

Alessandra Facchi - Paola Parolari - Nicola Riva

Values in the EU Charter of Fundamental Rights

A Legal-Philosophical Analysis
with a Focus on Migrants' Rights



G. Giappichelli Editore

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Acronyms

CCFSRW	Community Charter of the Fundamental Social Rights of Workers
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FRA	Fundamental Rights Agency (of the EU)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

Forward

This work is intended to make public the main findings of the Report on the Normative Content, Genesis, Historical Background and Implementation of the EU Charter, elaborated within the research project NoVaMigra – Norms and Values in the European Migration and Refugee Crisis, funded by the European Union under the programme Horizon 2020 (Grant Agreement no. 770330).

The NoVaMigra project, coordinated by the University of Duisburg-Essen, involves universities and research centres based in eight European countries, and a university based in the United States. It aims at: a) providing a comprehensive understanding of the core European values/norms; b) explaining how these values/norms motivate and/or affect relevant political, administrative, and societal agents with regard to migration and the integration of migrants and refugees into European societies; c) studying whether, how, and why these values/norms have been changing as a consequence of the refugee crisis since 2015; and d) developing a rights-based democratic perspective for the EU and its Member States, which takes into account differences in European values/norms that became visible during the refugee crisis, but also reflects Europe's global responsibility. In pursuing these goals, the NoVaMigra project devotes particular attention to gender issues.

Within this research framework, this work provides a sketch of a legal-philosophical understanding of the nor-

mative content of the Charter of Fundamental Rights of the European Union. In particular, it reconstructs how «the indivisible, universal values of human dignity, freedom, equality and solidarity» – on which, according to the preamble of the Charter (par. 2), the «[European] Union is founded» – are conceived in the Charter itself. This task is mainly carried out through the analysis of the rights specifically associated with each of those values, respectively, in Titles 1-4. Nevertheless, punctual references are made also to some of the rights included in Titles V and VI, devoted, respectively, to citizens' rights and justice.

Given its specific contextualization within the NoVaMi-gra research framework, this work mainly focuses on those rights which are, or could be, particularly significant in relation to migrants, asylum seekers and refugees. Furthermore, special attention is devoted to women's rights and gender equality.

The analysis is primarily based on the provisions of the Charter, on the Explanations relating to the Charter of Fundamental Rights, and on the case law of the Court of Justice of the European Union and the European Court of Human Rights¹. Nonetheless, EU secondary law and other international human rights instruments are also considered, when relevant.

¹ Our main (although not exclusive) sources in the selection of the cited case law are the commentaries to the Charter edited by Peers *et al.* (2014) and Mastroianni *et al.* (2017), and the reports edited by the European Observer on fundamental rights respect of the Fondazione Basso (2015, 2016 and 2017).

As regards its conceptual framework, the analysis combines both a value(s)-based and a rights-based approach, as defined in the Conceptual Map elaborated in the very first phase of the NoVaMigra project². In fact, as is typical of legal documents – and, in particular, of such legal documents as charters of rights and constitutions – the Charter uses normative concepts such as “values” and “rights” in ways that may appear, from a philosophical perspective, vague and ambiguous. It does not develop a coherent moral or political theory of how those normative concepts should be precisely understood and of how they relate to each other. In particular, while the Charter explicitly refers to values (par. 2-4 of the preamble³) and organizes fundamental rights according to their relations to them, it would be wrong to think that it definitely adopts a value(s)-based approach rather than a rights-based one. On the contrary, it leaves some space for both interpretations. Thus, for instance, it is possi-

² The Conceptual Map, edited by Jos Philips and Marcus Düwell of the Utrecht University research unit, defines the basic normative concepts of “value”, “norm”, “right”, “duty” etc., and identifies two different approaches to understand the relations and tensions between them: a *value(s)-based* and a *rights-based* approach. According to the first one, value(s) provide(s) the basis for duties, norms and rights: one value or a set of values is identified as what should be promoted, pursued and/or realized, and the moral validity of norms, rights and duties depends on their contribution to the promotion, pursuit and/or realization of that value or set of values. In turn, according to the second approach, duties are defined as correlative to rights: valid norms are those that secure rights and the language of values can be reduced to the language of rights.

