

SOME CONSIDERATIONS ON THE JURIDICAL VALUE OF THE CHARTER OF FUNDAMENTAL RIGHTS BEFORE AND AFTER THE LISBON TREATY (*)

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Summary: 1. A concise evaluation of the successes and failures of the Charter of Nice before the Lisbon Treaty; 2. Six levels of juridical relevance of the Charter of Fundamental Rights; 3. Problems arising from the Charter of 2001; 3.1 The vertical profile; 3.2 The horizontal profile; 4. The Charter of Fundamental Rights after the Lisbon Treaty; 4.1 The EU Treaty and the Charter: art. 6 and consequent problems; 4.2 Substantial problems of the protection of rights according to the Charter before and after Lisbon; 4.3. Arts. 52 and 53 of the Charter: real barriers to protect national law?; 5. A short conclusion in the line of continuity between pre and post Lisbon Treaty, relative to the protection of fundamental rights.

1. A concise evaluation of the successes and failures of the Charter of Nice before the Lisbon Treaty

First of all, the aim of this paper is to give a concise evaluation of the seven years following the coming into effect of the European Charter of Fundamental Rights (hereinafter EUCFR).

According to me the non binding nature of this act was confirmed during this period, as the Charter did not become the core of a new system of fundamental rights. And, in hypothesis, the definition of this system would have been a problematic attempt, as we will see further on.

The heart of the system of the protection of rights in European law remained based on art. 6 TEU-Maastricht - as interpreted by the European Court of Justice and the Tribunal of First Instance - and the reference to constitutional traditions common to the member States as general principles. This does not mean that the EUCFR had no significance for European law of course. The absence of a binding nature does not imply a lack of juridical relevance: it is a (well known) prejudice of continental (civil law) scholars to overlap these two aspects.

The EUCFR played a “confirmative role” in the above mentioned system of rights protection based on constitutional common traditions as interpreted by European Courts. Whenever the Charter has been quoted by the ECJ, it has been mentioned *after* and not *before* the fundamental rights inferred by the Court. What is more significant, there are no decisions based only on the EUCFR¹. As far as concerns the Italian experience, the

¹ See recently, Case C-47/07P *Masdar* (ECJ 16 December 2008), para 50; Case C-402/05P e C-415/05P *Kadi v Council and Commission* (ECJ 3 September 2008), para 335; Case C-450/06 *Varec* (14 February 2008), para 48; Case C-275/06

Constitutional Court adopted the same solution: the Court quoted the Charter only in a few decisions².

In my view, it can be confirmed that the value of the Charter is to recognize and not to set up fundamental rights. Someone referred the model of the “restatement of law” from the American experience³. In other words, we could say the Charter offers a presumption of existence of the rights mentioned⁴, but European courts may, in any case, create other rights using art. 6 TUE-Maastricht and the common constitutional traditions.

2. Six levels of juridical relevance of the Charter of Fundamental Rights

If we accept this starting point, it is perhaps easier to discuss the meaning and value of the Charter in the European constitutional experience.

It is possible to establish several levels of juridical relevance of the Charter in this context⁵: some of them are typical of a non binding document (but, not for this reason irrelevant). Further levels need binding value and so they may be appreciated only after the Lisbon Treaty has entered into force.

The first two steps - juridical even though not binding – concern the visibility of the “rights question” in the European Union.

It is a matter in no way of minor importance, connected with the roots of constitutionalism and the effort to create a real European public opinion in the name of the protection of rights. So the Charter gives more visibility to rights and their protection (1st level of relevance)⁶, with a symbolic and political effect on European people(s) and helps to create a better and deeper political awareness of the main core of European identity (founded on the protection of rights) and one of the essential goals of European action in the

Promusicae (ECJ 29 January 2008), para 69; Case C-341/05 *Laval un Partneri ltd* (ECJ 18 December 2007), para 90 and 91; Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Line Eesti*, (ECJ 11 December 2007), para 43 and 44; Case T-194/04 *Bavarian Lager v Commission* (CFI 8 November 2007), para 14; Case C-303/05 *Advocaten voor de Wereld VZW* (ECJ 3 May 2007), para 46.; Case C-432/05 *Unibet* (ECJ 13 March 2007), para 37; Case T-228/02 *Organisation des Modjahedines du peuple d’Iran v Council* (CFI 12 december 2006), para 71; Case 47/07P.

