

## **Viviane Reding**

Vice-President of the European Commission responsible for  
Justice, Fundamental Rights and Citizenship

# **The importance of the EU Charter of Fundamental Rights for European legislative practice**

*Check Against Delivery  
Seul le texte prononcé fait foi  
Es gilt das gesprochene Wort*

Lecture given at the German Institute for Human Rights

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Ladies and gentlemen,

I am delighted to be able to talk to you today as part of the series of lectures, "The Protection of Fundamental Rights in Europe", organised by the German Institute for Human Rights. I would like to thank Professor Rudolf very much for her warm introduction.

The aim of the Institute's series of lectures is to shed light on the significance that national and European fundamental rights have on law and politics. I must congratulate you on your excellent choice of the subject matter. It is an honour for me to take part in this important series of lectures and set out my views on the significance of the EU Charter of Fundamental Rights for the European legislative process.

### **The genesis and significance of the Charter**

The entry into force of the Lisbon Treaty is a historic breakthrough. At last, we now have a legally binding Charter, our own ambitious European Union bill of fundamental rights.

This array of fundamental rights, which is binding on the EU institutions and on the 27 Member States, has the same legal status as the Treaties and, politically speaking, is a giant step forwards on the path to making the Union as an area of law and values a reality.

The Charter is also one of the most modern codifications of fundamental rights in the world. It contains all the classic guarantees of fundamental rights, which are also enshrined in the European Convention on Human Rights, but goes beyond it. The Charter also guarantees rights and principles, including economic and social rights, which stem from the constitutional traditions common to the Member States, European Court of Justice case law and other international agreements. Furthermore, the Charter also protects so-called "third-generation" fundamental rights, such as an explicit right to data protection, guarantees in the field of bioethics or the right to good administration.

The unique richness of the Charter is primarily due to the innovative process that brought it into being.

As you know, it was elaborated and agreed upon by a Convention set up by the European Council. There were 62 members in the Convention: sixteen Members of the European Parliament, thirty members of national parliaments, one delegate appointed by each Head of State or Government and one Commission representative.

The inclusion of such a large number of members of national and supranational parliaments in the Convention showed from the outset how important the Charter is for the process of bringing the European Union closer to the people. The Lisbon Treaty takes the process further with important developments that strengthen the democratic legitimacy of the European project. So we can describe the Lisbon Treaty as a "Treaty of Parliaments".

But back to the Charter. Once the text had been finalised, it was solemnly proclaimed on 7 December 2000 by the European Council, the Commission and the European Parliament – although it was still not directly legally binding at that time. It was however an important signal that the EU institutions had politically bound themselves to the Charter.

Legal experts engaged in debates regarding the legal status of the Charter, while the European institutions made their first attempts to apply it as a yardstick for fundamental rights in the legislative process. Also the European Court began, after some initial hesitation, to cite the Charter ever more frequently in its decisions.

Yet it took almost ten years before all doubts could be dispelled and the Charter was to become a directly legally binding part of European primary legislation; ten years of optimism, a few setbacks and tough negotiations. You all know the story and I don't need to run through it again here.

### **The German contribution to the Charter**

However, as we are in Berlin, I would like to recall briefly the importance of Germany's role in elaborating the Charter of Fundamental Rights.

Germany played a major part in the formulation of the EU Charter of Fundamental Rights. It was the German Constitutional Court that had called for such a Charter over 30 years ago. It was the German Council Presidency which took the initiative to set up a Convention to draft the Charter in a decision taken at the Cologne Summit in June 1999. And it was the former German President and President of the German Constitutional Court, Roman Herzog, who chaired the Convention on Fundamental Rights. It is not by coincidence that in many respects the list of fundamental rights set out in the Charter of Fundamental Rights is similar to those in the German Basic Law. Article 1 of the Charter, for example, states that "Human dignity is inviolable", which is very similar to Article 1 of the German Basic Law. The value-based fundamental rights orientation of Europe could not be expressed in a clearer way.

As the Charter and the post-Nice European reform process are directly linked, we should remember that again it was the German Presidency that picked up the baton in the first half of 1997 - following the temporary deadlock brought about by the referenda in France and the Netherlands - and made a fresh attempt, showing determination and considerable strategic skills, to ensure the ultimate success of the reform of the European Union.

