THE EUROPEAN UNION’S CHARTER OF FUNDAMENTAL RIGHTS: A CONTRIBUTION TO THE EUROPEAN INTEGRATION, A STEP TOWARDS THE EUROPEAN CONSTITUTION OR JUST A NON-BINDING DECLARATION OF HUMAN RIGHTS?

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Abstract: The national legal orders of all member states, the European Convention on Human Rights and the jurisprudence of the European Court of Justice provided, without any doubt, a high level of protection of Human Rights in the European Union even before the European Union’s Charter of Fundamental Rights. This remark does not, however, mean that the European Union’s Charter of Fundamental Rights hasn’t any value in itself or that it is not of great importance. The contribution of the European Union’s Charter of Fundamental Rights is to be found in the creation of legal certainty, but above all, in the increase of the legitimacy of the European Union among its citizens and consequently in its contribution to the European Integration.

Keywords: Fundamental Rights, Protection of Human Rights, Legal Certainty, Jurisprudence.

JEL Classification : K19

I. Necessity and functions of the European Union’s Charter of Fundamental Rights

A. Was the European Union’s Charter of Fundamental Rights¹ really necessary or not and, in case of a positive answer, in what sense? This is the very first issue which

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rises in the frame of the Charter as all national legal orders of the member States of the European Union undoubtedly guarantee a high level of protection of Human Rights.

B. Moreover, it is not only the protection of Human Rights in the national legal (especially constitutional) orders which makes the existence of a European Union’s Charter of Fundamental Rights questionable. It is also the fact that all member states of the European Union are signatories to the European Convention on Human Rights and everyone is aware of the high level of protection provided so much by the European Convention on Human Rights as by the European Court of Human Rights in Strasbourg.

Let me only present the Greek experience: Every time a citizen feels that the national Greek courts have failed in providing him sufficient protection against Human Rights’ violations by the national (administrative and legislative) authorities, the first thing he says to his lawyer is: “Let’s go to Strasbourg”. And even if he loses the case in Strasbourg, he can be sure that the rejection was reasonable.

On the other hand, there are many who express the view that the protection provided by the European Convention on Human Rights is not sufficient anymore. The main argument is that the above Convention dates from the year 1950 and within the past decades there have been “dramatic” changes in the field of Human Rights. Especially the technological development has considerably increased the potential risks and the possibility of Human Rights’ violations. These arguments may seem correct at first sight, but they don’t take under consideration the fact that also an “old” legal text can – through interpretation – become “modern” and provide solutions to every recent problem in the field of Human Rights. And let us not forget that, still today, in France Human Rights are protected by the Declaration of the Human and the Citizen of the year 1789.

More important in this relation is the fact that the European Convention on Human Rights is not the only Convention and not the only legal source of Human Rights’ protection which origins from the Council of Europe. With these remarks we don’t mean only the additional to the European Convention on Human Rights protocols which allow the “modernization” of the Convention and its adaptation to the social, economic, political and technological development. We mean also the possibility of other Conventions which origin from the Council of Europe.

Let’s take for example Art. 3 of the European Union’s Charter of Fundamental Rights which refers to a very important and modern issue, the protection in the field of medicine and biology. According to this Article: “1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: - the free and informed consent of the person concerned, according to the procedures laid down by law, - the prohibition of eugenic practices, in particular those aiming at the selection of persons, - the prohibition on

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making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings”.

Thus, Article 3 of the European Union’s Charter of Fundamental Rights provides the basis of essential protection against a new source of risks for Human Rights. Of course, the European Convention on Human Rights could not at that time contain similar provisions related to this issue. No one could, for example, imagine – in 1950 - the reproductive cloning of human beings, except perhaps Aldous Haxley in his famous work “A brave new world”. But does this mean that there is no sufficient protection in this field between countries that are not members of the European Union? The answer to this question is negative, because the Council of Europe has elaborated a special Convention, which was signed in 1997: the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine. This Convention, which was signed also by the European Union, refers to all risks in the field of Human Rights which origin from the application of Medicine and Biology. Moreover, an additional Protocol to the Convention forbids expressly the reproductive cloning of human beings, exactly like the European Union’s Charter of Fundamental Rights does. To sum up, the European Convention on Human Rights, its additional Protocols and the other Conventions which origin from the Council of Europe provide a high level of Human Rights’ protection, also considering the risks which were not present in the year 1950, when the European Convention on Human Rights was signed.

