

The European Union Charter of Fundamental Rights: Strengthening the Participation in the European Union

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Abstract

This study employed legal and political analysis to assess the significance of the European Union Charter of Fundamental Rights to strengthen the democratic legitimacy of the European Union. There is a lack of comprehensive analysis of the contribution of the European Union Charter of Fundamental Rights to enhance the democratic legitimacy of the European Union. Therefore, this study tried to address the gap by focusing on specific provisions of the Charter that are designed to promote participatory democracy and to foster a closer relationship between the citizens and the European Union. The study also explored the legal challenges and complexities surrounding the interpretation, application, and balance of fundamental rights in the European Union, especially considering recent verdicts of national constitutional courts and their implications for the role of the European Court of Justice. The study aims to identify potential benefits of the Charter, such as improving the relationship between the EU and its citizens and strengthening the European Union's legal system and legitimacy by safeguarding citizens' fundamental rights.

Keywords: charter of fundamental rights, European union, participation.

A. Introduction

During the Summit in Cologne on June 3 to 4, 1999, the leaders made the decision to create a new document called the Charter of Fundamental Rights (Charter). The purpose is to effectively demonstrate the significance of fundamental rights to the citizens of the European Union (EU).¹ The event reached a political consensus on the protection of fundamental rights as one of the fundamental principles of the European Union and the necessary precondition for strengthening of democratic legitimacy.²

The Charter aims to improve the relationship between the EU and its citizens, as well as to strengthen the EU's legal system and legitimacy. It ensures that the citizens' fundamental rights are safeguarded. On the other hand, the Charter shows the goals of a political order since it brings the EU and its citizens closer. It looks like an excuse to constitutionalize the EU. Thus, it paves the road to a political

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¹ Conclusions of the European Council in Cologne, 3 and 4 June 1999, Annex IV.

² Conclusions of the European Council in Cologne, 3 and 4 June 1999, Annex IV.

union.³ Some authors claim that modern states are essentially built upon subjective rights.⁴

In addition, the potential of the Charter, as part of the Treaty of Lisbon, is interesting in respect of its legal effects, considering that the Court of Justice of the European Union (ECJ) guarantees the fundamental rights. The fundamental rights cannot rely on judicial supervision. It requires proactive institutions to 'promote' and to 'fulfill' human rights guarantees.⁵ By entering into force of the Treaty of Lisbon, the Charter superseded national laws and hence the direct effect of its provisions on the national level legal systems. However, based on the respect of fundamental rights, a comprehensive reasoning is of primary significance to ensure the legitimacy of the ECJ as the EU tribunal of fundamental rights. On the other hand, facing the possibility of national jurisprudence taking over the jurisdiction in these matters and thus placing the supranational essence of the EU law in a vulnerable state, the ECJ, way back in 1969, has conceptualized the protection of human rights primarily as a part of the then Community's general legal principles.⁶ The ECJ, in its ruling on the M.A.S. case, states that it is the duty of national judges to invalidate national regulations that fail to safeguard the fundamental rights of individuals.⁷ In addition, the ordinary national judges should guarantee the balance of rights between the European and the national dimensions of protection of fundamental rights.⁸

Recent rulings of the Federal Constitutional Court of Germany show that the concerns expressed by the ECJ in 1969 were justified. The two landmark verdicts from 2019 demonstrated that the Federal Constitutional Court of Germany adopted the EU fundamental rights as a standard for case evaluations and set up the concept of parallel application of the EU and domestic fundamental rights in areas that are not yet fully harmonized with the EU law.⁹ Some authors interpreted the Constitutional Court verdicts as forms of resistance against the ECJ's role as the court that assesses fundamental rights; and trying to diminish its importance by emphasizing that its involvement is unnecessary in cases deliberated at the

³ Justus Schönlau, *The EU Charter of Fundamental Rights: Legitimizing the European Union*. In: *Drafting the EU Charter* (London: Palgrave Macmillan, 2005), 55.

⁴ Jürgen Habermas, "Zur Legitimation durch Menschenrechte," in J. Habermas, *Die postnationale Konstellation: Politische Essays* (Frankfurt: Suhrkamp, 1998), 170-192.

⁵ Andrew Williams, "Human Rights in the EU" in Anthony Arnulf and D. Chalmers (eds.), *The Oxford Handbook on EU Law* (Oxford: Oxford University Press, 2015), 87.

⁶ Case 29/69 *Stauder v. City of Ulm, Sozialamt* [1969] ECR 419. In its case "*Internationale Handelsgesellschaft*" the ECJ ruled that the validity of the Community activities cannot be judged by the rules or concepts of national laws - only the criteria of the Community can be applied.

⁷ Rosaria Sicurella, "Effectiveness of EU Law and Protection of Fundamental Rights: The Questions Settled and the New Challenges After the ECJ Decision in the M.A.S. and M.B. Case (C-42/17)," *New Journal of European Criminal Law* 9, no. 1 (2018): 24-30, <https://doi.org/10.1177/2032284418761066>.

