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LA CHARTE DES DROITS FONDAMENTAUX saisie par LES JUGES EN EUROPE

THE CHARTER OF FUNDAMENTAL RIGHTS as apprehended by JUDGES IN EUROPE

Sous la direction de
Laurence BURGORGUE-LARSEN

IREDIES

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AVANT-PROPOS

Etudier le droit de l'Union n'est pas chose aisée. Ce « droit de l'intégration » tel que l'avait théorisé avec brio Pierre Pescatore au début des années 1970, est un droit hors du commun des catégories juridiques classiques, ce qui ne facilite guère son appréhension théorique et pratique. Le développement considérable dont il a fait l'objet depuis plus de soixante-ans, couplé avec la charge idéologique qu'il charrie, ne participent guère à faciliter son étude. La famille des juristes, dans sa grande majorité, s'évertue tant bien que mal à décrypter les jeux complexes qui se nouent au cœur des institutions qui participent à créer ce *droit commun* censé incarner l'intégration des marchés et, au-delà, celle des Etats et des peuples. L'étude du droit de l'Union est en règle générale abordée à partir de cette mécanique où institutions, compétences, objectifs s'entremêlent pour dégager un dénominateur commun minimum. Si le droit de l'Union est un monde à lui seul – ce qui explique qu'il ait besoin de spécialistes pour le décrypter et le diffuser afin de le rendre intelligible – il ne peut pas être déconnecté de ce qui participe à sa création et à sa diffusion : le droit et la politique des Etats membres. Car l'Union, qu'on le veuille ou non, c'est cette étonnante alchimie entre le supranational et le national, entre les institutions européennes et nationales, entre l'ordre juridique de l'Union et celui des Etats. Or, aujourd'hui, cette intime interconnexion n'est toujours pas au cœur des analyses doctrinales majoritaires de « l'idée européenne », pour reprendre la belle formule de Pierre-Henri Teitgen. Ce n'est qu'à l'occasion des crises du processus intégratif que l'approche nationale de l'étude du droit de l'Union se voit relancée avec les nombreux biais qui en découlent. Il y eut pourtant des précurseurs comme le professeur Joël Rideau qui, en France, s'est évertué à prendre au sérieux, tout au long de sa carrière, cet irréductible fait national. Il faut dire que cette approche de l'étude du droit et de la politique d'intégration nécessite de dépasser les cloisonnements disciplinaires (toujours à l'œuvre et particulièrement destructeurs) et d'avoir le goût, l'envie, l'énergie de *re*découvrir le droit des Etats sous le prisme européen. Le décloisonnement disciplinaire est plus que jamais nécessaire à une époque où les approches théoriques sur les rapports de systèmes sont entièrement revisitées.

Le lancement de la collection des « Cahiers européens » en 2011 – avec comme premier numéro *L'identité constitutionnelle saisie par les juges en Europe* – avait justement le souci, de réintégrer la part du « national » dans l'étude du droit de l'Union. Non pas que cette approche entende tomber dans un cloisonnement de plus, en étant exclusive de toute autre manière de penser de façon critique le fait européen, mais entend simplement faire en sorte que le champ national – en ce qu'il fait partie intégrante du champ européen – ne soit pas ignoré des études européennes.

La Charte des droits fondamentaux saisie par la juges en Europe /
The Charter of Fundamental Rights
as apprehended by Judges in Europe
EAN 978 2 233 00824 4

AVANT-PROPOS

Le dixième numéro de la collection des « Cahiers européens » arrive, ce faisant, à point nommé. L'ouvrage sur *La Charte des droits fondamentaux saisie par les juges en Europe-The EU Charter as apprehended by Judges in Europe,* a été conçu sur la base d'une grille d'analyse imaginée afin d'appréhender toutes les phases et les manières avec laquelle la Charte des droits fondamentaux a pu être « saisie » par les différents acteurs nationaux ; il s'est agi de prendre la mesure, précise, du degré d'effectivité de ce texte dont on sait qu'il a été pensé et rédigé afin d'incarner et de rendre visible les valeurs de l'Union.

Cet ouvrage est le fruit de près de trois ans de recherche collective laquelle fut menée avec des chercheurs et collègues issus de vingt-deux pays membres de l'Union[1]. Qu'ils en soient tous chaleureusement remerciés ; sans leur indéfectible engagement et professionnalisme, cette cartographie constitutionnelle et judiciaire de la Charte au sein des Etats membres n'aurait pas pu voir le jour. Une telle entreprise a nécessité de faire des choix, notamment en termes linguistiques. Plutôt que de laisser au bord du chemin l'étude de nombreux pays, il a été délibérément choisi de publier l'ouvrage en français et en anglais, ce qui est aussi une manière de faire se rencontrer deux mondes académiques, trop souvent claquemurés dans leurs différentes cultures.

Ces quelques lignes ne pouvaient faire l'économie de remerciement appuyés et chaleureux aux membres de l'IREDIES (Aurélie Guillemet et Inès El Hayek) qui, sous l'expertise de Catherine Botoko, ont relu et harmonisé l'intégralité des communications. De même, il est important ici de mentionner le soutien indéfectible de l'Institut et des ses directeurs qui, animés par une vision ambitieuse de la recherche, ont rendu possible la publication de cet ouvrage.

Laurence BURGORGUE-LARSEN,
Directeur de la collection

[1] Les pays « manquants » n'ont nullement été écartés de façon arbitraire. Leur absence résulte simplement du fait qu'il a été complexe de trouver des chercheurs disponibles issus de ces pays (Croatie, Estonie, Lettonie, Lituanie, Pays-Bas, Slovaquie), pour s'engager entièrement dans ce projet collectif.

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PREFACE

Studying the law of the European Union is not an easy task. This « law of integration », as Pierre Pescatore theorized it at the early 1970s, is a particular law, different from classical legal categories, which does not help researchers to understand it theoretically and practically. Its significant development since more than sixty years, coupled with the ideological charge it entails, does not make studying it easier either. The lawyers' community, in their majority, is struggling to decrypt the complex interactions appearing within the institutions that participate in the creation of a common law which is intended to embody the market integration and beyond that, the integration of States and peoples. The study of the law of the European Union is generally addressed from the perspective of the close interconnection between institutions, competences and objectives to identify the lowest common denominator. Whereas the law of the Union is just a world of its own – which explains the need for specialists to interpret and diffuse it so as to make it understandable – it cannot be disconnected from the factors that contribute to its creation and diffusion: the law and politics of the member States. The European Union is, whether we like it or not, an astonishing alchemy between the supranational and national levels, European and national institutions, the Union's and the member States' legal order. However, this intimate interconnection is still not at the centre of the dominant doctrinal analyses of the « European idea » − to cite the great formula of Pierre-Henri Teitgen. The national approach of the study of the European Union's law is re-launched only at the time of the integration's crises, with many biases resulting from it. There were some early pioneers such as Professor Joël Rideau in France who during his entire career was striving to take seriously this irreducible national aspect that is the law and politics of the member States. One has to add that this research approach of the European Union's law and politics requires overstepping the (still operating and particularly destructive) disciplinary boundaries and having the desire, the motivation and the energy to rediscover the States' law through a European prism. The cross-disciplinary approach is more necessary than ever at a time when theoretical approaches about the relationships between systems should be entirely revisited.

The launch of the collection « Cahiers européens » in 2011 – with its first number on *The constitutional identity as apprehended by the judges in Europe [L'identité constitutionnelle saisie par les juges en Europe]* – was intended to reintegrate the "national" aspect to the research of the Union. This approach is not aimed to strengthen even more the disciplinary boundaries, which would exclude any other ways of critically analysing the European integration, but it is intended to ensure that the national agenda, constituting integral part of the European agenda, is not ignored in the European studies.

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PREFACE

The tenth number of the collection « Cahiers européens » appears just at the right time. The book on the *Charter of Fundamental Rights as apprehended by Judges in Europe [La Charte des droits fondamentaux saisie par les juges en Europe]* was elaborated on the basis of an analytical framework to assess all the phases and means in which the Charter of Fundamental Rights could be « apprehended » by different national stakeholders; the research aimed to measure to what extent the Charter is effective, while bearing in mind that the instrument has been conceived and drafted in order to enshrine and make visible the European Union's values.

This book is the result of almost three years of collective research; it has been conducted with researchers and colleagues from twenty-two member States of the European Union[1]. I warmly thank them for their work; without their unwavering commitment and professionalism, the creation of the present political and judicial map of the Charter would not have been possible. Such an undertaking required to make choices, first of all as to the language. Rather than leaving the research of several member States aside[2], it has been deliberately decided to publish the book both in French and English, which also enables the cooperation between the two academic worlds, very often confined to their separate culture.

I cannot conclude my short lines without expressing my wholehearted and warm word of thanks to the members of the IREDIES (Aurélie Guillemet and Inès El Hayek) who, with the expertise of Catherine Botoko, reviewed and harmonized the entirety of the chapters. Similarly, I must emphasize the generous support of the Institut and its directors who, guided by an ambitious research vision, made this publication possible.

Laurence BURGORGUE-LARSEN,
Director of the collection

[1] The « lacking » countries were not arbitrarily set aside. Their absence results from the difficulties to identify and find researchers from those countries (Croatia, Estonia, Latvia, Lithuania, the Netherlands, Slovakia) available for fully collaborating in this research project.
[2] With regard to the often prohibitive costs that the translation from English to French required.

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BULGARIA

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I. THE FORMAL STATUS OF THE CHARTER AND ITS ROLE IN THE PREPARATION OF NATIONAL LEGISLATION

I. 1. The formal status of the Charter

I.1.a. Does the Constitution contain a reference to international or European human rights instruments? If the Constitution has been recently amended or is a new Constitution, does it explicitly refer to the Charter?

The provisions of the Bulgarian Constitution concerning the external power[1] (the state institutions' competences for participation in the international relations) are not codified in one constitutional chapter. They are spread throughout the constitution. Four groups of constitutional provisions concerning the external power can be outlined. The first group consists in the proclamation of constitutional values and aims related to the international relations. The second group encompasses provisions devoted to the institutional design of the external power. It consists in creation of a constitutional model for distribution of statuses, functions and competences between the Parliament, the President, the Council of Ministers and other state institutions for participation in the international relations, for negotiation and conclusion of international treaties and for representation of the state. The third group is related to the participation of Bulgaria in supranational organizations. Finally, the fourth group concerns the international treaties' status in the domestic legal order and the system of sources of law.

A short overview of these provisions is needed in order to better define the context in which the topic of international treaties' standing in the Bulgarian legal order and the standing of the Charter in particular is allocated. This brief analysis of the external power provisions aims at exposing the logic of the

[1] For more information regarding the external power see M. BELOV, "Separation of Powers Reconsidered: a Proposal for a New Theoretical Model at the Beginning of the 21st Century", *in* A. GEISLER, M. HEIN, S. HUMMEL (eds.), *Law, Politics and the Constitution. New Perspectives from Legal and Political Theory*, Frankfurt am Main, Peter Lang, 2014, pp. 47- 63.

"opening function"[2] of the Bulgarian Constitution part of which is also the way international treaties are operationalized by the national legal system.

The Bulgarian Constitution in its preamble proclaims the peace as a constitutional value that has to guide the international policy of the state. This value is not further clarified and developed by the constitution itself. In addition it is proclaimed as one among many other values most of which do not have direct impact on the international relations. Hence the constitutional axiology is directed much more towards internal (domestic) than external (international or EU) issues.

Furthermore article 24 of the Constitution proclaims that the Republic of Bulgaria shall conduct its foreign policy in accordance with the principles and norms of international law. It provides that the foreign policy of the Republic of Bulgaria shall have as its highest objective the national security and independence of the country, the well-being and the fundamental rights and freedoms of the Bulgarian citizens, and the promotion of a just international order.

The external power institutional design is centred on three main institutions – the National Assembly, the Council of Ministers and the President. The National Assembly has monopoly over the ratification of the key international treaties and accomplishes control over the activities of the government. The President has important representative competences and plays central role in the symbolic politics.

However the real power centre in the external power is the Council of Ministers. It is the main institution that participates through its members both in the EU decision making and in the international relations. The government concludes the most important treaties. It introduces the treaties that do not fall into the scope of article 85 of the Constitution in the Bulgarian legal order via governmental decree. The Council of Ministers also determines and implements the foreign policy of Bulgaria either directly or through the ministers and the diplomats. Important players in the external power are also the Prime Minister and the minister of foreign affairs.