C. Consequently, there has been already (before the appliance of the European Union’s Charter of Fundamental Rights) a high level of protection of Human Rights. An additional protection arises from the European Union itself and especially from the jurisprudence of the European Court of Justice and the Treaty of the European Union. More specifically:

According to Art. 6 par. 2 of the European Union’s Treaty: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. Furthermore, Art.46 of the European Union’s Treaty provides that the Court of Justice should, within its jurisdiction according to the Treaties of the European Community and the European Union, review the action of the institutions for their compatibility with the Fundamental Rights as they are referred in the Art. 6 par. 2 of the Treaty of the European Union. However, it must be pointed out that Art. 6 par. 2 of the Treaty of the European Union reflects only the existing jurisprudence of the European Court of Justice, which had already in the early 70’s accepted that “fundamental rights form an integral part of the general principles of law the observance of which 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

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2 See also B. Mathieu, La Charte européenne des droits fondamentaux et la bioéthique, European Review of Public Law, Vol. 14 : No1, Spring 2002, pp. 841 et seq.
4 See European Court of Justice, Case 11/70, Internationale Handelsgesellschaft.
have collaborated or to which they are signatories. The ECHR has special significance in that respect.”

Taking under consideration, according to the above remarks, the national legal orders, the European Convention on Human Rights and the jurisprudence of the European Court of Justice, no one could reasonably deny the high level of Human Rights’ protection in the European Community and the European Union even before the European Union’s Charter of Fundamental Rights. Because of this, already existing, high level of protection, someone could argue that the European Union’s Charter of Fundamental Rights has not contributed something really new to the protection of Human Rights.

D. These remarks should not, however, lead to the conclusion that the European Union’s Charter of Fundamental Rights hasn’t any value in itself or that it is not of a great importance. The contribution of the European Union’s Charter of Fundamental Rights is to be found in the creation of legal certainty, but above all, in the increase of the legitimation of the European Union among its citizens and consequently in its contribution to the European Integration, especially in a time where the adoption of the European Constitution seems to be highly probable:

As already mentioned, Fundamental Rights are guaranteed by the national constitutional orders, the European Convention on Human Rights, the other Conventions concerning Human Rights and, finally, the case-law of the European Court of Justice. There is a wide spectrum of legal sources related to Human Rights, and, unfortunately, because of this complexity, the citizen of the European Union is not able to identify his rights. In other words: almost everyone knows that Fundamental Rights are guaranteed within the European Union, but almost no one knows the specific Human Rights which are protected. The European Union’s Charter of Fundamental Rights contributes to the legal certainty in the field of Fundamental Rights and provides one clear catalogue of the most important Human Rights, which reflect the provisions of the European Convention on Human Rights and the common constitutional traditions of the member states. In a field where identification of the applicable norm seems to be the most difficult thing, this contribution of the European Union’s Charter of Fundamental Rights shouldn’t be underestimated.

Secondly, the European Union’s Charter of Fundamental Rights compensates the lack of legitimation and acceptance of the European Union’s institutions among its citizens. There are many who share the view that the European Union is only interested in the economic sector and doesn’t pay the appropriate attention to the needs and other aspects of the daily life of its citizens. The European Union’s Charter of Fundamental Rights aims to change this, unfortunately, widespread view, by protecting the rights of the citizens in all aspects of everyday life, from the right to marry and make a family until the right of access to state health services.

