

THE CHARTER OF FUNDAMENTAL RIGHTS WITHIN THE FRAMEWORK OF THE EUROPEAN UNION LEGAL SYSTEM

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Pateikta 2003 m. birželio 13 d.

Parengta spausdinti 2003 m. spalio 20 d.

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A b s t r a c t

Since December 2000 the European Union has obtained the Charter of Fundamental Rights, the document without explicit legal force, but with legally binding content that consists, in the light of constitutional law of the European Union, the essence of the rule of law of the Communities and the Union. The Charter is a solemn political declaration that gives a clear statement of the fundamental rights which the European Union institutions are committed to respect, both in their internal and external policies, as are the Member States when implementing EU law. There are legal and political problems which are worth considering. The purpose of this paper is therefore to present the place of the Charter within the EU law as well as its meaning for the EU individuals.

Since December 2000 the European Union has obtained the Charter of Fundamental Rights (further: the Charter). It raises a question of the ways in which human rights are presently protected within the EU and EC legal system. The main purpose of this paper is to consider judicial meaning of this act and also its institutional and political dimension in order to determine the present scope of human rights' protection within the European Union. The task of this paper is to answer if the Charter constitutes a new standard of protection or it just consolidates a *status quo*.

The Charter is consecrated to the rights that consist, in the light of constitutional law of the European Union, the essence of the rule of law of the Communities and the Union and the part of the principles, which are common to the Member States. The Treaty of Nice, the successor of the Amsterdam Treaty, states that the Unions respects these rights as general principles of Community law, coming equally from European Convention for the Protection of Human Rights and Fundamental Freedoms (further: European Convention) and the constitutional traditions common to the Member States. The Treaty on European Union explicitly confirms also the Union's attachment to the fundamental social rights, also by maintaining the previously adopted system of references to the European Social Charter, signed within the Council of Europe and Community Charter, signed in 1989. Therefore, accordingly to the mentioned provisions of the Constitutional Treaties, the rights, which are fundamental for the Union can arise from international law system, as well as from the Member States' domestic legislations. Both of these legal systems, as the human rights sources within the Union, they are different to the community law itself. It could be noticed, that in this sense, the EC law system, independent and autonomous what was stressed in the ECJ case-law many times, depends in fact on other legal orders.

The legal situation on this field was much worse before the Treaty of Amsterdam has come into force in 1999. Till that time, the category of human rights hasn't even fall strictly

within the competence of EC and, as it could be observed, the EC institutions had a task much more complicated in order to fulfill and to promote this kind of rights within the Community. The EU and EC organs' practice was aimed to harmonize the organization to the development so far in its nature, not only as the economic community, but also as a supranational organization that respects human values, as the important common values of its Member States. Overworking of the human rights catalogue was also to allow to the individuals for the easier and readilier identification with the Union. In this sense, it is an answer to the „deficit of democratic legitimacy”, pointed over the past several years within the Union.

The fundamental rights after the Amsterdam Treaty, although directly expressed amongst the rules that were already justiciable in the EC, they still were not legible for these citizens. As the Amsterdam Treaty has not led to an explicit recognition of particular fundamental rights, the elaboration of a document which could fulfill the expectations of the EC institutions, as well as its' citizens, was the task considered as very desirable and urgent. This opinion was quite often expressed by the EC institutions, like European Parliament in its resolution addressed to European Council in Feira, or a document dated 16.03.2000r. In the former and the latter, the Parliament requested that the Charter confirms indivisibility of fundamental rights in their application in relation to all institutions and bodies of the European Union, as well as in relation to all the politics of the Union, including the II-nd and the III-rd pillar. The Charter should be also binding for the Member States in the scope of the community law application.

The European Council has expressed its convictions during the Cologne Summit on 3-4 June 1999. According to the conclusions of the Council, the aim was to affirm the exceptional importance of human rights and their scope in a manner that can be seen and understood by EU citizens. In the opinion presented that time by the European Council, the Charter should comprise fundamental rights and freedoms, as well as procedural provisions, as guaranteed in European Convention and coming from the constitutional traditions common to the Member States. Drafting together material and procedural scope of protection could give in final the codification of those rights, but the European Council didn't specified, what legal form is the most appropriate to the elaborated act as a “Charter”, announcing only its solemn proclamation and eventual incorporation to the Constitutional Treaties of European Union.

