

THE ROLE OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS IN THE NEW EUROPEAN CONTEXT

Oana-Mihaela SALOMIA*

Abstract

The Charter of fundamental rights of the European Union was proclaimed by the European Commission, the European Parliament, and the Council of the European Union at the European Council held at Nice on the 7 December 2000, was modified on 12 December 2007 at Strasbourg, and, today, according to article 6 in the Treaty on European Union, the Charter gained the juridical value of an constitutive European treaty. The way it has been conceived, the content of the Charter reflects the Union's desire for the autonomy of the juridical order. The Charter clearly states the fact that it solely seeks to protect the fundamental rights of the individuals with regard to acts undertaken by the EU institutions and by the member states in applying of the Union treaties. A protocol to Lisbon Treaty introduces specific measures for the United Kingdom and Poland seeking to establish national exceptions to the application of the Charter. The new treaty provides a new legal basis for accessing of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Keywords: *autonomy, rights, courts, institutions, European Convention*

1. Introduction:

The protection of the human rights at the European Communities and European Union level has been increased in the same time and in a complementary way with the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

The Cologne European Council (3-4 June 1999) entrusted the task of drafting the Charter to a Convention and she is is the end-result of a special procedure, which is without precedent in the history of the European Union and may be summarized as follows:

- the Convention held its constituent meeting in December 1999) and adopted the draft on 2 October 2000,
- the Biarritz European Council (13-14 October 2000) unanimously approved the draft and forwarded it to the European Parliament and the Commission,
- the European Parliament gave its agreement on 14 November 2000 and the Commission on 6 December 2000,
- the Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000 in Nice¹.

The Nice European Council decided to consider the question of the Charter's legal status during the general debate on the future of the European Union, which was initiated on 1 January 2001. The Lisbon Treaty guarantee the enforcement of the Charter of Fundamental Rights, which are

* Ph.D. candidate, University "Nicolae Titulescu" of Bucharest, counsellor for European affairs, Ministry of Education, Research, Youth and Sports (e-mail: oanas2002@yahoo.com).

¹ http://www.europarl.europa.eu/charter/default_fr.htm#

legally binding not only on the Union and its institutions, but also on the Member States as regards the implementation of Union law.

The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

They are based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States (see the case of the European Court of Justice - *Internationale Handelsgesellschaft*, 11/70), the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties².

2. Content

In the doctrine it was sustained the idea that "the purpose of the Charter was that to emphasize the importance of the fundamental rights and their content in a easy way of understanding for the European citizens, in a critical moment, when the European construction was facing with a serious democratic deficit³, obtaining thus, in our opinion, a more revealing nature than innovative; we are already mentioned that some of the rights of the Charter have been consecrated and guaranteed by the primary and secondary community law and by case-law of the European Court of Justice.

The Charter lists all the fundamental rights under six major chapters: *Dignity, Freedom, Equality, Solidarity, Citizenship and Justice*, in the light of the social and economic European Union priorities and in the respect of the Union approach values. The Preamble of the Charter sets the person in the core of European actions, affirms the European citizenship and the establishment of the area of freedom, security and justice.

Thus, being the result of an original procedure of elaboration, the Charter also confirms the fact that the EU started an unprecedented renewal process of the human rights protection⁴.

At present, the article 6 of the European Union Treaty, mention that "the Union recognizes 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, the Charter is compulsory for all 27 Member States, with some exceptions⁵.

The Charter will be modified in the same way as the treaties, in accordance with the procedure stated in the new article 48: "*The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures*".

Also, the Charter will get the same features as the treaty's provisions in connection with the national law: priority/preeminence, direct effect (which will not apply to all treaty's provisions), immediate applicability, direct applicability. We consider that the Charter's provisions must get the direct effect in order to assure the effectiveness and the respect of the fundamental rights, because the principle of direct effect enables individuals to immediately invoke an European provision before a

² Article 6.3. "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

³ R.M Besteliu, C.Brumar, *Protecția internațională a drepturilor omului*, Note de curs, Ed a IV-a revizuită, (Ed. Universul Juridic, București, 2008), p. 88

⁴ F. SUDRE, *Drept european și internațional al drepturilor omului*, (Ed. POLIROM, București, 2006), p. 126

⁵ See the Protocol (no 30) on the application of the Charter of fundamental rights of the European Union to Poland and to the United Kingdom which is annexed to the Lisbon Treaty.

national or European Court of Justice⁶. The direct effect principle therefore ensures the application and effectiveness of European law in the Member States. When a Member State does not respect fundamental rights when implementing Union law⁷, the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the Court of Justice (action for failure to fulfill an obligation). So, in accordance with the Charter's provisions, Member States are bound by the Charter only when they are implementing Union law.