⁸ Annalisa Lucifora, "The Role of National Courts Between EU Obligations and National Standards of Protection of Fundamental Rights," *New Journal of European Criminal Law* 9, no. 2 (2018): 216-228, <https://doi.org/10.1177/2032284418778144>.

⁹ 1 BvR 276/17 and 1 BvR 16/13.

national level.¹⁰ It is important to mention that constitutional courts of other EU member states followed the practice of accepting the EU fundamental rights as a standard for a case evaluation. Some of them did it even before the Constitutional Court of Germany.¹¹

The ECJ plays a crucial role in addressing legal challenges related to fundamental rights in the EU. As the supreme interpreter and enforcer of EU law, it ensures that both EU institutions and member states adhere to fundamental rights and maintain the necessary harmonization. However, this role comes with sensitive and complex issues. The ECJ's enhanced judicial control over human rights observation in the Union is related to the ongoing debate on strengthening democratic legitimacy in the EU's institutional architecture, particularly the ECJ.¹² The complexity stands out as the ECJ is facing significant legal difficulties related to the interpretation, application and balancing of the fundamental rights throughout the Union.

This study aims to operate the democratic deficit theory that the EU lacks democratic legitimacy due to its indirect accountability to citizens, which differs from national governments.¹³ The complexity of the EU's decision-making processes and institutions may cause difficulties for citizens to understand and engage with, leading to a feeling of detachment and the perception that the EU is irresponsible to their needs and concerns.¹⁴ The EU Charter of Fundamental Rights targets the alleviation of these issues by outlining fundamental rights applicable throughout the EU, including the right to participate in the democratic process. Yet, critics argue that the Charter does not sufficiently address the democratic deficit; and that more direct forms of citizen participation are necessary to strengthen the EU's democratic legitimacy. The purpose is to examine whether the European Union Charter of Fundamental Rights has succeeded in bridging the gap between the EU and its citizens, which has been a challenge for many years. The study conducted a legal analysis to emphasize the importance of the Charter in the legitimization process through the observation of human rights. Chapter 5 of the Charter was given special attention in this study.

In addition, the study aims to show that the Charter is not only a legal document that enshrines fundamental rights. It also has significant political implications. The study illustrates the Charter's provisions for fundamental rights and legitimacy generating political consequences that affect the relationship

¹⁰ Dana Burchardt, "Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review," *German Law Journal* 3, no. 1 (2020): 1-18, <https://doi.org/10.1017/glj.2020.16>.

¹¹ Austrian Constitutional Court, 14 March 2012, docket number U 466/11-18, U 1836/11-13; Conseil constitutionnel, 26 July 2018, decision No. 2018-768DC; Corte Costituzionale, 23 January 2019, docket number 20/2019. See also Conseil d'Etat [Belgium], 15 March 2018, docket number 29/2018.

¹² Adnan Mahmudovic and N. Memic-Mujagic, *The Democratic Deficit of the European Union: Two Schools Under One Roof* (Switzerland: Springer, 2019), 155-172.

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between the EU and its citizens. In conclusion, it will highlight the Charter's importance in strengthening the relationship between the EU and its citizens; and the impact on the EU's legitimacy through the promotion and safeguarding of fundamental rights.

B. Strengthening the Democratic Legitimacy - EU Closer to Citizens

The fundamental principle of the EU is the desire of Europeans to collaborate in the economic realm. The EU leaders are tasked with finding ways to involve citizens more directly in the EU affairs, enabling them to have a greater say in decision-making, to defend their interests, and to gain a better understanding of various EU institutions, such as the European Parliament, the European Commission, the Council of Ministers, and the ECJ.¹⁵ In this context, the Charter is one of the instruments to get closer to the EU citizens because it, for the first time, guarantees protection of certain rights (e.g. social rights) before the supranational courts.¹⁶ It was pretty difficult to decide given the financial implications to the EU.¹⁷ Likewise, the Charter represents one of the rare EU's documents that can be easily understood by the EU citizens. Short sentences were used and composed in a most simple manner, basically targeting the EU citizens with the promotion of the EU values for them to first embrace them and then identify themselves with it. However, time has shown that many citizens seemingly difficult to understand and comprehend these simple sentences.¹⁸

The establishment of instruments to increase openness and transparency is also expected to bring the Union closer to the citizens. The citizens had instant access, via internet, to all documents and meetings that were directly broadcasted. The citizens could also use the internet to share their points of view and opinions about any current process and documents. Therefore, regardless of various pressures and limitations, the entire process of designing the Charter was open, transparent, and inclusive. It was good progress to strengthen democratic management and democracy in the EU: a powerful combination of representative democracy involving several forms of citizens' participation in decision-making processes.

1. EU Charter of Fundamental Rights

In the Treaty of Lisbon, the Charter is not referenced *in extenso*. The Treaty simply recognizes the Charter as a document of equal legal value. Thus, the Charter, conditionally, can be regarded as a *lex conventio non conventus*. The Charter is a

¹⁵ Paul Craig and G. de Búrca, *EU Law: Texts and Materials* (Oxford: Oxford University Press, 2015), 146.

