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## A COMPARISON BETWEEN THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN CHARTER OF HUMAN RIGHTS

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**Abstract:** *The essay is the result of a comparative research of European provisions regarding the human rights and fundamental freedoms. The authors want to point out the fact that in the 21<sup>st</sup> century the Europeans are protected by international legal mechanisms that provide the recognition of their rights. Moreover, the essay underline the importance of the fact that the European Charter of Human Rights has already come into force and what effects bring this new European disposals related to the ones of the European Convention of Human Rights.*

**Key words:** *right, convention, charter, court*

### 1. INTRODUCTION

The European Convention of Human Rights was adopted in Rome on November 4<sup>th</sup> 1950 by the European Council. Later it was amended by a series of protocols concerning either new rights and fundamental freedoms, or modifications of the European Court of Human Rights (ECHR) judicial procedure. After over 50 years, the Charter of Fundamental Rights of the European Union was drafted and officially proclaimed in 2000, and came into full legal effect upon the entry into force of the Treaty of Lisbon on 1 December 2009. Therefore, our research tries to elaborate a comparison between the two juridical acts and to reveal what juridical force results from these compared features.

### 2. MAIN ISSUES REGARDING THE EUROPEAN CONVENTION AND THE EUROPEAN CHARTER

The States Parties to the International Covenant on Economic, Social and Cultural Rights recognize the right of individual to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. As follows from the preamble of the Charter, it reiterates the rights already acknowledged by the European Convention of Human Rights, but also consequent to the jurisprudence of the European Court of Justice and the European Court of Human Rights.

The charter will be interpreted by the EU and member states courts of law starting from the explanations issued by the presidium of European Convention and published in the Official Journal of the European Union no. 2007/C 303/02.

Evidently, the two conventions have numerous similarities, related to the area of regulated rights. For example the right to life, the right to the integrity of the person, the prohibition of slavery and forced labour are only a few of the fundamental rights addressed in both conventions. Consequently the question arises of the necessity of two European conventions governing human rights.

We shall try to find the answer to this question, with an emphasis on the differences between the conventions, as well as on their relation from the juridical and applicability viewpoints, as they were devised by distinctive subjects of international law and have different areas of applicability. Thus, the European Convention on Human Rights is mandatory for all 47 member states of the European Council (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslavian Republic of Macedonia, Turkey, Ukraine, United Kingdom).

On the other hand the Charter of the European Union is mandatory for the 27 EU member states (Austria, Belgium, Czech Republic, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom), consequently to the ratification of the Treaty of Lisbon by these states.

What happens, though, when a state is a member of both the European Council and the European Union? Which of the two conventions has priority in the case of dissimilar provisions? How do internal courts of law and even European courts proceed in such cases? The extent of both conventions is conditioned by the principle of subsidiary.

By article 52 (1) the European Charter provides, that any restriction on the exercise of the recognized human rights and fundamental freedoms need to be provided by law and respect the substance of such rights and freedoms. These provisions thus acknowledge the possibility of restricting these rights by the internal legislation of each EU member state, however only in cases of endangerment of the general interest. Article 52 paragraph (3) stipulates the position of juridical equality of the two conventions, however specifying that while the extent and understanding of the rights regulated by both conventions are the same, the EU can offer a wider (*i.e.* not a restricted) protection than that offered by the European Council.

### 3. AN ANALYSIS OF SPECIFIC REGULATIONS

The mentioned explanations related to the European Charter as compared to the European Convention are integral part of the juristic act of the European Charter, having however no juridical value *per se*.

Where the same rights are also regulated by the Charter, the reference to the provisions of the Convention are explicit and always determine identity of interpretation, as to the notion itself and its extent, considering the latest amendments and completions faced by the European Convention.

Thus, according to the Article no.2 of the European Charter – the right to life– the provisions correspond to those of the European Convention and of Protocol No. 6 appended to the European Convention of Human Rights, having the same understanding and area of applicability as the Article no.52 paragraph (3) of the Charter.

The person's right to integrity, which is provided by art. 3 of the Charter relates to a right previously acknowledged by the European Convention of Human Rights and biomedicine, adopted within the European Council. Additional stipulations are added from the jurisprudence of the European Court of Justice, because that court of law represents by itself a source of law.