Finally, the draft to the Charter was elaborated by an expert group, which has renamed itself a Convention. This body has been set up during the European Council summit in Tampere and its first session took place on 17 December 1999. It was composed of fifteen representatives of the Member States and Governments, one representative of European Commission, sixteen deputies of European Parliament and thirty deputies of the national Parliaments of the Member States (two delegates from each Parliament). The two ECJ judges and two representatives of the Council of Europe, including the judge of European Court of Human Rights in Strasbourg, took part in the elaboration process as observers. Roman Herzog was elected as President of Convention, and the body was working in Brussels.

The establishment of the Convention, the body which make-up was very sophisticated, set up especially to elaborate the Charter, as well as other activities of a legal and practical nature like simultaneous proceeding on a draft undertaken by the 2000 Intergovernmental Conference, or the further coming resolutions of European Council and European Parliament, that all testify to the meaning of the Charter for the Union. All these efforts were crowned with the document presented for the first time as a whole by Convention on 28 July 2000r. That was a draft that European Council has adopted on its informal summit in Biarritz on 13-14 October 2000. The final proclamation of the Charter took place at the European Council's Nice summit in December 2000, when this act was proclaimed as a leading document for European cooperation.

Nevertheless the Charter has not been incorporated into the new Treaty on European Union signed there, acquiring a status of a political act. Formally, the Charter is the example of

interinstitutional agreement, published in Official Journal, existence of which was for the first time officially recognized in declaration in final act of the Nice conference - declaration concerning art. 10 of the Treaty on EC. The Parliament, the Council and the Commission are able to conclude such agreements that make no amendments to the Treaties in aim to facilitate the application of the Treaty on EC. These agreements are binding for the institutions engaged in the common relations. They are binding for them politically and morally, even when they do not raise any rights or obligations for the third parties. That means the Charter is deprived from the formal point of view from the legal binding force, and in consequence it is not able to raise "hard" legal obligations. But from the other hand, there is an obligation, but of political nature, that can evaluate into the legislative initiative. In this manner, the three institutions have indicated in the Charter the direction and the values that they are obliged to respect in their activities, also in the normative activity.

Is that mean that the Charter has obtained "only" a political character, what is its legal nature and the real sense of that instrument. To make the analysis of the legal meaning of the Charter for the European Union, its formal and material character is to be considered. The most important question that is to be answered this way is if the Charter effectively protects the rights of the individuals. This problem seems to be actual, because two years after "the solemn proclamation" of the Charter, the European Council still did not take the formal approach to its legal effects.

As far as the material extent of the Charter is considered, the title of this document gives an partial answer. According to that, the rights safeguarded by the Charter are "fundamental". That statement requires the case law of European Court of Justice to be recalled. Thanks to EJC case law, the determination of rights of a fundamental character for the Union is possible. This case law was developed throughout the decades, in large measure under influence of constitutional Courts of the Member States, mainly Germany, but this idea was expressed for the first time within the written sources of EC law in Single European Act, to finally find its place amongst the provisions of the Treaty on the Union (art. 6). To put it briefly, within the framework of European Union legal system, the source of its fundamental rights consists not only primary law but also constitutional traditions common to the Member States and the European Convention on Human Rights, as well as other international agreements safeguarding the human rights that the EU Member States are signatories. As it can be seen, these sources stay rather in diffusion, so the role for the Charter is to consolidate fundamental rights and freedoms protected on the territory of the Member States.

One can also put the other question if the Charter and the internal constitutional provisions, as well as European Convention or other international agreements are in contest. This position is not to be maintained. The Charter can serve in any event as an instrument to exclude this norms from the sphere of EC law. Such a practice could in effect nullify the whole contemporary case law of the Community. The present actions of the Union are aimed, like it seems, to guarantee the full protection of individuals' rights, and not the restriction of the latter. International standards, and particularly European Convention, analyzed in this context, are materially binding for the Union, because nothing in the Charter can be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized by Union law and international law. Insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention, the meaning and the scope of those rights shall be the same unless the protection provided by the Charter would be more extensive.

