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PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION: THE BINDING EU CHARTER

Introduction

The concept of fundamental rights protection according to the modern political thought is considered as setting boundaries to the political power. The establishment of the European Union as a sui generis creation that goes beyond the boundaries of the traditional concept of the nation-state has created a new challenge: how to protect the fundamental rights in a community whose priorities are dominantly economic. The necessity to provide proper protection for the fundamental rights in the EU has gradually transformed the priorities from economic into political ones.

In the beginning the European Court of Justice had a key role to provide fundamental rights protection by its judicial activism because the Founding Treaties did not contain any provisions on this issue. Later, as a result of the active role of the Court, the fundamental rights were declared as general principles of the EU law. By resolving

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different cases, the ECJ has created a catalogue of human rights that later was included in the EU Charter of Fundamental Rights.

The Charter of Fundamental Rights, although adopted at the Nice European Council in December 2000, it became legally binding for the first time when the Treaty of Lisbon entered into force in December 2009. The need to adopt its own, legally binding catalogue of fundamental rights of the European Union was doubtless. The enforcement of the Charter has resulted with benefits for the EU citizens. Today, the public interest for the Charter is increasing, together with its practical application.

Pre-Lisbon Treaty Fundamental Rights Protection in the European Union: Judicial Activism

The European Union Treaties signed in the 1950's did not contain any provisions that in particular concerned the fundamental rights protection of the citizens of the Union. It took more than fifty years before the Union adopted a legally binding document that strengthened and enhanced the protection of the fundamental rights. In the meantime, the mechanism for fundamental rights protection of the Union was slowly developed by the European Court of Justice (ECJ). The Court, in its judgments, began to monitor the respect for fundamental rights shown by the Community institutions and Member States when acting in the areas covered by the Community law. By that, the judicial activism of the ECJ has been developed. The concept of "judicial activism" has been introduced in the common law legal system of the U.S. and its definition has been controversial and never clearly précised by the beginning. The term "judicial activism" was introduced for the first time by Arthur Schlesinger Jr. in Fortune magazine article published in January 1947, although the idea has been present many years before. The article referred to the Supreme Court activity in the U.S. and by then the term has been used in many different publications. According to U.S. Legal, judicial activism is the views that the Supreme Court and other judges can and should creatively (re)interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. This common law concept refers to the role of judges that has been changed and goes beyond ordinary interpretation of the legal norms. By the creative interpretation of the existing legal norms, the judges make law and create legal basis for certain decisions. The most striking examples of judicial activism by the U.S. Supreme court are *Brown v. Board of Education (1954)* when the Court ordered desegregation of public schools in the U.S. and *Roe v. Wade (1973)* case when the Supreme Court

ruling decriminalized the abortion.

In fact, this role has been undertaken by the European Court of Justice, although it serves to a continental law system. The judicial activism of the ECJ was based on extensive, instead of restrictive, interpretation of the fundamental EC documents in order to create appropriate tools for fundamental rights protection. The judicial activism of the European Court of Justice served as a substitute for a systematized catalogue of fundamental rights in the EU many years before the EU Charter of Fundamental Right was adopted.

In the early series of cases of the ECJ, the court resisted many attempts of the litigants to invoke rights and principles recognized by domestic law, such as proportionality and natural justice. The court did not treat them as part of the Community's legal order even in cases when they were fundamental principles common to the legal systems of most of Member States. Some of these cases were *Stork v. High Authority* (1959) ECR 17, *Geitling v. High Authority* (1960) ECR 423 etc., when the ECJ regarded itself as not empowered to offer protection of human rights and that the issue is covered by national law. The Court's approach was very restrictive and focused on "a rigid reading of the treaty wording" (Williams, 2004, p.146).

In the late 60s, the situation has changed. Although not mandated by the Treaties, the ECJ informally established a competence for human rights issues within its case law by declaring human rights to be *a general principle of Community law, which the Court saw itself obliged to ensure*. (Rittberger, Schimmelfennig, 2008, p.1)

The ECJ undertook the position to ensure the fundamental rights as integral part of the EU law and therefore based on general principles of law, as defined and developed by common constitutional traditions and judicial traditions. National courts, most notably in Germany, Italy, France and Denmark threatened to reject the supremacy of EU law over national law if the EU did not adequately protect fundamental rights itself. The supremacy and autonomy of the European Union law subsequently opened the need to develop and adopt its own mechanism for protection of fundamental rights of the citizens of the Union that would not replace the national systems of the Member States, but rather have a complementary effect.

