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THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE CONSTITUTIONALIZATION OF THE EUROPEAN LAW*

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The aim of this short paper is to offer a brief overview of the interrelationships between protection of fundamental rights, in particular, through the application of the Charters of Fundamental Rights and constitutionalization process of the European Area.
It's possible to identify two parts which will serve as synthetic guidelines of this article:
I. the Historical Part: in which we will see that the protection of rights in the EU area does not have very recent origins; and
II. (more) the present Part: in which we will examine the impact of the EU Charter.

I.1 As regards the first part, we know that the idea of "Europe" – precisely, the "United States of Europe" idea – goes back in time (e.g., Kant, Hugo, Mazzini, Cattaneo…wanting to name just a few of the most famous people) but our analysis begins from the Schuman Declaration (dated 30.05.1950).

In particular, we are going to start from a small but significant part of this Declaration, which states: "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war (...)".

Actually, these statements show that at the basis of the "Community" construction there was the idea of the inseparability between the building of a union among the European countries and the safeguard of the peace value, with the relevant rights related to these two situations.

In fact, in the ancient Treaties (see below) there was not much concerning the Fundamental Rights (also with regard to the s.c. "Economic Freedoms"). About it, it's possible to consider that, otherwise, European Coal and Steel Community (ECSC) and European Economic Community (EEC), and, more in general, "the Communities" would not be accepted by national States.

Primary goal was the establishment of a Common High Authority, inside an international organization open to the participation of other "European countries", for the control and the exchange of Coal and Steel Production and, in perspective, for the creation of a single market in a larger free trade area. This was what the States wanted to accept.

Anyway, in this period the protection of fundamental rights was already ensured by States (particularly, by the "sovereign" State Constitutions and Constitutional Courts) and by the Council of Europe: inside it, specifically, by the European Court of Human Rights (based in Strasbourg).

I.2. Wanting to keep our attention to the Court of Justice, it should be immediately noted that in the initial (examined) regulatory framework the jurisprudence of the Court concerning the protection of fundamental rights was skeptical (s.c. "*negative phase*"). Otherwise, successively, there

was a "*phase of delicate opening*" of the jurisprudence of the Luxemburg Court (s.c. "*possibilist phase*").

What's happened in the meantime?

It should pay attention to two famous decisions.

In *Van Gend & Loos* judgment (C-26/62), the Court had made clear that provisions of Union law may, if appropriately framed, confer rights on individuals which the courts of member states of the European Union are bound to recognize and enforce (s.c. "principle of direct effect"). Then, in *Flaminio Costa* (C-6/64), it had recognized that the European Union law should take precedence over national law (even over constitutional provisions) and should there be any conflicts between EU law and national law, every national court is obliged to apply the law of the European Union (s.c. "principle of supremacy/primacy").

It follows that the law stemming from the treaty, an independent source of law, could not – because of its special and original nature – be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

From here, as we anticipated (see *supra*), the research by the Court of Justice of solutions to ensure greater protection of fundamental rights, hand in hand with the rise of the power of the Community.

The reaction of Italian and German Constitutional Courts is known.

While demonstrating to appreciate the road taken by the Court of Justice, in the historic decc. "Frontini" (judg. n. 183/1973) and "Solange I" (judg. 29-05-1974) it was claimed, at first, that "EEC law" should take precedence over national law even over constitutional provisions (so disapplication of national law conflicting with European provisions) but with the limit of the counter-limits. Secondly, that General Principles of Community Law and Constitutional Traditions of Member States (utilized by Court of Justice) are too vague parameters. Therefore, the Court of Luxembourg identified the parameter in Convention for the Protection of Human Rights and Fundamental Freedoms (see *supra*).

Precisely, it said that "Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in articles 8, 9, 10 and 11 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950 and ratified by all the Member States, and in article 2 of protocol No. 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests in a democratic society".

As has been observed, from that moment and through the time… «…le juge de Luxembourg a opéré une sorte de appropriation informelle de la Convention de Rome».

I.3. And the EEC Institutions? What did they do in this period?

In the European Economic Community it should be noted the importance of the European Parliament's role in the protection of human rights and fundamental freedoms. In particular, it highlighted «the political importance for development of the European Community – not least *with a view to direct elections in 1978* – of strengthening the ties of solidarity among its citizens by granting special rights falling within the category of civil and political rights whereas European union should lead progressively to profound changes in the civil and political status of Community citizens recalling its resolution of 10 july 1975 on European union, in which inter alia it expressed the hope that «with a view to giving the peoples of the Community a sense of common destiny, a «*charter of the rights of the peoples of the European Community*» will draw up and that pratical measures capable of contributing to the development of a European Community consciousness will be adopted ».