Furthermore, the European Union’s Charter of Fundamental Rights reduces the democratic deficit of the European Union and its institutions. The debate about the lack

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5 European Court of Justice, Case 112/00, Schmidberger, point 71, with reference to the previous jurisprudence of the Court in the same matter.

of democratic legitimation of the European Union and the ways in which this lack can be fought, is well known. In this context, the European Union’s Charter of Fundamental Rights is of great significance not so much because of its content and the individual rights that are protected by it, but because of the organ by which it was drafted. The European Union’s Charter of Fundamental Rights was indeed adopted by a proclamation of the European Commission, the European Council and the European Parliament at the Nice European Council in December 2000, but it was elaborated and drafted by a sui generis (body) Convention under the Presidency of Professor (and ex-President of the Federal Republic of Germany) Roman Herzog. The main characteristic of this Convention was its representation: it was composed by 62 members. 15 of them were nominated by the member state governments, 16 by the European Commission, 16 by the European Parliament and 30 by the national Parliaments (2 from each country). The clear dominance of the parliamentary representation (46 members from the European Parliament and the national parliaments in a total of 62 members) was of great, at least symbolic, importance: the parliament members, both in national and European level, are elected directly from the people (and not nominated) and represent (or they should represent) their interests. The European Union’s Charter of Fundamental Rights is the text with the greatest democratic legitimizing in the history of the European Union (until the draft of the European Constitution which was elaborated by a similar Convention). All these remarks indicate the importance of the European Union’s Charter of Fundamental Rights for the goal of European Integration, which cannot be achieved without a minimum of democratic legitimation and without the acceptance of the European Union among its citizens.

Last, but not least, the European Union’s Charter of Fundamental Rights can be characterized as the first step towards a European Constitution. Because in the majority of the legal orders of the member states Fundamental Rights build the main context of the constitution (in other words a constitution without a catalogue of Fundamental Rights is beyond any thought), the European Union’s Charter of Fundamental Rights was the first, small but very important step towards the making constitutional of the European Union. Therefore, it is not surprising that the Charter builds the second part of the draft of the European Constitution. Moreover, the fact that many are those who are opposed to the binding effect of the European Union’s Charter of Fundamental Rights is not irrelevant: if the Charter became a binding effect, then the road to the European Constitution would be inevitable.

E. The above remarks about the real aim and the functions of the European Union’s Charter of Fundamental Rights are confirmed by the documents which are related to the process of drafting this Charter: as an example let us refer to the conclusions of the Cologne European Council (June 1999) where it is stated (asserted) that: “The obligation of the Union to respect the Fundamental Rights has been confirmed and defined by the jurisprudence of the European Court of Justice ... There appears to be a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens”. What does the European Council, with these Conclusions, assert? Firstly, that Fundamental Rights are already protected within the

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European Union (especially by the European Court of Justice) and, secondly, that the real aim of this Charter was not to create new Fundamental Rights, but, on the contrary, to make the existing ones and their significance more visible to the European Union’s citizen.

Moreover, the contribution of the Charter to the making constitutional process of the European Union is clearly stated in the Point V of the Resolution of the European Parliament on the draft of the Charter of Fundamental Rights (16-3-2002): “Whereas the Charter of Fundamental Rights should be considered as a basic component of the necessary process of equipping the European Union with a constitution”.

II. Legal status of the European Union’s Charter of Fundamental Rights: The issue of the (non) binding effect of the Charter

The importance of the above mentioned positive effects of the Charter depends on the binding or non-binding character of the Charter. For example, the increase of democratic legitimizing and the acceptance of the European Union among its citizens would be considerably higher, if the Charter was “armed” with binding effect and if European citizens could invoke the violation of this Charter before the national and European Courts.

A. It is well known that, at least formally and at the present time, the European Union’s Charter of Fundamental Rights has not a binding effect. The question if the Charter will in the future obtain a binding character is going to be answered together with the question of the adoption of the European Constitution, because the Charter was incorporated to the Draft of the European Constitution as the second part of the Constitution. However and even now (before the adoption of the European Constitution), the European Union’s Charter of Fundamental Rights indirectly does have a binding effect, because it contains the most important Fundamental Rights, which are recognized by the common constitutional traditions of the member states and the European Convention on Human Rights and, consequently, protected in the European Union’s law as general principles according to the above mentioned jurisprudence of the European Court of Justice.

