

A Bill of Rights for the European Union?



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Part II **Speaking Notes**

1. Introduction to the subject

Ever since the 1970s there has been an ongoing discussion about the status and role of human rights within the European Community/European Union. This is partly due to the fact that the founding treaties establishing the European Communities did not contain any specific Bill of Rights as part of the legal order. However, the Treaty of Rome did contain provisions with relevance to fundamental rights such as discrimination based on nationality (article 7) and the principle of equal pay for men and women (article 119). Some proposals have been made on how to improve the protection of fundamental rights/human rights.¹ On the agenda there has been the option of adopting a catalogue of fundamental rights and the possibility for the European Community (EC) to accede to the European Convention on Human Rights (ECHR).

This discussion began already some thirty years ago. The Court of Justice (ECJ) has since late 1960s raised attention concerning the protection of fundamental rights/human rights. The ECJ has developed the fundamental rights protection and played a significant role in strengthening the human rights doctrine within the European Community/European Union. The ECJ has mainly due to its dynamic work conceded that fundamental rights form an integral part of general principles of Community law, which the Court is obliged to protect. In protecting fundamental rights, in general, the Court makes reference to constitutional principles that are common to the Member States as well as to international treaties and conventions which the Member States are parties to. The Court has specifically relied on the ECHR as a source of inspiration in protecting fundamental rights in the Community legal order.² However, despite of the Court's jurisprudence in this area, the Community is not bound by the European Convention on Human Rights and nor is ECJ bound by the interpretation of the European Court of Human Rights.³

¹ The terminology of fundamental rights and human rights will be used in this study as parallel concepts. Within the EU, the concept of fundamental rights has been used as a term that includes both references to international human rights conventions as well as to constitutional principles that are common to the Member States.

² The ECJ has also used for example the ICCPR, the European Social Charter and some of the ILO Conventions as sources of inspiration in dealing with fundamental rights issues. Ojanen, 1994, p. 14-15.

³ Rosas, 1999, p. 205.

Furthermore, the ECJ is interpreting fundamental rights issues in the light of Community law.⁴ According to Rosas, it is likely that the ECJ will continue to use these international conventions as sources of inspiration despite of the fact that the amended Treaty of EU in article 6(2) only makes reference to the ECHR.⁵ Despite of the jurisprudence of the ECJ, there is no clear understanding of the material content of the human rights protection within the Community legal order. In other words, the human rights protection is lacking the element of legal certainty. The case-law of the ECJ does not give a precise and clear picture of the rights, which are to be protected within the community legal order.⁶

Reference to fundamental rights was for the first time mentioned in Treaty text in the preamble to the Single European Act (SEA) in 1986.⁷ The preamble makes reference to the ECHR and to the European Social Charter (ESC). In the Maastricht treaty, establishing the European Union (EU), article F(2) mentions 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”. Reference to human rights and in particular to the ECHR is now mentioned in a treaty article and not merely in a preamble to a treaty text.

The latest development is the treaty amending the TEU, Treaty of Amsterdam, which came into force as late as 1.5. 1999. The Treaty of Amsterdam has not taken decisive steps on developing a clear recognition of fundamental rights protection by the EU. In other words, the Treaty of Amsterdam has not led to an explicit recognition of specific fundamental rights in a form of a written catalogue or a Bill of Rights. The Treaty of Amsterdam affirms the Union’s commitment to human rights and

⁴ Ojanen, 1994, p. 17.

⁵ Rosas, 1999, p. 205.

⁶ Fundamental rights recognized by the ECJ are within the category of civil and political liberties and economic rights. For example, the right to property, freedom of movement, the prohibition against discrimination, freedom of expression, freedom of association and certain procedural rights and the prohibition against retroactive punishment could be said to be protected as part of general principles of community law. Ojanen, 1998, p. 116 and Pentikäinen & Scheinin, 1993, p. 100.

⁷ 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”.

fundamental freedoms. According to article 6(1) of the Treaty on EU, "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".⁸ Furthermore, article 6(2) continues in the same manner as article F (2) in the Maastricht Treaty to stress respect for fundamental rights as guaranteed in the ECHR and common constitutional traditions in the member states as general principles of community law. Article 6(2) does not incorporate any substantive provisions of the ECHR into the Community legal order.

