The Charter of Fundamental Rights of the European Union: a tool to enhance and protect the rule of law?

NB This is an intervention during the Conference “The Shield of Europe: The European Charter of fundamental rights”, European Parliament Brussels 13.01.2016

(Original Italian – Provisional translation in English by Alfonsina CICCARELLI – FREE Group trainee)

1. Fifteen years after the proclamation in Nice of the European Charter of Fundamental Rights and six years after its transformation in a text of EU primary law, it could be now the right time to evaluate its impact assessment on the European legal order (covering both the EU institutions and the Member States when acting under the EU Treaties) in order to assess where critical tensions emerge or where still are unfulfilled opportunities.

First and foremost this could be the case of the Charter as instrument to implement the principle of rule of law, which today is under strain both at supranational level (see the lack of transparency and democracy in the EU economic governance) and at national level as it has appeared also recently in the Hungarian and Polish cases, which have rightly raised the attention of the European Commission and of the media. [2]

Despite these strains, which we will further discuss thereafter, We have to recognise that the Charter Project itself, is, to date, the most significant attempt to upgrade the integration process in the European Union (until now mainly in the sphere of economy) in order to achieve a deep connection between the European Institutions and European citizens through the constitutionalisation of their rights.

Thanks to the Charter and to the new complementary rules in the Treaties Now the European Institutions as well as the national governments when acting in the EU framework should be accountable, should debate in public and grant the direct participation of EU Citizens at least when their action has an impact on fundamental rights. The mere fact that now at supranational level the legitimacy of public action could derive from the protection of fundamental rights as well as from the legitimation deriving from delegations procedures (parliamentary) of political will as it happens in modern democratic legislatures could be a basis to overcome the current weaknesses of the EU action.

That having been said We should not forget that the Charter was first conceived in the 2000 Convention as a “Bill of rights”, that even if outside the Treaties could operate in the judicial area rather than in the politic area. But even in this ancillary position the Charter has gradually triggered the establishment of an
integrated judicial system. Now, more and more national judges work directly under the control of the Court of Justice of the European Union as guarantor of European law through principles envisaged by years in the European legal order which even if independent from national systems complement them with the principle of direct effect of European law, the principle of primacy of EU law, the duty of conform interpretation of EU law and if in specific cases disapplying of national rules, the access to preliminary ruling.

On the latter aspect of preliminary ruling, it appears that the Court of justice want to review the national judgements which do not comply with supranational law, (by even sanctioning non-complying national judges..) and is even creating “temporary remedies” to protect the life of the defendant pending the judgement, all measures clearly aimed to force the rebel or recalcitrant national judges to bide with the EU law.

These are extremely powerful and consolidated tools to strengthen the overall consistency of the EU jurisprudence: then, we can see how wisely the success of the Charter is now arising by the fact that it is in the tool box daily used by the national judge when acting as European judge.

Well, in my opinion, and also in the light of the Simitis Report of 1999[3] which settled the institutional base of the codification process, four should had been the main institutional objectives of Charter.

The first two objectives were to offer visibility and legal certainty to fundamental rights, because until the Charter proclamation they were only protected on a case by case basis by the Court of justice.

The third principle was to make these rights autonomous from the judges (of Luxembourg Court) so that they can be no more accused of creating instead of applying the EU law. In this perspective the Charter as a real “Bill of rights” has become the parameter of substantive legitimacy of the European Law (constitutional review) and thus of national legal systems entering in relation with it.

Fourthly, and finally, the Charter was intended to give an autonomous legal ground for social rights which are now equivalent to first and second generations of fundamental rights, and which are no more ancillary to the pursuit of the mainly economic integration process (as confirmed by the former Court of Justice jurisprudence).

Thanks also to the contribution of the legal doctrine a cross fertilizing effect [4] has progressively emerged because the Charter was able to operate as a catalyst and as triggering factor of the convergence between internal and supranational constitutional horizons by so going far beyond the limits of predetermined competences and by creating a possible ground for “failing to act” judgements by the main European Courts.

