

The EU Protection of Human Rights – a Unique System in the Unique Times (What it is and What it Could Be)

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Summary: The Union's protection of human rights is often associated entirely with the Charter of the Fundamental Rights of the EU. In fact, the protection of the rights of the individual is provided by the sophisticated combination of various mechanisms of the different nature. Each of these mechanisms is characterized by its own peculiarities and certain limits. Their mutual interconnection and balanced interaction create a unique system of human rights regulation at the level of the EU. The aim of this contribution is to analyse the nature and weak points of these mechanisms including: Mechanism of the Charter of the Fundamental Rights of the EU, the Common European Values, Judicial Doctrine of Fundamental Rights, Certain instruments of soft law character. The objective is to outline the eventual ways of their future eligible regulation, which will enable to eliminate (at least partly) the mentioned pitfalls.

Key words: human rights, fundamental rights, rule of law, Common European Values, Charter of the Fundamental Rights of the EU, judicial doctrine of the fundamental rights, general principles of law.

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1. Introduction

The Union's protection of human rights is often associated entirely with the Charter of the Fundamental Rights of the EU. In fact, the protection of the rights of the individual is provided by the sophisticated combination of various mechanisms of the different nature. Each of these mechanisms is characterized by its own peculiarities and certain limits. Their mutual interconnection and balanced interaction create a unique system of human rights regulation at the level of the EU.

In particular, the list of the key mechanisms of this system which will be the subject of this analysis consists of:

- I. Mechanism of the Charter of the Fundamental Rights of the EU
- II. Mechanism of the Common European Values, including the Human Rights and Rule of Law (Art.2 TEU)
- III. Judicial Doctrine of Fundamental Rights as a part of the general principles of law, elaborated by the Court of Justice of the EU
- IV. Certain instruments of soft law character focused on the field of human rights

The aim of this contribution is to analyse the nature and weak points of these mechanisms and to outline the eventual ways of their future eligible regulation, which will enable to eliminate (at least partially) the mentioned pitfalls.

2. Mechanism of the Charter of the Fundamental Rights of the EU

The Charter of Fundamental Rights of the EU occupies a central place and creates an iconic and powerful symbol of the entire EU system of the human rights regulation. As the first coherent catalogue of human rights of the European Union's standard it has become the most quoted and munificently mentioned instrument in this field.

It also very often serves as one of the main reference points in the reasonings of drafts and proposals for the adoption of new legislative acts and non-binding documents of the EU, as well as in the international agreements and treaties concluded by the Union.

Merely a fleeting glance at this document enables to notice that the Charter is characterized by its own very unusual, original and unique structure, which cannot be found in case of other human rights catalogues. In this respect it can be pointed out that the Charter abandons the traditional sequence in the classification and hierarchy of human rights that can be seen in other constitutional and international human rights instruments.

The authors of the Charter came up with their own innovative concept rejecting the usual hierarchization, where personal and political rights are superior to economic, social and cultural rights. On the contrary to this the main leitmotiv for the structural classification and sorting of individual rights in the Charter becomes their value mutual interconnection and their ideological affinity. “The Charter comes with its own original concept characterized by the fact that although each chapter brings the rights of different generations, which are nevertheless ideologically and philosophically connected (this is confirmed in particular by the chapters “Freedoms”, “Equality” and “Solidarity, which gathered from the legal philosophy of Immanuel Kant and the following additional considerations of Wienfried Brugger¹. This approach to the subdivision of rights is undoubtedly intended for a greater accentuation and emphasis on the value and ideal aspects of the Charter”.²

One of the most distinct features of the Charter consists in its extremely extensive material scope. The *ratione materiae* of this catalogue covers the very wide spectrum of human rights of different nature, including the personal rights, political rights, economic rights, social rights and so-called modern rights.

In other words, the whole concept of this document reflects the intention to create a really comprehensive, modern and innovative list of human rights of European Union’s standard capable for protection of rights of the individual in the 21th century.

The jurisprudence³ makes the classification of these rights in the 3 main categories.

- Fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States, as general principles of Community law;
- Fundamental rights that pertain only to the Union’s citizens;
- Economic and social rights as contained in the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers

To the mentioned categories of rights by Jean Claude Piris, it is necessary to add also the fourth category, which covers the new entitlements and rights (or modern rights), which are stemming from the latest scientific and technical progress, and which were declared for the first time just by the Charter of Fundamental rights of the EU as a part of a coherent catalogue of human rights.

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² ŠÍŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 77.

³ PIRIS, J. C. *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, Cambridge, 2010. p. 152.

To such entitlements belongs primarily so-called bio-ethical provisions of the Charter, which are contained in Art.3 (right to the integrity of person), including: the prohibition of eugenics practices, in particular those aiming at the selection of persons; the prohibition on making the human body and its parts as such a source of financial gain; the prohibition of the reproductive cloning of human beings. In other words, the mentioned provisions reflect the norms and principles brought mostly by the Convention on Human Rights and Biomedicine.⁴

To the same category of new rights belong also Art.37 (Environmental protection), Art.38 (Consumer protection) and some others, which go far beyond the analogical rights protected by ECHR, European Social Charter and Community Charter of Fundamental Rights of Workers, which are covered by the previously mentioned categories.