¹⁶ Vivian Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing The EU Foreign Policy Objective To Global Human Rights Protection* (Switzerland: Springer, 2019), 11-91.

¹⁷ Kaarlo Touri and Klaus Touri, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014), 231-241.

¹⁸ EU Observer, "The EU's Charter of Fundamental Rights – Five Years on", accessed on December 10, 2021, <https://euobserver.com/opinion/126708>.

very concisely composed document on civil, political, economic, social, and cultural rights, with only 54 articles. The first 50 articles describe fundamental rights in six chapters (dignity, freedom, equality, solidarity, civil rights, and justice) and the remaining four (51 to 54) constitute the last, seventh, chapter and deal with “technical” issues, i.e., the scope and interpretation of the Chapter. The first 50 articles appear as a codification of current international human rights law obligations.

The preamble of the Charter highlights that the Union is playing a role in safeguarding and advancing shared European values. It also recognizes the significance of cultural diversity and traditions and the national identities of its member states. The Charter encompasses all fundamental rights protected in the EU arising from the results of the common tradition of member states, *acquis* of the European Convention on Human Rights and the established case-law of the ECJ. The Charter is in fact a reaffirmation of fundamental principles of the Union and the goals dedicated to freedom, democracy, rule of law, respect of human rights, and fundamental freedoms. The Charter’s foundation is the idea that fundamental rights protect citizens from unjustified public authority interference. This concept could counter illiberal democracy caused by increasing populism. The Charter includes both defensive (negative) and broader positive rights based on equality and solidarity in certain chapters.¹⁹ In essence, the Charter has embedded rights that were taken over from existing legal documents: the European Convention on Human Rights and fundamental freedoms, the European Social Charter, the Community Charter on Fundamental Social Rights of Workers, rulings of the ECJ, and the Court of Human Rights, including the constitutional traditions of member states.

Based on the contents, the fifth Chapter has a particular significance: human rights. The Chapter represents various civil rights in a way that affects the position of the EU citizens. They belong to the Union as a supranational construct. Since it provides the authority to the Court of Justice of the EU to rule in cases of fundamental rights, it strengthens citizens’ feelings and makes them turn to the Union. It indicates that the Union and its citizens are “getting closer” and eventually strengthens the Union’s legitimacy.

2. The Right to Vote and Stand as a Candidate at Elections to the European Parliament

Article 39 of the Charter repeats the statement of rights specified by Articles 20(2)(d) and 22(2) of the TFEU. The article stipulates passive and active suffrage to the European Parliament. The second paragraph corresponds with Article 14(3) of the TFEU. Thus, candidates cannot be discriminated against based on their

¹⁹ Lothar Funk, “A Legally Binding EU Charter of Fundamental Rights?” *Intereconomics* 37 (2002): 253, <https://doi.org/10.1007/BF02928884>.

religious, gender, ethnic, or racial background, or physical ability to fulfill democratic principles of equality and non-discrimination. These principles are supported by various legal instruments, such as the International Convention on Civil Rights, which stipulates active and passive suffrage in Article 25.²⁰ In addition, the suffrage also exists in Article 21 of the Universal Declaration on Human Rights;²¹ Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination;²² and in Article 7 of the Convention on Elimination of All Forms of Discrimination Against Women.²³

Article 39 of the Charter states that the EU citizens enjoy active and passive suffrage at the European elections in their respective member states. It eliminates any connection between national background and the state where the right to vote can be exercised. Thus, the basic principle of elections to the European Parliament and local elections is presented in Articles 20(2)(b) and 22 of the TFEU: observing the principle of non-discrimination, the passive and active suffrage are acknowledged equally to all citizens regardless of member state.

The second paragraph points out the general principles that define elections to the European Parliament. The principles arise from the constitutional law of member states and Article 3 of the Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms, which stipulates the right to free elections.²⁴ On the other hand, the Court of Justice has confirmed that the Article 52(1) allows for individual limitations on exercising the right based on Article 39(2) of the Charter, if those limitations are stipulated by the law a being mindful of general respect of human rights and freedoms guarantees.²⁵

The introduction of the passive and active suffrage as a fundamental right additionally strengthens the position of the EU citizens. Similarly, the introduction of the residence criteria regarding the elections to the European Parliament can be regarded as an amendment to the freedom of movement. Furthermore, no additional conditions regarding the duration of stay, that the EU citizens reside in member states of which they are not nationals.²⁶ The citizens enjoy the free choice of place where their right to vote will be exercised, like choosing between the state of residence and nationality.²⁷ However, this right can be exercised only once.²⁸

²⁰ OHCHR, "International Covenant on Civil and Political Rights," accessed on May 1, 2022, <http://www2.ohchr.org/english/law/ccpr.htm>.

²¹ OHCHR, "Universal Declaration of Human Rights," accessed on May 1, 2022, <http://www.un.org/en/documents/udhr/>.

²² OHCHR, "Convention on the Elimination of Racial Discrimination," accessed on May 1, 2022, <http://www2.ohchr.org/english/law/cedr.htm>.

