

Working group II “Incorporation of the Charter/accession to the ECHR”

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How should the “replication” arising from the fact that some articles of the Charter repeat rights already enshrined in the EC Treaty be dealt with?

The following remarks are based on the assumption that the Convention is to prefer option f), i.e. incorporation of the Charter articles themselves into the Treaties or, which seems to be more appropriate, into a new basic Treaty. The ensuing question as to the ‘fate’ of current Article 52(2) Charter is not, however, just a matter of its drafting (or technical) adjustment. The possible readjustment of the (new) Treaty around the Charter and the latter’s impact on existing Treaty rights give rise not only to the need of technical revision of the Charter’s horizontal clauses but, possibly, of existing Treaty provisions too.

Undoubtedly, purely technical amendments would be needed if one of the options a) to e) were chosen which, on the other hand, would mean that the regime of existing rights as governed by the Treaties will remain unaltered.

It is clear that Article 52(2) was intended to deal with a situation arising from the fact that the Charter, in its attempt to draw up a full catalogue of the fundamental rights of the EU, included also rights already expressly enshrined in the EC Treaty¹. But it apparently has an additional implicit purpose which is in line with the purpose of Article 51(2) since the drafting of the Charter and its promulgation as a separate document presupposed its *cohabitation* with the existing Treaties. Thus the real (and specific) normative contents of its referral effect is actually to determine the scope of already existing rights and to ensure that the Charter, when restating such rights, does not confer “new” rights² and is not intended to extend the scope of the existing rights.

¹ Article 52 of the Charter as a whole serves as a general limitation clause. Its paragraph 2 has this function with respect to the rights already enshrined in the Treaties.

² In which sense the second sentence of the Explanations of the Praesidium relating to this Article (paragraph) should be read.

If the Charter is to form part of the constitutional structure of the EU, the issue of the relationship between the Charter, on the one hand, and the Treaty provisions, on the other, will arise. So far human rights provisions have existed and operated in a particular context of Community law. The future status of an incorporated Charter may have the effect of putting existing Treaty rights in a subservient position.³

If, therefore, the incorporation option leads to an alteration of the regime of existing rights, preserving Article 52(2) with a view of its legal effect (to determine the scope of certain rights) and not only of its wording is disputable

This provision may be preserved as such provided the existing system, i.e. so far the scope of the rights is concerned, is retained. In this respect the possibility of an asymmetrical situation resulting from the existence of different scope and levels of protection and separate contexts in which the norms operate must also⁴ be explored. The consideration based on the requirement of legal certainty is an important one but it may prove not entirely valid in the light of possible evolution of case law in the event of incorporation of the Charter

Notwithstanding these considerations on the legal aspects it may be maintained that replications between articles on the same rights both in the Charter and in the Treaties are not in themselves inadmissible. And that their elimination should not, therefore, be regarded as a purpose in itself.

Finally, it would be quite in accordance with the approach employed by a number of Constitutions to have (into the “Bill of Rights” part of a new basic Treaty) a definition of EU citizenship even though that may possibly entail some complement and/or adjustment of the Charter chapter. A complement or adjustment of the Charter to that effect would not be equivalent to its revision (reopening).

³ Judgements of 30 January 2002, T-54/99, and of 3 May 2002, T-177/01 seem to illustrate a tendency according to which Charter provisions prevail over Treaty provisions.

⁴ On the other hand, the issue of “replications” is being dealt with on the assumption that Charter provisions fully correspond to existing Treaty rights which is disputed by some observers.