

## The Protection of Fundamental Rights in the EU: Community of values with Opt-Out?

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Under the theme of constitutionalisation without Constitution, the question of fundamental rights comes naturally. As the French Declaration of man and citizen of 1789 states in its Article 16 “Any society in which the guarantee of rights is not secured (...) has no constitution”. The formula is negative; it does not mean that a guarantee of rights entail the existence of a proper constitution in the technical sense of the term, that is to say a set of norms more difficult to modify than the rest of the legal order. However it underlines that the recognition of fundamental rights and their effective protection are the condition under which people may agree to entrust institutions with legislative, executive and judicial powers to be exercised upon them in the public interest of the community to which they belong.

In the European Union, as the supremacy of EC law was progressively imposed by the case law of the Court of Justice, the question of the protection of fundamental rights arose and was resolved through the technique of reference to general principles of community law, “discovered” by the Court in two main external sources, the European Convention of human rights (“ECHR”) or the constitutional traditions common to the Member States. The more the area of competences of the Union developed, the more it proved necessary to formalise the conditions of guarantee of fundamental rights, namely when the Union extended its scope to new areas of competences and admitted a number of new members. Underlying the parallelism between constitutionalisation and the development of guarantee of fundamental rights, Article F.2 of the Maastricht Treaty (1992) reproduced the formula of the case law of the Court: “The European Union respects fundamental rights, as guaranteed by the ECHR and as they result of constitutional traditions common to the Member States, as general principles of Community law”. The same formula was reproduced in Articles 6.1 and 6.2 of the Amsterdam Treaty, not modified by the Nice Treaty.

Some contradictions or discrepancies between case laws of Strasbourg and Luxembourg Courts were pointed out occasionally, but very few. No real gap in the protection of individual rights could be denounced but an uncertainty of content which left the European citizen ignorant and non conscious of his rights under EC law. A proper European Union needed something more elaborated in conjunction

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with the perspective of new enlargements and the extension of the competences of the Union to new areas such as CFSP or JHA – where the jurisdiction of the ECJ has, from the origin, been either nonexistent or limited -. A new trend was introduced with the adoption of the Charter of fundamental rights. Germany continued insistence in favour of the adoption of a proper catalogue of rights with a constitutional dimension was a most influential factor in the adoption of the Charter of fundamental rights in 2000. It happened that the adoption of the Charter coincided with the initiation of the process of declared constitutionalisation of the Union (The Laeken Mandate, December 2001, followed by the Convention on the future of Europe). The Charter had always been presented as an element of the constitutional process of building an EU closer to its citizens and promoting a State of law.

The Charter should have become Part II of the Constitutional treaty. To what extent does the withdrawal of the non-ratified Constitutional Treaty modify the condition of guarantee of fundamental rights in the Union? Taking into account the new context created by the Lisbon Treaty, it appears that the legal value of the Charter is definitely confirmed. The Charter, although it contains limitations, which have been reinforced by the Lisbon Treaty, remains the expression of a community of values, with a highly significant potential of influence.

#### I. The Charter in the context of the Lisbon Treaty

The withdrawal of the non-ratified Constitutional Treaty has more likely facilitated than impeded the process of coming to term with the Charter. The Lisbon Treaty, renouncing to the Part II of the Constitutional Treaty, smoothly introduces the Charter as a source of Union law, taking full account of previous case law of the ECJ on fundamental rights. Article 6.1 TEU.L states:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

The question of the legal value of the Charter has been on the agenda as from 1999. It was drafted “as if” at a certain stage it would become legally obligatory, but some Member States objected so strongly that the solution of a proclamation as interinstitutional agreement was retained at Nice (7 December 2000), giving to the Charter no more than a political authority, backed by the commitment of the three main European institutions to comply with its requirements. Now the question is solved: if and when the Treaty of Lisbon enters into force, the Charter is to acquire the same legal value as the treaties; it will become a source of primary law. The principle of supremacy of Union law is no longer mentioned expressly in the Lisbon Treaty as it was in Article I-6 of the Constitutional Treaty, but the case law of the Court referred

to in the Declaration to the Lisbon Treaty on primacy will apply to the provisions of the Charter. The Charter should prevail over the law of Member States, including their constitutional provisions<sup>2</sup>.