In general, the modernization, innovation and adaptation for the changing conditions of the new age are one of the most characteristic and inherent features of this EU binding list of human rights, as it can be seen from the formulations of its articles and the commentaries to them contained in the Explanations Relating to the Charter.⁵

It is also confirmed *inter alia* by the declaration expressed in the Preamble of the Charter that “it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter”. In this respect it is worth thinking on the novelization of the text of this Union’s catalogue and on incorporation of other new rights, which has occurred after the adoption and entering of the Charter into the force. It relates especially to the entitlements and rights which stemmed from the digital transformation, introduction of the AI in the everyday life, and from the related changes of the general *modus vivendi* of the society. These rights just now are in the process of their shaping, crystallization and final formulation, and even their title itself is not being definitive, as we can meet with such names as *digital rights*, *cyber rights*, *modern technologies rights*, *internet rights*, etc. Nevertheless, it seems that the notion of “*the digital rights*” is the most appropriate, eligible and the most widely used in the last months both in the scientific doctrine and in legislative acts and thus worth to be used for the incorporation into the Charter. Nevertheless, the key issues consist not only in the finding of the correct title of such rights, but primarily in the elaboration of their proper list, which will be capable for introduction into the Charter, and the drafting of their optimal formulations and their precise content. In this connection it can be pointed out on some already sound proposals concerning the mentioned list of rights, eligible for the incorporation into the

⁴ ETS/164<http://conventions.coe.int/treaty/en/treaties/html/164.htm>.

⁵ Explanations (*) Relating to the Charter of Fundamental Rights (2007/C 303/02) Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

Charter, which would in particular cover the following entitlements of the individual, as for instance: Right to the access to Internet; Right to the communication in cyber space (via email, social media, chats); Right to be forgotten (right to erasure); Right for information, clear explanation and truthful information in e-commerce; Right to communication with a human operator and not to be the subject of the automated decision; Prohibition of discriminatory conditions in the transactions made online, especially in e-commerce (personalized pricing, geo-blocking, etc.).⁶ Such catalogue of digital rights could consist of both already declared rights, as well as entirely new entitlements of the individual. The Charter as a document, which was put by the Lisbon Treaty at the level of the primary law, and which is of a constitutional character, under its own nature must be formulated in a brief and clear form, and thus cannot comprise all the digital entitlements of the individual in a such short text. That is why the precise choice of the key and the most essential digital rights capable for their introduction into the Charter, is so important. As a good example can serve the right to be forgotten (right to erasure), which was declared as such by the Court of Justice of the EU and which is supported by rigorous regulation of it in the GDPR. For the mentioned reason this digital entitlement can be considered to be a fully capable for incorporation into the Charter as a real right, not only as a mere principle.

The entire group of digital rights ambiguously deserves their introduction into the Charter, which would be eligibly completed by them and thus would significantly enrich and actualize this modern catalogue of rights of the European Union's standard. The detailed mapping and specification of all the related human rights, entitlements and principles connected with the digital transformation must be rendered to the acts of the secondary legislation, which thus *de facto* completes already declared rights within the mechanism of the Charter.

The first step in this direction was already made, which can be found in the text of European Declaration on Digital Rights and Principles for the Digital Decade (2023/C/23/01).⁷ Nevertheless, as non-binding document, which “has declaratory nature and, as such, does not affect the content of legal rules or their application (Preamble of Declaration, point 9)⁸ and thus cannot serve as a whole text for this purpose. Besides, the actual wording and formulations in Declaration do not enable to incorporate these entitlements in their current form into the Charter. Another problem with this Declaration is connected with the fact, that

⁶ ŠIŠKOVÁ, N. (ed.) *Legal Issues of Digitalisation, Robotisation and Cybersecurity in the Light of EU Law*, Kluwer Law International, Alphen aan den Rijn, 2024. p. 59.

⁷ European Declaration on Digital Rights and Principles for the Digital Decade (2023/C/23/01) [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123(01)).

⁸ European Declaration on Digital Rights and Principles for the Digital Decade, Official Journal C 23, 23. 1. 2023

it is not quite obvious what are (from the declared entitlements) the real rights and what are the merely principles? If some of them are the autonomous rights which were already found and declared by Court of Justice of the EU or was regulated by the binding act of the secondary legislation, their incorporation into the Charter is quite reasonable and desirable and thus would complete and enrich the current list of binding rights of the European Union's standard.

Some of the latest EU acts of secondary legislation are already focused on the regulation of the issues of digital transformation, but not in the connection with individual rights (The Artificial Intelligence Act⁹ adopted by the European Union in 2024 is not an instrument specifically addressing human rights, though it refers to ensuring a high level of fundamental rights as enshrined in the Charter of Fundamental Rights of the EU).

Regardless of the above mentioned and other possible additions and improvements in its text, it can be stressed that already now the Charter of the Fundamental Rights of the EU is characterized by one of the broadest concepts of protected rights in the form of a single comprehensive document which was elaborated at the international level. It is just striking in the comparison with the European Convention of Human Rights, which is principally focused on the regulation of only personal rights, political rights and the rights of the mixed character, and thus brings the catalogue *de minimis*.

