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THE EUROPEAN UNION PROTECTION OF HUMAN RIGHTS

The process of European integration that began with the European Communities in the 1950s took an essentially economic approach. Despite the roots of a political nature at the origin of the European project, the Treaties that established the European Communities aimed solely to achieve goals of an economic nature, with the aim of creating a European common market.

The problem of fundamental rights in European construction should be situated in this particular historical and political context. As long as the European project progressed with strictly economic objectives, there were no references whatsoever to the subject of fundamental rights in the constitutive Treaties of the European Communities. Although human rights protection had assumed an essential dimension in the European legal order in the period after the Second World War, at the level of constitutional law in the different European States and at international level via approval of the European Convention on Human Rights in 1950, the specific nature of the Community integration process meant that it had not been the object of precepts on fundamental rights.

The lack of a catalogue of human rights in the constitutive legal acts of the European Communities and the total absence of Treaty provisions on supervision of those rights in the context of the application of Community law begged the question of knowing just what protection citizens would have before Community normative acts that potentially infringed on their rights, and before actions taken by Community institutions that offended the fundamental rights of persons.

Given that the Community normative situation did not include oversight of human rights, and taking into account the rise in complaints by private individuals against Community legal acts that infringed on the fundamental rights enshrined in the respective national constitutional law, the European Court of Justice (ECJ) was early on obliged to deal with the question of fundamental rights in the Community legal order.

After an initial period in which the ECJ seemed to be following a restrictive approach on the protection of human rights in the scope of application of Community law, the ECJ undertook from the late 1960s an important about-face in the understanding of the fundamental rights question.

The first step revealing the ECJ's change of attitude was in the ruling handed down in the *Stauder* case, in which the ECJ considered fundamental rights to be an integral part of the general principles of Community law.[1] Next, in the *Internationale Handelgesellschaft* case, the ECJ affirmed that the protection of fundamental rights it assured, as general principles of Community law, derived from common constitutional traditions of the Member States, and that it would not allow the application of Community provisions that were incompatible with the fundamental rights enshrined by the constitutions of those same States.[2] Evolution of the jurisdictional protection of fundamental rights in the European Communities was strengthened by the decision in the *Nold* case, in which the ECJ mentioned as a reference context for the protection of fundamental rights in Community law not only the national constitutions, but also the international instruments associated with the protection of human rights that the Member States were party to, or had played a role in elaborating.[3]

The ECJ thus clearly abandoned the restrictive position in matters of fundamental rights, in favour of a more active approach concerning the position of fundamental rights in the Community legal order. In the ECJ's understanding, fundamental rights would be considered as general principles of Community law; to determine their specific content, the Court would make use of the common constitutional traditions of the Member States, and the international legal instruments associated with the oversight of human rights.

This change in the ECJ's case-law can be seen in light of two basic motives. On the one hand, the Court had gradually perceived over the course of the 1960s that the expansion verified in the context of Community powers could lead to situations in which the activity of the European Community might affect the fundamental rights of private individuals – a likelihood that had not been considered when the Treaties were drawn up. As this was a gap in the Community legal order, it was up to the ECJ to find the appropriate means to judicially overcome same. On the other hand, the ECJ's activism in matters of fundamental rights had to be considered in the specific context of the relationship between the national and Community legal orders of the time. In the 1960s the ECJ had affirmed the founding principles of Community law – direct effect and primacy – which some national jurisdictions had found difficult to accept. Specifically, the German and Italian constitutional courts openly contested the possibility that Community law provisions could prevail over national rules, and, tangibly, over the constitutional provisions on human rights. The evolution of the ECJ's case-law for want of fundamental rights must necessarily reflect the concern to provide solutions that respond to the arguments presented by the highest Member States' jurisdictional bodies against effective application of the primacy of Community law over national law.[4]

Despite the fact that the ECJ's significant body of case-law on human rights had enabled the gap in the constitutive Treaties of the European Communities to be overcome, it did not by itself resolve the problem of how to treat fundamental rights in the European Union. The non-written nature of the general principles of law introduces elements of uncertainty *vis-à-vis* the content and scope of those rights. Also, the *ad hoc* protection of fundamental rights, based solely on the ECJ's commitment to safeguarding those rights, introduces ulterior elements of legal uncertainty for private individuals, which derive from the fortuitous nature of the judicial decisions themselves.[5] The value of the legal security that all legal systems pursue would hence in itself be enough for the European Union to consider protection of fundamental rights in the context of applying Community law on ground more solid than that resulting from the ECJ's case-law.

