



APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN CONSTITUTIONALITY REVIEW

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Abstract: *Charter of Fundamental Rights is a summary document from the constitutional traditions common to the Member States, the international commitments of the state and the practice of the European Court of Justice in the field of human rights, by selecting the essential ideas and the maximum generalization, and by that the general principles of European law. In principle the EU Charter of Fundamental Rights, is applicable in the constitutionality review as it provides guarantees and develop constitutional provisions regarding fundamental rights. Regarding the Member States, the Court of Justice in Luxembourg follows that they are obliged to respect fundamental human rights as defined in the EU if they are implementing Union law. Invoking the provisions of the Charter in the constitutional review in Romania must be done in relation to Article 148 of the Constitution and not in relation to Article 20 of the Constitution which refer to international human rights treaties. The main objective of the paper is to analyze the manner in which the provisions of the European Union Charter of Fundamental Rights are applied to the Romanian national legal framework in direct connection with the constitutionality review*

Keywords: *European Union, human rights, constitutionality review*

1. INTRODUCTION

Human rights, in all their plenitude, represent a central mission of many modern constitutions, occupying an important place within the European constitutional system.

Ever since its adoption, the Charter of fundamental rights of the European Union had as a central mission the solving of problems such as ensuring a more active role of the European Union in the world, as human rights defender, fact which committed the European Union as a unitary entity. It aimed to codify the existing fundamental rights and not to create new ones. It brings together, in a single document, the entire area of civil, political, economic and social rights, which are systematized in a new, original manner.

The role of the Charter of fundamental rights is to make it a synthesis document from the common constitutional traditions of the member states, from the international commitments undertaken by the states, namely the European Convention for the protection of human rights and fundamental liberties, and from the practice of the European Court of Justice in the field of human rights, selecting the essential ideas, of maximum generalization, in other words the general principles of European law (Popescu, 2013).

The Charter collects in a single document, for the first time in the history of Europe, the entire area of the civil, political, economic and social rights, which are systematized in a new, original manner: Title I Dignity – includes human dignity, the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labor; Title II Freedoms – includes the right to liberty and security, respect of the private and family life, the protection of personal data, the right to marry and the right to found a family, the right to education, the right to engage in work, the right to property, the right to asylum, the protection in the event of removal, expulsion or extradition, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, freedom to choose and occupation and the freedom to conduct a business; Title III Equality – contains provisions regarding the equality of rights, non-discrimination, cultural, religious and linguistic diversity, the rights of the child, equality between women and men, the rights of the elderly, integration of persons with disabilities; Title IV Solidarity – contains the workers' right to information and consultation within the undertaking, the right to collective bargaining and action, the right of access to placement services, the right to protection in the event of unjustified dismissal, the right to fair and just working conditions, the prohibition of child labor and the protection of young people at work, the family and professional life, social

security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection; Title V Citizens' rights - contains articles that establish the right to vote and to stand as candidate to the European Parliament, in the local elections, the right to good administration, the right of access to documents, the right to notify the European Ombudsman, the right to petition, freedom of movement and of residence, diplomatic and consular protection; Title VI Justice – establishes the right to an effective remedy, the presumption of innocence and the right of defense, the principles of legality and proportionality of criminal offences and penalties, the right not be tried and punished twice for the same criminal offence; Title VII General provisions – contains provisions regarding the scope, field and interpretation of the rights and principles, the level of protection and the prohibition of abuse of rights.

The Charter Preamble mentions that the Union is founded on the indivisible and universal values of human dignity, freedom, equality and solidarity (Busoi, 201).

2. THE RESEARCH

By placing the principles of the state of law and of democracy as the fundament of the European Union, the Charter understands to place the person at the core of the Union action, by establishing a European citizenship and by creating a space of liberty, security and justice. Thus, the Union contributes to the preservation and development of those common values and understands to consolidate the issue of fundamental rights, offering them increased visibility.

In what concerns the application field, article 51 of the Charter states: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiary and to the Member States only when they are implementing Union law”.