On the contrary to the Convention, in case of the Charter the cataloguing was subjected not only to fundamental rights forming the very core of human rights (which would strictly correspond to the name of the Charter of Fundamental Rights), but also to economic and social rights as well as the fourth-generation rights.¹⁰

It is necessary to stress *expressis verbis* that the Charter has its own distinct added value, which is focused not only on the codification of the rights declared before, but is also intended to be a document which bring the political, ideological and value dimension of the Union and thus creates "the new image for the project of European integration."¹¹

In other words, concerning its material scope, the Charter is a very ambitious, generous, munificent and amiable document towards the individual. Paradoxically, this generosity towards the individual in terms of the scope of protected rights creates also the main source of the greatest difficulties in the legal life of the Charter and in enforcement of its provisions.

⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng>.

¹⁰ ŠÍŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 76.

¹¹ KERIKMAE, T. (ed.) *Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights*. Munchen: Springer, 2014.

This is because the Member States are very cautious about taking on such extensive obligations in the human rights field. In other words, what was easily accepted by the Member States as a mere political declaration, in the case of a legally binding document has come to be seen as an excessive encumbrance and potentially great burden for the national governments. This was also the main reason why the Charter could not obtain the legal status over the course of almost a decade, and why this Union's "Bill of Rights" was not incorporated directly in the text of the Lisbon Treaty (as it was proposed in the case of the Constitutional Treaty), but became legally binding only on the basis of the reference in Article 6 of the TEU.

For the same reason, the Lisbon concept towards the Charter counts on 3 means that partially limit its effects and reduce the entitlements of individual, which were generously granted in the political declaration. They are: a) Explanations Relating to the Charter, b) Protocol No 30 to Lisbon Treaty, c) horizontal provisions of the Charter.

2.1. Explanations related to the Charter

From the formal point of view Explanations do not create a source of EU law, but, as it is stated in this document, "they are a valuable tool of interpretation intended to clarify the provisions of the Charter".¹² This commentary of the experts under the authority of the Praesidium of the Convent is considered to be a very important instrument, as its legal status is derived from the repeated references to Explanations both in the text of the EU Treaty itself (Art.6 (1) TEU, as well as in the provisions of the Charter (Art. 52, para. 7).

The increased attention to this instrument within the Lisbon concept is given by the fact that Explanations had made a division of all previously declared rights into the *rights* and *principles*. In case of *rights* Explanations speaks about the "subjective rights which may be directly invoked as such by the individuals in Courts, while *principles* define an objective to be respected by the EU legislative and which can be invoked once they have been implemented through legislation".¹³ Further specification of principles are contained in Art.52 para 5, which states: *"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable*

¹² Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

¹³ PIRIS, J. C. *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, Cambridge, 2010. p. 153.

only in the interpretation of such acts and in the ruling on their legality.” Another provision concerning Explanations is contained in Art.7 para 7:

“The Explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

In other words, some of the entitlements of individual in the Charter are perceived as the real and genuine rights, and some as the mere program provisions or certain definitions of objectives to be respected by secondary law and which enforcement is possible only if they have been implemented by the EU legislation. Thus, the Lisbon concept through Explanations has, on the one hand, considerably reduced the obligations of the Member States, while, on the other hand, it has removed from the list of previously declared individual rights a considerable category of entitlements declared as the *principles*, which cannot be enforced. This significantly weakened the effects of the Charter, as the rights which were originally generously granted to the individuals were substantially reduced at the level of their legal effects.

Moreover, this concept had become in contravene with the very purpose of the Charter, which was intended to be a document that is clear, understandable, and close to the citizen. At present, on the contrary, the list of real rights is hardly grasped and not easily understandable not only for laymen, but even for lawyers, despite the proclaimed purpose of Explanations. It therefore can be concluded that, although the Charter had become legally binding by the Reform Treaty, nevertheless it was achieved by a “high cost” in the form of the radical restrictions imposed by Explanations and their verification in the Treaty and in the Charter.

2.2. Protocol No 30 On the Application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom.

That restriction was not the only one. The Protocol No 30, annexed to the Lisbon Treaty, was negotiated as a further mean of limiting the effects of the Charter. Its adoption was initiated by the United Kingdom in view of the fact that two provisions of the Charter (Art. 28 –” Right of collective bargaining and action” and Art. 30 – “Protection in the event of unjustified dismissal”) were formulated as the *rights* and not as the *principles*, and thus their direct applicability cannot be excluded. This opinion was expressed in the Report of the European Committee of the House of Lords of the British Parliament¹⁴ and had become an official

¹⁴ EU Committee, 10th Report of Session 2007- 2008, the Lisbon Treaty: An Impact, Assessment, Published on 13 March 2008, HL Paper 62, www.parliament.uk/lords.

position of the Great Britain in negotiations on the Lisbon Treaty and in adoption of this additional guarantee concerning the reduction of the legal effects of the certain provisions of the Charter.

On the contrary to Explanations, which are characterized by its universal territorial scope towards all the Member States of the Union, in case of Protocol No 30 its *ratione loci* was limited towards the selected States. Besides the United Kingdom, the signatory became also Poland. The Czech Republic, although had expressed its intention, but had never acceded this Protocol.