Strengthened protection of fundamental rights in the Community legal framework has long been considered in light of two possible options.[6] One is the adoption of a catalogue of fundamental rights by the European Union. This solution derives from the pretext of the constitutional nature of the protection of human rights, as well as from the profound transformation of the Community legal order since its creation, for since its beginning as international law it has progressively taken on a set of characteristics closer to the constitutional law model. The adoption of a bill of rights by the European Union is thus presented as being a logical corollary of its own legal order.

The EC's accession to the European Convention on Human Rights

The other solution presented to strengthen the protection of fundamental rights in the Community legal order consisted of the European Community's accession to the European Convention on Human Rights (ECHR). The ECHR is the most advanced international system on fundamental rights, and all Union Member States are Contracting Parties of same. It would thus make little sense for the Member States' legal acts to be subject to human rights review by the ECHR bodies, while Community legal acts were in the meantime not subject to the same oversight and Community institutions might benefit from a sort of immunity due to lack of external supervision of fundamental rights.

The existing legal difficulties on the European Community's accession to the ECHR led the Council to ask the ECJ to provide an opinion on the subject. In wake of that request, the ECJ delivered *Opinion 2/94*, on the European Community's accession to the European Convention on Human Rights.[7]

In its opinion, the ECJ began by recalling that the European Community is ruled by the principle of conferred powers and that in the field of international relations the Community's competence to enter into international agreements may flow from the express provisions of the Treaty, but could be also implied on those provisions. As no Treaty provisions conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field, the ECJ considered whether article 308 (*ex* article 235) of the EC Treaty could constitute the appropriate legal basis for accession. The ECJ's opinion stated that this provision, being an integral part of an institutional system based on the principle of conferred powers, could not serve as a basis for widening the scope of Community powers beyond the general framework created by the EC Treaty. Thus, and despite the fact that respect for fundamental rights is a condition of validity for Community legal acts, the ECJ declared in *Opinion 2/94* that the European Community's accession to the ECHR would imply a substantial change in the Community system for the protection of human rights, in so far as it would entail the entry into a distinct international institutional system, as well as the integration of all ECHR provisions in the Community legal order. For the ECJ, such a change would be of constitutional significance and would therefore go beyond the scope of article 308. The power of the European Union to join the ECHR would thus have to result from an amendment of its constitutive Treaty.

Some observers have referred to hidden reasons held to be the basis for the ECJ decision.[8] Indeed, the ECHR grants victims of human rights violations additional recourse to its bodies after domestic remedies have been exhausted. If the European Community joined the ECHR, this would imply that the European Court of Human Rights would then be allowed to control the application by Community institutions – *even* the ECJ – of the ECHR provisions. In other words, European Court of Justice decisions could be subject to potential review by the European Court of Human Rights. Accession to the ECHR would cast doubt, although in a very small number of cases, on the ECJ's role as supreme jurisdictional court in the Community legal order. For some, this was the core aspect behind the European Court of Justice's position on European Community accession to the ECHR – the question of preserving its

functions. Although in *Opinion 2/94* the ECJ had not even dealt with the problem of Treaty articles that granted jurisdictional exclusivity in the Community legal order, such would have been the true grounds for its decision.[9] For understandable reasons, the ECJ would not have wanted to directly admit its concerns with its own prerogatives in the Community jurisdictional order. This state of mind nevertheless shows through in certain passages of *Opinion 2/94*, as in the statement that joining the ECHR would imply a substantial change in the Community system for the protection of fundamental rights, as it would imply the European Community's entry into a distinct international institutional system. Yet the singularity of the ECHR system is due precisely to the existence of an external supervision of human rights violations.

A Catalogue of Fundamental Rights of the European Union

Strengthened protection of fundamental rights in the European Union has been considered in light of two major lines of solution: European Community accession to the ECHR or the elaboration of a catalogue of fundamental rights for the Community legal order. The ECJ's *Opinion 2/94* and the lack of political consensus on ECHR membership among the Union Member States, during the Treaty of Amsterdam negotiations, meant that the idea of drawing up a catalogue of Union rights might seem to be the most efficient way to achieve the goal of increasing human rights protection. After the 50th anniversary of the Universal Declaration of Human Rights, in 1998, the European Commission developed a set of initiatives that underscored the importance of fundamental rights in the Union.

The German Council presidency in turn sought to adopt a strategy that emphasised the visibility of human rights in the Union.[10] The German presidency's decision was confirmed by the 1999 European Council meeting in Cologne, which approved the principle of a Charter of Fundamental Rights of the European Union. As a result of the Conclusions adopted in Cologne, the protection of fundamental rights was seen to be an indispensable prerequisite for enhancing the Union's legitimacy. Recalling the respect for fundamental rights in the Community legal order, the European Council decided to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's citizens.