² See Judgment No. 393/2006, para 6.2 which stresses the absence of juridical effectiveness of the Charter; Judgment No. 438/2008, para 4, which quotes the Charter among other international treaties.

³ A. Barbera, 2002; G. Silvestri, 2006 p 7 ss.; M. Cartabia, 2007, p. 32

⁴ I would prefer to define this presumption as *juris et de jure*. This means domestic jurisdiction cannot deny the existence of rights mentioned in the Charter (but, at least, give them a meaning connected with national rights). Some prefer to write about a *praesumptio juris tantum* (which admits contrary proof): see O. Pollicino & V. Sciarabba, 2008, p. 107, fn 27. See also L. Azzena, 2001, p. 124 s.

⁵ See A. von Bogdandy, 2001, p. 869, for a similar operation, even though with different features.

⁶ See M. Cartabia, 2007, p. 54 ss.; Id., 2008, p. 98.

contemporary world (affirming and protecting fundamental rights). In other terms, rights become the object of European political action (2nd level of relevance)⁷. In this perspective, the enhanced activism of European institutions after the Charter of 2001, which led in 2007 to the establishing of the *European Union Agency for Fundamental Rights*⁸ is not incidental.

Even a non binding act may be used by European institutions to set self-established limits to their own action (3rd level of relevance). Albeit not enforceable in a trial by citizens, no one could deny any juridical relevance to this dimension of the Charter (see especially art. 41 on the right to a “good administration”): it increases the duty of loyalty between Institutions⁹ and, in this sense, it is connected to art. 10 of the EU Treaty (and, in this way, it can even be used in judgments as an external element that makes loyalty duty real and concrete)¹⁰.

It is a sort of “back to the past” path to the dawn of *Rechtsstaat*, when C.F. Von Gerber theorized the *Reflexrechten*, because it was not (yet) possible to enforce advantageous positions of individuals before a judge and the only possible way to give juridical relevance to them was to establish rights as objective rules of good administrative machinery¹¹.

The 4th level of relevance of the Charter is the strongest level compatible with a non binding act: above we have mentioned the possible use of the Charter in judicial activity like a *Restatement of law*, like a point from which the judge can start, applying fundamental rights to the concrete case-law, and this is the case. We are conscious that here the line between the non binding and binding value of the Charter becomes fine: eminent scholars of public law of 20th century argued that the creation of a compilation of laws (*Testo Unico* in the Italian experience) implies creative – not only interpretative – activity¹² and the same may probably be referred to the *Restatement of laws*. So, if we are before a creation of law it is hard to deny full relevance to it: the barrier with a legislative act vanishes and the architecture (the system) of rights established in the Restatement of laws binds everyone (but especially judges...).

⁷ See L.M. Diez Picazo, 2001, p. 666; L.S. Rossi 2002, p. 280; R. Toniatti, 2002, p. 8; F. Palermo, 2002, p. 204; I. Pernice, 2008, p. 236 ss and p. 252 ss. A critic to the transformation of fundamental rights from a limit to competences to an object of politics in A. Von Bogdandy, 2002, p. 831 ss.

⁸ Reg. Ce No. 168/2007 of Council (15 February 2007).

⁹ The Charter is defined as an “Interinstitutional Agreement” by G.F. Ferrari, 2001, p. 42 and *ivi* other authors quoted.

¹⁰ In this perspective, it is possible to apply the “soft-law” notion to the Charter: see F. Palermo, 2005, p. 115; A. Poggi, 2007, p. 370; L.S. Rossi, 2002, p. 266; Id., 2009, p. 77.

¹¹ C.F. Von Gerber, 1852.

¹² C. Esposito, 1940. A. Pace, 2001a, 195 writes that the Charter looks like something like a “Testo unico” half interpretative, half creative.

