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A European Fundamental Rights Ornament that turns into a European Fundamental Rights Order: The EU Charter of Fundamental Rights at its fifth birthday¹

Gabriel N. Toggenburg²

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² Dr. Gabriel N. Toggenburg, LL.M. is Senior Legal Advisor at the European Union Agency for Fundamental Rights (FRA) and a Guest Professor at the University of Graz. The views expressed here cannot be attributed to the Agency.

Institut für europäische Integrationsforschung

Strohgasse 45/DG
1030 Wien/Österreich

Telefon: +43-1-4277-22401

Fax: +43-1-4277-9224

Email: eif@univie.ac.at

Web: eif.univie.ac.at

eif

Abstract:

The Charter of Fundamental Rights of the European Union is turning 5 years old. The EU's human rights bill was adopted back in 2000 but entered into force only in December 2009. 5 years later it appears timely to take a look at the Charter and, starting from an analysis of its character, examine the effects it has had on the European Union over the years. The Charter's character is here depicted as both conservative and innovative. It is argued that the Charter indeed made a difference in the EU landscape and influenced the way how EU institutions look at fundamental rights. Furthermore, the Charter also plays a role at national level which is exemplified through a look at its use by national courts. The author depicts the Charter as an instrument of multilevel governance as the Charter can inspire the political process even outside areas where EU law as such applies. In that sense the Charter is not only a 'Charter of Rights' but also a 'Charter of values'. This makes the Charter a relevant instrument not only in the context of an eventual creation of an EU internal strategic framework for the protection and promotion of fundamental rights but also in the context of the rule of law mechanism.

Zusammenfassung:

Die Grundrechtecharta der Europäischen Union feiert ihren fünften Geburtstag. Zwar wurde sie bereits vor 14 Jahren angenommen, doch in Kraft steht sie erst seit Dezember 2009. Insofern ist es ein guter Moment, den Einfluss der Charta zu untersuchen. Der Charakter der Charta wird hier sowohl als konservativ als auch als innovativ beschrieben. Die Wirkung der Charta wird als beträchtlich eingestuft. In den letzten Jahren hat sich die Art und Weise, wie die EU an Grundrechte herangeht, deutlich geändert. Auch auf nationaler Ebene spielt die Charta eine Rolle, wie ein Blick auf nationale Gerichte zeigt. Der Autor beschreibt die Charta auch insofern als ein Instrument des Mehrebenenregierens, als die Charta auch dort politische Wirkung entfalten kann, wo es nicht um Unionsrecht als solches geht. In diesem Sinne ist die Grundrechtecharta nicht nur im Zusammenhang mit einem unter Umständen entstehenden strategischen Rahmen zum Schutz und der Förderung von Grundrechten innerhalb der EU von

Relevanz. Auch im Kontext des EU-Rahmens zur Rechtsstaatlichkeit ist die Charta von Bedeutung, da sie nicht nur eine 'Charta der Rechte', sondern auch eine 'Charta der Werte' darstellt.

General note:

Opinions expressed in this paper are those of the author and not necessarily those of the Institute

Contents

1. The Inspiring Charter..... 5

2. The Conservative Charter..... 7

3. The Innovative Charter 10

4. The Multilevel Charter 13

5. The Charter Applied..... 17

6. The Charter of Values..... 21

7. The Charter in Conclusion..... 25

1. THE INSPIRING CHARTER

In 2014, five years after the entry into force of the Charter of Fundamental Rights, the Charter is, at least in “European” circles, a highly prominent document. It is often referred to alongside such solemn documents as the Universal Declaration of Human Rights or the European Convention of Human Rights. This is surely pleasing for those who work for the process of European integration. But it also has a slightly pompous taste. Can we really say – in analogy of what Eleanor Roosevelt, a prominent co-drafter of the Universal Declaration of Human Rights (UDHR) said about the UN Declaration – that the Charter is to become the Magna Charta for everybody living within the EU? And is it likely that the Charter will ever gain a similar standing to that which the European Convention of Human Rights (ECHR) acquired over decades characterised by the tremendous efforts of the highly specialised European Court of Human Rights in Strasbourg?

In this context it is worthwhile to recall that the idea of creating an additional fundamental rights catalogue – alongside international human rights treaties, national fundamental rights catalogues and, most importantly, next to the ECHR – was not everywhere met with frenetic applause. Some were concerned that the promising language of the Charter would carry with it a considerable potential for frustration³ or come along with the risk of “unintended consequences such as ‘fuelling anti-EU-feelings’ similar to previous cases of symbolic policymaking in the EU”⁴. Others went even further and said that the Charter has a merely symbolic value. According to one author, the Charter is a “comical attempt to make use of nation-state artefacts” resulting in “Kitsch”⁵. Finally, some questioned whether the European Union is at all in need of its own Charter. A prominent expert came to the following conclusion: “The Union does not need more rights on its lists, or more lists of rights. What is

³ See e.g. G.N. Toggenburg, ‘Menschenrechts- und Minderheitenschutz in der Europäischen Union’, in W. Weidenfeld (ed.), *Europa-Handbuch*, 5th edn, Bertelsmann Stiftung, Gütersloh, 2008, pp. 294-313, at p. 301.

⁴ A. Wiener, ‘The constitutional significance of the Charter of Fundamental Rights’, in 2 *German Law Journal* (2001) 18, pp. 1-9, at p. 9, online at <http://www.germanlawjournal.com/index.php?pageID=11&artID=113>.

