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THE CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights sets out the basic rights that must be respected both by the European Union and the Member States when implementing EU law. It is a legally binding instrument that was drawn up in order to expressly recognise, and give visibility to, the role of fundamental rights in the legal order of the Union.

LEGAL STATUS

The Charter of Fundamental Rights of the European Union was solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000. After being amended, it was proclaimed again in 2007.

However, the solemn proclamation did not make the Charter legally binding. The adoption of the draft Constitution for Europe, signed in 2004, would have granted it binding force. The failure of the ratification process ([1.1.4](#)) meant that the Charter remained a mere declaration of rights until the adoption of the Treaty of Lisbon.

On 1 December 2009, the Charter became legally binding. Article 6(1) of the Treaty on European Union (TEU) now provides that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties'. The Charter, therefore, constitutes primary EU law; as such, it serves as a parameter for examining the validity of secondary EU legislation and national measures.

BACKGROUND

The European Communities (now the European Union) were originally created as an international organisation with an essentially economic scope of action. Initially, therefore, there was no perceived need for rules concerning respect for fundamental rights.

However, once the Court of Justice affirmed the principles of direct effect ([1.2.1](#)) and of primacy of European law, according to which Community law takes precedence over domestic law [*Costa v ENEL*, Case 6/64], certain national courts began to express concerns about the effects which such case-law might have on the protection of constitutional values. If European law was to prevail even over domestic constitutional law, it would become possible for it to breach the fundamental rights granted by national constitutions. In response to this, in 1974 the German and Italian constitutional courts each adopted a judgment in which they asserted their power to review European law in order to ensure its consistency with constitutional rights [*Solange I*; *Frontini*].

At the same time, the Court of Justice developed its own case-law on the role of fundamental rights in the European legal order. As early as 1969 it recognised that fundamental human rights were 'enshrined in the general principles of Community law' and, as such, protected by the Court itself [*Stauder*, Case 29/69]. Its subsequent reaffirmation of the same principle eventually led the German Constitutional Court to adopt a more nuanced approach, recognising that the

Court of Justice ensured a level of protection of fundamental rights substantially similar to that required by the national constitution, and, thus, that there was no need to verify the compatibility of every piece of Community legislation with the constitution [*Solange II*, 1987].

For a long time, the protection of fundamental rights against action by the Communities was therefore left to the Court of Justice, which elaborated a catalogue of rights drawn from the general principles of Community law and from the common constitutional traditions of the Member States. However, the absence of an explicit, written catalogue of fundamental rights, binding on the European Community and easily accessible to citizens, remained an issue of concern. Two main proposals were made on repeated occasions with the aim of filling this legislative gap.

The first was that the European Community could accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), an already existing regional instrument aimed at protecting human rights, whose correct application by States Parties is supervised by the European Court of Human Rights. This option, however, was ruled out after the Court of Justice rendered an Opinion [2/94], according to which the Community lacked the competence to accede to the Convention. As a consequence, this avenue could only be pursued after the Treaties had been amended. The necessary amendments were finally adopted with the entry into force of the Treaty of Lisbon. Article 6 TEU now requires the Union to accede to the ECHR. The Court of Justice, however, concluded that the Draft Accession Agreement negotiated by the EU and the Council of Europe was not compatible with EU law (Opinion 2/13).

The other proposal was that the Community should adopt its own Charter of Fundamental Rights, granting the Court of Justice the power to ensure its correct implementation. This approach was discussed on a number of occasions over the years and was proposed again during the 1999 European Council meeting in Cologne.

THE DRAFTING PROCESS

The basic content of the Charter was shaped by the conclusions of the Cologne meeting, according to which the main purpose of the Charter was to make the overriding importance and relevance of fundamental rights more visible to EU citizens. The main sources of inspiration for the drafters of the Charter were to be the ECHR and the constitutional traditions common to the Member States, as general principles of Community law. In addition, the European Social Charter (a Council of Europe Treaty) and the Community Charter of the Fundamental Social Rights of Workers would also serve as sources of inspiration, insofar as they did not merely establish objectives for action.

The composition of the body which was to draft the Charter was decided on at the 1999 European Council meeting in Tampere. The body, which was called the ‘Convention’, included, as full members, 15 representatives of the heads of state or government of the then 15 Member States, one representative of the President of the Commission, 16 Members of the European Parliament, and 30 members of national parliaments (two from each parliament). Observer status was also granted to two representatives of the Court of Justice and two representatives of the Council of Europe, including one from the European Court of Human Rights. Other EU bodies (such as the Economic and Social Committee, the Committee of the Regions and the Ombudsman), as well as other bodies, social groups or experts, could be invited to give their views but were not directly involved in the drafting process. Representation of the views of citizens and civil society was ensured, given the predominance of representatives drawn from the national parliaments and the European Parliament. The composition and working methods of the Convention served as a model for the Convention on the Future of Europe ([1.1.4](#)).

CONTENT

The Charter of Fundamental Rights is divided into seven titles, six of which are devoted to listing specific types of rights while the last clarifies the scope of application of the Charter and the principles governing its interpretation. One significant characteristic of the Charter is its innovative grouping of rights, whereby it abandons the traditional distinction between, on the one hand, civil and political rights and, on the other, economic and social rights. At the same time, the Charter makes a clear distinction between rights and principles. The latter, according to Article 52(5), are to be implemented through additional legislation and only become significant for the courts in cases involving the interpretation and legality of such laws.

