

THE PAST, PRESENT AND FUTURE OF THE EU LEGAL FRAMEWORK ON FUNDAMENTAL RIGHTS¹

Albulena Uka, PhD Candidate

Ghent University, Belgium, albulena.uka@ugent.be

ABSTRACT

This paper examines the legal framework in the field of fundamental rights in the European Union. The main focus will be to depict the position of the fundamental rights in the peculiar legal system of the EU and do so by listing the relevant legal acts and following the evolution of the EU. It will include the Treaties, the Charter of Fundamental Rights in the European Union and secondary legislation. This paper will also analyse the role of the Charter and its prominence on the protection of fundamental rights in the EU. Also, the paper will look at the potential implications that may arise in the future of the EU or in relation with the Member States of the Union.

KEY WORDS: Fundamental rights, EU, legal framework, Charter.

INTRODUCTION

Respect for Fundamental Rights represents one of the core values that the EU is established on. In the EU, Fundamental Rights were addressed at different times following different steps. The main and latest success in this regard can be considered in 2009 when the Lisbon Treaty gave the Charter of Fundamental Rights of the EU the same value as the treaties. However, this did not solve all the issues and outstanding challenges remain in this context.

Since the EU creation and forward the fundamental rights have gone through a progressive process. The EU has a multi-levelled sophisticated

¹ review scientific paper

protection of the fundamental rights provided in the TEU where Article 6 illustrates perfectly this complex system. It begins by the first reference to the Charter and its same legal value with the Treaties. It proceeds with the second layer which contains a reference to the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lastly, the third layer is a legacy from the early case-law of the Court consisting of rights guaranteed by the ECHR and the constitutional traditions common to the Member States.

With respect to the content of the main instrument of the fundamental rights in the EU, being the Charter, i.e. the rights it guarantees, it's important to mention that ever since the entry into force of the Lisbon Treaty which integrated the Charter into the primary law of the EU, the number of cases that the Court of Justice referred to the Charter by directly quoting or mentioning in the reasoning kept significantly increasing in the last 10 years and this impact is increasing onwards.

A PAST REFLECTION OF THE FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

The aftermath of the Second World War was a driving force towards closer international cooperation, which at the same time also laid the roots for the establishment and development of the so-called European Communities. Needless to say, the atrocities committed during the war created the reaction aimed to ensure that the past could never repeat itself and, as a result, the protection of fundamental rights via codification became of significant importance at the international and national level.

Particularly, in the European context, many European states pieced together and created a new international instrument, the ECHR in the framework of the organization named Council of Europe which to the date consists of 47 members. Several years later, certain European states conjoined again in the contours of another type of organization which was more of a broader political project. Hence, the European Union in its original Treaties did not contain any particular reference to fundamental rights. This gap of fundamental rights became too apparent at a very early stage in the life of the Union.

The lack of legal basis made the institution of the Court of Justice carry the responsibility to develop a fundamental rights framework via the jurisprudence which ensured that citizens of the Union would be adequately protected. The Court of Justice in its case-law declared that the general principles of the European Communities law include protection

for fundamental rights and those are part of the common constitutional traditions of the member states. Furthermore, the Court continually developed a range of human rights policies in its case law which strengthen the need for fundamental rights at the EU level even more. A significant case in this regard is considered Case 11/70 *Internationale Handelsgesellschaft* which concerned export-licence. In this judgment the Court proclaimed that fundamental rights are protected by EU legal order, noting that: “*respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such 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*”.

This gap between the EU and fundamental rights was eventually remedied and from merely a judicial protection of fundamental rights, it was shifted to codification in the Treaties of the EU. Moreover, later on, the EU also proclaimed its own code of rights, namely the Charter of Fundamental Rights of the European Union. This Charter became a legally binding act following the entry into force of the Lisbon Treaty. Not only, the Lisbon Treaty also provided for a specific competence for the EU, which is to accede to the European Convention on Human Rights (ECHR), a fundamental rights document adopted from a separate organization being the Council of Europe.

Notwithstanding the achievements fundamental rights in the Union have reached so far, there remain also active challenges that require action in the present and future.

THE CURRENT LEGAL FRAMEWORK OF FUNDAMENTAL RIGHTS IN THE EUROPIAN UNION

As outwardly discussed in the previous chapter, the EU has undergone a genuine genetic transformation from the beginning of its origin to today. It has evolved from a very sui generis international organisation, with the main focus on economic purposes and market integration, to an autonomous legal order which protects and promotes the rule of law and fundamental rights not only within but also outside its boundaries. Today, the EU's main values are enshrined as sources of primary law in the Union. In the Treaty on European Union, Article 2 defines that “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-*

discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Those values of the EU are of paramount importance as they managed to firmly set a new character of the Union which focuses on fundamental rights, democracy and rule of law and creates a cohesive triptych. In addition to Article 2, the Treaty continues to elaborate more on fundamental rights specifically in Article 6. Thereto, a multi-levelled and complex system is utilized to protect fundamental rights in the EU. This complexity can be unfolded by elaboration each paragraph of the Article, consequently each layer of protection. The first layer gives a reference to the Charter of Fundamental Rights and recognising the rights and freedoms set in it, while at the same time it gives the Charter the same legal value with the Treaties, as part of the primary law.

