

**Mats Lindfelt**

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# **Fundamental Rights in the European Union – Towards Higher Law of the Land?**

**A Study of the Status of  
Fundamental Rights in a Broader  
Constitutional Setting**



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FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION –  
TOWARDS HIGHER LAW OF THE LAND?



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Turku/Åbo in December 2006

Mats Lindfelt

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# 1. INTRODUCTION

## 1.1 EU and fundamental rights in a nutshell: 1950s - 1999

The protection of fundamental rights within the European Community/European Union has been subject of debate for well over thirty years among the Union institutions, Member States, scholars and NGOs. This debate has essentially focused on a general critique that the European Community/Union lacks a clear commitment to the protection of fundamental rights. In the early days the issue of fundamental/human rights was not really of any concern.<sup>1</sup> The founding treaty establishing the European Economic Community<sup>2</sup> (henceforth EEC) did not contain any explicit reference to fundamental rights or any guarantee for the protection of fundamental rights. The proposal for establishing a European Defense Treaty in 1952 included an article (article 3) on safeguarding fundamental civil and political fundamental rights of its citizens. A defense community was never established, but the issue of incorporating fundamental rights was raised again in the drafting procedure for establishing a European Political Community. The draft treaty envisaged to establish the European Political Community would have incorporated the ECHR and its first protocol into the Community legal order.<sup>3</sup> The European Political Community was, however, never established.

The first of the three Communities, the European Coal and Steel Community (ECSC) was established already in 1951.<sup>4</sup> In establishing the EEC and the European Atomic Energy Community<sup>5</sup> (EAEC), it was thought that violations of fundamental rights would never be an issue or a real concern for the Communities.<sup>6</sup> Prior to the establishment of the EEC an impact assessment on social rights and social protection was carried out by a group of experts

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<sup>1</sup> In the aftermath of the World War II, in the European context the question of human rights was left to the Council of Europe (founded in 1949).

<sup>2</sup> The Treaty establishing the European Economic Community, signed in Rome 25 March 1957, entered into force 1 January 1958. UNTS 11.

<sup>3</sup> The German delegation raised the question of fundamental rights during the draft procedure of the treaties, but other delegates objected to this. Clapham, A., 1991, pp. 92-93.

<sup>4</sup> The Treaty establishing the European Coal and Steel Community, signed 18 April 1951, entered into force 23 July 1952 for a period of 50 years. The Treaty expired on 23 July 2002. 261 UNTS 140 (1951).

<sup>5</sup> The Treaty establishing the European Atomic Energy Community, signed 25 March 1957, entered into force 1 January 1958. UNTS 167.

<sup>6</sup> Szyszczak, E., 2001, p. 494.

introduced by the International Labour Organisation (ILO). A year before the signing of the Treaty of Rome, the report "Social Aspects of European Economic Co-operation" was published,<sup>7</sup> the main conclusion of which was that there was no need to give any legislative power to the EEC in matters of social policy. The expert group believed that improved working and living conditions would result from liberalization of trade, i.e. that the creation of the common market would more or less automatically result in social progress and thus in the realisation of social rights. It is, however, noteworthy that the negotiation of the Treaty of Rome was preceded by an analysis of the impact of economic integration on social rights. The liberalization of trade was perceived as a guarantee for the realization of social progress, i.e. social rights were consequently seen as unnecessary since they would develop naturally as a consequence of the process of economic integration.<sup>8</sup>

The EEC Treaty did, however, contain provisions relating to fundamental rights, such as the prohibition of discrimination on grounds of nationality (article 7) and the principle of equal pay for men and women (article 119). The European Court of Justice (henceforth ECJ) held in the second *Defrenne case*<sup>9</sup> that the aim of article 119 was to eliminate the harmful disadvantage of competition regarding pay, thus recognizing the double aim of the provision. One could say that fundamental rights were only protected to the

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<sup>7</sup> International Labour Organisation, Social Aspects of European Economic Co-operation. Report by a Group of Experts. Studies and Reports, New Series, No. 46, 1956.

<sup>8</sup> De Schutter, O., 2004, pp. 5-8. Article 2 of the 1957 EEC Treaty prescribed that "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between states belonging to it". The ECJ, however, denied in case 126/86, *Fernando Roberto Giménez Zaera v Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social*, judgment of 29 September 1987, para. 11, that social progress would consequently lead to legally binding obligations by stating that "with regard to the promotion of an accelerated raising of the standard of living, [EEC article 2] in particular, it should be therefore be stated that this was one of the aims which inspired the creation of the European Economic Community and which, owing to its general terms and its systematic dependence on the establishment of the common market and progressive approximation of economic policies, cannot impose legal obligations on Member States or confer rights on individuals".

<sup>9</sup> Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, judgment of 8 April 1976. See also Case 36/74, *Walrave and L.J.N. Koch v Association Union cycliste internationale*, judgement 12 December 1974.

extent they were necessary for the pursuit economic integration. Another significant characteristic introduced by the ECJ in the *Defrenne case* was that the court acknowledged that article 119 EEC created judicially enforceable rights and obligations between the employer and the employee, i.e. article 119 granted individual rights that could be enforceable vertically between individuals in national court proceedings. Consequently, fundamental rights could also be relevant between individuals. The EEC Treaty established a Community whose purposes were designed and limited to economic integration based upon liberal free market principles. The assumption that fundamental rights would not be an issue within the EEC proved, however, to be problematic and already in the late 1950s, the ECJ was confronted with fundamental rights issues. The ECJ concluded, however, that it was not within its competence to assess the compatibility of EC law with national constitutional fundamental rights provisions.<sup>10</sup>

The judicial arena, rather than the political arena, was the forum where it was recognised at an early stage that action by Community institutions and Member States in implementing Community law did pose problems in relation to the fundamental rights guaranteed in the national constitutions of the Member States and in international human rights treaties ratified by the Member States.<sup>11</sup> Since the late 1960s, the ECJ has maintained that fundamental rights form an integral part of the general principles of Community law doctrine. Today, there is an '*acquis communautaire*' of fundamental rights in the Community legal order. The ECJ is the architect of this fundamental rights doctrine. In protecting fundamental rights, in general, the ECJ makes reference to constitutional principles common to the Member States as well as to international treaties and conventions that the Member States have collaborated on or to which they are signatories. The Court has specifically relied on the ECHR as a "source of inspiration" in protecting fundamental rights. Despite the jurisprudence developed by the ECJ, there has not been any clear-cut understanding of the material content of this '*acquis communautaire*' of fundamental rights within the Community legal order. In other words, the fundamental rights doctrine lacks the element of legal certainty and predictability. Despite the fact that the European Union is founded on the principles of respect for human rights and that they form a central role, there is

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<sup>10</sup> Case 1/58, *Stork v. High Authority*, judgment of 4 February 1959, case 36-38/59 and 40/59 *Geitling v. High Authority*, judgment of 15 July 1960 and case 40/64 *Sgarlata v. Commission*, judgment of 1 April 1965.

<sup>11</sup> Szyszczak, E., 2001, pp. 494-495.

no complete enumeration of fundamental rights in the EC/EU treaties within the Community legal order. The development of the EU fundamental rights doctrine covering a period of some 40 years between the late 1950s and 1999 can perhaps be summarised roughly by highlighting the following central developments throughout the years:

- Before 1969: Fundamental rights outside the scope of Community law and competence of the ECJ
- 1969 Fundamental rights recognised as part of the general principles of Community law
- 1974 Explicit reference to the ECHR in the case of the ECJ
- 1977 Adoption of political declarations<sup>12</sup>
- 1988 Confirmed that not only EU Institutions but also Member States are bound by fundamental rights in implementing and applying EC law
- 1989 ECHR described as having special significance by the ECJ
- 1996 No competence for the EC to adhere to the ECHR
- 1997 Treaty of Amsterdam (art. 6:1, 6:2 and 7 TEU)
- Missing? A formal adherence to the ECHR and/or a Bill of Rights<sup>13</sup>

## **1.2 Towards a EU Charter of Fundamental rights – the turn into the 21st century**

The idea to elaborate a Charter of Fundamental Rights for the European Union emerged during the German Presidency of the Council in 1999. The rights contained in the proposal for a European Charter of Fundamental Rights were intended to be binding for European Union institutions ensuring clear, transparent and enforceable rights for the citizens of the EU. In addition, adopting a fundamental rights charter would, according to the German

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<sup>12</sup> Examples of such instruments are the joint declaration by the European Parliament, the Council and the Commission on fundamental rights of April 1977, O.J.-C103/1, the European Parliament declaration of Human Rights and Fundamental Freedoms of April 1989, O.J. C 120/51, Community Charter of Fundamental Social Rights of the Workers adopted by the Heads of State and of Government on 9 December 1989, COM 1989 471. For further references, see Opinion 2/94, ECR I-1759, para. III.5. See also Eicke, T., 2000, pp. 280-281.

<sup>13</sup> The development of the EU fundamental rights doctrine prior to the adoption of the EUCFR will be analysed in greater detail in chapter 2.

Government initiative, make it clear that EU law is based on shared values that would include fundamental and civil rights common to the Member States. The Charter of Fundamental Rights was also intended to promote the strengthening of European awareness among EU citizens. According to the German initiative, establishing a Charter of Fundamental Rights would be the best way of securing the future protection of fundamental rights within the Community legal order.

The Cologne European Council decided to move ahead with the discussion of adopting a Charter of fundamental rights for the European Union by stating that “at the present stage of development of the European Union, the fundamental rights *applicable at Union level*<sup>14</sup> should be consolidated in a Charter and thereby made more evident”.<sup>15</sup> The idea was to codify the ‘*acquis communautaire*’ of fundamental rights in the Community legal order. Furthermore, the Cologne European Council stated in Annex IV that “there appears to be a need, at the present stage of the Union’s development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible for the Union’s citizens”.<sup>16</sup> It should be noted that a reference was made specifically to the *European Union* rather than merely to the European Community.<sup>17</sup>

The Cologne European Council stated that it believed that the EU Charter should contain fundamental rights and freedoms including procedural rights guaranteed by the ECHR and constitutional traditions common to the Member States as general principles of Community law. Furthermore, account should also be taken of economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers in accordance with article 136 TEC “insofar as they do not merely establish objections for action by the Union”, in other words, insofar as they can

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<sup>14</sup> My italics.

<sup>15</sup> Presidency Conclusions based upon the Cologne European Council of 3-4 June 1999. European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, para. 44.

<sup>16</sup> Ibid., Annex IV.

<sup>17</sup> The secretariat of the drafting body submitted on request by the Chairman on horizontal questions that “The Charter applies to the institutions of the Union, and the Cologne European Council does not refer to the Community alone. The Charter should therefore be drafted in such a way as to apply within the framework not only of the Treaty on European Union but also of the EC Treaties. In other words, the Charter applies to Titles V (CFSP) and VI (JHA) of the Treaty on European Union”. Draft Charter of Fundamental Rights of the European Union, CHARTE 4111/00, Body 3, p. 3.

be formulated as proper individual rights.<sup>18</sup> The Cologne European Council stated that the Charter should also include fundamental rights that specifically would be addressed to the EU citizens. During the Tampere European Council in 1999, the working methods of the drafting body were set up. One of the objectives in drafting a EU Charter of fundamental rights was to tackle the current lack of visibility of fundamental rights. The idea was to clarify applicable fundamental rights within the Community legal order. This idea is based simply on the fact that fundamental rights can only fulfil their function if citizens first and foremost are aware of their existence.<sup>19</sup>

During the Cologne European Council meeting in 1999, it was decided that 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 should present a draft document on a Charter of Fundamental Rights for the European Union in advance of the European Council meeting in December 2000. The drafting body<sup>20</sup> (which referred to itself later on as the “Convention”) had freedom to define its aims and set the criteria for deciding the rights that should be included. The first meeting of this *ad hoc* body was held in December 1999 in accordance with the

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<sup>18</sup> Rosas, A., 2000, p. 97.

<sup>19</sup> Affirming fundamental rights in the European Union. Time to act. Report of the Expert Group on Fundamental Rights, 1999, p. 12. Available at: [http://ec.europa.eu/dgs/employment\\_social/publicat/fundamri/simitis\\_en.pdf](http://ec.europa.eu/dgs/employment_social/publicat/fundamri/simitis_en.pdf)

<sup>20</sup> Initially, the drafting body was “nameless” and was called the “body”. The Presidium suggested that the drafting body should be called the “Convention” having in mind the importance and nature of the mandate entrusted to the drafting body. CHARTE 4107/00, Body 2. A new Convention was established in order to discuss no more or no less than key issues arising for the Union’s future development. The second Convention was called the “European Convention”. The European Convention was the body drafting the Constitutional Treaty for Europe. The mandate was created by the decision taken by the European Council in December 2001 with the Laeken declaration. See Presidency conclusions of 14.-15 December 2001. SN 300/1/01/ REV. 1 under the heading “Convening a Convention on the Future of Europe, pp. 25-26. The Convention held its first inaugural meeting on 28 February 2002 and finalised its work on 18 July 2003. It is perhaps no coincidence why both the first and the second Convention named the “Convention” respectively. Looking into US constitutional history, one can find that the drafters of the US Constitution formed a *European Convention* for the purpose of revising the articles of the Confederation, the first constitution of 1777. The outcome of the process was the US constitution of 1787. A distinction between two Conventions established by the European Council is made in the following way in the thesis in order to avoid confusion: The first Convention drafting the EUCFR will be called the “Charter Convention” or the “Convention” while the second Convention will be called the European Convention which had the task drafting the Constitutional Treaty for Europe.

rules on the composition, method of work and practical arrangements set out in the annex to the presidency conclusions following the Tampere European Council.<sup>21</sup> The EU Charter was intended to apply to the Union's institutions and excluded the activities of Member States that would fall outside the scope of Union competence. The objective in adopting the EU Charter was to establish a fundamental rights catalogue rather than to confer new powers on the Union to legislate in the field of human rights.

The Charter of Fundamental Rights for the European Union was initially intended to be merely a political commitment and not a legally binding instrument.<sup>22</sup> The approach taken by the European Council was subject to criticism based on the argument that the Community already had adopted various 'solemn declarations' in order to improve its fundamental rights record. Although the starting point for the elaboration of a EU Charter of Fundamental Rights was a political declaration, the Charter Convention was committed to drafting a Charter that would serve as a legally binding document to be incorporated into the treaties. The Convention was working in accordance with the so-called "as if" notion, i.e. that the EU Charter would ultimately have full legal effect. The question of the legal nature of the Charter has been a central theme of the debate ever since the Cologne European Council decided to start the process of preparing the Charter. The European Council decided to address this question in two stages, namely that the Charter should be solemnly proclaimed by the European Parliament, the Commission and the Council and that it would have to be considered by the Member States whether and, if so, how the Charter should be integrated into the treaties.

In December 2000, the Commission, the European Parliament and the European Council jointly signed the EU Charter of Fundamental Rights during the opening of the Nice European Council. The EUCFR was adopted as a solemn proclamation, i.e. a political declaration without binding legal force. Despite the fact that the EUCFR is not *yet* a legally binding document, it has proven to be of legal relevance when the EU legislator adopts new regulations and directives and has had an impact of the case law in national courts, CFI and has now also been acknowledged by the ECJ including the European Court of Human Rights. However, the traditional critique of the fundamental rights

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<sup>21</sup> Presidency Conclusions based upon the Tampere European Council on 15 – 16 October 1999. The Tampere European Council set up the rules and composition and method of work for the body. See Annex, pp. 18-20.

<sup>22</sup> The option of choosing a non-binding political declaration certainly involves less complicated questions with regard to the material and personal scope of the Charter.

doctrine of the EU is that it is based on an assumption that fundamental rights have not been taken seriously, in particular, by the ECJ.

The starting point for this research project has been the adoption of the EU Charter of Fundamental Rights (EUCFR).<sup>23</sup> The adoption of the EUCFR represents the culmination of a process that had already begun with the fundamental rights doctrine developed mainly by the ECJ since the late 1960s, but can also be seen as a form of closure to the long-standing debate among the institutions and the Member States of the Community/Union on how to develop the fundamental rights doctrine. The two main options on the table have been to adopt a fundamental rights catalogue specifically designed for Community/Union and accession by the EC/EU to the European Convention of human rights (ECHR).<sup>24</sup> Both issues will be resolved in the event that the new Constitutional Treaty for Europe comes into force some day.<sup>25</sup> During the drafting process of the Constitutional Treaty a consensus was reached at an early stage that the EUCFR should be part of the Constitutional Treaty. WG II of the European Convention more or less unanimously proposed to the European Convention that the EUCFR should be made legally binding by incorporating it into the Constitutional Treaty. The EUCFR was adopted with some minor adjustments as part II of the Constitutional Treaty.

Article I-9 prescribes that “The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution”. The EUCFR would therefore become legally binding. At present, the Constitutional Treaty for Europe is in the ratification stage. However, the referenda held in France and in the Netherlands in May and in June 2005, respectively, which resulted in a “no” vote created confusion within the EU. The matter was discussed during the European Council meeting in June 2005 and resulted in a “time-out” or a period of reflection regarding the impact of the two no votes and how to proceed. The original plan was that, at the earliest, the Constitutional Treaty would have entered into force on 1 November 2006 provided that all Member States had ratified it in accordance with their respective constitutional requirements.<sup>26</sup>

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<sup>23</sup> O. J. C 364/01 of 18.12.2000.

<sup>24</sup> Convention for the protection of Human Rights and Fundamental Freedoms opened for signature on 4 November 1950, entry into force on 3 September 1953. CETS No. 5.

<sup>25</sup> The Treaty Establishing a Constitution for Europe was signed on 29<sup>th</sup> October 2004. Not yet in force. O.J. C 310 of 16 December 2004. The European Council will discuss the matter during the first half of 2006. SN 117/05 of 17 June 2005.

<sup>26</sup> At the time the thesis was being written the following Member States had ratified the Constitutional Treaty: Austria, Belgium, Cyprus, Germany, Greece, Hungary, Italy, Latvia,

The negative outcome in the two referenda mentioned above has put the whole Constitutional Treaty in jeopardy. This is naturally taken into account in the thesis. The recent events raise the question of whether the EU Charter will ever be recognised as a legally binding instrument as proposed by the European Convention and endorsed by the representatives of the Member States in signing the Constitutional Treaty in October 2004. Due to the uncertain fate of the Constitutional Treaty, the provisions in the Charter will be referred to as articles 1-54 as adopted in Nice 2000. The amendments introduced with the European Convention will, with regard to the text in the final provisions of the Charter, be taken into account. The provisions referring to the Constitutional Treaty will otherwise follow the structure and numbering of the Constitutional Treaty as provided for in O.J. C 310 of 16 December 2004.

The European Convention somewhat surprisingly adopted without much controversy the proposal put forward by WG II in the Convention, which prescribed that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution".<sup>27</sup> This is recognised in article I-9 (2) of the Constitutional Treaty. Naturally, in the event that the Constitutional Treaty never comes into force, this proposal is also put in jeopardy. Whatever the outcome of the Constitutional Treaty, the proposals put forward by the Constitutional Treaty in terms of fundamental rights must be reviewed as a significant expression of the collective agreement that fundamental rights should be made visible, thus in part contributing to legal certainty and that the EU should subject itself to external review. Legally speaking, the issues will not be resolved before all the Member States have ratified the Constitutional Treaty. Yet, the achievement of the Constitutional Treaty in terms of fundamental rights should be considered as an important

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Lithuania, Luxembourg, Malta, Slovakia, Slovenia, Spain and Estonia and Finland. The following States have postponed the ratification process: the Czech Republic, Denmark, Ireland, Portugal, Sweden and Poland. The United Kingdom has suspended the ratification process. The Constitutional Treaty was rejected by referenda in France and the Netherlands. Situation as of December 2006.

<sup>27</sup> It is well known that the European Community is not party to any human rights treaties. In 1996, the European Court of justice was asked to review whether an accession by the European Community to the European Convention of Human Rights and Fundamental Freedoms would be compatible with the Treaty establishing the European Community. According to opinion 2/94 of the Court, an accession could be brought about only by way of an amendment to the Treaty. Opinion 2/94, ECR I-1759.

milestone that eventually will lead the Charter being incorporated into a future treaty structure of the EU.

It is submitted that the negative outcome on the national referenda mentioned above has little to do with the proposals for conferring legal status to the EU Charter or making room for EU adherence to an international human rights treaty. These two proposals constitute the most visible contributions of the Constitutional Treaty to the status of fundamental rights within the EU. It is submitted in this thesis that the prospect of rejection of the Constitutional Treaty will *not be* detrimental to the proposal put forward by the European Convention for conferring legal status to the EU Charter. The EU has now put forward a strong statement in favour of strengthening the fundamental rights dimension with article I-9 and part II of the Constitutional Treaty.

The EU moves forward and accepts the “not mutually exclusive option” and takes both proposals on board.<sup>28</sup> With the Constitutional Treaty one could easily gain the impression that the EU could have a solid basis for the protection of fundamental rights. In the words of Lawson, “the rest is a matter of implementation”.<sup>29</sup> Lawson continues by asking whether this is the ‘end of the history’ of human rights within an EU context. The “EU Human Rights Story” is far from being finalized. As Lawson puts it, “quite the opposite – the best is yet to come!” In terms of the constitutionalisation of the EU fundamental rights doctrine, the set back experienced by the Constitutional Treaty at the ratification stage must be viewed in its greater setting, i.e. that the *Constitutional Treaty* might never come into force in the form Member States signed it. This does not necessarily mean that the fundamental rights component introduced with the Constitutional Treaty has been rejected. Other possibilities for the formal enactment of the Charter are still possible and will be discussed in chapter 5 of the thesis.

The incorporation of the Charter, taken together with EU accession to the European Convention of Human Rights, has been postponed, but hopefully this is only of a temporary nature. In the words of Lawson, the Constitutional Treaty has “brought with it a new phase in the on-going development of

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<sup>28</sup> The European Convention included furthermore in the Constitutional Treaty article I-9 (3), which prescribes that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law” (now article 6 (2) TEU). The exact connection between article I-9 (3) and the EUCFR remains unclear.

<sup>29</sup> Lawson, R., 2005, p. 27.

European human rights law".<sup>30</sup> The work that started at the turn of the 21<sup>st</sup> century in terms of fundamental rights has only begun. The Constitutional Treaty, regardless of its ultimate fate, is an important contribution to the discussion about the role of fundamental rights in the EU legal order. The Charter is central to that debate by having the potential of contributing to the protection and promotion of fundamental rights as a comprehensive catalogue reflecting the common values of the current 25 and soon to be 27 EU Member States.<sup>31</sup>

In order to understand the development and reason why the EU, after 30 years of hesitation, chose the "not mutually exclusive option" and went for the "jackpot", one needs to understand the EUCFR and the accession debate in light of the evolution of the fundamental rights doctrine within the EU. In particular, the adoption of the EUCFR was not a revolutionary process, but rather should be seen as a reflection of what is protected within the Community/Union legal order. Should the new development, however, be understood as a reflection of the development of the Union legal order into a more mature legal order, i.e. a developed legal system? According to Tuori, one of the characteristics of the deep structure of a legal order is connected to issues of fundamental rights and democratic principles.<sup>32</sup> As he notes in his book *Critical Legal Positivism*, "increasing emphasis on human rights principles within EC law can perhaps be interpreted as implying that the formation of an independent legal order is extending to the deep structure, that EC law is gradually acquiring deep structural support".<sup>33</sup> The gradual increase of emphasis on fundamental rights on the surface level is in his view however, not enough to guarantee that these principles will materialise. What is needed is a

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<sup>30</sup> Ibid., p. 28.

<sup>31</sup> The Commission has given green light to Romania and Bulgaria in its monitoring report on the state of preparedness for EU Membership of Romania and Bulgaria. They will join the EU as of 1 January 2007. COM (2006) 549 final.

<sup>32</sup> Tuori, K., 2002, pp. 201-203. Tuori sees modern law as a multilayered system, i.e. a three layered view of law where he makes a distinction between in the surface level, the legal culture and the deep structure of law. According to Tuori, the surface level constitutes of different laws, court rulings etc. The second level of the multilayered law is legal culture, i.e. rules and principles of interpretation of legal norms (for example, the doctrine of the sources of law and conflict rules). The third level consists of the deep structure of the law, i.e. fundamental rights and human rights as a general normative idea. See also Ojanen, T., 1998, p. 357.

<sup>33</sup> Tuori, K., 2002, pp. 208-209.

sedimentation process from the surface level to what he calls legal culture and deep structure of law.

### 1.3 Defining the research questions and structure of the study

Fundamental rights are thought to reflect the core values of any polity, be it a state, intergovernmental organization or any other form of supranational organization like the EU. The starting point for any polity is that, in order to be legitimate, it must be based upon certain agreed values. In a democratic polity founded on liberal rights philosophy, fundamental rights constitute the core value that defines not only the relationship between the governor and the governed, but also the relationship between the individuals. What constitutes *fundamental* rights is defined in most cases by the constitution of a state and is considered to be the higher law of the land providing the basic point of reference against which all norms shall be reviewed.<sup>34</sup> Fundamental rights constitute the basic value of the modern constitutional legal order together with democracy and the rule of law. These concepts usually go hand in hand and mutually constitute one another.

Recent years developments within the European Union have once again raised the issue of fundamental rights as one of the key issues or central factors in the construction of the new Europe. Things seem to have changed at the turn of the 21<sup>st</sup> century. The interesting aspect of this is whether the new development will have any real impact on the fundamental rights doctrine developed primarily by the ECJ. The focus of this research project is to discuss the status of fundamental rights as a *constituting value* of the European Union. Article 6 (1) TEU prescribe that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. This discussion is then connected to the foundations of the European project.

The object and purpose of this study is therefore to examine questions related to the role and the potential role of fundamental rights in the European Union legal order. The first hypothesis in the thesis is that fundamental rights will become more significant than before and will occupy a more prominent place within the *constitutional* framework of the EU legal order. This is partly based on the assumption that the EUCFR will eventually constitute a legally binding instrument in the EU legal order, i.e. in one way or another it will form

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<sup>34</sup> The intention is to avoid a never-ending discussion on which rights should be defined as *fundamental*.

part of the treaty structure of the European Union. The incorporation of the EUCFR will most likely have the effect of raising fundamental rights issues before the ECJ and before national courts more frequently in the interpretation of Union law. To adopt a fundamental rights catalogue and not give it the status of a legally binding document is not a sustainable solution in the long run. Different views have been expressed about the EUCFR. One of the most critical opinions is expressed by Pescatore who describes it as a “spurious document” and strongly hopes that the Charter will remain in the O J C series, thus never acquiring a formally binding legal status.<sup>35</sup>

Despite given difficulties in the ratification process of the Constitutional Treaty for Europe, the assumption is that the EUCFR will gain a legally binding status, regardless of the fate of the Constitutional Treaty. The second point is that the Member States now have come to an understanding that the EU should seek accession to the ECHR. The main argument put forward is that the Union should subject itself to the same review mechanism as each of its Member States. The whole discussion concerning the accession issue is closely related to accession criteria to the EU. The Union as a supranational organisation expects that its constituting Member States must ratify certain human rights conventions, notably the ECHR while at the same time the Union or the EU Member States have not seen a need to pursue the idea of an EU accession to any international human rights treaty. This paradox has now been, at least potentially, rectified with the new Constitutional Treaty, which sends an important political signal that the EU should ratify the ECHR in the long run.<sup>36</sup>

The second hypothesis is that fundamental rights have had a secondary position in relation to the four freedoms in the sense that economical considerations have had an impact on the realization of fundamental rights.<sup>37</sup> Economic interests have generally speaking been prioritised at the expense of fundamental rights. Recent developments will be discussed in light of the

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<sup>35</sup> Pescatore P., 2001, p. 267.

<sup>36</sup> This is, however, not enough. EU accession to the ECHR requires agreement by the Council of Europe and its 46 Member States.

<sup>37</sup> See case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgment of 13 July 1989 where the ECJ states that “the fundamental rights recognised by the Court are not absolute, however, must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organisation of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights”.

balance to be struck between fundamental rights and fundamental economic freedoms. The question of the hierarchical relationship (if any) between fundamental rights and fundamental economic freedoms is important not only with regard to the approach taken by the ECJ, but also in respect to the overall structure and framework of the Union, i.e. the nature of basic principles, values and the legitimacy of the Union in a wider sense. The potential impact of the EU Charter on fundamental rights as a legally binding instrument and the proposed accession by the EU to the ECHR will most likely more frequently raise tension between the four fundamental economic freedoms based on the EC treaty and their relation with other fundamental interests such as fundamental rights.

The research has an emphasis on the role fundamental rights in the current and future construction of the legal order of the European Union in light of the constitutionalisation of the fundamental rights doctrine of the EU. This on-going process can be divided into three steps. The first step consists of the case law of the ECJ, which elaborates on fundamental rights as part of the general principles of Community law. The second step is composed of the adoption of the EUCFR and the third step is the incorporation of the Charter into the treaty structure of the EU. The exercise of increased visibility concerning fundamental rights, combined with the element of external control of EU activities, has the potential to contribute to a legal order based upon human rights/fundamental rights being a prerequisite for the legitimacy of the European project. The importance attached to fundamental/human rights is not only seen as a prerequisite to the legality of norms, but also as the most important yardstick for determining the democratic credentials of a polity.<sup>38</sup> As noted by Tridimas, among others, the review calling for accountability, transparency and also legitimacy within the EU is connected to the observance and protection of human rights. With regard to human rights considerations, he raises three “big themes” of particular importance and challenge that the ECJ will face in the near future. These are the following: a) the relationship between the ECJ and the ECtHR; b) the interpretation of the Charter; and, c) the conflicts between the fundamental economic freedoms and human rights. The three points are the central themes in the thesis and will be dealt with subsequently, hopefully in a coherent way, by arguing for the need to start rethinking the role of fundamental rights in the process of building up the future of the European Union. The most central research questions are formulated as follows;

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<sup>38</sup> Tridimas, T., 2004, p. 135.

- 1) What is the normative status of fundamental rights in the European Union legal order? Has the normative status and importance of fundamental rights been strengthened as a result of the adoption of the EUCFR and the broader on-going constitutionalisation process of the EU?
- 2) What is the legal status of the EUCFR? What are the legal effects of the EUCFR?
- 3) What is the relation between fundamental rights and fundamental economic freedoms in the EU legal order? Is there a general priority order between fundamental rights protected as general principles of Community law and fundamental economic freedoms?
- 4) Does the EUCFR itself create an internal hierarchy rights? If so, what is the implication of this in terms of promoting the indivisibility of rights?

These research questions are complemented with some sub-questions that address specific issues related to the adoption of the EUCFR. The thesis is divided in 7 chapters including the introductory and the concluding chapter. *Chapter 2* has a focus on the development of the fundamental rights *acquis* both from a judicial and institutional point of view. The rights recognised in the EUCFR *ratione materiae* have their origin in the *acquis communautaire* and in international human rights treaties ratified by the Member States. The EUCFR has therefore not been drafted and adopted in a total lacuna or to fill a complete judicial gap for the protection of fundamental rights within the legal order of the Community. The protection of fundamental rights initially manifested itself in the case law of the ECJ as part of the unwritten general principles of Community law doctrine, i.e. as a judicial development within the catalogue of EU fundamental rights. The ECJ case law gained “constitutional recognition” when the core of the jurisprudence was included in article 6 (2) TEU.

In academic dissertations, there is often a tendency to use history as a backdrop to help us to perhaps better understand what we have at the moment. A study of the EUCFR and its potential role as a “constitutional bill of rights,” which reflects core EU values presupposes, in my view, the possession of a substantial body of contextual knowledge. Therefore, it is fully justified to start the analyses by putting the EUCFR in its wider historical and political context, in spite of the fact that discussion in scholarly writings about the fundamental rights doctrine in the EC/EU is well documented. Much has been written about

the status and role of human rights in EC law. In particular, the case law of the ECJ since 1969 has gained a lot of attention in scholarly writings, including the relation between human rights as general principles of Community law and the European Convention on Human Rights and its status in EC law.

The intention, therefore, is not to repeat the detailed 'story' of the development of the ECJ's case law as such. This discussion cannot, however, be completely ignored in a thesis dealing with the internal protection of fundamental rights. In fact, in order to better understand the reasons leading up to the adoption of a specific fundamental rights catalogue for the EU, it is important to review the EUCFR in light of the evolution of the human rights doctrine developed by the ECJ. The Cologne European Council reaffirmed in its mandate for drawing up an EUCFR that, "the obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice". An understanding of the broader picture of fundamental rights protection in the EC/EU is crucial for an understanding of the EUCFR and its role in the protection of fundamental rights within the European Union. The fundamental rights doctrine of the EC/EU is mainly a product of the work of the ECJ. The fundamental rights doctrine of the EU can also be reviewed as a "dialogue" between the ECJ and the constitutional courts of the Member States and also, more widely, as an inter-relation between the ECJ and the ECtHR. Chapter 2 focuses on a discussion of the development of the Community fundamental rights doctrine from the jurisprudential point of view, but also partly from the institutional point of view, and focuses on tracing the institutional debate on accession and the adoption of a legally binding fundamental rights catalogue, which eventually led to the adoption of the EU Charter of Fundamental Rights.

*Chapter 3* has initially a focus on the need for the EUCFR. Questions have been raised about whether adoption actually will enhance the protection of fundamental rights in the Union. The EUCFR is considered to be an important dimension of the European development of human rights standards. The system of drawing inspiration from common constitutional traditions and the ECHR as sources for the fundamental rights doctrine of the EU has been said to be working unsatisfactorily. In light of this, will the EUCFR actually enhance clarity? The analyses will secondly focus on the role of the Charter in buttressing the legitimacy of the EU and what role fundamental rights might play in that regard. The Cologne mandate suggested that there is strong link between the protection of fundamental rights and the issue of legitimacy. Much of the fuss surrounding the adoption of the EUCFR was connected to issues of popular legitimacy regarding the European project.

It is commonly believed that the EU suffers from a lack of accountability and legitimacy or of general support. The legitimacy crisis debate entered the scene in the early 1990s when the Member States took the first steps towards an economic and monetary union and a political union.<sup>39</sup> At the same time, the changing nature of the Economic Community also indicated a popular legitimacy crisis surrounding the “European project”. The Constitutional Treaty is the most recent example of the legitimacy crisis that the EU is currently facing. The underlying reasons for the popular legitimacy crisis of the EU are of course manifold. For the present purposes here, the focus will be on the increased role of the language of human rights that gained the attention of the Member States and the Commission as a way of responding to the alleged legitimacy crisis of the EU. This was a way of introducing human rights language in order to close the gap between the popular support of the citizens and the policies of the European Union. Does the EUCFR have a role to play with regard to the overall legitimacy deficit the EU suffers from? It is of great importance to focus on a general debate on the implications connected with adopting a Charter on Fundamental Rights for the European Union. The intention is not to discuss the substantive content of the Charter as such. What is more interesting is the broader picture that is presented at the end of the Charter with the so-called horizontal provisions.

An analysis of the Charter must therefore thirdly include a discussion of the horizontal provisions referred to as articles 51-54.<sup>40</sup> These final provisions are *central* to understanding the EUCFR and its relation to, *inter alia*, national constitutions and international human rights treaties and to the EC/EU treaties. A central issue is related to the relation between the EUCFR and the ECHR. The EUCFR has been considered especially innovative in the sense of being indivisible, by including not only civil and political rights but also economic and social rights in one document. On the other hand, the Charter seems to categorise provisions by making a distinction between enforceable rights and freedoms and non-justiciable principles.

The central legal question with regard to incorporation lies in the work of Working Group II of the European Convention, which introduced certain

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<sup>39</sup> De Burca, G., 2004, p. 687.

<sup>40</sup> Due to the uncertain fate of the Constitutional Treaty, the provisions in the “consolidated version” of the Charter will not be taken into account in this thesis. The provisions in the Charter will be referred to as articles 1-54 as adopted in Nice 2000. The amendments introduced with the European Convention are taken into account. The provisions referring to the Constitutional treaty will otherwise follow the structure and numbering of the Constitutional treaty as provided for in O.J. C 313/1 of 16.12. 2004.

new “technical adjustments” to the horizontal articles.<sup>41</sup> The most controversial “technical adjustment” is no doubt the introduction of article 52(5), which further underlines the distinction between rights, freedoms and principles.

*Chapter 4* will highlight the relationship between fundamental economic freedoms based on the EC Treaty and fundamental rights in the EU legal order. The question at hand is the constitutional balance between economic freedoms and fundamental rights rather than the treatment and status of specific economic freedoms or fundamental rights. Fundamental rights protection will be connected to the foundations of the European project. This analysis will be based on the case law of the ECJ. How has the ECJ dealt with cases involving the relationship between the four freedoms and fundamental rights? Are the four freedoms in fact part of the fundamental rights doctrine of the EU? The reasoning of the ECJ has primarily focused on whether a national provision distorts the common market and, only secondly, on whether such a national measure can be justified in terms of a legitimate policy goal.<sup>42</sup> The focus will be on the overall implications of the new approach of the EU in terms of fundamental rights protection, underlining that European integration is no longer exclusively about economic integration.

*Chapter 5* will focus on questions related to the role of the Charter in the process of what has been called “European constitutionalism”. The Charter has

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<sup>41</sup> The European Convention established 11 working groups to deal with specific issues to be discussed by the European Convention in the plenary setting. WG I dealt with the principle of subsidiarity WG II dealt with the question of incorporating the Charter within the Constitutional Treaty and whether the EU should accede to the ECHR. WG III dealt with the issue of the legal personality of the EU. WG IV dealt with the role of national parliaments in the future construction of the EU. WG V dealt with issues of complementary competences between the Member States and the Union. WG VI dealt with issues related to economic governance, i.e. monetary policy, economic policy and institutional issues. WG VII dealt with the external action of the EU. WG VIII dealt with defence matters. WG IX dealt with simplification of the treaty structure. WG X dealt with issues related to freedom, security and justice. WG XI dealt with the notion Social Europe. All the documents and final reports of the respective WGs are to be found on [http://european-convention.eu.int/doc\\_wg.asp?lang=EN](http://european-convention.eu.int/doc_wg.asp?lang=EN).

<sup>42</sup> See case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, judgment of 13 July 1989 where the ECJ stated that “the fundamental rights recognised by the Court are not absolute, however, must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organisation of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights”.

been given a central role in the “constitutional settlement” of the EU. The decision to incorporate the Charter is closely linked with the debate on the future of Europe. A central theme in this chapter is the legal status of the EUCFR. The EUCFR was adopted as, strictly speaking, a non-legally binding instrument. The drafting Convention worked on the assumption that the legal status of the EUCFR was to be decided at a later stage and that the outcome of the drafting process could either be incorporation into the treaties or simply the adoption of a political declaration. At the time of adoption, there existed a wide range of opinions and expectations concerning the legal status of the Charter. It was adopted as a solemn proclamation without legal binding force, but at the same time it is generally considered to constitute a codification of article 6 (2) TEU. Is it safe to assume that the EUCFR can be seen as an authoritative codification of existing fundamental rights protected by the ECJ?

The starting point in this study is the current legal status of the EUCFR *stricto sensu*, i.e. a political declaration without binding legal force. The main analyses will, however, focus on the Charter as part of the Constitutional Treaty, constituting a legally binding fundamental rights catalogue. Incorporation of the Charter into the Constitutional Treaty raises many legal questions: Can one assume that the ECJ no longer or to a lesser extent will need to use the mechanism of referring to international human rights instruments and, in particular, to the ECHR as well as to common constitutional traditions of the Member States as “general principles of law” after the incorporation of the Charter into the Constitutional Treaty?

Article I-9 (1) in the Constitutional Treaty prescribes that the “Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes part II”. Yet, article I-9 (3) prescribes that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the Constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. In light of this, what is the relation between article I-9 (1) and article I-9 (3)? The European Convention wanted to lay all its cards on the table by incorporating the Charter within part II of the Constitutional treaty and by including former article 6 (2) TEU as article I- 9 (3) of the Treaty establishing a Constitution for Europe. The rejection of the Constitutional Treaty by two Member States naturally raises the question of the future of the Constitutional Treaty. Is the Constitutional Treaty now dead? Will the Charter survive in the event that the Constitutional Treaty is rejected?

*Chapter 6* raises issues connected with the possible EU accession to the ECHR. The question of accession was on the agenda once again as a result of

the adoption of the EUCFR. The question of accession will partly be included in this thesis due to the fact that it was presented in the European Convention as a “package-solution”, i.e. that the Convention was given the mandate not only to consider the question of incorporating the EUCFR into the treaties, but also whether it would be desirable or perhaps even a necessity to become a party to an international human rights treaty, namely, the ECHR. Chapter 6 will focus on this renewed interest of accession. Why suddenly a change of heart after almost 30 years of rejection? As recently as during the IGC 2000, the proposal by the Finnish government for Community accession to the ECHR was rejected. Chapter 6 will focus on the implications of the maximum approach proposed by the European Convention. *Chapter 7* concludes the thesis by drawing conclusions on the normative status of fundamental rights in the EU legal order and introduces some thoughts on topical issues related, *inter alia* to the creation of a new Fundamental Rights Agency that has been decided by the JHA European Council to be operational as of early January 2007.<sup>43</sup>

#### **1.4 Methodology and material**

The purpose of this study is to increase the understanding of the status of fundamental rights within the European Union legal (constitutional) order. Much has happened since the turn of the 21<sup>st</sup> century within the European Union. We have witnessed the work of two separate Conventions dealing with constitutional issues. The first one tried to define which fundamental rights belonged within the fundamental rights doctrine of the EU. The second European Convention had a much broader mandate in the sense that it had as its main task the restructuring of the whole legal order of the EU. The first fundamental rights Convention and the second European Convention are closely linked, since the outcome of the first convention, (the EUCFR), constitutes a central part of the Constitutional document that now faces a troublesome future.

The ultimate fate of the *Constitution for Europe* is currently uncertain. The development that has taken place during the past few years in terms of

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<sup>43</sup> Justice and Home Affairs 2768<sup>th</sup> meeting 4-5 December 2006. The final decision on the establishment of the Agency will be taken by the Council in January 2007. The text for the Council Regulation establishing a European Union Agency for Fundamental Rights approved by the JHA European Council was received from the Finnish Ministry of Justice. Council Regulation XXX/2007/EC establishing a European Union Agency for Fundamental Rights. Not yet in force.

fundamental rights is the focus in this study. The formal constitutional development is not, however, the only significant or major issue that has captured the attention of the Member States, scholars, NGOs and other actors. The enlargement of the EU in 2004 by the inclusion of 10 new Member States has had a significant impact on the EU as a *European project*. One can say that the current and future enlargement of the EU has been a key issue impacting the need to restructure the EU legal order to function as a supranational organisation with 25 and more Member States. The enlargement of the European Union and its impact on fundamental rights is not the focus of this study. However, what can be stated is that the impact of the enlargement project that will continue in the years to come is significant when one wishes to discuss the future of the European Union. The formal constitutionalisation process that started soon after the adoption of the EU Charter of Fundamental Rights is undoubtedly very much linked with the enlargement process.

This study is a study of fundamental rights/human rights within a particular legal setting, i.e. the legal order of the European Union. This study is not, however, to be strictly understood as a study of EU Law, although the object of this study is placed within the setting of European Union law. As to its nature, it is a study set within the discipline of law. The theme of the study can be approached from various angles, i.e. from the perspective of international human rights law, constitutional law and European law. This study can perhaps be understood as a mixture of international human rights law, EC law and predominantly European constitutional law. As the main focus is on the development and status of fundamental rights within EU law, one cannot simply disregard international human rights law or post-national constitutionalism. The fundamental rights doctrine developed in the EU legal order has its basis not in EC law, but rather in external legal sources. These are the common constitutional traditions of the Member States and International Human rights treaties.

The EU Charter of fundamental rights can hardly be seen as a product of isolated EU law. Quite the opposite, the EU Charter must be understood as a product of contemporary international rights discourse. The normative basis is however in EU law. In that sense, it is a study of the status of fundamental rights *in EU law*. This study can also be seen as a contribution to the discussion on the development of a “European public order”. That does not only mean development within the European Union, but also development within the “greater Europe”. It is a study of the constitutionalisation of the EU legal order in the sense that fundamental rights are destined to occupy a more prominent role in the EU legal order. However, there is also a willingness among the EU Member States to go beyond a strict EU legal framework by

signalling that the EU wants to be part of the European public order as defined by the European Court of Human Rights in its case law interpreting the ECHR. From a strictly methodological point of view, this study is to be situated as a study in legal dogmatics, including a systematisation and textual analysis and interpretation of relevant legal norms. The thesis at hand combines a “human rights approach” with a predominantly constitutional discourse as understood in the context of EU law. A contextual approach has also been applied in the analysis leading to the adoption of the EU Charter.

The object of study is the norms related to fundamental rights norms as interpreted in the context of EU law. The matter is, however, a bit more complex in the sense that the Charter itself cannot yet be understood as “hard law,” since it has not yet been codified in the form of hard law. Neither has the EU Constitution seen daylight as a legally binding treaty. In this sense they are to be understood as “soft law”. Rosas goes even so far to state that the ECHR and other international human rights treaties are seen by the ECJ as a form of “soft law” in the sense that they are not formally part of Community law.<sup>44</sup> Another example of soft law is, according to Rosas, the EUCFR as a matter of Community law. In one sense, studying the meaning and significance of a “moving target” or “law not *yet* in force” has proven to be difficult. Per definition, a study in legal dogmatics is a study and systematisation of binding legal norms. How should one, as a legal scholar, address the fact that the EU Charter and now the EU Constitution are placed in the C-series<sup>45</sup> of the official journal of the EU? The Constitution and the Charter are placed in the pipeline as their ultimate fate as legal norms continues to be unsettled.

In this thesis, however, the EUCFR is seen as something more than simply an example of a soft law instrument. Rather, it is seen as a confirmation or codification of existing law that ultimately will find a formal place within the OJ L series. To simply treat the Charter as a soft law document is seen as misleading, since it should at least in part be seen as a codification of article 6 (2) TEU. To reduce legal norms as understood in their widest sense to merely a formal status is to oversimplify a much more complex issue. The formal normative status can, however, not be overlooked. Consequently, this thesis carries with it an element of *de lege ferenda*. After all, fundamental rights are to be perceived as legal norms rather than some other form of a non-binding

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<sup>44</sup> Rosas, A., (a) 2005, p. 334.

<sup>45</sup> The Official Journal of the European Union is the authoritative source of EU law. The O.J. is composed of two series, L for legislation and C for preparatory EU legislation, information and notices etc.

character. The very nature of fundamental rights is that they are perceived as binding legal norms. One must, however, in this context take into account that the protection and promotion of fundamental rights as codified in the EU Charter is not a new revolutionary thing. As noted, the Charter has not been adopted to fill a complete lack of fundamental rights protection. Fundamental rights *are protected* within the EU legal order despite the current status and fate of the Charter and the Constitutional Treaty as reflections of the constitutional order within the EU. The external sources functioning as “soft law” and, in particular, the case law from the Strasbourg Court are still today central in shaping the interpretation of fundamental rights by the ECJ, thus constituting important *normative sources* for the Luxembourg Court.<sup>46</sup>

This state of affairs has not diminished the need to study the purpose and impact of the Charter adopted in Nice in 2000 as an inter-institutional agreement between the Commission, the European Parliament and the Council and its prominent status in the Constitutional Treaty and its relevance for the fundamental rights doctrine perceived in the present day EU. As will be shown in the thesis, the Charter has not proven to be legally insignificant despite its current formally non-legally binding status. The material used in this study is related to the documents produced in the drafting process by the Charter Convention and the European Convention as well as other relevant legal norms including, in particular, case law from the ECJ. The ECJ does not traditionally pay much attention to the *travaux préparatoires* in its interpretation of relevant norms.

What, instead, has been focused on is the aim and purpose of norms, i.e. a teleological approach. In this thesis, the *travaux préparatoires* of the Charter has to a certain extent proven to be important in trying to understand the aim and purpose of the Charter. Some weight has been given to the non-binding explanatory report prepared by the Preasidium of the first Convention and updated by the Preasidium of the European Convention. The updated explanatory report has been recognized in the preamble of the Charter that forms part of the Constitutional Treaty. The purpose of the explanatory report has clearly been designed to function as an interpretative tool for the ECJ. While the weight and importance of the explanatory report on the Charter should not be emphasized too much, it can still be seen as a useful tool and guide to the sources of the specific articles in the Charter.

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<sup>46</sup> Rosas, A., (a) 2005, p. 335. For a discussion of the sources of the EU fundamental rights, see Rosas, A., 2003, pp. 719-737.

## 1.5 Research in this field

The adoption of the Charter and the process of elaborating a Constitutional Treaty for Europe have naturally received a lot of scholarly attention and analysis both in Europe and worldwide. How should one cope with all the scholarly writings, most in the form of articles, published in various international journals? The material used in this thesis cannot and, I argue, could not be fully covered due to the wealth of publications both on the Charter and the Constitutional Treaty for Europe. The material used is very much focused on contemporary writings and research on the new development that has taken place in the past few years within the European Union. Much has been said for instance about the EU Charter and its impact and added value to the current fundamental rights doctrine of the EU. This thesis is to be seen as one contribution to that debate.

However, before turning to important contributions relating to the EU Charter and all the controversy surrounding around it, an edited book by P. Alston deserves to be mentioned: *The EU and Human Rights*. First published in 1999, it is still considered today to be a particularly important collection of articles covering a broad range of issues relating to human rights or fundamental rights issue in the European Union, discussed both from an internal and an external point of view.<sup>47</sup> As the first edition was published in 1999, the very same year the mandate for the Charter Convention was created, one cannot find any analysis of the EU Charter or any references to the discussion of adopting or elaborating an EU Charter of Fundamental Rights.

Yet, it is still today a central academic contribution when discussing human rights in an EU context. In particular, the contribution by P. Alston and J. Weiler on the need of a Human Rights Policy for the European Union is indeed very topical at a time when the EU has decided on the establishment of a fundamental rights agency for the European Union. In this context, it is worth mentioning a book published in 2005 under the title *Monitoring fundamental rights in the EU: the contribution of the fundamental rights agency: essays in European law* that discusses the need for setting up a fundamental rights agency from various angles. The planned fundamental rights agency is relevant in this

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<sup>47</sup> *The EU and Human Rights* (ed. Alston P., with Bustelo M., and Heenan J.,) Oxford University Press, 1999.

context since its planned reference instrument in working with fundamental/human rights is precisely the EU Charter of fundamental rights.<sup>48</sup>

The adoption of the EU Charter received a lot of attention by many scholars from various fields, not only from the discipline of law. The amount of articles published during the elaboration of the Constitutional Treaty did not help in trying to get a grip on the most relevant articles for the purposes of this study. Most of the books published on the EU Charter and the role of fundamental rights in the EU since Nice 2000 are edited collections exploring the role of the Charter from various angles. A few of them deserve to be mentioned. An edited collection of articles specifically on the EU Charter was published in 2004 under the title *The European Union Charter of Fundamental Rights, Politics, Law and Policy*,<sup>49</sup> which offers expert responses to many questions relating to the adoption of the Charter. The book is divided into sections dealing with political, legal and constitutional issues relating to the EU Charter.

An influential edited collection of articles dealing with the Charter is the book *The Chartering of Europe-The European Charter of Fundamental Rights and its Constitutional Implications*, which explores some of the presuppositions and implications of adopting a Charter.<sup>50</sup> This particular collection address issues such as the reason for adopting a Charter of rights, the law and politics of the Charter and, *inter alia*, addresses issues on the relation between fundamental rights and fundamental economic freedoms. The above-mentioned edited collections of articles relating to the EU Charter have been particularly relevant as inspirations for this contribution. A newly published doctoral thesis by Xavier Groussot, *Creation, Development and Impact of the General Principles of Community law: Towards a jus commune europaeum?* discusses to some extent the role and function of fundamental rights as general principles of Community Law.<sup>51</sup> The first doctoral thesis, to my knowledge, on the EU Charter of fundamental Rights was defended in 2001 at the University of Reading (department of politics) under the title *The EU charter of fundamental rights:*

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<sup>48</sup> *Monitoring fundamental rights in the EU: the contribution of the fundamental rights agency: essays in European law* (Ed. by Alston, P., and De Schutter, O., ). Hart Publishers, 2005.

<sup>49</sup> *the eu charter of fundamental rights, politics, law and policy*, essays in european law (ed. Peers, S., and Ward, A.,) Hart Publishing, 2004.

<sup>50</sup> *The Chartering of Europe – the European Charter of Fundamental Rights and its Constitutional Implications*, ed. by Eriksen E. Fossum J., Menendez A. Nomos Verlagsgesellschaft: Baden-Baden, 2003.

<sup>51</sup> Groussot, X., *Development and Impact of the General Principles of Community law: Towards a jus commune europaeum?* Defended doctoral thesis at the Faculty of Law Lund University, 2005.

*legitimation through deliberation* by Justus Schönlau.<sup>52</sup> In this thesis, the EU Charter and the rights discourse in general is discussed as a tool in addressing the overall legitimacy crisis the EU has been facing from the early 1990s onwards. A third doctoral thesis also needs to be mentioned, which addresses the issue of the politics of human rights within the European Union. Under the title, *Particularity as Universality – the politics of Human Rights in the European Union*, Päivi Leino-Sandberg discusses critically the universality principle as applied and understood within the context of the EU, both internally and externally.<sup>53</sup>

The elaboration of a Constitution for Europe has gained a lot of scholarly attention. This particular contribution is not to be seen as a general contribution to the debate on the need for a Constitutional Treaty. What has been addressed are the most visible parts of the Constitutional Treaty concerning fundamental rights. In that respect, a lot of material that has been produced on the Constitutional Treaty itself and its role in simplifying the legal order of the EU has not been relevant as such. The focus has more been on the constitutionalisation of the fundamental rights doctrine of the EU – with or without a constitution as currently signed by the Member States and ratified, at the time of writing, by sixteen Member States. Finland is the 16<sup>th</sup> Member State to ratify the Constitutional Treaty.

## **1.6 Fundamental Rights and human rights as concepts in EU law**

An attempt to define the concept of ‘human rights and fundamental freedoms’ and ‘fundamental rights’ in a theoretical framework is beyond the scope of this thesis. However, it is important to address the concepts as they are understood and referred to in an EU context. The notion of ‘human rights and fundamental freedoms’ is often used together with the principles of ‘democracy’ and the ‘rule of law’ in a treaty context. Article 6 (1) TEU<sup>54</sup> provides that “The Union is founded on the principles of liberty, democracy, respect for human rights and

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<sup>52</sup> Schönlau, J., *The EU charter of fundamental rights: legitimation through deliberation* The University of Reading: Department of Politics. Graduate School of European and International Studies, 2001.

<sup>53</sup> Leino-Sandberg, P., *Particularity as Universality – the politics of Human Rights in the European Union*, 2005. Erik Castrén Institute Research Reports 15/2005. To be published by Martinus Nijhoff/Brill Academic Publishers as part of the Erik Castrén Institute’s Monographs on International Law and Human Rights Series.

<sup>54</sup> Consolidated version of the Treaty establishing the European Union and the European Community (the Amsterdam Treaty) signed on 2 October 1997, entered into force 1.5. 1999. O.J. C 340/1 (1997).

fundamental freedoms, and the rule of law, principles which are common to the Member States".<sup>55</sup> Article 6 (1) refers to the principle of respect for "human rights and fundamental freedoms", which also can be found, *inter alia*, in the UN Charter,<sup>56</sup> the UN declaration of Human Rights of 1948<sup>57</sup> and the ECHR.

Article 7 establishes a link to article 6 (1) in prescribing that the Council may determine the existence of a serious and persistent breach of the principle by a Member State and therefore suspend membership rights deriving from the treaties. Such a determination of a serious and persistent breach of the principles mentioned in article 6 (1) must first be made by the Council acting in the composition of the Heads of State or Government and after that obtained as an assessment by the European Parliament.<sup>58</sup> Article 49 TEU furthermore provides that respect for the principles set out in article 6 (1) is a precondition for membership of the European Union.<sup>59</sup> What is the substance of the reference

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<sup>55</sup> Economic freedoms in the EC treaty are often referred to as 'fundamental freedoms'. Hilf, M., & Staebe, E., 2000, p. 218. The distinction between 'human rights and fundamental freedoms' and the notion 'fundamental freedoms' as economic freedoms is important to recognise and should not be understood as having the same meaning. Economic freedoms or treaty-based rights are rights such as the freedom of movement of workers (article 39 TEC), freedom of establishment (article 43 TEC) and freedom to provide services (article 48 TEC). Fundamental freedoms in an EC/EU context are sometimes referred to as human rights. See Bogdandy, A., 2000, p. 1326.

<sup>56</sup> According to article 1 (3) of the Charter of the United Nations, one of the purposes of the United Nations is to achieve international co-operation by "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to sex, race, language or religion..." The UN Charter refers to the concept of 'human rights and fundamental freedoms' without defining what is meant by this notion. The real problem is not the absence of a general definition, but rather the identification of the content of the notion 'human rights and fundamental freedoms'. This problem was addressed, *inter alia*, with the adoption of the Universal declaration of Human Rights adopted by the General Assembly resolution 217 A (III) of 10 December 1948 and later on by the International Covenant on Civil and Political rights, signed on 16 December 1966, entered into force on 23 March 1976 and the International Covenant on Economic, Social and Cultural Rights, signed on 16 December 1966, entered into force on 3 January 1976.

<sup>57</sup> The preamble of the declaration provides that UN "Member States have pledged themselves to achieve in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms".

<sup>58</sup> The Treaty of Nice has amended article 7 so that the Council may after obtaining assessment by the European Parliament determine the existence of a "clear risk of a serious breach" by a Member State of the principles mentioned in article 6 (1). O.J. C 80 of 10 March 2001.

<sup>59</sup> The Copenhagen European Council adopted in 1993 requirements for membership stating that "membership requires that the candidate country has achieved stability of institutions

to 'human rights and fundamental freedoms' in article 6 (1)? It seems to be clear that the reference to "human rights and fundamental freedoms" is related to constitutional traditions common to the Member States in accordance with article 6 (2) and to international human rights treaties to which all Member States are parties.

According to Rosas, it seems to be fairly obvious that the ECHR is to be considered as an important source, but is not "necessary an exhaustive catalogue of rights in determining the substance of the notion of human rights and fundamental freedoms".<sup>60</sup> It is beyond doubt that civil and political rights are included in the EC concept of 'human rights and fundamental freedoms'. Perhaps a more difficult question is whether economic, social and cultural rights are included in the concept of 'human rights and fundamental freedoms'. The status and role of economic and social rights is unclear in the Community legal order.

It should be noted that the preamble to the TEU has two separate paragraphs that confirm the attachment to 'human rights and fundamental freedoms'<sup>61</sup> on the one hand and confirm the attachment to "fundamental social rights" on the other. It is true that article 6 (1) TEU does not explicitly exclude the concept of economic and social rights from the concept of "human rights and fundamental freedoms", but it seems to emphasize more civil and political rights.<sup>62</sup> Is this to be understood that the intention has been to make a distinction between human rights and fundamental freedoms on the one hand and economic and social rights on the other? With regard to economic and social rights, the preamble does not include a separate reference to economic and social rights as such<sup>63</sup>, but rather to specific instruments dealing with

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guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union". Presidency conclusions, Copenhagen European Council, June 1993.

<sup>60</sup> Rosas, A., (a) 2001, p. 60.

<sup>61</sup> The preamble (recital 3) to the TEU provides that "Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law".

<sup>62</sup> Rosas, A., (b), 2001, p. 482.

<sup>63</sup> The preamble (recital 4) to the TEU provides that "Confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers".

economic and social rights, such as the 1961 European Social Charter<sup>64</sup> and the 1989 Community Charter of Fundamental Social Rights of workers<sup>65</sup>. A similar reference can be found in article 136 TEC. It could therefore be concluded that one should not put too much emphasis on the fact that one can find references to specific economic and social rights instruments in the treaties separate from the notion 'human rights and fundamental freedoms'. Rosas and Brandtner conclude that, "the *acquis* may very well include other human rights (than the ECHR) conventions, including those dealing with economic and social rights".<sup>66</sup>

The principles of democracy, respect for human rights and fundamental freedoms and the rule of law are essential elements in considering whether an applicant country fulfils the "political criteria" as provided for in the 1993 Copenhagen European Council declaration and after the Amsterdam treaty, the legal criteria as provided for in article 6 (1) TEU. In an assessment of the current ten new Member States constituting Member states as of 1.5. 2004, the Commission had, in assessing their status as candidate countries in 1997, included economic and social rights in its concept of "human rights".<sup>67</sup> This can be seen as an indication that the concept of "human rights and fundamental freedoms" as provided in article 6 (1) does not exclude the concept of economic rights, social rights and cultural rights. One can also find other provisions in the TEU and in TEC containing similar references to principles of 'democracy', 'human rights and fundamental freedoms' and the 'rule of law'. With regard to common foreign and security policy, article 11 (1) TEU provides that "the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be... (t) to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".

Article 177 (2) TEC also uses the principles of 'democracy', 'rule of law' and respect for 'human rights and freedoms' in defining Community policy in the area of development cooperation. Reference to the concept of 'human rights' can be found in the so-called 'human rights clauses', which the European Community has inserted in agreements with third countries. From the beginning of the 1990s, all such agreements contain some kind of human rights clause referring to human rights and democratic principles. Agreements

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<sup>64</sup> European Social Charter opened for signature on 18 October 1961, entry into force on 26 February 1965. CETS No. 35.

<sup>65</sup> COM 1989 471.

<sup>66</sup> Rosas, A., & Brandtner, B., 1998 p. 484.

<sup>67</sup> COM (97) 2001-2010 Final.

with non-European countries include a reference to the 1948 UN Declaration of Human Rights and agreements with other European countries often make a reference to OSCE instruments. The reference to the UN universal Declaration of Human Rights in agreements with third countries outside Europe would perhaps suggest that the UN declaration is considered to be an authoritative interpretation of the substantive content of the “human rights democratic principles” as reaffirmed in many agreements.<sup>68</sup>

It is to be noted that no specific reference is made to the ECHR in trade and cooperation agreements with European third countries. The main objective with the human rights clauses has not been to create new substantive obligations for the parties, but rather to reaffirm existing commitments under general international law. An important reason to include human rights clauses is to provide a clear legal basis for the suspension of the agreement in case of a human rights violation by either party as affirmed in the human rights clause.<sup>69</sup> However, it is clear that a distinction needs to be made between individual human rights violations and grave and persistent human rights violations by a contracting party. Human rights clauses are based on the principles of universality and indivisibility of human rights.<sup>70</sup>

Two Council regulations<sup>71</sup> relating to Community action in the field of development cooperation were adopted in 1999 to provide the basis for technical and financial assistance that would “contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms”.<sup>72</sup> Article 2 and, respectively, article 3 include “promotion and defending human rights and fundamental freedoms as affirmed in the 1948 UN declaration and other international instruments concerning the development and consolidation of democracy and the rule of law” by promoting, *inter alia*, civil and political rights as well as economic, social and cultural rights.

The European Union continues to confirm in its external relations that all human rights are interrelated and indivisible. For instance, in its annual

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<sup>68</sup> Rosas, A., (a) 2001, p. 66.

<sup>69</sup> Bulterman, M., 2001, p. 190.

<sup>70</sup> The UN declaration is based on the principle of the indivisibility of human rights, including both civil and political rights as well as economic, social rights.

<sup>71</sup> Council Regulations No. 975/1999 and No. 976/1999 of 29 April 1999 O.J. L 120.

<sup>72</sup> Ibid. Para. 6 in the preamble notes that Community action concerning the promotion of human rights and democratic principles is “rooted in the general principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights”.

report 2005 on Human Rights, the Council stated that “The European Union attaches the same importance to economic, social and cultural rights as to civil and political rights, bearing in mind the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as confirmed by the 1993 World Conference on Human Rights, held in Vienna. Both categories of rights stem from the inherent dignity of the human person and the effective implementation of each right is indispensable for the full implementation of others”.<sup>73</sup>

The concept of ‘human rights and fundamental freedoms’ as used in the external relations of the EU does reflect universal, indivisible and interdependent nature of human rights as expressed in the Vienna declaration and Programme of Action of 1993.<sup>74</sup> It could more easily be contested whether or not the notion of ‘human rights and fundamental freedoms’ also internally reflects the indivisible and interdependent nature of human rights and fundamental freedoms. The status and role of economic, social and cultural rights in the Union legal order is a matter of controversy.<sup>75</sup> However, for the purpose of this study, the concept “human rights and fundamental freedoms” is to be understood as a reference to generally existing and widely ratified international human rights instruments. This is, however, not to be understood as a broader concept than the notion of ‘fundamental rights’ as prescribed in article 6 (2) TEU. The EUCFR does offer a definition of what could be understood by the concept “fundamental rights and freedoms” as prescribed in article 6 (1) TEU. In addition, the EUCFR has the potential to clarify the obligations of the European Council under article 7 TEU by providing a definition what is to be understood as a serious and persistent breach of ‘human rights and fundamental freedoms’.

The European Union shall, according to article 6 (2) TEU, respect *fundamental rights* “as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from Common constitutional traditions common to the Member States, as general principles of Community law”. The ECJ, in general, uses the concept of ‘fundamental rights’ rather than ‘human

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<sup>73</sup> EU Annual Report on Human Rights 2005, 12416/05 of 28 September 2005, p. 126.

<sup>74</sup> World Conference on Human Rights, A/CONF.157/23, 1993.

<sup>75</sup> For a discussion on the on the status and role of economic, social and cultural rights within an EU context, see for example Szyszczak, E., 2001, pp. 493-513.

rights'.<sup>76</sup> The notion of "human rights" is used by the ECJ mostly in situations when the court makes a reference to *international human rights treaties*.<sup>77</sup> In accordance with article 6 (2), the concept of 'fundamental rights' has been used as a term that includes both references to international human rights treaties as well as to constitutional principles that are common to the Member States. The notion of "fundamental rights" is, however, more commonly used in the context of constitutional law than the notion of "human rights". The traditional view is that only rights recognised in constitutional documents of the Nation State are referred to as 'fundamental rights'.

The strict reading of article 6 (2) TEU would furthermore suggest, as far international human rights treaties are concerned, that only the ECHR could 'operate as a source of inspiration' for the ECJ in its search for general principles of Community law. This could, however, hardly be interpreted as a statement that no other international human rights treaties could function as a source of inspiration available for the ECJ. The ECJ itself has stated in opinion 2/94 that the ECJ draws 'inspiration' from the constitutional traditions common to the Member States and 'guidelines' from human rights treaties in which the Member States have collaborated or of which they are signatories.<sup>78</sup> The ECJ has recently confirmed that international human rights instruments other than the ECHR can also be taken into account. In the *European parliament v. Council*<sup>79</sup>, where the court discussed the right to family reunification of nationals of non-Member States, the court discussed the relevance of the International Covenant on Civil and Political Rights (henceforth the ICCPR),<sup>80</sup> the UN Convention of the Rights of the Child<sup>81</sup> and the European Social Charter.

The EUCFR 'reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Fundamental Rights and Fundamental

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<sup>76</sup> The concept of "fundamental rights" is defined in the same manner as they have been declared as "fundamental rights" by the ECJ in its case law.

<sup>77</sup> According to discursive criteria, a "treaty is regarded as a human rights treaty if it is usually mentioned as such within the human rights discourse". Scheinin, M., 1991, p. 350.

<sup>78</sup> Rosas, A., (a) 2001, p. 56.

<sup>79</sup> Case 540/03, *European Parliament v. Council of the European Union*, judgment of 27 June 2006.

<sup>80</sup> International Covenant on Civil and Political Rights, adopted for signature of 16 December 1966, entered into force 23 March 1976. UNTS 171.

<sup>81</sup> UN Convention on the rights of the Child 1989. Entered into force on 2 September 1990. UNTS 3.

Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European court of Human Rights'. In other words, all rights recognised in the EUCFR have their origin the '*acquis communautaire*' and in international human rights treaties, but are to respected as 'fundamental rights' by the institutions and bodies of the Union and by Member States in implementing Union law. A general conclusion can however be drawn. One can say that the concept of fundamental rights is used in the internal context and the concept of human rights would refer to EU external relations. This distinction has not been changed in the Constitutional Treaty for Europe. The EU, however, is defined as having been founded on the respect for, inter alia, *human rights and fundamental freedoms* and not on respect for *fundamental rights*. In this study, and for the sake of clarity, the concepts of fundamental rights and human rights will be used as synonymous concepts, since no major conceptual difference is made within an internal EU context.

## 2. DEVELOPMENT OF FUNDAMENTAL RIGHTS AS GENERAL PRINCIPLES OF COMMUNITY LAW AND ITS CRITIQUE – THE PROGRESS SO FAR

### 2.1 Introductory remarks

In order to have a better understanding of the EUCFR and the reasons leading up to the adoption of the EUCFR in December 2000, it is important to analyse the EUCFR in its wider historical and political context. The references to the historical and political context of the EUCFR are meant to highlight the evolution of fundamental rights protection in light of the case law by the ECJ as well as the political initiatives by the Community institutions on how fundamental rights should be improved and recognised within the Community legal order. The immediate background to the adoption of the EUCFR is the Cologne European Council decision in June 1999. The process leading up to the adoption of the EUCFR is, however, the culmination of a discussion on how fundamental rights should be recognised in the European Community/Union context.<sup>82</sup> An understanding of the broader history of fundamental rights protection in the Community legal order is important in order to have a better understanding of the outcome of the process leading to the adoption of the EUCFR and several subsequent issues raised by the EUCFR.<sup>83</sup>

Chapter two focuses in particular on the role of the ECJ in laying the groundwork for the EU internal human rights dimension in a series of leading cases and on the political side of the discussion concerning the improvement of fundamental rights protection in the European Community/Union. The foundation for EUCFR was laid much earlier than the immediate background set out by the Cologne mandate in 1999. The process leading up to the adoption

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<sup>82</sup> McCrudden, C., 2001, p. 2.

<sup>83</sup> Menéndez has presented a less court-centred analyse of the leading cases from the ECJ “based on characterisation of the Luxembourg judges as responding to clear signals coming from the political process”. His argument is based on the assumption that fundamental rights “have always been at the heart of the European project and...the explicit affirmation of rights comes in hand with the transformation of the Communities”. He goes on, stating that “a more through analyses of the political context within which this line of jurisprudence was developed makes is plausible to play down a bit the *activism* of the Court to emphasise the extent to which judges used their margin of discretion in order to crystallise an emerging *political consensus*”. Menéndez, A., (a) 2003, pp. 36-39. In this chapter, I will focus only on the judicial activism of the ECJ as well as on political initiatives by the Commission and the European Parliament on how to recognise fundamental rights in the Community legal order.

and incorporation of the Charter is only the “tip of the iceberg”. This process began already in the late 1960s with the jurisprudence of the ECJ, but should also be viewed in light of the “dialogue” between the ECJ and national (constitutional) courts and the European Court of Human rights. The cornerstone of this doctrinal development is to be found in the case law dealing with the sources of fundamental rights and their scope of application. The fundamental rights case law of the ECJ has to a large extent been developed due to reasons that the EC/EU treaties have not contained any coherent set of fundamental rights provisions in the sense that one could find a fundamental rights catalogue in the treaties.

The need to elaborate a fundamental rights catalogue for the European Community/Union was put on the agenda in particular by the European Parliament and the Commission already in the mid-1970s. This discussion can be seen as the “other side of the coin” and a response to the way in which fundamental rights were protected in the Community legal order, i.e. developed almost entirely by the ECJ through its jurisprudence. Less interesting in this regard is which human rights are protected in the Community legal order.<sup>84</sup>

Both the jurisprudential development and the political response to this evolution constitute the broader context in which the current EUCFR can and should be reviewed. The broader context of the EUCFR helps us to understand that the initiative brought up by the Cologne European Council in 1999 is perhaps not as innovative and revolutionary in terms of fundamental rights protection as one might be inclined to think. However, one cannot overlook the importance of having fundamental rights clearly spelled out in the form of a fundamental rights catalogue that is part of the Constitutional Treaty for Europe. Indeed, the initiative of 1999 had a great impact on later initiatives to begin reorganising the whole structure of the European Union. The elaboration of a fundamental rights catalogue as part of the treaty structure of the EU was and is to be seen as the starting point that eventually led to the establishment of the second Convention and the elaboration of the Constitutional Treaty.<sup>85</sup> At

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<sup>84</sup> The ECJ has so far recognised at least the following rights: right to human dignity, equal treatment, non-discrimination based on sex, freedom of association, freedom of religion and confession, right to privacy including medical confidentiality, right to property, freedom of profession, freedom of trade, respect for family life, right to fair trial, inviolability of residence, freedom of expression and publication. For a reference to the specific case law, see Tridimas, T., 2000, pp. 209-210.

<sup>85</sup> For a discussion of the current state and future scenarios of the Constitutional treaty, see chapter 5.6.

the time of adoption of the EUCFR, the President of the Charter Convention and other members of the Convention actively denied a connection between the Charter and some future constitutional settlement. The time had not come to start openly speaking in terms of a constitution for the EU at the time of the elaboration of the Charter. It was seen a separate project altogether. The elaboration of a single treaty under the notion of a constitution has proven to be the wrong approach in terms of reorganizing the current treaties to make the primary law of the Union more workable and legible and the European Union more transparent and more democratic.

## **2.2. On the nature and sources of EU law**

### **2.2.1 Principles of a constitutional nature: direct effect and supremacy of Community law**

The EEC Treaty did not and the EC Treaty still does not contain any specific provision concerning the relationship between EC law and national law. One cannot therefore find any clear reference to the “principle” of supremacy in the treaties.<sup>86</sup> It has to be noted, however, that the doctrines of supremacy and direct effect are considered to be an inherent element of the principle of co-operation as established in article 5 (now article 10 ECT) of the EEC Treaty.<sup>87</sup> Indeed, the supremacy of EC law and direct effect has been developed by the ECJ through its case law. The ECJ itself refers rarely, if ever, to supremacy and direct effect in term of a principle, but rather to obligations of national courts to apply EC rules and set aside conflicting national rules.<sup>88</sup> According to De Witte, the doctrines of supremacy and direct effect are not principles of law in the meaning of “general principles of EC law”, but are rather to be considered as “principles of interpretation” of Community law.<sup>89</sup> He continues by stating that

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<sup>86</sup> The supremacy principle is introduced in the draft Treaty Establishing a Constitution for Europe in part I-6 para. 1, which prescribes that “The Constitution, and the law adopted by the Union’s Institutions in exercising competences on it, shall have primacy over the laws of the Member States”. O.J. C 310/1 of 16 December 2004.

<sup>87</sup> De Witte, B., 2000, p. 148. See also case 213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. Reference for a preliminary ruling: House of Lords - United Kingdom, judgment of the Court of 19 June 1990, para. 19.

<sup>88</sup> In the case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, judgment of the Court of 9 March 1978, the ECJ, however, referred to the principle of precedence of Community law, para. 17.

<sup>89</sup> De Witte, B., 2000, p. 148. General principles of Community law can, according to Tridimas, be categorised by subject matter in the following way: The first category would

“primacy is not a separate norm alongside the treaties and secondary law, but rather a *distinctive legal quality possessed* by all norms of Community law, including the treaties, secondary law and, indeed, the general principles of law”<sup>90</sup>. Indeed, supremacy and direct effect are often categorised as structural principles distinct from substantive principles.<sup>91</sup>

Structural principles do not *per se* qualify as “principles” where legal norms are either seen as rules or principles.<sup>92</sup> The role of structural “principles” is different in that they function as rules in adjudication or “metanorms” regulating conflicts between material rules.<sup>93</sup> According to Alexy, legal principles are optimising commands, i.e. “norms commanding that something be realised to the highest degree that is actually and legally possible”.<sup>94</sup> Therefore, by way of its nature, the absolute character of the doctrine of supremacy is not suitable to be labelled as a principle if one accepts the rule/principle distinction as a given differentiation of legal norms.<sup>95</sup> The doctrine of supremacy is therefore more closely related to an “all or nothing” rule than to a principle in the sense that it precludes the possibility of optimisation/weighting and balancing, which is a central feature in the collision of principles. The doctrine of supremacy operates more like a *lex superior* rule than an ordinary rule whose applicability might be set aside in a given case by

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consist of principles underlying the constitutional structure of the Community, i.e. principles that refer to the relation between the Community and the Member States (e.g. supremacy and direct effect etc.). The second category includes principles based on the rule of law regulating the relation between the individual and the Community (e.g. equality, proportionality, legal certainty, fundamental rights etc.). The third category would consist of principles of substantive Community law (fundamental freedoms and Community policies). Tridimas, T., 2000, p. 3.

<sup>90</sup> De Witte, B., 2000, p. 148. Prof. De Witte sees the doctrine of supremacy and direct effect as “meta-norms” in helping to define the over-all nature of Community law.

<sup>91</sup> Tridimas, T., 2000, p. 2.

<sup>92</sup> Dworkin, R., 1978, p. 22-28. Dworkin identified not only rules and principles, but also policies that set out a goal to be reached.

<sup>93</sup> For a more brief discussion on the “principle of supremacy” as a metanorm, see Helander, P., (a) 2001, p. 43-58. “Metanorms” are, according to Klami, norms of application of law or “norms about the interpretation of statutes and precedents and hierarchical relationships between the different sources of law”. Klami, H.T., 1997, p. 11.

<sup>94</sup> Alexy, R., 2000, p. 295.

<sup>95</sup> Raitio states in his doctoral thesis that “[t]he ECJ had designed the principles from the early 1960s, namely the supremacy, direct applicability and direct effect of EC law, as principles without having analysed the choice thoroughly in the Dworkian sense”. This case law was, however, developed by the ECJ prior to the intensified discussion on rules and principles by R. Dworkin in his contribution from 1967. Raitio, J., 2001, p. 214.

another conflicting rule. "The supremacy principle" is the ultimate conflict-resolving rule between EC law and national legal orders at the level of a particular court case.<sup>96</sup>

The "principle" of direct effect was initially developed in the *van Gend en Loos*<sup>97</sup> case, where the court ruled that individuals could require provisions of EC law to be directly enforced before national courts under the following preconditions: a) a Community provision has direct effect if the obligation imposed on Member States is clear and unambiguous, unconditional and not dependent on further action in creating rights for the individual; b) must be a legally valid and binding law seen from the point of view of national courts, i.e. that national courts recognise Community law as valid and binding law.<sup>98</sup>

In other words, the Community law in question must be appropriate to create rights for individuals and may therefore be invoked by individuals before a national court.<sup>99</sup> The doctrine of direct effect was followed the next year in the *Costa v. Enel case*<sup>100</sup> by the introduction of the doctrine of supremacy of Community law, which is closely connected to the doctrine of direct effect and proclaims that Community law overrules inconsistent norms of national law. The point of departure is that, where Community law is applicable, it has precedence in relation to national legislation. The doctrine of supremacy is clearly a conflict-resolving rule between EC law and national law. The supremacy doctrine applies both to primary as well as secondary Community law given that, in practice, the Community provision is directly effective.<sup>101</sup>

At first sight, it seems to be a rather straightforward and absolute rule. However, certain conditions must be fulfilled in order for the supremacy rule to step in and solve a norm conflict in a given case between EC law and national

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<sup>96</sup> Ojanen, T., 1998, p. 335-338.

<sup>97</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Tariefcommissie - Pays-Bas. Judgment of the Court of 5 February 1963. The Court made the following statement: "Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon the rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon institutions of the Community".

<sup>98</sup> Hartley, T.C., 2003, p. 198.

<sup>99</sup> *Ibid.* See further for a more thorough study of the evolution of the doctrine of direct effect in de Witte B., (a) 1999, pp.177- 213.

<sup>100</sup> Case 6/64 *Costa v. Enel*, judgment of 15 July 1964.

<sup>101</sup> It is to be noted, however, that the doctrine of supremacy does concern EC law as a whole. Ojanen, T., 1999, p. 290.

legislation. Such preconditions are connected to uncertainty about whether a norm conflict can be solved by way of a harmonious interpretation of national norms.<sup>102</sup> The primary way of solving norm conflicts should always be through a harmonious interpretation of national norms so that possible conflicts could be avoided altogether.<sup>103</sup> Secondly, the relevant national norm would have to fall within the scope of application of Community law.<sup>104</sup> Thirdly, concerning secondary legislation, Community acts would have to be adopted as a valid matter of EC law, i.e. *ultra vires* acts of Community law cannot prevail over national legislation.<sup>105</sup>

The supremacy of Community law implies a prohibition against the national legislator adopting laws that conflict with binding Community law. The Court ruled in the *Costa v. Enel* case that, “the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”. This reasoning by the court is based on the need for the unity and efficiency of Community law in order to achieve the aims set out in the treaties that otherwise would be undermined if the validity of Community measures would be reviewed in the light of national legal standards.<sup>106</sup> The European Community aims to create a uniform Community legal order, which must be applied in all Member States effectively and in a uniform manner. The effectiveness of Community law in national legal orders is, however, not a matter for national law, but is to be determined only based upon Community law. The ECJ proclaimed that the Treaty has created its own legal order, which has become an “integral part” of the legal systems of the member States.

The creation of a Community with real powers stemming from a limitation of the sovereign powers of the Member States to the Community has resulted in a body of law that is binding on both the Member States and their nationals. Community law, by integrating the laws of the Member States within

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<sup>102</sup> Ojanen, T., 1998, p. 335.

<sup>103</sup> Helander, P., (a) 2001 p. 48.

<sup>104</sup> According to Weiler, “the principle of supremacy can be expressed, not as an absolute rule whereby Community or federal law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence”. Weiler, J., 1999, p. 21 footnote 26. For a more thorough discussion of the scope of application of Community law and the doctrine of supremacy, see Helander, 2001, (a) pp. 49-53.

<sup>105</sup> Helander, P., (a) 2001, p. 48.

<sup>106</sup> De Witte, B., (a) 1999, p. 191 and Craig, P., & de Burca, G., 1998, p. 259.

the “spirit of the Treaty”, makes it, according to the ECJ, *impossible* for the Member States not to accept the doctrine of supremacy of EC law over national law, which is based on a need for unilateral implementation of Community law accepted by Member States on the basis of reciprocity. In the *Internationale Handelsgesellschaft* case,<sup>107</sup> the ECJ affirmed the doctrine of supremacy of Community law by stating that

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

In other words, the validity of a Community measure is a matter of Community law and not a matter of national law. It is therefore also solely within the jurisdiction of the ECJ to determine the validity of a Community act.<sup>108</sup> The doctrine of supremacy was further developed by the ECJ in the *Simmenthal* case, where it stated that “provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other hand is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions”.<sup>109</sup>

Conflicting national legislation is therefore to be set aside, irrespective of the hierarchical or chronological status of the national law, if clear and unconditional Community law is applicable in a given case before a national court. However, as de Witte points out, there is a difference between setting

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<sup>107</sup> Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-unde Vorratstelle für Getreide und Futtermittel*, judgment of 17 December 1970.