B. This conclusion can be confirmed by the references made about this issue in the Opinions of the General Advocates and in the decisions of the judicial bodies of the European Union, even in the very first period after the adoption of the Charter.

The most characteristic example is perhaps to be found in the opinion of the Advocate General Tizanno in the case Bectu v. Secretary of State for Trade and Industry (C-173/1999). Let us only refer to an abstract of this opinion (point 27, 28): “Admittedly… the Charter of Fundamental Rights of the European Union has not been recognized as having genuine legislative scope in the strict sense. In other word, formally, it is not itself binding. However, without wishing to participate here in the wide - ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. In its preamble, it is moreover stated that ‘this Charter reaffirms, with due regard to the powers and tasks of the Community and the Union and the principles of
subsidiary, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty of the European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case – law of the Court of Justice of the European Communities and of the European Court of Human Rights’. I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context”.

This indirect binding function of the European Union’s Charter of Fundamental Rights is notified and by Advocate General Lèger (Case C-353/1999, Council v. Hautala). According to this opinion (point 80 - 83): “Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject – matter at the highest level of values common to the Member States. As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law”.

In another Opinion (of Advocate General Jakobs) in the case C-126/01 (GEMO SA, point 24) the reference to the Charter was aiming to show the great importance of the services of general interest which are guaranteed in Art. 36 of the European Union’s Charter of Fundamental Rights, while Advocate General Misho in the joined cases C-20/00 and C-64/00 (Marine harvest McConnell and Hydry Seafood, points 125-128) uses the Charter as an argument to conclude that the right of property (Art. 17 of the Charter) does not include a right to a compensation from the state in cases of epidemic diseases of animals. Another characteristic example can be found in a Decision of the European Court of First Instance (Case T 177/01, point 47), where the European Union's Charter of Fundamental Rights was mentioned in order to confirm the conclusion that a certain procedure does not fulfill the requirements of the right to an effective remedy. It is to be read: “On the basis of the foregoing, the inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the European Convention on Human Rights and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation”.

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III. Subjective and objective scope of application of the European Union’s Charter of Fundamental Rights

Because of this indirect binding effect, the Charter raises the question of its subjective and objective scope of application.

In the era of globalization and international protection of Human Rights, it would be contradictory if the protection provided by the Charter was limited only to the citizens of the European Union. The Charter is called “The European Union’s” Charter but, in most cases, it is not the Charter of the Fundamental Rights only of the European citizens. The majority of the Fundamental Rights protect every person, of course within the scope of application of this Charter, as it follows already from the text of the individual rights: for example “human dignity is inviolable” (Art. 1), “Everyone has the right to life” and “No one shall be condemned to death penalty” (Art. 2). An exception is provided only for certain rights (like the one of Art. 15 par. 2 of the Charter: “Every citizen of the Union has the right to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”) and, above all, for the citizen’s rights: Some of these citizen’s rights apply only to the citizens of the Union (e.g. the rights to vote and to stand as a candidate at municipal elections and at elections to the European Parliament [Art. 39 and 40 of the Charter]), others refer to the European citizens and to every “natural or legal person residing or having its registered office in a Member State” (e.g. the right of access to documents and the right to position, Art. 42-44 of the Charter) and others protect “every person” (like the right to a good administration, Art. 41 of the Charter).

As far as the objective scope of application of the European Union’s Charter of Fundamental Rights is concerned, the main rule is settled in Art. 51 par. 1, according to which: “The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union Law”. In other words, the Charter provides protection against actions taken by the national authorities (of the Member States) only if these authorities act within the framework of the law of the European Union.

IV. Conflicts between the European Union’s Charter of Fundamental Rights and other legal texts and conflicts within the Charter.

Finally, the effectiveness of the Charter is influenced from the solution of another crucial problem, which arises in every catalogue of Fundamental Rights: The problem of conflicts.