However, the Amsterdam Treaty has made an important change with regard to the jurisdiction of the European Court of Justice (ECJ). According to article 46 of the Treaty of European Union, concerning the powers of the ECJ, article 6(2) is now within the jurisdiction of the ECJ. In accordance with article 46 of the EU Treaty, the ECJ has now the power to ensure that article 6(2) is observed by the Union institutions under the Community law "insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty". The jurisdiction of the ECJ is in principle restricted to Community law and does not cover the second and third "pillars".⁹ The jurisdiction of the ECJ is therefore mainly restricted to Community law (I pillar) but includes areas mentioned in article 46 of the EU Treaty.¹⁰ The amendments introduced by the Amsterdam Treaty have extended the Court's jurisdiction in a way that may have some implications concerning the fundamental rights protection.¹¹ The new provisions on fundamental rights aiming at strengthening the human rights protection within the EU are generally speaking of a cautious nature. The steps taken within the framework of the Amsterdam Treaty in the protection of human rights are not particularly striking from the perspective of

⁸ The Amsterdam Treaty introduces a new system for protection of fundamental rights. The new article 7 is meant as a mechanism for political control of "serious and persistent breach" within a Member State violating the principles of liberty, democracy, respect for human rights and fundamental freedoms or the rule of law in accordance with article 6(1). Furthermore, article 13 of the EC Treaty provides the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁹ Report of the expert group on Fundamental rights: Affirming Fundamental Rights in the European Union: Time to Act. European Commission Directorate-general for Employment, Industrial Relations and Social Affairs Unit V/D.2, 1999, p. 7-8.

¹⁰ Rosas, 1999, p. 204.

¹¹ The extension of judicial control over respect for fundamental rights has taken place due the removal of large areas of the "III Pillar" to the EC Treaty. Therefore, the Court has now jurisdiction over matters relating to free movement of persons, asylum and immigration and civil judicial co-operation. Ojanen, 1998, p. 297.

recognizing specific fundamental rights in a form a written catalogue or committing to accession to the ECHR. The Treaty of Amsterdam affirms the commitment to human rights and fundamental freedoms and also confirms the attachment to fundamental social rights in its Preamble as defined in the 1961 European Social Charter (Council of Europe) and in the 1989 Community Charter of the Fundamental Social Rights of Workers.¹² Furthermore, within the Treaty of EC, article 136 qualifies 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. According to the expert group, the system of references “suggest that fundamental rights are put on the same level irrespective of the document they are defined in.” However, fundamental social rights as defined in the European Social Charter and in the 1989 European Charter are merely seen as the basis for Community policies. The Treaty of Amsterdam has however been described as making “a decisive step on the way to an even clearer recognition of the principle of fundamental rights protection by the European Union”.¹³

The Expert Group on Fundamental Rights has taken 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. According to the Expert Group, “references 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”.¹⁴ However, the Treaty of European Union does state an obligation in article 6(4) that the “Union shall provide itself with the means necessary to attain its objectives and carry through its policies”. This could be understood as an obligation also to develop and implement policies securing the human rights protection within the EU. How can the doctrine of human rights or fundamental rights protection further be developed?

There seems to be a need for strengthening the current protection of human rights within the European Union. Ever since 1979 the discussion on accession to the

¹² This 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. Ojanen, 1998, p. 292.

¹³ Report of the Expert Group, p. 6.

¹⁴ *Ibid.*, p. 9.

European Convention on Human Rights has been on the Commission's agenda. In 1990, the Commission formally asked the Council to approve the accession to the European Convention on Human Rights and start the negotiations of accession. The Commission argued that an accession would fill "a gap in the Community legal system". An accession to the European Convention on Human Rights would mean that the EC becomes a party to the convention and therefore also be bound by the convention and the interpretations by the European Court of Human Rights.

Likewise, within the Union and also among certain Member States one can also find support for the option of adopting a Bill of Rights. The Council as well as the Commission has discussed the possibility of adopting a specific Bill of Rights for the EU on a few occasions. Both of these options would satisfy the current problem with legal certainty. However, the legal and political difficulties with such a catalogue are not to be underestimated. It has been suggested that the European Parliament Declaration of Fundamental rights and Freedoms of 1989 could be used as a starting point or the basis for such a fundamental rights catalogue. What would be the advantages and disadvantages with such a catalogue? Which basic fundamental rights should be included in such a catalogue? Could the accession to the ECHR be an alternative to the idea of adopting a fundamental rights catalogue? What would be the advantages and disadvantages with such an accession? What are the main arguments in favour and problems of accession to the convention? My intention is therefore to "follow-up" that discussion to present day and draw some conclusions on how the human rights doctrine within the EU could be improved.

During the German Presidency there has been some discussion on how the EU could develop and strengthen the fundamental rights protection within the Union. The government of Germany presented an initiative to draw up an EU Charter of fundamental rights. According to the German initiative, the adoption a Charter of Fundamental Rights would be the best way to improve the protection of human rights within the European Union.¹⁵ In other words, this study reviews the ongoing political debate on how the EU should proceed in strengthening its human rights policies. The main question is whether the EU should accede to some international human rights

¹⁵ Rosas, 1999, p. 207.

conventions, first and foremost to the European Convention on Human Rights, or whether the EU should proceed with the idea of a Charter of Fundamental Rights.

