

THE EU CHARTER OF FUNDAMENTAL RIGHTS ACCORDING TO TREATY OF LISBON

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Abstract:

Lisbon Treaty is one which intended to replace the European constitutional treaty. Its adoption will make an improvement of the Community institutional law system, by coming in force of the EU Charter of Fundamental Rights. The Charter was proclaimed by the European institutions (European Commission, European Parliament and EU Council) at the Nice European Council dated 07/12/2000 and its contents are set for the first time in a single piece of the overall social rights, economic, civil and political rights that can benefit all citizens.

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1. INTRODUCTION

The Treaty of Lisbon continues the tradition of EU treaty revisions bringing changes to the institutional balance - and the range of institutional reforms introduced is much more extensive than in the case of the previous reforms under the Treaty of Nice. This contribution is intended to provide an assessment of the shifts in relative power occasioned by the new treaty changes between the EU institutions which exercise legislative and/or executive power, i.e. the European Parliament, the European Commission, the Council and (as newly formally codified 'institution' of the EU) the European Council. This will allow us, at the end, to draw arrive at some conclusions regarding the overall implications of these shifts for the further evolution of the EU system.

2. THE DIFFERENT DIMENSIONS OF THE EU'S INSTITUTIONAL BALANCE OF POWER ACCORDING TO LISBON TREATY

The main objective of this paper is to identify some **challenges** for the future of the EU Charter of Fundamental Rights ("the Charter"), which text was also incorporated in the later Treaty of Lisbon. The Charter will have the force of law effective from December 1st 2009. The fifty-five articles of the Charter of Fundamental Rights list political, social and economic rights for EU citizens. It is intended to make sure that European Union regulations and directives do not contradict the European Convention on Human Rights which is ratified by all EU Member States (and to which the EU as a whole would accede under the Treaty of Lisbon).

The Treaty of Lisbon not only continues the strengthening of the Parliament's position - especially through a new massive extension of the fields to which legislative co-decision applies (see below) -, but it also transforms the tri-polar into a four-polar system as it gives to the European Council for the first time the official status of an institution (Article 13(1) TEU) which is also vested with powers it had not been provided with explicitly before, such as, for example, the power to "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" (Article 68 TFEU).

The „institutionalisation“ of the European Council adds already a degree of increased institutional complexity to the institutional balance as the European Council adds a second formal institutional representation of the interests of national governments to that already provided by the Council, although at a more senior level and with tasks which are clearly separated in the Treaties. Yet even more complexity is added by the introduction of the new combined position of the “High Representative of the Union for Foreign Affairs and Security Policy” and Vice-President of the European Commission (HR/VP) whose task it is to “conduct” and “put into effect” the Union’s common foreign and security policy (CFSP) as well as to represent the Union in this field (Articles 18(2), 24(1) and 27(2) TEU). Appointed by the European Council (Article 18(1) TEU) in whose work the HR/VP “takes part” (Article 15(2) TFEU) and who also defines the “strategic interests and objectives” of the EU in the CFSP domain (Article 22(1) TEU), the HR/VP is mandated by the Council (Article 18(2) TEU) whose foreign affairs formation the HR/VP presides (18(3) TEU). Yet the incumbent is at the same time responsible within the Commission as one of its Vice-Presidents for external relations and for coordinating other aspects of the Union’s external action and in this respect fully bound by Commission procedures (Article 18(4) TEU). The Treaty of Lisbon has thus assigned to the HR/VP a position somewhere in the middle between the institutional sub-triangle of Council, European and Commission, creating an extraordinarily hybrid position whose direct relationship to the EP – as the fourth pole in the institutional balance – is limited to consultation and information duties with no binding effects on action (Article 36 TEU).(2)

In order to pragmatically limit and focus the scope of this analysis we will in the following investigate six dimensions of the post-Lisbon relative power positions of the EU institutions of which the first four are based on the respective formal powers of the institutions as defined in the Treaties in line with the principle of conferral (Article 13(2) TEU). These are:

I. Power relating to the **constitutional position** of each institution. This dimension covers all powers with systemic relevance to the EU as whole, i.e. powers regarding treaty changes, the budgetary framework, key appointments and the relative degree of autonomy any of the institutions is given with regard to the others.