<sup>108</sup> Ojanen, T., 1998, p. 99.

<sup>109</sup> Case 106/77, *Amministrazione delle Finanze dello stato v. Simmenthal*, judgment of 9 March 1978, para. 17.

aside or simply not applying national law in a given case and invalidating conflicting national law altogether.<sup>110</sup> The concept of supremacy does not in itself invalidate conflicting national law, but requires that conflicting national law be set-aside, i.e. “calls for a concrete rather than abstract judicial review and, thus, it is mainly concerned with the national law’s applicability to the case and not its validity *in abstracto*”.<sup>111</sup>

Why is the doctrine of supremacy important to discuss in relation to fundamental rights? The precedent of Community law is accepted by large as being one of the foundational principles of Community law, but still to some extent disputed by national (constitutional) courts. This entails that it is not fully and completely accepted as a way of securing the unity and efficiency of Community law in order to achieve aims set out in the treaties, i.e. creating an ever closer union. Some national constitutional courts of Member States have openly questioned the validity of the doctrine of supremacy in cases dealing with fundamental values of national constitutions- national fundamental rights. As noted above, seen from the ECJ perspective, national courts are under obligation to give precedence to Community over all national law, including national constitutional norms. A somewhat different perspective arose in the early 1970s from especially national constitutional courts in Germany and Italy, which questioned the validity of the doctrine of supremacy as it related to constitutional values and principles (state sovereignty).<sup>112</sup>

### 2.2.2 Sources of law

One might be inclined to think that EU law would be structured and organised. The organised and structured nature of norms in EU law is however far from clear and consistent apart from general division of norms into primary law and secondary law. The question naturally is what norms constitute primary law respectively secondary law. The distinction between derived norms based on primary law and administrative measures has not been very clear. The distinction between legislative measures and administrative measures carried out by the Commission has proven to be unsatisfactory. In fact, the almost non-existent separation between the legislator and the executive authority has been

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<sup>110</sup> de Witte B., (a) 1999, p. 190.

<sup>111</sup> Helander, P., (a) 2001, p. 48.

<sup>112</sup> See chapter 2.3. The question of supremacy has also been discussed in connection to the adoption of the EUCFR in the context of article 53 of the Charter. See chapter 3.7 in the thesis and, for instance, Liisberg, J., 2001.

a distinct feature for EU governance.<sup>113</sup> A genuine hierarchy of legal acts is completely absent in the EU legal order.<sup>114</sup> The EC Treaty does not recognise in any formal way a distinction between the legislator the executive. In the words of Lenaerts and Desomer, "...there are no uniform legislative and implementing procedures, nor are there instruments of a clearly legislative or executive nature".<sup>115</sup>

Since 1991, the Commission has proposed that a new kind of hierarchy of norms be created. No progress was made during the IGC:s in 1996 respectively 2000. This question became one of the central themes during the preparatory work for a Constitutional Treaty for Europe in the European Convention 2002-2003. One of the central tasks for the European Convention was to simplify legislation and the legislative process, thus marking a more clear distinction between legislative and executive activity. The European Convention and the Constitutional Treaty has developed the hierarchical order of norms, but not necessarily in all aspects to the benefit of clarity.<sup>116</sup>

Community law was set up by treaties that created a new type of an international organisation with specific characteristics and a new legal order under international law. Community law/Union law is, however, a self-contained regime that is, although not entirely and could not even be, distinct from international law. As noted above, this has been emphasised by the ECJ already in the early 1960s. The sources of EU law can be divided into primary law and secondary law. Primary law is composed for example of the founding treaties and amendments to the treaties and accession treaties. Secondary legislation is divided into regulations, directives, decisions and recommendations in accordance with article 249 TEC. Article 249 does not provide for a comprehensive definition of what constitutes a specific type of secondary legislative act.

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<sup>113</sup> Article 202 TEC does however recognise that the Council may "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament". On the question of delegation of powers, see for instance Hartley, T.C., 2003, pp. 118-124.

<sup>114</sup> Lenaerts, K., & Desomer M., 2005, p. 745.

<sup>115</sup> Ibid.

<sup>116</sup> For a critique, see Lenaerts, K., 2005, pp. 57-61.

One cannot not say really anything about how specific or general a legislative act is by simply taking a look at a certain type of a secondary legislative act, i.e. it does not necessarily reveal whether it is a legislative or an executive act. A distinction between primary and secondary legislation is only one way of trying to systematise the sources of law specific to EU legislation. A distinction between primary law and secondary law does, however, incline that there is a hierarchy built in EU law. This is then to be understood so that the EU legislator can not adopt secondary legislation that would not be in conformity with primary law, i.e. the constituting treaties. One way of distinguishing the sources of Community law is to categorise them as

- 1) acts of the Member States
- 2) general principles of community law
- 3) international agreements with third parties
- 4) community acts
- 5) case law from the ECJ

The analyses of the sources of law might best be served by notifying the case law from the ECJ and the Court of First Instance, which is not easily placed as either part of primary law or secondary law. The ECJ has had a crucial role on the overall development of Community law. Its case law is characterised as having a strong binding effect *vis-à-vis* the Community institutions and the Member states. As noted already, constitutional principles such as supremacy and direct effect and the protection of fundamental rights are the sole creation of the court. An often heard critique of the ECJ is that the court “is running wild”. By this is meant that the ECJ has taken almost the role of the legislator rather than functioning as the last instance with the authority to interpret law within its jurisdiction. The Courts central role in developing Community law is partly due to reason of the general character of the founding treaties. A good example is the protection of fundamental rights. The political institutions, i.e. the Member States was until the decision in 2000 unable to reach a compromise whether or not it would be preferable to adopt a fundamental rights catalogue for the Union. The political unwillingness to reach a compromise has in many ways strengthened the central role of the ECJ in developing a fundamental rights doctrine.

The figure below is meant to illustrate the sources in Community law and their internal relation with each other.<sup>117</sup> The relation between the various

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<sup>117</sup> The figure takes notice of the present structure of norms. Therefore, the amendments brought with the Constitutional Treaty are not taken into account. For a review, see Lenaerts

sources has not explicitly been laid down in treaty context. Nevertheless, one can implicitly conclude from the treaties that the drafters had a certain hierarchy of norms in mind. The following figure is not to be treated as a pure formal hierarchical structure on the relations of norms in EU law. The puzzle of hierarchies in legal systems is more and more becoming difficult to capture in a pure Kelsenian way of thinking simply due to the reason that the sources of norms in legal orders including the legal order of the EU are becoming more pluralistic. Another feature is that norms of different legal orders can be viewed from various angles. For instance, the international agreements binding on the EU in the form of a “mixed agreements” and their status and normative effect can be viewed from the point of view of international law, EU law and Member State law. The norms forming part of EU law have their origin in three different levels, i.e. in international law, EU law and Member State law. The relations between these different levels of norms and their interpretative effect on EU law are clearly not that well structured as the figure tries to capture. What, however, can be seen as valuable is the outset of an internal structure of norms that is useful at least in the sense of partly contributing to legal certainty.

A hierarchical model serves the purpose of solving norm conflicts between “higher norms vs. lower norms”. It does not contribute to solve norm conflicts that tentatively are placed at the same normative level. Instead of emphasising too much on the formal nature of norms, it is perhaps better suited to place emphasis on the material content of norms, which again questions the usefulness of the Kelsenian theory of the hierarchy of norms. A feature of the critique towards the theory of hierarchies or norms has the roots in the view of a pluralistic setting of norms that more or less denies any vertical hierarchical structure of norms. The pluralistic view of norms places legal norms on a horizontal level rather than on any kind of vertical structure.<sup>118</sup> It might no longer even be fruitful to even try to establish any kind of hierarchical order between international law, national law and EU law.

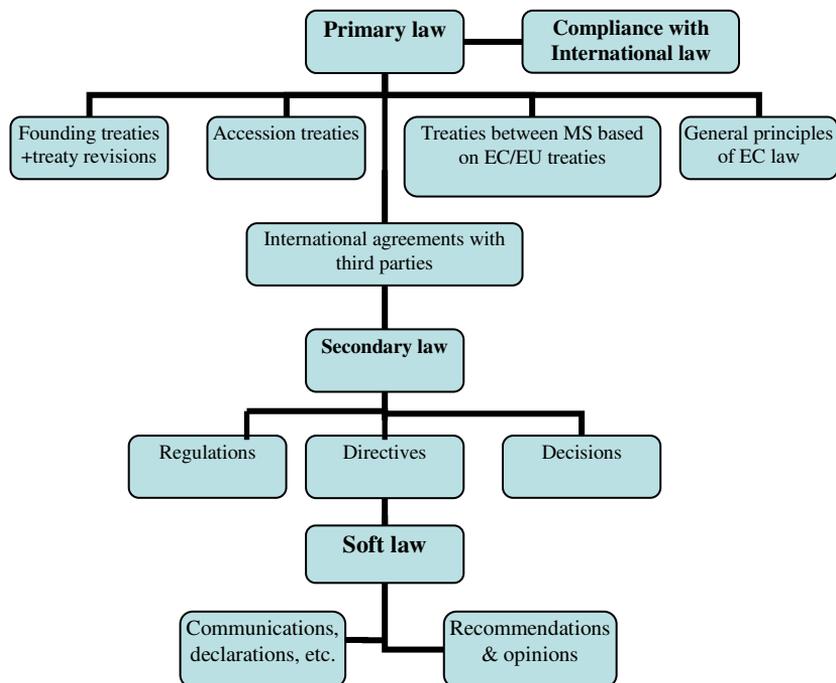
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K., & Desomer, M., 2005, pp. 748-765. The figure does not either take into account the acts under the second and third pillars. Sufficient is to state that articles 14 (a) and 15 TEU provides the council to adopt joint actions and common positions in the context of CFCP. There are a number of acts which the council may adopt in the context of police and judicial cooperation in criminal matters. For instance, the Council may adopt common positions, framework decisions or decisions to adopt conventions.

<sup>118</sup> This particular point is raised especially in the context of the relation between EU law and Member State law. The adoption of the EU Charter in 1999 triggered a new discussion on the issue of EU law vs. national [constitutional] law. For an overview, see Nieminen, L., 2004, pp. 239-265.

The relation *between* legal orders could be described as a dialogue where the substance of norms is given more weight than the formal status of norms.<sup>119</sup> The intention with the figure below is nevertheless simply to address the current internal structure of EU norms according to the understanding of the present author. The figure does not fully take into account the interaction between international law, EU law and national law. For instance, national law functions as a source of law in the context of general principles of Community law where common constitutional traditions are used as a source of inspiration.

**Figure 1: The structure of EU law**



A few words will be outlined on the various sources of EU law starting with international law. International law is placed beside primary law in the figure above in order to capture that general international law is not normatively on a higher level in relation to norms strictly forming part of primary EU law. As will be shown, the question concerning the relation between international law

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<sup>119</sup> The question of the relation between EU law and national law will partly be dealt with in chapter 2.3.

and secondary EU law is less complicated. What is underlined is that rules of international law is binding on EU law and that EU law in this respect cannot be seen as a new separate legal order that would be autonomous vis-à-vis international law. The European Community is a subject of international law and is therefore also bound by the rules of international law. EU law must be interpreted in conformity with norms of international law. The CFI has in two recent judgments discussed the status of *jus cogens* norms understood as peremptory norms of public international law in EU law. In the cases *Yusuf*<sup>120</sup> and *Khadi*,<sup>121</sup> the CFI was faced with complaints concerning EU implementation of UN Security Council resolutions freezing the funds and other financial resources of suspected terrorists and terrorist organisations identified by the UN Sanctions Committee.<sup>122</sup> The CFI held in light of public international law that the obligations under the Charter of the United Nations of the UN Member States prevail over any other obligations including EC law under article 103 of the UN Charter.<sup>123</sup> The CFI ruled that it was outside its mandate to rule on the lawfulness of the UN Security Council resolutions while the Council implemented the UN resolutions internally as to form part of EC law, i.e. that the Community “must leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations”.

The CFI concluded, however, that it could review the UN resolutions and their compliance with *jus cogens* norms understood as the highest rules of public international law from which no derogation is permitted either by the UN itself, any sovereign state or international organisations. The applicants claimed that the contested regulation breached, *inter alia*, their right to property

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<sup>120</sup> Case T-306/01, *Ahmed Ali Yusuf & Al barakaat International Foundation v. European Council and Commission*, judgment of the CFI of 21 September 2005.

<sup>121</sup> Case T-315/01, *Yassin Abdullah Kadi v. European Council and Commission* judgment of the CFI of 21 September 2005.

<sup>122</sup> Council Regulation No. 881/2002 of 28 May 2002. O.J. L 139/2002. The CFI rules that the Council is competent under articles 60, 301 and 308 TEC to impose economic and financial sanctions on individuals connected to the fight against terrorism.

<sup>123</sup> Article 103 of the UN Charter prescribes that “In any event of conflict between the obligations of the Member States of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Subsequently, the CFI held that the Community “must be considered to be bound by the obligations under the [UN] Charter...in the same way as its Member States, by virtue of the Treaty establishing it”.

and right to a fair hearing and right to effective judicial review. The CFI concluded after having examined the alleged breach of the applicants' fundamental rights that the contested Council regulation did not breach the rules of *jus cogens*. The CFI made it clear that EC law can never be contrary to *jus cogens* norms.<sup>124</sup>

Another important source of law in international law is customary law and general principles of law. It is undisputed that general international law is binding on the European Union. The ECJ has confirmed in the case law that Community legislation needs to be interpreted in accordance with rules of general international law.<sup>125</sup> For instance, in the *Poulsen and Diva navigation case*<sup>126</sup>, the ECJ stated that "as a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea". Already in the early 1970s, the ECJ made a reference to a general principle of international law by stating that "it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence".<sup>127</sup> The rules of international law are therefore binding in EU law and can under certain circumstances be invoked to challenge the validity of a Community measure. Such measures are invalid if they are contrary to an international agreement.

International law does not only consist of international agreements. Rules of customary international law may also be invoked in order to challenge the validity of Community measures. In the *Racke GmbH & Co. v Hauptzollamt Mainz case*<sup>128</sup>, the ECJ stated that "the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by

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<sup>124</sup> For a discussion of sources for *jus cogens* norms and *jus cogens* as a potential, but contested autonomous source of law, see Orakhelashvili, A, 2006, pp. 104-127.

<sup>125</sup> For an overview on the issue of EC/EU as a subject and actor under international law, see Leanerts, K., 2000 (b), pp. 95-138 and on the status of international law in EU law, Eeckhout, P., 2002, pp. 324-344.

<sup>126</sup> Case 286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, judgment of 24 November 2002, para. 9.

<sup>127</sup> Case 41/74, *Yvonne van Duyn v Home Office*, judgment of 4 December 1974, para. 22.

<sup>128</sup> Case 162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz*, judgment of 16 June 1998, para. 45-46.

virtue of, an agreement which it has concluded with a non-member country. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order". In light of this, one can conclude that the ECJ declares that the Community must respect the norms of international law in the exercise of its powers and that the Court is ready to examine the validity of secondary acts of the institutions and their validity in light of international law. The sources of EC law as distinguished earlier will be discussed as follows:

*(1) Acts of Member States*

The first category constitutes the founding treaties establishing the European Communities and the EU establishing the various organs and bodies in the Community allocating them the powers or competence to act in specific fields. The relevant treaties are the ECSC, EC and EURATOM treaties, the merger treaty and the subsequent amendments to the treaties, i.e. the Single European Act, the Maastricht Treaty (1992), Amsterdam (1997) and Nice (2001). The accession treaty enlarging the European Community and the Union constitute part of the first category and holds the status of primary law. Treaties drawn up between the Member States based, in particular, upon the constituting treaty provisions form part of primary law. An example is provided for under article 34 (2) (d) TEU prescribing that Member States may within the field of police and judicial cooperation in criminal matters "establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements". A similar procedure is established under article 293 TEC with a view of securing the benefits of their nationals in certain specific areas.

*(2) General principles of Community law*

Among the sources of Community law, general principles of Community law occupy a special position. General principles of law are unwritten principles of law elaborated by the courts seeking for inspiration from the legal traditions of the Member States. In particular with regard to fundamental rights, the ECJ seeks inspiration from international human rights treaties for the purpose of respecting the protection of fundamental rights as part of the general principles of Community law. This source of law has a clear "gap filling" function. It is unthinkable that the legislator in any legal system would be capable of providing answers to all legal problems occurring before a court of law. As a result, the judges are to a certain extent obliged to "be creative" without going

beyond their function as judges and not stepping into to the domain of legislative activity. It is generally accepted that general principles of Community law has the status of primary law, which also has strengthened their importance.<sup>129</sup> The treaties themselves provide for some justification for the ECJ to make use of general principles of law.

General principles of Community law have been development by the ECJ on the basis of article 220 TEC according to which the ECJ and the Court of First Instance shall ensure that “in the interpretation and application of this Treaty the law is observed”. The word “law” has been interpreted to cover not only written law. Article 230, laying ground for a Community act to be annulled by the ECJ, prescribes that “It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty *or of any rule of law* relating to its application, or misuse of powers”. Article 288 prescribes, with regard to non-contractual liabilities, that the Community is based on “the general principles common to the laws of the Member States”. Despite of the wording “common to the laws of the Member States”, the Court has not felt that a legal principle has to be of a similar nature in all the Member States to be able to apply a general principle of law.

Fundamental rights are certainly the best known area of law that has evolved from the notion “general principles of community law”. For the present purposes, there no need to go into detailed analyses of the general principles of Community law doctrine developed by the ECJ over the years. It is sufficient to simply spell out the most important principles recognised by the ECJ. The Court has recognised the following general principles of community law:

- the principle of equal treatment or non-discrimination
- the principle of proportionality
- the principle of legal certainty
- the principle of the protection of legitimate expectations
- the rights of defence
- the protection of fundamental rights<sup>130</sup>

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<sup>129</sup> Ojanen, T., 2006, p. 49.

<sup>130</sup> For an analyses of the general principles of Community law, see for example Tridimas, T., *General principles of EC Law*, 2000 and more recently Groussot, X., *Creation, Development and Impact of the General principle of Community Law*, 2005.

These general principles of community law have had a crucial role in filling gaps in EC law as well as in the interpretation of EC law. These principles are binding on the EU and its institutions, the Member States and individuals acting within the sphere of Community law. These principles rank at the primary law and constitute an independent and important source of law.

*(3) International agreements with third parties*

Article 300 (7) TEC prescribe that international agreements concluded by the Community are binding on the institutions of the Community law and Member States.<sup>131</sup> The ECJ has consistently held that international agreements concluded by the Community form an integral part of Community law and are in principal part of primary law.<sup>132</sup> Decisions by international organs established under any subsequent agreement to which the Community is a contracting party are binding on the EU institutions. There is no need for any kind of act of transposition of international agreements to become part of Community law. Community law is viewed as a monist legal order vis-à-vis international law. This does not automatically mean that no implementing measures would be needed. All international agreements are different and may require action by the Community legislator or no action for instance due to reason that Community law already is in compliance with the agreement. International agreements are in principle directly applicable, but does not necessary have direct effect.<sup>133</sup> Agreements with third countries can roughly be divided into three categories, i.e. (a) agreements that belong exclusively to the competence of the Community, (b) “mixed agreements” whose subject matter falls partly between the competence of the Community and the Member States, and (c) agreements that are part of Community law by way of succession.<sup>134</sup>

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<sup>131</sup> On this category of primary law, see for instance Hartley, 2003, pp. 159-186 and Shaw, Jo, 2000, pp. 240-242.

<sup>132</sup> Eeckhout, P., 2004, pp. 276-278. See for instance case 162/96 A. Racke GmbH & Co. v Hauptzollamt Mainz, judgment of 16 June 1998, para. 41.

<sup>133</sup> Rosas, 2005 (e), pp. 217-219. The ECJ has held that the WTO agreements lack direct effect, but are directly applicable, i.e. EU law is to be interpreted in conformity with WTO agreements. See for instance Case 93/02, Biret International v. European Council, judgment of 30 September 2003, para. 52. On the general requirements for direct effect of international agreements, see Case 265/03, Simutenkov v. Ministerio de Educación y Cultura & Real Federación Española de Fútbol, judgment of 12 April 2005.

<sup>134</sup> The Community became a party to the former GATT agreement by way of succession. See Joined cases 41-4/70, International Fruit Company v. Commission, judgment of 13 may 1971.

EU internal acts may be in conflict with international agreements. The question that subsequently arises is whether the violation of the international agreement can be used in order to challenge the legality of such acts. This issue was brought before the ECJ already in the early 1970s in the *International Fruit Company case*<sup>135</sup> where the Court stated that “since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law.” International agreements can in other words form the basis in order to invalidate regulations, directives and decisions under articles 230 and 234 TEC and are therefore hierarchically superior in relation to community acts within the meaning of article 249 TEC.<sup>136</sup>

AG Kokott concluded that “Under Article 300(7) EC, international law obligations of the Community [International agreements] enjoy an ‘intermediate status’, that is to say, they take effect subject to primary law, but take precedence over Community secondary law. Community secondary law must therefore be interpreted in line with the requirements of...[international agreements] the CN is based on a regulation and is therefore classified as Community secondary law”.<sup>137</sup> This was also confirmed by the ECJ stating that “primacy of international agreements concluded by the Community over secondary Community legislation...requires that the latter, in so far as possible, be interpreted in conformity with those agreements”.<sup>138</sup> In a recent case from the ECJ, the court confirmed that agreements concluded under the conditions set out in article 300 TEC prevail over provisions of secondary Community legislation.<sup>139</sup> The case concerned the validity of articles 5, 6 and 7 of regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights. The European Community was a contracting party to the Convention

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<sup>135</sup> Joined cases 41-4/70, *International Fruit Company v. Commission*, judgment of 13 May 1971.

<sup>136</sup> On the status of international agreements in Community law, see Ojanen, 2001, pp. 794-798.

<sup>137</sup> Case 311/04, *Algemene Scheeps Agentuur Dordrecht BV v. Inspecteur der belastingdienst*, Opinion of AG Kokott of 6 October 2005, para. 27.

<sup>138</sup> *Ibid*, judgment of 12 January 2006.

<sup>139</sup> Case 344/04, *International Air Transport Association v. Department for Transport*, judgment of 10 January 2006.

for the Unification of Certain Rules for International carriage by Air.<sup>140</sup> The Court found after examination that the Council regulation was in conformity with the “Montreal Treaty”. For the purpose here, it is sufficient to state that an international treaty to which the Community is a contracting party prevails over secondary community legislation.

Another question is whether a provision in an international treaty would be conflict with a provision in one of the constituting treaties. As the ECJ itself stresses that the main principle should be that international agreements should be interpreted in harmony with secondary law, nothing would preclude that this would also be the case with primary law.<sup>141</sup> An international treaty provision to which the Community is a contracting party would most likely not as such prevail over a provision for example in the EC Treaty.

Hartley has stated that “it is hard to see how it [an international agreement] could be applied in the Community legal system if it directly conflicted with a provision in one of the constitutive Treaties: the powers of the Community come from the Treaties and must be subject to the provisions of the Treaties”.<sup>142</sup> International agreements concluded by the Community would in a hierarchical structure according to Hartley therefore find its place somewhere between primary law and secondary law. This is also confirmed with the case law from the ECJ. However, one should keep in mind that agreements with third parties are a special category of a source of law due to the reason that these agreements are treaties governed by the rules of international law. These agreements with third parties, i.e. international organisations and third states and their impact on EU law can be viewed both from an international law aspect as well as from an EU law point of view. Yet, the formal internal status and place of international agreements is determined by Community law.

According to settled case law from the ECJ, once an international agreement is signed by the Community in accordance with article 300 TEC, its provisions form an integral part of the EC legal order. In terms of a norm-conflict between a provision in an international agreement and primary law,

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<sup>140</sup> Conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air. The “Montreal Convention” was approved by the Council of 5 April 2001. O.J. L 194/2001.

<sup>141</sup> Case 61/94 Commission v. Federal Republic of Germany, judgment of 10 September 1996, para. 52, where the Court stated that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements”.

<sup>142</sup> Hartley, T.C., 2003, p. 185.

strive for harmonious interpretation should be the guiding line at the level of adjudication. Article 300 (7) TEC does provide that agreements concluded under this article are binding upon the Community and the Member States. This approach does indeed confirm the monist approach of EC law vis-à-vis international law. Yet, it does not confirm that international agreements would be supreme to Community [primary] law. Article 300 (7) TEC prescribe the binding effect of international agreements, but does not express the legal consequences of such agreements.<sup>143</sup>

The category of international conventions which all Member States have ratified has been presented as forming part of primary law. The example given by Shaw is the ECHR and the ICCPR that normally would be seen as constituting important sources of inspiration for the ECJ in protecting fundamental rights as general principles of Community law.<sup>144</sup> This might seem as somewhat controversial in the sense that the ECJ does not itself as a matter of EU law consider it to be bound by the ECHR and the case law of the ECtHR. This is even more evident in the case of ICCPR and the views of the human rights committee. Nevertheless, as will be shown later on, the ECHR including the case law from the ECtHR has become an important source of inspiration [law] for the ECJ since the mid 1990s.

#### (4) Community acts

Secondary Community acts are the result of legislative activity by the Community institutions. The secondary sources of law are spelled out in article 249 TEC listing five different acts that are adopted by the European Parliament and the Council jointly, by the Council or the Commission. These secondary acts are regulations, directives, decisions recommendations and opinions. These secondary community acts can be classified as acts with a clear normative element and acts of a "soft law" character. Recommendations and opinions clearly belong to the latter category. The list of acts in article 249 TEC is not exhaustive. The ECJ has held that decisions concerning the internal management of the institutions are acts *sui generis* by for instance formulating internal rules of procedure.

*Regulations* prescribe general rules that are strictly binding both at the Community and the national level. Article 249 (2) prescribe that "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States". One of the characteristic features of

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<sup>143</sup> Eeckut, P., 2004, p. 277.

<sup>144</sup> Shaw, 2000, p. 241.

regulations is that they have direct effect without any need of national implementing measures. The fact that a legislative act has been labelled a regulation had not hindered the ECJ from treating a “regulation” as an individual decision “in disguise” due to their individual nature. What is decisive is the substance of the secondary act rather than the formal setting under which an act has been adopted.

*Directives* are in accordance with article 249 (3) “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Directives like regulations carry with them a normative element and are therefore binding acts of law. The difference compared to regulations is that directives are directly binding on the Member States as to the results to be achieved. What therefore is needed is national implementation of the directives. Directives are therefore not directly applicable. The Member States are free to choose how a directive is implemented as part of the national legislation. Directives allow therefore a certain leeway for the Member States to take into account national legal traditions in implementing a directive. A deadline for implementation is given with the directive. Member States are obliged as a matter of Community law to implement the directive as part of its national legislation within that given timeframe. In case that a Member State has not implemented a directive within the given timeframe, the state in question might run the risk of facing liability charges by individuals for not implementing a directive within the given timeframe. Articles 226-228 TEC also enables the Commission to take action against a Member State in breach of their treaty obligations.<sup>145</sup> A significant difference between regulations and directives is that directives cannot pose obligations on individuals.<sup>146</sup>

*Decisions* are binding in accordance with article 249 (4) “in its entirety upon those to whom it is addressed”. Decisions addressed to individual Member States are binding in its entirety to all institutions of the state concerned. A state is therefore under an obligation not to adopt national legislation or administrative decisions which would run counter to the effective implementation of a given decision. An individual may rely on provisions in a decision vis-à-vis national authorities. The ECJ has held that “in cases where for example, the Community authorities by means of a decision have imposed an obligation on a member State or all Member States to act in a certain way the effectiveness (*l’effet utile*) of such a measure would be weakened if nationals

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<sup>145</sup> Douglas-Scott, 2002, pp. 291-293.

<sup>146</sup> On the issue of horizontal direct effect of directives, see Douglas-Scott, 2002, pp. 295-310.

of that State could not invoke it in the courts and national courts could not take it into consideration as part of Community law".<sup>147</sup> They are not intended to be general in character, but are individually addressed towards companies, individuals or a member State and are therefore in contradistinction to regulations. Decisions adopted by the Commission under articles 81-82 TEC on competition provide a good example of decisions addressed to private individuals or companies. Decisions do not create general rules of conduct for companies and lack therefore a *general* normative element. *Recommendations and opinions* belong to the "soft law" category and lack normative force. The ECJ has stated that Community recommendations are "measures which, even as regards the persons to whom they are addressed, are not intended to procedure binding effects...generally adopted by the institutions of the Community when they do not have power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules".<sup>148</sup> The Court, however, observed that "the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular when they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions". On the other hand, it is clear that soft law cannot prevail to the extent they contradict norms of a clear normative nature.

In the context of primary law, the constituting treaties and the subsequent revisions include protocols and declarations. The status of protocols to the treaties has the status equivalent to the treaty itself. A protocol may therefore introduce certain changes in the treaty for instance in relation to a certain Member State. Declarations annexed to the Treaty are not binding. However, declarations which are signed by all the Member States can be taken into account by the ECJ in interpreting the provisions in the treaties.<sup>149</sup> The list in article 249 TEC as being a non-exhaustive list does not prevent the institutions from adopting instruments that can produce legal effects despite their soft law character. Soft law instruments are recognised in treaty context by authorising adoption of "provisions", "measures", "rules" or "arrangements",

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<sup>147</sup> Case 9/70, Franz Grad v Finanzamt Traunstein. Judgment of 6 October 1970.

<sup>148</sup> Case 322/88, Grimaldi v Fonds des maladies professionnelles, judgment of 13 December 1989, para. 13, 16 and 18.

<sup>149</sup> A basis for this can be found in the Vienna Convention of the law of the treaties article 31 (2) (b) in prescribing that "[A]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

“resolutions”, “declarations” and “conclusions” which are not intended to have any normative effect.<sup>150</sup> The Commission is increasingly using “communications”, “guidelines” and “codes of conduct” as their working tools in developing matters for instance in the area of social policy, economic policy and employment. These are but examples of the new governance techniques that has gained ground in recent years for instance with the relatively new “open method of co-ordination” (OMC) introduced with Lisbon European Council in 2000.<sup>151</sup>

Soft law as a concept has its roots in public international law from 1970s and can partly be traced back to the expansion of activities within international organisations. Soft law is by nature more light and informal and is therefore in a certain sense more attractive to governments as it offers flexibility in terms of introducing new initiatives. Soft law however creates expectations that the code of conduct of states and international organisations would be in conformity with formally non-binding rules. The adoption of the EUCFR as a formally non-binding inter-institutional agreement has certainly created expectations that the institutions themselves would comply in all their activity with the fundamental rights expressed in the document.<sup>152</sup> As will be later shown, the Charter is a good example on how a soft law instrument is used in adjudication. Lack of binding effect does not automatically mean lack of legal effect.<sup>153</sup>

### **2.3 A challenge of supremacy by Constitutional Courts – the case of Germany as an example**

The “familiar story” of the challenge from national constitutional courts concerning the absolute precedence of EC law in relation to national law sets the whole doctrine of supremacy in a very different light when seen from a national constitutional law point of view. This is based on the view that

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<sup>150</sup> On the nature and use of soft law instruments by the ECJ, see Klabbers, J., 1994, pp. 907-1023.

<sup>151</sup> The OMC method can be described as voluntary governance and has been formalised at the Lisbon European Council in 2000. The OMC method introduces non-enforceable obligations in the EU that does have the burden of the fear of sanctions. For a discussion of the increasing use of the OMC methodology, see Trubek & Trubek, 2005, pp. 343-364.

<sup>152</sup> For a review of the legal effects of the Charter, see chapter 5.

<sup>153</sup> For a review of other means than judicial for the enforcement of socio-economic rights, i.e. for the use of the open method of co-ordination as a way to pursuit a social and cultural rights policy, see Bernard, N., 2003, pp. 263-268 and more generally, Schutter, O., 2004.

Community law derives its validity ultimately from national constitutions.<sup>154</sup> This view denies the absoluteness of the doctrine of supremacy due to reasons that Community law cannot prevail over the foundation from which Community law derives its validity. The transfer of powers from the nation state to international organisations is seen as limiting the sovereign powers, but does not allow *carte blanche* the power to override the basic principles of Member States' constitutions. It is not a question of denying the doctrine of supremacy of EC law as such, but rather a question of denying that EC law could interfere with basic constitutional norms or, in the words of de Witte, it is a question of "where to set the limits of the penetration of EC law into domestic constitutional order".<sup>155</sup>

In scholarly writings, the challenge by national constitutional courts is often presented as a debate between the ECJ and the German Constitutional Court.<sup>156</sup> It is true that the German Constitutional Court has in a few cases, which will briefly be discussed, held that EC law may have precedence over German law as such, but cannot prevail over certain fundamental principles and, especially, fundamental rights protected in the German constitution. In the first so-called Solange case, Solange I,<sup>157</sup> the Constitutional Court refused to accept the supremacy of Community law due to the reason that the court protected certain fundamental rights which were not equally protected within the Community legal order. Therefore the Constitutional Court decided, although the court is not entitled to decide upon the validity of legal acts of the Community,<sup>158</sup> that it could declare a Community legal act inapplicable if

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<sup>154</sup> De Witte B., (a) 1999, p. 201.

<sup>155</sup> Ibid., p. 202.

<sup>156</sup> The question concerning the relation between EC law and national legal orders is much more complicated than merely a conflict involving the question of supremacy in relation to national constitutional rights. However, "the discussion" between the German Constitutional Court and the ECJ in relation to supremacy and national constitutional rights is very fruitful and will therefore also be discussed, briefly, in this context. It has to be said that this problem does not merely affect the relation between EC law and the German legal order and does not only concern fundamental rights issues, but, due to the reason that this has been discussed in an abundance of writings in books and articles concerning the question of supremacy, just the main points of relevance concerning fundamental rights issues will be highlighted.

<sup>157</sup> Case 2 BvL 52/71, Internationale Handelsgesellschaft, judgment of 29 May 1974. CMLR, 1974:2, p. 540.

<sup>158</sup> It has to be underlined that this is the view of the ECJ. See Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, judgment of 22 October 1987. The answer to the question of who has the ultimate authority to determine the scope of Community competence between the Member States and the Community is still very much a controversial question. For the

fundamental rights were violated. The Constitutional Court stated that fundamental rights form an inalienable component of the German Constitution.

The Court proclaimed that it would exercise control concerning the consistency of Community law with German constitutional law *as long as (solange)* the Community lacks a codified catalogue of fundamental rights. The refusal by the court to accept the absolute supremacy of EC law was connected to article 24 (1) of the German constitution, which allows a transfer of the legislative powers to international organisations. But the transfer of powers did not include the power to “open the way to amending the basic structure of the Constitution” and to amend an “inalienable essential feature” of the German constitutional structure, the protection of fundamental rights.<sup>159</sup> The court therefore concluded that the protection of fundamental rights in the German constitution would overrule Community law in the event of a conflict.<sup>160</sup> In the second Solange case, Solange II,<sup>161</sup> the Constitutional Court had a change of heart in that it now considered that the protection of human rights within the Community was satisfactory by stating that, “so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights...the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation.... And will no longer review

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purposes of this chapter, I will take no firm stand on this highly interesting and theoretical question.

<sup>159</sup> Case 2 BvL 52/71, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel, judgment of 29 May 1974 in 2 CMLR (1974), p. 549.

<sup>160</sup> For a more thorough discussion of the German challenge in Solange I of EC law supremacy, see Ojanen, T., 1998, pp. 100-106. See also case 183/1973 Frontini v. Ministero delle Finanze, judgment of Corte Costuzionale of 27 December 1973. CMLR, 1974:2, p. 372. The Italian Constitutional court confirmed that it would continue to review the exercise of power by the institutions of the EEC concerning possible infringement of fundamental rights and basic principles of the Italian constitutional order. In 1984, Case 170/1984 S.P.A Granital v. Amministrazione finanziaria, judgment of 8 June 1984 the Corte Costituzionale upheld the ECJ view on the issue of supremacy of Community law. For an English translation of the case, Gaja, G., 1984, pp. 756-772. The Italian Constitutional Court saw Community law as an external autonomous legal order that is as such applicable within the Italian legal order. The Court, however, still reserved the right to review on the conformity of Community law with fundamental values of the Italian constitutional order, i.e. fundamental rights. For a comment on the implications of the Granital case, se La Pergola & Del Luca, 1985, pp. 598-621.

<sup>161</sup> Case 2 BvR 197/83, Re Wunsche Handelgesellschaft, judgment of 22 October 1986 in 3 CMLR, 1987 p. 225.

such legislation by the standard of fundamental rights contained in the Constitution". This was the result of the strengthening of fundamental rights protection within the Community.

In other words, the court had modified its earlier position due to certain political and legal developments in the Community. However, in 1993 in the so called "Maastricht case"<sup>162</sup>, the Constitutional Court once again warned that "an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities". However, the court declared that it would exercise its jurisdiction concerning applicability on secondary Community legislation in Germany in a "relationship of co-operation" so that the ECJ "guarantees protection of basic rights in any particular case for the whole area of the European Communities and that the *Bundesverfassungsgericht* would restrict itself to "a general guarantee of the constitutional standards that cannot be dispensed with".<sup>163</sup> The court's acceptance of the supremacy of community law is not unconditional and the court is prepared to declare Community legislation inapplicable if it violates fundamental rights contained within the German Constitution. The *Maastricht case* was not solely concerned with fundamental rights protection in the Community, but also more generally with the determination of Community competence and the sovereignty of the Member States. The Constitutional Court wanted to emphasize that it possessed the ultimate power to determine the kompetenz-kompetenz<sup>164</sup>, i.e. that the limits of Community competence is in the hands of the Member States.<sup>165</sup>

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<sup>162</sup> Cases 2 BvR 2134/92 and 2159/92, Manfred Brunner and others v The European Union Treaty, judgment of 12 October 1993 in 1 CMLR 57,1994, para. 13.

<sup>163</sup> Ibid.

<sup>164</sup> For a discussion of the question kompetenz-kompetenz, see for example Weiler J., & Haltern, U., 2000, pp, 331-364.

<sup>165</sup> According to the constitutional court, "the Federal Republic of Germany...will remain a member of a federation of states, the common authority of which is derived from the Member States and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law is applied. Germany is one of the "Masters of the Treaties" (Herren der Verträge)...". Brunner v The European Treaty CMLR, 1994:1 para. 55. For a more thorough discussion on the challenge of EC law supremacy, see Ojanen, T., 1998, pp. 313-319. The same approach has been adopted by Corte Costituzionale in the Case 232/1989, Spa Fragd v. Amministrazione delle Finanze, judgment of 21 April 1989, where the Italian Constitutional Court stated that it is ultimately within its competence to "ascertain...whether a provision of the Treaty, as interpreted and applied by the Community institutions, is in conflict with the principles of our Constitutional system, or with the inalienable rights of the human person". The English text of the case in Oppheimer A., (Ed.)

A fairly recent case from the Constitutional Court is the so-called *Bananas case*<sup>166</sup> concerning an action brought by Germany for the annulment of Council regulation 404/93,<sup>167</sup> which establishes a common organisation for the banana market. The initial proceedings were brought before the German Administrative Court in Frankfurt where several German importers of bananas issued an action before the court against the EC regulation limiting third-country import of bananas, arguing that it infringed on their property rights, professional liberties and equal protection under German Constitutional law. The German Administrative court in Frankfurt found the complaint to be well founded and referred the case to the Constitutional Court as required under article 100 of the Constitution. The Constitutional court once again dealt with the competence of the ECJ and the court itself concerning the question of judicial protection of fundamental rights. The Constitutional Court stated that

A congruent protection in the various fundamental rights areas of the German constitution by the European Community law and the case law of the European Court of Justice based thereupon is not required. Constitutional requirements corresponding to the set conditions set out in...(the *Solange II* case) are satisfied when the case law of the European Court of Justice generally guarantees an effective protection of fundamental rights vis-à-vis the sovereign power of the Communities, which can be considered as essentially equivalent to the fundamental rights protection that is indispensably required by the German Basic Law, in particular as it generally safeguards the essential core of the fundamental rights<sup>168</sup>

The court proclaimed that the Administrative Court had “misunderstood” the *Maastricht* case in arguing that the court in *Solange II* determined not to exercise its jurisdiction in protecting German standards of fundamental rights whereas it had a change of heart in the *Maastricht* case. The Constitutional Court claimed that the *Maastricht* case did not reserve or limit the *Solange II* case in any way. It is true that *Solange II* and the *Maastricht* case do not contradict each other, but it must be emphasized that the latter case underlined to a greater extent the court’s jurisdiction concerning fundamental rights. The court made it clear that

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*The relationship Between European Community law and National Law- The Cases*, 1994. In other words, the Italian Constitutional court is willing to review the consistency of Community law with Italian Constitutional fundamental rights. For a comment on the Italian Constitutional Court case law, see Gaja, G., 1990, pp. 83-96.

<sup>166</sup> BverfG, 2 BvL 1/97, judgment of 7 June 2000.

<sup>167</sup> Case 280/93 Germany v. European Council, judgment of 5 October 1994.

<sup>168</sup> BverfG, 2 BvL 1/97, judgment of 7 June 2000, para 61. Free translation by Peters, A., 2000, pp. 276-282.

it will not give up its aspiration to review fundamental rights protection within the Community legal order, but will exercise its jurisdiction in individual cases only in the event that the protection of fundamental rights within the Community legal order has dropped below the German minimum standard of fundamental rights.<sup>169</sup> This case shows that the Constitutional Court is perhaps more willing to cooperate rather than go into open confrontation with the ECJ since it proclaimed that it will not review all Community measures against the German Constitutional law. Perhaps also, the prospects of adopting the EUCFR influenced the German Constitutional Court to such a degree that it was convinced by the legal evolution taking place within the EU concerning fundamental rights protection. The question of the absoluteness of the supremacy of EU law is however not yet solved.

A new approach questioning the validity of the absolute form of the doctrine of EU supremacy has also become standard practise in the Constitutional Law Committee of the Finnish Parliament.<sup>170</sup> According to Ojanen, “constitutional rights do shape domestic decision-making pertaining to EU affairs, even so to the extent that constitutional rights can be said to qualify the primacy of EU law over Finnish law. This new tendency is already evident in light of the practice of the Constitutional Law Committee, which has even gone so far as to emphasise that domestic implementation of EU law may not weaken the level of national protection of constitutional rights”.<sup>171</sup>

This approach that has gained new ground has evidently potential to pose tension between EU law and national constitutional law. It does not easily fit with Member States duty to implement EU law. In order to avoid tension between constitutional rights protected under the Finnish Constitution and EU law, the Constitutional Law Committee has generally sought to read EU law in harmony with national constitutional rights. This solution might however be problematic from an EU law point view as national law should be interpreted in conformity with EU law and not the other way around. However, it is not contrary to EU law to offer a more extensive protection compared to the standard of protection in EU law. The margin of discretion left to Member States in implementing directives and framework decisions under the third

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<sup>169</sup> Peters, A., 2000, pp. 280.

<sup>170</sup> In the absence of a Constitutional Court in Finland, the Constitutional law Committee of the Parliament in Finland has the task of reviewing that bills brought before the parliament are in conformity with the Finnish Constitution. On the role of the Finnish Constitutional Law Committee, see Ojanen, T., 2004 (b), p. 532.

<sup>171</sup> *Ibid*, p. 542 and references to PeVL 25/2001 and PeVL 9/2004.

pillar has made it easier to take into account national constitutional rights and other international human rights obligations.<sup>172</sup> The practise from the Finnish Constitutional Law Committee however reveals that it is prepared to underline the importance of protecting Finnish constitutional rights and take into account Finland's obligation under international human rights law in implementing of EU law.

The increased readiness to question the absoluteness of EU supremacy has gained new ground with regard to the implementation of the European Arrest Warrant in Poland and Germany. The framework decision provided that all Member States should implement it by 1<sup>st</sup> January 2004. On 18 July 2005, the German Constitutional Court declared the European Arrest Warrant Act void as the act touches upon the freedom from extradition of German citizens protected under article 16 (2) of the basic law. The Court found that the German Act was disproportionate due to reason that the legislator had not exhausted the margin of discretion afforded to it by the framework decision, i.e. the legislator did not take into account article 16 (2) of the German basic law including the lack of any possibility to challenge the judicial decision of extradition violating article 19 (4) of the Basic law.<sup>173</sup> What the Constitutional Court essentially said was that the German Basic law protecting fundamental rights need to be taken into account in implementing EU law. The Constitutional Court held that the framework decision on the European arrest warrant encroaches upon the freedom from extradition in a disproportionate way and that the German legislator should have given more consideration to the in respect of the rights concerned protected under the basic law.

Similarly, on the 27 April 2005, the Polish Constitutional Tribunal proclaimed that the article 607 (1) of the Criminal Procedural Code permitting a Polish citizen to be extradited to another EU Member State was

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<sup>172</sup> The national implementation of the Council Framework Decision on combating terrorism (O.J. L 164 of 22 June 2002) and Council Framework Decision on the European Arrest Warrant (OJ L 190 of 18 June 2002) in Finland provide examples where the starting point was that national constitutional rights and international human rights obligations was to be taken into account in the national implementation. Several changes, for instance that extradition could be postponed or denied for a person defined as a child in accordance with the UN Convention of the rights of a child at the time of committing an offence, were made by the Constitutional Law Committee in order to secure the protection of constitutional and international human rights obligations. See opinions of the Constitutional law Committee 48/2002 and 18/2003.

<sup>173</sup> 2 BvR 2236704, judgment of 18 July 2005.

unconstitutional under article 55 (1) of the Constitution.<sup>174</sup> The Supreme Court of Cyprus has taken a similar stand based on article 11 of the Cypriot Constitution.<sup>175</sup> By way of contrast, The Czech Constitutional Court dismissed an action brought up by a group of senators and members of Parliament arguing that the national implementation of the framework decision is unconstitutional on ground the that it authorised the surrender on Czech nationals and abolished the double criminality rule.<sup>176</sup>

The Belgian Constitutional Court has recently requested a preliminary ruling of the ECJ on the validity of the Council framework, i.e. whether it is, *inter alia*, compatible with article 6 (2) TEU.<sup>177</sup> The question raised was whether it is compatible with equality before the law to execute a European arrest warrant for offences listed in article 2 (2) of the framework decision. Article 2 (2) articulate the double criminality rule which does not apply in respect of 32 offences listed in the framework decision. AG Ruiz-Jarabo Colomer held that the introduction of different conditions based on the nature of the facts in not problematic in terms of the equality of the law since it takes into account the nature of the offence and not the personal situation of an individual. He underlined the difference in nature of the offences and the penalties thereof, thus being reasonable and justified in combating crime in an area of freedom, security and justice. He also held that the difference was proportionate as the European arrest warrant is build around objective and not on subjective criteria and on the principle of the rule of law where the rights of the individual in the course of criminal proceedings are secured. Consequently, AG Ruiz-Jarabo Colomer concluded that article 2 (2) of the framework decision respects article 6 (2) TEU being consistent with the principle of equality and the principle of legality in criminal proceedings. The dialogue between the Constitutional Courts of the Member States will continue when the ECJ issues its ruling on the questions raised by the Belgian Constitutional Court on an aspect of the framework decision.

The discussion in the legal doctrine on the relation between Community law and national law and how it should be resolved does not necessarily evolve around the issue of who is final arbiter of constitutionality in Europe. The national implementation of the European Arrest Warrant has placed the

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<sup>174</sup> Case P 1/05, judgment of the Polish Constitutional Tribunal 27 April 2005.

<sup>175</sup> Case 294/2005, judgment of 7 November 2005.

<sup>176</sup> Case 66/04, judgment of 3 May 2006.

<sup>177</sup> Case 303705, *Advocaten voor de Wereld VZW v. Leden van de Miniserrad*, opinion of the Advocate General Ruiz-Jarabo Colomer of 12 September 2006.

absolute supremacy of EU law into the spotlight. Proponents of legal pluralism, rather than on a view that the that the legal system is dependent on a hierarchical structure of the law, such as McCormick<sup>178</sup> and Maduro<sup>179</sup> argues that European law is not to be conceived in terms of a hierarchical understanding of the law. Legal pluralism is based on the theory that EU [constitutional] law is the creation of a legal dialogue between the ECJ and national courts. The legitimacy of European constitutionalism, according to Maduro, has its basis in the “bottom-up” effect on the nature of the European legal order. It would therefore not make sense to stick to a hierarchical conception of law in the context of understanding the relation between EU law and national law. The thoughts presented by the two distinguished scholars are to be situated on the level of legal interactions between different legal orders, such as on the interaction between international law, EU law and national law. The golden idea is that norms conflicts between Union law and national [constitutional] law cannot be solved by way of sticking eternally to the supremacy principle.

It is a dead-end road from both the ECJ perspective and national constitutional law perspective. Both national and EU law assume to be the final arbiter of European constitutionality. According to Maduro, “it has now become usual to high-light how different national and European perspectives on the notion of ultimate authority in Europe require a constitutional pluralist conception of the relationship between European and national constitutionalism”.<sup>180</sup> Without losing track by diving deeper and deeper into the quest on how to solve the ultimate challenge on the issue of constitutional “grundnorm”, it is sufficient for the present purposes to state humbly – no more no less – that the judicial bodies would have to strive for solutions that ultimately would avoid falling into the trap of entering into direct conflict, i.e. striving towards constructive cooperation where both national and Community courts takes into account the constitutional boundaries of the other having as the ultimate guiding principle the principle of coherence.

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<sup>178</sup> McCormick, N., 1998, pp.1-18.

<sup>179</sup> Maduro, M., 2003, pp. 501-537 (b) and Maduro, M., 2003 (c), pp. 95-100 emphasising mutual engagement of national and European legal orders and Weiler, J., 2003, pp. 7-23 emphasising constitutional tolerance. See also Kumm, M., 2005, pp. 262-307.

<sup>180</sup> Maduro, M., 2003, (b) p. 501.

## 2.4 The evolution of the human rights doctrine-the role of the ECJ

### 2.4.1 Early case law of the ECJ

The “story” of the evolution of the fundamental rights doctrine is equally well known as that of the constitutional dialogue between the ECJ and the national constitutional courts. This is natural as both lines of case law are, to an extent, prerequisites for one another. The intention is therefore not to discuss the jurisprudential development in any great detail. Rather, the intention is to discuss some important landmark case law that clearly has been of great importance for the process of drafting the EUCFR. Initially, the ECJ denied in the *Stork case*<sup>181</sup> that it had competence to protect fundamental rights in Community law. The initial motivation for the protection of fundamental rights by the ECJ was connected with the desire to defend the supremacy of Community law in early case law. The “story” or the evolution of fundamental rights as unwritten general principles of Community law began in the late 1960s when the ECJ was confronted with two German references for a preliminary ruling in accordance with article 177 of the EEC Treaty in which the ECJ had to consider whether acts of Community institutions under article 189 of the EEC Treaty were compatible with fundamental rights protected in the German Constitution. The ECJ ruled in the *Stauder case*<sup>182</sup> that fundamental human rights are enshrined in Community law as general principles of

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<sup>181</sup> Case 1/58, *Stork v. High Authority of the European Coal and Steel Community*, judgment of 2 April 1959. The ECJ stated that, “under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its Decision, it infringed principles of German constitutional law...” See also joined cases 36, 37, 38-59 and 40-59, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v. High Authority of the European Coal and Steel Community*, judgment of 15 July 1960. The ECJ stated that “It is not for the court, whose function is to judge the legality of Decisions adopted by the High Authority and, as obviously follows, those adopted in the present case under Article 65 of the Treaty, to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the court may neither interpret nor apply Article 14 of the German basic law in examining the legality of a Decision of the High Authority”.

<sup>182</sup> Case 29/69 *Eric Stauder v. City of Ulm*, judgment of 12 November 1969.

Community law and are therefore protected by the Court. This case was a turning point in that the ECJ recognised for the first time that fundamental rights form an integral part of general principles of Community law. The ECJ suddenly “discovered” or used legislative innovations to fill judicial gaps in EC law by proclaiming that fundamental rights form part of the general principles of law.<sup>183</sup>

In the *Stauder case*, the ECJ confirmed the existence of fundamental rights in Community law without, however, further specifying their content or primary source.<sup>184</sup> In the *Internationale Handelsgesellschaft case*<sup>185</sup>, however, the ECJ went on and proclaimed that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”. Here, the ECJ introduced a “source of inspiration” by stating that constitutional traditions common to the Member States form part of the general principles of Community law.

A few years later, in the *Nold case*<sup>186</sup>, the ECJ reaffirmed that “in safeguarding these (fundamental) rights, the ECJ is bound to draw inspiration from constitutional traditions common to the member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States. Furthermore, the ECJ introduced a new source of inspiration by stating that also “international treaties for the protection of human rights, on which the member States have collaborated or of which they are signatories, supply guidelines which should be followed within the framework of community law”.<sup>187</sup> In the three above-mentioned cases, the ECJ had affirmed that fundamental rights are protected within the Community legal order as general principles of Community law and that the ECJ draws inspiration and guidelines from constitutional traditions

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<sup>183</sup> Rasmussen submits that the ECJ simply made a new law out of nothing by substituting litigation for constitution making. See Rasmussen, Hjalte, 1986, pp. 403 – 409.

<sup>184</sup> Weiler has stated that, “the surface language of the Court in *Stauder* and its progeny is the language of human rights. The ‘deep structure’ is all about supremacy. ... (It was) an attempt to protect the concept of supremacy threatened because of the apparent (largely theoretical) inadequate protection of human rights in the original treaty systems”. Weiler, J., 1991 p. 580-581.

<sup>185</sup> Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-unde Vorratstelle für Getreide und Futtermittel*, judgment of 17 December 1970.

<sup>186</sup> Case 4/73 *Nold v. Commission*, judgment of 14 May 1974.

<sup>187</sup> *Ibid.*, para. 13.

common to the Member States as well as from international human rights treaties to which Member States are signatories.

In other words, as a result of the fact that the founding treaties did not contain an explicit fundamental rights catalogue, the ECJ had to “fill a gap” in the treaties by using the concept of general principles of Community law. However, the ECJ also stated that the validity of community acts or measures taken by the Community must be reviewed in the light of Community law and “must be ensured within the framework of the structure and objectives of the Community”.<sup>188</sup> It is widely accepted that part of the motivation by the ECJ in creating a fundamental rights doctrine was to protect the supremacy of EC law over national (constitutional) law.<sup>189</sup> In other words, the development of the ECJ fundamental rights protection also had functions other than the protection of fundamental rights *per se*, such as the promotion of European integration and safeguarding the supremacy of EC law.

## 2.4.2 Sources of fundamental rights

### 2.4.2.1 Constitutional traditions common to the Member States

The three cases mentioned above (*Stauder*, *Internazionale Handelsgesellschaft* and *Nold*) laid the groundwork for the future development of the human rights doctrine. As expressed in the early case law of the ECJ, fundamental rights are protected within the Community legal order by way of general principles of Community law. It is well established that fundamental rights form an integral part of the general principles of law, which are observed by the court on the basis of article 220 of the TEC. The court applies the well-known method of analogy, i.e. filling a judicial gap in the treaties by analogous application of other rules to be part of primary law.

In the *Nold* case, the ECJ underlined its commitment to the protection of fundamental rights and the method by which the court will operate in the absence of a written Community catalogue of fundamental rights. The court went on to state that, “the court is bound to draw inspiration from constitutional traditions...” The binding nature of the court statement is softened to merely a commitment to “draw inspiration” from *common* constitutional traditions. This source of inspiration is problematic in the sense

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<sup>188</sup> Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-unde Vorratstelle für Getreide und Futtermittel*, judgment of 17 December 1970, para. 4.

<sup>189</sup> See for example, Coppel, J., & O’Neill, A., 1992, p. 669, Weiler, J., 1991 p. 580-581, De Witte, B., (b) , 1999, p. 866.

that constitutional traditions are different in different Member States. Naturally, there are differences between Member States concerning, first of all, which rights are being protected as fundamental rights and, secondly, the extent to which the level of protection may differ with regard to specific rights.

There has been a lot of controversy concerning the question of whether the ECJ should adopt a “maximum standard approach”, i.e. the highest level to be found in one Member State, or, alternatively, a “minimum standard approach” protecting fundamental rights only insofar as they can be found in all the Member States. Both approaches are problematic in that every legal order has to find a unique balance between different principles. This is especially important concerning fundamental rights, where it is a question of looking for a balance between the individual interests to be protected against the general interest.<sup>190</sup> A “maximum standard approach” would ultimately lead to a dead-end situation in which there is a conflict of interest between individuals and where Member States put different weight on certain basic values.<sup>191</sup> The “maximum standard approach” would tend to focus more on individualist interests in that it would protect the highest level of individual rights and place a large number of restrictions of the public common good resulting in a minimum standard for the general interest of the Community.

The “minimum standard approach” would, on the other hand, reverse the situation by putting more emphasis on the general interest of the Community.<sup>192</sup> The case law of the ECJ would suggest that the court is not seeking a “maximum standard approach” in the sense that the court would be looking for the highest level of protection of a specific right found in one Member State simply for the reason that this would lead to a situation in which the court would subject the protection of fundamental rights of Community law to a specific level of protection offered in one Member State. The same is true with regard to the “minimum standard approach”.

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<sup>190</sup> This is not to deny, however, that in rights discourse there should not be any absolute rights. An example of an absolute right is freedom from torture.

<sup>191</sup> An example would be the right to life of the unborn child and the mother’s right to abort a foetus under certain circumstances. Should the ECJ follow the maximum standard approach in almost protecting the absolute right of the foetus to life as protected under the Irish Constitution or protect the mother’s *general right* to choose abortion for example in Finland. See case 159/90, *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, Judgment of 4 October 1991.

<sup>192</sup> Concerning the difficulties of using the “maximum standard approach” as a method of seeking inspiration from the constitutions of the Member States, see Weiler, J., 1995, pp. 56-66.

The “minimum/maximum standard approach” would not in any way reflect that the ECJ should look for inspiration in constitutional traditions *common* to the Member States.<sup>193</sup> Such an approach would in fact work counter to the approach taken by the court earlier in its case law in that the court cannot review the validity of a Community measure against the criteria of a specific right protected within a particular constitution of a Member State, which would cause obvious problems for efficiency and the unity of Community law.<sup>194</sup> The ECJ is trying to establish a common constitutional standard for all the Member States when seeking inspiration from the constitutions of the Member States by looking for neither the lowest nor the highest standard of protection to be found within the Member States. The ECJ has adopted a method of “focusing its attention exclusively on what it considered to be the constitutional precepts common to member States”.<sup>195</sup> This does not categorically mean that the ECJ is bound to draw inspiration from *all* Member State constitutions in order to establish a fundamental right of Community law, but rather, it means that the ECJ will look for common features when establishing fundamental rights protected “within the framework of the structure and objectives of the Community”.<sup>196</sup>

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<sup>193</sup> Besselink has recently argued for the “maximum standard approach” by stating in essence that this would provide for the best protection of fundamental rights and at the same time avoid the conflict between the Community legal order and national constitutional law. See Besselink, L., 1998, pp. 629-680. This approach would, however, fail to recognise the “common element” and would also always privilege one constitutional right protected in one single Member State over the others. Indeed, the choice of which rights are considered as “fundamental” varies among the Member States and reflects the value preferences chosen in one particular Member State. There is no reason for the ECJ to start choosing the “maximum standard” in order to privilege certain fundamental value choices in one Member State over standards in other Member States. The ECJ should be looking for the European Level of protection inspired by the *common* element of the constitutional traditions of the Member States.

<sup>194</sup> Ojanen, T., 1998, pp.111-112.

<sup>195</sup> Ibid. p. 109. The comparative method used by the ECJ is illustrated in the case 155/79, AM & S Europe Limited v Commission of the European Communities, judgment of 18 May 1982, see especially para. 18-22.

<sup>196</sup> Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr-unde Vorratstelle für Getreide und Futtermittel, judgment of 17 December 1970, para. 4. According to Mancini, “the court does not have to go looking for maximum, minimum or average standards. The yardstick by which it measures the approaches adopted by various legal systems derives from the spirit of the Treaty and from requirements of a Community which is in the process of being built up”. Reference from Hartley, T.C., 2003, p. 139.

In the *Hauer case*, the ECJ made references to the German, Italian and Irish Constitutions despite the fact that the court ruled that, "it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States".<sup>197</sup> In the *Hauer case*, the applicant wished to plant vines on her land, but was prevented from doing so by Council regulation 1162/76/EEC. The applicant argued that the Council regulation infringed on her property rights as protected under the German Constitution. The ECJ stated that "fundamental rights form an integral part of the general principles of law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those states are unacceptable in the Community..." The Court, however, replied that, "the question of a possible infringement of fundamental rights by a measure of Community institutions can only be judged in the light of Community law. The introduction of special criteria for the assessment stemming from the legislation or constitutional of a particular Member State would, by damaging the substantive unity and efficiency of Community law, lead inevitably to the destruction of the unity of the common market and the jeopardizing of the cohesion of the Community".<sup>198</sup> Therefore, the right to property is guaranteed in Community law in accordance with the *ideas common* to the constitutions of the Member States, which are also reflected in protocol 1 of the ECHR.

The constitutional practises are used by the court as a source for seeking inspiration from ideas inherent in the right to property. According to Weiler, "constitutional practices of the Member States are not used by the Court as a test for constitutionality of the Community measure but simply as a source for culling the "ideas" inherent in the right to private property".<sup>199</sup> The conclusion is that the ECJ does not seek a "maximum/minimum approach" in order to establish a common constitutional standard, but rather, it seeks a common standard for the legal orders of all Member States.

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<sup>197</sup> Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, para. 20.

<sup>198</sup> Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, para. 14 and 15.

<sup>199</sup> Weiler, J., 1995, p. 63.

#### 2.4.2.2 International human rights treaties

The second source of inspiration used by the ECJ is international human rights treaties. As noted above, this source was introduced in the *Nold case*, where the court stated that, “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”. In the *Rutili case*,<sup>200</sup> concerning the legality of certain Member States restricting the free movement and residence of nationals of other Member States on the grounds of public policy, the ECJ for the first time made a reference to an international human rights treaty, namely the ECHR by stating that “limitations placed on the powers of member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in articles 8, 9, 10 and 11 of the (ECHR)...ratified by all the Member States and article 2 of protocol no 4...(stating) that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-mentioned articles other than such as are necessary for the protection of those interests in a democratic society”.

The reason why the ECJ did not earlier make a reference to the ECHR was probably that it felt that it “had to wait” for all Member States to ratify the ECHR before the Court could make an explicit reference to the convention.<sup>201</sup> Later on, in the *Konstantinidis case*,<sup>202</sup> Advocate General Jacobs made a reference to the ICCPR even though Greece had not yet ratified the said convention.<sup>203</sup> After the *Rutili case*, references to the ECHR become more and more common in the case law of the ECJ.<sup>204</sup> However, the ECHR is not the only international human rights treaty that the ECJ has found inspiration and guidance from in its case law. The ECJ and its Advocates General have referred to international human rights treaties other than the ECHR, although to a lesser extent. These references include the European Social Charter and ILO Convention 111 in the

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<sup>200</sup> Case 36-75, *Roland Rutili v Ministre de l'intérieur*, Judgment of 28 October 1975.

<sup>201</sup> France was the last country of the Member states if the European Community to ratify the ECHR in May 1975.

<sup>202</sup> Case 168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw –Ordnungsamt*, Opinion of Mr Advocate General Jacobs delivered on 9 December 1992, para. 35.

<sup>203</sup> Greece has, however, subsequently ratified the ICCPR on 5 May 1997.

<sup>204</sup> For a discussion about the special status of the ECHR in Community law, see chapter 2.4.2.3.

second *Defrenne case*,<sup>205</sup> which concerned the elimination of sexual discrimination, to the ICCPR of 1966 in the *Orkem case*,<sup>206</sup> which concerned a breach of the rights of the defense, and, more recently, in the *Grant case*,<sup>207</sup> which concerned discrimination on the grounds on sexual orientation, in which the court stated that the UN “Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law”. The ECJ noted also that the Human Rights Committee is not a judicial institution and the findings of the Committee have no binding force in law.

The Human Rights Committee had noted in one case that the reference to “sex” in article 2 (1) of the Covenant does include a prohibition against discrimination based on sexual orientation.<sup>208</sup> According to the ECJ, such an interpretation is not generally accepted as part of the concept of discrimination based on sex and cannot therefore constitute a basis for the ECJ to extend the scope of article 119 (equal pay without discrimination based on sex) of the Treaty. It is clear that international human rights treaties no more than constitutions of the Member States bind the ECJ, but in the words of the court itself, merely provide inspiration and guidelines in the interpretation of fundamental rights within the Community legal order. It should be noted that, in seeking guidance from international human rights treaties, the ECJ does not limit itself only to instruments that *all* Member States have adhered too, but also to “international treaties...on which the Member States have collaborated or of which they are signatories”.<sup>209</sup>

#### **2.4.2.3 Special emphasis on the European Convention of Human Rights**

The ECHR has been and, even after the adoption of the EUCFR in December 2000, continues to be an important source of inspiration for the ECJ. The adoption of the EUCFR has not, at least in its initial years of existence, had any significant impact on the case law of the ECJ. As already noted above, the ECJ

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<sup>205</sup> Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, judgment of 15 June 1978, para. 28.

<sup>206</sup> Case 374/87, *Orkem v. Commission of the European Communities*, judgment of 18 October 1989, para 18 and 31.

<sup>207</sup> Case 249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, judgment of 17 February 1998, para. 43-47.

<sup>208</sup> Communication No. 488/1992, *Toonen v. Australia*, views adopted 31 March 1994, para. 87.

<sup>209</sup> For a reference to cases where the ECJ has referred to international human rights treaties in seeking guidance for its decisions, see, for example, *Rosas, A.*, 2005, (d) pp. 163-175.

identified international human rights treaties as one of its primary sources of inspiration, whose observance is guaranteed in the Community legal order. An explicit reference to the ECHR was for the first time made in the above-mentioned *Rutili case*. Since then, the function of the European Convention became more and more instrumental in the case law of the ECJ and one can find numerous references to provisions of the ECHR “which must be taken into consideration in Community law”.<sup>210</sup>

At first, the Court made general references to the ECHR, as it did in the previously mentioned *Hauer case*, where the ECJ took notice that, *inter alia*, the right to property is protected under protocol 1 of the ECHR. The ECJ has, in its case law, accorded “special significance” to the ECHR.<sup>211</sup> Given the special status of the ECHR in the case law of the ECJ, it would seem very unlikely that the court would disregard or not recognise a right of the ECHR as a fundamental right of Community law.<sup>212</sup> Therefore, in light of article 6 (2) of the TEU, it seems that the Community is bound to respect as a minimum the standards of the ECHR, which thus forms an integral part of Community law. This would seem to be even more true in light of the new EUCFR. The Community is still, however, not formally bound by the ECHR, but it is generally accepted that the Convention has the same effect “as if” the Community would be bound by the ECHR.<sup>213</sup> The ECJ, however, does not apply human rights as national courts or international supervisory bodies have interpreted them, but rather, it uses these institutions as sources of inspiration to assist the ECJ in defining fundamental rights as a special category of general principles of Community law.<sup>214</sup>

This approach has led in some cases to a situation where ECJ jurisprudence at times may conflict with the authoritative interpretations of the European Court of Human rights.<sup>215</sup> O’Leary saw a real danger in that the ECJ

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<sup>210</sup> Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, judgment of 15 May 1986, para. 18.

<sup>211</sup> Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, judgment of 21 September 1989, para. 13. Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, judgment of 18 June 1991, para.41. Case 299/95, *Friedrich Kremzow v Republik Österreich*, judgment of 29 May 1997, para. 14. See also opinion 2/94, *Opinion 2/94*, para. 33.

<sup>212</sup> Tridimas, T., 2000, p. 237.

<sup>213</sup> *Ibid.*

<sup>214</sup> Lawson, R., 1994, p. 227.

<sup>215</sup> O’Leary, S., 1996, p. 364.

is “free” to interpret the provisions of the ECHR in a manner that is not necessarily coherent with the case law of the European Court of Human rights. The difference in approach between the European Court of Human rights and the ECJ “has been attributed to the fact that the Luxembourg Court has the responsibility for protecting the operation of the common market, while the Strasbourg Court is charged with protecting fundamental rights”.<sup>216</sup> As will be shown later on, recent case law from the ECJ clearly indicates that this fear has been exaggerated. Lately, and more frequently, general references to the ECHR provisions have evolved further into detailed analyses of the provisions of the ECHR. Indeed, the ECJ has started not only to take notice of the provisions of the ECHR, but also to take into account the case law of the European Court of Human Rights. The ECHR has proved to be of particular importance in recent cases concerning the rights of homosexuals and transsexuals under Community law.

The above-mentioned *Grant case*<sup>217</sup> is illustrative in this respect. The ECJ pointed out that stable homosexual relationships do not fall within the scope of articles 8 and 12 of the ECHR and refused therefore to equate a stable relationship between two persons of the same sex with marriage or stable relationships outside marriage between persons of opposite sex as being discriminatory for the purposes of article 119 (now 141) of the TEC. In the *P.v.S case*,<sup>218</sup> the ECJ relied on the definition of transsexuals by the European Court of Human Rights, stating that they are a “well-defined identifiable group”. These recent examples do make it clear that the ECJ is very much willing to seek guidance from the ECHR and from the case law of the European Court of Human Rights. However, one should not forget that a possible infringement of fundamental rights by a measure of Community institutions can only be judged in the light of Community law as proclaimed in the *Internationale Handelsgesellschaft case*. It can, however, be stated that during recent years, the court has been more willing to seek inspiration from the ECHR. No doubt, the ECHR is certainly, at least for the time being, the most important source of inspiration for the ECJ in seeking the protection of “fundamental rights” within the Community legal order as general principles of Community law.

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<sup>216</sup> *Ibid.*, p. 366. On the question of divergent case law between the ECtHR and the ECJ, see chapter 3.5.3.

<sup>217</sup> Case 249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, judgment of 17 February 1998, para. 33-34.

<sup>218</sup> Case 13/94, *P v. S and Cornwall County Council*, judgment of 30 April 1996, para. 13.

The latest example where the ECHR provided with the answer for the ECJ is the *Cresson case*.<sup>219</sup> This case is one trace of the scandal which led the Commission to resign in 1999. Mrs Cresson, former member of the Commission, complained, *inter alia*, to the ECJ that she did not have a legal remedy in case the Court decided to impose a penalty to her due to her undertakings as a Commissioner. She argued that an official of the European Communities may challenge a decision of the appointing authority before the Court of First Instance and appeal to the ECJ whereas a Commissioner do not have to possibility to appeal a judgment by the ECJ. She argued that the lack of a possibility to appeal in case the ECJ imposed a penalty on her constituted a breach of her fundamental rights of defence and right to effective judicial remedy, thus challenging article 213 TEC of being contrary to fundamental rights. The ECJ stated that article 2 (1) of protocol 7 to the ECHR provides the right to have his or her conviction or sentence reviewed by a higher court. However, as the ECJ noted, article 2 (2) of the protocol prescribes that the right may be subject to exceptions in cases where a person concerned has been tried in the first instance by the highest court or tribunal. Consequently, the lack of possibility to appeal a judgment of the ECJ constituting the first instance but also the highest court did not constitute a violation of Mrs Cresson's fundamental rights.<sup>220</sup>

### 2.4.3 National measures under Community law

The human rights doctrine developed by the ECJ was designed to fill a gap in the legal protection of individuals against the action of the Community institutions. However, as EC law is very much a part of national law, it also became evident that Member States should respect the fundamental rights "acting within the scope of Community law". This has been confirmed by the ECJ in a number of cases from the beginning of the 1980s. The starting point for the discussion on whether Member States should be obliged to comply with Community fundamental rights was the *Cinétheque case*,<sup>221</sup> where the ECJ stated that "although it is true that it is the duty of this court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European convention of national legislation which

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<sup>219</sup> Case 432/04, *Commission v. Cresson*, judgement of 11 July 2006.

<sup>220</sup> For a discussion of the relevance of the *Cresson case* for this work, see chapter 7.1.

<sup>221</sup> Joined cases 60 and 61/84., *Cinétheque SA and others v Fédération nationale des cinémas français*, judgment of 11 July 1985.

concerns, as in this case, an area which falls within the jurisdiction of the national legislator". This statement by the court contains two important things. First of all, it reaffirms that the ECJ only protects fundamental rights within the scope of Community law. Secondly, it specifies that implicit national measures adopted within the framework of Community law could be reviewed by the ECJ in accordance with the fundamental rights doctrine established by the Court.<sup>222</sup>

In the *Kremzow case*<sup>223</sup>, the ECJ confirmed that "where national legislation is concerned with a situation... which does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose the Court observes, such as those deriving in particular from the Convention (ECHR)". The case law of the ECJ shows that the Court is careful to examine whether national measures alleged to be in breach of Community fundamental rights fall within the scope of Community law. The ECJ makes it clear that issues falling outside the scope of Community law are not within its jurisdiction.<sup>224</sup> The basic problem is therefore to determine whether national measures fall "within the scope of Community law".<sup>225</sup> The ECJ has recognised as much in at least in two types of cases, for the purposes of Community fundamental rights review, when national authorities are acting in a Community law context. The first line of cases is represented by the *Wachauf case*<sup>226</sup>, where the ECJ for the first time ruled that the requirement to respect fundamental rights is also binding on Member States when they *implement* Community rules, i.e. when Member States are acting as agents or as

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<sup>222</sup> Ojanen, T., 1998, p. 298.

<sup>223</sup> Case 299/95 *Kremzow v. Republik Österreich*, judgment of 29 May 1997, para. 19.

<sup>224</sup> See also Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, judgment of 30 September 1987, para. 28.

<sup>225</sup> For a comparison with of the US incorporation of constitutional rights at the federal level against federal and State infringements where the substantive division of powers between the Union and the States has no relevance concerning the protection of fundamental rights, see Lenartens, K., 1991, pp. 368-372. The Community legal order is described as a distribution of law-making powers between the "central government" (the Community) and the Member States in that the dividing line between the Community/Union and its Member States is either substantive according to the subject matter or normative in the sense that the legislative function is within the Union and the executive function is left to the Member States.

<sup>226</sup> Case C 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgment of 13 July 1989, para. 19.

the executive arm on behalf of the Community. This position was confirmed in the *Karlsson case*<sup>227</sup>, where the Court stated that “it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States, when they implement Community rules”.

The second line of cases are those where the Court has recognised that Member States are acting within a Community law context when measures, which normally would be contrary to Community law, are *derogating* from the fundamental requirements of Community law (articles 30, 39:3, 46 and 55 of the ECT).<sup>228</sup> In the *ERT case*,<sup>229</sup> concerning Member State derogation from freedom to provide services in accordance with articles 46 and 55 of the TEC, the Court stated that “where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights”.<sup>230</sup> The existing case law of the ECJ suggests in essence that Member States are bound by fundamental rights guarantees when they are acting “within the scope of Community law”. The problem lies in the fact that it is often difficult to determine when national authorities are acting within the context of EC law and when they are not.<sup>231</sup>

Ultimately, it is up to the ECJ to determine when Member State measures fall within the scope of Community law. The Court has made it clear that in situations when national legislation falls within the field of application of Community law, the ECJ will provide the interpretation concerning the compatibility of the Member State measure in light of the fundamental rights standards of the European Union. However, concerning national measures

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<sup>227</sup> Case 292/97, Kjell Karlsson and others, judgment 13 April 2000, para. 37.

<sup>228</sup> Weiler, J & Lockhart N., part I, 1995, pp. 63-64.

<sup>229</sup> Case 260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, judgment of 18 June 1991.

<sup>230</sup> *Ibid.*, para. 43. See also case 368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag, Judgment of 26 June 1997, para. 24-25.

<sup>231</sup> For a more thorough discussion of the problem of whether national legislations fall within the scope of Community law, see Lenaerts, K., 2000 (a), pp. 590-594. At this point, it is interesting to note that article 51 (1) of the EUCFR proclaims that the provisions are addressed to the Member States only when Member States are “implementing Union law”. This approach is narrower than the one taken by the ECJ in its case law. More on this in chapter 3 dealing with the horizontal articles of the EUCFR.

falling outside the scope of Community law, the court exercises self-restraint by stating that it has no jurisdiction to review the compatibility with Community fundamental rights standards. The EU fundamental rights doctrine is connected with the scope of application of EU law and more generally, on the abstract level, follows the division of competence between the EU and the Member States. A completely different question is whether it is possible to draw any clear-cut line between the EU legal order and the legal orders of the Member States.

## **2.5 Codification of the human rights doctrine in treaty context**

The already well-known doctrine established by the ECJ from the 1970s was recognized for the first time in an official treaty in the preamble to the Single European Act (SEA) in 1986, which addressed the concepts of fundamental rights/human rights.<sup>232</sup> ECS-rights are part of this development, but their specific status is controversial. Reference to human rights and, in particular, to the ECHR was included for the first time in a treaty article, and not merely in the preamble of a treaty, in the Maastricht Treaty,<sup>233</sup> which established the European Union. Article F (2) of the TEU prescribed that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as general principles of Community Law”. Article F (2) of the Maastricht Treaty was nothing but a reaffirmation of the ECJ case law. In a way, it was a peculiar provision in that article L expressly excluded it from the jurisdiction of the ECJ. The legal significance was therefore highly questionable and resulted in a rather inconsistent form of protection. Individuals could bring alleged violations of fundamental rights before the ECJ based on unwritten general principles of Community law, but could not rely upon an explicit treaty provision that basically consolidated the case law of the ECJ as article F (2), which was not brought under the jurisdiction of the court.<sup>234</sup> One can only

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<sup>232</sup> The SEA refers in its preamble to “the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for Protection of Human Rights and Fundamental Freedoms and the Social Charter, notably freedom, equality and social justice”.

<sup>233</sup> Treaty on the European Union (Treaty of Maastricht), signed on 7 February 1992, entered into force 1 November 1993. O.J. C 191/1.

<sup>234</sup> For a discussion of the implication of article F (2) of the Maastricht Treaty, see for example Neuwahl, N., 1995, pp. 13-16. A step forward under the TEU was the obligation to respect fundamental rights not only under the EC treaties, but covering a larger area as well.

question the logic of that piece of legislation. With the Amsterdam treaty of 1997, this inconsistency was rectified with article 46 (d) of the TEU, which made article 6 (2) of the TEU (formerly article F2) justiciable.

The Treaty of Amsterdam affirms the commitment to fundamental social rights in its Preamble<sup>235</sup> as defined in the 1961 European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers.<sup>236</sup> Articles 2 and 3 of the TEC set out a number of social policies or activities that the Community shall promote, such as a high level of employment and social protection, equality between men and women, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States. Reference to social rights standards in the preamble of the TEU is noteworthy, since a reference to social rights was “dropped” from the Maastricht Treaty.<sup>237</sup> Article 136 of the TEC establishes fundamental social rights *as guidelines* for activities within the Community and in Member States as defined by the European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers.<sup>238</sup>

The provisions in the Amsterdam Treaty concerning fundamental rights, which aimed at strengthening the protection of human rights within the EU, were of a cautious nature. However, the Treaty of Amsterdam set out important social *objectives* for Member States and for the Union, such as the promotion of employment, improved living and working conditions, and proper social protection in accordance with the above-mentioned instruments.<sup>239</sup> Article 137 of the TEC states that “the Community shall support and complement the activities of the Member States in order to achieve the

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<sup>235</sup> The preamble of the TEU states that the “Union confirms the attachment to fundamental social rights is determined to promote economic and social progress for their peoples...”

<sup>236</sup> A commitment to social rights was explicitly made through the adoption of the EUCFR. The Charter has been considered as an important step towards a Community Bill of Rights, when the Heads of State of governments of eleven member states adopted the Community Charter of Fundamental Rights of Workers. The Community Charter of 1989 is a legally non-binding instrument. Ojanen, T., 1998. p. 292.

<sup>237</sup> The references to human rights treaties in the Maastricht Treaty were focused on the ECHR leaving out the reference to the European Social Charter. In the Single European Act (SEA) of 1987, a reference to European Social Charter can be found in the preamble.

<sup>238</sup> The legal status of the Community Charter has been uncertain also having a limited role in the Commission’s first report on the application of the Community Charter. The Commission underlined that the 1989 Community Charter is not a legally binding instrument and does not create any new legal obligations in Community law. COM (91) 511 final. See also Szyszczak, E., 1999, pp. 143-144.

<sup>239</sup> Rosas, A., 2000, pp. 96-97.

objectives" mentioned in article 136. Article 141 of the TEC does consolidate some of the ECJ case law by including the concept of equal pay for work of equal value and also by providing a legal base for further measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of explicit prohibition against wage discrimination based on gender.<sup>240</sup> The Amsterdam Treaty established new procedures for securing the protection of social rights as guidelines for activities within the Community and in Member States. Article 13 of the TEC empowers the Council, after consultation with the European Parliament, to take appropriate action in order to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The focus in the Amsterdam Treaty has been to develop social policy rather than to concentrate on setting up explicit social rights.<sup>241</sup>

The system of references, while leaving it to the ECJ to further develop the protection of fundamental rights, had the advantage of not requiring difficult political decisions in order to reach agreement on, for example, the adoption of a legally binding fundamental rights catalogue. The chosen solution in the Amsterdam Treaty provided flexibility for the ECJ by not formally binding it to the ECHR and the jurisprudence of the European Court of Human Rights. The ECJ was "free to interpret" and adapt the general principles of Community law to the needs and objectives of the Community. However, the system of references does not rectify the problem of legal certainty. The Convention does only "form an integral part of the general principles of law whose observance the Court must ensure". In the opinion of Toth, it is totally "unacceptable that there are no written, binding and enforceable rules on human rights in the Treaty of European Union other than the vague references to another international instrument which is not part of Community law".<sup>242</sup> The Court cannot decide on the cases and issues brought before it and, therefore, the protection of fundamental rights is developing only on a case-by-case basis.<sup>243</sup> The Court's decisions can only operate on an *ex post facto* basis, which does not ensure legal certainty.<sup>244</sup>

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<sup>240</sup> Szyszczak, E., 1999, p. 152.

<sup>241</sup> For a more through analysis of the concept of social rights and social policy within the EU, see for example Maduro, M.P., 1999, pp. 455-472, Sciarra, S., 1999 pp. 473-501. Szyszczak, E., 1999, pp. 141-155.

<sup>242</sup>Toth, A. G., 1997, p. 494.

<sup>243</sup> O'Leary, S., 1996, p. 369.

<sup>244</sup> Toth, A.G., 1997, p. 495.

