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**THE “NEW LIFE” OF THE EU CHARTER OF FUNDAMENTAL RIGHTS AND
THE STATUS OF HUMAN RIGHTS IN EUROPE**

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The European Union Charter of Fundamental Rights (the Charter)¹ was drafted in 2000 under the premise that it would become legally binding.² The Charter’s main aim is to codify existing law, principally the case law of the European Court of Justice (ECJ) on civic and political rights, to increase their visibility. It nevertheless also contains “new” rights and principles, often of a social or economic nature, not always recognized in other binding sources of Community law.

Despite the original presumption, the Charter is not incorporated into the EU Treaty, but is only solemnly proclaimed by the Council of the European Union, the European Commission and the European Parliament at Nice in December 7, 2000. In 2004, the Charter makes its way into Pt II of the Treaty establishing a Constitution for Europe 2004.³ However, with the ratification of the European Constitution on stand-by following the French and Dutch negative referendums of 2005, and the current project of a brand new “simplified” Treaty,⁴ the future formal status of the Charter is uncertain.

¹ [2000] O.J. C364/1.

² CHARTE 4105/00, p.4.

³ [2004] O.J. C310/1.

⁴ The idea of a simplified Treaty is making its way: see *Le Monde*, May 23, 2007, at www.lemonde.fr/web/article/0,1-0@2-3214,36-914093@51-866290,0.html

Whatever the political fate of the Charter, it is argued that it is nonetheless slowly establishing itself as part of the *acquis constitutionnel communautaire*. This article examines the recent case law of the ECJ referring to the Charter, and draws conclusions regarding the legal status of the Charter and its implications on human rights protection in the European Union.

The Charter, “living” through judicial references

In spite of not yet being incorporated into any legally binding document, the Charter is far from a “dead letter.” It is kept alive by the political commitment of the EU institutions to respect it in both internal and external policies,⁵ by its serving as a benchmark in the monitoring of fundamental rights in the European Union,⁶ and also by judges referring to it in cases involving human rights at both national and EU level.

Early judicial references

Even before the Charter was solemnly proclaimed, the Spanish Constitutional Court referred to it, in order to assess the weight of the right to protection of personal data, one

⁵ See, e.g. European Commission, *Application of the Charter of Fundamental Rights of the European Union* SEC(2001) 380/3 and *The European Union’s role in Promoting human rights and democratization in third countries* COM(2001) 252 final, p.3.

⁶ e.g. the Three Wise Men who reported on the sanctions on Austria referred frequently to the Charter - *Report by Martti Ahtisaari, Jochen Frowein, and Marelino Oreja*, adopted in Paris on September 8, 2000 available at www.virtual-institute.de/en/BerichtEU/index. The Network of Independent Experts for Fundamental Rights, set up in 2002 to assess the fundamental rights situation in the Member States, uses the Charter as its benchmark (see http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm). Finally, the European Commission adopted a methodology to guarantee the Charter compatibility with its legislative proposals, as part of its wider new impact assessment approach (see *Compliance with the Charter of Fundamental Rights in Commission’s legislative proposals – Methodology for a rigorous and systematic monitoring* COM(2005) 172 final).

of the new rights guaranteed by the Charter.⁷ The European Court of Human Rights (ECtHR), too, warmly welcomes the Charter as a modern human rights document and often refers to it.⁸ The European Court of First Instance (CFI) is also eager to make use of the Charter. Its most remarkable reference was in *Jégo-Quéré*, where the CFI relied on the Charter to reverse the much criticised ECJ case law restricting private parties' standing to bring judicial review actions against Community regulations.⁹ Finally, Advocates General before the ECJ write eloquent Opinions, inviting the Court to consider the Charter as the most appropriate point of reference where fundamental rights are concerned.¹⁰

The ECJ's long silence

To the surprise of many observers, the ECJ has not showed a great enthusiasm in joining the cohort of the Charter's admirers. The ECJ, until last year, remained silent and carefully avoided any reference to the Charter, even in a footnote. Various explanations can be put forward to explain the ECJ's attitude. First, the ECJ probably felt that it should not defy straight away the explicit will of the Member States (or at least some of them), not to make the Charter binding, by *de facto* incorporating the Charter through judicial

⁷ Spanish Constitutional Court Decision 292/2000 of November 30, 2000, available at www.tribunalconstitucional.es/jurisprudencia/Stc2000/STC2000-292.html.