²³ OHCHR, "Convention on the Elimination of Discrimination Against Women," accessed on May 1, 2022, <http://www2.ohchr.org/english/law/cedaw.htm>.

²⁴ HRNET, The European Convention on Human Rights, accessed on May 1, 2022, <http://www.hri.org/docs/ECHR50.html#P1>.

²⁵ Case C-650/13.

²⁶ Article 5 Council Directive 93/109/EC of 6 December, Official Journal L 329, 30/12/1993 P. 0034-0038.

²⁷ Article 4(1) Council Directive 93/109/EC of 6 December, Official Journal L 329, 30/12/1993 P. 0034-0038.

²⁸ Article 4(1) Council Directive 93/109/EC of 6 December, Official Journal L 329, 30/12/1993 P. 0034-0038.

3. Right to Good Administration

The right to good administration²⁹ is one of the most basic civil rights in the Charter. It is a procedural fundamental right. Some authors define it administrative human right.³⁰ Essentially, this right implies that bodies and institutions must act impartially, fairly, and in a timely manner to resolve all cases filed by any person.³¹ The starting point of this fundamental right is the promotion of the European Union's dedication to the rule of law. It is one of the fundamental values of the Union.³² On the other hand, affirmation of the right to good administration aims to safeguard every person from administrative errors. Thus, it is a clear indicator of efforts invested in bringing closer the institutions of the Union to its citizens. All persons enjoy this right regardless of their original nationality or Union membership. The right to good administration was not explicitly stipulated by any of the Treaties, except the Constitution for Europe. The Treaty of Lisbon continues the practice. It introduces the right in an indirect manner in Article 6(1) of the TEU that the Union recognizes rights, freedoms, and principles incorporated in the Charter.

a. Court Practice

The case law of the ECJ had recognized the concept of good administration even before it was instituted as a principle.³³ In the beginning, the concept of good administration was not easily distinguished from *good administration management*.³⁴ The ECJ made a clear distinction by establishing it as a general legal principle.³⁵ It aims to create good relationships between the staff and the public. Therefore, the European Parliament adopted the European Code of Good Administrative Behavior.³⁶ The fundamental objective of the Code is twofold: (1) to encourage transparency and consistency in administrative proceedings; and (2) to guarantee that all institutions and bodies of the Union adhere to the same regulations and principles.³⁷ Within this context, the Code instituted a set of principles, which triggers good relations between the Commission and the public: lawfulness, non-discrimination, proportionality, prevention of abuse of authority, impartiality, consistency, and continuity in administrative behavior.³⁸

²⁹ Article 41 of the Charter.

³⁰ Klara Kánska, "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights," *European Law Journal* 10, no. 3 (2004): 296, <http://dx.doi.org/10.1111/j.1468-0386.2004.00218.x>.

³¹ Article 41(1) of the Charter.

³² Article 2 TEU.

³³ Case C-53/72: Mr Pierre Guillot v. Commission of the European Communities, 1974, ECR.

³⁴ Case C-64/82 Tradax / Commission, Judgment of 15 March 1984, ECR.

³⁵ Court of Justice Judgment of 31 March 1992 in Case C-255/90 P, Burban [1992] ECR I-2253, and Court of First Instance Judgments of 18 September 1995 in Case T-167/94 Nölle [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 New Europe Consulting and others [1999] ECR II-2403.

³⁶ Minutes of the European Parliament Session from 3 to 6 September 2001, OJ C 72E/331, 21 March 2002.

³⁷ E. Albu, "The European Charter of Fundamental Rights – the Right to a Good Administration," *Commercial Law Review* 10 (2007): 82.

³⁸ E. Albu.

b. Two Aspects and Three Requests

Based on the right to good administration from Article 41 of the Charter, the first paragraph contains a provision of general significance. The point of that provision is to give everyone the right to enjoy impartial and just treatment by institutions and bodies do the Union and have their cases resolved in a reasonable amount of time. The paragraph focuses on impartial and fair administration as a *leitmotif* of the right to good administration. In fact, the requirement for impartial and fair administration relies on the obligation of the Union to ensure respecting the principle of equality contained in Chapter III of the Charter. Furthermore, the Court of Justice explained impartiality as an objective and subjective dependence on whether it is, as a requirement, posed on institutions or individuals who perform a function in those institutions.³⁹ Resolving cases in a reasonable amount of time is logically viewed as a constitutive element of any good administration because slow administration is generally perceived as a bad or inefficient administration.⁴⁰ The term administration here refers to the EU institutions, bodies and agencies, certainly not of the member states, as it was confirmed by the ECJ.⁴¹

The second paragraph emphasizes three aspects of the right to good administration. The first aspect refers to a general user of the right and the right of an interested party to present their view of the case or request brought before the administration to decide about it. This is the elementary right to be heard. Hereby is confirmed that the right to a good administration is granted to all who need to communicate with the EU institutions, bodies and agencies and they can freely present their views and positions. The Court of Justice precisely stated that this right, in the procedural sense, includes not only the concerned party but any third party who wishes to demonstrate their interest as concerned party.⁴² The second aspect deals with the right to access documents in care of the administration. It is important at this point to emphasize the fact that this right refers only to the files that concern the interested party, it does not refer to the files about other interested parties. Therefore, the limitation of this right is also different from the right to access documents from Article 42 of the Charter. We shall analyze it later. These aspects can be commonly named *input* aspects because they are related to the participation of citizens in the administration's creation of documents which implies the right to access own files, the right to be heard and the right to address using own language.

