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DOI: https://doi.org/10.18662/eljpa/2015.0202.07

European Journal of Law and Public Administration, 2015, Volume 2, Issue 2, pp. 59-68

Published by:
Lumen Publishing House

On behalf of:
Stefan cel Mare University from Suceava, Faculty of Economics and Public Administration, Department of Law and Public Administration
THE EU STRATEGY FOR THE EFFECTIVE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

Răzvan VIORESCU¹

Abstract

The paper seeks to identify the usefulness of the present EU strategy for the implementation of the Charter of Fundamental Rights. It proposes a way in which this may be conceived in practice, and therefore it examines the conditions under which such an extension of the open method of coordination may be successful. It relates this new and expanded role for the open method of coordination to the question of the division of powers between the Union and the member states, and to the notion of regulatory competition between the states.

Keywords:
EU Charter of Fundamental Rights, EU law, implementation of fundamental rights, European Court of Justice, Member States obligations

JEL Classification: H1, K3.

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INTRODUCTION

The Charter of Fundamental Rights of the European Union has become legally binding\(^2\) and the Union is going to accede to the European Convention on Human Rights\(^3\). The European Parliament\(^4\) and the European Council\(^5\) have made promotion of fundamental rights in the Union one of their priorities for the future of the area of justice, freedom and security.

The relationship between the open method of coordination and the protection of fundamental rights may at first be characterized by the potential tension between two directions in which the institutional developments within the Union have been channelled.\(^6\)

Considered from the point of view of the second mode of governance, fundamental rights appear not only as limits imposed from the outside to the exercise of the powers which exist within this multilevel form of governance, but they could also fulfil a positive role: indeed, they could serve to orient the use of these tools the Member States and the institutions now have at their disposal – benchmarking, exchanges of information and the identification of good practices, evaluation of experiences and the promotion of innovative practices –, and perhaps justify expanding the recourse to these new modes of governance to the implementation of the Charter of Fundamental Rights in general.\(^8\)

FUNCTIONS OF THE CHARTER OF FUNDAMENTAL RIGHTS

The defensive function fundamental rights have fulfilled in the system of the Union is well documented. Fundamental rights were imported and developed in the legal order of the Union to respond to the fear that the transferral of powers from the Member States to the European Union would result in diminishing the level of protection enjoyed by the individual under the national legal systems. This explains both the initial development of fundamental rights as general

\(^2\) Article 6(1) of the Treaty on European Union (TEU). In addition, Article 6(3) reaffirms that fundamental rights as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States are general principles of EU law.

\(^3\) Article 6(2) TEU.


\(^7\) G. de Búrca, ‘Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU’.

\(^8\) Olivier de Schutter, The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination.
principles of EC law by the European Court of Justice, and the interpretation by the Court of the secondary legislation which seeks to offer a minimal level of protection of fundamental rights at the level of the Union or vis-à-vis the institutions of the Union.⁹

Fundamental rights have thus been imposed as checks on the exercise by the EU institutions of their powers, and per extension, on the acts adopted by the Member States when they implement Union law, acting as a decentralized administration for the Union.¹⁰ Rather than rehearsing here the well-known stages which this importation has followed, it will be useful to insist on the consequences which follow from this defensive – or negative – function the recognition of fundamental rights in the EU legal order has served to fulfil.

Three consequences in particular may be identified here:

- first, fundamental rights are conceived of as external limits to the exercise of powers under EU law, rather than as objectives which the EU should seek to promote;
- second, the need to ensure an effective protection of fundamental rights has not served to allocate competences between the EU and the Member States: instead, such an allocation of competences has been considered to be neutral vis-à-vis fundamental rights, in the sense that the existing allocation of competences has not been seen as having a potential impact on the level of protection of fundamental rights in the Union;
- third, although the Member States are recognized the possibility to fully respect fundamental rights under their jurisdiction, whichever kinds of accommodations this requires from the Union – again, this can be seen as a symptom and a consequence of this defensive attitude towards human rights –, States are neither encouraged, nor do they have incentives to, develop human rights beyond the minimal obligation to respect them.