⁵ U. Haltern, ‘Europe Goes Camper: The EU Charter of Fundamental Rights From a Consumerist Perspective’, in 3 *Webpapers on Constitutionalism & Governance beyond the State* (2001), available at http://www.wiso.uni-hamburg.de/fileadmin/sowi/conweb/conweb_wiener/2001/conWEB3-2001.pdf, p. 15.

mostly needed are programmes and agencies to make rights real, not simply negative interdictions which courts can enforce.”⁶

This very last criticism confirms that it is misleading to look at the Charter in isolation. In fact, close to fifteen years after its proclamation in 2000, the Charter is not standing naked in the EU landscape but has been complemented by a variety of mechanisms, programmes and institutions all aiming to protect and promote fundamental rights within the EU. From a fundamental rights perspective, the European Union of the year 2000 is a very different one from the one we are seeing today, in the year 2014.

Taking the “Human Rights Agenda for the EU for the year 2000” as a set of benchmarks, one has to recognise that the EU has come a very long way. Many years after that agenda was born in Fiesole (at the European University Institute) and presented in Vienna (during the Austrian EU Presidency in 1998), the European Union has delivered on close to all the postulations contained in that prominent document:⁷The EU has a Commissioner for Human Rights; -a Special Rapporteur for Human Rights informing the High Representative for the Common and Security Policy; a substantially increased jurisdiction of European Court of Justice; an EU Fundamental Rights Agency carrying out “balanced and objective surveys of the human rights situation”⁸; a substantially strengthened European Parliament that forms an “important force for promoting respect for human rights by and within the Union”; a “greater interaction with the human rights committees in national parliaments” (even if this is a brand new and still open development); an ongoing ratification of the European Convention on Human Rights; a Council working group that complements the external work of COHOM with a mandate for

⁶ J.H.H. Weiler, ‘Editorial: Does the European Union truly need a Charter of Rights?’, in 6 *European Law Journal* (2000) 2, pp. 95-97.

⁷ On the project see P. Alston, in *EUI Review*, November 1998, p. 30, available online at https://www.google.com/url?q=http://www.eui.eu/Documents/Research/EUIPublications/EUIReview/ERAutum_n98.pdf&sa=U&ei=rUFSVKaDDMmN7Aa2r4GYBQ&ved=0CA0QFjAG&client=internal-uds-cse&usq=AFQjCNFSD58w229oFhxy1Mfg5EUbQ5YOyg.

⁸ The fact that with the FRA the EU is equipped with a sort of “Human Rights Monitoring Agency” (as it was called in the agenda) does not mean that there is no room for further improving the latter’s mandate. See in this regard G.N. Toggengburg, ‘Fundamental Rights and the European Union: How does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?’, *EUI LAW Working Paper* 20013/13, <http://cadmus.eui.eu/handle/1814/3>.

the human rights developments within the EU (the FREMP working group); EU programmes earmarking funds for human rights related projects at national level and, finally, a substantially increased fundamental rights culture within the EU institutions.

Whereas it would be very naïve to argue that the Charter is responsible for all the remarkable developments in the recent past, it is even more naïve to deny the role of the Charter in creating a new fundamental rights “momentum” at EU level and thereby providing an inspiring tipping point which allowed for a variety of these innovations. It is indeed important to note that most of the major developments in the past 15 years took place after the Charter has entered into force at the end of 2009.

In this sense I would argue that one does not do justice to the performance of the Charter when looking at it only from the perspective of the case law or EU legislation referring to the Charter. There is more to the Charter and that is its obvious capacity to produce spill-over effects and to inspire the institutional landscape with a revamped fundamental rights spirit.

In the following I will briefly refer to the Charter’s conservative side (section 2), its progressive side (section 3), its multilevel character (section 4), its application in practice (section 5), its potential role in the context of the so-called “rule of law debate” (section 6) and finally conclude with some general remarks on the Charter’s psychograph.

2. THE CONSERVATIVE CHARTER

For some, the question what the Charter is going to add – in very concrete terms and at individual level - to the protection of fundamental rights was less important than the question whether the Charter could have unintended federalising effects as fundamental rights catalogues have produced in other federal realities. These concerns were (and are) present despite the “emerging trend to agree on the use of the language of constitutionalism in European integration” because this trend came about “without agreeing on the concept of

constitutionalism underlying such language”.⁹ It is not astonishing that the view to a Charter becoming a supranational vehicle of “constitutional patriotism”¹⁰ was (and still is) not a vision everyone feels comfortable with, especially amongst the “Herren der Verträge”. It is not a coincidence that federal systems with a confederal past were often reluctant to introduce a federal bill of rights for fear that it might legitimize, if not provoke, a widening of federal powers.¹¹

Indeed, the language of the Charter clearly accommodates such concerns. Already in the Preamble the mothers and fathers of the Charter assure the Member States that the Charter contributes to the common values “while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels”. Moreover, they stressed that the Charter simply “reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity,” the rights as they (already) result from the constitutional traditions and international obligations common to the Member States.

Four elements in the Charter clearly show the conservative nature of the Charter. Firstly, Article 51(1) clarifies that the Charter is primarily addressing the European Union (that is its “institutions, bodies, offices and agencies”). The Member States are only obliged under the Charter “when they are implementing Union law” which, however, has been interpreted widely by the Court (building on its earlier case law) as bringing the EU Member States under Charter obligations in legal situations that come within the scope of EU law without that it would be necessary that the Member State in question was implementing an EU law obligation

⁹ M. Maduro, ‘The Double Constitutional life of the Charter of fundamental rights of the European Union’, in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*, Hart, Oxford, 2003, pp. 272-276, at p. 276.

¹⁰ J.E. Fossum, ‘The European Charter: between deep diversity and constitutional patriotism’, ARENA Working Paper 05/2003, online at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2003/wp03_5.pdf.

¹¹ The constitutions of neither the USA and Canada nor Switzerland contained a fundamental rights catalogue in their original text. See M. Cartabia, ‘Article 51’, in W.B.T. Mock and G. Demuro (eds), *Human Rights in Europe. Commentary on the Charter of fundamental rights of the European Union*, Carolina Academic Press, Durham NC, 2010, pp. 315-322, at p. 320.

with a specifically dedicated national measure¹².