Finally, the third aspect reveals the obligation of the administration to adequately explain (give reasons) their decision. Therefore, this aspect can be called the *output* aspect. The obligation to adequately explain administrative documents is closely related to Article 47 of the Charter and Article 296(2) of the

³⁹ Case C-439/11.

⁴⁰ Opinion of AG Jacobs in Case C-270/99.

⁴¹ Case C-249/13.

⁴² Case T-167/94.

TFEU. However, it is important to stress that it is not interpreted as broadly as the obligation from the said article of the Treaty because it pertains only to the explanation of the administrative decisions. The right to be given reasons for decisions originates from traditional laws and constitutes a qualitative difference compared to the laws where rights like this do not always exist. The obligation to give reason is the condition for validity of the administrative document.⁴³ Therefore, the formulation of the *right to be given reason* in the Charter should be interpreted in a broader sense and include all decisions made by institutions, agencies, and bodies of the Union. It was explained in the European Code of Good Administrative Behavior that every decision of the institution should contain the legal grounds.⁴⁴ However, the fulfillment of the condition, i.e., giving reason for their decision, the administration is required not to disclose information of the kind covered by the obligation of professional secrecy.⁴⁵

c. Compensation for Damage

Based on the previous elaboration, the administration has the obligation to provide a reason for their decisions. However, if the institutions or the servants cause damage, they are entitled to compensation. Consequently, it guarantees compensation for damage to every person who suffered such damage by the EU civil servants or institution. The compensation for damages is obtainable in compliance with the laws of the Union. The Court of Justice of the EU control the execution of this right.⁴⁶ In other words, the Union, following the general principles common to all member states, shall compensate any damage caused by the EU institutions or servants in their duties.⁴⁷ The jurisdiction of the ECJ in this matter is regulated by Treaty.⁴⁸

In fact, in those cases, the right of an individual to compensation for damage is being assessed. The right to file a case for compensation for damage pertains to a case where the EU or its servant in performance of their duties caused damage to a third party and that party is entitled to file a request (complaint, suit) for compensation for damage. The person submitting the file must prove unlawful conduct of the EU and its bodies, that is, servants, to prove the co-relation between the activity or inactivity of the EU and the damage that occurred. These conditions arise from the practice of EU judicial bodies, i.e., their endeavor to define general elements of culpability for the caused damage, commensurate and harmonized with the EU law.⁴⁹

⁴³ Case C-131/15.

⁴⁴ Article 18 of the European Code.

⁴⁵ Article 339 TFEU.

⁴⁶ Case C-352/98, Bergaderm and Goupil / Commission ECR 2000, I-5291.

⁴⁷ Article 340(2) TFEU.

⁴⁸ Article 268 TFEU.

⁴⁹ Establishment of the cumulative conditions is most often linked to the explanation of the decision in case *Lutticke* where the Commission was not found liable for the compensation for damage.

Adjudication in the case *Lütticke v. Commission* [1971] by the ECJ included the position that the applications for damages are independent claims. Their purpose is to obtain financial compensation thus these claims are different from other claims. In case the liability for damages arises from a legal document issued by a body of the Union, then it is also worth to mention the principles, that is, the elements of liability set by the ECJ for that purpose adjudicating on the known case "*Aktien-Zuckerfabrik Schöppenstedt v. Council* (5/71)." The scope of liability was expanded to encompass legislative documents of a regulatory nature (such as regulations), subject to the conditions outlined in the Schöppenstedt formula, which requires that there must be a violation of a higher legal principle,⁵⁰ the violation must be of significant gravity,⁵¹ and that the higher legal principle must be designed to safeguard the rights of individuals.

However, the above case is viewed by the doctrine as a case where the general conditions for extra-contractual liabilities of the Union were formulated. When the EU servants are concerned, it is important to indicate whether the breach was service-related or not. The difference is relevant because the damages made by the EU servants outside the official duty are under the exclusive jurisdiction of the relevant national court of a member state. In respect to the determination of causality between the Union and damages caused, the damage was caused by a direct consequence of an illegal action committed by an organ of the Union. The causality can be broken in two ways. First, if the disputed document was adopted by an organ of a member state acting based on broad discretionary powers in application of the EU laws; and second, if the aggrieved party failed to prevent further consequences, or if their conduct contributed to the causing of the damage. For such cases, there is the possibility of reduction of the compensation or full exoneration of the EU from responsibility for the incurred damage. The result of that is that the injured party is required to take all possible and reasonable action on their part to reduce the escalation of the damage, that is, to prevent incurring of related additional damaging consequences. In addition, before accepting the request for compensation for damage it is necessary to verify the existence of the damage. To verify the existence of the damage means to establish whether the damage is real and quantifiable. Likewise, it is completely irrelevant whether the damage is material or non-material. Within this context, the compensation for damage must be comprehensive, i.e., include not only the real,

⁵⁰ In case *Bergaderm* the Court of Justice's position was that there must be a breach of rule of law. However, this difference is not too important because every rule of the Union can be a so-called superior rule of law if it obliges the issuer of the document which allegedly caused damage. See: case 352/98 Laboratories Pharmaceutiques Bergaderm SA and Goupil v. Commission [2000] ECR I-5291.

