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Twenty years later: application of the Charter of Fundamental Rights of the European Union as an anthropocentric and innovative document

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ABSTRACT: The paper analyzes the legal content and scope of the norms of the Charter of Fundamental Rights of the EU and their meaning and application as a para-constitutional document of anthropocentric and innovative nature in the last twenty years. Special attention is paid to the place and role of the CJEU as a judicial body in charge of implementing and harmonizing EU law. The article also deals with the possibility of direct application of the norms of the Charter, both vertically and horizontally. In addition, the paper cites the CJEU case law to confirm the thesis that it must undertake a moral and legal obligation in order to impose itself not only as a creator of legal doctrines but also as the guardian of the fundamental rights and freedoms of the EU.

KEYWORDS: CJEU · EU · Values · Rights · Interpretation.

Vinte anos depois: aplicação da Carta dos Direitos Fundamentais da União Europeia como um documento antropocêntrico e inovador

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RESUMO: O artigo analisa o conteúdo jurídico e o alcance das normas da Carta dos Direitos Fundamentais da UE e significado e aplicação como documento para-constitucional de caráter antropocêntrico e inovador nos últimos vinte anos. É dada especial atenção ao lugar e ao papel do CJEU como órgão judicial responsável pela aplicação e harmonização do direito da UE. O artigo igualmente trata da possibilidade de aplicação direta das normas da Carta, tanto vertical quanto horizontalmente. Além disso, o presente trabalho cita a jurisprudência do CJEU para confirmar a tese no sentido da sua obrigação moral e jurídica para se impor não apenas como criador de doutrinas jurídicas, mas também como guardião dos direitos e liberdades fundamentais da UE.

PALAVRAS-CHAVE: CJEU · UE · Valores · Direitos · Interpretação.

Veinte años después: Aplicación de la Carta de los Derechos Fundamentales en la Unión Europea como documento antropocéntrico e innovador

CONTENIDO: *1 Introdução · 2 La Carta de los Derechos Fundamentales de la Unión Europea como documento antropocéntrico e innovador · 3 Los derechos proclamados en la UE en la Declaración de Derechos de la UE · 4 El alcance de las normas proclamadas · 5 Las herramientas de interpretación que se pueden utilizar para reconocer el efecto útil de la Carta · 6 Conclusión · 7 Referencias.*

RESUMEN: El artículo analiza el contenido legal y el alcance de las normas de la Carta de los Derechos Fundamentales de la UE y su significado y aplicación como documento paraconstitucional antropocéntrico e innovador en los últimos veinte años. Se presta especial atención al lugar y al papel del CJEU como órgano judicial responsable de la aplicación y armonización de la legislación de la UE. El artículo también aborda la posibilidad de aplicar directamente las reglas de la Carta, tanto vertical como horizontalmente. Además, el documento cita la jurisprudencia del CJEU para confirmar la tesis de que debe asumir la obligación moral y jurídica de imponerse no solo como creador de doctrinas jurídicas, sino también como guardián de los derechos y libertades fundamentales de la UE.

PALABRAS CLAVE: CJEU · UE · Valores · Derechos · Interpretación.

1 Introduction

Exactly twenty years have passed since the proclamation of the Charter of Fundamental Rights of the European Union in Nice, under the guise of a *solemn declaration* (later re-proclaimed, in an adapted version, in Strasbourg on 17 December 2007). And although in terms of law even a month is sometimes a very long period – given the speed at which society, science, and new technologies evolve, this EU *Bill of Rights* continues to appear updated and well written.

The Charter, described as "the keystone of European integration" (JOSPIN, 2001), has provoked different positions in doctrine among those who have considered its approval as "a real regression, legally and politically" (FERRARA, 2002, p. 27) and those who have seen in it a rhetorical repetition of normative provisions already contained in other European or international charters (such as the ECHR, the European Social Charter or even the Universal Declaration of Human Rights), or in any case, a merely reconnaissance text without neglecting the position of the minority, localist, nationalist, separatist groups within the European Parliament itself, in addition to the British Conservatives, who have repeatedly expressed their skepticism, not so much because of its content, but because of "its very existence, which in itself highlights the political and not just the market nature of the Union, as well as being an important step in the process of constitutionalization of the European Union" (BARBERA, 2001 *passim*). Furthermore, we will present the functional dimension and prerogatives of the Court of Justice of the European Union, and its *interpretive power* derived from the EU fundamental values and its constitutive treaties, using the Charter on Fundamental Rights of the European Union as a source for making of legal doctrines. Therefore, in the text below, we will try to elaborate the specificity of the application of the Charter, with all of its potency and constraints within the complex system of the European Union, considering its nature as an anthropocentric, innovative and progressive document.

2 The Charter of Fundamental Rights of the European Union as an anthropocentric and innovative document

It is certainly very important to explore the role of the Court of Justice of the European Union (CJEU) in a real application of this document in the legal world. Therefore, it is necessary to underline that by following the aim for promotion, affirmation, and proliferation of the EU law, the Court possesses specific *interpretive*

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power, directly arising from the EU fundamental values and its constitutive treaties, which essentially regulates its normative framework, the legal structure, and its prerogatives as a central judicial actor armed with interpretive power. In that context, we can define the meaning of the *interpretive power* as a specific legal and institutional capacity of the Court of Justice for taking legal and intellectual actions that involve perception, articulation, and direct applicability of the EU treaties and legal documents in the spirit of European unification. As the author Karen J. Alter argued,

> [...] the central factor that allows the expansion of European law through the legal interpretation is the fact that the [CJEU] is an institution positioned outside the domestic contexts of the Member States in which national actors dominate (...) and supranational actors which supplies the capacity to review and national norms and European law. (ALTER, 2001, p. 28).