The approval of a Charter of Fundamental Rights of the European Union (hereinafter *Charter*) was welcomed by the European Council, but with a well determined political goal: to strengthen the visibility of fundamental rights among citizens of the Union. The political marketing strategy underlying adoption of the Charter also derives from the mandate approved by the Cologne European Council, which delimits the bill of rights content. The European Council had stated that the Charter should include the fundamental rights and freedoms, as well as basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States, as general principles of Community law. It was also to include the fundamental rights that pertain only to the Union's citizens. Lastly, it was to take into account economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers (article 136 TEC), in so far as they do not merely establish objectives for action by the Union.

While the European Council aimed to set clear limits on the content of the rights to include in the Charter, so that the latter would not have any pretence of increasing the scope of fundamental rights protected in the Community legal order, there were nevertheless some innovative elements in the European Council Conclusions. Indeed, the most original aspect of the decision of the Cologne European Council concerns the process chosen to draw up the Charter of Fundamental Rights. The European Council declared that the Charter should be elaborated by a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as members of the European Parliament and national parliaments.

The Cologne European Council mandated the body charged with drawing up the Charter – which in due course took on the self-proclaimed designation "convention" – to present a final draft document ahead of the European Council in December 2000. The Cologne Conclusions also stated that the European Council would propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It would then have to be considered whether and, if so, how the Charter should be integrated into the Treaties. In other words, the question of the Charter's legal nature would be a matter to decide after the document was elaborated. And such was doubtless the most negative aspect of the Cologne Conclusions.[11]

THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

Following on the work undertaken by the body charged with drawing up the Charter, the convention's chairperson reported to the European Council that it had reached overall consensus on the final draft. The Biarritz European Council unanimously endorsed both the draft Charter and that it should be proclaimed at the Nice Summit. On 7 December 2000, at the European Council in Nice, the European Parliament, the Council and the Commission proceeded with the joint signing of the Charter text, and solemnly proclaimed the Charter of Fundamental Rights of the European Union.[12]

The Charter contains 54 articles comprising a set of civil and political rights, rights of European Union citizens, economic and social rights, and other rights that aim to respond to the problems raised by modern post-industrial societies and by scientific and technological developments.

One of the Charter's innovative aspects is its very presentation. The rights contained in the Charter are not systematised according to the classic model used in declarations of rights, which distinguishes between civil and political rights on the one hand and economic and social rights on the other. Rather, the Charter breaks with the traditional systematisation of fundamental rights by presenting rights listed around an unprecedented enouncement of common values and general principles.[13]

The fundamental rights in the Charter are thus listed over the course of six chapters that correspond to each of the common values and general principles that embody the adopted systematisation, to wit: dignity, freedoms, equality, solidarity, citizens' rights and justice. At legal level, the main advantage deriving from this systematisation of the Charter consists of overcoming the traditional dichotomy separating civil and political

rights from economic and social rights, which was based on their distinct legal nature. The systematisation adopted by the Charter aims above all to state the principle of indivisibility of fundamental rights and to prevent any interpretation that seeks to put economic and social rights on a lesser par than civil and political rights. This idea is expressed at the start, in the second paragraph of the Preamble, which stipulates that "*the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.*"

The seventh and last chapter of the Charter, with the title "General Provisions," includes the so-called horizontal clauses, i.e., a set of precepts meant to deal with problems that concern all the rights included in the text.

Legal Nature

The Nice European Council solely comprised the solemn proclamation of the Charter, with the timing and manner of its integration into the Treaties to be dealt with subsequently.

Note that the ambiguity as to the Charter's legal nature, as established from the start, in no way affected the work undertaken in the convention with the aim of drawing up a final draft. Indeed, the convention President encouraged its members to proceed during elaboration of the draft Charter to produce a document "as if" same were incorporated into the Treaties. In the mind of the convention members, the draft document was thus prepared *as if* it were fully integrated in the primary law of the Union. In other words, the Charter text aimed to be a consensus document on the current state of fundamental rights in the European Union, codifying rights subject to protection in the Community legal order, though also resolving all eventual legal questions that might be raised because of its potential for immediate application. The articles of the Charter's Chapter VII, the "General Provisions," are inserted in this context.[14]

On the other hand, the duality of solutions regarding the Charter's legal nature as anticipated in the Cologne Conclusions – solemn political proclamation or integration into the Treaties – was during the convention also confronted with another problem having to do with the Charter's legal nature: the extent of the fundamental rights to include in the final draft. Some Member States, such as the United Kingdom, were less than sympathetic to the inclusion of social rights in the Charter. The solution found as a result involved a compromise between the various States taking part in the convention, towards the adoption of a document with a wide-reaching scope of fundamental rights, in exchange for an immediate legally binding Charter. This compromise, arranged by the French Presidency of the Inter-Governmental Conference concluded in Nice, is based on the pretext of a Charter of Fundamental Rights achieved at two times: first, political proclamation of the Charter; and next, hopefully in the near future, decision on its integration into the Treaties. From this standpoint, it seemed more important to ensure general political consensus around a document that encompassed an expanded set of rights, than to establish a more limited roll of fundamental rights with binding legal force.[15]