The Berlin Declaration played a key role in this process. In March 2007, at the former armoury on "*Unter den Linden*" on the occasion of the 50<sup>th</sup> anniversary of the Treaties of Rome, the 27 Heads of State or Government solemnly declared their desire to incorporate the reform of the European Union, contained in the constitutional treaty, in a new treaty which they would then ratify.

The Treaty of Lisbon saw all 27 EU Member States finally delivering on this promise.

### **The European Commission's new fundamental rights policy**

The lengthy debate on an EU treaty reform was successfully concluded on 1 December 2009. Since that day the Lisbon Treaty has given the European Union new foundations and a new set of instruments. The Charter of Fundamental Rights is one of the core elements of these new foundations.

However, one thing must be clear: we cannot now sit back and rest on our laurels simply because the words have become law. While there can be no doubt that the Union has taken a major step forward by making the Charter legally binding - with the result that citizens can take legal action against the EU institutions to enforce it - we must now implement the Charter, breathe life into it and make sure that it is effective in practice!

To do this, and to bring about a change of mentality with concrete results – to create, if you like, a sort of European fundamental rights culture – will be one of my key tasks in the years ahead.

As a first step, the Commission will shortly present a communication on the EU's fundamental rights strategy. This communication will set out our approach for the effective implementation of the Charter. My main objective will be to ensure that all EU institutions respect the rights laid down in the Charter in their day-to-day work, particularly when preparing new European laws.

The Charter must become the compass for all our EU policies. Particularly within the European Commission, the Charter will influence all actions of our services.

Finally, the future accession of the EU to the European Convention on Human Rights is a further incentive to develop an ambitious European fundamental rights policy. Through exemplary legislation and implementation of EU law the European Court of Human Rights will find itself far less often in the situation of having to intervene in cases relating to European law.

But in which policy areas and how can the Charter actually play a role in the European legislative process? It can do so only when the EU institutions act and adopt laws and only when Member States implement EU law. Let me explain.

### **Security policy and safeguarding fundamental rights go hand in hand**

One very relevant area, in which we can show the effectiveness of the Charter, is the broad field of internal security.

The stronger the fundamental rights guarantees given by the EU and its Member States, the greater our chances of making real progress in the fight against terrorism and organised crime. It is in this context that the Stockholm Programme expressly stated that all anti-terror measures must always fully respect fundamental rights.

I am convinced that an ambitious fundamental rights policy and an effective and sustainable anti-terror policy are complementary. Both must go hand in hand in a policy firmly based on our shared European values and common rights. I believe, for example, that the forthcoming review of the EU Data Retention Directive should take fundamental rights issues very seriously. Data retention can impinge on everyone's right to privacy. As EU Commissioner for Justice I will do my utmost to ensure that we strike the right balance between combating terrorism and the respect for privacy.

### **Plans for data protection**

Let me mention another area which regularly gives rise to heated debates, not least in Germany: data protection.

One of the greatest challenges the European Union is facing is to improve the protection of people's personal data. The protection of personal data is a fundamental right which is now expressly recognised in Article 8 of the Charter.

The Lisbon Treaty provides the legal basis for the creation of a comprehensive and coherent framework for the protection of personal data: Article 16 of the Treaty on the Functioning of the European Union today provides the legal basis for EU data protection rules in the EU and the Member States.

The review of the existing legal framework for data protection in the EU is one of my highest priorities.

To this end I plan to present a communication in autumn 2010 setting out a comprehensive strategy to protect the fundamental right to data protection in the EU and in its relations with other countries. An important principle that I would like to include in EU law is the principle of data minimisation. For me this principle is the expression of a policy that takes fundamental rights into account: in the fight against terrorism and organised crime national authorities should gather and store only data which is essential for that purpose. Any data-hoarding would be incompatible with EU principles.

### **Incorporating a fundamental rights culture in the legislative process**

I would now like to go into more detail regarding the concrete aspects of fundamental rights protection in the EU's legislative process.

It is my utmost priority to ensure that when creating EU law the Union is beyond any reproach. No EU legislation can be adopted that conflicts with the rights and principles guaranteed by the Charter.

