Aspects and Limits of European Charter of Fundamental Rights

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Introduction:

The Charter of Fundamental Rights of European Union is a document with a brief and although complex history. Its first appearance was in the Treaty Establishing a Constitution for Europe in 2004. But this project was not working so the member states tried once again and put the document in the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community document signed at Lisbon in December 2007.

The Charter also has political significance as a very important political massage sent from the Member States to European citizens. The question that arises is what is wanted from the European Union on human rights matter and whether it will manage to overcome all obstacles which hamper the process of European Union constitutionalization.

The paper aims to analyze how the emergence of the European Charter of Fundamental Rights document is an additional document which represents a guarantee European Union’s commitment to a political union as well as a commitment to its citizens.

The Charter has raised a number of controversies and put the Member States in face of a unique situation which has led to heated debates on this topic. Among this issues that arose on the adoption of the document are legally binding Charter, the European Union accession to ECHR and the opting-out clause of Great Britain and Poland.

1. A short history of the Charter of Fundamental Rights of EU:

Drafting the Charter of Fundamental Rights was decided in European Council in Koln. The method by which the Charter was to be drawn was that the appointment of an ad-hoc body composed by representatives of various constituent groups who had the job to prepare a draft Charter.

Even if at the European Council in Nice on 7 December 2000 the Charter was proclaimed by the Presidents Council, Commission and European Parliament, still the document has not appeared in this Treaty. It has appeared in The Treaty establishing a

\(^3\)Iordan Gheorghe Bârbulescu, „Uniunea Europeană: de la național la federal”, Ed.Tritonic, București, 2005, pp.152.
Constitution for Europe\textsuperscript{4}, a project that could not be done so the Charter does not have yet the value of a document legally binding. This fact happened because the Charter was not incorporated on the Treaty of European Union but on the Treaty Establishing a Constitution for Europe as I was said.

In drafting the Charter was established a Convention on which participated both European Institutions and representatives of national parliaments, the civil society representatives, academics, lawyers. This convention made a recommendation to the European Council. The real problem of this meeting was that nobody was expected that this Convention will produce such a great document. And at that time wasn’t established which will be the status of this document. Thus, the issue was whether the document must be included in the treaties or remain just a declaration of principles. If it was decided to incorporate it in the treaties then it could have been binding on all Member States\textsuperscript{5}. The Charter document represented an additional text to the European Convention of Human Rights and it aimed to protect fundamental rights against actions by the European Union’s institutions and by the Member States also when they applied the European treaties.

The European Charter of Fundamental Rights brings together all the civil, political, economic and social aspects of people living within the European Union. It is a policy document that explicitly expresses the aspirations of European Union institutions and Member States regarding the protection of fundamental rights within the European Union. Charter influences the legislative proposals at EU level that it is a source of inspiration for national laws of Member States as well as for legal enforcement of rights recognized by the European Convention of Human Rights in the constitutions of Member States.\textsuperscript{6} The European Charter of Fundamental Rights is a comprehensive document which includes both civil and political rights but also the economic and social rights. It is the very first European document that unifies the common values of European society. Within the adoption of Lisbon Treaty, the Charter becomes legally binding for European Union Member States. Until this Treaty, the European Union institutions were bind to respect ECHR. Since the entry into force of the Lisbon Treaty, the Charter becomes binding and has the same legal value as the Treaties. Its

\textsuperscript{5}http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=137&pageRank=2&language=RO.
binding nature derives from the provisions of Article 6.1 on Treaty on European Union (TEU).

2. Legally Binding Charter

As I noted above, the obligation to respect fundamental rights and freedom of the European Union Member States are no reference made by the primary law of European Convention on Human Rights on the one hand, and on the other states that were part of the European Convention on Human Rights represented an additional guarantee of compliance with this Convention. As referring to the European Union such a provision lacked. The obligation to respect fundamental rights referred to European Community. The Member States had a general obligation to respect the rules of community law and as a consequence the rules referred to human rights in these texts.

Lisbon Treaty gives the Charter of Fundamental Rights legally equal binding to the Treaty on the basis of the Protocol annexed to the Treaty.

It is also clear that more specific provisions of the Charter do not affect the powers of the European Union as they are established by the Treaties themselves. Legal effect of provisions relating to the Charter requirement sends a message to both institutions and European citizens towards the European Union in support of the dedication to the Charter of Rights and Freedoms.

The introduction of the Charter of Fundamental Rights as an annex to the Treaty of Lisbon also meant a declaration recognizing the binding nature of its European primary law.

Even if the Charter of Fundamental Rights is not part of the Treaty, it becomes legally binding as the treaties. So, in the context of the European Union legal personality acquisition, the Charter is the legal basis for European Union accession to the European Convention on Human Rights.

