

FUNDAMENTAL RIGHTS IN THE FACE OF THE CRISIS

Antoine Bailleux

Saint-Louis University, Lawyer, member of the Brussels Bar

The economic, social and identity crisis that the European Union is currently experiencing has placed significant strain on the protection of fundamental rights. It is apparent that these rights have been marginalised on particularly burning issues such as: (1) the opt-out status of the United Kingdom, Poland and – potentially – the Czech Republic in relation to the Charter of Fundamental Rights; (2) the deepening of economic coordination and governance; (3) the negotiation of free trade agreements with Canada and the United States; and (4) the negotiation of Protocol no. 15 amending the European Convention on Human Rights. Against this unfavourable background, it is incumbent upon the European Parliament to ensure that fundamental rights continue to serve as a compass and frame of reference for EU policies.

The difficult period that the European Union is experiencing has placed a strain on the protection of fundamental rights. In a large number of member states the economic crisis has fostered the growth of political movements and parties with an authoritarian, nationalist or simply eurosceptic bent. These parties have for the most part not come to power, but they nonetheless indirectly influence the political agenda of their states and, in turn, the entire European Union.

This context of identity tension is hardly conducive to the flourishing of fundamental rights, which are sometimes cited as the symbol of a legal-technocratic Europe that imposes its diktats on the popular will (or the presumed popular will). More generally,

these rights often seem to be considered hindrances to the efficiency of public action in sensitive and pressing areas such as the economy and security.

This spirit of the time, inimical to fundamental rights, is expressed in a number of areas in the European Union's legal system. In an inevitably partial and selective way, this contribution identifies four especially topical and wide-ranging areas that the European Parliament will be hard-pressed to ignore during the 2014-2019 term: (1) the opt-out status of the United Kingdom, Poland and the Czech Republic in relation to the Charter of Fundamental Rights; (2) the deepening of economic coordination and governance; (3) the negotiation of free trade agreements with Canada and the United States; and (4) the signing of Protocol no. 15 amending the European Convention on Human Rights.

Each of these subjects is addressed in two steps: first a description, followed by an assessment and recommendations. The aim of this short contribution remains modest, however: the issues it highlights are already well known, its analysis of them is too quick, and some of the recommendations it offers will likely appear too vague or simplistic to be implemented. But the exercise will not be useless if it achieves at least one objective: convincing the representatives of the European peoples that, in these turbulent times, fundamental rights must now more than ever serve as a compass for public action.

1. The position of the United Kingdom, Poland and the Czech Republic in relation to the Charter of Fundamental Rights

1.1. Observations

During the negotiation of the Lisbon treaty, Poland, the United Kingdom and the Czech Republic sought to opt out of the Charter of Fundamental Rights of the European Union. These efforts have led, for the former two member states, to the ratification and entry into force of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. According to article 1 of this Protocol no. 30, “[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the

United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” In order to remove any ambiguity, it states “ (...) nothing in the Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.”¹

Annex I to the conclusions of the European Council of 29 and 30 October 2009 includes a “protocol on the application of the Charter of Fundamental Rights on the European Union to the Czech Republic”, which in its first article states that Protocol n° 30 applies to the Czech Republic. This new Protocol, which in theory should have been ratified and entered into force at the same time as the Accession Treaty of Croatia, led to an uproar in the Czech senate² and European Parliament.³ The prospects of ratification of this Protocol in the near future are therefore dim.

In its *N.S.* ruling, the Court of Justice retained a narrow interpretation of the “special privileges” that Poland and the United Kingdom have secured, holding that article 1, § 1, of Protocol n° 30 “is not intended to exempt [these two states] from the duty to comply with the provisions of the Charter, or to prevent a court of one of those Member States from ensuring compliance with those provisions.”⁴

In contrast, the Court has not yet ruled on the scope of the second paragraph of the 1st article of the said Protocol, that denies Title IV (“Solidarity”) of the Charter the status as a source of “justiciable rights” except in so far as such rights are already provided for in national law.⁵ In its *Association de Médiation Sociale* ruling of

1. *O.J.*, 2007, C 306, p. 157.