³ See also articles 2 and 6 of the Treaty on the European Union.

ble both to consider freedom as a value that precedes and grounds specific freedoms (such as, for instance, freedom of religion, freedom of expression, freedom of association, and so forth) and to consider references to the value of freedom as simply a way of referring to the set of those fundamental rights.

Finally, it is worth specifying that, while this work adopts a predominantly philosophical-legal approach, it is aimed at a multidisciplinary audience. Accordingly, it avoids an excessively technical language and does not undertake an in-depth analysis of many philosophically and legally controversial questions, which, while certainly relevant, are also very specific and complex.

The work is structured as follows. The first introductory chapter briefly considers the genesis of the Charter and its main features, including its field of application and personal scope. The second chapter provides a short reconstruction of four traditions in the history of European thought – Christianity, Republicanism, Liberalism and Socialism – as those traditions which most contributed to the philosophical background of the values affirmed in the Charter. Chapters 3-6 analyse synthetically how dignity, freedoms, equality and solidarity are understood in the Charter and in the case law of the European courts. The concluding chapter summarises the main insights emerging from the analysis.

We want to thank Isabelle Aubert, Marcus Düwell, Volker Heins, and Jos Philips, as well as the monitors assisting in the project assessment, Ferdinando Sigona and Gezim Krasniqi, for their useful comments on the Report on the

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Alessandra Facchi, Paola Parolari, and Nicola Riva

Milan, 29th June 2019

This work is the result of a joint effort of the authors to combine their specific competences into a unitary analysis. Nevertheless, the authorship of its different parts can be attributed as follows: Chapter 1 was authored by Paola Parolari; Chapter 2 was authored by Alessandra Facchi and Nicola Riva; Chapter 3-7 were co-authored.

1. The EU Charter of Fundamental Rights. An Introduction

The unique supranational organization called “European Union” is the ongoing development of a process of regional integration which was originally conceived, in the aftermath of World War II, as a peace project based primarily on economic cooperation (Dinan 2019). For this reason, fundamental rights initially remained outside the scope of the European Communities. However, they became part of the process of European integration very soon. Indeed, since 1969¹, the Court of Justice (now Court of Justice of the European Union, hereinafter CJEU) has affirmed several times that fundamental rights are part of the general principles of Community law (now EU law)².

Subsequently, a political process began, which finally

¹ CJEU, *Stauder v. Stadt Ulm*, 1969 (C-29/69). See also CJEU, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 (C-11/70).

² With effect from 1 December 2009, date of the entry into force of the Lisbon Treaty, the EU has acquired legal personality and has taken over the competences previously conferred on the European Community. Community law has therefore become the law of the Union. For simplicity, in this work we will always refer to EU law and use the acronym CJEU to indicate the Court of Justice of the European Union, irrespective of when an act was adopted or a judgement was pronounced (with the sole exception of literal citations). Indeed, although we are aware that this is not properly accurate, we think that using different denominations and acronyms may be even more confusing.

led to the adoption of the Charter of Fundamental Rights of the European Union (hereinafter Charter) in 2000. In particular, besides a number of non-binding declarations and resolutions adopted by the European institutions³, fundamental rights were mentioned in the preamble of The Single European Act (1986) and, then, reaffirmed «as general principles of Community law» in art. F of Treaty on the European Union (hereinafter [TEU](#)), signed in Maastricht in 1992.

In this context, the Charter represents a milestone in the process of progressive inclusion of the protection of fundamental rights within the political goals and the legal framework of the EU, since it substantially contributed to producing a qualitative change in the way the EU now describes itself: that is, as a “Europe of Rights”.

This introductory chapter will sketch the genesis of the Charter (par. 1.1) and its main features, including its field of application and personal scope (par. 1.2).