However, the European Court of Justice defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and a Member State or be extended to relations between individuals. The article 51 of the Charter states, in this view, that *"the provisions of this Charter are addressed to the Member States only when they are implementing Union law"*; it is a mention "more accurate and rigorous"⁸ than the judgment of the European Court which determines the respect of the European law only when the Member States operate within the community law.⁹

In its Communication of 19 October 2010 on a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, the Commission committed itself to strengthening the "fundamental rights culture" (a innovative concept, in our opinion) at all stages of the procedure leading to the adoption of legislation and other acts.

The Commission will check¹⁰ the respect of the fundamental rights at the moment of the elaboration of its legislative proposal. Non-legislative measures adopted by the Commission, such as decisions, are also subject to checks on their compatibility with the Charter during drafting, even if there is no impact assessment. The impact assessments that accompany Commission proposals examine the impact of the proposal on fundamental rights when such an assessment is relevant. After the impact assessment, when the draft legislative proposal (or delegated/implementing act) is prepared, the Commission will check its legality, and in particular its compatibility with the Charter. The Explanatory Memorandums accompanying sensitive proposals will be reinforced by a summary of all the fundamental rights aspects contained in the impact assessment and the legislative proposal.

We consider that the Charter has an important external feature and the external action of the Union must take into account their provisions. Furthermore the title of Charter - "of the European Union" and not of the Union's institutions indicates its external dimension, which reaffirms the rights as they result „from the constitutional traditions and international obligations common to the Member

⁶ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm

The direct effect of European law is, along with the principle of precedence a fundamental principle of European law. It was enshrined by the Court of Justice of the European Union. It enables individuals to immediately invoke European law before courts, independent of whether national law test exist.

⁷ 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union:

The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.

⁸ M. DONY, *Droit de l'Union Européenne*, (Edition de l'Université de Bruxelles, Bruxelles, 2008), p. 50

⁹ CJCE, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, case 5/88, 13 July 1989

¹⁰ "Fundamental Rights "Check-List":

1. *What fundamental rights are affected?* 2. *Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?* 3. *What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?* 4. *Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?* 5. *Would any limitation of fundamental rights be formulated in a clear and predictable manner?* 6. *Would any limitation of fundamental rights: - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)? - be proportionate to the desired aim? - preserve the essence of the fundamental rights concerned?"*

States”; also, the Charter isn't addressed only to the European citizens, but also to the citizens of the third countries (article 15) or to all persons (article 2). In the context, the respect of the fundamental rights will be mandatory for the candidates or potential candidates States for the European Union accession (see the accession of Turkey).

The respect of the Charter will represent an important element within the external relations of the Union with the third countries, in particular within the development cooperation and the humanitarian aid. Every international treaty which will be concluded by the Union must be compatible with the Charter, as a treaty of the Union (article 218 of the Treaty on the Functioning of the European Union), and it will be interpreted in accordance with their provisions. Since 90's all agreements on trade or cooperation with non-European Union countries contain a clause stipulating that human rights - the conditionality clause. There are now more than 120 such agreements and the most comprehensive is the Cotonou Agreement – the trade and aid pact which links the European Union with 79 countries in Africa, the Caribbean and Pacific (the ACP group). If any ACP country fails to respect human rights, European Union trade concessions can be suspended and aid programs curtailed. The European Union sees democratic political structures as a precondition for reducing poverty – the main objective of its overseas development policy and it applies the same principles to other partner countries¹¹. So, this human rights clause's can facilitate the respect of these rights or can impose that the third countries should comply with them.

We consider that the Charter will activate the European Union Agency for Fundamental Rights, an advisory body of the European Union, which was established in 2007 by a legal act of the European Union¹². This Agency helps to ensure that fundamental rights of people living in the EU are protected. It does this by collecting evidence about the situation of fundamental rights across the European Union and providing advice, based on evidence, about how to improve the situation. The European Union Agency for Fundamental Rights also informs people about their fundamental rights. In doing so, it helps to make fundamental rights a reality for everyone in the European Union. The Agency should refer in its work to fundamental rights within the meaning of article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations. It considers that the close connection to the Charter should be reflected in the name of the Agency.

Another important European institution - The European Parliament appreciated the new statute of Charter in its *Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008*, which mentions that "the Charter constitutes a common basis of minimum rights, and the Member States cannot use the argument that the Charter would provide a lower level of protection of certain rights than the safeguards offered under their own constitutions as a pretext for watering down those safeguards". This Resolution welcomes article 53 of the Charter, which will enable the European Court of Justice to develop its case-law on fundamental rights, thereby giving them a basis in law which is vitally important in the context of the development of European Union law and stresses that the judiciary in the Member States have a vital role to play in the enforcement of human rights; urges the Member States to introduce a system of continuous training for national judges on systems for the protection of fundamental rights.