2. See resolution n°330 of 6 October 2011 cited in European Parliament Resolution of 22 May 2013 (n.3 below).

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

4. C-411/10 and C-493/10 *N. S.*, 21 December 2011, not yet published in European Court Reports, para. 120.

5. In a ruling of 15 September 2011 (C-155/10 *Williams*, not yet published in European Court Reports), the Court nevertheless did not hesitate to invoke the Charter to establish the right to an annual leave in a case on a preliminary ruling by the British Supreme Court. However, it also true that this right was already enshrined in secondary legislation.

15 January 2014, the Court nonetheless confirmed the ungenerous interpretation advanced by British and Polish authorities by stating that article 27, which recognises workers' right to information and consultation within the undertaking – a part of the "Solidarity" title – "by itself does not suffice to confer on individuals a right which they may invoke as such" and can therefore not be invoked in a dispute between individuals for the purpose of dismissing a national measure contrary to that article.⁶

1.2. Assessment and recommendations

It is unfortunate that, for the first time in the history of European integration, the "sacred union" of member states on fundamental rights has broken. The exemption sought by three states in relation to an axiological pillar of the European Union – fundamental rights – is extremely worrying symbolically, politically and legally.

The European Parliament may at first glance appear powerless in this situation, which relates to an act of primary law – a Protocol – signed and ratified by member states. However, it can use its powers to indirectly quash the negative consequences of this dislocation of states' shared commitment to fundamental rights.

On the one hand, it must continue to strongly oppose the extension of the Protocol to the Czech Republic and to fight to prevent the British and Polish examples from "spreading like wildfire."

On the other hand (and most importantly), the Parliament must act in its capacity as EU co-legislator to ensure, through secondary law, respect for values that primary law seems unable to guarantee. Specifically, the Parliament should use its legislative powers⁷ to work for continuous improvement of the protection of rights covered in the "Solidarity" Title of the Charter.⁸

It would certainly be a sensitive task, but this long-term legislative undertaking appears to be the only way to rebuild a united front of states supporting fundamental rights. With this in mind, the European Parliament is invited to seriously consider the stand-

6. C-176/12, not yet published in European Court Reports, points 47 to 51.

7. Which is in no way incompatible with the fact that the Charter does not expand the EU's competences (art. 6, § 1^{er}, al. 2, of the Treaty on European Union).

still principle, which forbids the EU, in the absence of compelling reasons, to lower the level of protection of these rights (Hachez, 2008: no. 55 ff.; Misonne, 2011: 356-359). In other words the Parliament should systematically refuse any legislative change that would unjustifiably or disproportionately undermine the fulfillment of these fundamental rights.

2. The deepening of economic coordination and governance

2.1. Observations

The sovereign debt crisis led EU member states to carry out major reforms aiming to strengthen economic governance in the European Union, and especially the eurozone. These reforms have largely followed the classical intergovernmental path, resulting in the conclusion and entry into force of the treaty establishing the European Stability Mechanism (ESM) and of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). Today they are largely anchored in the European Union's secondary law through the well-known "six-pack" and "two-pack."

Fundamental rights are only a small part of these reforms. In fact, the Court of Justice has recognised that the Charter of Fundamental Rights does not apply to the ESM because the latter does not formally come under the jurisdiction of EU law.⁹

The role of fundamental rights in economic governance thus appears to be limited to two elements. First, this governance is to "take into account article 28 of the Charter" and "accordingly, does not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice."¹⁰

8. These rights include workers' right to information and consultation within the undertaking (art. 27), the right of collective bargaining and action (art. 28), the right of access to placement services (art. 29), protection in the event of unjustified dismissal (art. 30), fair and just working conditions (art. 31), prohibition of child labour and protection of young people at work (art. 32), protection of family and professional life (art. 33), the right to social security and social assistance (art. 34), the right to a high level of human health protection (art. 35), the right to access services of general economic interest (art. 36), and the right to a high level of environmental protection (art. 37) and consumer protection (art. 38).

9. C-370/12 *Pringle*, 27 November 2012, not yet published in European Court Reports.

Second, the Commission has set up an “EU Justice Scoreboard”¹¹ to assess member state compliance with the right to an effective remedy as set out in Article 47 of the Charter. The scoreboard originated from the conviction that access to effective, independent and predictable justice is likely to increase investor confidence and thereby promote economic growth.