As in the Jurgen Habermas vision the Charter could then make easier the emergence of an European citizenship, which by acting to preserve its rights, would develop a public dimension sphere at continental level, which will be the basis of a subsequent constitutional development.

2. As far as the visibility of fundamental rights is at stake, the outcome of the first six years since the entry into force of the Charter is under our eyes.
By making more than 500 explicit references to the EU Charter in its rulings the CJUE has showed that, indeed, the Charter has become an essential element of the “bloc de constitutionnalite” with which any EU related act should comply.

However, problems could emerge when looking at the two other elements justifying the codification of fundamental rights by the Charter such as the principle of legal certainty and the self standing status of the Charter itself. These problems arise probably from the art. 51 of the Charter which is linked to the art.6 of the TEU and which defines the scope of application of the Charter with a clear impact on the implementation of the principle of conferral and on the repartition of competence at European and national level.

When the EU competence is undisputed the Court of justice has already shown in several occasions that the Charter can well play its role of parameter of constitutionality of EU Law. This has been notably the case:

1. a) with the judgement of 2011 C-236/09 – Association Belge des Consommateurs Test-Achats which partially invalidated the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services because of the violation of art. Articles 21 and 23 of the Charter which state, “respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas”;
2. b) with the two historical rulings “Kadi” where the Court while respecting the UNSC role to preserve peace at international level considered, first in Kadi I that that the primacy of international agreements on secondary law could not be extended “..to primary law, in particular to the general principles of which fundamental rights form part” and secondly, in KADI II where by making explicit reference to art.41 and 47 of the Charter (respectively access to his own file and right to a fair trial) confirmed the annulment of the relevant EU regulation [5]
3. c) with the triptych of 2014-2015 rulings dealing with privacy and data protection (61) as protected by art 7 and 8 of the Charter. It is worth mentioning that the third case (“Schrems”) dealing with the validity of the so-called “Safe Harbor” agreement the latter has been declared invalid in the absence of adequate protection of EU personal data when on the US soil. This principle could constitute an important precedent for other agreements [7] and notably for the TTIP agreement if it will be concluded with solutions which could infringe the Charter’s fundamental rights)

There are now several Court of justice judgements, where the Charter has become the “compass” to interpret an European directive as it happened with the “Scarlett” case (dealing with internet) or in the “El Didri” case, whose result was the immediate release (24h) of 10.000 irregular migrants illegally detained (which makes this Ruling the most important reference also for national legislature when dealing with the detention of irregular migrants). By judging in this way and by invalidating EU directives or agreements on the basis of the “bill of rights” which now is the Nizza’s Charter, the Court of Justice is playing a role very close to a constitutional court.

So, even if the Charter has not been taken in account when safeguarding some economic or functional aspects of the EU construction, this text has already emerged as the cornerstone of the EU integrative processes. In a way, even the so called “controlimiti” doctrine developed by some Constitutional Courts
(the prevalence of fundamental rights on Community law disregarding them) has been successfully integrated in the EU legal order itself.

But problems arise when the Charter is taken as reference for a constitutional review at national level where both the Commission and the European Parliament are not allowed to verify the impact of an envisaged national legislation on the rights of the Charter. In these cases an extensive interpretation of the art.51 of the Charter appears more than necessary. It is worth recalling that with the “Akeberg Fransson” judgment of 2013 dealing with the scope of application of the Charter, the Court was very close to declare that, Community law overrides national law, not only when national law has a direct link with the community law but also when this link is indirect and/or implicit.

However, thereafter the Court didn’t develop the evolutive approach in “Fransson” and has become increasingly careful, prudent and pragmatic. Also the support for the Charter is sometime less evident and the Court asks more and more to the national judges to demonstrate the practical impact of the community law governing the specific case (as recognized by the Court Judge Sajian [8]) by so restricting itself to a mere functional approach to art. 51 of the Charter. In order to justify the protection by the Charter the Court requires now an explicit link of the case under examination with a supra-nationally-rooted competence and no more an abstract and/or potential relation as it could had been the case following the former Fransson and Zambrano jurisprudence.

