

# THE CURRENT STATUS OF THE FULFILLMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS IN THE EUROPEAN UNION

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## Abstract

The events that we are witnessing lately at general international level, but also regional, at European and internal level, cause an acute need to review the fulfillment of the fundamental human rights and freedoms, in the light of the latest and the most modern governing rules, namely the Charter of the Fundamental Rights of the European Union.

**Keywords:** EU Charter on Fundamental Rights, Lisbon treaty, terrorism

Objectively, such a review is mandatory due to the fact that, retrospectively speaking, the Charter of the Fundamental Rights of the European Union faced over time a lot of difficulties in terms of the legislative procedures it was subject to. This happened due to the fact that at the onset of the community/European construction<sup>2</sup>, in the 50s, the decision making bodies took into account the fulfillment of the economic objectives<sup>3</sup>, in particular.

This is why 40 years later, by means of the Treaty of Maastricht (1992/1993), for the first time within the European Communities, at that point in time, a reference was made in the preamble to the principles of freedom, democracy, human rights and fundamental

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<sup>2</sup> The treaties on the establishment of the European Communities do not include any provision on the fundamental rights.

<sup>3</sup> In what concerns the historical developments, see Roxana-Mariana Popescu, *Scurte considerații privind evoluția consacării juridice la nivelul UE a respectării drepturilor fundamentale (Short considerations on the development of the legal consecration of the fundamental rights fulfillment at the EU level)*, Revista Română de Drept European, supplement, 2013, page 153-157.

freedoms observance and the state subject to the rules of law<sup>4</sup>. Important contributions in the field are also achieved by the Amsterdam Treaty (1997/1999), art. F par. (1)<sup>5</sup>, but also by the context given by the Treaty of Nice (2001/2003), respectively by the drafting of the Treaty establishing a Constitution for Europe<sup>6</sup>, a Treaty which failed because it was not ratified by France and the Netherlands.

The most important event in the field was represented by the enforcement of the Treaty of Lisbon, December 1<sup>st</sup>, 2009<sup>7</sup>, when the Charter of the Fundamental Rights of the European Union, after having firstly a declarative nature (following the Treaty of Nice), gained a mandatory legal force, according to art. 6 par. (1) of the Treaty on European Union (TEU): “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 7<sup>th</sup>, 2000, as adopted at Strasbourg, on December 12<sup>th</sup>, 2007, which shall have the same legal value as the Treaties”.

The mandatory nature of the Charter covers both the relationships involving institutions, bodies, offices and agencies of the European Union, and the relationships involving the European Union Member States. It is equally about the adoption of the rules of law of the European Union and about the application of the European Union acquis.

By becoming a reference source of law of the European Union<sup>8</sup>, the Charter is the subject of the annual review within the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, based on a Report of the European Commission. The figures claimed by the Commission itself in its Report for 2014<sup>9</sup> are relevant, meaning that the Charter was claimed/cited in 210 resolutions of the European Union courts of law (the Court of Justice; the Tribunal and the Civil Service Tribunal), an important improvement compared to previous years<sup>10</sup>.

<sup>4</sup> “By confirming their attachment to the principles of freedom, democracy and human rights and fundamental freedoms fulfillment, and of the state subject to the rules of law”.

<sup>5</sup> “The Union is founded on the principles of freedom, democracy and human rights and fundamental freedoms fulfillment, and of the state subject to the rules of law, principles which are shared by the Member States”.

<sup>6</sup> The Charter was found in the second part of the Treaty.

<sup>7</sup> The Treaty of Lisbon granted legal personality to the European Union (art. 47 TEU), this is why the doctrine provides the following: “by admitting explicitly the legal personality of the Union, the Treaty of Lisbon (...) establishes a state of law (by ending, indeed, any ambiguity)” - François-Xavier Priollaud, David Siritzky, *Le traité de Lisbonne, Commentaire, article par article, des nouveaux traités européens (TUE et TFUE)*, Ed. La Documentation française, Paris, 2008, pag. 134.

<sup>8</sup> In this respect see Oana-Mihaela Salomia, *Autonomia Cartei drepturilor fundamentale a Uniunii Europene (The Autonomy of the Charter of fundamental rights of the European Union)* in Dreptul Review, no. 2/2013, page 247-260.

<sup>9</sup> 2014 report on the application of the Charter of fundamental rights of the EU, Brussels, 8.5.2015, COM(2015) 191 final.

<sup>10</sup> In 2011 – in 43 cases; in 2012 – in 87 cases and in 2013 – in 114 cases.