2.2. Assessment and recommendations

While there was clearly a need to deepen economic governance, one can only deplore that it occurred with indifference to, or even to the detriment of, fundamental rights. References to the right to collective bargaining in some of the “two-pack” and “six-pack” instruments should not delude us in this regard: the array of sanctions and rewards that the Commission and Council can use to enforce compliance with their recommendations threatens, in practice, to eliminate social partners’ room to maneuver. Meanwhile, the Commission’s scoreboard is questionable, to say the least, in the sense that it was created for the sole purpose of gauging a member state’s attractiveness for potential investors. Such an instrumental approach to fundamental rights seems very simplistic.

This underutilisation of fundamental rights has not gone unnoticed. The Portuguese Constitutional Court has already struck down austerity measures imposed by European institutions for failing to respect social rights.¹² In the same vein, the European Committee of Social Rights has ruled that certain measures adopted by Greek authorities under pressure from the Troika (European Commission, ECB, IMF) violate the European Social Charter.¹³

10. See Regulation 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances, *O.J.*, 2011, L 306, p. 25-32, art. 1, § 3 and art. 6, § 3; Regulation n° 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *O.J.*, 2013, L 140, p. 1., art. 1, § 4, and art. 6, § 1; Regulation n° 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, *O.J.*, 2013, L 140, p. 11, art. a, § 2.

11. COM (2013) 160 final.

12. See Decision 187/2013 of 5 April 2013; Decision 862/2013 of 19 December 2013.

13. See *GENOP-DEI and ADEDY v. Greece*, claim. n° 65/2011 and n° 66/2011, decisions of 12 May 2012; *GENOP-DEI et ADEDY v. Grèce*, claim n° 65-66/2011; *IKA-ETAM, POPS, ISAP and POS-DEI v. Greece*, claim n° 76-80/2012, decisions of 7 December 2012.

The odds are that such backfiring will grow in the near future and thereby feed the legitimacy and confidence crisis that currently bedevils the European Union.

The European Parliament cannot stand idly by in the face of these challenges. It must use its powers – and especially those granted through the “economic dialogue”¹⁴ – to force the Commission and Council to jettison their one-dimensional approach to their assessment of member states’ economic situation.

These states are held to fundamental rights obligations that they cannot – be it from a legal standpoint alone – sacrifice on the altar of economic governance. In a communication of 2 October 2013, the Commission thankfully committed to developing the social dimension of economic and monetary union.¹⁵ It is up to the Parliament to ensure that this declaration of intent is realised and strengthened.

3. Negotiation of free trade agreements with Canada and the United States

3.1. Observations

The European Union has – quietly – negotiated a free trade agreement with Canada. To date the content of this agreement, whose details are still being finalised, has not been revealed to the general public. But it appears that this agreement will include provisions on investments that can be invoked before arbitration courts. In particular, businesses investing in the European Union or Canada would be able to obtain redress in the event of an “indirect expropriation”, that is, a “substantial deprivation” of the attributes of property. Specifically, these clauses would also allow businesses to claim damages and interest for legislative changes infringing on their investments if these changes – driven, for example, by environmental, health or public safety concerns – appeared to be “manifestly excessive in light of their objective.”¹⁶

14. See. art. 15 of Regulation n° 473/2013 quoted above and article 3, § 9, and 18 of Regulation n°472/2013 quoted above.

15. COM(2013) 690 final.

16. This information comes from a Commission document entitled Investment Provisions in the EU-Canada free trade agreement (CETA), available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

It is likely that the free trade agreement with the United States (the Transatlantic Trade and Investment Partnership (TTIP)) will feature the same type of clause. The Trade Commissioner is aware of the concerns that these provisions raise in the European population, and has decided to open a public consultation on this subject in March 2014.

3.2. Assessment and recommendations

The transatlantic free trade agreements have raised a number of public concerns, with some fearing that the removal of barriers to trade will lead to lower standards of protection for non-commercial interests (health, environment, etc.) in force today in the European Union.

It would behoove the Parliament to use its powers under article 2018 of the TFEU to oppose any clause in these agreements that might lead to a step backwards in the protection of fundamental rights, and in particular those included in Title IV of the Charter, such as the right to a high level of protection for human health, consumers and the environment.