Generally, human rights cannot be considered as being absolute because this depends on the credibility of the protection system. Limitations are inevitable, without them their effective character would suffer. Human rights may be restricted in order to guarantee the general interest. These limitations are expressly indicated for each constitutional right.

Article 52 indicates: “Any limitation (...) must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”(Duculescu, 2001).

In what concerns the level of protection, article 53 of the Charter established that "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective field of application, by Union law and international law and by internal agreements to which the Union, the Community or all Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"(Duculescu, 2001).

Article 54 established the prohibition of the abuse of right. "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein"(Duculescu, 2001).

Human rights protection is a central mission of the European Constitution, document in which human rights are given the statute of fundament. The European Union did not reserve a place for human rights, but developed three catalogues of rights. The declaration of unwritten rights is derived from the Union's general principles. The Charter of fundamental rights adds a written catalogue of rights for the Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms offered an external declaration of rights(Schutze, 2013).

The relationship between the Charter, the Treaties and the European Convention for Human Rights is specifically regulated by article 52. In paragraph 2 is indicated: "Rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties". In paragraph 3 it is mentioned that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. These provisions shall not prevent Union law providing more extensive protection"(Busoi, 2010).

If at the moment of its proclaiming in 2000 the Charter did not have a binding legal force, its statute being similar to that of the European Convention for the Protection of Human Rights and Fundamental Freedoms, through the Treaty of Lisbon it gained the same legal value as that of the Treaties.

Article 6.1 of the Treaty on the European Union shows that “the Union recognizes the rights, liberties and principles listed in the Charter of fundamental rights, which have the same legal value as the Treaties”⁴.

Assigning the Charter the same legal value as that of the Treaties, it becomes primary, origin law of the Union, having the same constitutional value as the Treaties. The Constitutional Treaty was distinctive from the European treaties, mainly by the fact that it contained, embedded in its body, the catalogue of fundamental rights. This was one of the main elements which allowed the consideration of the treaty’s material nature of a constitution. The Treaty of Lisbon returns to the logic of the traditional treaties, by not including in its body the Charter of Fundamental Rights, even though it preserves the legal compulsoriness. Through the Treaty of Lisbon both the Charter and the legal compulsoriness are saved(Luzarraga, Lorente, 2011).

Even though it exists in the content of the Treaty of Lisbon only in the form of an article referring to its text and its dispositions, the Charter directly contributes to the consolidation of the European Union’s policy in the matter of the protection of fundamental rights (Popescu, 2013).

The existence and compulsoriness of a catalogue of rights brings visibility to the European commitment to the fundamental rights and to their legal security, at the same time offering increased protection to the European citizens, by regulating new rights, not included in the international legislations(Luzarraga, Lorente, 2011).

The Charter represents a point of support, its integration in the Treaty of Lisbon guaranteeing the full and unlimited recognition of the fundamental rights comprised within. It presupposes in addition an important contribution to the European identity because it makes visible the shared values of the European project. The Charter gains major importance in the evolution of the European Union, having an increasingly significant impact on all institutions, including on the European courts, and which referred to it on more and more occasions.

It interferes in the central sphere of Member State responsibility when we talk about recognizing the right to social assistance or to housing, to the providing of decent conditions for the elderly and for other unfortunate social categories.

The document represents the most current declaration regarding fundamental rights in the world, promoting human dignity, clarifying the rights of the European citizens, emphasizing the principles of the European Union, presenting the Union’s legal bases and

⁴ Tratatul de la Lisabona pe înțelesul tuturor, on-line, http://www.euractiv.ro/uniunea-europeana/articles%7CdisplayArticle/articleID_14154/tratatul-de-la-lisabona-pe-intelesul-tuturor.html

guaranteeing the observance of the fundamental rights by all European institutions. As a consequence, European citizenship is consolidated and gains more coherence, which derives from the recognition of rights, from the equality of citizens and their non-discrimination, from the functioning of the European Union on the principle of representative democracy, but also from ensuring dialogue between the European institutions and the citizens.