⁸ See judge Costa in *Hatton v United Kingdom* (36022/97) (2002) 34 E.H.R.R. 1, to support the recognition of the principle of protection of the environment. Since then, the ECtHR's judgments refer regularly to the EU Charter of Fundamental Rights.

⁹ *Jégo-Quéré et Cie SA v Commission of the European Communities* (T-177/01) [2002] E.C.R. II-2365 ; [2002] 2 C.M.L.R. 44. The ECJ overruled the case on appeal, in *Commission of the European Communities v Jégo-Quere et Cie SA* (C-263/02 P) [2004] E.C.R. I-3425; [2004] 2 C.M.L.R. 12.

¹⁰ See, e.g. Opinion of Advocate General Tizzano in *R. (on the application of Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* (C-173/99) [2001] E.C.R. I-4881; [2001] 3 C.M.L.R. 7 and Opinion of Advocate General Mischo in *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Scottish Ministers* (C-20/00 & C-64/00) [2003] E.C.R. I-7411; [2003] 3 C.M.L.R. 6

construction. Secondly, it soon became clear that the Charter would be included in the Treaty establishing a Constitution for Europe, and the ECJ perhaps thought it wise to leave it to the peoples and their representatives to upgrade the Charter to constitutional status. Thirdly, the ECJ was perhaps not so eager to refer to the Charter because making it “the” reference could have reduced the flexibility granted by the general principles’ technique so far used by the ECJ to recognise and define the scope of specific fundamental rights. Finally, maybe the ECJ did not refer to the Charter simply because it did not need it to, in order to decide on the cases submitted to it, since it could always rely on other recognised sources.

A wind of change

Whilst commentators, parties and advisers had almost given up, the ECJ suddenly makes its first reference to the Charter in the summer of 2006.¹¹ Three have followed since.¹² This sudden awakening takes place a year after the negative referendums on the European Constitution, at a time where the constitutional process is in deadlock. It is thus tempting to conclude that, whilst the ECJ was happy to leave to politicians the formal incorporation of the Charter, perhaps influenced by democratic concerns, it is also willing to take the matter back into its own hands, should the political process fail. It would not be the first time that the ECJ has deployed activism to compensate for political inertia.¹³

¹¹ *European Parliament v Council of the European Union* (C-540/03) [2006] E.C.R. I-5769; [2006] 3 C.M.L.R. 28.

¹² *Salzgitter Mannesmann GmbH (formerly Mannesmannrohren-Werke AG) v Commission of the European Communities* (C-411/04 P) [2007] 4 C.M.L.R. 17; *Unibet (London) Ltd v Justitiekanslern* (C-432/05) (March 13, 2007, not yet reported) and *Advocateen voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) (May 3, 2007, not yet reported)

¹³ See J.H.H. Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403.

At first sight however, these four references are rather disappointing. First, because, like in most cases where fundamental rights are invoked, they did not lead to any finding of human rights violations. Secondly, because they were timorous in substance. They nevertheless remain significant, since they certainly open the door and may be pave the way for more substantial uses of the Charter in the future.

The first Charter reference: breaking the silence

The first reference, and the most substantial so far, arises in *European Parliament v Council of the European Union*.¹⁴ Council Directive 2003/86¹⁵ provides for third country nationals residing lawfully in a Member State to have their children join them through family reunification. It nevertheless provides for derogations, allegedly based on the need to secure family members' integration in the host State.¹⁶ The European Parliament challenges some of these derogatory provisions for being in breach of fundamental rights protected by national constitutional traditions, by the European Convention on Human Rights 1950 (ECHR) and other international instruments, but also by the Charter, in particular Art.7 on the right to family life, Art.21(1) on the principle of non-discrimination and Art.24 on the rights of the child.¹⁷ On the substance, Advocate General Kokott emphasises the parallelism between Art.8 ECHR and Art.7 of the

¹⁴ *European Parliament v Council of the European Union* (C-540/03) [2006] E.C.R. I-5769; [2006] 3 C.M.L.R. 28.