Another positive point to be underlined is that the Charter remains a self containing document, not reproduced in the Lisbon Treaty but independently proclaimed at Strasbourg on the 12 December 2007<sup>3</sup>. Thus the logic of the document elaborated by the Convention of 1999-2000 is respected. For instance the preamble of such document regains its significance while the inclusion of the Charter as part II of the Constitutional Treaty made the general presentation quite awkward, with a preamble for the Constitutional Treaty and another one for the Charter, right in the middle of the treaty and sometimes different in perspective<sup>4</sup>. Presented as an independent document the Charter may more easily be referred to by the Member States or in other circles. Incidentally one may observe that the second paragraph of Article 19.1 of the Lisbon Treaty (TEU.L) underlines the obligation for the Member States to establish legal remedies sufficient to ensure effective judicial protection in the fields covered by Union law. In that connection it may very well happen that domestic courts apply the Charter to situations related to Union law, for instance in case of implementation of EU legislative measures by notional authorities.

Equally important is the fact that, in the Lisbon Treaty, the Charter is not presented as the unique source of fundamental rights in the EU order. It was already the case in the Constitutional Treaty where Article I-9, after a reference to the Charter which constituted Part II of the treaty, mentioned on one hand the contemplated adhesion of the Union to the ECHR and, on the other, reproduced the traditional formula of the case law of the Court concerning the fundamental rights as general principles of Union law. But the physical presence of the Charter in the constitutional document created an imbalance in favour of the latter. In the Lisbon Treaty the various sources of fundamental rights available are presented on a more equal footing. In addition to the Charter “which shall have the same legal value as the Treaties” but is not reproduced in the Lisbon Treaty, Article 6.2 provides an indis-

- 2 In line with the traditional case law of the ECJ: case 11/70, *Internationale Handelsgesellschaft*, 11 December 1970. The provisions of Article 53 of the Charter might introduce some doubt as to the necessary prevalence of the Charter over national constitutions; however this article is to be construed as recalling a rule of interpretation according to which in the domain of fundamental rights and freedom the solution the most favourable to the rights of the individual must be retained.
- 3 One may wonder how this Charter which has the same legal value as the treaties but is not part of them should be revised. It seems difficult to envisage a revision of the charter which would not imply (1) a convention, and (2) the agreement of all the member States, including ratification following national constitutional provisions, as indirectly the Charter is ratified by the member States through the ratification of the Lisbon treaty.
- 4 See for instance in the Preamble of the Lisbon treaty the reference to the “religious heritage” of Europe, while the Preamble of the Charter carefully avoids any allusion to the concept of religion.

putable legal basis to the adhesion of the Union to the ECHR; incidentally, such adhesion will imply ratification by all Member States according to the provisions of 218.8 TFU.L. Further, Article 6.3, using - as preceding treaties did - the exact formula of the case law of the Court, recalls that the fundamental rights “as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States” constitute general principles of Union law. Finally, the Declaration number 1 to the Lisbon Treaty states firmly that the Charter “which has legally binding force, confirms the fundamental rights guaranteed by the ECHR and as they result from the constitutional traditions common to the member States”. Nothing prevents that such principles if needed continue to be established by the Court.

In between these various sources of fundamental rights, the Charter, the ECHR and the principles established by the case law of the Court, the Lisbon Treaty does not create any hierarchy. In case some of these rights happen to contradict others, it will belong to the judge to propose the right balance. The recent case law of the Court suggests some possible hypothesis of such conflicting situations<sup>5</sup>. The fundamentality of the right in connection with the existing situation seems to matter more than the nature of its original source: primary Union law, international agreement or general principles of Union law.

The Charter referred to in Article 6.1 of the Lisbon Treaty as “having the same legal value as the Treaties” is the “Charter (...) of 7 December 2000 as adapted in Strasbourg on 12 December 2007”. In fact the fifty articles of substance are strictly identical to those of the Charter elaborated by the first convention and agreed by the Heads of State and Governments at the Biarritz summit in October 2000. The adaptation referred to concerns some limited aspects of the preamble and certain general provisions on the interpretation of the Charter. These adaptations had been already introduced in the Part II of the Constitutional Treaty with the ambition of limiting the scope of the Charter and its possible impact on national sovereignty, in order to make it more acceptable to the public opinion of the Member States hostile to a legally binding Charter. These limitations have been more increased than decreased in the Lisbon Treaty but, on the other hand, the substance of the Charter as an expression of a community of values remains unchanged.