1.1. The genesis of the Charter

The preparatory works that led to the adoption of the Charter officially started in 1999 in Cologne, when the Eu-

³ Among the others: in 1977, the Parliament, the Commission and the Council adopted a Declaration on the importance of respecting fundamental rights; in 1984, the protection of fundamental rights was reaffirmed in art. 4 of the draft Treaty on the establishment of the European Union (“Spinelli draft”), which, however, was never signed; in 1989, the European Parliament adopted the Declaration on Fundamental Rights and Freedoms, which «can be considered as the first formal ancestor of the [Charter] and was prepared “to supplement the Maastricht Treaty”» (Dupré in Peers *et al.* 2014, 11).

ropean Council declared: «There appears to be a need, at the present stage of the Union’s development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union’s citizens»⁴. To this purpose, the European Council established that «a draft of such a Charter of Fundamental Rights of the European Union should be elaborated by a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments»⁵. This body – which called itself “Convention”, to underline the importance of the document it was called to elaborate – was led by a *Praesidium*, which coordinated its activities and which finally wrote the Explanations relating to the Charter of Fundamental Rights (hereinafter [Explanations](#)), providing official indication of how each article of the Charter has been conceived⁶.

The Charter was solemnly proclaimed during the Nice European Council, in December 2000. At the beginning, it was a non-binding document: it was soft law. Nonetheless, the conclusions of the Cologne European Council already prefigured the possibility to integrate it in the Treaties. In 2004, the project of a Treaty establishing a Constitution for Europe, which would have included the Charter as a very part of its text,

⁴ [Annex IV of the Conclusions of the Presidency of the Cologne European Council 3-4 June 1999](#).

⁵ *Ibidem*.

⁶ The [Explanations](#) are very important for the interpretation of the Charter, insofar as both the preamble (par. 5) and art. 52,7 of the Charter itself state that it must be interpreted «with due regard» to the them.

failed. However, only three years later, with the Lisbon Treaty, the Charter finally became a primary source of EU law. Indeed, art. 6 of the consolidated version of the [TEU](#) currently in force states that «The Union recognises 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*» (emphasis added).

The Charter was aimed at reaffirming a catalogue of fundamental rights that were considered to be already part of EU law. In this perspective, the preamble (par. 5) explicitly mentions the following reference sources: a) the constitutional traditions common to the Member States; b) the international obligations common to the Member States; c) the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter [ECHR](#)); d) the Social Charters adopted by the Union and by the Council of Europe (hereinafter COE): that is, respectively, the Community Charter of the Fundamental Social Rights of Workers (hereinafter [CCFSRW](#)) and the European Social Charter (hereinafter [ESC](#)); and e) the case-law of the CJEU and the European Court of Human Rights (hereinafter ECtHR).

In particular, the [ECHR](#) deserves special attention, since art. 52,3 of the Charter states: «In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention», although «This provision shall not prevent Union law providing more extensive protection». Furthermore, art. 6 [TEU](#) states a clear commitment of the EU to accede to the

[ECHR](#), although such accession has not been realised yet⁷. Therefore, the [ECHR](#) and the case law of the ECtHR have a special role and weight in the interpretation of the Charter. Nonetheless, as the [Explanations](#) make clear, the Charter has been inspired also by other international legal sources, in addition to those explicitly mentioned in the preamble. Those sources will be recalled in chapters 3-6 below, where relevant.

Therefore, the Charter deeply values its roots in the past achievements in the field of fundamental rights. Nonetheless, it also looks closely at the present and thinks about the future: in fact, as the preamble says, «it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments» (par. 4), and the «enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations» (par. 6).

This stance is immediately evident, for instance, in the specific provisions on the right to the integrity of the person in the fields of medicine and biology (art. 3,2), the right to the protection of personal data (art. 8)⁸, the environmental

⁷ In this regard, it is worth noting that, in 2010, the European Council adopted a Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human rights and Fundamental Freedoms. However, the CJEU, required to evaluate the compatibility of the draft agreement with the [TEU](#) and the Treaty on the Functioning of the European Union (hereinafter [TFEU](#)), expressed a negative opinion. See CJEU, [Opinion 2/13](#), 2014.