Secondly, Article 51 (2) stresses that it “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. Whereas the Charter’s very complete list of rights would not make an innocent observer assume that the primary addressee – the European Union – is equipped with limited competencies, this provision makes sure that the Union’s influence is clearly tied back to the principle of conferral: where, according to the Treaties, no powers were transferred to the EU level, the EU should have no normative say on how Member States should protect fundamental rights.

Thirdly, the Charter tries to limit the margin of interpretation of the Courts. After it became clear that the Charter was meant to become legally binding 4 Paragraphs were added to the original version (i.e. the one dating from the year 2000) of Article 52 defining the scope of the Charter. They underline that the rights resulting from constitutional traditions common to the Member States shall be “interpreted in harmony with those traditions” (Paragraph 4); full account shall be taken of “national laws and practices as specified in this Charter” (Paragraph 6); and the so called “explanations” drafted as a way of providing guidance in the interpretation of this Charter “shall be given due regard by the courts of the Union and of the Member States” (Paragraph 7).

Fourthly, Article 52 (5) states that provisions of the Charter, which contain mere “principles” are not directly applicable before Courts in the sense of enforceable claims by individuals. However, they can be used by the Courts as a means of interpretation and as a standard to review the legality of other acts of the EU or the Member States (this sort of counterlimit clarifies that the paragraph does not aim at excluding justifiability of principles, but merely at limiting it).¹³

¹² CJEU, Akerberg Fransson, C-617/10.

¹³ However, the wording suggests that principles can only be used in the interpretation of “such” acts (and in the ruling on “their” legality), which implement the respective principles. However, this narrow reading was rebuffed

3. THE INNOVATIVE CHARTER

The Charter was innovative already in the way it was created. The European Convention elaborating the Charter was both in composition and in working methods very different from the usual “black-box-type” of treaty amendment negotiations that take place at intergovernmental conferences. The convention was composed of 15 representatives of the Heads of State and Government, 1 representative of the European Commission and close to three times as many Parliamentarians (namely 46: 30 representatives of the national parliaments and 16 representatives of the European Parliament). The drafting process was discursive and transparent, and also civil society submitted contributions.¹⁴ Against this background it is not astonishing that the Charter was already very soon after its proclamation at the end of 2000 (and hence long before it entered into force) described as the document that “constitutes the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of [the EU] fundamental rights guarantees”.¹⁵ In fact the Charter was even exercising a certain influence on the ECHR system before it entered into force at the end of 2009.¹⁶

The Preamble of the Charter refers to the dynamic environment fundamental rights law is confronted with when stressing that it is “necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter”. Apart from drastically enhancing the visibility of fundamental rights to both rights holders and duty bearers within the EU, there are four other elements speaking for an innovative character of the Charter of fundamental rights.

in the literature as it would “severely limit the effects and use of the Charter” and goes counter to the obligation to observe the principles as laid down in Article 51 (1). S. Peers and S. Prechal, ‘Article 52’, in S. Peers *et al*, *The EU Charter of Fundamental Rights*, Hart, Oxford, 2014, Para. 52.182.

¹⁴ The contributions are still available online at http://www.europarl.europa.eu/charter/civil/civil0_en.htm.

¹⁵ Opinion of Advocate General Mischo delivered on 20 September 2001 in the Joined Cases C-20/00 and C-64/00, Para. 126.

¹⁶ The case of *Christine Goodwin v. the UK* (2002; on the notion of marriage), the case of *Scoppola v. Italy* (2003; on the *ne bis in idem* principle) and the case of *Vilho Eskelinen and others v. Finland* (2007; on effective remedies and fair trial) are examples in this regard.

Firstly, the Charter is innovative as it is a legally binding human rights bill that combines both classic civil and political rights with economic and social rights without differentiating between these two groups in terms of legal standing or judicial enforcement. Admittedly, the distinction between rights and principles (see last paragraph in section 2 above) was introduced to overcome political resistance against accepting social rights as integral part of the Charter. Nevertheless it is not the case that all economic and social rights are principles in the sense of Article 52(5).¹⁷ Unfortunately, neither the wording of the Charter nor of its “Explanations” are very helpful to render the distinction convincing and operational.¹⁸ Arguably, it is even impossible to define in abstract terms which provision is a right and which is a principle, since the question what sort of legal effect a provision can have depends on the concrete context of the case at hand.¹⁹

Secondly, the Charter is a modern fundamental rights catalogue as it includes provisions that respond to contemporary challenges. Examples in this regard are the prohibition of eugenic practices and the reproductive cloning of human beings (Article 3), the separate and specific right to the protection of personal data (Article 8), freedom of research (Article 13), protection of cultural diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), protection of the environment (Article 37), its encompassing antidiscrimination clause including even “genetic features” (Article 21) or the right to good administration (Article 41).

Thirdly, the Charter is a far-reaching instrument also in the sense of its level of protection. According to Article 52(3), the ECHR is taken as a minimum standard so that the Charter rights, which correspond to rights guaranteed by the Convention, have “the same ... meaning and scope of those rights” which explicitly is not meant to “prevent Union law [from]

¹⁷ For instance, the right to collective bargaining and action is fully justiciable, see CJEU, case C-438/05 Viking Line.

¹⁸ See for the various contradictions Ph. Alston, ‘The Contribution of the EU Fundamental Rights Agency to the Realisation of Economic and Social Rights’, in Ph. Alston and O. de Schutter (eds), *Monitoring Fundamental Rights in the EU*, Hart, Oxford, 2005, pp. 159-188, at pp. 167-169.