The motivations of these potential signatories were different. In case of UK, as it was already mentioned, it was the efforts to reduce the impacts of social rights, the Polish motivation was connected with the issues of public morality and family law, which under the opinion of the Polish authorities could be doubted while interpreting the Union's catalogue of rights.¹⁵

In the case of the Czech Republic, it was the fear of breaking of the Beneš Decrees on the basis of the Charter.¹⁶

However, today, a decade and a half after the entry into force of the Protocol, we are talking about a significant reduction in the territorial scope of this document, caused by Brexit and by the definitive decision of the Czech Government not to accede to the Protocol.

In relation to a single State, to which the Protocol is still applied (Poland), the basic question lies in ascertaining the nature of the mentioned document, in particular whether this instrument creates an opt-out from the Charter or, or is it rather an interpretation instrument that promotes the application of the Charter, but within the certain limits? In this respect it must be pointed out that despite the fact that media often refer to the Protocol No.30 as an opt-out, in jurisprudence prevails the opposite opinion.¹⁷ A number of arguments lead to this conclusion. First, an opt-outs as a deviation from the EU law are permissible only in those areas of the Union law which are not central.

The second argument is supported by the semantic interpretation, as the Protocol bears the title "On application of the Charter" and does not contain any notion on the opt-out, as for instance "exemption", "non-participation", "non-applicability", etc.(citace- ibid).

The third argument is the main one. It is above all the fact that while the Charter creates a fundamental source of human rights protection at EU level,

¹⁵ For more details see ŠIŠKOVÁ, N. New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter), *European Studies. The Review of European Law, Economics and Politics*, 2014, vol. 1, pp. 12–21.

¹⁶ Ibid.

¹⁷ See for example: SCHWARTZ, J. Protokol o uplatňování Charty základních práv Evropské Unie, *Jurisprudence*, 2010, vol. 19., no. 2, pp. 19–20.

nevertheless it is not the only one source. Therefore, even the adoption of the mentioned Protocol cannot call into question the existing judicial doctrine of fundamental rights of the EU as part of the general principles of law, a deviation from which is inadmissible.

These considerations expressed in legal science were also confirmed by the conclusions of Luxembourg judiciary. In particular, the Court of Justice in its decision C-411/10 had pointed out that¹⁸: *“In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.”*

It can therefore be concluded that the Protocol is de facto an additional, albeit superfluous “safeguard” guaranteeing that the Charter does not create new rights and does not extend the possibility of challenging of Member States for violation of fundamental rights.

In other words, as it has been aptly observed in legal science, “against an illusory danger the Protocol provides an illusory protection”.¹⁹

So, in legal terms, the effects of this document are very limited and can be assumed only in those hypothetical cases, when the Court of Justice by mean of interpretation should decide to broaden the duties of the Member States beyond the existing obligations.²⁰

Nevertheless, in political terms the Protocol indicates a very strong signal concerning the unwillingness to accept the Charter in the entire scope.

Besides the Protocol under the European Parliament, undermined the efforts of the EU to reach and maintain a uniformly high level of the “protection of fundamental rights”.²¹

All the aforementioned reservations about the Protocol lead to unequivocal conclusions that at present it is a document of a very little effect, redundant and not serving for the aims of European integration. Its further legal life thus no longer makes any sense.

¹⁸ C-411/10, N.S and others, ECLI:EU:C:2011:865

¹⁹ KOMÁREK, J. Česká “výjimka” z Listiny základních práv Evropské unii. *Právní rozhledy*, 2010, vol. 18, no. 9, pp. 322–331.

²⁰ For more details see: ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 95.

²¹ European Parliament resolution of 22 May 2013 on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE)), point K.

2.3. Horizontal provisions in the Charter

Horizontal provisions are considered to be those clauses in the European Bill of Rights which serve “for determination for the scope of its application in its relationship to other sources of law, essentially most of these provisions fulfil two purposes: they seek to ensure that the Charter can be accommodated within the community legal order without threatening its coherence, and also control the supremacy of fundamental rights ie. Balance their enhanced protection with government discretion.”²² In other words, they are the restrictive provisions which prevent an overly broad interpretation of the rights and thus serve to eliminate the potential responsibility of the Member States in the area of human rights. We can say that these are certain other additional “safeguards” which had ensured the smooth adoption of the Charter and the gaining of its legal binding force. The Lisbon Treaty had extended the number of these clauses over the original list of horizontal provisions contained in the political declaration, as well as made a certain modification in the text of the “old” ones. The entire current list of them can be found in Chapter 7 “General Provisions of the Charter”.

The Lisbon Treaty had extended the list of clauses beyond the original ones and had included also other horizontal provisions, which are primarily intended to avoid an overly broad interpretation of the rights contained in the Charter. These clauses consist in the incorporation, as it was already mentioned, of paragraph 5 of Article 52 (a distinction between rights and principles) as well as paragraph 7 of the same article (a reference to the Explanations). Besides two other horizontal provisions were introduced (Art.53 Level of protection and Art.54 Prohibition of abuse of rights), which create other guarantees against the excessive “burden” for the Member States in the human rights area.

