

OBSERVATORY ON FUNDAMENTAL RIGHTS IN EUROPE

FUNDAMENTAL RIGHTS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE – PERSPECTIVES AND RESPONSIBILITIES AFTER THE TREATY OF LISBON

I. Principles

1. A new perspective

The Treaty of Lisbon widens the perspective on the protection of fundamental rights. First of all it establishes that the EU is based on a set of values, some of which were not explicitly mentioned in previous treaties (dignity, equality, tolerance, justice and solidarity)¹. The European institutions will have to adopt their acts and then formulate European policies in accordance with this set of values².

Secondly, the attribution of a legally binding status³ to the European Charter of Fundamental Rights creates a change of perspective which puts the dignity of individuals at the centre and compels all institutions to play a more active role in fostering fundamental rights. A further binding element concerning the respect for fundamental rights lies in the accession of the European Union to the ECHR, as provided for in the new Treaty.

The European Parliament, the institution which represents the citizens, and in coherence with the new provisions on democratic principles⁴, is called on to promote individual rights and to monitor their implementation, in cooperation with national parliaments, whose powers have been increased with the Treaty of Lisbon.

2. A new area of freedom, security and justice

The Treaty of Lisbon entrusts the EP with new powers in relation to the adoption of provisions related to the area of freedom, security and justice. These powers must be accompanied with new responsibilities to guarantee and promote the fundamental rights of individuals, which are put at risk in this specific area of European policies.

Furthermore, it is also necessary to ensure an overall coherence of the provisions related to the area of freedom, security and justice, which have been fragmented between the pillars till now and thus have been inspired by different logics. This coherence must be pursued on the basis of the principles specifically established in the Treaty and the Charter on Fundamental Rights and aim at adjusting all the standards of protection to the highest existing level of European legislation.⁵

More specifically, Article 3 of the Treaty on the European Union (TEU), with a reference to the area of freedom, security and justice, states that the European Union fights social exclusion and discrimination and promotes justice and social protection, equality between men and women, solidarity among generations and the protection of minors' rights. Article 67 of the Treaty on the Functioning of the European Union establishes that the Union shall constitute an area of freedom, security and justice with full respect of fundamental rights as well as of the different jurisdictions and different juridical traditions of

1 Art.2 TEU

2 Art. 3 par. 5 TEU

3 Art. 6 TEU

4 Art. 12 TEU

5 Article 18 of the Framework Decision on a European Evidence Warrant must be referred as an example of best practices since it foresees two types of solutions: par.1 the solution which should be offered to the authorities of the requested state, par.2 the solution concerning all related issues which should be suggested to the judicial authority of the requesting state.

the Member States⁶.

With regards to the Stockholm Programme, the Observatory on the respect of fundamental rights addresses the following observations to the European Parliament, urging it to be the promoter of better protection of fundamental rights in the area of freedom, security and justice.

II. Contents

Citizens' rights

1) Equality principle

The European Court of Justice has systematically asserted that the Treaty does not prohibit the so called "reverse discrimination", in situations where a Member State is constrained by Community law to grant favourable treatment to the citizens of another Member State, but decides not to extend this special treatment to its own citizens. The principle of equality in front of the law, established by Article 20 of the Charter, should bring to a reconsideration of this issue. It would be appropriate to initiate a debate with Member States on this topic, also aiming at adopting a directive in this regard.

2) European diplomatic protection

It is necessary to reinforce the principle of European diplomatic protection, provided for already in the Treaty of Maastricht to protect European citizens which are outside the EU. With the Treaty of Lisbon this task could be assigned not only to the diplomacies of the Member States but also to the foreseen new service for external action.

Equality and non discrimination:

1) Equality between men and women

The Stockholm document does not contain any reference to the issue of gender equality. Despite the fact that the Community has already adopted several provisions in this area, the issue of equality between men and women is still a matter for concern in several Member States.

