

# **The Charter of Fundamental Rights**

## **A landmark in the institutional maturity of the European Union**

**By George Papadimitriou \***

### **I. The issue**

The deficit of democracy and the deficit of the rule of law that has already been discussed since the 1980's, and the drawbacks noticed at the establishment of the social principle at the institutional structure of the European Union are due to the fact that European integration is proceeding with different paces. While economic integration was always advancing, integration in the field of genuine politics by the promotion of institutions and actions of the core of the Union's powers, followed behind with difficulty. That explained the delay noted at the protection of the European citizen's rights and of every person living in the European Union against community powers.

That gap was realised at a later time. It became more apparent when European integration begun expanding in new fields where citizen's and personal freedom was obviously and more intensely at stake. First the Maastricht Treaty (1991) and then the Amsterdam Treaty (1996) attempted to provide an answer to that challenge. Even though the deficit in the protection of rights still remained intense, the progress accomplished – especially by the Amsterdam Treaty – is not negligible. In the dialectic of the historical process however, it was inevitable for progress to advance gradually.

The Amsterdam Treaty is proclaiming, by an explicit definition, democracy and the rule of law as fundamental principles of the European Union and favours the reinforcement of the social principle. Moreover, it acknowledges the protection of human rights – as prescribed in the common constitutional traditions of the Member States and in the ECHR – as an attribute of the institutional structure of the EU.

Within this context, the initiative for the drafting of a Charter of Fundamental Rights was taken at the Cologne Summit of June 1999. The summit mandate did not neglect to prescribe in general terms the framework for the articulation of the task.

### **II. The Convention**

The accomplishment of this ambitious task was entrusted to an agent of compound composition, unprecedented in the history of the European Union. Represented in the body were National Parliaments, the European Parliament, the European Commission and the National Governments, while representatives of the European Court of Justice and the European Court of Human Rights participated as observers. The Convention was actually comprised by a representative of each Head of State or Prime Minister of every country, two representatives of each National Parliament, sixteen representatives of the European Parliament and a representative of the European Commission.

Its composition, as such, was in every way a remarkable innovation. The Cologne mandate determined for the Convention the adoption of an original form of democratic legitimacy both at national and at Union level. These terms made feasible the constructive co-operation of National Governments, National Parliaments, the European Parliament and the European Commission for the drafting of the Charter.

We must also stress that, for the first time during the elaboration of a Union constitutive text circumstances of complete publicity and transparency were guaranteed. Thus, every NGO had the opportunity to express its views, while the media followed closely the works of the Convention. It is noteworthy that this has been the only time that civil society took part in a relevant process.

The Convention not only completed its works within the given period of time, but it also provided an extremely interesting example for the democratic function of the European Union: An example, that will certainly affect the institutional and political future of European integration, especially in the light of the federational prospect.

### **III. The works of the Convention**

The multileveled negotiation begun vividly almost at the opening of the works of the Convention, it was indeed turbulent and interesting in many aspects. Its main concern was to contract the conflicting interests and the different approaches as well as to achieve a consensus. Thus, hundreds of proposals for almost every issue that was discussed were submitted to the Presidium not only from the members of the body but also from NGOs and the representatives of the candidate countries.

The different origin of the members of the Convention specified pluralism in the solutions quest. Moreover, the dense flow of stimulating views from third parties contributed to the enrichment of its considerations. Soon enough, the different traditions and approaches were apparent and both the difficulties in drafting commonly accepted positions and the need for reaching consensus were realised.

Despite the major problems the Convention had to face, its members made great efforts to bring the works to successful conclusion and fulfil its historic mission. The final text of the Charter was adopted at the Convention's last working session on the 2nd of October 2000, it was presented at the Biarritz Summit and, finally, it was proclaimed by the Nice Summit. The Charter, even if it did not exactly live up to the expectations of the European citizens, was greeted as an important step forward.

### **IV. The features of the Charter**

The questions that were discussed intensively and sometimes tormented the Convention, were mainly: a) the compliance of the Charter with the definitions of the Treaties, b) the prevention of expanding the competences of the European Union, c) the creation of an autonomous system of rights' protection in the framework of the community legal order, d) the relation of the Charter to the ECHR, e) the prevention of an eventual constitutional reform in the Member States, and f) the avoidance of additional fiscal burdens. The

following remarks clarify the specific problems and present the solutions that prevailed. In the light of the mandate and the nature of the Convention, its choices had to remain strictly within the framework of the Union's Constitutive Treaties.

Going beyond the Treaties would, in anyway, mean exercising authority that the Convention was not vested with. That was more obvious in cases where the Treaties and the Charter included similar or relevant provisions. Characteristic is, therefore, the examples of the four fundamental freedoms and the political rights recognised by the Treaties of Maastricht and Amsterdam.

The aforementioned choice was clearly reflected in art. 52 par. 2. Similar was also the danger of expanding the competences of the Union indirectly and assign additional duties through the context and the regulatory function of at least some of the Charter's rights. This could happen especially in the field of social rights. The Convention demonstrated, at this point, reasonable self-restraint by preventing explicitly this prospect in art. 51 par. 2.