But if we prefer (and we do prefer...) a softer approach which denies the Charter creative features and, first of all, denies a binding of the judge to the system of rights in the Charter (for the simple reason that a system of rights is not sufficiently developed in the Charter, as we will attempt to highlight *further on*), the 4th level remains outside the creation of law. Only the 5th and 6th levels of juridical relevance play in the full area of a binding effectiveness of the Charter. This means, according to the *Rechtsstaat* tradition, that the real enforceability of fundamental rights is granted by an independent and impartial judge, separated from other public powers.

We face an alternative: if the rights mentioned (or better, stated by the Charter) are in force only against European public powers and member States when implementing European law and not in inter-private relationships (5th level of relevance)¹³ or these rights are characterized by the quality the German classical authors called the *Drittwirkung* of fundamental rights (6th level of relevance)¹⁴. We will come back to this issue later on in this essay. At present it suffices to mention both possibilities.

3. Problems arising from the 2001 Charter

The years between 2001 and 2008 show the “rights question” as one of the most problematic in European law. It would be useful to highlight two profiles of this complexity and analyze them.

3.1 The vertical profile

It is the “classical” profile about the relationship between the EU and its member States in matters involving the protection of rights. The framework of art. 51 of the Charter is founded on the separation between *normative competences* and *protection of rights*: the idea is that the second item cannot interfere with the first one.

The experience of federal countries, first of all the history of federalism in the United States, shows however that the basic idea of art. 51 of the Charter is quite axiomatic¹⁵.

¹³ See M. Cartabia, 2001, p. 345.; F.S. Marini, 2004, p. 57.

¹⁴ See P.F. Grossi 2003, p. 54. Some provisions of the Charter (especially in Chapter IV: see arts. 27, 28, 30 31) cannot receive a meaningful interpretation, if not considered *erga omnes*.

¹⁵ See. L. Diez Picazo, 2001, p. 674 ss.; U. De Siervo, 2001a, p. 156; M. Cartabia 2001, p. 346 ss. P. Caretti, 2005, p. 378. In the opinion of F. Turpin, 2003, p. 620 art. 51 as amended in 2007 can establish a stronger limit to the “*rampantes*” competences of the EU.

The problem was already apparent in its complexity to G. Hamilton in the worldwide commentary No. 84 of the *Federalist*. What is remarkable is that the American constitutional system developed in the precise way Hamilton was afraid of¹⁶: if the *Bill of Rights* in 1791 was added to the Constitution in order to link it closer to the hardcore of constitutionalism, the list of rights showed itself very soon as a real lever to change normative competences between Federation and member States: the relationship between these two entities relies upon concrete standards of protection, not upon abstract legislative competences¹⁷ and the upper level, introducing higher standard, changes competences.

This is not the right moment to speak about this not avoidable path¹⁸. It is just the case to remember the outcome of this evolution in which “only in a theoretical perspective, federal Governments establish bases, the constitutional minimum, to ensure the protection of fundamental rights, while member States, developing this starting point, offer additional guarantees which their own citizens desire. In an institutional perspective, the logic is a bit different. The basic decisions for the protection of rights are up to the member States (their political and judicial powers). Federal intervention compensates the omissions of the member States. It allows the courts of the States to freely develop a doctrine of civil liberties”¹⁹.

During this period the “incorporation doctrine”²⁰ goes forward and reaches relevant results in decisions like *K.B.* (Case C-117/01 ECJ 7 January 2004), *Richards* (Case C-423/04 ECJ 26 April 2006), and *Maruko* (Case C-267/06 ECJ 1 April 2008)²¹. A sort of “preliminary condition” linked with fundamental rights attracts competences and thanks to fundamental rights the competences of the EU and its member States can change.

3.2 *The horizontal profile*

¹⁶ For this assessment, see A. Pace, 2001a, p. 193; S. Mangiameli, 2008, p. 309.

¹⁷ See P. Caretti, 2005, p. 379. With regard to the deep connection between competences and rights, see L. Azzena 1998.