2. The Community debate on various options on how to improve the human rights doctrine

2.1. Historical review of the debate

The proposal for establishing a European Defence Treaty in 1952 included an article (article 3) on safeguarding civil and political fundamental rights of its citizens. A defence community was never established, but the issue of incorporating fundamental rights was raised again in the drafting procedure of establishing a European Political Community. The draft Treaty establishing the European Political Community would have incorporated the ECHR and its first protocol into the Community legal order.¹⁶ The European Political Community was also never established. In establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), the issue of fundamental rights was never really of concern for the Communities.¹⁷

The debate on strengthening the respect for fundamental rights within the community started already in the early 1970s. Reference to respect fundamental rights has been made in political declarations, statements, reports and general discussions by Community institutions and also by Member States. These political statements or declarations are not legally binding but can be seen as so-called “soft law” instruments with a certain legal relevance.¹⁸ In this study I will only follow the propositions made by various Community institutions in respect of adopting a Bill of Rights and the discussion on whether or not the EC should accede to the ECHR and therefore incorporate the convention into the community legal order. Notice will also be given to certain relevant statements or declarations, which are of general significance considering the respect for human rights.

¹⁶ Clapham, 1991, Vol. 1, p. 92-93.

¹⁷ However, the German delegation raised the question of fundamental rights during the draft procedure of the treaties, but were objected by the other delegates. Ibid.

The idea of an accession of the EC to the ECHR has gained support among Community institutions, notably the European Parliament, the Commission and the Economic and Social Committee. In 1973 the European Parliament invited the Commission to submit a report (to the Parliament) on how the Commission intends to prevent any infringement of the basic rights embodied in the constitutions of Member States.¹⁹ The Commission stated that it has certainly influenced the development of fundamental rights by adopting a number of preventative measures to meet the requirements necessary to protect fundamental rights. The Commission referred to the existing fundamental rights within the Treaty of Rome²⁰ and to its own decisive role in the law-making process within the Community, for example, in the field of freedom of movement and freedom of establishment. The respect for fundamental rights is therefore a permanent task for the Commission. The Commission stated that “it sees democracy as one of the basic conditions for coexistence and integration of the Member States within the Community. An essential part of any democracy is protection of and respect for human rights and fundamental freedoms which alone enable the individual citizen freely to develop his personality”.²¹ The Commission also stressed the importance of the role of the ECJ in developing the fundamental rights protection in the Community.

In its report to the Parliament, the Commission shared the opinion of the Court, that “international human rights treaties, 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”.²² The Commission stated that this is particularly important with regard to the ECHR. The Commission was at that time of the opinion that it is not necessary for the Community, as such, to become a party to the Convention. On the other hand, the Commission was of the opinion that a written catalogue of fundamental rights would have many advantages. In its report to the Parliament in 1976, the Commission was in favour of adopting a catalogue of fundamental rights. Such a catalogue would improve legal certainty and would

¹⁸ Rosas, 1999, p. 207.

¹⁹ OJ C 26 of 30.4. 1973.

²⁰ The Commission referred to articles 7, 48, 52, 75 117 and to 119 in the EEC.

²¹ The Commission has on various occasions expressed its views on the protection of the fundamental rights of citizens in stating that “every contravention of human rights and every violation of democracy, no matter where it may be, is adherent”. Bulletin of the EC – S 5/1976.

²² Case 4/73 (1974), ECR 491, p. 507.

emphasize the importance of fundamental rights and remove any remaining doubts about their relevance in Community law. The necessity for a comprehensive standard of fundamental rights is 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 not only in economic field. This was the result of the extension of the powers of the Community institutions. The Commission underlined especially the need for developing economic and fundamental social rights, since the activities of the community institutions are mainly concerned with economical issues. The Protection of civil and political rights as well as economic and social rights appeared already in mid 1970s to be more important than before. However, the Commission noted in its report that codifying a Bill of Rights cannot be realized in a short period of time.

For that reason the Commission was of the opinion, that the present 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 fundamental right is best ensured by the jurisprudence of the ECJ. The Commission expressed its faith in the doctrine of general principles of law used by the Court. The Commission felt that an earlier idea of a common declaration by the three political institutions of the Community to confirm the respect for fundamental rights should be seriously considered. Such a declaration could stress the importance of the ECHR by underlining the importance of the ECJ in protecting these specific fundamental rights.²³ As a result of this, a common declaration by these three political institutions was adopted in 1977. The declaration affirms the respect of fundamental rights in the Community by the European Parliament, Council and by the Commission.²⁴

This joint declaration is not a legally binding instrument. It only confers the political commitment and a support for the jurisprudence of the ECJ cornering the protection

²³ The Commission however considered that the development of the fundamental rights protection in the future European constitution remains desirable, if not essential.