Moreover, it is critical that the Parliament shed light on the content and reach of the investment clauses that are to be inserted into such agreements. In this connection it may be recalled that according to the Court of Justice's jurisprudence, "an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances. Nor can the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity."¹⁷

In other terms, neither property rights nor the right to freedom of economic activity¹⁸ can justify the insertion of a clause aiming to safeguard businesses from unpredictable legislative developments that might harm their investments. Conversely, the

17. C-120/06 and C-121/06 P *FIAMM v. Council and Commission*, 9 September 2008, *Rec.*, p. I-6513, point 185, and jurisprudence quoted.

18. See aff. 133 to 136/85 *Rau*, 21 May 1987, *Rec.*, p. 2289, pt. 19.

existence of such a clause – and its attendant legal threats – might dissuade states from pursuing reforms needed to safeguard the protection of “non-commercial” fundamental rights related to health, security or the environment. Finally, such clauses are all the more dangerous because they would be subject to private arbitration, under which they would likely take precedence over European standards to protect fundamental rights,

4. The signing of Protocol no. 15 amending the European Convention on Human Rights

4.1. Observations

On 24 June 2013, states parties to the Council of Europe concluded Protocol no. 15 to the European Convention on Human Rights. This Protocol will come into force once all the states parties to the Convention have ratified it.

This Protocol seems to be partly driven by a desire to limit the influence of the European Court of Human Rights’ jurisprudence over national policies. First, its preamble enshrines the principle of subsidiarity and the doctrine of the “national margin of appreciation.” Moreover, this Protocol places a four-month time limit – instead of the current six months – on filing a petition from the date of the final domestic decision.

On the basis of article 6, § 2, of the TEU, the European Union has negotiated an agreement to accede to the European Convention on Human Rights. This Protocol is currently under review by the Court of Justice.¹⁹

4.2. Assessment and recommendations

It is worrisome that some states parties to the Council of Europe are trying, via Protocol no. 15, to constrain the European Court of Human Rights’ scope for action. As nationalist and authoritarian movements are gaining traction in the aftermath of the crisis, it is more important than ever to save democracy from itself by entrusting the keys to an independent guardian above the political

19. Opinion 2/13, procedure currently pending before the Court.

fray. While the “margin of appreciation” technique and the subsidiarity principle are already used by the Strasbourg Court for the legitimate purpose of respecting the diversity and sovereignty of member states, these tools should not become a convenient shield for states trying to escape their international obligations.

Once the European Union becomes party to the European Convention on Human Rights it will also have to make a decision over the ratification of Protocol no. 15. At this point it is difficult to judge whether European Parliamentary opposition to EU accession to the Protocol would be politically possible and strategically advisable. However, the European Parliament has another option that would allow it to partially offset a possible weakening of the European Court of Human Rights’ oversight.

This option is nothing new. Called for by the Parliament itself,²⁰ and supported in the academic world (see Carrera, Guild, Hernanz, 2013), the solution would be to establish a system to monitor member state compliance with fundamental rights. This mechanism would allow for the continuous monitoring of each member state’s compliance with the Copenhagen criteria. It would be more efficient than the process referred to in article 7 of the TEU that provides for penalties against states which seriously and persistently breach EU values, but that is fraught with such serious consequences that it has never been used. At the same time, this mechanism could find a legal basis in this same article 7 of the TEU, as a preventative tool to anticipate and prevent the “clear risk of a serious breach” mentioned in article 7 of the TEU.

The European Parliament should therefore pursue this course with the help of the Commission and the European Union Agency for Fundamental Rights, which seems to naturally be best equipped to guide the implementation of such a “scoreboard for fundamental rights”.

20. See for example the European Parliament Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, pts. 78-82.

5. Conclusion

It is proposed that the European Parliament:

1. systematically refuse any legislative change that might unjustifiably or disproportionately lower the level of protection of the social rights and principles described in Title IV of the Charter of Fundamental Rights;
2. encourage the Commission and the Council to integrate the protection of fundamental social rights in their assessment of the economic situation of member states in the context of the new economic governance;
3. oppose any clause in transatlantic free trade agreements (EU-Canada and EU-US) that either in terms of content (weakened protection of human health, consumers and the environment), or of procedure (insertion of investment clauses that would paralyse member state action) would threaten the protection of fundamental rights;
4. work towards the implementation of a “scoreboard” for fundamental rights that would continuously monitor each member state’s compliance with them.

References

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