This formulation unambiguously confirms the current capacity of the CJEU with regard to its *interpretive power* over the national legislative, litigations and norms, in the spirit of European law. Or, as Article 19 of the Lisbon Treaty (2018) stipulates:

> The Court of Justice of the European Union (...) shall ensure that in the interpretation and application of the Treaties the law is observed. The Member States shall provide remedies sufficient to ensure effective legal protection in the areas covered by the Union law. (THE LISBON TREATY, 2018, art. 19).

As regards the CJEU, it is primarily necessary to locate the role, the competencies and the position of the Court of Justice of the EU. So, in accordance with the Article 19 of the Lisbon Treaty, The Court of Justice of the European Union:

> [...] shall in accordance with the Treaties: 1. rule on actions brought by a Member State, an institution or a natural or legal person; 2. give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; and 3. rule in other cases provided for in the Treaties. (THE LISBON TREATY, 2008).

From this formulation, also stems and the position of the Court of Justice of the EU, as judicial institution located *above* the national courts, which is activated by a Member States initiative or submission of the particular procedure or request for interpretation to the Court of Justice, in order to harmonise the EU law with that of the Member States. As an instrument for realisation of the competencies, the CJEU adopts preliminary rulings, according to which:

> 1 Reviews the legality of the acts of the institutions of the European Union;
>
> 2 Ensures that the Member States comply with obligations under the Treaties; e
>
> 3 Interprets EU law at the request of the national courts and tribunals (THE LISBON TREATY, 2008).

It is important to emphasize that the *interpretive power* of the Court certainly springs from the fundamental rights and freedoms as basic tenets of the creation, the existence, and the functioning of the EU as such. Moreover, the Lisbon Treaty reaffirms the Union as a major promoter and keeper of the fundamental values of humanity (according to the EU constitutive treaties), especially in Article 21, as follows:

> [...] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. (THE LISBON TREATY, 2013).

It can be stressed that the EU primarily rests on the values such as: respect of human dignity, fundamental freedoms and rights, the rights of the communities and family, freedom and liberty, democracy, equality, the rule of law, social justice, etc. Therefore, it can be acknowledged that the main purpose of the Charter as a new EU *Bill of Rights* was certainly to provide certainty and renewed vigor to the common heritage of rights, especially thanks to the increased visibility they have undoubtedly achieved.

The Charter immediately took on the role of a European para-constitutional framework, which set clear regulatory boundaries beyond which the legislative discretion of the Union and the Member States must stop and within which their political and legal commitment must be maximized. Concerning the fundamental rights, it is useful to stress that Article 6 of the Lisbon Treaty (2013) stipulated the following:

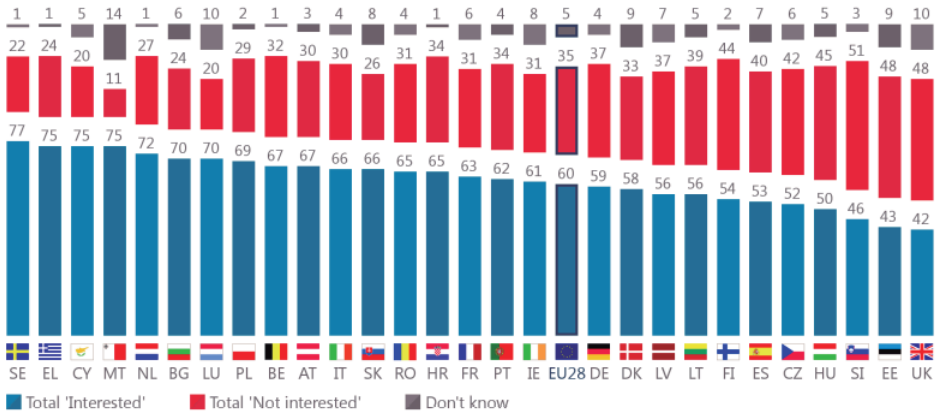
> The Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competencies of the Union as defined in the Treaties. (LISBON TREATY, 2013, art. 6).

The rights, freedoms, and principles in the Charter "shall be interpreted in accordance with the general provisions (...) its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources

of those provisions" (THE LISBON TREATY, 2008). Naturally, all this has meant for the drafting body the need to often make continuous linguistic and lexical compromises or too often resort to excessively broad and generic formulas, but it cannot be denied that the achievement of results considered unanimously satisfactory is an important goal, in the logic of a *functionalist* realization of a stronger European legal integration. On the other hand, it is undeniable that the large mistrust of the Charter pushed to the point of questioning its very usefulness, is probably linked to an incorrect application of its scope. There are, for example, those who – reading the event too much – considered it to be an effort identical to that made on other occasions in the past when an attempt was made to create a catalog of fundamental rights to be included in the (European) Community system (but history has shown that this was not the case); and those who, on the other hand, went too far in the opposite (federalist) direction, considering the Nice Charter as a genuine constitutional act.