5 Case C-438/05, *International Transport Workers' Federation v. Viking Line ABP*, 11 December 2007; case C-341/05, *Laval un Parteneri Ltd v. Svenska Byggnadsarbetareörbundet*, 18 December 2007; in these cases the freedom of establishment and the freedom to provide services are put in balance with the freedom to exercise social rights including the right to take collective action. Article 28 of the Charter which confirms the right of collective action as a fundamental right to be protected in accordance with Union law and national law and practices is mentioned for the first time ever by the Court. Other examples are case C-36/02 *Omega*, [2004] ECR I-9609; C-346/06, *Rüffert*, 3 April 2008.

## II. The substance of the Charter: the expression of a community of values

The Charter drafted by the first Convention in 2000 expresses a community of values, but not of the sort proclaimed by a Constituent Assembly voting at a majority of some sort. The Charter instead was fiercely negotiated by an international gathering in search of consensus. The Cologne Mandate of June 1999 indicated that the draft of the Charter should be elaborated in view of the European Council, by a body – the Convention – composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments. The various components of the Convention were free to express their views but, in the end, what mattered was the possible agreement of Heads of State and Government on an acceptable draft, which would make possible a consensus at the next European Council. This political situation and balance was directly reflected in the debates at the Convention, very free, very rich and open, but in the end the Presidium had to elaborate a common position acceptable to the executives of the Member States: at some stage the intergovernmental conference broke through the Convention, efficiently, as the draft Charter adopted unanimously by the Convention was approved without modification by the European Council at the pre-summit of Biarritz (13-14 October 2000) and then solemnly proclaimed in Nice (7 December 2000).

The substance of the negotiation varied considerably according to the subject matters. Following strictly the Cologne mandate, it did not prove to be too difficult to insert in the draft the fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR already accepted as general principles of Community law, nor the rights of the Union's citizen already inscribed in the EU treaty. But when it came to economic and social rights, the research for consensus became significantly more difficult because the documents of reference were somewhat uncertain in their scope (for instance the European Social charter) and because, fundamentally, Member States entertain strong differences. The Title IV "Solidarity" is the result of fierce negotiations. It accumulates limitations and references to national laws and practices in order to disarm the hostility of countries like UK which felt that their "liberal" labour law was threaten and did not accept easily provisions on topics such as worker's right to information and consultation within the undertaking (art. 27), right of collective bargaining and action (art. 28), fair and just working conditions (art. 31). Since then, due to new enlargements and global economic difficulties, these differences of national sensibility on economic and social rights seem to have increased more than decreased as indicates recent case law where the right to collective action is put in balance with freedom of establishment and freedom to provide services.<sup>6</sup>

<sup>6</sup> See case note 5 *supra*.

Other questions had special importance from the point of view of the defence of national interests of certain Member States and implied a special effort of negotiation. Any reference to the Christian roots of Europe was strongly opposed to by France while most other countries would have accepted it easily as historically evidenced. The Irish could not bear the furthest allusion to abortion while the Spanish and the French managed to avoid any clear reference to the rights of minorities. What is in the Charter and what is not is, for some part, the result of bargaining between nation States as in any diplomatic circle. The result is nevertheless a balanced expression of the rights generally admitted as fundamental in the free modern societies. Under the six headings of dignity, freedoms, equality, solidarity, citizen's rights, justice, most aspects of individual and social life are covered. These rights are commonly agreed and clearly defined; they are guidelines for the policies to be implemented by Union and national authorities in the field of Union law; they are intended to guarantee that the individuals in the Union "remain free and autonomous, have a decent life and may participate in the political and social process in their community".<sup>7</sup>

Another characteristic of the EU Charter of fundamental rights is that it nourishes an intrinsic contradiction. Dealing with fundamental rights, its approach is naturally inspired by universalism which characterises the rights of the individual; but the scope of such rights is necessarily limited to the competences of the Union in the framework of which they are proclaimed. Whatever unquestionable is this situation as a natural consequence of the principle of conferred competences, nevertheless the Charter is perceived by the Member States as a threat to their national sovereignty. Legal tools have been used in order to adjust to these specific fears.