The only supranational or international organization which is mentioned by the Bulgarian Constitution is the EU. Provisions regarding the participation of the Republic of Bulgaria in the EU have been included in the Constitution not at the moment of its initial adoption but in 2005 – less than two years before the EU accession of Bulgaria. The Bulgarian Constitution contains the minimum of provisions which are absolutely necessary for the EU integration of Bulgaria. These include EU integration clause, provisions regarding the parliamentary control over the governmental activity on the EU level, basic principles of the elections for Bulgarian MPs in the European Parliament, permission for EU citizens to acquire land property in Bulgaria and permission for extradition of Bulgarian citizens to other EU member states.

[2] For the opening function of the constitution see G. BLIZNASHKI, *Constitutionalism and Democracy*, Sofia, University of Sofia "St. Kliment Ohridski" Press, 2009, p. 184 (in Bulgarian).

There is no clear constitutional provision regarding the hierarchical status of the sources of EU law in the Bulgarian legal order. One can presume that they either have supremacy over the whole national legal order including the Constitution due to the case law of the Court of justice of the EU hereunder "ECJ" (e.g. Internationale Handelsgesellschaft)[3] or are allocated under the constitution due to their treatment as international treaties. The constant practice of the Bulgarian Constitutional Court leads in the second direction. The Constitutional Court has no explicit pronouncement on the hierarchical position of the EU law in general or the Charter in particular. However it has declared admissible complaints for infringement of the EU law by act of Parliament under the procedure for control for conformity of the Bulgarian legislation with international treaties.

Thus implicitly the Constitutional Court suggests that the EU law should be subsumed under the category of international treaties. This is due to the fact that there is no special procedure for control for the conformity of the domestic legislation with the EU law in front of the Constitutional Court. The constitution prohibits the granting of new competences to the Constitutional Court by ordinary legislation. There has been also no constitutional amendment granting the power for such review to the Constitutional Court.

Hence the Constitutional Court has been forced to either reject motions for non-compliance of the Bulgarian legislation with the EU law or subsume them under the category of international treaties. The Constitutional Court has chosen the second option. However it is not clear whether the equalization of the EU law with the international treaties has been a deliberate choice of the Constitutional Court following antifederalist logic directed against the supremacy of the EU law over the Bulgarian Constitution or it has been just a choice provoked by the practical reason not to deprive the EU law of such institutional safeguard for its primacy over the ordinary Bulgarian legislation as the constitutional justice.

The Charter is not mentioned by the Bulgarian Constitution either with regard to its hierarchical status or with view to any substantial limitations or requirements that it might impose on the Bulgarian institutions. There is also no specific constitutional provision on the relationship between the constitutional catalogue of human rights and the human rights provided by the Charter. Hence the common reasoning regarding the status, the scope of application and the substance of the rights and freedoms proclaimed by the Charter and the Lisbon Treaty are valid without any particularities stemming out of the Bulgarian constitutional law.

According to article 5, paragraph 4 of the Constitution the international treaties which are ratified, published and entered into force for the Republic of Bulgaria are part of the domestic law of the country. They have primacy over these norms of the domestic legislation which are contravening them. Hence this type of international treaties prevails over all domestic legislation except the constitution.

[3] ECJ, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Rec. 1970, p. 1125.

The idea is that the constitution is supposed to be the legal manifestation and core of state's sovereignty. Thus it has to be safeguarded from any infringements with either domestic or international origin. That is why Bulgaria can negotiate or enter into any international agreements which contravene the national constitution only if there are corresponding constitutional amendments accomplished in advance. For example the EU accession of Bulgaria has been preceded by such amendments[4].

It is doubtful whether the concept of rigid constitutional supremacy can still serve as a sufficient safeguard of sovereignty due to the increasing mismatch between the scope of the constitutional provisions and the international and supranational legal standards as well as because of the jurisprudential activity of supranational courts such as the European Court of Human Rights (hereunder "ECtHR") and the ECJ. Anyway the supremacy of the Bulgarian constitution over international treaties is explicitly proclaimed by its article 5, paragraph 1 and is maintained in the jurisprudence of the Constitutional Court.

On the other hand, the supremacy of the international treaties over the sub-constitutional domestic legislation is legitimated by several reasons. It is a safeguard for the pacta sunt servanda principle and for the observation of the international standards that have become binding for the state via ratification of international treaties. Especially the supremacy of the human rights' treaties allows for the achievement of formal equality of human rights' protection standards between the high contracting parties and for a high degree of legal uniformity. Last but not least the supremacy of the international treaties over the sub-constitutional domestic legislation is prerequisite for the supremacy of the jurisprudence of the ECtHR and the ECJ because they have the same legal force as the international treaties that they interpret or apply.

It has to be taken into account that there are two ways for the introduction of international treaties in the Bulgarian legal system. The most important treaties which are enlisted in the catalogue of article 85 of the Constitution have to be ratified by an act of the Parliament. The treaties which are not included in that list can be introduced by governmental decree. Supremacy over sub-constitutional sources of law is granted only to the treaties that are ratified by the National Assembly via act of Parliament, published into State Gazette (the official journal of Bulgaria) and entered into force. International treaties which are introduced by the Council of Ministers are allocated under the constitution, the acts of the Parliament and the ratified international treaties. They have the rank of a governmental decree.

The monist system for implementation of international treaties is used in Bulgaria. Consequently the international treaties as such and not only the act for their ratification are valid part of the Bulgarian legal order. The ratification act is

[4] See E. TANCHEV, M. BELOV, "Constitutional Gradualism: Adapting to EU Membership and Improving the Judiciary in the Bulgarian Constitution", *European Public Law*, vol. 14, issue 1, March 2008, pp. 3-21.

just a formal one[5]. It does not have substance itself but has only the function to introduce the international treaty in the Bulgarian legal system thus serving as a link between the international and the domestic legal order.

I.1.b. Does any piece of national legislation refer to the Charter?

The only act of Parliament which refers to the Charter is the Foreigners in the Republic of Bulgaria Act. According to its article 9f, paragraph 3 personal data as well as biometric data are processed in the course of visa issuing activities. The biometric data include the photography of the person and his or hers ten fingerprints which are collected via procedure determined by a governmental decree and in compliance with the protective mechanisms provided by the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the *European Convention on Human Rights (hereunder "ECHR")*, the Charter of Fundamental Rights of the EU, the Convention on the Rights of the Child and the Personal Data Protection Act. The aim of this article is to establish criteria for personal and biometric data protection which are fully in compliance with the supranational legal standards without repeating them in the text of the Bulgarian act of Parliament.

I.2. The Charter's role in democratic deliberations

Are questions related to the Charter addressed during parliamentary debates? In the event of the existence of an obligation to consider the Charter, is this obligation sanctioned by judiciary supervision?

The Charter is being used for argumentation in parliamentary deliberations. Arguments that are indirectly related or directly based on the Charter are not frequently used in the parliamentary deliberations. The Charter is not among the sources of key rhetorical strategies or tactics used by the MPs. The limitation of the scope of application of the Charter to infringements caused by the EU institutions as well as the national institutions that implement EU law, the relative novelty of the Charter and the better knowledge and higher popularity of other human rights instruments such as the *ECHR* and the two UN Covenants on Civil and Political and on Economic, Social and Cultural Rights are among the key restraints to the systematic use of the Charter in the parliamentary debates in Bulgaria.

On the other hand the Charter seems politically appealing due to its EU origin and the fact that it is part of the primary EU law. It serves both as a device for affirmation of the belongingness of Bulgaria and its constitutional and legal system to the European legal civilization and as criterion for evaluation of the qualities of the Bulgarian Constitution and legislation with regard to the level of protection of human rights. This is due to the fact that the Europeanization of the Bulgarian legal, political and social system is very persistent trend in the modernization discourse in Bulgaria after 1989.

[5] See R. TASHEV, *General Theory of Law*, Sofia, Sibi, 2004, pp. 51 et seq. (in Bulgarian).

Hence the Charter's argumentative potential is derived mostly from its European origin and the fact that it is the most modern supranational human rights' act. Paradoxically exactly these two qualities of the Charter serve also as impediments for its more frequent use in the parliamentary discourse. This is due to the fact that during the first years after the Bulgarian EU accession there has been less knowledge about its content, essence and scope of application in comparison to more classical human rights instruments such as the ECHR. Moreover the judicial practice on the Charter is incomparably less developed than the jurisprudence of the ECtHR on the ECHR. In addition fighting political battles based on the Charter do not promise sufficient media attention and political as well as electoral benefits because of the relatively low level of understanding of the nature of the Charter in the Bulgarian society.

Thus the Charter remains to some extent overshadowed by the ECHR in the context of electoral politics. This may be explained by the fact that the ECHR has had already an established standing in the Bulgarian constitutional culture due to the activity of politicians, NGO's and law firms in promoting its advantages to the broader public and the potential plaintiffs in the ECtHR. In addition the ECHR offers much more direct way for human rights' defence against an offender – the state – that is much closer to the citizens than the EU institutions or the national institutions applying EU law.

It is interesting to note that the Charter is less popular source of legal and political argumentation in the parliamentary debates than some international treaties – the ECHR, the two UN Covenants and some conventions of international organizations such as the ILO. An explanation can be found in the fact that there is already an established tradition in the use of arguments stemming out of these acts. This finding leads to the conclusion that there is an intrinsic logic and dynamic in the use of the supranational acts in the parliamentary and the broader political discourse that is not always directly related to the mainstream trends in the general participation of the state in forms of supranational cooperation. In other words the ECHR and the UN treaties, covenants and conventions are still much more frequently used in the parliamentary and political discourse than the Charter although the participation of Bulgaria in the EU policy making is much higher on the political agenda than its participation in other forms of supranational decision making.

The Charter is always used together with other EU acts or international treaties. It is very rarely a central object of discussion. The procedure for ratification of the Lisbon Treaty is the only case when the Charter has been in the focus of the parliamentary deliberations. However even then the discussion on the Charter has been part of the broader deliberation on the merits and effects of the Lisbon Treaty.

Charter based argumentation is used by several actors. Charter referrals have been accomplished by the MPs in the course of the legislative procedure, during the parliamentary control or in the context of debates for ratification of an international treaty. Several parliamentary committees' reports presented during first or second plenary reading of draft acts of Parliament also contain arguments

stemming from the Charter. The President of the Republic and the state prosecutor general have based some of their motives for discontent with the draft parliamentary legislation in the decree for imposition of presidential veto or in the opinion of the state prosecutors' general office.

There are several typical usages of the Charter in the parliamentary deliberations. The Charter serves as a criterion for assessment of the compliance of the Bulgarian Constitution and legislation with the achievements of the EU law, as precursor and stimulus for legal reform consisting in adoption of new legislation or in introduction of amendments in the existing legislation and as source of argumentation for the adoption of political declarations by the Parliament or parliamentary groups or in the parliamentary control procedure.

Most frequently the Charter is used as criterion for the compliance of the human rights' protection achievements of the Bulgarian legislation with the EU standards. This is done in the course of the legislative procedure when the internal qualities of the draft act have to be analysed and assessed. It has to be noted that this assessment is rather superficial and formal. It usually consists in brief ascertainment of the general compliance of the act or its provisions with the supranational legal standards the EU standards included.

There are four types of legislative procedure in which Charter based arguments can be traced down. Most frequently the Charter is used as a criterion for legality during the first reading on draft bills in the plenary session of the National Assembly. In much more limited number of occasions the Charter has served as a source of legal argumentation in the second plenary reading of draft acts, in procedures for implementation of EU directives and in procedure for overcoming a veto imposed by the President of the Republic.

Two conclusions can be made. First, the number of cases in which arguments from the Charter have been used in first reading is higher than its application in the other three procedures which have just been mentioned even if they are taken jointly. The relatively little number of cases of discursive use of the Charter in the parliamentary debates does not allow for drawing up conclusions whether this finding is caused by the fact that the first reading is the procedure during which the general philosophy of the draft act and its broader compliance with supranational standards are discussed. Second, in most of the cases when arguments from the Charter have been used the parliamentary debate was not held in the context of adoption of an act of the Parliament for implementation of an EU directive. Hence the debates based on the Charter are not triggered by genuine EU incentives but predominantly by domestic causes and stimuli.