II. Power relating to **policy initiation**. This dimension covers all powers given to the institutions in respect of the initiation of both policies and legislation, it being widely recognised that agenda-setting powers – and not just “voting power” in the decision-making process - can have a major impact on eventual policy-outcomes.⁶

III. Power relating to **decision-making**. This dimension covers all formal decision-making powers provided for by the Treaties, including both binding decisions (legislation, annual budget) and non-binding decisions (e.g. “recommendations” and certain CFSP decisions).

IV. Power relating to **implementation**. This dimension covers all powers of implementation in the legislative and budgetary fields as well as powers of control regarding the implementation of EU measures by the Member States.

V. Power linked to **institutional strength**. This dimension covers any changes in political impact possibilities an institution might derive from treaty changes to its internal organisation which enhance or decrease its abilities to fulfil its tasks and – wherever possible – provide political leadership.

VI. Power linked to **public visibility**. This dimension covers the changes in political impact possibilities of an institution resulting from treaty changes likely to increase or decrease its public visibility as such visibility – if effectively mediated – can play a major role in creating and sustaining a basis for support (3)

3. THE NEW CONSTITUTIONAL DIMENSION OF THE INSTITUTIONAL POWER BALANCE

The Treaty of Lisbon strengthens the European Parliament's significantly - and this in six ways:

First, by extending its powers under the ordinary treaty revision procedure. The Parliament now has a right to submit formal proposals for the amendment of the Treaties to the Council (Article 48(2) TEU), must be represented in the revision Convention and must give its consent to any decision by the European Council not to convene a Convention (Article 48(3) TEU).(4)

Second, by extending the Parliament's powers under the *simplified revision procedures*. Under the latter the Parliament has gained a right of initiative as well regarding any revisions of Part Three TFEU relating to the internal policies and action of the Union (Article 48(6) TEU) and the right to give its consent to the use of 'passerelle' provisions which allows the European Council to authorise the Council to pass from unanimity to qualified majority voting in the domain of Title V TEU (CFSP)⁹ and to move from a *special legislative procedure* to an *ordinary legislative procedure* in the context of the TFEU (Article 48(7) TEU).

Third, by extending the Parliament's powers regarding the launching of *enhanced cooperation* frameworks between Member States to which the Parliament has now to give its consent (Article 329(1) TFEU).

Fourth, by giving the Parliament powers of constitutional importance regarding EU competences and structures in the field of criminal justice cooperation: The Parliament has to give its consent to any Council decision extending the number of aspects of criminal procedural law which can be the object of common rules (Article 82(2)(d) TFEU) or identifying other areas of serious cross-border crime that may be subject to legislative approximation measures (Article 83(1) TFEU) as well as to the establishment of a European Public Prosecutor's Office (Article 86(1) TFEU).

Fifth, by enhancing the Parliament's powers in the appointment process of the Commission: The European Council now has to take into account the elections to the European Parliament and hold "appropriate consultations" in this regard before proposing a candidate to the Parliament as President for the European Commission - who now has to be formally "elected" by the Parliament. The HR/VP is also subject to a vote of approval by the Parliament together with all other Members of the European Commission (Article 17(7) TEU).

Sixth, by extending the budgetary powers of the Parliament: The removal of the distinction between compulsory and non-compulsory expenditure in revised Article 314 TFEU now puts the Parliament on a perfectly equal footing with the Council regarding the adoption of the EU's annual budget, a major constitutional function.

As a result of the above changes the Parliament has a significantly increased role regarding constitutional change, the extension of EU powers not requiring treaty revision, the appointment of the Commission and the EU's budgetary framework – which together clearly accounts for a major "plus" in the institutional balance.

