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The European Union after the Treaty of Lisbon

Fundamental Rights and EU Citizenship

Elsbeth Guild

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THE EUROPEAN UNION AFTER THE TREATY OF LISBON

FUNDAMENTAL RIGHTS AND EU CITIZENSHIP

CEPS 'LIBERTY AND SECURITY IN EUROPE'/JUNE 2010

ELSPETH GUILD*

Introduction

It is difficult to over-estimate the importance, and, in the fullness of time, the impact that the Lisbon Treaty has and will have on 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 that citizenship of the Union once was is now acquiring the flesh and blood it needs to merit the title;
- The EU Charter of Fundamental Rights transforms citizenship in the EU as it redefines who is entitled to 'bundles of rights' that inform the meaning of citizenship and belonging;
- 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 arising from and embedded in the EU.

I will examine each of these three reasons for rethinking the relationship between fundamental rights and EU citizenship as provided for in the Treaty of Lisbon. In doing so three main points will be made:

- To be a citizen of the Union has become much more attractive to nationals of member states, because rights to which they may not be entitled or be able to enjoy in their underlying national citizenship are now available to them through the Charter and EU citizenship;
- By defining in the Charter who is entitled to rights in the EU, we have changed the meaning of citizenship. There is a widening of the concept of rights' holders to include not only nationals of other member states (even those subject to transitional arrangements as regards free movement of workers) but also third country nationals;
- The entitlement to rights no longer depends either on national constitutional settlements or on international human rights treaties (with all the difficulties attendant on accessing those

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rights); they are now to hand for use by the individual backed by the member states' promise of good faith to EU law in their delivery.¹

Commencing with an outline of the key aspects of the Charter relevant to the above contentions, I then will examine how they change the nature and meaning of citizenship.

A bill of rights for EU citizens

The EU Charter of Fundamental Rights was adopted by the three central EU institutions (Parliament, Council and Commission) in Nice on 7 December 2000. It was the result of more than 12 months of discussion and negotiation which took place in the form of a Convention established by the Cologne European Council on 3-4 June 1999. The Convention included not only members of the institutions that would ultimately adopt it but also members of national parliaments, assisted by experts and taking into account the views of civil society.² 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. However, as with any such action to consolidate rights already held by individuals, by bringing them together in one place and set out clearly in one document, there is a centrifugal effect: rights engender rights. The interaction between 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 one member state, the Charter was not inserted into the treaty amendments that the Nice Council proposed to the member states. Instead it remained a stand-alone document without clear legal status in the EU's legal order or indeed those of its member states. 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 a 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 the national constitutional settlements they hold 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 of the rights of people;

¹ Though of course Poland and the UK have opted for a limited national effect of the Charter and the Czech Republic has been permitted to join them in this limitation.

² For all the background documents, including the remit of the project and the civil society contributions, see http://www.europarl.europa.eu/charter/default_en.htm; for a scholarly analysis see S. Peers and A. Ward (2004), *The European Union Charter of Fundamental Rights*, Oxford: Hart Publishing.

- The addition of the Area of Freedom, Security and Justice into the EU's field of law making demands that people's rights are set out, also to guide how the legislation in the AFSJ is crafted;
- National courts required assurance 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 to which they are entitled;
- 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.

The long and arduous road that led to the Lisbon Treaty does not require further explanation here. People's uncertainty in a couple of member states regarding the assurances of their national governments and political class about the desirability of the Constitutional Treaty threw the process into disarray in 2004. A long reflection period followed by an adjustment and modification of the project has resulted in a successful passage of the Lisbon Treaty and a new foundation for Europe. Article 6 Treaty on the European Union is the most relevant for consideration here. It simply states:

The Union recognizes 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.

In this way, the Lisbon Treaty gives legal force to the Charter after ten years of 'half life.'

So what does the Charter mean for citizens of the Union? It sets out a Bill of Rights to which they are entitled. It does so in seven chapters respectively entitled (i) Dignity; (ii) Freedoms, (ii) Equality; (iv) Solidarity; (v) Citizen's Rights; (vi) Justice and (vii) General Provisions. There has been much discussion among jurists about whether the different chapters have different legal effects.³ This debate tends to resemble discussions about the number of angels that can fit onto 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 the provisions contained in the Dignity chapter are somehow juridically different from those in any other chapter for instance. 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.⁴ The EU Charter sets out rights irrespective of the title of the chapter in which they have been placed.

The rights 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 that correspond to those in the ECHR, the meaning and scope of the charter rights shall be the same as those of the ECHR rights.

³ J.P. Jaqué, "Les droits fondamentaux dans le traité de Lisbonne", *mimeo*, 5 February 2010.

⁴ See for instance *McCann & Ors v UK* (27 September 1995 Series A No 324) where the UK was found in breach of Article 2 because of the actions of its military in killing three members of the IRA (Irish Republican Army) suspected of preparing a bomb attack.