It is important to get on the right track already at the very beginning of the legislative process, namely when the Commission is preparing legislative proposals. This is why I support systematic and thorough checks of all our legislative proposals aiming to achieve a "Charter compatibility". In the past few years we have developed and consistently applied a special methodology for this purpose.

We must continue down this path and build on what we have achieved if we are to promote and create a real fundamental rights culture.

For example, as early as at the fact-finding stage of new Commission proposals the consultation papers, such as Green Papers and Communications, should identify any possible impacts on fundamental rights. This type of upstream awareness of fundamental rights implications of our initiatives should strengthen and encourage Member States, associations, stakeholders and civil society to provide the Commission with any relevant information regarding fundamental rights already at the consultation stage.

At this fact-finding and consultation stage national human rights institutes and the Fundamental Rights Agency in Vienna will also have a key role to play.

This means that a thorough appraisal of the impact of new legislative proposals on fundamental rights is crucial. I therefore intend to enhance the fundamental rights dimension in the Commission's impact assessments.

The objective of these impact assessments is to discover which fundamental rights could be affected by the initiative and to evaluate systematically the effect of every option on the fundamental rights concerned. The extent and necessity of interference with fundamental rights should be described and analysed in these impact assessments.

Moreover, in future it will also be necessary to strengthen the fundamental rights dimension in the official grounds and preamble to any legislative proposals which affect fundamental rights. This will help to improve understanding of the fundamental rights impact of the proposals in all institutions involved in the legislative process.

## **The importance of the Charter throughout the *entire* legislative process**

I would like, however, to make one thing clear: the importance of the Charter cannot end with the first phase of the legislative process. It is not the Commission that decides; we only propose. If it is our task to produce legal acts in accordance with the Charter, we cannot content ourselves with just ensuring that the Commission produces particularly vigilant proposals and invests large amount of energy in drawing up impact assessments.

It is of paramount importance to keep a watchful eye on the *entire* process, including the legislative steps that come afterwards, to ensure that the *final legal texts*, as adopted by Parliament and the Council under the co-decision procedure, continue to comply with the Charter.

This responsibility has to be shared by all institutions involved in the legislative process, and this aspect of *collective responsibility* was expressly reiterated by the European Council in the Stockholm Programme.

However, the practicalities for ensuring this in practice still need to be worked out in detail at inter-institutional level.

How, for example, can we ensure that amendments drafted in Council Working groups or Parliamentary Committees are subjected to a detailed examination to establish whether they have any impact on fundamental rights?

How can we ensure, that once difficult and complex negotiated compromises between the Member State delegations in the Council and between the Council and the European Parliament have been reached, fundamental rights are not disregarded?

### **Excursus: Member States' legislative initiatives in criminal justice and police matters**

It should also be noted that all these questions become particularly relevant when Member States make proposals for EU legislation.

As you know, this still possible under the Lisbon Treaty in the fields of criminal justice and police cooperation, i.e. for policy areas that are highly sensitive in relation to fundamental rights.

Experience has shown that Member States' legislative initiatives are only rarely accompanied by a detailed impact assessment. At the same time, the Lisbon Treaty has limited the Commission's consultation role relating to Member States' initiatives even further than in other EU policy areas.

This is certainly an area where we will have to work towards making practical improvements and applying common standards, irrespective of whether the Commission or a group of Member States has made the legislative proposals.

Particularly in the highly sensitive areas of criminal justice and police cooperation citizens quite rightly expect us to act vigilantly and even-handedly and not to allow ourselves to be driven by an overzealous desire for action.

### **Example 1: Legislative proposals on asylum**

Let me illustrate my previous, somewhat abstract points with some concrete examples.

A whole series of Commission proposals on the European asylum system are currently working their way through the legislative process.

When preparing these proposals the Commission attached particular importance to compliance with the provisions of the Charter and the European Human Rights Convention, as well as with international standards on refugee law and the UN Convention on the Rights of the Child. Compliance in this case relates primarily to aspects of the custody of newly arriving refugees, effective legal protection and the rights of children.

Consequently, the Commission proposals make clear that, as a rule, nobody may be held in custody purely because he or she is seeking international protection. Where, in exceptional cases, custody is required, our proposals contain an explicit and comprehensive list of grounds for detaining people in custody, linked with strict checks of proportionality. The proposals are intended to ensure that custody conditions are dignified and contain a number of procedural safeguards.