The substantive part of the Charter is subdivided as follows:

Title I ('Dignity') upholds the rights to human dignity, life and integrity of the person, and reaffirms the prohibition against torture and slavery.

Title II ('Freedoms') upholds the rights to liberty and respect for private and family life, the right to marry and to found a family, and the rights to freedom of thought, conscience and religion, expression and assembly. It also affirms the rights to education, work, property and asylum.

Title III ('Equality') reaffirms the principle of equality and non-discrimination as well as respect for cultural, religious and linguistic diversity. It also grants specific protection to the rights of children, the elderly and persons with disabilities.

Title IV ('Solidarity') ensures protection for the rights of workers, including the rights to collective bargaining and action and to fair and just working conditions. It also recognises additional rights and principles, such as the entitlement to social security, the right of access to health care and the principles of environmental and consumer protection.

Title V ('Citizens' Rights') lists the rights of the citizens of the Union: the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections, the right to good administration, and the rights to petition, to have access to documents, to diplomatic protection and to freedom of movement and of residence ([2.1.1](#)).

Title VI ('Justice') reaffirms the rights to an effective remedy and a fair trial, the right of defence, the principles of legality and proportionality of criminal offences, and the right to protection against double jeopardy.

While the Charter mostly reaffirms rights which already existed in the Member States, and which had been recognised as forming part of the general principles of EU law, it is also innovative in some respects. For instance, disability, age and sexual orientation are now explicitly mentioned as prohibited grounds of discrimination. Moreover, the Charter includes some 'modern' rights, as illustrated by the prohibition against reproductive human cloning.

The main value of the Charter, however, does not lie in its innovative character, but in the explicit recognition of the pivotal role that fundamental rights play in the EU legal order. Thus, the Charter expressly acknowledges that the Union is a community of rights and of values, and that citizens' fundamental rights lie at the heart of the European Union.

SCOPE OF APPLICATION AND INTERPRETATION

Title VII of the Charter includes some general provisions governing its interpretation and application.

The personal scope of application of the Charter is potentially very broad: most of the rights it recognises are granted to 'everyone', regardless of nationality or status. However, some rights

are only granted to citizens (in particular, most of the rights listed in Title V), while others are rather relevant for non-EU nationals (for instance, the right to asylum) or for specific categories of persons (such as workers).

The material scope of application of the Charter is defined expressly in Article 51, which states that its provisions are addressed only to the EU institutions and bodies and, when they act to implement EU law, to the Member States ([2.1.2](#)). This provision serves to draw the boundary between the scope of the Charter and that of national constitutions: the Charter does not bind states unless they are acting to implement EU law. Moreover, the Charter does not extend the powers or competences of the Union, thereby ensuring that the adoption of the Charter does not, by itself, increase the powers of the Union to the detriment of those of the Member States.

Additional rules confirming the importance of national constitutional traditions and national laws are to be found in Articles 52 and 53. The first of these articles stipulates that fundamental rights must be interpreted in harmony with the constitutional traditions common to the Member States, as well as with the ECHR, and with full account taken of national laws and practices. Article 53 clearly states that the Charter cannot restrict or adversely affect the level of protection of fundamental rights already provided by Union law, international law (in particular the ECHR) and the Member States' constitutions.

While the Charter encompasses a number of rights, these are not granted unlimited protection. Indeed, Article 52 allows for limitations on the exercise of rights, so long as these are provided for by law, respect the essence of the rights in question, and are proportionate and necessary to protect the rights of others or the general interest. Moreover, while some rights are framed in absolute terms, others are only granted 'in accordance with Union law and national laws and practices', signifying that the scope of such rights may be subject to additional limitations.

The Charter is equally applicable to all the Member States of the European Union. Although a Protocol has been adopted to clarify its application to the United Kingdom and Poland, it does not limit or rule out its impact on the legal orders of these two Member States, as expressly recognised by the Court of Justice [*N.S.*, Case C-411/10].

ROLE OF THE EUROPEAN PARLIAMENT

Immediately after the Court of Justice recognised the primacy of Community law over national law, Parliament underlined the risk that the new doctrine might undermine human rights as protected by national constitutions.

In 1977, Parliament, the Council and the Commission adopted a Joint Declaration on Fundamental Rights, in which they committed themselves to respect fundamental rights in the exercise of their powers. Moreover, in 1979 Parliament adopted a resolution suggesting that the European Community should accede to the ECHR.

The 1984 draft Treaty establishing the European Union ([1.1.2](#)) specified that the Union must protect the dignity of the individual and grant everyone coming within its jurisdiction the fundamental rights and freedoms derived from the common principles of the national constitutions and the ECHR. It also envisaged accession of the Union to the ECHR.

In April 1989, Parliament proclaimed the Declaration of fundamental rights and freedoms. Subsequent attempts to grant this declaration the status of a legally binding document were, however, unsuccessful.

In 1997, after the adoption of the Amsterdam Treaty, Parliament again called for the adoption of a binding Charter of Fundamental Rights. During the drafting process that led to the adoption of the Charter, Parliament adopted several resolutions insisting that this instrument be given legally

binding force by incorporating it into the Treaties. After the Charter was solemnly declared, Parliament expressed its disappointment at its non-binding nature and again called for it to be incorporated in the Treaties in a legally binding manner.

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