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# THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: *A Commentary*

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## ARTICLE 54

### *Prohibition of abuse of rights*

*Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.*

This Article corresponds to Article 30 of the UDHR of 1948, Article 17 of the 1950 ECHR, Article 5 of the 1966 ICCPR, Article 5 of the 1966 ICESCR and Article 29 of the ACHR of 1969.

Under Article 30 of the UDHR: “*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.*”

Article 17 of the ECHR states that: “*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*”

Article 5 of the ICCPR establishes that: “*1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*”

In accordance with Article 5 of the ICESCR: “*1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.*”

Article 29 of the ACHR states that: “*Restrictions Regarding Interpretation - No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.*”

*Last but not the least* is a commonly used expression that will rarely be applied with as much pertinence as when applied to the qualification of Article 54 CFREU.<sup>1</sup>

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<sup>1</sup> On this Article, see Consultative Assembly of the Council of Europe, “Débat préliminaire devant l’Assemblée”, Strasbourg, ECtHR, 1957; H. Cannie and D. Voorhoof, “The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?”, *Netherlands Quarterly of Human Rights*, vol. 29 (2011); European Council, Note from the Præsidium – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, European Council, 2000; and S. Van Drooghenbroeck, “L’article 17 de la Convention européenne des droits de l’homme est-il

These provisions are deeply rooted in the wording of Article 17 of the ECHR, although it is clear that this provision reproduces Article 30 of the UDHR, which preceded the ECHR by two years; the rationale for its existence, and certainly its necessity, but, even more, its function, is to substantiate the ultimate defence (*ultima ratio*) of democracy and freedom against itself. In Goebbels' famous quote on democracy, we read the following: "*Cela restera toujours l'une des meilleures farces de la démocratie d'avoir elle-même fourni à ses ennemis mortels le moyen par lequel elle fut détruite.*" The freedom guaranteed by the international instruments on fundamental rights can, in fact, allow the development of liberticidal initiatives. This risk, which unfortunately has been considerable in recent years, was the main argument used by Mr Maccas, the representative of Greece, when, on 19 August 1949, he appealed to the Consultative Assembly of the Council of Europe for its inclusion in Article 17 of the ECHR.<sup>2</sup> The appeal from Mr Maccas prompted Teitgen, a rapporteur, to submit a proposal to the Committee on Legal and Administrative Matters of the Consultative Assembly, which included a provision whose content corresponded exactly to the current Article 17 of the ECHR. However, this proposal was rejected by the Commission. Resistance to the proposal would only be overcome at the Conference of Senior Officials on Human Rights in Strasbourg that took place between 8 and 17 of June 1950.

The underlying question of the *rationale* of this provision is the defence of freedom and democracy. This protection requires the awareness that fundamental rights, as subjective rights, must have limits. As taught by CASTRO MENDES,<sup>3</sup> there are extrinsic limits to the exercise of rights – the collision of rights and abuse of rights. In the wake of the various international instruments in this area, the EU's legislator conferred upon Article 54 the epigraph "Prohibition of abuse of rights", therein regulating such matter. The adopted solution leads the interpreter in the direction of the Principle of the Abuse of Rights. This is a general principle of law in the Roman-German legal tradition, arising both at the level of domestic law and at the level of international law. It has its origin in the emulative acts in Roman law and corresponds, generally, to the formulation in private law of the principle of the deviation of the existing power in public law.<sup>4</sup> The *rationale* of the Principle of Abuse of Rights is based on the idea that the exercise of a subjective right may be unlawful if the aim pursued is not consistent with the purpose of the law that protects the subjective right in question.