One of the first cases when the ECJ responded positively to an argument based on fundamental rights to human dignity was *Stauder* in 1969. In this case, the applicant opened the issue whether the EC measure for mandatory identification of subsidized-butter scheme violated the fundamental rights to human dignity of the welfare recipients. Although in this case, such an infringement has not been made, this decision is exceptionally important due

to the fact that it confirmed the existence of fundamental rights in Community law. In the *Stauder* case the ECJ declared that: “the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the Court.” In addition, it specifies that the protection of such fundamental rights, whilst “inspired by the constitutional traditions common to the Member States,” must be ensured within the framework of the structure and objectives of the Community”.

The *Stauder* case was followed by the famous *Internationale Handelsgesellschaft* case where the German Constitutional Court has challenged the supremacy of the EC measure that apparently conflicted with German constitutional rights and principles such as proportionality and economic liberty. After the *Handelsgesellschaft* ruling, the ECJ has begun to stress the autonomy of “general principles” of law that are related to the legal cultures and traditions of the Member States.

The next cornerstone of recognition of human rights by the European Union is the *Nold v. Commission* case, which affirms two points. The first one is the obligation of the Court to draw inspiration from constitutional traditions common to the Member States and the second point refers to further extension of sources of inspiration with international treaties for protection of human rights that have been signed by the Member States and that “supply guidelines which should be followed within the framework of Community law.” Besides the fact that there was a practice of adopting decisions based on supremacy of the Community law, this time the Court has based its decisions on superiority of the Member States’ constitutional laws for the protection of fundamental rights.

Concerning the reference to international treaties in the *Nold* case, the ECJ does not give an explicit reference to the European Convention on Human Rights (ECHR), but it is treated as a “*special source of inspiration for the general principles of EU law*” (Craig, Burca, 2008, p.382). Later, the ECJ has confirmed that the fundamental rights protected by the ECHR are considered as a component of the Community law, which has been proven in the cases *Rutili* and *Hauer*. By this, the ECHR did not become a binding source of Community law, but was kept as a source of inspiration in order to allow ECJ to have more space to cross over the boundaries set by the ECHR in human rights protection. The European Court of Justice and the Court of First Instance (CFI) have made an extensive reference to the case law of the Court of Human Rights in Strasbourg.

By this judicial activism the Court has recognized the fundamental rights as general principles of Community law, based on the common constitutional

traditions of the Member States of the Union and the judicial traditions.

It took many years afterwards to transform the case law of ECJ into a single legal act of a general character. There has been a long way to the adoption of the Charter, but progressive development over many years has been reached. The status quo situation for fundamental rights protection in the European Union has been gradually improved.

The Necessity of a Charter of Fundamental Rights for the EU

The progressive development of the European Union led to a shift of priorities from economic issues to political. The protection of human rights has been considered an important priority that has not been guaranteed in a proper way. As the authors usually say, in the '70 the ECJ has been motivated to create a “doctrine of fundamental rights” in order to protect its sometimes fragile supremacy over the national law of the Member States.

In fact, the activism of the ECJ was motivated by the challenges to respond to the fundamental rights protection. The European Communities could not foresee the growing number of cases for fundamental rights protection at the time when they were established. This provoked development of extensive jurisprudence: ECHR provisions were given effect as “general principles” of EC law and ECJ rulings contributed to the jurisprudence of the ECHR and to development of mechanism for human rights protection in EC legal order.

Before a bill of rights was adopted, human rights protection of the European Union was based on the case law and the ECHR was recognized as a special source of inspiration for the general principles of the EU law. The fundamental rights protection was considered an integral part of the Community law, and therefore ECJ and CFI have made an extensive reference to the case law of the Strasbourg Court.

The long debate among the Member States of the Union whether the Union should have a separate Bill of Rights or not was resolved after the Cologne European Council in June 1999. The arguments for consolidation of the human rights applicable at EU level in a Charter prevailed, especially after the adoption of the concept of “citizenship” of the Union that opened a new chapter of the political integration. In fact, Article 8 of the Maastricht Treaty¹, by introducing the citizenship of the Union, indicates that the European legal order is no longer constructed only as a contract among

1 Article 8, paragraph 1: Citizenship of the Union is hereby established.

economic actors, but also as a political union that needs to keep the legal certainty on fundamental rights protection.

The main purpose of the Charter is to *codify* a catalogue of human rights norms that already exist, that are part of the values that form the basis of the Union and which are also expressed among the fundamental principles relating to individual policy areas. This means that, for the first time in the history of continental law system, jurisprudence was used as a ground for establishment of a legal binding instrument - the Charter of Fundamental Rights of the European Union.