¹⁹ See also S. Peers and S. Prechal, ‘Article 52’, in S. Peers *et al*, *The EU Charter of Fundamental Rights*, cit., Para. 52.190.

providing more extensive protection”.²⁰ Indeed, the Charter can in certain instances be seen as going further than the ECHR. Not only does it explicitly establish rights that were only silently covered by the Convention such as the right to the protection of personal data (Article 8). It also extends the scope of some of the Convention rights such as Article 9 which covers also same-sex marriages if these are established by national legislation, Article 14(1) on education which also covers access to vocational and continuing training or Article 47 which guarantees effective judicial protection for all subjective rights (so not only civil rights and criminal charges as mentioned in Article 6 ECHR). Citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because according to Article 21 (2) any discrimination on grounds of nationality is forbidden: the limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them. Finally, the Charter extends rights to the EU level such as is the case with the freedom of assembly and association (Article 12). It creates a *ne bis in idem* guarantee applying across borders within the EU (Article 50) whereas Article 4 of Protocol No 7 ECHR applying only within one State, establishes a right to good administration (Article 41) and lists a variety of other EU-specific rights, including the right to vote and to stand as a candidate at elections to the European Parliament (Article 39), the right to vote and to stand as a candidate at municipal elections (Article 40), the right to petition the European Parliament (Article 44) or the right to freedom of movement and of residence (Article 45).

Fourthly, while the Charter, does not “establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”²¹ it still imposes a duty on the EU and its Member States to “respect the rights, observe the principles and promote the application thereof in accordance with their respective powers”²². Since the avoidance of fundamental rights violations and the active promotion of fundamental rights are indeed important tasks, Article 51 (1) is to be understood as underlining that these tasks enshrined in the Charter should not be misunderstood as constituting new EU “objectives” to those already enshrined

²⁰ See also Articles 53 and 54 of the Charter.

²¹ Article 51(2).

²² Article 51(1).

in the EU Treaties.²³ Exercising already existing EU powers in order to respect and promote fundamental rights does not amount to any transferral of new powers. There is nothing in the Charter, which would speak against using the EU's existing competences to protect and promote fundamental rights.²⁴ Quite to the contrary: the Charter underlines that the Unions and Member States have to "promote" the application of these rights throughout all policy fields. The Charter therefore urges the EU, and the Member States when acting within the scope of EU law, to revamp their efforts to mainstream fundamental rights in all their activities. Such a consistent mainstreaming is also of high relevance when drafting and executing the different EU funding schemes²⁵. Developing such an attitude across the board will help the EU legislator to deliver on its very explicit horizontal obligations in the area of equality between men and women (Article 8 TFEU); social protection, employment, social inclusion, education, health (Article 9 TFEU); and anti-discrimination (Article 10 TFEU).

4. THE MULTILEVEL CHARTER

The Charter was designed as a "thematically comprehensive catalogue of fundamental rights, comprising also guarantees that cover areas of life, which the EU has little or no legislative competence to regulate".²⁶ This is despite the fact that the primary addressee of the Charter is

²³ See Article 352 TFEU and Article 3 TEU. See also C. Ladenburger, 'European Union Institutional Report', in J. Laffranque (ed.), *Reports of the XXV FIDE Congress Tallinn 2012 (The protection of fundamental rights Post-Lisbon: The interaction between the Charter of fundamental rights of the European Union, the European Convention on Human Rights and national constitutions)*, Tartu University Press, Tallinn 2012, pp. 141-215, at p. 170. It should however be added that for many of the objectives mentioned in Article 3 TEU the Charter is of immediate relevance. This is the case for the promotion of peace, the Union's "values" (which in themselves enshrine fundamental rights) and the "well-being of its peoples"; the establishment of "freedom, security and justice"; "free movement of persons"; "appropriate measures with respect to external border controls, asylum, immigration"; the development of a competitive "social market economy, aiming at full employment and social progress"; combating social exclusion and discrimination; "social justice and protection"; equality between women and men; solidarity between generations; protection of the rights of the child; "social cohesion"; and respect for "cultural and linguistic diversity".

²⁴ See also EU network of independent experts on fundamental rights, 2006, p.395.

²⁵ G.N. Toggenburg, 'Menschenrechtspolitik', in Weidenfeld/Wessels, *Jahrbuch der Europäischen Integration*, 2014, Nomos, Baden-Baden.

²⁶ C. Ladenburger, 'European Union Institutional Report', in J. Laffranque (ed.), *Reports of the XXV FIDE Congress Tallinn 2012 (The protection of fundamental rights Post-Lisbon: The interaction between the Charter of fundamental rights of the European Union, the European Convention on Human Rights and national constitutions)*, cit., at p. 169.

the European Union itself, and much less its Member States. In fact the Charter appears to be drafted in a “competence-blind” manner. The fresh reader to the Charter might be surprised to read that she/he holds a right under EU law not to be “condemned to the death penalty, or executed”. After all, the risk of being treated in such a way by the Union’s institutions and agencies is not obvious. Indeed, it appears that one of the main arguments for introducing this provision was the positive signal such a prohibition would send to the outside world.²⁷

The advantage of designing the Charter as such a full-fledged catalogue irrespective of the specific competence situation within the EU/States-condominium is obvious: it allows for a full, consistent and easy-to read bill of rights covering all situations of life. Moreover, and maybe more importantly, such a comprehensive approach allows the Charter to fulfill the soft-law-function of a “memento juris” at all layers of governance. The content of the Charter is of relevance for the States, the regions or the municipalities because it reaffirms the “rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights”.²⁸ By consolidating the fundamental rights aquis as it applies within the EU, the Charter makes fundamental rights more visible that in turn can contribute to fundamental rights deliberations becoming part of any political or legal debate independently from the question who in the specific context is legally responsible for delivering the fundamental rights at stake.