²⁴ 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. 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". OJ C 103/1 (1977).

of fundamental rights within the community legal order. It also stresses the importance that the institutions of the Community will continue respecting fundamental rights in their exercise of powers. From that point on, the Community institutions started increasingly to engage themselves with fundamental rights issues by adopting resolutions, declarations, memorandums etc. The Treaty articles are however qualitatively very different from these so-called “soft law” instruments issued by Community institutions.²⁵ Nevertheless, these political fundamental rights declaration are not to be underestimated as they can be of significance to the interpretation concerning judicial review of legal measures and their conformity with fundamental rights.

The 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 Bill of Rights or by accession of the Community to the ECHR. The result was the 1979 memorandum on Accession of the Communities to the European Convention for Protection of Human Rights and Fundamental Freedoms.²⁶ In its memorandum, the Commission discussed the possibility of accession of the EC to the ECHR and more or less acknowledged the possibility of adopting a Bill of Rights. The Commission had changed its opinion and now believed that the best way of securing the protection of fundamental rights at Community level is by a Community accession to the ECHR. The Commission was of the opinion that an accession would be the most efficient way in strengthening the human rights protection within the Community. Therefore, the Commission proposed an accession as soon as possible. The idea of adopting a Bill of Rights for the Community was not totally abandoned.²⁷ An accession would only be the first step in the direction of the objective of adopting a Bill of Rights according to the Commissions memorandum. The decisive factor in favour of an accession was in the Commissions opinion the fact that the ECHR and the ECJ

²⁵ Ojanen, 1998, p. 296.

²⁶ Bulletin of the EC – S 2/1979.

²⁷ The Commission stated that it does not disregard the option of a catalogue of fundamental rights in the long term specially adapted to the exercise of its powers. The creation of a special bill of rights would be the best solution to remedy this lack of a written catalogue of fundamental rights, but was rejected for the time being because it would be a long and exacting task to draw up such a catalogue. Ibid.

essentially have the same aim, “namely the protection of a heritage of fundamental rights and human rights considered inalienable by those European States organized on a democratic basis”. The Commission argued that an accession is not an obstacle for adopting a Bill of Rights and nor does an accession 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 in the ECHR.²⁸ 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”.²⁹ An accession would clarify that the Community does not only make political declarations, but is rather determined to improve the protection of fundamental rights by binding itself to a written catalogue of fundamental freedoms. The Commission argued further that an accession would be completely in line with the Council declaration of 1978 on democracy.³⁰ If respect for democracy and human rights are essential conditions for membership in the European Communities, 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 that a written catalogue of fundamental rights should be established according to the Commission.³¹ In other words, the Commission recognized that legal certainty was lacking in the protection of fundamental rights and therefore one could not know in advance which rights would be recognized by the ECJ.

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.³² In 1982, The European Parliament requested the Commission to proceed with the accession by putting forward a formal proposal to the Council.³³ The invitation of the Parliament to

²⁸ The Commission had in mind especially the problem of definition of fundamental economic and social rights, which are barely included in the ECHR.

²⁹ Bulletin of the EC – S 2/1979. Member States draw up a document on European Identity in 1973 stating that “they are determined to defend the principles of representative democracy, of the rule of law, of social justice – and the respect for human rights”. Bulletin of the EC – 12 /1973.

³⁰ 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.

³¹ Bulletin of the EC – 2/1979.

³² The Economic and Social Committee endorsed the memorandum in 1980. The Parliament has on several occasions confirmed its favourable opinion starting in 1982.

³³ OJ C 304/254 (1982).

proceed with accession of the EC to the ECHR gained little support among Member States and therefore the Commission decided to adjourn the debate on accession and the proposal was postponed to a later date. In 1985, the Parliament renewed its question on the accession. The Commission had to admit that the idea of accession had not proceeded mainly due to the objection from certain Member States.³⁴ In spite of the difficulties in promoting the idea of accession, the Parliament continued to keep the protection of fundamental rights on the Community agenda. As a response to the weakness in the current system of protection, the Parliament adopted a declaration of fundamental rights and freedoms.³⁵ The idea for a Declaration can be traced to article 4 of the Draft Treaty Establishing the European Union.³⁶ Article 4 stated “(T)he Union shall adopt its own declaration on fundamental rights”.³⁷ Furthermore, it was suggested that the Union should consider the option of accession within a period of five years to the ECHR and to the European Social Charter as well as to the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

The European Parliament Declaration of Fundamental Rights and Freedoms was the first attempt to produce a catalogue of fundamental freedoms for the Community. It includes some of the classic concepts such as human dignity, the right to life, equality before the law, freedom of thought and expression, the right to privacy etc. Even certain social rights are included, for example freedom of assembly and association, freedom to choose an occupation, the right to strike, the right to education, right to access to information, principle of democracy etc. The Declaration also includes the right to access to courts, the principle of *ne bis idem* and the right to petition. The Declaration also includes the protection for every citizen in the field of application of Community law.³⁸

The declaration has only a symbolic value and is a non-legislative resolution of the Parliament. The declaration was meant as an element in building the European

³⁴ Greece, Denmark, Ireland and United Kingdom opposed the idea of accession. The Greece objection has become out of date, since Greece has recognized the right to individual complaint under article 25 of the ECHR in 1985. Betten, 1996, p. 8.