¹⁸ Regarding the evolution of federal systems concerning the protection of rights, see the classical pages of K. Stern, 1994, for the German experience. See also C. Fercot, 2008, for a comparison between the U.S.A., Germany and Switzerland.

For a different opinion which establishes rights as “negative competences” of European Institutions, see I. Pernice & R. Kanitz, 2004, p. 17 s.

¹⁹ G.A. Turr, 2005, p. 56.

²⁰ With regard to the application of the “incorporation doctrine” to EU law, see J.H. Weiler, 1985; R. Toniatti (2002), p. 15 s., referring to EUCFR. M. Cartabia, 2007, p. 27 ss. stresses the enlargement of the application of the “incorporation doctrine”, after EUCFR proclamation.

²¹ With regard to this decision, see L. Ronchetti, 2009.

The second example is even more relevant in my opinion. It refers to the effectiveness of European fundamental rights in their mutual relationship. It is remarkable that the mutual interferences between protected situations do not only refer to the articles of the Charter, but – as has been highlighted – involve rights from the EU Treaty too. And this is what art. 6 TEU-Maastricht Treaty confirms.

The analysis of this profile, all within European law, requires a systematic approach, or, at least, some fundamentals of the architecture of constitutional doctrine of fundamental rights²² and this makes the analysis more difficult and delicate.

The *Schmidberger* (Case C-112/00 ECJ 12 June 2003), *Omega* (Case C-36/02 ECJ 14 October 2004) and *Dynamics Medien Vertriebs GmbH* (Case C-244/06 ECJ 14 February 2008) cases are not, in my opinion, so emblematic of this new perspective: the “general interest” clause applied in these decisions, against economic liberties does not hide a conflict between two (or more) fundamental rights. The dialectic is between the fundamental (subjective) rights and objective limits (human dignity) to it. And this is a rather easier task for the ECJ, because there are no relevant doubts about the fact that objective limits to a subjective protected right must be restrictively applied with a severe proportionality test²³.

The worldwide (or Europawide...) *Laval* (Case C-341/05 ECJ 18 December 2007), *Viking Line*, (Case C-438/05 ECJ 11 December 2007) and *Rüffert* (Case C-346/06 ECJ 3 April 2008) judgments offer, indeed, the best recent examples of problems originating from the collision of fundamental subjective rights. There is a widespread awareness among scholars that these three decisions nullify the provision of art. 137 EU about the lack of relevance in European law of collective action, also considering article 28 EUCFR as lacking binding value: notwithstanding the refusal of the competence of the ECJ on collective bargaining and strike actions, the right to strike is here balanced with some fundamental economic liberties.

Here it is not possible to discuss the appropriateness of the Court’s solution in the specific case. We have to stress, indeed, that the result of the balancing is a *new regulation* of social and trade union matters. It is impossible, in my opinion, to avoid this point. The importance of *Laval*, *Viking* and *Rüffert* is to show a clear and real conflict between social and economic liberties: both of them are fundamental, but in the absence of positive elements about prevalence (prevalence which ought to be decided by the constitution

²²The importance of the support of the academic world in order to solve problems of the overlapping of different levels of protection of fundamental rights is enhanced by H.J. Blanke (2006), p. 277.

²³ On these aspects, see J. Morijn, 2006. See also, in a more systematic approach, referring to the Italian constitutional system, S. Mangiameli, 2006, p. 513.

maker, in accordance with the teachings of C. Schmitt...²⁴) they have to be balanced by Courts, first of all the ECJ, using self-made instruments.

The focus point, which I shall attempt to develop in the following pages, is the absence of clear statements of the Charter about the mutual relationship between the rights it mentions. Even if we do not want to reason about a *Wertordnung* of protected situations, we need some minimal spurs to build the European Bill of rights systematically. Otherwise, the lack of reference points of interpreters will reflect (and it reflects) on judges and judgments too.

4. The Charter of Fundamental Rights after the Lisbon Treaty

Could the Charter of 2007, in the perspective of its incorporation in European treaties, offer help to solve problems arising from the above mentioned situation (especially as far as concerns para. 3.1) and give a real orientation to European judges reducing their creative role?