The veto placed by some Member States (especially the UK, Sweden, and Denmark) to the recognition of the direct legal effect of the Charter was not, however, a *weak point,* as many authors and scholars believed, but the *trump card* of that document, because it allowed "the inclusion of new rights, especially of a social nature, since a consensus would not have been reached otherwise" (WEBER, 2002, p. 42). The certain importance that such document has had in everyday life immediately demonstrated its *metapolitical* value thanks to the role of the Court of Justice as well, "as *viva vox iuris*, tending to give the Charter the force of a 'living law' by including it in its hermeneutical horizon" (CIANI, 2003, p. 20-21) — as an important *axiological parameter*, and (indirectly, at least initially) as a control instrument not only for the European institutions but also for the Member States (LOIODICE, 2001, *passim*). The Charter has, moreover, the merit of having tried to make the most of both the principle of indivisibility (whereby every right must be read and interpreted in the light of all others – "Freedom cannot be without equality, solidarity limits freedom" (PACIOTTI, 2002, p. 98) – and the one of the universality of the legal situations covered by it (recognizing the ownership of the latter to each individual, regardless of their nationality or place of residence) (CIANI, 2003, p. 27). In the context of defining the fundamental rights of the EU citizens (private persons) stipulated in the Charter's content, at least three quarters of respondents in Sweden (77%), and Greece, Cyprus and Malta (all 75%) are interested in having more information about the content of the Charter, compared to 42% in the United Kingdom, 43% in Estonia and 46% in Slovenia according to Special Eurobarometer 487b Report (2019) (Figure 1).

Figure 1



Source: EUROBAROMETER, 2019, p. 16.

These are perhaps the two most important peculiarities of the Charter – the principles of indivisibility and universality – which have allowed many authors to call it an *anthropocentric* document. It is no coincidence that the Charter's Preamble points out that: "It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice" – and not simply reconnaissance (PIZZORUSSO, 2001, p. 68). Also, the Preamble determines the Member States and the EU:

> [...] to strengthen the protection of fundamental rights in the light of changes in society, social progress, and scientific and technological developments by making those rights more visible in a Charter (...) Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity; it is based on the principles of democracy and the rule of law (...). (CFREU, 2000, p. 8).

In this regard, the Parties that *signed and sealed* this Charter determine that courts of the EU Member States and the CJEU will interpret the Charter while beginning with the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental freedoms, the social charters adopted by the Union and the Council of Europe, the case law of the European Court of Human rights and of course the Court of Justice of the EU as a judicial and doctrinal authority of the Union (CFREU, 2000, p. 8).

3 The proclaimed rights in the EU *Bill of Rights*

A particularly significant aspect of the EU Charter of Fundamental Rights can be found in its Preamble, which makes a clear reference to a peaceful future as "the result of building institutions common to nations that had fought each other for centuries" (PACIOTTI, 2002, p. 19), according to a scholar who was a member of the group of editors of the text and to a commitment to "strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments" (CHARTER, 2012, C 326/395). Moreover, these first lines, which open the EU *Bill of Rights*, also highlight *apertis verbis* that "enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations" (CHARTER, 2012, C 326/395).

The Charter, in its legislative body, is composed of seven Chapters, within which a series of already proclaimed rights and freedoms are gathered for the most part in other important international conventional texts, but here are grouped, in a very singular way, around a series of fundamental principles or values, and all referable to unity thanks to the aforementioned principles of indivisibility and universality.

The first of these values is *Dignity* (Human dignity, Right to life, Right to the integrity of the person, Prohibition of torture and inhuman or degrading treatment or punishment, Prohibition of slavery and forced labor), which is now truly common, even though it is somewhere expressed and somewhere – on the contrary – unexpressed, in all the constitutions of the Member States, but it is also proper of the Community *Verfassung*. It should be recalled that the Universal Declaration of Human Rights (1948) states in its Preamble that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". An author (CIANI, 2003, p. 38) underlines that "it is a super-principle from which it is possible to deduce the limits of any right to freedom". The novelty of the Charter, compared to the draft European Constitution of 1994, and in conformity with the Declaration of Fundamental Rights and Freedoms of 1989, is precisely the provision of the right to human dignity in Article 1, therefore even before the right to life (sanctioned by Article 2) (VIGLIANISI FERRARO, 2004, p. 702).

This is followed, in particular, by *Freedoms* (Chapter II) (Right to liberty and security, Respect for private and family life, Protection of personal data, Right to marry and right to found a family, Freedom of thought, conscience and religion, Freedom of expression and information, Freedom of assembly and of association, Freedom of the arts and sciences, Right to education, Freedom to choose an occupation and

right to engage in work, Freedom to conduct a business, Right to property, Right to asylum, Protection in the event of removal, expulsion or extradition), *Equality* (Chapter III) (Equality before the law, Non-discrimination, Cultural, religious and linguistic diversity, Equality between men and women, The rights of the child, The rights of the elderly, Integration of persons with disabilities) and *Solidarity* (Chapter IV) (Worker's right to information and consultation within the undertaking, Right of collective bargaining and action, Right of access to placement services, Protection in the event of unjustified dismissal, Fair and just working conditions, Prohibition of child labour and protection of young people at work, Family and professional life, Social security and social assistance, Health care, Access to services of general economic interest, Environmental protection, Consumer protection), which seem to echo the ancient principles (such as *Liberté, égalité, fraternité*), proclaimed on another historical occasion of great importance for the whole of Europe in the years of the French Revolution.