The downside to the Charter’s comprehensive approach is that it remains a difficult task to understand from the Charter who the duty bearers are the rights holders should turn to when confronted with a fundamental rights issue. However, it would be unfair to ascribe this complexity to the Charter itself because the complexity derives from the division of

²⁷ Jürgen Meyer (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Nomos, Baden-Baden, 2003.

²⁸ Preamble of the Charter.

competences as laid down in the Treaties. The competencies of the EU developed over time following the needs in terms of European integration and available political consensus at a given time. There is no “fundamental rights logic” behind this division. In fact, the rule that Member States stand only under a EU born fundamental rights obligation when and where they act within the scope of EU law easily leads to results that are very peculiar when looked at through human rights glasses.

To give a practical illustration: In 2002 the CJEU had to decide a case of an UK citizen, resident in the UK and running a business in the UK. What was not from the UK was his wife who is a national from the Philippines. She overstayed her leave to enter the UK and was thus confronted with a deportation order. Ms Carpenter appealed against that order arguing that she had a right under EU law to stay with her husband – after all an EU citizen - in the UK. The Court came to the conclusion that indeed refusing Ms Carpenter the right to live in the UK with her husband would violate the freedom to provide services “read in the light of the fundamental right to respect for family life”.²⁹ The right to family life enters the discourse because the scope of EU law is opened via the freedom to provide services. Seen that the freedom to provide services does not apply in cases of merely internal nature, Mr. and Ms Carpenter’s right to family life became dependent on the concrete nature of Mr. Carpenters economic activity. In fact Mr. Carpenter was only able to invoke the freedom to provide services because his professional activities were not limited to the UK but “a significant portion of Mr. Carpenter business consists of providing services, for remuneration, to advertisers established in other Member States”. Thus one could conclude that the composition of Mr. Carpenter clients-portfolio was decisive for whether or not his wife could be legally deported under EU law. Whereas this result is in line with the logic of how the realms of EU and Member States influences are distributed, it looks a bit strange from a human rights perspective.

In fact, as was already stated at the beginning, the Charter has the potential to confuse rights

²⁹ CJEU, case C-60/00. For a comment see e.g. G.N. Toggenburg, ‘Familienangehörige aus Drittstaaten: der Schutz des Familienlebens als trompe d’oeil-Tor zum Binnenmarkt?’, in 9 *European Law Reporter* (2002), pp. 319-328.

holders about who has to deliver the different rights found in the Charter. In order to avoid the impression that the Charter is establishing new competences the drafters of the Charter introduced the conservative clauses described above (section 2). From a citizens perspective these clarifications do not clarify too much so that every week the Commission is confronted by citizens with cases where EU law does not apply and hence it is not the EU that can intervene in the given situations – a phenomenon the responsible Commissioner has labelled as the Charter’s “knocking on the wrong door effect”. In order to address the limited reach of the Charter, the Commissioner proposed to altogether “abolish” Article 51 so that all charter rights become “directly applicable in the Member States” irrespectively whether Member States are acting within the scope of EU law or not.³⁰

Admittedly, such a federal leap would make direct access to Charter rights simpler but it would at the same time shift the delicate federal balance that is currently characterising the EU/States-condominium. Could EU law (namely the Charter) be directly invoked in all contexts even those where the EU does not hold any legislative competence, the EU could intervene – even if only judicially – in virtually every corner of society and life. It is maybe more in line with the EU’s motto of “united in diversity” to invest political energies in making sure that the existing division of labour between European Union and Member States does not lead to any gaps in the protection of fundamental rights. This can be done by putting the different layers of governance – that is the responsible actors at EU, national and subnational level – in a structured process of cooperation and coordination, something the FRA calls “joined-up governance”.³¹ Addressing this challenge could for instance be part of the recently discussed possibility of developing a strategic framework for protection and promotion of fundamental rights within the EU.³² The Charter can in this context act as multilevel-

³⁰ Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, speech given at the XXV Congress of FIDE in Tallinn, 31 May 2012. See also the discussion paper number 5 as prepared for the Commission’s “assises de la justice conference”, online at http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf.

³¹ See e.g. FRA (2012), *Bringing rights to life: The fundamental rights landscape of the European Union*, Luxembourg, Publications Office of the European Union (Publications Office), <http://fra.europa.eu/en/publication/2012/bringing-rights-life-fundamental-rights-landscape-european-union>.

³² See Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental

instrument: it can inform and inspire the actors of all layers of governance - including at subnational level³³. Where it is not the EU that is tasked with granting an individual right, the Charter will not be directly accessible in Court rooms but still it will function as a source of information about rights, which can be accessed through (sub)national avenues vis-à-vis (sub)national institutions. In this sense the Charter is a multilevel instrument.

5. THE CHARTER APPLIED

Fundamental rights catalogues are used and referred to by all branches of government but also by civil society. Given that the EU's Charter of fundamental rights is not only used at EU level but also within the 28 Member States, its application cannot be fully portrayed. However, in the following a few points are given to show that the Charter is indeed of increasing practical relevance.

Firstly, the process of EU legislation has become considerably more fundamental rights concerned. Soon after the Charter was proclaimed the European Commission announced that it will consistently verify the compatibility of its proposals with the Charter.³⁴ In 2005 the Commission adopted a Communication clarifying its methodology in this regard³⁵ and in 2009 the Commission published a report on the practical operation of this methodology³⁶. In 2010 the Commission published its "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union" which amongst others contains a "fundamental rights check list".³⁷ Also impact assessments that have become a standard practice since 2002 do increasingly – even if not as a separate group of potential impacts apart

Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 5 and 6 June 2014, Para 24. See for some proposals FRA (2014), An EU internal strategic framework for fundamental rights: joining forces to achieve results, <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013>.

³³ See also Committee of the Regions (2014), Resolution on the Charter for multilevel governance in Europe, 3 April 2014, <http://www.cor.europa.eu/en/activities/governance/Documents/mlg-charter/en.pdf>.