So, it can be concluded, that all the mentioned measures towards the Charter brought by the Lisbon Treaty, had significantly deepen the limitations in its application.²³

In relation to the mechanism of the Charter, another very important aspect must be explicitly mentioned. It is the fact that, unlike the European Convention, this Union catalogue of human rights does not provide its own control mechanism. Although the Charter contains a Chapter VI entitled ‘Justice’, in fact it does not regulate the procedural rules for the special challenge concerning the enforcement of rights protected by the Charter, but contains only the material provisions related to the right for fair trial.

²² TRIDIMAS, T. *The General principles of Law*. 2nd edition, Oxford University Press, Oxford 2006. p. 362.

²³ For further details see: CRAIG, P. *The Lisbon Treaty. Law, Politics and Treaty Reform*, Oxford University Press, Oxford and New York, 2010. pp. 222–226.

This can be seen as one of the greatest weaknesses of the Charter and the shortcomings of its mechanism, especially in its comparison with the Convention.

3. Mechanism of Common European Values

Common European Values currently belong to the widely spread and used notions both in the scientific literature,²⁴ as well as in non-scientific sources and in media. Despite the fact, that this concept is almost daily referred to, its content still remains more or less uncertain and partly elusive.

This is mainly due to the vague wording of Article 2 TEU, which forms the basis and starting point of this concept.

A year ago, the author of this article had published a detailed analysis of this concept in the framework of European Studies,²⁵ therefore, in view of the purposeless reason of its repetition, only the main arguments and considerations regarding the mentioned postulates will be presented in the current article and in their brief form.

Primarily, it should be pointed out that the concept of Common European Values is not just merely a legal concept but creates also a moral and ideological-political basis for the entire construction and functioning of the European Union and its law. Moreover, under the observations of the Court of Justice “the values contained in Article 2 TEU define the very identity of the European Union “²⁶

However, we will not deal with these other aspects and focus entirely on the legal side of the term and its relationship to human rights issues.

If we look at the content of this concept in the context of Article 2 TEU,²⁷ we can find two facts. First, that it is a very general provision of a demonstrative (non-exhaustive) character, which does not provide any definitions and focuses on the relevant concepts in a very superficial and non-specific way.

The second fact that immediately intrigues, is that the most postulates mentioned in this Article have a human rights dimension.

²⁴ SCHRÖDER, W. The EU Foudning Values- Constitutional Character and Legal Implications. *European Studies. The Review of European Law, Economics and Politics*. 2016, vol. 3, pp. 50–64.

²⁵ ŠÍŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 19–40. DOI: 10.2478/eustu-2024-0001.

²⁶ C-156/21 Hungary v. EP and Council, ECLI:EU:2022:97, para 1.

²⁷ Article 2 TEU: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

In other words, here we see both an explicit reference to respect for human rights, as well as the mentioning to other notions that usually create an integral part of the traditional human rights catalogues, such for instance as respect for human dignity, equality, non-discrimination, justice, etc. Besides, the of human rights are de facto enshrined in the concept of the rule of law, as they create the integral component of this notion. So, the most of values enumerated in Art.2 are associated with the human rights.

Therefore, it can be concluded that human rights create the very core of Common European Values and are its quintessence.

At the same time the provision of Article 2 TEU requires the certain improvements and the introduction of other postulates, which are not directly connected with the human rights, but are common for Member states and inherent for the European identity (on which it was already pointed out in jurisprudence).²⁸

European law has elaborated a variety of instruments of different nature for the purpose of the protection of Common European values and the enforcement of the compliance with them, including human rights. Nevertheless, any of these tools cannot be considered to be fully effective and applicable in all the cases of the infringement of the mentioned values.

In this respect undoubtedly it should be mentioned at the first place the political procedure under Article 7 TEU, which was intended exclusively for the protection of the aforementioned postulates, and which was tailored especially for this purpose.

3.1. Article 7 TEU and its Procedures

Although the European Commission talks about this instrument as “the most emblematic tool for the EU to act in case of a serious rule of law failings in a Member State”,²⁹ nevertheless, up to now, a quarter of a century since the introduction of this norm, no proceedings under Article 7 have been brought to its end.

This is due to the very complicated and cumbersome procedures referred to in this article and, in particular, the need to achieve unanimity in the vote in the European Council on the alleged violation of these values by the Member State concerned.

Other reservations include unclear wording of the scope of sanctions and the temporal horizon of the entire procedures, as well as vagueness of other relevant

²⁸ For details see: ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, pp. 24–26. DOI: 10.2478/eustu-2024-0001.

²⁹ Communication of the Commission to the European Parliament and the Council. Further Strengthening the Rule of Law within the Union. Brussels, 3. 4. 2019, COM (2019), 163 final.

terms. Not negligible role play also the potential impacts of these procedures on the State concerned, as well as on other States of the Union.

In relation to the State against which these proceedings are being conducted, the fact must be taken into account that any State can operate in the long-term period under the conditions of limited membership, when it fulfils its obligation but has only limited rights, especially in decision-making process.

In these terms, the political procedure can be seen as a sort of “ante-room” of a possible exit from the EU.

