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**Mainstreaming fundamental rights in the post-Lisbon EU law:
inconsistency between internal and external policies continues**

(paper summary)

The entry into force of the Lisbon Treaty (1st December 2009) marked a step forward in the European political construction at providing binding legal force to the Charter of Fundamental Rights (CFR) of the EU with the same rank as the Treaties. Since then, fundamental rights protected in the EU have become more predictable and visible. This legal achievement has the potential to contribute to strengthening the democratic profile of the EU.

The binding scope of the CFR is limited to the EU realms of power. In this vein, article 51.1 of the CFR provides that it applies primarily to the institutions and bodies of the EU, while Member States are only bound when implementing EU law. Paragraph 2 of this provision adds that the CFR does not extend the field of EU law application beyond the powers of the Union or establishes any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

However, in this paper we argue that the effective implementation of the CFR is furthering European integration, since its practical application is going beyond its literal provisions. Indeed, the respect of the rights and freedoms enshrined in the CFR has become a transversal requirement for all new EU legislation (European Commission, 2011), whereas the legal provisions on fundamental rights are growing significantly beyond the core fundamental rights¹.

¹ Some recent, significant examples of this legal activism are, among others, the Directive on the right of access to a lawyer in criminal proceedings (Directive 2013/48/EU of 22 October 2013, OJ L294 of 6 October 2013), the recast Dublin Regulation, which aims to guarantee effective remedy to applicants on

Simultaneously to these developments, the CFR has become a reference for both national courts and the Court of Justice of the EU (CJEU), which have noticeably increased their role as adjudicators of fundamental rights (de Búrca, 2013; Beck, 2014).

As regard to citizens, the CFR is gradually becoming an instrument to enable people to enjoy rights in personal situations governed by EU law. Though there is still a lot to improve concerning certain freedoms and rights, this process contributes progressively to increasing citizens' awareness of the EU dimension of fundamental rights (European Commission, 2014).

But the EU also recognises that human rights are universal and indivisible and seeks to defend them outside its territory. Article 21, 2b of the Treaty on European Union (TEU) states that one of the Union's central roles is to promote and support democracy and human rights worldwide, identifying democracy, rule of law and the universality of human rights and fundamental freedoms as guiding principles of the EU's external action. In keeping with this commitment, the EU has placed democracy and human rights at the heart of its external policies. In this vein, cooperation and trade agreements signed with third countries contain conditionality clauses directly related to the protection of human rights, as well as the enlargement policy, currently governed by the Copenhagen criteria². The promise of membership, closely tied to this conditionality policy, has played a significant role in promoting democracy and human rights promotion in Central and Eastern Europe, since accession countries are required to adopt EU standards in this area. Likewise, as 2012, within the revised European

appeals against transfer decisions (Regulation(EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining and application for international protection lodged in one of the Member States by a third country national or stateless person, OJ L180 of 29 June 2013), the Asylum Procedures Directive and the Reception Conditions Directive, which strengthens the right to access asylum procedures (Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180 of 29 June 2013), the Regulation on mutual recognition of protection measures in civil matters (Regulation (EU) 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181 of 29 June 2013), the Directive on attacks against information system, which seeks to ensure full respect of the right to privacy and the protection of personal data, as well as the right of defence, the presumption of innocence and the principles of legality and proportionality of criminal offences and penalties (Directive 2013/40/EU of 12 August 2013, OJ L218 of 14 August 2013).

² The first of these criteria is 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'. European Commission, 'Conditions for membership', available at: http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (accessed 3 October 2014).

Neighbourhood Policy, the EU has introduced the “more for more” conditionality mechanism, which provides a higher level of differentiation among partners, with the largest financial incentives going to the most ambitious reformers (European Commission and High Representative for Foreign Affairs and Security Policy, 2011; Kurki, 2012). Consequently, the EU can be said to have exercised leadership in human rights and democracy promotion both inside and outside its borders.

Yet, this achievement has not been free of inconsistencies and shortcomings, which has undermined EU credibility on this realm. For instance, EU conditionality clauses have a very wide geographical scope, but they are not universal. Thus, trade and cooperation agreements with developed countries do not include any clause of this kind. Moreover, no human right and democracy conditions are included in sectorial agreements in areas such as fisheries, steel and textiles. This can lead to a certain inconsistency in EU Policy. For example, development aid may be suspended under the Cotonou Agreement between the EU and 79 African Caribbean and Pacific countries, while financial payments continue to be made under a Fisheries Partnership Agreement (Bartels, 2008). It has concretely been the enlargement policy which has mainly exposed internal and external inconsistencies in EU fundamental rights policy. Through the pre-accession Copenhagen criteria, the Union has set up a member-state making policy, which at the same time reflect what the EU stands for, or at least how it wants to be perceived by and penalthe rest of the world. But, in practice, there is a gap between accession conditions and membership obligations, which undermines the EU’s credibility.