³⁴ SEC (2001) 380/3.

³⁵ COM(2005) 172 final.

³⁶ COM(2009) 205 final.

³⁷ COM (2010) 573 final.

from economic, social and environmental impacts – take fundamental rights implications into account. Nevertheless it was argued that compatibility checks – as also the destiny of the data retention directive appears to submit – could be further improved³⁸ and the European Parliament proposed that Impact Assessments should give greater prominence to human rights considerations, revise its Impact Assessment Guidelines (including by widening the standards to include UN and Council of Europe human rights instruments)³⁹ and “make systematic use of external independent expertise, notably from the Fundamental Rights Agency”⁴⁰. The Parliament also urged the Commission “to ensure that the impact on fundamental rights of EU legislation and its implementation by the Member States systematically form part of the Commission’s evaluation reports on the implementation of EU legislation and its annual report on monitoring the application of EU law”⁴¹.

Once a legislative proposal has left the Commission it might undergo amendments by the European Parliament and the Council. Both of these institutions have also adapted a Charter-oriented approach. When the Charter entered into force the Parliament introduced a new “rule 36” allowing its LIBE Committee to express, at request, an opinion on a legislative proposal that appears not to “comply with rights enshrined in the Charter”. At the Council it was, again with the entry into force of the Charter, decided to establish the Working Party on fundamental rights and citizenship (FREMP) as a permanent working party and in 2011 the Council’s Secretariat adopted “Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies”.⁴² However, these steps at the Parliament and the Council appear – so far - open to considerable doubts as regards their practical relevance for any increased fundamental rights scrutiny of legislative proposals.

Secondly, also the Court of Justice of the European Union appears to take the Charter

³⁸ See e.g. I. Butler, ‘Ensuring Compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission’, in 37 *European Law Review* (2012) 4, pp. 397-418.

³⁹ European Parliament, Resolution of 12 December 2012 on the situation of fundamental rights in the European Union, Para 3.

⁴⁰ *Ibid.*, , Para 6.

⁴¹ *Ibid.*, Para 3.

⁴² Council doc. 10140/11 of 18 May 2011. At the time of writing these guidelines were under revision.

increasingly serious when looking at the EU's own legislation. This could be seen in the judgements in *Schecke and Eifert* concerning a Council regulation on the financing of the common agricultural policy⁴³ and, most prominently, in the case *Digital Rights Ireland Ltd* where the Court concluded that the data retention directive does neither "lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter", nor "provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data" and was therefore declared invalid.⁴⁴ Interestingly enough, the Court increasingly also looks at how the legislator has pondered the different fundamental rights impacts. In *Schecke and Eifert* the Court criticised that there was nothing that would show that, when adopting the regulation at hand "the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular".⁴⁵ This attitude of the Court to look at whether or not fundamental rights considerations were taken sufficiently serious during the legislative process will put further pressure on the legislator to take the Charter serious.

Thirdly, the Charter gained an increasing relevance in courtrooms within the EU. The trend before the CJEU is exemplary in this regard. The number of decisions in which the CJEU (in all its formations: Court of Justice, General Court and Civil Service Tribunal) quoted the Charter in its reasoning more than quadrupled in three years to 114 decisions in 2013 from 27 in 2010, whereas the general number of CJEU decisions in the same time increased only from 1,152 in 2010 to 1,587 in 2013 – a rise in three years of hardly 38%. Moreover, increasingly national courts when referring cases to the CJEU make use of the Charter. This was the case in 18 requests in 2010, 27 in 2011 and 41 in 2012. In 2013, 9% of the cases that national courts

⁴³ CJEU Joined Cases C-92709 and C-93/09.

⁴⁴ CJEU, Joined Cases C-293/12 and C-594/12, Paras 65-71.

⁴⁵ CJEU Joined Cases C-92709 and C-93/09, Para. 81.

referred to the CJEU (41 of them) cited the Charter. FRA research shows that the Charter is, however, also used by national courts outside any context of preliminary proceedings.⁴⁶

Asylum and immigration appears to be the area where national courts most frequently use the Charter, other prominent fields being for instance tax law and consumer protection.⁴⁷ The rights most frequently referred to at national level were – according to FRA research – the right to an effective remedy and a fair trial (Article 47) and the right to good administration (Article 41). This mirrors the situation before the CJEU, where also these two rights were most often referred to in 2013.⁴⁸ But also the horizontal provisions (Articles 51 and 52) and the right to privacy and family life (Article 7), the rights of the child (Article 24) and the right to non-discrimination (Article 21) were quite often referred to in national judgements delivered in 2013.⁴⁹

Whether or not a Court can raise a “Charter argument” independently (*ex officio*) differs from state to state. But in 2013 in close to half of the cases examined by the FRA, the adjudicating Court raised the Charter as a legal argument in its reasoning without the parties having done so. Thus, the Charter enters national courtrooms not only by the initiative of the parties but also through the national courts, which themselves often invoke the Charter as a legal source. Often the Charter is rather superficially referred to as a means of interpretation, without the question of whether or not the Charter legally applies being addressed. And there appears to be a number of decisions at national level where the Charter is used or at least referred to in cases that clearly fall outside the scope of EU law. In this sense the Charter appears to develop in some corners a “life of its own”.

⁴⁶ See FRA, ‘The EU Charter for fundamental rights before national courts and non-judicial human rights bodies’, in Annual Report 2013, pp. 21-33.

⁴⁷ These conclusions refer to the sample of cases examined by the FRA in its 2013 annual report.

⁴⁸ For differences between the decisions handed down before the CJEU and the national courts see FRA, ‘The EU Charter for fundamental rights before national courts and non-judicial human rights bodies’, in Annual Report 2013, pp. 21-33, at p. 24.