However, by introducing into the Treaty of Lisbon, the Charter is binding on the Member States and European Union institutions. Therefore, it was necessary to harmonize the fundamental rights at European Union level and this could be achieved by resorting to an

international body recognized by all Member States and at the same time ensure uniformity of compliance with these rights in all member states. Lisbon Treaty gives the European Union legal personality; it now has the ability to sign international treaties and to be member in international organizations. Thus, the proposed European Union accession to the European Convention on Human Rights came as a natural consequence of strengthening the European integration process towards a political union.

3. European Union’s accession to European Convention on Human Rights

European Union Member States are members of the European Convention on Human Rights and the treaties contain provisions relating to community rights and fundamental freedoms on the territory of these states or those that are expected to join the European Union.

Drafting of the Charter of Fundamental Rights was based on Council of Europe document but it could not copy or take this document. Moreover the Charter clearly specifies that its provisions are not intended to limit in any way the rights that are already guaranteed under the European Convention on Human Rights. In this respect, article 52 al 2 of the Charter it specify that “Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”, which means that the rights that have already correspondent Convention on Human Rights have the same legal value and the same type of regulation.

But while the Convention covers issues relating to civil and political rights of Member States citizens, the Charter of Fundamental Rights covers some issues related to collateral social rights of employees (Title IV Solidarity), the right to good administration (art.41) and covers those political rights of Union citizens cannot be included in the Council of Europe’s document.

The problem occurs in regarding to the European Union as a political structure, which is not a member of the European Convention on Human Rights and could not become one because it is not a state. In order to achieve this, it is necessary to review both the European Convention on Human Rights and the European Union treaties.

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The Lisbon Treaty confers legal personality through the European Union and expressly recognizes its ability to enter into legal relationships with other identities. The legal personality was recognized to the European Community until its entry into force.

The Treaty on European Union (TEU) expressly provides that "The union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." According to the same document, it states that the European Union acceding to the European Convention on Human Rights, thus giving assurance that European Union institutions are obliged to respect human rights and fundamental freedoms in the decisions they take. Moreover both the European Union and its institutions are subject to the jurisdiction of the European Court of Human Rights (ECHR) in Strasbourg as a Supreme Court that its decisions are binding on both the European Union and its institutions. An important consequence resulting from conferring legal status of the Charter may be required now that the European Court of Justice will be consulted to interpret the European Convention on Human Rights because most of the rights stipulated in the Charter are derived from this document. For a unity in approach to human rights issues between the two courts, one in Strasbourg and one in Luxembourg, European Union accession to the European Convention on Human Rights would be a solution that ensure consistent approach and thus reducing inconsistencies or discrepancies in risk judgments. So, if both the institutions and European Union as an international organization are subjects for the Strasbourg Court, this will come to a uniform interpretation of all causes that are brought to European justice.

The Charter of Fundamental Rights of the European Union establishes measures to protect individual rights as well as social rights. The content of the Charter clearly specifies that such rights do not justify the granting of European Union powers which have not been decided by the Member States through changes to the treaties and those limitations and conditions of Community law must be respected. The agreement on European Union accession to the European Convention on Human Rights must reflect the need to preserve the specific features of European Union primary law and in particular those two aspects: a) to set an

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arrangement that provides the proper tools for the participation of the European Union under the European control mechanisms; b) the mechanisms required to ensure that actions brought by Member States and those brought by individuals are directed either against Member States or the European Union as a whole. The European Union Accession Agreement to the European Convention on Human Rights should ensure that membership does not prejudice any Member States powers or the Union powers and its institutions and any of its provisions that does not change the status of the Convention or derogate from those Member States which have expressed reservations thereof.

States that have obtained an exemption from the Charter of Fundamental Rights are United Kingdom and Poland and they have signed a Protocol in this respect. For a better understanding the complexity of introducing the mandatory compliance with the Charter of Fundamental Rights this paper will focus on the causes which have led countries like United Kingdom and Poland to obtain an exemption from the requirement of the Charter.

**United Kingdom and Poland’s Protocol**

The United Kingdom and Poland have secured a Protocol, which under Article 51 of TEU will have the same legal value as the Treaties on the application of the Charter of Fundamental Rights in those two states.

a) **United Kingdom’s case**

The United Kingdom joined the European Union, as is known today, in 1973 since when it has been a requirement to incorporate European Union legislation into United Kingdom law and also to recognize the jurisdiction of the European Court of Justice in matters of European Union law.

The government of United Kingdom considers that this Protocol do not constituted an opt-out from the Charter, but an interpretative Protocol so the opt-out constitutes an inaccurate terminology.