Problems and conflicts as regard to fundamental rights protection have increased in old and newer Member States alike, as many cases demonstrate: the French expulsion of Roma, the restriction on media freedom, discriminatory treatment to migrant citizens, the retirement age of judges, prosecutors and notaries in Hungary, an increased feeling of antisemitism and anti-Muslim in EU countries (annual colloquium organised by the EU in October 2015, etc). In these and other similar cases, fundamental rights, vigorously promoted and monitored in the context of accession, have not turned out to be an effective remedy to prevent these circumstances. There continues to be a discrepancy between EU accession conditions and membership obligations. The EU

does not have vis-à-vis its Member States the powerful transformative leverage it enjoys in relation to candidates for accession (Hillion, 2013: 7-8).

Thus, the EU fundamental *acquis* related to the specific chapter in the area of fundamental rights in accession negotiations is broader than the list laid down by article 2 TEU and the CFR. Therefore, the obligation to respect fundamental rights appears to change depending on whether this country is a candidate to accession or a Member State. For instance, as regard to ongoing negotiations with Serbia, Chapter 23 (Judiciary and Fundamental Rights) provides deep reforms in order to address significant weaknesses regarding independence and efficiency of judiciary, corruption in many areas of public and economic life, discrimination of minorities, such as Roma, who are very often victims of racism, as regard to education, access to the media and religious services, homophobia, ill-treatment of refugees and internally displaced persons, lack of expression freedom and transparency...³, that is, the very same deficiencies suffered by some of the current Member States.

As indicated above, CFR only binds Member States when they act in the realms of EU competence. Outside the context of EU law, article 7 TEU provides a mechanism for controlling Member States excesses. However, as the experience demonstrates, this monitoring and corrective instrument requires a demanding procedure to be applied (unanimous decision of the European Council, consent of the EP,...). In contrast, the adoption of corrective measures, such as the suspension of negotiations in the case of slow progress in the field requires only qualified majority of Member States. Consequently, the EU's monitoring of fundamental rights differs whether it concerns a candidate state or a Member State.

Despite considerable achievements in EU primary law as regards human rights, the EU seems to remain ill-equipped domestically to monitor and guarantee respect of the fundamental values on which it prides itself to be founded. Paradoxically, the emphasis derived from the pre-accession conditionality is used to push for advancements essential to the proper functioning of the EU legal order, because such adaptations are difficult to implement in a post-accession context. Thus, the

³ European Commission, *Instrument for Pre-Accession Assistance (IPA II), Indicative Paper for Serbia (2014-2020)*, 2014, pp.17-18.

Copenhagen conditions articulated by the European Council have partly been codified in art. 49.1 TEU, which now explicitly requires the aspirant's respect of EU values and its commitment to promoting them. In addition, the content of these values has been adjusted to ensure some degree of correlation with the Copenhagen criteria. In this sense, a reference to the protection of the rights of persons belonging to minorities was introduced in article 2 TEU. Likewise, the procedure of art.7 TEU was introduced into primary law as an instrument to prevent possible democratic regression in the new Member States (Hillion, 2013: 9).

With the CFR in force, the EU monitoring power, and particularly that of the Commission is being strengthened, even beyond the scope of the EU Treaties. This stronger role of the Commission as guardian of the Treaties and of the Charter could go some way in tackling the evoked weaknesses of the EU system. Yet, several relate adjustments would have to be considered. In this vein, perhaps Member States should be asked to undergo an annual check-up on their fundamental rights and democracy compliance, as it happens, for example, within the Monetary Union⁴. This could then result in an annual report of the situation in all countries. Compliance with the EU's Charter of Fundamental Rights must be the minimum standard. In addition, no EU country should take lightly the so-called Copenhagen criteria once they have joined. Why no check current EU Member States against these criteria every year?

In sum, the evolving pre-accession fundamental rights discourse might catalyse further internal adjustments to enhance the domestic fundamental rights regime.

Enlargement and fundamental rights protection are thus significantly influencing one another: while the former contributes to enhancing the latter both externally and by necessity, internally, enhanced domestic fundamental rights protection might in turn benefit enlargement and the EU's legitimacy more generally.

⁴ To enter the Monetary Union, Member States have to comply with the conditions of the Stability and Growth Pact, especially as regard to public deficit and public debt. And these very requirements have to be respected once inside the Eurozone. At present, within the new economic and monetary governance framework, these conditions have been strengthened by a monitoring procedure, as a result of which there is the possibility of imposing economic sanctions on the countries that fail to respect the SPG's preventive and corrective rules. See European Commission, *New Guidance on Applying the Rules of the SGP*, available at: http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm

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