The DG V (now employment, social affairs and equal opportunities) within the Commission established an independent expert group on fundamental Rights in 1999 in order to review the status of fundamental social rights in the treaties and, in particular, in the Amsterdam Treaty and to review the possibility of a Bill of Rights in the next revision of the treaties. The expert group, chaired by Professor Simitis, took a quite critical approach to the system of references to certain human rights conventions as a way of stating the Union's commitment to fundamental rights. The system of references would "suggest that fundamental rights are put on the same level irrespective of the document they are defined in... [R]eferences may at first suggest a clear commitment to a set of specific rules. In reality, they neither delimit the applicable rules in a sufficiently precise way, nor do they secure an equal respect for all fundamental rights".<sup>245</sup>

The Treaty of Amsterdam has been described as marking "a decisive step on the way to an even clearer recognition of the principle of fundamental rights protection by the European Union".<sup>246</sup> The Expert Group on Fundamental Rights, however, took a rather critical approach to the developments made in the Amsterdam Treaty by stating that, "if the European Union's commitment to fundamental rights, as expressed in the Amsterdam Treaty, is to be taken seriously, both the Member States and the European Union's institutions must act under the same premises in all the three pillars".<sup>247</sup> In their view, fundamental rights should be the "primary and decisive criteria" in all the activities of the institutions of the Union. How this was to be achieved was yet to be determined. The members of the expert group were inclined to think that the elaboration of a new fundamental rights catalogue for the EU was perhaps too time-consuming and would prolong the debate on how to improve the protection of fundamental rights. Therefore, the suggestion was that an explicit recognition of fundamental rights should be built, in particular, on the ECHR and its protocols without, however, excluding other international human rights treaties.

It is undisputed that the ECJ has had a significant role in developing a human rights doctrine for the EU. This has also been a source of inspiration for treaty provisions, in particular article 6 (2) of the TEU. The question of civil and political rights is considered to be less problematic and is covered by the EC

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<sup>245</sup> Affirming fundamental rights in the European Union. Time to act. Report of the Expert Group on Fundamental Rights, 1999, p.10.

<sup>246</sup> *Ibid.*, p.7.

<sup>247</sup> *Ibid.*, 1999, p.9.

concept of human rights. More controversial and contested is the question concerning the status and role of economic, social and cultural rights. Social rights have had a contested role in European integration in terms of promoting economic freedom and deregulation and at the same time challenging the concept of social rights both at the national level as well as at the EU level. In general, there is a tendency in the EU to focus on social policy designed to promote social protection or social exclusion rather than to focus on social rights. The Treaty of Amsterdam does not contain a coherent set of either civil and political rights or economic and social rights.<sup>248</sup> The amendments made in the Amsterdam Treaty are to be welcomed and do strengthen the protection of fundamental rights within the Community legal order. However, due to the lack of political consensus among the 'masters of the treaties', the Treaty of Amsterdam included neither a specific provision for drawing up a catalogue of fundamental rights nor a treaty amendment allowing for an accession by the EC/EU to the ECHR.

What instead was introduced with the Amsterdam Treaty was article 7 of the TEU and article 309 of the TEC that equipped the Union institutions with the means to a post hoc reaction in the event a Member State would seriously and persistently breach the common values recognized in article 6 (1) of the TEU. What was introduced was a political tool that the EU could use in the event that a Member State would not respect the common values of the EU. The down side of this amendment was that it was only a remedial tool post hoc. This was amended with the Nice Treaty, which gave the Union the tools to also act preventively in the event that there would exist a clear threat of the common values. What was added was a prevention mechanism that would serve as a complement to the penalty mechanism introduced with the Amsterdam Treaty.

We now have a two- step evaluation process at hand: the first one being the determination of a clear risk of serious breach of the common values and the second one that there in fact is an existing serious and persistent breach of the common values. This process is outside the scope of judicial review. The ECJ can only review the procedural side of article 7 of the TEU and nothing more. In that sense, article 7 is purely a political tool.<sup>249</sup> Article 7 is all

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<sup>248</sup> The revision of the social rights provisions in the Amsterdam Treaty fell considerably short in light of the proposals presented, for example, in the report presented by the Comité des Sages "For a Europe of Civic and Social Rights" in 1996.

<sup>249</sup> On this, see Commission Communication to the Council and the European Parliament *on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*. COM (2003) 606 final of 15.10.2003.

embracing in the sense that it does not distinguish between what falls either within or outside the scope of Union law and what is clearly defined as a matter falling exclusively within the scope of national competence. This is fully understandable as its aim is to provide the tools to protect the *common values* of the Union and its Member States.

## **2.6 The institutional response to the method of protection**

### **2.6.1 The option of adopting a fundamental rights catalogue**

The process leading to the adoption of the EUCFR is the culmination of a long debate among Community institutions and Member States over the form and recognition of fundamental rights in the Community legal order. The place of human rights in the Community gained attention among Community institutions from the beginning of the 1970s and was based on discussions over how the protection of human rights within the Community legal order could be improved. The European Parliament and the Commission, in particular, were active in promoting the strengthening of fundamental rights protection. Community institutions and Member States expressed respect for fundamental rights in various political declarations, statements, reports and general discussions. These political statements or declarations are not legally binding, but can be seen as so-called “soft law” instruments.<sup>250</sup> The lack of an explicit fundamental rights catalogue in the treaties caused the German Constitutional Court, in particular, to question the whole supremacy doctrine when fundamental rights issues were at stake. The case law from the Italian Constitutional Court, together with the first “solange” case dealt with by its German counterpart, probably had a significant impact on the institutional discussion that started within the Community more or less at the same time as the German and Italian constitutional courts questioned the absoluteness of the supremacy doctrine.<sup>251</sup>

The European Parliament invited the Commission in 1973 “to submit a report (to the European Parliament) as to how it intends in the creation and development of European law, to prevent any infringement of the basic rights embodied in the constitutions of Member States...”<sup>252</sup> The same year the Heads of State or Government submitted a political statement expressing that they

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<sup>250</sup> Rosas, A. 1999, p. 207.

<sup>251</sup> See chapters 2.2-2.3.

<sup>252</sup> O.J. C 26/8 of 30.4. 1973. Resolution concerning the protection of the fundamental rights of citizens of the Member States when Community law is drafted.

were “determined to defend the principles of representative democracy, of the rule of law, of social justice... and the respect for human rights as basic elements of the European identity”.<sup>253</sup> The so-called Tinderman Report on the European Union proposed, *inter alia*, that rights and fundamental freedoms, including economic and social rights, should both be recognised and protected as a result of the increased powers of the European institutions.<sup>254</sup> In 1976, the Commission eventually submitted a report entitled “The Protection of Fundamental Rights as Community law is created and developed”<sup>255</sup>. In it, the Commission argued in favour of adopting a catalogue of fundamental rights. Such a catalogue would, according to the Commission, improve legal certainty and would emphasize the importance of fundamental rights and remove any remaining doubts about their relevance to Community law.

The necessity for a comprehensive standard of fundamental rights was considered to be important due to the fact that the Community at that point started to adopt more and more detailed and specific rules, which affected the individual in a more concrete way in more than just the economic sphere. This was the result of the extension of the powers of the Community institutions. The protection of fundamental rights gained more attention, not only in the form of ECJ jurisprudence, but also by the Community institutions. However, the Commission noted in its report that codifying a fundamental rights catalogue could not be realized in a short period of time. As a result, the Commission rejected the possibility of adopting a special fundamental rights catalogue at that time. Due to reasons that it would be a time-consuming exercise to draw up a bill of rights, the Commission felt that, at the present stage of integration, the current standard of protecting fundamental rights within the community legal order was satisfactory given the present jurisprudence of the ECJ.

In the light of the structure of the Community, the Commission felt that the protection of fundamental rights would be best ensured by the jurisprudence of the ECJ and therefore stressed the importance of the role of the ECJ in developing the protection of fundamental rights within the Community. In its report, the Commission shared the opinion of the ECJ, that “international human rights treaties, on which the Member States have collaborated or of

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<sup>253</sup> Bulletin of the EC – 12 /1973, Declaration on European Identity.

<sup>254</sup> Bulletin of the EC-S 1/1976. Report on European Union by Leo Tinderman to the European Council.

<sup>255</sup> Bulletin of the EC – S 5/1976. The protection of fundamental rights in the European Community.

which they are signatories, can supply guidelines, which should be followed within the framework of Community law".<sup>256</sup> The Commission shared the view of the ECJ that the ECHR is of special significance in this respect.<sup>257</sup> However, the Commission underlined in 1976 that it was not necessary for the Community as such to become a party to the ECHR.

Nevertheless, the Commission felt that the commitment by the Community to the protection of fundamental rights would be strengthened by adopting a common declaration by the three political institutions of the Community, which would confirm their respect for fundamental rights. Such a declaration would stress the importance of the ECHR and underscore the significance of the ECJ in protecting fundamental rights. As a result of this, a common declaration by the Commission, the European Parliament and the Council was adopted in 1977. The declaration by the three Community institutions affirms their respect for fundamental rights within the Community.<sup>258</sup> This joint declaration is not a legally binding instrument. It only confirms the political commitment and support for the jurisprudence of the ECJ, i.e. the protection of fundamental rights within the community legal order. It also stresses the importance that the institutions of the Community will continue to place on respecting fundamental rights in their exercise of powers. This joint declaration by the three institutions did not affect the legal status of fundamental rights within the Community legal order, but underlined instead a pragmatic approach to the protection of fundamental rights in the exercise of powers by the Community institutions.<sup>259</sup> The difficulties identified with the adoption of a fundamental rights catalogue were not legal, but rather political.

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<sup>256</sup> Case 4/73, *Nold v. Commission*, judgment of 14 May 1974.

<sup>257</sup> Case 36/75, *Rutili v. Ministre de l'intérieur*, judgment of 28 October 1975, where the court singled out some provisions of the ECHR, noting explicitly that the Convention had been ratified by all the Member States. France was the last of the Member States to ratify the ECHR in 1974.

<sup>258</sup> In the declaration, these political institutions stressed the importance of the protection of fundamental rights by stating; 1) "The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms," and; 2) "In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights". O.J. C 103/1 (1977).

<sup>259</sup> The joint declaration was mentioned in the case *Hauer v. Land Rheinland-Phalz*, judgment of 13 December 1979, ECR 3727. The court noted that some of its case law and the importance of the ECHR were "later recognised by the joint declaration of the European

One of the most problematic issues in drawing up a fundamental rights catalogue was whether a fundamental rights catalogue should include only civil and political rights or whether it should also cover economic, social and cultural rights. In a study on the problems of drawing up a catalogue of fundamental rights for the European Communities prepared by Professor Bernhardt, it was suggested that there are strong reasons for not including fundamental social rights in a fundamental rights catalogue.<sup>260</sup> In that report, it was stressed that social rights are not only less capable of being formulated in a clear and unequivocal manner than civil and political rights, but they are also less amenable to direct application and enforcement by the courts.<sup>261</sup> The inclusion of social rights within a community catalogue of fundamental rights would probably have an effect on judicial protection, according to Bernhardt.<sup>262</sup>

During the 1970s and 80s, the discussion about the protection of fundamental rights within the framework of the European Communities reflected the idea that economic and social rights should not be included in a fundamental rights catalogue. This was seen as problematic simply for the reason that it was thought that it would be difficult for the Member States to agree on the definition of economic and social rights in the short term. The general feeling at that time was that agreement could not be reached between the Member States on the content of, in particular, economic and social rights.

### **2.6.2 The 1989 European Parliament declaration and the 1989 Community Charter of Fundamental Social Rights of Workers- significant steps towards a bill of rights**

As a response to the weak manner in which fundamental rights were protected in the Community legal order, the European Parliament adopted a declaration

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Parliament, the Council, and the Commission of the 5 April 1977." The court used the joint declaration in a confirmatory way.

<sup>260</sup> Bulletin of the EC – S 5/76, Annex. The problems of drawing up a catalogue of fundamental rights for the European Communities.

<sup>261</sup> The concept of economic and social rights has been subject to debate and controversy. Some see them as not "true individual rights", but rather as programmatic rights or objectives requiring positive action by the State. However, others argue that at least some economic and social rights are by nature justiciable. For a discussion on the legal nature of economic and social rights and the issue of justiciability, see Scheinin, M., (a) 2001, pp. 29- 54.

<sup>262</sup> Bulletin of the EC – S 5/76, Annex. The problems of drawing up a catalogue of fundamental rights for the European Communities.

of fundamental rights and freedoms.<sup>263</sup> The idea for a declaration can be traced to article 4 of the “Draft Treaty Establishing the European Union”.<sup>264</sup> Article 4 stated that “(t)he Union shall adopt its own declaration on fundamental rights”.<sup>265</sup> The *European Parliament Declaration of Fundamental Rights and Freedoms* was the first attempt to produce a catalogue of fundamental rights for the Community. The idea was to present a declaratory-codifying document that reflected *lex lata*.<sup>266</sup> The drafting Committee drew inspiration from the languages of different constitutions and international conventions that all Member States were party to in the same manner as the ECJ had developed its jurisprudence on fundamental rights. In other words, the declaration was meant to reflect and constitute a basic list of fundamental rights derived from the sources mentioned by the ECJ.<sup>267</sup>

The declaration has only a symbolic value and is a non-legislative resolution by the Parliament. The principal motivation for adopting the 1989 declaration of Fundamental rights was not limited strictly to the legal arguments. Perhaps more importantly, the declaration was meant as a crucial element in building a European identity for Community citizens and residents and also as an important statement on the meaning of belonging to such a Community.<sup>268</sup> The Declaration was meant to be a symbolic act demonstrating the Parliament’s concern for the welfare of Community citizens. One goal of the Parliament was that the ECJ would incorporate the Declaration of Fundamental Rights and Freedoms into the Community legal order, whether gradually or all at once.<sup>269</sup> The ultimate aims of the Parliament were to invite the other Community institutions to formally associate themselves with the declaration and also that the declaration would be incorporated into the treaties during the next Intergovernmental Conference. Today, one can say that the Declaration

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<sup>263</sup> Declaration of Fundamental rights and Freedoms. O.J. C 120/51(1989).

<sup>264</sup> Weiler, J., 1991, p. 622.

<sup>265</sup> European Parliament resolution on the Draft Treaty establishing the European Union. O.J. C 77/33 (1984).

<sup>266</sup> Weiler J., p. 623.

<sup>267</sup> The drafting committee of the declaration stated “whereas measures incompatible with fundamental rights are inadmissible and recalling that these rights derive from the Treaties establishing the European Communities, the constitutional traditions common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the international instruments in force and have been developed in the case law of the Court of Justice of the European Communities...”. Ibid.

<sup>268</sup> Weiler, J., 1991, vol. II, p. 623.

<sup>269</sup> Report drawn up on behalf of the Committee on Institutional Affairs on the Declaration of Fundamental rights and Freedoms. PE DOC. A 2-3/89/B20 (1989).

has had little success in its ultimate goals. None of the Community institutions have associated themselves with the Parliament's Declaration of 1989. It was suggested that the Declaration could be seen as the basis for adopting a Community catalogue or a bill of rights in the future, since it was formulated on the basis of the language of national constitutions and instruments to which the Member States are party.

The second significant step towards a Community 'Bill of Rights' was taken when the Heads of States or Governments of the Member States adopted the "Community Charter of Fundamental Social Rights of Workers" in December 1989.<sup>270</sup> The Community Charter was, similar to the 1989 European Parliament declaration, a political statement signed by eleven out of twelve Member States. The United Kingdom was the only Member States not to sign the Community social rights charter, which was intended to reaffirm the concept of a specific European Social model first articulated in the SEA treaty. The original proposal from the Commission would have included social rights for all citizens and was designed to be socially inclusive rather than exclusive. However, this inclusive approach was rejected and its scope was limited solely to workers.<sup>271</sup> The Community social charter, however, draws upon existing international treaties, such as the "European Social Charter"<sup>272</sup> and the "International Covenant on Economic, Social and Cultural Rights"<sup>273</sup>.

The Community social rights charter has proven to be more influential than the 1989 European Parliament declaration in that it became the basis for European Communities social policy.<sup>274</sup> The Amsterdam Treaty ended the era of the United Kingdom opting out of such declarations and charters by including references to the Community social rights charter.<sup>275</sup> The inclusion of these references in the Amsterdam Treaty is significant in that the social rights charter can, according to Szyszczak, fulfil a teleological role in the interpretation

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<sup>270</sup> For a discussion of the significance of the European Community Charter of Fundamental Social Rights of the workers, see Dominick, M.F., 1991, pp. 639-668 and Kenner, J., (a) 2003, pp. 7-13.

<sup>271</sup> For a thorough analysis of the background to the adoption of the Community Charter of Fundamental Rights of Workers, see Kenner, J., (b) 2003, pp. 109-152.

<sup>272</sup> European Social Charter, CETS No. 35, opened for signature on 18 October 1961, entry into force on 26 February 1965.

<sup>273</sup> Covenant on Economical, Social and Cultural Rights, entered into force on 3 January 1976. UNTS 3.

<sup>274</sup> Betten, L., 1996, p. 11.

<sup>275</sup> See chapter 2.5.

of Community law.<sup>276</sup> The Community social rights charter has gained recognition in the preamble statements of secondary legislation. Furthermore, the Community social rights charter was also one significant resource for the Convention in drafting social rights provisions for the new EUCFR. One can find certain similarities between the Community social rights charter and the new EUCFR in terms of their legal significance. Both instruments have been adopted by the Member States as a form of a political declaration. Both instruments have also been referred to in the preamble statements of secondary legislation suggesting that these declarations cannot be without legal significance, even though they were adopted as political declarations without binding legal force *stricto sensu*.<sup>277</sup>

## **2.7 The debate of accession by the EC/EU to the ECHR: 1979–1996**

### **2.7.1 Commission initiatives**

The European Parliament was less satisfied with the Commission's report in 1976 and wanted the Commission to follow up its study. The discussion within the Community started to move in the direction that the Community should commit itself to a written catalogue of guaranteed fundamental rights either in the form of a Community fundamental rights catalogue or by way of accession by the Community to the ECHR. The result was the 1979 memorandum on the "Accession of the Communities to the European Convention for Protection of Human Rights and Fundamental Freedoms".<sup>278</sup> In its memorandum, the Commission discussed the possibility of accession by the Community to the ECHR. The Commission had changed its opinion and now believed that the best way of securing the protection of fundamental rights at the Community level was by Community accession to the ECHR. The Commission was of the opinion that an accession would be the most efficient way of strengthening human rights protection within the Community. Therefore, the Commission proposed accession as soon as possible. An argument in favour of accession was, according to the Commission's opinion, the fact that the ECHR and the ECJ essentially had the same aim, "namely the protection of a heritage of

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<sup>276</sup> Szyszczak, E., 1999, p. 144.

<sup>277</sup> For a discussion of the legal status of the EUCFR, see chapter 5.

<sup>278</sup> Bulletin of the EC – S 2/1979. Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

fundamental rights and human rights considered inalienable by those European States organized on a democratic basis”.

The Commission argued that an accession would not serve as an obstacle to adopting a Community fundamental rights catalogue. Furthermore, an accession would not prevent the ECJ from further developing the case law of fundamental rights. According to the Commission, the ECHR would only form a minimum basis and the ECJ would be free to further develop and go beyond the rights contained within the ECHR.<sup>279</sup> The Commission argued that an accession would “make a substantial contribution in strengthening the democratic beliefs and freedom both within and beyond the free world”.<sup>280</sup> An accession would clarify that the Community did not only intend to adopt political declarations, but was also rather determined to improve the protection of fundamental rights by binding itself to a written catalogue of fundamental rights. In addition, accession would be completely in line with the Council declaration of 1978 on democracy.<sup>281</sup> If respect for democracy and human rights is an essential condition for membership in the European Community, it is only logical for the Community itself to be bound by the respect for human rights.

An accession would at least partly satisfy the demand for a Community catalogue of fundamental rights.<sup>282</sup> The Commission recognised that accession would have a number of major advantages. The Commission underlined that “however satisfactory and worthy of approval the method developed by the court may be, it cannot rectify one of the shortcomings affecting the legal order of the Community, i.e. the lack of a written catalogue of fundamental rights. The European Citizen has a legitimate interest in having his rights vis-à-vis the Community laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria”.<sup>283</sup> The Commission stated that it did not disregard the

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<sup>279</sup> The Commission had in mind especially economical and social rights, which are barely included in the ECHR.

<sup>280</sup> Bulletin of the EC – S 2/1979. Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>281</sup> The Council stated, “that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities”. Bulletin of the EC – 3/1978. Declaration on democracy.

<sup>282</sup> Bulletin of the EC – 2/1979. Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>283</sup> Bulletin of the EC – 2/1979. Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

option of a catalogue of fundamental rights in the long term, but rejected the idea for the time being. In fact, the conclusion of the Commission memorandum was that accession was the preliminary step towards the creation of a Community catalogue of fundamental rights. The creation of a special bill of rights would be the best solution to remedy this lack of a written catalogue of fundamental rights.

Why did the Commission recommend accession as a preliminary step towards the adoption of a Community catalogue of fundamental rights? The Commission itself answered this question by stating that "If (such a separate catalogue) were to be undertaken too hastily, there is a fear that it would bring to light differences between Member States, particularly with regard to economic and social rights, and that agreement would be possible only on the basis of the lowest common denominator".<sup>284</sup> The biggest obstacle to pursuing the option of drafting a Community catalogue of fundamental rights was the opposition by Member States to including economic and social rights in a Community fundamental rights catalogue.<sup>285</sup> The result of the Commission memorandum was fairly modest since no formal step was taken to proceed with the idea of accession to the ECHR.<sup>286</sup>

In 1982, the European Parliament requested that the Commission proceed with the accession by putting forward a formal proposal to the Council.<sup>287</sup> The invitation of the European Parliament to proceed with the accession of the EC to the ECHR gained little support among Member States and therefore the Commission decided to discontinue the debate on accession and the proposal was postponed to a later date. In 1985, the European Parliament renewed its question of accession. The Commission had to admit that the idea of accession had not proceeded mainly due to objection from certain Member States.<sup>288</sup> In 1990, the Commission placed the issue once again

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<sup>284</sup> Bulletin of the EC – 2/1979. Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>285</sup> Dominick, M.F., 1991, p. 648.

<sup>286</sup> The Economic and Social Committee endorsed the memorandum in 1980. The Parliament has on several occasions since 1982 confirmed its favourable opinion.

<sup>287</sup> Resolution embodying the opinion of the European Parliament on the memorandum from the Commission of the European Communities on the accession of the European Communities to the Convention for the Protection of Fundamental Rights and Freedoms. O.J. C 304/253 (1982).

<sup>288</sup> Greece, Denmark, Ireland and the United Kingdom opposed the idea of accession. The Greek objection has become out of date, since Greece has recognized the right to individual complaint under article 25 of the ECHR in 1985. Betten, L., 1996, p. 8.

on the agenda by requesting from the Council a mandate to start the negotiation process with the Council of Europe on the basis of former article 235 EC. The Commission argued:<sup>289</sup>

There is a conspicuous gap in the Community legal system. All legal acts of the Community Member States are subject to review by Commission on Human Rights and the Court of Human Rights, which were set up by ECHR of 1950, to ensure that human Rights are respected. The Community, however, while proclaiming its commitment to respecting democratic values and human rights is not subject to this control mechanism and acts promulgated by its institutions enjoys a sort of "immunity" from the Convention.

According to the Commission, this gap could be remedied with Community accession to the ECHR. An accession would not preclude the further development of fundamental rights protection within the Community. The idea of putting the issue of accession on the agenda was a response to a long-felt need of ensuring the respect for human rights in the application of community law. The objection raised by certain member states to this initiative was based on a fear that accession would lead to a general competence to act in the field of human rights and that the Community could start monitoring all the activities of the Member States irrespective of whether member states operated within the scope of Community law or not. The Commission argued, however, that accession would affect the legal systems of the Member States only to the extent that member states would act within the scope of Community law and that the question of accession was not about giving the Community new powers, but rather, about ensuring that fundamental rights would be observed by the Community institutions in their activities and within the framework of their powers.<sup>290</sup> Community law would become the subject of external review, affording the citizens better protection against Community measures that might infringe on their fundamental rights. The Community would subject itself to the same review mechanism as all its Member States. The element of external control by an external court was the strongest argument put forward by the Commission.

The Commission also noted that the fact that the Community had not acceded to the ECHR might raise a special problem when a Member State

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<sup>289</sup> Commission Communication SEC (90) 2087 of 19 November 1990. On Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols.

<sup>290</sup> *Ibid.*

implemented Community law domestically.<sup>291</sup> The Community is responsible for adopting legislative acts that do not necessarily conform to the ECHR. This would seem to be less of a problem for the Community itself since it is not a contracting party to the ECHR. The Commission, however, touched upon the issue of domestic implementation that might trigger Member State responsibility for implementing Community law in situations where such acts are not in conformity with the ECHR. The transfer of competences from the Member States to the Community/Union has meant that matters falling within that competence are vested in the Community/Union while Member States still remain contracting parties to the ECHR. The question therefore is: Under what conditions can Member States of the European Community be held responsible for complying with the ECHR in matters falling within the competence vested upon the European Community/Union?

The former European Commission of Human Rights concluded that it is not possible to hold Member States responsible for alleged infringements of the ECHR where the sole responsibility where in the hands of the Community institutions. Applications directed against the European Community were inadmissible, *ratione personae*, due to the simple reason that the Community is not a contracting party to the ECHR.<sup>292</sup> Can Member States, however, be held responsible under the ECHR for implementing rules enacted by Community institutions that violate the ECHR? In the *M & co. case v. Germany*,<sup>293</sup> the former Commission on Human Rights was faced with this question. The European Commission noted that, under article 1 of the ECHR, the contracting parties “are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with the states international obligations”. The Commission of Human Rights stated that:<sup>294</sup>

The Convention does not prohibit a member State from transferring powers to international organisations. Nonetheless, the Commission recalls that if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the

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<sup>291</sup> Ibid., p. 2.

<sup>292</sup> According to article 34 of the ECHR, only complaints brought against High Contracting Parties are admissible. This excludes complaints against the European Community/Union.

<sup>293</sup> Case 13258/87, *M & Co. v. Federal Republic of Germany*. Decision on admissibility by the European Commission of Human Rights, judgment of 9.2. 1990.

<sup>294</sup> Ibid., p. 145.

earlier treaty...The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers... the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection. The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance.

The European Commission took into consideration that it would be contrary to the very idea of transferring powers to international organisations to hold member States responsible for examining in each individual case whether or not the acts of the Community were in compliance with the ECHR. The Commission held that Member States would be allowed to implement the acts of Community institutions without any further need for investigation by the Commission of Human Rights on whether or not these acts were in compliance with the ECHR. This was mainly due to the reason that the Commission noted that fundamental rights were being protected within the legal system of the European Communities by the ECJ. The application was declared inadmissible, *ratione materiae*, since the Member States of the Community bore no responsibility. In other words, the former European Commission ruled that Member States could not be held responsible for implementing rules enacted by international organisations to which they had transferred powers, under the condition that within these international organisations sufficient judicial control had been established for the protection of human rights. The Commission of Human rights noted that the Community legal order not only secured fundamental rights but also provides for judicial review of their observance.

The Commission of Human Rights concluded that the transfer of powers to international organisations is not contradictory to the ECHR as long as *equivalent protection* of human rights can be ensured within that international organisation. This potential problem was, however, acknowledged by the Commission in 1990 as a result of the decision on the admissibility of the former European Commission of Human Rights in the case of *M & co. v. Germany*, delivered earlier the same year as the European Commission issued its communication on Community accession to the ECHR. The Commission emphasized the importance of this potential future conflict by advocating for direct action against the Community for acts issued by the European Community itself.<sup>295</sup> As a result of the new proposal from the Commission, the

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<sup>295</sup> On recent case law on this issue, see chapter 6.

Council of the Union requested an opinion from the ECJ on whether or not an accession to the ECHR would be compatible with the EC Treaty.

### **2.7.2 Opinion 2/94**

The Commission formally asked the Council to mandate that the Commission start the negotiation process for European Community accession to the ECHR on the basis of former article 235 (now article 308) of the TEC. This proposition by the Commission resulted in a request by the Council in 1994 to the ECJ for an opinion on whether accession by the Community would be compatible with the Treaty establishing the European Community. The request for an opinion by the Court came from the Council prior to any decision taken to open negotiations with the authorities of the Council of Europe.<sup>296</sup> The Council requested an opinion in spite of the fact that no written text on the agreement existed. The ECJ addressed the issue of whether accession was compatible with existing treaty provisions and whether former article 235 TEC should constitute the legal basis for accession. With regard to the compatibility issue, the Court dealt with the request as an “envisaged agreement” and ruled that the request was admissible within the meaning of the former article 228(6) (now article 300) TEC.

Former article 228 (6) provided that the Court might give an opinion on an envisaged agreement to determine its compatibility with the Treaty establishing the European Community. The Court maintained that the Community institutions as well as the Council of Europe have a legitimate interest in knowing in advance whether accession by the European Community would be compatible with Community law in the first place. The issue at stake was whether accession would be compatible with former articles 164 (now article 220) and 219 (now 292) TEC, i.e. whether accession would be compatible with the position of the court entrusted to be the final interpreter on matters of Community law. Article 164 of the Treaty provides that “the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed”. Article 219 provides that the “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein”.

On the question of compatibility, the Court ruled that it had insufficient information to be able to give an opinion, in particular, to the solutions envisaged for the submission of the Community to the jurisdiction of an

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<sup>296</sup> Borrow, N., 1997, p. 58.

international court. Therefore, the ECJ did not address the question of whether an accession would be compatible with former articles 164 (now article 220) and 219 (now article 292) of the EC Treaty. What really was at stake was whether the ECJ would accept that an international court would be in a position to rule on whether Community law would be in conformity with the ECHR, i.e. whether accession would constitute a potential threat to the jurisdictional autonomy of the ECJ.<sup>297</sup> In opinion 1/91,<sup>298</sup> the ECJ had no trouble in accepting that an international agreement that submits the European Community, including the ECJ, to the binding decisions of an international court, was compatible with existing Community law. The ECJ underlined, however, that this is only the case when an international court interprets the agreement and does not interfere with the interpretation of Community law itself.<sup>299</sup>

On the question of whether former article 235 TEC (the “implied powers doctrine”)<sup>300</sup> could be used as the legal basis for accession the answer was negative. The Court was of the opinion that the Community lacks the competence to accede to the ECHR without a Treaty amendment. In the opinion of the Court, an accession would entail a substantial change “of constitutional significance” in the present system of fundamental rights protection. The Court concluded, on the basis of the following reasoning, that the Community lacks the competence to accede to the ECHR “as the Community law now stands” by stating the following:<sup>301</sup>

Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in present Community system for protection of human rights in that it would entail the entry of the Community into a distinct

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<sup>297</sup> O’Leary, S., 1996, p. 370.

<sup>298</sup> Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, and which relates to the creation of the European Economic Area. Opinion of 14 December 1991.

<sup>299</sup> In opinion 1/91, the ECJ stated that “where an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and as a result to interpret its provisions, the decisions of that court will be binding on the Community institutions including the Court of Justice”. Ibid.

<sup>300</sup> Former article 235 EC provided as follows: “if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.

<sup>301</sup> Opinion 2/94 of 28 March 1996, para. 34-35.

international system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system of protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of article 235. It could be brought about only by way of Treaty amendment.

The Council agreed with the ECJ that former article 235 (now 308) could not be used as the legal basis for an accession. This “implied powers” article provides a legal basis for Community objectives when more specific legislative provisions are lacking in a certain field. Article 235 could not be used as the legal basis of accession since the purpose of implied powers is to allow the Community to carry out its functions in order to accomplish the objectives of the Community where it had been entrusted to act expressly or implied.<sup>302</sup> The message of the ECJ was that the implied powers doctrine could not be used as a substitute for a treaty amendment. The Court stated in its opinion that an accession by the Community would require a treaty amendment in order for the Community to gain competence to ratify the Convention, thereby referring the issue of accession to the Member States of the EU.

## **2.8. Some concluding reflections**

Fundamental Rights were not initially part of a master plan to create a European economic area. Issues related to fundamental rights became part of the plan partly as a result of the need to defend the primacy of Community law over national law, which was called into question by the German and Italian Constitutional Courts, respectively, in the early 1970s in the name of unity and efficiency of Community law. As a result, the ECJ had to be creative and included fundamental rights as part of its general principles of Community doctrine. Seen from the perspective of EC law, the Community legal order has primacy over national law, including constitutionally protected standards. From this, it follows that EU fundamental rights have priority in instances of conflict, even with national constitutionally protected fundamental rights. On the other hand, what follows from the case law of the ECJ is that EU standards of fundamental rights are to be implemented nationally when the matter falls within the scope of Community law. When Member States act strictly outside the scope of Community law they are not bound by the EU standards of fundamental rights. In such cases, the supremacy of Community law does not

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<sup>302</sup> Borrow, N., 1997, p. 60.

materialise and the issue of supremacy becomes irrelevant. However, the problem with supremacy relates to situations in which national constitutional provisions offer a higher level of protection in relation to EU standards in matters falling within the scope of Community law. It is precisely in these types of situations that the supremacy of EC law becomes problematic.

The case law of the ECJ has shown that the EU internal human rights doctrine is based on the *need* to use external sources due to the reason that treaties do not contain any fundamental rights catalogue of their own. The ECJ is the architect of the fundamental rights doctrine we have today as it exists within the Community legal order. The problem, however, with this approach is precisely that fundamental rights almost exclusively are based on the case law of the ECJ, causing obvious problems with regard to another fundamental principle recognised in the EC law, i.e. the principle of legal certainty. The fundamental rights doctrine is developing piecemeal simply on the basis of complaints being brought before the court. The content of this human rights doctrine remains open-ended and is developing *ex post facto*. The critique is based on the reasoning that it is unacceptable that the treaties lack a binding and enforceable catalogue on human rights in the EU treaties other than vague references to external sources outside the scope of the Community from which the Court simply draws “inspiration” and “guidelines”. The citizens of the European Union have a legitimate interest in knowing in advance which rights are protected under Community law.<sup>303</sup> The human rights doctrine developed by the ECJ is not separate from the constitutional traditions common to the Member States and is not isolated from international human rights law.

The ECJ, however, made it clear in *Internationale Handelsgesellschaft* that fundamental rights are ensured within the framework of the structure and objectives of the Community. The ECJ is by no means bound by its external sources of inspiration, but is rather “free” to interpret them within the context of Community law. This again would suggest that the content and the level of protection might vary in individual cases from that offered at the source of origin. What generally can be concluded, however, is that Community measures must be interpreted in harmony with fundamental rights. This was confirmed by the ECJ in *Oyowe case*.<sup>304</sup> The way the ECJ has formulated its doctrine of fundamental rights reflects however the autonomous nature of

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<sup>303</sup> This argument was put forward by the Commission in its Memorandum on the accession of the European Communities to the ECHR. See EC Bull., suppl. 2/79, p. 7.

<sup>304</sup> Case 100/88, Augustin Oyowe and Amadou Traore v. Commission, judgment of 13 December 1989, para. 16.

Community law as being a legal order distinct from the legal orders of the Member States and the international legal order. It were seen as problematic that the particular rights protected within the EC legal order are derived from such vague concepts as general principles of law.<sup>305</sup> What is needed is a move away from the unwritten general principles of community law doctrine to a codification of human rights as legally binding norms.

The initiatives by the political institutions and, in particular, the European Parliament and the Commission, to either draw up a fundamental rights catalogue for the Community or for the Community to adhere to the ECHR in the 1970s was a response to the inadequate way fundamental rights were protected within the Community legal order. In the late 1980s the European Parliament and 11 Member States, respectively, put two initiatives forward for drawing up a fundamental rights catalogue for the EC. The European Parliament declaration was the first attempt to produce a catalogue of fundamental rights for the Community and was described as “the first measure, which responds in a concrete way to the call for a written catalogue”.<sup>306</sup> The second significant step was taken when the “Community Charter of Fundamental Social Rights of Workers” was adopted by eleven of the Member States. The Commission tried to mobilise political activity by endorsing accession by the Community to the ECHR in its communication of 1990. This resulted in a request sent by the Council to the ECJ asking whether this would be compatible with the EC treaty. The answer by the ECJ was, as noted, negative. At that time, it was generally thought that the accession alternative was no longer a realistic option to pursue. It was not until the turn of the new millennium that Member States’ ‘suddenly’ reached political agreement and the elaboration of a fundamental rights catalogue was put on the agenda.

The adoption of the EUCFR is certainly the culmination of a long political debate among Member States and Community institutions on how fundamental rights could best be improved and protected within the European Union in the future. Previous attempts to draw up fundamental rights catalogues had not been particularly successful in the sense that they would have turned into binding legal norms. The absence of any self-contained “Community bill of rights” or any other form of explicit commitment to a written fundamental rights catalogue has resulted in uncertainty and unpredictability as to what extent fundamental rights are being protected within the Community legal order and their legal significance in relation to

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<sup>305</sup> Toth, A.G., 2000, p. 81.

<sup>306</sup> Cassese, A., Clapham A., and Weiler, J., 1991, p. 21.

other compatible demands. The contributions by the Community institutions, on the other hand, has shown how difficult it has been to reach an agreement on the “next step”, i.e. to adopt a fundamental rights catalogue for the EU or to go for the accession alternative.

The first step towards treaty recognition of a fundamental rights catalogue was, however, taken with the adoption of the EUCFR in the year 2000. The next chapter is devoted to a discussion on why the EU adopted a Charter of fundamental rights after almost 30 years of refusing to either seek accession to the ECHR or to elaborate a bill of rights for the EU and refusing to set the question of accession on the agenda, i.e. what is the *rationale* underlying the EU Charter and how we should understand the Charter within a larger context.

### 3. THE DELIBERATION FOR A EU CHARTER OF FUNDAMENTAL RIGHTS FOR THE EUROPEAN UNION - THE WORK OF THE I AND II CONVENTION

#### 3.1 Need for a Charter of Fundamental Rights- some preliminary observations<sup>307</sup>

There was disagreement and confusion even among the central actors involved in the drafting of the EUCFR about the purpose in elaborating a Charter of fundamental rights, i.e. what the exercise was really all about. Different actors saw different things and possibilities, ending up in an entirely different understanding of the nature of the process of elaborating the EUCFR. The Conclusions of the Cologne European Council also reveal a certain ambivalent approach to the exercise. The ambivalent nature of the exercise was evident due to the fact that final status of the EUCFR was left open by the European Council in 1999. The uncertainty as to the legal status was to become a symbol of contradictory political motivations for why the European Council felt that there was a need to draft a Charter of rights.

Several reasons may have led the European Council to believe that there was a need to draft a Charter of rights for the EU. The European Council may have been looking for a more stable foundation for the protection of fundamental rights within the EU.<sup>308</sup> As noted, the EUCFR had not been drafted and adopted to fill a complete lacuna or a judicial gap of fundamental rights protection. One can detect a plethora of different justifications presented for a need to adopt the EUCFR. Arguments presented in favour of adopting the EUCFR were often based on the changing structure of the European Union. The expansion of the competences of the union into new areas of co-operation has created new demands for the protection of fundamental rights. The Union also wants to create an image of a “peoples’ Europe” emphasising a common European citizenship, which should result in a statement of citizens rights. It has also been advocated that the enlargement process created a need for the Union to emphasise the principles and values on which the Union is founded

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<sup>307</sup> The question of whether the adoption of the EUCFR is a “step forward” or marks a new era in the protection of fundamental rights is the central theme throughout this doctoral thesis. In this chapter, the intention is not to look for any definitive answers to the issues raised. The intention is merely to highlight some of the issues discussed prior to the conception, drafting and birth of the Charter.

<sup>308</sup> Lenaerts, K., & De Smijter, E., 2001, pp. 278-279.

by adopting a Charter of rights.<sup>309</sup> There is an appearance and inconsistency or double standard in that the EU requires applicant countries to sign up for international treaties on human rights as a precondition for membership in the EU, while the EU itself has neither committed itself to any international human rights treaties nor been willing to consolidate respect for fundamental rights in the form of a legally binding fundamental rights catalogue.<sup>310</sup>

A concern was also raised that the rapid expansion of the Council of Europe in the early 1990s<sup>311</sup> to include new member states from central and eastern Europe that do not have a tradition of protection of human rights, might in fact weaken the system established under the ECHR. This would in turn create a need for the EU to develop its own standard of fundamental rights protection. The adoption of the EUCFR also fits nicely into the ongoing constitutionalisation process. The idea of adopting a Community catalogue of fundamental rights for the EU has been seen by many as a symbol for the elaboration of a constitution for the EU that would transform the EU into a more federalist enterprise. There can be no doubt that the project of drafting a catalogue of fundamental rights did have an important political dimension. It was acknowledged, even before the EUCFR was formally adopted, that the Charter marked the true start of the constitutionalisation of the EU. In short, that it represented the first step in the drafting of a European Constitution.<sup>312</sup> Indeed, one could rightly ask whether the elaboration is actually a step forward in protecting fundamental rights within the Union or whether the project has been serving other, ultimately political, purposes. This question was raised soon after the European Council decided to start the process of elaborating a EUCFR.<sup>313</sup>

One of the most common arguments presented in favour of the need for a fundamental rights catalogue has been the absence of clarity over which

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<sup>309</sup> Editorial Comment: 2001, pp. 5-6.

<sup>310</sup> For a summary of different views expressed on various justifications for the need for a fundamental rights catalogue, see McCrudden C., 2001, pp. 8-9.

<sup>311</sup> The Council of Europe now has 46 Member States.

<sup>312</sup> Draft resolution of the European Parliament on the drafting of a EUCFR, where the following is stated: "Whereas the Charter of Fundamental Rights should be regarded as a basic component of the necessary process of equipping the European Union with a constitution". A5-0064/2000. See also Antola, E., 2000, p. 26.

<sup>313</sup> See for example the Editorial, 2000 pp. 97-98 and Weiler, J., (editorial) 2000, pp. 95-97.

rights are protected under Community law.<sup>314</sup> The Comité de Sages report on fundamental rights in the EU in 1999 was most likely very influential in stating that “[f]undamental rights must be visible... It could be argued that most fundamental rights can be found in national constitutions and international treaties, and that an explicit enumeration of these rights by the European Union would therefore add very little. This, however, does not justify a system of citations that conceals the fundamental rights and makes them thus incomprehensible to the individuals. Where rights are concerned, ways and means must be found to make them as visible as possible. This involves spelling rights out at the risk of repetition, rather than merely referring to them in general terms as contained in other documents”.<sup>315</sup>

One of the arguments questioning the need for yet another fundamental rights catalogue was based on the notion that the citizens of Europe do not suffer from any deficit of judicial protection of fundamental rights.<sup>316</sup> It was argued that fundamental rights are protected in national constitutions, by the “safety net” built upon the system under the ECHR and by the ECJ in matters falling within the scope of Community law. However, perhaps the greatest fear with the exercise of adopting a EUCFR is based on the scenario that it would “threaten” the protection currently offered by the European Court of Human Rights under the ECHR by creating “the risk of inconsistency between different definitions of human rights and their interpretation”.<sup>317</sup> To build up a separate competing system of human rights could create a dual system of fundamental rights protection in Europe, one within the Council of Europe and one within the European Union. It has been suggested that this in turn would create a new dividing line in Europe, this time in the field of human rights.<sup>318</sup>

## **3.2 The genesis of the EUCFR**

### **3.2.1 Mandate of the Cologne European Council**

The former German Minister of Foreign Affairs, Joseph Fischer, stated on 12 January 1999 in Strasbourg to the European Parliament as follows:

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<sup>314</sup> Curtin, D., 2000, p. 310. According to Curtin, the adoption of the EUCFR is, however, only to be considered as the first “small step” towards the real goal, which according to her would be an EU accession to the ECHR.

<sup>315</sup> Affirming fundamental rights in the European Union. Time to act. Report of the Expert Group on Fundamental Rights, 1999, p. 12.

<sup>316</sup> For a different view, see Eicke, T., 2000, pp. 287-288.

<sup>317</sup> Fredman, S., & McCrudden C., & Freedland M., 2000, p.180.

<sup>318</sup> See further chapter 3.5.2.

In order to strengthen the rights of the citizens, Germany proposes in the long run the elaboration of a European Charter on Fundamental Rights. We intend to launch an initiative in this direction during our presidency. Our aim is to consolidate the legitimacy and identity of the EU. The European Parliament, which provided important preliminary work elaborating the draft constitution of 1994, as well as the national parliaments and possibly many other social groups shall participate in the drafting of such a Charter on Fundamental Rights.<sup>319</sup>

During a conference in Cologne on 27 April 1999, the German Minister of Justice, Ms. Herta Däubler-Gmelin announced her intention, as the holder of the Presidency of the European Council at that time, to put forward an initiative to the Cologne European Council in June 1999 to draw up a EU Charter of Fundamental Rights. The initiative announced during the German Presidency of the European Council can and should be viewed in light of three *Comité des Sages* reports of the late 1990s dealing with fundamental rights in the EU. The *Comité des Sages* of 1996, appointed by the Commission, presented its report<sup>320</sup> underlining the need to recognise a number of fundamental civil and social rights to be incorporated into the treaties. It was suggested that the European Union should first include in the treaty a minimum core of rights, which later on could be “updated” and completed with a list of civil, political and social rights and duties. The intention was to stress the need for strengthening the concept of citizenship and democracy in the European Union by formulating fundamental rights that reflect the evolution of human rights protection.

The first report underlined not only short-term solutions, but also focused on the longer process of elaborating a European Bill of Civic and Social Rights. The Treaty of Amsterdam did not include any basic set of fundamental civil and political and social rights in the form of a fundamental rights catalogue. The need to continue the debate for an explicit recognition of fundamental rights in the treaties was therefore still considered to be important.

Following the 1996 IGC and the Treaty of Amsterdam, the Commission initiated two new *Comité des Sages* dealing with fundamental rights in the EU. The first report was presented in 1998 and resulted in a “Human Rights Agenda”.<sup>321</sup> Many suggestions, such as setting up a Commission directorate

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<sup>319</sup> EP *Minutes*, 12 January 1999.

<sup>320</sup> For a Europe of Civic and Social Rights chaired by Maria de Lourdes Pintasilgo. Report in *The Protection of Fundamental Social Rights in the European Union*, 1996, pp. 241-292.

<sup>321</sup> Leading by Example: A Human Rights Agenda for the European Union for the Year 2000. Agenda of the *Comité des Sages* and Final Project Report. Academy of European Law,

with responsibility for human rights and establishing a human rights monitoring centre, did not lead to any new initiatives within the EU.<sup>322</sup> The third *Comité des Sages* was established in order to review, *inter alia*, the possibility of including a fundamental rights catalogue in the next revision of the treaties.<sup>323</sup>

The report of the third *Comité des Sages* was presented in February 1999 and basically suggested the elaboration of a specific fundamental rights catalogue based upon the ECHR and its protocols. The German Government was attracted to the “old” idea of elaborating a fundamental rights catalogue for the EU. The intention to pursue the initiative for drawing up the EUCFR was formally announced in April 1999 during a Conference entitled “Towards a new Charter of Fundamental Rights?” co-hosted by the German Ministry of Justice and the Commission representation in Germany. Instead of moving towards developing a coherent high-profile human rights policy for the EU as proposed in the second report, the German Government chose to introduce the adoption of a fundamental rights catalogue that would neither alter the existing legal and constitutional framework of the EU nor introduce any new human rights policy.<sup>324</sup>

In accordance with the Cologne European Council decision, the European Council stated “[t]hat the fundamental rights applicable at Union

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European University Institute 1998. In this agenda, the *Comité des Sages* presented reasons why the EU needs to develop its human rights policy. These included the rapid movement towards an “ever closer Union” and towards a comprehensive single market; the adoption of a single currency for close to 300 million people; the increasing incidence of racism, xenophobia and ethnic hatred within Europe; the tendency towards a “fortress Europe” which is hostile to “outsiders” and discourages refugees and asylum seekers; the growing cooperation in police and security matters, which is not matched by adequate human rights safeguards; the increasingly complex political and administrative system that governs the Union and is supported by a bureaucracy with extensive powers; and the aspiration to bring at least five and perhaps as many as thirteen countries within the Union’s fold in the years ahead. Report prepared for the *Comité des Sages* 1998, p. 2.

<sup>322</sup> This proposal has now been taken on board with the proposal from the European Council in December 2003 with an intention to extend the mandate of the EU monitoring Centre on Racism and Xenophobia for the purpose of creating a Fundamental Rights Agency with the mission to collect and analyse data in this field. See Presidency Conclusions of 12-13 December 2003, p. 27. A political agreement was reached at the JHA European Council on 4 December 2006 on the establishment of a Fundamental Rights Agency to be operational as of January 2007.

<sup>323</sup> See chapter 2.6.

<sup>324</sup> De Burca, G., 2001, p. 129.

level should be consolidated in a Charter and thereby made more evident". The apparent motivation for proposing a fundamental rights charter is to be found in annex IV, which states that "[t]here appears to be a need at the present stage of the Union's development to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible for the Union's citizens". The Cologne European Council set out two arguments in support of the need to develop a EUCFR. The first notion, "at the present stage of the Unions development", was certainly politically controversial. What the European Council meant by the notion, "at the present stage of the development of the Union," remained unclear.<sup>325</sup> The second objective was to strengthen the protection of fundamental rights by making them more "visible".<sup>326</sup>

No doubt one of the most important political goals was to increase visibility and clarity of fundamental rights. According to the preamble of the EUCFR, the purpose of the EUCFR "is to strengthen the protection of fundamental rights in the light of changes of society, social progress and scientific and technological developments by making rights more visible in a Charter" (recital 3). The Cologne European Council intended that the EUCFR would improve the protection of fundamental rights by enhancing public awareness of their basic rights.<sup>327</sup> The objective of increased visibility can be used as an argument to underline that the EUCFR in fact does not add anything new and does not therefore enhance the protection of fundamental rights. On

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<sup>325</sup> Helander, P., 2001, (b) pp. 58-59. The elaboration of the EUCFR was, however, seen by many as the first step towards the elaboration of an EU constitution. One may well ask if not one of the political goals in adopting a EUCFR was to develop the idea of the need for a constitution for the EU seen in the light of the expression used by the Cologne European Council in their argument for a need of an EUCFR. The Chairman of the drafting body, Mr Roman Herzog made it, however, clear in his opening speech, after being elected chairman of the first "Convention", that the elaboration of an EUCFR was *not* a project involving the idea of a federal state or a project leading towards a European constitution: "We are not talking about a European Constitution here, and the issue is not whether in setting itself fundamental rights the European Union stands to gain in terms of statehood, which, incidentally, I don't believe it would. We are not talking about the emergence of a federal state, supervision by a constitutional court, or anything like that. Those are all issues, which will have to be clarified and decided on in their own time". CHARTE 4105/Body 1, p. 9.

<sup>326</sup> Heringa, A. & Verhey, L., 2001, p. 12.

<sup>327</sup> The question of visibility and legal certainty were among the most important issues raised by the independent group of experts in their report, "Affirming fundamental rights in the European Union. Time to act" in 1999. It is naturally a key issue for European citizens to be aware of their existing fundamental rights.

the other hand, increased visibility is an important element for the protection of fundamental rights and the EUCFR can therefore be seen as an element in strengthening the protection of fundamental rights. Professor Simitis has stated that “it (the Charter) materialises the governing principles of the union, ensures the visibility of fundamental rights, promotes the development of the Union marked by the awareness of both the individual’s rights and the need to prevent and combat discrimination, furthers the identification of the EU-citizens with the policies of the Union and increases its credibility”.<sup>328</sup> If one of the political goals was to add more visibility to fundamental rights within the European Union, one must agree that this political objective has been achieved.

The Charter Convention was not entrusted with the power to produce a legally binding document in the strict sense of the word.<sup>329</sup> Yet, Roman Herzog (elected Chairman of the drafting body) stated in his opening speech on 17<sup>th</sup> December 1999 that “we should therefore proceed as if we had to submit a legally binding list, and we should not forget that our mandate is in principle to draft a list addressed to the bodies of the European Union, by which they will be bound”.<sup>330</sup> The European Parliament also advocated for adopting a legally binding fundamental rights catalogue for the EU.<sup>331</sup> On the contrary, the aim and objective for the drafting body was to codify *applicable* fundamental rights at the Union level, i.e. to give concrete content to the wording in article 6 (2) of the TEU. The Cologne European Council recognised that “the obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice” and that this jurisprudence ought to be the basis for the drafting of a EUCFR. This became clear when the Council stated that it believed that the “Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed

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<sup>328</sup> House of Lords, Committee on European Union, Eighth report “EU Charter of Fundamental Rights”, 16.5. 2000, para. 48.

<sup>329</sup> In this context, strictly speaking one can hardly say that this “Convention” reflects the concept of a “legislator”. This drafting body is to be considered as no more than an *ad hoc* body codifying applicable fundamental rights within the EU. Furthermore, it is to be kept in mind that this drafting body did not have a mandate to determine the legal status of the EUCFR. Helander, P., (b) p. 57.

<sup>330</sup> CHARTE 4105/00, Body 1, p. 9.

<sup>331</sup> This became evident during the opening speech by Inigo Mendez de Vigo (leader of the EP representation) when he stated that “[T]he Charter of Fundamental Rights must be binding and must be incorporated into the Treaty. To the extent that the Treaties constitute the Constitutional Charter of the European Union, as reaffirmed by the case law of the Court of Justice, the Charter of Fundamental Rights should be part of it”. CHARTE 4105/00, Body 1, p. 12.

by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from constitutional traditions common to the Member States, as general principles of Community law". Account should also be taken of economic and social rights insofar as they can be formulated as individual rights.

The intention is not to analyse how successful the drafting body has been in consolidating "already applicable fundamental rights" within the EU legal order. It can be noted, however, that the rights included in the EUCFR go beyond the fundamental rights recognised by the ECJ so far,<sup>332</sup> but on the other hand fall short of what could be included as fundamental rights based upon the current criteria set out in article 6 (2) of the TEU.<sup>333</sup> Indeed, it is questionable whether the rights included in the EUCFR are to be considered solely as the rights recognised and protected by the ECJ from now on. In other words, are other so-called potential rights not included in the EUCFR now excluded from the Community legal order or not protected by the ECJ? For the time being, the ECJ is not bound to interpret fundamental rights in light of the new EUCFR. Therefore, the ECJ is still "free" to interpret fundamental rights in light of its well-known sources of inspiration.<sup>334</sup> It becomes clear from reading the

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<sup>332</sup> According to Lenaerts and De Smijter, the fundamental rights recognised by the ECJ so far in its case law cover the principle of equal treatment for both men and women, the right to a fair hearing and effective judicial control, the principle of non-retroactivity of penal laws, respect for private life and family life, home and correspondence, freedom of religion, freedom of expression, freedom of association, the right to property, freedom to carry on economic activity and the freedom of movement within the territory of a State. See Lenaerts, K., & De Smijter, 2001, p. 280. For a reference to the case law of the ECJ and CFI, see for example Lenaerts, K., & van Nuffel, P., 1999, p. 548, para. 14-065.

<sup>333</sup> Lenaerts, K., & De Smijter, E., 2001, p. 280.

<sup>334</sup> However, the EUCFR is part of the Constitutional Treaty of the European Union constituting part II. For a discussion of the future of the Constitutional Treaty, see chapter 5.6. With regard to the interpretation of the Charter, WG II of the European Convention wanted to emphasize the importance of the explanatory report prepared by the Presidium of the Charter Convention by stating that "In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared by the instigation of the Praesidium of the Convention which drafted the Charter *and updated under the responsibility of the Praesidium of the European convention*". Preamble to the EUCFR, recital 4. See CHARTE 4473/00 Convent 49 with regard to the explanations. It is to be noted, however, that the explanatory report prepared by the Presidium has no binding legal value. It was not discussed by the Charter Convention as a whole. The corresponding adjustments proposed by WG II are taken on board in the updated Explanations relating to the Charter of Fundamental Rights. See CONV 828/1/03 REV 1. The last phrase was added during the ICG

conclusions of the Cologne European Council meeting that it was not intended that the EUCFR create anything substantially new, but rather that it would increase the visibility of what was considered to be already existing rights. In other words, the drafting of the EUCFR was a consolidating process for positive law rather than a process for creating “new rights”.<sup>335</sup> This approach is said to be true with regard to the substantive rights in the EUCFR as well as for the general provisions referred to as articles 50-54 of the EUCFR.<sup>336</sup> The European Commission has stated that the mandate given by the Cologne European Council was “a task of revelation, rather than creation, of compilation rather than innovation”.<sup>337</sup> The exercise of drafting the EUCFR has also been described as being a “showcase” for existing rights that are already protected within the Union legal Community legal order, putting “flesh on the bones of article 6 (2) TEU”.<sup>338</sup>

### **3.2.2 The Convention method – seeking for legitimacy**

In June 1999, the European Council decided that the time had come to start preparing a fundamental rights catalogue for the European Union. During the Tampere European Council in October 1999, the composition, method of work and practical arrangements were agreed upon. Prior to the Tampere European Council meeting agreement was reached on the three component parts to be represented in the drafting body, namely representatives of the Heads of State or Government, members of the European Parliament and members of the national parliaments. The Charter Convention was composed of one representative of head of State or Government from each Member State, sixteen members of the European Parliament, thirty members of national parliaments, (two representatives from each National Parliament) and one representative of the President of the European Commission.<sup>339</sup> In addition, observer status was given to two representatives of the ECJ and two representatives of the Council of Europe.

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2003. The updated explanations are published in C series of the Official Journal of the European Union. O.J. C 310 of 16 December 2004 at p. 424.

<sup>335</sup> De Burca G., 2001, p. 130.

<sup>336</sup> Helander, P., (c) 2001, p. 95-96. See discussion of the so-called “horizontal clauses” in chapter 3.4 onwards.

<sup>337</sup> COM (2000) 559 final, p. 3. Commission Communication on the Charter of Fundamental Rights of the European Union.

<sup>338</sup> House of Lords, Committee on European Union, Eighth report “EU Charter of Fundamental Rights”, 16.5. 2000, para. 125.

<sup>339</sup> See Cologne European Council decision of 3-4 June 1999, Annex IV, p. 76.

The Charter Convention was working outside the normal decision/legislation-making structure and was not formally part of the IGC 2000. The composition of the drafting body was totally new. The composition of the Charter Convention was innovative in the sense that national parliaments for the first time were officially included in the work of the European Union. The working method of the Charter Convention were intended to reflect the political nature of the representatives chosen by the European Council, bearing in mind the predominant place reserved for parliamentary representation. In a speech given in December 1999, Mr. Vitorino, a representative of the Commission on the drafting body, pointed out that never before has a Community/Union act been drafted by a composition including both representatives of the Member States and representatives of the European Union. He welcomed this innovatory configuration where democratically elected representatives of national parliaments and from the European Parliament formed parliamentary predominance of the Charter Convention. Vitorino was convinced that the “wise combination of the Community and national sides and, above all, the parliamentary predominance will help bolster the draft Charter’s legitimacy in the eyes of a public which is often critical of the complex decision-making machinery at European level”.<sup>340</sup>

The actual process of elaborating a fundamental rights catalogue became an important issue. In the words of de Burca, “[t]he process of drafting the Charter was always going to be at least as important -if indeed not more so- than the substantive document which eventually emerged”.<sup>341</sup> The European Council agreed in Nice 2000 to discuss the future development of the Union.<sup>342</sup> The European Council called for a deeper and wider debate in co-operation with the Commission and the European Parliament and also involving representatives of national parliaments and representatives of civil society. The question that immediately arose after the Charter Convention completed its work was whether the Convention method could be used for the “next step”, i.e. the reorganisation of the treaties involving, *inter alia*, the question of the future status of the EUCFR. The “success” of the Charter Convention no doubt had a crucial role to play in the establishment of the European Convention, dealing as it did with fundamental questions on the future architecture of the

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<sup>340</sup> CHARTE 4105/Body 1. p. 16.

<sup>341</sup> Ibid.

<sup>342</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001. O. J. 2001/C 80/01, Declaration No. 23 to the Final Act of the Treaty of Nice.

EU.<sup>343</sup> In other words, the success of the Charter Convention was used as a justification for adopting a new Convention based on a similar method used prior to the 2003-04 “grand debate”.

### 3.2.3 Fundamental rights and the question of legitimacy

The Cologne mandate raised the issue of the legitimacy of the European Union by prescribing that, “[t]he protection of fundamental rights is a founding principle of the European Union and an indispensable prerequisite for its legitimacy...<sup>344</sup> This statement suggests that there is strong link between the protection of fundamental rights and the issue of legitimacy. Indeed, respect for human rights is now seen as an essential criteria in determining the legitimacy of any given polity, be it a state or an international/ supranational organization. Every political entity has to take into account the issue of rights in one way or another when searching for its legitimacy or right to legitimately exist. The Cologne mandate clearly states that what is needed is to make rights more visible to the EU citizens. The intension is to examine in general terms the role of fundamental rights and their relation to the legitimacy of the “European project”. Is there a link between fundamental rights and the legitimacy of the EU as spelled out in the Cologne mandate?

The very foundation of any polity is that in order to be legitimate, it must be based on certain agreed upon values such as democracy, the rule of law and human rights. This statement might, however, be considered controversial in the sense that not all states are based upon a democratic model,

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<sup>343</sup> The Laeken declaration on the Future of the European Union prescribes that “In order to pave the way for the next IGC as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union....It will be the task of that Convention to consider the key issues arising for the Union’s future development and try to identify the various possible responses”. Key issues discussed in the “Future Convention” involved, *inter alia*, a definition of competencies between the EU and its Member States, the status of the EUCFR and the question of accession by the EC/EU to the ECHR, the reorganisation of the treaties and the role of national parliaments in the future construction of the EU. The European Convention started its work on the 28<sup>th</sup> of February 2002. SN 273/01 Laeken Declaration-The Future of the European Union of 15 December 2001. See further on a discussion of the Future Convention in chapter 5.

<sup>344</sup> “The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident”. European Council meeting in Cologne 3-4 June 1999.

but are yet perceived, at least by the international community, as being run by a legitimate government. For example, not all states that are members of the United Nations can be considered equally democratic based on the 'universally' agreed upon values such as the ones mentioned above. Perhaps today, one can distinguish between an external and internal dimension to the concept of legitimacy in an increasingly globalised world. It would seem safe to say that the international community does not require as strict conditions for what constitutes a legitimate state/government compared to what might be needed for a state to gain internal legitimacy.

However, in the European context, "[t]he most obvious reason is that it [fundamental rights] enhances the Community's legitimacy. Rights-based protections against the exercise of governmental power are justly regarded as central in democratic polities. The greater the powers of the Community, and the more that they impinged on matters which were social and political and not merely economic, the greater the need for some *quad pro quo* in terms of individual rights".<sup>345</sup> Therefore, the logic of the Council seems to be based on fact that the EU wants to solve its legitimacy crisis by, *inter alia*, addressing the issue of fundamental rights, i.e. to give something back to its citizens in return for an ever growing and deepening of the process of European integration. An important part of this was the process of determining who gets to decide on the definition of rights to be included as part and parcel of the EU legal order. The *process* of establishing a common agreement on which rights are to be protected would seem to constitute an important part of the quest for legitimacy in any polity. The basic assumption is, however, that fundamental rights have a role to play in the process of building up legitimacy for the EU.

### **3.2.3.1 Some conceptual remarks on the notion of legitimacy**

The concept of legitimacy is a complex multidimensional notion that is difficult to grasp in simple terms. The concept is often used but seldom defined, at least in the context of the EU. What further makes it complex is that it is used in different ways, for instance in legal philosophy and political science. The former is more interested in questions related to some kind of rational or moral value-based principle as the basis for legitimacy whereas the latter is more interested in it as a reflection of acceptance of authority by the governed. It is common to distinguish at least three different layers or dimensions to the concept of legitimacy. Beetham distinguishes three dimensions to the concept

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<sup>345</sup> Craig, P., 2001, p. 141.

'legitimacy'. Firstly, he proposes that a system or a polity has to have legal validity, i.e. that the power is to be exercised in accordance with the law. Secondly, the rules of power must be justified by reference to trust both by the governor and the governed, i.e. a justifiability of rules. Thirdly, there must be an expressed consent or evidence of consent by the governed to the power relation between the governor and the governed in order to gain legitimacy.<sup>346</sup>

According to Beetham, the three elements of legitimacy need to be examined separately, i.e. the legal validity, the moral justifiability and the public consent to the system. Schönlaue also sees the concept of legitimacy as a multi-layered notion, stating that, "one of these is to do with the 'legality' or formal correctness of decisions according to a set of predetermined rules. The second element requires a legitimate decision to be consistent with the identity, or shared ideas or norms of the collectivity that makes up the polity. The third element of a legitimate decision requires some notion of institutionalized consent to, or participation in, such a decision, by those who are affected by it".<sup>347</sup> In simplistic terms, one can distinguish between formal (legalistic) legitimacy and social (empirical) legitimacy. The former is easier to capture where institutions or built-up systems imply that all actions or creations of institutions or systems fulfil the requirements set out in law. In other words, formal legitimacy has its akin in the formal juridical validity.<sup>348</sup> The formal legitimacy has to have its foundation in a democratic system, i.e. in some form of consent by the people to established structures of power through a democratic process. In other words, formal legitimacy, according to Weiler, has to be reduced to democracy. Weiler makes a distinction between formal legitimacy and the concept of legality by stating that, "formal legitimacy is legality understood in the sense that democratic institutions and processes created the law on which it is based".<sup>349</sup>

Formal legitimacy of the EU is said to be unquestionable. The EU is set by the a series of treaties that validly entered into force by signing and ratifying the treaties by the high contracting parties in accordance with their own respective constitutional requirements. Having said this, it might be useful to note that individuals in the Member States have not always had the possibility of expressing their consent to the transfer of sovereign powers from the state level to an international organization such as the EU. Therefore, the statement

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<sup>346</sup> Beetham, D., 1991, p. 15.

<sup>347</sup> Schönlaue, J., 2001, p. 11.

<sup>348</sup> Weiler, J., 1999, p. 80.

<sup>349</sup> Ibid.

that formal legitimacy is a straightforward affair within the context of the EU is perhaps too simplistic. However, it seems that formal legitimacy is not enough in order to achieve the overall legitimacy of a polity such as the EU. The EU must also achieve social legitimacy in order to enjoy a broad societal acceptance. The legitimacy deficit of the EU does not have its roots in a lack of fulfilling the formal legitimacy requirements, but rather in a lack of social (empirical) legitimacy.

In recent years, we have seen examples of problems in ratifying treaties by certain Member States. The Danish people first refused to ratify the Maastricht Treaty in a referendum in 1992 and, more recently, Ireland faced problems with the ratification process of the Nice Treaty of 1999. Social legitimacy is a more flexible concept than formal legitimacy and therefore more difficult to capture. What exactly is meant by social legitimacy? First of all, the main rule is that in order to gain social legitimacy, institutions, systems or a polity must enjoy formal legitimacy. This entails that the system must be built upon the rule of law, as noted already. This does not entail that it would not be possible under any circumstances to gain social legitimacy without formal legitimacy. An example would perhaps be civil disobedience that might eventually lead to a change in the law, even if the law would still lack social legitimacy. Therefore, formal legitimacy does not mean that a polity would automatically enjoy social legitimacy.

Social legitimacy reflects a broad social acceptance of the system or the polity committed to values such as justice, freedom and welfare. What is interesting in terms of legitimacy is not that of formal legitimacy, but rather to what degree people de facto assume that the polity or the system that produces legally binding norms is legitimate.<sup>350</sup> The people being subjected to binding decisions therefore base social legitimacy on consent. By calling for broad social acceptance, Karlsson emphasises that legitimacy is public rather than elite oriented. The difficulty with the notion of “broad social acceptance” is, of course, in determining how this is to be measured.

Most studies in political science on legitimacy do not include the concept of rights as a key element in defining the legitimacy of a polity, but rather seem to emphasize the three elements discussed above.<sup>351</sup> However, some scholars include rights as a central element in defining legitimacy

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<sup>350</sup> Karlsson, C., 2001, pp. 107-109.

<sup>351</sup> Schönlau, J., 2001, pp. 39-44.

together with legitimacy through outcomes, values or morals.<sup>352</sup> The legitimacy of the EU has, prior to the legitimacy crisis that began in the early 1990s, been based upon a performance or outcome legitimacy, which has its basis in the legitimacy of the democratic states constituting the EU. This indirect legitimacy of the Union has become problematic and inadequate since the EU has emerged as a polity in its own right distinct from that of the nation state. Consequently, it is no longer possible to derive the legitimacy of the EU solely from that of the nation states.

Fossum has studied the legitimacy crisis of the EU by using the concepts of performance, values, and rights. He argues that legitimacy based on performance is at best incomplete.<sup>353</sup> In short, he argues that legitimacy through outcomes or performance should be consistent with the indirect legitimacy of the EU being based, as noted, upon the democratic characteristics of the member states. Outcome or performance legitimacy has its weakness in that it can be unstable and lead to inefficiency in the decision-making process based as it is upon, at least previously to a significant extent, the consent of all the member states.<sup>354</sup> In essence, what Fossum argues is that legitimation through outcomes is reasoned on the self-interest of the nation state by highlighting the benefits of cooperation where values and rights are no more than instrumental for building up the common market. Legitimacy through values and rights is referred to as normative justifiability. Value is referred to as “something which is seen as to be valuable, or ethically salient, and which is important to a group’s or community’s sense of identity and conception of the good life”, while rights is seen as a normative element which “presupposes mutual recognition and respect from each and everyone”.<sup>355</sup>

Legitimation through the concept of values highlights or tries to identify a common set of European values by focusing on identity, belonging, and the existence, or rather, the non-existence, of a European *demos* based upon

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<sup>352</sup> Rights-based legitimacy, in turn, presupposes mutual recognition and respect between each right-holder. Fossum, J., 1999, p. 2.

<sup>353</sup> Ibid.

<sup>354</sup> Tuori also posits three main alternatives for ensuring the legitimacy of the EU. He also identifies outcome or performance legitimacy and indirect legitimacy through the democratic procedures of the Member States and, thirdly, direct legitimacy through the EU’s own democratic structure. Tuori sees performance and indirect legitimacy as inadequate, thus arguing that legitimacy of the EU and its legal order can only be achieved through the democratic means of self-governance, i.e. that the authors of the law should be the subjects of the law. Tuori, K., 2004, pp. 52-56.

<sup>355</sup> Fossum, J., 1999, p.2.

shared cultural conceptions of collective identity. Some see the affirmation a kind of common platform of shared values for the Europeans to build upon as the most important contribution that the EU Charter could bring about. The preamble of the Charter prescribes that “conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom and equality and solidarity; it is based on the principles of democracy and the rule of law” (second recital). However, as Tuori has spelled out, “claiming such universalistic values does not yet ensure the formation of a unifying political and legal culture, focusing these values on the polity called the European Union and on the legal order of this polity”.<sup>356</sup> There is no automatic mechanism that triggers when something is written in a document that could give rise to a common identity and shared common values.<sup>357</sup> The problem of creating legitimacy through values is connected with the strong diversity of peoples living in a multicultural Europe.<sup>358</sup> However, the Charter process and, in particular, the deliberation over the values to be set out in the preamble was very much a debate about the underlying values of the EU and an attempt by the Union to specify the norms and values underlying European integration in order to sustain “ a kind of post-national legitimacy through a deliberative process”.<sup>359</sup>

For Habermas, the issue of human rights and the sovereignty of the people are essential to understanding the notion of legitimacy or the legitimacy of legal systems. The democratic process must be based on the mutual recognition of citizens as rights holders, thus constituting the private autonomy of the individual. This private autonomy is then complemented by public autonomy and the right to take part in public discourse (right to participation) forming the will of the people. It seems that the participants taking part in a deliberative democracy should be allowed to express their free will and that the end result of such deliberation shall be binding. The participants in the deliberative process should also be formally and substantially equal during all stages of deliberation and the end result should be based upon some kind of

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<sup>356</sup> Tuori, K., 2004, pp. 81-82.

<sup>357</sup> For a discussion on the notion of the *demos* in connection with concept of citizenship, see Tuori K., 2004, pp. 62-84.

<sup>358</sup> The Treaty establishing a Constitution for Europe recognises in its preamble that “convinced that, while remaining proud of their own national identities and history, *the peoples* of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny” (third recital).

<sup>359</sup> For a discussion of the drafting of the “new values” spelled out in the preamble of the Charter, see Schönlau, J., 2003, pp. 112-132.

consensus.<sup>360</sup> Legitimacy is therefore based upon providing the means for a free, rational and open debate. What Habermas is arguing for in terms of legitimacy is that rights-bearing individuals must have the opportunity to take part in the collective formation of the will in order for the law to be legitimate, i.e. that the subjects of law should also be the ultimate authors of the law. The precondition for this deliberative democracy model is that the subjects of law must be given some basic concept of (fundamental) rights in order to be able to take part in the public debate, i.e. it presupposes the freedom of the individuals or the autonomy of the individuals. According to him, “the law receives its full normative sense neither through its legal form per se, nor through an a priori moral *content*, but through a procedure of lawmaking that begets legitimacy”.<sup>361</sup>

So, what Habermas strongly seems to be arguing for is the legitimate force of (fundamental) rights and the process or conditions under which these are “collectively defined” and therefore the product of the formation of the social will within a political context. This proceduralistic conception of the law believing that the discursive and procedural basis of the democratic will of the people is for him the central source for legitimacy. This understanding of democracy has its roots in a view that collective decision-making can only be legitimate if it has been conducted in a deliberate way. The deliberative concept is, thus, reduced and justified in the concept of human rights and the principle of the sovereignty of the people. The concept of human rights in this deliberate democracy model is assigned the role of the right to equitable participation in formulating a common decision and the will of the people. In trying to apply the “ideal” deliberative democracy model to political reality, one runs into the inevitable question of how this model can work in practical terms.

How is this deliberative democracy model to be applied in real life? Surely, in the pluralistic political setting of the 21<sup>st</sup> century, it is unrealistic to think that all subjects of the law would be able to contribute to the formation of the common will and, ultimately, become the authors of the law. It is even naive to think that representative democracy would be able to cover all the viewpoints of its constituting members and somehow demonstrate them to be expressive of the common will. With regard to the European Union, a critique that has been raised about the problem with the legitimacy deficit is the view that the EU as such is not particularly democratic and lacks democratic accountability. The democratic deficit has partly and gradually been rectified by the treaty revisions that began in the early 1990s with an increase in the

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<sup>360</sup> Maurer, A., 2004, pp. 326-328.

<sup>361</sup> Habermas, J., 1998, p. 135.

powers of the European Parliament. However, there are strong views presented that this is not the right path to travel in order to rectify the democratic deficit of the EU. This is because, it is argued, the European Parliament, with over 700 members, cannot represent the interests and views of more than 400 million Europeans due to the cultural and political differences of the Member States. Others see precisely the increase in the powers of the European Parliament as the key answer in how to rectify the democratic deficit of the EU. According to this second view, the answer simply should not be connected to the European Parliament, but rather that the Council should be accountable through national democratic procedures, i.e. that the governments are and should be accountable before the national parliaments of the Member States.

Another matter that should be taken into account with regard to the proper functioning of the deliberative democracy model is the extent to which there has to be a common ground or some kind of basic consensus on the issues to be “bargained over” as a precondition before a meaningful deliberation can take place. As for human rights considerations, a proper and meaningful common understanding did exist, at least in abstract terms, prior to the exercise of convening a Convention for the purposes of drawing up a EU Charter of Fundamental Rights. At least a preliminary consensus among the Member States of the EU had been reached when they began arguing over the need for a EU bill of rights. It was not necessary to start the debate on the overall justification of rights and human rights discourse. A preliminary consensus on these issues had already been reached at the universal level with the signing of the UN 1948 Universal declaration of Human Rights. Rather, what was at stake was the definition of what rights could be defined as fundamental and what should be left outside this exercise.

### **3.2.3.2 Legitimacy and the role of rights**

As noted above, it is commonly believed that the EU suffers from a lack of accountability and legitimacy or general support. The recently held European Parliamentary elections in June 2004 once again indicated that “Europeans” feel alienated from the work of the EU. The average voter turnout in the EP election in the EU was 45, 6%. The overall trend since the first EP elections in 1979 shows that the voting activity of the Europeans in EP elections has steadily decreased from 63% in 1979 to 45, 6% in 2004.<sup>362</sup> This alleged legitimacy crisis of the EU has been on the agenda since the early 1990s with the signing of the

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<sup>362</sup>[http://www.elections2004.eu.int/epelection/sites/en/results1306/turnout\\_ep/turnout\\_table.html](http://www.elections2004.eu.int/epelection/sites/en/results1306/turnout_ep/turnout_table.html)

Maastricht treaty. In its white paper on European Governance in 2001, the Commission acknowledged that “[m]any Europeans feel alienated from the Union’s work...it reflects particular tension and uncertainty about what the Union is and what it aspires to become, about its geographical boundaries, its political objectives and the way these powers are shared with the Member States”.<sup>363</sup> The difficulties with the ratification process of the Constitution for Europe are only the most recent example of mistrust by the Europeans towards the formal constitutionalisation process and increased powers of the EU.<sup>364</sup> The legitimacy crisis debate entered the scene in the early 1990s when the Member States took the first steps towards an economic and monetary union and a political union.<sup>365</sup> At the same time, the changing nature of the Economic Community also indicated a legitimacy crisis for the “European project”. De Burca and Aschenbrenner have stated that “[a]rguably, it has become ever more important to articulate and prioritize the fundamental rights and interests of citizens as a response to the ongoing process of economic and political integration”.<sup>366</sup>

The underlying reasons for the popular legitimacy crisis of the EU are of course manifold. For the present purpose, the focus will be on the increased role of the language and discourse of human rights that gained the attention of the Member States and the Commission as a way of responding to the alleged legitimacy crisis of the EU. This was a way of introducing human rights language as a means of closing the gap between the popular support of the citizens and the policies of the European Union. The Member States decided to close the gap between the citizens and the EU by establishing a special convention charged with the task of drawing up a Charter of rights for the EU. De Burca and Aschenbrenner argue that, apart from the articulation of common values, the Charter project is potentially an instrument for enhancing the political and moral legitimacy of the EU.<sup>367</sup> They rightly argue that the Charter increases legal certainty to the extent that it provides a guide for the ECJ in

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<sup>363</sup> COM(2001) 428 final, p. 7.

<sup>364</sup> In the referenda, Both France and the Netherlands submitted the Constitutional Treaty for ratification, resulting in a clear “no” vote by the respective peoples of each nation. The people of France rejected the Constitutional Treaty in its referendum stage by a clear majority with some 55 % on 29. May 2005. Three days later, the people of Netherlands rejected it with a majority of some 62 %. It is noteworthy that both countries are the founding Member States of the EEC. Ratification situation as of February 2006.

<sup>365</sup> De Burca, G., 2004, p. 687.

<sup>366</sup> De Burca, G., & Aschenbrenner J., 2003, p. 368.

<sup>367</sup> Ibid.

dealing with fundamental rights issues raised before it. Furthermore, the Charter itself could constitute a guide for the citizens to understand the values upon which the Union purports to be built.

Indeed, by spelling these values out in clear and legible language, the Charter has the potential of paving the way for the citizens to better identify with the EU as a political entity. However, what needs to be asked is whether the rights language as such has a role to play in terms of legitimacy. What becomes important in terms of the connection between rights and legitimacy within the context of the EU is that a transfer of rights must follow the transfer of competences. The EU cannot constitute itself as a legitimate polity with all its increased competences without a similar protection of fundamental rights. This discussion is known from the case law, for example, by the German Constitutional Court.<sup>368</sup> What the German Constitutional Court was arguing was that the EU needed to provide the same “equivalent protection” as the German constitution already provided its citizens.

Rights are expressed in positive law and reflect, for the most part, subjective enforceable rights. As noted above, Fossum argues that, “rights are founded on the notion of reciprocal recognition and as such foster a sense of community allegiance”.<sup>369</sup> Whatever one’s view on the theoretical justification of rights is, the concept of rights and respect for fundamental rights cannot function as the only building block in the search for legitimacy. Schönlau argues in his thesis that the concepts of ‘legitimacy’ and ‘rights’ need to be linked together with the notion of democracy so that these concepts can be translated into practice by a democratic process in which rights and legitimacy mutually constitute each other.<sup>370</sup> Indeed, rights are important to democracy because they offer individuals protection and entitlements. As Fossum argues, rights are detrimental in the sense that they “enable a given community of rights-holders the ability in substantive and symbolic terms to conceive of itself as a democracy”.<sup>371</sup> The rights-based model for legitimation is conceived as vital in fostering a sense of community alliance by ensuring that all rights-holders are recognized and given the ultimate possibility to act as the authors of the law, i.e. being able to participate in a deliberative way in defining the content of rights within a given polity.

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<sup>368</sup> See chapter 2.3.

<sup>369</sup> Fossum, J., 1999, p. 11.

<sup>370</sup> Schönlau, J., 2001, p. 30. Unpublished. On file with the author.

<sup>371</sup> Fossum, J., 1999, pp. 11-12.

### 3.2.3.3 The EUCFR- a result of a deliberative process?

The novelty of the Convention model is that it clearly has a different approach than the classic way of discussing integration issues as it was set up outside the normal framework of the EU treaties and aimed at greater transparency and participation by new interest groups. There is, however, much to be said about the working methods of the Charter Convention itself.<sup>372</sup> Criticism was already raised about the way consultation on the European NGOs was conducted. Can one really say that European civil society was heard and consulted during the drafting process?

De Shutter has raised some critiques about the way European civil society was included during the drafting of the EUCFR. He argued for a better organization and involvement of the civil society in order to achieve something more than a diffuse right to express its viewpoints. What he advocated was the right to participate more directly in the drafting process. Otherwise, he argues that the mere participation by civil society will embody nothing more than a weak right to be heard rather than a more full consultative role.<sup>373</sup> What he was looking for was a way of giving civil society a prominent role in the deliberating process of shaping the values of the EU without actually going as far as to ultimately give a “seat at the table” to representatives of European civil society.

No doubt, the unprecedented transparency of the whole drafting process, which was supposed to involve representatives of civil society, had a strong anchor in serving the purpose of legitimizing the drafting process. However, it is difficult to conclude that drafting process, “all things considered”, was truly a deliberate debate of the values to be recognized by the EU. The involvement of different actors in the drafting process, including the “consultation” of civil society, clearly had the purpose of serving the objective of visibility. Indeed, it cannot be contested that the Charter Convention in many ways paved the way for a reassessment of how to increase the legitimacy of the EU. The Convention model clearly has an advantage over the “closed door” way of doing things represented by the IGC models. What then can be said about the Charter process in terms of it being an open deliberative process?

