

Bence Ákos Gát

Charter of Fundamental Rights of the European Union: A Reinterpreted Instrument?

The Charter of Fundamental Rights of the European Union originally required guarantees for the fundamental rights not from the Member States but from EU institutions. This would be changed by the EU's mainstream policy, which would also use the Charter to hold Member States accountable.

It was a dilemma for decades in the European Union that there was no EU legal document that could ensure that European institutions, similarly to the Member States' authorities, comply with fundamental rights and rule of law criteria.

In the European Communities established in 1957, only in 1989, during the preparation of the Maastricht Treaty, would we see a first attempt at the creation of a document containing fundamental rights. At that time, the European Parliament voted for a proposal on fundamental rights and freedoms, which, however, was not adopted during the negotiations on the new treaty. After that, it took years for this issue to return to the European political agenda.

In 1997, during negotiations on the Treaty of Amsterdam, it was placed again on the agenda of the European Union to have its own Charter of Fundamental Rights, but the proposal was still not incorporated into the Treaty. The Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights) was finally proclaimed on the 7th of December 2000, in Nice, in line with the conclusions of the 1999 Cologne European Council. However, even then, the document was ratified in the form of an interinstitutional agreement, which could not be considered equivalent to the Treaties. The Charter of Fundamental Rights was only elevated to the level of the Treaties when the Treaty of Lisbon entered into force in 2009, and can therefore be considered a relatively new fundamental rights instrument.

Article 51 of the Charter of Fundamental Rights has, from the outset, fixed that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. The authors of the text saw fit to stipulate in advance that “the Charter

does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

It is apparent from the above that the original purpose of the Charter of Fundamental Rights, entered into force in 2000 and elevated to the level of the Treaties of the Union in 2009, was primarily to ensure the proper functioning of EU institutions in line with fundamental rights. With this, it answered a problem of decades, as no such fundamental rights document existed at EU level until then. Originally, the Union and its institutions have lagged far behind the Member States, whose national constitutional systems had long been equipped with fundamental right guarantees as regards the functioning of national public bodies. The provision of the Charter according to which the Charter could be applicable in certain cases to the Member States is secondary and serves first of all purposes of coherence: EU law has to ensure fundamental rights guarantees also when it is applied by Member States. All that means is that the Charter of Fundamental Rights was not intended to be an instrument for general rule of law investigations against Member States. In order to prevent any incorrect interpretation, it was even made clear in Article 51 of the Charter that it cannot be the instrument for any extension of EU competences.

It follows from the above that in the European political arena, one should hear debates primarily on whether the institutions of the Union comply with the provisions of the Charter of Fundamental Rights in their procedures, decisions and operations, and whether they themselves respect human rights and the rule of law or not. Incidentally, the context of the Covid pandemic could have provided an opportunity for this, as the functioning of EU institutions has changed and raised a number of rule of law issues. However, the debate on compliance with the Charter of Fundamental Rights today is not outlined around the proper functioning of the EU institutions. EU politicians and officials are debating on how they could apply the Charter of Fundamental Rights to Member States.

On the 2nd of December 2020, the European Commission published its Strategy to strengthen the application of the Charter of Fundamental Rights in the EU. The main focus of the Strategy is placed on how to better hold EU Member States to account for the rights enshrined in the Charter and for this, how to strengthen the knowledge, capacities and networks of the various NGOs. The document describes that “from 2021, the Commission will present a new annual report on the application of the Charter in the EU, which, in contrast with the Commission’s previous Charter reports, will look more closely at the

Charter of Fundamental Rights of the European Union...

Charter's application in the Member States and will provide further insight to the Commission for the assessment of compliance of national legislation with EU law."

At the beginning of this year, the LIBE Committee of the European Parliament held a debate on a new strategy for the Charter of Fundamental Rights. It also became apparent during the exchange of views that the majority of the MEPs see the Charter as another instrument for rule of law investigations against Member States. In the debate, the usual criticisms against Hungary and Poland were repeated, focusing on how the Charter of Fundamental Rights could be linked to the Commission's annual report on the rule of law monitoring EU Member States. Thereby, the Charter appeared as a supplementary tool to put pressure on Member States in order to force domestic political changes requested by the EU.

The reflection at EU level on the application of the Charter of Fundamental Rights could easily get lost in the series of loud political debates around the rule of law. However, it is worth paying more attention to this instrument. The Commission's Communication of last December stated that the application of the Charter would cover an increasing number of areas. Koen Lenaerts, President of the European Court of Justice also claimed at a conference organised on the 20th anniversary of the Charter last December that the Charter would play an increasing role in important cases before the Court of Justice of the Union. As the Communication of the Commission also mentions, these could include sensitive areas to Member States' sovereignty such as migration, justice, employment or taxation. Meanwhile, the original aim of the Charter, the protection against violations of fundamental rights by the EU institutions, becomes more and more forgotten.

31 March 2021