The CJEU change of approach is now more and more evident: if with Zambrano, MacCarthy, Frassons, Siracusa rulings the supranational competence from potential has become effective and specific (because actually exercised) for the applicability of the Charter more recently the operability field of the Nice Text has been narrowed significantly be it with the Luxembourg Judges or with national judges. Certainly we are still in a “pro-charter” mood as the art.51 refers to “the application” of the European law by the member states and this expression suggests a direct relation as it happens when the problem arise in the occasion of transposition of an EU Directive. However we are now far from the wider interpretation of the scope of the EU law which is suggested by the “explanations” to the Charter articles [9].

Needless to say that this change of attitude by the CJEU on the scope of application of the Charter in view of the art.51 is engendering new doubts, uncertainties, disputes, and discourages the national courts leading them to even more cautious positions.

Moreover the Court has recently raised serious doubts even on the enforceability of some articles of the Charter dealing with social rights. In the “Social Mediation Association” judgment, the judges of Luxembourg denied even the clear link between the art. 27 of the Charter with the provisions of the EU directive dealing right to information and consultation right of the workers in the work place (art. 27 opening the head of the Charter devoted to solidarity).[10]

In the same (depressive) perspective we have to note that, the non discrimination principle taken apart, the principle according to which the Charter’s social rights should also have an “horizontal” applicability (and be invoked also between private persons) has still to be settled. And even the principle of non discrimination is no more open and inclusive as it was described by the Mangold and Küküke devici rulings and the latest judgments of the Court show an increasing favor only for an “operational” role of the art.21 of the Charter as far as linked with the applicability of specific EU directives.
The Charter of Fundamental Rights of the European Union: a tool to enhance and protect the rule of law?

Not even the notion of European Citizenship has been taken into account by the Court to counter the national legislation which is restricting the access to national welfare institutes so that the CJEU is now indirectly endorsed the notion of « social tourism » denounced by some Member States ! (see Dano judgment 2014). Not surprisingly Stefano Giubboni recently declared that” The most recent case-law shows, in fact, a spectacular retreat from this rhetoric in tune with the neo-nationalistic and social-chauvinistic moods prevailing in Europe” [11].

But the most evident vulnerus to the credibility of the Charter (in a Constitutional perspective) is the fact that apparently there is still no judge at supranational and national level who can assess the compatibility with fundamental rights of austerity measures adopted in the framework of supranational rescue plans or recommended by the EU in the economical governance framework , (which has even been praised recently by the Court in Strasbourg worked in the Greece and Portugal cases).

As for the first set of measures the Court of Justice legal reasoning in “Pringle” is not only appalling but sets a bad precedent for the future because in case of future bailouts in the MES framework (European Stability Mechanism) according to the Court, these operations will not be under the scope of the Charter because framed by an international treaty…

As for the second set of measures (dealing with Greece and Portugal) the declaration of incompetence by the Judges seems also difficult to overcome, because a State should be able to prove that he was forced to adopt a specific measure instead of another to cut its deficit.

It then appear that because of their nature, the procedures linked with financial stability and with the Euro, are de facto in an …unchartered space (as it could be the case also for those same measures that the ECB may require as a counterpart to the so-called out right monetary transactions). Needless to say this is outcome is the result of a formalistic approach which, unsurprisingly, has been contested by the academia (see the vigorous article of Andreas Fischer Lescano on this subject) [12]. Moreover it has demoralized the national judges (with the exception of the Portuguese and Italian Constitutional Courts) not to speak of the ordinary citizens, who have seen that the Charter is ineffective when issues that pertain to the guarantee of minimum subsistence level and access to welfare are at stake. Claire Kilpatrick[13] in a major study of the European University Institute has showed the “conformist” effect arising from these decisions, which have placed budgetary constraints above all the other public obligations by so shattering the hierarchy of constitutional values at EU and National level. Also Alain Supiot has recently denounced such a Constitutional abdication in his lates book “ La gouvernance par les nombres”[14].