⁵¹ In cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & CoKG v. Council* and *Commission* [1978] ECR 1209, the ECJ's position was that the Union shall not be liable for legislative issues than involve broad discretion, unless the institution of the Union in charge "obviously and severely disregarded the boundaries of its authority."

simple damage but also the lost gain incurred due to the effects of the disputed measure.

Every person has the right to be heard before any individual measure is taken.⁵² The right is a classical expression of the right to a defense.⁵³ The ECJ confirmed it in its verdicts;⁵⁴ and established it as a general legal principle.⁵⁵ Likewise, the ECJ has fortified it in several cases, laying it down as a fundamental rule in proceedings,⁵⁶ be it disciplinary⁵⁷ or some other type of proceedings.⁵⁸

Within the context of the right to be heard in the proceedings, the right to use own language as one of the EU's official languages and to receive the answer in that language is equally important.⁵⁹ The right to linguistic diversity in proceedings is present from the very beginning of the integration process. It is embedded in its very core. In other words, the regime of the linguistic diversity of the Union has been gradually developed by accepting the languages of new member states and it is said that the Union respects its rich cultural and linguistic diversity of the European heritage.⁶⁰ Every person has the right to have access to their files, while observing the legitimate interests of confidentiality and professional and business secrecy.⁶¹ This right, too, belongs to the group of fundamental rights in administrative proceedings.⁶² The significance of the right to have access to own files becomes prominent in situations where the person has to organize the defense in the best conditions and decide whether to ask for appropriate court protection in the specific case.

In the end, the reviewed article of the Charter that stipulates the right to good administration makes the Union administration to be open, efficient, and independent, following the principles of openness and transparency. Likewise, the article contributes to higher professionalism and independence of the administration from political influence in the first place, and to enable every citizen to enjoy their rights.

⁵² Article 41(2)(a) of the Charter.

⁵³ Case C- 322/82 Commission v. Italy (Rec 1983, P 3689) [1983] ECR.

⁵⁴ CJCE, 23 October 1974, Transocean Marine Paint c. Commission, aff. 17/74, Rec. 1063.

⁵⁵ ECJ, 29 June 1994, Fiskano AB c. Commission, C135/92, ECR I-2885. The Court concluded that the right to have defence is a fundamental right that must be guaranteed even in the absence of any rules that regulate the proceedings in matter.

⁵⁶ ECJ, 13 February 1979, Hoffmann-La Roche v. Commission, Case. 85/76, Rec., p. 461; ECJ, 10 July 1986, Belgium c. Commission, Case. 234/84, Rec., p. 2263; EJC, 10 July 1986, Belgium c. Commission, Case. 40/85, Rec. p. 2321.

⁵⁷ ECJ, 4 July 1963, Alvis, C- 32/62, Rec., p. 101; ECJ, 11 July 1968, Van Eick c. Commission, C-35/67, Rec., p. 481.

⁵⁸ ECJ, 21 March 1990, Belgium c. Commission, C-142/87, Rec., p. 2589.

⁵⁹ Article 41(4) of the Charter.

⁶⁰ Article 3 of the TEU.

⁶¹ Article 41(2)(b) of the Charter.

⁶² ECJ, 15 October 1987 Heylens C - 222/86, Rec., p. 4097.

4. The Right of Access to Documents

We have already mentioned that the introduction of the right of access to documents in the Charter represents an integral part of the overall efforts to make the decision-making process and the EU institutions more democratic, open, and transparent for its citizens. The right of access to documents was unknown to the European Convention on Human Rights and Fundamental Freedoms. This right is now embedded in Article 42 of the Charter. The analysis of the provision tells us that it transfers and makes more precise the attitude from Article 1 of the TEU. Besides, this article, by promoting the principle of transparency, also supports the provisions from Declaration No. 17 – about the right of access to information⁶³ along the Treaty of Maastricht that set the legal basis for the activities aimed at the strengthening of the democratic nature of European institutions, that is to improve the level of trust of the public in European administration. The previous qualification of the Article 42 of the Charter may suggest that it has an important role in securing and promoting the democratic legitimacy of the decision-making process of the European Union

On the other hand, the right of access to documents belongs to the group of rights from the Charter that have grounds in the text of the Treaty.⁶⁴ The link to the Article 15 of the TFEU is different from Article 42 of the Charter. It contains certain limitations and conditions regarding access to documents, as discussed earlier. The application of these conditions and limitation is provided by Article 52(2) of the Charter.⁶⁵ The article stipulates that the rights acknowledged by the Charter, based on Treaties, should be interpreted correspondingly with the conditions and limitations defined by those Treaties.