The Charter is debated in the context of adoption of various draft acts of Parliament covering a wide range of issues. The substantive scope of draft acts of Parliament during the adoption of which arguments stemming from the Charter have been used covers the following fields: foreigners' rights, refugees' rights, minority rights, trade unions' rights, freedom of press and freedom of expression, right to life, property rights, biometric data protection, the free and informed consent as a safeguard for the human dignity of the organ donors,

the right to informed consent for vaccination, the protection of cultural, linguistic and ethnic pluralism, the principle of equality and prohibition of discrimination and the prohibition of preaching of fascist, anti-Semitic, xenophobic or antidemocratic ideology.

The only case of argumentative use of the Charter in the context of implementation of EU directive concerned Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. However there was no real debate concerning rights provided by the Charter. The Charter has only been mentioned by Svetlin Tanchev – the MP who presented the directive to the plenary of the National Assembly. His speech was purely affirmative and not meant to produce any debate. According to Mr. Svetlin Tanchev

> "the directive aids the safeguarding of the fundamental rights of the citizen and is drafted in full compliance with the Charter and more precisely with its article 11. Hence the directive does not prevent in any way the member states to apply their constitutional rules on the freedom of press and freedom of expression in the mass media"[6].

The procedure for outvoting the veto of the President concerned the draft act for the amendment of the Labor Code. According to the motives of the President written down in his decree the grounding of the representativeness of the employers' organizations on the number of workers employed via labor contract contravenes the equality principle proclaimed by many international treaties as well as by article 20 of the Charter. However there was no follow up parliamentary debate related to this Charter based argument.

The Charter is used also as a criterion against which the human rights' catalogue or more broadly the general system of human rights' protection provided by the Bulgarian Constitution is assessed for meeting the EU standards. This is done not in the context of debates for constitutional reform but either in the course of a general political debate on the advantages and disadvantages of the EU membership of Bulgaria or in the case of the Lisbon Treaty ratification by the Bulgarian National Assembly.

The latter case demonstrates very well the typical features of the attitude towards the Charter. On the one hand, the Charter as well as most of the EU law is deemed modern, advanced and well elaborated thus deserving to be almost uncritically followed. Usually the implementation of EU standards in Bulgaria is accomplished not by thorough deliberation and critical reception but by welcoming transplantation[7].

[6] Protocol from the parliamentary session from 18.12.2009.
[7] For the legal transplantation see A. WATSON, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., University of Georgia Press, 1993.

Hence the debates on the ratification of the Lisbon Treaty and the Charter as a part of it have been devoted mainly to the celebration of its achievements. For example one of the socialist MPs – Janaki Stoilov, in his speech has said that

> "…the Lisbon Treaty grants new safeguards for the protection of human rights…This demonstrates that the EU is not only a system of institutions but it also allows the individual citizens to get in direct contact with these institutions". According to him "from political point of view the mere fact of the adoption of the Charter is more important than the concrete human rights' catalogue that it contains"[8].

The political affirmative discourse is supported by most of the parliamentary groups. The MP Jordan Bakalov from the center right United Democratic Forces has stated that the EU becomes a value union due to the Lisbon Treaty and the Charter. He has suggested that they transform Europe into Europe of the citizens[9]. According to the socialist party MP Georgi Bliznashki "the Charter gives new self-confidence to the European citizens as well as meaning and depth to the EU citizenship". He has especially underlined "the great importance of Part IV "Solidarity", which encompasses the rights of the working people". Furthermore Bliznashiki has put a special emphasis on the function of Part IV of the Charter as a "great step forward towards the achievement of social Europe, Europe that is aiming at full employment"[10].

On the other hand, the debates on the Lisbon Treaty's ratification are used as an occasion for demonstration of the merits of the Bulgarian Constitution and for appreciation of its democratic and European character. According to the MP Georgi Bliznashki "while comparing our Constitution – the 1991 Constitution of Republic of Bulgaria - with the Charter we can come to the conclusion on many issues that our Constitution is fully integrated with the most advanced tendencies in the development of the European constitutionalism. We will not need to make amendments provoked by the Charter"[11]. The MP Janaki Stoliov stipulates:

> "we can ascertain with satisfaction the principle congruence between the rights enshrined in Chapter II of the Bulgarian Constitution and the Charter. Consequently the ratification of the Lisbon Treaty and the Charter by the Republic of Bulgaria does not cause any contradiction between the Bulgarian legal system and the legal system of the EU"[12].

Some speeches held during the Lisbon Treaty ratification debate deviate from the general trend of parallel affirmation of both the progress made with the Charter and the satisfactory conformity of the Bulgarian Constitution with the new human rights' standards established by the EU law. However they are following different logic and argumentative aims and are triggered by rather opposite incentives.

[8] Protocol from the parliamentary session from 21.03.2008.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.

According to the Vice Prime Minister Ivaylo Kalfin "the Charter goes far beyond the provisions of the Bulgarian Constitution and the Bulgarian legislation"[13]. However his proposition was meant not to be critical towards the domestic legislation but to be supportive to the new trends in the EU law and the granting of primary EU law status to the Charter in particular. That is why he ascertained that through the Charter as a source of EU law with binding character Europe becomes more democratic and turns into a "community of equal democratic standards" valid throughout its territory.

The position of Ivaylo Kalfin is supported by the MP Janaki Stoilov who has suggested that there is no acute problem regarding the possible differences between the Charter and the national constitutional law due to two reasons. The first reason is that there is great proximity between the human rights' catalogues provided by the Charter and the Bulgarian Constitution. The second reason is the partial separation of the fields of application of these two legal acts[14].

An opinion which goes in the opposite direction has been expressed by the nationalist party "Ataka" leader and MP Volen Siderov. According to him

> "the Bulgarian Constitution safeguards the human rights and the rights of the minorities regardless of their origin, faith, religion etc. Consequently why should we look for a Charter that reaffirms rights which are already provided by the Bulgarian Constitution?"[15]

This speech has been directed towards affirmation of the achievements of the Bulgarian constitutionalism and has been conceived to serve as an expression of Euroscepticism. It is clear that it did not sincerely tackle the true nature of the Charter which is not meant to serve as a substitution of the Bulgarian or any other national constitution.

There is also a third discourse in the framework of the Lisbon Treaty ratification debate which has run in parallel to the already mentioned affirmative and critical discourses. It has consisted in the attempts at analysing the merits and problems of the Charter itself and detached from any comparison with the Bulgarian Constitution. The MP Janaki Stoilov has presented to the Parliament a brief overview of the nature and the characteristics of the Charter as well as the novelties that it will introduce in the EU and the national constitutionalism. He has emphasized several issues that might have become problematic, i.e. the congruence between the rights and duties according to the EU law and the rights and duties provided by the national constitutional law, the distribution of power between the EU and the member states with regard to human rights protection, the discrepancy between the official recognition of certain rights and their factual limitation etc[16].

[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.

It has already been mentioned that arguments from the Charter have been used for political communication between the President of the Republic and the National Assembly in the context of the procedure for overcoming and outvoting the presidential veto on a draft act of the Parliament. Another occasion for implementation of Charter based arguments in the context of the political discourse between the head of state and the Parliament has been the parliamentary debate on the national referendum on compulsory, majority and electronic voting that has been proposed by the President. According to the report of the Legal Issues Committee of the Parliament the compulsory voting proposed by the President will constitute an infringement of article 39 of the Charter because it violates the principle of free expression of the voters' will. The MP Chetin Kazak from the Movement for Rights and Freedoms Party on behalf of the Legal Issues Committee has expressed also concerns that the compulsory voting will have a negative general influence on the human rights in Bulgaria because it will set the negative precedent of transforming a right into a duty[17].

The Charter is cited also in one declaration adopted by the National Assembly. This is the Declaration for Condemnation of the Attempt for Compulsory Assimilation of the Bulgarian Muslims. It uses as source of argumentation both the Charter and the ECHR.

Furthermore the Charter is used as a source of argumentation in one declaration of a parliamentary group. This is the Declaration against the so called "Lukov March" which has been introduced by the parliamentary group of the Movement of Rights and Freedoms. This declaration stipulates that the Charter as well as several other human rights documents prohibit the dissemination of fascist, anti-Semitic and other xenophobic or antidemocratic ideology.

The Charter has been used on two occasions also in the context of the parliamentary control procedure. The minister of foreign affairs Kristian Vigenin has been asked by the MP Djema Grozdanova why he is not dismissing from diplomatic service persons who have worked for "State Security" − the secret services of the former communist regime. Mr. Vigenin insisted that the limitation of the possibility of persons who belonged to or cooperated with "State Security" and the intelligence service of the Bulgarian Army to occupy diplomatic positions would constitute discrimination and infringement of their right to free practice of the profession granted by several international treaties as well as by the Charter[18].

Another instance in which arguments from the Charter have been used in the parliamentary control procedure is the question asked by the MP Desislav Chukolov to the minister of health Miroslav Nenkov. Mr. Chukolov suggested that the parents of the children must have the right to informed consent for the vaccination in Bulgaria. According to Mr. Chukolov the right of the parents to an informed choice whether to allow immunization of their children or not which is granted by the Charter is infringed by the compulsory vaccinations for many diseases imposed by the Bulgarian legislation[19].

[17] Protocol from the parliamentary session from 17.06.2014.
[18] Protocol from the parliamentary session from 14.03.2014.
[19] Protocol from the parliamentary session from 29.10.2014.

II. THE CHARTER SEIZED BY NATIONAL JUDGES

II.1. The applicability of the Charter

II.1.a. Do national judges have a fair understanding of the notion of "implementation of EU law" to which Article 51 of the Charter refers, as well as to the case law of the ECJ regarding the matter?

The Bulgarian judges are supposed to be informed and educated on many occasions regarding the Charter in general as well as the scope of its implementation in particular. There are courses on EU Law, on Constitutional Law and on Human Rights that are taught at the law faculties of the Bulgarian universities which should tackle the matter. Moreover there is specialized training for magistrates (judges and state prosecutors) which is provided in the framework of the educational programs of the National Institute of the Justice. All judges and state prosecutors get such education aiming at improving their practical knowledge and skills.

However it is hard to assess whether the magistrates have a fair understanding of the notion of "implementation of EU law" used in Article 51 of the Charter as well as of the CJUE's practice on that matter. It is impossible to track down whether the theoretical training both in the universities and in the National Institute of the Justice suffices for making that notion operational in the judicial practice.

Nevertheless, a short overview of the national judicial practice on application of the Charter does reveal that domestic courts take into account the Charter's provisions and consider it as an integrated part of domestic law. In this relation, we could point out that ordinary courts frequently apply the Charter even if the dispute brought before them does not fall into its field[20]. According to this commonly shared position, the Charter has a broad scope of application. This tendency is quite original and explains to some extent the important number of decisions of ordinary courts which refer expressly to the Charter.

However a more traditional approach could also be observed when the national judge has to interpret article 51 of the Charter. According to it the Charter should be applied by national judges when the dispute falls into the field of EU law or when national measures implement EU provisions[21]. If the dispute does not

[20] In that respect the Charter represents an exception from the general trend of reluctance of the Bulgarian courts to apply directly EU law, international law and case law of ECJ and ECtHR. According to a representative survey with judges and state prosecutors accomplished in 2012 by the Justice Development Foundation the number of the magistrates (judges and state prosecutors) which never apply directly the case law of the ECJ and the ECtHR is 17.1 % and 12.5 % respectively. Moreover only 54.1 % of the magistrates declare that they regularly apply with primacy international treaties, 43.2 % the case law of the ECJ, 52.6 % the case law of the ECtHR and this is the case only if there is an established practice. For further analysis and data see M. BELOV, "The Sources of Law in Action: the Judiciary between Legal Positivism and Legal Realism", *Savremenno pravo*, 2012, n° 4, pp. 29-46 (in Bulgarian).

[21] For example, see the case-law quoted hereby.

concern EU law, the courts reject the requests as inadmissible and manifestly ill-founded. Nevertheless, it could be underlined that the latter judicial position has not been yet sufficiently clear and precise in order to have a common understanding of the basic concept of "national implementation of EU law".

