New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter)

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Summary: This paper deals with issues of the application and interpretation of the Charter of Fundamental Rights of the EU as the first catalogue of human rights at the level of supranational entities. Author describes the the peculiarities of the application of the Charter, especially deals with the most problematic issues like legal status of the Explanations to the Charter, two categories of provisions = rights and principles and distinction between them. The article also focuses on the Protocol on the Application of the Charter of the Fundamental Rights of the EU to Poland and the United Kingdom and explains the reasons for non-accession of the Czech Republic to this instrument.

Keywords: Fundamental Rights, EU Chapter of Fundamental Rights of the EU, Application, Mechanism of the Protection, Protocol No 30

1. Introductory remarks

The Lisbon Treaty brought undoubtedly a number of cardinal changes in the field of human rights regulation at the level of the EU, nevertheless its contribution to this area is burdened by some reservations, clauses of restrictive character, unclear formulations and other facts, which prevents in a certain way the effective enforcement of the individual rights in all cases.

To the specifics of the Lisbon Treaty belongs also the fact, that the Reform Treaty is focusing not only on one mechanism, but accounts with the deepening of human rights regulation in several directions, including the envisaged accession of the EU to the European Convention of Human Rights and Fundamental Freedoms.

Due to the limited space of the contribution, the analysis will be done concerning only one of the mechanisms, which plays the key role in the protection

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of human rights at the level of the EU, particulary on the deepening of the mechanism of the Charter of the Fundamental Rights of the EU.

2. Charter of Fundamental rights of the EU and its character in the intention of Lisbon Treaty

First it must be pointed out that the Lisbon Treaty brought the change, which was expected for a long time, concerning the legal status of the Charter, which ensures its transformation from the merely political declaration into a legally binding document, which **"has the same legal value as the Treaties"**.

Nevertheless, concerning the form in which it was done, sets out the Reform Treaty in another way than in the case of the Constitutional treaty, which had incorporated the Charter into its own text (as part II of the Constitution for Europe). In other words, in the intentions of the Lisbon approach, the Charter is singled out from the text of the Treaty and repeatedly declared as an autonomous act on the 12th of December 2007 and gains its legal binding character due to the reference contained in the article 6 paragraph 1 of the European Union Treaty.

The chosen concept reflects 2 facts:

Firstly, the Charter does not become the integral part of the Foundation Treaties and as such was not the subject of the ratification process in the Member states.[1]

Secondly, despite the fact, that the Charter "has the same legal value as the Treaties", but it was upgraded to the level of the primary law by reference only.[2]

In other words, the authors of this concept tried not only to avoid the obstacles and uncertainty of the ratification process, but also decided **intentionally** to weaken and make different the status of the Charter in comparison with that it had under the Constitutional Treaty.

The chosen concept became the result of the complicated compromise between the states-opponents of the Charter (Great Britain and Ireland) and other Member states, for which the abandoning of the Charter was totally unacceptable.[3]

The mentioned solution, which enabled to remain a binding character of the Charter at the level of the primary law act, however without its incorporation

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[1] For more details, see Syllová, J., Pitrová, L., Paldusová, H. a kol. *Lisabonská smlouva, komentář*. C.H.Beck, Praha 2010. p. 40.

[2] Judgment of the Czech Constitutional Court from 26. 11. 2008, Pl. ÚS 19/08, 446/2008 Sb., point 190

[3] Piris, J.-C. The Lisbon Treaty – A Legal and Political Analysis, Cambridge University Press, Cambridge, 2010, p. 150.

into the framework of the Treaties, was "compensated" by the number of "warrants" which de facto weakened the impacts of this human rights catalogue of the European Union standard.

For understanding of the reasons why the Charter has met so great and long lasting obstacles during the obtaining of its legal binding character, the decisive role play the issues of its material scope. The creators of the Charter were seeking for the widest concept of human rights regulation in the form of one coherent act. That is why the catalogisation was done concerning not only the fundamental rights which create the mere core of human rights (which would be strictly corresponding to the title of this act), but also the economic and social rights, as well as the rights of the fourth generation (including bio-ethical provisions and other so-called modern rights).

This fact, by the way, refutes the wide spread, but not proved opinion, that the Charter does not create any new rights, but only does the catalogisation of those rights, which were already formulated by the Luxembourg Court in the framework of its judicial doctrine of fundamental rights.

In fact, it was not only the mechanical arrangement of the rights already found in the framework of the judicial doctrine of fundamental rights (which was not of course the main intention for the adoption of this act) and undoubtedly the Charter has its own very distinct and considerable "added value" and even great emotional and philosophical dimension as the document not only legal, but the political and ideological as well. It was of great importance for the authors of the Charter to create not only a very modern and pioneering document reflecting the actual scientific and technical progress, but also one containing the basic values of the Union.