Chapters V and VI are intended to regulate *Citizen's rights* (Right to vote and to stand as a candidate at elections to the European Parliament, Right to vote and to stand as a candidate at municipal elections, Right to good administration, Right of access to documents, Ombudsman, Right to petition, Freedom of movement and of residence, Diplomatic and consular protection) and *Justice* respectively (Right to an effective remedy and to a fair trial, Presumption of innocence and right of defense, Principles of legality and proportionality of criminal offenses and penalties, Right not to be tried or punished twice in criminal proceedings for the same criminal offense) (CFREU, 2000, p. 9-20).

Therefore, it can be concluded that the Charter clarifies and gives visibility to the catalogue of fundamental rights. The enumerated rights contained in the Charter can be categorized into four broad categories:

1 The so-called *classical* civil rights, *i.e.* human rights already guaranteed by the European Convention on Human Rights (ECHR);

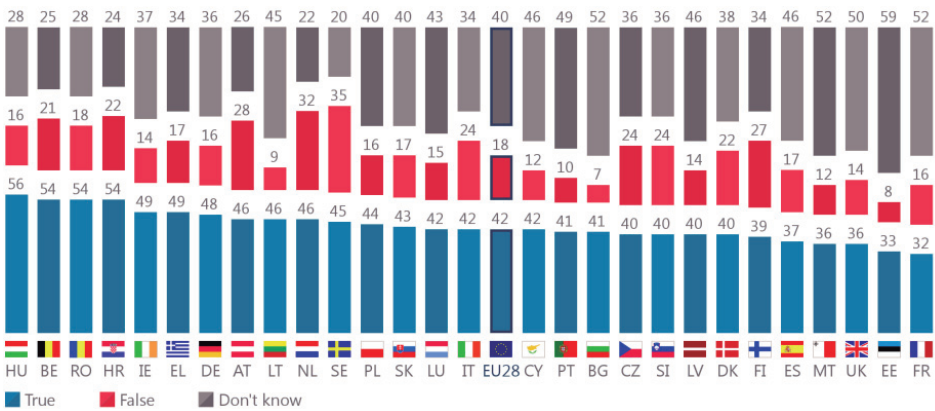
2 The political rights inherent in the European citizenship established by the Treaties concerning the European Union (Maastricht, Amsterdam, Nice, and Lisbon);

3 Economic and social rights, which take over those, set out in the Community Charter of the Social Rights of Workers, adopted on 9 December 1989 at the Strasbourg Summit, by the Heads of State or Government of the 11 Member States, in the form of a Declaration;

4 *New generation* rights (regardless if third, fourth, or fifth generation) such as environmental rights, consumer rights etc.

Chapter VII, on the other hand, deals with the *General provisions*, whose task is to *contextualize* the Charter within the pre-existing European legal world, thereby coordinating the rules contained therein with those already operating at Community and national level (GARCIA, 2002, *passim*; VIGLIANISI FERRARO, 2005, p. 503-581). This Chapter more accurately determines the area of Charter application, the scope of interpretation of the rights and principles, the degree of protection of the fundamental rights, and the explicit prohibition of abuse of stipulated rights, as an imperative provision which appeals (Article 54) that: "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein" (CFREU, 2000, p. 22). The provisions of the Charter are directly related to the EU institutions (its agencies, bodies, and offices), and the Member States as well, in a situation when they apply the EU law, and follow the principle of subsidiarity as a fundamental principle in the functioning of the European Union. Hence, it is very important to stress that the Charter is not applicable to the areas that are under exclusive national competence by the Member States. In this sense, it is very interesting to mention that there are only four EU countries where at least half of all respondents know it is true that the Charter applies to EU Member States only when implementing EU law: Hungary (56%), and Belgium, Romania and Croatia (all 54%), as presented in Special Eurobarometer 487b Report (2019) (Figure 2).

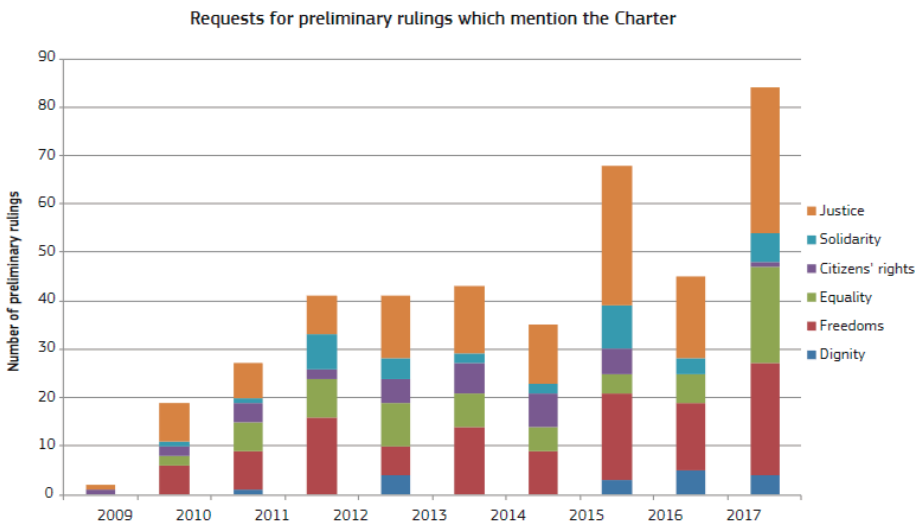
Figure 2



Source: EUROBAROMETER, 2019, p. 16.