However, the administrative courts' practice on Article 133 of the Code of Administrative Procedure could be interpreted as a first step for national jurisdictions in the way to define the concept of implementation of EU law. This article expressly stipulates that "the proceedings shall fall within the jurisdiction of the administrative court in whose judicial district the authority which adopted the contested administrative act has its seat". As to ownership and use of agricultural land issues, "individual administrative acts (…) and its implementing decree and refusals to adopt such acts – unless enacted by the Minister for Agriculture and Food – may be challenged before the district court in the place where the property is allocated". The administrative courts have confirmed the conformity of these legal provisions regarding the national rule of jurisdiction with article 47 of the Charter. In addition, they have also declared that article 133 is a national measure implementing EU law clauses when the schemes and measures of the common agricultural policy have to be applied[22]. In this connection, the national rule of jurisdiction provided by article 133 has to be applied in relation with the principle of effectiveness according to ECJ's case-law on procedural autonomy of Member States. This position was confirmed by ECJ in *Agrokonsulting-04* case[23].

Are there divergences between the constitutional court and ordinary judges?

The Charter is taken as a holistic phenomenon functions as a legal standard in the national legal argumentation in Bulgaria. This conclusion can be made on the basis of the analysis of the national judicial practice. Hence there is not significant divergence between Constitutional Court and ordinary jurisdictions regarding the referral to the Charter as an authoritative and quasi-ideological source of principle argumentation. The Charter serves as one of the sources of legal argumentation which are used both by the parties to the law suit and by the judges.

However there is significant divergence in the jurisprudence of the Constitutional Court and the ordinary courts when they apply concrete provisions of the EU law in general or the Charter in particular. Indeed this divergence is fundamental due to the different approach used by the two types of jurisdictions regarding the EU law and the Charter.

The Constitutional Court refers to the international law nature of the Charter and decides in favour of the primacy of the Constitution over the sources of EU law even if it has to take into account the relevant clauses of the EU law when it

[22] See, administrative court Pernik, 30 May 2011, n° 402, on case n° 490/2011; See administrative court Pazardjik, 25 August 2011, n° 439 on case n° 600/2011; administrative court Pleven, 20 September 2011, n° 657 on case n° 826/2011; supreme administrative court, 25 November 2011, n° 15590 on case n° 14187/2011.
[23] ECJ, Case C-93/12, *Agrokonsulting-04*, ECLI:EU:C:2013:432.

interprets the Constitution. Such paradoxical position could be explained by article 149 of the Constitution which is ambiguous. Indeed article 149, paragraph 1, point 2 provides for a judicial review of the compatibility of a domestic law with the Constitution (control for constitutionality) while article 149, paragraph 1, point 4 deals with the judicial review for conformity with the international law (control for compliance with international law). The Constitutional Court in its practice does scrupulously respect the distinction between these two constitutional provisions Hence, the Constitutional Court do not use argumentation from the EU law both in the motives and in the dispositive part of its decisions when it is not invoked directly in relation with article 149, paragraph 1, point 4. Such position could be explained by the reluctance of the Constitutional Court to solve potential conflicts between the Constitution and the EU law in general. However, its decisions do reveal that the Constitutional Court gives precedence to the Constitution over the EU law in general and the Charter in particular.

Unlike the Constitutional Court the ordinary courts, have expressly ruled in favour of the application of the Charter[24]. The Charter was explicitly supported by ordinary courts so as to ensure both its status as part of the internal law and its primacy over the domestic legal provisions. Hence, the Charter is not an ordinary supranational law instrument. It is a part of the national law in spite of its supranational nature. This reasoning is expressly based on article 5, paragraph 4 of the Constitution. In the light of this constitutional provision, the Charter is immediately applicable with direct effect and is integrated into the domestic legal system taking precedence over domestic laws. Hence, its provisions could not only be directly invoked in front of the courts, but also would bind them to control the compliance of the national legislation with the Charter and if necessary to apply the Charter instead of national legal provisions which are incompatible with it.

This principle position on the Charter's status has also been reiterated within national judicial practice of most of the courts even if the dispute does not fall into the Charter's scope of application especially with regard to its article 51[25]. The court's position is that the Charter has to be applied in any circumstances as an integral part of domestic law. Such position could be explained by the specific nature of Founding Treaties and the EU integration process[26] but also by the specific scope of the Charter in the field of human rights[27]. Its embodiment into domestic law is supposed to contribute to strengthen the protection of the rights

[24] As A. KORZNEZOV says "these might (…) be the signs of an unusual upheaval for the lower courts against the system's intertia, a contemporary story of David standing up to Goliath. All of this would have been Unthinkable before EU accession", A. KORNEZOV, "When David teaches EU law to Goliath: a generational upheaval in the making", in M. BOBEK (ed.), *Central European judges under the european influence. The transformative power of the EU revisited*, Oxford, Hart Publishing, 2015, p. 242.

[25] See the analysis regarding the application of the Charter by the national courts even in cases when the EU law is not concerned.

[26] M. FARTUNOVA, « Le droit de l'Union européenne devant les juridictions bulgares : retour sur 7 ans d'application juridictionnelle », *RAE*, 2014, n° 3, pp. 553 and following.

[27] See district court Pleven, 12 November 2014, on case n° 2639/2014.

and freedoms provided for by the Constitution. The Charter does contribute with certainty for the amendment and the evolution of national legislations in this domain[28].

The invocation and the application of the article 47 of the Charter is good example for the divergent positions of the Constitutional Court and the ordinary courts regarding the Charter's scope and status with view to the judicial review. During the period 2010-2012, several cases were brought in front of ordinary courts in order to appreciate the compatibility of national legislation which limited the right to an effective remedy with the Charter. This legislation excluded the possibility to file a legal complaint if the material interest of the case is below certain value[29]. Thus in many cases the citizens were deprived of a right to judicial defence against sanctions imposed on them. Important examples are the sanctions provided by article 189, point 13 of the Road Traffic Act and article 416, point 7 of the Labour Code[30].

Many ordinary jurisdictions declared the incompatibility of article 189, point 13 of the Road Traffic Act with article 47 of the Charter as well as with article 6, paragraph 1 of ECHR[31]. The ordinary courts stipulated that, these articles have direct effect and thus have to be used as criterions for evaluation of the domestic legislation and as safeguards of the right to fair trial. The Constitutional Court has been approached on the basis of article 149, paragraph 1 point 2 of the Constitution with the demand to pronounce on the constitutionality of this legal provision with the Constitution and with the article 6, paragraph 1 of the ECHR. In its Decision n° 1 of 2012 the Constitutional Court declared the unconstitutionality of the above mentioned legal provision. According to the Constitutional Court it contravenes article 120, paragraph 2 and article 56 of the Constitution. The reasoning of the Constitutional Court deserves attention. As to the direct effect of article 6 paragraph 1 of ECHR, the Constitutional Court ruled that the ECHR had to be taken into account due to the principle of consistent interpretation in relation to the ECtHR's case-law on the right to a fair trial. On the other hand, article 47 of the Charter has not been mentioned by the Constitutional Court although most of the ordinary courts' decisions have declared the inconsistence of this legal provision with the Charter and not with the article 6 paragraph 1 of the ECHR.

The ambiguity between points 2 and 4 of article 149, paragraph 1 of the Constitution has led paradoxically to a very challenging situation in which some

[28] See for the same position on ECHR, M. FARTUNOVA, « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales dans la doctrine nationale bulgare », *ADE*, 2009, p. 1044.
[29] District court Pomorie, 3 January 2010 ; district court Pomorie, 24 June 2010, n° 50 ; district court Pomorie, 7 February 2011, n° 13 ; district court Pomorie, 4 July 2011, n° 56 ; district court Shoumen, administrative section, 14 March 2011, n° 296; for example 100 leva: district court Berkovitsa, 17 January 2011, n° 520 ; administrative Court Rousse, 26 September 2011, on case n° 312/2011 (Article 113 § 3 of the Forests Act) ; administrative court Rousse, 3 October 2011, on case n° 304/2011 (Article 239 § 3 of the Territorry Structure Act).
[30] Administrative court Sliven, 19 December 2011, on case n° 268/2011.
[31] See district court Shumen, 22 March 2011, n° 370 on case n° 2/2011.

ordinary courts have refused to recognize the legal effects of the EU law. When article 416, point 7 of the Labour Code was challenged with regard to its incompatibility with article 47 of the Charter and article 6 paragraph 1 of the ECHR, the national courts did not ensure the precedence of the EU law over national legal provision. The reasoning in these cases is extremely interesting for the proper understanding of the difficulty of the application of the Charter in Bulgaria. In this regard, the courts also ruled that they could not control the conformity of this legal provision with the relevant clauses of the ECHR, due to the fact that according to article 149, paragraph 1 point 4 of the Constitution the accomplishment of such control is competence of the Constitutional Court[32].

Consequently the national courts had to apply the domestic legal provision[33] until the Constitutional Court had solved the issue of the compatibility with the constitutional provisions and international treaties' clauses which do not possess direct effect. This judicial position is clearly inconsistent with and contradictory to article 5, paragraph 4 of the Constitution and with the case-law of the ECtHR and the ECJ on the legal effects of the EU law and the ECHR.

Fortunately, this position is not shared by the majority of ordinary courts[34]. However it does reveal the difficulty for the ordinary courts to apply the EU law in general and could explain the divergence in the case-law not only between ordinary courts themselves but also between different formations of the same court[35].

This judicial position could be explained to some extent by the particular conception of the hierarchy of the sources of law adopted by the 1991 constitution[36]. The hierarchical place of international law has been recognized by the 1991 Constitution in its article 5, paragraph 4[37]. Because of this article the supranational sources of law have been progressively integrated in the national courts' decisions. This integration is still recent and this fact explains the reluctance of some national courts to apply them with primacy and derogative

[32] Administrative court Sofia grad, 27 March 2009, n° 279/2009; district court Silistra 2 August 2011, n° 43 ; district court Silistra, 3 August 2011, n° 581 ; district court Silistra, 3 August 2011, n° 232. See the developments above.

[33] See administrative court Varna, 28 November 2011, on case n° 4050/2011; administrative court Varna, 20 December 2011, on case n° 4053/2011.

[34] See administrative court Varna, 14 November 2011, on case n° 3842/2011; administrative court Sliven, 19 December 2011, on case n° 268/2011. This administrative court expressly controlled the national legal provision with the Article 47 of the Charter and Article 6 § 1 of ECHR. It ruled that the legal provision challenged before it was inconsistent with the European instruments which are part of national law according to Article 5 § 4 of the Constitution.

[35] See administrative court Varna, 28 November 2011, on case n° 4050/2011 (IVth division) quoted above; on case 4050/2011 ; administrative court Varna, 20 December 2011, on case n° 4053/2011 (VIth division) quoted above; *a contrario* administrative court Varna, 14 November 2011, on case n° 3842/2011 (II division) quoted above.

[36] See administrative court Pernik, 27 October 2011, n° 248 on case 242/2011.

[37] E. KONSTANTINOV et al., *The 1991 Constitution and the Participation of Bulgaria in the international Treaties*, Sofia, SIBI, 1993 (in Bulgarian); E. KONSTANTINOV, "The incorporation of international law into national law under the 1991 Constitution", *Judicial Reflection*, 1993, pp. 54-63 (in bulgarian) ; E. KONSTANTINOV et al., *Civil society and individual rights: the Bulgarian experiment during the transitional period*, Sibi, Sofia, 1997 (in Bulgarian).

effect to the national legal provisions[38]. In that respect, this judicial position is clearly in favour of the fundamental rights' protection provided by the constitution[39].

II.1.b. What is the ordinary judges' understanding of the horizontal effect of the Charter?

There is no data on the Bulgarian ordinary judges' understanding of the horizontal effect of the Charter. Research on that issue is also lacking. The future magistrates get legal training on the Charter at the law faculties of the universities as well as at the National Institute of the Judiciary. However no special emphasis is put exactly on the horizontal effect of the Charter.

II.2. Implementation of the Charter

II.2.a. References to the Charter

Does the constitutional Court use the Charter? Has the Charter been integrated as an instrument of reference of the constitutionality control? How often do ordinary judges refer to the Charter, and are these references more frequent in some domains than in others? What are the most important cases in the internal legal order?

II.2.a.i. The Charter in the jurisprudence of the Constitutional Court

The Charter is relatively frequently used in the constitutional justice procedures accomplished in front of the Bulgarian Constitutional Court. This is especially true if we compare the intensity of usage of the Charter in other legal and political discourses in Bulgaria – legislative, parliamentary control, ratification, electoral, media etc. Hence the constitutional jurisprudence can be defined as a sphere of more or less systematic use of the Charter since it became valid source of law for Bulgaria in 2009.