So, it can be concluded, that on the contrary to the European Convention, which protects a relatively limited number of rights (the rights of a personal and a political character only), which are supported by a very effective control mechanism of the judicial type, and other rights are protected by means of other instruments (European Social Charter, for instance) with the control mechanism of the soft-law type, the **EU Charter regulates the rights of all four generations, including economic, social and so-called modern rights**.

Such an extensive concept of the human rights bill at the level of the EU has undoubtedly its own positive and negative sides. On one side it creates a coherent catalogue of all the rights of the European Union's standard and is very generous towards the individuals (not only the citizens of the EU). On the other side this extensive concept is very difficult for all Member states to accept, especially if we take into consideration the approach of some countries (first of all Great Britain and Ireland) to the issues of the protection of economic and social rights and the role of the state in guaranteeing them.

So, it can be summarised, that the Charter is shown to **be too ambitious, too broad-minded and too generous document**, which was very simply acceptable as the political declaration but caused great problems as the document legally binding, due to the extremely extensive articulation of rights and the potential burden for the Member states, especially in the economic and social field.

That is why brings the Lisbon Treaty in principle the old text of the Charter, but "dressed in a new coat" which was supplemented by "new accessories" in the form of three kinds of measures in order to weaken its possible effects.

They are**: Explanations, horizontal provisions and Protocol No 30 to the Treaty.**

3. Explanations to the Charter. Differentiation between the rights and principles.

One of the mentioned measures became the incorporation of the so-called **Explanations relating to the Charter**[4] into the text of the Charter itself (art. 52 para 7), as well as into the art 6 of the European Union Treaty. It is an instrument, which was elaborated by a group of experts under the authority of the Presidium of the Second Convention.

Despite the fact, that the Explanations do not have the status of the source of law, nevertheless its incorporation into the text of the Reform Treaty (even two times) rises the question about the reasons of it.

The answer could be found in the fact, that the Explanations once more provided the *expressis verbis* verification of the limited character of the obligations coming from the Charter. But first of all they had done the division of economic and social rights into 2 categories: ***rights*** and ***principles***.

In the case of **rights** speaks the Explanation about the **directly invokable rights** of individuals (for instance art. 23 – Equality between women and men), while the **principles** are considered to be merely the definitions of the objectives to be respected by EU legislature and which can be invoked only in the case they have been implemented through legislation (for example art. 25 – the rights of the elderly).

So private individuals are not able to bring a legal actions to enforce them, and they are judicially recognizable only in the interpretation of such acts when ruling on their legality.

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[4] Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, Official Journal, 14. 12. 2007.

So, it can be stated, that by means of this instrument a very considerable weakening of the impacts of the Charter were reached, although the fact, that it was not done in the form of the direct reduction of the number of rights declared by the Charter. In other words, the introduction of para 5 of art. 52 of the Charter in combination with para 1 art.6 of TEU and the text of Explanations enable to give away in a very elegant and simple form from the group of directly invokable rights a lot of entitlements, which some Member states considered to be as too great burden for them.

Another very important aspect consists in the fact that the weakening of the impacts of the Charter in the field of economic and social rights was realized concerning the territory of the whole Union, on the contrary to Protocol No 30, which relates to some states only.

4. Horizontal provisions of the Charter

The second measure which reduces the effects of this "European Union's Bill of Rights" consists in the introduction of the new so-called horizontal provisions, which prevent from the too extensive interpretation of the Charter.

They are para 4–7 to the art. 52 and the articles 53 and 54 of the Charter, which were added to the text of the original horizontal provisions of the art. 52 para 1–3 and para 5. As there is no place to analyse these provisions in details, it can be summarised briefly, that they are creating other guarantees in the relation to the anticipated burden on the Member states in the mentioned area. Besides this, they have to break up the fears of the Member states, that on the basis of the Charter the further transfer of competences from Member states to the Union would take place in the areas covered by this Bill.[5]

5. Charter and Protocol No 30

5.1. The Reasons and Preconditions for the Creation of Protocol No 30

Nevertheless, even this measure (new horizontal provisions) did not seem to be satisfactory enough for fitting the British attitude to the issues of social and economic rights. Especially, on the side of British businessman grew stronger the awareness from the fact, that art. 28 (Right of collective bargaining and

[5] Piris, J.-C., work cited, p. 158.

action) and art. 30 (Protection in the event of unjustified dismissal) are formulated as the *rights* and not as the *principles*, and their direct applicability thus cannot be excluded. It was the opinion which was expressed in the Report of the European Committee of the House of Lords of the British Parliament, 2007.[6] That is why Great Britain had used the refusal of the Constitutional Treaty as the appropriate opportunity for the revision of its position in this field. Especially during the negotiations on the Lisbon Treaty at the Berlin summit on 21 and 22 of July 2007 Great Britain succeeded in arranging the Protocol on Application of the Charter of the Fundamentals Rights of the EU in Poland and the United Kingdom (now it is Protocol No 30).[7]