Shortly thereafter (precisely, on 5 April 1977) for the first time, an "Interinstitutional Declaration" about "the respect for fundamental rights and the ECHR" was prepared.

This goal was certainly important. In particular, it contributed to the occurrence of a first «constitutional» crossroad formed of the Spinelli's Project (characteristic elements: community approach to EU policy, realization of a Federal Union), on the one hand and of the De Gaulle's vision (intergovernmental approach to EU policy; construction of a Europe of de Nations), on the other hand.

The Single European Act (1986) decreed the prevalence of the second approach: this, with regard to the fundamental rights, meant that the idea of giving the Community a Charter of Fundamental Rights was dropped.

Anyway, in this matter some progress was made: so the "four freedoms" (free movement of goods, services, capital and people) were formalized. Overall, for the first time in an act of primary law of the Union (Treaty) it is said: "determined to work together to promote 'democracy on the basis of the fundamental rights Recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, freedom Notably, equality and social justice " (see preamble of the Treaty).

In the years immediately following, in the process of constitutionalization of the Community (with particular attention to the protection of fundamental rights) other two important columns that here we only mention consist of EP Resolution"adopting the Declaration of fundamental rights and freedoms" (1989); and Comm. "Community Charter of Fundamental Social Rights for Workers of the Fundamental Social Rights of Workers" (1989).

I.4. After the Fall of the Berlin Wall with the consequent transformation of the geopolitical aspect of Europe, it was evident the need to transform the Economic and Commercial Community into a Political Community (too). A bill of rights would have been necessary to give her a new identity but in the Treaty establishing the European Community (the "Maastricht Treaty", 1992) it was only possible to insert a provision (summarizing the road traveled), the content of which is known: " The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome

on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law" (Article F-6, par. 2).

At that point, in order to provide the Union of a bill of rights the Convention EDU (see *supra*) was looked, but in the Opinion n. 2/94 the Court of Justice said that: «As it is clear from the observations submitted by the Governments of the Member States and by the community institutions, accession by the Community to the Convention presents two main problems: the competence of the Community to conclude such an agreement and its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court » (§9 follow).

Consequently, the Union found itself facing a second «constitutional» crossroad: what to do? Which way to go?

To determine what to do, the European Commission asked help to a first Expert Group. In particular, it asked to review «the action that might be taken on the Community Charter of the Fundamental Social Rights of Workers in the context of the revision of the European Union treaties as provided for in the Maastricht Treaty».

With the Treatyof Amsterdam (1997) it was strengthened the European Union's commitment to human rights and explicitly affirmed that the identity of the European Union is based on democracy and human rights, but no Charter was adapted, revised or included in the Treaty. So the same European Commission asked help once again to a second Expert Group, that in its Report went «Affirming» that for «fundamental rights in the European Union» was «Time to act» (February 1999).

This time it was ok: in the European Council of Cologne the Heads of State and Government took the decision to draw up a Charter of Fundamental Rights of the European Union.

Specifically, it was stated that «Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court

of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens » (see the Presidency Conclusions of the Council, 3 and 4 June 1999, Annex IV).

II.1. What last mentioned introduces us to the second part of the paper. As known, the Charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council of Nice (on 7 December 2000).

It's the result of an original procedure – carried on by the s.c. "First Convention" (or Herzog's Convention) – more transparent and participated, compared to the other which took place in the history of the European Union (especially for the preparation of the Treaties).

It is not possible to examine here the contents, but it is important to note that a peculiar trait of the catalog, which makes his story even perhaps unique, is that its drafters did not know what "destiny" (and "destination") it would have had. So it's possible to imagine it as a "stem cell undifferentiated" and this – as we shall see – from a certain point of view has given strength to the catalog.

With the aim of answering the question if the proclamation of the Charter has changed anything (and if "yes", what it has changed), in particular, about the Constitutionalization of European Union, it should be noted that since 2000 (there has not been a single Charter but) three Charters have followed each other (the periodization is quite indicative):

1) The Charter proclaimed in Nice (2000-2003);

2) The Charter integrated in the unfortunate "European Constitutional Treaty" (2004-2007); and

3) The Charter re-proclaimed in Strasbourg (2007) and became directly enforceable with the coming into force of the Lisbon Treaty (2009).

II.2. With regard to the "Nice Charter" it is now necessary to point out that when it was solemnly "proclaimed" in Nice (see *supra*) it did not have any

binding legal effect. Especially at the beginning it had a "politico-institutional" impact. Firstly, about it, the "political" reactions towards the proclamation of the Text are significant; precisely, the statements which are shown below by the Presidents of the European Council, the European Parliament and the Commission on the Charter of Fundamental Right.