The problem, however, is to know whether the Charter's being only object of a solemn political proclamation means that it produces no legal effects whatsoever. At first

view, this would seem a natural consequence of the failure to include the Charter of Fundamental Rights into the Treaties. But elaboration of the Charter gave rise to an unprecedented forum in which all the political institutions involved in the European Union's decision-making take part. It would thus be strange if the Council, the European Parliament and the Commission did not feel bound by the Charter's provisions when they act on the legislative level. Hence, it may also be stated that although the Charter was not promptly integrated into the primary law of the European Union, it is likely to produce legal effects, due to the solemn commitment assumed by it main addressees.

The European Court of Justice may likewise refer to provisions of the Charter of Fundamental Rights. It has already been mentioned that in order to plug the existing gap *vis-à-vis* fundamental rights in the Community legal order, the ECJ considered fundamental rights to be general principles of law. Its sources of inspiration on the matter are the common constitutional traditions of the Member States and the ECHR. There is nothing to prevent the ECJ from adopting the Charter in the future as the preferential source of reference in its decisions on fundamental rights in Community law. In any case, the ECJ occasionally grants interpretative authority to other non-binding Community provisions. *A fortiori*, it is reasonable to expect the ECJ to adopt a similar attitude with regard to the Charter, which was drawn up with the participation of the various sources of legitimacy of the European integration process.

In truth, the Charter is a legal text that condenses and affirms the common constitutional traditions of the Member States in the field of fundamental rights. The Charter should be viewed as a substantive emanation of those common constitutional traditions applied by the ECJ, as per article 6 paragraph 2 of the TEU, as general principles of Community law. The new catalogue of rights may thus be considered an integral part of the *acquis communautaire*.[16]

The binding nature of the Charter of Fundamental Rights will doubtless only be fully achieved through its respective integration into the Treaties. In so far as one of the current legal challenges of the Community legal order consists of simplifying the Treaties, in a process that may lead to the adoption of a European Constitution, the problem of the Charter's integration in primary law should soon see new developments.

Personal Scope of Application

The issue of the passive personal scope of application, i.e., to know which authorities are meant to respect the Charter, is dealt in article 51 paragraph 1. This provision states that "*the provisions of the 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.*" The Charter's provisions are therefore applied to the activity undertaken by Union institutions, encompassing in this concept all existing entities and bodies in the framework of the European Union and the Community. It thus comprises a set of initiatives reportable to the three pillars of the Union. However, and given that Member States are granted important functions with regard to implementation of the Community legal order, the Charter declares that the States are also addressees of its provisions when they implement Union law.

The elaboration of article 51 paragraph 1 had as general context the case-law of

the European Court of Justice, which guarantees respect for fundamental rights in the Community legal order, with respect to the activity of Community institutions, and also the measures taken by the Member States in the scope of Community law. This means that the respect for fundamental rights covers both national norms that implement Community provisions and national measures that introduce restrictions on the application of Community law. The Charter's provisions are thus addressed to the States whenever they act in the scope of the Community legal order. But the Charter's provisions are not applied in fields that belong to the exclusive jurisdiction of the Member States. In such cases, there is no possibility that the Charter's provisions can be invoked against the national legal order.

Along with the problem of addressees of the provisions of the Charter of Fundamental Rights is the question of holders of the rights enshrined in the new catalogue – a matter which was not subject to any horizontal clause that set a general principle. The active personal scope of application was resolved pragmatically, and consists of leaving each right stated by the Charter to define its holders. The sphere of beneficiaries of the Charter's various rights and principles thus depends solely on the terms in which those same rights are written in the text of the Charter. Consequently, some rights involve everybody, while others are only recognised as pertaining to people holding Union citizenship, and still others again are attributed as per the specific characteristics of certain persons, as in children's rights or workers' rights.

The question of rights beneficiaries was met with a great deal of apprehension by civil society, which feared the Charter would be an instrument addressed only to citizens of the Union. The solution found overcomes those fears, as it allows enshrined rights to be invoked, in most cases, by all persons, according to the principle of universality.[17]

The result is thus that most civic and political rights may be invoked by all persons. Economic and social rights likewise have a formulation that includes their applicability to citizens from third countries. Indeed, in the Charter's first four chapters, as well as in Chapter VI, there are few provisions specifically addressed to citizens of the Union. For obvious reasons, the situation of Chapter V, on "Citizenship," is distinct. As the European Union is a political agreement between States, which grants citizenship status to nationals of these countries, it is natural that the provisions dealing with said citizenship have a more restricted scope than other articles in the Charter.