However the use of the Charter is predominantly formal. There are several potential ways through which the Charter can be put in practice by a constitutional court. The Charter may serve as criterion for validity of legal acts, as source of inspiration and legal argumentation and as a source of references with political and indirect legal importance. Hence the Charter could have high importance for maintaining the compliance of the national law with EU human rights standards or could function as an argumentative strategy for broad reassurance of the compatibility or for claiming of incompatibility of the national and supranational legal standards in the sphere of human rights.

The Charter has specific scope of application. It is binding for the EU institutions as well as for the national institutions when they apply EU law. Consequently the Charter is not directly binding for the national institutions

[38] See M. BELOV *op.cit*., pp. 29-46.
[39] For further details on the place of the international law in the field of human rights in the domestic legal system see M. FARTUNOVA, « La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales dans la doctrine nationale bulgare », *op. cit*., p. 1034.

when they adopt or apply purely domestic law that has no reference to EU law. However the Charter is an international treaty. It is part of the Bulgarian law due to the monistic system of implementation of international treaties. Furthermore the Bulgarian Constitution provides for the control for compliance of the domestic legislation with the international treaties to which Bulgaria is part.

Hence the Charter may serve as a source of legal argumentation for the Bulgarian Constitutional Court although it is not directly binding for the Bulgarian institutions and more precisely for the National Assembly in the course of the adoption of legislation that is not implementing EU law. In most of the cases the Constitutional Court has used the Charter as a source of legal argumentation of secondary importance and as indirect criterion for validity of the Bulgarian legislation. Typically the Charter is just one among many supranational acts that are used as arguments for the contravention of the acts of Parliament to the supranational human rights' standards.

The Constitutional Court uses the Charter much more frequently in the motives to the decision than in the dispositive part of the decision. In most of the cases the Charter has served purely decorative functions. This is due to the fact that it has been mentioned by the subjects which can approach the Constitutional Court in their motions as part of the supranational standards' package potentially infringed by Bulgarian legislative provisions. Then it has either been incrementally cited in the motives to the decision (i.e. Decision n° 13 of 2012 on constitutional case n° 6 of 2012, Decision n° 15 of 2010 on constitutional case n° 9 of 2010) or it has been tacitly forgotten and left without any further assessment by the Constitutional Court (i.e. Decision n° 8 of 2013 on constitutional case n° 6 of 2013, Decision n° 11 of 2012 on constitutional case n° 1 of 2012, Decision n° 3 of 2012 on constitutional case n° 12 of 2011). An example of the rather formal use of the Charter and the secondary role that it plays in comparison to other international treaties is the above cited Decision n° 13 of 2012 on constitutional case n° 6 of 2012. In the motives to that decision the Constitutional Court uses many arguments from the ECHR whereas the Charter is just mentioned.

Constitutional Court's decisions which contain relatively elaborated Charter based argumentation are rather rare. An example is Decision n° 7 of 2012 on constitutional case n° 2 of 2012 which concerns pretended infringement by provisions of the Bulgarian Labor Code of the right to labor granted by the Charter. The Constitutional Court develops relatively extensive analysis based on arguments stemming from several international treaties including the Charter. However the Constitutional Court proclaims only the unconstitutionality of the Labor Code provisions but not their invalidity due to infringement of the international treaties in general and the Charter in particular. This decision is an instance where the protective function of the Constitutional Court for the international treaties and the EU law is overshadowed by its role as a safeguard of the Bulgarian Constitution.

Decision n° 11 of 2012 on constitutional case n° 8 of 2011 should also be mentioned due to the fact that it is one of the rare decisions in which the

Constitutional Court proclaims the invalidity of legislative provisions due to both unconstitutionality and contravention to international treaties although the Charter is not explicitly mentioned in the dispositive part of the decision. This decision is interesting and important also in other aspect. Together with Decision n° 2 of 2015 on constitutional case n° 8 of 2014 it is rare example of the use of arguments taken from decisions of the ECJ by the Bulgarian Constitutional Court.

Decision n° 11 of 2012 the Constitutional Court refers to the practice of the ECJon article 15 of the Charter concerning the freedom to choose an occupation and the right to engage in work. Decision n° 2 of 2015 contains arguments provided by the ECJ regarding the infringement by the EU Data Retention Directive 2006/24 of privacy rights granted by the Charter. In Decision n° 2 of 2015 the Bulgarian Constitutional Court puts forward also arguments for the Data Retention Directive's contravention to the Charter that are taken from the practice of the constitutional courts of Germany, Austria, Romania, Check Republic, Slovenia and Poland. Thus the Bulgarian Constitutional Court engages in a horizontal judicial dialogue[40] on EU matters with other constitutional jurisdiction of EU member states.

Decision n° 12 of 2010 on constitutional case n° 15 of 2010 is the only decision in which the Charter is used not just as a source of argumentation in the motives but also as a direct criterion for invalidity of provisions of an act of Parliament stipulated in the dispositive part. In this case the President of the Republic and opposition MPs pretend that provisions of the Labor Code and the State Officials Act infringe the Charter. The Constitutional Court finds that indeed paragraph 3 of the Transitory Provisions of the Labor Code and paragraph 8 of the Transitory Provisions of the State Officials Act contravene the right to an annual period of paid leave provided by article 31, point 2 of the Charter as well as infringe several other international treaties and an EU directive.

According to the Bulgarian Constitution there are several acts that can be controlled for constitutionality and for compliance with the international treaties and the generally recognized principles of international law. These are the acts of Parliament, the parliamentary decisions and the decrees of the President of the Republic. The international treaties can also be compared for their constitutionality before their ratification[41].The control for constitutionality and the control for conformity with international treaties and generally recognized norms of international law are two distinct competences of the Constitutional Court which can be accomplished either separately or jointly. However all of the cases in which the Charter is used as an argument for invalidity of provisions of an act of Parliament concern joint procedure for parallel control for constitutionality and for compliance with international treaties. In other words

[40] See also F. JACOBS, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", *Texas International Law Journal*, vol. 38, 2003, pp. 547 *et seq*.
[41] See Article 149 § 1 (4) of the Constitution.

the Charter has never been the one and the only criterion for validity of acts of Parliament. Actually this is not a peculiarity of the Charter because the overwhelming part of cases for control of legislative acts for their conformity with international treaties is accomplished together with their control for constitutionality. Thus the Constitutional Court's practice on the Charter just follows well established trends and tendencies in the analyzed domain.

The main explanation of the systematic application of such joint procedures consists in the fact that the Charter as well as the other international treaties is typically used as an additional source of argumentation for the infringement of human rights provided by the Bulgarian Constitution. Hence the control for compliance of the acts of Parliament with international treaties is typically substantially though not formally subordinated to the control for their constitutionality in the practice of the Bulgarian Constitutional Court. Partial exception of that tendency is the ECHR and the jurisprudence of the ECtHR which enjoy high standing in the Constitutional Court's practice and do not serve supplementary function to the control for constitutionality.

Since 2009 – the year when the Charter became valid law for Bulgaria − only acts of Parliament have been reviewed for their conformity with the Charter. This is due to several reasons. Parliamentary decisions and presidential decrees are in principle much rarely controlled for their constitutionality and compliance with international treaties. The overwhelming practice of the Constitutional Court concerns control of acts of Parliament. Moreover the parliamentary decisions and the presidential decrees do not implement EU legislation. Partial exception are the Rules for Organization and Activity of the National Assembly which contain provisions regarding the parliamentary control over the governmental activity on the EU level. They are adopted by parliamentary decision. In addition the constitutional jurisprudence allows the parliamentary opposition to have a second chance in invalidating some legislative provisions through their declaration by the Constitutional Court as being in contradiction to supreme legal standards – the constitution and the international treaties. That is why Charter based reasoning is used only in connection with the constitutional control over the legislation.

The normative acts adopted by the government are excluded by the Bulgarian Constitution from the controlling competence of the Constitutional Court. Their compliance with the international treaties in general or the Charter in particular can be controlled in front of the Supreme Administrative Court.

The use of the Charter by the institutions that have the right to approach the Constitutional Court has to be distinguished from its use by the Court itself. These two types of use of the Charter are grounded on different argumentative strategies, follow different incentives and are made possible by different legal competences. The Bulgarian Constitution grants the right to approach the Constitutional Court with motions for unconstitutionality or incompliance with international treaties and generally recognized norms of international law to 1/5 of the MPs, the President of the Republic, the government, the Supreme Court of Cassation, the Supreme Administrative Court and the State Prosecutor General.

Most of the cases for control of the compatibility of acts of Parliament with international treaties are initiated by the MPs. This is true also for the cases in which arguments from the Charter have been used. There is only one case initiated by the President of the Republic in which arguments stemming out of the Charter has been put into practice. However this case n° 15 of 2010 has been merged with case initiated by MPs due to their common object. The government, the Supreme Court of Cassation, the Supreme Administrative Court and the State Prosecutor General have neither initiated cases for control of the compliance of the Bulgarian legislation with the Charter nor have used Charter based arguments in proceedings that have been initiated by them in the context of the realization of other Constitutional Court's competences.

The explanation of the fact that the main initiators of cases for incompatibility of domestic legislation with the Charter are the MPs is that the right to approach the Constitutional Court serves in practice as an element of the right to opposition. This is not a Bulgarian peculiarity. In all states where the MPs are allowed to bring cases in front of the Constitutional Court this competence is put into practice predominantly by the parliamentary opposition.

The ombudsman has the right to approach the Constitutional Court only with regard to presumed unconstitutionality of an act of the Parliament. The ombudsman cannot initiate control for incompliance with international treaties and generally recognized norms of international law. Moreover the unconstitutionality has to concern only infringement of constitutionally proclaimed human rights and not some other constitutional provisions. Until now the ombudsman has initiated cases for infringement of the right to privacy, the private property right, the equal treatment of owners, the consumer rights and the protection against monopolism and unfair competition.

Despite the above mentioned limitations the ombudsman has been the second most active institution after the MPs in initiating control procedures in front of the Constitutional Court in which Charter based arguments have been put forward. In order to avoid declaration of inadmissibility of the motion the ombudsman approaches the Constitutional Court with the demand for declaration of unconstitutionality while at the same time presenting many arguments also for the contradiction to the Charter as well as to other international treaties.

Until August 2015 the ombudsman has initiated three cases in front of the Constitutional Court in which arguments stemming from the Charter have been put forward and have ended up with decision. These are Decision n° 2 of 2015 on constitutional case n° 8 of 2014, Decision n° 15 of 2010 on constitutional case n° 9 of 2010 and Decision n° 5 of 2010 on constitutional case n° 15 of 2009. In all of them the Charter has been used as an indirect criterion for the validity of provisions of act of Parliament and as a source of inspiration.

In case n° 8 of 2014 the Constitutional Court has declared the unconstitutionality of the legislative provisions using also arguments derived from the international treaties the Charter included. However the Charter and the

international treaties have not been used as a direct criterion for invalidity of legislative provisions. The Constitutional Court has not been directly approached with demand for control for compliance of the legislative provisions with them because they would have been declared inadmissible. Exactly that has happened in case n° 9 of 2010 where the Constitutional Court has admitted only the demand for constitutionality control but via Ruling from 22 April 2010 has declared inadmissible the control for compliance of acts of Parliament with international treaties. Anyway even in this case as well as in case n° 15 of 2009 in which the Court has rejected the ombudsman's motion for declaration of unconstitutionality of Civil Procedure Code provisions the Charter has been used as a source of argumentation.

It is interesting to note that case n° 8 of 2014 concerns the unconstitutionality of the Electronic Communications Act through which the EU Data Retention Directive 2006/24 has been implemented in the Bulgarian law. It is one of the rare cases which directly fall into the scope of application of the Charter due to the fact that it concerns the infringement of human rights provided by the Charter through national legislation for implementation of directive. The ombudsman uses arguments stemming from the Charter as well as several other international treaties to which Bulgaria is part in order to give reasons also for the infringement of human rights provided by the Bulgarian Constitution.