For starters, the European Council gave no more than 10 months for deliberation to members of the Convention based upon a prearranged mandate, i.e. the deliberation on what rights were supposed to be included in the

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<sup>372</sup> Unfortunately, the time and the space here does not allow for an extensive analyses.

<sup>373</sup> For a critique of the shortcomings of the Charter drafting process that affected the role of the civil society, see for example De Schutter, O., 2002, pp. 198-217.

EUCFR was not spelled out in any great detail, but the sources from which the Charter was supposed to be based upon were more or less spelled out in advance. The prearranged time limit caused some difficulties in terms of when the presidium was supposed to conclude that a broad enough consensus had been reached on a particular debate. Secondly, the whole exercise was an open one, but hardly transparent in the sense that tracking down the changes and proposals for each and every article proved to be extremely difficult. In the words of Liisberg: “In some ways, tracking down provisions of human rights conventions drawn up at diplomatic conferences under the auspices of the United Nations is easier”.<sup>374</sup> Thirdly, the secretariat of the Preasidium was empowered with great influence, on the basis of its proposal, to steer the direction of the discussion within the Charter Convention.

No doubt, the secretariat took into account the proposals received by the Convention members and from the civil society, but still it was entrusted with great powers. It was the secretariat that had the role of drafting proposals that were debated by the Convention in a plenary setting. Still, the Convention model was seen as a success, not only for being able to produce a Charter within the given time limit, but also because it contributed much to a new way of producing results outside the IGC framework. It could be said to constitute a premature test model for the theoretical, deliberative democracy model within the context of the EU.<sup>375</sup>

### 3.3. Drafting of the Charter

As Françoise Tulkens elegantly states, [t]he drafting of a text of law, all the more so of a text of fundamental rights is the result of a subtle reasoning between precision and intelligibility, concision and extension”.<sup>376</sup> No doubt, the Charter Convention was faced with a challenging task in elaborating a fundamental rights catalogue for the EU within such a restricted timeframe. It becomes clear from the reading of the Cologne European Council mandate that the drafting of a EUCFR was primarily a project targeted at the “citizens”. This implied a need to draw up a clear and legible document. As already noted, the motivation spelled out by the European Council prescribed a need to “establish

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<sup>374</sup> Liisberg, J., 2001, p. 18.

<sup>375</sup> For some statistical information and discussion about the input or the empirical reality of the debate within the Charter Convention, see Maurer, A., 2004, pp. 334-338.

<sup>376</sup> Tulkens, F., 2000, p. 331. The purpose is not to discuss the drafting process itself in any great detail, but rather to make some observations on certain key features of the drafting of the Charter. For a discussion of the drafting process, see De Burca, G., 2001, pp. 126-138.

a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's citizens".<sup>377</sup>

The structure and the wording of most of the rights reveal that visibility and simplicity were at the heart of the drafting process. The Charter Convention opted for a solution in which it tried to draft a clear and comprehensible list of rights that essentially captured the very essence of the rights based upon existing sources of law and jurisprudence aiming at maximum public impact. In other words, the Charter Convention looked for convenient and understandable statements of existing rights. At first sight, the Charter Convention seems to have succeeded in its goal of producing a legible document for EU citizens. The structure of the EUCFR is divided into three parts: the preamble, the substantive part and, finally, the general provisions at the end of the document (articles 50-54).<sup>378</sup> The general provisions at the end of the document are crucial for defining the scope of the EUCFR, its relationship with the ECHR and other international conventions covering the field of human rights and Member States' constitutions. This gives the impression that the substantive part is targeted at the citizens since it deals with the very core of particular rights and general provisions by addressing questions of legal significance, i.e. the "rules of interpretation" clarifying further the substantive part of the EUCFR.

Prior to any discussion about substantive articles, the Convention raised such issues as who should be bound by the new EUCFR and what would be the implications concerning the relation between the EUCFR and national constitutions and the implications for the well-functioning system of human protection established under the ECHR. The mandate of Cologne did not prescribe the need to draft any horizontal articles, but merely to put together what was considered to be part of existing rights. The Convention was, however, determined to draft a EUCFR "as if" it would have full legal effect. Therefore, the Convention felt that it was equally important to define the scope of the EUCFR and its relationship with other instruments in the area of protection of fundamental rights having in mind that the EUCFR ultimately would/could be incorporated into the treaties. The fact that the Convention

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<sup>377</sup> The Chairman of the Charter Convention, Mr. Roman Herzog underlined in his opening speech on 17. 12 1999 to the Convention that the mandate was to "put together a list of fundamental rights which will enable us together...to bring about a more "people-centred" approach in the European Union".

<sup>378</sup> This Charter Convention chose to divide 50 articles into six (6) chapters, i.e. dignity (articles 1-5), freedoms, (articles 6-19) equality, (articles 20-26) solidarity, (articles 27-38) citizens rights, (articles 39-49), justice, (articles 47-50).

included horizontal articles in the EUCFR shows that the intention was to draft a bill of rights that ultimately would be incorporated into the treaties without any amendment procedures. In other words, the Charter Convention aimed at producing a legally binding document from the very beginning being aware that the question of legal status was to be determined by the Member States at a later stage. The Convention was entrusted with neither the power to decide upon the legal status of the EUCFR nor the power to promulgate the EUCFR itself.

The horizontal clauses (articles 51-54) seek to offer an appropriate response to highly important questions related to the incorporation of the EUCFR into the treaties. Why would there have been any need to emphasise the importance of the horizontal articles if the aim was solely to codify applicable fundamental rights at the union level? A Charter whose aim is merely to be informative rather than enforceable in character would not provide anything other than greater transparency. Therefore, from the very beginning, the EUCFR was very much forward looking.

The structure of the EUCFR at first sight gives the impression of legibility. The technique used, however, is rather “complicated” in that the EUCFR itself does not necessarily clarify the substance of a particular right. For example, some of the articles based on the rights of the ECHR merely capture the core and do not clarify the meaning or the scope of a particular right.<sup>379</sup> In order to understand the content of a particular right based on the ECHR, one must therefore also address the source. An illustrative example of the drafting technique “reflecting simplicity” can be mentioned. Article 6 prescribes that, “everyone has the right to liberty and security of person”. Indeed, it is drafted in a simple and straightforward manner based on article 5 of the ECHR. Article 6 of the EUCFR captures the essence of article 5 of the ECHR. This is, however, not enough to understand the content of article 6 in the EUCFR. It is therefore of paramount importance to read article 5 of the ECHR, including the subsequent case law of the Strasbourg court, in order to have at least some understanding of article 6 of the EUCFR and to know under what conditions a person may be deprived of his/her liberty.

Indeed, the Convention looked for an “easy” and legible way of “incorporating” the provisions of the ECHR into the EUCFR. The coherence between these lists was “secured” by the inclusion of article 52 (3), which

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<sup>379</sup> The “Convention” opted also for the model of a general limitation clause among the “horizontal provisions” without providing for specific limitation grounds for each of the rights and freedoms included in the EUCFR.

prescribes that, to the extent the EUCFR correspond to the provisions of the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Mr. Fischbach, observer of the Council of Europe, has elegantly stated that “[t]o ask citizens to compare two parallel texts, and in this instance that would mean grasping and understanding all the subtle differences between Articles referring to the same rights... seems to me to go well beyond what one can legitimately expect of an individual subject of law and in any case to run counter to the objective of making the EUCFR readable and comprehensible”.<sup>380</sup> Furthermore, some of rights reproduce the rights recognised in the TEC without spelling out in clear and precise terms the limits to the exercise of a particular right. An example is article 39 of the EUCFR, which is based on article 19 (2) of the TEC. Article 39 of the EUCFR should first of all be read in light of article 52 (1), i.e. move on to the actual source and further on to the directive adopted on the basis of article 19 (2) of the TEC, which is ultimately implemented into national law.

The problem often is that when EUCFR provisions are based, for example, on provisions in the TEC, they do not contain the limits and conditions spelled out in the corresponding Treaty articles. The point here is to underline that the EUCFR may have been drafted for the citizen aiming at being a legible document. However, it has to be said that one cannot understand the substance of the rights in the EUCFR without first of all taking into account the general provisions functioning as the “rules of interpretation”, thus, consequently, consulting the source of origin of the provisions spelled out in the EUCFR.<sup>381</sup>

The final outcome of the drafting process has been described as being “elegantly conceived, beautifully drafted, and a masterly combination of pastiche, compromise and studied ambiguity”.<sup>382</sup> Members of the Charter Convention spent a significant amount of time trying to find compromises for the definition of fundamental rights that at least potentially belonged to the

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<sup>380</sup> CHARTE 4139/00, Contrib. 31, p. 4.

<sup>381</sup> It is easy to detect that the EUCFR provisions corresponding, for instance, with the ECHR have been “simplified” by merely capturing the core of the rights in question. In fact, it is rare the EUCFR has followed the ECHR verbatim. An example is [take out “however”] article 4 copying article 3 of the ECHR word for word and article 10 (1) following the wording of article 9 (1) of the ECHR. For a comparative list of the corresponding articles in the EUCFR with the ECHR, see text of explanations relating to the complete text of the EUCFR, CHARTE 4473/00 Convent 49 on article 52 (3).

<sup>382</sup> McCrudden, C., 2001, p. 7.

*acquis communautaire*.<sup>383</sup> The need to find compromises was important, not only for the reason that agreement had to be reached by the ‘masters of the treaties’. It goes without saying that, in particular, representatives of the Member States had an important part to play during the final stage of the drafting process in reaching compromises before the Charter Convention Presidium could conclude that a broad enough consensus had been reached within the Convention. It was understandably more easy to reach agreement on classic fundamental rights, most of them based on the ECHR provisions, which can be found in chapters on “dignity” (chapter 1), “freedoms” (chapter 2), “equality” (chapter 3) and “justice” (chapter 6).

The inclusion of social rights, however, raised considerable difficulties. The point of departure was that no definitive distinction should be made between different categories of rights, i.e. between civil and political rights on the one hand and economic and social rights on the other.<sup>384</sup> However, different views and understandings of the nature of economic and social rights were evident. On the one hand, human rights were seen as indivisible and interrelated where it is no longer possible to make a clear cut distinction between civil and political rights and economic and social rights. However, certain members of the Convention put forward a strong position underlining that only justiciable rights should and could be included into the EUCFR.<sup>385</sup> The argument was based on a view that social rights are, by their normative character, not justiciable in the sense that they could be invoked before a court of law and, therefore, have no place in a fundamental rights catalogue.

It has to be noted that the Cologne mandate made a distinction between classic fundamental rights to be included based upon the ECHR and common constitutional traditions as general principles of law and economic and social rights. The concept of economic and social rights was to be adopted only “insofar as they do not merely establish objectives for action by the Union”. This already reflected a certain hesitance to include economic and social

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<sup>383</sup> Lenaerts, K., & De Smijter, E., 2001, pp. 281-282.

<sup>384</sup> For a general discussion in different categories or different “generations of rights”, see for example, Rosas, A., & Scheinin, M., 1999, pp. 49-62.

<sup>385</sup> Arguments against inclusion of economic and social rights were also related to a fear of expansion of competences in an area that, to a large extent, belongs to the competence of the Member States. Secondly, inclusion of social rights would lead to an undesirable effect where the ECJ would intrude on the territory of the legislator. Judicial review of social rights could lead to social policy review by the judiciary. Thirdly, ideological arguments were put forward opposing inclusion of economic and social rights. Mendenez, A., (c) 2003, p. 377-378.

rights.<sup>386</sup> To a large extent, members of the Convention felt that economic and social rights, if included, should be drafted in rather vague terms due to reasons that it would be easier for certain Member States to accept the concept of social rights as part of the EUCFR.

Through difficult and lengthy debates within the Convention, a common denominator was found for the inclusion of a range of social rights under the chapter on 'solidarity' (chapter IV), but can also be found in other parts in the Charter.<sup>387</sup> The end result is, however, inevitably very much a compromise. As noted already, some of the Member States objected strongly to the inclusion of many of the rights included in the 'solidarity chapter'. As a result of strongly qualifying many of the rights in the solidarity chapter, the question has been raised of whether several of the labour rights can be considered as rights in the first place.<sup>388</sup> The polarisation on the notions of justiciability and non-justiciability as they pertain to certain rights reflects a rather simplistic and also a controversial view on the question of the justiciability of economic and social rights. The differentiation between justiciable and non-justiciable rights seems to be based on extremely vague grounds. At the end of the day, it is for the courts and, ultimately, for the ECJ to decide which rights they consider to belong to which category according to the scale of the rights, freedoms and principles set out in the EUCFR. The main argument, however, was based on a desire to classify economic and social rights as non-justiciable principles rather than subjective rights.

### **3.4. General Provisions – The Rules of Interpretation**

#### **3.4.1. Some preliminary remarks**

The aim of this chapter is examine the key provisions of the EUCFR (articles 51-54), taking also into account the proposals put forward by Working Group II of the European Convention. Working Group II of the European Convention was given the task of discussing the procedures for and consequences of incorporating the Charter into the Treaties. The point of departure was that the

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<sup>386</sup> Sakslin, M., 2001, p. 231.

<sup>387</sup> The Social rights provision are scattered in different parts of the Charter. The right to education (article 14) and the freedom to choose an occupation and engage in work are placed in chapter II (freedoms). Equality between men and women (article 23), the rights of the child (article II-24) and elderly (article 25) integration of person with disabilities (article 26) are to be found in chapter III (equality).

<sup>388</sup> See McCrudden, C., 2001 and Kenner, J., (a), 2003, p. 17.

substance of the Charter, as elaborated by the previous Charter Convention, was neither to amend nor to interfere with the explanations accompanying the Charter published by the Preasidium of the Charter Convention. However, WG II saw it necessary to make some “technical adjustments” prior to any incorporation of the Charter into the new Constitutional Treaty for Europe. These technical adjustments were made for the most part to the general provisions (articles 50-54) in order to prepare for the incorporation of the text as part of the new Constitutional Treaty of the EU.

Some technical adjustments were indeed necessary in order to synchronise the general provisions with the new Constitutional Treaty. However, concern was raised that incorporation of the Charter could, *inter alia*, lead to an extension of Union competences in spite of article 52 (1) by prescribing that the Charter does not modify or extend the competences of the Union. Perhaps the most controversial proposal is article 52 (5), which further stress the distinction between rights and principles in the Charter. The underlying assumption is that WG II wanted to clearly emphasise that there is a difference between civil and political rights on the one hand and economic and social rights on the other as to their legal nature. This led to a discussion concerning the legal implications of the notion of indivisibility more generally within the context of the EU. Furthermore, a new horizontal clause was proposed to remedy and clarify the provisions that are neither based on nor correspond to the ECHR or treaty provisions, but rather, that constitutional traditions common to the Member States are to be interpreted in harmony with national constitutional traditions.<sup>389</sup> To the extent that the provisions reflected common constitutional traditions, this new proposal aimed at harmonising national constitutional rights by precisely addressing the possible tension between the Charter and the national constitutional rights rather than arguing for the supremacy of one over the other.

Article 52 (6) was added to underline that, in applying the provisions of the Charter, full account would be given to national laws and practices in places where the Charter includes such references.<sup>390</sup> This amendment is rather straightforward and is not controversial. These “technical adjustments” proposed by WG II will be taken into account when discussing the horizontal

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<sup>389</sup> Article 52 (4) read as follows: “Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

<sup>390</sup> Article 52 (6) reads as follows: Full account shall be taken of national laws and practices as specified in this Charter”.

provisions of the Charter. Some of the new proposals “clarifying” the horizontal provisions seem to be legally problematic and will be discussed in more detail.

### **3.4.2 Field of application**

The so-called general provisions or horizontal clauses are placed at the end of the EUCFR (Chapter VII) and address questions such as the scope of application, limitations to recognised rights, freedoms and principles and its relationship to other sources of human/fundamental rights protection. The natural choice is to follow the order of the horizontal clauses in the EUCFR by first analysing the scope of application. The reflections made under the section “rules of interpretation” is based on the premise that the EUCFR is part of the new Constitutional Treaty for Europe and constitutes a full, legally binding constitutional rights Charter. In fact, it must be emphasised that the horizontal clauses were adopted precisely for the reason that, at the time of drafting, the Charter Convention based its work on the “as if” notion, i.e. that the EUCFR will ultimately be fully incorporated into the treaties. Reality, however, has shown that certain Member States have great difficulties in ratifying the Constitutional Treaty.

This state of affairs might well have consequences for the constitutionalisation of the Charter as incorporated in the Constitutional Treaty. This must naturally be taken into account. What can, at the time of writing, be stated is that the current ratification problems might postpone the constitutionalisation of the Charter, but will most likely not prevent it.<sup>391</sup> Therefore, it is argued that there are still good reasons for analysing the most important provisions in the Charter as adopted in the Constitutional Treaty. The horizontal clauses seek to offer an appropriate response to highly important questions related to the incorporation of the EUCFR into the treaties and how the EUCFR must find its place among the plurality of sources of inspiration for the ECJ in defining the fundamental rights protection in the EU. The main objective of the horizontal clauses is to clarify those particular relations.

According to article 51 (1): “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 Member States only when they are implementing Union law. They shall therefore respect the rights, observe the

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<sup>391</sup> For a discussion on whether the Constitutional Treaty is dead or still alive, see chapter 5.6.

principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it in other parts of the Constitution*".<sup>392</sup> The EUCFR is, in other words, applicable to the Union's institutions and not the activities of Member States falling outside the scope of Community law.<sup>393</sup> It has to be emphasised that the EUCFR is by no means an instrument of general application within the Union and its Member States as was advocated by several NGOs during the drafting process.<sup>394</sup> The problematic part is to identify when national authorities are acting within the context of EC law, triggering the application of the EUCFR, and when that is not the case. This leads to the conclusion that, when Member States are acting strictly within a scope of competence outside Union law, the provisions of the EUCFR are not applicable. This, however, is most problematic in areas with parallel competence between the Union and with regard to the doctrine of implied powers.<sup>395</sup>

This question is of paramount importance concerning the application and effect of the EUCFR. The inclusion of the subsidiarity principle was considered important in that Member States were seen as having the primary responsibility for protecting fundamental rights. The EUCFR is, on the other hand, first and foremost addressed to the institutions and bodies of the Union and not to the Member States. It is difficult to see the benefits in referring to the

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<sup>392</sup> The part in italics was added to article 51 (1) by WG II during the drafting of the Constitutional Treaty for Europe and endorsed by the European Convention.

<sup>393</sup> The term "institutions" applies to the institutions as referred to in article 7 of the TEC and the term "body" refers to all the authorities set up by the Treaties and secondary legislation. In other words, the EUCFR is addressed to all the institutions set up by the Union under all three pillars and not merely restricted to EC law. It can be taken for granted that the EUCFR is primarily addressed to the institutions and bodies of the Union and only to the Member States when they operate within the scope of Union law.

<sup>394</sup> Certain NGOs were less concerned with the question of the scope of application of the EUCFR and instead called for a new European human rights instrument applicable within the EU and its Member States and which disregarded the intention to limit the scope of application. See for example a common statement made by the broad platform of European social NGOs and the ETUC calling for legally binding EUCFR for all the EU institutions and Member States. CHARTE 4286/00, Contrib. 158, p. 4. Amnesty International on the other hand recognised this intention, but nevertheless called for a EUCFR that "applies to the activities of the EU institutions...Member States action acting within and also *outside* the current sphere of EC/EU law". CHARTE 4290, Contrib. 162, pp. 5-6.

<sup>395</sup> Indeed, as the EP identified: "powers and responsibilities are more often shared between the EU level and Member State governments than they are delegated exclusively to the EU institutions". European Parliament report of 3 March. 2000, A5-0064/2000, p. 11.

principle of subsidiarity within the context of fundamental rights protection in the Union. The application of the subsidiarity principle to the EUCFR implies non-interference by the Union in the relationship between the nationals and their own state authorities in matters falling outside the scope of Union competence.<sup>396</sup> In practice, it is much more difficult to separate the legal systems of Member States from the EC legal system since the EC law is very much integrated with national legal systems.<sup>397</sup> The scope of application is indeed very much connected to the question of where the line between the legal systems of the Member States and Union legal order can be drawn. This can only be done in each individual case and is a matter ultimately to be solved by the ECJ. In practical terms this means that, in order to trigger an application of the EUCFR in individual cases, an appropriate nexus between EUCFR provisions and Union law needs to be established.

The doctrine developed by the ECJ makes it clear that Member States should respect Community fundamental rights not only when they are implementing Community law<sup>398</sup>, but also when Member States are derogating on justified grounds from the fundamental economic freedoms which are likely to obstruct the exercise of the free movement of goods, right of establishment and the freedom to provide services imposed by the EC Treaty.<sup>399</sup> The wording in article 51(1) of the EUCFR is therefore narrower than the case law of the ECJ in prescribing that Member States are bound to respect the Charter “only when they are implementing Union law”.<sup>400</sup> From this it would follow that the Charter Convention perhaps deliberately wanted to limit the effects of the EUCFR on the Member States by simply prescribing that the Charter is only applicable with regard to the Member States in implementing Community law.<sup>401</sup>

However, it is interesting to note that the explanatory report prepared by the presidium seems to have a broader formulation in mind in its comment

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<sup>396</sup> CHARTE 41111, Body 3.

<sup>397</sup> For a more thorough discussion on fundamental rights and the scope of Community law, see, for example Lenaerts, K., 2000 (a), pp. 590-594 and Eeckhout, P., 2002, pp. 962-969.

<sup>398</sup> See Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, judgment of 13 July 1989, para. 19.

<sup>399</sup> Case 260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Judgment of the Court of 18 June 1991, para. 43.

<sup>400</sup> See chapter 2.4.3.

<sup>401</sup> Besselink, L., 2001, p. 76-79. De Burca, G., 2001, pp. 136-137. Jacobs, F., 2001, pp. 338-339, Garcia, A., 2002, p. 495.

on article 51, which says that the provisions are “only binding on the Member States when they act in the context of Community law”.<sup>402</sup> This formulation seems to correspond far better with the case law of the ECJ, which also covers situations where Member States derogate from Community law rather than merely “implement Union law” as prescribed in article 51 (1). The explanation of article 51 (1) does indeed refer to the *ERT judgment*, but does not in any other way address the question of derogation. The explanatory report simply refers to “Member States when they act in the context of Community law”, which could be seen as an indication of both implementation and derogation types of application. However, this questions remains unclear in that the drafting history of article 51 (1) does not shed any more light on this question.<sup>403</sup> Alonso Garcia, has stated that the presidium “considered that the rights acknowledged therein would be imposed on Member States when they acted ‘within the framework of Community law’, a notion which certainly covers a wider spectrum than ‘implementation’ understood in its strict sense”.<sup>404</sup> One possible answer to the uncertainty about the narrower formulation in article 51 (1) compared to the case law of the ECJ is perhaps the English text version, which refers to “insofar as they are implementing Union law” and reflects the ECJ “implementation” doctrine as stated in the *Wachauf case*.

Having a closer look at other language versions of article 51 (1), it becomes perhaps more clear that the drafters of the EUCFR did not necessarily intend to formulate the scope of application more narrowly than the existing case law of the ECJ by stating that Member States are bound by Community fundamental rights guarantees to act “within the scope of Community law”. For example, the Swedish language version of the text resembles more the scope of application of Union law in prescribing “när dessa tillämpar unionsrätten”. The Finnish version prescribes “kun ne soveltavat unionin oikeutta” and the German version “bei der durchführung des Rechts der Union”.<sup>405</sup>

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<sup>402</sup> CHARTE 4473/00, Convent 49. See also De Burca, G., 2001, p. 128.

<sup>403</sup> See Eeckhout, P., 2002, pp. 954-958.

<sup>404</sup> Garcia, A., 2002, p. 495. However, his argument seems be of similar to that of De Burcas, where she underlines that the presidium seems to treat the “implementing doctrine” as a summary of the entire ECJ jurisprudence by citing a recent judgment of the court. See Case 292/97, Kjell Karlsson and Others, reference for a preliminary ruling. Judgment of the Court of 13 April 2000. De Burca, G., 2001, pp. 136-137.

<sup>405</sup> Helander, P., 2001 (c), p. 106.

It seems to be sufficient to state that article 51 (1) includes both *Wachauf* and *ERT*, i.e. implementation and derogation types of situations as can be noted from the explanatory report by the presidium on article 51(1).<sup>406</sup> Unlike De Burca and Eeckhout, the present author would submit that the drafters of the EUCFR did not intend to limit the effects of the Charter on the Member States with article 51 (1) compared to the seemingly broader case law of the ECJ on this issue.<sup>407</sup> Despite the uncertainty expressed by certain scholars concerning the scope of application, the problem seems to be to a certain extent exaggerated in that article 51 (1) would fit nicely with the doctrine developed by the ECJ in which the scope of application is connected with questions of application of the substantive law of the Union.

### **3.4.3 The Charter and internal EU Competences in the field of human rights<sup>408</sup>**

The negative response by the ECJ in opinion 2/94 on the possibility for the EC to adhere to the ECHR has had significant consequences for the question of whether the EU has the general power to enact rules in the field of human rights. The Court based its argument on article 5 of the TEC by stating that the “community only has those powers which have been conferred upon it”. The Court further stated that, “no treaty provision confers on the Community any general power to enact rules on human rights or to conclude international conventions in this field”.<sup>409</sup> Subsequently, one interpretation has been that it would go beyond the objectives of the Community to enact general internal rules in the field of human rights.<sup>410</sup> The secretariat of the Presidium of the Charter Convention was asked to produce a draft on certain horizontal articles, including the scope of application at the very beginning of the drafting process.

The secretariat followed rather strictly the reasoning in opinion 2/94, where the Court “made a distinction between the obligation to respect fundamental rights and the power to legislate with regard to fundamental

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<sup>406</sup> CONV 828/1/03, Rev 1.

<sup>407</sup> Eeckhout, P., 2002, p. 977 and De Burca, G., 2001, pp. 136-137. See also Garcia, A., 2002, p. 495.

<sup>408</sup> The question of Union competences and human rights will not be dealt with in regard to the EU’s external human rights policies. For a general discussion on the question of general competence in the field of human rights, see for example De Burca, G., 2002, pp. 135-145 and, for a critique with regard to the question of competence and the desirability of such a competence, see Beaumont, P., 2002, pp. 152-159.

<sup>409</sup> Opinion 2/94, para. 27.

<sup>410</sup> De Burca, G., 10/01, p. 11.

rights”.<sup>411</sup> This view represents a restrictive reading of opinion 2/94 that has been challenged based on the argument that the ECJ had ruled out the possibility of accession of the Community but had not taken a stand on the question of whether human rights might constitute an objective or rule out any EC competence in the field of human rights.<sup>412</sup> This particular opinion of the Court in 1996 is, however, very much reflected in the EUCFR, where article 51 (2) prescribes that “this Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify the powers or tasks defined in other parts of the Constitution”.<sup>413</sup> In other words, from an autonomous reading of the provision, it follows that the EUCFR cannot be seen as a basis for positive legislative action in the field of human rights. The EUCFR should be seen as nothing more than a codification of what already exists under the jurisprudence of the ECJ in the field of human rights, i.e. as a set of standards or constraints on EU and Member State action within the limits of conferred powers.

Article 51 (2) reflects the opinion presented by the secretariat to the drafting body where it was concluded that, “the aim of the Charter is to establish a bill of rights, rather than to confer new powers on the Union to legislate in the field of human rights.”<sup>414</sup> Yet, the same secretariat later on stated that some of the rights in the Charter will “require action by the European Union for them to be implemented, and the legislator has broad discretionary powers as regards such action”<sup>415</sup> However, the question of whether the requirement to *promote* the rights, freedoms and principles in the EUCFR in accordance with article 51 (1) included the possibility to legislate remained more or less open. There is, however, a certain tension between the statement on powers or competences and the objective to *promote* respect for the rights, principles and freedoms set out in article 51 (1). How is this to be understood and, more importantly, to be solved?

If one takes the view that the role of fundamental rights is to be understood as more than simply a constraint on the EU/Member State power, i.e. an obligation for the legislator also to *actively* promote fundamental rights

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<sup>411</sup> CHARTE 4111/00, Body 3.

<sup>412</sup> See for example Alston, P., & Weiler, J., 1998, p. 46-47, Weiler, J., & Fries, S., 1999, pp. 147-165 and Rosas, A., (a) 2001, pp. 64-67, Eeckhout, P., 2002, pp. 979-983.

<sup>413</sup> The previous version of article 51 (2) as endorsed by the Charter Convention read as follows: “This Charter does not establish any new powers or task for the Community or the Union, or modify powers and tasks defined by the Treaties”.

<sup>414</sup> CHARTE 4111/00, Body 3.

<sup>415</sup> Ibid. pp. 2 and 5. For a critique on this point, see De Burca, 2001, p.135.

more generally, one might run into problems with article 51. It would seem odd that the objective of promoting the EUCFR would not in any way affect or modify the powers and tasks of the institutions of the Union. De Burca finds it difficult to imagine, in spite of the wording in article 51 (2), that the competences of the Union would not be affected by an incorporation of the EUCFR into a constitutional treaty. According to her, “it seems difficult to maintain that the competences and powers of the Community will not at the very least be *altered*...but more significantly, that they are likely to be expanded in certain respects”<sup>416</sup> One cannot overlook the fact that the content of the EUCFR is more than merely a statement of previously existing fundamental rights that would not in any way modify the substance of fundamental rights protection in the EU.

One way of looking at this problem would be to argue that fundamental rights simply have a constraint function, which would certainly satisfy governments that fear a transfer of competences by incorporating the EUCFR into the new Constitutional treaty. Another way would be to accept that incorporation would ultimately lead to an extension of Union competences in the field of human rights.<sup>417</sup> This option is certainly too far-reaching and, therefore, not feasible as such. However, one possibility would be to further underline that incorporation would only mean that the obligation to promote the protection would have to fall within the limits of the conferred powers of the Union. Such an example can be found in article 13 of the TEC, which states that “*within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*” This, however, is still problematic with regard to a strict reading of article 51 (2) of the EUCFR.

The obligation to promote could also be interpreted as an obligation for the Union legislator to act in such a way that would best enhance the respect for rights and freedoms and observe the principles for carrying out the functions within the limits on conferred powers. This could, in practical terms, mean an obligation for the legislator, for example, to enhance the right to access the

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<sup>416</sup> De Burca, G., 10/01, p. 12 and De Burca, G., 2002, p. 137 where she make an equally bold statement: “...there is no doubt that its [The Charter] formal incorporation would be likely to have a significant effect on the legal basis for Community competence in the field of human rights, whatever disclaimers and qualifications the Charter itself may contain in this respect”.

<sup>417</sup> See Weiler, J., & Fries, C., 1999, p. 161.

documents by imposing an obligation to develop transparency legislation within the Union. This would hardly be problematic in light of the question of competences.<sup>418</sup> This option would seem to best reflect the obligation to promote the provisions without transferring any new competences from the Member States to the Union, which is also reflected in the final outcome of WG II of the European Convention with regard to the question of competences. Indeed, the fear of creating new competences for the EU, as a result of the incorporation into the new Constitution, was downplayed by WG II of the European Convention.

According to a background paper prepared by the Chairman of WG II, it was argued that the institutions and bodies, together with the Member States, shall indeed “respect the rights, observe the principles and promote the application thereof, however, *“in accordance with their respective powers”*”. This would suggest that the obligation to promote the rights and principles would accordingly only arise within the limits of the existing division of competences between the Member States and the EU.<sup>419</sup> Certain rights, however, relate to areas in which the Union has little or no competence to act. One question to be raised is whether the obligation to promote the application of the EUCFR could also cover matters falling outside the scope of Union law? The answer seems to be clear. The EUCFR makes it clear that the obligation to promote the application of the Charter is restricted “in accordance with their respective powers”.<sup>420</sup> In other words, the Union is under an obligation to promote the Charter *only* with due respect to the powers conferred upon it.<sup>421</sup>

The clarification made by WG II aimed at underlining that no new policy powers to legislate in the field of human rights will result from making the EUCFR part of the Constitutional treaty. However, any positive obligations that might derive from certain provisions must fall within the existing competence of the Union to act *under the substantive provisions of the Treaty*. This is very much in line with the “spirit” of article 51 and is further emphasized in

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<sup>418</sup> On the right to access to documents as a *fundamental right*, see AG Leger’s opinion of 19 July 2001 in case 353/99 *Hautala v. Council of the European Union*.

<sup>419</sup> WG II/Working document 03 of 5 July 2002.

<sup>420</sup> This line of reasoning was later established in the *Grant case*, where the Court stated that “human rights themselves cannot have the effect of extending the scope of Treaty provisions beyond the competences of the Community”. See Case 249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, judgment of 17 February 1998.

<sup>421</sup> This view is shared by judge V. Skoris of the ECJ, provided that this point is made clearer in articles 51 and 52 as suggested by WG II. See WG II, working document 19 and Director-General of the European Commission’s Legal Service Mr Petite and Johann Schoo, Director in the Legal Service of the European Parliament. See WG II, Working document 13.

the new proposal for a horizontal article 51 where the obligation to respect fundamental rights is seen simply as a constraint on the action of Union institutions and not a general license to legislate in the field of human rights.<sup>422</sup> The question, however, is whether this is sufficient enough to prevent further transfer of competences as a result of incorporation into a constitutional Treaty. It still would seem inevitable, in spite of the new formulation proposed by WG II of the European Convention, that incorporation will have an effect on the nature and tasks and powers of the institutions. This would not establish new powers in the field of human rights, but rather would alter the tasks in a somewhat softer manner. The intention was to strongly underline that incorporation would not establish new powers for the Union resulting from political realities.<sup>423</sup>

### **3.5 Scope of guaranteed rights**

#### **3.5.1 Limitation of rights and the principle of conformity**

Article 52 begins by introducing a general limitation clause on material provisions by prescribing that “any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”. Fundamental rights as such can be characterised both as absolute and as more or less relative. However, it has to be said that most of the fundamental rights are more or less relative in that they can not be viewed as static or “once and for all” settled standards, but rather as standards reflecting fundamental values in society, i.e. values brought under the legal framework that represent a certain continuity while, at the same time, being open and dynamic.

It is more a rule than an exception that constitutional fundamental rights provisions are further specified that introduce limitation clauses to specific fundamental rights at the level of ordinary legislative acts. It is usually at the constitutional level that the criteria is set that determines to what extent and under which conditions fundamental rights may be limited or derogated.<sup>424</sup>

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<sup>422</sup> CHARTE 4111, Body 3.

<sup>423</sup> De Burca, G., 2003, p. 21.

<sup>424</sup> Alexy, R., 2002, p. 81.

In Alexian terms, “limits with constitutional status are *constitutionally immediate* and limitations resulting from ordinary legislative acts are *constitutionally mediate*”.<sup>425</sup> Few fundamental rights can therefore be characterised as absolute from which no limitation or derogation would be permitted. However, the inalienable core of each fundamental right determines the limitation criteria. In other words, only a very few fundamental rights are, generally speaking, absolute in the sense that any limitation or derogation whatsoever is prohibited. That is also the case when a fundamental right in and of itself does not contain any limitation clause.

Alexy calls such limitation principles “first degree limitation principles” capable of limiting a limitlessly protected constitutional right.<sup>426</sup> An individual cannot claim his or her right to be protected to the fullest degree while at the same time violating some others fundamental rights, i.e. “the rights of others doctrine” serve as a logical immanent limitation. A limitation to fundamental rights can also be called upon on the basis of some other collective interest without ever justifying the limitation to the essential core of each constitutionally protected right. Naturally, different constitutional systems and different international human rights treaties include different solutions as to under which conditions are accepted and how far-reaching the limitations should be.

The solution, for example, in the Finnish constitution is that only a few provisions in the fundamental rights catalogue include specific limitation clauses while most of the other provisions lack any specific limitation clause. This does not mean that the provisions lacking specific limitation clauses would be absolute. Since the Finnish fundamental rights catalogue, however, lacks a general limitation clause the question of what constitutes legitimate grounds for

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<sup>425</sup> Ibid. p. 185.

<sup>426</sup> Alexy, R., 2002, pp. 73 and 81. Alexy states an example a German Constitutional Court case of 1970 forming the basis for the case law from Constitutional Court on the limitation of limitlessly guaranteed constitutional rights. See BVerGE 28:243 where the court states that “only conflicting constitutional rights of third parties and other legal values of constitutional status are capable, with due respect for unity of the constitution and the entire order of values it upholds, of limiting limitless constitutional rights in certain circumstances. The conflict arising in such situations can only be resolved by establishing which constitutional provision is of greater weight for the concrete issue at hand...The weaker norm may only be overridden to the extent that appears logically and systematically necessary; whatever happens, its fundamental substantive value must be respected”. Alexy holds this as evidence that the German Constitutional Court sees fundamental rights as principles distinct from rules at least to a certain extent.

justifying the restriction of constitutionally protected rights is to a large extent a question of interpretation. A set of principles on legitimate restrictions has, however, been developed by the Constitutional Law Committee of the Finnish Parliament.<sup>427</sup>

With regard to international human rights treaties, the ECHR includes certain limitation clauses on explicit provisions in the Convention. Articles 8-11 prescribe more or less in the same manner that respect for privacy, the home, private correspondence, freedom of information, freedom of religion and freedom of assembly can be provided for by law to a limited extent and are necessary in a democratic society on one of the expressly enumerated grounds in the provisions, while still taking into account the rights and freedoms of others. The European Court of Human Rights is the authoritative court for interpreting the limitations posed by the Member States. Here, it is sufficient to note that the limitations in the ECHR are expressly connected to specific provisions in the Convention. The same model can also be found in the ICCPR.<sup>428</sup> The solution to the question of limitations and restrictions by the Charter Convention was to introduce a general limitation clause, i.e. opting for a model of producing a convenient, understandable and easily readable

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<sup>427</sup> The new Constitution of Finland was adopted in Finland in 1999 and entered into force on 1 March 2000. With regard to fundamental rights, a reform of the Finnish catalogue of fundamental rights was completed in 1995 and is now incorporated into the new Constitution in Chapter II. The doctrine of limitation was summarised during the parliamentary consideration of the Government Bill of Rights by the Committee of Constitutional Law in the following terms: 1) no restriction that extends to the core of a constitutional rights may be enacted through an ordinary Act of Parliament; 2) restrictions must comply with the requirement of proportionality...A restriction may not extend further than what is justified taking into account the weight of the societal interest forming the background for the restriction, in relation to the right to be restricted; 3) A restriction is legitimate only if the aim sought cannot be reached by means of that would in a lesser extent touch upon the fundamental rights in question; 4) limitations to fundamental rights must be decided in the form of an Act of parliament by the Finnish Parliament; 5) fundamental rights formulated as prohibitions are bind on the legislature allowing no exceptions by ordinary legislative acts; 6) all restrictions must be accurately defined and precise; 7) the restriction must serve a legitimate aim; 8) a restriction is only legitimate if the legitimate aim cannot be obtained by constitutionally less intrusive means; 9) sufficient legal safeguards must be provided for when restrictions are imposed; and, 10) restrictions may not be in conflict with Finland's international human rights obligations. See further, Scheinin, M., (b) 2001, and Viljanen, V-P., 2001.

<sup>428</sup> Concerning the Human Rights Committee, see General Comment No. 27 (67) illustrating the general principles of interpretation by the Committee with regard to restriction clauses. UN doc. HRI/GEN/1/REV.5. pp. 163-168.

catalogue of fundamental rights. In other words, the Charter Convention avoided a model where specific provisions would be complemented by specific limitation clauses.

The question concerning the limitation of rights within the context of the Charter is very much related to the internal priorities of Union law itself as well as to the level of protection. But limiting a right does have immediate consequences with regard to the level of protection offered. As noted, only a limited part of rights can be considered as absolute. From this it follows that most of the rights must be considered as more or less relative, i.e. rights that can be limited *per se* or balanced in relation to each other. As noted, however, certain fundamental rights can be described as absolute in that no limitation or derogation is permitted. Examples of such rights can also be found in the EUCFR, i.e. article 4, which prescribes that “no one shall be subjected to torture or inhuman or degrading treatment or punishment,” or article 49, which prescribes that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time it was committed”.<sup>429</sup> Indeed, all general international human rights conventions prescribe certain rights to be non-derogable, from which derogation is prohibited even for the most serious situations “threatening the life of a nation”.<sup>430</sup>

As a general rule, rights cannot be limited any more than is necessary in order to achieve the objective of limiting rights. Limitations fulfilling certain criteria must be introduced restrictively to be lawful. Criteria set out for limitations can, as noted, be found among the general provisions in article 52 (1). According to the definition in article 52 (1), limitations must meet the principles of legality, proportionality and necessity in addition to meeting more specific grounds of limitations found in other contexts from which the EUCFR draws inspiration.<sup>431</sup> It would seem odd that article 51 (1) could be applied to articles that correspond with the ECHR, resulting in a situation in which a different set of limitation criteria could be applied with regard to similar rights found both in the ECHR and EUCFR and operating in different contexts. Article 52 (1) must therefore be seen as an additional limitation clause to specific

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<sup>429</sup> It is to be noted that the EUCFR only contains a general limitation clause. See article 52 (1) of the EUCFR.

<sup>430</sup> For a brief discussion on the notion of non-derogable rights, see Lindfelt, M., 2001, pp. 15-97.

<sup>431</sup> Peers, S., 2001, p. 155.

limitation clauses found in article 52 (2 and 3) and not a self-contained standard governing any derogation and limitation from rights set out in the Charter.

In light of article 52 (3), for example, it would seem unthinkable that a Charter provision corresponding to an article in the ECHR could be subject to limitation based upon article 52 (1), while the same rights under the ECHR would not be subject to any expressed limitation clause.<sup>432</sup> Secondly, in light of the *Matthews case law*<sup>433</sup> from the European Court of Human Rights, the argument against article 52 (1) being a self-contained standard that could go beyond the limitations provided for under the ECHR is based on the premise that Member States also have treaty obligations under the ECHR. The probable reason, therefore, was to include a general limitation clause to cover provisions in the Charter not based upon either the ECHR or the TEC/TEU. According to the explanatory report from the Presidium, the general limitation clause in article 51 is based on the ECJ case law.<sup>434</sup>

Limitations must, in other words, be prescribed by law and respect the principles of proportionality and necessity without, at the same time under any circumstances, limiting the very essence of a particular right. The proportionality principle and the principle of necessity should, furthermore, be balanced in relation to the interest of others and, secondly, with due respect for the general objectives of the Union. The requirement to take into account the interests of the others subject holders of rights is not that problematic. It is a question of balancing the interest of the subject holders of rights against each other. These situations are fairly normal in every-day jurisprudence where the interests of two subject rights holders collide and a balancing and weighting exercise needs to be done in an Alexian way while seeking to optimize the rights of all.

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<sup>432</sup> For an analyses concerning limitation of rights under the Charter, see Peers, S., 2001, pp. 152-155.

<sup>433</sup> Application 24833/94, *Matthews v. United Kingdom*, judgment of 18 February 1999. For a discussion on this case, see chapter 6.2.

<sup>434</sup> See, for example, Case 292/97, *Kjell Karlsson and Others*, Reference for a preliminary ruling. Judgment of the of 13 April 2000, para.45: "it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights also mentioned as a ground for the general limitation clause". The reference to this case can be found in the explanatory report prepared by the presidium. See *Charte 44/73/00*, Convent 49.

The more difficult part in the general limitation clause is the reference to the general interest of the Union as grounds for limiting fundamental rights. Here, the situation seems to be a balancing test between the interests of the rights holders and the collective interest. In many national constitutional systems, the interests of the collective are sub-ordinate to that of the individual.<sup>435</sup> One could ask whether any general interest of the Union could justify the limitation of fundamental rights. The answer to this question must be that the general interest of the Union cannot serve as the basis for the limitless limitation of fundamental rights in the name of the general interest of the Union. First of all, the core of each right must always prevail in relation to the collective good.

At the end of the day, this question is evidently related to the principle of proportionality and what this means in terms of what are considered to be at the core of each right in a given case and its relation to the collective good. It is a question of, again, balancing between the collective good and the rights of the individual. This would seem to be the most sensitive area in terms of the general right of limiting rights within the EUCFR. This question is very much related to the criticism previously levelled at the Community in the legal doctrine on whether the EC/EU is taking rights seriously or not.<sup>436</sup>

Article 52 (2), on the other hand, sets out in more simple terms that, when a Charter provision is based on EC/EU treaty provisions, it shall be exercised under the same conditions and within the limits defined by those treaties. In other words, the intention was that the Charter provisions would not in any way alter the scope of the rights based on provisions in the EC/EU treaties. However, tensions are likely to arise due to the fact that it is difficult to state which rights are “based on” the treaties, bearing in mind that certain provisions contain changes and additions.<sup>437</sup>

An example of such an overlapping or even conflicting right is the right to collective bargaining, including strike action, in article 28, which creates tension with article 137 (6) of the TEC that in particular excludes the right to strike. Article 52 (2) would seem to be insufficient to solve this type of tension between a Charter provision and a treaty provision. Another example is article 21. The list of what is covered by the non-discrimination clause is far wider

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<sup>435</sup> That is at least the situation in the Finnish context, in particular after the constitutional rights reform in 1995. On the reform of constitutional rights in the Finnish context, see for instance Lämsineva, P., 2002, pp. 56-90. Alexy would also sub-ordinate the interest of the collective to that of the individual. See Alexy, R., 2002, p. 193.

<sup>436</sup> For a critique’ see, for example, Coppel, J., & O’Neill, A., 1992, pp. 669-692 and a response to the critique, Weiler J., & Lockhart N., 1995, part I pp. 51-94 and part II, pp. 579-627.

<sup>437</sup> De Burca, G., 10/01, p.2

than what is recognised in article 13 of the TEC (proposed article III-8). The grounds on which discrimination is prohibited in the Charter are based on a combination of rights found in article 13 of the TEC, article 14 of the ECHR and article 11 of the Convention on human rights and biomedicine.<sup>438</sup> Does article 21 imply a stronger protection in comparison with article 13 of the TEC or does article 52 (2) set limits to article 21? To answer this question, one needs to establish whether article 21 is “based on” article 13 of the TEC. The answer to this question seems to be both “yes” and “no.” To the extent that the Council has exercised its powers under article 13 of the TEC, the corresponding provision in question will have to serve as the basis for contracting the scope of article 21 (1) of the Charter. Otherwise, one cannot conclude that article 21 (1) would be based on article 13. Consequently, one must conclude that the prohibition is unconditional to the extent that the discrimination falls within the scope of application of the Charter in the first place.

If this line of argument is correct, one should be able to conclude that article 13 of the TEC, which prohibits discrimination on the grounds of colour, language or political or any other opinion is, thus, limited by article 52 (2). Article 52 (2) is intended to be a neutral confirmation of the provision that are “based on” treaty provisions without widening or reducing the scope of application or the level of protection. Article 45 (1) can serve as an example, according to which “every citizen of the Union has the right to move and reside freely within the territory of the Member States”. The freedom of movement is conditioned according to an equivalent provision, 18 (1), of the TEC. Article 52 (2) is construed not to disturb the rights provision already protected in treaty context. The aim is clearly consistency, but what exactly goes under the notion, “which are based on the Community Treaties or the Treaty on European Union,” seems ambiguous.

### **3.5.2 The EUCFR and the ECHR – a dual system of human rights protection?**

A concern was raised within the Council of Europe about the possible negative effects on the ECHR as soon as the Cologne European Council decided to adopt a EUCFR.<sup>439</sup> The Parliamentary Assembly adopted a resolution in which it invited the EU “to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental

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<sup>438</sup> See explanatory report prepared by the Praesidium, CHARTE 4473/00, Convent 49.

<sup>439</sup> Lemmens, P., 2001, p. 49.

Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretation of those rights".<sup>440</sup> The relation between the EUCFR and the ECHR was an issue of concern during the whole drafting process of the Charter, not only within the Council of Europe but also among the members of the Charter Convention. It was seen as very important to avoid a situation in which two human rights/fundamental rights instruments had different standards of operation within a European context. Therefore, the question of coherence was of utmost importance during the whole drafting process. Mr. Fischbach (judge at the European Court of Human Rights) and Mr. Krüger (observer of the Council of Europe) stressed the relation between the Charter and the ECHR already at the first meeting of the Convention in December 1999 by stating that, "as far as civil and political rights are concerned, the Charter should build on the European Convention on Human Rights.

The rights and freedoms contained in the Convention and its additional protocols are worded in such a way that they could be incorporated lock, stock and barrel into Community law".<sup>441</sup> The Charter Convention did not follow this lock, stock and barrel approach. However, already at the very beginning of the drafting process, it was accepted that that the ECHR was to become *the* minimum standard and that the Charter therefore should not be taking steps backwards in relation to the ECHR.<sup>442</sup> In other words, the level of protection in the Charter could not be inferior "regardless of the wording of the Charter".<sup>443</sup> This was valid also with regard to the question of the limitation of rights. In spite of this, the observers of the Council of Europe raised a concern that the adoption of a general limitation clause might lead to the risk of reducing the level of protection already afforded by the Charter.<sup>444</sup> As noted, any specific limitation clauses tailored to particular rights was not an option due to reasons of readability and simplicity. As a response to the concern that had been raised, the presidium presented a text on the question of limitations, which determined

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<sup>440</sup> Resolution 1210 of 25 January 2000 on the Charter of Fundamental Rights of the European Union, CHARTE 4115/00, Contrib. 11.

<sup>441</sup> CHARTE 4105/00, Body 1, p. 25.

<sup>442</sup> CHARTE 4111/00, Body 3, p. 5.

<sup>443</sup> CHARTE 4123/1/00, Rev. 1, Convent 5. Draft of a limitation clause, article Z.

<sup>444</sup> The observers of the Council of Europe underlined this risk in their statements. See CHARTE 4139/00, Contrib. 31, pp. 1-2 and CHARTE 4178/00 Contrib. 61, p. 2. Article 52 (3) is in this respect to be considered as *lex specialis* in relation to article 51 (1). On this point, see chapter 3.5.1

that restrictions to the rights and liberties corresponding to the provisions of the ECHR could not be exceeded under any circumstances.<sup>445</sup>

Mr. Fischbach, observer of the Council of Europe, stressed further that there is also a need to extend the reference to the ECHR to include protocols such as the *case law* of the European Court of Human Rights in the interest of legal certainty.<sup>446</sup> The argument was that a reference to the case law would not be a threat to the autonomy of the interpretation of the Charter in that nothing would prohibit an interpretation beyond the minimum level provided by the ECHR. No reference to the case law was, however, included in article 52(3). The argument was that the European Court of Human Rights could not set the standard for the interpretation of the Charter.<sup>447</sup> However, a reference to the case law of the European Court of Human Rights can be found in the preamble, which shows that the case law of the Court was not totally neglected by the Convention. Indeed, it would be unthinkable that the case law of the European Court of Human Rights would not be relevant in the determination of the *minimum standard* of protection offered under the ECHR. Therefore, from the perspective of coherence, it is of utmost importance that the scope of guaranteed rights in the Charter corresponding with the ECHR should be determined not only by the Convention, but also, most importantly, by the case law of the European Court of Human Rights.

However, the case law of the Strasbourg Court cannot as such set the standard of interpretation for EUCFR standards in that the judgments of the court do not have any general rule making effect. The end result was satisfactory for the observers of the Council of Europe. According to them, the necessary element of coherence is more or less secured and expressed jointly in articles 52 (3) and 53 of the Charter, “whose effect, in substance, is to ensure an identify of scope and meaning between the rights contained in the two instruments, without preventing Union law from affording wider protection than provided under the ECHR”.<sup>448</sup> The ECHR is in other words recognised as a minimum standard for the interpretation and application with regard to rights

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<sup>445</sup> SN 3340/00 of 29.6. 2000, p. 3. The observers of the Council of Europe were generally satisfied with the end result, stating that this would “exclude all wider restrictions than those permitted by the ECHR, or a level of protection lower than that afforded by the ECHR”.

<sup>446</sup> See CHARTE 4411/00, Contrib. 268, pp. 2-3. In the explanatory statement given by the presidium relating to the specific provisions of the Charter, it is recognised that the reference to the ECHR also includes both the convention and the protocols. CHARTE 4473/00. Convent 49.

<sup>447</sup> Lemmens, P., 2001, p. 52.

<sup>448</sup> CHARTE 4961/00, Contrib. 356, p. 2.

similar or identical in both instruments. The question that arises is whether the protection of fundamental rights can be coherent within these two supranational legal orders acting within their own contexts? In other words, is article 52 (3) of the EUCFR in fact sufficient enough to secure consistency and legal certainty in the future? From the perspective of the Member States, this question is of utmost importance in that the Member States will remain responsible for their actions under the ECHR and at the same time be required to fully comply with the obligations embodied within the framework of Union law.

One of the principal concerns with the adoption of a EU fundamental rights catalogue has been a fear that Europe would once again be divided, this time in the field of human rights. The achievements of the judicial authorities under the ECHR were said to be weakened as a result of the possibility that individuals would start to seek redress from the ECJ rather than from the system established under the ECHR. The option of drawing up a separate catalogue for the EU is, in the opinion of Toth, a way of splitting up of the present system of a single set of human rights in Europe that would ultimately undermine the authority of the ECHR.<sup>449</sup> The argument is based on the notion that there is one single system of substantive human rights since the ECHR is applied in the Member States of the Community, within the Community and also in the “rest of Europe” more or less in the same way. The question that arises is whether the protection of fundamental rights can be coherent within these two supranational legal orders when Member States act both within the framework of the Community legal order and also outside the scope of Community law.

How has this problem been dealt with in the EU Charter? This becomes an even more important question if and when the Charter is incorporated within the new Constitutional Treaty. The question of consistency between the EU Charter and other international instruments and, in particular, the ECHR is an important issue. Fundamental rights are too important to be interpreted inconsistently. The Council of Europe observers expressed their satisfaction with the EU Charter in that “the Charter draws to a significant degree on certain Council of Europe conventions, namely that European Convention on

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<sup>449</sup> Drawing up a separate fundamental rights catalogue for the Union would, in the opinion of Toth, be a threat to the unity of human rights protection in the whole of Europe. He argued for a model of full incorporation of the substantive provisions (articles 1-18) of the ECHR into the TEU, thereby creating a uniform system of human rights for the whole of Europe. See Toth, A., 1997 p. 501 and Toth, A., 2000, p. 88-92.

Human Rights (ECHR), the revised social Charter and the Convention on Human Rights and Biomedicine".<sup>450</sup> They drew particular attention to the links between the Charter and the ECHR. This was seen as an important issue, especially when the Charter is presumably made legally binding, since the Member States will therefore be bound by both the ECHR and the Charter when implementing Community law. This is due to the reason that the Charter expressly relies on the ECHR and therefore constitutes "a sort of extension to it in Community law".<sup>451</sup>

Article 52 (3) recognises a close link between the Charter and the ECHR by stating that, "insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". The European Court of Human rights has, through its interpretation of the Convention, determined the level of protection afforded by the ECHR, which is recognised as the minimum level of protection by the Charter. According to the text of explanations relating to the Charter prepared by the Presidium, article 52 (3) is intended to ensure the necessary consistency between the Charter and the ECHR by including a principle that ensures the consistency between these two instruments, including the limitation clauses set out in the ECHR. The reference to the ECHR also includes the protocols for the ECHR. The scope of guaranteed rights is determined not only by the texts, but is also included within the case law of the European Court of Human Rights and within the ECJ as stated in the preamble to the Charter. This is important in order to avoid diverging interpretations of provisions similar in content within the Charter and the ECHR and between the ECJ and the European Court of Human rights.

The provisions reflecting the ECHR are not written in identical terms, but article 52 (3) guarantees the same content as spelled out in the ECHR. One could therefore ask why the "Convention" chose not to write the provisions of the Charter in terms identical to those of the ECHR. Perhaps a reason was the will to kind of "update" the provisions written in 1949, i.e. to modernise the language used in the ECHR and also perhaps to mark the Charter as a distinct project within the Union that did not follow the ECHR word for word and, at the same time, to make a statement that the Community legal order is autonomous in relation to the ECHR. The level of protection offered by the

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<sup>450</sup> CHARTE 4961/00, Contrib. 356.

<sup>451</sup> Ibid.

ECHR is a minimum standard. Article 52 (3) also prescribes that Union law can offer a higher level of protection if it is desired by the Union. This, is in line with article 53 of the ECHR, envisages that the Contracting Parties may increase the level of protection afforded by the ECHR under domestic laws or other Treaties.<sup>452</sup>

It is true that the Charter offers, to some extent, a higher level of protection. This is, however, not the case in general terms. The Charter seems to avoid the situation of creating a dual system of fundamental/human rights protection in Europe. At first sight, the solution chosen by the drafters of the Charter in articles 52 and 53 seems to avoid the problem concerning coherence between the two instruments.<sup>453</sup> The coherence established between the Charter and the ECHR to enhance legal certainty is nevertheless not necessarily a guarantee for coherent interpretation of the rights embodied in both the Charter and the ECHR.

The application of the Charter presupposes, however, the determination of at least the same level of protection afforded by the European Court of Human rights as prescribed in article 52 (3) if and when the Charter is formally incorporated within a future treaty of some kind. This could easily be a source of problems, especially in situations where the ECJ is faced with issues that have not previously been dealt with before by the European Court of Human Rights. Member States will remain under the scrutiny of the ECHR while at the same time also being required to comply with Community law. Furthermore, one must not forget that two different courts will apply two different catalogues, both acting within its own context. This might very well create a problem for the objective of coherence that cannot be avoided. The Charter will

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<sup>452</sup> Article 53 of the ECHR states that “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”. The same line in article 53 of the Charter is intended, for its part, to ensure that, when there is a conflict with a national constitution or international convention, the text offering the best protection prevails. Lemmens, P., 2001, pp 54-55. It is to be regretted that a similar kind of clause as represented by article 52 (3), with regard to the status of the Charter in relation to the ECHR, cannot be found in the Charter concerning other human rights instruments. This is especially regrettable with regard to the European Social Charter and UN Conventions in this field. This is not to say that the ECJ would not be able to make references to other conventions and case law from various control mechanisms established, for example, within the European Social Charter for interpreting those social rights included within the Charter that correspond with European Social Charter.

<sup>453</sup> Mahoney, P., 2002, pp. 300-303.

be interpreted by the ECJ within the framework of treaties that have their own objectives.<sup>454</sup>

A difference of approach between the two courts can be described simply by stating that the ECJ primarily has the responsibility of ensuring the efficient operation of the internal market. The European Court of Human Rights, on the other hand, deals with the protection of human rights.<sup>455</sup> The EU Charter will be interpreted in light of the objectives set out in the Constitutional Treaty. However, the fear of creating a dual system of fundamental rights protection has been tackled by the drafters, at least with regard to the relationship between the ECHR and the Charter, in such a way that it would be possible to avoid two entirely different sets of standards for human rights between the two systems working for the protection of fundamental rights in Europe. Furthermore, one should also keep in mind that the EU Charter is based on fundamental rights already applicable within the Community legal order. The Charter will not replace the present system of protecting fundamental rights within the Community legal order. The Charter will, however, make the present protection of fundamental rights more visible as requested by the Cologne European Council. Fundamental rights are already protected within the Community legal order. Another question is whether the Charter is sufficiently comprehensive enough to avoid the problem of divergent interpretations by the ECJ and the European Court of Human Rights.

### **3.5.3 The Charter in light of the alleged problem of divergent interpretations by Strasbourg and Luxembourg Courts**

The ECHR is not part of Community law in itself. The ECJ is therefore under no legal obligation as a matter of law to follow the case law of the European Court

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<sup>454</sup> Polakiewicz, J., 2001, p. 76.

<sup>455</sup> An analogy to the relationship between the EUCFR and the ECHR can be found in opinion 1/91 of the ECJ relating to the creation of the European Economic Area. The ECJ stated that "the fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must be necessarily be interpreted identically. An international Treaty is to be interpreted not only on the basis of its wording, but also in light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose...It follows from those considerations that homogeneity of the rules throughout the EEA is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording". Opinion 1/91 of the ECJ of 14 December 1991, para. 14 and 22.

of Human rights. Neither does the EU Charter include any provision stating that the ECJ is bound to follow the case law of the European Court of Human rights. A problem often raised is the possible divergence between the case law of the ECJ and the European Court of Human Rights when seeking to apply the same provisions under the ECHR. Advocate general Darmon stated in the *Orkem case*<sup>456</sup> that,

“I must not fail to remind the Court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities...The most authoritative commentators on the judgment of this Court also emphasise that the Court’s position regarding the European Convention on Human Rights consists in most cases in using it merely as a reference even though it goes as far as possible in that direction and that by doing so, it develops directly or indirectly its own case law interpreting the Convention. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation, which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities”.

This particular position expressed by the Advocate General Darmon in the late 1980s, has caused discussion among scholars and others who argue that it is undesirable that interpretation of the same provision can result in different outcomes by the two courts.<sup>457</sup> This approach has led in some cases to a situation where ECJ jurisprudence at times may conflict with the authoritative interpretations of the European Court of Human rights on provisions found within the ECHR.<sup>458</sup> Many have argued that, while the chance for diverging interpretation is fully possible, such conflicts seldom occur in practice. In fact, the ECJ rulings with regard to fundamental rights have followed the case law of the ECHR to a significant degree. Nevertheless, divergent interpretation has occurred in the past and should, as such, be seen as posing a problem to the aspiration for coherence in Europe.

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<sup>456</sup> Case 374/87, *Orkem v. Commission*, Opinion of Advocate General Darmon delivered on 18 May 1989, para. 139-140.

<sup>457</sup> The position of the ECJ is based upon a view that the legal order of the Community is an autonomous *sui generis* legal order both in relation to the legal orders of Member States and international law.

<sup>458</sup> O’Leary, S., 1996, p. 364.

For example, in *Spuc v. Grogan*<sup>459</sup> the ECJ did not interpret the Irish prohibition on spreading information about abortion services in England as a restriction of freedom to provide services within the meaning of the TEC. This was due to the lack of an economic link between the information offered in Ireland and the provider of abortion services in England. Since a link to Community law was not established, the prohibition fell outside the scope of Community law. The Court did not address the issue of whether the restriction amounted to a breach of the freedom of expression. However, Advocate General van Gerven, in his non-binding opinion, concluded that if the case had fallen within the scope of Community law, the freedom of expression would still not have been breached since the restriction on providing information would constitute a legitimate derogation from free movement on the grounds of public policy.

In contrast to the ECJ's case of *Spuc v. Grogan*, the ECHR held in the *Open Door case*<sup>460</sup> that restrictions of the right to provide information on abortion was a disproportionate measure by the State Party and found to be in violation of article 10 of the ECHR. True, the ECJ never took a stand on the fundamental rights issue but, as AG Gerven suggested in his opinion, the ECJ might have come to the conclusion that the restriction would be legitimate on the grounds of public policy. Another question is whether the ECJ avoided taking a stand on the issue due to the pending case in the ECHR, as suggested by O'Leary.<sup>461</sup> Furthermore, in the *Hoechst case*<sup>462</sup>, the ECJ determined whether the right to privacy extended to business premises. Even though the European Court of Human rights had not dealt with a similar issue, the ECJ concluded that the protective scope of article 8 of the ECHR "is concerned with the development of man's personal freedom and may not therefore be extended to business premises".<sup>463</sup>

The European Court of Human right, however, later ruled in *Niemietz case* that article 8 of the ECHR did extend to business premises.<sup>464</sup> These examples illustrate the difficulties caused by two courts dealing independently

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<sup>459</sup> Case 159/90 Society for the protection of the Unborn Child v. Grogan, judgment of 4 October 1991.

<sup>460</sup> Application 14234 and 14235/88, *Open Door and Dublin Well Women*, judgment of 29 October 1992.

<sup>461</sup> O'Leary, S., 1996, p. 364.

<sup>462</sup> Joined cases 46/87 and 227/88, *Hoechst v. Commission*, judgment of 21 September 1989.

<sup>463</sup> The CFI has confirmed this position in *Joined cases T-305/94, Limbursse Vinyl Maatschappij and others v. Commission*, judgment of 20 April 1999, para. 420.

<sup>464</sup> See application 13710/88 *Niemietz v. Germany*, judgment of 16.12. 1992.

with human rights issues with reference to the same provisions of the ECHR.<sup>465</sup> This problem is particularly difficult in cases in which the ECJ has to deal with issues that have not been dealt by the European Court of Human rights, as the two above mentioned examples show. The ECJ has however gone on to state that it is willing to reconsider its current case law and follow the case law of the ECtHR as the case law evolves over time. In *Roquette Frères*<sup>466</sup>, expressively referred to development of the case law in the ECtHR relating to the right to privacy of commercial enterprises and how they in fact can benefit from the protection of article 8 of the ECHR despite of having concluded the opposite in the *Hoechst case*. The Court stated as follows:

For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. France*, not yet published in the *Reports of Judgments and Decisions*, § 41) and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.

In light of *Roquette Frères*, it might well be concluded that the risk of tension between the case law of the two courts has been minimised. However, the system is not “watertight”. Naturally, it is problematic that the ECJ has a certain freedom to interpret the provisions of the ECHR in light of Community law in such a way that it might result in incoherent case law for the two courts. A fairly recent example in which the ECJ departed from established case law of the ECtHR is the *Emesa Sugar case*,<sup>467</sup> where the court rejected a party’s application to submit written observations, on the basis of article 6 of the ECHR, on the opinion of the Advocate General.

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<sup>465</sup> Case 17-/98, order of the court on 4. February 2000. Another example Case 374/87 Orkem v. Commission, judgment of 18 October 1989, where the ECJ held that the right not to incriminate oneself was not protected under the ECHR. This case law was confirmed by the CFI in the T-112/98 Mannesmannröhren-werke AG v. Commission, judgment of 20 February 2001. In comparison, see application 10828/84, Funke v. France, judgment of 25 February 1993.

<sup>466</sup> Case 94/00, *Roquette freres SA v. director general de la concurrence..Commission*, judgment of 22 October 2002, para. 29. See also joined cases 238/99, P et al. *Limburgse Vinyl Maatschappij NV*, judgment of 15 october 2002, para. 273-274 relating to developments in the case law of the ECtHR.

<sup>467</sup> Case 17-/98, order of the court on 4. February 2000.

The ECtHR has ruled that article 6 of the ECHR “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision”.<sup>468</sup> The ECJ pointed out that Advocates General are an inseparable part of the ECJ and have the same status as the judges, thus they are not independent members of the legal service. The ECJ avoided the problem of adversarial proceedings by stressing the judicial nature of AG opinions.<sup>469</sup> AGs are institutionally members of the ECJ, but their opinions are by no means legally binding on the ECJ. Therefore, one could also argue that the parties should have the right to respond to the opinion of the AG before the ECJ decides a case. On the other hand, the ECJ did raise a valid point in expressing that such a possibility would increase the length of court procedures, in particular due to reasons of the language regime of the Court. The ECJ saw the opinions of the AGs as the first phase of the judicial process and therefore rejected the claim for the right to submit observations in response to the opinions of the AG being based upon article 6 (1) of the ECHR.

However, in the *Deutsche Telecom* case<sup>470</sup>, the ECJ stated that, in light of the recent opinion by the AG, the re-opening of oral procedures would be well-founded under article 61 of the rules of procedures of the ECJ “if it considers that it lacks sufficient information or that that the case must be dealt with on the basis of an argument which has not been debated between the parties”. This argument was based precisely on article 6 of the ECHR. It has been pointed out that in all cases where the ECJ and the ECtHR have differed, the ECJ has argued for a more restrictive interpretation of fundamental rights.<sup>471</sup> As already noted above, the difference in approach between the European Court of Human rights and the ECJ is to a great extent a result of the fact that the ECJ has the

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<sup>468</sup> Application 19075/91, *Vermeulen v. Belgium*, judgment of 20 February 1996, para. 33.

<sup>469</sup> The ECJ argued as follows: “It constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court itself. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court’s judgment. Having regard to both the organic and functional link between the Advocate General and the Court...the case law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court’s Advocates General”, para. 15-16. For a comment on the case, see Lawson, R., 2000, pp. 983-990.

<sup>470</sup> Case -50/96 *Deutsche Telecom v. Lilli Schröder*, judgment of 10 February 2000.

<sup>471</sup> Krüger H. C., & Polakiewicz, J., 2001, p. 6.

responsibility for protecting the operation of the common market while the ECtHR is solely responsible for protecting human rights.<sup>472</sup>

Lenaerts argues that if the ECJ and the Court of First Instance want to remain credible in their application of ECHR case law under article 6 (2) of the TEU, they must be willing to include in their own judgments “precedents from the case law of the Court of Human Rights in order to explain whether those precedents are relevant to the interpretation of fundamental rights in the specific context of a review of the legality of a particular act of the Community institutions”.<sup>473</sup> He underlines that the ECJ and the Court of First Instance, if necessary, need to be prepared to modify their earlier case law in order to avoid divergent interpretations of the Convention given the European Court of Human Rights in cases where the European Court of Human rights is addressing an issue later than the Community case law on a similar issue.

In other words, judge Lenaerts would strongly argue for Community Courts to follow the developments in the interpretation of the Convention by the European Court of Human rights. Such an approach would increase the transparency of the courts’ grounds for judgment and would be crucial concerning consistency with the ECHR when applied by the ECJ and the Court of First Instance. He continues by stating that if the Union is serious in declaring itself bound by the substantive provisions of the ECHR, the approach mentioned above is “the least it can do to ensure that the Community legal order incorporates in the interpretation of the Convention developments in the case law of the Court of Human Rights”.<sup>474</sup> However, Lenaerts makes the point that the issue of divergence in the case law between the two courts is not always easy to detect based on the very nature of fundamental rights. He states that very few of the rights are absolute in character. He also draws attention to the subject of limitation clauses as prescribed by law and necessary in a democratic society as specified in the ECHR.<sup>475</sup>

The general interest in a democratic society that justifies restrictions in accordance with law may vary in different contexts as to the precise grounds

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<sup>472</sup> For an analysis on human rights case law in the Strasbourg and Luxembourg courts, see Spielmann, D., 1999, pp. 757-780.

<sup>473</sup> Lenaerts, K., 2000 (a), p. 580.

<sup>474</sup> Ibid.

<sup>475</sup> The relevant provisions in the ECHR are article 8 (respect for private and family life), article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression), article 11 (freedom of assembly and association), article 1 of Protocol 1 (protection of property), article 2 of Protocol 4 (freedom of movement) and article 1 of Protocol 7 (procedural safeguards relating to expulsions of aliens).

that might be invoked.<sup>476</sup> The question of limitation clauses included in the ECHR will be a challenge for the ECJ when reviewing the legality of a Community act in which certain restrictions are imposed on fundamental rights based on general interest. This is certainly an area where it will be difficult for the ECJ to determine whether or not the assessment would be in line with the case law of the European Court of Human Rights.

As noted above, the question of divergence has been tackled by the drafters of the Charter who state that, insofar as the Charter contains rights that correspond to the ECHR, these rights shall have the same meaning and scope as in the ECHR. However, it must be remembered that, whether or not the Charter is legally binding, the ECJ would still not be legally bound to follow the case law of the European Court of Human rights.<sup>477</sup> Indeed, different interpretation from the two courts on similar cases would give rise to confusion and legal uncertainty. Another problem connected to this is that there is a real risk that the authority of the European Court on Human Rights is being undermined. It is clear that the authority of the European Court of Human rights will be

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<sup>476</sup> Lenaerts, K., 2000 (a), p. 582. Striking the balance between respect for fundamental rights and the general interest may vary in different societies depending on where the assessment is made. The ECHR is constructed so that this assessment is to be made by the national legislator provided that the restrictions of fundamental rights are reasonable. The interpretation of national legislation is a matter for the national courts. This does not however mean that the European Court of Human Rights cannot test national legislation for its conformity with the ECHR. It is the notion "prescribed by law" that can be interpreted by the court and not the law itself. However, the European Court of justice has left a wide margin of appreciation to the national authorities. On this point, see van Dijk & van Hoof, 1998, pp. 765-773.

<sup>477</sup> A different interpretation could perhaps be based on article 31 (3-b) of the Vienna Convention on the Laws of Treaties in prescribing with regard to the interpretation of the treaties that "any subsequent practise in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Vienna Convention of the Law of Treaties of 23 may 1969. Entry into force of 27 January 1980. UNTS 331. One could perhaps argue that as the ECJ and the ECtHR in fact are interpreting the same convention, the case law from the specialised monitoring body is the authoritative body with the authoritative interpretation of the norms in the said convention backed up by the Member States overseeing the implementation of the judgments of the Court through the Committee of Ministers. This would lead to the conclusion that the ECJ should follow the interpretation of ECHR given by the ECtHR. However, the fact still remains that the EU is not a contracting party to the ECHR as a matter of law and that the ECHR is only recognised as having special significance in the interpretation of EC law, i.e. to be interpreted as part of the general principle of Community law. The argument that the ECJ would be bound by the ECtHR case law becomes much stronger once the Charter forms part of any future Treaty.

undermined by conflicting interpretations on similar issues. Another potential problem is the fact that there are differences in the ECHR and the EUCFR regarding the structure and wording of the substantive rights. The drafters of the Charter had their reasons for not following the exact wording of the ECHR, as identified earlier. In practical terms, it will certainly not be easy to follow the requirements laid down in article 52 (3) in the Charter and apply them consistently with the ECHR. The rewording of the provisions in the Charter corresponding with the ECHR might create confusion and, according to Polakiewicz, “open the door for the reinterpretation of existing ECHR guarantees based upon the new wording”.<sup>478</sup>

For one thing, the increased competences of the EU in areas such as asylum and immigration policies and close cooperation within the field of police work and judicial cooperation in criminal matters that are “human rights sensitive areas” may very well lead to future divergences in interpretation and pose future challenges to the uniform application of the law. Another area where potential conflict may arise is the treatment of homosexuals and transsexuals. The ECJ has ruled that the prohibition of discrimination based on sex does not cover discrimination on the grounds of sexual orientation.<sup>479</sup> The ECtHR has, however, recently ruled that investigation and discharge on the basis of homosexuality from armed forces in the UK constituted a violation of article 8 in conjunction with article 14 of the ECHR.<sup>480</sup>

With regard to transsexuals, the ECJ has, however, ruled on the basis of the equal treatment directive of 1976 that the prohibition of discrimination based on sex does include transsexuals.<sup>481</sup> The ECtHR, on the other hand, has allowed states a wide margin of appreciation with regard to the legal recognition of transsexuals.<sup>482</sup> However, in the *Goodwin case*,<sup>483</sup> the ECtHR ruled

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<sup>478</sup> Polakiewicz, J., 2001, p. 78.

<sup>479</sup> Case 249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, judgment of 17 February 1998.

<sup>480</sup> Application 33985/96, *Smith and Grady v. the United Kingdom*, judgment of 27 September 1999 and application 31417 & 32377/96, *Lustig-Prean and Beckett*, judgment of 27 September 1999. The ECtHR based its decisions on the right to privacy and not discrimination. However, the cases are illustrative in the way the two courts operate with regard to sexual orientation. See also application 22985/93 and 23390/94 *Sheffield and Horsman, v. the United Kingdom*, judgment of 30 July 1998.

<sup>481</sup> Case 13/94, *P v. S and Cornwall County Council*, judgment of 30 April 1996.

<sup>482</sup> For a discussion on the subsequent case law on homosexuals and transsexuals in the ECtHR, see Defeis, E, 2001, pp. 319-325.

that as it was not possible under United Kingdom law for a transsexual to marry a person of the same sex to which he/she has belonged prior to gender reassignment operation was a breach of article 12 of the ECHR. In the *K.B. case*<sup>484</sup>, concerning the refusal to award a widower's pension to K.B.'s transsexual partner, the ECJ held that national legislation that is not in conformity with ECHR is, in principle, incompatible with the requirements of article 141 TEC. K.B.'s partner R was unable to amend his birth certificate to reflect the gender reassignment officially. This prevented K.B. and R. to marry under national law. Consequently, K.B. was not able to receive a widower's pension as national legislation did not recognise a person as a spouse in the absence of a lawful marriage. In the *K.B. case*, the ECJ followed the path laid down by the ECtHR in the *Goodwin case*.

### **3.6. Rights and Principles in the Charter context**

#### **3.6.1 Indivisibility in the context of the EUCFR**

The preamble of the Charter provides that "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity..". This statement builds upon the 1948 UN universal declaration of human rights<sup>485</sup> and on the UN Vienna declaration and Programme of Action, which provides that

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.<sup>486</sup>

The EUCFR, at least at first sight, reflects the indivisible nature of human rights by integrating both civil and political rights as well as economic and social rights in one single text implying a holistic approach to human rights. The notion of indivisibility suggests that specific human rights cannot have a hierarchal status in relation to each other in spite of the fact that some human rights may perhaps be prioritised in relation to other rights.<sup>487</sup> Internationally

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<sup>483</sup> Application no. 28957/95, *Christine Goodwin v. United Kingdom*, judgment of 11 July 2002.

<sup>484</sup> Case 117/01, *K.B. and National Health Service Pensions Agency*, judgment of 7 January 2004.

<sup>485</sup> UN GA resolution 217 A (III) of 10 December 1948.

<sup>486</sup> World Conference on Human Rights, A/CONF.157/23, para. 5, 1993.

<sup>487</sup> The classic example would be the non-derogable rights recognised in the three general human rights treaties, i.e. the ECHR, ICCPR and the Inter-American Convention of Human

recognised human rights are often divided into different categories or generations.<sup>488</sup> Both the 1948 UN declaration and the 1993 UN Vienna declaration would suggest a non-hierarchical affirmation of all human rights since they make no distinction or categorisation between different types of rights. The conclusion would be that all human rights are of equal value where it is not possible to make a distinction or categorisation.

The doctrine of indivisibility was developed precisely in order to deny a dichotomy of rights, i.e. a predominance of civil and political rights in relation to economic and social rights. The EUCFR seemingly follows a contemporary understanding of human rights where it is no longer desirable to categorically make a distinction between different generations of rights. In a strict legal sense, there is still much to be done before one could say that all human rights are treated in an *equal manner, on the same footing and with the same emphasis*. The crucial question is whether the notion of indivisibility as reflected in the Vienna declaration should truly to be considered as a legal concept or simply as something of a political nature.

It is one thing to underline the indivisibility, interdependence and interrelation of human rights in a political context, but another thing to capture the legal implications of the indivisibility notion. The discussion within the UN of setting traditional civil and political rights on the same footing with economic and social rights raised doubts fairly soon after the adoption of the 1948 UN declaration of Human rights.<sup>489</sup> In 1952, the UN General Assembly passed the so-called separation resolution, which divided civil and political rights and economic and social rights within the UDHR into two separate covenants. Both, however, remained legally binding under international law.<sup>490</sup>

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Rights, and recognised norms of *jus cogens*. On hierarchies and non-derogable rights, see Teraya, K., 2001, pp. 917-941. Recently, a discussion of hierarchies has evolved more generally in scholarly writings in Public International law. Examples such as Siederman, I., 2001, May, R., & Wierda M., 2003 pp. 511-532 and Pauwelin, J., 2003, pp. 89-157, all seem to point to an understanding that the international community of States is step by step willing to recognise that some norms of international law are to be considered as more important than others.

<sup>488</sup> The first generation is comprised of classic civil and political rights. The second generation is comprised of economic, social and cultural rights, while the third generation looks towards collective or group rights. For another approach to the generations of rights see, for example, Rosas, A., & Scheinin M., 1999, pp. 49-56 and Eide, A., 2001, pp. 9-21.

<sup>489</sup> Craven, M., 1999, pp.101-102.

<sup>490</sup> GA res. 543 (IV) of 5 February 1952. As a result of this, it is common to believe that the International Bill of Rights consists of two different categories of human rights. See further, Eide, A., & Rosas, A., 2001, pp. 3-7.

This separation approach was also recognised at the regional level within the CoE where two separate conventions were drafted, i.e. the ECHR in 1950 and the European Social Charter in 1961 addressed civil and political right and economic and social rights, respectively. The argument was based on the view that the two sets of rights were of a different nature and could therefore not be included in one single instrument. Economic and social rights were left out of the ECHR. The argument was closely connected to the differences of state obligations arising from the two sets of rights. Economic and social rights were seen as resource demanding whereas civil and political rights were thought to be relatively cost free. The main emphasis between the two different categories of rights can be best explained by stating that civil rights require less or non-interference on the part of the state while the major element with regard to social rights is the claim to positive action on the part of the state.

This picture is naturally over-simplified and might even be regarded as a somewhat crude statement. The division at the universal level as well as at the European level has to a significant degree led to an oversimplified categorisation of different sets of rights, which are not categorically suited to such a differentiation. There are rights, which are difficult to classify in a traditional way, such as the right to property and the right to education (articles 17 and 14, respectively, of the EUCFR). Another example is the freedom of assembly and association (article 12 of the EUCFR) reflecting the dualistic nature of this right.<sup>491</sup> The evolution of human rights at the international level makes it clear that it is difficult to categorically draw a clear line between rights that should be treated as civil rights on the one hand and rights that should be treated as social rights on the other.<sup>492</sup> International human rights treaties are not structured categorically in terms of making a distinction between the two sets of rights and have, thus, become less important in that different sets of rights can be found in one and the same instrument.

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<sup>491</sup> The freedom of assembly is recognised both in article 11 of the ECHR and article 5 of the revised European social Charter.

<sup>492</sup> Article 1 and 2 of the first protocol to the ECHR. The ECHR is not formally restricted merely to civil and political rights. The ECtHR has stressed in its case law that “the fact that the interpretation of the convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation...there is no water-tight division separating the sphere from the field covered by the Convention”. See application 6289/73, *Airey v. Ireland.*, judgment of the Court 9.October 1979, para. 26.

A classic example of the integration approach is the Convention of the Rights of the Child,<sup>493</sup> which includes both categories of rights side by side, as well as the International Convention on the Elimination of All Forms of Racial Discrimination<sup>494</sup> (CERD) and the Convention on Discrimination against Women<sup>495</sup> (CEDAW). The drafting of the EU Charter made it clear, however, that there is still much controversy about the legal nature of economic and social rights.<sup>496</sup> The legal nature of economic and social rights is often seen as problematic due to their uncertain nature with regard to their justiciability and not due to their validity as such.<sup>497</sup> The adoption of the EUCFR as a unified text codifying the two sets of rights into one single instrument is, as such, to be understood as part of an ongoing broader human rights discussion that is moving away from an understanding of rights as belonging in two different categories.

The discussion of different categories or generations is not - or at least should not be - about the value attributed to economic and social rights or their place in the classification of internationally recognised human rights. It is generally acknowledged that all human rights are of equal value and that one therefore cannot differentiate between them in any kind of hierarchical order.<sup>498</sup> However, one could say that the distinction made between civic and social rights is of a more general priority order. This is to underline that there are important differences between civil and political rights on the one hand and economic and social rights on the other with regard to the international monitoring mechanisms set up under the subsequent treaties. While individual complaint systems have been created under the ICCPR and the ECHR, the

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<sup>493</sup> UN Convention on the rights of the Child 1989. Entered into force on 2 September 1990. UNTS 3.

