

BETWEEN PROMISE AND DELIVERY – FUNDAMENTAL RIGHTS IN THE EU

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Abstract

This year we are marking the eleventh year of the establishment of the EU Agency for Fundamental Rights. Since there is too much wrong out there, marking is the proper term instead of celebrating the anniversary. Human and fundamental rights are on the pedestal of the European Union and we have to admit that a lot has been done. However, facing the future, still needs to be done. The aim of this article is to indicate the current state of play and to propose ideas for the future role of the FRA (Fundamental Rights Agency), consistency in application of the Charter of fundamental rights of the EU, as well as commitment and communication of the importance of the human rights and freedoms. The specific goal of this article is to bring closer the fundamental rights framework in principle and fundamental rights outcomes in practice.

Keywords

human rights, Agency for Fundamental Rights, EU, law

Accelerating European Union

Recently I participated in a public event where one eminent academician from Bulgaria was giving lecture on Europe's center and periphery. While explaining the stages of development of the European Union, the ongoing debates on EU's future crossed over my mind. There are plenty of ideas but only few are rational and accepted. Europe on two or different (several) speeds, EU targeted competition, Concentric circles of European nations, etc. It is normal to debate about the EU's future and development. It concerns all of us. But, what made me think about the EU's state of play and future was the conclusion of the lecturer: "In this

debate we forget about the values of Europe and why EU was created: freedom, peace, democracy, equality, rule of law, human rights...”

EU is constantly changing and we have to accept the changes. It is changing on several levels: institutionally, politically, economically and geographically. Starting from the endmost point, in the last one or two decades, EU expanded its territory by accepting new Member States and promised the EU future for many European countries when they become ready to join the EU family. Consequently, the EU market has grown in capital, goods, services, consumers and labor. Politically, EU is covering a larger area and it is about to grow but also, it is playing crucial role in terms of peace and stability. Last but not least, institutionally, EU hasn't reached the peak. And, instead of quantifying the EU we should never forget the above-mentioned EU values.

2017 was a year that marked a double anniversary: sixty years since the creation of the European Community and ten years since the establishment of maybe one of the most important but non-political institutions of the Union – the Fundamental Rights Agency. These anniversaries are a clear demonstration that EU's evolution from a dominantly economic organization to a political one and to one in which respect of human rights is a basic pillar of law and policy. They also reflect the fact that the EU is not just a union of states, but a union of people, granting rights to citizens and individuals.

At the same time, the past decade witnessed fundamental rights challenges that have not just persisted, but in many areas, such as migration, asylum and data protection – have grown more pressing. Despite the many pledges the EU and its Member States have made over the last ten years and more, the fundamental rights system itself has been increasingly under attack.

Fundamental Rights Agency 1.0

The Treaty of Rome, signed in March 1957, mostly focused on the economic integration, but, it did leave the door open for commitment to fundamental rights, with reference to an “accelerated raising of the standards of living” and the introduction of the principle of equal pay for women and men (European Communities, 1957). It took thirty five years, with the Treaty on European Union (the so-called Maastricht Treaty) to include the first provision to highlight the importance of respect for fundamental rights, stating that the “Union shall respect fundamental rights, as guaranteed by the

European Convention for the protection of Human Rights and Fundamental Freedoms” (European Communities, 1992).

It took a new century to have the next milestone – the Charter of Fundamental Rights of the European Union, tracing the path for the EU to take more outspoken stance on fundamental rights (Toggenburg, 2014). The mosaic would have missed some parts if there was no specialized body for human rights protection and advocacy. As a specialized independent body, established in March 2007, the Fundamental Rights Agency (FRA) was established to demonstrate the will and dedication of the EU to place the fundamental rights on the pedestal.

Why was the FRA established? There was no opposition to the need to create an agency for promotion and protection of fundamental rights, since there was a clearly identified need to have an institutional funnel. Simply, it was an echo of the strong voices alarming about the existence of striking gaps in the protection of fundamental rights among the Member States. It was difficult to identify who is responsible on the EU level for protection and promotion of human rights in general. The origin of the “human rights agency” dates from 1998, as a *monitoring* agency. Philip Alston and J. H. H. Weiler made the proposal in a study prepared for the *comite des sages* that issued the report entitled: “Leading by example: A Human Rights Agenda for the European Union for the Year 2000” (Alston and Weiler, 1998). In this study, the two authors proposed a monitoring agency without offering particular details. The outcome of this study was to identify the need of institutional solution that will provide and collect information related to fundamental rights in relation to legislative and policy-making process. In late 2003, the Report was launched on a meeting of the European Council in Vienna, where the decision was made to establish a “Human Rights Agency”.