Title II of the European Charter called "Freedoms" commences at the Article no.6 with the regulation of the right to freedom and safety, corresponding to the rights guaranteed by the Article no. 5 from the European Convention (Barsan, 2005). Again it is expressly stipulated that the restrictions legally applicable to these rights provided by the Charter cannot exceed the ones allowed by art. 5 of the European Convention of Human Rights, and consequently the correspondence of the two conventions is reiterated, the identity of interpretation of the extent of rights and freedoms, as well as the fact, deduced *per a contrario* that the European Charter cannot add restrictions to these rights extended further than those enjoying exception status in the European Convention of Human Rights.

In the same conception, the Article no.7 of the Charter regarding the right to respect for private and family life corresponds to the rights guaranteed by the Article no. 8 of the European Convention of Human Rights, but for the word "correspondence" that is replaced by "communications"; while this replacement takes into account the technical progress, it does not affect the same understanding of the two articles and conventions, respectively.

Art. 17 of the Charter - the right to property – starts from the acknowledgement of this right by the consistent jurisprudence of the Court of Justice, and in the first place, from the *Hauer case* (13 December 1979); this jurisprudence however does not allow a restriction of the understanding of this right beyond the limits provided by Additional Article no. 1 to the European Convention of Human Rights.

The Article no.21 – non-discrimination – includes additional explanations in relation to the Treaty on EU functioning and mentions that the area of applicability includes exclusively discrimination caused by EU institutions and bodies while exercising their competencies, and by member states, only to the extent to that they apply European Union law. Further, paragraph 1 of the Article no.21 is applicable only within the limits set by the Article no.14 of the European Convention of Human Rights, "to the extent to that is coincides" with the latter regulations.

#### 4. THE EUROPEAN UNION AND THE EUROPEAN CHARTER

Nevertheless, according to the EU Lisbon Treaty, the European Union is an autonomous entity, a supranational organisation and the Charter of Fundamental Rights was proclaimed as the European Union's Charter of Fundamental Rights, as a separate document (Borchardt, K.-D., 2010).

This makes the Charter of Fundamental Rights legally binding and also establishes the applicability of fundamental rights in Union law. Poland and the United Kingdom did not adopt the system of fundamental rights of the charter, but they are bound by the case-law of the Court of Justice. Thus, the Court of Justice stated that respect for human rights was a condition for the protection for the lawfulness of European Union's acts.

#### 5. CONCLUSION

Accession to the convention would entail a substantial change in the present Union system for the protection of human rights and the European Union shall make decisive steps towards the creation of a common constitutional European law.

Art. 47 of the Charter – the right to an effective remedy and to a fair trial establishes a more extended protection within EU law than the Article no.13 of the European Convention, starting from the relevant EU jurisprudence. The area of applicability is also different; as the Article no. 47 applies to EU institutions and member states to the extent to that these apply EU law (The Official Journal of the EU no.2007/C 303/02). Moreover, the 2<sup>nd</sup> paragraph of the Article no.47 corresponds to the Article no.6, the 1<sup>st</sup> paragraph, of the European Convention of Human Rights relating to the right to an effective remedy and to a fair trial within a reasonable term; here too, however, the area of applicability of the Charter is extended in relation to that of the European Convention of Human Rights.

Thus, in EU law, the right to seek justice in a court of law is applicable not only for complaints concerning civil rights and obligations. The 2<sup>nd</sup> and the 3<sup>rd</sup> Paragraphs of the Article no.6 of the European Convention of Human Rights are dedicated a distinctive regulation in the Charter, according to art. 48 – Presumption of innocence and the right to defence.

The understanding and area of applicability are identical, however according to the principles established in the 3<sup>rd</sup> paragraph of the art.52 from the EU Charter. Consequently the dominant principle governing the European Convention of Human Rights – Charter relationship is the principle of subsidiary of application of the Charter in relation to the European Convention. Further, the member states are held to abide by the Charter (thus not by the European Convention!) only to the extent to that EU law is being applied.

Hence the area of general applicability of the Charter is significantly restricted as compared to the of the European Convention, the latter being applicable including in cases when the institutions of a member state apply only internal law. Further, not to be neglected is the fact that the entry into force of the Charter does not extent the competencies and tasks granted to the Union by the treaties, nor those granted to the EU member states.

The results of the research are very important for the near jurisprudence of the European Court of Human Rights and of the European Court of Justice as well. Therefore, the European Convention of Human Rights ha already become part of the European Law and the EU Treaty of Lisbon created the possibility for the European Union to recognize the juridical force of the European Convention of Human Rights.

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