<sup>494</sup> Convention on the Elimination of All Forms of Racial Discrimination. Entered into force on 4 January 1969. UNTS 195.

<sup>495</sup> Convention on the Elimination of All Forms of Discrimination against Women. Entered into force on the 3 September 1981. UNTS 13.

<sup>496</sup> See discussion in chapter 3.3.

<sup>497</sup> Scheinin, M., (a) 2001, p. 29.

<sup>498</sup> For a discussion on hierarchies in a human rights context, see Meron, T., 1986, p.22, where he rejects the idea of hierarchy between human rights by stating that "there is no accepted system by which higher rights can be identified and their content determined"...caution should therefore exercised in resorting to hierarchical terminology. Too liberal an invocation of superior rights such as "fundamental rights" and "basic rights" as well as "*jus cogens*, may adversely affect the credibility of human rights as a legal discipline".

reporting system by State parties is normally applicable under the ICESCR and the European social Charter.<sup>499</sup>

The image of the Charter as an affirmation of indivisible rights is, however, put in question by the fact that, while the Charter makes a bold affirmation of the indivisible nature of fundamental rights, it seems to distinguish between justiciable rights and the recognition of vague principles. The last paragraph of the preamble to the Charter prescribes that “[t]he Union therefore recognises the rights, freedoms and principles set out hereafter”. The drafters of the Charter deliberately chose to leave open the question on which of the provisions belongs to the rights and freedoms basket and which of the provisions belongs to the principles basket. This distinction is also recognised in article 51 (1), which prescribes that the institutions of the Union shall “[r]espect the rights, observe the principles and promote the application thereof in accordance with their respective powers”. What exactly is meant by the distinction between rights and principles in this context? Is there in fact a distinction between respecting rights and observing principles? Would rights simply constitute clear and well-defined obligations placed upon the EU and its Member States corresponding to justiciable subjective rights? Whereas, would “principles” suggest provisions of less precise “objectives” that could be

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<sup>499</sup> An additional protocol to the European Social Charter was adopted in 1995, which merely provides for the right of NGOs, organisations of employers and trade unions to submit complaints to the Committee of Independent Experts. An individual complaints procedure has not been established. In 2002, the UN Commission on Human Rights decided in its resolution 2002/24 (para. 9 f) to establish a working group to consider the option of elaborating an optional protocol to the International Covenant on Economic, Social and Cultural Rights concerning an individual complaints procedure. See also resolution 2003/18 (para. 12 and 13.). See also the reports of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, E/CN.4/2002/57 and E/CN.4/2003/53. This discussion was raised by the Committee on Economic, Social and Cultural Rights in the early 1990s, i.e. whether it would be appropriate to adopt an optional protocol for the ICESCR by allowing the consideration of communications relating to the rights recognised under the said Covenant. In its resolution 2004/29, the Commission on Human Rights renewed the mandate of the established Open-ended Working Group to continue to consider options for an optional protocol to the ICESCR. In 2006 the newly established UN Human Rights Council passed a resolution 2006/3 deciding to extend the mandate of the open-ended working group for a period of two years with a mandate to begin developing a first draft text to the envisaged optional protocol. See A/HRC/1.10/L.10. For a discussion, see Scheinin, M., 2006, pp. 131-142.

justiciable, but may need further legislative or otherwise executive acts in order to create a subjective right?<sup>500</sup>

The explanatory report prepared by the presidium (CHARTER 4473, Convent 49) does not shed any light on these questions. The debate on the role of rights and their inclusion in chapter IV on “solidarity” resembles a continuing debate about the role of economic, social and cultural rights, both nationally and internationally.<sup>501</sup> Is it in fact possible to distinguish between justiciable rights and freedoms and non-justiciable principles that are not set on the same footing as “true rights” in the Charter context? The government representative from the United Kingdom has stated that such an interpretation is implicit because, according to him, the Charter’s economic and social rights are no more than ‘principles’ that are only to be realised as justiciable rights “to the extent that they are implemented by national law or in areas where there is such competence, by Community law”.<sup>502</sup> The message he sends is that, by nature, economic and social rights are different and less important since they, according to him, are not usually justiciable. This implicitly suggests a hierarchy of rights. Do the Charter’s social rights only qualify as “principles”, i.e. inherently non-justiciable even when the Charter is incorporated within the Constitutional treaty of the EU?

One of the paradoxes of the EUCFR is that it at first sight appears to recognise the importance of the indivisibility of civil and political rights and economic and social rights, but then leaves the question open or appears to distinguish significantly between them according to the way they were drafted and their justiciability. Is this a way of introducing a hierarchical way of thinking between different categories of rights within the context of the EUCFR?

This question became a central issue in WG II of the European Convention where the importance of the distinction between “rights” and “principles” was strongly underlined. WG II suggested that certain additional horizontal adjustments should be included simply to further clarify what the previous Charter Convention had agreed. Accordingly, it was stressed that

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<sup>500</sup> Heringa, A., & Verhey, L., 2001, p. 14.

<sup>501</sup> The concept of economic and social rights has been subject for debate and controversy. Some see them as not “true individual rights”, but rather as programmatic rights or objectives requiring positive action by the State. However, theories of the inherent non-justiciable nature of at least some economic and social rights have been questioned. For a discussion on the legal nature of economic and social rights and the issue of justiciability, see Scheinin, M., (a) 2001, pp. 29- 54.

<sup>502</sup> Goldsmith, L., 2001, pp. 1212-1213. The article was written in his personal capacity.

principles are by their nature different from subjective “rights”. The members of WG II argued that principles are to be observed and “may call for implementation through legislative or executive acts”.<sup>503</sup> This line of reasoning seems to point to an understanding of, in particular, social rights as non-justiciable as to their fundamental character. As a result, a new horizontal provision (article 52: 5) was included in the proposal from the WG II as follows:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling of their legality.

As noted, the question concerning the inclusion of economic and social rights into the EUCFR raised considerable problems during the drafting of the document. This is one reason why the ‘masters of the treaties’ were not able to reach agreement on the incorporation of the Charter into the treaties during the IGC 2000. WG II of the European Convention had as its starting point that the content of the Charter should not be changed. It was just a matter of whether the Charter should be incorporated into the European Convention or not. However, WG II saw it necessary to make some ‘technical adjustments’ to some of the horizontal clauses. The most problematic one is the above-mentioned article 52 (5). This new proposal seems to revisit the substance and content of the Charter despite the assumption that WG II was not re-opening the content of the Charter. This amendment proposal was likely instigated by the UK delegation of the working group in order to continue the struggle initiated by UK government representative Lord Goldsmith during the drafting of the Charter.

This view reflects a position known from some national constitutional systems where, in particular, provisions in social law are taken on board in constitutional fundamental rights catalogues in the form of “principles” rather than as subjective rights that would require further positive action and budgetary allocations by the legislator.<sup>504</sup> The proposed amendment, however, suggests that principles “may be implemented”, i.e. that their realisation

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<sup>503</sup> CONV 354/02 WG II 16, p. 8.

<sup>504</sup> For example, article 19 (2) of the Finnish Constitution prescribes that “Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider. The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population”.

requires legislative or executive decisions by the Union institutions and Member States acting within scope of Union law. This again would suggest that the content of the principles would be clarified only on the basis of the adopted legislative acts or on the basis of executive decisions. The main feature of this proposed amendment denies any subjective nature of principles as such in the Charter.

The problem still to be solved is that of which provisions within the Charter belong to the rights and principles category, respectively. This new proposal does not shed any new insight on this question. The underlying assumption is, however, that a distinction is made between civil rights and social principles. There is, however, no clear division in the Charter between economic and social rights and civil and political rights.<sup>505</sup> The 'solidarity' chapter, however, contains core labour rights, such as the right to information and consultation within the undertaking, (article 27), the right to collective bargaining and action (article 28), the right to protection in the event of unjustified dismissal (article 30), the right to fair and just working conditions (article 31), the prohibition of child labour and protection of young people at work (article 32) and protection from dismissal for a reason connected with maternity and the right to paid maternity leave and parental leave (article 33(2)). In addition, it includes the right of the family to legal, economic and social protection (article 33:1), it recognizes and respects the entitlement to social security (article 34:1) and the right to social and housing assistance (article 34:3). Certain rights, however, that fall within the economic and social rights, but are also found in other chapters in the Charter, include the prohibition of forced

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<sup>505</sup> Menéndez has tried to make a typology of the legal positions of the provisions in the Charter by introducing three categories, i.e. fundamental rights proper, ordinary rights and policy clauses. Examples of what he calls "fundamental rights proper" would be article 7 (Everyone has the right to respect for his and her private family life, home and correspondence). Ordinary rights again is the result of the interplay between article 51 (the charter does not extend the competences of the Union) and different "escape clauses" referring to national laws and practices determining the substantive content of a particular right. The third category would be provisions reflecting policy clauses. He notes that not all fundamental rights provisions give rise to subjective rights of the individual *vis-à-vis* the legislature. Examples he mentions are article 11(2) (freedom and pluralism of the media shall be respected), article 25 (rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life), article II-26 (protection of the disabled), article 37 (environmental protection), and article 38 (consumer protection). Indeed, the terminology used in the Charter is confusing. One can find references to 'values', 'rights', 'freedoms' and 'principles' as well. The legal meaning of the different categorisation is left open and hence remains a contested matter. Menéndez, A., (b) 2003, pp. 380-388.

and compulsory labour (article 5:2), the right to education (article 14), the freedom to choose an occupation and engage in work (article 15), and equality between men and women (article 23). The right to social security and social services (article 34(1)) is recognized in the explanations prepared by the Charter Convention presidium as a principle, thus it does not constitute a subjective right.<sup>506</sup>

### **3.6.2 Justiciability of economic and social rights – a black and white issue?**

The intention here is briefly to look into the question of the justiciability of economic and social rights generally in order to challenge the assumption that economic and social rights are inherently non-justiciable. The question of the justiciability of social rights has raised, and continues to raise, discussion. It is, however, not without reason that the justiciability of economic and social rights is being contested. The proposed main reason for the ‘underdevelopment’ of economic and social rights in international human rights treaties can be identified in the rather vague wording of these provisions, but also due to the relatively weak international monitoring mechanism set up under these treaties both at the universal level and at the regional level.<sup>507</sup> The vague wording of many of the provisions in economic and social rights treaties is seen as the major shortcoming in their normative effect.<sup>508</sup>

According to the proponents of the dichotomy of different rights, social rights are often seen as a resource demanding rights that are to be the subject of progressive realisation. In short, they are not usually formulated as individual rights but follow rather a “means and ends approach” by establishing no direct link between the fact and legal consequences as opposed to civil and political

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<sup>506</sup> CHARTE 4473/00 Convent 49 of 11.October 2000. This is also the view of the Commission in stating that the entitlement to social security benefits and social assistance does not constitute a subjective right. According the Commission, this applies also to articles 36 (access to services of general economic interest), 37 (environmental protection) and article 38 (consumer protection). COM (2000) 559 Final, 13 September 2000.

<sup>507</sup> Scheinin, M., (a) 2001, pp. 30.

<sup>508</sup> The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, however, is drafted in a precise language by using such notions as “every migrant worker has the right to”...see for example article 28 of the Convention. One of the major drawbacks with this approach is that States rather hesitantly ratifies conventions such as this one precisely due to reason that many of its provisions have been drafted as subjective rights. Adopted on the 18 December 1990 and entered into force on 1 July 2003.

rights that follow an “if so formula” and establish a link between the facts and legal consequences.<sup>509</sup> The vagueness and requirement for progressive realisation of the maximum resources available are arguments put forward as evidence of the different nature of the two sets of rights.<sup>510</sup> Others have rejected this dichotomy of rights or categorisation of rights by introducing a tripartite obligation to respect, protect and fulfil human rights.<sup>511</sup> The obligation to respect human rights requires states not to interfere with a particular right and the obligation to protect them would require states to prevent violation by third parties, thus requiring positive measures. The obligation to fulfil human rights again requires states to take appropriate measures in order to achieve the full realisation of the rights in question.

The right to respect, protect and fulfil the human rights approach does not follow the traditional way of distinguishing between different sets of rights, but tries to break down the hierarchy between the two sets of rights by arguing that compliance with human rights can require various forms of measures from non-interference to active realisation in order to achieve full realisation of the rights in question. It does this by cutting across the traditional lines of passive non-interference (civil and political rights) and positive obligations (economic and social rights).<sup>512</sup> Without going into detail on this discussion, it is sufficient to state that this approach makes it clear that one cannot simply make an argument that civil and political rights would be negative based on a notion of non-interference and that they would therefore as such be cost-free. It cannot be contested that the realisation of civil and political rights encompasses positive resource demanding elements. A classic example of this is the right to a fair trial with its clear resource demanding elements. The vagueness or precise description of rights as well as resource demanding rights versus cost-free rights does not hold up as an argument and, therefore, as a justification for holding economic and social rights as inherently non-justiciable.

The UN Committee on Economic, Social and Cultural Rights has indicated in its general comment No. 3 that it considers several provisions of

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<sup>509</sup> Koch, I., 2003, pp. 3-5.

<sup>510</sup> Article 2 of the ICESCR provide that “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

<sup>511</sup> Eide, A., 2001, pp. 23-28.

<sup>512</sup> For a through discussion on the tripartite obligation of states with regard to human rights, see Koch, I., 2003, pp. 11-18.

the covenant as justiciable and capable of immediate implementation by national courts.<sup>513</sup> This expression used by the Committee would suggest that the rights in question are justiciable and are not dependent on the resource situation. The Committee underlines further that all provisions of the covenant contain justiciable dimensions.<sup>514</sup> As noted, in one respect it is indeed acceptable that economic and social rights are justiciable, despite the fact that they are subject to progressive realisation as recognised in article 2 of the ICESCR.

However, there is still much doubt among national courts about whether the judiciary is the right forum for assessing how social rights are to be realised, i.e. how resources are to be allocated for a specific purpose. This is not to say that social rights alone would be resource demanding. The argument is based on the following premise: the judiciary should exercise a great deal of self-restraint with regard to economic and social rights in order to not interfere with the role of legislator. What essentially is at stake is whether it is up to the courts to decide upon the allocation of resources available. This argument was strongly put forward by some Member States during the drafting of the charter that was against including social rights. It would simply be wrong to make a general statement that there is no difference between the two sets of rights. Naturally there is a difference between the right to protect one's home and the right to demand a home of one's own.<sup>515</sup> In terms of the obligation to respect, protect and fulfil human rights, Koch argues that the fulfilment of a civil right, be it resource demanding or not, should be considered the final step in guaranteeing a right that has already been recognised, whereas fulfilling a social right would "entail a recognition of a disputed right", i.e. setting foot on unknown territory.<sup>516</sup> The difference between the two sets of rights might explain the hesitancy by the judiciary to fulfil social rights as such.

On the international level, the question concerning the justiciability of economic and social right has been put on the agenda through individual complaints procedures established under the ICCPR and the ECHR. This is usually described as the "integrated approach" where the treaty bodies include social rights components in civil rights case law. Individuals are thus given

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<sup>513</sup> "The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3".

<sup>514</sup> See General Comment No. 9, E/CN.12/1998/24. para. 10.

<sup>515</sup> Koch, I., 2003, p. 26.

<sup>516</sup> Ibid.

access to procedures that would otherwise not be possible under international treaties on social rights due to the lack of any individual complaints procedures. For the purposes here, it is sufficient just briefly to mention some leading cases where the subsequent bodies have made use of the “integrated approach”.<sup>517</sup>

Under article 26 of the ICCPR on non-discrimination, the Human Rights Committee has ruled that when states adopt legislation on economic, social and cultural issues the legislation in question must comply with the general non-discrimination clause.<sup>518</sup> The ECtHR has recognised in its case law on the right to a fair trial (article 6 ECHR) the right to free legal assistance as a social element in the above-mentioned *Airey case*. The case was about granting free legal aid in civil law suits. Article 6 recognises free legal aid in criminal cases, but does not extend it to cover civil cases. The Court, however, interpreted the right to a fair trial in civil law suits to also include the right to free legal aid. The ECtHR has indeed been willing to go beyond the wording of the provisions of the ECHR and integrate social elements into the civil rights provisions, interpreting the Convention as a living instrument.

The “integrated approach” developed by the Human Rights Committee and the ECtHR, respectively, shed light on the question of the justiciability of social rights, but seems to apply only to situations where social rights are connected to civil rights. In her article on the justiciability of indivisible rights, Koch has shown that the question of the justiciability of social rights as self-standing rights is far from being resolved. The notion of indivisibility as a legal concept does seem to have some relevance, but cannot be considered as a done deal in the sense that it would be expressed in a political context. According to Koch, “in a political context one is free to call attention to indivisibility, interdependence and interrelation of human rights by emphasising the connection between the right to food and the right to life, or the legal right to

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<sup>517</sup> For a short discussion on justiciability and indivisibility of human rights and subsequent case law developed under the ICCPR and the ECHR see, Scheinin M., (b) 2005, pp. 17-26, Scheinin, M., (a) 2001, pp. 32-42, Scheinin, M., & Krause C., 2000, pp. 253-269 and Koch, I., 2003, pp. 21-25.

<sup>518</sup> Communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, views adopted on 9 April 1987, Communication 172/1984 *Broeks v. the Netherlands*, views adopted on 9 April 1987, Communication 180/1984, *Danning v. the Netherlands*, views adopted 9 April 1987. See also General Comment 18 by the HRC on article 26 para. 12, stating that “Article 26 prohibits in law or in fact in any field regulated and protected by public authorities...the application of the principles of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant”.

education and participation rights: in a legal context the connection between the two sets of rights might have another and more limited meaning".<sup>519</sup>

The integrated approach is a useful tool for developing the issue of the justiciability of economic and social rights, but seems to be insufficient to solve the notion of the justiciability of economic and social rights as self-standing rights. This is not to say that economic and social rights could not be worded in precise language constituting as such a justiciable right. A clear example is article 13: 2 (a) of the ICESCR, which prescribes that primary education shall be compulsory and available free of charge to everyone. This particular article shows in clear and precise terms that primary education is not only a privilege for everyone, but also compulsory for everyone. States are, in other words, obliged to establish resource-demanding education for all. This is yet another example showing that economic and social rights by their nature are not inherently non-justiciable. The European Committee of Social Rights has established that the right to social and medical assistance (article 13:1) is a justiciable right.<sup>520</sup>

This is naturally not evidence that all economic and social rights would be justiciable. However, it seems to be too simplistic to state that courts should not get involved in policy-making and therefore should not deal with economic and social rights based on the simple notion that economic and social rights entail budgetary implications.<sup>521</sup> All human rights have budgetary implications to a smaller and greater extent. Indeed, the question of prioritising is unavoidable. Many social rights are worded in vague terms and cannot fulfil the requirement of clarity and predictability to the same extent as in the case with civil rights.<sup>522</sup> An example of this is that it is not even possible to define in clear terms by black letter law what is meant by the right to adequate housing. Why would it be inherently problematic that the definition of what is to be understood by adequate housing in a given context should not be the subject of legal control by the judiciary? Would that constitute interference in the separation of powers between the judiciary and legislator?

The *Grootboom case* from the South-African constitutional court shows that the balance between the judiciary and the legislator can be maintained when the court is faced with a vague social provision on access to adequate

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<sup>519</sup> Koch, I., 2003, p. 17.

<sup>520</sup> On this, see Scheinin, M., (a) 2001, p. 43.

<sup>521</sup> On this, see Koch, I., 2003, pp. 34-38.

<sup>522</sup> However, it is not all that clear that one could say that civil and political rights on the contrary are worded in precise language.

housing.<sup>523</sup> The Constitutional Court had to interpret whether a concrete housing program was in conformity with article 26 (2) of the Constitution requiring that the state is obliged to progressively realize the right of access to adequate housing and that reasonable measures are to be taken to achieve this goal. With regard to the question of justiciability of social rights, the court found that “the state is not obliged to beyond available resources or to realise these rights immediately...these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can and in appropriate circumstances must enforce”.

In the case at hand, the court found that the housing program fell short of complying with the constitutional obligations of the states under article 26 (2). The case shows that the obligation of progressive realisation can be the subject of judicial determination. However, the South-African Constitutional Court declined to take a stand on the issue of a minimum core obligation on what constitutes access to adequate housing. One would assume that the determination of a core minimum obligation should be settled before one could start assessing whether a particular housing program conforms to at least the minimum core standards. The Grootboom case is, however, illustrative of vague social rights wording that can be invoked before a court of law.

What, however, seems to be lacking is a tradition of interpretation by both domestic and international courts with regard to the issue of the justiciability of economic and social rights. It is submitted that it is not necessarily the imprecise wording of the provisions that cause the greatest problems for the courts. It is more a question of drawing a line with regard to the division of tasks between the judiciary and the legislator.<sup>524</sup> To the question

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<sup>523</sup> See case CCT 11/00 *Government of the Republic of South Africa v. Irene Grootboom*, judgment of 3 October 2000.

<sup>524</sup> See also case CCT 23/96, *Certification of the Constitution of the Republic of South Africa of 9 September 1996*. Section 26, 27 and 29 provide right of access to housing, health care, sufficient food and water and basic education respectively. The South-African Constitutional Court held that inclusion of socio-economic rights in the constitution is not inconsistent with the separation of powers as a result of possible budgetary implications. The court argued that enforcement of civil and political rights, such as equality, freedom of speech and the right to fair trial often may have direct budgetary implications and that therefore the inclusion of socio-economic rights within a bill of rights is not so different from ordinary (civil and political) rights conferred upon the court to protect it from constituting a breach in the separation of powers. It held that the socio-economic rights included in the constitution are, at least to some extent, justiciable. Budgetary implications were not seen as problematic with regard to the question of whether socio-economic rights could be justiciable. For a cautious view concerning the judicial determination of economic and social rights based on

of whether the issue of justiciability is a black and white issue, the answer is negative. The justiciability issue is a complex issue that needs further elaboration. However, there is both at the international and at the domestic level an increased willingness to explore the issue on a case-by-case basis that in time might help us to understand the complex notion of the justiciability of economic and social rights.<sup>525</sup>

Now back to the social provisions in the EUCFR. Are they to be considered as inherently non-justiciable? This is what the WG II of the European Convention proposed when it underlined the different nature of rights and principles that pose problems to the notion of indivisibility of rights in the Charter context.<sup>526</sup> This could lead to a hierarchy regarding civil rights and social principles within the Charter context, i.e. in the EU. Indeed, many of the rights contained in the solidarity chapter are highly selective when distinguishing between justiciable rights. Many, however, are heavily qualified in accordance with Community law, national laws and practices, and provisions recognising vague principles. An example of a vague principle is article 34 (3), where the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources in accordance with rules laid down by Community law and national laws and practices. It appears that article 34 is intended to be non-justiciable. This could lead to the conclusion that the justiciability of article 34 is dependent upon national legislation and practices.

Again, the right to paid annual leave was recognized by the ECJ to constitute a fundamental right in the *BECTU case*.<sup>527</sup> The Court had to interpret directive 93/104 EC article 7 granting every worker the right to paid annual leave in accordance with the conditions laid down by national legislation and

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the argument that the protection and regulation of economic and social rights should be a matter for the legislature, see Rytter, J., 2001, pp. 153-159. For a discussion on the division of powers between the legislature and judiciary with regard to international human rights, see Koch, I., & Vedsted-hansen J., 2001, pp. 175-217.

<sup>525</sup> For a review of economic and social rights in national legal orders, see Liebenberg, S., 2001, pp. 55- 84. See also ESC Rights Litigation Programme Centre on Housing Rights and Evictions, 2003.

<sup>526</sup> The group underlined the distinction between “rights” and principles,” stating that principles are different from subjective rights. They are to be observed and may call for implementation and accordingly become significant for the judiciary only in interpreting such acts. The group stressed that “this is consistent....to principles particularly in the field of social law”. CONV 354/02 WG II 16 Final Report, p. 8

<sup>527</sup> Case 173/99 Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of state for Trade and Industry, judgment of 26 June 2001.

practice. The court found that 93/194 EC does not allow a Member State to adopt national rules that deny the right to accrue paid annual leave until 13 weeks of employment with the same employer. Therefore, the ECJ came to the same conclusion as the general Advocate Tizzano in stating that “[I] consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right (article 31 (2) of the Charter), without, however, itself relying upon the specific provision of the Charter.

The right to paid annual leave is an automatic and unconditional right granted to every worker reaffirmed by article 31 (2) in the Charter. It is to be noted, however, that article 31 (2), in stating that “every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to annual period of paid leave,” is to be interpreted in light of directive 93/104/EC, which stipulates in detail what is to be understood by the notion “every worker” due to article 52 (2) of the Charter.<sup>528</sup> Despite the limiting clause put forward in article 52 (2), article 31 (2) is an example of a social right that is drafted in precise terms that clearly show that it is to be understood as a right and not as a principle in light of the different categories prescribed in the Charter and now also in the new proposed article 52 (5).

The proposal from WG II to underline in stronger terms the distinction between rights and principles was not followed by any clarification of how this was to be interpreted. The proposed new article 52(5) does not clarify which articles in the Charter belong to the rights group and which belong to the principles group, respectively. This question is left to the courts to determine. The proposed article 52 (5) tries to strongly underline that civil rights are to be understood as justiciable rights whereas social rights are to be categorically understood as merely political aspiration of goals. This is implicitly more or less in precise terms how article 52 (5) is to be understood. It is, however, not submitted in any precise terms what provisions in the Charter belong to rights and freedoms and what provisions belong to the category of principles. If, however, the assumption above is right, it would create a hierarchy between civil rights and degrade social rights to a secondary class of rights, moving in the opposite direction recognised in international human rights law where the notion of indivisibility at least partly has gained recognition also in a legal context. If article 52 (5) specifically is targeted towards marking a clear distinction between civil and social rights, it becomes problematic for the

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<sup>528</sup> See Case 133/00 Bowden and others v. Tuffnell Parcels Express Ltd, judgment of 4 October 2001 on the scope of application of directive 93/104/EC.

celebrated feature of the Charter as being truly indivisible by including civil and social rights in one and the same instrument.

The trend both internationally and at the domestic level is that social rights are to be recognised to a greater extent as at least partly justiciable. The new proposal would clip the wings of the Charter as being an indivisible list of rights by introducing a hierarchy of rights within the context of the EU rather than reflecting any indivisible nature of human rights. The very fact that social rights were taken on board in the Charter of fundamental rights of the EU among the substantive provisions might reflect a shift in European integration from a market-oriented approach towards a balancing of economic freedoms with social objectives or a shift of balance in favour of social values. It is to be noted that social rights were introduced into the substantive part of the Charter while the four economic freedoms were not included in the substantive part of the Charter, but can be found only in the preamble. Solidarity is now seen as one of basic values of the Union. It has been advocated that social rights provisions could be interpreted as providing support for Member States by claiming exceptions to the four economic freedoms, i.e. moving more strongly towards a weighing and balancing approach between the four market freedoms and other fundamental values. This shift from an automatic protection of the four freedoms can already be seen in the case law of the ECJ.<sup>529</sup>

It has been advocated that the social rights in the Charter are not justiciable as such, where individuals could base a claim against the Union or a Member State, but should merely be seen as a “touchstone” where action taken by the Union and the Member States can be reviewed in light of the socio-economic provisions within the Charter.<sup>530</sup> An example might illustrate this position. It has been argued that article 15 (1) (the right to engage in work) cannot be justiciable, but rather should be viewed as a means to “preclude the Community or a Member State from introducing or maintaining rules that make it extremely hard to gain access to certain professions”.<sup>531</sup> This interpretation of article 15 could be questioned in that it would seem odd that an individual could not rely upon article 15 to bring a claim against the Union or a Member State in cases where the Union or a Member State introduces or maintains rules that make it difficult to gain access to one’s profession. Article 15 does not guarantee the right to work per se. It would be odd that individuals could not

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<sup>529</sup> Menéndez, A., 2003, pp. 393-395.

<sup>530</sup> For a review of the social rights guaranteed by the ECJ, see Lenarters, k., & Foubert P., 2001, pp. 272-293.

<sup>531</sup> Lenarters, k., & Foubert P., 2001, pp. 272.

be able to rely upon article 15 before a court of law. Therefore, not all social rights can be described as a merely a “touchstone” for actions by the legislature and the executive.

The social provisions in the Charter are, however, to be seen as a guarantee and a safeguard for the ECJ to continue developing its case law on social rights. Despite certain constraints placed upon social rights, it is nevertheless submitted that, by making social rights more visible, the Charter contributes to the development of social rights. The potential threat posed by the proposed article 52 (5) on social rights might nevertheless point to a different direction. What falls under the rights and principles category respectively remains to be seen. This question is left to the judiciary. To grant social rights the status of principles that are inherently non-justiciable would work contrary to the notion of indivisibility of all human rights, which is one of great achievements of the Charter.

### **3.7 Level of protection**

Article 53 raises questions on the relationship between the EUCFR and national constitutional rights and international human rights treaties and the level of protection they provide. Article 53 provides as follows:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States’ constitutions.

Article 53 resembles provisions found in international human rights treaties. Examples of such provisions are article 53 of the ECHR and articles 5 (2) of the ICCPR and ICESCR respectively.<sup>532</sup> Similar provisions in international human rights treaties are intended to express that the level of protection in subsequent treaties only confers minimum standards. This is less problematic since international human rights treaties are seen as complementary standards to national protection. Article 53, however, has increasingly raised discussions on the extent to which it should be seen as a possible threat to the supremacy principle, i.e. the ultimate guarantee for the unity and effectiveness of Union law.<sup>533</sup>

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<sup>532</sup> For a comparison to similar provisions in international human rights instruments, see Liisberg, J., 04/01, pp, 21-36.

<sup>533</sup> Liisberg, J., 04/01.

Article 53, for its part, has triggered a debate over the controversial doctrine of *absoluteness* of the supremacy principle, which has been questioned more and more in the Member States. For example, the Constitutional Committee of the Finnish Parliament,<sup>534</sup> in its statement on the report from the Finnish Government on the 'Future of EU', has recognised the possibility that, in a conflict situation, the EUCFR has absolute priority in relation to the fundamental rights standards at the national level when EU law is implemented domestically. However, the Constitutional Law Committee holds the view that this is only acceptable where the EUCFR and national constitutional provisions of the Finnish Constitution offer more or less equivalent levels of protection both at the EU level and at the Finnish Constitutional level. In other words, the EUCFR shall not have any implications on the level of protection offered by the Member States.<sup>535</sup>

Article 53 has been the subject of discussion among the scholars with regard to the purpose and meaning of including such a provision among the horizontal articles. Some see it as totally void of any legal significance and feel that it could be left out when the Charter will is incorporated as part of the new Constitutional Treaty.<sup>536</sup> For example, Liisberg sees article 53 as just an "inkblot" included for political purposes to reassure Member States that the EUCFR does not pose a threat to the national constitutions of the Member States. Liisberg has shown that article 53 was adopted as a response to a fear that the Charter might have a severe impact on the national constitutions of the Member States. During the drafting of the provision, little attention was paid to the possible impact article 53 might have on the supremacy principle. Liisberg, however, rightly came to the conclusion that article 53 as such cannot pose a challenge to the principle of supremacy as one of the cornerstones of EU law. According to Liisberg, "such an interpretation would involve new developments in the European legal order, completely outside the mandate of the Convention".<sup>537</sup>

However, the primary meaning of article 53 is to spell out that the provisions in the Charter are the minimum standards for retaining all higher

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<sup>534</sup> The Constitutional Committee of the Finnish Parliament is the body exercising primary control of the constitutionality during the progress of bills through parliament. Finland has no Constitutional Court and ordinary courts only have a secondary role with regard to the control of the constitutionality of laws.

<sup>535</sup> Opinion 25/2001 of the Constitutional Law Committee of the Finnish Parliament.

<sup>536</sup> Liisberg, J., 04/01.

<sup>537</sup> Liisberg, J., 04/01, p. 40.

existent standards found elsewhere.<sup>538</sup> This would mean that in situations where national constitutions or international human rights treaties provide for a higher standard or level of protection one would have to go for the human rights-friendly interpretation and choose the standard offering the highest level of protection. This again would lead to a situation where the Union level of protection would always provide for the maximum standard of protection. A problem that might arise from the maximum standard approach is that, from the point of view of EU, the principle of supremacy would pose a challenge.<sup>539</sup> This again would alter the very foundations of Union law regarding the relationship between EU law and national law. Article 53 tries to secure that the provisions of the Charter shall not be interpreted as restricting the level of protection offered, *inter alia*, by national constitutions. A strict reading of this would, however, suggest that the provisions of the Charter shall be interpreted following the maximum standard approach, i.e. that the interpretation should be based upon the provision of the Member States' constitutions offering the highest level of protection. This approach has proven to be problematic due to reasons that the level of protection offered by the Member States differs to such a degree with regard to the same rights. Therefore, the maximum standard approach must be rejected.<sup>540</sup>

At the Union level, the starting point for interpreting article 53 should therefore be based on striving for a harmonious interpretation of the provisions in the Charter for both international human rights treaties as well as with the constitutionally protected fundamental rights of the Member States.<sup>541</sup> This approach would be in line with the fundamental rights case law of the ECJ by prevailing on the autonomous nature of the fundamental rights doctrine of the

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<sup>538</sup> Liisberg argues that article 53 is without any legal significance. The principle of supremacy is seen as an absolute way of solving norm conflicts. Helander on the other hand does not see the supremacy principle as an absolute principle that should be defended by all means in all situations, but would rather place it in a context where the principles of adjudication should be guided by a more holistic way of solving cases that first and foremost places the rights of the individual in the forefront without, however, questioning the need to preserve the effectiveness and unity of EU law as such. See Helander, P., (c) 2001, p. 119.

<sup>539</sup> Ibid. 2001, p. 118.

<sup>540</sup> For a discussion on the problem with the maximum standard approach, see chapter 2.4.2.1.

<sup>541</sup> Helander, P., (c) 2001, p. 108.

EU, while at the same time interpret Charter provisions in light of international and European human rights law.<sup>542</sup>

The supremacy principle has now been adopted as article I-6 of the Constitutional Treaty, which reads as follows: “The Constitution, and the law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over law of the Member States”. This provision stipulates that EU law categorically takes precedence over national law including fundamental rights. How is article 53 of the EU Constitution to be reconciled with article I-6? Article I-6 of the draft Constitution is meant to confirm the principle of supremacy. It does so, however, in a manner that raises questions as to the exact wording of the provision. It is not contested that the supremacy principle should not be adopted into the Constitutional Treaty of the EU. However, what is questioned is the exact wording spelled out in the constitutional text. The wording of the said provision does not take into account the jurisprudence of the ECJ in a precise manner.

The ECJ has emphasised the principle of harmonious interpretation by stating that “it is for a national court, to give it, where possible, an interpretation which accords with the requirements of the applicable Community law and, to the extent this is not possible, to hold such domestic law inapplicable”.<sup>543</sup> The proposed article I-6 goes further than the jurisprudence of the ECJ in this respect by prescribing the supremacy principle in absolute terminology. This again would suggest that national standards offering a higher level of protection are to be set aside when Member States are implementing Union law domestically.<sup>544</sup> With regard to fundamental rights, article 53 again stipulates that “nothing in this Charter shall be interpreted as

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<sup>542</sup> The pursuit of a harmonious interpretation of provisions in the Charter that is based on common constitutional traditions of the Member States was underlined by the WG II of the European Convention by proposing a new horizontal (article 52 (4)), which prescribes that “Insofar as this Charter recognised fundamental rights as they result from constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”. This proposal was adopted by the European Convention. The new horizontal clause follows what is known from article 6 (2) of the TEU taking into account common constitutional traditions followed by the ECJ in its case law. As such, this new proposed provision seems to be a useful one in that its intention is to strive for a harmony between the national constitutional rights and the expression of those rights contained in the Charter by addressing the tension between the CFU and constitutional provisions rather than strongly underlining the supremacy of one over the other. De Burca, G., 2003, p. 22.

<sup>543</sup> Case 157/86, *Mary Murphy and others v An Bord Telecom Eireann*, judgment of 4 February 1988. See also chapter 2.3.

<sup>544</sup> Ojanen, T., 2003, p. 1157.

restricting or adversely affecting human rights and fundamental freedoms as recognised...by the Member States Constitutions”.

On the face of it, it looks like article 53 would fail to recognise that the national implementation of EU laws are to be reviewed in accordance with the EU standard, which ultimately and inevitably might lead to a restriction of national standards. From a national constitutional law point of view, this becomes problematic when national constitutional standards offer a higher level of protection in relation to Union standards when Member States are implementing EU law. How is this tension between the proposed absolute principle of supremacy and article 53 to be resolved? Can Member States who implement the law and courts that apply Union law take into account a higher level of protection offered at the national level in comparison with what is offered in EU law, i.e. the EUCFR? A strict reading of the proposed article I-6 would suggest that it would not be possible to take into account national provisions offering a higher protection for implementing and applying Union law in domestic settings. As noted in chapter 2.3, the question concerning the absoluteness of the supremacy principle has been questioned precisely due reasons that the EU law imposes a lower standard of protection in relation to national standards. On the basis of article 53, the absoluteness of the supremacy principle has been questioned to the extent that it is no longer clear, even from an EU law point of view, whether EU law prevails in the implementation and application of EU law.

Arguments have, however, been put forward by scholars stating that national standards offering a higher level of protection can be taken into account when Member States implement Union law domestically.<sup>545</sup> The possibility of taking into account a higher standard of protection offered at the national level in implementing Union law domestically should not be a problem as long as this does not pose too big of a problem for the goal of unity and the efficiency of Union law.<sup>546</sup> Such a position is based on the argument that it is important to place the rights of the individual at the forefront, thus not placing too much emphasis on a strict reading of the scope of union law determining whether an individual can or cannot make use of higher standards offered at the national level when Member States implement Union law.<sup>547</sup> At

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<sup>545</sup> In the Finnish legal debate, see for instance Ojanen, T., 2003, pp.1160-1167 and Helander, P., (c) 2001 pp. 121-122.

<sup>546</sup> Helander P., (c) 2001 p. 124.

<sup>547</sup> The scope of application of the EU fundamental rights, i.e. the EUCFR, follows the scope of application of EU law and, more generally, the question of competence between the EU

the heart of the matter should be the obligation of the Member States to protect fundamental rights and human rights when implementing Union law.<sup>548</sup>

As far as international human rights treaties are concerned, article 53 is less problematic than the EUCFR relation to the national constitutions of the Member States. The minimum guarantee is restricted to treaties to which the “Union, the Community or all Member States’ are a party”. In this regard, the Charter is very much future-oriented as the EU is not (yet) a party to any international human rights treaty. This formulation would imply that the Charter could be interpreted as restricting or otherwise derogating from the rights and freedoms to which not *all* Member States are parties. It is, however, more or less clear that the provisions of the Charter cannot fall below the standard found in international human rights treaties. It is important that the provisions of the EUCFR that shall be read take into account the interpretation given to the legal system from which these standards have their normative basis.<sup>549</sup> This is clearly spelled out in the Charter in article 52 (3), but also in article 53 with regard to the ECHR. This is also important with regard to other international human rights which influence the provisions of the Charter. The minimum guarantees expressed in article 53 in relation to international human

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and its Member States. EU standards of fundamental rights are to be applied by the EU itself and Member States in implementing Union law. Another question is whether there is a possibility to draw a clear line between the competence of the EU and the Member States, i.e. what is the scope of application of EU law? The drafters of the CFR has been criticised for including the notion “in their respective field of application,” thereby implying that, for instance, international human rights treaties would have a separate field of application. No doubt, it was taken on board precisely as a reaction to the fact that article 53 might have implications for the notion of supremacy. This notion does suggest separate fields of application with which the Charter would not interfere. However, EU law and national legal orders separate are not categorically separate legal orders.

<sup>548</sup> The starting point for Ojanen is that constitutional provisions, when offering a higher level of protection, can and should be taken into account in implementing Union law. The argument is based on the premise that the national legislator, in implementing Union law, does not step out of the domestic law, i.e. EU law and national fundamental rights are not separate but rather integrated. Secondly, EU laws are for the most part minimum standards that pave the way for taking into account higher standards at the national level. Thirdly, in accordance with EU law, Member States have a certain freedom as to way directives and framework decisions are implemented domestically that make it possible to take into account national standards. From this it follows that it is rare that EU standards would pose a challenge to domestic standards and could therefore be seen as more of a theoretical problem. Ojanen, T., 2003, pp. 1163-1164.

<sup>549</sup> Report on the Situation of the Fundamental Rights in the European Union and its Member States by the EU Network of Independent Experts Annual Report, 2002, p. 21.

rights treaties reduce the risk of conflicts between the obligations imposed upon Member States by the Union law and the obligations that arise for the Member States from international human rights obligations to which they are contracting parties.

### 3.8 Abuse of power

Article 54<sup>550</sup> corresponds with similar articles found in international human rights instruments<sup>551</sup> and notably also in article 17 of the ECHR.<sup>552</sup> This clause is intended to constitute the final defense against any kind of abuse of the fundamental rights set forth in the Charter. It is intended to prevent from making use of the provisions under the Charter by limiting the enjoyment of rights, freedoms and principles in order to diminish the very essence of those provisions or to limit the essence to a greater extent than is provided for in the EUCFR. Article 54 is therefore not an independent article, but a dependent provision in the sense that it must be in connection with the substantive provision of the Charter, i.e. can only be invoked by the individual against the EU or a Member State in conjunction with a complaint against one of the provisions in the Charter.

In the ECHR context, the corresponding provision (article 17) has mainly been invoked in connection with the rights to freedom of expression, thus setting the limits of article 10 of the ECHR. It is a settled case law that freedom of expression cannot be invoked contrary to article 17 of the ECHR.<sup>553</sup> In the *Schiminek* case,<sup>554</sup> the ECtHR held that “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention”. The case concerned a person convicted for taking part in the

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<sup>550</sup> “Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein”.

<sup>551</sup> See articles 5 (1) of the ICCPR and article 5 (1) of the ICESCR.

<sup>552</sup> “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

<sup>553</sup> See subsequent references to the case law of the former Commission of Human Rights in Van Dijk & van Hoof, 1998, pp. 750-755.

<sup>554</sup> Application 32307/96, *Schimaneck v. Austria*, decision of admissibility of 1 February 2000. See also application 24662/94, *Lehideux and Isorni v. France*, judgment of 23 September 1998.

activities of the new Nazi organization. In essence, article 54 is intended to constitute a final guarantee against such activity that, for instance, spreads xenophobic information based on the right to freedom of expression that runs counter to the very idea of human rights and democracy.<sup>555</sup>

### 3.9 Concluding remarks

It was certainly not clear in 1999 why the European Council felt that the time had come to start working on a Charter of fundamental rights for the European Union. Arguments presented by the Council in its mandate of 1999 were connected to issues of legal certainty, visibility, clarity, and legitimacy. It was not a task of fulfilling a major lacuna or gap in the protection of fundamental rights within the EU legal order. The Council found a clear source of inspirational in the 1999 Comité des Sages report, which states that “fundamental rights must be visible”. The preamble of the EUCFR spells out that the purpose “is to strengthen the protection of fundamental rights in light of changes of society, social progress...by making rights visible in a Charter”.

One important way of strengthening rights is to make them known. The Cologne mandate made it clear that it would adopt nothing new that would have any kind of consequences for the division of competences between the Member States and the EU. It was a consolidation process rather than a process of creating new rights. The Convention method was seen as a success and later became the model for the elaboration of the Constitutional Treaty for Europe. The predominance of the parliamentarians in the Convention was seen a guarantee for a more people-centred way of defining the content of fundamental rights to be protected within the EU. The process became almost as important as the outcome of the drafting procedure. This, in turn, would help bolster the legitimacy of the whole exercise.

The Council also indicated in its mandate that there is a close link between fundamental rights and the issue of legitimacy, i.e. that fundamental rights are an indispensable prerequisite for the overall legitimacy of the European Union. The rights-based approach was a way for the EU to tackle its legitimacy crisis. However, it is safe to say that the adoption of the Charter has had only a marginal effect as a way of bringing the EU closer to its citizens. The outcome of the referenda in France and the Netherlands in 2005 on the Constitutional Treaty for Europe are the latest evidence of the mistrust towards

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<sup>555</sup> See explanations prepared by the Charter Convention Presidium and updated by the European Convention, which prescribes that article 54 is corresponding with article 17 of the ECHR. See CONV 828/1/03 Rev. 1 of 18 July 2003.

the EU and its increased powers. However, what can be concluded is that a transfer of rights must follow the transfer of competences from the Member States to the European Union. In this sense, the Council stressed, rightly, that there is a close link between rights and legitimacy. However, fundamental rights are no more or no less than one important building block in the construction of a legitimate polity such as the European Union.

Understanding the material content of the Charter is far from an easy task. It is seemingly written in simplistic language, but can hardly constitute a prime example of an easily understandable fundamental rights document. One can naturally argue that provisions in any international human rights treaty or national constitutional bill of rights have to be interpreted and applied by courts and other authorities in order for the rights to be of any significance. The content of the provisions should be dynamic. The rights, freedoms and principles spelled out in the Charter are still in an embryonic phase. This is due to its uncertain legal status. The Charter was adopted already 6 years ago, but the ECJ has still not taken any stand on the Charter. What is missing is interpretative case law from the Court of Justice for instance on the issue of rights, freedoms and principles. What is the difference between the rights, freedoms and principles in the Charter?

The emphasis on underlining the difference between rights, freedoms and principles was taken a step further with article 52 (5). Undoubtedly, the new clause introduced by WG II of the European Convention was directed at socio-economic provisions in the Charter. The updated explanation given by the Praesidium of the second Convention states that "principles may be implemented through legislative and executive acts...accordingly, they become significant for the Courts only where such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or by the Member States". An attempt was even made by the drafters at the European Convention to narrow the freedom of interpretation allowed the courts by stating in the revised preamble of the Charter that, "[I]n this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention". It is certainly too early to make any kind of prediction on how the ECJ will interpret the socio-economic provisions in the Charter.

The conceptual difference between the rights and the principles remains unclear and needs clarification. Every fundamental rights provision has a central core that contains a "rights element". The issue of justiciability of rights will hopefully be taken a step forward rather than a step backwards in the

interpretation of the provisions of the Charter. In spite of article 52 (5), the Charter has at least the potential to take further the principle of indivisibility and interdependence of rights as it contains a broad spectrum of rights and principles in one single set.

The horizontal provisions at the end of the document – the so-called rules of interpretation – are of paramount importance in defining the scope of application, setting limits to the competences in the field of human rights and the relation between the Charter and international human rights treaties and, in particular, the relation to the ECHR. In particular, the relation between the EUCFR and the ECHR was an important issue to be settled. This relation is reflected both in article 52 (3) and article 53 of the Charter. A principal concern was that the Charter would pose a threat to the existing system developed under the ECHR and the ECtHR as the principal and specialized courts on Human Rights. What was achieved in this regard was that Europe was not divided in the field of human rights.

However, what we still, at least in theory, might be facing is a risk that the Luxembourg Court and the Strasbourg Court will each interpret the provisions of the ECHR differently. The Charter has de facto incorporated the substantive provisions of the ECHR and its protocols, albeit in such a way that might create difficulties from a coherence perspective. Since the mid 1990s, the ECJ has been willing to take into account not only the rights specified in the ECHR but also the case law from the ECtHR. The question that now arises is whether the ECJ is under a legal obligation to interpret and follow the case law of the ECtHR with the EUCFR? This is, according to the present author, still an open question even though it seems to be clear that the two courts are engaged in interpreting the same human rights. The Charter has, even if it would be incorporated into the treaty structure of the EU, not brought with it as a matter of law the obligation of the ECJ to interpret the Charter strictly in light of the case law of the ECtHR. However, as article 52 (3) prescribes that, “insofar as the Charter contains rights which correspond to the rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by that said Convention...”, one can clearly argue that the case law from the ECtHR must be included to the extent that the provisions in the Charter correspond with the ECHR and its protocols thereof.

The case law of the ECtHR is not mentioned in article 52 (3), but is recognized in the preamble of the Charter and in the explanations prepared by the Charter Presidium. The problem in this regard is to define when a Charter provision corresponds with a right in the ECHR. Theoretically, there are still two courts protecting human rights that theoretically might offer two standards of protection, each operating within its own context. The ECJ interprets

fundamental rights in light of EC law, i.e. in light of the framework of the structure and objectives of the Community (*Internationale handelsgesellschaft* C-11/70). This is, however, more a theoretical problem that can be debated and not a practical problem of any magnitude. The question that now needs to be addressed is whether the Charter and its potential incorporation might have an impact on the interpretation of rights in EC law context, i.e. to what extent rights are to be interpreted strictly in light of the framework for the structure and objectives of the European Union. In other words, it is important to consider the extent to which the protection of rights can be understood simply as a means and end in itself within the context of the EU.

## 4. CONSTITUTIONAL VALUES: ON THE RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS AND FUNDAMENTAL ECONOMIC FREEDOMS

### 4.1 Introduction

The European Union, as we now know it, has undergone a significant change during the last 50 years from being a system based pre-dominantly on economic co-operation into a constitutional polity. While the integration has both widened and deepened, issues such as identity and fundamental values and standards of fundamental rights have gained new ground. This became evident during the drafting process of the new constitutional treaty for Europe.<sup>556</sup> However, the principles and objectives set out in the constituting treaties have focused to a large extent on the creation of a common market guaranteeing the four Community fundamental economic freedoms, i.e. the free movement of workers, capital and goods and the freedom to provide services.

The establishment of a monetary union in twelve of the current Member States has underpinned this evolution. The four freedoms are said to have attributed the status of “super rights” within the EU legal order. It is not uncommon to come across statements in the relevant literature that fundamental economic freedoms have been attributed the status of “super rights” whereas fundamental rights are only protected within the Union in a selective, hazard and unpredictable way.<sup>557</sup> They have had a prominent place from the very beginning in the EEC Treaty and can be said to the very foundation in the whole exercise of building an “ever closer union”. The legal system established by the EEC Treaty was to a significant degree market-based, one in which social considerations were of secondary relevance. European integration has been said to promote economic freedoms by leaving fundamental rights and, in particular, social rights and policies in a secondary position.<sup>558</sup>

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<sup>556</sup> See Constitutional Treaty for Europe article I-2 where it is stated that, “The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. O.J. C 310 of 16.12.2004.

<sup>557</sup> Heliskoski, J., 2004, pp. 417-443.

<sup>558</sup> Maduro, M., 1999, p. 449.

This is not to say that either the four freedoms or fundamental rights as such are absolute in their nature where no restrictions would be possible to make. What, however, has been argued is that economic interests have, generally speaking been prioritized at the expense of fundamental rights. For example, Craig and De Burca state that "...the Court has manipulated the rhetorical force of the language of rights while in reality merely advancing the commercial goals of the common market being biased towards 'market rights' instead of protecting values which are genuinely fundamental to the human condition".<sup>559</sup> De Schutter, again, states that "where a conflict arises between the so-called 'fundamental freedoms' recognized by the EC Treaty and the protection of fundamental rights, the ECJ tends to accept that the latter objective may justify certain restrictions to be imposed on the former, *but only to the extent that imposing such an obstacle is necessary for a Member States to respect its obligations towards human rights*".<sup>560</sup> His point is that the more a Member State is willing to protect fundamental rights progressively, the more difficult it becomes to justify restrictions on the four freedoms.

As noted already in the introductory chapter, fundamental rights were not taken as part of the treaty structure with the EEC treaty. It was not anticipated in the late 1950s that fundamental rights would become an issue that would be of concern for the EEC. The whole project was initially based upon market integration that would be separate from fundamental rights/human rights consideration. This task was left to the Council of Europe, an intergovernmental organisation established with the main task of dealing with issues such as democracy, human rights and the rule of law. The whole philosophy of the EEC was different from that of the Council of Europe. This is still very true even today.

The European Union of today is, however, much more than a trade union organisation. It can be viewed as a constitutional polity with its own identity and values. The intention of this chapter is to analyse the concept of fundamental economic freedoms and its relation to fundamental rights. The dichotomy between fundamental economic freedoms and fundamental rights has also been presented in the form of basic values upon which the current union is supposedly based. How has the relationship between the two fundamentals, i.e. the four freedoms and fundamental rights, been understood in the EU legal order? The ongoing constitutionalisation of the EU legal order has not been brought forward with the new Constitutional Treaty, but is a

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<sup>559</sup> Craig, P., & De Burca G., 1998, p. 337.

<sup>560</sup> De Schutter, O., 2004, p. 9.

product of the developments of the case law of the ECJ.<sup>561</sup> The constitutionalisation of the legal order is, to a significant extent, connected with the increased importance of human rights in the European Union. The doctrines of direct effect, supremacy, implied powers and divisions of competences as building blocks in the constitutionalisation of the legal order are subjected to a fundamental rights scrutiny, which constitutes the last major constitutional building block.

#### **4.2 The foundation of the European Economic Constitution**

The establishment of the common/internal market is no doubt one of the cornerstones of the European Union constituting the core of the EU. Article 2 of the EC Treaty prescribes that “the Community shall have as its task, by establishing a common market and an economic union and monetary union...to promote throughout the Community a harmonious, balanced and sustainable development of economic activities...” The core of market integration lies in the free movement provisions. Article 3 prescribes that, for the purposes set out in article 2, the Community shall set therein “the prohibition, as between Member States, of custom duties and quantitative restrictions on the import and export of goods, and all other measures having equivalent effect” (art. 3:1 a). Article 3:1 (c) prescribes that that Community shall establish “an internal market characterised by the abolition, as between Member States, of obstacles to free movement of goods, persons, services and capital”.

The EC Treaty breaks down the establishment of the internal market into the free movements of goods (part three title I) and the free movement of persons, services and capital (part three title III).<sup>562</sup> The ECJ has defined the common market in the following way: “The concept of a common market involves the elimination of all obstacles to intra community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market”.<sup>563</sup> The founding EEC Treaty used the concept of a common market instead of an internal market or a single market. With the SEA, the concept of the common market was replaced with the concept of the internal market as articles 8 a-c committed the

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<sup>561</sup> See for example Weiler, J., 1999, pp. 19-39 and Maduro, M., 2004, pp. 4-13.

<sup>562</sup> The detailed provisions on the free movement of goods are referred to in articles 28-30, in article 39 on the free movement of workers, in articles 49-50 on the freedom of establishment and services and in article 56 on the free movement of capital. Consolidated version on the Treaty Establishing the European Community O.J. C 325/01 of 24.12. 2002.

<sup>563</sup> Case 15/81 *Gaston Schul v Inspector der Invoerrechten*, judgment of 5 May 1982, para 33.

Community to adopt measures “with the aim of progressively establishing the internal market over a period of 31 December 1992”. The present version, article 14 (2) of the EC Treaty, defines the internal market as an “area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”.

The change of the term from that of common market to internal market has in practise had little effect and they are likely to be understood as synonymous concepts, although the term internal market, launched with the white paper by the Commission in the mid 1980s,<sup>564</sup> did not cover issues of competition, agriculture or transport policy or social policy.<sup>565</sup> In practice, the realisation of the internal market is, however, dependent on an ever-ranging field of activities including competition and social policy.

AG Tesauro discussed the concepts of “common market” and “internal market” in his opinion, *Commission v. Council* in 1991,<sup>566</sup> stating that “no difference – can exist between the concept of “common market” and that of “internal market”; the two concepts differ in breadth, in that the “common market” extends to areas which are not part of the “internal market”, but not in depth, in that both concepts relate to the same level of integration”.<sup>567</sup> Perhaps more importantly for the establishment of the internal market, article 14 (1) of the TEC refers to article 95, which empowers the “Council to adopt by a qualified majority 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”.

Article 95 of the TEC is therefore designed to empower the Council to remove potential barriers of trade between the Member States. It is to be noted, however, that article 95 of the TEC does not imply a general power for the

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<sup>564</sup> Commission Communication *Completing the Internal Market*: White paper from the Commission to the European Council. COM (85) 310 final of 14 June 1985.

<sup>565</sup> Barnard, C., 2004, pp. 12-13.

<sup>566</sup> Case 300/1989, *Commission v. Council of the European Community*, opinion delivered by AG Tesauro of 13 March 1991.

<sup>567</sup> On the relationship between the “common market” and the “internal market”, see Mortelmans, K., 1998, pp. 101-136. The concept of the common market is not part of the EU Constitutional Treaty, but refers to the “internal market” throughout the text. The EU Constitution simply prescribes the internal market in article III-130 as “an area without internal frontiers in which the free movement of persons, services, goods and capital is ensured in accordance with the Constitution”. Part III of the EU Constitution covers not only the four freedoms, but also rules on competition and harmonisation provisions. The provisions on agriculture, fisheries and transport are headed under “policies in other specific areas” (art. III 203-256).

Community to harmonise national legislation, but sets out the objective of harmonising national legislation in order to further the establishment of the internal market. The internal market is established by article 3:1 (c) of the TEC through the abolition of obstacles hindering the free movement of goods, persons, services and capital. Taking the free movement of goods as an example, articles 28 and 29 of the TEC provide for the prohibition of quantitative restrictions on the importing and exporting of goods including all measures having an equivalent effect. This objective is not and could not be of an absolute character. Article 30 of the TEC provides for the conditions under which prohibitions or restrictions on the importing and exporting of goods in transit may be justified on the grounds of “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property”. A national measure restricting free trade on the justifiable grounds outlined above entails the establishment of a barrier to trade. However, in order to set aside the established national barrier to trade, the Community legislator is entitled to adopt measures under article 95 of the TEC on taking over a national interest and transforming it into a Community matter, i.e. the realisation of the internal market may mean that that a particular matter of [national] public interest is dealt with at the level of the European Union.

The interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded.<sup>568</sup> The opinion of AG Geelhoed in the *American Tobacco case* seems to suggest that the EU does not exclusively aim at creating an internal European market, but also would include other legitimate policy goals, such as the protection of public health, that might even have to be considered as taking precedence over that of exclusively focusing on fostering internal market matters. AG Geelhoed goes on to state, “the value of public interest [public health] is so great that in the legislators assessment of other matters of interest, such as freedom of market participants must be made subsidiary to it”.<sup>569</sup>

Is this to be considered as a radical change of legal reasoning since it focuses more on a direct weighing and balancing between different interests rather than on whether a national measure has consequences for the

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<sup>568</sup> See Case 491/01 *The Queen v. Secretary of the State for Health*, opinion of AG Geelhoed of 10 September 2002, para. 106.

<sup>569</sup> *Ibid.* para. 229.

functioning of the internal market without quantitative restrictions? Does it focus only secondly on whether such imposed restrictions might be justified in light of some general legitimate policy goal as interpreted by Menendez?<sup>570</sup> The ECJ was faced with interpreting the validity of directive 2001/37/EC<sup>571</sup> by using article 95 of the TEC as the adequate legal basis for the approximation of laws in the Member States concerning the manufacture, presentation and sale of tobacco products. The ECJ was faced with the task of balancing the interest of market making with that of fostering public health. The objective of the directive is to eliminate the barriers that existed between the Member State's laws, regulations and administrative provisions regarding the manufacture, presentation and sale of tobacco products and impede the functioning of the internal market. In pursuing that objective, the directive takes as its basis a high level of health protection in accordance with article 95 (3) of the TEC. The Court went on to accept that a public health policy might contribute to the harmonisation policy under article 95 of the TEC. The Court stated that "provided that the conditions for recourse to article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made".<sup>572</sup>

In other words, the Court accepted that public health considerations form an essential part of the Community policies included in the construction of the internal market. The Court found that the prohibitions imposed by the directive were proportionate to the aim of attaining the objective pursued. This means that the Community can, by means of harmonisation, adopt standards that restrict certain forms of trade.<sup>573</sup> This judgment clearly shows that the ECJ

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<sup>570</sup> Menendez, A., (b) 2003, p. 194.

<sup>571</sup> Directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products of 5 June 2001. O.J. L 194/26.

<sup>572</sup> Case 491/01, *The Queen v. Secretary of the State for Health*, judgment of 10 December 2002, para. 62.

<sup>573</sup> The Court recognised that the directive "genuinely has as its objective the improvement of the conditions for the functioning of the internal market and that it was, therefore, possible for it to be adopted on the basis of Article 95 EC, and that it is has no bar that the protection of health was a decisive factor in the choices involved in the harmonising measures which it defines". The Court went on to state, however, "that even where a provision of Community law guarantees the removal of all obstacles to trade in the area it harmonises, the fact cannot make it impossible for the Community legislature to adopt that provision in step with other considerations [public health]". Case 491/01 *The Queen v. Secretary of the State for Health*, judgment of 10 December 2002, para. 75 and 78. See also *Whetherwill, S.*, (a) 2004 p. 27.

does not see the construction of the internal market as being the only primary objective of the EU, but other considerations also have to be taken into account, such as social considerations. Thus, the exercise of Community competence cannot be seen as exclusively aimed at constructing the internal market.

A similar statement that concerns shifting the emphasis from that of a purely market-oriented system to that of a much broader emphasis on other considerations such as human rights is the *Deutsche Post case*<sup>574</sup> on the interpretation of article 141 (equal pay). In it the ECJ stated that “the economic aim pursued by article 119 [now article 141], namely the elimination of distortions of competition between undertakings established in different Member States, is *secondary* to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”.<sup>575</sup> In other words, what we are now facing are competing interests that are shaping the core of the internal market. The Court, at least to some extent, now interprets differently provisions that the ECJ previously interpreted as motivated purely by economic considerations, such as the right to equal pay between men and women. What the Court stated in the *Deutsche Post case* was that the elimination of the distortions of competition was not as important as the social aim of pursuing equal pay between men and women. This is an example of a fundamental change of reasoning by the ECJ from its case law in the mid 1970s with regard to the issue of equal pay. The *Deutsche Post case* can be read as a statement by the ECJ that fundamental rights are increasingly gaining strength in the construction of the internal market. The competence of the EU is no longer solely aimed at constructing the internal market, albeit the internal market still gained a prominent place in the Constitutional Treaty. The president of the ECJ also spelled this out in 2002 by stating that:<sup>576</sup>

...I do hope that the central character of the basic economic provisions of the treaty, the rules of free movement and competition, will be preserved in the future constitutional Treaty. One should not forget that the Union is based upon them, that they constitute the core and best established layer of the legal order. Indeed, they have a constitutional nature...These constitutional economic provisions should not be overlooked and downgraded as something of secondary importance. Rather, they should be given pride of place within

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<sup>574</sup> Cases 270/97 and 271/97 *Deutsche Post v. Sievers and Brunhilde Schrage*, judgment of 10 February 2000, para. 57.

<sup>575</sup> Compare with case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, judgment of 8 April 1976.

<sup>576</sup> Reference from Olivier, P., 2004, p. 159. Inaugural speech by the President of the European Court of Justice at the 2002 FIDE Conference.

the new constitutional framework. This would secure the lasting value of the decades of case law that gives them their present meaning.

The President of the ECJ does not have to be disappointed. Article I-4 expressly prescribes that “free movement of person, services, goods, and capital and the freedom of establishment shall be guaranteed within the Union, in accordance with the provisions of the Constitution. In the field of application of the Constitution, and without any prejudice of its specific provisions, any discrimination on grounds of nationality shall be prohibited”. Interestingly, the prohibition of discrimination on the grounds of nationality in the same provision with the four freedoms shows the close connection with the prohibition of discrimination based on nationality in the construction of the internal market. The link between the fundamental economic freedoms and the principle of non-discrimination is therefore reinforced in the Constitutional Treaty.

The ECJ has, however, been willing to interpret the current article 12 (discrimination on the basis of nationality) rather extensively in order to broaden the free movement beyond the categories of workers and self-employed, i.e. the economically active.<sup>577</sup> The ECJ has extended the protection of article 12 to such situations where there is only a weak link or no link at all with EC law.<sup>578</sup> The EU citizenship concept has further broadened the free movement of EU citizens between the Member States. Article 17 TEC makes it clear that EU citizenship does not replace national citizenship, but rather complements it. Article 18 TEC prescribe that “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”. Directive 2004/38/EC deserves to be

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<sup>577</sup> For a review of the case law of article 12 TEC, see Eckhout, P., 2002, pp. 959-962.

<sup>578</sup> For an extended interpretation of the link between article 12 and EU citizenship, see Case 85/96, *Martínez Sala v. Freistaat Bayern*, judgment of 12 May 1998, para. 61-62. The issue raised was whether or not a Spanish national lawfully resident in Germany could obtain a child-raising allowance. Since the ECJ could not establish whether she was an employed person or a worker, the court examined her position under article 12 of the TEC. The ECJ concluded that, as she was lawfully resident in Germany, she fell within the scope of *ratione personae* of EU citizenship and article 12 of the TEC was applied. See also recent cases where the EU citizenship has had an impact on the outcome of the cases, for instance cases 138/02, *Collins v. Secretary of State for Work and Pensions*, judgment of 23 March 2004 and case 209/03 *Queen v. London Borough of Ealing & Secretary of State for Education and Skills*, judgement of 15 March 2005. For a discussion on the recent development of the EU citizenship concept, see Rosas, A., 2005, (c) pp. 1251-1266.

mentioned in bringing together the previous scattered legal regime for the free movement and residence as part of the EU citizenship concept.<sup>579</sup> The directive regulates the conditions under which Union citizens and their families exercise their right to move and freely reside in another EU Member State, the conditions for the right to permanent residence and the restrictions on these rights on grounds of public policy, public security and public health. The directive codifies the previous instruments that dealt separately with workers, self-employed persons, students and other inactive persons by bringing together the EU free movement policy, which has moved far beyond merely the free movement of the economically active workers in the early days of European integration.

### **4.3 The fundamental rights character of the free movement principles**

It is generally acknowledged in the case law of the ECJ that ‘fundamental rights’ are understood as distinct from that of ‘fundamental economic freedoms’. It is common to treat them as distinct from each other reflecting different values protected in the Union legal order. The ECJ has described the four freedoms as “fundamental freedoms”,<sup>580</sup> and “one of fundamental principles of the Treaty”.<sup>581</sup> The free movement of workers was, however, already defined as a fundamental right by the ECJ in the early 1980s.<sup>582</sup> The EUCFR marks a clear distinction between fundamental rights and fundamental economic freedoms by not incorporating the four freedoms within the Charter. The four freedoms are merely recognised in the preamble. This has been interpreted as reinforcing the argument that the European integration is not merely about market-making but is also about market-redressing.<sup>583</sup>

The fact that the EUCFR makes a distinction between the four freedoms and fundamental rights is significant in the sense that the drafters of the Charter saw a clear distinction between the four freedoms and fundamental

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<sup>579</sup> European Parliament and Council directive 2004/38/EC on the right of citizens of the union and their family members to move and reside freely within the territory of the Member States. O.J. L 229/35 of 29.6. 2004.

<sup>580</sup> See for instance, case 112/00, Schmidberger v. Austria, judgment of 12 June 2003.

<sup>581</sup> Case 265/95, Commission v. France, judgment of 9 December 1997.

<sup>582</sup> Case 152/82, Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure, judgment of 13 July 1983. See also case 415/93, UEFA v Jean-Marc Bosman, opinion of AG Lenz of 20 September 1995, para. 203.

<sup>583</sup> Menendez, A., (b) 2003, pp. 192-193.

rights. However, article 16 in the Charter recognises the freedom to conduct business as a fundamental right that can be interpreted as encompassing the freedom of establishment in article 43 of the TEC. The free movement of goods recognised in article 23 of the TEC might also be considered as part of the freedom to conduct business recognised as a fundamental right in article 16 of the Charter and even as part of the right to property.<sup>584</sup> The ECJ has recognised the right to property, freedom to pursue trade and business and freedom of economic activity as fundamental rights protected within the EC legal order.<sup>585</sup> Furthermore, article 15 of in the Charter guarantees the freedom to choose an occupation and the right to engage in work.

According to Roth and Olivier, an individual's right to live and work in the country of choice under the free movement provisions and, thus, not to be separated from his/her family, is an example of a fundamental right within the meaning of the ECHR.<sup>586</sup> However, it must be noted that the freedom of movement is far from being unrestricted and of a general nature. The right for people to move freely within the Community was originally a right for *economically active persons* (articles 39-55) subjected to derogation on the grounds of public policy, public security and public health.<sup>587</sup> In the 1990s, the scope of the free movement provisions was broadened to a general right of free movement and residence for retired persons, students and other persons that would have sufficient resources.<sup>588</sup> This shift in the beginning of the 1990s,

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<sup>584</sup> The right to property is recognised as a fundamental right in ECJ case law (case 4/73) and in article 17 of the Charter. It is also recognised in article 1 (1) of the first additional protocol to the ECHR. Olivier, P., & Roth, W-H., 2004, p. 409.

<sup>585</sup> See the recent case 154/155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales*, judgment of 12 July 2005, para. 126-128, thus not recognising fundamental rights as absolute, but as rights to be viewed in light of their social function.

<sup>586</sup> Olivier, P., & Roth, W-H., 2004, pp. 407-411.

<sup>587</sup> The principle of non-discrimination based on nationality (article 12 TEC) is closely related to the free movement provisions. This was a guarantee that the migrant worker was to be treated on an equal basis as nationals of the host country.

<sup>588</sup> See directive 364/90/EEC on the right of residence for persons of sufficient means O.J. L 180/26 and directive 365/90/EEC on the rights of residence for employees and the self-employed who have ceased their occupational activity O.J. J 180/28 European Parliament. These two directives have now been repealed with Council directive 2004/38/EC on the right of citizens of the union and their family members to move and reside freely within the

however, shows that the free movement provisions have gradually been extended to also cover more than merely economically active persons, thus seeing such people as individuals with rights and not merely as factors of production.<sup>589</sup> The free movement of natural persons is therefore more likely to be treated as a fundamental right than, for instance, the free movement of goods since they have been closely connected with the prohibition of discrimination on the grounds of nationality and EU citizenship.<sup>590</sup> Some see that fundamental economic freedoms as limiting public power, much in the same way as fundamental rights are construed to limit public power in order to safeguard the free market. Maduro argues that the ECJ has referred to the “free movement provisions as ‘fundamental freedoms’ granting them the status of fundamental rights similar to that of fundamental rights in national constitutions”.<sup>591</sup> By this he means that the free movement provisions as fundamental rights have played a crucial role in the construction of the European economic constitution. He is advocating a European Constitution with fundamental economic rights or freedoms similar to those recognised in national constitutions.

Maduro associated the construction of the internal market with a rights discourse, thus arguing that the free movement provisions are granted the *character* of fundamental rights. This is, according to Maduro, due to the extent of European supervision over national regulation that might have a negative impact on the rules of the free market, which in turn has caused market integration to spill over into all sectors of national law. This spill over effect has led some to argue that the free movement principles should be conceived as

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territory of the Member States. O.J. L 229/35 of 29.6. 2004. Directive 366/90 EEC concerns the rights of residence of students O.J. L 180/30.

<sup>589</sup> Barnard, C, 2004, pp. 231-234. This shift of emphasis was further recognised with the introduction of the European Citizenship introduced in the Maastricht Treaty in 1992. Article 18 of the EC provide that “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”.

<sup>590</sup> Already in 1991, AG Jacobs stated that “In my opinion, a Community national who goes to another Member State as a worker or self-employed person... is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights.” See case 168/91, Christos Konstantinidis v Stadt Altensteig, Opinion of AG Jacobs delivered on 9 December 1992, para. 46.

<sup>591</sup> Maduro, M., 1999, p. 452.

“fundamental economic freedoms limiting public power and safeguarding competition in the free market”.<sup>592</sup> However, Maduro is keen to warn that there is a risk of giving fundamental economic freedoms a normatively higher status in relation to other fundamental rights in the Community legal order.<sup>593</sup>

There is no evidence that the ECJ would categorically grant to the fundamental economic freedoms the status of fundamental rights as understood in a national constitutional context.<sup>594</sup> The difference between fundamental economic freedoms and fundamental rights as constitutional rights must be recognised while at the same time recognising that the fundamental freedoms understood as economic freedoms can also be linked with fundamental rights.<sup>595</sup> An example already noted above is article 16 of the EUCFR. The right to conduct business might well be connected to the free movement of goods and services. Article 16 in the Charter is, according to the revised explanatory statement, partly based upon article I-3 (2) of the Constitutional Treaty in stating that the objectives of the EU is to “offer... an internal market where competition is free and undistorted”.<sup>596</sup> The basis for recognising the freedom to conduct business as a fundamental right in Community law is to be found in the construction of the internal market.

The question of the normative status of fundamental economic freedoms and fundamental rights is of paramount importance in how we conceive the EU as a European enterprise *sui generis*. The most important question is perhaps not whether the fundamental economic freedoms can or cannot be seen as fundamental rights, but rather that of their normative status in relation to fundamental rights. What we can conclude from this is, however, that fundamental rights are distinct from fundamental economic freedoms according to the definition of the four freedoms in the EU Charter. However, certain provisions in the Charter can well be construed as forming part of the fundamental economic freedoms concept. The role of fundamental rights as posing restrictions to four freedoms is of interest in this chapter. What happens when the interests of the internal market collide with the protection of

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<sup>592</sup> Maduro, M., 2003 (a), p. 215.

<sup>593</sup> Maduro, M. 1998, p. 168.

<sup>594</sup> As noted above, the free of movement of *workers* has been recognised as a fundamental right by the ECJ.

<sup>595</sup> For a discussion about the fundamental freedoms as fundamental rights, see Bleckmann, 1997, pp. 269-278, where he acknowledged that the four freedoms do not confer subjective rights to individuals, but are rather targeted at states to abstain from restricting the free movement provisions.

<sup>596</sup> CONV 828/1/03 REV 1 of 18 July 2003.

fundamental rights? Is it simply a question of finding a proper balance between different rights protected within the EU legal order? Next, some theoretical considerations will be discussed with regard to the issue of balancing between different values and different rights.

#### **4.4 On legal norms as rules and principles and “balancing”**

It is sufficient, for the purpose of this study, to primarily discuss the core of constitutional rights theories developed mainly by R. Dworkin and R. Alexy. Naturally, one could question whether the theoretical model developed by Dworkin and Alexy is even applicable to the situation in which the values of fundamental rights and fundamental economic freedoms are discussed. The theories on balancing address the situation of balancing between constitutional rights in a strict sense, i.e. for situations of collision between different constitutionally protected fundamental rights. However, this is an attempt to discuss the theoretical framework in situations of collision between constitutionally protected “rights” in the EC law, i.e. fundamental rights and fundamental economic freedoms. As noted above, one can see some analogies between the concept of fundamental rights and fundamental economic freedoms in EC law, but they should mainly be understood as different concepts. This has been recognized in the EU Charter. Fundamental freedoms are not part of the fundamental rights concept per se, but elements of the fundamental economic freedoms have been adopted into the Charter as fundamental rights.

The typical way of constructing the relationship between the fundamental rights concept and fundamental economic freedoms in EC law is that fundamental rights should be used as justifications to derogate from the free movement principles in the same manner as, for example, public morality or public health. The basic value against which fundamental rights considerations have been “balanced” is the free movement principles. The reason why the “balancing” theory is discussed in this context is partly due to the reason that fundamental economic freedoms and fundamental rights are of the same normative level, i.e. they both form a part of primary law and that the ECJ lately has been facing situations in which fundamental rights have to be balanced against the free movement principles. By way of analogy, it is a question of balancing between two kinds of rights protected under EC law—fundamental rights and fundamental economic freedoms that cannot be seen as normatively of a completely different nature. What is characteristic of both concepts of rights is that they are not formulated in absolute terms, but can be derogated from or limited accordingly. Only a few fundamental rights are

absolute in their normative nature, i.e. from which no derogation or limitation is allowed. However, the situation is the same in balancing between fundamental rights per se.

The theories developed by the two distinguished scholars are based on a distinction between rules and principles of legal norms and, in particular, on constitutional rights being the basis for theories of limitation and conflict of rights and the role of constitutional rights in legal systems. The distinction between norms as rules and principles has been discussed among legal scholars for quite some time already and has resulted in various versions and critique of the theories starting with Dworkin. The distinction between legal norms as rules and principles is most often useful at the level of adjudication where the theories come into practical play in actual legal cases. This discussion draws on the theory developed in particular by *Ronald Dworkin* initially in his famous essay "The model of Rules I,"<sup>597</sup> which *Robert Alexy* developed further in his main contribution to a theory on constitutional rights.<sup>598</sup> The ideas on the legal structure of norms developed by Dworkin and Alexy are already well known. Therefore, the intention is not to discuss their contribution on the structure of legal norms in any great detail, but to discuss the fundamental rights within an EU context in light of the very essence of the theories on fundamental rights. This will be done by applying a distinction between rules and principles as the basic pillars in constitutional rights theory.<sup>599</sup>

The theory developed by Dworkin on the distinction between rules, principles and policies<sup>600</sup> has its roots in the critique of legal positivism. Prior to Dworkin's theory on the structure of norms, the concept of legal norms was restricted to valid rules adopted by specific social institutions. The very essence

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<sup>597</sup> Dworkin, R., 1978, pp. 15-45.

<sup>598</sup> Alexy, R., 2002.

<sup>599</sup> The concept of legal norms has been, to a certain extent, a subject of discussion by Finnish legal scholars since the late 1980s. This discussion has led to concrete applications in different fields of law. One could mention for example in the field of contract law Pöyhönen, J., (The system of Contract Law and the Adjustments of Contrats) 1988, pp. 3-116, in criminal law Lappi-Seppälä; T., (On Sentencing I, Theory and the General Part) 1987, pp. 21-28, Aarnio, A., (The Theory of the interpretation of law,) 1989, pp. 78-81, Tolonen, H., 1991, pp. 271-293, Scheinin, M., 1991, pp. 29-39, Siltala, R., 2000, pp. 41-64, Raitio, J., 2001, pp. 214-248.

<sup>600</sup> Dworkin identifies not only rules and principles, but also policies. Dworkin calls a policy a standard of norm that sets out a goal to be achieved, such as the improvement of the economic, social or political feature of a community. A principle is, according to Dworkin, a standard to be observed distinct from economic, political or other social dimension because it is a requirement of justice based on some other dimension of morality. Dworkin, R., 1978, p. 22.

of his critique of legal positivism can be captured by stating that traditional legal positivism does not recognize the role of legal principles in legal systems and adjudication. The positivist conception of law rejects any open-ended legal principles in the definition of a legal norm. According to Dworkin and Alexy, both rules and principles have a claim of validity in legal decision-making. However, the logic on how they operate at the level of adjudication differs. Rules operate in an all or nothing fashion, i.e. rules are either applied or not. In other words, if a rule is applicable on the level of adjudication, it should always lead to a rather simple or clear answer. In accordance with Alexy, "rules are norms that can only be either complied with or not. If a rule is valid, it requires that one do exactly what it demands, nothing more and nothing less".<sup>601</sup> In cases of conflict between two or more rules, a situation of conflict of norms exists that can only be solved by declaring one of the rules invalid or by introducing an exception clause for one of the rules.<sup>602</sup> Conflicts between rules are typically resolved by using metanorms such as *lex superior*, *lex posterior* and *lex specialis*.<sup>603</sup>

Principles on the other hand operate differently concerning the logic of argumentation. It is not a question of "all or nothing", but rather a question of weight or importance. According to Alexy, "principles are optimizing commands, i.e. norms commanding that something be realized to the highest degree that is actually and legally possible".<sup>604</sup> Principles operate, in other words, differently from rules in that they are not of an "absolute character" in the same sense as rules. Principles do not rule out each other in the sense as rules do, but rather compete or collide and are therefore weighed or balanced against each other. The principle that is given more weight is given precedence in relation to other competing principles. This, however, does not necessarily result in a situation where other competing principles are completely ruled out, but on in which they are given less weight. The weighing and balancing of principles can be stated as a process of optimizing the content and scope of applicable principles in a given case. However, neither Dworkin nor Alexy makes any statement on whether principles could or should be organized hierarchically in relation to each other. Indeed, it is sufficient to state that principles cannot be organized in a hierarchical order that could be applied in

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<sup>601</sup> Alexy, R., 2000, p. 295.

<sup>602</sup> Ibid., p. 49.

<sup>603</sup> Ibid.

<sup>604</sup> Ibid., p. 295.

each particular case simply because it would require that one should know the weight of each principle in each individual case.<sup>605</sup>

A criterion for recognising legal norms as either a rule or a principle is to what extent one can precisely state when a rule is applicable and how a norm has been created. Rules are commonly created by legislators, but can naturally also form the core of unwritten norms, whereas principles might also derive from other means implying the fundamental character of the entire legal system. The bottom line is that it is not always easy to characterize a norm as either a rule or a principle. Dworkin points out that there are significant problems involved in distinguishing between legal rules and legal principles.<sup>606</sup> According to Dworkin, “sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone”.<sup>607</sup> A rule might sometimes seem to function as a principle and vice versa. The distinction between rules and principles provides a tool for categorizing norms in order to be able to better understand how norms function differently in different situations. However, the problematic part is in differentiating one type of norm from the other.

The central assumption in this differentiation of norms is that all norms are either rules or principles regardless of the practical difficulties in separating one from the other. One can ask whether it in fact is possible to make a distinction between norms as either rules or principles simply on the basis of abstract legal norms. The point of departure here is that it is not fruitful to label norms as either one or the other simply on the basis of abstract legal norms. The “either or” distinction becomes fruitful only at the level of adjudication. The distinction between rules and principles relates to the effect that an abstract legal norm has in an actual case. From this it does not necessarily follow that norms could not function as either rules or principles on the basis of written legal texts or otherwise established legal norms prior to the application of the law in concrete cases. However, one should be careful in categorising abstract legal norms as either rules or principles. The content of a specific legal norm cannot be understood simply on the basis of an abstract text, but must be defined at a concrete level, i.e. at the level of adjudication. Therefore, the nature of legal norms is only revealed when a norm is examined in a concrete context in light of the whole legal order.<sup>608</sup> Fundamental rights/human rights provisions

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<sup>605</sup> Raitio, J., p. 241.

<sup>606</sup> Dworkin, R., 1978, pp. 27-28.

<sup>607</sup> *Ibid.*, p.27.

<sup>608</sup> Scheinin, M., 1991, p. 30.

may enact both rules and principles, thereby establishing a double aspect for fundamental rights norms.<sup>609</sup> Alexy argues that constitutional rights norms are either rules or principles. However, he further states that constitutional rights norms may have a double character by combining both rule type and principle type. Constitutional rights norms include both aspects by combining a rule with a limitation clause that needs to be balanced.