¹⁵ Council Directive 2003/86 on the right to family reunification [2003] O.J. L251/12.

¹⁶ Art.4(1) provides that where a child is aged over 12 and arrives independently, the Member State may verify that he or she meets integration conditions provided by law. Art.4(6) enables the Member State to require applications for family reunification of minor children to be made before the age of 15. Art.8 allows the Member State to impose a minimum residence period for the sponsor, before he or she can have his family members join him or her.

¹⁷ It is worth noting that it was not the substantial provisions of the Directive that posed problems, but rather the leeway that it left to Member States at implementation level which was problematic in the light of fundamental rights protection.

Charter, and follows the instructions included in Art.II-112(3) and Art.II-113 of the Treaty establishing a Constitution for Europe, by calling for the application of an ECtHR approach. In relation to the weight to be given to the Charter, she considers that:

“[w]hile the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order.”¹⁸

Moreover, she stresses a further relevance of the Charter, produced by the recital of the Directive itself, which mentions that the Directive is intended to be compatible with the fundamental rights recognised in the Charter. Whilst she considers that Art.4(1) and (6) of the Directive can be interpreted consistently with fundamental rights, she does not think so of Art.8, which she finds to violate the right to family life. Indeed, as this provision leaves an excessive discretion to Member States, it makes it possible for national rules to be enacted in breach of fundamental rights requirements, which itself constitutes a breach of Community law.

As to the ECJ, it goes in a similar direction to that of its Advocate General's on most points. It even finally decides to break its silence, and refers to the Charter in the following terms:

¹⁸ *European Parliament v Council of the European Union* (C-540/03), cited above, para.108 of the AG Opinion.

“The Charter was *solemnly proclaimed* by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is *not a legally binding instrument*, the Community legislature did, however, *acknowledge its importance* by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognized not only by Article 8 of the ECHR, but also in the Charter. Furthermore, the *principal aim of the Charter*, as is apparent from its preamble, is to *reaffirm rights* as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.”¹⁹

According to the Court, the Charter is thus relevant to the extent that it confirms rights as they result from other sources. The ECJ considers nevertheless the Charter as a coherent whole, since its provisions must be read in conjunction with each other.²⁰ Like the Advocate General, the Court opts for an ECtHR approach. However, unlike her, the ECJ does not find any violation of fundamental rights and considers that all contested provisions can, and must, be interpreted and implemented in conformity with fundamental rights.

¹⁹ *European Parliament v Council of the European Union* (C-540/03), cited above, para.38 of the judgment (italics added).

²⁰ *European Parliament v Council of the European Union* (C-540/03), cited above, para.58 of the judgment. The Charter recognises, in Art.7, the same right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child’s best interests, which are recognized in Art.24(2) of the Charter, and taking account of the need, expressed in Art.24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

This case is interesting for two main reasons. First, the manner in which the ECJ refers first to ECHR provisions, as well as the way it applies ECtHR case law, gives the impression that the European Union is *de facto* a party to the Convention. The ECJ appears to treat the Convention as the first point of reference where fundamental rights also protected in the ECHR are concerned and ECtHR case law as binding precedent. This is clearly in line with the spirit of the European Constitution. Secondly, the Charter, although coming second to the ECHR, is upgraded to the status of “rule of law in whose light [Community acts] legality may be reviewed.”²¹ For the ECJ, this is so because it codifies rights, which already have constitutional status, due to their incorporation in the Treaties or their recognition as general principles protecting fundamental rights, inspired by international instruments and national constitutional traditions.