The drafting of this disposition points to the existence of a certain confluence of concepts; the concept of abuse of right and another extrinsic limit to the subjective rights, pointed out by CASTRO MENDES, the collision of rights.<sup>5</sup> The solution cannot be dissociated from the fact that the nature of the CFREU in this matter results from the synthesis between different legal traditions. It so happens that, as M. BYERS came to demonstrate,<sup>6</sup> the Anglo-Saxon legal tradition constructed the concept of abusive use of the law in the perspective of illegality (*tort*) of the exercise due to the violation of the limits imposed by the rights of others: "*The excessive or abusive exercise of rights as limited by the rights and interests of others.*" Which explains how we arrive

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indispensable?"; *Revue trimestrielle des droits de l'homme*, Brussels, Nemesis (2001): 542-543.

<sup>2</sup> M. Maccas, "Débat préliminaire devant l'Assemblée", Strasbourg: ECHR, 1957.

<sup>3</sup> J. Castro Mendes, *Teoria Geral do Direito Civil I* (Lisbon: AAFDL, 1978).

<sup>4</sup> A. Vaz Serra, "Os actos emulativos em Direito Romano", in *Boletim da Faculdade de Direito da Universidade de Coimbra*, Coimbra (1928).

<sup>5</sup> See J. Castro Mendes, *Teoria Geral do Direito Civil I*.

<sup>6</sup> See M. Byers, "Abuse of Rights: an old principle, a new age", *McGill Law Journal*, 47 (2002).

at the co-existence of abuse of rights and collision of rights. In any case, when it comes to Fundamental Rights, the collision of rights seems to be the most evident manifestation of the abuse of rights. In fact, it is inherent in the concept of abuse of rights that the exercise of the right is unlawful. The unlawfulness of the exercise of a right can only result from a breach of a higher-level provision which, in the case of Fundamental Rights, arises from a precept establishing a fundamental right of a higher level.

This seems to have been the solution contemplated by M. Maccas in the proposal submitted to the Consultative Assembly of the Council of Europe in 1949. Indeed, the citation presented in note 55 continued as follows: *“En second lieu, la liberté et la sûreté de la personne humaine, justement parce qu’elles doivent être générales et solidaires, doivent avoir pour corollaires et pour frontières la liberté et la sûreté de son prochain. S’il n’en était pas ainsi, on finirait par ne garantir que la sûreté des malfaiteurs. Et dans ce cas, la seule sûreté dont les innocents bénéficieraient serait la sûreté avec laquelle ils seraient atteints.”*

Article 54 of the Charter covers two broad categories of recipients: the Member States as such (sovereign bodies) and natural and legal persons who, for some reason (personal or territorial jurisdiction), fall within its scope. For this reason, it is possible to state, as regards to this provision, as is the case with Article 17 of the ECHR, that two provisions co-exist: one that clearly addresses the Member States and another the individuals (natural or legal persons). The provision regarding Member States prohibits the use of any of the provisions set forth by the Charter as a means to limit in an unauthorised way any of the rights or freedoms existent therein. The provision that pertains to individuals prohibits the use of the Charter to justify any activity which has as its object or effect the offense of one of the rights or freedoms set forth therein, which is to say that the norm is essentially intended to prevent and ward off any violation of liberty that an inattentive or fundamentalist interpretation of fundamental rights and freedoms might provide.

From the coexistence of two different provisions in a single article, it is conceivable, theoretically, that vertical disputes may arise between Member States and individuals (in a broad sense, between Member States and the Union or even between private individuals) as well as horizontal disputes (between Member States or between private parties). While there is still no case-law application of Article 54 of the Charter, we again refer to Article 17 of the ECHR and, where appropriate, the relevant case-law.

Article 17 of the ECHR has been dealt with in three ways in the case-law of the ECtHR and the European Commission on Human Rights: it has been used in a number of cases as a basis for preventing the use of fundamental rights and freedoms against themselves; in other cases where the use of fundamental rights against the rights themselves might be justified it was simply ignored; and in the third situation it was simply used as an interpretive element and as an aid to the “main” provisions.

*José Caramelo Gomes & Noémia Bessa Vilela*

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The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.