4.1 The EU Treaty and the Charter: art. 6 and consequent problems

Let us begin with the formal element. In the Lisbon treaty the Charter does not become part of the treaty as part of the text of it. In other words, the Charter is not incorporated in the EU Treaty as happened in the Treaty establishing a Constitution for Europe, but art. 6 TEU confers to the Charter "*the same legal value as the Treaties*"²⁵.

Will this be enough to give the provisions of the Charter the same range as other provisions of the treaties or is there a risk of creating a "golden cage" for the Charter, reduced to a preamble with a different (reduced) juridical *status* ?

In my opinion, the problem of the collocation of the Charter outside the core of the treaties may be quite easily overcome by conferring to it really the same value as the provisions of the two fundamental treaties. The choice of a separated Bill of Rights is probably connected to the opt-out decision of United Kingdom and Poland. The opt-out solution – apart from any question of its practical relevance²⁶ – would be more difficult to justify and

²⁴ The reference is obviously to C. Schmitt, 1928.

²⁵ With regard to other possible solutions to insert the EUCFR in the binding European law, see A. Weber, 2003, p. 220; M. Michetti, 2006, p. 176

²⁶ For a sceptical approach to the opt-out problem, see; J. Dutheil de la Rochère J., 2008, p. 127 ss.; I. Pernice, 2008, p. 244 ss.; O. Pollicino & V. Sciarabba, 2008, p. 112.

to build too, from a juridical point of view, if the Charter was a part of the EU treaty, producing perhaps a denial of ratification of some of the articles of the international treaty from the two States just mentioned.

The explicit reservation of United Kingdom and Poland in protocol No. 30 annexed to reform treaties, reaffirmed in protocol No. 53 and declarations No. 61 and 62 may confirm, on the grounds of *argumentum a contrariis*, the legal value of the Charter.

The separate position of the Charter in the treaties may be ambiguous from a different point of view: the idea that between the fundamental rights of the European Union and the EUCFR there exists a complete correspondence: that is, there would be no fundamental rights outside the Charter.

As para. 3 of art. 6 TEU clarifies, the drawing up of the Charter is not exhaustive: the rights guaranteed by the European Convention for the Protection of Human Rights²⁷ and the constitutional traditions common to the member States are the other sources to identify and protect the European heritage of fundamental rights.

In this sense, the separated topographic position of the European Bill of Rights may cause misunderstandings and problems of systematic interpretations, but nothing more than this. Otherwise, we would be before a dramatic crisis in the European legal system, if it was possible to create a “constitutional apartheid”, with reduced binding value for the rights enshrined in the Charter.

If someone were to emphasize a separate *status* for the Charter, reducing it to a “son of a lesser god”, he could set off the unhappy provisions of para. 1 art. 6 TEU which recommends the “due regard to the explanations referred to in the Charter”, and the similar provision of para. 7, art. 52 of the Charter. Both of them refer to the explanations drawn up in 2000 and modified during the European Conventions.

Notwithstanding the reference to the explanations is an undoubted step-backwards to the interpretative instruments - belonging to the tradition of international law more than to constitutional law - chosen to guarantee some of member States with regard to the risks of the effectiveness of the Charter, the importance of this point must not be overestimated²⁸. According to the explanations themselves, they “do not have as such the status of law, [although] they are a valuable tool of interpretation intended to clarify the provisions of the Charter”²⁹.

²⁷ About relationship between ECHR and EUCFR, see K. Stern, 2006. A critical approach in F.G. Jacobs, 2006.

²⁸ *Contra*, see F. Petrangeli, 2004. Doubts about this technique of interpreting the Charter also in F. Turpin, 2003, p. 631 ss.; P. Caretti, 2005, p. 377

²⁹ See the Premise to the Explanations of the Charter.

In any case, the classical theory of interpretation well knows the typical *Entfremdung* of sources of law and the modest importance of subjective interpretation in this area. So it is difficult that European and national judges will remain tied down to the explanations of 2001 and 2007.