In so far as the Member States are also addressees of the Charter's provisions, as per article 51 paragraph 1, national courts may be confronted with invocation of the rights included in its text. Indeed, private individuals can invoke the violation of fundamental rights enshrined in the Charter against national measures implementing Community law. Effective application of Charter provisions by the national courts is a question that naturally depends on the binding force of the new catalogue of rights, though once the problem of the Charter's legal nature is resolved it is likely that an important part of its norms will be able to produce direct effect.

Powers

Another significant question debated by the convention elaborating the Charter of Fundamental Rights concerned the impact it would have on the sphere of powers

conferred to the Community and to the European Union. In other words, to what degree would the inclusion of certain rights in the Charter lead to expansion of the European Union's powers. On this matter, article 51 paragraph 2 states that "*this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*" To strengthen this horizontal clause on the division of powers between the Union and the Member States in the context of application of the Charter, the 5th paragraph of the Preamble also stresses that "*this Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity...*" Thus, and in line with the mandate set by the Cologne European Council, the Charter does not aim to be an instrument of change for the current state of the Community's legal order, namely the division of powers between the Union and the Member States.

The problem of the Charter's impact on the scope of Union powers derives from the relationship that may be established between the rights guaranteed in its text and Community powers. As a background to this question is some States' fear that the Charter's affirmation of certain rights might serve as justification for future expansion of the Union's powers. According to this view, the Charter should not include rights in areas outside the Union's jurisdiction. Yet that position seems overly reductive. Indeed, the European Court of Justice affirmed in *Opinion 2/94* a distinction of principle on the matter of fundamental rights in Community law, for while the Community is fully obliged to respect fundamental rights, its action in the field of fundamental rights presupposes the existence of a specific power.

Based on this distinction, it is possible to foresee situations in which the lack of a Community power may not be enough to prevent the violation of a fundamental right by the Community. For example, it is thought that approval of a Community legal act that regulates the way animals are slaughtered could interfere with religious rites in that area, whence it may conflict with rights deriving from the freedom of religion – and the Community certainly has no jurisdiction in matters of religion. However, the Community bodies and institutions may in the course of their activity directly or indirectly affect rights related to the freedom of religion. So the question of the rights enshrined in the Charter is a problem not to be confused with the scope of powers conferred upon the European Union.[18]

On the other hand, the Charter aims to reflect a set of values common to the political heritage of the European Union. To this degree, its contents cannot but include provisions such as the ban on the death penalty or provisions concerning the respect for family life, which, though foreign to the scope of Community jurisdiction, serve as a natural complement to the function of legitimising the Union's political power, as contemplated by the adoption of a catalogue of rights.

Relationship with the European Convention on Human Rights

The most delicate issue the convention had to deal with was definition of the kind of relationship to establish between the provisions of Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). It is well known that the ECHR is held to be the principal instrument of the European public order on human

rights. The ECHR provisions and the case-law handed down by the European Court of Human Rights are a superior guarantee of the protection of fundamental rights. As the European Union's accession to the ECHR was for the time being a problem off the Union's political agenda, it was important to define what kind of relationship should be established between those two catalogues of fundamental rights. But the problem of the relationship between the Charter and the ECHR encompassed only a part of the Charter's provisions, given that the ECHR basically focused on the so-called civil and political rights.

The problem thus consists of defining the rights included in the Charter that correspond to rights in the ECHR. Regarding this aspect, article 52 paragraph 3 states that the meaning and scope of the Charter's rights are equal to those granted by the ECHR, unless the Charter guarantees broader or more extensive protection. In the case of conflict between the contents of a Charter provision and a ECHR article, the latter's precepts therefore constitute the basic level of protection of fundamental rights. In other words, interpretation of the Charter's norms cannot in any case have the effect of reducing the level of protection of fundamental rights stemming from the ECHR. This means that in the Charter system the ECHR is held to affirm a minimum standard of guarantee for human rights and, when the meaning and scope of the Charter provisions do not reach the protection offered by the ECHR standard, the conflict of the norms is resolved in the latter's favour. If the Charter provisions offer a protection of fundamental rights beyond that resulting from the corresponding ECHR precepts, article 52 paragraph 3 states that the conflict of norms should be resolved by application of the Charter.

The importance of article 52 paragraph 3 also derives from the application of same to the restrictions of the rights and freedoms recognised in the Charter. It is in this aspect that the relationship with the ECHR is more delicate. The legal techniques used in both catalogues are profoundly different with regard to limits on the exercise of rights. In the ECHR each stated right has a corresponding specific clause that regulates situations in which same may be subject to restrictions. The underlying concern of this legal technique was to carefully limit the circumstances in which public authorities could interfere with the exercise of fundamental rights. For the Charter has only one horizontal clause, in its article 52 paragraph 1, which deals with the regime of restrictions on fundamental rights.

