

ADDED VALUE OF THE EU CHARTER OF FUNDAMENTAL RIGHTS TO OTHER HUMAN RIGHTS INSTRUMENTS

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ABSTRACT

After almost seven years since the Charter entries into force is still not yet an explicit and regular element in the procedures applied for scrutinising the legality or assessing the impact of legislation in the EU Member States. Other international human rights instruments, such as the ECHR, tend to be more systematically included in such procedures. So, this paper aims at analyzing one of the measure that can help at strengthen the Charter's role in the legislative processes at national level. We shall focus on Article 51 (field of application) –that could part of the assessment of the impact and legality of draft legislation. Thus, we can conclude that the Charter is a added value not only in respect with other instrument regarding the human rights but also that can be a more complete instrument for the national legislation on human rights, that bring, indeed, an “added value” in this field.

Key-words: Charter, human rights, European, national.

1. Short considerations on the evolution and history of the Charter

About the latest European document regarding the fundamental rights, and here I refer to the Charter of Fundamental Rights, a lot of scholars, specialists in the field of justice, defenders of the human rights, practitioners wrote and write thousands of pages. Indeed, it has had a difficult birth, for many reasons, and it needs almost ten years in order to entry into force. Today, The Charter is in line with the old and specific international legal framework of human rights which consists of a series of documents that form the International Bill of Human Rights, such as: the United Nations Charter (UN), the Universal Declaration of Human Rights and two UN pacts on civil and political rights, on one hand and, on the other hand, on economic, social and cultural rights. Also, in the Europe, it stands beside the old and well- known European Convention on Human Rights. That's why our source of information are provided by the official date issued by the European institutions and agencies.

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The Charter of Fundamental Rights, a mechanism for protection of fundamental rights at EU level, was adopted by the European Council in Nice in 2000. The Charter of Fundamental Rights is part of the Lisbon Treaty which entered into force on the 1st of December 2009. Article 2 of the Treaty establishing European Union includes among “the fundamental values of the Union, which are common to the Member States”, the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as well as pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. These values are equally binding for the EU and member states.

But till it reached to this success, the Charter was part of the Constitutional Treaty, signed in 2004, at Rome, and as it is known the European Constitution was rejected due to its “too much federalization”, “too much Europe” as many voices had protested. So the Charter was undoubtedly the most – if not the only – really “constitutional” part of the Constitutional Treaty and for this reason it has formally been removed from the Lisbon Treaty and included in a new Declaration adopted in Strasbourg on 12 December 2007 by the three EU legislative institutions.

Because it was not included in the Lisbon Treaty, the visibility of Charter to citizens could be reduced and this led to the European Parliament's decision for a solemn proclamation in order to become more visible and to increase its legal importance (Luzárraga & Llorente, 2011, p. 145). The Charter was proclaimed for the second time by the President of the European Parliament, Hans Pottering, the President of the Council, José Sócrates, and the President of European Commission, Emanuel Durão Barroso. The new legal frame is the Lisbon Treaty signed on 13 December 2007 and entered into force on the first of December 2009.

The Lisbon Treaty gives full legal value to the Charter. A new Article 6 of the TEU affirms (paragraph 1) that the Charter “shall have the same legal value as the Treaties”, specifying that it does not extend the competences of the European institutions. The Charter of Fundamental Rights of the European Union (Charter) complements national human rights legislation and the European Convention on Human Rights (ECHR). According to the Court of Justice of the European Union, Member States are bound by the Charter whenever they act within the scope of EU law.

The European Agency for Fundamental Rights (FRA) did a lot of analysis of this document and shows that the Charter is still not yet an explicit and regular element in the procedures applied for scrutinising the legality or assessing the impact of legislation in the EU Member States. However, other national human rights instruments, including the ECHR, tend to be more systematically included in such procedures (Summary Report- FRA- Charter-Workshop- 18 OCT-2016).

Since the end of 2009, the EU has its own legally binding bill of rights: the Charter of Fundamental Rights of the European Union, which complements national human rights and the European Convention on Human Rights (ECHR).

Whereas national human rights and the obligations under the ECHR are binding on EU Member States in whatever they do, the Charter is binding on them only when they are acting within the scope of EU law. While the EU stresses the crucial role of national actors in implementing the Charter, it also underlines the need to increase awareness among legal practitioners and policymakers to fully unfold the Charter potential. FRA therefore examines the Charter's use at national level (FRA Fundamental Rights Report 2016).

2. The Charter and the Legislative process

In autumn 2015, the European Parliament stressed that "national authorities (judicial authorities, law enforcement bodies and administrations) are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter" (European Parliament (2015), Resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014) 2014/2254(INI)), Strasbourg, 8 September 2015, *apud* FRA Fundamental Rights Report 2016).. Indeed, it is mainly at the national level that fundamental rights, as reflected in the Charter, have to be respected and protected to make a difference in the lives of rights holders.

