

Giacomo Di Federico
Editor

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The EU Charter of Fundamental Rights

From Declaration to Binding Instrument

THE EU CHARTER OF FUNDAMENTAL RIGHTS

FROM DECLARATION TO BINDING
INSTRUMENT

Edited by
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 Springer

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THE EU CHARTER OF FUNDAMENTAL RIGHTS

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Preface

The fact that fundamental rights are an essential component of the European Union is today a consolidated state of affairs. In this sense, the EU seems to have undergone a true genetic transformation, evolving from a *sui generis* international organisation, mainly focused on market integration, to an autonomous legal order protecting and promoting the rule of law within and outside its boundaries.

It is well known that the failure of the ambitious constitutional project did not stop the reform process undertaken with the 2001 Declaration on the Future of Europe. The reflection period which followed the French and Dutch referenda on the Treaty Establishing a Constitution for Europe ended with the Berlin Summit in March 2007. The resulting Intergovernmental Conference promptly returned a Treaty purged of all constitutional elements, but deeply rooted in the work of the Giscard d'Estaing Convention.

The final text, signed in Lisbon on 13 December 2007, provides that the European Union shall replace and succeed to the European Community. The former will be founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union, with the same legal value. The repeal of the Pillar architecture, a profoundly modified institutional framework designed to ensure effectiveness and coherence, the enhanced judicial protection bestowed to individuals, the primary law status assigned to the Charter and the envisaged accession to the European Convention on Human Rights are all decisive elements in the affirmation of the European Union as a legal order based on the rule of law, and a credible actor on the international scene.

Although the specificities preserved in the Common Foreign and Security Policy (including the Common Defence Policy) still betray strong national resistances in relation to further integration in this area – sometimes linked to well consolidated constitutional traditions – the new provisions enhance the overall capacity of the EU to effectively respond to external threats while concomitantly promoting and defending its internal values outside its borders.

Despite the lack of a specific competence on fundamental rights, the EU has increasingly been involved in their protection, mainly to uphold the legitimacy of the system, and most notably to ensure the effectiveness of pivotal principles for European integration, such as direct effect and supremacy, vis à vis national (constitutional) prerogatives and international obligations. Since the implementation of EC/EU law was (and still is) to a large extent left to the Member States, adherence to the standard of protection ensured under the European Convention on Human Rights increasingly became an unfailing necessity for the deepening of European integration. Until the Lisbon Treaty this was achieved mainly through a “wise” judicial control over EC/EU law, as well as domestic legislation and practice falling within the scope of application of the treaties, and by virtue of a certain self-restraint on the part of the EU institutions.

On the other hand, being invariably connected to the legal traditions of the Member States and to the development of a higher international standard of protection, the respect of fundamental rights has become a priority in itself, a way to affirm the autonomous nature of the EU legal order. The elaboration of a document codifying the rights and principles guaranteed under Union law and its solemn proclamation by the three main institutions is an outstanding illustration of this resolution. Making it binding and legally enforceable means providing the Union with a true *Bill of Rights* and thus contributes to the creation of “an ever closer Union among the peoples of Europe”.

For EU countries, this assimilating role has until now been played by the European Convention on Human Rights. It is suggested that the centralising effect once performed by the Strasbourg Court will now be played by the Court of Justice of the European Union. Indeed, if the Charter is a more than welcome *tertium genus* in the multilevel system of fundamental rights protection in Europe, accession to the ECtHR should not distract national courts, especially Supreme and Constitutional Courts, from respecting EU law. Having “the same value as the Treaties”, the Charter is now the main parameter of legality for the institutions and bodies of the Union as well as for the Member States when they apply, implement or derogate from EU law. Moreover, it acts as a compass for the development of important policies such as, for instance, Health, Environmental and Consumer protection, once again underscoring the high prioritization of fundamental rights within the Union.

But the Charter does not extend the competences of the EU. National distrust led to an overabundance of provisions excluding this possibility (see Art. 51 (2) of the Charter and Art. 6 (1) TEU), including a Declaration by the Czech Republic and Protocol No 30 on the application of the Charter in the United Kingdom and Poland. Nevertheless, it could be argued that by exercising their renewed competences the institutions will increasingly bring domestic legislation and practice within the scope of application of EU law and thus indirectly extend the scope of the Charter.

With the rejection of the Constitutional Treaty, the emperor might have lost his robes but still rules, and integration will proceed in a renewed institutional framework where normative and judicial action must build upon and comply with the Charter. On the other hand, accession to the ECHR shall provide the system with more coherence allowing individuals to contest the compatibility of EU law and practice before the Strasbourg Court. As will be seen, although the reasons for accession are mostly political in nature, the practical consequences of membership could be quite significant. Indeed, this external supervision should be understood as complementary to the newly binding Charter, which sets the minimum standard of protection by and within the Union. By contrast, the protection offered under the Convention will remain the lowest applicable standard for Member States, when acting outside the scope of application of the treaties, and for the EU when operating within its competences.

This volume brings together a number of contributions by researchers working within the Interdepartmental Research Centre on European Law (CIRDE) of the University of Bologna and under the direction of Professor Lucia Serena Rossi. It is the result of a coordinated investigation which began within the EU CONSENT Network of Excellence (VI Framework Programme) “Wider Europe, Deeper Integration?” and was subsequently carried out in the context of the Jean Monnet Centre of Excellence “Rule of Law and Fundamental Rights: The EU Model”. In light of the process which finally led to the adoption of the Lisbon Treaty it appeared useful to assess whether and to what extent the binding force attributed to the EU Charter of Fundamental Rights and the envisaged accession to the European Convention on Human Rights would impact the functioning of the EU legal order.

Since its first proclamation on 7 December 2000, the nature, value and scope of the Charter have been thoroughly investigated in legal literature, together with its use by the EU courts and national judges. Taking as a frame of reference the new Treaties, this book firstly addresses the consequences of a legally binding *Bill of Rights* in a broader perspective, taking into account its legal and political relevance, its contribution to the multilevel system of fundamental rights protection in Europe, the influence it has so far exercised on domestic and EU case law, as well as the possible repercussions on the role of the European Parliament, on judicial protection and on human rights conditionality in the EU’s enlargement policy. The second part focuses on the consequences of a binding Charter in certain specific areas of law: from citizens’ rights to internal market derogations; from judicial cooperation in civil and criminal matters to social rights and environmental policy making; from the common commercial policy to the common foreign and security policy.

A comprehensive analysis of the multiple consequences, legal and political, stemming from the Reform Treaty falls beyond the scope of the present volume. More sensibly, this volume is directed at offering a first

assessment of possible future developments in what are believed to be some crucial domains of EU law, both in terms of legislative action and judicial practice.

Bologna, Italy
1 December 2009

Giacomo Di Federico

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Abbreviations

AFSJ	Area of Freedom Security and Justice
AG	Advocate General
CCP	Common Commercial Policy
CFI	Court of First Instance
CFR	EU Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
EC	European Community
ECtHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EP	European Parliament
EPI	Environmental Policy Integration
EU	European Union
EUCJ	Court of Justice of the European Union
GC	General Court of the European Union
ILO	International Labour Organisation
OJ	Official Journal
OMC	Open Method of Coordination
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

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