Furthermore, when assumed the mandate, the president of the Commission, Jean-Claude Juncker, referred specifically to this field: “...I intend to make use of the powers of the Commission in order to promote, within our field of competence, our shared values, the state subject to the rules of law and the fundamental rights, by taking into account at the same time the diversity of the constitutional and cultural traditions of the 28 Member States”<sup>11</sup>.

By means of its content, the Charter is the subject of integration in all the European Union policies in the performance of which the executive power has a critical role, both in the relations with the member states, and in the relations in which the Union takes part with other international law subjects.

Being a real Catalog of human rights<sup>12</sup>, the Charter includes, in 6 chapters 54 articles on the following: dignity; freedom; equality; solidarity; citizens' rights and justice (the 6 chapters are supplemented by the preamble and by the 7<sup>th</sup> chapter on the general provisions which regulates the construction and the application of the Charter).

In order to have an overview on the current status of the fulfillment of the fundamental human rights and freedoms in the European Union, in reference to the Charter, in terms of evolution, we will review the Reports of the European Commission<sup>13</sup> for 2014 and 2015.

The report for 2014 includes in the introduction (item 2) references on the *application of the Charter of the Fundamental Rights of EU* in several fields, such as: legislative activity; the management of the EU funds and human rights dimension in the EU external actions.

In what concerns the *legislative activity*, the Commission claimed as example, case *Digital Rights Ireland*<sup>14</sup>, for the need to “check the fulfillment of the fundamental rights within the legislative projects”. Basically, we could refer here to the stages taken under the ordinary legislative procedure and of the special procedures, stages where we meet, as participants, the institutions of the European Union. The Court of Justice of Luxemburg has interfered by making invalid the Data Retention Directive<sup>15</sup>, due to the fact that

<sup>11</sup> *Orientările politice pentru viitoarea Comisie Europeană (Political guidelines for the future European Commission)*, Strasbourg, July 15<sup>th</sup>, 2014, Jean-Claude Juncker, [http://ec.europa.eu/priorities/sites/beta-political/files/pg\\_ro.pdf](http://ec.europa.eu/priorities/sites/beta-political/files/pg_ro.pdf), page 9

<sup>12</sup> Vassilios Skouris (the president of the Court of Justice of Luxemburg), during the lecture delivered to the 4<sup>th</sup> year students of the Faculty of Law of the University of Bucharest, November 2004, a lecture in which he participated together with the course coordinator – the author of this article. For further details, see Augustin Fuerea, *Manualul Uniunii Europene*, edition VI, reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2016, page 93 and the following.

<sup>13</sup> Presented in 2015 and 2016

<sup>14</sup> The European Union Court of Justice, resolution of April 8<sup>th</sup>, 2014, *Digital Rights Ireland and Kaertner Landesregierung*, C-293/12 and C-594/12, ECLI:EU:C:2014:238.

<sup>15</sup> Directive 2006/24/EC of the European Parliament and of the Council of March 15<sup>th</sup>, 2006 on the retention of the data generated or processed in connection with the provision of electronic

privacy and the protection of personal data are not guaranteed. This resolution of the court of law of Luxemburg being extremely important for all the entities of the European Union which take part in the legislative process, on December 2014 the Council updated its “Guidelines on the methodological measures that had to be taken in order to check the compatibility with the fundamental rights at the level of the preparatory bodies of the Council”<sup>16</sup>, thus gaining a practical nature.

By presenting *The management of the EU funds* (item 2.2. of the Report), the Commission of the European Union states that in this field “the institutions, bodies, offices and agencies of the European Union are also bound to observe the fundamental rights provided by the Charter. The European Union Member States have the same obligation when they implement the law of the Union”. As an example, case *Liivimaa Lihaveis MTU*<sup>17</sup> is claimed, the Court confirming the previous case law according to which “the implementation of the law of the Union [...] entails the existence of a certain level connection, which exceeds the proximity of the aforementioned legal subject areas or the indirect effects they have on each other”<sup>18</sup>.

*Human rights dimension in the European Union external actions* is assessed in terms of the governing rules provided for by art. 21 TEU. The contribution of the European External Action Service and of the Commission in assessing the Action Plan on human rights and democracy (2012-2014) is brought into discussion, as well as for the substantiation of the action plan for the term 2015-2019, a plan which aims “the assurance of the coherence between the internal and external policies on human rights, particularly in what concerns the fights against terrorism, migration and movement and trade”. As case law, in what concerns this field, case *Yusef*<sup>19</sup>, but also case *Kadi*<sup>20</sup> are used.

A distinct item of the Report is represented by the *application of the Charter by the Member States and the modality the Charter is applicable to such states* (item 3). In this

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communications services accessible to the public or of public communication networks services and on the amendment of Directive 2002/58/EC, published in the Official Journal of the European Union L 105, 13.4.2006.