The ways of limiting the scope of the Charter, in order to preserve national sovereignty and competence is twofold: (1) general limitations as those included in the Charter of 2000 and reinforced in the 2004 Charter and in the Lisbon Treaty, and (2) specific limitations or opt-out as those imposed namely by Poland and the UK at the time of the negotiation of the Lisbon Treaty. These limitations and opt-out of great political significance do not really undermine the legal authority of the Charter as having the same legal value as the treaties; further, they do not apply to the other sources of fundamental rights within the field of Union law, namely general principles.

### III. General limitations reinforced by the Lisbon Treaty

Initially, the Charter was drafted "as if" it could at a time become obligatory. The Member States, anxious to avoid any risk of extension of EC competences in con-

<sup>7</sup> See *Pernice*, *The Treaty of Lisbon and Fundamental Rights*, in: *Griller/Ziller* (eds.) *The Lisbon Treaty: EU Constitution without a Constitutional Treaty*, 2008, p. 235, at 253.

nection with the implementation of the Charter had erected solid barriers. Article 51.2 states that the Charter “does not establish any new power or task of the Community or the Union, or modify powers and tasks defined by the Treaties”. The “Explanations”, added at the request of the UK and proposing for each article elements of interpretation taken from pre-existent sources of law most of them already accepted by Member States, underline these limitations with reference to art. 51.2. Regarding the definition of its own field of application, the Charter is more restrictive than ECJ case law on fundamental rights. Art. 51.1 provides that the Charter is “addressed to the institutions and bodies of the Union (...) only when they are implementing Union law”, while according to the case law of the Court fundamental rights bind member States whenever they act within the scope of Community law, which also includes derogating to the treaty. Interestingly enough, this case law is reported in the Explanations under article 51, which demonstrates that the Explanations are not necessarily inspired by the objective of limiting the scope of the Charter; they set the sources as they were at the time of the drafting of the Charter.

As to provisions on social law on which an agreement was difficult to find, it is regularly recalled in Title IV “Solidarity” that rights set out therein shall be exercised “under the conditions provided by Community law and national laws and practices”; such precisions were intended to underline the absence of possible direct effect of the provisions of the Charter in the field of social rights.

The consensus on the initial drafting of the Charter was obtained on the basis of the balance between social rights which were new in the landscape of fundamental rights in comparison to civil rights already accepted in the ECHR and economic freedoms or citizen’s rights already included in the EC/EU treaty, and, besides, with solid limitations as to the scope of a text which at first was not intended to have compulsory legal value. When it appeared that the Charter would become Part II of the Constitutional Treaty, with value of primary law, those Member States hostile to any visible extension of EC/EU competences - which could be badly received by their respective public opinion - reopened the debate in order to obtain new guarantees.

At the Convention on the future of Europe, Working group II, under the chairmanship of Commissioner Vittorino, proposed various amendments to final provisions, all intended at limiting the scope of the Charter and the freedom of interpretation of its provisions by the courts of the Union and the Member States once it becomes compulsory. At the end of the preamble was added the mention of an obligation to pay due regard to the Explanations prepared under the authority of the Presidium<sup>8</sup> of the Convention which drafted the Charter (also at Article II-112.7). Unnecessary adjunctions were made at Article II-111.2 (former art.51.2) in order to

8 As mentioned above, this reference to the Explanations has more political than substantial meaning as the Explanations are nothing more than a cursive presentation of existing sources; they are neither exhaustive nor very elaborate.

limit again the field of application, at Article II-112.6 (former art. 52) to insist on the fact that full account shall be taken of national laws and practices when implementing the Charter, at Article II-112.4 (added) to assert in a very tautological way that rights recognised in the Charter which result from the constitutional traditions common to the Member States shall be interpreted in harmony with these traditions. Finally a new paragraph was introduced at Art.II-112.5 stating that Charter provisions containing “principles” which may be implemented by Union legislative and executive acts and by Member States acts implementing Union law “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. This is a clumsy attempt to ensure that exhortatory principles cannot in themselves form the basis of directly effective individual rights. De facto these principles correspond, by definition, to non directly effective provisions.