It must be pointed in this moment that the Charter presents very wide range and really complex approach to the rights of this character. It's extent goes further than to civil and political aspects of human rights, encompassing also these of cultural, economic and social character. Systematically, the rights in Charter are catalogued in 54 articles, grouped in 7 chapters, these are: "Dignity" (art. 1-5), "Freedoms" (art. 6-19), "Equality" (art. 20-26), "Solidarity" (art. 27-38), "Citizens' rights" (art. 39-46), "Justice" (art. 47-50) and "General" (art. 51-54). In amongst of the rights safeguarded already in other international conventions

or documents, there are also the provisions of an innovatory nature, like for example the integration of persons with disabilities, the prohibition of eugenic practices, in particular those aiming the selection of persons, the prohibition on making the human body and its parts as such source of financial gain or the prohibition of reproductive cloning of human beings. In these aspects, the Charter reaches very clearly not only beyond international arrangements, but also beyond the contemporary case law of the ECJ.

It seems that it could be observed that material content of the Charter is without any doubt its value. The opponents point out that there is too many general clauses or references to national legislations without clear specification of the limits of these regulations. From the other hand, the general aim of the Charter must be recalled, that is to be a better presentation and consolidation of the fundamental rights to the citizens, and this purpose has evidently had an impact into the way the Charter has been formulated. The Charter is very wide in range, and the rights are expressed clearly in uncomplicated language. The provisions are concise, the sentences are brief, what in final, next to expected transparency, makes also the effect of generality. And the latter is not a real reproach to the Charter.

Complexity and simplicity in the approach doesn't mean that the Charter deletes the differences and defines in clear the procedures of protection of particular rights. In opposite, it could be pointed out that there is a deficit of effective enforcement methods and that the Charter really does not regulate that field, confining to the reference to the constitutional law of the Union by constating that: „Rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties”. That means that the *status quo* has been maintained on this field, and the jurisdiction in cases where the human rights has been infringed belongs to ECJ, extending its competence to the cases against the Community institutions (art. 46 T UE).

Referring what was mentioned above to the particular categories of fundamental rights in the Charter, it could be found that the judicial protection is ensured in principle just to the civil and political rights, while other rights, that is of social, cultural or economic dimension are deprived of this protection. The feature of the latter, as the Charter's provisions, is of the character of a program and a postulate addressed to the Community institutions. In conclusion, the method of protection of a kind of fundamental rights which have a character of social, economic or cultural rights, means the political measures that is just to the practice of the organs in charge, and not to the law.

As it could be seen, materially taking, the Charter is not homogenous. It raises another question about the legal nature of this document considered as a whole. It seems that at least two aspects deserves the consideration. First of them is the legal form in which it has been adopted and the second – its name.

The Charter has been adopted by the join decision of the Council, Commission and European Parliament as a solemn proclamation. As an informal act, the proclamation does not belong to the category of sources of community law and, in consequence, is deprived of the binding character. It means that the Charter is not placed within the system of community law, and particularly, it doesn't create a direct legal effect, that is it can't serve as a legal source for specific rights from the part of individuals, the rights that could be next be enforced in judicial procedure.

The question of a legal character of informal acts of the Community is nevertheless the subject of an unequivocal settlement. There is a category of the “soft law” acts, where the doctrine puts sometimes such documents like the proclamation. Being the part of that group means from the one hand a deprivation from the legal binding force, from the formal point of view, and in consequence no possibility to raise “hard” legal obligations, but from the other hand, there is an obligation, but of political nature. The real political value that can evaluate into the legislative initiative is expressed in the obligation put on the Community and the Member States' institutions to follow the standards accepted by the Charter as well in the implementation of the community law, like in its legislative process.

Even though the Charter doesn't belong to the sources of community law, as an element of "soft law" in complex with these sources it composes *acquis communautaire*. Is not it like in this context, that the name appearing in the title of this document means is too much? Considering that the name "charter" is reserved in international law to the documents of the highest standing and of the most important content, the atmosphere of the Nice Summit (7-9 December 2000) can be recalled. There were the great expectations of adopting the Charter as a constitutional act to the European Union legal order but, in contrary to the institutional reform provided by the Treaty of Nice, they did not achieve a success. The Charter was not given the constitutional meaning and, as there was already talk of, not even the binding force.

The conclusions issued after the Nice Summit are quite concise in statement that the European council welcomes the joint proclamation, by the Council, the European Parliament and the Commission, the Charter of Fundamental Rights, combining in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European and national sources. The European Council would like to see the Charter disseminated as widely as possible amongst the Union's citizens. In accordance with the Cologne conclusions, the question of the Charter's force within the Community law will be considered later.