An explication more valid is that in United Kingdom’s case this Protocol is a consequence of the British legal system. The British legal system is a dual one. The dual system of Great Britain shows that international obligations are translated into national laws only after they were assimilated by internal system. For States with a “dualist system”, international law is not directly applicable domestically. It must first be translated into
national legislation before it can be applied by the national courts. Therefore, for a dualist State ratification of the International Criminal Court Statute is not enough and national implementing legislation is necessary. War crimes trials, for example, can only take place when the national legislation is enacted, unless of course such legislation already exists.

The explanation of this system is that a perfect separation of powers must exists in state. Since the singing of a treaty or international agreement was the government attribute (the executive power in this case), and power law granting this document would branch this principle in that, this violates the legislative competence of the Parliament.

The most telling example is for instance the case of extradition and expulsion. The provisions on those two cases appear in Protocol IV of the European Convention of Human Rights that United Kingdom has not ratified so this document is not enforceable. As a result United Kingdom’s obligations in this area came from international instruments ratified by the United Kingdom.

Regarding deportation, the United Kingdom system of law is based on Article 13 of International Convention on Civil and Political Rights that was adopted by the United Nations General Assembly at 16 of December 1966, and on Article 32 (2) of the Geneva Convention Relating to the Status of Refugees of the 1951 and the Protocol Relating to the Status of Refugees.10

United Kingdom is a signatory to the European Convention of Human Rights, convention that was incorporated into United Kingdom law with the passing of the Human Rights Act from 1998 which allows for the provisions of the Convention to be applied directly by the United Kingdom courts.

As I previously explained the dualist theory applicable in the United Kingdom, this state is not forced to accept in its internal rules of an international document that has the same scope with the existing rules. Regarding expulsion and extradition, the Charter of Fundamental Rights of the European Union statues that its provisions are based on the provisions of Protocol IV of the European Convention on Human Rights, document from which United Kingdom is except because this country does not ratified it. But as I pointed out, the United Kingdom is a signatory to the Geneva Convention Relating to the Status of

Refugees and also a signatory to the International Covenant on Civil and Political Rights. The fact that the European Charter of Fundamental Rights and the European Convention of Human Rights are not incorporated into domestic law of United Kingdom does not automatically mean that those documents are not applicable on its territory.

Great Britain’s courts of appeal when dealing with cases relating to human rights violations use the general principles set out in the Human Rights Act from 1998 and other international regulations, because Great Britain is not a signatory to all European Convention on Human Rights Protocols.

Great Britain’s position regarding to European Charter of Fundamental Rights implementation is explained by the law system that Great Britain have and by the specific character of the social rights that its internal system protect. To be more explicit we should tell that the Protocol achieved by United Kingdom ensures its government that nothing in the Charter of Fundamental Rights would give national courts any new power to strike down or interpret United Kingdom law. Human rights and civil liberties are enshrined in the United Kingdom through its constitutional system and through the Human Rights Act from 1998.

Another Britain’s concern about the full implementation of European Charter of Fundamental Rights is that this document gives to workers a full right to strike. Or the United Kingdom’s corps of constitutional laws does not have a right to strike. The trade unions in Great Britain have immunity for being suit if certain conditions are satisfied. In the immunity base system strike are seen as unlawful. So the trade union has to justify why they are going on strike. In the European system which provides a right based system strikes are lawful because the state’s law limits the rights to strike. As the Report published by the House of Lords said “Article 28 of the Charter does not create a free-standing right to strike: it is clear that within the Community framework, the right to collective action, including the right to strike, is already recognized as a general principle of law. Furthermore, Article 28 clearly stipulates that workers and employers have the right to collective bargaining “in accordance with Union law and national laws and practices” and the ECJ, in its December judgments, has indicated the significance of this limitation.”11 However, the United Kingdom considers that the rights and principles stated in the European Charter of Fundamental Rights are actually a restatement of existing rights in other international conventions and agreements to

11Idem 6.
which United Kingdom is already a signatory so it doesn’t consider relevant to sign this particularly one.

b) **Poland’s case:**

Poland joined United Kingdom in opting out from the Charter of Fundamental Rights most because of the conservative government view in some matters.

According to the Constitution of Poland the Prime Minister has an obligation to inform Sejm (the lower chamber of the Parliament) of his intent to submit for ratification by the president of any international agreement that’s ratification does not require consent granted by the statute.\(^2\) This is the first way of ratifying international agreements. The second way is that the document shall be passed by the Sejm and the Senate by a 2/3 majority. Regarding Lisbon Treaty ratifying, the Sejm decided that, referring to the Article 90 of Constitution, an agreement of the Parliament would be necessary. After this game with the parliament Poland’s decision was to sign Lisbon treaty with a clause of opting-out from the Charter of Fundamental Rights.

