

Q1. After the lecture, I tried to find the difference between the EU Treaty and the EU Charter. I'd especially like to understand the relationships between them. Is it possible to say that the EU Charter is based on the EU Treaty? Can you recommend any reading material (may be on the web) to refer to? (EU Treaty Charter?)

Q2. One more question is about "proportionality". Can you share an example to understand the concept of it (I prefer to have Korean cases, if possible)

Let me first respond to your question regarding the status of and the relationship between different treaties adopted under the auspices of the EU.

EU is an international organization created under the process called, "regional integration" originally developed under the framework of international law.

What is regional integration? It is the process of providing common rules, regulations and policies for a range of actors including states, companies and people in a region. So we can say that the EU is an end-product of regional integration among 27 states (as of today). And the glue that holds these member states together is not just the power politics and common European history, but also the law. There is a set of laws that integrates those 27 states together under the authority and power of the regional institution, called "EU."

The key to understand the EU as an institution is the law, and the EU law consists of hundreds of treaties, regulations and directives etc. Not every one of them has equal importance of course. We have founding treaties.

[1] Among other things, Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are the two most fundamental treaties.

They set out terms under which the EU operates in practice, regulate the relationship between the EU and its member states, and various other essential matters. Then we have a number of satellite treaties closely connected to these two founding treaties and/or directly attached to these two.

[2] The Charter of Fundamental Rights of the European Union is like... bill of rights or constitution-like instrument setting out basic rights of the EU citizens.

The Charter originally existed outside the mechanism established by the EU's founding treaties. What I mean by this is that --- they knew these are the fundamental rights to be protected, but the Charter was not regarded as legally binding upon states (i.e. no way we can enforce the rules (contained in the Charter) against the state). The Charter's legal status (especially what this means for the EU member states collectively) was uncertain for some time.

Throughout many decades, EU's founding treaties have been amended multiple times. One of the major changes introduced in the human rights protection was that in 2007, EU decided to formally recognize the Charter's legal effect. They made that decision in 2007, and after going through some additional process required to make the whole thing happen, Since Dec 2009, the Charter has been fully effective in legal terms.

Now TEU (as above, this is one of the EU's founding treaties) Article 6.1 says,

“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.”

So as you see here, now all the rules and principles in the Charter have the “same legal value” as the EU Treaties.

[3] Same thing with the European Convention for the Protection of Human Rights and Fundamental Freedoms (commonly called ECHR or maybe the Convention).

Technically speaking, ECHR is actually a separately existing human rights treaty. But when the Charter became recognized to have full legal effect and legal value as same as the EU treaties, it was also agreed that the EU as a whole accede to (i.e. join) the ECHR. Please see TEU Article 6.2 (same article 6 as above):

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.

Altogether, rules and principles of the Charter and the ECHR all constitute the general principles of the EU law especially in the area of human rights protection.

Now let me move on to your second question about the proportionality.

First I want to highlight this point: the principle of proportionality may be differently understood and applied depending on jurisdictions (be it Korea, Germany, the EU, or international court?). Perhaps I can give you a very general understanding first.

[1] Proportionality is one of the basic standards to decide the constitutionality of certain law or government action.

What that means is that, when the Court seeks to adjudicate whether certain legal rules and/or government action violates the constitution, it may apply proportionality as a standard and see whether the rules and/or gov actions in dispute has met the standard. If those rules and actions have passed proportionality test, it's highly likely that they do not violate the constitution (assuming that they passed other requirements already).

[2] Then what is proportionality? Let's assume that we are curious to know whether the legal rule A (disputed in the case) meets the proportionality.

In view of proportionality, first, there must be a legitimate aim for such a new law, such a new measure of the government.

Secondly, the means chosen by the legislature (in this case, the rule A) must be suitable to promote and achieve the legislative purpose. To really simplify, your means must be appropriate to meet your ends.

Then, if there are equally appropriate, equally suitable means, the legislature must go for the one that is least restrictive of basic rights. Or in some jurisdictions, it is required that the law/measure in question must be necessary to achieve the goal.

Finally, there must be an appropriate balance between the extent of restrictions on basic rights and the weight of public interest. Basically this means that you need to choose a law in consideration with the competing interests of relevant stakeholders.

[3] If I give you a real court case as an example, I think I will make this even more complicated and make my email really long. So perhaps I can give you a very simplified, roughly *made-up* example instead.

Let's assume that the government has adopted a new law concerning the use of plastic bags and environment. This law prohibits any production and use of plastic bags in the state A starting from December 2022. We want to know whether this law meets proportionality.

First you look at the objective. We can easily say that the objective (e.g. environment protection and reduction of garbage) is legitimate.

Secondly, is the law suitable to achieve this goal? I would say yes. Clearly if we ban the production and use of plastic bags altogether, better for environment.

Then, is this the one that is least restrictive of basic rights? Is this really necessary to achieve the goal? Maybe yes, maybe no --- depending on how you see it. I would say this law is not least restrictive of rights --- one of my concerns will be the rights of companies who have produced the plastic-made bags and other products. Maybe they will go out of business quickly and it's very hard to explore some other business options and prepare for the worst just in about two months.

Finally, we need to do some balancing among different views and interests including public interest.

So this is how proportionality test would look like in practice. But again it's very, very hard to generalize the scope and meaning of proportionality principle. Like I said, not all national/regional/international law systems use and apply this principle in the same manner..

-- Heejin Kim, 25/9/2022