Providing the aforementioned fundamental rights, the Charter appears as an interpretive framework consisted of human rights and freedoms as its parameters, which must be used for interpretation of legislative, litigations, or norms, addressed and submitted to the CJEU. The stipulated rights also represent a confirmation of the EU liberal (democratic) essence, which starts from the position of *giving* more rights and freedoms while interpreting the submitted legal requests or referrals by the Members States. When addressing questions to the CJEU (requests for preliminary rulings), national courts often refer to the Charter. Of those requests submitted by judges in 2018, 84 contained a reference to the Charter, as compared to 44 in 2017 and 19 in 2010 (Graph 1).

Graph 1



Source: REPORT FROM THE COMMISSION, 2018, p. 30.

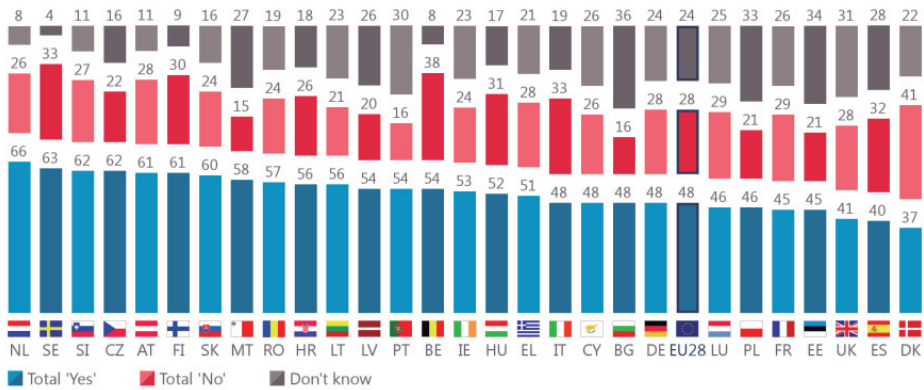
4 The scope of the proclaimed norms

One of the most discussed issues by the doctrine engaged in the study of property law in a European context – in so far as the Charter is applicable – is that the private individual invokes direct effectiveness of the norms contained in that document, therefore, asks for the immediate justifiability of his claims of European derivation, without waiting for an implementing – or reforming – intervention by the national legislator. The Treaty of Lisbon, while giving the Charter a binding power similar to

that one given to the original or primary law, has established nothing in this respect (reference is made to Article 4 (3) TEU, Article 19 (1) TEU, and Article 197 TFEU).

As a curiosity, according to Special Eurobarometer 487b Report (2019), more than half of all respondents think the Charter is legally binding, with the highest proportions seen in the Netherlands (66%), Sweden (63%) and Slovenia and the Czech Republic (both 62%). The Netherlands (22%), the Czech Republic (21%), and Sweden (20%) are the only EU countries where at least one in five says that the Charter is *definitely* legally binding. Overall, there are 17 countries where at least one in five say that they do not know. The following figure brings a visual example of the answers:

Figure 3



Source: EUROBAROMETER, 2019, p. 28.

While anticipating clarification by the Court of Justice on this issue, an important aid for the national interpreter could certainly be found in the CJEU case law itself, which has been drafted not only to enumerate the exact scope of the rules contained in the Treaties, but, above all, to offer the national courts some useful guidelines concerning the effects to be attributed to sources of secondary legislation ontologically devoid of the character of direct applicability. At the same time, the CJEU appears as a proactive judicial actor, which through the interpretation of the EU law actively performs latent political and legal integration of the Member States. Starting from this, the Court attributed an extremely high credit for its significant contribution to the advancement of European integration. Or as an author stressed: "Unquestionably, the activist stance of the [CJEU] has borne great fruit in the past, and much of the success of the Community project can be attributed to it" (DE WAELE, 2010, p. 12). Arguably both, "neo-functional as well as intergovernmental

scholars, promoted extreme hypothesis about the relevance of the judiciary. Over time, their opposing positions slowly converged" (WASSERFALLEN, 2008, p. 8).