Always with regard to the political effects of the Charter we must highlight, secondly, the effectiveness of the Charter in the EU Institutions" (e.g., COM(2005) 172 final "Compliance with the Charter of Fundamental Rights in Commission legislative proposals "Methodology for systematic and rigorous monitoring"); Rules of Procedure of the European Parliament (see, e.g., the art. 36 of the July 2013 version) and Council Framework Decision (2002/584/JHA, 13 June 2002, "on the European arrest warrant and the surrender procedures between Member States", preamble, §12).

Furthermore, the Charter began to be mentioned in the Preamble (citations and recitals) of the EU acts (see e.g., Council Directive 2003/86/EC of 22 September 2003, "on the right to family reunification" §2).

On a more strictly legal impact, it's necessary to pay attention to the use of the "Nice Charter" in the Advocates General Opinions. From this perspective it is possible to further distinguish between "moral impact" (e.g., Opinion 10-07-2001, C-353/99, *P Hautala*,§80 follow.); "judicial politics" impact (e.g., Opinion 8-01-2004, C-87/02, *Commissione / Italia*, §36) and "legal" impact "*ad adiuvandum*" of the Charter (e.g., Opinion 22-03-2001, C-270/99, *P, Z / Parlamento*, §40).

More generally, after the proclamation of the Charter, the Union found itself, once again, behind a crossroads as shown by the final document of the European Council meeting in Laeken (14 and 15 December 2001). So in such document it puts into play the following series of crucial questions: "What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? The question ultimately arises as to whether this simplification and reorganisation might not lead

in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union? ".

II.3. In order to answer these questions (precisely, in the light of the foregoing, to consider the key issues arising for the Union's future development and try to identify the various possible responses) the European Council decided to convene a Convention composed of the main parties involved-in the debate on the future of the Union.

As known, the European Council has appointed Mr V. Giscard d'Estaing as Chairman of the Convention and Mr G. Amato and Mr J.L. Dehaene as Vice-Chairmen and finished its work in July 2003, after drafting the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 in Rome by representatives of the then 25 member states of the European Union. It was later ratified by 18 member States, which included referendums endorsing it in Spain and Luxembourg. However the rejection of the document by French and Dutch voters in May and June 2005 brought the ratification process to an end.

What most concerns us is that the Charter of Fundamental Rights was incorporated (and republished in the Official Gazette) with some changes into the second part of the Constitutional Treaty, consequently beginning the second phase of its life (see *supra*). In this new form the Charter was used by the Grand Chamber of the Court of Justice for the first time (see judg. 27 June 2006, in C-540/03, *European Parliament/Council of the EU*, spec. §§31-34).

More in general, in this phase can be found some new constitutional strategies for the judicial protection of individual rights, especially by the Advocates-General. In a progressively "constitutionalist perspective", they have begun to conduct a "judgment in balancing", especially competing (privates/public) interest with fundamental rights (e.g., case (12.06.2003), C-112/00, *Schmidberger*, §81) and "four freedoms" vs. "fundamental rights" (e.g., case C□438/05, *Viking* and C□341/05, *Laval*, §45). Furthermore, they have recognized with increasing regularity the primacy of "fundamental

rights" (e.g., case C-36/02, *Omega*, §33-4).

There is no way to focus our attention on the events that followed the failure of the Constitutional Treaty. It is sufficient to note that it was replaced by the Treaty of Lisbon(signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009).

II.4. In this context, the Charter, as proclaimed in Strasbourg (12 december 2007) and published again in the Official Gazette of European Union, is mentioned by the Treaty of Lisbon: therefore, it is known that it has entered into force with the same Treaty (1 December 2009). More precisely, the article 6 of the Treaty states that "The Union recognizes 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. The provisions of the Charter shall *not extend in any way the competences* of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the *general provisions* in Title VII of the Charter governing its interpretation and application and with due regard to the *explanations* referred to in the Charter, that set out the sources of those provisions " (par. 1).

After the entry into force of the Charter, in terms of quantity a first visible effect is given by the increase of the number of pronunciations in which the Judges and Advocates General are using the Charter of EU Rights. In terms of quality, there was a further prominence on constitutional sense of argumentative strategies and techniques of decision of the Court of Luxembourg. So more and more regularly in the balance between fundamental rights and market interests the first ones are prevalent; about it, see, most recently, e.g., CJUE, Gr. Ch., sent. 13.05.2014, C-131/12, *Google Spain SL*: «As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also

the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question» (§4).

More in general, the Charter is used as a reference for judging the declaration of invalidity of acts of the Union; about it, see, most recently, e.g., CJUE, Gr. Ch., sent. 08.04.2014 (C-293/12 e 594/12), *Digital Rights Ireland Ltd*:«The retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically affects private life and, consequently, the rights guaranteed by Article 7 of the Charter. Furthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, therefore, necessarily has to satisfy the data protection requirements arising from that article Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter» (§29 and §69).