The idea of the ombudsman is that the human rights provided by the international treaties (the Charter included) as well as by the Bulgarian Constitution coincide to a great extent. Hence arguments from supranational human rights documents can be used in support of the unconstitutionality of the Directive as well as the implementing act of Parliament. Actually this maneuvering was necessary not only due to the existence of such proximity and the convincing power of supranational arguments but also in order to circumvent the prohibition for introducing motions for legislative contravention against international treaties.

It has been mentioned that the Charter has almost never been used alone either as a criterion for the validity of acts of Parliament or as a source of legal argumentation in front of the Constitutional Court. The Charter is typically used together with the ECHR, the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights and the UN Covenant on Social, Economic and Cultural Rights. Other international treaties and supranational sources of law that are cited as sources of argumentation in parallel or in conjunction with the Charter are the European Social Charter, ILO conventions, the Treaty on EU, the Treaty on Functioning of EU and EU directives.

The only Constitutional Court's decision in which the Charter is the only supranational source of legal argumentation is Decision n° 5 of 2010 on constitutional case n° 15 of 2009. However it has already been mentioned that this is a case for unconstitutionality of legal provisions and not for direct incompliance with the Charter provisions.

The Charter is applied either as a criterion for invalidity of legislative provisions or as a source of indirect legal argumentation by the Constitutional Court and the institutions that are competent to bring motions to it with regard to the following rights and principles: privacy rights, equality and non-discrimination, freedom of association in trade unions and employers' organizations, private property right, right to leave, consumer protection and protection of the free and fair competition.

II.2.a.ii. The Charter and the jurisprudence of the ordinary courts

A short overview of the national case law is very important step for understanding the judicial treatment of the Charter by the ordinary courts. Indeed, there are more than one thousand decisions which quote the Charter's provisions since the effective entry into force of the Lisbon treaty in 2009. In this way, two aspects have to be taken into account when analyzing the national judicial decisions. The first and the most important one is the conceptual evolution of the place of international law in general in the domestic law. The second one, which is of chronological nature, deals with a quantitative and qualitative appreciation of these decisions. These two aspects are closely interrelated in the jurisprudence of the courts in Bulgaria.

An important factor from a conceptual point of view is the fact that article 5, paragraph 4 of the 1991 Constitution explicitly proclaims the primacy of the international treaties over the domestic Bulgarian legislation and provides that they are integral part of the domestic law from the moment of their ratification[42].

From a chronological point of view, we can stress that the present application of the Charter by national courts coincides with its embodiment in domestic law[43]. In 2009 only 5 decisions have mentioned the Charter whereas the number of decisions which mention the Charter has increased significantly in 2010 and 2011. In 2010, there are 111 decisions and in 2011-810 decisions which explicitly refer to Charter's provisions. Since 2012, this favourable trend has been reversed. In 2012 there are 132 decisions, in 2013 - 49 decisions, in 2014 - 32 decisions and in 2015 - only 16 decisions with a referral to the Charter.

Two comments can be made. First, this tendency does reveal a significant change in the judicial attitude towards the Charter. A possible explanation can be the better knowledge of the EU law by the Bulgarian judges who take the Charter progressively into account and apply it instead of national provisions that contradict to it. Another reason may be the activism of the lawyers who do not hesitate to invoke the Charter's provisions in their argumentative strategies because of its specific subject which concerns the protection of human rights and its legal status in the domestic legal system. Anyway the high number of cases in which argumentation from the Charter has been used is an evidence for the

[42] See the analysis above.
[43] For a general presentation of judicial and legal system of Bulgaria, see M. FARTUNOVA, "Bulgarie - Introduction générale au système juridique", *J.-cl. Droit comparé*, 2008.

positive attitude of the Bulgarian courts towards the application of the EU law in general[44] and the Charter in particular. However, as Alexandre Kornezov says,

> "by contrast, the Bulgarian supreme and appellate courts have played a minor role in the process[45] (...). A peculiar phenomenon has been also taking place: Lower courts were using [the EU law] to stand up to supreme courts and question their EU-competency"[46].

Second, the high number of decisions could mean that the Charter plays significant role in the domestic Bulgarian legal system. However the detailed in-depth analysis of the national court's decisions reveals that the practice for application of the Charter during the period 2009-2015 can be divided into two main phases. The first one is characterized by a the trend for increasing application of the Charter provoked by its explicit and grave disregard by the domestic legislator especially with regards to the right to a fair trial. The second phase could be defined as a phase of maturity which has been marked by a more informed use of the Charter by the ordinary judges.

This evolution in the national treatment of the Charter by the Bulgarian courts can be explained by the fact that since its entry into force in 2009 the national courts have used its provisions as an instrument for evolving the domestic law in order to ensure its consistence with the Charter. This is the reason why, from a chronological point of view, the Charter has been referred to and argumentatively used by the ordinary courts since the very moment of its entering into force. The high number of ordinary courts' decisions adopted in 2011 which are referring to the Charter demonstrates well this suggestion.

Most of the national decisions concern the control of the provisions of the domestic sources of law with regard to article 47 of the Charter and the right to fair trial[47]. An overview of the different decisions during the period 2011-2012 does reveal that ordinary courts did not hesitate to apply the Charter directly and systematically even if its provisions were not applicable in the case which was pending in front of them.

However, even if this period was marked by an important number of decisions which referred to the Charter, these decisions raised the same issue on the consistence of domestic law with article 47 of the Charter. Consequently, as

[44] M. FARTUNOVA, « Le droit de l'Union européenne devant les juridictions bulgares : retour sur 7 ans d'application juridictionnelle », *op. cit*., p. 554 ;

[45] During the period 2009-2015, only 18 decisions of the Supreme Court of Cassation and 100 decisions of the Supreme Administrative Court have referred to and mentioned the Charter.

[46] A. KORNEZOV, "When David teaches EU law to Goliath: a generational upheaval in the making", *op. cit*., p. 242 ; See Supreme Administrative Court, 13 December 2010, n° 15222 on case n° 3581/2010 and dissident opinion of judge Yankulova; supreme administrative court, 13 December 2010, n° 15270 on case n° 2026/2010 and dissident opinion of judge Yankulova; supreme administrative court, 24 January 2014, n° 969 on case n° 13570/2013 and dissident opinion of judge Michaïlova on that case.

[47] District Court Burgas, 16 August 2010, n° 2187 ; district court Berkovitsa, 25 January 2011, n° 537; administrative court Sofia, resolution of 27 December 2010, *Vinkov*. See *a contrario*, Supreme Administrative Court, 7 March 2011, n° 3179 on case n° 10941/2010.

mentioned above, the Constitutional Court has ended this situation by ruling that the domestic legal provisions concerned were unconstitutional. Moreover this period accurately reflects the increasing willingness of ordinary judges to recognize the specific nature of the EU law and its legal effects in the domestic legal system. However this positive attitude shows the difficulty to apprehend the specific scope of application of the Charter. That is the reason why this period was also marked by an important number of references for preliminary rulings regarding Charter's provisions initiated by the ordinary courts. Yet, as will be shown below, the ECJ rejected these references for preliminary rulings which were inadmissible as manifestly ill-founded because the case pending before national judges did not fall into the field of the EU law or the national provision which was supposed to be incongruent with the Charter did not stem out of implementation of EU law. Nevertheless, this was not an obstacle for some national courts to refer to article 47 of the Charter and to articles 6, paragraph 1 and 13 of the ECHR. They have maintained their position regarding the place of these supranational sources of law in the domestic law[48] even if they have recognized that the right to a fair trial is not absolute right and could be limited in certain circumstances[49].

As a response to that situation the national courts were forced to change their initial position on the application of the Charter. It was replaced by a new approach characterized by a substantial appreciation of the Charter's provisions instead of using it as a permanent source of argumentation even in cases that were falling outside of the scope of application of the Charter.

Hence from 2013 onwards the ordinary courts have progressively taken into account not only the specific scope of application of the Charter in the light of the article 51 but also have more thoroughly evaluated and reflected on its substantive provisions.

Regarding the freedom of movement and choice of residence provided by article 45 of the Charter[50] the ordinary courts have to control and assess the national legal practice to adopt an automatic administrative prohibition for leaving the state territory based on public order grounds which were not precisely defined[51]. Many of the administrative courts[52] have resolved this

[48] Administrative court Varna, 8 October 2014, on case n° 2081/2014.
[49] Varna Court of Appeal, Commercial chamber, 21 February 2014, n° 131 on case n° 83/2014. In this case, national court was called upon to check the conformity of the court fee paid by the applicant with the Article 47 of the Charter ; D. GITEVA, I. GANCHEV, "Application of Article 6 § 1 of the ECHR in administrative litigation", *Human Rights*, 2003, pp. 19-31 (in Bulgarian).
[50] Administrative court Sofia, resolution of 11 August 2010, *Gaydarov*; administrative court Sofia, resolution of 24 august 2010, *Aladhzov* ; supreme administrative court, 15 November 2011, n° 14918, on case n° 14449/2010.
[51] For the judicial reasoning in case of challenging of the administrative measures for prohibition of residence permission for foreigners in Bulgaria on the basis of the Charter and of the Article 8 of the ECHR see : administrative court Kardjali, 7 November 2014, on case n° 83/2014.
[52] Administrative court Dobritch, 13 April 2011, n° 136, point 27; administrative court Dobritch, 13 April 2011, n° 137; administrative court Dobritch, 27 April 2011, n° 147 ; administrative court Sofia grad, 17 March 2011, n° 1245.

specific issue through the simultaneous application of provisions of the Bulgarian Constitution provisions, the Charter and the ECHR[53]. This case-law is strongly related to the ECJ's case law regarding the obligation of the administrative authorities to investigate the individual situation of the person which is concerned by the measure[54]. Moreover they have to base their acts on specific and individual grounds[55] with regard to article 52, paragraph 1 of the Charter or with view to article 21 of the Charter. In this way the national courts have used the same reasoning in relation to the material and personal scope of judicial review based on articles 47[56] and 49, pararagraph 3[57] of the Charter.

The national courts have admitted many cases for control of the validity of administrative acts with regard to article 54 and 41[58] of the Charter[59]. Article 41 has been used by the administrative courts in order to enhance the obligation of the public authorities to provide reasons for their decisions[60].

The same judicial reasoning was applied regarding the principle of proportionality in the light of article 11 of the Charter. This approach was made operational in all types of cases - criminal, civil or administrative, when the limitation of the exercise of the rights and freedoms guaranteed by the Charter is concerned[61].

Several judicial decisions have been adopted also on the basis of article 18 of the Charter in relation to the right to asylum. In that respect the domestic courts have adopted an interpretation of the relevant EU law provisions in conformity with the ECJ's case-law on that matter[62].

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[53] See Supreme Administrative Court, 20 April 2012, n° 5699 on case n° 2713/2012 (interpretation of *Ruiz-Zambrano* ECJ case-law and Article 8 of ECHR).
[54] Supreme Administrative Court, 27 June 2012, n° 9256 on case n° 8796/2011.
[55] ECJ, Gr. Ch., Case C-173/09, *Elchinov*, ECR 2010 p. I-08889; ECJ, Case C-249/11, *Byankov*, ECLI:EU:C:2012:608.
[56] Administrative court Sofia, resolution of 12 October 2011, *Halaf*, (sought to interpret the Article 18 of the Charter in light of the scope of Article 53): ECJ, 30 May 2013, *Halaf*, C-528/13 PPU; administrave court Sofia, resolution of 28 March 2014, *Mahdi*, (interpretation of the scope of judicial review in the light of Article 47 of the Charter in accordance with 2008/115/CE Directive); ECJ, 5 June 2014, *Mahdi*, C-146/14 PPU.
[57] District court Sevlievo, 11 March 2014, n° 63, on case n° 29/2014; district court Sevlievo, 3 June 2014, n° 120, on case n° 141/2014; district court Montana, 9 February 2015, on case n° 40015/2015, administrative court Dobrich, 31 March 2015, on case n° 141/2015; district court Montana, 21 April 2015, on case n° 40109/2015.
[58] Administrative court Varna, 6 March 2014, on case n° 3397/2013.
[59] Administrative court Varna, 28 October 2014, on case n° 3309/2014; administrative court Varna, 12 November 2014, on case n° 3474/2014.
[60] See administrative court Rousse, 9 June 2014, on case n° 72/2014. In some judicial decisions this obligation is directly based on Article 47 of the Charter. See for example, Sofia city court, 1 October 2014, on case n° 10304/2014.
[61] District court Burgas, 13 January 2014, n° 82, on case n° 6131/2013; district court Burgas, 13 January 2014, n° 80, on case n° 5803/2013; Sofia city court, 8 July 2014, on case n° 13355/2013.
[62] On Article 19 of the Charter, see Supreme Administrative Court, 23 June 2014, n° 8570 on case n° 490/2014 ; supreme administrative court, 17 February 2011, n° 2458 on case n° 14987/2009 ; supreme administrative court, 25 January 2012, n° 1296 on case n° 12723/2011 ; See for example, administrative court Haskovo, 2 June 2015, n° 176 on case n° 214/2015.