Fundamental rights are conceived of in the structure of the Union as limits, and not as a mandate to fulfil. They draw lines which cannot be crossed; they do not indicate the direction in which to move forward. This characteristic has been most clearly expressed by the European Court of Justice in the Opinion 2/94 it delivered on the question of the accession of the European Community to the European Convention on Human Rights, where it stated that the Community institutions do not have at their disposal a ‘general power to enact rules on human rights or to conclude international conventions in this field’.

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¹⁰ The European Court of Justice has also imposed on Member States to respect fundamental rights as part of the general principles of EC law when they rely on certain exceptions which are made in their favour in the Treaties or in secondary legislation.
although it did not question that respect for human rights constituted a ‘condition of lawfulness of Community acts’. The significance of these statements have been much debated in doctrine.\textsuperscript{11}

The neutrality on rights of the division of competences between the Union and the Member States Second and more fundamentally, the instrumental mode through which fundamental rights were imported within the constitutional structure of the Union – more precisely: the way they were added on to that structure – implies a separation between the logic which prevailed over the division of competences between the Member States and the European Economic Community, and now the European Community and the Union, on the one hand, and the logic of fundamental rights, on the other hand. Until recently, these two questions have been treated as clearly distinct.

Moreover, all the six original Member States of the EEC were parties to the European Convention on Human Rights (ECHR) of 4 November 1950 when the Treaty of Rome was negotiated, with the sole exception of France. There was, therefore, a commonly agreed ‘floor of rights’ – civil and political at least – in the Community, which probably would have led the delegations, if the question had been asked during the negotiation of the Treaty of Rome (it was not), to answer that the ECHR had done the task, and that all that remained to be done in that field was to convince France to adhere to the instrument implementing the Universal Declaration of Human Rights in Europe.

Fundamental rights could be interpreted as exceptions to fundamental market freedoms despite the apparent reluctance of the European Court of Justice to read social rights into the Treaty of Rome beyond those which are explicitly recognized, the Court did accept that States may justify imposing certain interferences with the free movement of goods,\textsuperscript{12} the free provision of services,\textsuperscript{13} or freedom of competition,\textsuperscript{14} where these interferences were justified by the need to preserve certain social rights or to promote objectives of a social nature. This is of course to be welcomed. It highlights, however, a third consequence on the status of fundamental rights in the EU legal order of their instrumental nature, i.e., of the fact that fundamental rights were imported within EU law in order to protect the Union from the accusation that the expansion of its powers would result in lowering the protection of the rights which the individuals enjoyed under the national legal systems. Indeed, in this context, where a conflict arises between the so-called ‘fundamental freedoms’ recognized by the EC Treaty and the protection of fundamental rights, the European Court of Justice tends to accept that the latter objective may justify that certain restrictions be imposed on the former, but

\textsuperscript{12} See, e.g., Case C-120/95, Decker, [1998] ECR I-1831.
\textsuperscript{13} See, e.g., Case Arblade, [1999] ECR I-8453.
\textsuperscript{14} Case C-67/96, Albany, [1999] ECR I-5751.
only to the extent that imposing such an obstacle is necessary for a Member State to respect its obligation towards human rights.

The fundamental rights in the EU legal order are conceived of as rights which neither the institutions of the Union, nor the Member States acting upon delegation of the Union or upon its authorization, may violate: they impose to the institutions of the Union and the national authorities implementing Union law to abstain from unjustifiably interfering with those rights in the exercise of their respective powers. However, fundamental rights are not seen as influencing the allocation of powers between the Member States and the Union: the Union has not been attributed a competence to fulfil fundamental rights; the distribution of competences between the levels has been devised without the debate having been influenced by the need to ensure an effective protection of fundamental rights in the Union; finally, although the recognition of fundamental market freedoms constituting the legal infrastructure of the internal market should not oblige States to renounce protecting the fundamental rights of persons under their jurisdiction, the development of those market freedoms – freedom of movement of workers now extended to the citizens of the Union, freedom of establishment for the self-employed or for undertakings, free provision of services, free movement of goods, and free competition – is considered to be independent from the protection of fundamental rights, in the sense that the shape of the evolution of market freedoms is not seen as having to be influenced by the need to effectively promote fundamental rights. It is this classical understanding of the position of fundamental rights in the EU legal order which Article 51 of the Charter of Fundamental Rights restates.