<sup>16</sup> General Secretary of the Council, ST 5377 2015 INIT (*Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies*), <http://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf>

<sup>17</sup> The European Union Court of Justice, resolution of September 12<sup>th</sup>, 2014, *Liivimaa Lihaveis MTI*, C-562/12, ECLI:EU:C:2014:2229.

<sup>18</sup> The European Union Court of Justice, resolution of May 29<sup>th</sup>, 1997, *Kremzow*, C-299/95, ECLI:EU:C:1997:254, pct. 16.

<sup>19</sup> The European Union Court of Justice, resolution of March 21<sup>st</sup>, 2014, *Hani El Sayyed Elsebai Yusef c. the European Commission*, T-306/10, ECLI:EU:T:2014:141.

<sup>20</sup> The European Union Court of Justice, resolution of July 18<sup>th</sup>, 2013, *the Commission and others c./Kadi* (Kadi II), C-584/10 P, ECLI:EU:C:2013:518, second appeal against the resolution ruled in case *Kadi c./Commission* (Kadi I), T-85/09, ECLI:EU:T:2010:418.

case, *the role of the procedures for the ascertainment of the Member States infringements* is also emphasized in the document of the Commission. Compared to 5 procedures where references were made to the Charter in 2013, in 2014 their number increased to 11. Out of the 11 procedures, 5 refer to asylum and migration, 5 to the Visa Code and the appeal against the decision to reject a visa request and one to the segregation of gypsy children in school.

*The guidelines made available by the European Union Court of Justice to the Member States by means of the preliminary resolutions* concern the following: human dignity of asylum seekers; the equality of arms in the field of consumer protection and “*ne bis in idem*” principle in the Convention for the implementation of Schengen Agreement.

*The national case law referring to the Charter and the Charter awareness raising actions* represent another two issues contemplated by the Commission's Report.

The issues on the European Convention on human rights (pct. 4) have a special relevance. Therefore, on December 18<sup>th</sup>, 2014, the European Union Court of Justice issued an opinion on the draft agreement on the European Union accession to the Convention, by identifying a series of issues on the compatibility of the draft agreement with the European Union law (i.e.: art. 6 par. (2) TEU and related Protocol no. 8).

The training of legal practitioners “on the Charter and on notifications on the application of the Charter represent priorities in the proposal request within Program “Fundamental rights and Citizenship”. Following the proposals request of 2013, about EUR 2.8 millions (25 % of the total budget) were allocated for projects in this field; in 2012, out of EUR 20,9 millions, EUR 1.9 millions (7 % of the total budget) were allocated. Within the financial perspective for 2014-2020, the training on the Charter intended for the judicial authorities and the legal practitioners shall be financed by means of program “Justice” (2014-2020). Furthermore, the training and awareness raising shall be supported within program “Rights, equality and citizenship” (2014-2020), which is focused on the individual rights”<sup>21</sup>.

In May 2016, the European Commission published the *2015 Report on the application of the Charter of fundamental rights of the EU*<sup>22</sup>. The main section of the report is represented by *The Annual Colloquium of 2015 on Fundamental Rights*, where subject “Tolerance and respect: prevention and fighting against anti-Semitism and islamophobia in Europe” was discussed.

In item 2.2. of the Report for 2015, called *The integration of the Charter in legislative and policy actions*, the Commission reiterates that “the EU institutions are bound to observe the Charter in all their actions” and recalls that “this conformity is reviewed by the

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<sup>21</sup> 2014 Report on the application of the Charter of fundamental rights of EU, footnote 43, page 12.

<sup>22</sup> Brussels, 19.5.2016 COM(2016) 265 final.

European Union Court of Justice”. The following developments are highlighted among the developments recorded at European Union institutions level in what concerns the observance of the Charter: the Commission continues to ensure the systematic checks on its legislation and policies conformity; the draw up of certain legislative projects for the promotion of the fundamental rights; the data protection reforms package, agreed by the Parliament and by the Council (the package consists of a general regulation on data protection and a directive on data protection intended for police and judiciary authorities); the approval of the Parliament and of the Council on the Directives on the presumption of innocence and the right to be present at trial,<sup>23</sup> respectively the special guarantees for the children involved in a criminal procedure<sup>24</sup> etc.

In what concerns the *Integration of the Charter in the international agreements and the assurance of the coherence in the filed of human rights*, the Report highlights the following: the action plan of the EU on human rights and democracy (2015-2019)<sup>25</sup>, which consists of more than 100 measures on human rights and democracy, presented in 34 items; the strategy of the Commission of October 2015 - “Trade for all”<sup>26</sup>, which establishes a series of measures intended to ensure that the fundamental rights are fulfilled within the European Union and the states outside the Union, and also the completion of the negotiations on “EU - USA Draft Agreement on data protection”.