These new trend are likely to jeopardize also the legal certainty at supranational level, because it shows that technicalities have priority over substantive matters by so paralyzing the virtuous cycle that, according to a beautiful expression of Luigi Ferraioli, should had been established between the Charter and the European citizens and ultimately the European Courts as ultimate protectors of the Charter’s rights.

To quote Stefano Rodotà (in La Repubblica January 9, 2014) : << What is happening in the European Union is a de-constitutionalisation process. The Charter of fundamental Rights, the EU Bill of Rights, which, as written in art. 6 of the Lisbon Treaty, has the same legal value as treaties is now progressively cut out from the European system” and later, <<the perspectives have been changed , the European Union
is acting as if the Charter was no more, citizens are denied the added value entrusted to the Charter as their instrument to confer legitimacy to the EU itself; European citizens are turned from actors of the European process to disheartened and powerless witnesses of sacrifices imposed by “Brussels” instead of persons whose rights are protected by the EU institutions.

All of this without mentioning the case of the “Troika” which is unknown by the treaties and not regulated in any way by internal constitutional rules.

The grip of the EU Charter in the social matters is then very weak if not evanescent and brings no added value to the protection already offered by the Union Social Chapter already adopted (see the “Mascolo” ruling as well as the jurisprudence on fixed-term contracts make no reference to the EU Bill of Rights).

That having been said there are some timid signals of the Court of Justice with the “Fenoll” judgement (C-316/13) of 2015, which places under the protection of the Charter a rather unusual working relationship, between a person with handicap and an association for social support. Also in this case (as in Mascolo) the judges have considered that that budget reasons may not lead to a precariousness of workers.

As well as the president of the ECB Mario Draghi said, repeatedly and with increasing insistence that, the cohesion and solidarity cannot be achieved only through monetary means, (moreover, adopted by a Central Bank without a clear mandate by the Treaties), so, we can say that even the CJEU is implicitly asking through its rulings an effective support by the politicians and the legislature in order not only to extend guarantees but also in the context of strengthening supranational institutions.

We should not forget that in recent years the CJEU was acting in a very difficult situation, marked by increasing disagreements between the EU Member States and by growing protests against its hegemonic role which is lead notably by the German Constitutional court. Last but not least is the problem of the lack of knowledge in the member states of the Charter which as even if, as source of EU primary law it requires a uniform application throughout all the Member States.

A comparative analysis (conducted by website www.Europeanrights.eu) shows that if the national Judges in Spain, Portugal, Italy, Belgium and some other countries more or less regularly make reference to the EU Charter, in other member states this text is still unknown as (quite surprisingly) in France. Moreover it is very unlikely that a national measure is abandoned due to the Charter (even outside the very sensitive area of social rights).

At Constitutional Courts level some of them (like the Italian) are developing a wise integration of the sources of law by so showing how you can build an European ius commune, while others Courts do not seem showing the same attention.

All in all, a deep common understanding between judges is still lacking even if something is slowly moving towards a shared vision of the Charter. This common approach is extremely important because unlike the ECHR which should be implemented according the legal framework of each country the EU Charter should be always present when assessing national choices. It is possible that the planned EU Justice Portal EU will make this exercise easier but it is appalling that in 2014 only 46 preliminary rulings dealing with the Charter have been submitted by the national judges to the CJEU.
The Charter of Fundamental Rights of the European Union: a tool to enhance and protect the rule of law?

Summing up, what arise from a first overview of the EU Charter impact is very contrasted; we can’t deny that the Charter is playing an important role in some domain of the EU law such as the rights on Internet or even the migration policies or the cooperation in criminal law (the latest sensitive competence falling under the ordinary EU regime). In this domain the Charter could have very positive effects in relation to the various directives, (some of them still under negotiation) dealing with procedural rights as well as for all the measures which can strengthen the European Area of Freedom Security and Justice (where stoks should be taken of the past and current experience of the Council of Europe and of the the case law of the Strasbourg Court).

As said above in social matters the role of the Charter is modest when inexistent and seems unable of granting the control needed to assess the compatibility with fundamental rights of recovery measures.

Unfortunately the socio-economic rights have not been strengthened by the Charter but they have been subordinated to the objectives of defending the Euro.