The Charter is not the part of the Constitutional Treaty, has not obtain the force of generally binding act in the European Union. This document did not succeed to replace the contemporary *acquis* of the Union as far as fundamental rights are concerned. In spite of this it made that *acquis* clearer, in accordance to recommendations of Cologne European Council. The doctrine expresses also its hope that thanks to the Charter that formulates the new rights, the level of their protection would be higher in future. The Charter gives the possibility to broaden the reach of fundamental rights protection beyond the sources defined in art. 6(2) T UE but its' future legal meaning lays in the hands of the next Intergovernmental Conference that is to take place in 2004.

Yet in the Treaty of Nice Declaration on the Future of the Union (Declaration 23), the European Council called for further consideration of the status of the Charter. In the Laeken Declaration on the Future of the Union issued in December 2001, the Council agreed to convene a Convention on the Future of Europe, composed of the main parties involved in the debate on the future of the Union. Its task is to consider the key issues arising for the Union's future development and to try to identify the various possible responses. In the section of the Declaration headed 'Towards a Constitution for European citizens', the Declaration identified several questions that should be considered, including the need to consider the simplification and reorganization of the Treaties. In this context, the Declaration says that "*thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights*".

This part of the abovementioned Declaration could be read as the suggestion that the protection of fundamental rights within the Union would still not be complete thanks only to the incorporation of the Charter into the Treaties. Next to that, the Union's accession to the European Convention as a cumulative step is also recommended.

Conclusion

The title of this document carries the announcement and the promise for the future although this future of the Charter as a formal act is difficult to be foreseen. Would it be the example of "soft law" or would be incorporated to the constitutional law of the Union? The affirmation and existence of such Charter might be one of the elements in the process of constitutionalization of the EU, and is seen as a valuable objective. The Charter identifies the EU as a public law structure with a constitution. The Charter would define a system of human rights protection binding universally across when incorporated to the Constitutional Treaty. But without any doubt, such process would require the consecutive amendments in the EC primary law substance, e.g. procedure of the judicial enforcement of such rights. And such

amendments are not only time consuming but also complicated from the legal point of view. In this aspect it could be additionally pointed that, the promotion of European Union constitutional development thanks to the Charter, raises also the expectations of the third countries, including the candidates countries for improvement of the human rights protection also outside the Community.

What is therefore the general balance of the fundamental rights protection within the Union these days when it gets its own catalogue of human rights? The Charter appears to be, as a whole, well drafted and politically balanced. The Charter consolidates the fundamental rights and consists a codification of all the norms, written or unwritten within the Community. It also incorporates the domestic constitutional norms of the Member States and the international norms coming from European Convention, European Social Charter and International Pacts on Human Rights.

The primary function that the Charter is to perform is the improvement of human rights protection. Eligible for protection are in the first instance the citizens of Member States, and also other persons under the jurisdiction of the Union. However, it seems that this function doesn't comply with its legal force. When getting acquainted with the Charter, a citizen can only get informed about the catalogue of his rights and freedoms. The judicial enforcement of these values must yet find some other legal basis, that is primary law provisions, constitutional regulations or international treaties to which the Member States are signatories. The lack of the binding force is without any doubt the biggest deficiency. As a legal instrument, it needs some improvement, e.g., in order to be precise on the restrictions that may apply to the rights of the Charter and this is still an open question.

Unfortunately, it seems that even the eventual future incorporation of the Charter to the Constitutional Treaty is not the remedy. It means the protection of fundamental rights within the Union would not be complete thanks to this incorporation. As far as there exist in Europe two material systems, but only one of them provides the complete legal procedure of protection, the latter could be only the copy of the former, even if this copy is of a constitutional form.



BIBLIOGRAPHY

1. **Ranp A.** Karta Praw Zasadniczych Unii Europejskiej. PiP 4/2001.
2. **EPC Workshop: The EU Charter of Fundamental Rights: Solving the Remaining Technical and Legal Issues.** EPC Working Papers. 18 October 2002 // www.theepc.be/europe/strand_one_detail.asp?STR_ID=2&REFID=928&TWS.
3. **Barcz J., Żukrowska K.** (eds.) Przyszłość Unii Europejskiej, Polski punkt widzenia, MSZ. – Warszawa, 2001.
4. **Kellermann A. E., Zwaan J. W., Czuczaj J.** (eds.) EU Enlargement, the Constitutional Impact at EU and National Level. – The Hague: T.M.C. Asser Institut, 2001.
5. **Lenaerts K.** Fundamental rights in the European Union. 2000. 25 ELRev. No 6.
6. **Suchocka H.** Jaka konstytucja dla Europy? Problem konstytucji europejskiej z punktu widzenia kraju przygotowującego się do przystąpienia do Unii Europejskiej. – Hamburg, 2000.
7. **Popławska E.** (ed.) Konstytucja dla rozszerzającej się Europy, Instytut Spraw Publicznych. – Warszawa, 2000.
8. **Traktat z Nicei** – polski punkt widzenia. Document of Polish Ministry of Foreign Affairs of 15 February 2001. – Warszawa, 2001.

