# THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU AND PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU TO POLAND AND UNITED KINGDOM

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RESUMEN:

La primera parte del texto recuerda el término "fragmentación" en el Derecho Internacional Público como el enlace a la autonomía del sistema legal de la Unión Europea. Sin profundizar en el alcance de la fragmentación y su papel en el Derecho Internacional Público, se analizan tanto el carácter como los pros y contras de la Carta de los Derechos Fundamentales de la UE. En la parte final se presenta la naturaleza y el significado del llamado Protocolo Polaco-Británico a la Carta, así como las posibles consecuencias legales de su adopción.

ABSTRACT:

The first part of the paper analyzes the "fragmentation" in public international law as well as the link between it and the autonomy of European Union legal system. Without going deeper into the considerations of fragmentation and its role in public international law, the character and the pros and cons on the Charter of Fundamental Rights of the EU are discussed. In the final part, the nature and the meaning of the so called Polish-British Protocol to the Charter is presented as well as the possible legal consequences of its adoptation.

PALABRAS CLAVE: *Derecho Internacional, Unión Europea, Carta de Derechos Fundamentales,*
KEYWORDS: *International Law, European Union, Charter of Fundamental Rights*

## 1.- INTRODUCCIÓN

There are some strong evidences, that legal system of the European Union is one of the *self-contained regimes*[1]. The phenomenon of

[1] Wider about fragmentation in public international law and *self-contained regimes* see especially No nr 31 of «New York University Journal International Law and Politics» (NYUJILP): Abi-Saab, G.: *Fragmentation or Unification: Some Concluding Remarks*, pp. 919-933; Charney, J. I.: *The Impact on the International Legal System of the Growth of the International Courts and Tribunals*, pp. 697-708; Danilenko, G. M.: *The Economic Court of the Commonwealth of Independent States*, pp. 893-918; Dupuy, P.M.: *The Danger of the Fragmentation Or Unification of the Internal Legal System and the International Court of Justice,* pp. 791-808; Jackson, J.H.: *Fragmentation or Unification Among International Institutions: the World Trade Organizations,* pp. 823-832; Kingsbury, B.: *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, pp. 679-696; Pinto, M.: *Fragmentation or Unification Among International Institutions: Human Rights Tribunals, pp. 833-842;* Romano, C.P.R.: *The Proliferation of International Judicial Bodies: the Pieces of the Puzzle*, pp. 709-751; Petersmann, E-U.: *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System*, pp. 753-790; Treves, T.: *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice,* pp. 809-821; Koskenniemi, M.: *Study on the Function and Scope of the Lex Specialis Rule and the Question of «Self-Contained Regimes*, UN Doc. ILC (LIV)/SG/FIL/CRD.1/Add.1, 2004, Leathley, Ch.: *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has ILC Missed the Opportunity?,* NYUJILP, vol. 40/2007, s. 259-306; Yamamoto, R: *What are «self-contained regimes» and How Do They Work? Contemporary Features of*

fragmentation of public international law has permeated the ground of the ongoing legal discourse among the representatives of the doctrine of this law for good, contemporary, prompting reflection on the nature and directions of development of this law. Public international law just like any other decentralized legal order is governed by its specificity (mainly no single legislator, no single executive power – no single authority that enforces the compliance with the law, the lack of formal hierarchy legal norms relevant to the domestic law, specific sources and special structure) determined also by the processes of progressive fragmentation.

Growing number of international organizations has its strong impact into forming international law standards. International organizations operate nowadays, often forming specialized legal standards, with judicial bodies acting within their structures, have been permanently etched into contemporary international law, not only as its subjects, but also as active participants creating the international reality.

In other words – "fragmentation of public international law" is the term describing deepening differentiation of the international legal system[2] (formation of a variety of specialized fields – namely: sections, subsystems), correspondingly – fragmentation means creating autonomous normative subsystems in the frame of public international law, called *self-contained regimes*. It simply means, that *self-contained regimes* have been emancipated/distincted from general rules of public international law (although European Union according to the Lisbon Treaty itself is pronounced as international organization, so by some means EU still is and will be any way situated in international public legal order).