However, this provision expressly does not prevent Union law providing more extensive protection (Article 52(3)). This means, for instance, that the ambit of Article 7 of the Charter, the right to respect for private and family life must extend at least as far as the European Court of Human Rights judgment in *Gillan and Quinton v UK* (12 January 2010). In that case the ECtHR found the UK's laws permitting police officers to stop and search individuals on the basis of a broad discretion was in violation of the right to private life. While this ECtHR case may be at the edges of EU competences, its sister judgment, *S & Marper v UK* (4 December 2009) clearly has implications for the development of the AFSJ. In this case the ECtHR found the UK police DNA data base, which includes fingerprints, cellular samples and DNA of persons never even suspected of criminal activity let alone convicted, to violate the right to private life. The Stockholm Programme, the new five year plan for development of the area, requests that the Commission

explore if and how authorities of one Member State could obtain information rapidly from private or public authorities of another Member State without use of coercive measures or by using judicial authorities of the other Member State.⁵

Similarly, it calls on the Commission to “examine how operational police cooperation could be stepped up, for example as regards incompatibility of communications systems and other equipment, use of undercover agents, and, where necessary, draw operational conclusions to this end”.⁶ In carrying out these activities, the Commission will have to have regard to the ECtHR jurisprudence and ensure that its actions do not encourage or attempt to justify breaches of the individual's right to privacy through exchange of fingerprints, cellular samples of DNA among law enforcement authorities, where even the retention of those samples is contrary to Article 7 of the Charter.

A bill of rights for the people of Europe

The Charter is not limited in its scope of application to citizens of the Union. Indeed, few of the Charter's provisions have a citizenship limitation and these are contained in chapter 5. Specifically limited to citizens of the Union are the right to vote and stand for elections in the European Parliament and in the municipal elections in the member state in which the citizens reside (Articles 39 and 40); the full right of freedom of movement and residence (Article 45(1)) and diplomatic and consular protection (Article 46). However, even in this chapter, which has the citizen as its title, there are very important rights which accrue to anyone in the EU whether they are a citizen or a third country national. For example, Article 41 contains a right to good administration. It is in the citizen's rights chapter but it states “every person has the right to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union”. Here, every person means exactly what it says – not just citizens but everyone whether regularly on the territory of a member state, irregularly present in the Union or anywhere in the world if his or her affairs require action by an EU authority. The institutions and bodies of the Union also include authorities at the member state level when they are carrying out EU law. Thus, the asylum seeker in a member state is equally entitled to rely on Article 41 of the Charter to request that his or her claim be dealt with in an impartial and fair manner and within a reasonable period of time because the asylum application must be dealt with in accordance with EU secondary legislation.⁷

⁵ Stockholm Programme, Council Doc 5731/10, 3 March 2010, p 40.

⁶ *Ibid.*, p 69.

⁷ Most important for these purposes are the Qualification Directive 2004/83 and the Procedures Directive 2005/85.

T.H. Marshall, the British sociologist who was active in the second half of the 20th century, still provides a valuable starting place to understand the meaning of citizenship. His work has been very influential because it provides a way of thinking about citizenship that escapes the rather unsatisfactory ideas about race and nation which dogged 19th century Europe. According to Marshall, citizenship describes a process of accumulation of bundles of rights by people. As people within a territory and under an authority claim bundles of rights and as those claims become realized, citizenship is created and enacted.⁸ In his own work regarding the UK, he examined how civil rights were acquired in struggles in the 18th century by people in the UK followed by political rights in the 19th century, with the gradual extension of universal suffrage and finally social rights in the 20th century.⁹ This framework is particularly apt for an examination of EU citizenship. If one follows the bundles of rights acquired by people in the EU through the EU treaties, one finds that there is a move from rights to work and for that purpose to move and live anywhere in the EU, to political rights and more recently social rights wherever the individual goes. It is worth noting that the new EU social security system that came into force on 1 May 2010 revolutionises entitlements of people in the EU to enjoy equality in social rights wherever they find themselves.¹⁰

In the EU today, third country nationals enjoy EU rights through a variety of instruments that have been adopted. These include, most importantly, the Directive on long-term resident third country nationals (Directive 2003/109), which provides for a secure residence right and free movement for economic and other purposes across the EU for (most) third country nationals who have completed five years lawful residence in a member state. The family reunification directive (Directive 2003/86) provides a right for third country nationals resident in the EU to be joined by their family members; the students and researchers directives (Directives 2004/114 and 2005/71) provide for the admission and residence of third country nationals etc. Even the controversial Returns Directive (2008/115)¹¹ provides that member states must either give residence permits to third country nationals or expel them. The expulsion of a third country national from the Union, however, will now also be subject to the Charter. The individual's right to respect for private and family life (Article 7) has often been held by the ECtHR to found a right to protection against expulsion. This jurisprudence must be applicable to EU law through the Charter. Already, through the EU's secondary legislation on third country nationals, it is clear that they are acquiring bundles of rights in Marshall's citizenship sense. This is now further developed and extended by the Charter.

Almost all of the rights contained in the Charter apply not only to EU citizens but also to third country nationals. Thus, third country nationals acquire bundles of rights through the Charter in a manner which resembles that outlined by Marshall regarding the core meaning of citizenship. One can say that third country nationals in the EU are entitled to enact citizenship in the EU now via the exercise of Charter rights. The gulf between the rights of citizens of the Union and third country nationals has diminished with the Charter's move towards the equalisation of rights for everyone in the EU.