2) Condition of immigrant women

Alongside more traditional concerns in this area, the issue of the condition of immigrant women (spouses or female relatives of immigrants) is currently a growing cause for concern. Abuse towards women is tolerated by Member States in the name of a *pseudo*-understanding inspired by *political correctness*, to the point where proprietary attitudes of husbands, fathers or brothers of adult women are justified in the name of tradition. Europe must assert fundamental rights, because the principle of non-discrimination on the basis of culture or religion cannot prevail over the very fundamental principle of equality of all human beings, men or women. To this end the EU should start to develop a strategy. In particular, it should start to reflect on a European pact for the integration of immigrants (as proposed by the United Kingdom). Such a pact would incorporate targeted measures, including:

- a) the creation of specific bodies dedicated to the protection against family abuse, equipped among others with the necessary linguistic competences;
- b) promotion of informational training on fundamental rights as a cornerstone of European values and condition for integration, targeted at all those individuals, men and women, who wish to settle in the EU. Such a training would include particular reference to women rights in society (right to education, medical care) and within the family (principle of self determination once a woman reaches adulthood).

Immigration and integration

In contradiction with the principles set in the Charter of fundamental rights and in the Treaty of Lisbon, the Communication of the Commission⁷, in the chapter related to immigration and asylum, refers to the value of solidarity, corresponding to Article 26 and 38 of the Charter, exclusively in the meaning of solidarity among Member States or with third countries. The European Commission further recalls the pact on

6 A reference to the respect of fundamental rights is also stated in Art. 82 TFEU with reference to the possibility of suspending the legislative procedure in criminal matters.

7 COM (2009) 262, 10.6.2009, chapter 5

immigration and asylum, whose intergovernmental layout fully contrasts with the Communities' competencies as defined in the Treaty⁸.

The effective control of irregular immigration and the reinforcement of readmission agreements must not violate internationally recognised rights of the individual, such as the right to leave any country.

The utilitarian approach taken to the question of "flexible" immigration seems to draw inspiration from the idea that immigration is a temporary phenomenon. This risks undermining policies of integration. The appropriate objective of conferring to regular immigrants a status comparable to that of EU citizens must include the principle of family reunification, as well as the right to fully benefit from the right to family life and the right of the child to live with both parents.

Protection of personal data

The Charter of fundamental rights⁹ and the Treaty of Lisbon¹⁰ radically modify the approach that should guide measures related to the protection of personal data. Indeed, it is not guided anymore by the idea of maximum freedom of circulation of the data collected for market purposes, or by the idea of security in the exchange of data for investigative purposes. It places emphasis, rather, on the protection of a fundamental right of individuals, which is increasingly threatened by the development of information technologies.

The shift to the ordinary legislative procedure (co-decision) in the area of judicial and police cooperation will help to overcome current limitations that have hindered the adoption of a satisfactory framework of guarantees concerning privacy in this policy domain.

The principle of *habeas data* should be extended to all the areas of activity of the EU and should guide the action of the European institutions, including as regards the conclusion of agreements with third countries. From this point of view, one can regret the Commission's position¹¹, which considers that the agreements reached with the United States under the previous Treaties may be the basis for the promotion of international provisions in this field.

Lastly, it is necessary to reinforce provisions for data protection within the internal market domain. The existing directives on the protection of personal data are indeed committed to a logic of free circulation and have been conceived to favour the interests of industry. This concept, however, is nowadays completely inadequate to confront the risks for the privacy of the citizens incurred by the development of information and communication technologies.