³⁵ OJ C 120/51-52 (1989).

³⁶ Weiler, 1991, Vol. II, p. 622.

³⁷ OJ C 77/33 (1984).

³⁸ Neuwahl, 1995, pp. 16-18.

identity for Community citizens and residents and also as an important statement to the meaning of belonging to the Community.³⁹ The Declaration was meant to be a symbolic act demonstrating the Parliament's concern for the welfare of Community citizens. One goal for the Parliament was that the ECJ could incorporate the Declaration of Fundamental Rights and Freedoms into the Community legal order, either gradually or in one go.⁴⁰ The ultimate aim for the Parliament was to invite the other Community institutions to associate themselves formally with the declaration and also that the declaration could be incorporated into the Treaties during the next Intergovernmental Conference. Today, one can say that the Declaration has had little success in its ultimate goals. None of the Community institutions have been associated themselves with the Parliament's Declaration of 1989. It has been suggested that the Declaration could be seen as a basis for adopting in the future a Community catalogue or a bill of rights, since it was formulated on the basis of the language of national constitutions and instruments to which the Member States are parties. Others seem to reject the idea that the Declaration could be used as basis for a Bill of Rights in the EU. Anyhow, the Parliament's Declaration of Fundamental Rights and Freedoms was the first of its kind and also so far the only serious attempt in trying to adopt a fundamental rights catalogue for the Community.

In 1990, the Commission formally asked the Council to approve accession and to allow the Commission to negotiate the Community's accession to the ECHR on the basis of article 235.⁴¹ The Commission argued:

“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 enjoy a sort of “immunity” from the Convention”.

³⁹ Weiler, 1991, Vol. II, p. 622.

⁴⁰ 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).

⁴¹ Commission Communication SEC (90) 2087 of 19 November 1990.

In the Opinion of the Commission, this gap can be filled by an accession of the Community to the ECHR. An accession would not preclude a further development of the fundamental rights protection within the Community. This idea of accession to the ECHR is a response to a long-felt need to ensure the respect for human rights in the application of community law. The result of accession would affect the legal systems of the Member States only as regards the scope of a Community legal act and that Community acts would be subject to review by the Convention authorities in accordance with the ECHR. The fact that the Community has not acceded to the ECHR raises special problem, accord to the Commission, when a Member State implements a Community legal instrument. First of all, the Community is not subject to the review mechanism of the Convention authorities against the Community, which is responsible for the contested act. Secondly, in implementing obligations of Community law, Member States are outside the scope of jurisdiction of the Convention authorities.⁴² Once again, the Commission's accession proposal was supported by the European Parliament.⁴³ As a result of the new proposal from the Commission, the Council of the Union requested an Opinion from the ECJ on whether an accession to the ECHR would be compatible with the EC Treaty.

In conclusion, the debate on how the protection of fundamental rights could be improved within the Community legal order started already in the early 1970s. This discussion is the result of the fact that the original Treaties did not contain any specific references to the protection of fundamental rights. Apart from ECJ jurisprudence on the protection of fundamental rights, the political institutions have taken a wide interest in strengthening the protection of fundamental or human rights within the Community. Especially the European Parliament and the Commission has been fairly active in promoting the strengthening of fundamental rights protection. The discussion has involved two alternative ways of improving the status of human rights within the Community. One desirable solution has been an accession of the Community to the ECHR. The other possibility has been the adoption of a Bill of Rights for the Community. Neither of these possibilities has gained enough support to be a reality for the Community. Both of these alternatives involve certain political as well as juridical problems. The European Parliament has supported both of these

⁴² Ibid.

⁴³ OJ C 60/29 (1994).

alternatives. The Commission has on the other hand felt that the option of accession would be a better solution for the Community as a result of the political obstacles involved with the idea of a Bill of Rights. The Commission supports the idea of Bill of Rights for the Community in the long run, but not as a short-term solution. In the 1990s, the discussion has taken new interest in developing the fundamental rights protection. Next I will turn to the to the discussion of problems and arguments in favour involved with a possible adoption of a Bill of Rights and with an accession of the Community to the ECHR. I will also follow-up the recent developments as regards the alternatives involved in strengthening the fundamental rights protection in the European Union.