The Court of Justice is the one that exercised the *control on the European Union institutions*. In this respect, the Report includes the reference to the resolution ruled in case *Schrems*<sup>27</sup>, whereby the Court of Luxemburg declared invalid the Decision of the Commission on the safe harbor<sup>28</sup>.

In what concerns the *European Convention on Human Rights* (item 2.5 of the Report), the Commission maintains its engagement on the accession of the European Union to the Convention, emphasizing that “the accession shall contribute to the consolidation of

<sup>23</sup> Proposal for a Directive on the consolidation of certain aspects of the presumption of innocence and of the right to be present at trial within the criminal procedures, COM(2013) 821 final, 27.11.2013

<sup>24</sup> Proposal for a Directive on the procedural guarantees for children suspected or charged within the criminal procedures, COM(2013) 822 final, 27.11.2013.

<sup>25</sup> *The conclusions of the Council on the action plan on human rights and democracy 2015-2019*, as they were adopted by the Council on July 20<sup>th</sup>, 2015 (<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/ro/pdf>).

<sup>26</sup> *Trade for all — “Towards a more responsible trade and investment policy”*, 14.10.2015, COM(2015) 497 final

<sup>27</sup> The European Union Court of Justice, resolution of October 6<sup>th</sup>, 2015, *Maximillian Schrems c./ Data Protection Commissioner*, C-362/14, ECLI:EU:C:2015:650.

<sup>28</sup> Decision 2000/520/EC of July 26<sup>th</sup>, 2000 of the Commission based on Directive 95/46/EC on the on the adequacy of the protection provided by the principles of “safe harbor” on privacy and frequent asked questions, published by the USA Department of Commerce, published in the European Union Official Journal L 215, 25.8.2000.

the fundamental values, to the improvement of the efficiency of the European Union legislation and to the increase of the coherence of fundamental rights protection in Europe. The opinion of the Court of Justice of December 2014, whereby the Tribunal declared that the accession draft agreement issued in 2013 is incompatible with the treaties and has raised complex issues from the legal and political point of view. Following a period of reflection, when the Commission examined the best way to follow, the Commission, in its capacity of negotiator of the European Union, is currently engaged in the process of consultation together with the Committee especially designated by the Council on different concrete solutions for problems raised in what concerns the opinion of the Court of Justice<sup>29</sup>.

In what concerns the *application of the Charter in the European Union by the Member States* (item 3), the Report provides, among others: “as the Charter is applicable to member states only when they apply the legislation of the Union, the procedures for the ascertainment of the infringements in what concerns the Charter can be started only if a sufficient connection was established with the Union law, likely to trigger the applicability of the Charter. An example of 2015, on the relevant procedures or the ascertainment of the infringements, refers to the assurance of the right to a fair trial within the implementation of the Directive on asylum procedures<sup>30</sup>”.

An important place in the economy of this report is taken by the *guidelines that the Court of Justice makes available to the states*, but also to the *national case-law which refers to the Charter*. In what concerns the first issue (the guidelines made available by the Court), two cases are detailed, namely: *Chez Razpredelenie*<sup>31</sup> (which contemplates the discrimination of gypsies) and *Léger*<sup>32</sup> (the Court reviewed a decree issued by the French state whereby blood donation by men who had have sex relationships with other men was contraindicated). In 2015, the Agency for Fundamental Rights<sup>33</sup> found that the national courts continued to resort to the Charter for guidance and inspiration, even in the cases which did not fall under the scope of the Union law.

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<sup>29</sup> *2015 Report on the application of the Charter of fundamental rights of the EU, pre-cited*, page 9.

<sup>30</sup> *Idem*, page 10.

<sup>31</sup> The European Union Court of Justice, resolution of July 16<sup>th</sup>, 2015, *CHEZ Razpredelenie Bulgaria AD c./ Komisija za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480.

<sup>32</sup> The European Union Court of Justice, resolution of *Geoffrey Léger c./ Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, C-528/13, ECLI:EU:C:2015:288.

<sup>33</sup> The Report on *fundamental rights of 2016. FRA opinions* ([http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-fundamental-rights-report-2016-opinions\\_ro.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-opinions_ro.pdf)).

All the above are irrefutable arguments on the current status of the process of monitoring the modality the fundamental rights and freedoms are fulfilled within the European Union, especially in the context provided by the developments recorded internally (of the Member States), at the European Union level, but also within the international, universal society.

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