4. WHAT ARE FUNDAMENTAL RIGHTS FOR EU CITIZENS AFTER LISBON TREATY

It is difficult to over-estimate the importance, and in the fullness of time, the impact which the Lisbon Treaty has and will have regarding fundamental rights and citizens of the Union. There are three main reasons for this:

- Citizenship of the European Union has finally acquired its Bill of Rights in the form of a legally binding EU Charter of Fundamental Rights; the skeleton which citizenship of the Union has been is now acquiring the flesh and blood it needs to merit the title; (5)

- The EU Charter of Fundamental Rights transforms citizenship in the EU as it redefines who is entitled to bundles of rights which inform the meaning of citizenship and belonging; (6)

- The EU Charter of Fundamental Rights is neither part of a constitution in the traditional nation state sense, nor is it an international human rights treaty even in the regional sense of the European Convention on Human Rights. As a new mechanism for the delivery of rights it transforms the relationship between the individual and the state through a different type of rights entitlement arisen from and embedded in the EU.(7)

The EU Charter of Fundamental Rights was adopted by the three central EU institutions (Parliament, Council and Commission) in Nice 7 December 2000. It was the result of 12 months of discussion and negotiation which took place in the form of a Convention established by the Cologne European Council 3-4 June 1999. The Convention included not only members of the institutions which would ultimately adopt it but also members of national parliaments assisted by experts and taking into account the views of civil society. (8) It was a magnificent accomplishment, and like all such events, surrounded by controversy and debate. The intention for the Charter was that it would codify the rights to which EU nationals were already entitled. There was no objective to extend those rights by virtue of the Charter.(9) However, as with any such action to consolidate rights which individuals already hold, by bringing them together in one place set out clearly in one document, there is a centrifugal effect: rights engender rights. The interaction among rights and the necessity of enjoying some rights in order to be able to access others becomes apparent from any such effort.

Due to the rather strong opposition in 2000 of at least one Member State, the Charter was not inserted into the treaty amendments which the Nice Council proposed to the Member States. Instead it remained a self standing document without a direct legal status in the EU's legal order or indeed that of its Member States. (10) As an aspirational document setting out a Bill of Rights, however, it gained authority and importance. As the years of its long languish as a more political rather than legal document stretched out, it acquired supporters in many different areas. While the Charter was referred to in political debates at the EU and national levels, and by judges in the Member States, it also gradually gained stature at the European Court of Justice, initially as Advocates General began to have regard to it. Nonetheless it remained outside the realm of binding legal documents within the EU order. Remedying this unsatisfactory situation was central to many Member States and the EU institutions for a number of reasons. Among them were:

- Member States need confidence that their national constitutional settlements with their people are not undermined by EU measures because of the lack of

comprehensive and legally binding fundamental rights provisions at the EU level;

- The EU needs to have a single document setting out what rights exist under EU law so that this is clear for Member States' authorities and people in the EU;

- As EU law engages in areas where people are directly affected, a parallel reinforcement of rights is needed to ensure that state and supra state powers do not grow at the expense rights of people;

- The addition of the Area of Freedom, Security and Justice into the EU's field of law making demands that peoples' rights are set out as well to guide how the legislation in the AFSJ is crafted;

- National courts required confidence that EU law is not only adopted in conformity with fundamental rights, a matter normally included in the preambles of EU secondary legislation, but that in its application and transposition people affected by those measures have a chance to challenge them on the basis of a clear and legally binding set of rights which they are entitled to enjoy;

- The coherence of EU law depends on full human rights compliance as the Member States' obligations under the European Convention on Human Rights and other international human rights treaties must not be undermined by EU law.

So what does the Charter mean for citizens of the Union? (12) It sets out a Bill of Rights to which they are entitled. It does so in seven chapters respectively entitled 1.Dignity; 2.Freedoms, 3.Equality; 4. Solidarity; 5.Citizen's Rights; 6.Justice and 7. General Provisions. Among jurists there has been much discussion whether the different chapters have different legal effects. This debate tends to resemble discussions about the numbers of angels which can fit on the head of a pin. It seems to me that from a natural reading of the Charter and an examination of the General Provisions, which the TEU invites us to do, there is no substantial foundation to accept that for instance the provisions contained in the Dignity chapter are somehow juridically different from those in any other chapter. For example, Article 2 which is found in this chapter contains the right to life. It mirrors a similar provision in the European Convention on Human Rights. The European Court of Human Rights has never questioned the legal applicability of the right to life and has interpreted it frequently in complex and politically sensitive cases. . The EU Charter sets out rights irrespective of the title of the chapter in which they have been placed.

