THE APPLICATION OF THE PROVISIONS IN THE FIELD OF HUMAN RIGHTS – SOME ISSUES IN THE RELATION TO THE CHARTER OF FUNDAMENTALS RIGHTS OF THE EU

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Abstrakt v rodném jazyce
Článek se zabývá některými problémy v souvislosti s aplikací ustanovení Charty základních práv EU a norem sekundární legislativy v oblasti lidských práv. Hodnocení je uskutečňováno s ohledem na analýzu podmínek sine qua non: problém závaznosti, konstrukce norem a eventuality kontrolního mechanismu.

Abstract
The article deals with certain problems concerning the application of provisions of the Charter of Fundamental Rights of the EU and secondary legislation in the field of human rights. The evaluation is made in the regard to the 3 conditions sine qua non: issues of binding character, construction of norms and eventuality of the control mechanism.

The effective enforcement of the provisions of the Charter of Fundamentals rights of the EU is underlied by 3 conditions sine que non :

1. binding character and legal status of this instrument,

2. construction of its norms,

3. its control mechanism.

1. QUESTIONS OF LEGAL STATUS OF THE CHARTER

During mere 8 years of the existence of the Charter, (from its proclamation till now), several attempts to change its status were made. At the time being the issues of the binding character of the Charter creates the direct link with the legal life of Lisbon Treaty and without the entering into the force of Reform Treaty is not possible.

2. THE CHARTER AND THE ISSUES OF CONTROL MECHANISM

Despite the considerable generosity of this European Union's Bill of Rights as regards to its material provisions concerning concrete rights, it absolutely lacks its own control mechanism in the form of the institutional provisions and procedural guarantees of enforcement of those rights.

This fact is striking especially in comparison with the European Convention for the Protection of Human Rights and Fundamental Freedoms, which contains an effective control mechanism comprising the institute of individua complaints that enables private persons to appeal directly and to invoke thein claims of a human rights nature within the Strasbourg proceedings.

3. CONSTRUCTION OF NORMS AND VAGUE FORMULATIONS OF THE CHARTERS PROVISIONS

The analysis of the construction of norms contained in this catalogue of the EU human rights standard shows a number of vague formulations and provisions of program character, especially concerning the economic and social rights, where a direct effect can be hardly anticipated. The provision of Article 31, para 1, can serve as an example: 'Every worker has the right to working conditions which respect his of her health, safety and dignity'.

Based on the aforesaid, it can be stated that the Charter from its own nature as a brief document of the constitutional character is capable to articulate the rights in a very general way, whereas it leaves the filling of the contents of such generally declared rights to the secondary legislation, national laws, and the authoritative interpretation by the European Court of Justice.

Besides while solving the question of the effectiveness of enforcement of concrete provisions of the Charter, the nature of the particular right is determining. In this sense, it is important to distinguish if they are personal and political rights or rights of an economical and social nature. The latter ones, considering the difficulties in the effort to reach consensus among Member States when incorporating those rights into the Charter, have been divided into social rights and social principles (aspirations)[1]. In other words, some rights are understood as subjective enforceable entitlements, while the others as mere provisions of the programme character or definitions of objectives to be reached.

With regards to the above-mentioned peculiarity of the Charter it is hardly possible to anticipate enforcement of these above-mentioned norms by individuals directly before the national courts of Member States in all the cases. So in consideration therefore comes the enforcement of such provisions at EC/EU level.

4. ISSUES OF THE ENFORCEMENT OF THE CHARTERS PROVISIONS AT EC/EU LEVEL/ DE LEGE LATA/

Concerning the application of the vague provisions of the Charter at the Community level, i.e. before the European Court of Justice or the Tribunal of First Instance, certain problems must be mentioned. Namely, within the proceedings before the European Court of Justice in the cases of the infringement of those human rights, contained in the acts of the secondary

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[1] For detailed differentiation of rights and principles whithin the Charter`s provision see Updated Explanation relating to the text of the Charter of Fundamental Rights, Conv. 828/03, Brussels, 9.July 2003, at. 1-52

2 Ward, A.: 'The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures', p. 212-214. Ward, A.: Access to Justice, in Peer, J., Ward, A (ed.), 'Hart Publishing', Oxford and Portland, Oregon, 2007, p. See Jacobs, E.: Human Rights in the European Union: The Role of the Court of Justice, (2001), 26 E.L.Rev., Sweet and Maxwell, at 333.