The Charter *clarifies* and gives *visibility* to the catalogue of fundamental rights. There was an apparent need to make rights more visible for the citizens. By being informed, the citizens will be able to know more about their rights and to ask for protection if their rights were violated by the EU institutions when implementing EU law. This is one of the key arguments why the Charter of Fundamental Rights is needed.

The Charter is not applicable to the areas that are under exclusive national competence by the Member States of the Union, but the Charter's provisions refer to the Member States and its authorities on central, regional and local level. The Charter's provisions are applicable during the implementation of EU law by the national authorities. Article 6 of the Lisbon Treaty states that the Union recognizes the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties.

In fact, the Charter sets out a hierarchy among fundamental rights by distinguishing between rights and principles. Rights enshrined in the Charter in areas of the Union's competence can be enforced in courts, while principles are binding for authorities in the exercise of their functions; therefore, they are to be taken into account by the Union's institutions as well. (Zoltan, Odor, 2010, p.108). In addition, this article declares that the Charter "shall have the same legal value as the Treaties," which means that the Charter is not an integral part of the Treaties and is officially a solemn declaration of the three institutions of the Union; it now has legally binding force the same way the Union primary law does.

The Charter recognizes the universality of rights and freedoms that are not only applicable to the EU citizens, but to everyone. This universal character does not exclude the reference of the Charter to some specific categories of persons, such as children, the elderly and persons with disabilities. The rights enshrined in the Charter and the prevalence of which has to be respected during legislation can be interpreted by the ECJ, CFI and the courts of the Member States.

The key benefits of the adoption of the Charter

The adoption of the Charter of fundamental right has marked the beginning of a new era in the EU fundamental rights protection. The legally binding catalog of human rights has replaced the previous model based on general principles of EU law and the case law of the supranational courts.

The Charter was adopted for the first time at Nice European Council in December 2000, but it became legally binding when the Treaty of Lisbon entered into force in December 2009.

The key benefits of the adoption of a Charter of Fundamental Rights of the European Union could be summarized:

- Strengthening of human rights guarantees in the EC legal order because this was not provided before the Charter. This is of importance for the new Members States that have joined or would join the European Union and belong to Central and Eastern Europe regions with shorter democratic background that would need stronger fundamental rights guarantees. Adopting a Charter of fundamental rights of the Union is a step towards reducing the democratic deficit of the European Union institutions, for which the Union has been permanently criticized.

- Inclusion of fundamental rights catalogue in the Lisbon Treaty would increase the visibility of the human rights guaranteed by the Union. The Charter is not aiming to create new rights, but to make the existing ones more visible and known in order to be easily noticed by the citizens. In this context, the Preamble of the Charter states: “To that end it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological development by making those rights *more visible* in a Charter.” In fact, the individuals will have an easier approach to information on the guaranteed rights and therefore they can ask for protection if their rights were violated by the EU institutions when implementing EU law. This is significant because, before the Charter was adopted, the citizens would have to rely on the searching on Treaty provisions, secondary laws and ECJ case law that is based on the doctrine of the “general principles” for fundamental rights protection. Raising the awareness of the citizens for the rights guaranteed would also mean bigger case load for the European Court of Justice and greater legitimacy of the mechanism for fundamental rights protection by the Union.

- The Charter of fundamental rights of the Union would “unveil the indefinites on protection of human rights” (Goldsmith, 2001, p.1204). The Charter provides consistent rights protection and enforcement in the European Union. It also enables codification of the existing rights, a process

that results with defined limits and space for discretionary powers of the European Court of Justice and national courts of the Member States when dealing with EU law or fundamental rights.

- The Charter goes beyond the internal policies of the European Union - it also applies to its external action. In accordance with Article 21 TEU, the Union's action on the international scene is designed to advance in the wider world democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and the respect for the principles of the United Nations Charter and international law. When implementing Article 21 TEU, the EU applies the Charter, as well as applicable UN human rights standards. Additionally, the Union has developed a dedicated policy to promote human rights and democratization in non-member countries. Article 8 TEU provides that the Union shall develop a special relationship with neighboring countries founded on the values of the Union. Finally, Article 49 TEU provides that any European country upholding the values on which the Union is based may ask to become member of the Union. The political criteria for accession laid down by the 1993 Copenhagen European Council require candidate countries to have stable institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities. The opening of the accession negotiations thus depends on whether the candidate country meets these criteria adequately. Issues concerning the fundamental rights are dealt with in detail during the accession negotiations.²

The interest of the public for the guaranteed rights by the Charter is permanently increasing, but there is a need for improved level of information of the people for the scope of application of the Charter and how to enforce the rights when they are violated. The rights of the Charter apply to the acts of the European Union institutions and bodies and to the Member States only when they are implementing EU law and people should be informed how to ask for assistance when some of the guaranteed rights have been violated. When the appropriate information is provided for the people, the chances are higher to protect the fundamental rights and to redress the potential violation.