For the rest of the EU, there is a risk of a split between Member States and a disruption of its unity, which in the worst case may even trigger the process of disintegration of the EU.³⁰ Just for the mentioned reasons this article is referred to as “the nuclear option” or “the nuclear alternative”³¹, which very temperate and judicious application is required beyond all doubts.

3.2. Judicial procedure under Article 258

An alternative legal instrument, which is also comes into consideration for the protection of Common European Values, is the infringement procedure under the Article 258 TFEU. This traditional challenge due its universal nature can be successfully applied in this field as well. Nevertheless, it is significantly limited by the fact, that the breach of these postulates must create at the same time a violation of the specific norm of EU law, which is not always reachable, as it may consist in a pure national dimension. That is why this mechanism cannot serve as a main instrument for the protection of these values and will always remain a “backdoor solution” and surrogate action in this field.³²

3.3. Mechanism of the Rule of Law Conditionality.

Another instrument, which is worth mentioning in the above context, which has already proved its effectiveness in practice, is the Regulation 2020/2092 “On General Regime of Conditionality for the Protection of Union Budget”.³³ However, its application is limited by its material and temporal scope with regard to

³⁰ ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, p. 37. DOI: 10.2478/eustu-2024-0001.

³¹ President Barroso :State of the Union Address. European Parliament , Strasbourg, September 2012; https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596.

³² ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 293.

³³ Regulation 2020/2092 “On General Regime of Conditionality for the Protection of Union Budget” Official Journal L I 433/1 <https://eur-lex.europa.eu/eli/reg/2020/2092/oj/eng>.

the purposes of this act. Especially, as Court of Justice has stated, that: “while in the case of Article 7 the subjects are all common values referred to in Art. 2 TEU, in the case of the Regulation, these are exclusively the principles of the rule of law so far as they have an impact on the budget.”³⁴

As regards the nature of the measures that may be taken for the protection, in the case of Art.7 involves the suspension of certain membership rights and, in the case of Regulation, they are the measures of a purely budgetary nature. Termination of measures in case of Art. 7 is linked to a change in the situation and, in case of a Regulation, termination may occur even if the breach is still ongoing but no longer has an impact of the Union budget.³⁵

4. Judicial Doctrine of Fundamental Rights as a Part of the General Principles of Law Elaborated by the Court

The constant case-law of the Court of Justice creates an original source of “discovering” of human rights at the level of the EC/EU. The Luxembourg Court has become not only the pioneer in the field of human rights at the supranational level, when it had unambiguously applied the protection of these rights as a part of the general principles of law. But it has also formulated in the framework of the development of its doctrine of fundamental rights the most important entitlements of the individual, which can be enforced in the conditions of the functioning of the supranational entities, including the definition of the relevant notions. The Court of Justice has demonstrated a great creativity and independence, while formulating these rights, and in choosing the sources of its inspiration (including the Constitutional law of Member States and International treaties), which would serve in the best way to the specific aims of the Union, including the determination of the conditions for their application.³⁶ The Court of Justice also takes into account the case-law of the European Court of Human Rights.

In the early days of European integration, in the *Stauder* judgment,³⁷ the Court of Justice had invented a way how to protect fundamental rights, even

³⁴ C-156/21 Hungary v European Parliament and Council of the European Union. ECLI:EU:C:2022:97.

³⁵ For more details see: ŠIŠKOVÁ, N. Rule of Law as an Integral Part of the Common European Values. *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 1, p. 36. DOI: 10.2478/eustu-2024-0001.

³⁶ ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. p. 295.

³⁷ C-29/69 Stauder v. Ulm; ECLI:EU:C:1969:57.

when the relevant norms were lacking in the “written” law. In the Court’s view, these rights are enshrined in general principles of law and as such should be protected by the Court.

The birth of the general principles of law within the judicial doctrine can be expressed in a simplified way through two stages:

- inductive in which the Court derives a general principle from the specific provision from the source of its inspiration (Foundation Treaty, Constitutions of the Member States or International Treaty)
- deductive – here the Court arrives at a solution to the particular issue by applying general principle.³⁸

In the hierarchy of EU law, the general principles of law occur at the level of the sources of primary law. This means that in case of conflict between the general principles of law and, for instance, the secondary legislation, the first of them will prevail.

This privileged position within the system of European law stems from the fact that, in the view of the Court, they become a “precondition of lawfulness and legality”³⁹, i.e. an indicator of the legality of other sources of EU law.

The first judgments of the Court of Justice in the field of human rights were focused on the declaration of the really fundamental rights (in the sense of the most important entitlements of the individual forming the very core of human rights), which were reflected in the title of the judicial doctrine itself (and subsequently in the title of the Charter). At present, however, the extensive set of rights declared and protected by the Court goes far beyond this originally used concept and encompasses in fact the human rights of all four generations. Therefore, the title of *fundamental rights* in this context can be perceived as a well-established terminological custom, but not as a notion, which correspond *stricto sensu* to this term under the theory of human rights.

The results of the Court’s decision-making activities in the field of human rights, in the form of an extensive corpus of the declared rights of different generations, had prepared the conditions and the basis for the creation of the Charter of Fundamental Rights of the EU.

