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## THE EUROPEAN SYSTEM OF PROTECTION OF HUMAN RIGHTS AND FREEDOMS

### Abstract

This article aims to analyze the European Convention on Human Rights of the Council of Europe and the Charter of fundamental rights of the European Union which had made a European system of human rights.

**Keywords:** Council of Europe, European Union, European Convention, charter, Fundamental Rights.

**Тірек сөздер:** Еуропа Кеңесі, Еуропалық Одақ, Еуропалық конвенция, хартия, негізгі құқықтар.

**Ключевые слова:** Совет Европы, Европейский Союз, Европейская конвенция, хартия, основные права

The EU Charter of Fundamental Rights (further “the Charter”) [1] was concluded in 2000 following a decision that the EU law concerning fundamental rights was set out in a fragmented fashion across numerous primary and secondary law provisions. The Charter would however not only cover the social and economic rights recognised as general principles of EU law, but the fundamental rights adopted by the EU from the European Convention on Human Rights (ECHR) [2] and the constitutional traditions common to the member states. The Charter was specifically devised by the members states acting in the European Council at Tampere in 1999. Therefore the heads of state gave express approval to the idea and instigated its creation. The content was discerned by a Convention appointed to the task from the member states, Commission and European Parliament and national parliaments.

The Charter of Fundamental Rights of the European Union enshrines the key political, social and economic rights of EU citizens and residents in EU law. In its present form it was approved in 2000 by the European Parliament, the Council of Ministers and the European Commission. However its legal status remained uncertain until the entry into force of the Treaty of Lisbon [3] in December 2009. The Charter obliges the EU to act and legislate consistently with the Charter, and enables the EU's courts to strike down EU legislation which contravenes it. The Charter applies to EU Member States when they are implementing EU law but does not extend the competences of the EU beyond the competences given to it in the treaties.

This Commentary on the Charter [4], the first in English, written by experts from several EU Member States, provides an authoritative but succinct statement of how the Charter impacts upon EU, domestic and international law. Following the conventional article-by-article approach, each commentator offers an expert view of how each article is either already being interpreted in the courts, or is likely to be interpreted. Each commentary is referenced to the case law and is augmented with extensive references to further reading. Six cross-cutting introductory chapters explain the Charter's institutional anchorage, its relationship to the Fundamental Rights Agency, its interaction with other parts of international human rights law, the enforcement mechanisms, extraterritorial scope.

The Charter is therefore a binding set of principles bringing together in one place all of the personal, civil, political, economic and social rights enjoyed by people within the EU aimed at protection of the individual as against actions of the state. It is a free standing instrument that derives its authority from the Treaty on the European Union (TEU) article 6(1):

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties [5].

According to the Court's case-law, this means that fundamental rights are binding on Member States both when they implement EU rules, and when they derogate from EU law provisions.

After the Charter of Fundamental Rights of the EU acquired binding legal status in 2009, a vexed question surfaced: does Article 51 of the Charter restrict the scope of the EU fundamental rights standard?

Article 51 (1) states that the Charter is only binding on Member States “when they are implementing Union law”.

Accession by the European Union to the European Convention on Human Rights will further strengthen the protection of human rights by submitting the Union’s legal system to independent external control. Any individual will be able to bring a complaint about infringement of ECHR rights by the EU before the European Court of Human Rights (the Strasbourg Court). The EU would thus be in the same situation as the member states.

The wording of many of the Charter’s rights is based on the wording of corresponding rights contained in the ECHR and its Protocols. The meaning and scope of such rights will be determined by reference to the text of the ECHR and the case-law of the European Court of Human Rights. Conferring primary law status on the EU Charter of Fundamental Rights, as the Treaty of Lisbon did, and accession, are complementary steps ensuring full respect of fundamental rights within the EU legal order. In this regard, the EU merely follows the same logic as the member states, most of which have their own written catalogue of fundamental rights and are also Parties to the ECHR. The relationship between the Charter and the ECHR is similar to that between the ECHR and a national constitutional bill of rights of a State Party to the ECHR.