More problems stem from the above mentioned circumstance that the Charter is not the only text in which European rights are established³⁰: The provisions of EU and EC Treaties (like the provisions on the basic four free movement liberties); the European social Charter, the communitarian charter of 1989 and, of course, common constitutional traditions crowd the already chaotic scene of the protection of rights in Europe. This plurality of levels establishing rights³¹ (some in a text, some without a text) may cause interpretative problems, because it is impossible to identify a hierarchy of European rights depending on their formal seat. So it will be the interpreter (especially the courts) to determine the borders³² and relationship among different rights³³.

On the contrary, the separation of the Charter from the treaty may constitute a positive resource according to some scholars³⁴: the separate position gives more visibility to the act, making the reference by European citizens easier first of all. Instead of a “son of a lesser god”, the Charter would receive an enhanced evidence in the Treaty of Lisbon and its symbolic importance would increase, not decrease.

In this interpretative path, it has even been possible to affirm that the Charter, in its own separate position, would represent the core of a proper constitutional text, while the (remaining) treaties would be connected to a more traditional agreement ruled by international law³⁵.

In a more technical profile, someone rightly asked whether it was necessary to ratify the Charter separately (from the treaties) and the correct procedure in the case of the future amendment of the same³⁶. The first question may be solved thanks to the technique of cross-reference to the Charter from states ratifying the treaties (and art. 6 TEU). But this is necessarily a so called *fixed* cross-reference, which maintains the problem of future

³⁰ See J. Dutheil de la Rochère, 2008, p. 121 and p. 129.

³¹ See K. Lenaerts, 2000.

³² See. H.J. Blanke, 2006, p. 272 about “considerable uncertainty” in the present protection of fundamental rights in European law.

³³ It is interesting to notice some authors move from this point to criticize *ex fundamentis*, the idea of a catalogue of rights, which would be reductive and inappropriate: in Italian literature, see F. Palermo, 2002, 202; O. Chessa, 2006, 249 ss.

³⁴ A positive evaluation of the separate position of the Charter, with regard to the Charter of Nice, in A. Manzella 2001, p. 242 ss.; G.G. Florida 2001, 165. With regard to the Constitutional Treaty, see F. Turpin, 2003, p. 631. See now, after the Lisbon Treaty, L.S. Rossi, 2007, 1 s, (the A. focuses lights and shadows of the Lisbon Treaty on this theme).

J. Dutheil de la Rochère, 2008, p. 121.

³⁵ A. Manzella, 2001, 242.

³⁶ On this issue, see L. Daniele, 2008.

modifications of the Charter open; problems that we only mention in this text: First of all, is it possible to amend the Charter, because it is not part of the treaties? If the answer is affirmative, is the same procedure required (and is it enough) for its adoption (the “Convention system”) or is it necessary to ratify it as an amendment to the treaty (that is, in the Lisbon system by majority rule), or even, by reason of its separate position, the unanimity of the States ?

4.2 Substantial problems of the protection of rights according to the Charter before and after Lisbon

The answer to the question asked at the beginning of paragraph 4. cannot avoid dealing with the problems stemming from the structure of the Charter and its technique of the guarantee of rights. From this point of view we must refer to the peculiarities already focused on during these years, from the adoption of the Charter in 2000, and – as is mentioned later – unchanged after the amendment in 2007 and the ratification of the Treaty of Lisbon.

First of all, some provisions of the Charter are *principles* more than *rights*, more objective proclamations of values than subjective granted situations. It is an assessment claimed, if we may say so, by the same (new) para. 5 of art. 52 of the Charter, and in protocol No. 53, in order to bridle the relevance of provisions like arts. 1, 20-23, 34-38 EUCFR.

Distinguishing principles from rights does not mean making their juridical relevance disappear. On the contrary, it is true that para. 5 of art. 52, even in a rather concise way, recognizes some important effects of the guaranteeing of principles in the Charter³⁷: they can and must lead the interpretation of ambiguous laws, so we must prefer interpretations according to the principle and reject the others (not according to them). Furthermore, referring to principles - when ruling the legality of the acts implementing them - must lead to invalidate these acts, if it is not possible to justify them on the ground of principles.