⁸ In fact, this article stems from the need to protect individuals' privacy in the "digital era".

protection (art. 37), and the consumer protection (art. 38). In addition, the attention to how society has changed in the last decades is also reflected in the wording of some of the articles concerning classical rights, such as the right to marry and the right to found a family, recognized in art. 9. In fact, this provision is unprecedented in the way it avoids any reference to men and women, thus letting the way open to same-sex marriages, as far as States decide to allow them⁹; which is also coherent with the prohibition of discrimination based on sexual orientation as stated in art. 21 of the Charter.

1.2. The structure of the Charter, its field of application, and its personal scope

The Charter is composed of six Titles, dedicated, respectively, to dignity, freedoms, equality, solidarity, citizens' rights, and justice, plus a final Title containing general provisions for the interpretation and application of the Charter. This unconventional structure can be related to the principle of the *indivisibility* and *interdependency* of fundamental rights. The centrality given to this principle – which was a leading one also in the Universal Declaration of Human Rights (hereinafter [UDHR](#)) and was strongly reaffirmed in the [Vienna Declaration and Programme of Action](#) adopted by the UN World Conference on Human Rights in Vienna,

⁹ On this point, see ECtHR, [Schalk and Kopf v. Austria](#), 2010 (application no. 30141/04).

on 25 June 1993¹⁰ – marks an important difference with, for instance, the COE system, where civil and political rights, on the one side, and social rights, on the other, go “at different speeds”. In that system, in particular, civil and political rights, stated in the [ECHR](#), can count on stronger judicial guarantees as compared to social rights, stated in the [ESC](#).

The field of application of the Charter is defined in art. 51,1, which states: «The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the *principle of subsidiarity* and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof *in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*» (emphases added). Furthermore, art. 51,2 confirms that «The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties».

The field of application of the Charter is therefore confined within the limits of the scope of EU law. However, the CJEU case law proves that the implications of the growing EU legislation directly or indirectly concerning matters of fundamental right protection may lead to affirm the fundamental rights jurisdiction of the EU beyond its *prima facie* limits. Therefore, the “spillover effects” of such

¹⁰ See, in particular, art. 5 of the Vienna Declaration, which states: «All human rights are universal, indivisible and interdependent and inter-related».

EU legislation must be taken carefully into account, as they may pose multiple challenges for the interaction between the European and domestic legal orders (Muir 2014). Furthermore, as regards the duties of the Member States established in art. 51,1, it is worth noting that the phrase “implementing Union law” has been interpreted by the CJEU in a broad sense, as substantially including every case in which States act in the scope of Union law (FRA 2018, 17-18, 38-39, 58-67)¹¹, even if they are exercising their so called “retained powers”¹².

As regards the personal scope of the Charter, it has been argued that the very decision of dedicating a specific Title – Title V – to (a limited number of) citizens’ rights indicates the will to stress the universality of all the other rights enshrined in the Charter, which are recognized to everyone (Paciotti 2010, 41). In this perspective, the preamble (par. 2) lists equality as one of the universal and indivisible values that found the EU, together with human dignity, freedom and solidarity. Here, the Charter seems to assume the idea of *basic or fundamental equality*, understood as a normative principle that prescribes to consider all persons as (morally and) legally equal, independently from their being “the same”, as a matter of fact, in any respect¹³.

¹¹ Sometimes, the simple fact that the national rules gave effect to an EU obligation (even if they did not flow directly from EU law) has been enough to trigger EU fundamental rights protection. See, e.g., CJEU, [Åkerberg Fransson](#), 2013 (C-617-10).

¹² On the «retained powers formula» in the case law of the CJEU, although not specifically in relation to the Charter, see Azoulai (2011).