⁸ E. Isin and B.S. Turner (2002), *Handbook of Citizenship Studies*, London: Sage.

⁹ M. Bulmer and A. Rees (1996), *Citizenship Today: The Contemporary relevance of T H Marshall*, London: UCL Press.

¹⁰ Regulation 883/2004 and its extension to third country nationals.

¹¹ D. Acosta Arcarazo (2009), "Latin American Reactions to the Adoption of the Returns Directive", CEPS, Brussels, 13 November.

The transformation of rights

Until the Charter, we have been accustomed to understanding fundamental rights as belonging to two quite separate universes. The first is that of national constitutional settlements. Most constitutional doctrine includes not only the mechanisms by which governance is determined and carried out but also the Bill of Rights approach – constitutions include the rights of citizens.¹² The Bill of Rights is a part of the national constitution and as such, it is the duty of the state authorities to protect it. Authorities beyond the state may or may not concur with any national Bill of Rights but this is irrelevant to the obligation on the state where the writ of the Bill passes to ensure the correct application of the rights. Alternatively, following the failures of constitutionalism to protect people in parts of Europe, which were highlighted by WWII, we have developed human rights through treaties entered into by states. Here human rights as contained in international (and regional) treaties are entered into by states (such as the ECHR by all EU member states). The state undertakes to respect and ensure the human rights contained in the international treaty for anyone within the state's jurisdiction. The mechanism for determining the content of international human rights contained in the treaties is first national administrations, which may vary among themselves as to the meaning and extent of some rights. Secondly it is for national courts to decide what the meaning of an international treaty is in the context of the actions of national administrations. Sometimes, as in respect of the ECHR, there is a court like the ECtHR that has been created to which an aggrieved individual can make a complaint if he or she has exhausted all national remedies and recourses. However, fully fledged courts are something of an exception in international human rights treaties. It is beyond the scope of this paper to examine the UN Treaty Body system and its supervisory function in respect of international human rights treaties. Suffice it to note that none of the Treaty Bodies have been allocated the name 'court'.

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 that 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.

If one takes as a starting point the Weberian state, which is defined by a territory, people and bureaucracy and that has established a claim to a monopoly over the legitimate use of violence, the Charter reveals fundamental transformations in Europe. First, the Charter is the result of supranational negotiation, discussion and adoption. It has been ratified by all member states via the Lisbon Treaty. But it is not the product of a national constitutional system of any one member state. The power to create this Bill of Rights describes an authority which is not that of the Weberian state. Nonetheless, the Charter modified the state authorities' claim to a monopoly over the legitimate use of violence. I would refer you back to my earlier comments on the ECtHR's recent jurisprudence against the UK and the Stockholm Programme and the impact this will have on state authorities' claims regarding the legitimacy of the use of violence. The people to whom the rights in the Charter accrue cannot be limited by the act of any national authority. Thus for instance, one member state's authorities cannot decide that the right to private and family life (Article 7) will only apply to their own nationals. They are required by the Charter to accept that these rights also accrue to nationals of any other member state who happen to be within their jurisdiction. But they are also required by the Charter to ensure the

¹² K. Laenarts (1990), "Constitutionalism and the Many Faces of Federalism", *American Journal of Comparative Law*, Vol. 38, L 205.

respect for these rights as regards third country nationals who fulfil the jurisdiction rule. In this way the people who are entitled to claim Charter rights are not the people of the Weberian state nor can they be limited to that group. Finally, the territory over which the Charter rights apply cannot be modified by any one member state. The capacity of the state to determine that Charter rights will not apply on some part of the territory, as for instance the Australian authorities have done when they ‘excised’ Christmas Island, which remains part of Australia but not for the purposes of applying for asylum.¹³ Nonetheless, the authorities of the member states are obliged to ensure the faithful delivery of Charter rights to all persons entitled to them.

What the Charter reveals, in the wider picture of the transformation that is the European Union, is the desegregation of the elements of the Weberian state. Authority, territory and people no longer fit into a coherent single framework.¹⁴ Instead people are entitled to rights that emanate from multiple sources and which are enforced through a variety of mechanisms, now most importantly for this discussion, the Charter of Fundamental Rights.

Conclusions

This paper sought to outline the key changes brought about by the Lisbon Treaty for citizens of the Union. Among the most important is access to EU fundamental rights through the legal effect that has been given through the Lisbon Treaty to the EU Charter of Fundamental Rights. There are three main consequences:

- Citizens of the EU now have a Charter of Rights that is legally binding and which their state authorities must deliver in accordance with their duty of good faith to the EU;
- Third country nationals ever more resemble citizens of the Union through their inclusion as beneficiaries of Charter rights under the same conditions as citizens of the Union;
- 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 that those rights might constitute to them. There has been a desegregation 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.

¹³ See the Australian government’s Department of Immigration and Citizenship (<http://www.immi.gov.au/media/fact-sheets/81excised-offshore.htm>).

¹⁴ S. Sassen (2006), *Territory, Authority, Rights*, Princeton: Princeton University Press.