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

The Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 51 contains two interrelated rules. The first rule is that the Charter may be invoked vis-à-vis the institutions, bodies or agencies of the Union, as well as vis-à-vis the Member States when they implement Union law, but it may not extend the scope of application of Union law beyond its current reach. Therefore, when they act outside the domain of application of Union law, the Member States are not bound to respect the Charter, despite the fact that any violations of fundamental rights they could commit might discourage the exercise of certain freedoms of movement, could lead to distortions of competition within the Union, or could endanger the mutual trust on which cooperation in the fields of justice and home affairs is based.
The second rule is that the adoption of the Charter should not be seen as investing the Union with a new task, that of realizing the fundamental rights recognized in the Charter. The allocation of competences between the Member States and the Union responds to a logic which is independent from the need to ensure the protection of fundamental rights, and the introduction of the Charter in the constitutional scheme should not be seen as modifying this.

Most of the provisions of the Charter of Fundamental Rights may in fact be implemented by the Union – more precisely, in most cases, the European Community, as long as the current division persists between the Union and the Community –, under the competences which have been conferred upon it by the Member States. Therefore the principal question we are facing is whether, and to which extent, the Charter of Fundamental Rights will be relied upon by the Union to justify an expanded use of those powers, in order to fulfil the rights, freedoms and principles of the Charter.\(^{15}\) Once it is recognized that the Charter of Fundamental Rights may be the source of positive obligations on the institutions of the Union or on the Member States when they implement Union law, deep consequences follow which, even within the existing constitutional strictures, may facilitate overcoming the apparent tension between the obligation to respect the Charter and the neutrality of the Charter on the existing allocation of competences.

In order to facilitate compliance with the positive obligations derived from the Charter, the Union should be recognized implied powers to realize certain fundamental rights of the Charter, when these coincide with objectives the Union has to fulfil; although the fundamental rights policy of the Union should not lead to the transferral of supplementary competences to the Union, it may be based on the need for the Union to exercise the powers it shares with the Member States, where the decentralized implementation of fundamental rights produces consequences; finally, an obligation to act to implement the rights of the Charter at the level of the Union may be imposed, in particular, where diverging approaches to fundamental rights risk creating an obstacle to the fundamental freedoms of movement recognized by Union law – currently, by the EC Treaty. Moreover, as the Member States are bound by the Charter in the implementation of Union law, they may be obliged not only to abstain from violating the rights of the Charter when they implement Union law, but also to take measures to ensure that fundamental rights of the Charter will be fully protected in the areas thus covered. The following paragraphs describe these consequences in further detail.

\(^{15}\) B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003, p. 11, at p. 21.
It cannot be excluded \textit{a priori} that the Charter may impose such an obligation on the Union institutions. Article 51(1) of the Charter mentions that the institutions and organs of the Union and the Member States, to which the Charter is addressed, are obliged to ‘promote the application’ of the rights and principles contained in the Charter. The formulation suggests at least that the drafters of the Charter recognized that it may impose obligations beyond the purely negative duty to abstain from interfering without justification with these rights and principles.\textsuperscript{16} This should not be seen as being in tension with the provision according to which the Charter ‘does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’ (Article 51(2)). Indeed, as clearly recognized for instance by the Working Group II ‘Incorporation of the Charter/accession to the ECHR’ constituted within the European Convention, where the same question arose when the Group assessed the impact the accession of the Union to the ECHR would have on the division of powers between the Member States and the Union, the exercise of \textit{already existing} powers in order to conform to fundamental rights does not amount to the transferral of new powers. Given the strong link which the drafters of the Charter have sought to maintain between that instrument and the European Convention on Human Rights, moreover, this reasoning per analogy seems perfectly justifiable.\textsuperscript{17} It is in line with the idea that, as the Charter of Fundamental Rights constitutes an instrument for the protection of human rights, it should be interpreted accordingly, and therefore should be seen as capable of imposing positive obligations where this appears to be required for the effective protection of those rights.\textsuperscript{18}

