



26.1.2016

WORKING DOCUMENT

on Establishment of an EU mechanism on democracy, the rule of law and
fundamental rights - Litigation by citizens as a tool for private enforcement

Committee on Civil Liberties, Justice and Home Affairs

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Litigation by citizens as a tool for private enforcement

Introduction

This working document will focus on means of action at the disposal of persons, individually or collectively, to ensure the respect of their fundamental rights before judicial authorities both in Member States and at EU level. Although the report covers also respect for democracy and rule of law, the author of this working document believes that litigation is primarily concerned with protection of fundamental rights as this is the basis on which individuals have standing and they are attributed to persons (natural/legal). Standing to defend the rule of law and democracy is rather limited (e.g. challenges of constitutionality), but of course these fundamental principles are also advanced as a result of fundamental rights litigation.

The Charter as a tool for defending fundamental rights

After the entry into force of the Lisbon Treaty, the EU Charter of Fundamental rights constitutes primary law of the EU. This should have direct implications in the lives of persons living in the EU, by guaranteeing a list of basic rights, that all Member States and the EU have to respect. However, there are several limitations as to how legal or natural persons could defend those rights before courts.

First of all, Article 51 defines the scope of the Charter quite narrowly, since it only applies, as far as Member States are concerned, when they implement EU law. The CJEU has interpreted this provision in a more flexible way (see, for instance, the *Fransson* case), but the Commission still keeps interpreting it as narrowly as it can. The author believes that the wording of Article 51 is too restrictive and does not help advance the respect for fundamental rights in the EU.

The Commission is indeed reluctant to bring forward infringement proceedings on the basis of the Charter and very little information is available to the public as to how relevant complaints are treated.

On the other hand, the means of litigation at the disposal of natural and legal persons are also rather limited. The options are, either to bring an annulment action before the General Court (Article 263 TFEU) or by challenge the national implementation of an EU measure and invite the national court to make a preliminary reference to the CJEU. Neither of these avenues provides an effective remedy for fundamental rights violations, either they are not easily accessible (e.g. individual and direct concern to obtain standing in the General Court) or they entail lengthy and discretionary procedures (preliminary rulings).

Another tool awarded by the Treaties to EU citizens is the right to submit a petition to the European Parliament. The right to petition is exercised by thousands of citizens and the Committee on Petitions may choose to respond to such complaints by various means, among which informing petitioners about the position of the European Parliament, asking for information and exerting political pressure on Member States and asking the European Commission for information. If the Committee on Petitions chooses to ask the European Commission for information on a potential misapplication or violation of EU law, the Commission will investigate the matter and communicate its findings to the Committee, although it may choose not to initiate an infringement procedure against a Member state. Indeed the Commission does not follow-up on petitions systematically, but only upon request by the Committee on Petitions; this however does not diminish the importance of this right for citizens and its positive results.

The author proposes that individuals should have at their disposal a direct and easily

accessible way of challenging Member States behaviour before EU courts without leaving any margin of discretion to national courts or European institutions.

Strategic litigation

This instrument is meant to include cases where equality bodies, NGOs, or other bodies active in the defence of fundamental rights engage in litigation either in their own name, representing the applicant in front of a court, financially and otherwise supporting the applicant in court proceedings, intervening on the side of the applicant, or submitting third-party interventions / amicus curiae. In practice, strategic litigation can be used to establish, clarify, and strengthen the protection of fundamental rights. Strategic litigation by its very definition also looks at the domino effects and the echoes created in media and vis-à-vis the legislator.

The author believes that strategic litigation could be another viable alternative available for upholding respect of fundamental rights. In this regard, the EU legislator could explore further how to develop and encourage the recourse to strategic litigation by establishing specific rules for accessing national and EU courts.

Collective litigation/ class actions

Collective litigation is available in several Member States¹, albeit not specifically aimed at the defence of fundamental rights, and has proved a useful tool at the disposal of individuals to have their rights defended, notably in the area of consumer protection and employment. At EU level, although there was a lot of discussion on collective action, resulting in a Commission Green paper, no legislative proposals have been put forward by the Commission yet.

The author considers class actions to be an efficient way of addressing mass violations of established rights and believes that the Commission should reconsider to propose a horizontal Directive on class actions, in order to guarantee minimum standards across the Member states, covering also cases of fundamental rights violations.

Individual redress under the ECHR

Unlike the situation at EU level, individual redress is available before the European Court of Human Rights, once internal remedies are exhausted. Indeed, the Court of Strasbourg has jurisdiction to ensure the respect of the ECHR. Judgments finding violations are binding on the States concerned, which are obliged to execute them, including the payment of any amounts awarded to the applicants as compensation for the damage they have incurred. The effect of the case-law of the ECtHR has been an important driver for improvements in national legislation and administrative practice in a wide range of areas.

At EU level, ECtHR judgments against Member States are not properly followed up. The Parliamentary Assembly of the Council of Europe, last October, pointed the finger to a few States (including EU Member States) for recurrent violations and poor implementation of the judgments².

¹ [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET\(2012\)462478_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf)

² [http://echrblog.blogspot.be/2015/10/call-for-bett.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+blogspot/KCGaBs+\(ECHR+BL+OG\)](http://echrblog.blogspot.be/2015/10/call-for-bett.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+blogspot/KCGaBs+(ECHR+BL+OG))

While the author understands that the ECHR is a separate instrument to the Charter, she believes that the two are founded on the same set of values defending many common rights. Under Article 52 (3) of the Charter, "(i)n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

Therefore, drawing inspiration from respective case-law can be mutually beneficial. The author believes that the Commission should, in its annual report on the application of the Charter, dedicate a chapter on the follow-up given by Member States to convicting judgments. This follow-up can also be the subject of in-depth discussion among national Parliaments and the European Parliament in the frame of the pan-European parliamentary dialogue on fundamental rights, democracy and rule of law.

In a longer term perspective, the author believes that the EU should actively pursue the negotiations for accession to the ECHR, as required by the Treaties.