One could, as *Jens Ole Rytter* has done in his doctoral thesis<sup>610</sup>, characterise fundamental rights by either emphasising a rules approach or a principles approach. In emphasising the rules approach for fundamental rights, the written text is the most important source for the interpretation of fundamental rights provisions, including the *travaux préparatoires*. International norms and unwritten norms are given less importance for an understanding of the provisions in question. In emphasising the principles approach, the understanding of fundamental rights is based on a view of fundamental rights as open principles or values. The normative structure and content of constitutional fundamental rights provisions are by their nature open and dynamic. The content of the principles cannot be captured simply on a textual basis. One has to be able to look beyond the text for the underlying normative principles.

This approach emphasises that fundamental rights are “living provisions” that need to be interpreted in light of present conditions. *Travaux préparatoires* and the text itself are emphasised to a lesser degree, although the wording of the fundamental rights provisions naturally must be seen as the starting point for defining the content of fundamental rights provisions. This approach also stresses the importance of unwritten norms and arguments coming from other legal systems. *Rytter* strongly advocates the principles approach for fundamental rights where the underlying principle of justice is prioritised instead of the rules approach, which secures the element of legal certainty.<sup>611</sup> It needs perhaps to be emphasised that the role of the *travaux préparatoires* is certainly more relevant and more important in dealing with the more recently adopted constitutions compared to relatively older constitutions that do not necessarily reflect present day conditions.<sup>612</sup> It is clear that

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<sup>609</sup> Alexy, R., 2002, p. 84.

<sup>610</sup> Rytter, J., 2000, pp. 129-135.

<sup>611</sup> *Ibid.*, p. 130. His thoughts are based on Dworkin’s ideas on the nature of principles in stating that principles are “standard that is to be observed...because it is a requirement of justice or fairness or some other dimension of morality”. Dworkin, R. 1978, p. 22.

<sup>612</sup> Lämsineva, P., 2002 p. 98. Particularly, concerning the *travaux préparatoires* of the EUCFR, one should be careful in emphasising too much the multiple volumes of documents

constitutional rights provisions are not to be regarded as static, but rather as dynamic. The obvious starting point in interpreting constitutional provisions is how they are worded. The text of the provisions sets limits to an evolutionary interpretation. Indeed, the key question is where one should draw the limits of interpretation, i.e. where the interpretation of constitutional rights provisions ends and where amendment of the provisions by the judiciary begins.

For the present purpose it is sufficient to state that fundamental rights characteristically include both rules and principle types of provisions. One should not emphasize too much either of these two types of fundamental rights provisions.<sup>613</sup> A sufficient model is based on a combined approach that derives from both the rules and principles approach reflecting the double aspect of constitutional rights norms. The fundamental economic freedoms in EC Law cannot be treated as rules, but are, in a Dworkian and Alexian sense, seen as principles of a non-absolute nature that are limited or restricted on various grounds. Rather, when we apply the theoretical model developed by Dworkin and further elaborated by Alexy, we see that what is at stake here is perhaps a balancing exercise between different fundamental values comprised of free movement principles and fundamental rights. The free movement principles recognised in EC law are discussed in term of basic values that reflect the whole legal system, but at the same time they are seen as the core rights of the EU legal order against which constitutionally fundamental rights are being balanced.

## **4.5. Fundamental economic freedoms as non-absolute values**

### **4.5.1 At the very outset – introductory remarks**

Weatherill has argued that the adoption of the EU Charter has been seen as a sign of reorientation for the EU from a dominating emphasis placed on market

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produced by various actors involved in the drafting of the EUCFR. This is also equally true for the explanatory report prepared by the presidium of the Charter Convention. The explanatory report was also prepared by the presidium itself and did not at any point involve the Convention as a whole. The presidium itself has also underlined that the explanatory report has no legal value and should be treated as a guideline for the interpretation of the EUCFR. See CHARTE 4473/00, Convent 49 of 11 October 2000.

<sup>613</sup> For more on the double aspect of constitutional rights norms, see Alexy, R., 2002, pp. 69-86, where he rejects both the pure rule approach and pure principle approach of constitutional rights. See also Lämsineva, P., 2002, pp. 94-99, where he also argues for a combined model where the rule and principle approach can not be seen as opposite to each other but rather as complementing each other.

integration towards a more balanced influence of respect for wider values underpinning public regulation that would perhaps rise above pure market oriented integration. What he argues is that the EC law has never been shaped solely to focus on the development of market integration for the reason that the adoption of the EU Charter will not introduce anything fundamentally new as to the structuring and weighting of values within the EU.<sup>614</sup> The intension is to discuss the potential impact of the Charter and the impact that the accession of the EU to the ECHR might have on market integration, thus reflecting the core values of the EU. The discussion will be based on the ECJ case on the internal market and fundamental rights case law. This discussion will focus on Weatherill's contribution to the discussion, but also on another recently published article by Heliskoski that touches upon the relation between fundamental rights and fundamental economic freedoms in EU law and which states that "fundamental rights are treated as just one ground among other which may or may not qualify as exceptions to the Treaty freedoms, no more or no less".<sup>615</sup>

Weatherill argues that the internal market provisions have always been influenced by broader considerations, such as social concerns and other national priorities, and that the EU Charter can be seen as a welcome engine for securing future fundamental rights including civil and political rights and social rights. He sees the function of the Charter as a welcome contribution to the development and preservation of fundamental rights as they come into contact with EC trade law. He is, however, doubtful as to whether the EU Charter has a role to play in reshaping the balance between the market and other considerations. What he essentially is arguing is that the Charter brings nothing qualitatively new to internal market law. For his part, Maduro sees the Charter's potential related to the impact that it might have on the balance between economic freedom and social rights within the EU Constitutional framework.

It is not revolutionary to state that social rights have occupied a secondary position in relation to economic freedoms in internal market law.<sup>616</sup> Menendez, similar to Maduro, argues that, "the Charter furthers the development of a more articulated system of fundamental rights, encouraging a

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<sup>614</sup> Weatherill, S., (b) 2004, pp. 183-210.

<sup>615</sup> Heliskoski, J., 2004, p. 440.

<sup>616</sup> See for instance Maduro, M., 2003 (a), pp. 214-217, and, for a more in depth analysis, 1999, pp. 449-472.

*rebalancing* of different goals of European integration”.<sup>617</sup> Menendez goes on to state that the social rights included in the Charter under the heading of “solidarity” could be used as an argument for claiming exceptions to the four freedoms in order to actively promote goals of economic and social rights. As noted, in the doctrine one can find different positions as to potential of the Charter for *rebalancing* the fundamental rights–fundamental economic freedoms dichotomy. This is the starting point for the following subchapters, which take as a starting point the ECJ case law on the free movement provisions and, in particular, justified exceptions thereof.

#### **4.5.2 Exceptions to the free movement provisions – the case of goods<sup>618</sup>**

The free movement principles are by no means absolute in the sense that they would overrule just about any national interest for the sake of protecting the internal market. The Treaty provisions themselves clearly spell out the justified grounds for restricting the free movement principles, i.e. on the grounds of public policy, public security and public health (now articles 30, 39:3, 46 and 55), thus leaving a certain regulatory autonomy to the Member States. This regulatory autonomy is reserved for the Member States in order to protect certain internal values.<sup>619</sup>

Relating to the free movement of goods, article 28 provides that “quantitative restrictions on imports (and exports article 29) and all measures having equivalent effect shall be prohibited between Member States”. This rather simple provision prohibits two types of national measures: a) quantitative measures; and, b) measures having an effect equivalent to those of quantitative restrictions. Exceptions to the main rule of free trade can thereby only be imposed on the grounds provided for in article 30 of the TEC with regard to the free trade of goods, although the Court has developed additional justifications in its case law usually referring to them as “mandatory

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<sup>617</sup> Mendendez, A., (b) 2003, p. 192.

<sup>618</sup> For an extensive analysis of the four freedoms, the reader is referred to a recently published book by Barnard, C., 2004.

<sup>619</sup> Article 30 TEC reads as follows: “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

requirements". The list of exceptions provided for in article 30 of the TEC has proven to be problematic in that it reflects the priorities of 1957 and has not been amended since then. Therefore, the Court has developed a "non-exhaustive list" of mandatory requirements in order to justify certain measures of equivalent effect that can be justified under article 30 of the TEC.

In its famous *Cassis de Dijon* case, the ECJ had to interpret article 30 (now 28) concerning state measures having the equivalent of quantitative restrictions on inter-state trade within the Community.<sup>620</sup> Germany restricted the import of the French liqueur, Cassis de Dijon, on the grounds that it did not fulfil the German standards on alcohol content of 25 %, i.e. it was equivalent to the German standards. The restriction was, in order words, based on national technical standards. The German argument in favour of such a restriction was based on public health considerations and the protection of the consumer against unfair commercial practices. The ECJ made it clear that the regulatory autonomy of a state would be subject to ECJ review in so far as such autonomy would restrict inter-state trade. The ECJ accepted that it is for the Member States themselves, in the absence of common rules, to regulate on matters relating to production and the marketing of alcoholic beverages in their territory. However, the court added a threshold to this rule by stating that, "obstacles to movement in the Community resulting from disparities between national laws in question must be accepted in so far as those provisions may be recognised as being *necessary* in order to satisfy mandatory requirements".

The state that places restrictions on inter-state trade must therefore provide a sufficient justification for such restrictions. The mandatory requirements for competing interests include the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. The Court concluded that Germany had not made a sufficiently good case for not importing the French liqueur on the grounds of German regulatory standards. A state that introduces restrictive measures on inter-state trade within the Community must therefore be able to provide sufficient justification of public interest that prevails over the objectives of the internal market.

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<sup>620</sup> Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein*, judgment of 20 February 1979. In the *Cassis De Dijon* case, the Court developed the mandatory requirement doctrine after the strict formula applied the *Dassonville* case. Case 8/74, *Procureur du Roi v. Dassonville*, judgment of 11 July 1974 where the Court stated that "all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions" within the scope of application of article 28 TEC.

The list of exceptions provided for in the treaties has proven to be inadequate and the ECJ has added, in relation to all the free movement provisions, other grounds of justification that may limit the free movement provisions. In line with the *Cassis de Dijon* case, the mandatory requirements include, *inter alia*, consumer protection, the protection of the environment,<sup>621</sup> the protection of culture,<sup>622</sup> the improvement of working conditions,<sup>623</sup> and the plurality of media.<sup>624</sup> In the *Keck* case,<sup>625</sup> the ECJ refined its previous hard-line *Dassonville* approach by differentiating between product-bound (technical standards) regulations and selling arrangements by stating, with regard to selling arrangements, that national regulatory autonomy was permissible in so far as the impediment is not discriminatory with regard to products coming from other Member States or does not result in a complete ban on products coming from other Member States. In other words, the ECJ has been prepared to accept restrictions to inter-state trade beyond those listed in article 30 of the TEC that have an impact on the functioning of the internal market provided that the impediments imposed satisfy the criteria of non-discrimination on the grounds of nationality and proportionality.

In the *Keck case*, the ECJ reserved room for national regulatory autonomy with regard to certain selling arrangements where the ECJ will not intervene as long as the national restrictions are not discriminatory, i.e. where

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<sup>621</sup> Case 3027/86, *Commission v. Denmark*, judgment of 20 September 1988, where the court stated that, “the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty”.

<sup>622</sup> Case 154/89, *Commission v. France*, judgment of 26 February 1991, where the court stated that, “The general interest in the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country can constitute an overriding reason justifying a restriction on the freedom to provide services”.

<sup>623</sup> Case 369/96, *Arlade v. Leloup*, judgment of 23 November 1999, where the court stated that, “It must be acknowledged that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services”.

<sup>624</sup> Case 368/95, *Vereinigte Familiapress v. Bauer Verlag*, judgment of 26 June 1996, where the Court stated that, “maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order”.

<sup>625</sup> Case 267-268/91, *Keck and Mithouard*, judgment of 24 November 1993.

national measures have an affect on all traders operating within a state with regard to law and the factual circumstances of marketing domestic products or products from other Member States.<sup>626</sup> The ECJ has clarified its somewhat unclear concept of selling arrangements by stating that rules on the times and places at which goods can be sold and restrictions on advertisement constitute “selling arrangements”.<sup>627</sup>

The ECJ stated in the *Rau Lebensmittelwerke* case that “[it] is also necessary for such rules [mandatory requirements] to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objectives it should choose the means which least restrict the freedom of goods”.<sup>628</sup> The ECJ applies basically a two-step test, i.e. the test of suitability (means and ends) and the test of necessity (weighing of interests) in order to determine proportionality. Essentially, what this means is that the court has to perform a balancing exercise between the objectives pursued by a state and its effects on the free movement provisions. In essence, the ECJ has been prepared to broaden the national interests that may impede inter-state trade beyond those listed in article 30 of the TEC. It is in this connection that Weatherill sees an “intersection between matters falling within the scope of the Charter of Fundamental Rights and matters treated by the Court as potential justifications for national measures that impede cross-border trade”.<sup>629</sup> The respect for environmental protection, public health and consumer protection as values also identified in the Charter is also to be taken into account in defining and implementing community policies.<sup>630</sup> However, Weatherill argues that there is nothing fundamentally new in this as the ECJ has already stated that it merely derives from the *Cassis De Dijon* formula. Next, the question is turned more

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<sup>626</sup> Weatherill, S., (b) 2004, p. 186.

<sup>627</sup> For a reference to the ECJ case law, see Barnard, C., 2004, p. 137.

<sup>628</sup> Case 261/81, *Rau Lebensmittelwerke v De Smedt*, judgment of 10 November 1982, para. 12.

<sup>629</sup> Weatherill, S., (b) 2004, p. 190.

<sup>630</sup> Olivier, P., 2004, pp. 159-162. Article 6 of the TEC (environmental protection), 152:1 of the TEC (high level of health protection) and article 153:2 (consumer protection) of the TEC. Oliver has referred to these clauses in the Treaty as “Querschnittsklausel”, i.e. that certain policies shall be taken into account in all EU action. The Charter [take out “respectively”] prescribes in article 35 that “a high level human health care protection shall be ensured in the definition and implementation of all Union policies and activities” and articles 37 and 38, respectively, prescribe a “a high level of environmental protection “ and a “high level of consumer protection “.

precisely to the issue of fundamental rights in relation to the free movement provisions.

### **4.5.3 Fundamental rights as an independent ground for impeding free movement?**

Fundamental rights forming part of general principles of Community law do not only restrict the leeway of the Member States with regard to the freedom to implement Union law. The ECJ has acknowledged that fundamental rights may serve as justifiable grounds for imposing restrictions on the free movement provisions recognised by the Treaty provisions whereby Member States have an obligation to ensure the protection and promotion of fundamental rights. This concerns in particular restrictions on the free movement of goods and the free movement of services. The ECJ has since the 1980s accepted that States may impose restrictions on the free movement provisions on the grounds of certain social rights or the need to promote objectives of a social nature.<sup>631</sup> However, despite the fact that both fundamental rights and fundamental economic freedoms are recognised in treaty law, it seems that the fundamental economic freedoms have gained a particularly prominent position in the EU legal order in the sense that they in practice play an equivalent role as fundamental rights in national constitutional law. Restrictions on the free movement provisions recognised in the EC Treaty are to be interpreted narrowly, i.e. the free movement provisions constitute the main rule and fundamental rights the exception. Internal market rights are actively being imposed against any kind of national measures that might be inclined to hinder the realisation of the internal market.<sup>632</sup> With regard to social rights, Bernard states that, “social rights have primarily been invoked in a defensive, to protect national competence from of social protections”.<sup>633</sup>

Related to the relationship between economic freedoms and fundamental rights, Heliskoski has divided the ECJ case law into two categories

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<sup>631</sup> For a reference to the relevant case law in this regard, see Schutter, O., 07/04, pp. 8-9.

<sup>632</sup> Weatherill writes that “it is admittedly true that most cases before the Court are decided in a manner unfavourable to state regulators with the result that trade integration is advanced and local regulatory preferences are suppressed... the list of cases in which the Court has, on the facts, reckoned the strength of the interests in trade integration sufficient to outweigh those in continuing (national level) protection and intervention in the market covers the majority of those that it has decided over the last 25 or so years”. Weatherill, S., (b) 2004, pp. 194-195.

<sup>633</sup> Bernard, N., 2003, p. 249.

when examining the relation *as a matter of Community law* rather than as a matter of EC law versus national law. A clear example of the latter situation is the *Grogan case*.<sup>634</sup> From that type of case it follows more generally that derogations imposed by Member States in order to justify restrictions to the free movement provisions are to be compatible with fundamental rights considerations recognised as a matter of Community law. Therefore, when a Member State invokes a recognised justification in Treaty law (public policy, public security or public health) for restricting a fundamental freedom, it must also satisfy the fundamental rights test. National measures derogating from the free movement principles must satisfy the fundamental rights standards of Community law, i.e. fundamental rights are important in determining whether or not a national measure is justifiable in relation to the free movement provisions.<sup>635</sup>

Firstly, there are cases where Member State measures derogating from the free movement principles have been reviewed by the ECJ in light of fundamental rights protected as general principles of Community law. The second category is related to cases where Member States have invoked fundamental rights protected under Community law as an independent ground for derogating from the free movement principles.<sup>636</sup> The most interesting cases, however, relate to situations where fundamental rights and the fundamental economic freedoms are “competing interests”, i.e. where free movement provisions are reviewed directly according to the EC fundamental rights. It is in these kinds of situations that one can really understand the relationship between the four freedoms and fundamental rights. In other words, to what extent can fundamental rights limit the realisation of the principles of free movement?

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<sup>634</sup> Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, judgment of 18 June 1991, paragraph 43, where the ECJ stated that “where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules, which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community Law, must be interpreted in light of the general principles of law and in particular of *fundamental rights*. Thus the *national rules* in question can fall under the exception provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court”.

<sup>635</sup> Heliskoski, J., 2004, p. 429.

<sup>636</sup> *Ibid.*, p. 432.

In *Familiapress*,<sup>637</sup> the ECJ had to consider whether Austrian legislation prohibiting the sale of magazines published by a German publisher that offered readers the opportunity to take part in games to win prizes was a breach of article 28 of the TEC. The Austrian Law of Unfair Competition does not in general prohibit the offering of free gifts linked with the sale of goods that provide the opportunity to take part in a competition provided that the total prize money does not exceed a fixed amount. However, this law has been declared inapplicable with regard to periodicals. The Austrian legislation on unfair competition prohibited the sale of magazines containing tempting prize competitions for the purpose of protecting smaller newspapers and publishers. This has been justified by a need to preserve media diversity by not imposing too heavy a financial burden on smaller newspapers and publishers.

With regard to fundamental rights, the Court saw that the maintenance of press diversity is closely connected to the freedom of expression. The ECJ ruled that, “where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in light of the general principles of law and in particular of fundamental rights...those fundamental rights include freedom of expression, as enshrined in Article 10 of the European convention”.<sup>638</sup> Fundamental rights operate as an added incentive for a Member State trying to justify a national measure that derogates from its obligations as specified under article 30 of the TEC. The overriding requirement that could justify the national measure was that of upholding diversity of the press and, therefore, freedom of expression. Both the German publisher and the Austrian government could in fact invoke this argument in order to maintain diversity of the press, thus fearing that small publishers might not be able to resist competition as a result of the organisation of prize competitions in periodicals. As noted, this was the reason for prohibiting sales of periodicals containing prize competitions.

According to Heliskoski, freedom of expression could be relied upon in favour of national prohibition invoked as a derogation to the free movement of goods but also in support of the free movement of goods.<sup>639</sup> The ECJ held that the maintenance of press diversity might in principle constitute an overriding requirement, but it was for the national court to make the call on whether the imposed restriction was proportionate to the objective pursued on the basis of

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<sup>637</sup> Case 368/95, *Vereinigte Familiapress v. Heirich Bauer Verlag*, judgment of 26 June 1997.

<sup>638</sup> *Ibid.*, para. 24.

<sup>639</sup> Heliskoski, J., 2004, p. 435.

the factual situation of the Austrian press market. The Court did, however, rule that the prohibition imposed in the national legislation may detract from the freedom of expression protected under article 10 of the ECHR. However, the ECJ noted that derogations from the freedom of expression for the purpose of maintaining press diversity are permissible in so far as they are prescribed by law and necessary in a democratic society. The Court held that as long as the national legislation was proportionate to the legitimate aim pursued and that the objective could not be achieved by less restrictive measures on intra-Community trade and freedom of expression, the national measure could not be challenged.

The *Familiapress* case did raise the question of a collision between the free movement of goods and fundamental rights. Fundamental rights, however, was not directly raised as a possible justification but rather as an additional tool to decide upon whether a public policy framed as press diversity was justifiable as a means of restricting inter-state trade within the Community. A question that did not come up directly was whether the restriction imposed by the Austrian Government should be considered as justified regarding freedom of expression or how to strike a balance between the free movement of goods and the freedom of expression. What the *Familiapress case* made clear is that when a Member State relies on mandatory requirements in order to justify rules that are likely to obstruct the exercise of the free movement of goods, such justification must be interpreted in light of fundamental rights. The case at hand did, however, leave open questions on the direct relation between fundamental rights and fundamental economic freedoms.

In the *Karner case*,<sup>640</sup> the question of freedom of expression in the context of free of movement of goods was brought up. The case concerned a company A that was engaged in sale by auction of industrial goods and the purchase of stock of insolvent companies. The company intended to sell the stock from the insolvent estate in an auction. The auction was advertised in a sales catalogue stating that it was an insolvency auction and that the goods originated from that estate. Karner Company held that company A had misled the public in its advertisement by giving the impression that it was the insolvency administrator who was selling the assets of the insolvent company. Para. 30 (1) of the UWG prohibits any public announcements or notices intended for a large circle from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question no longer from part of the insolvent estate.

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<sup>640</sup> Case 71/02, *Karner Industrie-Auktonen and Troostwijk*, judgment of 25 March 2004.

The case was brought by Karner to the Commercial Court in Vienna, who issued an interim injunction ordering A to refrain from referring in its advertisements to sale of the goods giving the impression that the goods were from an insolvent company no longer constituting part of the insolvent estate. An appeal was issued by A to the Supreme Court claiming that national legislation was incompatible with article 28 TEC and article 10 of the ECHR. A preliminary ruling was sent to the ECJ for an interpretation of article 28 TEC. The ECJ recognised concerning the issue of freedom of expression that whilst it is recognised as a fundamental pillar of a democratic society, the wording of article 10 (2) allows for certain limitations justified by objectives in the public interest and are proportionate to the legitimate aim pursued. The ECJ ruled that a restriction on advertising in the national law under UWG para. 30 was reasonable and proportionate in light of the legitimate goals protected, namely consumer protection and fair trading.

## **4.6 Economic freedoms and Fundamental Rights – towards a direct balancing and weighting of principles?**

### **4.6.1 The Schmidberger case**

The *Schmidberger* case<sup>641</sup> is the first case, and therefore an important landmark case, where fundamental economic freedoms and fundamental rights were directly in collision and where the ECJ therefore had to strike a balance between a Member State's duty to keep major transit routes open for the purpose of the free movement of goods within the Community and the right to freedom of assembly and expression for the purpose of expressing environmental concerns. The facts of the case are the following: The claimant, Schmidberger, is a German transport company transporting mainly timber and steel between Germany and Italy. In May 1998 an environmental group gave notice to the Austrian authorities of their intention to hold a demonstration on the Brenner motorway blocking the route for 28 hours and demanding the strengthening of legal measures to limit and reduce the trafficking of heavy goods on the motorway based upon environmental considerations.<sup>642</sup> In order to reduce

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<sup>641</sup> Case 112/00 Eugen Schmidberger Internationale Transporte Planzüge v. Austria, judgment of 12 June 2003.

<sup>642</sup> A Convention on the Protection of the Alps was signed in Salzburg in 1991 for the purpose of safeguarding the natural ecosystem of the Alps and promoting sustainable development in the Alpine area. The objective is to reduce the volume and dangers of inter-Alpine and trans-Alpine traffic which would be less harmful for humans, animals and plants. The

environmental damage caused by inter- and trans-Alpine traffic, Austria had taken certain measures to ban the trafficking of heavy goods during certain hours on the weekends and public holidays and by vehicles exceeding certain noise limits between 10 p.m. and 5 a.m. every night.

The Austrian authorities found no legal reason to ban the proposed demonstration. Consequently, the motorway was closed to all traffic from 9 am on 12 June until 3.30 pm on 13 June and reopened to the trafficking of heavy goods at 10 pm on 14 June. Proceedings were brought by Schmidberger against Austria for civil liability regarding the failure to comply with Community law, i.e. that the authorities had failed to guarantee the free movement of goods guaranteed under article 28 of the TEC. The Schmidberger firm was prevented from operating its vehicles on their normal transit route during the period of demonstration. The main issue was, however, not whether the environmental considerations per se raised by the demonstrators were of a higher order than the free movement of goods, but rather the relationship between fundamental rights and fundamental economic freedoms protected under Community law.<sup>643</sup> The Innsbruck higher regional court made a reference for a preliminary ruling under article 234 of the TEC, which raised the question of whether, *inter alia*, a Member State is obliged under article 28 of the TEC to ensure the free movement of goods and to what extent a Member State is required to prohibit political demonstrations that might result in impeding the free movement of goods. What essentially was at stake was whether a restriction on the principle of free movement could objectively be justified, i.e. whether the freedom of speech and assembly protected under the Austrian Constitution and guaranteed under Community law prevailed over the free movement of goods.

AG Jacobs noted that the restriction imposed by the Austrian authorities was a result of the autonomous and voluntary behaviour of private individuals and blessed by the national authorities.<sup>644</sup> In this respect, the Schmidberger case is different from the *Commission v. France*<sup>645</sup> case, which concerned violent acts committed by private individuals (French farmers) directed against agricultural products from other Member States. These acts

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convention has been signed by the European Community and a number of States in the Alpine region, including Austria, Germany and Italy. See Council decision of 26 February. O.J. L 61 (1996).

<sup>643</sup> On a similar case involving free movement of goods and protection of health and the environment, see case 320/03, *Commission v. Austria*, judgment of 15 November 2005.

<sup>644</sup> Case 112/00, *Eugen Schmidberger Internationale Transporte Planzuge v. Austria*, opinion of AG Jacobs of 12 July 2002.

<sup>645</sup> Case 265/95, *Commission v. France*, judgment of 9 December 1997.

consisted of the interception of lorries transporting agricultural products in France and the destruction of their loads as well as violence against lorry drivers and the damage of goods not of French origin. The ECJ noted that, in incidents involving serious criminal offences that had taken place for more than 10 years and in which French authorities had not taken enough preventive action or punitive action, it was up to the French authorities to adopt appropriate measures to guarantee the functioning of the internal market. Consequently, the Court ruled that the French government had failed to fulfil its obligations under article 28 of the TEC.<sup>646</sup>

The *Schmidberger case* differs, however, from the *Commission v. France case* on a number of significant points and is therefore not to be treated as an equivalent case. What needs to be taken into account is the issue of justification of restriction caused either by state intervention or when a state abstains from adopting the required measures for removing obstacles to inter-state trade caused by private actors. In his opinion on the Schmidberger case, AG Jacobs advocated a similar two-step approach as a means of analysing traditional grounds of justification recognized in article 30 of the TEC (public policy, public security). He therefore followed a two-step approach in analyzing whether the demonstration blessed by the Austrian authorities was justified, i.e. whether it was a legitimate in terms of public interest and whether the freedom of expression was to be considered proportionate. AG concluded that Austria did in fact pursue a legitimate public interest objective and could justify the restriction of a fundamental freedom by seeking to protect the fundamental rights of the demonstrations. It did this by relying in particular on articles 10 and 11 of the ECHR and articles 11 and 12 of the EU Charter of Fundamental Rights. AG Jacobs further concluded that the measures imposed satisfied the proportionality test by not creating a restriction on the free movement that would be disproportionate to the objective pursued.

The ECJ followed the opinion of AG Jacobs and concluded that a restriction based upon fundamental rights *interests* is justified even under a fundamental freedom guaranteed by the Treaty.<sup>647</sup> The court concluded that, “since both the Community and its Member States are required to respect fundamental

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<sup>646</sup> Following the *Commission v. France* decision, the Council adopted regulation No. 2679/98 with the purpose of clarifying the duties of Member States in situations where the free movement of goods is impeded as a result of the behavior of private individuals. Council Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States. O.J. L 337 (1998).

<sup>647</sup> Case 112/00 *Eugen Schmidberger Internationale Transporte Planzüge v. Austria*, judgment of 12 June 2003, para.81

rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".<sup>648</sup> In a way, the final outcome of the *Schmidberger* case was very much expected and, in principle, a simple case to solve. Yet, it was the first time when the free movement of goods was tested in relation to fundamental rights also protected under Union law and the case should therefore be seen as a landmark case in which fundamental rights prevailed over an economic freedom. The opposite solution would have been detrimental with regard to the protection of fundamental rights under Union law.

The ECJ had no choice but to rule in favour of fundamental rights. The ECJ did recognise that the free movement of goods may in certain circumstances be subject to restriction for reasons spelled out in the treaty or for overriding requirements relating to public interest. Similarly, the Court noted that the freedom of expression and assembly might be subject to certain limitations justified by objectives of public interest. Therefore, the interests involved had to be weighed against all things considered in order to better determine or strike a fair balance between those interests. In that regard, the Court noted that the competent authorities enjoyed a wide margin of discretion. The Court applied the normal proportionality test in order to determine whether the demonstration allowed by the Austrian authorities was proportionate with regard to the pursued aim. This case is, however, illustrative in that it demonstrates the extent to which fundamental rights have gained or occupy a more prominent place in Union law. It is difficult to make any statement about whether recent developments, such as the adoption of the EUCFR, had any impact to the final outcome of the case. It is noteworthy that the ECJ, once again, deliberately chose not to rely on the Charter in its argumentation in spite of the fact that AG Jacobs had relied upon it in his opinion.<sup>649</sup> What became clear in the *Schmidberger* case is that fundamental rights are treated as one of many possible grounds, which may or may not justify an exception to the four freedoms.<sup>650</sup>

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<sup>648</sup> My italics. *Ibid.* para. 74.

<sup>649</sup> Case 112/00, *Schmidberger v. Austria*, opinion of AG Jacobs delivered on 11 November 2002, para. 101.

<sup>650</sup> Rosas offer a different reading of the *Schmidberger* case by emphasising that the Court did not establish a hierarchical relationship between economic freedoms and fundamental rights but saw them a complementary to each other. He underlines that the reason the ECJ took as the starting point an alleged violation of the free movement of goods was simply because the question submitted by the national court was framed in that manner. The court

The starting point for making the balancing exercise is that the economic freedom is the fundamental value against which all interests, including fundamental rights, are to be reviewed. In other words, the free movement provisions are treated as *the* basic “grundnorm” from which derogations can be made and justified on the grounds recognized in the Treaty including the mandatory requirements of which fundamental rights are now form part of. The reliance on fundamental rights is to be treated the same as any other ground that might be invoked by a Member State in justifying a restriction or derogation from the free movement provisions.

I would agree with Heliskoski when he states that, “this, it seems, could have some profound significance to the question of the relationship between fundamental economic freedoms and fundamental civil and political rights in the legal order of the Community, quite irrespective of the material outcomes of individual cases”.<sup>651</sup> In other words, economic freedoms provide the basic strand against which all other considerations shall be reviewed, including fundamental rights. What Heliskoski in fact sees is a kind of hierarchical order between the economic freedoms that form the basic paradigm and other freedoms as possible justifications for restricting the main principle, including fundamental rights. This again suggests that fundamental rights are not to be treated as the “highest law of the land”, but merely as one of many restricting elements that could be invoked to impede basic economic freedoms. The conclusion from this case law shows that the reliance on fundamental rights is treated as any other ground of justification for derogating fundamental economic freedoms i.e. based upon express provisions in the treaty and other mandatory requirements. It should be acknowledged that the ECJ will in the future be confronted with cases that deal precisely with the delicate balance between the fundamental economic freedoms and the fundamental rights that are both protected under primary Community law.

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did emphasise that most the fundamental rights are not absolute, i.e. freedom of expression and assembly are, unlike freedom from torture, not absolute rights. In such a situation, the interest involved had to be weighed “having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests” (para. 81). Rosas puts weight on the fact that the balance to be struck was not between an economic freedom and an absolute fundamental right. If that would have been the case, the court would not have had to resort to a proportionality test. Rosas, 2005 (d), pp. 167-168.

<sup>651</sup> Heliskoski, J., 2004, p. 439. A similar conclusion is reached by Ojanen, T., 2004 (a), pp. 126-135.

#### 4.6.1 Omega Spielhallen case

In the *Omega spielhallen case*,<sup>652</sup> the ECJ had to clarify to what extent the human dignity protected under the German Constitution in order to safeguard public policy would restrict the free movement of goods and freedom to provide services under Community law. In 1994, a German Company, Omega Spielhallen, opened a facility called the “Laserdrome”, which caught the attention of the mayor of Bonn. He asked for a detailed description of the premises and threatened to serve a public order notice in the event that the operation involved a simulated killing of human beings and posed a threat to public order and, consequently, also to human dignity. According to the findings of the mayor, the equipment used in the facilities provided players with sub-machine-gun-type laser targeting devices for the purpose of hitting sensory tags affixed to the chest area and the backs of the players.

Later in 1994, the regulatory authority served a notice to Omega prohibiting it from “facilitating or allowing the pursuit of the games on its...business premises the object of which is the deliberative shooting of people using laser beams or other technical devices that is to say so-called playing at killing people based on record hits”.<sup>653</sup> The reasoning was based on a belief that simulated killing would pose a threat to public order and offend common fundamental values. Omega objected, claiming, *inter alia*, that the ban infringed on its fundamental rights, i.e. its right to run a business and free choice of profession. Omega challenged the ban but lost in the first and second instances. It then lodged an appeal with the *Bundesverwaltungsgericht* (Federal Administrative Court). The appeal was unsuccessful.

The *Bundesverwaltungsgericht* ruled that the killing game violated the principle of human dignity protected under the German Constitution. However, the Court did not rule out that the ban violated Community law and therefore requested a preliminary ruling on the interpretation of articles 49-55 and articles 28-30 of the TEC. Since the British company Pulsar international Ltd. supplied the equipment used in the “laserdrome”, the question arose as to whether the right to human dignity constituted a justifiable grounds for impeding the freedom to provide services protected under article 49 of the TEC and the free movement of goods guaranteed in the EC.

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<sup>652</sup> Case 36/02 OMEGA Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, judgment of the Court on 14 October 2004.

<sup>653</sup> *Ibid.*, para. 12.

The AG identified a direct conflict between fundamental economic freedoms and fundamental rights protected under Community law as the protection of human dignity is protected in Community law derived from the common constitutional traditions of the Member States. The AG dealt with the issue in three steps. The first step was the rehearsing of the status of fundamental rights in Community law. The AG noted that the ECJ “should defend fundamental rights as general principles of Community law. It is particularly questionable whether there is in fact any order of rank between fundamental rights applicable as general legal principles and the fundamental freedoms enshrined in the Treaty”.<sup>654</sup> The AG saw this as an implicit result of the Schmidberger case discussed above. Secondly, the AG had to examine the concept of human dignity under Community law.

In an attempt to define the concept, AG Stix-Hackl stated: “human dignity is an expression of the respect and value to be attributed to each human being on account on his or her humanity” (para. 75). After examining the features of human dignity in Community law (para. 87-92), she concluded that it must be possible to allow for human dignity considerations recognized in Community law under a public policy exception provided by the freedom to provide services.<sup>655</sup> Thirdly, she examined the concept of public policy in light of human dignity, thus concluding that the justification for restricting the freedom to provide services on the grounds of public policy can be considered only if it can be construed that the “Laserdrome” constituted a genuine and sufficiently serious threat to public safety (para. 100). The AG found evidence to support the existence of a serious threat to the interests of society and argued that the Member States could invoke the protection of human dignity in order to impede the freedom to provide services. However, in general, the national authorities have a margin of discretion in making such an assessment. The opinion suggests that derogation from economic freedoms should be viewed in light of fundamental rights standards and that it is not permissible to go beyond the core element of any fundamental right.<sup>656</sup>

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<sup>654</sup> Case 36/02 OMEGA Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, AG Opinion of 18 March 2004, para. 49.

<sup>655</sup> For a discussion on this, see Ackermann, T., 2005, p. 1111.

<sup>656</sup> See also Case 260/89 ERT v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, judgment of 18 June 1991 where the ECJ states that “where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights”.

What is interesting in this context is that the AG is asking the ECJ to consider whether there is a general order of priority in Community law between fundamental rights and economic freedoms. The AG argued that neither economic freedoms nor fundamental rights are absolute in their nature. However, in balancing the interests between economic considerations and fundamental rights, the ECJ could not go beyond this and restrict the core element of any fundamental right. The conclusion reached by the AG in the Omega Spielhallen case is that a national restriction based upon fundamental values, i.e. human dignity, is permissible as long as it can be defended on the grounds of public order and that the goal of the restriction cannot be achieved by other measures.

In line with the AG opinion, the ECJ examined whether the restriction imposed by the authorities was justified with regard to the freedom to provide services. It took articles 46 and 55 of the TEC as the starting point in its analysis. Article 46 applies to the provision of services on the basis of article 55 and allows for restrictions on the grounds of public policy, public security or public health. The starting point for the Court was that the justification had to be examined under the public policy exception under the freedom to provide services. The Bonn police authorities relied on the argument that the activities in the “Laserdrome” constituted a threat to public policy. The Court expressed in familiar language that the justification for derogating from the fundamental principle of freedom to provide services must be interpreted strictly, thus recognising that the specific circumstances that might justify a public policy exception may vary from one country to another and should therefore to be examined by the Court contextually. The national authorities have a certain margin of discretion within the limits imposed by the Treaty.

The ECJ acknowledged that the respect for human dignity is recognised as a general principle of Community law. Inspired by the Schmidberger case, the Court concluded that the protection of fundamental right is a legitimate interest, which in principle justifies a restriction on the obligations imposed by Community Law, even under free movement provisions. Then, the Court applied the necessity and proportionality test. In this regard, the Court stressed that the restrictions imposed under the public policy umbrella are to be reviewed *in casu* and therefore need not to be shared by all the Member States. In its reference to the *Schindler case*,<sup>657</sup> the Court stated that “the need for, and proportionality of, the provisions adopted are not excluded merely because one

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<sup>657</sup> Case 275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, judgment of 24 March 1994.

Member State has chosen a system of protection different from that adopted by another State” (paragraph 37). The Court concluded that the prohibition imposed by the national authorities concerning a game that ultimately simulates acts of homicide corresponds to the protection of human dignity in the German Constitution and that the measure imposed did not go beyond what is necessary for the purpose pursued by the national authorities.

The new task for the Court in this case was to define the concept of public policy as a fundamental right or as, in this case, an issue of human dignity. The lesson to be drawn from the Omega case is that, in order for a fundamental right to justify a restriction on the freedom to provide services, the fundamental right must be recognised as a general principle of Community law and not solely be protected under national law. Furthermore, not all Member States need to define human dignity in the same way. In this case, the German authorities relied on their own particular understanding of the concept of human dignity.

As to the question of hierarchy, AG Stix-Hackl noted that the fundamental rights recognised in the legal order of the Union “are to be considered as part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms” (paragraph 49). What, however, can be concluded from both the *Schmidberger case* and the Omega Spielhallen case is that fundamental rights indeed can justify restrictions on the free movement provisions, either on the basis as a recognised exception in treaty context or as part of the courts developed mandatory requirement doctrine. What, however, seems to be the case is that the free movement provisions still constitute the main principles from which exceptions are allowed - even on the grounds of fundamental rights- but that the exceptions should be interpreted narrowly so as to satisfy the normal necessity and proportionality requirements. We now have two cases settled by the ECJ where fundamental rights considerations have been taken into account by the ECJ on the expense of the free movement principles. However, we are still faced with a situation where the free movement provisions constitute the main rule and fundamental rights the exception to the main rule. As noted already, “Fundamental rights are...treated as just one ground among others which may or may not qualify as exceptions to the treaty freedoms, no more, no less”.<sup>658</sup>

The proposals made in the Constitutional Treaty for Europe concerning fundamental rights issues, i.e. those concerning the incorporation of the EUCFR and the accession by the EU to the ECHR, might very well contribute to a

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<sup>658</sup> Heliskoski, J., 2004, p. 440.

situation in which fundamental economic freedoms and fundamental rights truly rank at the same level in a hierarchy where a balancing exercise takes place in a genuine “all things considered” setting. It is easy to subscribe to a statement made by de Schutter that “we should move from a situation where the fundamental rights protected by the Member States are seen as potential obstacles to economic freedoms, where they are invoked by the States to justify restrictions to the free movement of goods, the free provision of services, or – for instance – rules relating to competition, to a situation where economic freedoms are balanced against fundamental rights...in the new understanding propose here, instead what would be sought are means of preserving both values...without one value being sacrificed to the other”.<sup>659</sup> The very fact that the Charter itself includes both economic freedoms and so-called ordinary fundamental rights is a good argument for the need to strive towards a non-hierarchical approach, i.e. without a predetermined priority relation between the two sets of values in the EU legal order.

The *Schmidberger* and *Omega Spielhallen* cases are welcome and important decisions, but these cases also illustrate that the fundamental economic freedoms still operate as the main rule and fundamental rights as the exception. In a normative sense, incorporation of the Charter would place the EUCFR on the same normative level as the four freedoms. One can hardly argue that the Charter now adopted in the form of a political declaration is normatively on the same level as the treaty protecting the four freedoms. Fundamental rights are, however, protected as general principles of Community law and, normatively forms part of primary law of the European Union legal order. In this regard, would incorporation of the Charter in a constitutional treaty setting have the potential for “upgrading” fundamental rights at least to the same level as the four freedoms?

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<sup>659</sup> De Schutter, O., 2004 p. 39. See also Ackermann, T., for a discussion of the *Omega Spielhallen* case in concluding “that the outcome is not a result of the Court’s own judgment as how to balance between the freedom to provide services and the protection of human dignity should be struck in the present case, but of its tolerance towards national solution of the conflict”, 2005, pp. 1114-1120.

## 5. IMPLEMENTATION OF THE CHARTER AND THE CONSTITUTIONAL DEBATE

### 5.1 Impact of the EU Charter of Fundamental Rights as a non-legally binding instrument on the protection of fundamental rights

#### 5.1.1 Introductory remarks

The question concerning the legal status of the EU Charter has been a central theme of debate ever since the Cologne European Council decided to start the process of preparing a fundamental rights catalogue for the European Union.<sup>660</sup> The European Council decided to address this question in two stages. In the first stage the Charter was proclaimed by the European Parliament, the Commission and the Council as a political declaration without binding legal force. This was done in December 2000 as part of the IGC 2000. In the second stage the Council considered whether and, if so, how the Charter should be integrated into the treaties. A political commitment was announced in Nice to start a “deeper and wider debate on the future development of the EU.”<sup>661</sup> The European Council intentionally avoided using notions like constitutional or constitutionalism in the declaration on the Future of Europe adopted by the Conference. The Laeken declaration - on The Future of the European Union - prescribed that the Future Convention<sup>662</sup> shall consider, *inter alia*, whether the

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<sup>660</sup> Presidency Conclusions of the Cologne European Council of 3-4 June 1999. European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, p. 18.

<sup>661</sup> The Treaty of Nice included a declaration on the future of the Union calling for a debate on the future development of the European Union. The European Council agreed in Nice to discuss the future development of the Union at its meeting in December 2001 concerning appropriate initiatives for the continuation of further integration involving, among other things, the status of the Charter of fundamental rights of the European Union proclaimed in Nice. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001. The other specific issue to be discussed was the division of competences between the Member States and the EU, simplification of the treaties and the role of national parliaments in the future architecture of the Union. O. J. 2001/C 80/01, Declaration No. 23 to the Final Act of the Treaty of Nice.

<sup>662</sup> The Laeken declaration on the Future of the European Union prescribes that “In order to pave the way for the next IGC as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union....It will be the task of that Convention to consider the key issues arising

EU Charter should be included in a basic treaty and also whether the Community should accede to the European Convention on Human Rights. In that context, the notion of a constitution was introduced for the first time. The second Convention working with no less than issues touching upon the future structure of the European Union was composed of 15 representatives of the Heads of States of the Member States, 30 members of national parliaments, two representatives of the Commission, accession candidate countries with one government representative and two representatives from the national Parliaments. The second stage of the process concerning the legal status of the Charter has now been completed. The Convention on the Future of Europe decided to incorporate the Charter within the Constitutional Treaty of Europe. The third stage was to leave it to the IGC to decide on the role and effect of the Charter. What we are now witnessing is a transitional period in which the Member States are in the ratification process of the Constitutional Treaty for Europe. The intention is to discuss the legal status of the Charter and possibly the legal effects of the Charter on the protection of fundamental rights prior to and after the incorporation of the Charter as part of the new Constitutional Treaty of the EU.

### **5.1.2 The current implications of the non-binding Charter - a declaration without legal effect?**

In signing the Charter, the institutions in question committed themselves to respecting the provisions of the Charter.<sup>663</sup> The Commission stated that “it is

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for the Union’s future development and try to identify the various possible responses”. SN 273/01 Laeken Declaration-The Future of the European Union of 15 December 2001. The European Convention started its work on the 28<sup>th</sup> February 2002 and completed its work on 10<sup>th</sup> July 2003.

<sup>663</sup> The president of the European Parliament, Mrs Nicole Fontaine, stated on the occasion of the signing of the Charter of fundamental rights that, “a signature represents a commitment...from now on...the Charter will be the law guiding the actions of the Assembly that the European citizens have elected. From now on it will be the point of reference for all Parliament acts that have a direct or indirect effect for the European citizen throughout the Union” i.e. the Charter will be binding upon the European Parliament. The President of the Commission, Mr Romano Prodi, proclaimed that, “the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote... The citizens can rely on the Commission to respect it in all aspects of the life of the Union”. Statement given on 7<sup>th</sup> December 2000 in Nice. Mr. Jacques Chirac, representing the European Council during the French Presidency, stated on the 12<sup>th</sup> of December in Strasbourg: “In Nice, we proclaimed the European Union Charter of

reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. It is clear that it would be difficult for the Parliament and the Council, who are to proclaim it solemnly, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert".<sup>664</sup>

When considering the Charter from a historical perspective as well, it seems to be rather clear that the European Parliament and the Commission have committed themselves to adopting a legally binding fundamental rights catalogue for the Union. Anything else would be considered as somewhat confusing. The European Parliament has adopted several resolutions stressing the need to commit the Community/Union to a legally binding fundamental rights catalogue. In its resolution of March 2000, the European Parliament stated that "a Charter of fundamental rights constituting merely a non-binding declaration and, in addition, doing no more than merely listing existing rights would disappoint citizens' legitimate expectations".<sup>665</sup> The Parliament has "insisted that the Charter should be included eventually within the Treaty on European Union".<sup>666</sup>

In similar terms, the Commission has, in its communication on the legal nature of the Charter, concluded that "it is unlikely that the expectations aroused in the public opinion by the decision to prepare the Charter could be satisfied by mere proclamation by the Community institutions without the incorporation of the Charter in the treaties".<sup>667</sup> Therefore, it seems to be rather clear that both the European Parliament and the Commission are willing to commit themselves to the EU Charter, even if it is only adopted for the time being in the form of an inter-institutional agreement. At the time of adoption,

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Fundamental Rights, a text which is of major political importance. Its full significance will become apparent in the future and I wish to pay tribute to your Assembly for the major contribution it has made to its drafting".

<sup>664</sup> Commission Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final of 11.10.2000.

<sup>665</sup> European Parliament resolution, C5-0058/1999-1999/2064 (COS).

<sup>666</sup> European Parliament Report, Committee on Constitutional Affairs, A5-0064/2000, p. 12. The Economic and Social Committee has also stated, in its report been in favour of incorporating the Charter into the treaties, that "A binding Charter of Fundamental Rights adds a further dimension to the European Union as an area of freedom, security and justice in that the Union is formally committed a clear Community of values". Opinion of the Economic and Social Committee on "Towards an EU Charter of Fundamental Rights", SOC/013 of 20.9. 2000.

<sup>667</sup> Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final of 11.10.2000.

one could not find a similar kind of commitment from the European Council. Does this mean that during this transitional period the Charter is without binding legal effect? To what extent have the institutions committed themselves to a formally non-legally binding instrument?

Several Member States were not willing to adopt the Charter in a legally binding form during the ICG 2000.<sup>668</sup> Neither were these Member States willing to commit themselves to the idea of accession of the Community/Union to the ECHR. The invitation to elaborate a fundamental rights catalogue for the Union came from the European Council. Germany, which first proposed the idea in the European Council in 1999, was willing to adopt a legally binding Charter from the very start. This alternative was not a realistic option for the European Council. Therefore, it was much easier for Germany, as holder of the Presidency at the time, to agree upon a model where the legal status of the Charter was to be decided at a later stage. The Commission, however, wanted to downplay the question of the legal status of the Charter by stating that “it can reasonably be expected that the Charter will become mandatory through the Court’s interpretation of it as belonging to the general principles of law”.<sup>669</sup> In other words, the ECJ would have a central role in giving mandatory effect to the Charter through its jurisprudence.<sup>670</sup> De Witte put forward similar thoughts when he commented on the likelihood that the Charter would affect the case law of the ECJ and CFI.<sup>671</sup> Therefore, the whole debate concerning the legal status of the Charter would, according to him, become less interesting if not a non-factor.<sup>672</sup>

The former judge at the ECJ, Mr. Sevón, similarly stated that, in terms of the extent to which the EU Charter includes rights that are already protected by the ECJ and are therefore legally binding, the question of the legal status of the Charter is less interesting.<sup>673</sup> A large number of the provisions in the Charter confirm or codify fundamental rights that are already applicable. According to Sevón, one possible problem that might arise from this approach and create confusion is that the EU Charter, in containing rights that are already applicable

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<sup>668</sup> Ireland, United Kingdom, the Netherlands, Sweden, Finland and Denmark rejected the idea to incorporate the Charter into the Treaties.

<sup>669</sup> Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final of 11.10.2000.

<sup>670</sup> De Witte argues that the Charter will most likely become the “favourite source of inspiration” for the ECJ in the future. De Witte, B., 2001, p. 84.

<sup>671</sup> *Ibid.*

<sup>672</sup> *Ibid.*, p. 89.

<sup>673</sup> Sevón, L., 2000 p. 404.

and protected under EC law, is presented in a non-legally binding form that contains rights that are already protected and legally binding through the jurisprudence of the Court.<sup>674</sup> Eeckhout has stated that, in terms of legal practise, it would not make much difference whether the EU Charter is legally binding or merely adopted as a political declaration. He points out that it would be difficult for the courts not to use the Charter in support of their arguments merely on the grounds that the “Charter is not a binding legal instrument and therefore the Court has no jurisdiction to apply it”.<sup>675</sup> However, it seems clear that the ECJ cannot use the EU Charter as such as a legal source of law for protecting fundamental rights within the Community legal order during the transit period. Formally, the ECJ will probably still have to use article 6 (2) as the legal basis in matters concerning fundamental rights issues. The principal source of law for fundamental rights protection in the Community legal order would therefore continue as ‘general principles of Community law’.

## **5.2 Impact on the legal argumentation of fundamental rights by the CFI and ECJ**

Some comments have been made that the EU Charter will probably “become the favourite source of inspiration” and that the court will no longer need to use the mechanism of reference to international human rights instruments and, in particular, to the ECHR as well as to the common constitutional traditions of the Member States as “general principles of law”. Or, at least it will do so to a lesser extent.<sup>676</sup> The Charter would now serve as the principle authority for defining and codifying those fundamental rights that are to be protected, i.e. the content of this “general principles of law-doctrine”, based on the assumption that international human rights treaties and common constitutional traditions are now incorporated into the EU Charter.<sup>677</sup> Indeed, it is not very

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<sup>674</sup> Ibid.

<sup>675</sup> Eeckhout, P., 2000, p. 104.

<sup>676</sup> According to de Witte, “references to international human rights conventions and to common constitutional traditions, as can currently be found in the case law of the ECJ and CFI may even be entirely replaced by references to the Charter, on the assumption that these other sources are now incorporated in the text of the Charter”. De Witte, B., 2001, pp. 84-85. See also Helander, P., (b) 2001, p. 63.

<sup>677</sup> Helander, P., (b) 2001, p. 63. De Witte argues along similar lines when he states that “references to international human rights conventions and to common constitutional traditions, as can currently be found in the case law of the ECJ and CFI, may even be entirely

likely that the ECJ would be able to use the Charter as such as a reflection of general principles of Community law. In that sense, seen from an ECJ point of view, the present model of arguing cases dealing with fundamental rights will not change much. This is due to the fact that the Nice European Council was not willing to include a reference to the Charter in article 6 (2) of the TEU, despite the proposal made by the European Parliament and the Commission. The ECJ will probably still use the ECHR and common constitutional traditions as a source of “inspiration” and “guidelines” in its jurisprudence. However, it is likely that one can find references or similar wording in the case law of the ECJ as stated in the EU Charter. The ECJ would simply use the Charter as a source of confirmation rather than as a legal basis for its decisions. The Charter in itself would not be a source of law but rather a guide to law. According to Sevón, the ECJ is not willing to overlook the decision taken by the European Council, which states that the legal status of the Charter is to be determined at a later stage.<sup>678</sup> Lenaerts, current judge of ECJ, has stated that whatever the future status of the EU Charter, “it will in any event be a strong statement on the values and principles the European Union stands for and this both *vis-à-vis* the present Member States and the other European States applying for European Union membership”.<sup>679</sup>

Indeed, several General Advocates of the ECJ have referred to the Charter in their opinions. In the *BECTU case*<sup>680</sup>, a case concerning the right to paid annual leave, Advocate General Tizzano stated that

The EU Charter of Fundamental Rights of the European Union has not been recognized as having genuine legislative scope in the strict sense...the fact remains that it includes statements which appear in large measures to reaffirm rights which are enshrined in other instruments...I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved-Member States,

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replaced by references to the Charter, on the assumption that these other sources are now incorporated in the text of the Charter”. De Witte, B., 2001, pp. 84-85.

<sup>678</sup> Speech given by Mr. Sevón in Tallinn, 6.4. 2001, Conference Centre of the National Library of Estonia on a seminar held on the European Charter of Fundamental Rights. A conference organised jointly by the Technical Assistance Information Exchange office of the European Commission (TAIEX Office) in cooperation with the Ministry of Justice of Estonia.

<sup>679</sup> Lenaerts, K., 2000 (a), p. 600.

<sup>680</sup> Case-173/99 Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of state for Trade and Industry, Opinion of AG Tizzano, 8 February 2001, paragraphs 26-28.

institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right (article 31 (2) of the Charter).

In other words, Advocate General Tizzano argues that, in a particular case concerning the nature and scope of a fundamental right, the EU Charter cannot be ignored even if it is merely adopted in the form of a political declaration. In the case of *P, Z v. European Parliament*,<sup>681</sup> Advocate General Jacobs made reference to the EU Charter stating that, while the Charter in itself is not legally binding, it proclaims a generally recognised principle of good administration. Advocate General Jacobs did not discuss the impact of the Charter as such.<sup>682</sup>

Thus, Advocate General Mischo, in his opinion in the case of *D and Sweden v. Council*<sup>683</sup>, where a Council civil servant from Sweden required the Council to acknowledge his right to a family allocation based upon a registered partnership, i.e. concerning, *inter alia*, an alleged discrimination based on sexual orientation, states that there is a difference between marriage on the one hand and a partnership between persons of the same sex on the other as recognised in article 9 of the Charter.<sup>684</sup> Article 9 of the EUCFR neither prohibits nor prescribes that a partnership between persons of the same sex equals marriage, but implies that it should be interpreted in accordance with national legislation. In the joined cases of *Booker Aquaculture and Hydro Seafood v. The Scottish*

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<sup>681</sup> Case 270/99 *P, Z v. European Parliament*. Opinion of AG Jacobs of 22 March 2001, paragraph 40.

<sup>682</sup> See also Advocate General Jacob's opinion in Case 50700, *Unión de Pequeños Agricultores v. Council of the European Union*, opinion of 21 March 2002, paragraph 39, where he states that article 47 of the Charter proclaims a generally recognised principle. In case 112/00, *Schmidberger v. Austria*, opinion of AG Jacobs of 11 November 2002, he recognised that the freedom of expression and assembly have been reaffirmed in articles 11-12, respectively, in the EUCFR. Some AGs have emphasised the Charter's clear purpose by pointing out that it has placed the rights which it recognises at the highest level of the hierarchy of values common to the Member states and necessarily constitutes a privileged instrument for identifying fundamental rights or by arguing that it constitutes an invaluable source for the purposes of ascertaining the common denominator of the essential legal values prevailing in the Member States, from which the general principles of Community Law in turn emanate.

<sup>683</sup> Joined cases 122/99 and 125/99, *D and Sweden v. European Council*, opinion of AG Mischo of 22 February 2001, para. 97.

<sup>684</sup> This reasoning by Advocate General Mischo is based on the explanatory note from the Praesidium -CONVENT 49- on article 9, which states that "[T]his article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".

*Ministers*,<sup>685</sup> concerning the right to property, Advocate General Mischo recognised that “[i]t is worthwhile referring to it, [the Charter] given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order”. In the case of *Hautala v. European Council*,<sup>686</sup> concerning the public right to access Council documents, Advocate General Léger stated that...[a]side from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences...the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law”.<sup>687</sup>

In other words, the Charter in and of itself would not be a source of law but rather a guide to law. As can be noted, several Advocates Generals of the ECJ have referred to the Charter. However, references to the EU Charter have been made in different ways, thus suggesting no consistent recognition of its legal force. AG Ruiz-Jarabo Colomer has summarized the positions of the AGs at the ECJ by stating that, while the Charter does not have an autonomous binding effect, it can help to point out that the Charter has placed the rights that it recognises at the highest level of the hierarchy of values common to the Member States. Thus, it constitutes a privileged instrument for identifying fundamental rights or ascertaining the common denominator of the essential legal values prevailing in the Member States, from which the general principles of Community law in turn emanate.<sup>688</sup>

The ECJ, however, recently had a change of heart and has made its first reference to the EUCFR in June 2006.<sup>689</sup> The previous unwillingness, as noted already, might have partly been due to the fact that the Nice European Council

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<sup>685</sup> Joined Cases 20/00 and 64/00 *Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v. The Scottish Ministers*, opinion of AG Mischo of 20 September 2001.

<sup>686</sup> Case 353/99, *Hautala v. Council of the European Union*, opinion of AG Léger of 10 July 2001.

<sup>687</sup> *Ibid.*, para. 80-86.

<sup>688</sup> Case 466/00, *Arben Kaba v. Secretary of State for the Home Department*, opinion of AG Ruiz-jarabo Colomer of 11 July 2002, footnote 73.

<sup>689</sup> In case 540/03, *European Parliament v. Council*, judgment of 27 June 2006, the ECJ for the first time acknowledged the Charter. The reference to the Charter did not have any substantial impact on the outcome of the case. The case is discussed later in this chapter.

was neither willing to incorporate the EU Charter into the treaties nor willing to include a reference to the Charter in article 6 (2) of the TEU despite the proposal made by the European Parliament.<sup>690</sup> This background might very well explain why the ECJ showed a certain degree of caution by not referring to the Charter in its case law until June 2006. As will be shown, it is not very likely that the ECJ would use the Charter as such as a reflection of general principles of Community law. In that sense, the present model for arguing cases dealing with fundamental rights will perhaps not change much. The ECJ will still use the ECHR and other international human rights treaties and common constitutional traditions as a source of “inspiration” in its jurisprudence and the Charter as an additional reaffirming argument of fundamental rights protected in the EU legal order.

A similar hesitance towards the Charter was at first taken by the CFI soon after the adoption of the Charter. In the *Mannesmannröhren-Werke AG case*,<sup>691</sup> the applicant requested that the Court of First Instance (henceforth the CFI) take into account the new EU Charter in determining the case on the grounds that the Charter constitutes a new point of law concerning the applicability of article 6 (1) of the ECHR. The Court stated, however, that the Charter had no relevance to the case for the purpose of reviewing a contested measure adopted by the Commission due to the reason that the contested measure was taken prior to the date of the adoption of the EU Charter. Therefore, the Court did not take into account the EU Charter of Fundamental Rights. In other words, in this way the CFI avoided taking a stand concerning the question of the legal status of the EU Charter. However, the CFI did in fact rely upon the Charter in the *max-mobil case*,<sup>692</sup> which concerned the right to good administration and the right to effective remedy before a tribunal. The case concerned a complaint by max-mobil Telecommunications that the Commission had failed to undertake a diligent and impartial examination when it rejected a complaint that Austria had infringed on the competition rules - by determining the amount of the fee for the granting of a GSM concession - set out in articles 82 and 86 (1) of the TEC. The CFI stated that the

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<sup>690</sup> The European Parliament proposed that a reference to the EU Charter could have been inserted in article 6 (2). CONFER 4804/00.

<sup>691</sup> Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, judgment of the Court of First Instance of 20 February 2001, and paragraphs 15 and 76.

<sup>692</sup> Case T-54/99, *max-mobil Telecommunications Services GmbH v. Commission of the European Communities*, judgment of the Court of First Instance of 30 January 2002.

[t]reatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 confirms that ‘every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’. It is appropriate to consider, first of all, the nature and scope both of that right and of the administration’s concomitant obligations in the specific context of the application of Community competition law to an individual case, as called for in this instance by the applicant.<sup>693</sup>

It is well established that, in so far as the Commission is required to undertake diligent and impartial examination of complaints, the fulfilment of that obligation must be liable to judicial review. Therefore the CFI further recognised that

Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.<sup>694</sup>

In comparison with the above-mentioned *Mannesmannröhren-Werke AG case*, where the court avoided taking a stand on the EU Charter, the CFI relied upon the EU Charter in stating that the EU Charter “confirms” the right to good administration and the right to effective remedy before a court. This would imply that the EU Charter is indeed seen as a codification of rights already existing in the Community legal order. In the *Territorio Historico de ‘Alava case*<sup>695</sup>, the CFI confirmed that article 47 of the Charter is recognized as a general principle of Community law existing on an equal footing with the sources mentioned in article 6 (2) of the TEU.

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<sup>693</sup> Ibid., para. 48.

<sup>694</sup> Ibid., para. 57. See also case T-198/01, *Technische Glaswerke Ilmenau GmbH v. Commission*, order of the President of the CFI of 4 April 2002, paragraphs 85 and 115, where the court notes that article 41 of the Charter confirms the right to good administration as a fundamental right and the right to effective remedy recognised as a general principle of Community law. The argument was based on common constitutional traditions of the Member States, found in articles 6 and 13 of the ECHR and article 47 of the EUCFR.

<sup>695</sup> Case T-77/01 *Territorio Histrico de ‘Alava v. Commission*, Order of the CFI of 11 January 2002, para. 35.

The most far-reaching interpretation by the CFI can be found in the *Jége-Quére et Cie SA case*<sup>696</sup> concerning the right of access to the courts within the meaning of article 230 (4) of the TEC. The CFI noted that the ECJ has confirmed that access to the courts is one of the essential elements based on the rule of law and is guaranteed in the Community legal order. The court further noted that right to effective remedy within the Community legal order is based upon constitutional traditions common to the Member States and on articles 6 and 13 of the ECHR. In addition, in a separate paragraph, the CFI noted that the right to an effective remedy for everyone is *reaffirmed* by article 47 by the EUCFR. In the above-mentioned cases, the CFI does not discuss the legal nature of the Charter at all, but makes use of the Charter in a manner equal to the sources mentioned in article 6 (2). In contrast to the position spelled out by several AGs of the ECJ, the CFI in its recent case law is not interested in dwelling upon the legal nature of the Charter, but uses it in a similar fashion as the sources mentioned in article 6 (2) of the TEU, i.e. it sees the provisions in the Charter as a confirmation or reaffirmation of existing rights guaranteed within the Community legal order. It is perhaps now more likely that the Community courts will cite the Charter more often.

It is perhaps too soon to make any kind of estimate on whether the position taken by the CFI in its case law is to be considered as the position now taken by the Community courts concerning the Charter. The CFI has clearly shown a willingness to draw legal effects from the Charter, even in the absence of its formal legally binding status. It would seem that nothing would prevent the ECJ from using the Charter as a “guide to law,” despite the fact that the European Council avoided incorporating the Charter into the treaties during the IGC 2000. Prior to June 2006, the ECJ refused to discuss the Charter. This became abundantly clear when the ECJ was faced with a case substantially similar to the *Jége-Quére et Cie SA case*.<sup>697</sup> The reasons for this attitude by the ECJ have already been presented. The first point made by Maduro is that the ECJ wanted to preserve its dominant position with regard to fundamental rights discourse in the EU, i.e. to preserve its dominant position in the constitutionalisation process. Adopting fundamental rights would challenge the position of the Court in this field.<sup>698</sup> This cynical reading of the attitude of the court is not very convincing. Adopting a fundamental rights catalogue does

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<sup>696</sup> Case T-177/01, *Jége-Quére et Cie SA v. Commission*, judgment of 3 May 2002.

<sup>697</sup> See case 50/00 *Union de Pequenos Agricultores v. Council*, judgment of 25 July 2002.

<sup>698</sup> Maduro, M., P., 2003, p. 213.

not mean that rights and freedoms would be fixed once and for all in the EU context.

A more convincing argument was presented by AG Maduro, who stated that the next step that needs to be taken is that the political process follows a traditional form of constitution making.<sup>699</sup> It is not for the ECJ to decide upon the legal status of the Charter. This question is to be determined by the political process. This line of reasoning is known from the courts opinion 2/94, which considers whether accession by the Community conforms to EC law. The refusal until June 2006 by the ECJ to take a stand on the Charter was likely to be in connection with the process of elaborating a constitution for the EU, a process that started no more than one year after the adoption of the Charter with the Laeken declaration in December 2001.<sup>700</sup>

However, as already noted, things seem to be changing. In a recent case *Parliament v. Council*,<sup>701</sup> concerning the application by the European Parliament to partially annul directive 2003/86/EC (right to family reunification) under article 230 EC, the ECJ for the first time took notice of the EUCFR. The questions handed to the ECJ by the EP concerned articles 4 (1), 4 (6) and 8 and whether they are in conformity with fundamental rights, in particular with the right to family life and the right to non-discrimination. The directive determines the conditions for family reunification by third country nationals residing lawfully in the territory of the Member States. The Court rejected the claim by the EP, thus allowing a margin of discretion to the Member States with regard to the right to family life. The directive allows Member States to apply national legislation derogating from the directive under certain conditions. A Member States may, when a child aged over 12 years and arriving independently from his/her family, verify if the child meets the conditions provided for in the national legislation concerning entry and residence on the date of implementation of the directive.

An application for family reunification may also be required in accordance with national legislation before the age of 15. The directive also provides that a Member State may require that the sponsor have stayed lawfully for no more than two years. The ECJ used its standard language of how fundamental rights are protected in the EU (para. 35-36). The ECJ also

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<sup>699</sup> *Ibid.*, p. 214.

<sup>700</sup> For a discussion on the “legal bite” of the Charter in the case law of the ECJ and the CFI, see for example Menéndez, A., (a) 2003, pp. 41-45.

<sup>701</sup> Case 540/03, *European Parliament v. Council of the European Union*, judgment of 27 June 2006.

recognised the importance of international human rights treaties which it takes into account in applying general principles of Community law. The Court, however, held that these international treaties do not create for family members a subjective right to be allowed to enter the territory of a State. A certain margin of discretion is in this regard left to the State parties. In this regard, the ECJ noted that the margin of discretion left to the Member States in the directive is not different from the case law relating to respect for family life in respect of weighing the competing interest by the ECtHR. Therefore, the margin of discretion left to the Member States in the directive not greater than what is allowed for the Member States under their international human rights obligations. The ECJ took notice of the EUCFR in para. 38 by stating that

The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.

The important part in the statement made above by the ECJ concerns two things. The first is related to the reference made by the court to the intention of the legislator by prescribing in the preamble that the directive observes the principles recognised in article 8 of the ECHR and the Charter. The second point is that the ECJ now confirms the principal intention with the Charter, i.e. that the Charter is an instrument that reaffirms the EU fundamental rights doctrine. The fact the legislator places emphasis on the Charter, i.e. the EU law should be in conformity with the Charter has now been recognised by the ECJ. While the ECJ notes that the Charter is not legally binding, the ECJ nevertheless recognises the legal effect of the Charter, i.e. the EUCFR sets the standard for EU legislation. The ECJ acknowledged further that article 7 (respect for private and family life) of the EUCFR "must be read in conjunction with the obligation to have regard the child's best interests, which are recognised in Article 24 (2) of the Charter, and taking account of the need, expressed in Article 24 (3) for a child to maintain on a regular basis a personal relationship with both his or her parents" (para. 58). The salience by the ECJ on the Charter has now ended.

### 5.3 Institutional practice within the EU

In accordance with article 51 (1), “the provisions of this Charter are addressed to the institutions and bodies of the Union...[T]hey shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers”. Article 51 clearly establishes that the Charter applies primarily to the institutions and bodies of the Union with due regard to the principle of subsidiarity. The term “institutions” applies to those institutions that are referred to in article 7 of the TEC and the term “body” refers to all the authorities set up by the treaties and secondary legislation.<sup>702</sup> No definition or authoritative list, however, exists of what constitutes a “Community body”. Nonetheless, it can be noted that the term “bodies” applies to bodies established under the Treaties, such as the European Investment Bank, the Economic and Social Committee and the Committee of the Regions and the European Central Bank as well as bodies set up under Treaties, including decentralized agencies.<sup>703</sup> In other words, the Charter is addressed to the activities of the Union under all three pillars, and is not merely restricted to EC law. In light of this provision, it could be asked to what extent the institutions of the Union have committed themselves to a non-legally binding instrument? Soon after the adoption of the EUCFR, one could witness an emerging institutional practice by the Community institutions, foremost among them the Commission and the European Parliament, of citing the Charter as a reference document for their decisions and actions.

In the Commission Communication to the staff concerning the proclamation of the EU Charter, Prodi, jointly with Commissioner Vitorino, stated as follows:<sup>704</sup>

The Commission, like the other institutions, must look to the practical implications of this historic event and make compliance with the rights contained in the Charter the touchstone for its action.

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<sup>702</sup> CHARTE 4473/00, Convent 49. Explanatory note on article 51.

<sup>703</sup> European Centre for Development and Vocational Training; European Foundation for the Improvement of Living Conditions and Working Conditions; European Environment Agency; European Agency for the Evaluation of Medical Products; Office for Harmonisation of the Internal Market; European Training Foundation; European Monitoring Centre for Drugs and Drug Addiction; Community Plant Variety Office; European Monitoring Centre for Racism and Xenophobia; European Agency for Safety and Health at Work; Translation Centre for bodies of the European Union.

<sup>704</sup> Commission communication on the application of the EU Charter of Fundamental Rights of the European Union SEC (2001) 280/3.

This must be an overriding requirement in the Commission's day-to-day business, both in relation with the general public and with those to whom our decisions are addressed and in our internal rules of procedures. But it must also be reflected in the way the Commission exercises its right to initiate legislation and its powers to lay down rules.

An inter-institutional agreement as such does not legally bind the legislative power exercised by the EC legislator. As noted above, the Commission has stated that any proposal having a specific link to fundamental rights will include either a general reference to the EU Charter or a specific reference to an article in the Charter.<sup>705</sup> The minimum that one therefore could expect is that the institutions signing the EU Charter would be bound to follow it in their own activities relating to fundamental rights. From now on, all legislation and proposals for legislation having an effect on fundamental rights will be examined for their compatibility with the Charter. Reference to the Charter can be found in the preambles EU legal acts that have already been adopted<sup>706</sup> and Council regulations, in particular in the field of asylum<sup>707</sup> and in the sensitive areas of judicial cooperation in criminal matters, i.e. the European arrest warrant<sup>708</sup> and for combating terrorism.<sup>709</sup>

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<sup>705</sup> The decision in 2001 providing for an insertion of a recital in "legislative proposals or drafts which have a specific link with fundamental rights" has not been applied systematically in order not to run the risk of trivialising the recital by using it extensively. The general guide provided for by the Commission is that a recital will be used when a legislative proposal includes a limitation of a fundamental right, which must be justified under article 52 of the Charter or where there is a direct or indirect differentiation of treatment in regard to general principles of equality and non-discrimination. Another way of using the recital is when a legislative proposal is aimed at implementing or *promoting* a particular fundamental right. See Commission Communication Compliance with the Charter of Fundamental Rights in Commission legislative proposals COM (2005) 172 final of 27 April 2005, p. 6.

<sup>706</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime O.J. No L 63 of 6 March 2002, preamble recital 18. See also Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding access to European Parliament, Council and Commission documents, preamble, recital 2. O.J. No L 145 of 31 May 2001.

<sup>707</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. O.J. L 50 of 25 February 2003.

<sup>708</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. O.J. L 190 of 18 June 2002.

<sup>709</sup> Framework Decision on Combating Terrorism. O.J. L 164 of 22 June 2002.

This is an important signal by the institutions having legislative powers to scrutinise new legislation so that it meets the standard set out in the Charter. At present, the evaluation of the impact of fundamental rights on legislative proposals is made through a general impact assessment process. From 2005 onwards, all major Commission initiatives are followed by an integrated assessment of their probable impact in combination with their ultimate effect.<sup>710</sup> The Commission further adopted a Communication, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals*,<sup>711</sup> as a follow-up to the decision of 2001 regarding the methodology for ensuring that the Charter is properly implemented in the Commission proposals. This methodology is based upon a systematic and thorough check that all fundamental rights concerned are respected in all draft proposals. It also follows the results under scrutiny in order to “promote a fundamental rights culture” and make the results of the Commission monitoring visible to the other institutions and to the general public. This fundamental rights check is made an integral part of the verification of legality. The scrutiny of fundamental rights is then brought forward as part of two documents submitted with the draft legislative proposal, i.e. the *impact assessment* and an *explanatory memorandum*.<sup>712</sup>

All legislative proposals that include a standard recital introduced since 2001 must include a section in the explanatory memorandum pointing out how fundamental rights are taken into account in the proposal. Both the impact assessment and explanatory memorandum aim at enhancing the effectiveness of the internal scrutiny of fundamental rights in draft proposals.<sup>713</sup> The

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<sup>710</sup> Commission work programme for 2005 – COM (2005) 15 final.

<sup>711</sup> Commission communication on the compliance with the Charter of Fundamental Rights in Commission legislative proposals methodology for systematic and rigorous monitoring COM (2005) 172 final.

<sup>712</sup> On the current practise of impact assessment of legislative and policy proposals, see De Schutter, O., 2005 (a), pp. 52-54. For further details of how to perform an impact assessment, see Commission Communication *Impact Assessment* COM (2002)276 final of 5 June 2002. The impact assessment procedure is designed to contribute to an effective regulatory environment covering economic, environmental and *social impacts* that cut across all sectors. In 2004, the Commission issued a report on the Impact Assessment: Next steps. SEC (2004)1377 of 21 October 2004. For a practical guide on how impact assessment is made, see Impact Assessment Guidelines of 15 June 2005. SEC (2005) 791.

<sup>713</sup> The impact on social rights and standards was added to the revised list of impacts covered by an Impact Assessment. See impact Assessment: Next steps. SEC (2004)1377 of 21 October 2004, p. 14. For a critical evaluation of the way fundamental rights are being assessed in the legislative proposals by the Commission, thus proposing a human rights mainstreaming into European policy- and law making, see De Schutter, O., 2005, (a) pp. 51-65.

Commission made it clear that the Charter should be a reference instrument against which all legislative proposals should be reviewed. As the Charter spells out the fundamental values of the Union that are to be taken into account when EU law is being developed within the limits of allocated competences, the EU should focus its attention on a respect for fundamental rights already at the drafting stage of secondary legislation, i.e. a kind of a preventive control of fundamental rights imposed on the legislator. As noted, this is already part of all major initiatives adopted by the Commission. This is not, however, a guarantee that the policy- and legislative initiative are being assessed in a satisfactory manner with regard to their *impact* on fundamental rights or the *compatibility* of the proposal with fundamental rights.<sup>714</sup> The evidence of a true change regarding mainstreaming of the Charter in all policy-initiatives and legislative proposals is yet to be confirmed. The fact that the Charter has been cited in preambles to EU legislative instruments since 2001 is not yet evidence that the text in itself would in all aspects be in conformity with the requirements of the Charter. What is more important than a simple reference to the Charter in the preamble is whether the impact assessment process has had any real effect on EU acts. If that is the case, one can conclude that the Charter has had an impact on the effective protection of fundamental rights.

The European Ombudsman has launched three own-initiative inquiries on EU officials' freedom of expression, on age discrimination in recruitment, and on parental leave in EU institutions to encourage Community institutions to respect the rights set out in the Charter. In a letter to the President of the European Parliament, he expressed a deep concern that the responses from institutions and bodies to the initiatives taken by the Ombudsman to promote the Charter have "mostly been rather lukewarm and uninterested".<sup>715</sup> The most significant one was the initiative decision on age-discrimination. The European

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<sup>714</sup> In its report on the situation of Fundamental Rights in the EU, the E.U. Network of Independent Experts held that integration of fundamental rights into law- and policymaking remains inadequate. The report concluded that impact assessments on fundamental rights remain unsystematic due to a lack of expertise as each impact assessment is prepared by each service of the Commission responsible for a particular legislative or policy proposal and not by a specialized branch in fundamental rights issues. CFR-CDF.rep.EU en.2004, pp. 27-30. The EU Network of Independent Experts on Fundamental Rights was set up in September 2002 by the European Commission (DG Justice and Home Affairs), in response to this request of the European Parliament.

<sup>715</sup> Ombudsman letter to the President of the European Parliament of 7 March 2002. See also speech held by the European Ombudsman to the Petition Committee, concerning his presentation of the annual report 2001, on 8 April 2002.

Ombudsman raised a concern with regard to age-discrimination in recruitment by certain bodies and institutions of the Union.<sup>716</sup> A new joint requirement office is about to be established by the EU institutions that will possibly allow the Management Board of the office to decide upon age limits.<sup>717</sup> In his letter to the President of the European Parliament, the European Ombudsman expresses concern that “certain institutions and bodies are openly negative towards the Charter as regards the use of age limits in recruitment”.<sup>718</sup> Article 21 (1) of the EU Charter prescribes as follows:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, *age*, or sexual orientation.

Article 21 of the Charter is the first provision addressed to the Union institutions and bodies that specifically prohibits discrimination based on age by the Union institutions and bodies. The Ombudsman rightly expresses concern at imposing age limits in recruitment unless there is an objective justification and therefore a legal basis for such measures. He further notes that the European Parliament is still one of the institutions using age limits in recruitment, thus not respecting article 21 (1) of the EU Charter. The European Parliament defended this practice by stating that the EU Charter is not legally binding, but merely a solemn proclamation without binding legal force. This attitude most certainly sent a “bizarre signal” to European citizens that “mere” political declarations signed by the institutions of the Union are not meant to be taken seriously.

The European Ombudsman refused to sign the decision setting up a European Requirement Office unless the provision allowing for age

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<sup>716</sup>According to survey made by Ombudsman Söderman, five institutions and bodies continued to apply age limits in their recruitment procedures: the Court of Auditors, the Court of Justice, the Council, the economic and social committee and the Office of Harmonisation in the Internal Market. The European Parliament and the Commission did not reply to the inquiry before the deadline set out by the Ombudsman. <http://www.europarl.eu.int/ombudsman/release/en/2001-10-03.htm>

<sup>717</sup> The European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the Ombudsman are jointly establishing the new European Requirement Office, which replaces the current system of requirement.

<sup>718</sup> Ombudsman letter to the President of the European Parliament of 7 March 2002.

discrimination was deleted.<sup>719</sup> As a result of the initiative enquiry by the Ombudsman, age discrimination was ended with immediate effect in relation to requirement of staff to the Commission and the European Parliament. This is a prime example of the legal effect the EUCFR can have despite its formally non-legally binding character.

The ECJ has in the recent *Mangold case*<sup>720</sup> ruled on age-discrimination. The ECJ held that national legislation encouraging integration into working life of unemployed older workers does not justify conclusion of fixed-term employment for all workers over the age of 52. The principle of non-discrimination on grounds of age is a general principle of Community law. The Labour Court in Munich referred to the Court for a preliminary ruling on the interpretation of directive 2000/78 concerning German law on part-time working a fixed-terms contracts. The German law allowed fixed-term contracts once a worker has reached the age of 52. The ECJ did recognise that the sole purpose with the national legislation was to promote integration of elderly unemployed workers. Such an objective fulfils the objective and reasonable grounds for difference of treatment on grounds of age. The Court however ruled that the objective went too far and stated that it goes beyond what is appropriate and necessary in order to obtain the legitimate goal pursued. The ECJ held that the group of workers once reached the age of 52 and whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment would therefore be excluded from benefiting of stable employment constituting a major element in the protection of workers. The Court concluded that the German national court must guarantee full effectiveness of the general principle of non-discrimination in respect of age and set aside the national law permitting discrimination based on age.

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<sup>719</sup> According to the European Ombudsman Jacob Söderman: "I cannot agree to sign any decision that does not make clear that the Office must not discriminate on the grounds, including age, that are prohibited by the Charter of Fundamental rights"

<sup>720</sup> Case 144/04, *Werner mangold v Rüdiger Helm*, judgment of 22 November 2005.

## 5.4 Constitutionalisation of fundamental rights<sup>721</sup>

### 5.4.1 The European Convention – the background

The Laeken declaration announced the establishment of a new Convention modelled after the Charter Convention to “pave the way” for the 2004 IGC. The pilot Convention model was, “all things considered,” seen as a success in terms of introducing a new methodology for working outside the normal IGC mode. The Convention was composed of 105 members in total representing the Member States, the European Parliament and the Commission and representatives of the candidate countries. The idea was to gather a broad European discussion forum to set a new direction for the European Union in order to prepare the next groundbreaking enlargement of the EU. The Laeken declaration that was adopted listed four themes that the Convention should address, namely a better division and definition of competence in the European Union, a simplification of the treaty structure, a means for addressing the democracy and legitimacy crisis of the EU by making the EU more democratic, transparent and efficient and a means for determining whether the EU should move towards a Constitution for European citizens.<sup>722</sup>

The task for the Convention was to propose a way of simplifying the treaties and of considering the possibility of constitutionalising the treaty structure. It was in the context of the Laeken declaration that the European Council for the first time introduced the word “constitution” by asking whether “the simplification and reorganization of the treaties might not lead in the long run lead to the adoption of a constitutional text in the Union”. This statement greatly influenced the established Convention on the Future of the European Union, transforming it in practice into a “Constitutional Convention” that from

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<sup>721</sup> The term “constitutionalisation” or “constitutionalism” in an EU context has been actively discussed in the last few years. See for example recent contributions by Maduro, M., 2005, pp. 332-356 and Maduro, M., 2004, pp. 1-55. The constitutionalisation of fundamental rights in the EU is understood in a more narrow sense where fundamental rights form a central part of a Constitution. Groussot sees the constitutionalisation of fundamental rights as a three-step process. The first step is the elaboration of the unwritten bill of rights, the second step the adoption of the EUCFR, and the third and final step would be the formal incorporation of the Charter into the treaties. Groussot, X., 2005, pp. 166-167. One could add that the first step of elaborating an unwritten bill of rights by the ECJ was constitutionalised with article 6 (2) of the TEU also formally recognised as being within the jurisdiction of the ECJ with the amendments in the Amsterdam Treaty.