Concern over the limitations on the exercise of fundamental rights recognised by the Charter, given the different legal approach, led to duplication of references to the ECHR in article 52 paragraph 3 and article 53. The convention's earlier drafts had envisaged only a general clause that established that no Charter provision could reduce the protection offered by the ECHR, the constitutional traditions of the Member States and other instruments of international law. The manifest concerns of Council of Europe observers over the risk of lowering the level of protection granted by the ECHR led to the introduction of a specific clause on the relationship between the rights and freedoms envisaged by the Charter and the restrictions on the corresponding rights in the ECHR system. There are thus two precepts that regulate the relationship between the Charter of Fundamental Rights and the European Convention on Human Rights, which, given their content, seem rather redundant. For reasons of clarity, it would have been preferable

to suppress reference to the ECHR in article 53 and to deal with the relationship between the two legal instruments only in article 52 paragraph 3.[19]

In so far as the ECHR constitutes the preferential source of inspiration in the Charter's drafting, especially for civil and political rights and for fundamental procedural rights, and although the convention was not limited to a literal transposition of the content of the rights inscribed in same, it is important to know which rights enshrined in the Charter correspond to rights in the ECHR. With this in mind, the convention secretariat drew up two lists of rights recognised by the Charter, which are published in the Charter text explanations but do not yet have any legal value as they are simply intended to clarify the Charter provisions.[20]

The Charter thus maintains the current relationship between Community law and the ECHR system. The European Court of Justice will continue to interpret in its own way the ECHR provisions, as well as the case-law of the European Court of Human Rights. The Charter of Fundamental Rights does not interfere with Community law's level of autonomy with respect to the ECHR system. Risks of a different interpretation of the ECHR provisions by the European Court of Justice and the European Human Rights Court therefore remain.

Civil and Political Rights

As civil and political rights are at the core of the European Convention on Human Rights, it would be natural during elaboration of that part of the Charter for the ECHR to constitute a basic reference. Some members of the convention drawing up the Charter went so far as to defend that it should be limited to directly importing the ECHR provisions. Although this was not the prevailing understanding, due to the technical difficulties related to ECHR interpretation by the European Court of Human Rights, the former served as a direct source of inspiration in the editing of the civil and political rights. It may nevertheless be recalled that the ECHR is a catalogue of fundamental rights adopted in 1950, and that its text thus reflects the perspective on human rights at that time. Given that even in the field of civil and political rights the understanding of fundamental rights has continually evolved – reflecting deeper oversight of human rights and the achievement of full democracy in modern societies – this evolution has been accompanied by the case-law handed down by the ECHR bodies. Whence the adoption of a new Charter of Fundamental Rights is an appropriate opportunity for the desirable updating of civil and political rights in the European Union's legal order.

The range of civil and political rights is nevertheless not confined to the rights included in the ECHR. Indeed, the body charged with drafting the Charter also included some new rights that aim to respond to the challenges of the contemporary world. Article 3 of the Charter thus aims to introduce a core of principles related to the integrity of human beings *vis-à-vis* technological developments in the areas of medicine and biology.[21] In the same line of concerns, raised by technological progress in the field of computing, article 8 includes the right to personal data protection. On the other hand, other new rights recognised by the Charter reflect a different level of concern over furthering democracy. In this context, article 41 deserves mention, as it

introduces the so-called right to good administration, which grants citizens a set of rights concerning the relationship with Community institutions.

The Charter's most ambiguous aspect, in the area of civil and political rights, consists of the problem of guaranteeing rights. And the question is not asked so much at the level of the Charter provisions, but above all at the level of the Community legal order. The crux of the question concerns private individuals' right of access to the European Court of Justice. The essence of the problem has to do with the restrictive interpretation of the legal standing of private individuals who approach the ECJ, resulting from its own case-law on articles 230 and 232 of the TEC. But private individuals' access to justice is held to be a fundamental right, as a pretext of the rule of law.[22] Limits on private individuals' direct access to the ECJ, namely when the violation of fundamental rights is invoked, is thus one of the most controversial points of the Community legal order concerning the guarantee of fundamental rights.