However, even after the adoption of this first Union’s coherent catalogue of human rights, the importance of the case-law of the Court has not diminished, and this source of European law remains irreplaceable. As Takis Tridimas has noted: “The protection of fundamental rights in the Community legal order has been almost entirely the product of case law. This still remains the case despite

³⁸ HARTLEY, T.C. *The Foundations of European Union Law*, 7th edition, Oxford University Press, Oxford, 2010. p. 142.

³⁹ Opinion C-84/95 *Bosphorus v Minister for Transport, Energy and Communication and Others*, ECLI:EU:C:1996:179, point. 51.

the fact that there are now express references to their protection in the TEU and the Union has acquired its own catalogue of fundamental rights in the form of the Charter.³⁴⁰

The significance of the case-law of CJEU is given at least by two reasons: First, due to the fact that CJEU specifies and does the interpretation of the rights declared in the Charter. Second, the Court is still “finding” and formulating the new rights (for instance, the rights that are connected with the usage of modern technologies, etc.) In other words, the Luxembourg Court is still making complete the original catalogue of rights of the Charter, which in the future can be extended and supplemented with regard to the relevant case-law of the Court.

The fact that the case-law of the CJEU still remains an irreplaceable source of human rights was confirmed, besides others, also in the case of Protocol No 30 of the Lisbon Treaty, when it prevented evaluation of this document as an opt-out just with regard to the existing judicial doctrine of fundamental rights, which as a part of the general principles of law cannot be cancelled.⁴¹

Besides the extension of the list of the protected rights, the Court has also provided a number of authoritative interpretations of the key notions not only concerning the protected rights but also as regards the conditions for the application and implementation of the Charter. As an example can be mentioned, in particular, that it has specified the concept of “when implementing Union law” in the intention of horizontal provision under Art.51(1)⁴² in *Aklagaren v. Fransson* case (C-617/10)⁴³, including the partly correction of this concept in its further cases (C-206/13 *Siragusa*⁴⁴, C-198/13 *Hernandes*⁴⁵ and others).⁴⁶

The Court of Justice, over a half-century of developing of its doctrine of fundamental rights, had to also settle and reconcile with the positions of International courts and the practice of the Constitutional courts of the Member States in the human rights field, which has also been duly reflected in its case law and were shaping its conclusions. However, given the limited scope, these essential questions cannot be the subject of this study.

⁴⁰ TRIDIMAS, T. *The General Principles of EU Law*, second edition, Oxford University Press, Oxford-New York, 2006. p. 298.

⁴¹ ŠÍŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*, Wolters Kluwer Prague, 2021. pp. 295–296.

⁴² About the Rationale of Art. 51 of the Fundamental Rights of the Charter see: Applying the Charter of the European Union in law and policymaking at national level, Publications Office of the European Union, Luxembourg, 2020.

⁴³ ECLI:EU:C:2013:105.

⁴⁴ ECLI:EU:C:2014:126.

⁴⁵ ECLI:EU:C:2014:2055.

⁴⁶ For further details see: HAMULÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, vol. 10, no. 3, p. 14.

5. EU soft law instruments of human rights nature.

To this category belong the EU documents, which are formally not binding, nevertheless they have a great political authority and are capability to cause the certain impacts and influence on the area of human rights.

This thesis can be illustrated in case, for instance, by one of the instruments of such kind.

In particular, the Community Charter of Fundamental Social Rights of Workers,⁴⁷ which was signed on 9. 12. 1989 in Strasbourg by the leaders of the 11 Member States of the EC, can serve as a good example.

This instrument was adopted in the form of the political declaration of the intentions of the Heads of States and Governments of almost all Member States at that time (except UK). The idea and purpose of this document was given by the President of the European Commission Jacques Delors, who had pointed out that "The Charter was intended to reveal how far the Member States share common values and how far these can be reflected in rights."⁴⁸

Part I of the Community Charter contains the declaration of fundamental social and economic rights of workers, as well as the formulation of the specific objectives of the Communities in this field. The palette of the declared rights in the Charter partly corresponds to the analogic rights protected by the European Social Charter, but with several differences given *inter alia* by the advantages of the market, as for instance, freedom of movement (including the elimination of obstacles arising from nonrecognition of diplomas or equivalent occupation qualifications) or the right to establishment etc.

Seemingly the control mechanism of the Community Charter in its usual meaning, in view of the non-binding nature of this document, cannot be observed. However in fact, Part II of this declaration establishes a system of annual reporting on the application of the Charter by the Member States, and thereby ensuring a certain control in its embryonic form.

Despite all the weaknesses of this document – the non-binding character and the related impossibility of its enforcement, the fragmentation and incompleteness in the regulation of certain social rights – the adoption of the Charter can be evaluated in general rather positively.

⁴⁷ Community Charter of Fundamental Social Rights of Workers Official Journal COM 89 248, 9. 12. 1989 eur-lex.europa.eu/EN/lega.-context/summary-community-charter-of-fundamental-social-rights-of-workers.html

⁴⁸ Jacques Delors: Speech to the Parliamentary Assembly of the Council of Europe, October 1989, Council of Europe, Parl. AS/soc/41/21, p. 2

It must be viewed through a prism, that it was an initial attempt to catalogue social and economic rights at Community level and therefore the creation of the first coherent document in this field.