The Charter has also an important role in accessing of the European Union to the European Convention on Human Rights and Fundamental Freedoms in accordance with the article 6 of the Lisbon Treaty (European Union Treaty), which states that "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall*

¹¹ http://europa.eu/pol/rights/index_en.htm

¹² http://fra.europa.eu/fraWebsite/home/home_en.htm

not affect the Union's competences as defined in the Treaties". Also, the European Parliament welcomes, in its Resolution of 14 January 2009, "the prospect of the Union acceding to the European Convention, even if that accession does not bring about fundamental changes, given that "when questions relating to the rights and freedoms enshrined in the Convention are raised before the Court of Justice of the European Communities, the latter treats the European Convention as forming a genuine part of the European Union's legal system".

This accession will assure "a increased coherence of the human rights protection in Europe, because the European Court of the Human Rights could guarantee the harmony between the Convention and the Charter, checking the interpretation of the Convention by the judge of Luxembourg when apply the Charter"¹³; this value judgment imposes an analysis on the role of the two Courts in the field of human rights.

The Charter relaunched the idea of the accession to the Convention which had a specifically evolution at the level of the Council of Europe and the European Communities. The Court of Luxembourg opinion's – 2/1994¹⁴ stated that the European Union has been not prepared, at that moment, for accessing, because the "accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond" the treaty's provisions (article 235).

At present, the European Convention on Human Rights is not directly bound on European Union institutions, but it will be once the process of accession to the Convention will be finalized; all Member States of the Union are directly bound by the Convention. Therefore, all proposals for legal acts of the Union that need to be applied by Member States must fully respect the Convention.

We mentioned already that many of the rights contained in the Charter correspond to rights guaranteed by the Convention, but it also protects certain rights that are not covered by the European Convention. The Charter precises that "*the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*".

Furthermore the Court of Strasbourg stated, in its case-law, the Charter as external source. For example, the article 9 of the Charter, which guarantees the right to marry ("*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*") "departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women"¹⁵. Or a dissenting opinion of a judge of

¹³ F. SUDRE, *Drept european și internațional al drepturilor omului*, (Ed. POLIROM, București, 2006), p. 130

¹⁴ CJCE, *opinion no. 2/94* from 28 march 1996. „It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT*. Respect for human rights is therefore a condition of the lawfulness of Community acts”.

¹⁵ CEDO, *Christine Goodwin v. United Kingdom*, no. 28957/95, 7 July 2002. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

“1. *Everyone has the right to respect for his private ... life...*

the Court of Strasbourg¹⁶ stated that it is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of “human beings” in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. In conformity with this dissenting opinion, the article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the *foetus* against the negligent acts of third parties, “there has been a violation of Article 2 of the Convention”. “As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide)”.

On the other hand, the judge of Luxembourg interpreted the community law in the light of the Charter's provisions, before acquiring the compulsory statute; for example, in the case C-275/06, when the community judge outlined the necessity to assure a balance between the various fundamental rights guaranteed by the community judicial order¹⁷.

Conclusions

In conclusion, we consider that the Charter will get an important role in the new European Union context and development, at internal and international level. The Union European action must be above reproach when it comes to fundamental rights and the Charter must serve as compass for the Union's policies and their implementation by the Member States. So, the European Union institutions and Member States are obliged to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it by the Treaties.

This role of the Charter could be analyzed in the context of the actual procedure of the Union accession to the European Convention on Human Rights and Fundamental Freedoms, because their provisions will be interpreted by the European Court on the Human Rights. Also, we consider that it is important and useful to elaborate a research on the application of the Charter's provisions by the national courts.

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”.

¹⁶ CEDO, *VO v. France*, no. 53924/00, 8 July 2004.

¹⁷ CJCE, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06, 29 January 2008. Even if, formally, the national court has limited its question to the interpretation of Directives 2000/31, 2001/29 and 2004/48 and the Charter, that circumstance does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it, whether or not that court has referred to them in the wording of its question (see case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited)...Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter, whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

References

- Raluca Miga Besteliu, Catrinel Brumar, *Protecția internațională a drepturilor omului*, Note de curs, Ed a IV-a revizuită, (Ed. Universul Juridic, București, 2008).
- Augustin Fuerea, *Manualul Uniunii Europene*, Ed. a IV-a revăzută și adăugită după Tratatul de la Lisabona (2007/2009), (Ed. Universul Juridic, București, 2010)
- Paul Craig, Gráinne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Ed. A IV-a, (Ed. Hamangiu, București, 2009)
- Marianne Dony, *Droit de l'Union Européenne*, (Edition de l'Université de Bruxelles, 2008)
- Andrew Duff, *Saving the European Union. The Logic of the Lisbon Treaty*, (Ed. Shoehorn Current Affairs & History Books, London, 2009).
- Frédéric Sudre, *Drept european și internațional al drepturilor omului*, (Ed. POLIROM, București, 2006).