Unfortunately, awareness of the Charter's content remains low and this aspect is shown in a Flash Eurobarometer from February 2015. The survey did show that general awareness of the Charter's existence has increased, with 40% having heard of the Charter in 2007 and 65% having done so in 2015. But this can hardly be said about the public's understanding of what the Charter is really about: in 2015, only 14 % of respondents said that they were "familiar with the Charter" and knew "what it is" - compared with 11 % in 2012 and 8 % in 2007. This signals a need for awareness raising.

Legal practitioners particularly have to be familiar with the Charter's rights if these are to be implemented in practice. In June 2015, the Council of the European Union noted that it is "necessary to continue promoting training and best practice sharing in the field of judiciary at national and EU level thus enhancing mutual trust" (Council of the European Union (2015), Council conclusions on the application of the Charter on Fundamental Rights in 2014, Brussels *apud* FRA Fundamental Rights Report 2016).

Therefore, one of the conclusion imposed is that one measure to strengthen the Charter's role in the legislative processes at national level is a more consistent 'Article 51 (field of application) - screening'. This would allow to better integrate the Charter in the assessment of the impacts and legality of draft legislation. Such screening might also help the legislator mainstream fundamental rights in EU relevant national legislation.

3. Other human rights sources and the Charter: joining up rights from different layers of governance

Even the Charter is not so well known among the European citizens, in this part of the paper we want to see how its provision could join to other layers of governance. The next analysis is based on a review of 68 court decisions issued in 26 EU Member States, mostly by constitutional, supreme, cassation, high and supreme administrative courts. The decisions were selected based on the relevance of the Charter references.

The review focused on court decisions that use the Charter in their reasoning and cases in which judges simply refer to the fact that parties cited the Charter were not taken into account. Up to three court decisions per EU Member State were considered (FRA Fundamental Rights Report 2016, pp39-40). (The proposed documents for comparison were ECHR, UN instruments, European Social Charter, National constitution, National fundamental rights instruments CJEU decisions EU directives EU general principles of law EU treaties).

Only five of the 68 cases analysed in 2015 referred to the Charter alone. All other cases referred to the Charter and to other legal sources. Twelve of the analysed decisions referred to the Charter and to the European Convention on Human Rights (ECHR); eight decisions also addressed national constitutional provisions; and 14 decisions referred to the Charter in combination with both national human rights legislation and the ECHR. Twenty-four decisions used the Charter in combination with other EU law sources, such as general principles of EU law or secondary EU law. Many decisions mention the Charter in combination with sources from different layers of governance, combining references to the Charter with international human rights law and EU law.

These findings are in line with previous FRA Annual reports and confirm that national constitutional law and the ECHR play a prominent role in cases referring to the Charter. Similarly, the ECHR remains the legal source most often referred to in decisions using the Charter.

4. Instead of Conclusions. FRA opinions

To increase the use of the EU Charter of Fundamental Rights in EU Member States and foster a more uniform use across them, FRA considers that the EU and its Member States could encourage greater information exchange on experiences and approaches between judges and courts within the Member States but also across national borders, making best use of existing funding opportunities such as under the Justice programme. This would contribute to a more consistent application of the Charter.

Also, FRA considers that national courts when adjudicating, as well as governments and/or parliaments when assessing the impact and legality of draft legislation, could consider a more consistent 'Article 51 (field of application) screening' to assess at an early stage whether a judicial case or a legislative file

raises questions under the EU Charter of Fundamental Rights. The development of standardised handbooks on practical steps to check the Charter's applicability – so far only in very few Member States the case – could provide legal practitioners with a tool to efficiently assess the Charter's relevance in a case or legislative file. FRA (Fundamental Rights Report 2016, p. 52).

Under Article 51 of the EU Charter of Fundamental Rights, EU Member States are under the obligation to respect and observe the principles and rights laid down in the Charter, while they are also obliged to actively “promote” the application of these principles and rights. In light of this, one would expect more policies promoting the Charter and its rights at national level. Such policies as well as Charter-related training activities are limited in quantity and scope, as 2015 FRA findings show. Since less than half of the trainings address legal practitioners, there is a need to better acquaint them with the Charter.

The Charter is a codification of minimum standards and fulfills a complementary role to the protection of fundamental rights given to citizens at the national level. The novelty that this legal document brings is a further guarantee of the rights of European citizens. Thus, the Charter of Fundamental Rights is a complement to the European Convention on Human Rights and Fundamental Freedoms, a document that gives legitimacy to European integration by establishing rights and responsibilities for citizens, reiterating the political and democratic character of the Union (Stoica, 2012, p. 89).

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