Their discourse, according to the author Fabio Wasserfallen (2008, p. 8), was "mainly about whether the Court is superior upon governments or vice versa. But neither law, nor politics is determinant towards the other". By interpreting norms (from the Charter), the judiciary can heavily influence the policy-making process (WASSERFALLEN, 2008, p. 8). Hence, it should be noted that the CJEU is not an *isolated island*, but an extremely communicative judicial institution, which functions in continuous communication and cooperation with the courts of the Member States. Namely, as the Lisbon Treaty stipulates: "The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, ensures the uniform application and interpretation of European Union law" (CURIA, 2013). Namely, the communication between the national courts and the Court of Justice, following the constitutive treaties of the EU, is based on *the principle of referring* effectuated in non-coercive hierarchical communication. This principle highlights the Court quasi-federal *sui generis* nature, which makes this judicial institution authoritative but not absolute. The national court is the one who decides on the referral and the EU Court delivers decisions on the addressed questions whereas the case is then referred back to the national courts that need to apply the EU law on the specific case. Consequently, the CJEU in an unconstrained way causes the transformation of the national legislation and the judiciary through its preliminary rulings, which perform targeting and modeling of the national legislation and the judiciary following the provisions of the EU law. As is well known, since the entry into force of the international treaties establishing the first Communities, the CJEU has made it clear that not all the provisions contained therein enjoy direct effects similar to those recognized *apertis verbis* only to certain binding acts (*i.e.* regulations). According to the CJEU, the rules laid down in Article 30 TFEU (*ex* Article 12 EEC, concerning customs duties) (in *Van Gend & Loos,* Case 26/62), Article 18 TFEU (*ex* Article 12 EC, containing the prohibition of discrimination on grounds of nationality) (in *Patrick Christopher Kenny v. Insurance Officer,* Case 1/78), Article 49 TFEU (*ex* Article 43 EC, concerning the freedom of establishment) (in *Costa v. Enel,* Case 6/64), are, for example, directly applicable, while the provisions contained in Articles 67 EC (not incorporated into the Treaty on the Functioning of the European Union), 151 and 153 TFEU (*ex* Articles 136 and 137 EC, concerning certain important social rights) were not considered to be self-executing. As early as 1970, starting with the *Grad* judgment concerning the direct effect of a decision (in *Franz Grad v Finanzamt Traunstein*, Case 9/70), the CJEU stressed that:

> a specific obligation on the part of the State has a right on the part of the individual, and while it is true that regulations (...) *are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that article can never produce similar effects.* (CURIA, 1973).

A few months later, in the *SpA SACE v. Finance Minister of the Italian Republic* ruling on the direct effect of a directive, the CJEU punished the Italian State's non-compliance and *expressis verbis* highlighted the principle of the direct effect of directives that reproduce or better clarify the content of self-executing rules already enshrined in the constitutive Treaties.

In the years immediately following, the European Courts began to forge the principle of *d'effet direct* in a more articulate and precise manner, going as far as to affirm the direct effectiveness of directives, which have expired and have not been implemented (or have been incompletely transposed), *negative – i.e.* which impose on a Member State an absolute and unconditional obligation not to do so, to abstain from adopting certain rules) – or *detailed – i.e.* clear, precise (laying down obligations in unequivocal terms), and unconditional.

The CJEU has clarified that (in adherence to a generally accepted notion in the international community of *State*) they must be considered as *public body* obliged to recognize the direct effect of the directives, which are not (or not adequately) transposed by the state legislators, the territorial authorities (in *Fratelli Costanzo v. Comune di Milano,* Case 103/88), the forces in charge of maintaining public order and public security, even if independent from the state (in *Johnston v. Chief Constable of the Royal Ulster Constabulary* Case 222/84), bodies providing public health services (in *Marshall v. Southampton and South-West Hampshire Area Health Authority,* Case 152/84), tax authorities (in *Ursula Becker v Finanzamt Münster-Innenstadt,* Case 8/81, and *ECSC v. Acciaierie e Ferriere Busseni,* Case C-221/88), and, more generally, any entity which regardless of its legal form has been entrusted by a specific act of public authority with the task of stipulating certain provisions or, as it is stated in *A. Foster and Others v. British Gas Plc,* Case C-188/89,

> [...] unconditional and sufficiently precise provisions of a directive may be relied upon against organizations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable in relations between individuals. (CURIA, 1973).

Similar rules would seem to apply today to the provisions of the Charter of Fundamental Rights of the European Union.

It would therefore be appropriate to make a preliminary distinction between rules that have only a negative impact (for example, a ban, such as that referred to in Article 2, *i.e.* on the death penalty, which implies an immediately preceptive duty of abstention), rules that reproduce the content of certain provisions already found in the European Treaties and on which the CJEU has ruled in recognition of their direct effects (such are, for example, those enshrined in Article 2), norms concerning equality between women and men in all areas, including employment, work and pay (Article 23), and, finally, provisions which require positive — or supplementary, if preferred — action by the national authorities or the European institutions themselves (this group includes all rules concerning the protection of the elderly, the disabled or the environment, which impose an obligation on the state to act).

Apart from the possibility of giving direct effect to the latter category of provisions, the first two and, more generally, all those that set out rules that are "sufficiently precise and detailed" (*i.e.* that confer a well-defined and unconditional right, which therefore corresponds to an equally precise obligation on public bodies), can probably be considered self-executing.

It should be considered from this point of view that the same explanations attached to the Charter – with the purpose to clarify what Article 52 (5) means when it differentiates rights from principles – point out that, based on this distinction, subjective rights are respected while principles are observed which is stipulated in Article 51 (1). The principles can be implemented by legislative or executive acts (adopted by the EU under its powers and by the Member States only in the context of the implementation of Union law); consequently, they are relevant to the court only when these acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the institutions of the Union or the authorities of the Member States (the Court of cassation's application of Article 25 of the Charter, concerning *the rights of the elderly*, is unusual in this respect). If, reasoning *per absurdum,* a Member State was to introduce legislation designed to deny its citizens the possibility of bequeathing more than half of their property to their children (some of whom are resident in other European countries) and require the transfer of the remaining share to the state's assets, it would probably be possible to invoke the direct effect of Article 17 of the Charter (as well as being able to plead, obviously, the violation of a series of constitutional rules, for which, however, as is well known,