National courts are also increasingly being asked to give rulings in the domain of protection of the children provided by article 24 of the Charter. This is done with a special emphasis on the "child's best interests"[63].

II.2.b. The Charter as a source of inspiration among others – Articulation of the Charter with internal and European law

II.2.b.i. How do national judges interpret Article 53 of the Charter allowing a stronger national protection of rights? Generally, would you say that national judges are willing to offer a more generous protection or do they entirely rely on the Charter and the interpretation given by the ECJ?

The analysis of the jurisprudence of the Bulgarian ordinary courts demonstrates that they do not often refer to article 53 of the Charter. Only the Sofia administrative court approached the ECJ with a demand for interpretation and further clarification of the protection provided by the Charter as a threshold in the light of its articles 18 and 53 with regard to the European Asylum System. In *Halaf*[64] case, the national court expressly referred to the ECJ a request concerning "the content of the right to asylum under Article 18 of the Charter in conjunction with Article 53 of the Charter" when the humanitarian clause in article 15 of Regulation (EC) n° 343/2003 is not applicable. In its judgement, the ECJ did not give an explicit answer to the raised question but preferred to refer to the "sovereignty clause" provided in article 3 paragraph 2 of the Regulation.

Consequently the national courts in their decisions try to use the Charter in order to enhance and upgrade the national systems for protection of fundamental rights. Both the Charter and the ECHR are tackled as key instruments for the achievement of this goal. Actually the Charter derives its peculiar and enhanced role in the context of the national system of judicial review due to the EU integration which is quite different from the establishment of the human rights' protection system of the Council of Europe and the ECHR. The attitude of the ordinary Bulgarian courts is in favour of the application of the Charter even if the ECHR is also mentioned by national courts or invoked by the parties to the law suit.

The ECHR is still treated differently from the EU law. It has been hardly taken into account by the national courts because it implied a drastic change in the mentality and in the legal culture. The ECHR established for the first time in the history an international jurisdictional authority which could condemn Bulgaria

[63] Sofia city court, 29 mai 2014, on case n° 12780/2013 ; Sofia city court, 28 July 2014, on case 14222/2013 ; District court Pernik, 24 November 2014, on case n°4731/2014 ; district court Sofia, 29 May 2015, n° 12780; district court Gorno Oriahovo, 11 August 2015, on case n° 736/2015, Regional court Pernik, 1 July 2015, on case n° 327/2015.See also pending case before ECJ C-215/15.
[64] ECJ, Case C-528/11 PPU, *Halaf*, ECLI:EU:C:2013:342; administrave court Sofia, resolution of 28 March 2014, *Mahdi*, (sought to interpret the scope of judicial review in the light of Article 47 of the Charter in accordance with 2008/115/CE Directive); ECJ, Case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1320.

for inadequate legislation[65]. This explains to some extent why the ECHR has been met with certain reserves on the part of the national courts. The 1991 Constitution aimed at building a fully democratic political regime and consequently also provided for the protection of human rights. The parallel teleology and axiology of the Constitution and the ECHR should have reinforced the appreciation and the standing of the ECHR. However in cases of contradiction between the Constitution and the ECHR the Constitutional Court ruled in favour of the Constitution as it is supposed to due to the primacy of the Constitution over the international treaties.

The ordinary courts, on the contrary, were less reluctant to apply EU law because the EU accession of Bulgaria in 2007 was accompanied by important reforms in the Bulgarian legal system. It has to be noted that the primacy over sub-constitutional legislation and the substantial provisions of the ECHR have been progressively taken into account by the ordinary courts in their jurisprudence. In other words, the courts' awareness of the formal and substantial qualities of the ECHR rose with the time in the course of its application. Therefore the national jurisdictions were better prepared to apply the Charter in comparison to the ECHR due to their augmented experience and ability to apply supranational law with primacy and derogative effect over domestic law.

Consequently it seems that the national judicial practice has evolved over time. As mentioned above the Charter is considered by ordinary jurisdictions as integral part of the domestic law taking precedence over national legal provisions regardless of its specific scope of application. Progressively ordinary jurisdictions have taken into account article 51 of the Charter in the motives to their decisions[66]. However this tendency favours also the ECHR especially with regard to its general scope of application. This new tendency regarding the application of the ECHR provoked by the Charter strengthens the role of the ECHR in the Bulgarian legal system - a role which has been to some extent delicate due to the high number of the decisions against Bulgaria pronounced by the ECtHR[67].

[65] Y. GROZDEV, "The execution of the European Human rights' decisions: problems and perspectives", *in Application of Article 11 of the European Convention of the Human Rights*, Sofia, Fenea, 2008, pp. 20-32 (in Bulgarian); see also D. LILOVSKA, "The execution of the decisions of the European Court of Human rights: the Bulgarian experiment", *in Application of Article 11 of the European Convention on the human rights*, Sofia, Fenea, 2008, pp. 67-79 (in Bulgarian).

[66] See Supreme Court of Cassation, 18 March 2013, n° 154, on case n° 193 of 12 November 2012 (Article 3 § 2 of the Charter) ; Supreme Court of Cassation, 30 June 2014, n° 19 on case n° 2101/2013 (if the case falls into the field of application of EU law the Supreme Court does not hesitate to affirm the fundemental caracter of the rights provided by the Charter. This is especially true for Article 50 of the Charter and for the principle *non bis in idem*).

[67] E. EKIMDJIEV, "The rights to association freedom and its possible limits. The case Peter Jetchev v. Bulgaria and Zeleni Balkani v. Bulgaria", *in Application of Article 11 of the European Convention on the Human Rights*, Fenea, Sofia, 2008, pp. 80-98 (in Bulgarian).

II.2.b.ii. Is the Charter interpreted in reference to the European Convention on Human Rights as provided by Article 52 § 3? It would be interesting to have further information on the authority and application of the case law of the ECtHR, compared to the authority and application of the case law of the ECJ.

It has to be noted that the Charter is interpreted in conjunction with the ECHR even if the national courts do not expressly refer to article 52, paragraph 3 of the Charter. Such interpretation reinforces the authority of the case-law of the ECtHR. The references to the Charter and to the ECHR are frequently intermingled in the decisions of the domestic courts. On the one hand, the Charter is used as a source of complementary argumentation[68] when the dispute does not fall into its scope of application. On the other hand, the ECHR and the ECtHR's case-law do contribute for increasing the protection provided by the Charter especially regarding issues which have still not been clarified by the interpretation of the ECJ[69].

II.2.c. The Charter as a source of inspiration

Do national judges refer to the Charter as a purely substantial source of inspiration even outside of its field of application?

The increasing awareness of the Bulgarian judges to use arguments from the Charter and the ECHR as well as to apply them directly and with precedence over the domestic legislation strengthens the protection of fundamental rights in the domestic legal system even if it is interpreted in the light of possible limitation to exercising rights and freedoms according to article 52 paragraph 1 of the Charter[70]. In conclusion it has to be mentioned that the Charter is substantial source of inspiration for the domestic courts even when it is not directly applicable law in the pending lawsuits.

II.3. The invocation of the Charter

II.3.a. Invocation and request for preliminary rulings

Has the number of requests for a preliminary ruling by the ECJ increased due to the entry into force of the Charter ?

Two aspects should be taken into account with regard to the invocation of the Charter in the request for preliminary ruling. The first aspect is a general one. It deals with the judicial practice of the ordinary courts on preliminary ruling. The second one concerns the specific approach of the Sofia administrative court towards EU law in general and the Charter in particular.

[68] Regional court Stara Zagora, 21 July 2010, n° 1113.
[69] For case-law on Article 24 of the Charter see : administrative court Sofia, 31 March 2011, on case n° 1527. For case-law on Article 47 of the Charter and its interpretation in the light of Articles 6 § 1 and 13 of the ECHR, see regional court Berkovitsa, 21 January 2011, n° 537.
[70] District court Tran, 3 February 2011, n° 105.

The national courts made use of the preliminary ruling as soon as it became available. A short overview of the rulings of the national courts for request for preliminary ruling does reveal that this procedure is now part of national judicial review and is integrated in the judicial practice for application of the EU law in general and the Charter in particular[71]. It has to be noted that this judicial practice on preliminary rulings could contribute to define the notion "implementation of EU law"[72].

In spite of this favourable tendency for using preliminary ruling it has to be underlined that in general the domestic courts do scrupulously respect the domestic legal provisions when they have to check whether an interpretation of the relevant EU law clauses is necessary. In other words, domestic courts have to estimate if the case pending before them falls into the field of EU law application according to articles 628 and 629 of the Civil Procedure Code. If this is not the case the domestic courts which have been asked by some of the parties to the law suit to address a preliminary ruling on interpretation of the Charter to the ECJ do not hesitate to reject the applicant's request[73].

However the terms of article 628 are rather ambiguous. According to this article "the Bulgarian court shall submit a request for a preliminary ruling to the ECJ if an interpretation of an EU law provision or a confirmation of the validity of an act of the institutions of the European Union is necessary in order to enable a legal dispute to be determined appropriately"[74]. This article does grant broad discretion to domestic courts which may apply the "clear act theory" instead of addressing a preliminary ruling request to the ECJ. Such judicial practice, especially of the supreme courts[75], could raise problems with the application of EU law in general and of the Charter's provisions in particular[76].

[71] See the pending case before ECJ, Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514; see also A. KORNEZOV, "When David teaches EU law to Goliath: a generational upheaval in the making", *op. cit*., pp. 241 *et seq*.

[72] See ECJ, Case C-339/10 order, *Asparuhov*, ECR 2010 I-11465 (reference requested by Supreme Administrative Court) ; See A. KORNEZOV, *Preliminary rulling procedure before the ECJ*, Sofia, Sibi, 2012, p. 332 (in Bulgarian).

[73] Court of appeal Burgas, 2 June 2011, n° 164 on case n° 113/2011; Sofia city court, 4 August 2014, on case n° 9024/2014 ; Sofia city court, 15 December 2014, on case n° 11582/2014 ; Supreme Court of Cassation, 27 March 2013, n° 157 on case n° 540/2012 ; Supreme Court of Cassation, 5 April 2013, n° 465 on case n ° 1694/2013 ; Supreme Court of Cassation, 19 April 2013, n° 68, on case n° 1790/2012 (request for preliminary ruling rejected because of lack of jurisdiction of the ECJ in the field of the third pillar) ; Supreme Court of Cassation, 11 September 2013, n° 535 on case n° 2063/2013 ; Supreme Court of Cassation, 30 April 2015, n° 114, on case n° 1548/2015 ; Supreme Court of Cassation, 7 July 2015, n° 429, on case n° 3512/2015. See for Supreme Administrative Court : Supreme Administrative Court, 16 January 2011, n° 600 on case n° 13158/2012 ; 21 September 2011, n° 11732, on case n° 11593/2011 ; 8 May 2012, n° 6393 on case n° 5001/2012 ; Supreme Administrative Court, 22 April 2015, n° 4425 on case n° 6983/2014.

[74] For a critical analysis of this provision, see M. FARTUNOVA, « Rapport bulgare », *in* L. COUTRON, *L'obligation de renvoi préjudiciel à la Cour de justice : une obligation sanctionnée ?*, Bruxelles, Bruylant, 2014, pp.146 *et seq*.

[75] Supreme Administrative Court, 28 January 2015, on case n° 7668/2014.

[76] Similarly it should be pointed out that the Constitutional Court has until now not considered necessary to initiate any preliminary ruling in spite of fact that it controls the conformity of the national law with the EU law on the basis of Article 149 § 1 point 4 of the Constitution. For a

To face up such situation the courts have adopted different approach in order to avoid a breach of EU law by omitting to address a preliminary reference to ECJ. The practice of the Sofia administrative court illustrates this position. In *Elchinov* case, the court approached the ECJ with the following question:

> "is the national court, with regard to the principle of procedural autonomy, obliged to take into account binding guidelines imposed by a higher court when its decision is abolished and the case referred back for reconsideration, if there is a reason to assume that such guidelines are inconsistent with the community law?"[77].