2.2. Adopting a Human Rights Bill

2.2.1. Objective of adopting a Human Rights Bill

The option of adopting a written catalogue of fundamental rights has been on the agenda of the EC/EU ever since the mid 1970s. As noted above, a catalogue of fundamental rights has not yet seen daylight within the European Union. Discussions on the adoption of a Bill of Rights have led nowhere. 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. Still the Treaties do not contain a constitutional basis for the protection of human rights within the European Union. What would be the objective of adopting a Human Rights Bill? The discussion on the reasons behind the adoption of a Bill of Rights is focused on two issues. The first issue is the symbolic note such a fundamental rights catalogue would play within the Union. The idea behind it would be that a Bill of Rights would create a stronger commitment to fundamental rights. Since the early 1990s, human rights have gained increasing importance considering the external policies of the EU.⁴⁴ This being the case, it seems only natural that the EU should commit itself even stronger to fundamental rights within the Community legal order. The second issue would be the focus on legal certainty, whereby individuals can assert their basic rights. The Commission has argued already in 1979 that the “European Citizen has a

⁴⁴ Brandtner & Rosas, 1998, p. 468.

legitimate interest in having his rights vis-à-vis the Community laid down in advance”.⁴⁵ The Commission noted in its Memorandum on the accession of the European Communities to the ECHR that the lack of a written catalogue of fundamental rights was one of the “shortcomings affecting the legal order of the Community”.⁴⁶ The Commission felt that a creation of a special Bill of Rights would be the best solution to remedy the lack of a written catalogue, but it rejected the idea for the time being. The Commission felt that that it would be a long and exacting task to draw up such a Bill.

The lack of a written catalogue of fundamental rights within the Community legal order has also been subject for concern in national courts, especially in Germany. In the first so called Solange case, Solange I,⁴⁷ the German Federal Constitutional Court refused to accept the supremacy of Community law due to the reasons that German Constitutional law protected certain fundamental rights which were not equally protected within the Community legal order. Therefore the German Court decided, although that it was not entitled to decide upon the validity of legal acts of the Community, that it could declare a Community legal act as inapplicable if fundamental rights were violated. The Constitutional Court stated that fundamental rights form an inalienable feature of the German Constitution. The Court stated that it would control the compatibility with German Constitutional law as long as the Community is lacking a codified catalogue of fundamental rights. In the second Solange case, Solange II,⁴⁸ the German Constitutional Court was convinced of the protection of human rights within the Community 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 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. The Constitutional Court had modified its position due to certain political and legal developments in the Community.

⁴⁵ Bulletin of the EC – S 2/79.

⁴⁶ Bulletin of the EC – 2/79.

⁴⁷ Internationale Handelsgesellschaft CMLR, 1974:2, p. 540

In 1993, the Federal Constitutional Court warned once again that it would “maintain an effective protection of basic rights for the inhabitants of Germany....against the sovereign powers of the Communities’ in the so called Maastricht case.⁴⁹ However, the Constitutional Court declared that it would exercise its jurisdiction concerning applicability on secondary Community legislation in Germany in a “relationship of co-operation” with the ECJ. The German Federal Constitutional Court seems to be prepared to declare Community legislation inapplicable if it violates fundamental rights contained in the German Constitution. The decisions by the German Federal Constitutional Court illustrate the importance of respecting fundamental rights within the Community legal order. They are also representing a clear threat to the supremacy of Community law when fundamental rights are threatened. The German Federal Constitutional Court is obviously not satisfied with the fundamental rights protection and is seeking for a more clear indication of which rights are protected in Community law.⁵⁰ The Court is obviously concerned with the lack of legal certainty in the Community legal order in protecting human rights.

A Bill of Rights would ensure a duty to protect fundamental rights in situations where the interest of the individual and the objectives of the Union differ. It has been argued that rights contained in the ECHR are not relevant for the Community and that it therefore does not meet the requirements of the Community. Therefore, the EU should adopt a Bill of Rights of its own as a way of strengthening the fundamental rights protection within the Community legal order. One principal advantage of adopting a Union catalogue of fundamental rights lies in the opportunity to take into account the second- and third-generation rights and not merely civil and political rights.⁵¹ For example, the 1989 European Parliament Declaration of Fundamental

⁴⁸ Wunsche Handelgesellschaft CMLR, 1987:3, p. 225.

⁴⁹ Brunner v The European Treaty CMLR, 1994:1 p. 57

⁵⁰ Betten & Grief, 1998, pp. 66-68.

⁵¹ There has been a tendency to categorise international human rights into three “generations” of human rights. With second generation human rights is meant economic, social and cultural rights and by third generation rights is meant rights such as the right to peace, the right to development and environmental rights. The second generation of human rights is often seen as objectives and is said to require positive action by the state part. Third generation rights are often more seen as collective rights relating to global structure problems. Rosas & Scheinin , 1999, p. 49.