The rights declared by the Community Charter was used as a reference point by the Court of Justice in the deepening and shaping of its doctrine of fundamental rights.⁴⁹

The importance of the Charter is also confirmed by the numerous references to it in other acts of the *acquis communautaire* – the preamble to the Single European Act, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon and the Preamble to the EU Charter of Fundamental Rights. This unambiguously shows that this legally non-binding declaration has influenced very substantially the entire development of the social policy of the EC/EU in recent decades and has definitely determined its direction.

To other instruments of soft-law character in this area could be referred also European pillar of Social rights⁵⁰ or European Declaration on Digital Rights and principles.⁵¹ Their content and impacts due to the limited space cannot be analysed in this paper.

6. Conclusions

The provided overview of the relevant instruments shows that human rights regulation at EU level is not limited solely to the Charter but goes much further. It provides a sophisticated system of mechanisms of a different nature that makes it possible to capture the potential violations of human rights at the different levels and under the varied conditions and circumstances. The sum of these mechanisms creates and completes a unique system of protection of human rights at EU level. However, any of the mentioned components of this system is not quite optimal, has some weaknesses and deficiencies, as well as requires some improvements.

⁴⁹ See for instance: C-173/99, C-13/05, C-438/05.

⁵⁰ European Pillar of Social Rights,

HYPERLINK “[⁵¹ European Declaration on Digital Rights and principles \[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123\\(01\\)\]\(https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023C0123\(01\)\)](https://nam04.safelinks.protection.outlook.com/?url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FEN%2FTXT%2F%3Furi%3DCELEX%3A52017DC0250&-data=05%7C02%7Cmarie.novotna%40wolterskluwer.com%7C005ad114e25840284e1908d-edb6effe%7C8ac76c91e7f141ffa89c3553b2da2c17%7C0%7C0%7C639189466999136672%7CUnknown%7CTWFPbGZsb3d8eyJFbXB0eU1hcGkiOnRydWUsIlYiOiIwLjAuMDAwMCIiOiIiOiJXaW4zMiIsIkFOIjoiTWFPbCIiOiIldUIjoyfQ%3D%3D%7C0%7C%7C%7C&sdata=gWfb2Zn0CCyPlm6s%2BT%2BUAOTSTCLKjZ0Zz9FqYdwfYHw%3D&reserved=0”https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0250</p>
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For instance, the iconic symbol and the core of this system, the Chapter of the Fundamental Rights of the EU, in order to become really the catalogue of rights “per excellence”, as it was originally envisaged, needs the creation of the effective control mechanism of the judicial type. Instead of this, the Lisbon solution provides the certain improvement of *locus standi* of individual under Art. 263 para 4 TFEU, but which is done in the half-hearted manner. In other words, although the fact, that the Charter is very generous concerning the scope of the protected rights, nevertheless it is “limping” and lagging behind concerning their judicial enforcement.

Other reservations are connected with the introduction by the Lisbon Treaty of the restrictive measures in the form of Explanations, adoption of the Protocol No 30 and the widening of the horizontal provisions of the Charter, which have led to a substantial weakening of the effects of the Charter towards an individual. Besides, the lack of clarity and vagueness of these measures caused the collision with the original intention of Charter, which was envisaged to be a document, that is close and understandable for the citizens.

The content of the Charter, which brings the wide palette of the rights of all four generations, could be further expanded by the incorporation of the digital rights, especially those entitlements, which were already declared as such by Court of Justice and/or were regulated by the acts of the secondary legislation. Taking into account that the digital rights will play an increasing role in everyday life, this would really enrich and significantly improve the EU catalogue of human rights.

The concept of common European values constitutes not only a legal concept, but also creates a moral and ideological basis for the construction and functioning of the EU and, in the words of the Court of Justice, also defines the European identity itself. Analysis of Art. 2 TEU, which contains these values, makes it possible to conclude that human rights form the very core and the “heart” of the mentioned concept and they are the *conditio sine qua non* for their implementation. But the wording of the Article 2 TEU requires some improvements and introduction of other postulates which are also common for the Member States and are inherent for the European identity. The same refers to the legal instruments for the protection of this values, including the human rights.

The Court of Justice, that had become a pioneer in the protection of human rights at the supranational level, maintains its irreplaceable role in this field even after the Charter has become legally binding. This is because of its doctrine of fundamental rights of the EU as a part of general principles of law, which occupies a privileged position in the hierarchy of the sources of EU law, due to the fact that such principles create “precondition for lawfulness and legality” of other acts of the EU law. The Court not only declares the new rights, but also provides

the authoritative interpretation of the key notions concerning the protected rights, as well as regards the conditions for the application of the Charter.

The soft law tools, which are formally non-binding documents, nevertheless are capable to cause certain impacts and to influence the future progress in the field of human rights. This suggestion was proved on the example of the Community Charter of Fundamental Rights of Workers, which, being non-binding declaration, had influenced very substantially the entire development of the social policy of the EC/EU and had determined its direction for several decades.

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