The legal technical hurdles raised (even by the Court of Justice) when the protection by the Charter is invoked risk to undermine the legal certainty that the Charter was deemed to grant. The national case-law is very limited and follows the traditional paths which are very far from a truly supranational vision. common design.

Moreover art. 51 of the Charter is justifying an overly restrictive interpretation of the Charter’s scope (see EP Resolution 08/07/2015). Even if the ambitious multilevel process which is promoted by the Charter is not yet compromised it is also clear that it is impossible to build it only on the judiciary side..

It is unjustifiable (even if it is comprehensible) that the Fundamental Rights Agency in Vienna does not develop an inspective role in the member states in order to respect the Charter (as it did in the “Ponticelli” on the Nomad Camps case in Italy soon after its establishment).

Moreover some emergencies such as migration don’t lend themselves to be governed by the legal instruments only. It was not yet clear, however, if the violations of the Charter may give result to infringement proceedings and if there is for States a duty of compensation damages.

3. The situation of the Charter being the one described above it is clear that a positive evolution could be no more triggered only by the judiciary as front runner of the integration process but requires also a strong impulse by the institutions and by the political families. Between them it is up to the European Parliament as the only institution legitimized by the universal mandate, to raise the role of the Charter in the interest of the European citizens (“a demos and a charter “ as was the initial project of2000) with the support of the Commission whose political role has been strengthened in the last two years.

It should not be a coincidence that the best doctrine which was rather hesitant on the last Commission Communication dealing with the rule of law is now more and more vocal on the binding character of art 2 TEU, which does not seem to suffer the limits of art 51 of the Charter, and whose preceptive aspects beyond the art.7 (16) should not be underestimated.

Since the first proclamation of the EU Charter it appeared that violations of art 2 of the Treaties were also quite likely also violations of the Charter so that the same procedure should been applied (even with the
limitations foreseen by the Treaties for the Court of Justice in these cases). It is necessary to insist in this reasoning, also to respond to emergence of newly formed liberticidal governments in some Member States and to overcome at least at political and institutional level the limits set by Article 51. This could pave the way for a more important role of the Charter for the EU States taking part to an enhanced cooperation like the Eurozone (or Schengen?).

Another urgent issue to bring to the political and institutional fore is bringing social rights under the protection of the Charter. The “social pillar” (whose main elements should be a single system of protection against unemployment, the introduction of a minimum wage and of a minimum European income, and a framework agreement covering both self-employed and dependents, etc.) promised by the Commission President Juncker apparently goes in that direction, although it seems already off-track since its inception was together with the European Investment plan which is in a much more advanced phase.

If duly developed and implemented the social chapter of the Charter could have a spreading effect in other domains (as it is happening within the domain of cooperation in criminal law).

The Charter could also become the best tool to assess if the objectives of the strategy 20-20 have been reached and in case of failure of the Member States (for instance in reducing poverty and social exclusion) always the Charter can be taken as reference to justify possible sanctions (such as the partial or total exclusion from EU funds).

Again it would be wise to “communitarise” the rescue procedures covered by the Fiscal Compact and by the MES as it is expressly foreseen by these international treaties.

More complex could be the improvement (in a Charter-compliant perspective) of the other austerity measures as the EU economic governance is still in its embryonic phase. That having been said a more transparent assessment of the economic impact of some EU governance envisaged measures could resolve their possible ambiguity and pave the way for successive actions of responsibility.

Another important initiative should also be the prompt ratification of the European Social Charter which, on one hand does not require a reform of the Treaties and on the other does not raise problems in the relations with the Strasbourg Court as it has been the case for the EU accession to the ECHR (see Opinion 2/13 of the Court of Justice).

Speaking of a Charter for EU citizens it would be a question of common sense to resume the old proposal about the direct access to the court of justice when a violations of fundamental rights would be at stake. This measure will transform the judges of Luxembourg in the higest guarantors of fundamental rights in the European Union.