The most important source of inspiration for the Charter is the ECHR. That was expected since article 6 par. 2 of the EU Treaty recognises it as an essential foundation for the protection of human rights. It is noteworthy that some of the members of the Convention supported from the beginning the opinion that, in many cases, it would be sufficient to adopt in the Charter the exact wording of the provisions of the ECHR: That opinion having had prevailed, the Charter would acquire – at least in the civil and in a good extent in the political rights – a more or less subsidiary character.

Thus, the Convention chose to formulate an autonomous and complete system, intended to serve the needs of the European Union. This choice is reflected in the Charter's structure and is documented by the provisions that guarantee the rights. It is also finalised in the last chapter, where the terms of implementation are prescribed, especially in relation to the established systems of the ECHR and the national Constitutions.

Naturally, this choice determined the relation of the Charter to the ECHR, which is and will remain privileged. ECHR's decisive influence during the drafting of the Charter will continue, certainly in different terms, at the implementation stage since the Charter makes reference to the ECHR in order to clarify the meaning, the context and the restrictions for the exercise of most of the rights it recognises (art. 52 par. 3). This is an inventive solution that is expected to contribute to a great extent to the harmonious coexistence of the two systems.

Furthermore, the Convention was constantly concerned with the prevention of challenging the Member States' Constitutions due to the wording of the provisions of the Charter. The reason is obvious. National Parliaments will be sooner or later called upon to approve the Charter. If, therefore, divergences from the constitutions' provisions on human rights were noted, the issue of their revision would arise, followed by all the subsequent institutional and political inconveniences. It is worth mentioning however, that this possibility seems remote, mainly for two reasons. The features of the Charter correspond basically to the common attributes of all the national Constitutions while, on the other hand, the scope of the Constitution and the scope of the Charter are more or less distinct.

The Convention was also preoccupied with the consequent increase of fiscal burdens mostly due to the eventual recognition of social rights. This explains the relatively weak protection finally provided by some of the social rights. The members of the Union that traditionally maintain a strong system of social care were afraid that a generous approach in the recognition of those rights throughout the European Union would lead to the increase of necessary funds, a big part of which they would be asked to cover.

However, the dynamic that is inherent in social rights will lead to an increase of the required funds especially when the Charter acquires binding effect. The Convention attempted to prevent this prospect as much as possible with a temporary compromise that was strenuous to carry out. The compromise consists of the inclusion of social rights in the Charter with a context, though, that often falls behind the common attributes applied in most of the countries of the European Union.

## **V. The contents of the Charter**

The Charter, at first, protects fundamental rights included in the three traditional categories. It thus includes civil, political and social rights. Its concern reasonably extends though, to some other new rights intended to deal with the challenges relating to the explosive development of new technologies.

The Charter's main novelty is that it moves away from the pattern of including the rights into the three traditional categories. The Charter innovates internationally and arranges the protected rights into six new distinct groups.

Those groups correspond to six principles-values, which constitute the foundations of the European institutional and political civilisation. In the text's order these are, dignity (arts. 1 to 5), freedom (arts. 6 to 19), equality (arts. 20 to 26), solidarity (arts. 27 to 38), democracy – as represented in the political rights of the European citizens – (arts. 39 to 46) and justice (arts. 47 to 50). At the forefront of the Charter is, therefore, placed the protection of the person in all the basic aspects of his life, as it is also underlined in the preamble.

More specifically, the inviolability of human dignity, the right to life, the right to the integrity of the person, the prohibition of torture and of inhuman or degrading punishment or treatment, the prohibition of slavery and forced labour are included in the dignity chapter.

Furthermore, the freedoms chapter includes the right to liberty and security, the respect for private and family life, the protection of personal data, the right to marry and found a family, the freedom of thought, conscience and religion, the freedom of expression and information, the freedom of assembly and of association. Included are also the freedom of arts and sciences, the right to education, the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business, the right to property, the right to asylum and the protection in the event of removal, expulsion or extradition.

The equality chapter guarantees the equality before the law, the prohibition of discrimination, the cultural, religious and linguistic diversity, the equality between men and women, the rights of the child, the rights of the elderly and the integration of persons with disabilities. In

the next group regarding solidarity, the workers' right to information and consultation with the undertaking, the right of collective bargaining and action, the right of access to placement services, the protection in the event of unjustified dismissal, the guarantee of fair and just working conditions, the prohibition of child labour and the protection of young people at work, the family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection are included.

Under the title citizens' rights are recognised, the right to vote and to stand as a candidate at elections to the European Parliament, the right to vote and to stand as a candidate at municipal elections, the right to good administration, the right of access to documents, the right to refer to the European Ombudsman, the right to petition, the freedom of movement and of residence and the diplomatic and consular protection are recognised.

Finally, the chapter regarding justice provides for the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of legality and proportionality of criminal offences and penalties and the right of the person not to be tried or punished twice in criminal proceedings for the same offence.