Our proposals expressly state that under no circumstances may unaccompanied minors, who are in special need of protection, be detained in custody. It has to be self-evident that we have to find accommodation options other than detention or closed custody, e.g. in foster families or special homes for young people.

The European Parliament and specialist civil society organisations have expressly welcomed our proposals. Negotiations with Member States in the Council, however, have proved anything but easy.

The Commission defends its proposals and hopes it can convince Member States of the need for a common high level of EU protection for refugees.

### **Example 2: Body scanners – airport security**

I would like to give you another example, an example that has caused uproar, particularly in Germany: the use of body scanners at airports.

In June this year the Commission presented a communication on this subject, raising and addressing a whole series of issues relating to the use of body scanners. This paper is intended to provide a basis for discussions in the Council and Parliament and for all citizens; the Commission has not committed to pursuing one particular option over the others.

I worked closely on the drawing up of this communication with my colleagues Siim Kallas, the Commissioner for Transport, and Cecilia Malmström, the Commissioner for Home Affairs, to ensure that sufficient attention was paid to the fundamental rights aspects of the possible use of body scanners, especially with regard to the protection of human dignity and individual rights, data protection issues and health, especially the health of children and pregnant women.

This communication is a good example of one of the aspects I mentioned earlier: the need for upstream awareness of fundamental rights implications so that the whole range of fundamental rights issues can be examined at the fact-finding stage of new legislative initiatives.

Let me also say that I personally, take the view that we can allow the general use of these technologies at European airports *only* if the machinery is technologically sophisticated enough to ensure that no health damage is caused and that the right to privacy is not breached. Passengers must also have the right to refuse to undergo technical scanning, opting instead to undergo some other sort of security examination.

### **Example: Legislative proposals for a Regulation on the slaughtering of animals**

One last example: some time ago the Commission presented a proposal for a new Regulation on the protection of animals at the time of killing.

In this case it was important to ensure that the general ban on killing animals for slaughter without prior stunning provided for in the Regulation did not violate religious freedoms, which means that it therefore would still have to be possible to allow forms of slaughter on religious grounds.

I have mentioned this example not least because it affects another very sensitive issue, which is also the subject of intense debate in Germany: the relationship between animal welfare and fundamental rights principles.

I have also taken this example to make clear that the protection of fundamental rights at EU level goes far beyond justice and home affairs policy. While the creation of the European area of freedom, security and justice obviously has an impact on policies where fundamental rights are especially affected, such as criminal justice, police cooperation, immigration and asylum, the Charter is not confined to these policy areas only. It covers all actions and all areas for which the European Union is responsible.

### **Example: Economic legislation**

In the field of economic legislation – traditionally the Commission's principal area of activity – the work of the Commission departments and the other EU institutions will also be affected by the binding character of the Charter of Fundamental Rights. This is due to the fact that freedom to conduct a business is today another important fundamental right safeguarded in Article 16 of the Charter. EU measures curtailing this freedom will need sound justification on public interest grounds and a detailed consideration of the proportionality of the measure. We would have to take this into account, for example, if yet another time beliefs should come to the surface – in the European Parliament, the Member States or within a Commission department – that we could introduce US-style class actions at European level. Let me give you another example: you know that I have a certain sympathy for the idea of quotas for women on supervisory boards. It may well be a sensible measure for the supervisory boards of publicly listed companies operating in the European single market, and I am currently examining the issue. However, it would undeniably be disproportionate in terms of the EU Charter of Fundamental Rights, if we were to require a quota for women for small and medium sized businesses, for example.

### **Member States' obligation to respect the Charter when implementing EU law – 3 examples**

As I draw to the end of this lecture, I would still like to address the importance of the Charter of Fundamental Rights for the Member States.

It is a well-known fact that the EU is not a super state, and so it is most certainly not the supreme fundamental rights guardian policing the Member States. Deliberately, therefore, the Charter is primarily binding on the institutions of the European Union.



The Charter is not addressed primarily to the Member States. After all, Member States have their own constitutional systems and their own national arrangements for protecting fundamental rights. The EU Charter was in fact developed because the EU institutions were not originally bound to a set of fundamental rights. It is therefore the aim of the Charter of Fundamental Rights to oblige the EU institutions to uphold fundamental rights in the same way as the 27 Member States do.