The other cases: confirmation of the Charter as “reaffirming” rights

The second ECJ reference to the Charter occurs in an appeal against a CFI judgment confirming a decision by the European Commission to impose fines on the companies involved in a cartel.²² Mannesmann, one of the companies, appeals the case to the ECJ, on the basis, *inter alia*, of a breach of the right to a fair trial, guaranteed by Art.6 ECHR and Arts 46 and 48 of the Charter, since the decision to impose the fine was partially based on a document whose origin was not revealed. The ECJ rejects the plea, but uses the opportunity to remind that, at the time of the contested decision, the Charter had not

²¹ It is under this heading that the Charter is mentioned.

²² *Salzgitter Mannesmann GmbH (formerly Mannesmannrohren-Werke AG) v Commission of the European Communities* (C-411/04 P) [2007] 4 C.M.L.R. 17

yet been adopted,²³ thereby signaling that a review of compatibility of EC acts with the Charter is not excluded for acts adopted after the Charter's proclamation.

The third reference appears in *Unibet*.²⁴ Unibet bought advertising space for its online gambling service in Sweden, where gambling is strictly regulated. The authorities delivered an injunction against the media advertising Unibet's service. Unibet brings legal actions which are dismissed by lower courts. It appeals to the Swedish Supreme Court, which decides to refer various questions to the ECJ. In particular, it asks whether the principle of effective judicial protection guaranteed by Community law requires the national legal order to provide for a self-standing action to question the compatibility of national law with Community law, where alternative remedies only provide for the compatibility question to be decided as a preliminary issue. The ECJ confirms that the principle of effective judicial protection is a general principle of Community law stemming from national constitutional traditions and Arts 6 and 13 ECHR, "which has also been *reaffirmed* by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice."²⁵ The ECJ finds nonetheless that this principle does not require the national legal order to provide for self-standing action. In this case, like in the family reunification case, the Charter is used to confirm the existence of a specific right, already protected as a general principle protecting fundamental rights.

Finally, the most recent reference²⁶ arises in a ruling addressing the thorny issue of the validity of Council Framework Decision 2002/584.²⁷ The European arrest warrant

²³ *Salzgitter Mannesmann*, para.50.

²⁴ *Unibet (London) Ltd v Justitiekanslern* (C-432/05) (March 13, 2007, not yet reported)

²⁵ *Unibet*, para.37 (italics added).

²⁶ *Advocateen voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) (May 3, 2007, not yet reported)

(EAW) provides for a fast procedure of surrender to replace long and cumbersome extradition mechanisms amongst EU Member States. National implementations of this decision have been the object of constitutional litigation in many EU countries, for they conflict with constitutional rules preventing the extradition of nationals. Some national courts have declared the implementing measures invalid,²⁸ whilst others have upheld them.²⁹ The association *Advocaten voor de Wereld* brought an action before the Court of Arbitration of Belgium, seeking annulment of the Belgian Law implementing the Framework Decision 2002/584. The national court refers to the ECJ questions concerning the validity of the Decision, and in particular questions whether the Decision is compatible with the principles of legality in criminal matters, equality and non-discrimination. The Advocate General, Ruiz-Jarabo Colomer, presents the proclamation of the Charter as “an event which was difficult to ignore”³⁰ and refutes the “view that nothing has changed, as though the Charter were not worth the paper it is written on.”³¹ He refers to the family reunification case as announcing “a change of direction” in the ECJ’s case law,³² and urges the ECJ to “break its silence and recognize the authority of the Charter of Fundamental Rights as *an interpretative tool at the forefront of the protection of fundamental rights which are part of the heritage of the Member States.*”³³ The ECJ did not go as far as called for by its adviser. However, it stated that the principle of the legality of criminal offences and penalties and the principle of equality and non-

²⁷ Council Framework Decision 2002/584 (JHA) on the European arrest warrant and the surrender procedures between Member States [2002] O.J. L190/1

²⁸ Polish Constitutional Court Decision in Case P 1/05 of April 27, 2005 [2005] Dz. U. 5250; German Federal Constitutional Court Decision in Case 2BvR 2236/04 of July 18, 2005 [2005] BGBL (D) I 2300 and Supreme Court of Cyprus Decision in Case 294/2005 of November 7, 2005.

²⁹ See, e.g. Czech Constitutional Court Decision in Case 66/04 of May 3, 2006.