Documents:

1. **Charter** of Fundamental Rights. OJ C 2000, 364/01.
2. **Document** CHARTE 4422/00. CONVENT 45.
3. **European Council's conclusions** // www.europarl.eu.int/council/off/conclu/index.htm.
4. **Resolution** of 15.06.2000, OJ C 2001, 67/280.
5. **Resolution** on Elaboration of the Charter of Fundamental Rights. OJ C 2000, 54/93.
6. **Resolution** on the Drafting of a European Union Charter of Fundamental Rights. d0064/2000.



Pagrindinių teisių chartija Europos Sąjungos teisės sistemoje

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SANTRAUKA

2000 m. gruodį priimta Europos Sąjungos pagrindinių teisių chartija – dokumentas, neturintis apibrėžtos teisinės galios, tačiau jo turinys – teisiškai įpareigojantis, o tai, Europos Sąjungos konstitucinės teisės požiūriu, yra Bendrijų ir Sąjungos teisės viršenybės principo pagrindas. Chartija yra reikšminga politinė deklaracija, kurioje aiškiai nurodoma, kokių pagrindinių teisių Europos Sąjungos institucijos, taip pat ir Europos Sąjungos valstybės narės, įsipareigoja laikytis tiek vidaus, tiek užsienio politikoje įgyvendindamos Europos Sąjungos teisę. Verta panagrinėti su Chartija susijusias teises ir politines problemas. Šio straipsnio tikslas – apibūdinti Chartijos vietą Europos Sąjungos teisės sistemoje, taip pat jos svarbą asmenims, esantiems Europos Sąjungoje.

Straipsnyje analizuojama Europos Bendrijos bei ją keitusių sutarčių nuostatos, įtraukusios, keitusios ir plėtojusios žmogaus teisių katalogą, taip pat Europos Bendrijų veiklą formuojant Bendrijos ir valstybių narių bendrą žmogaus teisių politiką siekiant ugdyti požiūrį į žmogaus teises kaip vertybes, svarbias ir pripažįstamas visų valstybių narių. Tokio požiūrio materialinė išraiška kaip tik ir tapo Europos Sąjungos pagrindinių teisių chartija, kuri, be kitų nuostatų, įtvirtintų ir kituose dokumentuose bei tarptautinėse konvencijose, įtvirtino visiškai naujas teises, tokias kaip asmenų su negalia integracija; eugeninės praktikos uždraudimas, ypač jei jos tikslas yra žmonių selekcija; žmogaus klonavimo uždraudimas. Tačiau greta šių naujovių straipsnyje analizuojama efektyvių šių teisių užtikrinimo procedūrų ir priemonių trūkumas, atkreipiamas dėmesys į faktą, kad Chartija, nebūdama vienas iš Bendrijos teisės šaltinių ir atitinkama tik „švelniosios teisės“ (soft-law) kategoriją, nesukuria privalomo teisiškai įpareigojančio poveikio.

Analizuojamas problemiškas klausimas, ar, įsigaliojus Nicos sutarčiai, Europos Sąjungos pagrindinių teisių chartija taip ir liks vertinama kaip „švelniosios teisės“ pavyzdys, ar vis dėlto galima tikėtis jos įtraukimo į Europos Sąjungos konstitucinę teisę. Pastaruoju atveju toks žingsnis būtų labai sveikintinas, nes pagaliau būtų sukurta teisiškai privaloma žmogaus teisių apsaugos sistema ir įtvirtintas pirminis Chartijos tikslas. Tačiau atrodo, kad ir laukiamas Chartijos įtraukimas į Konstitucinę sutartį nebūtų išeitis, nes vien tik paties akto įtraukimo fakas nereikštų efektyvios žmogaus teisių apsaugos sistemos sukūrimo.