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The Consequences of the “Constitutionalization” of the Charter of Fundamental Rights of the European Union

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Abstract

At their origin, the fundamental rights used to be considered as a peripheral element of the European Community construction, yet, with the development of the EC normative competencies, the gap of the Treaty of Rome regarding the protection of the fundamental rights soon became obvious and unacceptable. Therefore, the Court of Justice of the European Union elaborated by way of jurisprudence a system of protection of the fundamental rights, inspiring itself from the common constitutional traditions of the Member States and from the international instruments to which the Member States have adhered, especially the European Convention on Human Rights. The praetorian construction was then progressively constitutionalized by treaties until the adoption of the Charter of Fundamental Rights in the area of the EU, at the same time giving a great visibility to the values on which it is based. First proclaimed in Nice on 7 December 2000, then officially adopted in its definitive version by the presidents of the European Commission, of the European Parliament and of the EU Council on 12 December 2007, the Charter of Fundamental Rights has acquired a constraining juridical force after the Treaty of Lisbon for 24 Member States, the United Kingdom, Poland and the Czech Republic benefiting of a derogation concerning its application. The Charter is not included in the Treaty of Lisbon but it is annexed under the form of a declaration. The consecration of the Charter of Fundamental Rights, which until recently used to be just a political message of the Member States of the European Union addressed to the European citizens, is part of a larger will of the European Union of assuring the respect of these rights, which, from now on, have become “a part of the law of the European Union as general principles” (art. 6, par. 3 TUE).

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Introduction

The integration of the Charter in the new European Constitution has radically changed the perspectives regarding the use of this instrument. The Charter was likely meant not just to acquire the force to constrain but also to occupy a prominent position in the European Community's fundamental rights protection system as it had a constitutional value. The integration consequently allowed the clarification of this instrument and the Court's shying away from it was therefore unmotivated. The set of problems related to the constitutionalization of the Charter is a vast and complex topic, which cannot be analyzed thoroughly enough in this paper. This is why we shall content ourselves here with just a few general considerations on the main consequences triggered by the insertion of this Charter in the new Constitution. Therefore, it appears important to synthetically analyze the principal modifications that had to be made on the directives of the Charter and mention a few issues for which it was impossible to find a solution through the constitutionalization process. A glimpse on the most important perspectives has permitted a better definition of the goals that the European Union had set for itself in the domain of defense of the fundamental rights.

1. Constitutionalization techniques of the Charter of Fundamental Rights

The diversity of the propositions concerning the insertion of the Charter in the new European Constitution highlighted different positions regarding the role that should be attributed to this instrument in the constitutional order of the Union. While the minimalist solution imagined that the Charter could have been presented as a declaration annexed to the Constitution, another option consisted in integrating it in a protocol with an explicit reference in a directive of the new Constitution. The option finally opted for was, however, that of the insertion of the Charter in the constitutional text as Part Two with a reference in Part One of the new Constitution at article I-7. This differs of the method that is almost always practiced today by the national elaborators of the Constitution who place the catalogue of the fundamental rights in the first part of the Constitution, yet it also represents a significant option as the Charter is placed in this way at the very heart of the new European Constitution. This crystallization of the fundamental rights presents the advantage, but also the risk, according to certain authors, of creating a system of rights endowed with a great rigidity as any change had to go through a Constitution revision procedure (Flauss, 2/2003, p. 150). We could, nevertheless, retort that the fundamental rights and freedoms inscribed in the national constitutions have always been interpreted by the national jurisdictions in an evolutive manner, in harmony with the changes of the societies. The inclusion of the Charter directives in the new European Constitution required several amendments to clarify their meaning and their scope. The text of the essential articles of the Charter was not modified – except for some technical adjustments (For instance, the references to the Community were replaced by references to the “Union” and the references to the community treaties and to the Treaty on the European Union were replaced by references to the new Constitution). On the contrary, the Final Dispositions, which constitute the instructions on how to use the Charter were revised in a more substantial manner, opening, in this way, in certain cases, new perspectives on the protection of the fundamental rights.

2. Fundamental rights classification

The constitutionalization of the Charter introduced a type of explicit hierarchy as far as the fundamental rights are concerned, as article II-52 paragraph 5 states: “The directives of the present Charter containing principles may be implemented by means of legislative and executive acts of the institutions and organs of the Union, and by acts of the Member States when they implement the EU Law, while exerting the respective competences. Invoking them in front of the judges is only admitted for the interpretation and control of the legality of such acts.” Without wanting to start here a debate on the identification of hybrid rights, principles and directives (Turpin, 4/2004, p. 627), it is necessary to observe that the result of the insertion of this paragraph is that there exists, from now on, a clear distinction – absent from the Charter – concerning the level of protection given to rights that need to be *respected* and to principles that have to be *followed* (according to what article II-51 paragraph 1 states). The latter were also possible to invoke only in the cases foreseen in article 52, paragraph 5, which means that in presence of a violation

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