⁴⁹ *Ibid*, 24.

6. THE CHARTER OF VALUES

Article 2 TEU solemnly declares 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 founding values – so the article continues – “are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Thus these European values are co-owned by the Union and its States and there is a shared assumption that all inhabitants of the condominium built by the Union and its Member States share these values as common “house rules” building what can be called the “Verfassungsbogen” of the European Union.⁵⁰ In fact the assumption that all cohabitants respect these shared values forms the basis for the mutual trust within the Union allowing for the daily cooperation European integration implies, including for instance mutual recognition of judgments, execution orders, arrest warrants etc. An expression of the assumption that all EU Member States stay within the “Verfassungsbogen” as drawn by the values in Article 2 TEU is for instance the fact that all Member States shall regard each other as safe countries of origin so that applications for asylum made by a national of a Member State may not be taken into consideration.

Of course a situation of fully justified and solid trust between all Member States in terms of shared values cannot be taken for granted and is certainly not set in stone. In fact, to remain with the example of asylum, EU primary law states that there are scenarios where indeed nationals of an EU Member States can successfully apply for asylum in another EU Member States.⁵¹ This is for instance the case when the former State is subject of an Article 7 TEU procedure, which allows the EU to take steps against a Member State who is (or risks)

⁵⁰ See G.N. Toggenburg, ‘Was soll die EU können dürfen um die EU- Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedstaaten zu schützen? Ausblick auf eine neue Europäische Rechtsstaatshygiene’, in *Österreichische Gesellschaft für Europapolitik, Policy Brief*, 10, 2013, http://www.oegfe.at/cms/uploads/media/OEGfE_Policy_Brief-2013.10.pdf.

⁵¹ See Protocol (nr. 24) on asylum for nationals of Member States of the European Union, in OJ 2012 C 326 as of 26.10.2002.

seriously breaching the Article 2 values.⁵² Not so many years ago the scenario of Member States overstepping the boundaries of the “Verfassungsbogen” was perceived as rather far-fetched. In 2004, some days before the long-awaited coming together of old and new Member States in a greater European Union, the European Parliament declared that the Union “as matter of principle” has “confidence” in the “democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles”.⁵³

Not many years later, in 2009, the Parliament called on the European Commission to “create – as soon as risks of violations of Article 2 TEU are identified – an ‘Article 2 TEU/ Alarm Agenda’, i.e. a Union values monitoring mechanism” so that threats to the shared values can be addressed “with exclusive priority and urgency ... until full compliance with Article 2 TEU is restored and any risks of violation thereof are defused”.⁵⁴ The Parliament calls for a regular assessment of all the Member States with regard to their “continued compliance with the fundamental values of the Union”.⁵⁵ A “new mechanism” should be established to ensure this compliance. The “setting up of such a mechanism could involve a rethinking of the mandate of the European Union Agency for Fundamental Rights, which should be enhanced to include regular monitoring of Member States’ compliance with Article 2 TEU” or the establishment of an expert Commission (a “Copenhagen high-level group”).⁵⁶

Such a move at political level shows that there is an increased understanding that the assumption of full-value-commitment across all EU Member States is “rebuttable”.⁵⁷ Events in

⁵² For more details see e.g. B. de Witte and G.N. Toggenburg, ‘Human Rights and membership of the European Union’, in S. Peers and A. Ward, *The EU Charter of Fundamental Rights*, Hart, Oxford, 2004, pp. 59-82.

⁵³ European Parliament, Legislative Resolution on the Commission Communication on Art. 7 of the Treaty on European Union: ‘Respect for and promotion of the values on which the Union is based’ (COM(2003) 606), adopted on 20 April 2004, Para. 12.

⁵⁴ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012), Para 70.

⁵⁵ *Ibid.*, Para 74.

⁵⁶ *Ibid.*, Para 80.

⁵⁷ See in this context the judgement in the case NS where the CJEU stated that generally “it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR” but that under certain circumstances this assumption must be rebuttable. Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the “Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within

Hungary (constitutional reform, media law, reforms of the judiciary, etc.), Romania (constitutional crisis) or France (expulsion of Roma) have led the European Parliament, but also the European Commission and even the Council of the European Union to enter a debate on how to better protect the founding values as listed in Article 2 TEU.⁵⁸ Interestingly, this large debate was from the outset labelled as “rule of law debate” and stayed with this name, irrespective of the fact that the rule of law is only one of the many values listed in Article 2 TEU. Arguably, this is to be explained by the nature of the events especially in Hungary but also in Rumania, which indeed concerned core aspects of the rule of law. Nevertheless, it would appear more appropriate to look at the Article 2 values through the prism of the Charter of Fundamental Rights as the Charter is a more detailed version of the list of thirteen values that can be found in Article 2 TEU (with, admittedly, democracy and the rule of law being two values which are only partly covered by the Charter). In this sense the Charter of Fundamental Rights is also a Charter of Article 2 values. And indeed one could think of two functions the Charter could offer in the context of the ongoing debate on how to guarantee respect for the shared EU values.

Firstly, within the scope of EU law, the Charter could form the normative backbone of an EU strategic framework to protect and promote fundamental rights within the European Union.⁵⁹ Such an internal framework could be equivalent to the EU Strategic Framework and Action Plan, which has been guiding the EU’s external human rights policies since 2012, thereby showing that the EU practices at home accord with what the EU projects to the outside world. Such a framework to protect and promote fundamental rights would also synergistically

the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.” See CJEU, Joined Cases C-411/10 and C-493/10, Paras. 80, 104-106.

⁵⁸ For an overall view on the different proposals by the institutions see e.g. Democracy Reporting International (2013), *Proposals for new tools to protect EU values: An overview*, Briefing Paper 43, or G.N. Toggenburg, ‘Was soll die EU können dürfen, um die EU-Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedstaaten zu schützen?’, cit.. For proposals from academia see e.g. C. Closa, D. Kochenov, and J.H.H. Weiler, ‘Reinforcing rule of law oversight in the European Union’, in *EUI Working Papers*, (2014) 25 RSCAS, online at http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3.