The Protocol was at the beginning conceived to be applicable for Great Britain only. But Poland reserved its right to access it.[8] So, Poland did not participate in the negotiations on the Protocol, but accepted only the final text which was arranged by Great Britain, without the possibility to influence its content.[9] On the contrary to the motivations of the United Kingdom, which were connected with the issues of social rights, in the case of Poland they were the issues of public morality, family law, together with the protection of human dignity and adherence to the physical integrity of a person, that cannot be doubted while interpreting the Charter.[10]

5.2. Protocol No 30 and the "Czech saga"

In the case of the Czech Republic a very dramatic development took place. On the 9th of October 2009 the Czech President Václav Klaus declared the exclusion of the questionability of the Benes Decrees on the grounds of the Charter being the condition of his signature of the Ratification act.[11] Concerning the form, in which it would be done, demanded Václav Klaus the reference in the text of the Lisbon Treaty itself, which would lead to the re-opening of the whole ratification process.

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[6] EU Committee, 10th Report of Session 2007–2008, the Lisbon Treaty: An Impact Assessment, Publisher on 13 March 2008.

[7] The Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the EU to Poland and the United Kingdom

[8] Schwarz, J.: Protokol o uplatňování Charty základních práv Evropské unie, Jurisprudence, No 2/2010, p. 17.

[9] Ibid.

[10] Pítrová, L. a kol.: Lisabonská smlouva. Co nového by měla přinést? Kancelář Poslanecké sněmovny Parlamentu ČR, Praha, 2007, p. 12.

[11] For more see Schwarz, J.: Charta základních práv Evropské unie, thesis, Fakulta sociálních věd UK, 2010, p. 107.

In the reaction to this, the Czech Government under the leadership of Jan Fisher in cooperation with Sweden as the Presiding country negotiated at the Brussells meeting of the European Council on the 29th of October 2009 the accession of the Czech Republic to the Protocol No 30 at the moment of the nearest Accession Treaty (in other words, not in the form of the special reference on non-questionability of Benes Decrees in the text of the Lisbon Treaty, which was already ratified by all other Member states).[12]

That is why the European Council agreed with the Czech accession to the Protocol at the moment of the conclusion of the nearest Accession Treaty (it was expected that it would be in the case of Croatia).

Nevertheless, it wasn't done in the envisaged form, even after the accession of Croatia into the Union in June 2013. The reason was that under the opinion of the Legal service of the Council, it is impossible to combine these two issues – the accession to the Union (in the case of Croatia) and the modification of the primary law (in the case of Protocol) due to the different legal basis (art. 49 and art. 48 of the EU Treaty).

That is why the connection between the Protocol and Accession Treaty with Croatia must be understood as the mere temporal synchronisation and the same timing, but not the organic connection of these different documents. The approval of the mentioned documents would to be done separately.

As the European Parliament gives its opinion to the European Council to all Treaty changes proposed, the issue was discussed first by the Committee on Constitutional Affairs of the European Parliament, which issued in February 2013 a very critical report. Besides others it pointed out that:

1) Klaus concerns were absent from the political debate until early 2009 and were not mentioned in submissions to the Czech Constitutional Court in either of its two Lisbon judgments;
2) it is far from certain that the Czech Parliament will ultimately ratify the new Protocol. Ratification of an international treaty which transfers competence in any direction requires a three-fifth majority in both Senate and Chamber of Deputies of the Czech Parliament;
3) two judgments of the Czech Constitutional Court (2008 and 2009) affirm that the Lisbon Treaty is fully in accordance with the Czech Constitution;
4) Pointed out the letter from the President of the Czech trade unions Jaroslav Zavadil to the President of the European Parliament Martin Schultz setting out his objections to the Draft Protocol.

[12] More Králová, J.: K vlivu tzv. britsko-polského protokolu a tzv. český „zásah" k Listině základních práv EU na uplatňování základních práv v těchto státech, Jurisprudence, No 3, 2010, p. 4.

5) At the end it is concluded that: **the Protocol has given rise to legal uncertainty and political confusion. In that respect, it affects adversely all Member states and not just the UK, Poland or, prospectively, the Czech Republic and would therefore undermine the efforts of the EU to reach and maintain a uniformly high level of protection of fundamental rights.**[13]

The Plenary session of the European Parliament in its resolution from 22nd of May 2013 called on the European Council not to examine the proposed amendments of the Treaty. As the resolution is not binding for the European Council, it was expected that the matter would be discussed at a future summit and in case of its approval it would be the subject of the ratification process in all Member states. This development has been interrupted by the recent decision "not to continue in the arrangements of the Protocol", which was adopted on 14th of February 2014 by the new Czech Government under the leadership of Bohuslav Sobotka. It means definite termination of the so-called "Czech saga".