The Treaty of Lisbon allowed the transformation of the Charter from a document with a moral value into one with a legal value and the fact that it is no longer part of a complicated treaty makes the fundamental rights contained within to be better known by the European citizen (Popescu, 2013).

The Treaty of Lisbon takes without changes the disposition of the Constitutional treaty, which assigned to the Union the competence to accede to the European Convention of Human Rights. The accession will not be easy, since there are already several problems related to the possibility that the European Union would be part of the Council of Europe.

This treaty represents a step forward in what concerns the democratization of the union's structure, by improving the protection and guaranteeing of the fundamental rights. All this progress was possible due to the establishment of a compulsory value of the Charter and by means of clauses allowing the accession of the European Union to the European Convention of Human Rights.

At present, one of the most interesting debates, both from the jurisprudence and from the doctrine point of view, targets the cooperation mechanisms between the Court of Justice of the European Union and the constitutional tribunals of the Member States.

The application by the Court of Justice of the European Union of the Charter of Fundamental Rights of the European Union represents an additional guarantee to the benefit of the European citizens, but may lead to the limitation of the effects of the decisions taken by the constitutional tribunals, through the effects of European law.

With respect to this subject there are several opinions, one arguing the supremacy of constitutions, including in relation to the law of the European Union, even though it accepts the principle of priority in the application of the latter, and another opinion supporting the unconditional priority application of all dispositions of the European Union law, in relation to all domestic law regulations, including the national constitutions.

The Constitutional Court of Romania considers that it is neither a positive lawmaker, nor a competent court of law, to interpret and apply European law in the litigations pertaining to the fundamental rights of citizens.

The use of a European law regulation within the constitutionality control implies, on the grounds of article 148, paragraphs 2 and 4 of the Romanian Constitution, a cumulative conditionality:

- On the one hand, this regulation must be sufficiently clear, precise and non-equivocal in itself or its meaning must have been established clearly, precisely and without doubt by the Court of Justice of the European Union, and
- On the other hand, the regulation must relate to a certain level of constitutional relevance, such as its normative content to support the possible infringement by the national law of the Constitution, the single direct reference regulation within the constitutionality control⁵.

From the jurisprudence of the Court of Justice in Luxembourg it is derived that all European Union Member States must observe the fundamental rights of the person defined within the Union, if they apply Union law⁶.

In what concerns the invocation of the provisions comprised in the Charter of Fundamental Rights of the European Union, in the constitutionality control, they are applicable to the extent to which they ensure, guarantee and develop the constitutional provisions in the matter of fundamental rights, in other words, to the extent to which the level of the right to protection is at least at the level of the constitutional regulations in the field of human rights⁷.

What happens in the situation when a Member State applies European law, observes the European standard, but breaches the higher national standard? The problem is solved by article 53 of the Charter, which states that a higher national standard in the field of human rights will not be subjected to the priority of a lower European standard. In this sense ruled also the Constitutional Court of Romania, on several occasions.

As long as a higher national fundamental right clashes with a different European right, the higher national standard is accepted. The general rules governing the relation between the Charter and the Member States are restricted for Poland and the United Kingdom of Great Britain and Northern Ireland. The protocol imposes, explicitly, that the Charter application and interpretation are executed by the courts of Poland and the United Kingdom.

⁵ Decision no. 688 of 18 May 2011 of the Constitutional Court, published in the Official Gazette no. 487 of 8 July 2011;

⁶ Decision of 24 March 1994, given in the matter C-2/92, The Queen and Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock, paragraph 16;

⁷ Decision no. 1479 / 8 November 2011, published in the Official Gazette no. 59 of 25 January 2012;

Within the constitutionality control, the referring to the provisions of the Charter of Fundamental Rights, act having the same legal force as the European Union constitutive Treaties, must be done in relation to the dispositions of article 148 of the Romanian Constitution, not to those comprised in article 20 of the fundamental law, which refers to international treaties.⁸

The Constitutional Court of Romania was notified by the Bucharest Tribunal, Section V Civil, regarding the unconstitutionality exception of article 1, point 1¹, and of article 299, point 1¹, of the Civil Procedure Code, exception invoked by a party in a file pending before this court.