The question \textit{when} positive obligations may be identified which impose on the institutions of the Union to adopt certain measures for the effective protection of the fundamental rights recognized in the Charter is more controversial than \textit{whether} such positive obligations may in principle be derived from the Charter. It is submitted here that such a positive obligation exists where, in the absence of action at the level of the European Union, we may witness a ‘race to the bottom’ by Member States tempted to diminish the level of protection of fundamental rights within their jurisdiction\textsuperscript{19} – where, in other terms, the preservation of a high level of protection of fundamental rights appears to require an initiative from the Union. This is borrowed, \textit{mutatis mutandis},

\textsuperscript{16} M. Poiares Maduro, ‘The Double Constitutional Life of the Charter of Fundamental Rights’.
from the reasoning which guided the transferral of certain powers to the Union in the field of social rights, or in the field of asylum. In the former fields, the transferral of powers – or the exercise by the Union institutions of powers which had been transferred but had not been exercised yet, the Union having therefore not pre-empted the Member States – was justified by the need to avoid social dumping. With respect to asylum, the transferral of certain powers to the EU resulted from the need to limit the risk of secondary movements of asylum-seekers ‘shopping’ for the most favourable legislation from within the Member States of the EU, as it appeared that such movements could incite the Member States to restrict the advantages, procedural and material, afforded to asylum-seekers, in order to appear less attractive to potential candidates. Would it not be justified to examine whether the same reasoning would not apply to other values embodied in the Charter of Fundamental Rights? Moreover, would the same reasons not lead us to the conclusion that, where the Union takes measures by which it seeks to implement the rights, freedoms and principles of the Charter, it should seek to achieve a high level of protection of fundamental rights, taking into account the developments within the international law of human rights?20

THE DEFINITION OF A HIGH LEVEL OF PROTECTION OF FUNDAMENTAL RIGHTS UNDER UNION LAW

The Member States are bound to respect the Charter of Fundamental Rights when they implement Union law. It is submitted, however, that Union law itself should stipulate the guarantees derived from the Charter, rather than leave it to the Member States to identify such guarantees when they act in the scope of application of Union law, under the control of the European Court of Justice. The Member States are under a general obligation to respect fundamental rights when they act in the field of application of Union law.21 This is not a substitute for ensuring, in each specific situation, that these rights will indeed be fully respected by the Member States in this framework. A positive obligation should be imposed on the Union legislator to ensure that where it intervenes, and thus extends the scope of application of EU law, it bases its intervention on a high level of protection of fundamental rights. Indeed, where an EU instrument defines instead a certain minimal level of protection of certain fundamental rights or creates for the benefit of the Member States certain exceptions, this may create the impression that provided they comply with that instrument or remain within 20 The wording is inspired of course by that of Article 95(3) EC, which states that the Commission shall base its proposals for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market on a high level of protection.
21 This concerns not only the provisions of the Charter of Fundamental Rights (Article 51(1) of the Charter).
the boundaries set by that exception, the Member States are acting in conformity with the requirements of fundamental rights.  

This latter approach results in subordinating the level of protection of fundamental rights to the scope of the powers of the European Court of Justice and the mechanisms through which these powers may be exercised. Three other considerations may be put forward to justify this insistence on a preventive approach, based on the imposition of a positive obligation on the Union legislator.

CONCLUSIONS

The EU strategy on implementation of is based on a clear objective: the Union must set an example to ensure that the fundamental rights provided for in the Charter become reality. The Commission has taken steps to achieve this objective, in particular by strengthening the assessment of the impact of its proposals on fundamental rights. It will also encourage other Union institutions to ensure the full respect of the Charter in their legislative processes. It will remind Member States where necessary of the importance of complying with the Charter when they implement Union law. It will develop communication actions targeted on the needs of the public. This strategy will be effective if it is implemented in a continuous, determined and transparent manner and with the involvement of all the interested parties. The Commission has decided to submit an Annual Report on the application of the Charter each year in order to show the progress that has been made and steer the development of its policy. This undertaking testifies to the Commission's determination to put the Charter into practice.

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22 For example, Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p. 12), provides that ‘Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity.'
De Schutter Olivier, The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination, Jean Monnet Working Paper 07/04