However, the Charter of Fundamental Rights is binding on Member States in specific circumstances, namely when national authorities apply or implement EU law; to be more precise, where they are "active in areas covered by EU law", as the Court of Justice puts it. In these circumstances Member States are just as directly bound by the Charter as the EU institutions themselves. Breaches of the Charter by the Member States when they are implementing or applying EU law are breaches of the EU Treaties. In this situation it is the Commission's task to keep a watchful eye, talk to the Member States concerned and, if necessary, not to shy away from taking the step of initiating formal infringement proceedings. As you will almost certainly know, the European Commission is in the process of examining whether to open such proceedings against France, as the suspicion has unfortunately arisen that in their application of the EU Free Movement Directive the French authorities have taken decisions targeting an ethnic minority, the Roma. Should these suspicions be borne out, the Commission will have to play its role as the guardian of the Treaties.

To ensure that, as a rule, such steps are not necessary the Commission, through so-called "contact committees" monitors the process of EU law implementation in and by the Member States and stands ready to give advice.

1.) A real example of this approach is the contact committee on the implementation of the EU Return Directive, which concerns third country nationals unlawfully resident in the EU. Some of the key subjects discussed in this committee are the rights of the child, the right to effective legal protection and the right to freedom and security, as laid down in the Charter.

2.) Here is another example to illustrate how Member States are bound by the Charter. In March this year the European Court ruled on whether the Dutch provisions on the income requirement for the reunification of families of third-country nationals complied with the EU's Family Reunification Directive.<sup>1</sup> In its judgment the Court made clear that the Directive had to be interpreted in accordance with fundamental rights, particularly the right to a family life, as guaranteed by the Charter. The Court concluded that the Dutch rules were contrary to the Directive when interpreted in that way.

3.) I would like to look at one final civil-law example. Once again, it is a real case which was brought before the European Court of Justice. Shortly after the Charter became legally binding, the court was asked for clarification in a case where Italian and Slovenian courts had to rule on the consequences of the divorce of a bi-national couple, the law applicable and, above all, the rights of custody of the couple's child.<sup>2</sup> The Court explained how the relevant EU Regulation was to be interpreted and applied. In its ruling it attached particular importance to Article 24 of the Charter and the right of the child enshrined therein to regular and personal contact with both parents. The Court made clear that the Regulation could not be interpreted by the national courts in such a way that it might allow one parent who unilaterally and unlawfully decided to leave a Member State with the child to extend or justify after the event the situation created.

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<sup>1</sup> Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken*; judgment delivered on 4 March 2010, not yet reported.

<sup>2</sup> Case C-403/09 *PPU Detiček v Sgueglia* [2009]; judgment delivered on 23 December 2009, not yet reported.

I hope that these three real-life examples have illustrated the broad spectrum of practical situations in which the Charter must also be applied at national level.

### **The need to join forces and work together**

Before I end this lecture on the importance of the EU Charter of Fundamental Rights for the European legislative practice let me once again stress the need for all EU institutions, all national authorities and civil society to work together.

We must all pull together to make the Charter a reality that works in practice. We should explain and make clear how the EU Charter complements national fundamental rights systems at the European level. We should also equally make clear that the Charter does not replace national fundamental rights systems.

I hope I have shown that the simple fact that the Charter is now legally binding is not just an "institutional event"!

The Charter should be respected and filled with life by everyone concerned, in their specific areas of responsibility: by the European Parliament, Council and Commission in the EU legislative process, by national authorities when implementing and applying EU law and by national courts when they take decisions that in any way relate to EU law.

The national human rights institutes and the EU Agency for Fundamental Rights in Vienna have a particularly important role to play in building the "house of European fundamental rights". We will make particular use of their expertise, their research, their information and documentation, and their work in raising and stimulating awareness in the field of human rights. And, at this point, I would like to thank them all once again for their important work.

The legally binding Charter sees us enter a new phase of European integration.

As Vice-President of the Commission responsible for Justice, Fundamental Rights and Citizenship I am counting on the support of the Parliament, the Council, the Member States and the general public to make an ambitious European Union fundamental rights policy a reality.

Thank you.