In this respect, the ECJ explicitly ruled that

> "article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case. (...) National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate. (...) The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which concern it".

Since *Elchinov* Case, the Sofia administrative court has been very active in applying and interpreting the EU law and the Charter's provisions. A short overview in the ECJ data base does reveal that the most references for preliminary ruling were addressed by this court[78]. Hence the EU law based argumentation is strategically used by national ordinary judges and could be considered as an expression of their independence and autonomy from supreme national jurisdictions in the way that the ordinary courts have to apply the EU law[79].

The Sofia administrative court deliberately and explicitly approached the ECJ with the demand to interpret article 45 of the Charter in *Gaydarov* case[80] and *Aladhzov* case[81]. In *Byankov* case[82] the Sofia administrative court asked the ECJ

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presentation of the Constitutional Court's practice related to the EU law see A. KORNEZOV, *National judicial practice on EU law* (2007-2008), (in bulgarian), Sofia, Sibi, 2009, p. 101; A. KORNEZOV, *Preliminary ruling machinery before the Euroopean Union Court of Justice*, (in Bulgarian), Sofia, Sibi, 2012, p. 332; M. FARTUNOVA, « Rapport bulgare », *in* L. COUTRON, *L'obligation de renvoi préjudiciel à la Cour de justice : une obligation sanctionnée ?*, *op. cit*., p. 155 ; M. FARTUNOVA, « Le droit de l'Union européenne devant les juridictions bulgares : retour sur 7 ans d'application juridictionnelle », *op. cit*., p. 560.

[77] See, M. FARTUNOVA, « Précisions sur l'autonomie institutionnelle et procédurale des Etats membres. A propos de l'arrêt Elchinov », *RAE*, 2009-2010, pp. 905 *et seq*.

[78] Since 2007 nine requests for preliminary rulings on the interpretation of the Charter have been initiated by the administrative court Sofia.

[79] See M. FARTUNOVA, « Rapport bulgare », *in* L. COUTRON, *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée ?*, *op. cit*., p. 154. See Supreme Administrative Court, 30 June 2011, n° 9666 on case n° 14369/2010 ; supreme administrative court, 22 March 2012, n° 4173 on case n°16362/2011.

[80] ECJ, Case C-430/11, *Gaydarov*, ECLI:EU:C:2012:777.

[81] ECJ, Case C-434/10, *Aladzhov*, ERC 2011 I-11659.

to interpret article 52, paragraph 1 of the Charter in order to ensure the precedence of the EU law by controlling the conformity of national legislation which provides for a limitation on the freedom of movement within the EU. However in its judgement the ECJ did not refer to the Charter, but to article 27 of Directive 2004/38/CE when interpreting the principle of proportionality of the limitation on the freedom of movement. In *Halaf* case[83] the Sofia administrative court asked the ECJ to interpret articles 18, 41 and 47 of the Charter in the field of protection of asylum seekers. In *Agrokonsulting*-04 case[84], The Sofia administrative court asked the ECJ to interpret Article 47 of the Charter with regard to the conformity of Article 133 of Code of Administrative Procedure with the Charter's provisions[85].

It should be stressed again that the Sofia administrative court has been very active and has not hesitated to approach the ECJ with requests for preliminary rulings. In fact it has adopted a broad interpretation of the Charter's scope of application. However Charter based references for preliminary ruling have not always been admissible due to the lack of application of EU law in the relevant case[86]. Hence in *Vinkov* case[87] the reference for preliminary ruling concerned the non-recognition in the domestic law of the right to judicial remedy in case of decisions imposing financial penalties and deprivation of the driver of licensing points for certain breaches of road traffic regulations on the basis of article 189 of the Road Trafic Act [88]. In other words domestic courts were approaching the ECJ with demands for interpretation of article 47 of the Charter.

The ECJ has ruled that the request of the Bulgarian court was inadmissible because "provisions [of EU law] are directed solely at the institutions of the European Union and none of them concerns the system of penalties applicable to breaches of road traffic regulations they are not applicable in the main proceedings". In addition the ECJ declared that "it is not apparent from the order for reference that the national legislation constitutes a measure implementing EU law or that it is connected in any other way with EU law. Accordingly, the jurisdiction of the Court to rule on the reference for a preliminary ruling in so far as it relates to the fundamental right to an effective remedy is not established". In *Stoilov* case[89] the requested reference was rejected because of lack of EU law relevance of the questions.

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[82] ECJ, Case C-249/11, *Byankov*, ECLI:EU:C:2012:608, point 28.
[83] ECJ, Case C-528/11 PPU, *Halaf*, ECLI:EU:C:2013:342.
[84] ECJ, Case C-93/12, *Agrokonsulting-04*, ECLI:EU:C:2013:432.
[85] See the developments above.
[86] Administrative court Sofia, 17 December 2012, *Cholakova* and ECJ, 6 June 2013, *Cholakova*, C-14/12; See also, district court Sofia, resolution, 3 Septembre 2014, *Petrus* and ECJ, 5 February 2015, *Petrus*, C-451/14 ; administrative court Varna, 5 September 2013, *Yumer* and ECJ, 17 July 2014, *Yumer*, C-505/13 (reference on interpretation of Articles 20 and 21 of the Charter).
[87] ECJ, Case C-27/11, *Vinkov*, ECLI:EU:C:2012:326.
[88] See developments above on this national legal provision.
[89] ECJ, Case C-180/12, *Stoilov*, ECLI:EU:C:2013:693.

It has to be mentioned that the public authorities are very committed to proactive approach on the application and promotion of the Charter through preliminary rulings. For example the Commission for Protection against Discrimination addressed to the ECJ a request for a preliminary ruling. The Commission asked the ECJ

> "to establish whether the placing of the electricity consumption controlling devices at a 7-meters height on pillars situated outside the houses of the clients in two areas (…) mainly inhabited by members of the Roma community, constitutes discrimination based on ethnic origin and, if so, to order the termination of that discriminatory practice as well as the imposition of fines to the responsible persons"[90].

In addition the Commission asked the ECJ to interpret article 38 of the Charter devoted to the consumer protection. The ECJ in its judgement has expressly rejected the preliminary ruling reference as manifestly inadmissible. In point 51 of the judgement the ECJ stipulated that the Commission was not a 'court or tribunal' within the meaning of the case-law of the Court relating to that concept in Article 267 TFEU. Therefore the ECJ did not have jurisdiction to pronounce on the substance of the preliminary ruling request. Due to the preliminary reference request of the Sofia administrative court the Grand Chamber of the ECJ has pronounced a judgement on this issue in CHEZ Razpredelenie Bulgaria AD case[91].

II.3.b. Modalities of invocation

II.3.b.i. Is the Charter invoked on its own or is it combined with other EU law provisions, national law or the ECHR? Is there a trend to a combination or an autonomization of legal provisions?

The jurisprudence of the Bulgarian courts reveals a tendency for increasingly favourable treatment of the Charter. Domestic courts started to use Charter based arguments in their decisions and examine the domestic law in the light of the Charter's provisions.

During the first years after the Charter became valid law the Bulgarian courts even gave preference to arguments stemming out of the Charter than to those which were based on the ECHR. The domestic courts gave broad interpretation of the Charter's scope of the application by considering it as autonomous legal argument. The Bulgarian courts began to adopt an increasingly coherent position with regard to article 51 of the Charter as a consequence of the ECJ's decisions on preliminary rulings initiated by them[92].

[90] ECJ, Case C-394/11, *Belov*, ECLI:EU:C:2013:48.
[91] ECJ, Gr Ch., Case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, ECLI:EU:C:2015:480.
[92] See District Court Rousse, 25 October 2011, on case n° 1118/2011 ; District Court Rousse, 25 October 2011, on case n°1190/11 and ECJ, Case C-339/10 order, *Asparuhov*, ECR 2010 I-11465.

Nevertheless while applying and interpreting the Charter in combination with the ECHR and the Constitution, the Bulgarian courts, apart from the Constitutional Court, do not always resolve normative conflicts between the EU law and the Constitution. As a matter of fact, such combination is frequently used by the Bulgarian courts and contributes to the strengthening of the fundamental rights' protection in the Bulgarian legal system.

II.3.b.ii. If the Charter is not invoked by the parties, does the judge proceed to an examination of its provisions on his own motion?

Not documented.

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RAPPORT DE SYNTHÈSE

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Cahiers Européens

Le lancement de la collection des « Cahiers européens » en 2011 – avec comme premier numéro *L'identité constitutionnelle saisie par les juges en Europe* – avait le souci, de réintégrer la part du « national » dans l'étude du droit de l'Union. Non pas que cette approche entende tomber dans un cloisonnement réducteur, en étant exclusive de toute autre manière de penser de façon critique le fait européen, mais elle entend simplement faire en sorte que le champ national – en ce qu'il fait partie intégrante du champ européen – ne soit pas ignoré des études européennes. Le dixième numéro de la collection des « Cahiers européens » arrive, ce faisant, à point nommé. L'ouvrage sur *La Charte des droits fondamentaux saisie par les juges en Europe* est le fruit de près de trois ans de recherche collective menée avec des chercheurs et collègues issus de vingt-deux pays membres de l'Union; il a été conçu sur la base de l'élaboration d'une grille d'analyse imaginée afin d'appréhender toutes les phases et les manières selon lesquelles la Charte des droits fondamentaux a pu être « saisie » par les différents acteurs nationaux ; il s'est agi de prendre la mesure, précise, du degré d'effectivité de ce texte dont on sait qu'il a été pensé et rédigé afin d'incarner et de rendre visible les valeurs de l'Union.

The launch of the collection « *Cahiers européens* » in 2011 – with its first number on *The constitutional identity as apprehended by judges in Europe* – was intended to reintegrate the "national" aspect to the research of the Union. This approach is not aimed to strengthen even more the disciplinary boundaries, which would exclude any other ways of critically analysing the European integration, but it is intended to ensure that the national agenda, constituting integral part of the European agenda, is not ignored in the European studies. The tenth number of the collection « *Cahiers européens* » appears just at the right time. The book on the *Charter of Fundamental Rights as apprehended by judges in Europe* is the result of almost three years of collective research; it has been conducted with researchers and colleagues from twenty-two member States of the European Union and it was elaborated on the basis of an analytical framework to assess all the phases and means in which the Charter of Fundamental Rights could be « apprehended » by different national stakeholders; the research aimed to measure to what extent the Charter is effective, while bearing in mind that the instrument has been conceived and drafted in order to enshrine and make visible the European Union's values.

L'ouvrage réunit des analyses sur l'Allemagne (Evelyne Lagrange, Anne-Marie Thevenot-werner), l'Autriche (Jane Hofbauer, Christina Binder); la Belgique (Pierre-Vincent Astresses), la Bulgarie (Martin Belov, Maria Fartunova), Chypre (Stéphanie Laulhe shaelou, Katerina Kalaitzaki), le Danemark (Jonas Christoffersen, Mikael Rask Madsen), l'Espagne (Augusto Aguilar Calahorro, Stéphane Pinon), la Finlande (Tuomas Ojanen), la France (Edouard Dubout, Perrine Simon, Lamprini Xenou), le Grand Duché de Luxembourg (Véronique Bruck), la Grèce (Costas Stravilatis, Christos Papastylianos), la Hongrie (Antal Berkes), l'Irlande (Brice Dickson), l'Italie (Edoardo Stoppioni), Malte (Arnaud Lobry), la République Tchèque (Magdalena Lickova), la Pologne (Nina Poltorak), le Portugal (Natalia Leite), la Roumanie (Dragos-Alin Cálin, Constantin Mihai banu, Daniel-Mihail Sandru), la Slovénie (Samo Bardutzky, Martina Greif, Živa Nendl, Bruno Nikolić, Sandra Pavlic, Zoran Skubic), la Suède (Valère Ndior), le Royaume-Uni (Brice Dickson). Le rapport sur la jurisprudence de la Cour de Justice a été élaboré par François-Xavier Millet, tandis que le rapport de synthèse le fut par Laurence Burgorgue-Larsen.

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