The second layer proceeds with the reference to another major act for human rights being the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, this reference is more of an obligation for the Union to accede to the European Convention on Human Rights. This obligation has brought many challenges in the EU and has not been yet fulfilled which will also be touched upon in the following chapter. Lastly, the third layer is a legacy from the early case-law of the Court consisting of rights guaranteed by the European Convention on Human Rights and the constitutional traditions common to the Member States and all together constitute general principles of law of the Union.

Fundamental rights have also a central spot in the Union's External Action and Common Foreign and Security Policy. In Article 21, it's stipulated that *“The Union's action on the international scene shall be guided by the principles which have inspired its creation, development and enlargement, and which it seeks 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 respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph.”* Moreover, the same article also ascertains that the Union's policies in all fields of international relations shall be defined in order to consolidate and support democracy, the rule of law, human rights and the principles of international law. Such an approach enhanced the role of the EU in the field of fundamental rights despite not being a human rights organization.

Reversing to the fundamental rights within the EU, of crucial prominence is the Charter of Fundamental Rights in the EU which as elaborated earlier

in this paper. Despite the fact that the Charter was solemnly proclaimed by Parliament, the Council and the Commission since 2000 in Nice, it later continued amending process and was proclaimed again in 2007. However, in December 2009, with the adoption of the Treaty of Lisbon, the Charter came into direct effect, and as stipulated by Article 6 of the TEU it became a binding source of primary law in the Union.

The eminence of the Charter can be depicted in several aspects. Firstly, considering that the rights of EU citizens were established at different times, and in different forms, hence the codification of all those rights in one single act represents a great step forward. Moreover, the fact that the Charter has been updated in the light of social changes and progress as well as scientific and technological developments, makes this fundamental rights document even more of a milestone. This reflection over the modern society and technological progress made the Charter include the so-called “third-generation” fundamental rights, such as data protection, guarantees on bioethics, and transparent administration.

Another accomplishment that can be listed is that the Charter unifies in a single text all the civic, political, economic and social rights the citizens of the EU are entitled to. Those rights derive from the fruitful case law of the EU Court of Justice, the rights and freedoms which are enshrined in the European Convention on Human Rights and also other rights and principles deriving from the common constitutional traditions of the EU Member States and other international instruments. The rights and freedoms of the Charter are categorised under six titles: The charter contains rights and freedoms under six titles, being: dignity, freedoms, equality, solidarity, citizens' rights and justice.

This way, the Charter has managed to strengthen and enhance the protection of fundamental rights and has made them way more visible and more explicit for citizens on the one hand and made the Member States and Union itself more accountable and fundamental rights-driven.

FUTURE DIRECTIONS OF THE FUNDAMENTAL RIGHTS IN THE EUROPIAN UNION

It is apparent the long yet successful road fundamental rights compassed since the beginning of the functioning of the EU to today. However, the road is not finished and active challenges remain in this context. As it was previously discussed, one of the novelties brought by the Lisbon Treaty was the obligation of the EU to accede to the ECHR provided for by

Article 6 of the TEU. To fulfil this obligation, negotiations between the ECHR and EU took place and were finalised with a draft accession agreement. The draft agreement designed a strict framework for dialogue between the two courts, while both would be referring to the same common legal heritage. Also, the draft accession agreement proposed for a co-respondent mechanism and for the possibility of “delaying” procedures to allow the Court of Justice to assess the compatibility with the Convention of the EU law if it could not do so before the case reached the European Court of Human Rights. However, after this draft agreement was finalised, it was submitted for opinion to the Court of Justice, whether the agreement complies with the EU law.

The main point analysed by the Court was to outline that the EU is not a state, but an autonomous legal order, with its constitutional framework and founding values. The draft accession agreement could hence threaten the specific characteristics of the EU as well as the primacy of EU law and the direct effect of EU law.

In addition, according to the Court, the draft agreement does not adequately recognise the common values on which the EU is founded and on basis of which the mutual trust among the Member States functions. In *Opinion 2/13*, the Court claimed that in continuity with its case-law, “*the interpretation of fundamental rights should be ensured within the framework of the structure and objectives of the EU*” and it is binding for the institutions, bodies, offices and agencies of the EU and the Member States of the Union when they are implementing EU law.