Procedural rights in criminal proceedings

So far the Union has achieved important progress in criminal matters, particularly concerning the exchange of information between law enforcement authorities (framework decision 2006/960/JAI), judicial cooperation (framework decisions 2002/584/JAI and 2008/928/JAI), fight against terrorism and cyber crime (framework decisions 2002/475/JAI and 2002/222/JAI). New instruments are foreseen in the Treaty of Lisbon, among which the strengthening of Eurojust and the possible establishment of a European Prosecutor. However, there has not been a parallel development of protection and guarantees, despite the apparent consensus over the need for such instruments. It is necessary to proceed with firmness regarding the rights of guarantee via the adoption of binding instruments on the rights that should be granted across the European territory to the individuals involved in criminal proceedings, whether accused, victims or witnesses. More specifically, it is necessary to foresee:

For the victims, the right to impartial and effective investigation on the facts of the case, so that they may enjoy, as is the case for the accused person, access to an independent and impartial judicial organ for each decision on the outcome of the investigation¹²;

For the suspected and incriminated parties, in addition to the presumption of innocence, the right to legal assistance and to a lawyer before as well as during the proceedings, the right to immediate notification of the reasons underlying the charges and on the guarantees established by the law, the right to interpretation and to translation of all relevant documents in a language which is fully comprehensible, as

8 Art.79 TFEU, specifically §2,a) conditions of entry and residence

9 Art.8 of the Charter

10 Art.16 TFEU

11 COM (2009) 262 point 2.3

12 In coherence with the right established by Article 47 of the Charter of Fundamental Rights and Article 13 of the ECHR.

well as the right to silence.

These instruments should provide for a high level of protection which constitutes added value compared to what is already provided for by the ECHR. The "Roadmap" tabled by the Swedish Presidency is a first step, but it appears too general and lacks courage, specifically in relation to the prompt access to a lawyer, the maximum duration of pre-trial detention and effective remedies in cases of violation of recognised rights.

It is also necessary to foresee a rapprochement of the conditions which can justify restrictive and preventive measures before the judgment and of the provisions related to the minimum standards in prison conditions.

The instruments in this domain should not be limited to transborder cases but also apply to all the individuals involved in criminal proceedings in the Member States, establishing the highest level of common rights applicable to all those people within the European territory.

The gathering of evidence both inside and outside the Union should be conducted in full compliance with fundamental rights provisions and with particular regard to the rights of defence.

It is necessary to conclude binding agreements in the field of legal assistance and extradition with third countries, which guarantee fundamental rights and prevent any risk of inhuman and demeaning treatment.

The promotion of the rule of law in third countries should be constantly integrated in all European Union activities in terms of aid or trade policy.

Cooperation in civil matters

1) Family law has great importance within the area of freedom, security and justice.

Although unanimity is the overarching principle, private international law has already obtained two important results regarding the right of visit (regulation n. 2201/2003) and in the field of international child abduction (regulation n. 2201/2003, which completes the Hague Convention of 1980). These regulations concern jurisdiction and allow the immediate recognition of any Community decision taken within these two subjects (as is the case for the European enforcement order). Furthermore, Regulation n. 4/2009 on maintenance obligations establishes a mechanism of immediate recognition of Community /decisions. Finally, the Network of judicial and administrative cooperation (regulation n. 2201/2003) protects the interest of minors in cases of conflicts over custody.

In this respect, it would be advisable to reinforce and complete Community legislation on jurisdictional conflicts in family law, through the following specifications:

- a) harmonisation of the legal regime applicable in the field of marriage and parental custody by adopting the proposal for the Rome III regulation.
- b) to reinforce the mechanism for the recognition of decisions related to marriage and parental custody, in particular by establishing a mechanism of immediate recognition, as is the case for decisions regarding the right of visit and abduction of minors (today an exequatur is still needed). This objective had already been established in the Hague Program of 2004 but it has not yet been translated into legislation.
- c) to introduce EU legislation in the field of adoption in order to provide for mechanisms of recognition even faster than those foreseen by the Hague Convention

2) In other fields

It is necessary to accelerate the adoption of EU legislation in the field of seizing bank assets (on which a Green Paper already exists), inheritance (Green Paper), e-justice, completion and reinforcement of the trade domain (Green Paper on Bruxelles I).