⁵⁹ See on this the focus section in the FRA Annual Report 2013 entitled ‘An EU internal strategic framework for fundamental rights: joining forces to achieve better results.’

complement the “rule of law framework” as presented by the European Commission in March 2014.⁶⁰ The Commission framework is triggered only in clearly outrageous situations where a Member State is about to “systematically and adversely affect the integrity, stability or the proper functioning” of its own institutions and the safeguards securing the rule of law. To the contrary, a strategic framework for protecting and promoting fundamental rights would be a day-to-day engagement that is mainstreaming the rights and duties as enshrined in the Charter into actions of the EU and the Member States, bringing together all relevant actors and all layers of governance. This mixture of mainstreaming, coordination and cooperation could help avoiding any risk that situations of rule of law crisis materialize.

With regard to the form of such a strategic framework, it could consist of a light version building, for instance, on inter-institutional agreements and practical arrangements or, alternatively, it could be based on Article 352 TFEU. The latter allows adopting “appropriate measures ... to attain one of the objectives set out in the Treaties” in situations where such action “should prove necessary, within the framework of the policies defined in the Treaties ... [but] the Treaties have not provided the necessary powers”. As was already argued above,⁶¹ the objectives in Article 3 TEU not only refer back to the promotion of the Union’s values which are listed in Article 2 TEU and developed in more detail in the Charter of Fundamental Rights but also contain many specific fundamental rights objectives such as the protection of the rights of the child etc. Admittedly, the Treaties do not contain a section that would “define” a fundamental rights “policy”. However, to use this as an argument against the usage of Article 352 TFEU reveals a misunderstanding of the nature of fundamental rights. Also in other federal systems fundamental rights are not confined into a silo of a separate policy allocated to a specific actor. By their very nature fundamental rights are horizontal obligations that have to be respected by all actors in all their respective policy fields.⁶²

⁶⁰ European Commission, ‘A new EU framework to strengthen the rule of law’, COM(2014) 158 final, 11 March 2014.

⁶¹ *Supra* Footnote 19.

⁶² This is also the reason why it appears to be preferable to envisage the establishment of an EU strategic framework for the protection and promotion of fundamental rights rather than a single EU fundamental rights policy.

Secondly, the Charter could play an important role also outside the scope of EU law. As was shown above, the Charter was not drawn along the lines dividing the competence spheres between the Union and its Member States. Therefore the content of the Charter is also relevant as a matrix for areas and acts falling outside the scope of EU law even if there it does not produce legal effects vis-à-vis the Member States. With the introduction of the sanctioning procedure in Article 7 TEU, the mothers and the fathers of the Treaties granted the European Union a certain (even if limited) role in areas falling outside the scope of EU law. The reason for this is that situations where Member States seriously and persistently violate the Article 2 values will have obvious spill-over effects onto the working of the internal EU system (for instance, the other Member States will be reluctant to recognize judgments handed down by courts situated in a Member States where the independence of the judiciary is no longer guaranteed; where a Member States does no longer guarantee free and fair elections, the other Member States will be concerned about the influence of the representatives of that State exercised in the EU's institutions and so on and so forth).

In this light, Article 7 TEU is seen as conferring “new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks” also in areas where the Member States “act autonomously”.⁶³ The European Commission has already defined how she is intending to exercise its role in future scenarios of threats to Article 2 values. For the reasons mentioned above, the Charter can – besides other international standards - provide a useful matrix for checking, whether or not the different values listed in Article 2 TEU are under a specific threat.

7. THE CHARTER IN CONCLUSION

The Charter has led to very different sorts of discussions ranging from a quite sceptical attitude (for instance, in the UK which pressed for the adoption of Protocol 30 in the hope to

⁶³ European Commission, ‘Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based’, COM(2003) 606 final, 15 October 2003, 3 and 5.

limit the reach of the Charter in the United Kingdom) to an embracing practice (for instance, in Austria where the government saw the Charter as an aid in their fight against the data retention directive and where the Constitutional Court declared that the Charter enjoys constitutional standing within the national legal system). It has a clearly increasing relevance before the European Courts, and also at national level the Charter is referred to by the Courts. Many of these references are of a declaratory nature, just as many EU directives and regulations refer to the Charter in a rather superficial way. But to try to measure the relevance of the Charter by doing sterile counts of references to the Charter in European or (sub)national legislation and case law is not a too promising approach if not complemented with more qualitative research on the usage of the Charter in various levels and context. What is already clear after 5 years is that the Charter had a considerable impact on how the European Union and its institutions look at fundamental rights: the latter moved between 2000 and 2015 from the periphery to the centre of the EU's interest. If the Charter was ever an ornament it was a quite effective one.

Disappointments tend to be results of illusions. And of course it is an illusion to look at the Charter as a unique instrument having the monopoly as the Union's fundamental rights standard. Quite the contrary is the case. The Charter is embedded in a complex system of fundamental rights standards and mechanisms and its added value will develop exactly in cooperation with international standards, Council of Europe standards, national constitutions and general principles of EU law, which will continue to unfold. What is needed is to further increase the awareness about the Charter's limitations and its potential. Legally speaking the Charter only applies in the scope of EU law, politically speaking its reach goes beyond this limitation as it can inspire the fundamental rights momentum also at national, regional and municipal level just as it already did at the EU level. If we could succeed in creating a situation where all fundamental rights actors can use the Charter to raise fundamental rights awareness and at the same time point individuals to the relevant national sources, institutions and avenues, then the Charter is far more than an ornament but a prominent expression of a European fundamental rights order.