<sup>722</sup> Laeken Declaration on the Future of the European Union SN 300/1/01/Rev 1.

an early beginning saw its major task as converting the existing treaties into one single constitutional text, i.e. to reform the treaties into one constitutional treaty by abandoning the pillar structure introduced by the Maastricht Treaty.<sup>723</sup> On 28 October 2002, the presidium of the Future Convention presented its first preliminary draft of the Constitutional Treaty after several debates in the Future Constitution on working towards a constitutional treaty.<sup>724</sup>

The Convention model represents a break in the traditional way of reforming the treaties, which normally were concluded behind closed doors during an IGC. Member States still wanted to keep the IGC model as the final forum for revising the treaties. The European Convention had been mandated to discuss and propose amendments to the treaty structure and had not been entrusted to adopt a new binding treaty for the EU and its Member States. The final decision still resided with the Member States in the traditional setting of an IGC. The Laeken declaration had envisaged that the work of the Convention would be concluded within one year. However, this proved to be unrealistic since the Convention had an ambitious mandate to carry out. The Convention held its first meeting on 28 February 2002. The Convention met once a month in plenary sessions. The presidium established a total of eleven (11) working groups.<sup>725</sup>

The Convention completed its work on 10 July 2003 and presented the final proposal of the “Draft Treaty Establishing a Constitution for Europe” on 18 July 2003 to the Italian Presidency of the European Council. Article 7 of the draft Constitutional Treaty proposed to incorporate the EUCFR as an integral part of the Constitutional Treaty.<sup>726</sup> In legal terms, the outcome of the European Convention was by no means settled. The IGC was in other words not bound to either reject or accept the final blueprint of the Convention. However, as the draft Constitutional treaty was adopted by the Convention by way of consensus, it greatly influenced the final outcome of the IGC.<sup>727</sup>

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<sup>723</sup> The Convention on the future of the European Union came into operation on 28 February 2002.

<sup>724</sup> CONV 369/02 of 28.October 2002.

<sup>725</sup> For an overview of the working groups and their specific mandates, see [http://european-convention.eu.int/doc\\_wg.asp?lang=EN](http://european-convention.eu.int/doc_wg.asp?lang=EN)

<sup>726</sup> CONV 850/2003 of 18 July 2003. Article I-9 of the Treaty Establishing A Constitution for Europe (O.J. 2004/C 310/01 of 16.12. 2004) replaced article 7 of the DCT (Draft Constitutional Treaty).

<sup>727</sup> On 18 June 2004, the Constitutional Treaty was adopted by the 2003-2004 IGC and was signed on 29 October 2004 in Rome. O.J. C 313/1 of 16.12. 2004.

## 5.4.2 Working Group II of the Convention

At an early stage of the work of the Convention, the Presidium announced the establishment of six different working groups, with five more working groups added shortly thereafter. For the purposes here, the intention is to analyse the results of the WG II in more depth. The mandate given by the Preasidium of the Convention was to take a stand on the issue of whether or how the Charter of Fundamental Rights could be incorporated into the Constitutional Treaty. The following questions had to be discussed by the Working Group: *If it is decided to incorporate the Charter of Fundamental Rights in the Treaty, how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?* From the very outset, the majority of the members of the WG II already favoured incorporation of the Charter and endorsed its binding legal effect. The initial position within the WG was that the substantive content of the Charter was to be respected and therefore unchanged as negotiated by the Charter Convention and adopted in Nice 2000.<sup>728</sup> What essentially, therefore, was at stake was whether it would be desirable to incorporate the Charter or not.

Three ways of endorsing the legal status to the Charter were discussed. The first option was to insert the text of the Charter at the beginning of the Constitutional Treaty in a separate title or chapter. The second option was to include a reference to the Charter text in one single article of the Constitutional Treaty combined with annexing or attaching the Charter to the Constitutional Treaty, either as a separate section or as a separate legal text in the form of a protocol. A relatively easy option would have been simply to include a reference to the Charter along with the references to the common constitutional traditions of the Member States and the ECHR in the same manner as article 6 (2) of the TEU is constructed. A final model presented by WG II would have been an indirect reference to the Charter, thus conferring upon it a legally binding status, but not constitutional status.<sup>729</sup> The final option proposed would be problematic due to the reason that conferring legal status to a Charter of rights is of a constitutional nature. The proposal referred to the overall length of

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<sup>728</sup> WG II felt that certain clarifications to the horizontal provisions could be made in order to stress certain points made already by the previous Charter Convention. The intention was not to alter the consensus reached by the Charter Convention regarding the substance of the Charter. For a discussion of the so-called “technical adjustments” introduced by WG II, see chapter 3.4 ff.

<sup>729</sup> CONV 354/02 WG II 16, p. 3.

the Constitutional Treaty if the Charter would be incorporated as such within the constitutional framework.<sup>730</sup>

The inclusion of the Charter as adopted by the Charter Convention in its entirety would render it visible, setting a clear constitutional tone for the reorganization and simplification of the Union's current treaty structure. The final report was presented to the Convention in October 2002. In it, the WG reached a common understanding by prescribing that "all members of the Group either support strongly an incorporation of the Charter *in a form which would make the Charter legally binding and give it constitutional status or would not rule out giving favourable consideration to such incorporation*".<sup>731</sup> According to the final report, a "building block" as central as fundamental rights should find its place in the Union's constitutional framework.

The preliminary draft Constitutional Treaty presented in October 2002 included in its first version an article on the Charter. On the same day, WG II presented its report on the Charter in the Convention making it clear that the Constitutional Treaty cannot be adopted without the Charter being part of it. The discussion within the Convention on 28 October 2002 is summarized in the following way: "A very large majority of the speakers supported incorporation of the Charter into the Constitutional Treaty thereby making the Charter a legally binding text with constitutional status, or stated that – on the basis of common understanding reached and of the conditions defined by the Group – they were now ready to consider such an incorporation favourably, leaving behind the disagreements of the past...fundamental rights would find their rightful place in the Union's future Constitution, and that such incorporation would follow the logic of the evolution from an economic Community to political Union of common values".<sup>732</sup>

The second option proposed by WG II was, ultimately, the most pragmatic one. Members of the Convention eventually chose to include a reference to the Charter in the first part, the actual constitutional part, and the Charter text as part II. This is a rather workable solution. It follows the second proposal put forward by the WG II rather than the first proposal that would have meant that the Charter articles would have been placed at the beginning

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<sup>730</sup> Voices were raised that the Charter document is too long to be incorporated in its entirety into a constitutional treaty. Some saw the incorporation of the Charter as a real alternative if the Charter provisions could be reduced to some 30 articles.

<sup>731</sup> CONV 354/02 WG II 16.

<sup>732</sup> CONV 378/02, summary report of the plenary session 29 and 29 October 2002, p. 9.

of the Constitutional Treaty under a separate title or chapter.<sup>733</sup> What was achieved is recognition of the Charter as a constitutional document and visibility of the fundamental rights recognized by the EU. The Charter has a prominent place in the Constitutional Treaty. This model now means that the Constitutional Treaty for Europe can be divided into a Constitutional core made up of parts I and II and the detailed provisions of parts III and IV of the Constitutional Treaty, which resembles more an international treaty than a constitutional text.<sup>734</sup> The reference in part I underlines the constitutional nature of the EUCFR. The Charter has fulfilled at least one of its basic functions by ensuring the visibility of fundamental rights in the EU legal order.<sup>735</sup>

The Convention therefore, without much ado, followed the majority proposal of WG II by incorporating the Charter with certain “technical adjustments”. However, it must be kept in mind that the consensus reached within WG II and the Convention to incorporate the Charter came with a price to pay. The technical adjustments to the horizontal clauses were to be a decisive factor for incorporating the Charter into the Constitutional Treaty transposing it to a legally binding document in due course in the formal sense.<sup>736</sup> Conferring legal status onto the Charter has now been put forward with the Constitutional Treaty. The fate of the Constitutional Treaty, at the time of writing, is however uncertain leading to a situation in which the constitutionalisation of the charter in its present form might prove to be problematic. Yet, it is submitted here that the Charter will most likely be incorporated in one form or the other into the treaty structure of the European Union. How this will be done is, at present, simply a question of pure speculation.

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<sup>733</sup> The first option of incorporation was supported by the majority of the members of the WG II “in the interest of greater legibility of the Constitutional Treaty. CONV 354/02, p. 3.

<sup>734</sup> The draft articles of February 2003 provided in article 5 “that the Charter shall be an integral part of the Constitution”. CONV 528/03 of 6 February 2003. This formulation corresponds with the Charter preamble.

<sup>735</sup> The Convention Preasidium explained that the way the Charter was incorporated will render the Charter Constitutional status and therefore “safeguard its fully binding legal nature and allow the general rules concerning future amendments of the Constitution to be applied to the Charter. Moreover, the technique will also keep the structure of the Charter intact and avoid making the first part of the Constitution lengthier. At the same time, the reference to the Charter in the first few articles of the Constitution will underline its constitutional status”. CONV 528/03 of 6 February 2003, p. 13.

<sup>736</sup> The so-called technical adjustments to the final horizontal clauses are discussed in Chapter 3.

The recent problem with the ratification process of the Constitutional Treaty is hardly a question that can be related to the proposal of incorporating the Charter, thus conferring upon it a legally binding status or otherwise strengthening the human rights dimension by proposing that the EU shall submit itself to international human rights scrutiny by acceding to the ECHR as proposed in article I-9 (2) in the Constitutional Treaty. The root causes of the EU's legitimacy crisis are of a complex nature that cannot be reduced to a question of the status of fundamental rights in the EU legal order.<sup>737</sup> On the contrary, the question of visibility was one of the main arguments put forward by the European Council in 1999 in order to address the legitimacy issue. The logic was that making rights more visible would increase the legitimacy of the EU. A great deal was invested in a belief that the enhancement of fundamental rights by incorporating the Charter into the Constitutional Treaty would increase the EU's legitimacy. The ratification problems that the EU is facing are, however, more complex than simply being part of the question of a crisis in legitimacy that could largely be solved merely by rendering fundamental rights visible through the formal incorporation of the Charter into the Constitutional Treaty.

### **5.5 The Charter and its relation to fundamental rights as general principles of law?**

An interesting question that arose with the adoption of the EU Charter, already in the wake of the drafting stage, was whether the Charter should now be perceived as a restatement of the fundamental rights doctrine as recognised in article 6 (2) of the TEU. Is the Charter simply a codification of the general principles of law doctrine? What one also needs to address is whether the Charter has now codified the general principles of law doctrine regarding fundamental rights once and for all? In other words, does the Charter leave room for the ECJ to further develop its fundamental rights jurisprudence outside the framework of the Charter? In a recently published doctoral thesis, Groussot shows that more than half of the charter provisions are already recognised by the ECJ in its case law. From this one can draw the conclusion that at least half of the substantive provisions in the Charter must already be

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<sup>737</sup> The reasons for rejection are identified as fears related to the decrease of national sovereignty and identity, the increasing amount of EU legislation virtually covering more and more fields, the pace of enlargement and the single currency. See Research Paper 05/45 *The Future of the European Constitution* of 13 June 2005 in the House of Commons Library research papers series.

considered as *de facto* legally binding and enforceable rights recognised as general principles of Community law.<sup>738</sup>

From the analysis of Groussot, one can conclude that the Charter is far more extensive than what the ECJ has protected under the order of fundamental rights so far. Lenaerts and De Smijter concluded that this was the case by stating that “it may be said that the Charter contains *ratione materiae* more fundamental rights than the Court of Justice has so far effectively guaranteed, but less than the Court could guarantee on the basis of article 6 (2)”.<sup>739</sup> So, what can be concluded from this is that, at least partly, the Charter must be seen as *de facto* binding by codifying general principles of EC law.<sup>740</sup> Groussot asks how we can benefit from codifying general principles of Community law. The argument goes as follows: The elaboration of the Charter does not in fact improve the protection of fundamental rights as they are already protected by way of article 6 (2) of the TEU.

Certainly, fundamental rights are being protected within the EU by way of general principles of Community law. The vague references to external sources in article 6 (2) have proven to be insufficient as to the content of the *acquis communautaire* fundamental rights protection. The potential for recognising what is now codified in the Charter has always been there on the basis of article 6 (2) of the TEU, but one must take into account the way this “unwritten” bill of rights has been developed on a case-by case basis and has been interpreted by the ECJ according to the particularities of a specific case. The codification of this “unwritten bill of rights” may not be revolutionary as such, but at least it makes fundamental rights more visible rather than simply leaving it to the ECJ to develop fundamental rights on the basis of vague references to external sources.

Certain scholars recognised that, while the ECJ might by way of using the general principles tool protect infringements of fundamental rights by the Community, “codification of those rights would nevertheless be desirable, but not necessary”<sup>741</sup>. Perhaps the most critical view was presented by Weiler in an editorial, “Does the European Union Truly need a Charter of Rights?”, where he questioned the whole exercise by arguing that the European Union does not

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<sup>738</sup> For a list of the ECJ case law on fundamental rights and corresponding provisions taken on board in the Charter, see Groussot, X., 2005, pp. 171-172.

<sup>739</sup> Lenaerts, K., & De Smijter, E., 2001, p. 289.

<sup>740</sup> Groussot, X., 2005, pp. 170-173.

<sup>741</sup> Statement made by Professor Schermers in the Eight Report of the House of Lords Committee “The EU Charter of Fundamental Rights” of 16. May 2000, para. 48.

suffer from a lack of judicial protection of fundamental rights.<sup>742</sup> An argument raised was that the exercise of drafting a charter might set aside the current constitutional architecture as regards human rights, i.e. the ability to make use of the common constitutional traditions of the Member States in order to feed into the constitutional dialogues between the ECJ and its national counterparts, the national courts. The point he raised was that the introduction of a Charter of rights might run the risk of reducing the use of external impulses fed into the system or “chilling the constitutional dialogue” by simply looking inwards at the Charter. The question that therefore needs to be addressed is the extent to which the rights doctrine is now settled with the EUCFR.

What is the relation between the Charter and general principles of Community law? Will the Charter replace all other references to fundamental rights once it has gained a legally binding status? De Burca found it likely that references to external sources would be restricted if the Charter were incorporated within the treaties as a definitive and closed list of EU rights and values.<sup>743</sup> As noted by De Burca, the text in the preamble would suggest that the Charter incorporates the constitutional traditions and international obligations common to the Member States, which gives the impression that the EU would no longer need to take into account the familiar external sources expressed in article 6 (2) of the TEU. She even sees a danger that the Charter will become the authoritative point of reference for the ECJ, since any kind of open-ended reference familiar from ECJ case law is missing in the Charter text. The issue of continued reference to external sources was the subject of debate in WG II. However, as the members were divided on the issue, WG II refrained from taking a stand on the issue and left the issue to be decided by the European Convention.<sup>744</sup>

A proposal was put forward by the Praesidium to include a third paragraph, which was eventually included as article I-9 (3) in the Constitutional Treaty clearly signalling that incorporation of the Charter would not prevent the ECJ from further developing its case law on the basis of future development by the ECHR and the common constitutional traditions of the Member States.

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<sup>742</sup> Weiler, J., 2000, pp. 95-97.

<sup>743</sup> De Burca, G., 2003, p. 14-16.

<sup>744</sup> Two concurrent views were presented. Some members argued that a continued reference to external sources would create nothing but confusion given that the Charter already includes most of the provisions of the ECHR and is also built upon the common constitutional traditions of the Member States. The other view can be captured by stating that inclusion of a reference would clarify that the Union is open to future developments in spite of what is included in the material provisions of the Charter.

The explanatory report by the Preasidium clarified this as follows: [t]he usefulness of this provision is to make clear that incorporation of the Charter does not prevent the European Court of Justice from drawing on these two sources to recognise additional fundamental rights which might emerge from any future developments in the ECHR and common constitutional traditions. This is in line with classic constitutional doctrine which never interprets the catalogues of fundamental rights in constitutions as being exhaustive, thus permitting development, through case law, of additional rights as society changes".<sup>745</sup> The logic of this approach seems to be clear. The incorporation of the Charter must *not* be seen as a 'once and for all done deal' as far as material rights are concerned. It is kind of a safety net for securing that the open-ended approach adopted by the ECJ can continue regardless of the fact that legal status has been conferred upon the Charter. Article I-9 (3) has therefore been taken on board for situations in which the ECJ finds it necessary to develop its fundamental rights approach outside the scope of the material rights recognised in the Charter. The fears of a closed and done deal approach proved to be unfounded. In light of article I-9 (1) and I-9 (3), the ECJ would still be free to continue its approach of taking account of common constitutional traditions and international human rights standards for identifying fundamental rights that form part of the general principles of Union law.<sup>746</sup>

## **5.6 But... is the Constitutional Treaty dead?**

An interesting issue brought up by Weiler already in the year 2000 was that elaborating a Charter of fundamental rights might eventually backfire. What he had in mind was that the controversial issue of conferring legal status to the Charter was left to the IGC, i.e. to the Member States. Certain Member States were extremely unenthusiastic with the idea of conferring any kind of legal status to the Charter. We now know that all Member States agreed that the Charter should be part of the new Constitutional Treaty, thus giving it a prominent place in the Constitution and incorporating it as part II of the Constitutional Treaty. However, this is not the end of the story. There is still a long way to go. The project of conferring formal legal status as part of the Constitutional Treaty framework might very well be endangered. Perhaps the resistance of the Member States per se does not endanger it, but nevertheless

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<sup>745</sup> CONV 528/03, p. 143.

<sup>746</sup> This view was presented also by the EU network of Independent Experts in its report on the situation of Fundamental Rights in the European Union in 2004, January 2005, pp. 14-15.

the end result is the same. All Member States must, in accordance with article 48 of the TEU, ratify the Constitutional Treaty in order for it to enter into force.

The constitutional crisis experienced after the referenda held in France and the Netherlands in late May and early June 2005, respectively, led the European Council to take a “period of reflection”. The drafters of declaration No. 30 annexed to the Constitutional Treaty already acknowledged the possible problems of ratifying the Constitutional Treaty by stating that, *“The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council”*. This declaration is naturally a consequence of previous difficulties with ratifying the Maastricht and Nice Treaties. Recent difficulties with Treaty ratifications have shown that public support within the Member States is not self-evident. The problems surrounding the ratification of the Constitutional Treaty were anticipated and taken into account during the IGC 2003-2004.<sup>747</sup> What took the EU by surprise was that it was the “wrong countries” – the two founding Member States of the EEC – who had difficulties in gaining popular support for the referenda.<sup>748</sup> The mood surrounding the outcome of the two referenda has been described as one of shock.<sup>749</sup>

Lawson acknowledged that the EU Constitution still needs to be ratified and that EU accession to the ECHR needs to be sealed through an agreement with the Council of Europe and its Member States. However, he was perhaps too optimistic when he claimed that these two steps “are more or less technical issues and they are hopefully of a temporary nature”.<sup>750</sup> The Constitutional Treaty might never enter into force! The European Council underlined, however, in its declaration that “recent developments do not call into question the validity of continuing the ratification process”.<sup>751</sup> Member States have chosen different paths as to whether to continue with the ratification process or

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<sup>747</sup> CIG 87/04 ADD REV 2 of 25 October 2004. Declaration on the ratification of the Treaty establishing a Constitution for Europe.

<sup>748</sup> The United Kingdom, Ireland and Poland were seen as the potential Member States that would not ratify the Constitutional Treaty. House of Commons, 2005, p. 21.

<sup>749</sup> *Ibid.*, p. 7.

<sup>750</sup> Lawson, R., 2005, pp. 27-28.

<sup>751</sup> Declaration by the Heads of States or government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe of 16-17 June 2005. SN 117/05.

not.<sup>752</sup> The European Council agreed to discuss the matter of how to proceed during the first half of 2006. What are the alternatives after the French and Dutch rejection of the Constitutional Treaty?

In 1992, with the ratification of the Maastricht Treaty, the Danish people voted against the Treaty by only a slight majority. The Danish Parliament had earlier voted in favour of the Treaty. The Danes resolved the issue by means of an “opt out” process, whereby a number of special arrangements applying to Denmark entered into force simultaneously with the Maastricht Treaty. These special arrangements helped the Danish people to vote in favour of the Treaty in a second referendum.<sup>753</sup> In 2001, the Irish people signed and rejected the Treaty of Nice amending the Treaty on European Union. Another model for how to proceed was chosen this time. It was thought that the Irish rejection of the treaty was the result of a lack of information. The Irish government launched a national debate and a second referendum was held a year later in October 2002. After having voted “incorrectly” the first time, the Irish people voted in favour of the Nice Treaty by an overwhelming majority, enabling the treaty to enter into force on 1 February 2003.

The Irish rejection of the Nice Treaty did not result in any changes to the treaty. What are the options for how to proceed with the Constitutional Treaty? Is it feasible to think that certain “opt outs” might come into play with regard to France and the Netherlands? The other option would be to hold referenda in France and the Netherlands after a period of reflection, i.e. to use the Irish model of simply initiating a broad debate in France and the Netherlands followed by new referenda? Is this a feasible option or is the Constitutional Treaty legally and politically dead? These are questions that, at the time or writing, are impossible to answer, but merely serve the purpose of sketching alternative ways of going ahead. It is acknowledged that the Constitutional crisis faced by the EU might have severe implications for, *inter alia*, ever conferring legal status to the EU Charter of Fundamental Rights. An argument for continuing the ratification process would be to give the possibility to all Member States of having a say. As noted, the European Council confirmed this in June 2005. The European Council agreed that a time out was necessary, i.e.

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<sup>752</sup> The Latvian Parliament went on and completed the ratification process on 2 June and the Luxembourg consultative referendum was held on the 10<sup>th</sup> of July 2005 with a clear positive outcome. On the 6<sup>th</sup> of June the UK Government suspended parliamentary proceedings on the European Union Bill and, thereby, the ratification process.

<sup>753</sup> On the Danish “opt outs”, see Denmark and the Treaty of European Union O.J. C 348/1 of 31.12.1992 and related acts.

that the timetable for ratification in the different Member States would be altered according to the specific circumstances in each country. The EU will, no doubt, continue to operate in spite of the set back to the Constitutional Treaty. However, this period of reflection will hopefully be used to discuss various options on how to proceed. Several ideas have been circulating after the French and Dutch no votes.<sup>754</sup> The options are, presumably, the following:

- a) Maintaining the status quo
- b) Continuing the ratification process and consulting the voters once more after a period of reflection
- c) Introducing a revised Constitutional Treaty by convening a new Convention
- d) Partially revising the treaties by building upon the existing treaties and parts of the Constitutional Treaty

The intention is not to go into a detailed discussion of the broader consequences of maintaining the *status quo* by referring here mainly to institutional questions in light of the enlarged European Union or by addressing questions related to a more efficient and democratic functioning of the enlarged EU. What will be addressed are questions related to possible solutions in terms of the most visible contributions related to fundamental rights, namely that of article I-9. Maintaining the *status quo* in terms of not conferring the legal status of the Charter is, as such, not detrimental since fundamental rights will continue to be protected within the already existing Constitutional framework of the EU as general principles of Community law recognised in article 6 (2) of the TEU. As noted, the ECJ is already protecting fundamental rights and so the Charter represents an attempt to codify the existing *acquis communautaire* of fundamental rights.

The question that arises here is which of the two versions of the Charter should or could the ECJ take into account when interpreting fundamental rights cases. One of the main reasons why the ECJ was not willing to take into account the Charter in its case law relating to fundamental rights until June 2006 was perhaps that the Charter's legal status is still uncertain. A possible outcome of the potential death of the Constitution, in light of the ECJ case law, might still be that the ECJ takes the Charter merely as an interpretative aid. The most likely scenario is that the Charter, as adopted in Nice 2000, would form

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<sup>754</sup> See for example House of Commons Research Papers 05/45, 2005 or Kurpas, S., 2005, No. 70 and 75 policy papers.

the basis of future interpretative work by the ECJ. What naturally would be detrimental is the situation with accession by the European Union to the ECHR. Article I-9 (2) provides that the EU shall seek accession to the ECHR. Strictly speaking from a legal perspective, the consensus reached in the Constitutional Treaty over the question of accession would be lost if the first option was followed. However, it is submitted that the first option is not the most likely option to be followed.

The second option, that of continuing the ratification process, is the one that certain Member States now follow—at least in part. This is the only possibility to save the Constitutional Treaty in its entirety. This option would entail submitting the Constitutional Treaty for referenda not only in Member States such as Denmark and Ireland, due to their constitutional requirements, but also in the United Kingdom. After such a ratification process in which all the Member States would have had a chance to either ratify the treaty or suspend ratification, the wounded and sick would have to take a stand on whether to pursue the process of ratification or simply announce that the Constitutional Treaty will not be ratified. This would mean that the Constitutional Treaty would be declared dead. Member States that have faced problems with ratification would have to consider whether or not they would be willing to submit the Constitutional Treaty for a second referendum. This option seems highly unlikely. This is based on the view that the Constitutional Treaty will not be altered in order to pave the way for second referenda to be held in France and the Netherlands. Renegotiating the Constitutional Treaty is simply not an option due to the reason that it will open the Pandora's box of unforeseen consequences. There is simply no room for any kind of substantial revisions to the current text. From this it follows that the third option, that of convening a new Convention to fully revise the Constitutional Treaty, is not a realistic option.

The most likely outcome of this exercise would seem to be the fourth option building upon parts of the Constitutional treaty and other treaties in order to address the current problems of making the EU more democratic and transparent and to strengthen the issue of protecting fundamental rights. It is a bit ironic that, with the Constitutional Treaty, the perception of the EU as being undemocratic has been addressed by introducing certain improvements that would have made the EU more democratic.<sup>755</sup> What seems politically to be the

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<sup>755</sup> Title VI, "The Democratic Life of the Union," provides in article I-46 that the functioning of the Union is based on representative democracy. The Union's legitimacy is based on a dual model, where the citizens are represented at the Union level in the European Parliament and

most realistic option at the time of writing is that the EU will proceed with partial revisions to the treaties, i.e. revision of the Nice Treaty, in the not too distant future. The Constitutional Treaty as such may have come to an end in spite of the continuing process of ratification in some Member States. An option that might be feasible is that parts I and II of the Constitution could be saved and brought within the framework of the Nice Treaty, thus setting aside the technical and explanatory articles in parts III and IV. The Nice Treaty would have to be consolidated with parts I and II of the current Constitutional Treaty. This option would perhaps be criticised for leading to a revised Constitutional Treaty II that would have to be ratified by all the Member States in accordance with their national constitutional requirements.

For the purposes of this study, and in spite of the fate of the current Constitutional Treaty, the fact that the European Convention and the IGC agreed to incorporate the EU Charter, thus conferring to it a binding legal status, cannot be overlooked. The fundamental rights dimension introduced with the Constitutional Treaty can hardly be seen a key factor in why the French and Dutch voters rejected the Constitutional Treaty. However, the fact remains that the Constitutional Treaty has been rejected and its future has seriously been questioned. The reasons for this might be manifold, but it won't change the facts. The Constitutional treaty has been rejected, at least for the foreseeable future. This does call into question the fate of the EU Charter and whether it will ever be incorporated into any future treaty structure of the European Union and possible EU accession to the ECHR.

The good news is that this does not create any serious lacuna in terms of fundamental rights protection. The EU Charter has been adopted, albeit in a non-binding manner, but nevertheless. As noted, the EU Charter has proven to be more than a simple non-binding document without any legal effect.

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Member States via the European Council, which is democratically accountable either to their national parliaments or to their citizens. A new innovation is direct participatory democracy where one million citizens may take the initiative of inviting the Commission to submit a proposal for a legal act for the purpose of implementing the Constitution (article I-47 (4)). A desire to engage national parliaments in the activities of the European Union was introduced by involving national parliaments in the drafting stage of legislative acts (Protocol on the Role of National Parliaments in the European Union). The ordinary revision of the Constitutional Treaty is done by way of the Convention model (article IV-443). However, more attention was drawn to the "early warning system" for monitoring the principle of subsidiarity as spelled out in [take out "the"] protocol 2 annexed to the Constitutional Treaty on the application of the principles of subsidiarity and proportionality. For an analysis of the early warning system, see Raunio, T., 2005.

Fundamental rights are being protected in the EU. By conferring legal status to the Charter and agreement on a legal base for EU accession to the ECHR as part of the Constitutional Treaty, the Charter survived the “Member State test” in the European Convention and in the IGC. This shows that the EU is ready to take a new step in terms of respecting fundamental rights within the EU legal order. This “new approach” may not be realised within the framework of the constitution as set out in the Constitutional Treaty. The time may have not been right to introduce any kind of formal Constitutional Treaty.<sup>756</sup> However, the steps taken during the process of deliberation on the Constitutional Treaty have shown that the incorporation of the Charter and the legal basis introduced for accession by the EU to the ECHR should be part of any future treaty amendment. The fundamental rights package introduced with the Constitutional Treaty is part of a much broader discourse or commitment to a constitution in the making. What will be the outcome of all this is naturally uncertain.

What, however, is submitted is that the introduction of a fundamental rights charter as a non-legally binding document in Nice in 2000 will prove unworkable in the long run. The fundamental rights doctrine of the EU needs to be consolidated in a visible and legally binding form. The process in the European Convention and during the 2003-04 IGC has proven to be an important benchmark in the discussion on the direction in which the EU should proceed in terms of fundamental/human rights protection. The most likely outcome, at the time of writing, is that the Constitutional Treaty will not enter into force in the form it was adopted and signed by all the current Member States. However, a scenario that has been presented is that the Charter will, in spite of its formal non-legally binding status, be made legally binding through the case law of the ECJ. The first sign of this approach was taken by the ECJ in June 2006. However, the ECJ will most likely continue with the familiar pattern of referring to fundamental rights in its case law and on occasion make use of the Charter as an affirmative document. The potential death of the Constitutional Treaty is certainly a setback. What about the proposals in the Constitutional Treaty relating to fundamental rights?

Arguably, the Charter fits perfectly into the process of constitutionalisation, thus representing a cornerstone of the EU constitutional Treaty. The reason for rejecting the Constitutional Treaty is perhaps not to be reduced to the inclusion of rights in a constitutional setting. The reason lies

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<sup>756</sup> For a discussion whether the EU already possess a Constitution in a material, formal and normative sense, see Menendez, A., 2004, pp. 109-128.

elsewhere. Making rights more visible is just one element in building the legitimacy of the EU. Next, the question of the future status of the Charter will be discussed in light of the negative results of the French/Dutch referenda.

### **5.7. Will the Charter survive?**

Already prior to the adoption of the Charter in 2000 the Commission Communication on the legal nature of the EU Charter considered that, “[it] will produce all its effects, legal and other whatever its nature. It is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert”.<sup>757</sup> At the time of writing the communication, the Commission wanted to downplay the fact that the Charter was not going to be part of the Nice Treaty by proclaiming that the legal bite of the Charter was simply not a question of formal legal status. Now, as noted, the future of the European Constitutional Treaty is seriously endangered. The question arises of whether the EU Charter forming part of the Constitutional Treaty also will be placed on death row? As noted, the Charter has proven to be legally significant in spite of its formal non-binding status. It has had an impact on the case law of the CFI and the AG opinion of the ECJ and now in the case law of the ECJ, but perhaps more importantly it is being used as a reference instrument in the drafting of secondary legislation. The fact that the ECJ until June 2006 was not willing to make any direct references to the Charter in its case law can be interpreted as a sign of unwillingness to confine legal status to the Charter through the case law in a situation where the legal status of the Charter is still very much pending.

The clear choice by the ECJ of not prior to June 2006 having made any use of the Charter as a direct reference instrument might have been influenced by the fact that we now have different versions of the Charter text, i.e. the first version adopted by the Charter Convention and signed by the three institutions in December 2000 and the “revised version” meant to constitute part II of the Constitutional Treaty. The Charter might be conceived of as a “moving target” that has not yet found its way as a legally binding constitutional “bill of rights”. The ECJ has however now made a reference to the EUCFR in its case law using it as a reaffirmation of *lex lata*. This might perhaps be understood as a

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<sup>757</sup> Commission Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union. COM 644 final.

willingness to use the Charter as an additional interpretative tool. This new approach might have been influenced by the fact that the EU legislator itself makes a reference to the Charter in preambles of legislative acts with a fundamental rights dimension.

The problem that one could foresee with the likely rejection of the Constitutional Treaty is whether the “revised version” of the Charter is the prevailing one or whether the Charter adopted in December 2000, without any “technical adjustments” made during the work of the European Convention, is the one to be referred to by the European Union legislator in drafting new policy- and legislative proposals. As noted above, the most significant difference between the two versions relates to the issue of justiciability of the rights and principles in the Charter. As noted above, article 52 (5) of the revised version sought to clarify the meaning of rights and principles in the Charter, however unsuccessfully. There is still no acceptable definition for deciding which of the provisions are to be categorised as rights and which are to be defined as non-justiciable principles.<sup>758</sup>

What is submitted is that the EU Charter is not facing a “death row” phenomenon with the possible rejection of the Constitutional Treaty. At least, what can be established is that we have a Charter that has proven to be of legal significance in spite of its formally non-legally binding character. As far as the material content of the Charter is concerned, the European Convention made no changes. The European Convention respected the consensus reached by the Charter Convention with regard to the material content. The “technical

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<sup>758</sup> For a recent contribution to this discussion, see Alston, P., 2005, pp. 167-171. Alston claims that the division of justiciable and non-justiciable provisions is misleading in the Charter context. He argues that it is better suited to talk about non-self-executing provisions in the context of article 52 (5) as it provides that principles are only judicially cognizable in interpreting EU legislative acts, i.e. after the EU has taken legislative steps in order to implement a principle recognised in the Charter. He underlines that not only economic and social rights are non-self-executive but also civil and political rights. As an example he gives the US government’s approach of declaring the provisions of all international human rights treaties ratified in recent years as non-self-executive. Alston holds that the notion “non-justiciable” undermines the importance of economic and social rights. The EU Network of Independent Experts has adopted a similar position in terms of the importance of economic and social rights by underlining that a principle should not be understood as inherently non-justiciable as such. The Network states that “article 52 (5) merely acknowledges that “principles” differ from subjective rights” only in terms of the condition under which they are relied upon. Principles are indeed cognizable, yet they have, but a limited use in courts of law”. See report of on the situation of fundamental rights in the European Union in 2004, January 2005, pp. 13-14.

adjustments" made by the WG II and endorsed by the European Convention and the Member States in the IGC have nevertheless been rejected and do not form part of the Constitutional Treaty package together with the French/Dutch referenda. The European Convention exercise, however, proved that if and when the Charter forms part of any future treaty structure of the EU, the revised version will be the one that will be incorporated within the treaty and conferred a legal status.

The deliberation during the drafting of the Constitutional Treaty made it clear that the Charter will not form part of any treaty structure without the amendments and additions made to the horizontal clauses. The fact remains that the Member States did not take the Charter on board in signing the Nice Treaty when the first opportunity was at hand. Therefore, politically we must be clear that the revised version is the one that eventually will form part of any future revision of the current treaties. Certain technical adjustments have to be made prior to incorporating the Charter within any treaty other than the currently rejected Constitutional Treaty.<sup>759</sup> What we now have is a Charter of rights whose formal incorporation has been postponed. The European Convention exercise is an important moment in the constitutional discourse that has been going on since the early 1960s when the ECJ recognised the Constitutional character of the Community treaties. The signing of the Treaty establishing a Constitution for Europe in October 2004 created significant momentum that, in the words of the EU Network of Independent Experts, "holds the promise of a major improvement, if and when the Treaty will be ratified by all the Member States, in the institutional framework for the promotion and protection of fundamental rights in the Union".<sup>760</sup> It is submitted that the setback now witnessed in the EU with the Constitutional Treaty will perhaps prolong the incorporation of the Charter into the treaty structure, but it will most likely not stop the process.

The European Union is committed to realising fundamental rights in the form of a legally binding Charter. At least the proposal made in the area of fundamental rights by the European Convention was supported by a large majority and subsequently endorsed by all the Member States in the IGC. The

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<sup>759</sup> All references to the Constitutional Treaty that currently exist in the horizontal provisions have to be adjusted to the new setting that eventually will take place. It is submitted that the next treaty revision will not mention the word "Constitution" or "Constitutional Treaty" since these terms may have proved to be too controversial. Naturally, this is nothing but speculation and should be treated as such.

<sup>760</sup> EU Network of Independent Experts on Fundamental Rights, EU report on EU activities of 2004, January 2005, p. 10.

proposals in the European Convention were by far not the most controversial issues discussed. Despite the recent setback, the European Council, the Commission and the European Parliament had already prior to the Constitutional exercise committed themselves to respecting the EU Charter in its work. The European parliament uses the Charter as a reference instrument in its annual reports on the situation of fundamental rights in the European Union. The initiative to set up an independent expert group to consult on matters of fundamental rights was initiated by the European Parliament, which used the EU Charter as its reference instrument.<sup>761</sup>

The latest proposal is found in the conclusions of 12-13 December 2003 by the Brussels European Council calling for the creation of a Human Rights Agency for the purpose of creating a coherent and consistent EU human rights policy. The EU Charter played at least a role in establishing this new agency that will be operational as of January 2007. These are but several examples of recent initiatives resulting from the adoption of the EU Charter of fundamental rights. The conclusion that can be drawn from this is simply that the EU Charter will survive the rejection of the Constitutional Treaty and will continue to exist, albeit in a formally non-binding form, and produce all its effects, legal or otherwise—as noted by the Commission in 2000.

## **5.8 Concluding reflection on the constitutionalisation of the Charter**

The recent setback with the Constitutional Treaty has *postponed* the process of endorsing the EU Charter with a legally binding status. It is submitted that the Constitutional Treaty might have run into serious difficulties in terms of ever being ratified by all 25 Member States in its current form. Despite this setback, the Charter has a role to play, even as formally non-legally binding instrument. However, the question of the legal status of the Charter cannot simply be reduced to its current formal non-legally binding status. As noted, the Charter has proven to be significant in the jurisprudence of the CFI and opinions of

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<sup>761</sup> In a resolution of 5 July 2001 on the situation of fundamental rights in the European Union, the European Parliament recommended that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise for the purpose of assisting the Parliament in the its assessment of the implementation of rights recognised in the Charter. European Parliament Resolution on the situation of fundamental rights in the European Union (2000/2231) INI A5-02223/2001 of 5 July 2001. The Commission set up the EU Network of Independent Experts in September 2002. As a consequence of the establishment of the EU Fundamental Rights Agency, the operation and mandate of EU Network of Independent Experts was put to an end in September 2006.

AG:s of the ECJ also now by the ECJ itself when fundamental rights issues are brought before the EU courts or national courts. This state of affairs will not change in the event that the Constitutional Treaty never enters into force.

In Nice, the intention of the Member States was that the Charter would remain in the O.J. C-series for the time being. Now, it looks like the Charter will remain in the C-series for the foreseeable future as incorporated within the Constitutional Treaty that also has found its place in the O.J. C-series. It seems to be a long and troublesome journey for the Charter to reach the final destination, i.e. the O.J. L-series. Despite of all this, the Charter has proven to be more than just simply a formally non-binding instrument with no legal bite. The Charter is alive and continues to have an impact on the EU legal order in spite of its current status. Legally, the Constitutional Treaty might have been rejected and with it Chapter I-article 9 and Chapter II of the Constitutional Treaty. However, it seems that the Charter and the contents of what now constitutes article I-9 will become part of hard law in spite of the event that the Constitutional Treaty never enters into force. It is a matter of speculation on how and when and in what form the Charter will form part of any future treaty structure. For the time being, it can be stated that at least half of the material content of the Charter is *de facto* binding in spite of its current formal legal status. One could even say that, to the extent the Charter reflects article 6 (2) of the TEU and sums up the content of what has been defined as common constitutional traditions of the Member States, the argument could perhaps be drawn a bit further than stating that half of the Charter is *de facto* binding as argued by Groussot in his recent doctoral thesis. At the end of the day, it seems to be for the courts to determine in their case law the extent to which the Charter *de jure* constitutes a reference instrument that can be relied upon in a court of law. The Member States have come to an understanding on whether or not to confer legal status to the Charter. There is a strong argument for stating that the EU Charter cannot be reduced to simply an inter-institutional document. All the Member States have expressed their will to formally incorporate the Charter within the treaty structure of the European Union.

Legally speaking, the fact that we now can talk about two versions (or can we?) of the Charter, both forming part of the C-series, is not the most desirable outcome. Which of the "two versions" should be the prevailing one? This is not an easy question to answer. Legally, the version adopted in Nice 2000 has never been rejected, unlike Chapter II of the Constitutional Treaty. Therefore, it would seem that the Nice 2000 version, without the technical adjustments made during the work of the European Convention, is the one that should be used as a reference instrument in arguing for the Charter either in front of a court of law or in using it a reference instrument by the Commission

and perhaps also by the Fundamental Rights Agency for defining its policy and legislative initiatives that have to be in conformity with the Charter. That the Charter forms part of the “check list” when the Commission scrutinises its legislative initiatives has been a reality since 2001.

The Commission developed the impact assessment procedure in 2002 in order to further develop its legislative and policy proposal, taking into account, *inter alia*, the requirements of the Charter, albeit in an unsatisfactory way as identified by Oliver de Schutter. Another question involves when the revised version will enter the scene and most likely form part of any future Treaty structure of the EU. It is submitted that the content of article I-9 and Chapter II of the Constitutional Treaty will become part of primary law. This might still be in the form of the Constitutional Treaty adopted in 2004 by the Member States, but this option seems to be a long and troublesome road. Other possibilities exist. Next, an analysis will be made of the other side of the coin, i.e. the accession by the Union to the European Convention of Human Rights.

## 6. TOWARDS A MAXIMUM APPROACH? – THE ACCESSION DEBATE REVISITED

### 6.1 Why accession?

The adoption of the EU Charter once again brought up the debate of accession by the EU to the ECHR. The Finnish government raised the question of accession during the ICG 2000.<sup>762</sup> The proposal by the Finnish government, however, was not successful due to a lack of political will among certain Member States.<sup>763</sup> The Finnish government held that the process of adopting a Charter of fundamental rights and the question of accession do not exclude one another, but quite the contrary, they complement each other. This is a position, which was supported by the European parliament<sup>764</sup>, the Commission and also several Member States of the EU. The argument was that the adoption of the Charter and accession by the EU to the ECHR would complement each other in a similar fashion as Member States have their own constitutions and constitutional traditions including a catalogue of fundamental rights, but at the same time accept external control by being contracting parties to international human rights conventions.<sup>765</sup> The fact that fundamental rights are being protected in national constitutions has not diminished the need for external control.

The question of accession has also become topical for another reason related to the transfer of competences from sovereign States to international

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<sup>762</sup> CONFER 4775/00.

<sup>763</sup> The Finnish Government already considered before the 1996 ICG that the protection of fundamental rights within the European Union could be strengthened by preparing a list of fundamental rights to be included into the Amsterdam Treaty or through accession of the EC to the ECHR. The Finnish Government determined that these two alternatives are not exclusive of each other. The parliamentary Foreign Affairs Committee drew attention to potential problems arising from constructing a fundamental rights catalogue for the Union. In other words, they expressed a fear of creating a dual system of fundamental rights protection in Europe. The Grand Committee and the Constitutional Committee of the Finnish Parliament also pointed this out. See statements by Foreign Affairs Committee 7/1996, Grand Committee 2/96 and Constitutional Law Committee 6/96.

<sup>764</sup> The European parliament stated this once again in its resolution of 16. 3. 2000 in which it invited the ICG 2000 to “enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights”. C5-0058/1999 -1999/2064(COS).

<sup>765</sup> Carrasco M., 2001, p. 195.

organisations. The transfer of competences from Member States to the EU has meant that matters falling within that competence are vested in the Union while, at the same time, being contracting parties to the ECHR. The question therefore is under which conditions are Member States of the European Union responsible for complying with the ECHR in matters falling within the competence vested upon the European Union? Mr. Lenaerts, who sees a relevant point with accession, states that “only such accession can indeed give the European Union Member States, as contracting parties to that Convention, the watertight guarantee that they will in no circumstances be held responsible...for the infringement of fundamental rights by the European Union institutions”.<sup>766</sup> This is a way of looking into the future development of the case law of the European Court of Human Rights with regard to the question of the conditions under which Member States can be held responsible for any infringements committed by the various institutions of the European Union. Accession would contribute to a coherent protection of fundamental rights in Europe. The problems resulting from divergent interpretations by the ECJ and European Court of Human Rights could be avoided as a result of accession by the EU to the ECHR. The European Court of Human Rights could review the compatibility of acts adopted by the EU institutions and the ECHR, thus avoiding the current situation in which Member States of the EU can be called upon to defend acts of the EU institutions.<sup>767</sup>

The accession by the EU to the ECHR would give the signal that the EU is prepared to accept external control of its judicial system. Setting aside all juridical technicalities involved with the accession question, what would be achieved is a coherent human rights standard for the whole of Europe, while emphasizing that the European Court of Human Rights in Strasbourg would remain the epicentre for human rights review in Europe. The political signal sent by the European Convention and the IGC was that fundamental rights would occupy a more prominent place within the EU legal order. The question of accession was frequently raised within the European Convention during the drafting process of the EU Charter in spite of the fact that the Convention did not have the mandate to deal with the question.

In accordance with opinion 2/94 of the ECJ, the question of accession is a matter for the IGC. The option of accession was previously believed to be the “best way forward” in strengthening the fundamental rights protection within the Community legal order. Accession by the Community to the ECHR was

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<sup>766</sup> Lenaerts, K., 2000 (a), p. 600.

<sup>767</sup> Lenaerts, k., & De Smitjer, E., 2001, p. 297.

seen not only as being symbolically important, but also important with regard to the issue of ensuring external control. In its communication in 1990, the Commission stated that accession to the ECHR would not rule out the option of adopting a fundamental rights catalogue specific to the Community. The above-mentioned statement by the Commission also means that the adoption of a fundamental rights catalogue does not exclude the option of accession by the Community/Union to the ECHR.<sup>768</sup> Furthermore, the Commission drew, *inter alia*, attention to possible problems when Member States implement Community law.<sup>769</sup> Under article 1 of the ECHR, Member States are responsible for all acts and omissions of domestic organs allegedly violating the ECHR regardless of whether such acts or omissions are a consequence of international obligations or domestic law.<sup>770</sup> In other words, as the Community is not a party to the ECHR, the Community is consequently not subject to the review mechanism of the Convention authorities, which is “to be held responsible” for adopting acts to be enforced by Community Member States allegedly violating Member State obligations under the ECHR.

All EU Member States have ratified the ECHR and have subjected themselves to the control of the European Court of Human Rights. Why should the Community/Union not also subject itself to external control of its institutions and acts of Community law? Accession by the Community/Union would subject the European Community/Union to the same degree of supervision as Member States are being subject to by the European Court of Human Rights. Accession to the ECHR would have the advantage of ensuring a watertight consistency for the protection of fundamental rights in Europe as a whole. By accession, the ECJ would be bound by the jurisprudence of the

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<sup>768</sup> In fact, in a Communication on the EU Charter of Fundamental Rights in September 2000, the Commission stated that the existence of a Charter of Fundamental Rights neither requires nor precludes accession by the EC/EU to the ECHR. According to the Commission, “the existence of a Charter does not diminish the interest in joining, as accession would effectively establish external supervision of fundamental rights at Union level”. Commission Communication on the Charter of Fundamental Rights of the European Union. COM (2000) 559 final, p. 5.

<sup>769</sup> Commission Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols. SEC (90) 2087.

<sup>770</sup> *M & Co. v. Federal Republic of Germany*. Decision on admissibility by the European Commission of Human Rights 9 February 1990.

European Court of Human Rights. An accession would eliminate the risk of a divided interpretation of human rights jurisprudence in Europe.<sup>771</sup>

## 6.2 A new approach by the ECtHR – The Matthews case

The reason why the question of accession has become topical in the 21<sup>st</sup> century is to a great extent related to the transfer of competences of sovereign states to international organizations. As noted in chapter 2.7, the Commission drew attention to this already in 1990 by stating that, “the fact that the Community has not acceded to the Convention raises a special problem when a Member State enforces a Community legal act”.<sup>772</sup> The former European Commission of Human Rights held in its case law that it is not possible to hold Member States responsible for infringements upon the ECHR by Community institutions. The Community is a separate legal person.<sup>773</sup> Applications directed against the European Community were inadmissible *ratione personae* due to the simple reason that the Community is not a contracting party to the ECHR.<sup>774</sup>

The (new) European Court of Human rights<sup>775</sup> had in the *Matthews case*<sup>776</sup> to consider whether the United Kingdom could be held responsible under article 3 of the First Protocol of the ECHR for the lack of elections to the European Parliament in Gibraltar. Article 3 of protocol I of the ECHR provides that the high contracting parties should hold free elections for the choice of the legislature. Mrs. Matthews is a British citizen resident in Gibraltar. Mrs. Matthews complained that the fact that she was not allowed to vote in the European Parliamentary election was a violation of article 3 of protocol I of the ECHR. The alleged violation of the ECHR was connected to Council decision 76/787.<sup>777</sup> The Council decision, signed by the president of the Council and by the foreign ministers of the Member States, required laying down appropriate election provisions, which it recommended that the Member States adopt.

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<sup>771</sup> Kokott J., & Hoffmeister, F., 1996, p. 667.

<sup>772</sup> Commission Communication SEC (90) 2087 of 19 November 1990, p. 2.

<sup>773</sup> Schermers, H., 1999, p. 679.

<sup>774</sup> According to article 34 of the ECHR, only complaints brought against High Contracting Parties are admissible. This excludes complaints against the European Union. Canor, I., 2000, p. 9.

<sup>775</sup> The former Commission of Human Rights and the Court of Human Rights was replaced by a permanent European Court of Human Rights in accordance with protocol 11 to the ECHR.

<sup>776</sup> Case 24833/94, *Matthews v. United Kingdom*, judgment of 18.2. 1999.

<sup>777</sup> O.J. L 278/1 (1976).

The Act of 1976 concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage laid out the specific provisions that were attached to the Council decision. Annex II of the 1976 Act stated, “the United Kingdom will apply the provisions of this Act only in respect of the United Kingdom”. In other words, the United Kingdom shall apply the 1976 Act only with regard to the territory defined as “The United Kingdom” in accordance with its domestic law.<sup>778</sup> Article 138 (3) (now article 190 (4)) required all Member States to ratify the act.<sup>779</sup> Therefore, neither the Council decision nor the 1976 Act could be challenged before the ECJ. The ECJ does not have jurisdiction to review the legality of primary Community law. The ECJ was, however, in the *Cresson case*<sup>780</sup> prepared to review the compatibility of a provision of primary law with fundamental rights. In the case of *Roujansky v. Council*,<sup>781</sup> the Court of First Instance stated “that the Treaty [Treaty on European Union] is not an act of a Community institution within the meaning of Articles 4 and 173 of the Treaty, and consequently, this Court has no jurisdiction to examine the legality of its provisions”. The case was brought before the ECtHR<sup>782</sup> where the Court stated, among other things, that:

The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.

In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliaments competences brought about the Maastricht Treaty. The Council Decision and the 1976 Act... and the Maastricht Treaty... all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a “normal” act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty too is not an act of the Community, but a treaty by which a revision of the EEC treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.

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<sup>778</sup> Olivier, P., 2000, p. 332.

<sup>779</sup> *Ibid.*

<sup>780</sup> Case 432/04, *Commission v. Cresson*, judgement of 11 July 2006.

<sup>781</sup> Case T-584/93 *Roujansky v. Council*, judgment of 14 July 1994, para.15.

<sup>782</sup> Case 24833/94, *Matthews v. United Kingdom*, judgment of 18.2. 1999, para. 32-33.

The Court ruled that the exclusion of Gibraltar from the scope of application of the 1976 Act on the direct election of members of the European Parliament was a violation of article 3 of protocol 1 of the ECHR. The European Court of Human Rights drew attention, among other things, to the lack of a possibility to challenge the 1976 Act before the ECJ due to the reason that it was not a normal legislative act, but rather a treaty within the Community legal order and, therefore, not within the jurisdiction of the ECJ. The Court made a distinction between primary and secondary Community law in the sense that the criterion for distinction is the possibility to challenge acts of Community institutions before the ECJ.<sup>783</sup> In this regard, the important statement by the European Court of Human Rights is that the 1976 act cannot be challenged before the ECJ for “the very reason that it is not a normal act of the Community, but it is a treaty within the Community legal order”. It is implied that the Court considers judicial control by the ECJ as an important element. Therefore, the lack of judicial control by the ECJ was one of the arguments making the United Kingdom, together with all Member States, liable for a violation of article 3 of protocol 1 of the ECHR.<sup>784</sup>

In this respect, one could implicitly say that the European Court of Human Rights is following the case law of the former Commission as expressed in the case of *M & Co. v. Germany* when it said that the Member States of the European Union will not be held responsible for acts of the Community under the Convention as long as the Community itself is upholding its own effective system of judicial review by offering “equivalent protection”. In other words, if a Community act constituting a “normal act” can be challenged before the ECJ, the legal system of the Community can offer an “equivalent protection” of fundamental rights. According to Lenaerts, “the only thing which the Community legal order has to do, to remain worthy of the credit it enjoys at present in this matter, is to continue to make it clear that indeed it possesses a system of judicial review offering an “equivalent protection” against the acts or failure to act of Community institutions said to be incompatible with the fundamental rights guaranteed by the Convention”.<sup>785</sup>

The conclusion of this case is that European Union Member State *may* be held responsible under the ECHR for a violation of the ECHR in the absence of the possibility of judicial review within the Community legal order. This line of case law from the European Court of Human Rights triggered the debate

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<sup>783</sup> Lenaerts, K., 2000 (a), p. 584.

<sup>784</sup> Schermers, H., 1999, p. 680.

<sup>785</sup> Lenaerts, K., 2000 (a), p. 585.

concerning the question of accession of the Community/Union to the ECHR. This case might very well also bring the organisations and their activities established under Title VI (judicial and police cooperation in criminal matters) within the jurisdiction of the Court of Human Rights of alleged violations of the ECHR where no other court is competent to review the operational activities of such organisations created by the Member States of the EU.<sup>786</sup>

The *Matthews case* is certainly an important case for marking the development in the relationship between the Community legal order and the ECHR. Member States cannot diminish their obligations under the ECHR by transferring powers to international organisations.<sup>787</sup> The *Matthews case* has indeed subjected primary Community law to the jurisdiction of the Court of Human Rights.<sup>788</sup> An interesting question in relation to this is whether the European Court of Human Rights would be willing to deal with a case that is within the jurisdiction of the ECJ, thus failing to uphold “equivalent protection” as guaranteed under the ECHR.<sup>789</sup> The European Court of Human Rights has recently received new applications against all fifteen Member States relating to matters falling within the competence of the Union.<sup>790</sup> In other words, the Member States will be brought before the European Court of Human Rights to defend measures taken by Community institutions. Community institutions are not in a position to defend themselves before the Court, but instead have to rely upon Member States to present arguments on their behalf. However, according

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<sup>786</sup> King, T., 2000, p. 87.

<sup>787</sup> In the case of *Waite and Kennedy v. Germany*, the European Court of Human Rights held that “where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose of the Convention, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such an attribution”. Case 26083/94, *Waite and Kennedy v. Germany*, judgment of 18. February 1999, para. 67.

<sup>788</sup> In this case, the Community/Union could not offer “equivalent protection” in that the ECJ lacked jurisdiction to deal with the case.

<sup>789</sup> Lenaerts, K., & De Smitjter, E., 2001, p. 291.

<sup>790</sup> See for example Application no. 56672/00, *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom* for the decision by the Grand Chamber on the admissibility of 10 March 2004 in the issue of Member State responsibility of CFR and ECJ decisions. The case, however, was declared inadmissible on grounds that the facts of the case were according to the Court no longer such as to permit the applicant company to claim to be a victim of a violation.

to article 36 (2) of the ECHR, the President of the Court may, in the interest of the proper administration of justice, “invite... any person concerned who is not the applicant to submit written comments or take part in hearings”. According to Olivier, this could also be applied with regard to the Community.<sup>791</sup> This would not, however, solve the problem. The European Court of Human Rights might be willing to further develop the conditions under which the Member States of the European Union can be held responsible for violations of the ECHR committed by Community institutions.

The *Matthews case* makes it clear that, in the event of the absence of the possibility to challenge acts of Community institutions before the ECJ, the Member States of the European Union may be held liable for violating the ECHR as a result of having transferred competences from the Member States to the European Union. Lenaerts sees a relevant point with accession, stating that “only such accession can indeed give the European Union Member States, as contracting parties to that Convention, the watertight guarantee that they will in no circumstances be held responsible...for the infringement of fundamental rights by the European Union institutions”.<sup>792</sup> This is a way of looking into the future development of the case law of the European Court of Human Rights with regard to the question of the conditions under which the Member States can be held responsible for any infringements committed by European Union institutions.

According to Lenaerts, even if the EU Charter, which is primarily addressed to the institutions of the Union, is incorporated into the treaties and becomes legally binding, the importance of accession should not be forgotten. Furthermore, accession would contribute to a coherent protection of fundamental rights in the EU. Furthermore, the compatibility of acts adopted by the EU institutions with the ECHR could be reviewed by the European Court of Human Rights, thus avoiding the current situation in which the Member States of the EU can be brought to defend acts taken by the EU institutions.<sup>793</sup>

The “Matthews case” was recently taken a step further in *Spain v. UK*<sup>794</sup> raising the issue of whether a Member State is entitled to extend the right to vote in European Parliament elections to nationals of third countries resident in Europe. The case concerned the obligation of the United Kingdom to

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<sup>791</sup> Olivier, P., 2000, p. 334.

<sup>792</sup> Lenaerts, K., 2000 (a), p. 600.

<sup>793</sup> Lenaerts, K., & De Smitjter, E., 2001, p. 297.

<sup>794</sup> Case 145/04, Kingdom of Spain v. Kingdom of Great Britain and Northern Ireland, judgment of 12 September 2006.

implement the *Matthews case*. The UK enabled the inhabitants of Gibraltar to participate in the elections to the European Parliament by establishing a new electoral region combining Gibraltar with an existing electoral region in England. The right to vote was conferred to EU citizens and Commonwealth citizens satisfying the criteria of residence in Gibraltar. Spain argued that the UK failed to comply with its treaty obligation and breached Annex I to the 1976 Act by adopting a declaration (Act concerning elections of the representatives of the European parliament by universal suffrage) of 18 February allowing third country nationals to vote in EP elections. The ECJ recalled that it was to comply with the *Matthews* judgment of the ECtHR. The Court recalled that neither the EC Treaty nor the 1976 Act defined in precise terms persons who can stand as a candidate or entitled to participate in EP elections. Subsequently, the ECJ stated that this definition belong to the competence of the Member States. The only requirement is that this definition must be in compliance with the principle of equal treatment.

This approach was confirmed in the *Eman v. den Haag case*<sup>795</sup> where the question arose whether a Member State may exclude certain categories of its own nationals standing as candidate or entitled to participate in EP elections being resident in overseas territory associated to the Community. Two Dutch citizens residing in Aruba (part of the Kingdom of the Netherlands) applied to be registered as electors in the 2004 European Parliament elections. Their applications were rejected. A request for a preliminary ruling was sent to the ECJ asking whether EU citizenship rights extended to persons living in an overseas territory referred to in article 299 (3) TEC, in this case forming part of the Kingdom of the Netherlands. The ECJ confirmed that the objective pursued by the Dutch legislator in using the criterion of residence in order to identify who have the right to vote and stand for election does not appear to be inappropriate in light of the ECtHR case law as long as the equal treatment requirement is satisfied. The Court held that the

Netherlands government has not sufficiently demonstrated that the difference in treatment observed between Netherlands nationals resident in a non-member country and those resident in the Netherlands Antilles or Aruba is objectively justified and does not therefore constitute an infringement of the principle of equal treatment...in the current state of Community law, there is nothing which precludes the Member States from defining, in compliance with Community law, the conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of

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<sup>795</sup> Case 300/04, M.G. Eman and O.B. Sevinger v. Collage van burgemeester en wethouders van Den Haag, judgment of 12 September 2006.

residence in the territory in which the elections are held, the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified (para. 60-61).

### **6.3 Post Matthews – acceleration of application against EU Member States collectively and individually**

In the aftermath of the *Matthews case*, we can witness an ever-increasing acceleration of application directed against the EU Member States, i.e. indirect challenges to Community acts. For the time being, it is not possible to challenge the European Community/European Union due the simple reason that the EC/EU is not a contracting party to the ECHR. Soon after the Matthews judgment, the ECtHR issued an admissibility decision involving an application against the EU Member States. In *Guérin Automobiles*,<sup>796</sup> the ECtHR was faced with a complaint involving two letters by the European Commission during a competition investigation that the applicant held to be in violation of articles 6 and 13 under the ECHR. The applicant argued that these decisions by the Commission should include information on delays, remedies and possible jurisdictions. The ECtHR, however, found the application inadmissible as the alleged violations did not fall within the scope of articles 6 and 13 respectively and dismissed it on the grounds of *ratione materiae*. Due to this reason, the question of *ratione personae* was not subsequently examined.<sup>797</sup>

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<sup>796</sup> Application 51717/99, *Société Guérin Automobiles v. 15 Member States of the European Union*, , admissibility decision of 4 July 2000.

<sup>797</sup> See also application 620023/00 *Emesa Sugar v. the Netherlands*, decision of Admissibility of 13 January 2005, which raises the issue of whether individual Member States can be held responsible for ECJ rulings implemented by national courts and other authorities. However, the Court did not enter into the question as it held that the question of whether the applicant company was entitled to import into the EU its sugar produce free of custom duties or other charges did not fall within the remit of civil rights and obligations under article 6 of the ECHR and found it therefore unnecessary to deal with the issue of *ratione personae*. The Court simply wanted first to determine whether the dispute at stake was a matter of civil rights and obligations. The answer has negative and consequently the application was declared inadmissible *ratione materiae*. A similar conclusion was reached by the Court in applications 6422/02 and 9916/02 *Segi and Gestoras Pro-Amnistía v. 15 EU Member States*, decision of admissibility of 23 May 2002 relating to Common Positions 2001/930CFSP and 2001/931 CFRP of 27 December 2001 adopted by the European Council as a means of combating terrorism. The Court concluded that the applications did not amount to the status of victims of a violation under the Convention within the meaning of article 34. The application was consequently inadmissible.

If the Court had found the case admissible on the grounds of *ratione materiae*, it would have discussed the question relevant here, i.e. the question of *ratione personae*. In 2004, the ECtHR was faced with an application by Senator Lines against the 15 EU Member States.<sup>798</sup> The case originated from a challenge by Senator Lines to the CFI of a Commission decision, which imposed a fine of 13, 75 million Euros for violating competition rules. As a result of the fine imposed by the Commission, and while the case was still pending, Senator Lines was obliged to provide a bank guarantee to cover the imposed fine. The company requested an interim relief due to financial difficulties, but the CFI rejected the request.<sup>799</sup> An appeal on the issue of the bank guarantee was sent to the ECJ, which upheld the CFI ruling.<sup>800</sup> The case was settled in a final decision by the CFI setting aside the imposed fine by the Commission.<sup>801</sup>

While the process was tied up in the Community Courts, the applicant sent an application to the ECtHR claiming that the Court was competent to rule on the compatibility of the decision of the EC institutions. For its part, the ECHR argued that the EU Member States were individually and collectively responsible for the acts of the Community institutions by dismissing the requested interim relief allowing an administrative body to force the company into liquidation, thus violating the rights to a fair hearing, effective access to judicial recourse and presumption of innocence contrary to article 6 of the ECHR. The applicant observed that it would be a violation of the right of access to the court if a fine were imposed before the proceedings had been judicially determined. As the fine was neither paid nor enforced, and ultimately quashed, the ECtHR concluded that it could not sustain the applicant company's claim that it was a victim as the company could not produce reasonable and convincing evidence of the likelihood that a violation had occurred. The case was accordingly declared inadmissible. The difference between the *Senator Lines case* with the *Matthews case* is that, in the latter case, the possibility of challenging the 1976 act constituting primary law was non-existent, while in the former case such a possibility existed and was taken advantage of by the applicant.

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<sup>798</sup> Application no. 56672/00 Senator Lines v. 15 EU Member States, decision of admissibility of 10 March 2004.

<sup>799</sup> Case T-191/98 R. DSR-Senator Lines v. Commission, order of the President of 21 July 1999.

<sup>800</sup> Case T-364/99 P(R), DSR-Senator Lines v. Commission, order of the President of 14 December 1999.

<sup>801</sup> Joined Cases T-191/98 and T-212/98 to T-214/98, Atlantic Container Line AB (et.al) v. Commission judgment of 30 September 2003.

The most recent judgment is the case of *Bosphorus v. Ireland*,<sup>802</sup> where the Court had to examine an application for an alleged violation of article 1 of protocol 1 under the ECHR resulting from sanctions impounding a leased aircraft. The sanctions originated from a series of UN sanctions against the former Federal Republic of Yugoslavia (Serbia and Montenegro) in order to address the armed conflict and human rights violations taking place in the former Yugoslavia. The European Community implemented the UN sanctions pursuant through EC regulation (prohibition of trade with Federal Republic of Yugoslavia) 1993.<sup>803</sup> The applicant had leased two Boeing aircrafts from Yugoslav airlines (JAT) and had registered them in the Turkish Civil Aviation Register as being owned by JAT and operated by the applicant.

The applicant claimed that the impounding of the two aircraft by the Irish authorities constituted a disproportionate interference with its peaceful enjoyment of property protected under article 1 of protocol 1. Bosphorus Airways challenged the impounding of the aircraft in the Irish High Court, which found that impounding the aircraft was not compatible with Regulation 990/93 of the EC. The case went to the Irish Supreme Court, which requested an interpretation of article 8 of EC Regulation 990/93.<sup>804</sup> The ECJ ruled that<sup>805</sup>

as compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate. Article 8 of [EC Regulation 990/93] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest.

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<sup>802</sup> Application 45036/98 Case of *Bosphorus hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, judgment of 30 June 2005.

<sup>803</sup> A difference between the *Matthews case* and the *Bosphorus case* is that the first case concerned primary law and the latter case secondary law EC law.

<sup>804</sup> O.J. 102/14 of 28 April 1993 prescribed that " All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States".

<sup>805</sup> Case 84/94, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*. Judgment of 30 July 1996, para. 26-27.

The ECJ did not accept the applicant's argument that the EC regulation did not apply since a non-FRY innocent party controlled the aircraft on a daily basis, as opposed to ownership as a criterion, as it would jeopardise the effectiveness of the sanctions. The ECJ also failed to uphold the applicant's argument that EC Regulation 990/93 would infringe on its right to peacefully enjoy its possession as well as on its freedom to pursue commercial activity as an innocent party. Bosphorus Airways' lease on the aircraft had already expired and, as a result of lifting the sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro), the Irish authorities returned the aircraft directly to JAT. Due to its being impounded, the airline had lost three years of its four-year lease on the aircraft.

On 30 June 2005 the ECtHR delivered its judgment in the Bosphorus case regarding the alleged breach of the right to the peaceful possession of a piece of property as a result of the impounding of the leased aircraft by Ireland. The Court found that the Irish authorities had a legal right to impound the aircraft and concluded that the interference resulted, not from any indiscretion by the Irish authorities, but simply from the legal obligations stemming from EC law under article 8 of EC Regulation 990/93/EC. The Court discussed in some length the notion of "equivalent protection" and concluded that Ireland did not depart from its obligation under the ECHR in implementing EC law as the European Community offered "equivalent protection" in the field of human rights comparable to that offered under the ECHR. The Court noted that it was ready to test the "equivalent protection" on a case-by-case basis if the Court would consider that the protection of the rights guaranteed under the ECHR would be *manifestly deficient*. In such cases, the protection of human rights would have to be reviewed in light of international cooperation using as the yardstick the ECHR constituting the "constitutional instrument of the European public order" regarding human rights protection.

By "equivalent" the Court means "comparable", but not identical as it would run counter to the interest of international cooperation being pursued. The ECtHR found that the law against interfering in a company's peaceful enjoyment of its property had not been breached but rather the interference was a consequence of the general interest resulting from legal obligations flowing from the Irish State's membership of the EC. The ECtHR accepted that compliance with EC Law by a Contracting Party "constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No 1".<sup>806</sup> In

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<sup>806</sup> Case of Bosphorus hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, application 45036/98, judgment of 30 June 2005, paragraph 150.

this case, the Court consequently found that the protection of Bosphorus Airways' Convention rights was not set aside by the ECJ and that impounding the aircraft did not constitute a violation of Article 1 of Protocol No. 1. It is noteworthy that the ECtHR discussed the "equivalent protection" of human rights within EC law in considerable length and looked at the "fundamental rights doctrine of the EU", i.e. the case law of the ECJ and relevant Treaty provisions, thus also recognising that the EU Charter of Fundamental Rights was not being "fully binding." It also, at the same time, recognised the Treaty establishing a Constitution for Europe and its article I-9. The Court went on to discuss the control mechanisms under the EC Treaty, direct effect and the preliminary reference procedure. The Court concluded that the protection of fundamental rights by EC law could be considered, at the relevant time, "equivalent" with the ECHR system. The ECtHR did not therefore go against the findings of the ECJ.

However, two concurring opinions were expressed in the present case questioning the "equivalent protection test" applied by the Court. The first concurring opinion offered the reminder that full protection (equivalent protection) at the European level does not exist as the EU has not yet acceded to the ECHR.<sup>807</sup> What the concurring opinions are suggesting is that there is a lack of effective substantive guarantees of fundamental rights from a procedural perspective, i.e. access to court as protected under article 6 (1) of the ECHR. The first criticism relates to the preliminary reference ruling system, which states that it is clear that the use of discretion in implementing a preliminary ruling by the ECJ is not covered by the presumption of an equivalent protection. The second point raised is that individual access to a Community Court is limited and acknowledged by the ECtHR. However, the Court accepts that the appeals system within EC law is equivalent to that offered under article 6 (1) of the ECHR. It is true that the judicial protection offered under Community law is based primarily on the preliminary rulings procedure and secondly on article 230 (4) of the TEC.

Yet, it is questionable whether the right to individual application within the Community system would constitute equivalent protection according to the meaning intended by article 6 (1) of the ECHR. The ECtHR did not address this

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<sup>807</sup> Case of Bosphorus hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, application 45036/98, judgment of 30 June 2005, with concurring opinions by judges Rozarkis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki and a second concurring opinion by judge Ress. Both concurring opinions subscribed to the Courts general conclusion that there was not a breach of article 1 of protocol 1 of the Convention in the present case.

question. It concentrated more on the “general picture” by stating that there exists within the European Community an effective protection of fundamental rights and freedoms, i.e. those guaranteed by the ECHR. As the first concurring opinion states, “a reference for a preliminary ruling entails an internal *a priori* review. It is not the same nature and does not replace the external *a posteriori* supervision of the European Court of Human Rights, carried out following an individual application”. It remains to be seen whether article 47 of the Charter will in fact have any real impact on the right to access the Court once it constitutes a part of EU primary law. What the Court meant by the notion of “manifestly deficient” remains unclear. What it does suggest is that the current protection of fundamental rights within the European Union is generally at a satisfactory level and that the threshold for concluding that the Union would uphold a case of “manifestly deficient” human rights protection is extremely high.

By way of contrast to the Bosphorus case, the CFI in the Yussuf<sup>808</sup> and Khadi,<sup>809</sup> cases discussed earlier clearly held that the obligations under the Charter of the United Nations of the UN Member States prevail over any other obligations including EC law under article 103 of the UN Charter. The CFI ruled that it was outside its mandate to rule on the lawfulness of the UN Security Council resolutions while the Council implemented the UN resolutions internally as to form part of EC law. The CFI held that obligations stemming under the UN Charter prevail over the obligation under the ECHR, i.e. resolutions adopted by the UN Security Council have a primary status vis-à-vis any other norm under international law *jus cogens* norms being the only exception. The CFI, after having examined the alleged infringement of the applicants’ fundamental rights protected as *jus cogens*, i.e. inhuman and degrading treatment, right to property, rights of defence and right to effective judicial review, the Court simply concluded that there is no international court available with jurisdiction to review the legality of the decisions taken by the UN Sanctions Committee not constituting breaches of *jus cogens* norms.

The UN Sanctions Committee is thus by far not in any respect a human rights body. The CFI found that the lacuna in judicial protection is not in itself contrary to *jus cogens* by underlining that the right to access to court is not an

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<sup>808</sup> Case T-306/01, Ahmed Ali Yusuf & Al barakaat International Foundation v. European Council and Commission, judgment of the CFI of 21 September 2005.

<sup>809</sup> Case T-315/01, Yassin Abdullah Kadi v. European Council and Commission judgment of the CFI of 21 September 2005.

absolute right. The Security Council enjoys immunity from jurisdiction of any international court being the international body having the sole responsibility of maintaining international peace and security.

What these ECtHR cases illustrate is that the Member States rather than the European Union itself are the subjects of ECtHR review when it comes to implementing Union law. This is clearly a new tendency, post-*Matthews*, to bring all the EU Member States or individual Member States implementing Union law before the Court when a potential breach under ECHR are put in the spotlight originating from the European Union. Clearly, the European Union as a supra-national organisation cannot be held responsible for alleged violations of the ECHR as the Union is not a contracting party to the ECHR. Nor, as a matter of ECHR law, is the European Union legally obliged to follow the jurisprudence of the ECtHR. Another question is that of whether the EU is already bound by the ECHR as a matter internal EU law. In light of the “equivalent protection” offered in terms of human rights protection within the EU legal order, the question of accession will be discussed as will the question of whether there in fact is a need for accession in light of the equivalent protection doctrine developed by the ECtHR. What indeed are the benefits of accession?

#### **6.4 Still a feasible option and a necessity?**

Different views have been presented in the doctrine on whether accession still is necessary in light of the equivalent protection doctrine developed by the ECtHR. For instance, Lawson argues that it is one thing to say that the EU is bound by fundamental rights and, yet, quite another thing to say that the EU should submit itself to external review, recalling opinion 2/94 of the ECJ as an example.<sup>810</sup> Groussot suggests that there is no need for accession in light of the equivalent protection doctrine working satisfactorily, thus arguing that the current substantive protection of fundamental rights in the EU is consistent.<sup>811</sup> What he argues for is that, after opinion 2/94, the ECJ has referred to and takes into account the jurisprudence of the ECtHR more and more frequently since the mid 1990s striving for a coherent set of interpretations between the two courts.

According to Groussot, the principle of equivalent protection is more or less well respected both by the ECJ and the ECtHR. Groussot illustrates this with some examples from cases both by the ECJ and the ECtHR, making the

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<sup>810</sup> Lawson, R., 2005, p. 31.

<sup>811</sup> Groussot, X., 2005, pp. 154-158.

point that both courts have shown a willingness to strive for a uniform interpretation of the ECHR and that the risk of a divided interpretation might not be of such a grave nature.<sup>812</sup> The recent *Bosphorus Airways case* from the ECtHR is a good example of the fact that the Strasbourg Court is willing to discuss the fundamental rights doctrine of the EU to a great extent in order to confirm that the EU fundamental rights doctrine offers equivalent protection with the standards set under the ECHR and interpreted by the Strasbourg Court. It would seem that the ECtHR has good faith in the fundamental rights doctrine of the EU. Groussot concludes in his analysis that the two courts feed into each other in a way that he describes as a “cross-fertilization of the two legal orders”.

He uses the *Kress case*<sup>813</sup> as an example of the “cross-fertilisation” between the two courts. The *Kress case* concerned the proceedings in the *Council d'État* involving the opinion by the government commissioner. The Court found a violation of article 6 (1) of the ECHR based upon the participation of the commissioner in the court proceedings. The Court did not find a violation of article 6 (1) concerning the possibility to comment upon the submissions of the Government Commissioner before the hearings. As to the latter point, the ECtHR took notice of the above-mentioned *Emesa Sugar case* handled by the ECJ where the Luxembourg court concluded that the parties do not have the right to comment on the AG opinion before the final deliberation of the court itself. The ECtHR did indeed take notice of the *Emesa Sugar case* when it discussed the *Kress case*. The case represents an equivalent standard of protection between the two courts, as demonstrated by the *Kress* and *Emesa Sugar case*, with regard to the possibility of challenging the positions of the AGs in the ECJ and the government Commissioner in the *Council d'État*. In light of these two cases, Groussot argues that one might very well question the need of accession when each courts take into account the jurisprudence of the other when interpreting the ECHR, i.e. the ECtHR was legitimating the jurisprudence of the ECJ with the *Kress case*.

The principle of “equivalent protection” is held as a satisfactory means of achieving a coherent set of jurisprudence by the two courts. Groussot rightly acknowledges that inconsistencies of interpretation may still occur even in light of article 52 (3) of the EU Charter, but he continues to argue that such inconsistencies might not necessary be a bad thing. The conclusion he draws is that the diverging interpretations might in fact stimulate dialogue between the

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<sup>812</sup> Ibid.

<sup>813</sup> Application 39594/98 *Kress v. France*, judgment of 7 June 2001.

two courts. He goes on to express the opinion that accession might be the best solution in cases where the principle of equivalent protection is the ultimate guarantor for achieving a coherent set of case laws. What is argued here is that the principle of equivalent protection might not necessarily be the final guarantor for achieving a coherent set of case laws for interpreting the ECHR. It is submitted that the Charter incorporating the substance of the ECHR might even result in conflicting jurisprudence by the ECJ as the wording of the provisions in the Charter “corresponding” with the ECHR is not identical. The most problematic point relates to the way limitation clauses have been used in the Charter as opposed to the limitation clauses in the ECHR.

The inclusion of article 52 (3) in the Charter might not even be sufficient enough to secure a coherent set of interpretations regarding the ECHR. This problem is even greater in situations where the ECJ has no guideline from the ECtHR, i.e. where the ECtHR has not dealt with an alleged fundamental rights problem. What the equivalent protection doctrine does secure becomes more evident in factual situations where an individual is unable to challenge an alleged fundamental rights violation due to the fact that the case cannot be dealt with by the ECJ, i.e. the Matthews situation. In such situations, the collective responsibility of the Member States can be invoked as the principle of equivalent protection falls short.<sup>814</sup>

The *Bosphorus Hava case* clearly provides evidence that the ECtHR has jurisdiction to review the compatibility of domestic implementation adopted on the basis of EC law under the ECHR. The ECtHR itself acknowledges that, “if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of the case, it is considered that the protection of Convention rights was manifestly deficient”.<sup>815</sup> In terms of this “equivalent protection doctrine”, the ECtHR has merely presumed that equivalent protection exists on the basis of a formal assessment relating to the procedures for achieving protection, but the ECtHR has so far not been willing to discuss the material substantive content protected under the Convention as identified in the dissenting opinion by judge Ress in the *Bosphorus Hava case*. It is submitted that the equivalent protection doctrine as applied by the ECtHR so

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<sup>814</sup> Groussot, X., 2005, p. 157.

<sup>815</sup> Application 45036/98, Case of *Bosphorus hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, judgment of 30 June 2005, para. 156.

far is perhaps based too much on formal developments in the past years within the EU.

As the ECtHR itself acknowledged, a once and for all settled state of affairs safeguarding that equivalent protection exists in the EU, as shown in the present case, is not self-evident. The *Bosphorus Hava case* can be seen as an important case that shows that it is still very important for the EU to accede to the ECHR. As long as the EU is not a contracting party to the ECHR, the applications must be directed towards Member States. The recent case confirms that the ECtHR has jurisdiction to review national implementation of EC law.

## **6.5 A clear mandate exists, but still a long way to go**

### **6.5.1 WG II and the European Convention**

During the work of the European Convention, WG II had the task of discussing the option of accession of the EU to the ECHR. At the very outset, the European Council had in mind that one of the issues to be discussed by the Convention was whether accession of the EU to the ECHR would be an alternative to pursue.<sup>816</sup> What they had in mind was that a possible incorporation of the Charter into a revised treaty would not necessarily diminish the value of EU accession to the European Convention on Human Rights. WG II of the European Convention was given the mandate to discuss the consequences of any accession of the Community/Union to the ECHR.<sup>817</sup> The Chairman of WG II stated that the issue of incorporating the Charter and the issue of accession are complementary, as incorporation would not lessen the importance of any accession to the ECHR. It was more a task for WG II to discuss and address the issue from a “technical point of view” rather than to concentrate on the pros and cons of an accession, i.e. the issue of autonomy of Community law and the legal basis for accession. It was not a question of whether or not accession was possible, but rather a question of how it was to be done.<sup>818</sup>

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<sup>816</sup> The Laeken declaration stated that “thought would have to be given...to whether the European Community should accede to the European Convention on Human Rights”.

<sup>817</sup> CONV 72/02 of 31 May 2002.

<sup>818</sup> For a comprehensive analysis of consequences of accession of the Community/Union to the ECHR, CONV 116/02 WG II 1 of 18 June 2002 addresses the issue of autonomy of the Community legal order and consequences for the allocation of competences between the Community and the Member States. See also working document 13 by WG II of 5 September where Mr Schoo, Director-General of the Legal service of the European Parliament, Mr. Piris, Legal consultant and Director-General of the Council’s Legal Service and Mr Petite, Director

The final report of WG II stated that “all members of the Group either strongly support or are ready to give their favourable consideration to the creation of a constitutional authorisation enabling the Union to accede to the ECHR”.<sup>819</sup> The arguments presented in favour of accession were that accession to the ECHR would give a strong political signal of the coherence between the Union and the “greater Europe”, i.e. coherence between the EU and the Council of Europe. Accession was also seen as a way of giving similar protection vis-à-vis acts of the EU as citizens currently enjoy in relation to its own state, i.e. the issue of transferred competences from the Member States to the EU was used as an argument. The overall credibility of the EU was raised as an issue in that membership to the European Union requires that candidate countries are also contracting parties to the ECHR. Perhaps most importantly, accession would secure that the issue of divergent interpretations of case law could be avoided by way of EU accession. The increasing case law in the ECtHR directed indirectly against the EU institutions where the Union could only intervene as a third party could be avoided.