II.5. In this fluid environment the final clauses of the Charter (s.c. "horizontal clauses") are playing an important – probably decisive – role with regard to the interpretation and application of the catalog. In particular, key issues under discussion concerning first of all

- art. 51: the Union – and, consequently, Court of Justice – competence to apply the Charter (see e.g., Gr. Ch., sent. 26.02.2013, C-617/10, *ÅkerbergFransson*, and Gr. Ch., sent. 06.03.2013, C□206/13, *Cruciano Siragusa*);

- art. 51 too: the extent of the "horizontal direct effect" of the provision of the Lisbon Charter (see e.g., Gr. Ch., sent. 19.01.2010, C-555/07, *Kücükdeveci*; and Gr. Ch., sent. 15.01.2014, C□176/12, *Association de*

médiationsociale);

- art. 52: the concept of «law» (see e.g., Opinion, 14.04.11, C-70/10, *Scarlet Extended*); and

- art. 53: the «protection level» (see e.g Gr. Ch., sent. 26.02.2013, C-399/11, *Melloni*).

Of course, we are waiting to see what will happen about the accession of the EU to the European Convention of Human Rights (see above); opening, however, in this regard, a new chapter to be written yet.

As we know, Council and Strasbourg Court were respectively established in 1950 and 1959 with the specific purpose of overseeing the protection of fundamental rights laid down in European Convention of Human Rights. On the other hand, the Court of Justice (based in Luxembourg) was created in 1952 by the European Communities in order to ensure that European Community law was applied uniformly throughout the European Union.

In this regard, we quote certain passages of these significant decisions (our italics):

- *Stork* judg. (case 1/1958): "Under article 8 of the Treaty the High Authority is only required to apply community law. *It is not competent to apply the national law of the Member States.* Similarly the Court is only required to ensure that in the interpretation and application of the treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German Constitutional Law " (§3.A);

- *I. Nold*judg. (case 40/1959): "It is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority and, as obviously follows, those adopted in the present case to ensure that rules of internal law, even constitutional rules, enforced in one or other of the

Member States are respected. Therefore the Court may neither interpret nor apply German Basic Law in examining the legality of a decision of the High Authority" (II);

- *Sgarlata* judg. (case 40/1964): "Having regard to the formal wording of this text it matters little whether the contested measure is attributable to a direct power of the commission or only to a derived or delegated power. It follows from all the above considerations that the application must be declared inadmissible" (I).

With regard to this we quote three other cases:

- *Stauder*judg. (case 29/1969): « interpreted in this way the provision at issue contains nothing capable of prejudicing the Fundamental Human Rights enshrined in the *general Principles of Community Law* and protected by the Court » (§7)

- *InternationaleHandelsgesellschaft* judg. (case 11/1970): « However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the *general principles of law* protected by the Court of Justice» (§4).

- *J. Nold*judg. (case 4/1973): «As for the question of fundamental rights, the protection of property ownership constitutes without any doubt one of the guarantees recognized by Community law which, in this connection, is based on the *constitutional traditions of Member States* and on acts of public international law, such as the Convention for the Protection of Human Rights and Fundamental Freedoms ».

See C-36/75, 28.10.1975, *Roland Rutili* (§32).

See L. Favoreu, *Droits des libertés fondamentales*, Paris, 2000, 484.

See European Parliament, Resolution EP10-07-1975§12 and Resolution 12-12-1977, §11.

See the *Report* of the Expert Group chaired by Maria de Lourdes

Pintasilgo: "*For a Europe of civil and social rights*", 1996, p. 23.

See the *Report*of the Expert Group on Fundamental Rights chaired by Spiros Simitis (s.c. "Simitis Committee"); about the Committee work, see A. Pizzorusso (member of the group), *Il rapporto Simitis*, in *Dir. pubbl. comp. eur*., 1999, 556 ff.

See e.g., *euobserver.com*, 12-12-2000:

- Mr Jacques Chirac: «In Nice, we proclaimed the European Union Charter of Fundamental Rights, a text which is of major political importance. Its full significance will become apparent in the future and I wish to pay tribute to your Assembly for the major contribution it has made to its drafting» (Strasbourg, 12 December 2000);

- Mrs Nicole Fontaine: «A signature represents a commitment . I trust that all the citizens of the Union will understand that from now on the Charter will be the law guiding the actions of the Assembly . From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union» (Nice, 7 December 2000);

- Mr Romano Prodi: «In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote (...). The citizens of Europe can rely on the Commission to ensure that the Charter will be respected » (Nice, 7 December 2000).

Quintupled at least, see here: *http://www.giurcost.org/casi_scelti/CartaUE.html*

At present, see : *http://hub.coe.int/it/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention*.