The next question is What will be the relationship between the Strasbourg and Luxembourg Courts? The ECHR contains minimum standards. Parties remain free to provide more extensive human rights protection and this would also be the case for the EU. Judgments by the Strasbourg Court are essentially declaratory judgments. The Court cannot itself annul or amend national measures or court decisions. It will be for the EU, like any other Party to the ECHR, to decide how best to comply with the Court’s judgments, provided that the judgments are executed (obligation of results). The principle of autonomy of EU law, in the sense of the EU legal order existing apart from both national and international law, is preserved and is no obstacle to EU accession to the ECHR. After accession, the Strasbourg Court will examine in concrete cases whether, as a result of EU law and acts, there has been a violation of the ECHR. In making that assessment, the Strasbourg Court will undoubtedly have regard to “specific characteristics of the Union and the Union law”. The CJEU’s (The Luxembourg Court) position will be analogous to that of national courts in relation to the Strasbourg Court. The CJEU will remain the final authority on the interpretation of EU law; the Strasbourg Court will be the final authority on the interpretation of the ECHR. The CJEU should, for the purpose of any ECHR complaints against the EU, be regarded as a “domestic” court and individuals may need to turn to the CJEU before they can lodge an application to the European Court of Human Rights. The latter cannot be regarded as a superior Court (in the way a national supreme court is superior to a national court of appeal) but rather as a specialised human rights court exercising external control over the international law obligations of the Union resulting from accession to the ECHR. There will not be a conflict or overlap between their roles any more than there is a between the roles of the supreme or constitutional court of any member state and the Strasbourg Court.

There are cases conceivable in which the EU is a party but in which the CJEU has not yet had the opportunity to rule on the conformity of an EU act with human rights. This might happen when a case went through the national courts of the EU member states without the latter having made a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. This is a situation which cannot arise with respect to any other party to the ECHR. The accession agreement puts in place a procedure to ensure that in such cases the CJEU is given the opportunity to review the conformity of the EU act at issue with human rights before the Strasbourg Court pronounces itself.

The Strasbourg Court will in any case not be bound by the assessment of the CJEU. This procedure should not therefore be seen as a privilege for the EU but as the application to this specific situation of the principle of subsidiarity, which requires that all domestic procedures are used to solve a case before the Strasbourg Court has to intervene.

In summary, I would like to give some information about the summary analysis of the case law on the Charter 2009-2012. The Court of Justice made reference to provisions of the Charter in at least 122 judgments, and the General Court – the Court of First Instance in at least 37 judgments during this period. Also the General Court referred to the European Convention on Human Rights in 15 of the 37 judgments in which the Charter was mentioned, and the case law of the European Court of Human Rights in 6.

These statistics on the practice of the European Court since the Charter came into force indicate that the frequency of citations of the European Court to the European Convention on Human Rights has declined, and that whereas the Court used to cite the ECHR more often than the Charter in cases involving human rights claims. By comparison, the CJHR cites the ECHR in only 20 out of 122 cases.

At present, the Court is also missing the opportunity to improve the quality and fairness of its judgments and to strengthen their legitimacy in the eyes of the European citizens.

Relations between the Charter and the ECHR is controversial. Because the the same, the parties are the same, contents are the same, citizens are the same. Nevertheless, the advent of the Charter provides a powerful new impetus to the twenty first century.

#### REFERENCES

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- 2 Convention for the Protection of Human Rights and Fundamental Freedoms // Rome, 4.XI.1950 // amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010
- 3 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon // Official Journal of the European Union. C 306. 13 December 2007.
- 4 Charter of fundamental rights of the European Union. Explanations relating to the complete text of the Charter // Luxembourg: Office for Official Publications of the European Communities, 2001
- 5 Article 1 of Protocol No. 8 relating to Article 6 (2) of the Treaty on European Union on the Accession of the Union to the ECHR.

#### **Европейская система защиты прав и свобод человека**

##### **Резюме**

В данной статье сравнительно проанализированы региональные международные договоры, как Европейская конвенция по защите прав и свобод человека, заключенная в рамках Совета Европы и Хартия Европейского Союза об основных правах, которые составляют европейскую систему защиты прав и свобод человека основой национальной безопасности обоих государств.

#### **Адам құқықтары мен бостандықтарын қорғаудың еуропалық жүйесі**

##### **Резюме**

Бұл мақалада адам құқықтары мен бостандықтарын қорғаудың еуропалық жүйесін құрайтын Еуропа Кеңесі шеңберінде жасалған адам құқықтары мен бостандықтарын қорғау туралы Еуропалық конвенция мен Еуропалық Одақтың негізгі құқықтар туралы Хартиясына салыстырмалы түрде анализ берілген.