The rights which are contained in the Charter come mainly from two sources: first rights which already existed in EU law such as for citizens of the Union the right of free movement (Article 45); secondly, the European Convention on Human Rights (and its protocols). Here the Charter specifically states that in so far as it contains rights which correspond to those in the ECHR, the meaning and scope of the Charter rights shall be the same as that of the ECHR rights. However, this provision expressly does not prevent Union law providing more extensive protection (Article 52(3)).

The Charter takes on legal force with the entry into force of the Lisbon Treaty at a critical moment for the EU. The Charter is neither a national constitution nor an international human rights treaty. Instead it belongs to the EU legal order and depends for its interpretation and enforcement on the mechanisms of EU law. In this regard it imposes obligations on state authorities which are not amenable to modification by those authorities. Its definitive interpretation is the preserve of the European Court of Justice to which any

national court can turn for assistance in interpretation. But that interpretation when provided is binding on both national administrations across the Member States and national courts.

5. CONCLUSIONS

The key change which the Lisbon Treaty is bringing about for citizens of the Union. Among the most important is access to EU fundamental rights through the legal effect which has been given through the Lisbon Treaty to the EU Charter of Fundamental Rights. There are four main consequences:

- Citizens of the EU now have a Charter of Rights which is legally binding and which their state authorities must deliver in accordance with their duty of good faith to the EU;

- Third country nationals resemble ever more citizens of the Union through their inclusion as beneficiaries of Charter rights under the same conditions as citizens of the Union (with only limited exceptions);

- The Charter provides a new and potentially very important source of rights for people in Europe which cannot be modified by any one Member State's authorities on the basis of the inconvenience which those rights might constitute to them. There has been a disaggregation of authority and rights which will assist Member State authorities to have greater confidence in one another and people to have greater confidence in all EU authorities.

- Accession of the EU to the European Convention of Human Rights (ECHR) is of high political and legal significance. It will guarantee that any alleged victim of an action undertaken in the framework of Union's competences is able to bring a complaint against the Union before the Strasbourg Court under the same conditions as those applying to complaints brought against Member States. In political terms, accession means that the European Union reaffirms the pivotal role played by the ECHR system for the protection of human rights in Europe. The accession to ECHR is not an isolated initiative but as one among several leverages underpinning the development of an ambitious EU policy aimed at strengthening the effectiveness of the fundamental rights that people enjoy in Europe. The European Court of Human Rights is likely to have fewer occasions to intervene on matters linked to EU law if the EU is beyond reproach when it makes legislation and when Member States implement it.

NOTES

(1) [Draft Reform Treaty – Projet de traité modificatif](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317)". Council of the European Union. 24 July 2007. http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317.

(2) Jörg Monar, The European Union's institutional balance of power after the Treaty of Lisbon

(3) On the power dynamics of mediated visibility see John B. Thompson: The new visibility, in: *Theory, Culture & Society*, vol. 22, number 6, 2005, pp. 31-51.

(4) The Parliament was represented in the 2002/2003 Constitutional Treaty Convention, but its right to be represented in any future Convention had not been codified in the Treaties before.

(5) Peers, S & A Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy* Hart, Oxford, 2004.

(6) Guild, E 'The Variable Subject of the EU Constitution, Civil Liberties and Human Rights' (2004) *EJML* pp. 381-394(14); Framework 7 Project: ENACT which examines the changing meaning of citizenship in the EU today <http://www.enacting-citizenship.eu/>; the research which this project is generating has been fundamental to my own understanding of European citizenship and its relationship to rights.

(7) Menendez, A J *The Chartering of Europe: The European Charter of Fundamental Rights and its Constitutional Implications* ARENA Working Paper 01/13.

(8) http://www.europarl.europa.eu/charter/default_en.htm

(9) De Burca C & J B Aschenbrenner 'European Constitutionalism and the Charter' in Peers, S & A Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy* Hart, Oxford, 2004 pp 3 – 35.

(10) S Peers, 'Taking Rights Away? Limitations and Derogations' in Peers, S & A Ward, *The EU Charter of Fundamental Rights: Politics, Law and Policy* Hart, Oxford, 2004 pp 141 – 182.

(11) J P Jaqué, 'Les droits fondamentaux dans le traité de Lisbonne, version 5 février 2010

(12) Elspeth Guild, *What Fundamental Rights for whose EU Citizens?*, Jean Monnet Professor *ad personam*, Radboud University Nijmegen

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