The Constitutional Court allowed the unconstitutionality exception invoked in the file, indicating that, in what concerns the regulation of the challenge (contestation) possibilities against court decisions, the lawmaker has exclusive competence to institute, in particular situations, special procedural rules, as well as special manners of exercising the process rights, the significance of the free access to justice not being that of access, in all cases, to all court structures and to all manners of challenge. It was also indicated that the lawmaker is bound to observe the reference constitutional regulations and principles and the possible limitations brought to the conditions of exercising the challenge possibilities must not infringe on the right in its substance.

In this matter, the Court established that, through the dispositions of article 1, point 1 and point 28 of Law no. 202/2010, any challenge possibility against the decisions given by judges on the base matter was eliminated for cases whose object is the obligation to pay an amount of money of up to 2000 lei inclusively, which is equivalent to the impossibility of a judicial control court to examine the matter in a higher jurisdiction rank.

Thus, the Court establishes that the elimination of the judicial control over the decision given by the first court in matters and petitions regarding liabilities having as objects amount of money of up to 2000 lei inclusively, infringes on the constitutional principle regarding equality before the law, as regulated by article 16 of the Constitution.

In what concerns the invoking of article 47 – the right to an efficient challenge possibility and to a fair trial – comprised in the Charter of Fundamental Rights of the European Union, the Court establishes that the relating to these provisions comprised in a document having the same legal force as the European Union constitutive Treaties must be

⁸ Decision no. 967 20 November 2012 of the Constitutional Court, published in the Official Gazette no. 853 of 18 December 2012;

made to the dispositions of article 148 of the Constitution and not to those included in article 20 of the fundamental law.

With respect to this unconstitutionality criticism, the Court indicates that the provisions of the Charter of Fundamental Rights of the European Union are applicable in the constitutionality control to the extent to which they provide, guarantee and develop the constitutional provisions in the matter of fundamental rights. Or, in the conditions in which the provisions of article 47 of the Charter refer, among other things, to the person's possibility to address a court of law, in examining a complaint grounded on the breaching of rights and liberties guaranteed by the Union law, the Court establishes that in the present matter the criticized legal texts do not contravene these European dispositions, analyzed through the viewpoint of the dispositions of article 148 of the Constitution.

In a different matter, the Constitutional Court was notified with the unconstitutionality exception of the dispositions of article 86, paragraph 6, of Law no. 85/2006, in the sense that the criticized legal dispositions are unconstitutional because they remove, in case of the employer in insolvency, the employees' right to consultation and information when collective dismissals are performed, right generally recognized to the employees and regulated by article 69 of the Labour Code, instituting a derogation with respect to the prior notice term which must be respected in this situation.

Examining the exception, the Court proceeded to analyze and configure the fundamental rights invoked in the matter, according to the reference European and international regulations, thus proceeding, on a jurisprudential way, to the constitutionalization of the labour social protection measures regulated by international treaties.

Indicating with respect to the applicability of the Charter of Fundamental Rights of the European Union in the constitutionality control, the Court reiterated its jurisprudence in the sense that it is a document distinct, as legal nature, from the other international treaties to which article 20 of the Constitution refers, such as the constitutional text relating to it is article 148 of the Constitution and, in principle, its dispositions are applicable in the constitutionality control to the extent to which they provide, guarantee and develop the constitutional provisions in the matter of fundamental rights, in other words, to the extent to which their level of protection is at least at the level of the constitutional regulations in the field of human rights.

3. CONCLUSION

The conclusion rendered by the Court in this matter was that there is no reason to estrange from this jurisprudence and to apply it *mutatis mutandis* also in what concerns the exigencies derived both from the constitutive Treaties of the European Union and from its secondary acts, namely the directives⁹.

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⁹ Decision no.64 of 24 February 2015 of the Constitutional Court, published in the Official Gazette no. 28 of 28 April 2015