3 See Case I-174/01 Jégo-Quéré and Cie v. Commission [2002] ECR II-2365, Opinion of Advocate General Jacobs in case C-50/00 Union de Pequenos Argicultures v. Council.

4 Working Group II, Working document 021 from 1.10.2002: 'The question of effective judicial remedies and access of

individuals to the European Court of Justice', http://european-convention.eu.int/docs/wd2/3299.pdf.

5 Biernat, E.: 'The Locus standi of Private Applicants under Article 230(4) EC and the Principle of Judicia Protection in the European Community', New York University School of Law, New York, 2003, p. 51.

legislation, the individual as unprivileged plaintiff has a very hard position being an object of some restrictions. It is due to the fact that under the current wording of Article 230 TEC, the natural or legal person must prove that this act is of direkt and individual concern to him or her. It is just the word individual that cause certain problems in practice. Especially it can be considered as the source of unnecessary limitations as regards to individuals, namely in the cases of regulations, as the acts of general nature and normative character where it is rather difficult, if not impossible, to prove that those acts are of individual concern to private parties.

The Constitutional Treaty and after it the Treaty of Lisbon tried to reduce to some extent these restrictions. In this respect, three eventual options were discussed at the meeting of the Working Group II of the Convention.

As the result of the discussion the new wording of the provision of Article 230(4) was incorporated into the text of the Constitution and later on into the Lisbon Treaty as follows: 'Any natural or legal person may, under conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct or individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.' (article 263 (4) of the Lisbon Treaty).

So certain teh progress was reached, but only concerning one groups of act, especially in such exceptional situations where currently there is no protection at any level, and when the private parties have even to break the law in order to have the access to justice.

5. PROPOSALS DE LEGE FERENDA

I tis neccessary to stress, that at the same time the Advocate General Francis Jacobs tried to give away the restrictions towards the private parties by the extension of the interpretation of the word „individual".

Under his opinion in the case Union Pequenos, 'the applicant is individually concern by a Community measure where the measure has, or is liable to have a substantial adverse effects on his interests.'

Althought the fact, that ECJ agreed with the Jacob's argumentation concerning the unsatisfactory conditions of locus standi of natural and legal persons under the wording of the article 230 p.4, newertheless it declared, that the those changes could be done only by the way of the appropriate modifications of the Treaties.

In our opinion the Jacobs argumentation is worth including into the Reform treaty.

Two other proposals of the Convention Members – to convert the conditions of 'direct' and 'individual' into alternative criteria (i.e. 'direct or individua concern) or simply delete the words 'an individual'15 – were also refused. The reasoning of the rejection of all these proposals was that it 'could lead to a rather significant opening-up of direct access of individuals to the Court of First Instance.

While evaluating the discussed options, it must be stressed that in our opinion the risk of increasing the number of cases and the overloading of the judicial body cannot be a strong reason for the continued existence of restrictions for private parties in the future. An adequate measure for the solution of this problem could be found in the possibility of the omission of the word „individually" from the text of the mentioned provisions. This would enable

individuals to appeal for the review of those acts of secondary legislation that have the human rights dimension.

Regardless of the changes suggested herein, it is eligible and worth considering introducing a special procedure for violating of rights granted by the Charter. We suppose that this proceeding could be structured either in the form of the incorporation of a new action on breach of human rights protected by the Charter in the text of the Treaty or by the extending the Charter itself, especially the Chapter VI 'Justice' of this coherent catalogue, which will contain the provisions dealing with the control mechanism. The latter mentioned version will reach the analogical solution as in the case of the European Convention for the protection of human rights, which also has provisions of procedural character incorporated in to the text of the instrument itself.

In our opinion, the introduction of a new procedure for violation of rights granted by the Charter will mean creation of the European Union's sub-regional system of human rights protection, which would contain a binding catalogue of human rights combined with an effective control mechanism for its enforcement. In our opinion this solution concerning proper legal life of Charter will be the most optimal and thus is the most preferable towards the individual.The eventuality of the accession of the EU to the European Convention on Human Rights doesn't lower the importace of the introduction of its own control mechanism of the Charter, because the Convention brings the standard of protection of human rights de minimis in the pan-European region. The creation of the mechanism for the enforcement of the Charter of the EU in the form of special proceedings in this connection seems to be a further step aiming the construction of the highest standard of the protection of the individuals' rights in the European Union area.

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