3) It would be advisable also to foresee actions in the field of access to justice (art. 47 of the Charter) and more precisely:

- a) to foresee new and further harmonised merit procedures (on the basis of the model of small claims and of the European Decree) which cut the costs of transborder cases, through the extended use of information technology tools for the transmission of judicial acts, and the promotion of the direct involvement of the citizen in judicial mechanisms (to free him as much as possible from the obligation of referral to a legal counsel).
- b) to widen the mechanism of state aids regarding access to justice (*legal aid*, directive 2003/8/CE): for example, a lower threshold for access to free legal aid and less restrictive conditions in this regard

c) greater transparency and accessibility of the procedural and substantial national norms in favour of Community citizens who wish to start a procedure in a different Member State

Judicial area

The foreseen accession of the European Union to the ECHR, the binding nature granted to the Charter of fundamental rights and the limited, but effective widening of the powers of the Court of Justice will reinforce the role and scope of intervention of the judges of both European and national courts.

The protection of fundamental rights is increasingly based on a "multilevel" system where national jurisdictions intersect with Community jurisdiction, as well as with the remit of the ECHR. Also with the objective of guarantying the fair application of law, it seems increasingly necessary to provide a common professional training to all those who work in this field. This aspect, as well as the facilitation of access to justice is correctly emphasised in the Commission communication on the Stockholm Programme. It is necessary to add that the training of judicial professionals must focus primarily on the constitution of a common culture of fundamental rights.

III Instruments

To increase democratic control

The protection of fundamental rights cannot be left only to the sanction of judges and to the remarks of renowned organisations which do not have effective powers. It has to be subject to policies promoting the respect of fundamental rights, for which parliaments should be the first responsible, as representatives of citizens. In particular, the European Parliament should dedicate a yearly reflection on this topic, promoting analyses, proposals and initiatives in this domain through the information and reports published by European bodies such as the Agency for Fundamental Rights of the EU and the Council of Europe and provide support for interventions by other institutions.

Rethinking the Agency for Fundamental Rights

The remit of the Agency for Fundamental Rights, established in 2007 by a Council regulation and which replaced the European Observatory on racism and xenophobia, should be reconsidered following the entry into force of the Treaty of Lisbon, taking into account the binding effects attributed to the Charter on Fundamental Rights. The restrictive scope of the tasks envisaged by its founding Regulation impedes any activity of control of the Agency. As a consequence it limits the Agency to a function of assistance and advice in the Community domains. Furthermore, the restrictions established by the Council in specific fields of interventions through the multiannual program to which the Agency has to comply, reduces the credibility of the commitment of the European Union to protect fundamental rights. The very independence of the Agency is thus undermined, as well as the possibility for the European Parliament to dispose of adequate instruments of information and advice for the evaluation of the respect of fundamental rights in EU activities.

It is also necessary that the Agency be allowed to cooperate in a concrete fashion with the other bodies, agencies and structures of the European Union which operate in sensitive areas for the protection of fundamental rights, such as Frontex and Europol, to monitor the coherence of adopted instruments and operational tools, with the objective of full compliance with fundamental rights.

The only alternative to a real widening of the remit of the Agency (which should be accompanied with adequate structural transformations guaranteeing its independence, including the availability of means) seems that of putting side by side a structure made of effectively independent experts, who could monitor the respect of fundamental rights in the areas that are not covered by the Agency and provide reliable advice to the European Parliament and to the other institutions, also with respect to the provisions of Article 7 TEU.

To reinforce training instruments

The necessity of creating a common culture based on the respect of fundamental rights requires the reinforcement of all professional training instruments and the establishment of cultural exchanges for all those individuals who operate in the field of judicial and police activities within the EU. The training

activity carried out by CEPOL (the European Academy of Police) will have to comply with the same requirements. Necessary measures also include the reinforcement of a European Judicial Training Network, as well as the promotion of a European training for lawyers, in partnership with European and national professional associations.

With the same aim, relations between European Courts and national supreme and constitutional courts of Member States ought to be promoted within the European Union, through the establishment of a Network of Supreme and Constitutional Courts, with a permanent secretariat which will sustain mutual acquaintance with the Courts' jurisprudence.

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