Rights and Freedoms did include at least second-generation rights in its proposal for a Bill of Rights for the Community.⁵²

Some proposals have been made to strengthen the role of the ECJ in advocating a more general right to intervene in order to protect fundamental rights in relation to *all* subject matters in Member States. This is based on the idea that the Community law is supreme in relation to national legal orders. This would imply that all matters, including those falling outside the scope of Community law, would be governed by the ECJ in protecting fundamental rights.⁵³ In its present state, Community law does not have any significant role with regard to protection of fundamental rights outside the scope of Community legal order. This idea would indicate a need for a clear recognition in the Treaties for a Community Bill of Rights to be applicable under *all* circumstances irrespective of the subject matter involved. However, this model would only complicate the relationship between the ECJ and the European Court of Human Rights, acting in strictly national matters, as to their respective responsibilities for the enforcement of human rights in the Union Member States.⁵⁴ The Parliamentary Declaration of Fundamental Rights and Freedoms stated in article 25 (1) that “this declaration shall afford protection for every citizen in the field of the application of Community law”. The best solution for the development of fundamental rights protection within the Community legal order would be to afford protection in the field of the application of Community law. This, for the reasons to avoid further confusion between the two supranational legal orders in protecting human rights within Member States concerning national matters.⁵⁵

In the opinion of judge Lenaerts⁵⁶, fundamental rights contained in the ECHR could be included as part of the constitution of the Community legal order by reference. In acting outside the scope of Community law, Member States would remain subject to the control machinery of the European Court of Human Rights.⁵⁷ The proposal by

⁵² Twomey, 1994, p. 129.

⁵³ Lenaerts, 1991, p. 373.

⁵⁴ *Ibid.* p. 374.

⁵⁵ *Ibid.*

⁵⁶ Koen Lenaerts is a judge of the Court of First Instance.

⁵⁷ The question arises whether the fundamental rights protection can be coherent within these two supranational legal orders when Member states act both within the framework of community legal order and also outside the scope of Community law. According to the proposal by Mr Lenaerts, this objective of coherence can be reached. In acting outside the scope of Community law, the ECHR

judge Lenaerts would include the ECHR and any future extension of the rights guaranteed in additional protocols as well as the interpretation by the European Court of Human Rights. According to this proposal, the protection offered by the ECHR is justified from the standpoint of the Community legal order, since all Member States are parties to the ECHR. In the view of judge Lenaerts, this would present two advantages. First of all, the human rights protection offered by the ECHR including the case law of the Court of Human Rights would be incorporated as part of the constitution of the Community legal order ensuring a common base level for the safeguarding of fundamental rights protection as a whole in Europe. Secondly, coherence could be achieved with regard to the two distinct supranational legal orders, both in relation to the subject matters, which are covered by Community law, and in relation to matters falling outside the scope of the Community legal order. In other words, according to judge Lenaerts, coherence could be reached by the enforcement of the ECHR control machinery when Member States act outside the scope of Community. On the other hand, when Member States act within the Community legal order, normal judicial protection by national courts or by the ECJ would ensure that the ECHR part of the Community constitution would be observed. This would mean that the ECJ would be bound by the case law of the European Court of Human Rights on the basis of the Community constitution in order to ensure coherence of interpretation by the two supranational courts protecting human rights. In other words, judge Lenaerts would avoid drawing up a new separate fundamental rights catalogue. Instead he suggests that the Community should commit itself by law making to an existing catalogue of fundamental rights, notably to the ECHR.

The obvious advantage in creating a special Bill of Rights for the Community is that it can be adapted fully to the particular characteristics and needs for the European Union. In creating a Bill of Rights of its own for the Community, a starting point is to take a look at the international provisions which has been signed or ratified by the Member States. It is also possible to include other rights than the rights included in

control machinery will operate in relation to the Member States as it has always done. On the other hand, when Community institutions or Member States act within the scope of Community law, the normal mechanisms of judicial protection offered by national judiciaries and/or the Court of Justice will ensure that the ECHR as part of the Community constitution is being observed. If the European Court of Human Rights has interpreted a fundamental right and the issue is raised before the ECJ, then ECJ will be bound, on the basis of the Community constitution, to adopt the interpretation of the European Court of Human Rights. Lenaerts, 1991, p. 377-381.

international human rights conventions. In other words, the existing body of international provisions on fundamental rights can be used as a source of inspiration. The idea was to present declaratory-codifying document reflecting *lex lata*. The drafting Committee drew inspiration from the languages of the different constitutions and international conventions which all Member States are parties too in the same manner as the ECJ has developed its jurisprudence on fundamental rights. In other words, the Declaration was meant to reflect and constitute a basic list fundamental rights deriving from the sources mentioned by the ECJ.⁵⁸

The protection of fundamental rights can best be realised if citizens are aware of their rights. It is most important that fundamental rights must be visible. In the current state, the lack of visibility is a serious problem concerning legal certainty. One of the objectives in creating a special Bill of Rights is naturally to tackle the problem of visibility. Creating and adopting a Bill of Rights specially designed for the EU can certainly do this. However, one must not underestimate the legal and political problems involved in creating such a Bill of Rights for the Union. The big problem would be the content of such a Community catalogue of fundamental rights.