Poland’s point of view regarding Charter was that this document is too much liberal with some moral issues. The Charter of Fundamental Rights was supported in Poland most by the trade unions that were in favor of charter’s social rights. The initiative of the opting-out belonged to the government of LechKaczynski and his Law and Justice Party. The official rationale was that the EU would impose its moral standards in this way the Polish law. The main reason for the former president of Poland and his government to take this decision was the concern that the Charter would enforce the legitimization of homosexual marriages, euthanasia, and gives the women the right to abortion in Poland.\(^3\)

In order to obtain a wide support for this initiative Law and Justice Party argued that the Charter would give the German’s a right to claim the territories of western Poland.

After the elections when JaroslawKaczynski and his party have lost, the new majority was formed by a coalition of two parties the Civic Platform and the Polish People’s Party; Donald Tusk was nominated the Prime Minister. The new prime minister maintains the

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Protocol regarding to the Charter because the government needed the support of Jaroslaw Kaczynski’s party in order to reach the majority required for ratifying an international agreements.\textsuperscript{14} (\textsuperscript{\text{14}}).

Poland though keeps the Protocol regarding European Charter of Fundamental Rights despite of its political change.

\textbf{Conclusions:}

European Union Charter of Fundamental Rights represents a first step in constitutionalization process in spite of the sinuous road. The Charter might give the European Union’s its consistence and coherence and help EU moving towards that vision, namely that of a political structure that is based on principles of respect for human rights and fundamental freedoms. The problem, in the current context is whether it will succeed in implementing the Charter in a manner that demonstrates the vision of a unified Europe. A first step in European Union’s coherence respect fundamental rights represents EU’s accession to European Court of Human Rights. European Union accession to the European Court of Human Rights will introduce an additional judicial protection of fundamental rights. After European Union’s accession to European Court of Fundamental Rights its institutions, agencies and bodies will be just as Member States, subject to the jurisdiction of the European Court of Human Rights in Strasbourg which will be the last instance who decides at European level in terms of fundamental rights and will exercise judicial review even on European Court of Justice’s decisions.

From the political point of view, European Union accession to the European Court of Human Rights will enhance the credibility established by the Union human rights protection and development of a common culture of human rights in the European Union and not least to demonstrate that the European Union attaches importance to Strasbourg’s system regarding protection of fundamental rights.

Since EU Member States were signatories to the international documents such as the Universal Declaration of Human Rights, European Convention on Human Rights, European Social Charter, Community Charter of Fundamental Social Rights of Workers, rights and fundamental freedoms were respected on European Union territories but with specific

\textsuperscript{14}No EU rights charter for Poland article available at http://news.bbc.co.uk/2/hi/europe/7109528.stm.
function of each Member State was the Union turn to show commitment to the values that it proclaim.

The Charter of Fundamental Rights resolves the legitimacy of European institutions even though they had sufficient power to influence the life of Europeans did not have a document to provide effective means of protecting the rights of all those citizens. At the same time, it solves the problem related to the existence of several systems for the implementation of legally binding human rights guaranteed by the Charter as an express provision contained in the treaty.

Regarding United Kingdom and Poland Protocol about European Charter of Fundamental Rights, it relieves those two states from certain aspects of charters provisions, but under 51 article of Lisbon Treaty this Protocol shall have the same legal value as the treaties. Precisely from this point of view, the Protocol is not an opting-out from Charter and its provisions can be enforced in United Kingdom and Poland. Only his performance will be affected by the provisions of this Protocol. Article 2 of the Protocol provides that laws and practices of the Charter it apply to United Kingdom and Poland only if they are recognized by the laws and practices of the two states. The Protocol will not lead to a different enforce of Charter’s provisions in United Kingdom and Poland. An observation to the Protocol shows that this document explains mostly how the Charter shall be interpreted rather that how those two states are except from its provisions.

Charter of Fundamental Rights provisions is addressed both to institutions, agencies and European Union bodies regarding principle of subsidiarity and also to the Member States when implementing European Union common law. Therefore each of these actors respects the rights and principles of the Charter in accordance with their powers and respecting the limits conferred to the Union by the Lisbon Treaty. The Charter is formulated in terms suitable for either a constitution or either a treaty, does not create new rights for Member States since they have their own legislative sovereignty with regard to fundamental rights. At the same time it can be about the transfer of responsibilities from the European Union to Member States. The aim of this document was to make the law more transparent not to confer a set of new rights.
Bibliography