At that time, the European Ombudsman and the European Data Protection Supervisor were dealing with human rights protection, but only for very specific divisions. No institution on EU level was responsible for fundamental rights as such, nor was there any EC commissioner who had a particular portfolio related to fundamental rights.

Therefore, the EU has created specialized agency which plays the role of an assistant to the EU institutions and Member States in fulfilling fundamental rights obligations implementing the EU law. FRA was imagined as a body that will help to make basic rights a reality for everyone in the EU. It was shaped on several basic pillars: to protect, to give opinion, to follow and compare the situation how rights are protected in the EU and among

Member States, to advise, to report, to advocate and promote. At the early stages of proposal and negotiation, *monitoring* was regarded as one of the new Agency's main tasks. The monitoring role was, nevertheless, sidelined in the months directly preceding the Regulation. The FRA, it seems, was deliberately not modelled on the basis of a warning system idea that would sound the alarm when legal developments ran the risk of violating fundamental rights (Sokhi-Bulley 2011: 684).

FRA is dedicated to protection and promotion of the following fundamental rights priority areas: access to justice, asylum, migration and borders, gender, hate crime, information society, privacy and data protection, LGBTI, people with disabilities, racism and intolerance, rights of the children and Roma.

But, the limited role of the FRA lies in the fact that it cannot deal with individual rights violations and does not have to be consulted by the EU institutions. There are some additional bodies which deal with human rights, such as: the European Institute for Gender Equality; the Council's Working Party responsible for fundamental rights, citizens' rights and free movement of persons; the Council's Working Party on human rights and the Special Representative for Human Rights in relations with third countries. On a national level there are National Human Rights Institutions which are growing in both qualitative and quantitative manner.

One more shortcoming of the FRA when established was that the EU lacked a legally binding bill of rights to frame its action. This changed only two years later with the Lisbon Treaty and made the Charter legally binding. The Charter's greater role became more obvious with the developing case law of the Court of Justice of the EU (CJEU). Since 2010, when the Charter became legally binding, the number of references to the Charter in CJEU decisions has multiplied annually. Also, the FRA monitors the use of the Charter on a national level by producing annual Fundamental Rights Report – "Charterpedia", referring to the contribution of the Charter to fundamental rights protection through MS legal systems. We may conclude that CJEU is the EU's ultimate arbiter of EU legislation's compliance with fundamental rights.

Additionally, the FRA position was improved when in 2009 the European Council stressed that the EU institutions should "make full use of FRA's expertise in devising the EU's actions in the area of freedom, security and justice" It invited them to consult, where appropriate, with the Agency, in line with its mandate, on the development of policies and legislation with implication for fundamental rights, and to use it for communication to citizens of human rights issues affecting them in

their everyday life (Council of the European Union, 2009). Ever since, the FRA referred to this demand via creation of legal opinions delivering views on draft EU legislation “as far as its compatibility with fundamental rights concerned” (European Union, 2007, *Council Regulation (EC) No. 168/2007*). Since the establishment of the FRA, dozens of legal opinions have been created, many of them refer to legislative proposals.

The Lisbon Treaty made one more project milestone. It introduced the obligation for the EU to increase social inclusion and equality in defining and implementing policies and activities (European Union, 2012). This means that the Lisbon Treaty introduced the need of establishing a new culture of fundamental rights. The internal changes also upgraded the level of the visibility of the fundamental rights by raising the awareness by providing on-line tools for access to protection of rights. Also, as part of the innovation and continuous upgrade, FRA carries out large-scale surveys on people’s experiences of the protection of their fundamental rights. Additionally, FRA develops handbooks and many other useful materials to provide guidance on legal issues and principles in many areas such as: non-discrimination, data protection, asylum and immigration, children’s rights and access to justice. Publications are available on all EU languages in order to disseminate the legal and practical tools and information to as much people as possible.

Fundamental Rights Agency 2.0

By scratching how the FRA was established and how it developed and improved mechanisms to respect, protect and promote fundamental rights, an attempt was made to highlight the first decade of the FRA.

Looking into the current state of play, guided by the lessons learned, past experience of the FRA, written reports and all data available, it is a significant challenge to identify the major obstacles of the FRA and to predict how the FRA will look like in ten years. Undoubtedly, it remains a major goal – human rights of everyone living in the EU. The EU made significant steps to become a human rights actor. The base of the new construction is in place. However, it still needs to be done. There are a few major shortcomings. One is the varying application of the fundamental rights legislation and policy around the EU Member States. Next, the failure to communicate that human rights are for everyone.

There is little evidence highlighting these problems. Member States have not fully embedded the transposition of the Charter in the legislative,

administrative and judicial procedures. Also, not all Charter rights are used and fully implemented (e.g. the socio-economic rights). This creates an impression that the EU does not fully use the potential of all Charter rights. The EU does not systematically request independent legal advice when legislating. Moreover, the EU has not yet acceded to the European Convention on Human Rights and therefore is not subject to jurisdiction of the European Court of Human Rights. A gap persists between the EU's internal fundamental right policies and its external commitment to human rights (FRA, 2017).