This immediate relevance of principles as sources of law has already been highlighted, for example, in the Italian experience, in the debate about the so called *norme*

³⁷ With reference to the impossibility of making these effects disappear, see F. Petrangeli, 2004 (who strongly criticizes the Charter over the distinction between rights and principles). As far as concerns the different status of principles in a binding Charter, see F. Turpin, 2003, p. 628 ss. On the possibility to cross the border of judicial relevance of “principles” thanks to the application of art. 234 EC Treaty to national laws implementing principles, see M. Michetti, 2006, 183 and, more recently, O. Pollicino & V. Sciarabba, 2008, p. 120.

For a critical approach to the fortune of social rights in European law, see M. Luciani, 2000. Critical remarks about social rights in EUCFR in P. Caretti, 2001, p. 944 s.

programmatiche (programmatic provisions) of the Constitution and it was considered a successful demonstration of the full normativity of the whole Constitution³⁸.

Something similar happens today: the distinction between principles and rights does not necessarily cause the loss of any juridical meaning in the first ones. It requires scholars to understand the differences between these two different kinds and levels of normativity, according to the will of the Founding Fathers of the Charter, or better, according to a systematic interpretation of its provisions.

When I refer to the problems stemming from the presence of principles in the Charter of fundamental rights, I do not mean the – false – problem of their inconsistency, but something different: the close inherence of any principle with the value underlying it and the consequent difficulty to apply to the interweaving of rights (sometimes opposed rights) and the limitations to these rights which every constitutional text has.

In other words, it is the “absolute attitude” (tyrannical, as C. Schmitt demonstrated³⁹) of the value transmitted to the principle and not translated into the relational language of rights, (with its graduations, inner and outer limitations, the *Wertordnung* established in the Constitution) to make the concrete usage of principles difficult by interpreters of the *Charter*.

But this uncertainty affects the rights of the Charter too. This is the second – and more relevant – substantial problem arising from a scientific examination of the Charter.

It is the scientific analysis of contemporary Constitutions that shows us that fundamental rights are not monads. They often interfere with each other and the interpreter needs to control this interference: increasing the protection of a right may mean increasing its limits or reducing the area of protection of other rights⁴⁰. The constitutional text itself often offers important guidelines to this delicate activity, establishing inner and outer limits to single rights and grading the relevance of rights.

The rights granted by the Charter are, on the contrary, “one-dimensional”: they are not characterized by internal limits (i.e. public order, decency, dignity) and they are set up on a uniform landscape⁴¹. It often happens that rights (and the above mentioned principles) collapse among themselves (i.e. art. 7 vs. art. 11; art. 10 vs. art. 11 and 12 [I refer to satire in religious matter]; art. 14 vs. art. 25; art. 16 vs. art. 37; art. 16 vs. art. 38). In these cases

³⁸ See V. Crisafulli, 1952.

³⁹ C. Schmitt, 1967.

⁴⁰ See, among others, A. Pace 2001b p. 9, referring to ECHR; U. Villani, 2004, para 8; F. Sorrentino, 2008, p. 354 s.

⁴¹ See U. De Siervo, 2001a, p. 156 ss; 2001b; P. Caretti 2001, p. 944 ss.; L. Trucco, 2007, p. 330 who writes of the “apparent simplicity” arising from the Charter. A critique to this approach, based on comparative suggestions, in A. von Bogdandy, 2001, p. 889. See also, T. Groppi, 2001, p. 353.

it is unavoidable that opposed rights (or principles) have to be balanced with a wide (perhaps too wide) discretionary power by the judge⁴².

It is important to add that this structural characteristic of the Charter was not changed in 2007: the *pre-Lisbon* and *post-Lisbon* eras are not different, if we consider the particular perspective of protection of fundamental rights.