Despite the above-mentioned questions, it's justified to start with some general principles governing relations between states, adopted in the frame of United Nations system.

The general principles governing friendly relations between States are set out in one of the most important (however not legally binding) documents - UN General Assembly Resolution 2625. It states that the progressive development and codification of the seven principles listed below would ensure their more effective application in the international society and would promote the realization of the purposes of the United Nations. This resolution sets out the common view in the international community according the content of the following seven principles:

- Peaceful settlement of disputes,
- Prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations,
- Non-intervention in matters remained in the domestic jurisdiction of any State, in accordance with the Charter,
- Co-operation between States in accordance with the Charter,
- Equal rights and self-determination of peoples,
- Sovereign equality of States,
- Fulfilment in good faith the obligations assumed by the States in accordance with the UN Charter.

In the consequence of expansion of its scope, contemporary international law has

*Enforcement System of International Law with Special reference to International Human Rights Law:* http://www.curri.miyakyo-u.ac.jp/curri-ex/pub/maca/rep99/yamamoto.html or Simma, B. and Pulkowski, D.: *Of Planets and the Universe: Self-contained Regimes in International Law*, «The European Journal of International Law» (EJIL) Vol. 17, No. 3, pp. 512-516 and others.

[2] M. Koskenniemi indicates, that the background of fagmentation was already created by Wilfred Jenks, that described conflicts between treaty regimes: M. Koskenniemi, *Fragmentation of International Law: Difficulties Airising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Fifty-Eight Session, Geneva, 1 May- 9 June and 3 July – 11 August 2006, the text avaiable: http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1

strengthened compulsory adjudication and some of enforcement mechanisms, but in the meantime it has lost its strong link to state consent. The ground of the inter-state obligations is no longer the specific consent of states and its interpretation, applying and enforcement is no longer up to the states. Correspondingly, the question of the legitimacy of international law is placed somewhere between traditional international obligations based on the state's consent and the more and more autonomous regional international legal systems with their specificity (and discipline) in the name of democratic values and human rights protection. International law takes seriously the commitments underlying constitutional democracy developing kind of constitutionalist model for assessing the legitimacy. The very core of this model there contains four distinct principle, that go as follows: the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability as well as the substantive principle of achieving outcomes that are not violate of fundamental rights and are reasonable[3].

All those things mentioned above (fragmentation processes in international law, general principles of states cooperation, that come from classic international law and that are still in force, distinction of different normative system connected with activity of international organization, specific character of European Union as non-typical organization and specific character of states obligations in the EU legal system) should be consider while examining the normative character of the Charter of Fundamental Rights of the EU and Protocol on the Application of The Charter of Fundamental Rights of the EU to Poland and United Kingdom (the so called British or UK Protocol).

[3] See: M. Kumm, *The Legitimacy of International Law: a Constitutionalist Framework of Analysis*, EJIL 2004, vol. 15, issue 5, p.907-931.

## 1. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU – SOME REMARKS ON IT'S MEANING AND IT'S NATURE

The Charter of Fundamental Rights of the European Union was signed by the Member States in December 2000 during the meeting of the European Council held in Nice, France.

The Charter contains in a single text all together the civil, political, economic, social and social rights which had previously been laid down in a variety of international, European and national sources (mostly in Convention for the Protection of Human Rights and Fundamental Freedoms[4] from 1950 and the International Covenant on Civil and Political Rights[5] and International Covenant on Economic, Social and Cultural Rights[6] – last both from 1966 as well as national constitutions).

The Charter brings together in a single document the following groups of rights:

- Coming from human dignity (e.g. the right to life, respect for private and family life);
- freedoms (e.g. freedom of conscience, religion and beliefs, freedom of expression);
- equality (e.g. respect for cultural, religious and linguistic diversity, the prohibition of discrimination);
- solidarity (e.g. right of collective bargaining and action); citizens' rights (e.g. freedom of movement and residence);
- justice (e.g. presumption of innocence and right of defense).