A. Every time a new legal text is created there occurs the question of the possible conflicts with other legal texts which refer to the same subject and regulate it in a different way. As far as the European Union’s Charter of Fundamental Rights is concerned, the protection guaranteed by this Charter can differ from the protection provided, firstly, by the national constitutional orders, secondly, by the European

Fundamental Rights (right to marry and to found a family) in order to accept the right of the transsexuals to marry according to Art. 12 of the European Convention on Human Rights: “The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women” (point 100).
Convention on Human Rights and, thirdly, by the Community Treaties and the Treaty of the European Union (which protect also some fundamental rights, like, for example, the free movement of persons [Art. 18 of the EC Treaty], the right to vote and to stand as a candidate at municipal elections and at elections to the European Parliament [Art. 19 of the EC Treaty], the right to petition [Art. 21 of the EC Treaty] and the free movement of goods [Art. 23 - 31 of the EC Treaty]).

In relation to the Fundamental Rights provided by the European Union’s Treaty or the Community Treaties, European Union’s Charter of Fundamental Rights adjusts its level of protection to the standards guaranteed by the Treaties (Art. 52 par. 2 of the Charter): “Rights recognised by this Charter which are based on the Community Treaties or the Treaty of the European Union shall be exercised under the conditions and within the limits defined by those Treaties”.

As far as the relation to the European Convention on Human Rights, other international Conventions and the national constitutions of the member states is concerned, Art. 52 par. 3 and 53 of the European Union’s Charter of Fundamental Rights make crystal-clear that the Charter provides only the minimum of the protection and more extensive protection by the above mentioned instruments shall not be prevented: (Art. 52 par. 3) “Insofar 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. This provision shall not prevent Union law providing more extensive protection”, Art. 53: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union Law and international law and by international agreements to which the Union or all the member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

B. However, conflicts can appear not only between the European Union’s Charter of Fundamental Rights and other legal texts (which also protect Fundamental Rights), but also within the Charter. This is the situation when the exercise of one Fundamental Right (for example: freedom of expression and assembly in the case of demonstration, Art. 11 and 12 of the Charter) conflicts with another Fundamental Right (for example: free movement of goods, Art. 23-31 EC Treaty). The European Union’s Charter of Fundamental Rights provides (Art. 52 par. 1) that: “Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of

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9 After the incorporation of the Charter to the Draft of the European Constitution, the same provision has the following wording: “Rights recognised by this Charter for which provision is made in other Parts of the Constitution, shall be exercised under the conditions and the limits defined by these relevant Parts”.

10 See also the new par. 4 to Art. 52, which was added with the incorporation of the Charter to the Draft of the European Constitution. According to this provision, “Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

general interest recognized by the Union or the need to protect the rights and freedoms of others”. However, the same provision doesn’t indicate which conflicting Fundamental Right is going to have the supremacy over the other and on the basis of which criteria, if the reconciliation of the conflicting interests is not possible. Although the resolution of each conflict presents its own particularities, jurisprudence (of the national courts and the judicial bodies of the European Union) must develop criteria in order to weigh the gravity of the opposite interests and resolve the conflict (for example the gravity of the negative consequences for the one conflicting Fundamental Right coming from the exercise of the other conflicting Fundamental Right)12.

V. Conclusion

The European Union’s Charter of Fundamental Rights is a legal text with indirect binding effect. Despite the high level of Human Rights’ protection by the European Convention on Human Rights and by the national (especially constitutional) legal orders of all member states, the contribution of the Charter is mainly to be seen in the creation of legal certainty, but above all, in the increase of the legitimation of the European Union among its citizens. In that sense, the Charter can be described as one of the most important (if not the most important) legal instruments in the long and “cloudy” process towards the European Constitution and the European Integration.

12 For such balancing criteria (in the case of conflict between the freedom of expression and assembly on the one hand and free movement of goods on the other hand) see European Court of Justice, Case C-112/00, Schmidberger, points 81 et seq. See further M. Stathopoulos, The Protection of Fundamental Rights in the EU after the Charter’s Proclamation: Assessment and Proposals, European Review of Public Law, Vol. 14 - No1, Spring 2002, pp. 751, 759 et seq.