¹³ For philosophical discussions of the idea of basic or fundamental

However, there are indications that the situation is actually more complex. First, the distinction between EU citizens and third-country nationals re-emerges in different parts of the Charter. For instance, art. 15 states that «Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation» (par. 1). However, only EU citizens are recognized «the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State» (par. 2), while third-country nationals are only entitled to working conditions *equivalent* (and not equal) to those of the EU citizens (and only if they are authorized to work in the territory of a Member State, par. 3). Furthermore, the «right to vote and to stand as a candidate at elections» – at both EU (art. 39) and municipal (art. 40) level – as well as the «freedom of movement and of residence» (art. 45) are placed in Title V on Citizens’ Rights.

Secondly, even when the Charter does not connect rights to EU citizenship, it grants several of them in accordance with EU and/or Member States law, which actually distinguish different entitlements depending on the different status of individuals: for instance, refugees and beneficiaries of subsidiary protection¹⁴, beneficiaries of a residence permit

equality see Williams (1962); Singer (1979, chap. 2); Veatch (1986, chap. 2-4); Waldron (2008) and Carter (2011). On the evaluative idea of “equality as sameness” see MacKinnon (1987) and Gianformaggio (2005).

¹⁴ See the [Directive 2011/95/EU](#) (Qualification Directive). As regards the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, see par. 4.1 below, on the relation between this directive, the Charter, and the [Geneva Convention on the Status of Refugees](#) (1951).

for victims of human trafficking¹⁵, asylum seekers¹⁶, long-term residents¹⁷, beneficiaries of a family reunification permit¹⁸, migrants in an irregular situation and/or in a return procedure¹⁹, and so on²⁰. In particular, while beneficiaries of international protection are granted many of the rights enshrined in the Charter (including freedom of movement and maintenance of family unity, as well as the access to employment, education, health care, social welfare, and accommodation)²¹, migrants (with the partial exception of long-term residents) generally enjoy less favourable conditions (see, in particular, chap. 6 below).

In this regard, it is meaningful that, while the Charter explicitly recognises the right to asylum (see par. 4.1 be-

¹⁵ See the [Directive 2004/81/EC](#) (Residence Permit for Victims of Anti-Trafficking Directive).

¹⁶ See, in particular, the [Directive 2013/33/EU](#) (Reception Conditions Directive) and the [Regulation \(EU\) no. 604/2013](#) (Dublin Regulation).

¹⁷ See the [Directive 2003/109/EC](#) (Long-Term Residents Directive).

¹⁸ See the [Directive 2003/86/EC](#) (Family Reunification Directive).

¹⁹ See the [Directive 2008/115/EC](#) (Return Directive).

²⁰ Furthermore, the conditions reserved to third-country nationals may vary depending on the existing agreements between their country of origin and the EU.

²¹ The Qualification Directive grants to the beneficiaries of international protection substantially the same rights recognized in the [Geneva Convention on the Status of Refugees](#). Differently from that Convention, it does not explicitly mention freedom of religion, right to association and access to justice. Anyway, art. 20 of the Directive, which opens the chapter on the content of international protection, explicitly states that that chapter «shall be without prejudice to the rights laid down in the Geneva Convention».

low), it is silent on the issue of the right to migrate, and that the freedom of movement is recognized to third-country nationals, «in accordance with the Treaties», only if they are «legally resident in the territory of a Member State» (art. 45,2). Furthermore, although the impact on national sovereignty of the growing body of EU laws relating to asylum, borders and immigration (prominently those concerning the Schengen system and the Common European Asylum System – CEAS) has to be considered²², the decision as to whether, and under what conditions, a third-country national may be authorized to enter and stay in a Member State mainly depends on the legislation of that State.

The EU legal framework concerning migrants', asylum seekers' and refugees' rights is therefore very fragmented²³.

²² For further information on the Schengen system and the CEAS, see FRA (2014).

²³ On the «fragmentation of citizenship within the European Union» see Benhabib (2004, chap. 4).