Between 2000 and 2007 the Charter was not legally binding. A Declaration annexed to the Nice Treaty provided that an

[4] http://www.echr.coe.int/Documents/Convention_ENG.pdf

[5] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[6] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

Intergovernmental Conference would be held in 2004 to consider, *inter alia*, the legal status of the Charter. It means, that from the very beginning non – binding character of the Charter has been considered as temporary solution. This resulted in the adoption of the Lisbon Treaty and consequently according to its provisions in the giving to the Charter binding legal character. On 1 of December 2009 with the entry into force of the Lisbon Treaty also The Charter entered into force and therefore became an integral part of European Union law. The Charter sets out the fundamental rights which every Union citizen can benefit from.

However, Charter does not create fundamental rights which are of general application in national law – and that's the link to the question of Protocol on the Application of The Charter of Fundamental Rights of the EU to Poland and United Kingdom.

Article 2 EU Treaty states, unequivocally, that «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail». Those values can and should be considered as basic UE principles, because they cause legal consequences. Correspondingly, their violation can be sanctioned, their consideration is one of the requirements to fulfil due to get EU membership as well as the one of the fundamental EU members' obligations and they have the important impact on the UE objectives.

Article 6 of the EU Treaty (as amended by Lisbon treaty) includes the Charter of Fundamental Rights of the EU into the catalogue of primary sources of EU law (correspondingly – into EU normative system), stating, that:

*1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adopted 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 competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

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 by the Treaties.

The latter paragraph explicitly provides that the Charter does not introduce any new EU powers or tasks[7].

[7] As rightly indicates N. Chronowski, that effect is in compliance with the common concept that fundamental rights norms do not attribute power, but merely limit the exercise of powers. The Union cannot directly influence the formation of the common standards, i.e. it has no legislative competences except of the treaty-based rights. See: N. Chronowski, *Enhancing the Scope of the Charter of Fundamental Rights – Problems of the Limitations and Advantages of Directly Applicable Charter Rights with Regard to the Recent Case Law Developments of the European Court of Justice and National Courts,* Discussion Paper upon the call of the European Commission for contributions to the Assises de la Justice, the text avaiable here: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/36.hungarianacademyofsciences__preliminary_contribution_assises_cfr_chronowski_en.pdf

The provisions of the Charter are addressed:
- To the institutions of the EU with special regard to the principle of subsidiarity,
- The national authorities in cases they implement EU law (what for instance happens when domestic authorities apply or adopt the national law implementing directives or apply regulations directly).

The Charter and European Convention for the Protection of Human Rights and Fundamental Freedoms play subsidiary roles to each other – when the Charter is not applied, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions (like European Convention) they have ratified.

The Charter strengthens the protection of fundamental rights by making those rights more visible, more defined and more explicit for citizens. The Charter has its supporters as well as its opponents, that comes along with its advantages and disadvantages. The latters will be briefly show below.

**Pros and cons for the Charter:**

| Pros | Cons |
|---|---|
| **Complex character** in objective and subjective aspect:<br><br>- the protection covers all groups of rights: personal, politic, economic, social and cultural,<br><br>- the Charter's aim is not only protect EU citizens but to protect all persons within EU and does not exclude legal persons' protection in some cases.<br><br>However it's always possible to claim to implement the rights from the Charter, not always it's admissible to start legal procedure according to it. | Quite **controversial, new typology** of fundamental rights. The Charter does not reclaim to the categories of human rights known from the public international or national law. So far the typology covered the distinction for rights and freedoms and the division for personal and political, economic, social and cultural – those typologies have been confirmed in International Covenants (1966), European Social Charter (1961) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).<br><br>The Charter creates six categories, that answers to the Charter's division for six main chapters, which titles are connected with ideas/values especially important for EU.<br><br>That concept is quite new, not based on philosophy of human rights and not universally accepted yet – going further it can encourage the collisions between different systems of laws or creating different interpretations of the same terms within the EU.<br><br>One can argue, that it does not make any sense to make a special human rights system within the economic – oriented organization. |
| **Harmonization of the terms** according to fundamental rights – most of human rights protection systems imply creation variety in terminology, what has the significant | **The lack of precision in describing the principles.** The Charter makes the division for fundamental rights and principles (that aren't mentioned in the name of the |