The Charter such modified became Part II of the Constitutional Treaty. One may consider from a strict legal point of view that these amendments did not add or subtract anything to the substance of the Charter as initially negotiated. However they were felt by the opponents to any extension of European Union competences as a victory. Fair to say that the French *Conseil constitutionnel* in its decision of 19 November 2004 on the compatibility of the Constitutional Treaty with the constitution found these limitative measures convincing; it concluded that the content of the Charter “does not modify the conditions of exercise of national sovereignty”<sup>9</sup>.

The Charter to which article 6 TEU of the Lisbon Treaty refers – that adapted at Strasbourg on 12 December 2007, in fact proclaimed again the day before the signature of the Lisbon Treaty - includes the same amendments that appeared in Part II of the Constitutional Treaty; it is a Charter identical to the initial one as regards the substance, but felt as less threatening for national sovereignties due to the amendments brought to its general provisions by the Convention on the future of Europe. Further, in comparison with Article I-9 on Fundamental rights of the Constitutional Treaty, Article 6.1 of the Lisbon Treaty, in order to accommodate some member States always anxious to court their public opinion a step further in the perspective of ratification, introduces new and unnecessary duplicating limitative provisions. It states:

“The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

9 Cons. Const., décision n°2004-505 DC, *Traité établissant une Constitution pour l'Europe*, Rec. Cons. Const. p.173.

All that is already stated somewhere else; but some member States wanted more and took advantage of the reopening of the negotiation in June-July 2007 to obtain it. Further the already mentioned Declaration number 1 to the Lisbon Treaty concerning the Charter of fundamental rights states in its second paragraph that “the Charter does not extend the field of application of union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties”. This is an exact repetition of the terms of Article 52.2 of the Charter. Although the political intentions are obvious, one may wonder if this technique of repetition of the same provisions in various documents of unequal legal value (primary law, declaration, explanations) does not entail a risk of disqualification of provisions which would become commonplace.

The Declaration of the Czech Republic on the Charter comes back to the same theme of competences of the Union and their delimitation. It stresses that the provisions of the Charter “are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law *independently* from Union law”. This last phrase may be read as underlying that, on the other hand, when Union law is implemented by national law the provisions of the Charter may be invoked by individuals.

#### IV. Special limitations or opt-out: an innovation of the Lisbon Treaty, without much consequences

Whatever had been obtained in terms of legal and political guarantees in previous negotiations, the real need of the British government after the failure of ratification of the Constitutional Treaty was to obtain enough special treatment so that a referendum might be avoided. UK was joined by Polish government which, in the expectation of general elections, was anxious to keep a maximum of legislative freedom in social matters<sup>10</sup>. Protocol n°7 on the application of the Charter of fundamental rights of the EU to Poland and the UK introduces new specific limitations with a legal value equivalent to that of primary law.

Article 1.1 of the Protocol provides that the Charter does not extend the ability of the Court of Justice, or any court or tribunal in Poland or the UK, to find that the laws, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. Article 1.2 then states that, in particular, and for avoidance of doubt, nothing in the title “Solidarity” of the Charter

10 Subsequently, the new majority elected in Poland at the autumn of 2007 reaffirmed its commitment to social policy and social rights, see Declaration n°62 annexed to the Lisbon treaty. In Declaration n°61 Poland maintains its position as to the fact that Member States cannot be prevented by the Charter to legislate in the field of public morality, family law, protection of human dignity and physical and moral integrity.

(Title IV) creates justiciable rights applicable to Poland and the UK except in so far as Poland or the UK has provided for such rights in its national law. Finally, according to Article 2, to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the UK to the extent that the rights and principles it contains are recognised in the law or practices of Poland or the UK.