the person concerned would not enjoy the same immediate protection provided by supranational law); and they would operate, obviously, according to the Court of Justice, only in a vertical and unidirectional sense (since the state could never take advantage, paradoxically, of its failure to fulfill an obligation deriving from the participation in the EU). Much more delicate is the problem concerning the possibility of granting the rules contained in the Charter, and therefore also in Article 17, not only a *mittelbare Drittwirkung* (the effectiveness would be similar to that of the human rights enshrined in the third paragraph of Article 1 of the Basic Law for the Federal Republic of Germany: "basic rights shall bind the legislature, the executive and the judiciary as directly applicable law"), but also a *mittelbare Drittwirkung* (as called for in the United Nations General Assembly Resolution 53/144 of 9 December 1999, containing the Declaration on the right and responsibility of individuals, groups, and organs of society to promote and protect universally recognized human rights and fundamental freedoms), *i.e.* a power of immediate dis-application of incompatible national rules even in the case of relations between private parties (natural persons, legal entities, groups etc.).

In doctrine, there is a consensus that private individuals can only be bound to respect the rights contained in the *Bill of Rights* of the European Union if, and to the extent that, the national legislators implement the rules in question, as there is no provision in the Charter which, on the other hand, supports the idea of direct recognition of the obligations of individuals. Nor does the aforementioned Article 54, which, as has been seen, unlike Article 17 of the European Convention on Human Rights (ECHR), does not use the expression *a state, group or individual*, but lays down a general duty not to attribute to any fundamental right a reading which could lead to abuse.

5 The interpretative tools that can be used to recognize the useful effect of the Charter

The opportunity not to recognize direct horizontal effects of provisions (and even those protecting fundamental rights), although justified by the need not to give interpreters a power that should be reserved for legislators, has – as is well known – always given rise to many doubts because of the serious and discriminatory consequences that may arise (it is no coincidence that many national courts have often extended the immediate effects of supranational sources that have remained unimplemented to inter-private relations).

The same right contained in a self-executing rule of the Charter (and not transposed, for example, by the national legislator) could, for example, be invoked directly by a worker only in the case of a public employment relationship, whereas, on the contrary, the same could not happen in the case of a contract of employment between private individuals.

As is well known, to remedy such (unacceptable) inequalities, the CJEU has developed the instrument of *interpretation in conformity with EU law* and, while confirming the impossibility of recognizing immediate horizontal effects to standards contained in sources that are not directly applicable, has, in other words, invited the interpreter to use the provisions as a hermeneutical parameter, in the light of which the national legislation can be used if decided to be read and implemented. Such a judicial technique (which in substance has practical implications very similar to those produced by the recognition of direct effects) does not seem to be always feasible in practice. On the other hand, CJEU jurisprudence

> [...] concerning intertwined relations between the principles of direct effect and interpretation in conformity (see, on the matter and as a pedagogical example, *Maribel Dominguez* judgment, C-282/10, whereas 23) stated it is up to national authorities to firstly conduct an interpretation in conformity of national rules and, only when this interpretation would not be possible, direct effect could be thought. (ABREU, 2021).

Think of the cases (really remote, if we talk about fundamental rights) in which in a particular Member State there is no national legislation regulating the matter covered by the EU law (as could happen for example for the prohibition, contained in Article 3 of the Charter, of the reproductive cloning of human beings, which, if not transposed from a national source, could perhaps operate – directly and in a binding manner – only for public health facilities, but not for private ones). However, let us also reflect on the hypotheses in which the national provision, even though it exists, does not have a structure so elastic as to lend itself to an *adequate interpretation* (in such cases, an interpretation following the Charter would result in an *interpretatio contra legem* of the internal rule: a possibility deemed inadmissible even by the Court of Justice itself with regard to the European Union law *tout court*. See, for all of them, the judgments of *Praetor de Salò of* 11 June 1987, Case 14/86; *Arcaro of* 26 September 1996, Case C-168/95; *Berlusconi and Others of* 3 May 2005, Cases C-387/02, C-391/02 and C-403/02.

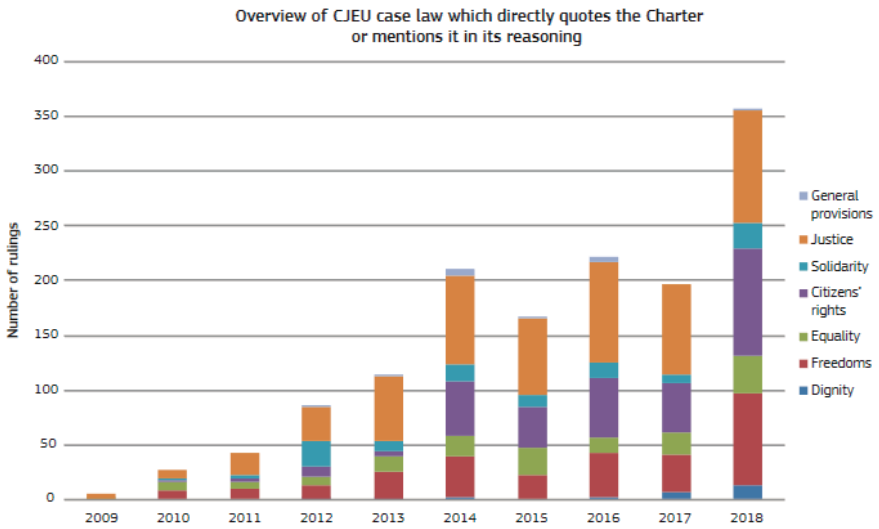
The extreme expedient, recently adopted by the CJEU to guarantee adequate protection of private citizens in horizontal relations as well, has been the recognition of the so-called *exclusion effect* or *impediment* (which, in reality, can be defined as *substantially disapplicative*) of the self-executing rules. According to this controversial case law, by the principle of the primacy of EU law over national law, the same possibility of producing and/or maintaining (or at least applying judicially) internal rules that conflict with those contained in the EU legal documents should be excluded *a priori*.

