative courts had to interpret a provision of a treaty or a charter or an agreement to implement the EU Charter, they would first apply to secondary instruments such as views of the relevant commissions, boards and academics. After they clarify the meaning of the provision of the relevant international legal text, then they try to interpret and implement the provisions of both the EU Charter and the relevant provision of international texts together. There can easily be said that national administrative courts have legal power to evaluate all reference norms.

L– Other

27. Is there a structure in your member state for consultation between administrative courts on EU law issues to ensure that interpretations are uniform? Would you like to see a similar structure at the level of ACA-Europe?

Turkey is not a full member of the EU yet.

28. Do you have any other questions or comments on the EU Charter which have not been addressed in this questionnaire?

The questionnaire seems to be detailed enough to cover most of the topics on discussion already.