



NETHERLANDS

The Court, the Charter, and the vertical division of powers in the European Union

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By construing an unwritten human rights catalogue for the European Union, with a broad scope *ratione materiae* and *ratione personae*, the European Court of Justice has played an important role in the vertical division of powers in the European Union. This judge-made Bill of Rights will now, however, be replaced by the incorporation of the - legally binding - Charter of Fundamental Rights in the recently signed EU Constitution. There were several concerns during the European Convention that a legally binding Charter could particularly lead to a significant - and hence undesired - shift in the vertical division of powers in the European Union. Similar fears had already led the Convention which drafted the Charter to construct a narrow scope of application. The two Conventions therefore decided to delimit both the scope *ratione materiae* and *ratione personae* of the Union's fundamental rights *acquis* and hence to curtail the role of the Court.

This article will examine the question of whether and how the incorporation of the Charter could change the role of the Court of Justice in the vertical division of powers in the European Union. It analyses the possible effects of this incorporation from a comparative perspective, since, remarkably, similar arguments were used when it was decided to add a legally binding Bill of Rights, with only a limited scope, to the United States Constitution. The Bill of Rights has nevertheless had an important centralizing effect, a process in which the Supreme Court has played a pivotal role. This article will consist of two sections. Section 2 will examine how Article II-111 of the Constitutional Treaty (hereafter: "CT"), by limiting the scope *ratione personae* of the Union's fundamental rights *acquis*, will affect the role of the Court of Justice. It is important to point out that the term "scope *ratione personae*" is used here to describe what Curtin and Van Ooik have called the "passive personal scope of application", which concerns the question against whose acts the Charter offers protection.¹ Section 3 will discuss what effects the Charter in general will have on the use of the Union's powers, and how this can subsequently also, indirectly, widen the scope of the Court's fundamental rights review.

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