³⁰ *Advocateen voor de Wereld*, cited above, para.76 of the AG Opinion.

³¹ *Advocateen voor de Wereld*, cited above, para.77 of the AG Opinion

³² *Advocateen voor de Wereld*, cited above, para.78 of the AG Opinion.

³³ *Advocateen voor de Wereld*, cited above, para.79 of the AG Opinion (italics added).

discrimination are “reaffirmed” in the Charter of Fundamental Rights of the European Union.³⁴ The ECJ eventually upheld Framework Decision 2002/584. In this case again, the Charter is used as a means of confirmation, rather than as a primary source of identification and definition of rights.

Secondary source of inspiration or mandatory reference? The impact on human rights protection in the European Union

Eagerly awaited by observers of the ECJ, these first references are also criticized by many for not going far enough. The Charter is still presented as a “second class,” supplementary source of rights, whilst it was meant to become “the” Bill of Rights of the European Union. In the eyes of the ECJ, its weight is still only made up of the constitutional value of the provisions which it codifies.

In most cases, i.e. where the Charter provides for already recognized rights, the actual status of the Charter may be of little practical consequence, for the same result may be achieved with or without the Charter. However, granting constitutional status to the Charter could affect the balancing of the rights it contains against other high-ranking Community norms, such as the free movement provisions. Admittedly, the ECJ has already started to tip the balance more in favor of fundamental rights where they conflict with free movement rules, and this without using the Charter.³⁵ Yet, the Charter provides a stronger basis for doing so. Perhaps the Fishermen Union Strikes case, soon to be

³⁴ *Advocateen voor de Wereld*, cited above, para.46 of the judgment.

³⁵ *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34 and *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-9609; [2005] 1 C.M.L.R. 5.

decided, will throw more light on how the social rights and economic freedoms can be appropriately reconciled with the help of the Charter.³⁶

In relation to the new rights and principles contained in the Charter, the lack of intrinsic legal recognition of the Charter is problematic as it maintains a *flou juridique* as to the real status of these norms in the context of judicial actions. We know that the “principles” of the Charter are programmatic in nature and are not designed to be judicially enforceable directly,³⁷ but what about the new “rights”?

It is argued that the judicial recognition of the constitutional value of the Charter as a whole would improve the position of fundamental rights in the EU legal corpus, as well as clarify the content of the fundamental rights protected in the EU. Furthermore, it would provide a new and stronger basis for the balancing of the “economic” and the “social” in the European Union,³⁸ something which EU citizens, at least in some countries, seem to be calling for.

Prospects: from the back door to the front door

In adopting a careful approach, insisting on the “legislative instruction” to refer to the Charter, the ECJ kills two birds with one stone. It allows the progressive recognition of the Charter as a primary text of reference, whilst fending off criticism of judicial activism. Indeed, with the generalisation of Charter compatibility clauses in all EU

³⁶ See also Advocate General Maduro’s Opinion of May 23, 2007 in *The International Transport Workers’ Federation and the Finnish Seaman’s Union v Viking Line ABP and OÜ Viking Line Festi* (C-438/05) (not yet reported) where the right to strike and collective actions protected by Arts 12 and 28 of the Charter are balanced against freedom of establishment.

³⁷ See Art.II-112(5) of the Treaty establishing a Constitution for Europe.

³⁸ For a similar argument, see A.J. Menéndez, “Legal status and policy implications of the Charter of Fundamental Rights of the European Union”, ARENA Working Papers WP 02/7, available at www.arena.uio.no/publications/wp02_7.htm.

legislation, the Charter will inevitably become a mandatory point of reference. The Charter is thus making its way into the EU *acquis constitutionnel* through the back door. Moreover, the lack of full recognition of the Charter may have less to do with a deep-rooted reluctance of the ECJ, and more to do with a lack of opportunity. Indeed, all these recent cases concern “old” rights, which had been recognised prior to the proclamation of the Charter. It is thus not excluded that, should the opportunity occur for consecrating a “new” right, the ECJ would finally recognise the intrinsic value of the Charter, so as to base the new right on it.