All in all, the Court ruled that it was incompatible with the EU Treaties. As such, The Opinion is being analysed by the European Commission, which can reopen negotiations based on the principles that have been underlined by the Court. This delicate issue is also subject to debate in other European institutions such as the Council and the European Parliament. Many reactions have been triggered on the academic side likewise, from which some have been very critical whilst others more supportive. The intensive and complex debate does not seem to be done, to the contrary, it proceeds to shape up.

CLOSING REMARKS

This paper aimed to summarize the past, present and future of the fundamental rights in the European Union due to the gradual development of the same. Undoubtedly, it can be said that the field of fundamental rights has evolved more markedly with the evolution of the European

Union – it arose from a constitutionally lenient Community, it was proceeded by institutional and legislative recognition, to culminate in full codification. The paper commenced with a historical reflection on the fundamental rights in the EU from the origin by pointing out that the first treaties of the Union did not contain any provisions concerning fundamental rights. The lack of legal basis made the institution of the Court of Justice carry the responsibility to develop a fundamental rights framework via the jurisprudence which ensured that citizens of the Union would be adequately protected. This gap between the EU and fundamental rights was eventually remedied and from merely a judicial protection of fundamental rights, it was shifted to codification in the Treaties of the EU.

As per the current situation of the fundamental rights framework in the EU, since the Lisbon Treaty was adopted, the fundamental rights have been ensured an important spot in the Treaties as one of the values on which the EU is founded.

Apart from the important role the fundamental rights have within the EU, the Treaties have also opted for a great role of fundamental rights even outside the boundaries since TEU stipulates that the Union's action on the international scene shall be guided by the principles which have inspired its creation, development and enlargement, and which it seeks to advance in the wider world, one of which being the universality and indivisibility of human rights and fundamental freedoms.

An eminent accomplishment of the EU in the field of fundamental rights is the codification of fundamental rights in the Union via the Charter of Fundamental Rights. This Charter apart from unifying in a single document all the civic, political, economic and social rights the citizens of EU are entitled to, has reflected over the modern society and technological progress and included the so-called “third-generation” fundamental rights, such as data protection, guarantees on bioethics, and transparent administration.

Lastly, this paper reflected over the latest developments in this field in the EU and undoubtedly the EU accession to ECHR has utmost attention. This process which has been ongoing for several years now began with negotiations between the EU and ECHR but it ended up with an Opinion of the Court of Justice which concluded that the draft agreement is not in compliance with the EU law. As such, the future of this particular issue together with other matters which may derive from this or in general related to fundamental rights in the EU, remains uncertain yet crucial to attentively follow.

REFERENCES

1. Alasdair Blair, *The European Union since 1945*, Edinburgh, page 3-84, 2010.
2. Consolidated Version of the Treaty on the European Union, OJ C 326, 2012.
3. Diamond Ashiagbor, Nicola Countouris, Ioannis Lianos, *The European Union after the Treaty of Lisbon*, Cambridge, page 78-136, 2012.
4. European Union, *Charter of Fundamental Rights of the European Union*, C83. Vol. 53, 2010.
5. Giuseppe Palmisano, *Making the Charter of Fundamental Rights a Living Instrument*, Amsterdam, page 10-90, 2015.
6. Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as Human Rights Adjudicator?*, Maastricht, page 168-204, 2013.
7. Matte Eilstrup-Sangiovanni & Daniel Verdier, *European integration as a solution to war*, *Television & New Media* 11, no. 1, page 101-111, 2005.
8. Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials*. Oxford: Oxford, page 379-428, 2015.
9. Philip Alston & Olivier De Schutter, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, United Kingdom, page 227-279, 2005.
10. Rainer Arnold, *The Convergence of the Fundamental Rights Protection in Europe*, Amsterdam, page 185-199, 2016.
11. Robert Schutze, *An introduction to European Law*, Cambridge, page 26-70, 2015.
12. Sacha Garben, Inge Govaere, Paul Nemitz, *Critical Reflections on Constitutional Democracy in the European Union and its Member States*, Hart Publishing, page 1-47, 2019.
13. Sonia Morano-Foadi, Stelios Andreadakis, *Protection of Fundamental Rights in Europe: The Challenge of Integration*, Oxford, page 1-21, 2020.
14. Sophie Meunier & Kathleen R. McNamara, *Making History – European Integration and Institutional Change at Fifty*, Oxford, page 1-20, 2007.
15. Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary*, London, page 20-79, 2014.

16. Steven Greer, Rosie Slowe, Janneke Gerards Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges, Cambridge, page 156-201, 2018.
17. Ulrich Becker, European Fundamental Rights and Freedoms. Berlin, page 518-541, 2011.