2 More details can be found in the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF>

The Application of the EU Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union has become legally binding with the entry into force of the Lisbon Treaty. Before, it was the case law of the European Court of Justice that obliged the Union to respect fundamental rights. The extensive interpretation of EC law for fundamental rights protection by the ECJ is considered as one of the most striking examples of judicial activism in a continental law system. Normally, this activism of extensive interpretation of law in the continental system is considered as a danger of judicial voluntarism and arbitrariness, because the distinction line among the application of legal norms and their interpretation is very thin and it can be easily overstepped.

In the Report on the application of the EU Charter (COM (2011)160 final) it states that the Charter is not just a text setting out abstract principles and values. It needs to be put into practice whenever the EU institutions and bodies take action or EU law is otherwise implemented, so that people can effectively enjoy their fundamental rights. This is the main reason why the Commission decided to adopt a Strategy on the effective implementation of the Charter (COM (2010)537 final) in 2010. As the Strategy states:

“The Charter is an innovative instrument because it brings together in one text all the fundamental rights protected in the Union, spelling them out in detail and making them visible and predictable. The Lisbon Treaty, by recognizing the rights, freedoms and principles set out in the Charter and giving the Charter the same binding legal force as the Treaties, has offered citizens more visible and legally secure rights.”

In fact, the key question that appears here is whether the citizens are aware of their rights and do they ask for proper protection of their fundamental rights. Efficient implementation of the Charter is set as an aim of the Union because it contributes towards building mutual trust among the Member States of the Union, public confidence in the EU policies and strengthening of the credibility of the Union's efforts to protect and promote fundamental rights. The rights must become more visible and the Charter must be respected in every stage of the law-making procedures in the European Union. This means that the Charter should be respected and applied from the start of preparing proposals in the European Commission, throughout the phase of submitting amendments in the legislative process and up to the day they enter into force once adopted by the European Parliament and by the Council, and to their implementation by Member States. The Commission has even worked on issuing “Fundamental Rights Check-

List” that has been created for better evaluation of the compliance of the Commission’s legislative proposals with the Charter. The Commission also committed to providing information to citizens on when it can intervene in fundamental rights issues. (IP/11/386 Brussels)

The Strategy for the effective implementation of the Charter sets out an obligation for the Commission to publish an Annual Report on application of the Charter, which will have two objectives:

- to take stock of progress in a transparent, continuous and consistent manner. It will identify what has been done and what remains to be done for the effective application of the Charter;

- to offer an opportunity for an annual exchange of views with the European Parliament and the Council. (COM (2010) 573 final, p.12)

The Annual Report should cover all the rights contained in the Charter and how they are implemented within the Union’s field of competence, identifying issues of concern and describing what has been done by the EU institutions in order to ensure effective application of the Charter. In order to evaluate the level of implementation of the Charter, it is necessary to set the framework of the Charter’s scope of application.

The scope of application of the Charter is precisely defined in Article 51 of the Charter, where it explicitly states that: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” Considering this, the scope of application of the Charter refers to the European Union institutions when acting in the sphere of their competences, but it does not refer to the Member States of the Union when acting in areas that are considered within their national competences. It is clear that the Charter applies primarily to the institutions and bodies of the Union with regard to the principle of subsidiarity. Before the Charter was adopted and became legally binding, the EU institutions, which legislate at the European Union level, were not shown the limits of their powers in the field of human rights protection. The Charter also addresses the Member States but to a limited level - only when they are implementing EU law. This is an important contribution by the Charter’s adoption towards proper implementation of the EU law by the Member States and respect of the standard for fundamental rights standards, as set in the catalogue of rights.