How should we approach this Protocol? Is it a proper opt-out? Do two Member States out of twenty seven escape the fundamentality of such rights? Politically it might be useful to say yes, just to make ratification of the Lisbon Treaty in the UK easier. Lawyers would very likely answer no for two reasons. One is that the Charter is by no means due to become the exclusive source of fundamental rights in the European Union, which it has never been; as explained above, in accordance with the provisions of Article 6.3 of the Lisbon Treaty (TEU), the case law of the Court will continue to nourish the development of fundamental rights as general principles of Union law. To these fundamental rights, the limitations of Protocol 7 do not apply; it would be absurd to accept limitations which would be brushed aside by the simple effect of another source of fundamental rights. The second and more globally satisfactory reason is that the Protocol n°7, most cleverly drafted, may very well be construed in a way which minimises its impact. One should recall the general principle that any instrument seeking to delimit the effects of a written bill of fundamental rights must be strictly construed. According to the recitals, the Protocol is not intended to derogate nor to have any novel legal effects, but to clarify certain aspects of the Charter's application.

Consider for instance Article 1.1 of the Protocol. That provision would best be interpreted by stating the obvious: the Charter does not extend the possibility of judicial review of Polish/British law in situations which fall altogether outside the scope of the treaties. Conversely, Article 1.1 does not prejudice the jurisdiction of the Union or national courts in situations that do indeed fall within the scope of the treaties, on the basis of the revised Charter. If the protocol had wanted actively to diminish the possibilities for judicial review, it should have used much stronger language.

Article 1.2 of the protocol also emerges as a largely declaratory text. It rules out the justiciability of the Title IV ("Solidarity") provisions to the extent that they might create directly effective individual rights; but since Title IV provisions do not purport to do so in any case, the novel legal effects of Article 1.2 seem rather limited. In fact, Article 1.2 appears little more than a partial restatement, for the benefit of Poland and the UK, of the distinction between the legal effect of rights and principles applicable to the Charter as a whole under Article 52.5 thereof.

As to Article 2 of the Protocol, similar technique of interpretation suggests that its legal effects are rather minimalist. To the extent that a Charter provision refers to national law, it shall only apply to Poland or the UK insofar as that provision is already recognised under national law. One might point out equally that to the extent that a provision of the Charter also or instead refers to Union law, it will apply to Poland and the UK to the full degree demanded by any applicable Union secondary

legislation, the binding nature and direct effect of which remaining unaffected by the Protocol, and if necessary will override any conflicting provisions of national law.

It seems therefore possible to interpret the Protocol as saying nothing that can prejudice the binding force of existing provision of Union primary or secondary law. The merit of that approach is to preserve a coherent system of fundamental right protection, based on the primacy of the Charter and on a residual role for the general principles, which will apply in full to all twenty seven Member States of the Union. In the end it will belong to the judges to determine the precise nature and effects of the Protocol.

The Charter is not actually a serious threat to UK labour law, but it was felt from the beginning as being so. The Protocol is not really an opt-out from anything but – as Michael Dougan observes<sup>11</sup> – it may prove to be useful if it helps the UK government to neutralise unjustified criticisms of the Charter which in reality formed part of a broader campaign to derail ratification of the whole Lisbon Treaty: if a smoke-screen it may well be a useful one.

To sum up, as regards the Charter of fundamental rights, the entry into force of the Lisbon Treaty could be the end of a process and the beginning of a new one. The recognition by primary law that the Charter has the same legal value as the Treaties put an end to a long process started in 1999. The Cologne mandate already raised the question of the possibility and the moment at which the Charter could acquire a character of legal obligation. In the absence of political decision, the Court could have progressively admitted the Charter as the necessary reference for the fundamental rights it contains. But a political signal was expected; the Lisbon treaty proceeds to a welcome step which clarifies the situation and will certainly enhance the authority of the Charter in the Union and in other circles. On the other hand, the presentation of the Charter as one among other possible sources of fundamental rights of the Union, together with the ECHR and the general principles of Union law opens a new area. The perspective of a unique and final catalogue is abandoned to favour a more flexible solution perhaps better adapted to the moving frontiers and perspectives of the Union. To a certain extent, the benefit expected for the EU citizen in terms of clarity and certainty of rights will only partly be obtained.

11 *Dougan, The Treaty of Lisbon 2007, CMLR [2008].*