4.3. Arts. 52 and 53 of the Charter: real barriers to protect national law ?

The width of the general limits set down in art. 52 of the Charter does not help in such a model.

The limitation “*by law*”, set out in art. 52, may unlikely play the role we are used to in national law. The meaning and role of “*law*” in the European experience is still too different from the usual constitutional experiences: European law will not belong to parliament as far as the co-decision method is not the rule but the exception (also if we have to admit that the Treaty of Lisbon is going to improve the model).

Furthermore, in advanced constitutional experiences, law limiting liberties often find substantial guidelines in the Constitution itself, so the Constitution does not place a mere formal regulation, but rules (elements of) contents of law affecting liberties, depriving the discretionary power of the legislator. So this kind of guarantee is lacking in the Charter⁴³.

Last but not least, what do we mean when we are reasoning about the “*law*” mentioned in art.52 ? It is not clear which kind of source of law art. 52 refers to. After the failure of the Constitutional Treaty to attempt to introduce “*European law*”⁴⁴, probably the reference in the Charter must be interpreted in a broad way, including secondary sources of law, not only in European law but at national level too, according to the internal source system.

Nor can the guarantee of “*the respect the essence of those [of the Charter] rights and freedoms*” offer a safer standard of protection for its unavoidable uncertainty⁴⁵. In any case, even if we want to appreciate this clause, it is impossible to avoid the fact that it can be appreciated – as the “*principle of proportionality*” – only by the Courts and the Courts say what *essence* of fundamental right and *proportionality* of its limitation is (case by case...).

⁴² The importance of the “particular case” in judicial balancing operations is enhanced by K. Lenaerts, 2000, p. 581.

⁴³ See authors quoted at fn. 41

⁴⁴ With regard to the sources of law system in European law, see, among others, M. Nettesheim, 2006; U. Wölker, 2007; S. Baroncelli, 2008.

⁴⁵ See H.J. Blanke, 2006, p. 273.

The above mentioned problems of the vertical profile of the Charter and the real possibility to separate the European guarantee from the national guarantee of rights should make us skeptical about the success of art. 53 of the Charter and the maintenance of a “higher national level of protection of rights” with respect to Charter provisions.

Viking, Laval and *Rüffert* judgments are emblematic in this perspective too. The balancing of the ECJ between the free circulation of services and collective bargaining and the right to strike, impacts on quite different – and always delicate – balances inside national systems, and it is difficult to invoke a “higher national level of protection” when this level reduces the protection of another European right.

5. A short conclusion in the line of continuity between pre and post Lisbon Treaty, for what concerns the protection of fundamental rights

It is enough, I hope, to further justify my personal skepticism about the strength of the Lisbon Treaty to radically change the system of the protection of fundamental rights in the European Union.

If the problem is restraining the judicial creativity of European (and national) judges through the Charter, we probably need a different style of drafting the Charter. Until this happens – that is, until a fundamental decision at least about *Wertordnung* of fundamental rights is taken – the European courts, including in this multi-level system national judges applying the Charter – will continue to play the central role they already have, according to the common law model and the spill-over expansion of European competences, also through fundamental rights⁴⁶.

The Charter will play and improve a role of political legitimacy of the European Union, according to the principles of classic and contemporary constitutionalism and integration of the legal system, while judicial protection of rights will go further with light and dark areas. Since it is not time for those “fundamental decisions” which C. Schmitt described, the system above described is the only possible system, and probably not such a bad one.

⁴⁶ With regard to the central role of jurisprudence in the European “system” of the protection of rights, before and after Lisbon, see P. Caretti, 2001, p. 947; R. Toniatti, 2001, 186 ss.; R. Toniatti, 2002, p. 21 ss.; J. Dutheil de la Rochère, 2008, p. 122; L.S. Rossi, 2009, p. 79 ss. (highlighting the values mentioned in art. 2 TUE, which looks more widely than those in art. 6); P.M. Huber, 2009, p. 10 ss.

Contra, for the efficiency of the Charter to restrict the discretionary power of Courts, see C. Pinelli, 2002, p. 214; Id., 2008, p. 58 s.

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