6. A Character of the Protocol and the evaluation of its eventual impacts[14]

After reviewing the reasons for the adoption of the Protocol, the question about the impacts of this instrument is quite justified, especially finding out whether the Charter loses on the grounds of Protocol a part of its territorial scope or not. In other words, does it create an opt-out or rather interpretation instrument?

Despite the fact, that the media often present the Protocol as the opt-out, the representatives of the jurisprudence evaluate it mostly in the other way.[15]

In this respect let us remind, that the opt-outs create the diversion from the contract law in the benefit of a certain state, which is not entirely or partly to be a subject of obligations.[16] For instance, the transitional provisions which are realised in the connection with the enlargement of the EU, which suspended the application of EU law in new Member states. The opt-outs are permissible

[13] Third draft Report on the Draft Protocol on the Application of the Charter of Fundamental Rights of the EU to the Czech Republic, European Parliament, Committee on Contributional Affairs 11. 12. 2012, PR 922077XT. doc, p. 9–11

[14] This part of the contribution gathers from Šišková, N.: Charter of the Fundamental Rights of the EU in the Context of Protocol No. 30 to Lisbon Treaty, Danube: Law and Economics Review, 2011, issue 2, pages 55–61, No. 2, 2011.

[15] Schwartz, work cited, p. 19–20; Králová, work cited, s. 7; Piris, work cited, p. 163.

[16] Schwarz, work cited, p. 17.

only in others, but not in the main fields of the Union law.[17] They are not permissible in those aspects of the Treaties, which are principal. Besides, following the case-law of the Court of Justice of the EU, it is impossible to arrange an opt-out from the fundamentals rights[18], which were recognised as such by the Luxembourg Court in the framework of its doctrine of the general principles of law (the principle of the protection of fundamentals rights creates the integral part of this doctrine). The Protocol thus does not interfere in the judicial protection granted in the case of those rights, which the Court of Justice of the EU already incorporated among the protected rights in the framework of its developed doctrine of fundamentals rights. This fact is also proved by the case-law of the Luxembourg Court, which just before obtaining the binding character of the Charter declares: "Even when the Charter did not have legal force, the right to take collective actions, including the right to strike, has already been recognised by the Court of Justice as fundamental right which forms an integral part of the general principles of the Community law the observance of which the Court ensures."[19]

The fact is that it is not the opt-out, but the interpretation instrument, is also confirmed by the semantical interpretation, because the Protocol is named as "On the Application of the Charter" and does not contain any expressions, which indicate the diversion from the Charter, such as "opt-outs", "non-participation", "non-binding", "non-applicability"[20] etc.

That is why in jurisprudence prevails the opinion, that the Protocol thus in principle changes nothing in the binding character and the unity of the current system of the Union's protection of the fundamental rights in the Member states. It is an additional and unnecessary warrant which guarantees that the Charter does not extend the current possibility to claim the Member states for the infringement of fundamental rights.

Protocol thus will have the importance only in those hypothetical cases when in the framework of the interpretation made by the Court of Justice of the EU the duties of the Member states in the field of human rights would be extended beyond the existing obligations.[21]

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[17] Ibid, p. 19.

[18] Ibid.

[19] Judgment ECJ, 11.12.2007, No C-438/05 "Viking Line" SbSD I-10806, p. 43–44. More also Judgment ECJ, 18. 12. 2007 No C-341/05 "Laval" SbSD 2007, I-11845, p. 90–92. More also Piris, work cited, p. 157, 163.

[20] For more see Schwarz, work cited, p. 19.

[21] For more see Šišková, N.: Charter of the Fundamental Rights of the EU in the Context of Protocol No. 30 to Lisbon Treaty, Danube: Law and Economics Review, 2011, issue 2, pages 55–61, No. 2, 2011.

7. Conclusions

So it can be summarized that the chosen concept towards the Charter consists in the extreme generosity of its content. This fact became not only a brake in its legal binding character which has lasted for almost ten years, but even after obtaining of legal status it still leads to limitations by means of the Explanations and divisions into the rights and principles (without clear differentiation).

These measures together with the Protocol No 30 causes the difficulties in understanding of its provisions not only from the side of the general public, but even from the side of the practical lawyers and the representatives of the jurisprudence as well.

This fact collides with the main aim for the creation of the Charter, which was envisaged to be an instrument, which is clear, understandable and close to the citizens.

That is why the clarification and the simplification of the provision of the Charter, including the surrender of Protocol No 30, reducing of the restrictions given by the horizontal provisions as well as Explanations and the elaboration of its own effective control mechanism will create a great and complicated challenge for the European Union in the field of human rights in future several decades.