Accordingly it would be necessary to improve impact assessment on fundamental rights of the envisaged EU legislation by avoiding that these rights could be severely limited by measures which are not of legislative nature (such as Commission or Council implementing acts – see the Case C-355/10 on search and rescue in international waters).

The quality of the EU legislation with an impact on fundamental rights could not be a theoretical exercise
and should involve also in more permanent and structured way the national parliaments which can give to the European Parliament and to the Commission a closer view on what has or could happen on the ground.

By the same token it would be sensible to re-create a Committee of Independent experts on fundamental rights assessing the transposition of EU law dealing with fundamental rights in the member states. Such a Committee could submit its reports to the European Parliament, and take stock of the resources availed to the FRA Agency of Vienna (until now very little proactive).

As it has been the case for the evaluation of the common principles of flexicurity (approved in December 2007) some countries could spontaneously agree to be closely monitored on their compliance with the Charter by transforming such an “enhanced cooperation”, even if only de facto, a further guarantee for their citizens.

It could also be necessary

- to reevaluate the binding force (as already suggested by several advocates general) of the clauses of social, ecological and antidiscrimination (TFEU art. 9-10-11)
- in the external security field as long as the EU accession to the ECHR is not granted it would be wise , to appeal to neutral authorities external to the European system such as the Venice Commission, or the Copenhagen Commission to assess if the EU external action comply with the Charter

Last but not least it in a EU common European area of justice it would be wise to convene again (as in November 2013) on a regular basis the Assises generales of the Justice which under the supervision the European Parliament could make possible to exchange the best practices and give an idea of the emerging trends in the case law of the “multilevel” legal system that the EU has become.

What we have to avoid is the banalization of the EU Charter and learn from our difficulties so that the Charter could become not only a shield for the EU citizens and all the people under its jurisdiction but become a compass for the political institutions and the new soul of the EU policies in analogy with the national constitutions where, as stated in the Charter preamble, the person is at the center of all public policies .

So, even if the EU is now traversing on of its most difficult crisis there is still much to do to make concrete the idea of a supranational demos protected and inspired by the values expressed by the Charter

Giuseppe BRONZINI Judge at the Italian Supreme Court of Cassazione

NOTES

[2] On 13th December the European Union announced to active a procedure (adopted on March 2014) against Poland to enforce the rule of law, to avert threats of “systemic character “ on the rule of law . This is a an act of soft law that is activated by Commission, praeter legem, because which is not mentioned in
the Treaties. This act is a measure that can be invoked before to resort to the measures provided for in art.7 TUE. They are threats that not concern the scope of European law, in this case the commission is able to use art.258 TFEU. In its document the Commission confirms that infraction procedure could not concerns the violations not relating to European union law.

[3] It is a document to “Protection of Fundamental Rights in Europe: is the time for action” drown up by six famous legal experts, including Alessandro Pizzorusso, chaired by of Spiritos Simit, text that preceded the Council of Colonia Decision to codify the subject entrusted to the first Convention.


[5] Quite surprisingly the Court after having examined the UNSC Resolution declared « ..that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking. » (p.163)

[6] See « Digital Rights v.Ireland » (2014) annulling the data retention Directive, « Google v Spain » (2014) which confirmed the right to be forgotten when personal data are no more relevant and, 2015, the « Schrems » case

[7] See, for instance the EU-US TFTP agreement on the exchange of bank account data or the Draft « Umbrella Agreement » on data protection also when public security aspects are at stake.


[9] The Explanations contend of the applicability of the Charter whenever states “acting within the framework of EU law” then without a direct and obliged with such legislation, without so that the internal act is necessarily an act of fulfillment of any obligation supranational but still falls in its “gray area”

[10] Quite surprisingly the Court states: « It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation. » (par.46)


[15] It should be remembered in particular 178/2015 case of the Italian Constitutional Court that declared unconstitutional the non-indexation of pensions and the blocking of collective bargaining in the public sector (request from Brussels to contain the Italian deficit); the Italian Court, while applying the art. 39 of the Constitution, provides an invaluable reference art. 28 of the Charter of Rights, the sources ILO and the European Social Charter, in key of multilevel guarantor


Tratto da Free Group EU