It is worth pointing out that the Convention used as sources of inspiration the constitutional traditions of the Member States of the Union, the ECHR and its protocols, the jurisprudence of the ECJ, the Social Charters and some International Conventions. The Convention drew out ideas and solutions from all of these sources and tried to bring them together into a new institutional and political perception.

## **VI. The character of the Charter**

A major issue for the function of the Charter and the institutional development it envisaged within the framework of the European Union, was the character of the Charter, not only during the works of the Convention but also later on, at the Nice Summit. Thus, if the Charter was intended to acquire a binding effect, it would to an important extent reform the institutional structure of the Union, while on the other hand, if it was to remain a declaration it would only exercise political influence.

The issue was left open at the Cologne Summit since the relevant mandate prescribed the drafting of the Charter under both options. The Convention was thus faced from the very beginning with an extremely difficult political and methodological problem. The problem was eventually apparent also during the drafting of the various provisions of the Charter.

The solution that the Convention reached is characterised as realistic. The document that was adopted corresponds more, in the end, to the requirements of a binding document. Indeed, the last chapter that describes the terms of implementation of the Charter would have no meaning, if the Charter was not intended to acquire binding effect. On the other hand though, the provisions recognising the rights correlate more with a document of declaratory character, since they have not always a thorough regulatory context.

The Intergovernmental Conference of Nice faced the dilemma and gave the Charter declaratory character. It is noteworthy that, the persistence of some of the countries and the difficulty to reach a consensus had already predetermined the decision of Nice. A few minutes were needed for the celebratory proclamation of the Charter and its registration in the history of the European Union as a declaration. The self-consciousness of the Heads of State or Government was apparent at the Conclusions of the Summit where the fate of the Charter and its institutional upgrading was already referred to the next Intergovernmental Conference.

The solution that prevailed is therefore temporary. Hopefully, the restraints that determined the decision of Nice will be lifted and the circumstances – that will allow the binding effect of the Charter – will mature. Meanwhile, the Charter is expected to exert an important influence. Reasonably, the Charter will have a quasi-regulatory impact affecting directly or indirectly the European Union's policies and actions. In this transitional stage the Charter will contribute both to the covering of the deficit of democracy and of the rule of law, on the one hand, and to the institutional maturity of the European Union, on the other.

## **VII. Holders and addressees of the rights**

Holder of the rights is every person who lives in the European Union and naturally every citizen of the Member States of the Union. Drafting the Charter, the effort focused in guaranteeing the more rights possible for every person that lives and works legally in the Union. Care was also taken in order to express the liberal and democratic notions that prevail in the Continent and to present to the international community a high quality standard of historical perspective.

It is worth mentioning though, that the Charter in some cases awarded rights only to the benefit of the Union's citizen although these rights could be guaranteed for everyone without exception according to the rights' nature and context. This applies e.g. to the field of political rights that, at the first place, belong to the Union's citizens. This rule should have some exceptions though, like for example the gradual recognition of the right to participate in the local government for every person that lives and works legitimately in the countries of the European Union. The Charter apparently disregarded these possible exceptions. The addressees of the Charter's provisions are in the first place the institutions and the bodies of the European Union. This is reasonable since the main mission of the Charter is to provide for a system of protection towards the community powers.

Since the European Community did not become a member of the ECHR – despite the fact that this prospect had repeatedly been raised – the Union's citizen was left exposed to the actions of the community authorities. The protection that resulted through appeal to the ECJ and reference to the ECHR was not and will definitely not, be a satisfactory solution until the Charter acquires binding effect.

Addressees are also the national authorities when they have to apply, within the framework of their competence, rules of Community law (article 51 par. 1). It is obvious that, if this provision did not exist, the Charter would remain more or less ineffective, since the implementation of Community law is frequently entrusted to the national authorities. That is

exactly the point when the protection provided by the Charter aims not towards the community but towards the national competent authorities. In this way, a separate field for the implementation of the Charter is established – in relation to the Constitution and the national legislation on the one part and the ECHR on the other – within the framework of the internal legal order of the European Union Member States.

### **VIII. Addendum**

The initiative for the adoption of the Charter of Fundamental Rights was taken at a moment when the institutional and political future of the Union is discussed. The pending enlargement, the federational perspective and the debate on the Union's Constitution lay down a new framework for the architecture of European integration. A framework that constitutes a quality leap, in relation to the evolution that took place in the past. Under these circumstances, the Charter functions as the basic tool and plays a leading role in the new structure of the European Union. It finally brings the citizen at the centre of the European political system and creates the conditions that will allow him to undertake the responsibility for the promotion of the European integration and therefore to participate as an actor in the historical process. It is thus obligatory to determine in every aspect the position of the citizen within the institutional structure of the European Union.

This is the task that the Charter has to accomplish, being intended to operate as the chariot for the constitutional organisation of the Union. Any attempt to comprehend the main target leads to the conclusion that the Charter's inclusion in the Constitutive Treaties and the consequent binding effect would constitute, by the engraving of the first integrated constitutional enclaves of the European Union, an historical transition. In other words, it will function as the pioneer and the forerunner for the endorsement of a Constitution within the federational perspective.

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