LUMEN 2014

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

Maria-Luiza Hrestică

*Lecturer PhD, Faculty of Law and Administrative Sciences, “Valahia” University Târgoviște, Târgoviște, 130105, România

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).

Keywords: the “constitutionalization” of the Charter; the Treaty of Lisbon; the protection of the fundamental rights; a uniform protection system; the national rights; the European Convention on Human Rights.

* Corresponding author. Tel.: +40 745 025 690; fax: +40 245 60 60 49.
E-mail address: marylou1981@yahoo.com

© 2014 The Authors. Published by Elsevier Ltd. This is an open access article under the CC BY-NC-ND license (http://creativecommons.org/licenses/by-nc-nd/3.0/).
Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.

do:10.1016/j.sbspro.2014.08.198
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
an individual would not have been able to invoke them to obtain reparation (Berramdane, 3/2003, p. 627; Flauss, 6/2001-2002, p. 705).

3. Articulation between the Charter of Fundamental Rights and the national rights

Another innovation is represented by the inclusion in article II-52 of the new Constitution of a paragraph inspired from article 6 on the Treaty on the European Union and stating that “to the extent to which the Charter acknowledges the fundamental rights as they result from the common constitutional traditions of the Member States, these rights need to be interpreted in harmony to the aforementioned traditions” (paragraph 4). This may have seemed obvious and superfluous as article II-53 had mentioned that the level of protection offered by the Charter cannot be inferior to the level recognized by the national constitutions and the international conventions that the Member States have signed. The problem may have arisen as a consequence of the wish to interpret this directive in the sense of the existence of an obligation to interpret the rights in harmony to the constitutional traditions, as in this case we witnessed a sort of reversed primacy of the national rights, which contradicted the primacy principle of the EU law (article I-10 of the new Constitution) (Berramdane, 3/2003, p. 629). A sort of neutralization of the primacy of the Charter became therefore possible through the introduction of a paragraph 6 in article II-52 according to which “the national legislations and practices should be fully considered as it has been mentioned in the present Charter.” The goal of this directive, inserted following the British initiative, was to guarantee an interpretation of rights – and especially of social rights – in conformity with the national legislations; yet, uncertainties emerged, however, in cases of divergences between the Member States.

4. Refusal to award normative competence in matters of fundamental rights

The new Constitution of the Union was unable to foresee modifications regarding the introduction of a normative competence in matters of fundamental rights. This refusal was very explicitly expressed in three dispositions, which showed well the desire of the Member States of not modifying the statu quo. Therefore, article II-51 paragraph 2 stated that “the Charter creates no new competence or task for the Community and for the Union and does not modify the competences and the tasks defined by the treaties.” Moreover, article I-13 regarding the competences shared by the Union and the Member States did not mention the domain of fundamental rights and article I-7 mentioned that the adhesion to the European Human Rights Convention should not have modified the competences of the Union as defined by the Constitution.

5. The importance of the constitutionalization of the Charter of Fundamental Rights

The inclusion of the Charter in the new European Constitution did not represent the last stage of the consolidation of the fundamental rights protection in the Union. The constitutionalization of the Charter was able indeed to unblock and enliven the realization of two ambitious subsequent goals: improvement of the right of access to the Court of Justice for individuals and adhesion to the European Convention on Human Rights.

5.1 The right to an actual appeal

The Convention in charge of the elaboration of the Charter had not wanted – when it inscribed in article 47 the right to an actual appeal – to try and propose changes regarding the ways of appeal, since its mandate excluded any constitutional revision. The constitutionalization of the Charter did not foresee the introduction of a directive regarding the creation of a direct and special appeal in case of violation of the fundamental rights, neither of modifications regarding the possibilities of introducing an appeal for annulation in the Court of Justice for individuals. And this, despite the divergence that seemed to take shape between the position of the Court of First Instance and that of the Court of Justice regarding the conditions of receivability of the appeal for annulation. The modification of the right of access for individuals to the Court of Justice, often invoked, constituted a subsequent stage towards a more efficient implementation of a jurisdictional warranty system for fundamental rights. The
problem was therefore reconsidered in order to change the juridical status of the Charter – in order to guarantee an efficient protection of the rights consecrated in this instrument.