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|---|---|
| impact into practice and application of law and can create some problems, especially having regard to even language and translation aspects. That's why in its article 52 point 3 the Charter recalls the scope and the meaning of the rights of the European Convention. The Charter uses also the definitions and the terms from the most of European constitutions (like: human dignity).<br><br>All of that lets to create quite homogenous catalogue of the fundamental rights and to unitary understanding of those rights in EU law as much as in domestic law. | Charter), but in the text of the Charter there are not precisely identified principles and the provisions of the Charter do not specify, which declare the rights and which ones - principles.<br><br>Probably this problem is connected with question of social rights, widely described in the Charter and contested as binding by some states. |
| Creation **autonomic mechanism of human rights protection for EU** (before protected only on the basis of ECJ judgments or in the relation «individuals – states» on the basis of provisions of the European Convention). Now the rights are protected in wider scope – because in the relations:<br><br>Individuals – states,<br><br>Individuals – EU institutions/organs<br><br>Legal persons (in some cases) – states and EU institutions/organs | The Charter thanks to its provisions can **stimulate the extension of the competences of EU's institutions/organs**, however its Article 53 unequivocally exclude such possibility (there are some contradictions within the Charter itself obviously).<br><br>Example – right to marriage and to start the family supposed to be protected in conformity with national laws, but where are the EU competences according to this right?<br><br>It might be, that the Charter has been done in this shape a bit in advance – for the future expanded EU competences. |
| **New important rights:** i.e. right to diplomatic protection (not confirmed yet in any other legal act before and very important to individuals). | The **lack of protection measures** in the Charter, no procedural guarantees (no control mechanism). It could be good to separate European Convention system from the Charter system (does it exist?). |

## 2.- THE CHARACTERISTIC OF PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

The UK and Poland sought reassurance, that the Charter would not be directly incorporated into their national law.
Article 1, Protocol No. 30 (which is annexed to the TEU and TFEU) provides that:
*1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative*

*provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it [i.e. the Charter] reaffirms.*

*2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law […]*

Taking into the consideration those provisions, one must notice, that in Poland the value and legal importance of the Charter has been overshadowed by the so – called British – Polish Protocol, annexed to the Treaty of Lisbon, because the applicability of the Charter in Poland is analyzed through the lens of the disputable content of the Protocol No. 30. The decision of the polish authorities to join the Protocol, negotiated earlier by the British delegation, invoked a high level of uncertainty concerning the Charter's status in Poland.

The Protocol seems to be an *opt-out clause*[8]. Quite poor jurisprudence of the Court of Justice of the EU and Polish courts in that matter has not helped much to clarify the scope of the application of the Charter in Poland. That's why the implementation of the Charter in Poland is quite limited. For the same reason it's too soon to predict the real potential it has and can have in polish legal system. It's sure, that Polish motives (obviously political) to join the Protocol were completely different from those of the UK (here we have: not to create new rights, not to make social rights justiciable). The Declarations No. 61 and No. 62 annexed to the Lisbon Treaty illustrates polish government's reservations as to the Charter - the delicate spheres like: euthanasia, same-sex partnership or even marriages, liberalization of abortion, for which at least part of society is not ready yet in Poland. According to the Article 51 of the EU Treaty, the Protocol has the same legal value as the treaties. Because of joining the Protocol, the legal status of the Charter is in Poland questionable. According to polish realm, the Protocol is rather invisible in the courtroom and in practice courts do not invoke its provisions. It can confirm some opinions, that the Protocol plays currently mostly political role. Any way final clarification of the whole normative significance of the Protocol by the Court of Justice of the EU is strongly needed.

[8] What allow states to opt out of otherwise-required commitments (i.e. optional protocols and opt-out clauses) can be called „negotiated options", see: J. Galbraith, *Treaty Options Towards a Behavioral Understanding of Treaty Design*, VJILA vol. 53, no 2, 2013, p. 313.