Article 47 of the Charter affirms the right to action before a court in cases where a fundamental right protected by the Union's legal order is violated. This solution is based on the idea that the Community jurisdictional system is not limited to actions before the ECJ, but also encompasses legal procedures introduced before national courts in so far as the latter are considered common judicial bodies for the application of Community law and as such are covered by the provision of article 47. However, this is a formal solution for a tangible problem of Community law: the standing rules regarding private individuals' direct access to the European Court of Justice and the Court of First Instance. Indeed, full resolution of the problem of private individuals' direct access to the ECJ would have to be effected through amendment of the Treaty provisions that deal with legal standing – a situation clearly beyond the mandate of the convention that drew up the Charter. Yet nothing prevents the ECJ from proceeding to reassess its understanding in light of the right to legal action enshrined in the Charter, and to eventually introduce changes in the restrictive case-law handed down in this matter.[23]

Citizens' Rights

The Charter of Fundamental Rights includes a Chapter V on citizens' rights. The Cologne mandate asserted that the Charter should also include rights only granted to citizens of the Union, whence the *raison d'être* of the specific Charter chapter on citizenship.

European Union citizenship was established by the Maastricht Treaty, which brought together a small set of rights conferred upon nationals of the Union Member States. The rights considered to bear on citizenship in Maastricht are basically of a civic and political nature, to which are joined a right taken from the economic freedoms envisaged in the Treaty establishing the European Community; they aim to constitute the basis for affirmation of a special direct link between the European Union and the citizens of the Member States. However, as elaboration of the Charter of Fundamental Rights was meant to reflect the prevailing law in the Community legal order, it was not expected to cause significant changes in citizens' rights.

In terms of citizenship, the Charter encompasses the rights to political participation by the Union's citizens as per article 39 on the right to elect and be elected to the

European Parliament in the Member State of residence, and article 40, which concerns the right to elect and be elected in municipal elections in the Member State of residence. In articulation with these provisions, the Charter's article 12 paragraph 2 states that "*political parties at Union level contribute to expressing the political will of the citizens of the Union.*" Another precept that configures a right of a clearly political nature is the Charter's article 46, on diplomatic and consular protection in the territory of third countries. A common aspect to all these rights is the fact that same are exclusively applied to citizens of the Union.

The right of access to the Ombudsman, article 43 of the Charter, the right to petition the European Parliament, article 44, and the right of access to documents, article 42, may be invoked by any private individual or corporation with residence or headquarters in a Member State. Common to the exercise of these rights is the fact that same presuppose a direct relationship between the person or entity holding the right and the European Union, unlike the right to vote in European and municipal elections and the right to diplomatic and consular protection that are rights that require some form of intermediation by a Member State.[24]

Closing the reference to citizens' rights included in the Charter is the right to free movement and residence stipulated in article 45. This right has a different origin from the other citizens' rights in the Community legal order. Its genesis derives directly from the provisions of the Treaty establishing the European Community that set out economic freedoms, especially free movement of persons and, above all, from creative interpretation of those articles by the European Court of Justice. The right to freedom of movement and residence is doubtless the most important of the rights conferred in the name of Union citizenship. Comparison of the content of article 45 of the Charter with article 18 paragraph 1 of the TEC could lead to the result that the right to free movement and residence enjoyed by Union citizens in the territory of a given Member State was subject to full recognition on the part of the Charter, i.e., that it would not be subject to the limitations deriving from Community law. However, included in the Charter's general provisions is paragraph 2 of article 52, which states that "*rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.*" The existing limitations to the right of free movement and residence resulting from the Treaty and Community directives are therefore maintained.[25]

Social Rights

The inclusion of social rights in the Charter of Fundamental Rights was the aspect that generated the most controversy during the convention proceedings. Indeed, there was a major divide between defenders of the so-called social dimension of the Union and the positions of certain States that considered that social rights did not bear on the nature of fundamental rights – they understood that in any case such rights were beyond the powers of the Union. The final compromise between these two antagonistic viewpoints on social rights was achieved by considering fundamental social rights to be an integral part of the dignity of human beings, in the sense of the Charter's article 1. Their inclusion in the Charter's final version must be considered a very positive

result, which would by itself affirm the value added of the Charter of Fundamental Rights *vis-à-vis* the European Convention on Human Rights.[26]

Note that the Amsterdam Treaty had introduced a new paragraph in the Preamble of the Treaty on Union that declared the attachment of fundamental social rights as defined in the 1961 European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers. Reference to these two international instruments on fundamental social rights in the Preamble of the Union Treaty is held to be not enough to make them binding under Community law. However, the reference in the Preamble was complemented by article 136 of the TEC, which declared that the Community and the Member States, keeping in mind the fundamental social rights enounced in the European Social Charter and in the Community Charter of the Fundamental Social Rights of Workers, should pursue the social policy goals stated therein.