5.2 EU adhesion to the European Convention on Human Rights

The new Constitution, in exchange, expressly opened the perspective of an adhesion of the EU to the European Convention on Human Rights. Article I-6 of the new Constitution foresaw that the Union should be endowed with juridical personality and article I-7 explicitly allowed it to adhere to the European Convention on Human Rights. In this way, the Union finally acquired the necessary competences that it had missed until then [The adhesion to the European Convention on Human Rights had been proposed by the Commission of the European Communities already in 1979. A new proposition, in 1994, had led the Council to request the opinion of the Court of Justice on the compatibility of the adhesion with the Treaties. The Court of Justice, in its notice 2/94 of March 28, 1994 (Rec. I-1759), after having noticed that the Community institutions were obliged to respect the fundamental rights, considered that the Community did not avail itself – not even on the basis of article 235 (nowadays article 308) – of the competence of adhering to the Convention. The issue of adhesion was therefore subordinated to an eventual revision of the Treaties]. The adhesion had the effect of increasing the protection of the fundamental rights, submitting the Union to an external control similar to that that the Court of Strasbourg exerted on the Member States. The fact of reinforcing the powers of the Court of Strasbourg in relation to the Court of Justice did not constitute a weakness for the Union, but on the contrary, it represented a strength, as “it is a sign of maturity for a juridical order to possess, like State orders, the force to endow its own citizens with an instrument that they could use against its institutions” (Rossi, 1/2002, p. 46). Moreover, the adhesion was able to provide a solution to several sensitive issues. Therefore, for instance, it was able to compensate the aforementioned issue of the limitations regarding the individuals’ appeal (Benoît-Rohmer, 2003, p. 281). The adhesion was finally able to solve, on the one hand, today’s contradictory situation that made the Member States risk being called into question by the Court of Strasbourg because of the adoption of measures taken while executing the EU law, as it happened on the occasion of the Cantoni decision [Cour européenne des droits de l’homme (European Court of Human Rights), arrêt Cantoni c. France du 15 novembre 1996, Recueil des arrêts et des decisions 1196/V (Collection of juridical decisions 1196/V)], and, on the other hand, it was able to clarify the control powers of the European Court. Actually, most of the EU acts are submitted to the control of the Court of Strasbourg, although the Union is not represented there. The adhesion allowed the EU institutions, on the one hand, to plead their own means of defense in front of the European Court in the matters concerning the EU law and, on the other hand, a judge elected on behalf of the Union was appointed at the Chamber in charge with the decision in relation to EU law matters. He has brought in his specific knowledge and his experience regarding the EU law. Actually, the values of the European Convention on Human Rights were already part of the juridical order of the Union via the jurisprudence of the Court of Justice but also via the Charter of Fundamental Rights. In this way, the two issues regarding the constitutionalization of the Charter and the adhesion to the European Convention on Human Rights appeared as closely connected. The inclusion of the Charter in the new European Constitution made indeed explicit the will to situate the protection of the fundamental rights at the heart of the juridical system of the Union, and this had as final consequence – for the aforementioned reasons – the exigency of adhesion to the European Convention on Human Rights as accomplishment of the process meant to affirm the fundamental rights (Cutinelli Rendina, 2004, pp. 33-41).

6. Conclusion

Originally, the fundamental rights were considered a peripheral element of the EU construction, yet, with the development of normative EU competences, the gap present in the treaties of Rome regarding the protection of the fundamental rights soon became evident and unacceptable. The Court of Justice therefore elaborated, by way of jurisdiction, a system of protection for the fundamental rights, inspiring itself from the common constitutional traditions of the Member States and from the international instrument to which the Member States adhered, especially the European Convention on Human Rights. The praetorian construction was then progressively constitutionalized in the treaties until the adoption of the Charter of Fundamental Rights. This instrument consecrated the protection of the fundamental rights in the EU territory at the same time giving a great visibility to
the values on which it is founded. While the reticence of the Court of Justice regarding the use of the Charter could
have found an explanation in its will not to influence the political process regarding the issue of the juridical value
of the Charter, with the introduction of this instrument in the text of the new Constitution as Part Two, a change of
position of the Court of Justice became possible. The States had already manifested their will to integrate this
instrument in the text of the new European Constitution and, consequently, the reticence of the Court of Justice in
taking into account the Charter was less easy to explain, although from a strictly formal viewpoint, it remained
devoid of obligatory force until the entry into force of the European Constitution. However, even though the Charter
has apparently become a constraining instrument within the European Union, the old question of the admission to the
European Convention on Human Rights – which expressed the values to which the EU Member States adhered – has
remained increasingly topical. The adhesion really guaranteed juridical security through the creation of a uniform
protection system in the domain of fundamental rights and permitted a clarification of the relations between the UE
law and the control powers of the Court of Strasbourg. This is why the adhesion appeared not just as a necessary
approach for the European Union to be able to be considered a juridical system that respects the fundamental rights
but also equally the logical accomplishment of the constitutionization of the Charter of Fundamental Rights. In
conclusion, the adhesion constituted the final stage that marked the completion of the long process of affirmation of
the fundamental rights in the juridical area of the European Union.

References

Dutheil de la Rochere, J. (eds.), Constitution européenne, démocratie et droits de l’homme (European Constitution, Democracy and Human
Rights), Bruylant, Bruxelles, pp. 278-289.


juridictionnelles communautaires (The taking into account of the Charter of Fundamental Rights of the European Union in the community
domestic judicial instances’ jurisprudence), Mémoire finale soutenue dans le cadre du Diplôme d’études approfondies (L.L.M.) en droit européen
européen et droit international économique, l’Université de Lausanne – Suisse, pp. 33-41.

fondamentaux (Fundamental rights in the European Constitution: the constitutionization of the Charter of Fundamental Rights), in Revue
des affaires européennes (European business review), pp. 703-709.

Today’s Chronicle 2001-2002), in Revue suisse de droit international et de droit européen (Swiss review of international and European law),
pp. 143-179.

Rossi, L. S. (1/2002). “Constitutionnalisation” de l’Union européenne et des droits fondamentaux (Constitutionalization of the European Union
and of the fundamental rights), in Revue trimestrielle de droit européen (Trimestrial European law review), pp. 27-52.

Turpin, F. (4/2004). L’intégration de la Charte des droits fondamentaux dans la Constitution européenne (Integration of the Charter of
Fundamental Rights in the European Constitution), in Revue trimestrielle de droit européen (Trimestrial European law review), pp. 615-636.