In April 2012, the second Annual Report (COM(2012) 169 final) on application of the EU Charter of Fundamental Rights has been published. The Annual Report shows that there is high public interest for the Charter and that the fundamental rights are relevant in a wide scope of policies. The Annual Report’s aim is to enable easier access to justice for the EU

citizens, but the first step that has to be undertaken by the Commission is to clarify where the Charter applies and where it does not, to inform the citizens about the purpose of the Charter and EU's role. In our view, these are very important processes that have to be undertaken because people's interest and expectations about the enforcement of the EU Fundamental Rights Charter are high.

The recent Eurobarometer (April 2012) indicates that the general awareness of the Charter of Fundamental Rights is increasing up to 64% in 2012 from under 50% five years ago. Besides the awareness, the detailed knowledge about the Charter is very limited due to the fact that large majority of the EU citizens do not know when the Charter applies, but there is a raising number of citizens who would like to learn more about their rights envisaged in the Charter and how to react if their rights are violated.

This monitoring process of the Commission is intended to offer an exchange of views in the field of fundamental rights protection with the European Parliament and the Council. Today, when the ECJ jurisprudence is replaced by a codified, legally binding document - the Charter - it is easier to follow the implementation process of the fundamental rights instrument on an annual basis. The impact of the Charter on the judiciary, both at national and at EU level, is already visible.

The Annual Report brings together a coherent overview of the most relevant information illustrating the dynamic application of the Charter. The EU institutions increasingly refer to the Charter and by that the fundamental rights protection is becoming one of the central characteristics of the EU. There is common commitment in Charter's promotion. The Commission has prepared guidance in details on how the impact of fundamental rights should be assessed by Commission officials when they prepare new legislation.

The Council committed to ensuring that Member States proposing amendments to Commission legislative initiatives assess the impact of those amendments on fundamental rights. This commitment is a significant development which helps to ensure that 'final compromises' are not obtained at the expense of fundamental rights. (Reding SPEECH/12/266).

The Court of Justice of the European Union has increasingly referred to the Charter in its decisions: the number of decisions quoting the Charter in its reasoning rose by more than 50% as compared to 2010, from 27 to 42. National courts, when addressing questions to the Court of Justice (preliminary rulings,) have also increasingly referred to the Charter: in 2011, such references rose by 50% as compared to 2010, from 18 to 27.

In addition, the national courts use the Charter more frequently at the national level. National judges increasingly referred to the Charter when

addressing preliminary questions to the Court of Justice. In 2011, such references increased by 50% as compared to 2010.

The Report shows that the Charter has positive impact on building public confidence in the policies and laws of the European Union, such as the issue of asylum, by introducing responsibility for the Member States to examine the asylum application of the seekers. This was established on the basis of the The Court of Justice ruling on the Dublin Regulation which is the EU instrument which determines the Member State responsible for the assessment of asylum applications.

The Report includes a part that relates to gender equality policies and shows the positive impact of the initiative for more women involved in targeted initiatives and top positions in different spheres. In addition, it clearly refers to different socially marginalized groups, presenting their status and action that has been undertaken to improve their social inclusion and representation.

It clearly leads toward the conclusion that in 2011, the EU took further concrete steps for the effective implementation of the Charter and it proves that the necessity of adopting this act was justified. These efforts served to help citizens of the EU to enjoy their fundamental rights by a single binding document.

Abstract

The paper analyses the fundamental rights protection in the European Union after the Treaty of Lisbon entered into force. Namely, the European Union by enforcing the Treaty of Lisbon has adopted its own legally binding act- the EU Charter of Fundamental Rights that has the same legal value as the EU Treaties. The judicial activism of the European Court of Justice in Luxembourg, by resolving cases referring to fundamental rights protection and by that creating an extensive case law, has served as a basis for establishment of EU system for human rights protection. There are certain visible benefits of the adoption of the EU Charter, but the analyze of its practical application shows that reaching more efficient implementation of the EU Charter is one of the challenges that still remain for the Union.

Резиме

Во овој труд се анализира заштитата на правата во Европската Унија по усвојувањето на промените со Договорот од Лисабон. Имено, со ратификацијата на Лисабонскиот договор, Унијата донесе сопствен акт - Повелба на Европската Унија за фундаментални права, која има правно-обврзувачки карактер и иста правна вредност како и договорите на ЕУ. Поттикната од судскиот активизам на Судот на правдата во Луксембург, кој послужи како основа за формирање на сопствен систем на заштита на правата, Европската Унија се одлучи за усвојување на сопствен, правно-задолжителен акт. Придобивките од Повелбата се очигледни, но анализата на нејзината практична примена укажува на фактот дека Унијата е соочена со нов предизвик за нејзина ефикасна имплементација во годините кои доаѓаат.

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