The Charter is now part of the EU primary law. It serves as a model for the national and EU legislation. The Charter provides standards for fundamental rights for the EU and Member States. However, it plays only a peripheral role in national law and policy making, as well as in jurisprudence. On a national level, the transposition of the Charter remains limited in both quantity and quality. The Charter can reach its full potential only if it is actively used by the national administration, lawyers and courts. At the EU level, explicit references to the Charter are far more frequent and assessment of the level of approximation and enlightenment with the Charter has become standard. Nevertheless, the potential to enhance the Charter's use remains (De Schutter, 2016: 397).

Additional challenges are connected to the possibility to increase the opportunity for the civil society organizations to be more actively involved in the process of promotion and protection of the fundamental rights. Especially CSO's and FRA can play a very important role in communicating rights. In a period when there is an increased level of populism and nationalistic ideology and rhetoric, human rights are usually under pressure. It will be a test for the FRA in the upcoming period to find a way to improve the communication with the citizens. The FRA is already aware of this challenge and is taking some steps forward. In this manner, the FRA, as well as the EU and the Member States will have to find more effective ways to address mistrust of public institutions and perceived threats deriving from phenomena such as immigration and globalization and to highlight the benefits of fundamental rights for everyone in the EU.

With the FRA establishment, the EU enhanced the tools for human rights protection with an independent center that can provide professional, objective and relevant information and data, as well as advice and guidance. It also created an agency that contributes to raising awareness of fundamental rights, cooperates with public bodies responsible for human rights at national level, engages with civil society and coordinates with international human

rights organizations. The best way to strengthen its role will be if it becomes mandatory to consult the FRA when legislating and creating policies. Also, the FRA can receive a greater mandate of agency that can provide assistance and expertise to national actors on how to address fundamental rights.

While independent expert institutions in many Member States systematically issue legal opinions and statements on legislative drafts in their own initiative, this is not the case with the EU. This is the case for the European Data Protection Supervisor, but not for the FRA, which has a horizontal role across all fundamental rights (European Union, 2001, *Council Regulation (EC) No. 45/2001*). The FRA, as the EU's human rights agency cannot issue legal opinions on legislative drafts on its own initiative. The FRA mandate instead requires that the European Parliament, the Council or the Commission explicitly request a legal opinion when "it concerns" their proposals or positions in the course of the legislative process (European Union, 2007, *Council Regulation (EC) No. 168/2007*). However, the EU institutions do not consistently request such an independent service provided by the FRA.

In the following years, FRA 2.0. should keep up the status of a reliable partner in invigorating the legitimacy of human rights. On the research side, the FRA will need to enhance further the delivery of targeted outputs of immediate use to policy makers and lawmakers. Also, methodologically, the FRA should continue developing and implementing multi-annual plans and programs of research in areas where evidence gaps hamper progress in the full implementation and fulfilment of fundamental rights.

In terms of positioning and cooperation, FRA 2.0. should further strengthen its ties with partner organizations of international and regional human rights system, in particular with the UN system, the OSCE, the Council of Europe and the EU institutions. With utmost importance is FRA to equally build relations and cooperation with national human rights institutions.

Conclusions and recommendations

Charter for Fundamental rights, as part of the primary EU law, should become obligatory for the Member States when legislating and practicing the law. A detailed "Charter compatibility check" should be a standard practice even though currently is not. It will be suitable Member States to promote the use of the Charter in national public administration and legal system.

The FRA has proven track record in collecting data, observation, analysis and guideline in fundamental rights. It should be considered to

have the FRA's more systematic involvement in the development of EU legislation and for this purpose agency's founding regulation should be revised. It is recommended to introduce a mandatory step when the EU institutions are legislating and creating policies to request an opinion from FRA whenever fundamental rights are concerned. The obligation should create an atmosphere of always putting fundamental rights first.

Very often the perception on fundamental rights is perceived as focusing on minorities, rather than common benefit for all. This means that fundamental rights defenders need to increase collective ownership of fundamental rights at all levels: politicians among the constituencies and on national administration, lawyers and law makers on law practice and jurisprudence, CSO's on public opinion. Traditional human rights activities and tools may no longer suffice to address the challenges effectively.

Bringing all together, there is an urgency to decrease the gap between the fundamental rights framework in principle and fundamental rights outcomes in practice. The FRA, the EU and its Member States should continuously reinvigorate their commitment to ensure that fundamental rights are *status naturalis* – the new normal in people's lives. One more successful decade will be another step forward in achieving the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

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