The previous provision suggests that the rights based on Treaties are not applicable directly but are subject to the principles and conditions that need to be defined by the secondary legislation, which especially must set limitations based on public and private interest as stated in Article 15(3) of the TFEU. The most important legislative document of the Union that more precisely defines the conditions and limitations of the right of access to documents is *Regulation 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents* that came into force in 2001.⁶⁶ In addition, there are the documents of the European Parliament,⁶⁷ Council,⁶⁸ and Commission⁶⁹ with their additional rules which ensure efficient enforcement of the said Regulation.

⁶³ OJ, C-191 of 29 July 1992, 1.

⁶⁴ Article 15 TFEU.

⁶⁵ 2010/C 83/02.

⁶⁶ OJ L 145 of 31 May 2001, 43-48

⁶⁷ Rules of Procedure of the European Parliament 7th parliamentary term - March 2012. Rule 9 - Members' financial interests, standards of conduct, mandatory transparency register and access to Parliament, Rule 39 - Access to documents and provision of information to Parliament, Rule 103 - Transparency of Parliament's activities, Rule 104 - Public access to documents, Rule 148 - Distribution of documents. Annex VIII Confidential and sensitive documents and information; Decision of the European Parliament of 13 November

The right of access to documents is linked to several other rights contained in the Charter such as the right to the freedom of expression and information⁷⁰ and the right to good administration.⁷¹ This right should be interpreted in a broader sense. This is not the right that only the citizens of the Union enjoy, as we have seen in the cited provision of Article 42, but every natural and legal person residing or having a registered office in any member state. The need to ensure as extensive access as possible to the documents is in line with the principle of proportionality, which indicates that in case of certain exceptions, it does not mean that parts of the documents which are exempt from exceptions are not available to the public.⁷² According to Article 3 of Regulation 1049/2001, the term 'document' is interpreted broadly and covers any content, regardless of its medium, whether written on paper, stored electronically, or in sound, visual, or audio-visual form. This includes matters related to policies, activities, and decisions within the institution's responsibility. Besides, the right of access to documents covers the right of access to the information contained in the documents of the Union and thus not only protects the said right but it appears as its precondition. European Parliament and the Council use regulations in regular legislative procedures to set general principles and limitations on the grounds of the public or private interest, which are the guidelines for the right of access to documents.⁷³ That means that regardless of the need to have a broad understanding of the right to have access to documents, it still must be limited in a certain manner and be condition dependent. As stated earlier, this right is limited and depends on public or private interest. In fact, it is noted that there is a certain public interest that justifies the limitation of the right to have access to documents. Such interest can exist in cases when it is required by the public safety, defense, financial, economic, and monetary policy etc. Likewise, there can be cases where the revealing of such documents would jeopardize certain investigations, inspections and audits

2001, adapting its Rules of Procedure to the provisions of European Parliament and Council Regulation (EC) No. 1049/2001 on public access to Parliament, Council and Commission documents. (2001/2135(REG); and Bureau Decision 2001/1229, on public access to European Parliament documents, OJ C 374, 29 December 2001, 1.1347

⁶⁸ Council Decision 2001/264/EC of 19 March 2001, OJ L 101 of 11 April 2001, 1; Decision of European Parliament of 23 October 2002, Interinstitutional agreement between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ C 298 of 30 November 2002; Interinstitutional Agreement of 20 November 2002, between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ C 298 of 30 November 2002, 1.

⁶⁹ Commission Decision 2001/937/EC of 5 December 2001 amending its rules of procedure OJ L 345 of 29 December 2001, 94, and Commission Decision 2002/47/EC of 23 January 2002 amending its Rules of Procedure, OJ L 021 of 24 January 2002, 23.

⁷⁰ Article 11 of the Charter

⁷¹ Article 41 of the Charter.

⁷² Case C-353/01 P, Mattila v. Council and Commission, [2004] ECR I-1073.

⁷³ Article 15(3) of the TFEU.

including the very institutional decision-making process of the Union. On the other side, private interest can also be the reason for limitation or setting a condition on the right of access to documents. The Charter provides for the protection of a such interest, as outlined in Article 7 (the right to respect for private and family life and communications) and Article 8 (the right to the protection of personal data). However, every limitation and condition should be reviewed in the context of the principle of proportionality as implied by the verdicts of the Court of Justice and the Court of First Instance.⁷⁴

The Charter includes two important rights that serve as tools for democratic control over the legislation and administration of the EU - the right to refer to the European Ombudsman⁷⁵ and the right to petition.⁷⁶ These rights facilitate direct communication between citizens and EU institutions, contributing to the strengthening of democratic control over legislation and administration. The right to petition not only benefits citizens, but also enables institutions to receive direct information about issues related to the implementation of EU law. The European Parliament Petitions Committee can use this information to provide an overview of problems with the functioning of administration for citizens and other residents of the EU. Furthermore, the Charter emphasizes the principle of non-extension of its application, defining a sphere of liberty that must remain free from interference.⁷⁷