However, there has also been talking of *triangular effectiveness* or (with more explicit reference to fundamental human rights) *indirect horizontal effects*, concerning *a relation between private parties, but via the act of a public authority, for instance, an executive or legislative act*; and the issue decided in *Commission v Hungary* of 21 May 2019 (Case C-235/17) seems to be emblematic in this respect. As the CJEU made clear in this ruling by providing that *no one shall be deprived of his or her property*, the second sentence of Article 17(1) of the Charter does not only concern deprivations of property whose subject is the transfer of property to public authorities. This, however, is not to be denied – it is tantamount to the not extremely implicit recognition of direct horizontal effects, as has happened much more casually in terms of the CJEU, both for a series of rules of the Treaties (for example, those protecting the four fundamental freedoms) and for certain rights proclaimed in the Charter (think of *Kücükdeveci v Swedex GmbH & Co KG,* C-555/07 and *Dominguez* cases, C-282/10).

We have only to wait for further precise indications from the Court of Justice in order to know the real scope of the individual rights enshrined in the Charter and to understand which rules produce immediately executable claims for the benefit of private individuals.

The Annual Report from the European Commission [COM (2019) 257] presents a review of the most relevant data concerning the application of the Charter. The EU courts have increasingly referred to the Charter in their decisions. The number of decisions quoting the Charter in their reasoning rose from 27 in 2010 to 195 in 2017 and 356 in 2018. The Charter articles referred to prominently in cases before the EU courts were those on the right to an effective remedy and to a fair trial, the right to good administration, equality before the law and the right to property (Graph 2).

Graph 2



Source: REPORT FROM THE COMMISSION, 2018, p. 30.

6 Conclusion

Twenty years after the proclamation of the European Charter of fundamental rights, it is possible to say that many goals have been achieved, but many challenges are still on the horizon. And it certainly appears illogical and inconsistent the possibility — repeatedly invoked in recent times by some constitutional courts, such as the Italian one — of using the so-called *counter-limits* to paralyze the effects of the norms sanctioned in the Charter that conflict with those contained in the state constitutions in the name of a "naive and infertile patriotism" (RUGGERI, 2015, p. 330).

If anything, it is easy to predict that – thanks to the important role of the Court of Justice as well, as it happened since the '90s with the non-observance of the Community sources (so-called *primary* and *derived*) – also for the rules of the EU *Bill of Rights* another important (and drastic) remedy could be configured (as an alternative or in addition to the above-mentioned instruments of direct effect and conforming interpretation), in order to guarantee maximum protection to the EU citizens: *i.e.* the civil responsibility of the state for violation of the fundamental rights recognized in the Charter.

Considering that this particular form of sanction was then used to repair the damage caused by failure to comply with any rule of European law – even only with a general principle of the EU (as it happened in *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag* Case, C-300/04) – it is easy to imagine that, since the Charter has now taken on the same binding value as the Treaties, it is possible to recognize this instrument of protection for private individuals, in cases of *manifest and serious* violation of the rights set out therein (in this regard, a reference may be made to the judgment of 11 June 2015 in *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam,* Case C-98/14), just as it is expressly provided for, and moreover, in Article 340 TFEU (*ex* Article 288 EC) for the prejudice caused to private individuals by unlawful conduct of the EU institutions or agencies and as some authoritative scholars have long imagined could happen due to the violation of the rules of the European Convention on Human Rights by the signatory countries (RONZITTI, 2009, p. 242). Useful guidance can be drawn from the Judgment of the Court of Justice of 15 January 2014 in *Association de médiation sociale,* Case C-176/12. Consequently, the Court (Grand Chamber) decided:

> Article 27 of the Charter of Fundamental Rights of the European Union, by itself or in conjunction with the provisions of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the French Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision. (CURIA, 2014).

After denying the direct invocation of Article 27 of the Charter to disapply a national law that conflicts with the provision in question – both because of the *low perceptive* nature of the latter and because the dispute concerned two private parties – the Luxembourg judicial authority stressed the possibility for the citizens concerned to take legal action in order to obtain the state's compensation for damages caused through violation of the supranational law.

This is an approach that certainly favors the position of the injured parties in their fundamental rights and guarantees the private enforcement of a Charter that is now called upon to play a very important role within the European Union.

Therefore, we can stress that the Court of Justice and the Member States too must embrace the moral and legal obligation derived from the stipulated human

rights and freedoms, and thus impose their institutional authority as a keeper of those fundamental rights. This especially concerns the role of the Court of Justice of the EU, which represents a "doctrinaire authority based on the EU axiological set and its constitutive treaties, while appearing as doctrine – maker and doctrine – keeper, at the same time" (ILIK, 2013, p. 5).

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