The biggest problem raised by social rights, in terms of juridical technique, derives from their special legal nature. For social rights, as a rule, are not subjective rights that can be directly invoked by private individuals before the courts. In most cases, social rights consist of the capacity of their holders to receive a State allowance.[27] Because of their programmatic nature, social rights usually suffer from a lack of justiciability. Such is the case, for example, of the right to social security, the right to education, the right to health and the right to housing. There are also certain social rights that bear the legal nature of true subjective rights, such as the case of the freedom to form and join trade unions, the right to collective bargaining or the right to protection against unjustified dismissal.[28] But the element that marks the difference between civil and political rights and social rights lies in the special nature of the subjective rights of the former versus the nature of the rights of credit, to be provided for by the State, of the latter. A result of this different legal nature is that civil and political rights are rights that usually benefit from the so-called direct effect, while social rights, because they are rights of positive content, are not directly applicable.

Such considerations were present during proceedings of the convention that drew up the Charter, especially given that the Cologne European Council's mandate had declared that "*account should ... be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), in so far as they do not merely establish objectives for action by the Union.*" The mandate given the convention thus distanced from the Charter's scope the social rights that are merely goals for action by the European Union.

On the basis of this delimitation, the body's proceedings were oriented towards the aim of elaborating a distinction between rights, principles and goals. Although goals concerning social matters would certainly be considered outside the scope of rights to include in the Charter, the social chapter should nevertheless not be limited to those rights likely to produce direct effect. As seen beforehand, the distinctive feature of social rights lies basically in the fact that their nature is that of rights that are the object of a State allowance – by the very nature of which they cannot be limited to subjective rights. As social rights require measures for political powers to implement them, the norms that establish those rights have the legal nature of principles, which are implemented through the action of lawmakers, and public agencies who should necessarily apply them. The failure of public powers to implement such legal principles

may be subject to judicial review undertaken by the appropriate authorities. Yet private individuals may not directly invoke in court the rights contained in those principles when they have not been subject to implementation by political powers.
In terms of juridical technique, the Charter's provisions do not explicitly refer to establishment of rights or the proposition of principles. It is nevertheless possible to infer, by the way certain Charter articles are formulated, the nature of rights that citizens may directly invoke, or the principles that require implementation by the public authorities. Thus, in cases where the right holder is directly mentioned in the content of the provision, as for example in articles 30 and 31, we note the consecration of true justiciable rights. But in situations where it is stated that the Union should recognise or ensure the protection of certain values, the Charter contains only a statement of principles, as in articles 34 and 38.[29]

The distinction between principles and objectives is in turn based on the fact that principles consist of commands endowed with a certain degree of precision, whose application confers a narrow margin for appreciation by public powers, as in the situation of norms concerning environmental protection and consumer protection. Oversight of the environment or of consumers are principles whose implementation has been subject to judicial review by the ECJ. The competent public institutions cannot exempt themselves from the duty to implement such principles, they may otherwise be taken to court. And norms that stipulate ends of a very generic nature, allowing broad discretion to lawmakers in their implementation, are to be considered as mere social policy objectives. The case of a norm concerning full employment, for example, stipulates a goal so vague that its application cannot be controlled by the courts.[30]

Regarding the social rights contained in the Charter, which are generally grouped in its Chapter VI under "Solidarity," the provisions of the European Social Charter and the Community Charter of the Fundamental Rights of Workers are the preferential source of inspiration for the new catalogue of rights. Other Charter provisions derive directly from the precepts on social matters applicable in the national legal order of the Member States, such as the rights in articles 30, 34 and 35.[31] The Treaty on the European Community also served as a source of inspiration for some social rights contained in the Charter, namely the precepts on non-discrimination and gender equality.

In any case, and despite the undeniable added value represented by the inclusion of social rights in the Charter of Fundamental Rights, it must not be forgotten that adoption of the Charter, in accordance with its article 51 paragraph 2, does not interfere with the current division of powers between the Community and the Member States. This means that the Charter does not affect the power States hold in social matters, namely the possibility of introducing restrictions of the social protection in force at national level, without Community law being able to interfere in such cases. This situation is particularly sensitive given fears over the displacement of business enterprises. Indeed, the possibility that companies may move has been used by business at national level to press for the reduction of social burdens existing in some Member States; the former otherwise threaten to move to States where the social costs are lower. This has unleashed a trend on the part of national governments towards flexible social protection in light of an alleged increase in competition among companies. This phenomenon of social deregulation has been

viewed by large sectors of the States' civil society to be a political cost associated with the process of European economic integration.[32]

Thus, and despite the positive side of the introduction of social rights in the new catalogue of rights, the Charter's adoption is apparently not enough to prevent the most harmful effects deriving from construction of a large internal market, to combat which requires adoption of an effective European social policy. Indeed, the inclusion of social rights in the Charter of Fundamental Rights of the European Union has not replaced discussion on the need to approve social policies at Community level which consubstantiate definition of the Union's new powers.

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[3] *J. Nold*, case 4/73, ECR, 1974, p.491.
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[19] P. Lemmens, "The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects," *Maastricht Journal of European and Comparative Law*, 8 (2001), pp.50-55.
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