C. Conclusion

The Charter is a solid legal basis of the human rights protection in the Union. Unfortunately, a solid legal document alone is not enough to protect fundamental rights. The EU must share commitment to enforce and uphold these laws and regulations. The EU faces a challenge here.⁷⁸ The Charter strengthens the principles of legal certainty, the rule of law, and the citizens' faith in the Union's institutions. In fact, the Charter has also played a role not only to enhance the formal legitimacy of the Union but also its overall legitimacy. The changes have substantial significance in upgrading the democracy and human rights protection. The key question is how much these changes affected the perception of the EU citizens about protection. In addition to the discussion on the contribution of the Charter, the member states must also address the EU's fundamental rights challenges because the implementation of the Charter can be a political fuel among member states.⁷⁹

⁷⁴ C-353/99 P, Council v. Hautala, [2001] ECR I-9565; T-188/98, Kuijjer v Council, [2000] ECR II-1959.

⁷⁵ Article 43 of the Charter.

⁷⁶ Article 44 of the Charter.

⁷⁷ Koen Lenaerts, "Limits on Limitations: The Essence of Fundamental Rights in the EU," *German Law Journal* 20, no. 6 (2019): 779-793, <https://doi.org/10.1017/glj.2019.62>.

⁷⁸ Rudy, Rudi Natamiharja, Jalil Alejandro Magaldi Serna and Ahmad Syofyan, "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia," *Hasanuddin Law Review* 8, no. 3 (2022): 299-309, <http://dx.doi.org/10.20956/halrev.v8i3.4229>.

⁷⁹ Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press, 2017), 76.

The analysis of available sources demonstrated the Charter did not attract equal attention to all member states. Some member states define the Charter as a constitutional benchmark to be compared to the national norms. Some other member states do not take the Charter seriously enough due to their opt-out status. Although the Charter was initially embraced with hope and optimism, especially with respect to getting closer to the citizens, it could not transform the expectations into a reality. One of the reasons is its limited scope. Unlike the European Convention on Protection of Human Rights, the Charter legally binds and is applied only when the member states act within the scope of the EU law. Such formulation imposes limitations on the area of effect of the Charter; and creates additional confusion to its practical application considering the complexity of the delegation of power between the various levels of administration. It is important to observe the formulation of Article 51(1) of the Charter. The article pertains only to the member states but not to the EU institutions. Thus, the EU institutions have an obligation to comply with the Charter regardless of their interpretation of the EU law.⁸⁰

After analyzing the case of the ECJ, there are inconsistencies in its application. There are instances where the Court of Justice does not refer to the EU Charter or where the scope of the EU law is limited in the presence of the Charter. The lack of coherence and predictability may be the root cause. However, the EU Charter should be the primary guiding principle for the Court; and should not be avoided. The Charter's instruments provide flexibility in defining its scope of application, which should not cause any court concern. The analysis of the Charter's contents has demonstrated that the Charter promotes a new culture of fundamental rights. It unifies the political and cultural rights on one side and socio-economic on the other. Therefore, the Charter is unique, considering that the 1948 Declaration, unlike the Charter, is not legally binding. The Charter can be considered a catalog of fundamental rights. The catalog also introduces a new quality in the domain. In fact, the Charter constitutionalizes rights specific to the EU. First, this study refers to the freedom of movement, the right to political participation of citizens on the supranational level, and the right to good administration.

Promotion and protection of human rights in a democratic society are generally appreciated as minimum standards to be adopted by any political establishment. Democratic authorities must not cross the boundaries of human rights and freedoms. The rights guarantee citizens' freedoms and secure certain rights that enable the citizens to affect the functioning of the Union and adequately control the power. The Charter increases the fundamental rights in the Union. Previously, the protection has existed as the case law of the Court of Justice of the European Union.

⁸⁰ Anastasia Poulou, "Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights," *Common Market Law Review* 54, no. 4 (2017): 67, <http://dx.doi.org/10.54648/COLA2017087>.

The Charter's legitimacy is a step towards stronger integration and deepening of the Union. The Preamble states that fundamental rights need to be protected more effectively considering social, scientific, and technological changes. By increasing fundamental rights, the Charter contributes to the stabilization of legal security and demonstrates the EU's ability to protect its citizens. It strengthens citizens' faith in the EU. The Charter's promotion of fundamental human rights establishes a basis for a democratic constitutional and legal order. It also advocates the idea that economic integration alone is not sufficient; and that fundamental rights and political union must be included in the philosophy of integrative processes within the European Union.

Promoting democracy is a key goal of the European Union. Therefore, it is essential for the EU to maintain the trust of its citizens. New members must commit to respecting the EU's political and legal system based on a common decision-making process that upholds democratic representation. Its absence risks the EU losing its legitimacy and authority. It can lead to the failure of further integration efforts or even the collapse of the EU.

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