The concern about losing the autonomy of Community law was rightly seen as a non-obstacle for accession, i.e. the ECJ would still constitute the supreme court of the EU with regard to the interpretation of EU law. The ECtHR would constitute a superior court vis-à-vis the ECJ, operating more as a specialised court in human rights. The positions of the WG seemed to have diminished all the fears of past years about whether accession would pose a real alternative for increasing the protection of fundamental rights in the European Union. WG II therefore recommended that a legal basis should be included in the Constitutional Treaty, this it seems without much ado. So, the road was clear for the Convention and its secretariat to start drafting a legal base enabling accession. The first version presented was prescribed in the following terms: “The Union *may accede* to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union’s competences as defined by this Constitution”.<sup>820</sup> One could state that this was a beginning, but it hardly reflected great enthusiasm.

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General of the European Commission’s Legal Service, presented their views on the issue of accession. All of the statements saw no danger of accession with regard to the issue of autonomy of Community Law and extending competence in the field of fundamental rights as a result of accession.

<sup>819</sup> Final Report of Working Group II CONV 354/02 of 22 October 2002.

<sup>820</sup> CONV 528/03 of 6 February 2003.

Next, the formulation evolved and was framed as such: “The Union *shall seek* accession to the European Convention...”<sup>821</sup> This showed more of a commitment to accession and was presented by the Convention as the final version. During the following ICG, the formulation was made even more stringent by prescribing that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution” (now article I-9:2). This formulation takes it for granted that the Union can accede to the ECHR without much ado, i.e. it can be seen as a bit arrogant. Accession also requires that the receiving party, the Council of Europe and its Member States must agree that entities other than states can become contracting parties to the ECHR. Again, it can be interpreted as a strong commitment by the Member States of the Union that they are willing to subscribe to an international human rights treaty in the same way as the Member States themselves are contracting parties to the ECHR.<sup>822</sup>

Naturally, this clear mandate by the EU Member States has been put on hold as a result of the uncertain fate of the Constitutional Treaty. However, it is submitted that the political straggle that has been going on since the mid 1970s over whether the EC/EU should seek accession has been resolved irrespective of the overall fate of the Constitutional Treaty. Article I-9 (2) gives the necessary mandate for starting negotiations with the Council of Europe. The uncertain fate of the Constitutional Treaty may have put the question of accession on hold, but it is submitted that the EU Member States have now given their firm commitment to the idea that the EU shall accede to the ECHR in the future. The *first political hurdle* among the EU Member States has now been clarified. However, there is still a long way to go. Next, the issue will be addressed from the other side of the coin, i.e. from the side of the Council of Europe and, more specifically, its position on how the ECHR must be amended.

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<sup>821</sup> CONV 850/03 of 18 July 2003.

<sup>822</sup> The following clarification, in particular with regard to the issue of competences and the position of Member States vis-à-vis the ECHR, was included as protocol 32 to the Constitutional Treaty: “The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof”.

## 6.5.2 The other side of the coin

It is no secret that the Council of Europe has for quite a few years had a positive attitude towards EU accession to the ECHR.<sup>823</sup> It does not consider the matter impossible merely on the basis that the EU is not state. Nor does the Council of Europe see it as problematic that the EU should accede to the ECHR and not become a member of the Council of Europe.<sup>824</sup> Protocol 14 of the Convention amending the Control system of Convention 825 in article 17 prescribes that “The European Union may accede to this Convention”. This is, however, not enough. The explanatory memorandum clarifies the state of affairs from the ECHR side of things:<sup>826</sup>

Article 59 has been amended in view of possible accession by the European Union to the Convention. A new second paragraph makes provision for this possibility, so as to take into account the developments that have taken place within the European Union, notably in the context of the drafting of a constitutional treaty, with regard to accession to the Convention. It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view... At the time of drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter’s possible accession to the Convention, simply because the European Union still lacked the competence to do so. This made it impossible to include in this protocol the other modifications to the Convention necessary to permit such accession. As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty.

The Steering Committee on Human Rights (CDDH), which is an expert body under the Committee of Ministers of the Council of Europe, prepared a study of the technical and legal issues that need to be addressed in light of a possible

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<sup>823</sup> Recommendation 1479 (2000) of 29 September 2000, Doc. 8819, Report of the Committee on Legal Affairs and Human Rights (rapporteur Mr Magnusson).

<sup>824</sup> In accordance with article 59 of the ECHR “This Convention shall be open to the signature of the members of the Council of Europe”.

<sup>825</sup> Protocol No. 14 to the Convention for the protection of Human Rights and Fundamental Freedoms amending the Control System of the Convention. CETS No. 194. Not yet in force. Open for signature as of 15 May 2004.

<sup>826</sup> See Explanatory Report to protocol 14.

accession of the EU to the ECHR.<sup>827</sup> It is, in other words, not enough that the EU has sent a positive signal that it has a firm will to ratify the Convention. The Constitutional Treaty provided the legal basis for ratification. The first ratification process must first be completed within the EU before the second round of ratification can begin, which will occur after the negotiations between the Council of Europe and the EU. In light of the problems with the ratifications in the first round, it is likely that ratification of the ECHR will not be resolved in the near future. What, however, has been clarified is that there is a will both by the EU and the Council of Europe that ratification will eventually take place. At the time of writing, it is not possible to predict when such ratification will take place. What is of significance is the will of the EU Member States to enable the negotiations to start in the near future. What precisely has been lacking earlier is the lack of a political will to start the process of accession. This political will now exists. The legal base was created with the Constitutional Treaty. It is submitted that the accession process will start regardless of the ultimate fate of the Constitutional Treaty. The currently proposed article I-9 (2) of the Constitution, or at least the substance of it, will find its way into the next treaty revision, be it the Constitutional Treaty or any other reform that is bound to take place in the not too distant future.

The text of the ECHR must be amended in order to recognize that other states can also ratify the text without becoming members of the Council of Europe. This is more of a legal technical nature. Different models were identified in the study for how accession could take place. The first option would be to amend the text of the provisions in the ECHR and its protocols. A second option would be to add supplementary provisions in an amending protocol clarifying the scope of terms in the ECHR, while recognizing EU as a special case. What perhaps is more important to note is that all the current Council of Europe Member States must ratify every amendment to the text of the ECHR and its protocols. This applies as well to the signing of a new additional protocol to the ECHR recognizing the EU as a Contracting party. This second round of ratification that would have to be completed before the EU could formally be a contracting party to the ECHR.

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<sup>827</sup> Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53<sup>rd</sup> meeting of 28 June 2002. DG-II (2002)006.

The Council of Europe has currently 46 Member States, of which 25 of them are EU Member States.<sup>828</sup> Accession by the EU to the ECHR will raise both political and legal questions, but they are hardly of such a nature that would jeopardize the exercise. Politically, the most problematic state of affairs is the current uncertain fate of the Constitutional Treaty for Europe that gives a legal mandate for the EU to start the process of accession. The second stage of ratification might also bring unexpected surprises.

### **6.6 Does article I-9 (2) of the Constitutional Treaty entail a general mandate to accede to other international human rights treaties?**

In the event that the Constitutional treaty enters into force or the substance of article 1-9 (2) becomes part of any treaty reform in the future, one could ask whether the mandate spelled out that the EU should accede to the EU and also could be interpreted as a more general mandate to accede to other international human rights treaties. It is clear that the ECHR has been recognised as having “special significance” in the case law of the ECJ and has also been recognised in article 6 (2) of the TEU as a result of the case law of the ECJ. As early as 1977 the Commission, the EP and the Council also singled out the ECHR in the inter-institutional declaration.<sup>829</sup> What, however, can be mentioned is that the ECHR is not the only international convention recognised in the EU treaties. The European Social Charter of 1961 is mentioned in the preamble to the SEA and in article 136 of the TEC.<sup>830</sup>

Indeed, with regard to social rights, article I-9 (2) of the Constitutional treaty opens up the need of accession by the EU to the European Social Charter. The reference in article I-9 (2) to the ECHR can be interpreted as a signal that the EU is less enthusiastic about social rights. This is of course unfortunate in light of the EU Charter of Fundamental Rights as it endorses both civil and political rights and economic and social rights in one single instrument. One of the merits of the Charter is that it, at least seemingly, highlights the interdependence and indivisibility of human rights. Article 63 of the TEC makes a reference to the Geneva Convention of 28 July 1951 and to the protocol

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<sup>828</sup> For a closer review of different options for how the ECHR must be amended before the EU could ratify the ECHR and options on how this could be done, see the Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53<sup>rd</sup> meeting of 28 June 2002. DG-II (2002)006. See also Polakiewicz, J., 2001, pp. 87-90.

<sup>829</sup> O.J. (1977) C 103/1.

<sup>830</sup> European Social Charter, adopted on 18 October 1960. Entered into force 26 February 1965. CETS No. 35.

of 1967 on the status of refugees as well as to *other relevant treaties*.<sup>831</sup> The reference in article 63 of the TEC to other relevant treaties could, according to Rosas,<sup>832</sup> constitute the ICCPR, the international Convention of the Elimination on all forms of Racial Discrimination<sup>833</sup> and the UN Convention against Torture and other Inhuman and Degrading Treatment or Punishment.<sup>834</sup> One could add that the AGs of the ECJ have made references to the Convention against the discrimination of women.<sup>835</sup> Given the prominent place of gender equality in the Community and article 13 of the TEC on discrimination, the above-mentioned conventions against racial discrimination and discrimination against women would seem to be relevant candidates if one were to mention any other international human rights convention that the EU could adhere to. The inclusion in the TEC of provisions on visas, asylum and immigration would indicate that the 1951 Geneva Convention could be a potential candidate for EU accession. However, a problem exists similar to that faced by the ECHR, namely that only States can be contracting parties to international human rights treaties. These conventions would have to be amended with regard to that “minor problem”.

The EU network of Independent Experts stated in its report on the EU of 2004 that article I-9(2) “cannot be interpreted *a contrario*”.<sup>836</sup> While the provision explicitly refers to the ECHR, it does not rule out the possibility that the EU could accede to other international human rights conventions. Several examples of this are the above-mentioned CERD and CEDAW Conventions and the Refugee Convention. Similarly, accession to the revised European social

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<sup>831</sup> Convention relating to the Status of Refugees, adopted on 28 July 1951. Entered into force on 22 April 1954. UNTS 137. Protocol relating to the Status of Refugees, adopted on 16 December 1966. Entered into force on 4 October 1967. UNTS 267.

<sup>832</sup> On this, see Rosas, A., 2001, pp.55-64.

<sup>833</sup> International Convention on the Elimination of all Forms of Racial Discrimination, adopted on 21 December 1965. Entered into force on 4 January 1969. UNTS 195.

<sup>834</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984. Entered into force 26 June 1987. UNTS 85. Also the European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted on 26 November 1987. Entered into force on 1 February 1989. CETS No. 126.

<sup>835</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979. Entered into force on 3 September 1981. UNTS 13.

<sup>836</sup> EU Network on the Situation of the Fundamental Rights in the European Union in 2004, p. 19.

Charter of 1996 might be mentioned as a potential candidate for accession.<sup>837</sup> The UN convention on the rights of persons with disabilities<sup>838</sup> is the first international convention prescribing that “[t]he present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention” (article 43). The new convention enables entities such as the EU to ratify it. An extensive interpretation of article I-9 (2) demonstrates that EU could also accede to other international human rights treaties provided it falls within the area of competence of the EU. Another matter is whether it is feasible to think that the EU ever could ratify UN human rights treaties. The reason for this would simply be that that it might not be realistic that the UN would be willing to open up “the Pandora’s box” that would allow entities other than states, such as international organizations, to become contracting parties to the UN human rights treaties.

It is easier in a European setting to amend or introduce additional new protocols to existing treaties than to amend or introduce them at the UN level. A perhaps more realistic approach would be to allow the European Union to start sending reports according to the reporting mechanism established under the subsequent UN human Rights treaties to the UN treaty bodies either in conjunction with a EU Member State report or simply as an EU report. A similar step in this direction has already been taken by the European Union in reporting to the UN Counter Terrorism Committee on its counter-terrorism measures in addition the EU Member States report pursuant Security Council resolution 1373<sup>839</sup> Another solution would perhaps be to add a procedural protocol to the relevant UN human rights treaties that would allow international organizations such as the European Union to subscribe to the UN human rights treaty regime with regard to the substance of these treaties and thereby submit themselves to the scrutiny of international supervision. An additional point in relation to the accession by the EU to international human rights treaties other than the ECHR is that it would not create similar

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<sup>837</sup> For a recent contribution on the issue of EU accession to the European Social Charter, see De Schutter, O., 2005 (b), pp. 111-152.

<sup>838</sup> An agreement was reached by the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities during its Eighth session, New York, 14-25 August 2006. The GA adopted the Convention at its 61 session on 13<sup>th</sup> December 2006. The Convention is now open for ratification and enters into force after 20 ratifications. UN doc. A/RES/61/106.

<sup>839</sup> UN doc. S/2001/1297 and UN doc. S/2002/928

constitutional consequences as noted by the ECJ in its opinion 2/94. There would be no legally binding judicial authority to review ECJ judgments.

## **6.7 Conclusion**

The possible future incorporation of the EU Charter of Fundamental Rights has not diminished the need of accession by the Union to an international human rights treaty. The two steps taken with the Constitutional Treaty are to be seen as complementary steps to be taken by the Union rather than as competing or alternative steps. The logic of accession stems from the fact that Member States have seen a need to ratify international human rights conventions in spite of the fact that states usually include a national bill of rights expressing the core values in a national constitutional setting. Similarly, incorporation of the Charter has not put the question of accession once and for all aside. On the contrary, the elaboration of the Charter placed the question of accession once again at the forefront together with the elaboration of a fundamental rights catalogue for the EU. The Charter Convention did not have the mandate to discuss the question of accession, although the issue seemed to come up on a regular basis during the drafting of the Charter. However, the accession of the EU to the ECHR was set for discussion in the famous Laeken declaration of 2001. The question of accession of the EU to the ECHR is not only a question of law, but to a significant degree a question of political will. This lack of political will among the EU Member States was apparent during IGC 2000, i.e. at the time of signing the inter-institutional EU Charter of Fundamental Rights.

However, things seemed to have changed dramatically only a year later when the Laeken declaration determined that the next Convention should have the task of revising the current EC/EU treaty structure. The European Council stated that thought would have to be given on whether or not there would be a need for EC/EU accession to the ECHR. After listening to experts on the issue, WG II concluded that accession would be a favourable option to pursue along with the idea of conferring legal status on the EU Charter. The European Convention was ready to go for the maximum approach by taking on board both proposals put forward by WG II. With approval at the IGC 2003-2004 and the signing of the Constitutional Treaty in October 2004, we now are facing a situation in which both proposals have survived the final "Member State test." The fact that the ultimate fate of the Constitutional Treaty is, at the time of writing uncertain, will most likely not, put into jeopardy the proposals included in article I-9 and part II of the Constitutional Treaty. These proposals were not among the most problematic parts of the Constitutional Treaty. The

incorporation of the Charter as well as pursuing with accession will perhaps be postponed, but not rejected.

The EU Member States have now come to a political consensus that accession is necessary in order to further strengthen the fundamental rights protection in the EU. The European Convention included a clear mandate that the EU should pursue the issue of accession. This mandate was even clarified by the Member States during the IGC. What we can conclude from this is that there is now strong support by the Member States for the idea that accession is a necessary step to be taken by the EU. Accession can also be seen as a step towards a more mature EU legal order in the sense that a mature legal order allows external review of its human rights or fundamental rights record. All the Member States of the EU have found it necessary to ratify a range of international human rights treaties in spite of the fact that they have themselves elaborated their own fundamental rights catalogues, which usually form a core part of national constitutions.

The most important contribution that accession will bring with it is the coherent interpretation of case law in “greater Europe”. Perhaps the risk of diverging interpretations in the case law by the two courts might be considered more an academic question, but the risk is still there. Is that necessarily a bad thing? It has even been argued that divergent interpretation might not after all be a bad thing as it would stimulate a dialogue between the two courts. Again, it can be argued that diverging interpretation can also be seen as problematic from the point of view of the Member States. Divergent interpretation can hardly benefit States that are both contracting parties to the ECHR and Member States of the EU. What should be the goal is a coherent set of standards operating in a European framework where national courts and authorities are under an obligation to both take into account the interpretations under the ECHR as well as the obligations stemming from EU membership. It seems that a coherent set of standards applied by the two courts cannot be seen as counter-productive.

The “cross-fertilisation” between the two courts is to be welcomed, but it will not diminish the need for accession. Divergent interpretation might even still be increasing when the EU Charter is interpreted by the ECJ. The EU Charter reproduces the content of the ECHR, albeit not word for word. Accession would ultimately avoid divergent interpretation between the two courts. The increasing case law directed against the Member States in implementing EU law before the Strasbourg Court can also be seen as an argument for accession. As the EU itself is not currently a contracting party to the ECHR, addressee of the applications directed indirectly to the EU has to the Member States of the EU either collectively or individually, The EU itself can

only intervene as a third party. This is not satisfactory. Individual Member States can be held responsible for implementing EU law and, at the same time, can be violating their obligations under the ECHR. Accession would ultimately solve this problem as the EU itself could be challenged under the ECHR for the acts adopted within the framework of EU law.

The fear raised that accession would have implications for the autonomy of EC/EU law has proven to be unnecessary. The ECtHR would not be competent to rule on the substance of EU law. The ECJ is still the ultimate interpreter of EU law and, more importantly, on issues arising from competences between the EU and its Member States. Accession will not have any consequences for the division of competences between the EU and its Member States since this relation will be based upon EU law itself. The ECtHR is not competent to rule on the division of labour between the EU and its Member States. That is a job for the ECJ. The principle of autonomy rules out that the ECJ would be bound by an interpretation of another court on the substance of EU law. The declaration concerning article I-9 (2) prescribed that, "The conference agrees that Union's accession to the European Convention...should be arranged in such a way as to preserve the *specific features of Union law*". Accession would neither sub-ordinate the EU to the Council of Europe nor subordinate the ECJ to the ECtHR. What accession will clarify is that the specialised court is the final interpreter of the ECHR, i.e. the ECtHR. The ECJ would still be free to develop its fundamental rights case under the EUCFR and the ECHR as well as under the general principle of law doctrine. The only requirement is that the standard of protection cannot be lower than that offered under the ECHR.<sup>840</sup> The ECHR offers a minimum standard of protection that is recognised in article 53 of the ECHR. The table is set for accession to the ECHR. Both the Council of Europe and the EU have shown a willingness to make the final arrangements of both political and legal nature. The problem surrounding the ratification of the Constitutional Treaty is a temporary setback, but nothing more.

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<sup>840</sup> Case 84/94, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*. Judgment of 30 July 1996, para. 26-27.

## 7. FUNDAMENTAL RIGHTS AS A SUPRA-CONSTITUTIONAL VALUE IN EUROPEAN UNION LAW – CONCLUDING OBSERVATIONS

### 7.1 On the normative status of fundamental rights in EU law

With the reference in the title of the thesis “towards a higher law of the land?” is made a connection with the constituting values of the European Union. Article 6 (1) of the TEU prescribes that: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States”. This would suggest that respect and the protection of human rights is seen as the very basis for the whole legal order and would constitute the basis for all EU activity. Fundamental rights are seen, at least in the national constitutional traditions of the EU Member States, as the core of the legal order and, as such, are considered to be the “highest law of the land” against which all norms are reviewed in order to determine the validity of norms. Fundamental rights are to be understood as the ultimate limit to the powers of the legislative branch, the executive branch and the judiciary. Fundamental rights are an important value in the modern European (national) constitutional setting together with democracy and respect for the rule of law. These are concepts that usually go hand-in-hand and mutually constitute each other.

The protection of human rights or fundamental rights is therefore seen as something more than just simply a specific branch of law, i.e. human rights/fundamental rights has a close link to *fundamental* moral values. The European Court of Human Rights has described the ECHR as a *constitutional instrument* of the European public order, i.e. a convention with a special character.<sup>841</sup> Allot has described the present EU fundamental rights doctrine developed by the ECJ as a total misunderstanding of the nature of fundamental rights by stating that “The Court of Justice unfortunately misunderstands the nature of fundamental constitutional rights. They are not ‘general principles of

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<sup>841</sup> See for instance the admissibility decision by the ECtHR in application No. 52207/99 *Bankovic and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* where the Court found that “The Court’s obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties”. Admissibility decision of 12 December 2001. para. 80.

law'. They are ultimate limits on the powers of all constitutional organs".<sup>842</sup> Respect for fundamental rights is therefore to be seen as a precondition for the validity of specific laws. The fundamental rights doctrine developed by the ECJ from the late 1960s as part of the "general principle of community law" doctrine was a way of introducing the language of rights into EC law. Introducing fundamental rights as general principles of Community law was a way of securing that fundamental rights are part of the EC/EU legal framework. This particular approach was later blessed by the Member States with the Maastricht Treaty in 1992. Fundamental rights are still today protected within the EU through the "general principles of Community law" prism.

Recent developments in the European Union after the turn of the 21<sup>st</sup> century have once again raised the issue of fundamental rights as one of the key issues or central factors in the construction of the new Europe. The adoption of the Charter as a non-binding instrument *per se* in 2000 and the strife within the EU for a constitutional settlement by simplifying the current treaty structure with the Treaty establishing a Constitution for Europe, that also would strengthen the legal status of the Charter, has the potential of lifting the normative status of fundamental rights. The Constitutional Treaty would also settle the issue of EU accession to the ECHR. Fundamental rights are part of primary law and have normatively the same status as other norms belonging to primary law. In that sense, there is no hierarchical order between fundamental rights protected as general principles of Community law and other norms constituting primary law. The normative status of fundamental rights would not formally speaking change as a result of incorporation of the Charter into Treaty law.

The status of fundamental rights as part of primary law would only be confirmed. The Charter itself is to be seen a culmination of the process that started already with the case of the ECJ in the late 1960s with the *Stauder case* and is a reaffirmation of the rights "as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention of Human Rights...the social charters adopted by the Union and the Council of Europe and the case law of the European Court of Justice...and of the European Court of Human Rights" (Charter preamble). This reaffirmation approach of the Charter has been confirmed in the case law by the Court of First Instance and in several Advocates General opinions of the ECJ. The European Court of Justice has now also joined the club

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<sup>842</sup> Allot, P., 2003, p. 217.

by acknowledging the Charter in the *European Parliament v. Council* case of 27 June 2006.

The normative status of fundamental rights has been discussed in light of the relation between fundamental rights and the fundamental economic freedoms both forming part of primary law. The focus in this thesis is on the constitutional balance between economic freedoms and fundamental rights rather than on the treatment and status of specific economic freedoms or fundamental rights. Many scholars have argued that, within the EU legal order, we have a *de facto* normative hierarchical order between the four freedoms and fundamental rights. What has been argued is that economic interests, generally speaking, have been prioritised at the expense of the protection of fundamental rights. This critique has been targeted at the ECJ in stating that the court has not taken fundamental rights seriously. A case that can be mentioned is the *Wachauf* case where the ECJ stated that fundamental rights are not absolute, but must be viewed in light of their social function. Consequently, the court concluded that restrictions or limitations may be imposed on the realisation of these rights, “in particular in the context of a common organisation of the market, provided that these restrictions in fact correspond to the objectives of the general interest pursued by the Community and are as such not disproportionate and does not impair on the core of these rights”.

The *Wachauf* case was decided in 1989. It is therefore not uncommon to come across statements still today that the four freedoms are placed on the highest hierarchical level within the normative value system in the European Union. Perhaps one should not be surprised by such statements. The European integration project has its roots in the creation or establishment of the internal market. The founding treaty, the European Economic Community, was precisely a treaty that reflected the ideology of liberal free-market principles. The issue of fundamental rights was not even thought to be of any relevance in the construction of the new European project. This task was more or less left to the Council of Europe in the aftermath of the Second World War. The roots of today’s European Union are to be found in the creation of a regional economic organisation. What we today know as the European Union is a product of 50 years of integration between European states that goes far beyond the economic ambitions set out in the late 1950s. We no longer have a European Economic Community, but simply a European Community and a European Union constituting the umbrella for a supranational polity.

However, the creation of the internal market is still very much part of the core of the integration project. The Constitutional Treaty for Europe placed and defined the objectives of the Union in article I-3, *inter alia*, by prescribing that, “The Union shall offer its citizens an area of freedom, security and justice

without internal frontiers, and an internal market where competition is free and undistorted". In article I-4, the free movement provisions were included. However, the Constitutional Treaty also marked new ground in terms of fundamental rights. The most visible contributions were the incorporation of the EUCFR in Chapter II and the creation of the legal basis for accession by the EU to the ECHR.<sup>843</sup>

In spite of the uncertain fate or that the Constitutional Treaty has been placed on the death row, these two elements are important statements by the European Union since they prescribe that fundamental rights are to be taken seriously. The Constitutional Treaty is to be seen as an important contribution to the constitutional debate on the role of fundamental rights in the EU legal order. With the Constitutional Treaty for Europe, the Member States have now signalled that they are prepared to make rights more visible and to subordinate the EU to external review by a specialised human rights court. The proposal to incorporate the EUCFR in a constitutional setting is to be seen as an important value statement that European integration is not only about economic integration.

The hypothesis in the thesis was that fundamental rights will soon occupy a more significant and prominent place within the *constitutional* framework of the EU. The incorporation of the EUCFR within a treaty setting will most likely also have the effect of more frequently raising fundamental rights issues before the ECJ and before national courts in the interpretation of Union law. What can reasonably be expected is that economic freedoms, which traditionally have been considered as the cornerstone of the EU legal order, will be tested and weighed against fundamental rights.

The present author is aware of only two cases so far where the interests of fundamental rights and fundamental economic freedoms have pointed in opposite directions, i.e. where the ECJ has directly dealt with the issue of balancing between fundamental economic freedoms and fundamental rights.

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<sup>843</sup> Article I-3 in the Constitutional Treaty also identified that combating social exclusion and discrimination, promoting social justice and protection, pursuing equality between men and women, solidarity between generations and protection of children's rights are listed as objectives of the Union. The underlying values (article I-2) of the European Union were defined in the following way: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

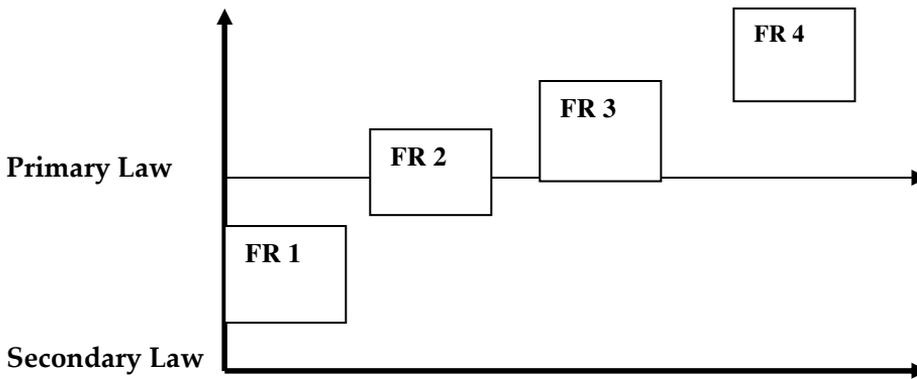
The significant point in the *Schmidberger case* was that economic freedoms *are the fundamental value* against which all other interests, including fundamental rights, are to be reviewed. In other words, the free movement provisions were treated as *the basic "grundnorm"* from which derogations can be made and justified on the grounds recognized in the Treaty and the mandatory requirements of which fundamental rights are now a part. Fundamental rights are treated as any other ground that might be invoked by a Member State in order to justify a restriction or derogation from the free movement provisions.

The present author agrees with Heliskoski when he concluded that this state of affairs might have profound significance concerning the relationship between fundamental economic freedoms and fundamental rights in the Union legal order quite irrespective of the material outcomes of individual cases. The four freedoms form the basic paradigm against which all other considerations shall be reviewed, including fundamental rights. One might therefore conclude that there in fact is a normative hierarchical order between economic freedoms and fundamental rights. This would suggest that fundamental rights are not treated as the "highest law of the land", but merely as one of many restricting elements that could be invoked as a ground for impeding basic economic freedoms. The authors reading of the case law of the ECJ would suggest that fundamental economic freedoms possess the status equivalent to fundamental rights in national constitutional setting.

In *Schmidberger*, the ECJ recognised a "need to reconcile the requirements of the protection of fundamental rights with those arising from a fundamental freedom enshrined in the Treaty (para. 77). The reconciliation is, however, not to be understood that fundamental rights considerations could be, in the words of AG Stix-Hackl, "negotiable". (Omega para. 53). Most fundamental rights are thus relative and are not formulated in absolute nature. In the *Omega Spielhallen case*, the Court had to define the concept of public policy as a fundamental right, i.e. as a human dignity issue. The ECJ concluded that in order for a fundamental right to justify a restriction on the freedom to provide services, the fundamental rights must be recognised as a general principle of Community law.

The *Schmidberger* and *Omega Spielhallen* cases are important decisions, but these cases also illustrate that the fundamental economic freedoms still operate as the main rule and fundamental rights as the exception that needs to be justified in the same manner as all the other grounds spelled out within the context of the Treaty and in the case law of the ECJ. One could perhaps try to capture the normative status of fundamental rights in the EU legal order by presenting four alternative options on how to understand the normative and formal status of fundamental rights in the EU legal order.

**Figure 2: Normative status of fundamental rights**



The case law from the ECJ clearly suggest that the normative status of fundamental rights is to be placed normatively higher than secondary community law; FR (1). General principles of Community law have constitutional status and are therefore superior to secondary Community law. This was clearly confirmed by the ECJ in its recent *Parliament v. Council case* in June 2006. Secondary Community law shall not infringe fundamental rights as protected currently in Community law as general principles of EC law (article 6.2 TEU). However, their normative status vis-a-vis- primary law is less clear. Tridimas understands the doctrine of general principles as a way to “signify fundamental unwritten principles of law which underlie Community law edifice. Such principles are derived by the Court of Justice primarily from the laws of the Member States and used by it to supplement and refine the Treaties”.<sup>844</sup> It is submitted that as general principles of Community law recognised by the ECJ are therefore generally considered to be of constitutional nature, they must also rank at the “constitutional level” of Union law, i.e. form part of primary law.

As noted, fundamental rights are protected as general principles of Community law and would according to this understanding find their place at the level of primary law; FR (2). The question raised in this thesis is whether fundamental rights protected as general principles of Community law are afforded a certain precedence vis-à-vis general primary law; FR (3). In light of the case law from the ECJ, in particular the *Schmidberger* and

<sup>844</sup> Tridimas, 2000, p. 3.

*Omega* cases discussed in chapter 4 in the thesis would confirm that fundamental rights rank at the level of primary law without any kind of afforded precedence vis-à-vis other norms of primary law. It is even submitted that the fundamental economic freedoms enjoy a certain precedence vis-à-vis fundamental rights ranking at the same normative level.

What however must be noted is that the ECJ in *Schmidberger* underlined that both fundamental economic freedoms and most fundamental rights are by their normative nature not absolute. Therefore, it has been argued that it boils down to a genuine balancing exercise that the Court had to resort to, i.e. that the ECJ had to apply the proportionality principle. The ECJ did underline that there is a difference between absolute rights, such as the freedom from torture and rights including limitation clauses such as the freedom of expression (ECHR article 11). The Court suggests that there is no need to resort to any balancing exercise when a case involves fundamental rights being of an absolute nature from which no derogation is allowed. This is of course a valid argument. Yet, one must keep in mind that there are not many fundamental rights of an absolute character. Most fundamental rights and human rights are principles rather than straightforward rules that are applied or not applied at the level of adjudication. It is also acknowledged that fundamental economic freedoms are by no means absolute either.

An interesting point was raised in *Omega* by AG Stix-Hackl stating that fundamental rights “are to be considered as part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms” (para. 49); FR (2). The normative status of fundamental rights and fundamental economic freedoms is the same, i.e. they form part of primary law. A different question altogether is whether there is a general priority order between fundamental rights and fundamental economic freedoms. This question was raised by AG Stix-Hackl in the *Omega case* (para. 50) by stating that

It would nevertheless be appropriate to discuss in general the question of whether, in view of the fundamental rights safeguarded in general by fundamental law and human rights, in the light of the Community’s conception of itself as a community founded on the observance of such rights and, above all, having regard to the need in today’s world to have recourse to commitment to the protection of human rights as a prerequisite for the legitimacy of all State orders, *fundamental and human rights could in general be afforded a certain precedence over ‘general’ primary legislation*. However, fundamental freedoms themselves can also perfectly well be materially categorised as fundamental rights – at least in certain respects: in so far as they

lay down prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights.<sup>845</sup>

The point raised by her touches upon the very core of this theses, namely whether fundamental rights and human rights could and should be afforded a certain precedence in relation to general primary law due to their close link to fundamental moral values. The proposal put forward by AG Stick-Hackl in her opinion in *Omega* would correspond to FR (3) in figure 2 above. The point raised by AG Stick-Hackl in *general terms* is answered in the affirmative in this thesis. The very core values articulated in article 6 (1) TEU should be made the basis for all EU activity. The minimum standard suggested in her opinion however followed the *Wachauf* line where derogation from economic freedoms should be viewed in light of fundamental rights standards and that it would not be permissible to go beyond the core element of any fundamental right.

The recent *Cresson case*<sup>846</sup> is an interesting case in terms of the status of normative place of fundamental rights in the EU legal order. It might be worthwhile recalling briefly the facts of the case. The case was one trace of the scandal which led the Commission to resign in 1999. As a member of the Commission, Mrs Cresson, complained, *inter alia*, to the ECJ that she lacked legal remedy if the ECJ decided to impose a penalty to her due to her undertakings as a Commissioner. The argument was based on different treatment between an official of the European Communities having the possibility to challenge a decision of the appointing authority before the Court of First Instance and appeal to the ECJ whereas a Commissioner do not have to possibility to appeal a judgment by the ECJ, thus allegedly constituting a breach of her rights fundamental rights and the right to effective remedy.

Mrs. Cresson challenged articles 213 TEC (2), 216 and article 16 of the Statute of the ECJ (primary law) of being contrary to fundamental rights. The ECJ did accept to review her argument in light of fundamental rights, i.e. whether a specific treaty article was contrary to fundamental rights. Article 2 (1) of protocol 7 to the ECHR provide the right to have his or her conviction or sentence reviewed by a higher court. The Court noted however that article 2 (2) of the said protocol is subject to exceptions in cases where a person concerned

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<sup>845</sup> Italics by the author.

<sup>846</sup> Case 432/04, *Commission v. Cresson*, judgement of 11 July 2006.

has been tried in the first instance by the highest court or tribunal. Consequently, the lack of possibility to appeal a judgment of the ECJ constituting the first instance but also the highest court did not constitute a violation of Mrs Cresson's fundamental rights. This judgement of the ECJ is relevant due to reason that the ECJ was willing to review the compatibility of primary law with fundamental rights. Would this suggest that the fundamental rights would have acquired the status equivalent to FR (4) in figure 2, i.e. that fundamental would have a clear precedence vis-à-vis other primary law?

The *Cresson case*, at least raises this question. It is true that the ECJ has a mandate to interpret the treaties and to safeguard the treaties vis-a-vis-secondary law. In this case, the Court interpreted provisions of primary and their compatibility with general principles of Community law being at the same normative level, i.e. fundamental rights. One can not however draw too far reaching conclusions on the basis of the *Cresson case*. It may however mark that the ECJ is also prepared to review the compatibility of primary law with that of fundamental rights. This interpretation would at least come closer to a situation known in national constitutional setting where respect for fundamental rights in general is seen as a prerequisite for the validity of the law.

A recent AG opinion does however challenge the interpretation of the *Cresson case* by stating that "to give priority to the fundamental right to effective judicial protection and to disapply for that purpose the relevant provisions of the EU Treaty on the powers of the Court of Justice would necessitate recognising that there was also a hierarchy among primary rules and a kind of 'supra-constitutional' value in the respect for fundamental rights'.<sup>847</sup> The case concern, *inter alia*, an alleged lack of effective judicial protection of the appellants rights resulting from a European Council Common Position 2001/931CFSP listing certain organisations as terrorist organisations and certain individuals as terrorists. The applicants claimed for damage allegedly caused for being included in the list of persons, groups and entities mentioned in article 1 of the Common Position adopted under articles 15 and 34 TEU. The case shows the shortcomings of the limited jurisdiction under article 35 TEU and the tension it creates with article 6 (2) TEU. For the present purposes, it is interesting to note that the AG does not give any kind of preference to fundamental rights vis-à-vis other primary rules as it would not

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<sup>847</sup> Case 354/04, *Gestoras Pro Amnistía, J., Olani and J., Errast v. Council & Case 355/04, Segi, A., Izaga and A., Galarraga v. Council*, opinion of Advocate General Mengozzi of 26 October 2006, para. 177 (pending).

be permissible “*in the present state of Union law*, not least because the current treaties do not explicitly list the fundamental rights guaranteed by the Union”. I believe that he makes a valid point by stating that the EUCFR does not help much in that regard being stuck “*in the pipeline*”. AG Mengozzi did however not in any way discuss the above-discussed Cresson case indicating that the ECJ is willing to review provisions of primary law in light of fundamental rights.

In light of the Cresson case, it must be acknowledged that it is less common to question the validity of provisions in national constitutions itself as it is taken as prerequisite that the provisions in national constitutional setting are in conformity with fundamental rights. Fundamental rights are often a central part of the Constitution itself. An analogy can be made to the Finnish Constitution and to the practice of the Constitutional Law Committee of the Finnish Parliament. Section 22 of the Finnish Constitution prescribes that the “public authorities shall guarantee the observance of basic rights and liberties and human rights”. Accordingly, all public authorities including the legislator and the judiciary are obliged under the Constitution to guarantee the observation of fundamental rights of the Constitution including international human rights. This implies a duty to actively promote the protection of fundamental rights and human rights. It also implies a fundamental rights friendly approach and human rights–conform interpretative approach.<sup>848</sup> This approach has been standard practice of the Constitutional Law Committee since the fundamental rights reform in 1995 (969/1995).<sup>849</sup> This entails that when different but equally valid interpretative solutions are at hand, the judges and

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<sup>848</sup> Fundamental Rights prescribed in the German Basic Law of 1949 are directly applicable. This also implies that all norms of the German legal system and all measures taken by public authorities must be in conformity with the German basic Law. The German Constitutional Court has held that fundamental rights in the German Basic law not only provide subjective rights vis-à-vis the state, but also reflect *an objective order of values and principles* setting the standards for the entire legal order, i.e. rank at the top of the hierarchy of norms. See Sommermann, K., with references on the chapter on “Germany”, 2001.

<sup>849</sup> Section 74 of the Finnish Constitution prescribe the role of the Constitutional Law Committee of the Finnish Parliament as follows: “The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties”. The Constitutional Law Committee is composed of Members of Parliament, but experts in Constitutional Law are consulted. Opinions of the Committee are sought on the constitutionality of proposed bills. The opinions of the Constitutional Law Committee are authoritative interpretations of the Constitution. On the role and operation of the Constitutional law Committee, see Scheinin, 2002. pp. 40-42.

all public authorities including the legislator shall opt for a fundamental right friendly and human rights-conform interpretative solution.<sup>850</sup>

In respect of international human rights law, section 22 establishes an obligation for public authorities to take into account, independently of their status in domestic law, and apply international human rights treaties ratified by Finland.<sup>851</sup> Section 22 also diminishes the need to have resort to *the lex posterior* rule when solving tensions between domestic legislation and international human rights law enacted as ordinary law in Finland.

Section 22 of the Finnish Constitution therefore guarantees that fundamental rights and international human rights are to be actively observed and taken into account by public authorities. A distinction is made between fundamental rights protected under the Finnish Constitution and international human rights. Section 22 of the Finnish Constitution gives a strong emphasis on international human rights treaties. The human rights-conform interpretative approach has also been emphasised by the EU independent experts of fundamental rights in their mandate to monitor fundamental rights in the EU and its Member States in light the EUCFR.<sup>852</sup> One can therefore conclude that there is no de jure normative hierarchical order or precedence of fundamental rights vis-à-vis other provisions in the Finnish Constitution. However, through section 22 there is a de jure obligation to give a certain precedence of fundamental rights vis-à-vis other norms including constitutional norms in case of conflict. It is more a theoretical exercise to think that a constitutional provision in the Finnish Constitution itself could be problematic in terms of fundamental rights. Section 22 of the Constitution is to be seen as an obligation to secure that the judges should opt for a fundamental rights-friendly interpretation when several possible interpretative solutions are at hand, i.e. that best eliminate an interpretation that could be interpreted as unconstitutional.<sup>853</sup>

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<sup>850</sup> Opinions of the Constitutional Law Committee, PeVL 2/1990 vp and PeVM 25/1994 vp. This approach has also been confirmed in the above-mentioned *Wachauf case* where the ECJ stated that when Member States implement Community rules, the requirements fundamental rights protected under Community law must be taken into account as far as possible (para. 19).

<sup>851</sup> Scheinin, M., 2002, p. 34.

<sup>852</sup> The EU Network of Independent Experts on Fundamental Rights was set up in September 2002 by the European Commission (DG Justice and Home Affairs), in response to this request of the European Parliament.

<sup>853</sup> PeVM 25/1994.

The formal status of fundamental rights is not the primary concern. They are part and parcel of primary law. It is also submitted that the normative status of fundamental rights being part of primary law need to be enhanced. The *Cresson case* shows that the normative status of fundamental rights is moving towards higher law of the land. The present development in the case law of the ECJ June-July 2006 in terms of fundamental rights with the *Parliament v. Council* and the *Cresson cases* might be an indication that the ECJ is willing to take a more firm position in the protection fundamental rights given the current difficulties with the ratification of the Constitutional treaty. It is argued that the subsequent proposals in the Constitutional Treaty for Europe would enhance to normative weight, but not the formal status of fundamental rights, in the EU legal order.

The proposals made in the Constitutional Treaty for Europe i.e. the incorporation of the EUCFR and the accession by the EU to the ECHR, might contribute towards a development where the basic paradigm is not predetermined, i.e. where a balancing exercise takes places in a genuine "all things considered setting". The Charter itself includes, at least to a certain extent, elements that directly relate to economic freedoms and fundamental rights, which in itself is a good argument for the need to strive towards a non-hierarchical approach, i.e. without a predetermined priority relation between the two sets of values in the EU legal order. The question of the hierarchical relationship between fundamental rights and fundamental economic freedoms is important not only with regard to the approach taken by the ECJ, but also in respect to the overall structure and framework of the Union, i.e. the nature of basic principles, *values and legitimacy* of the Union in a wider sense.

It is proposed that an understanding of the relationship between the fundamental economic freedoms and the fundamental rights doctrine of the EU needs to move from a situation where fundamental rights are seen as "obstacles" to the economic freedoms invoked by Member States, justifying restrictions on economic freedoms, to a situation where fundamental rights are balanced against economic freedoms on an equal footing without one value being automatically subordinate to the other. Yet, EUCFR signals that fundamental economic freedoms are different from fundamental rights. Fundamental economic freedoms were recognised in the preamble but not as forming part of the substantive *fundamental rights per se*. Fundamental economic freedoms can nevertheless to some extent be categorised as fundamental rights, although many would disagree.

In one sense, one can however conclude that the Charter itself introduces a priority order between the rights, principles and freedoms. The emphasis on underlining the difference between the rights, freedoms and principles was taken a step further with article 52 (5). The new clause

introduced by WG II of the European Convention was directed at socio-economic provisions in the Charter. The updated explanation given by the Praesidium of the second Convention states that “principles may be implemented through legislative and executive acts...accordingly, they become significant for the Courts only where such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or by the Member States”.

This understanding of the normative element of socio-economic rights was taken a step further by the European Convention with the clear intention of tying the hands of the ECJ when it states in the revised preamble of the Charter that, “[I]n this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”. However, the fact that the Charter includes social rights can be interpreted as giving a stronger argument in the hands of the Member States in claiming exceptions to the four freedoms. It is too early to make any kind of prediction on how the ECJ will interpret the socio-economic provisions in the Charter. The conceptual difference between the rights and the principles remains unclear and needs clarification.

The issue of indivisibility of rights will hopefully be taken a step forward rather than a step backwards in the interpretation of the provisions of the Charter. In spite of article 52 (5), the Charter has at least the potential to take further the principle of indivisibility and the interdependence of rights as it contains a broad spectrum of rights and principles in one single set. The fundamental rights component of the Constitutional Treaty is to be seen as an important step in the process of improving the protection of fundamental rights. The distinction between rights and principles in the Charter is, however, bound to create confusion. The fact that economic and social rights are treated differently should however not mean that they would be less important or possess an inferior role vis-à-vis civil and political rights. Normatively, they are still part of primary law as social rights are part of the open-ended “general principle of Community law” formula.

In light of the current state of affairs it is still too early to make any kind of general conclusion that the normative status of the fundamental rights doctrine of the EU now would be upgraded to the same level as the four freedoms. The conclusion in Chapter IV suggests that the four freedoms still

have a strong position in the EU legal order.<sup>854</sup> However, one must be aware that ECJ case law was adopted during the time that the Constitutional Treaty for Europe was on the drafting table. The judgement in the *Schmidberger case* saw daylight only a week before the European Convention adopted the Constitutional Treaty. The *Omega Spielhallen* judgement saw daylight some two weeks prior to the signing of the EU Constitution by the heads of state and government. The latest case law from the ECJ during summer 2006 has come at a time when it seems to be settled that the Constitutional Treaty for Europe will never enter into force in the form it was adopted by the European Convention and by the Member States in the 2004 IGC.

## 7.2 Towards higher law of the land?

The adoption and deliberation of the Charter of Fundamental Rights at the turn into the 21<sup>st</sup> century raised a discussion of the “founding values” of the European Union. This discussion was brought forward by the European Council (perhaps not deliberately) in its mandate to set up the first Convention with the task of drafting a Charter of rights. The European Council stated that “the protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy”. The preamble of the Charter also tries to capture a value statement by prescribing in its second and third recital that

...[t]he 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. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

...it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

On the one hand, the statement in the second recital capture albeit in somewhat broader fashion the value statement of article 6 (1) TEU. On the other, the drafters wanted to emphasize the importance of the four freedoms for the Community legal order. One might wonder why the drafters had to include a reference to the four freedoms in the preamble of a fundamental rights catalogue. To include simply a reference to the four freedoms not granting them

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<sup>854</sup> For a different view arguing that the days of an all-encompassing and overriding role of the four freedoms belong to history, see Rosas, A., (b) 2005, p. 201.

the status of fundamental rights in the substantive part of the document has in the legal doctrine been interpreted as marking a clear distinction between fundamental rights and the four freedoms.<sup>855</sup> Indeed, this can be seen as making a distinction between the two “constitutionally protected” values of the European Union. One can also question the need to make a reference to the four freedoms altogether in a document that tries to reaffirm fundamental rights that are protected and promoted in the European Union. As has been stated elsewhere, a clear-cut distinction between fundamental rights and fundamental economic freedoms is by no means possible to make. Some of the rights recognised in the Charter might well be read as either directly or indirectly to include a dimension that easily can be traced back to the fundamental economic freedoms.

This thesis has argued that the basic paradigm is still very much connected to the foundations of the European project that started in the 1950s. In the words of Olivier, it seems that “the crucial point is that, at the time when so many rights are being repackaged as fundamental rights and other interests are coming to the fore, the four freedoms and the maintenance of effective competition have not been downgraded in importance”.<sup>856</sup> The principal aim with this study has been to analyse to what extent the development with the adoption of the EUCFR and the second important proposal of EU adherence might have on the overall status and position of fundamental rights in the EU legal order. In light of the case law from the ECJ, it is argued that fundamental economic freedoms still have a strong normative position in the EU legal order. However, it is argued that the normative status of fundamental rights continues to rise with the new developments that have taken place during the past few years. The contribution of the Constitutional Treaty, despite of its ultimate fate is significant in that it would have conferred constitutional status to the EUCFR. This is still on the agenda that most likely will be brought forward regardless of the ultimate fate of the constitutional treaty itself.

Naturally, the results of the steps taken by the EU in terms of placing fundamental rights at the forefront of the European project is yet to be seen. Luckily, the protection and promotion of fundamental rights is not solely dependent upon the proposals put forward by the European Union of the past few years. Fundamental rights are being protected in the EU legal order by way of general principles of Community law. The Constitutional Treaty would have taken the present way of protecting fundamental rights a step further from that

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<sup>855</sup> Menendez, A., 2003, p. 192, Olivier, P., 2004, p. 165.

<sup>856</sup> Olivier, P., 2004, p. 175.

of simply having to resort to an open-ended “general principles of community law” formula. This approach was not abandoned with the Constitutional Treaty. Significant initiatives and proposals that directly can be traced back to the adoption of the Charter have however taken place despite of the current status of the Charter as an inter-institutional agreement. The initiative brought forward by the Commission in 2001 to place all new legislative proposals with a fundamental rights dimension under the scrutiny of the Charter was an important step.

In the introductory chapter, a list of “stages” was given to illustrate how the EU:s internal fundamental rights doctrine has evolved from the late 1950s to the end of the 20st century, i.e. roughly summing up a development of some 40 years. As has been discussed in this thesis, new development has taken place during the past few years that has had and will continue to have impact on the status of fundamental rights in the EU legal order. Significant new development has taken place over the past few years that perhaps could be summarised as follows:

- 2000 Adoption of the EU Charter of fundamental rights
- 2001 Reference to the EUCFR in the case law of CFI and ECJ Advocates General of the ECJ
- 2004 EUCFR as part II of the Constitutional Treaty + mandate for EU adherence to the ECHR (Constitution for Europe not yet in force)
- 2006 Recognition by the ECJ of the EUCFR in its case law as an additional tool for interpretation of fundamental rights
- 2006 The ECJ willing to review primary law in light of fundamental rights

### **7.3 On the need to focus on preventive dimension**

#### **7.3.1 From a reactive to proactive approach?**

The European Council conclusions adopted in Brussels on 4 and 5 November 2004 hold the promise that the normative content of the EU fundamental Rights doctrine is making its way towards a higher law of the land. The European Council states that:

Incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of human rights and fundamental freedoms will place the Union, including its institutions, under a legal obligation

to ensure that in all its activity, fundamental rights are not only respected but also actively promoted.

This position taken by the European Council in 2004, i.e. prior to the recent ratification problems with the Constitutional Treaty, is seen as a strong commitment by the European Council to actively promote the EU Charter irrespective of the ultimate fate of the Constitutional Treaty itself. This would entail that the EU would be moving from a position where the function of fundamental rights is seen as something more than simply setting the limits of action, i.e. moving from a reactive to proactive function of fundamental rights. A distinction can be made between negative function of fundamental rights protection performed by the ECJ and the preventive dimension of fundamental rights where they are actively promoted when adopting policies and legislation. The Charter itself formulates a duty to act by imposing an obligation on the EU and the Member States “to promote the application” of the rights in the Charter, i.e. calls upon political institutions to promote fundamental rights. Many rights in the Charter require “positive action” by the legislator in order to become meaningful. This has been even articulated in article 52 (5) of the Charter. The obligation to promote should be interpreted as an obligation for the Union legislator to act in such a way that would best enhance the respect for rights and freedoms and observe the principles within the limits on conferred powers.

The quest for a monitoring centre to be established in the European Union was expressed by Alston and Weiler in 1998 in a report prepared for the *Comité des Sages*, “Leading by example: A human Rights Agenda for the European Union for the year 2000,” in which they argue for the need to establish a monitoring body that would focus on a preventative and proactive approach to human rights rather than an exclusively supervisory function within the ECJ.<sup>857</sup> The Commission did not receive the proposed initiative favourably.<sup>858</sup> All these efforts made by the Commission to scrutinize policy and legislative initiatives are of course to be welcomed, but what is still missing is a coherent (internal) fundamental rights policy. What Weiler has been

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<sup>857</sup> Weiler J., and Alston, P., 1999, p. 21.

<sup>858</sup> See Commission Communication COM (2001) 252 final, in which the Commission discussed the European Union’s Role in promoting Human Rights and democratisation in Third World Countries. It concluded that the EU does not lack information on human rights. It stated that, “It (the Commission) can draw on reports from the United Nations, the Council of Europe and NGO’s” and underlined that it was not willing to pursue the proposal of setting up a human rights agency, p. 20.

suggesting for years now is that the EU does not need more rights, but rather a human rights policy, i.e. programmes and agencies to make rights real. What he essentially has in mind is that fundamental/human rights should be made part of the policy objective of the EU alongside other policy objectives recognized in article 3 of the TEC.<sup>859</sup>

An important reason for why the EU has not adopted a human rights policy is opinion 2/94 by the ECJ, where the Court proclaimed that the Community institutions have no *general* power to enact rules on human rights.<sup>860</sup> From this it has followed that fundamental rights are conceived as limits to EU powers rather than as a policy objective that the EU should pursue. This essentially passive and defensive role was at the heart of the EU strategy reflected in article 51 (2) of the Charter. The protection of fundamental rights did not have any impact on the allocation of competences between the EU and its Member States. Fundamental rights are perceived as neutral with regard to the issue of competences. This defensive view is also the prominent one found in the Constitutional Treaty, which does not confer any *general power* to actively promote fundamental rights. Rather, article I-3 prescribes that “[I]t (EU) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”.

In light of the Constitutional Treaty, De Schutter stated, rather cynically, that, “Human Rights are constraints which the institutions of the Union have to take into account in all their activities. In principle, they are not objectives to be fulfilled by the institutions in their exercise of powers. In that sense, fundamental rights remain external limits imposed on the Union; they are not part of its mandate”.<sup>861</sup> Nevertheless, in developing an alternative intermediate view of a fundamental rights policy within constitutional boundaries<sup>862</sup>, he

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<sup>859</sup> See for example Weiler, J., 2004, pp, 63-66. Weiler and Alston introduced the call for a human rights policy in 1998 by insisting on the need for the establishment of a human rights monitoring centre for the EU. See *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*.

<sup>860</sup> Alston and Weiler have argued that the ECJ did not state that the protection of human rights would not constitute an objective of the EU or that the Community lacked any competence to legislate in the field of human rights. Weiler J., & Alston, P., 1999, pp. 24-25. See also Weiler, J., and Fries, S., 1999, pp. 147-165, where they argue that fundamental rights may actively be realised through the implied powers doctrine (article 308 of the TEC).

<sup>861</sup> De Schutter, O., 07/04, p. 5

<sup>862</sup> A radical view also discussed by De Schutter would imply two changes to the constitutional nature that would require a modification of the Treaties. The first change

rightly recognizes that certain fundamental rights in the EU Charter are now part of the objectives recognized in the Constitutional Treaty that could justify the use of the implied powers doctrine (article I-18) in order to actively fulfil the realization of certain fundamental rights where “action by the Union should prove necessary within the framework of the policies to attain one of the objectives set by the Constitution and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal and after obtaining consent of the European Parliament, shall take appropriate measures”.<sup>863</sup> This “implied powers” article in the Constitutional Treaty retains, but to some extent also enlarges article 308 of the TEC, making it therefore possible to adopt measures for realizing the above-mentioned objectives.<sup>864</sup> He has also identified that most of the rights, freedoms and principles in the Charter may be implemented by the Union within the limits of existing competences conferred upon the EU by the Member States.<sup>865</sup> Naturally, the possibility to make use of existing powers regarding implementation in the field of fundamental rights is not the same as an obligation to do so.

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would concern the scope of application of fundamental rights in the Union. The second change would relate to the impact of fundamental rights on the issue of competences between the Member States and the EU. Such an alternative view would move towards an incorporation of the Charter by making the Charter applicable also in situations where a sufficient nexus to Union law cannot be established, i.e. through article 6 (1) of the TEU. A second channel would be the provisions relating to EU citizenship and article 12 of the TEC through which the ECJ has extended the scope of application to situations where there, at least seemingly, is no link to Community law other than nationality. The second component would represent the identification of the promotion of fundamental rights as an objective of the Union attributing the Union with a general power to realise fundamental rights. On this alternative view, see De Schutter, O., 07/04, pp. 11-16.

<sup>863</sup> Ibid., p. 17.

<sup>864</sup> A reference here is made to the discussion of the fate of the Constitutional Treaty in chapter 5.6.

<sup>865</sup> De Shutter refers to article 21 of the EUCFR (article 13 of the TEC and directives adopted; 2000/43/EC, “equal treatment between persons irrespective of racial and ethnic origin”, 2000/78/EC, “equal treatment in employment and occupation” and a proposal for a Council Directive implementing equal treatment between women and men in access to goods and services and provision of goods and services (COM (2003) 657 final); article 8 of the EUCFR (article 95 EC and Directive 95/46/EC on “protection of individuals with regard to the processing of data and on free movement of such data”). For more examples given by De Schutter, see De Schutter, O., 07/04, pp. 18-19. See also the opinion given by the EU Network of Independent Experts, “Position Paper on the Human Rights Agency,” footnote 15 on p. 8, which takes into account the relevant provisions in the Constitutional Treaty and gives further examples.

The former EU Network of Fundamental Rights consistently held that it may not be sufficient that the EU refrains from merely violating the provisions in the Charter, but that the EU institutions should accept “ a duty to act” in order to prevent Member States from violating fundamental rights when implementing Union law. What the EU Network did emphasize is that the problem might not directly relate to the activities of the EU institutions, but rather could originate in the “margin of appreciation which is left to the Member States in implementing EU law”.<sup>866</sup> What was stated by the network was that it might not be sufficient enough that the EU is not violating rights, but that Member States acting as decentralized agencies should implement the secondary legislation internally in conformity with the EU fundamental rights standards. This does not, however, imply a straightforward support for a view that only EU fundamental rights standards are to be taken into account in the national transposition of EU norms. Quite the contrary, Member States are still obligated for instance to take into account its obligations under international human rights law.

De Schutter has in another context raised the issue on the need to shift the emphasis from a purely reactive approach to a preventative approach that would be favourable to legal certainty.<sup>867</sup> The emphasis placed on a preventative approach would, according to him, be favourable for the Member States when implementing EU legislation in order not to be caught in a dilemma of having to implement incomplete or not detailed enough legislation in terms of fundamental rights protection.

When Member States are implementing EU law that is not precise enough in terms of fundamental rights, they are caught in a dilemma. Either they implement EU law faithfully or risk being challenged before the ECJ for not implementing their obligations vis-à-vis the EU. This highlights the question of the extent to which EU Member States can fill a possible lacuna of EU law, taking into account national standards of fundamental rights that might have consequences for the functioning of the internal market. This also highlights the issue of supremacy of EU law in relation to national legislation in conflict situations, including fundamental rights protected under national constitutions. The case of Lindquist<sup>868</sup> is given as an example to highlight the

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<sup>866</sup> See the report on the situation of fundamental rights in the European Union in 2003, pp. 30-35 CFR-CDF.rep.EU.en 2003 and report in 2004, CFR-CDF.rep.EU.en.2004, p.9, available at <http://cidho.cpd.r.ucl.ac.be/index.php?pageid=15>

<sup>867</sup> De Schutter, O., 07/04.

<sup>868</sup> Case 101/01, Sweden, v. Lindquist, judgment of 6 November 2003.

dilemma of insufficient EU law. Mrs Lindquist was charged for publishing on her Internet site the personal data of colleagues working with her on a voluntary basis in a parish of the Swedish Protestant Church. At stake was a breach of Swedish legislation implemented on the basis of directive 95/46/EC.<sup>869</sup> The argument of the defendant was that this directive could be in breach of the freedom of expression due to the reason that nowhere does it define a balance between the freedom of expression and the right to privacy.

The ECJ noted that the directive in question is general in nature as it is to be applied to many different situations leaving to the Member States to decide on the details or to choose between several options (recital 83). However, the ECJ defended the directive for being sufficiently precise in terms of legal certainty and held that the directive is in conformity with the general principles of Community law and, in particular, with the fundamental right protected under Community law. The ECJ went on to underline that it is for the national courts and authorities to interpret national legislation in conformity with directive 95/46/EC, but also that national courts should interpret the directive in conformity with Community fundamental rights and the principle of proportionality. The proportionality requirement relates to the sanctions that might be imposed on a breach of national legislation on the basis of the said directive.

The point made by De Schutter is that, in terms of legal certainty, it would be favourable that EU law would provide for, in this case, a specific level of sanctions that the national legislation would have to implement in cases of violations or more clearly specify the balance to be made between the freedom of expression and the right to privacy, “so that the Member States will know more precisely what limits they cannot exceed in implementing EU law, without having to rely on their own understanding of the requirements of fundamental rights”.<sup>870</sup> Certainly, it can be argued that legislation should be precise and clear in order to avoid problems of legal certainty. However, as the ECJ stated in the *Lindquist case*, it is almost impossible to legislate in precise terms that would take into account all possible situations or balances to be established between different fundamental rights.

The courts have a central role in striking the balance between different fundamental rights. In terms of legal certainty, the legislator has a central role

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<sup>869</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. O.J. L 281 of 23 November 1995.

<sup>870</sup> De Schutter, O., 07/04, p. 23.

in setting the boundaries, but needs many times to rely on relatively general or open-ended formulations in order to reach comprehensive legislation. De Schutter offers a workable solution to the question of legal certainty in terms of fundamental rights that was also supported by the EU Network of Independent Experts.<sup>871</sup> The rights, freedoms and principles included in the EU Charter require, in the interpretation thereof, that they are linked to existing international and European Human Rights law on which they to a large extent are based upon. This argument is based on the fact that fundamental rights norms often are formulated in rather vague and imprecise terms. There would be a need to adopt a proactive fundamental rights policy operating on a preventive basis with the objective of establishing a high standard of protection in Union law.

From the point of view of the Member States, this would also have the advantage of better reconciling potential conflicts stemming from the fact that Member States are obliged to follow both the requirements coming from EU law and the obligations stemming from international human rights treaties signed by a particular Member State. A more precise specification to the extent possible based upon international human rights treaties and imposed by the EU legislator in terms of fundamental rights may have the advantage of limiting the risk that these are violated by the Member States on a post hoc basis<sup>872</sup> What the EU Network suggested was that when the EU has legislated in a particular field where it has competence to do so, the EU legislator should take all measures that reasonably could be anticipated in order to prevent violations of fundamental rights, i.e. a move from simply a post hoc approach for addressing potential fundamental rights violations to an ex ante preventative approach.<sup>873</sup> This is of course much easier said than done.

This is much in line with what Alston and Weiler advocated when they argued for the need of a human rights policy for the EU prior to the adoption of the EU Charter of fundamental rights. The methodology for systematic monitoring of compliance of proposals for EU acts and policy initiatives

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<sup>871</sup> The Network of Independent Experts already in their first report described its method as “indexing” the EU Charter in the context of international human rights law. Report of the situation of Fundamental Rights in the European Union and its Member States in 2002, pp. 21-24.

<sup>872</sup> De Schutter, O., 07/04, pp. 23-24. See also a critical voice raised by De Schutter on the impact assessment procedure within the Commission, 2005, pp. 51-65, also briefly discussed in chapter 5.3.

<sup>873</sup> Independent Experts of Fundamental Rights. Report on the situation of fundamental rights in the European Union in 2003, pp. 30-35.

introduced in 2001 by the Commission and further developed in 2005 are important steps taken by the Commission in order to ensure *better* compliance of EU acts with the requirements of the Charter.

However, serious lacuna still exists in terms of strengthening the preventive mechanism introduced in 2001. First of all, this preventive mechanism is only performed at the stage when a legislative proposal is being introduced by the Commission. There is no guarantee that the final legislative act adopted by the EU legislator fulfils the compatibility requirements to the same extent as any given legislative proposal introduced by the Commission. Another problem concerns the fact that the compatibility check only concerns initiatives brought forward by the Commission. The EU acts introduced under police and judicial cooperation in criminal matters does not form part of the preventive mechanism that would ensure that these acts would respect the requirements under the EU Charter. Particularly, the problems related to the framework decisions on combating terrorism have proven to be problematic in terms of respecting fundamental rights.

For instance, the national implementation of the Council Framework Decision on the European Arrest warrant in Finland (Act No. 1290/2003) was deemed to be in conflict with section 9 (3) of the Finnish Constitution providing for an absolute prohibition to extradite Finnish citizens to another country against their will. The Constitutional Law Committee made a general statement that the domestic implementation of EU measures can not weaken the level of national protection of constitutional rights and human rights.<sup>874</sup> Consequently, constitutional rights and international human rights to some extent compromised a straightforward implementation. The implementing act makes the prerequisites for extradition tighter from those under the Framework Decision on the European arrest warrant.<sup>875</sup> The Council framework decision on combating terrorism, which called for a definition on terrorism and the criminalisation of terrorist activity, similarly raised issues in particular related to the requirement of precision of legality in criminal cases.<sup>876</sup>

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<sup>874</sup> Opinion of the Constitutional Law Committee 18/2003 vp.

<sup>875</sup> Domestic implementation of the European Arrest Warrant was deemed unconstitutional in Germany and Poland. See Chapter 2.3.

<sup>876</sup> Another problem is related to the limited jurisdiction under title VI of the ECJ to issue uniform interpretations of framework decisions. This is seen as problematic in terms of protecting fundamental rights as judicial control remains inadequate. In accordance with article 35, the ECJ can give preliminary rulings on the validity and interpretation of framework decisions and decisions on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them provided

The fact that the legislator itself acknowledges the Charter as important has now also been recognised by the ECJ in its first reference to the Charter by discussing article 7 and 24 of the Charter together with the ECHR and the in particular the UN Convention of the rights of the Child. However, it is not enough to place a standard reference in the preamble of any legislative proposal stating that this legislative act is in conformity with the requirements of the EUCFR without carefully examine the impact a proposal might have on the realisation of fundamental rights. In this regard, the newly established fundamental rights agency might have much to contribute. This new fundamental rights agency should be equipped with specialised expertise on fundamental rights that would have the mandate the screen legislative proposals having a fundamental rights dimension in light of the EUCFR. After all, the EU charter was adopted for the European Union and the Member States when implementing Union law.

The emphasis on the preventive dimension of protecting and promoting fundamental rights does strengthen the normative reaffirming nature of the Charter (recital 5 of the Charter preamble). The preventive dimension should be developed further in order to address the current existing lacunas in the “compatibility check” with fundamental rights. This “compatibility check” of legislative proposals is clearly abstract in nature. It must be acknowledged the legislator can not in advance identify all different problems that might appear in the actual application of the law. An increased emphasis on the preventive function does not diminish the need for post hoc control currently performed by the ECJ where the court can annul legislative acts not being in conformity with the requirements of fundamental rights. The first initial steps have been taken by the EU that would award fundamental rights the status they have in national constitutional law setting.

The implementation of the proposals put forward in article 1-9 of the Constitutional treaty would be the tip of the iceberg of the development that started with the case law of the ECJ in the late 1960s. This might, however, not be enough. What can be said is that the inclusion of the EUCFR as part of

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that a Member State has accepted the jurisdiction of the ECJ. The Constitutional Treaty would have extended the jurisdiction of the ECJ to cover current Title VI. On the fight against terrorism in the EU and Member State context, see opinion of the EU network of independent experts on “The Balance between Freedom and Security in the Response by the European union and Its Member States to the Terrorist Threats”. Thematic Comment No. 1 of March 2003. Available at: <http://cridho.cpd.r.ucl.ac.be/DownloadRep/Reports2002/CFR-CDF.ThemComment1.pdf>.

primary law and accession by the EU to the ECHR would enhance the status and importance of fundamental rights in the EU legal order.

### 7.3.2 The establishment of the new Fundamental Rights Agency

The recent decision taken by the JHA European Council in December 2006 to establish a Fundamental Rights Agency was initiated by the European Council in December 2003 in stating that “[t]he Representatives of the Member States meeting within the European Council, stressing the importance of *human rights data collection and analysis* with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia and to extend its mandate to make it a Human Rights Agency to that effect. The Commission also agreed and indicated its intention of submitting a proposal to amend Council Regulation 1035/97 of 2 June 1997 in that respect”.<sup>877</sup> A Commission communication was launched in October 2004.<sup>878</sup> A difference between the European Council initiative and the Commission consultative document is related to the name of the Agency, namely whether it should be called a Human Rights Agency or a Fundamental Rights Agency. This is related to the *mandate* of the Agency rather than to a conceptually different understanding of the notions of human rights and fundamental rights within the EU context.<sup>879</sup>

What should the Agency be doing? Should it have a broad mandate or a limited mandate, i.e. should it be inward looking regarding fundamental rights issues within the EU and its Member States including a mandate covering human rights issues of the Member States within the meaning of article 7 of the TEU? Should it also concentrate on monitoring third countries having agreements with the EU, i.e. should it concentrate on evaluating human rights clauses and follow-ups to the human rights clauses when such a need occurs? In June 2005, the Commission announced a proposal for a Council Regulation establishing a *European Union Agency for Fundamental Rights* and a Council decision empowering the Agency to pursue its activities in areas related to judicial and police cooperation in criminal matters (title VI of the TEU).<sup>880</sup> The

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<sup>877</sup> Brussels European Council of 12-13 December 2003. Presidency Conclusions 5381/04 of 5 February 2004.

<sup>878</sup> Commission Communication Public Consultation Document on the EU Fundamental Rights Agency of 25 October 2004. COM (2004) 693.

<sup>879</sup> On the difference between the concepts human rights and fundamental rights, see chapter 1. 6.

<sup>880</sup> Commission Communication COM (2005) 280 final of 30.6. 2005.

proposal for the establishment of an Agency stressed the importance of human rights data collection and analysis for the purpose of defining Union policy in the field of fundamental rights. The Agency will be built upon the existing European Monitoring Centre on Racism and Xenophobia (EUMC) by amending Council regulation No. 1037/97.<sup>881</sup> The Fundamental Rights Agency is part of the Hague Programme on strengthening freedom, security and justice in the EU that was adopted by the European Council in December 2004. The Commission noted that the proposal to extend the EUMC mandate is a natural follow-up to the EU commitment to respect and strengthen fundamental rights as recognized in articles 2, 6 and 7 of the TEU.

The proposal put forward by the Commission in June 2005 would have extended the scope from racism and xenophobia to cover all areas of fundamental rights recognized in the EU Charter of Fundamental rights. The Agency would then have pursued its activities within the conferred competences guaranteed under Community Law, but would also relate these activities to police and judicial cooperation in criminal matters under articles 30, 31 and 34 of the TEU. The proposal was that the mandate of the Agency would cover the EU and its Member States in implementing Union law and candidate countries would participate in the work of the Agency. Furthermore, the Commission could have asked the Agency to submit information on third countries with which the Community has concluded association agreements containing human rights clauses. The objective is the Commission's proposal was that the Agency could provide the EU institutions and Member States assistance and expertise in the field of fundamental rights for taking legislative or policy choices having a fundamental rights dimension. The thematic areas of activity would be defined in 5-year action plans by politically involved Community institutions, thus collecting and assessing fundamental rights data with, at least seemingly, complete independence.

During the Finnish Presidency in 2006 a political agreement was reached on the establishment of a European Union Agency for Fundamental Rights. A series of informal bilateral consultations were held aiming at reaching a political compromise on certain issues that needed to be solved in order for the Agency to be operation as of January 2007. The legal basis for the Agency is article 308 TEC. In light of this, the establishment of the Agency on the basis of article 308 TEC will contribute to an understanding that fundamental rights are seen as one of the objectives of the European Community.

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<sup>881</sup> Council Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia. O.J. L 151 of 10 June 1997.

Certain amendments have taken place compared to the proposal put forward by the Commission in June 2005. The Council regulation setting out a clear task for the political institutions to determine and define the focal points of action does put into question the independence of the Agency vis-à-vis the Union institutions. In accordance with article 5 of the regulation, “the Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt a Multi-annual Framework for the Agency”. This is defended in the interest of efficiency and with the intention that Agency should not set its “own political agendas”, thus reducing the task of the Agency to simply technical tasks. Yet, article 15 (1) prescribe that “the Agency shall fulfil its tasks in complete independence”. The regulation includes the thematic areas defined by politically accountable Union institutions. The Agency has a mandate to collect and assess data from the Union and assess the impact of measures taken by the union in terms of fundamental rights. The Agency would also collect information of good practices in respecting and promoting fundamental rights, express opinions on developments with regard to fundamental rights policy initiatives and raise public awareness about fundamental rights.

The focus of the Agency’s work is clearly internal, i.e. that the Agency’s would be on the European Union and its Member States. In addition, the Agency has the mandate to look into fundamental rights issues in candidate countries to the extent it would be necessary considering the gradual alignment of these countries to Community law. The Agency would, however, not be carrying out tasks of systematically monitoring its Member States for the purpose of article 7 of the TEU. However, the Council made a declaration to the regulation stating that nothing would preclude the possibility for the Council to seek assistance of the Agency when deciding on matters falling within article 7 TEU. The fact that the Agency would not perform normative monitoring of the Member States on an annual basis is clearly to be seen as a weakness. The role of the former EU network of independent expert has been replaced by the Agency in order to collect, analyse and disseminate data on fundamental rights when implementing Community law.

The Agency will collect data and information that will be provided by NGO:s on the state of fundamental rights. It is envisaged that the agency is reduced to simply a centre for collecting information on fundamental rights on a technical basis. As noted, the Commission has decided to put an end to the

activities of the Network of Independent Experts.<sup>882</sup> The Network has for the past four years systematically collected data, performed analysis of a normative nature and issued specific opinions on fundamental rights issues on an annual basis, i.e. performed normative analysis of fundamental rights situations within the EU and its Member States. The Council has opted for establishing a Fundamental Rights Agency that would not perform tasks on normative monitoring, but would rather function as a data collection and analysis centre based on thematic areas defined by the political institutions of the EU on the basis of article 6 (2) TEU.<sup>883</sup>

One of the most important tasks performed by the Network was to help detect fundamental rights violations of a systematic nature that might constitute breaches of fundamental rights under article 7 of the TEU. The Commission has recognized this in its communication on article 7 of the TEU by stating that, “The network's main task is to prepare an annual report on the fundamental rights situation in the Union giving a precise picture of the situation in each Member State. The published report reaches a wide audience. The information should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches”.<sup>884</sup> Scheinin emphasizes that that “legal-normative nature of true monitoring is something quite distinct from the planned profile of the Agency which related to the collection and analyses of data for the purpose of providing input for policy-making”.<sup>885</sup> Indeed, it seems that the proposal for a Fundamental Rights Agency would not include monitoring the fundamental rights situation from a “legal-normative nature”, but merely that of observing and providing policy input on normative monitoring usually performed by independent experts in settings of judicial or

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<sup>882</sup> This is related to the proposal to establish the new Fundamental Rights Agency. See Report on the situation of Fundamental Rights in the European Union and its Member States in 2005, p. 22. Available at:

[http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/report\\_eu\\_2005\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf)

<sup>883</sup> For a short review of tasks performed by the EU Network of Independent Experts in Fundamental Rights, see for example the position paper produced by the network on the Human Rights Agency, CFR-CDF. Agency of 16 December 2004.

<sup>884</sup> Commission Communication on Article 7 of the Treaty on European Union. COM (2003) 606 final.

<sup>885</sup> Scheinin, M., (a) 2005, p. 73.

quasi-judicial nature.<sup>886</sup> Therefore, Scheinin concludes that an Agency whose primarily task seems to be data collection and analysis for the purpose of defining a fundamental rights policy would have left plenty room for the continued operation of the EU Network of Independent experts.<sup>887</sup>

The question to what extent the EU Charter should form the only reference basis for the activities of the Agency was subject of disagreement among the Member States. Initially, it seemed to be more or less clear that the Agency should refer to the EU Charter of fundamental rights as its reference instrument. However, there was disagreement on whether the Agency should concentrate on specific parts of the Charter or should it collect data on the basis of the whole EU Charter. The final outcome of the negotiations between the Member States was that the EU Charter is no longer considered to the main reference of instrument for the work of the Agency bearing in mind its current status. A reference to the Charter can only be found in the preamble to the Council regulation (recital 2 and 9). The EU Charter envisaged as the central instrument of reference for the Agency has been replaced with a reference in article 3 (2) of the regulation to article 6 (2) TEU by stating that “The Agency shall refer in carrying out its tasks to fundamental rights as defined in article 6 (2) of Treaty of the European Union”. This would initially imply that the mandate of the Agency is to some extent more narrow that what initially was envisaged in the Commission proposal for a regulation in June 2005. The objective of the Agency is defined in article 2 as follows:

The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

This task is complemented further with a significant restriction laid down in article 3 (1) providing that the agency “shall carry out its tasks for the purpose

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<sup>886</sup> For a discussion on the meaning of “normative monitoring” under existing human rights treaties, see Scheinin, M., (a) 2005, pp. 73-80.

<sup>887</sup> For a discussion on the different tasks performed by the planned Agency and the Network, see Scheinin, M., (a) 2005, p. 83. What essentially Scheinin is arguing for is that the Network performs a normative assessment of fundamental rights in the EU and its Member States and issues opinions on fundamental rights on the basis of the EU Charter whereas the Fundamental Rights Agency is designed to collect and analyse data relating fundamental rights within the European Union and its Member States when implementing Community law.

of the objective set in Article 2 within the competencies of the Community as laid down in the Treaty establishing the European Community". This formulation is a disappointment in the sense that mandate does only cover activities within the first pillar, i.e. within Community law. The regulation excludes the mandate to operate within the field of Title VI TEU, i.e. within the field of police cooperation and judicial cooperation in criminal matters. It proved to be unrealistic to reach for a compromise that would have extended the mandate of the Agency to cover also Title VI TEU. Given that police and judicial cooperation in criminal matters is clearly a fundamental rights sensitive area, this compromise must be considered as a failure by the EU Member States to underline that fundamental rights is a matter for the EU law and not simply a matter of Community law. During the negotiations for a Council regulation, a minority of States denied that articles 30, 31 and 34 (2)(c) TEU could stand as a legal basis for extending the mandate of the Agency by a Council decision.

What was agreed upon is that the Union institutions and Member States could on a voluntary basis request for expertise of the Agency also in matters covering police and judicial cooperation in criminal matters. This is recognised in the preamble (recital 32) in prescribing that "Nothing in this Regulation should be interpreted to prejudice the question of whether the remit of the Agency *may be* extended to cover the areas of police cooperation and judicial cooperation in criminal matters". This compromise does to some extent rectify the lack of an extended mandate of the Agency without having to (dis)agree upon the question of a legal basis for such activity, i.e. that the Agency could perform under Title VI upon request. The current compromise reached is the first step towards extending the mandate of the Agency to cover areas of police cooperation and judicial cooperation in criminal matter. This was done by way of a specific declaration adopted by the Council annexed to the regulation providing for such a compromise, i.e. the Council will adopt a separate declaration whereby it would agree to reconsider its current position before the end of 2009.

Despite certain weaknesses in the Council regulation, the fundamental Rights Agency holds the promise and potential of carrying further the commitment to respecting and actively promoting fundamental rights primarily on the basis of article 6 (2) TEU and secondary on the basis of the EU Charter, thus contributing to the development of a fundamental rights policy within the European Union. The mandate is mainly limited to fundamental rights within the EU and the Member States when implementing Community law. This is supplemented with the possibility for the Council to seek assistance of the Fundamental Rights Agency to carry out evaluations of serious and

persistent human rights violations within the Member States within the meaning of article 7 TEU. The dimension of carrying out systematic normative analyses of the fundamental rights situations in the Member States on an annual basis has not been envisaged for the Fundamental Rights Agency. Essentially, the role intended for the Agency is more that of a proactive role. It could be seen as a specialized agency with an active role in preventative work, primarily with the task of further developing an impact assessment procedure for legislative and policy initiatives. It would thus help to define a more clear fundamental rights policy for the EU. The European Council Regulation is a welcome addition and should be seen as having the potential for further strengthening the respect for fundamental rights within the EU.<sup>888</sup> In determining the mandate of the Agency, the Commission and the Council have been given great power, thus putting into question the independence of the Agency vis-à-vis these institutions. The independence of the Agency vis-à-vis the Union institutions is a matter of debate due to the reason that all the central EU institutions and Member States have been reserved a place within the governing bodies of the Agency. Another aspect is that the Agency is also by definition an EU body itself.

The establishment of a Fundamental Rights Agency for the European Union is an important initiative by the EU to shift the emphasis from being merely reactive towards a proactive and preventative approach in the protection of fundamental rights. This initiative has the potential of strengthening the protection and promotion of fundamental rights in the EU. This emphasis on preventative work on the basis of the EU Charter is an important and complementary dimension to the post hoc approach represented by the work of the national and EU courts in addressing and protecting fundamental rights. The decision to establish a Fundamental Rights Agency for the European Union is an important contribution by the EU to shift the emphasis for protecting fundamental rights within the EU from being merely reactive towards a proactive and preventative approach. This initiative has the potential of strengthening the protection and promotion of fundamental rights within the EU.

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<sup>888</sup> For a most useful academic contribution on the Fundamental Rights Agency and various aspects thereof, see the articles on monitoring fundamental rights in the EU. The Contribution of the Fundamental Rights Agency – essays in European law, 2005.

## ABBREVIATIONS

AG	Advocate General
BVerfG	Bundesverfassungsgericht, Federal Constitutional Court of Germany
CETS	Council of Europe Treaty Series
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CMLR	Common Market Law Reports
COM	Commission legislative proposals and other communications
EAEC	European Atomic Energy Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EC	European Community
EU	European Union
EUCFR	European Union Charter of Fundamental rights
EP	European Parliament
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
NGO	Non-governmental Organisation
O.J.	Official Journal
OSCE	Organisation for Security and Cooperation in Europe
PeVL	Opinion of the Constitutional Law Committee of the Finnish Parliament
PeVM	Report of the Constitutional Law Committee of the Finnish Parliament

SEA	Single European Act
TEC	Treaty of European Community
TEU	Treaty of European Union
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNTS	United Nations Treaty Series
US	United States (of America)

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Recent developments within the European Union have raised the issue of whether fundamental rights have become a central building block in the construction of the enlarged European Union of the 21st century.

A decisive development, in this regard, commenced with the adoption of the EU Charter of Fundamental Rights in December 2000 as an inter-institutional agreement between key political institutions. This was followed by the establishment of the so-called European Convention, the work of which eventually led to the signing of a Constitution for Europe that would incorporate the Charter of Fundamental Rights. The EU was also proposed a legal mandate to adhere to the European Convention on Human Rights and Fundamental Freedoms. The subsequent difficulties with the ratification process of the Constitutional Treaty need not be understood as a detrimental setback with regard to the protection of fundamental rights in the EU legal order.

This study has its focus on the increasing role of fundamental rights in the construction of the legal order of the European Union. In this regard, questions relevant to the normative status of fundamental rights in the present state of Union law are placed under thorough analyses in order to assess to what extent fundamental rights are today to be understood as a central cornerstone of the European Union.

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