2.2.2. Arguments in favour of a Bill of Rights

At a recently held Conference⁵⁹ on Fundamental Rights in Europe jointly by the Commission representation in Germany and the German Government, German Justice Minister Herta Däubler-Gmelin presented a German government initiative to draw up an EU Charter of fundamental rights. The rights contained in the proposal for a European Charter of Fundamental Rights are intended to be binding for European Union institutions, to ensure clear, transparent and enforceable rights for the citizens of the EU. In addition, adopting a fundamental rights charter would according to the German Government make it clear that the system of Community law in the EU is based on shared value judgements that include fundamental and civil rights common

⁵⁸ 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...". Weiler, 1991, vol. II, p. 623.

⁵⁹ The Conference was held in Cologne on 27 April 1999

to the Member States. The Charter of Fundamental Rights is also intended promote the strengthening of European awareness among EU citizens. According to the German proposal, 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 object of this chapter is to discuss the advantages connected to the idea of drawing up a Bill of Rights for the European Union.

As already noted above, one of the principal advantages of drawing up a separate catalogue of fundamental rights/Bill of Rights for the EU lies in the opportunity to take into account the advances in human rights protection since the ECHR was signed in 1950.⁶⁰ Another principal advantage is that a catalogue could be specially designed for the requirements of the Community. It has been suggested that this could be done in conjunction with an accession to the ECHR or as an alternative to accession.⁶¹ The option of drawing up a separate Bill of Rights has the advantage that human rights could be considered as equal to the economic freedoms granted by the EC Treaty. Furthermore, adopting an explicit Bill of Rights would strengthen the position of individuals in relation to the Union and its institutions as well as in relation to the Member States acting within the scope of Community law. An enforceable catalogue of fundamental rights would also ensure that the courts would be under a duty to protect the fundamental rights particularly in the field of Community law where the interests of the individual and the objectives of the Union can differ. Clearly, an adoption of a Bill of Rights would ensure the visibility and transparency of the rights of the citizens and make it clear that human rights protection within the Community legal order is based on common values among the Member States. At the present stage, there appears to be a need to establish a non-binding Charter of Fundamental rights in order to make the protection of fundamental rights more visible to the Union's citizens. Obviously, the idea is to strengthen fundamental rights protection by creating enforceable fundamental rights for the citizens of the Union in the long run.

⁶⁰ Twomey, 1994, p. 129.

⁶¹ In the Commission memorandum in 1979, the Commission stated that an accession of the European Communities to the ECHR does not form an obstacle to the preparation of a separate Community Catalogue. The ECHR is only a minimum code and does not prevent the contracting parties to develop a higher standard of fundamental rights protection. Bulletin of the EC – S 2/79.

The advantages of adopting a Bill of Rights for the Union can be summarized as follows: First of all, it would emphasize the importance of fundamental rights and remove any remaining doubts about their relevance in Community law. Secondly, the Bill of Rights could be adopted strictly according to the requirements of the Union. Thirdly, it would enhance legal certainty and would of support to the judiciary. In addition, it would enable the exercise of economic and social rights, most of which would require legislative measures to take affect and therefore be more completely assured. These are the advantages summarized already in 1976 by the Commission in its report on protection of fundamental rights as Community law is created and developed.⁶² These arguments from the 1970s are very much still valid.

Apart from the advantages in drawing up a Bill of Rights for the Union, there are certainly problems involved in such a written fundamental rights catalogue. As noted already in the 1970s by the Commission, codifying fundamental rights can hardly be realized in a short period of time. This assumption has also recently been made during the German presidency.

2.2.3. Problems involved in adopting a Bill of Rights

What are the main problems involved in drawing up a bill of rights for the Union? It has been argued that a Bill of Rights should be adopted based on the common tradition of fundamental rights protection within national constitutions as well as on international instruments to which the Member States are parties too. It has also been argued that an accession of the Community to the ECHR does not cancel the need for an independent Community Catalogue of fundamental rights, since the ECHR does only set a minimum standard of protection.⁶³ The difficulties involved with such an adoption of a Bill of Rights are not merely judicial, but rather political. How can agreement be reached among the Member States on which rights should be included in such a catalogue of fundamental rights? It might be difficult for certain Member States to accept a binding codification of fundamental rights for the Union institutions as well as for the Member States acting within the Community legal order, especially if the rights included differ from their own national constitutional traditions. Defining

⁶² Bulletin of the EC – S 5/1976.

⁶³ Weiler, 1995, p. 80.

a Bill of Rights is therefore very much a question of reaching compromises among Member States. In other words, the risk is adopting the lowest common denominator of fundamental rights protection. The fear among certain scholars is a weakening rather than improving the current protection of fundamental rights protection. Further, O’Leary seems to be of the opinion that adopting a Bill of Rights “might give rise to additional differences in the fundamental rights standards guaranteed by the ECJ Justice and the European Court of Human Rights”.⁶⁴

One of the principal concerns among certain scholars with adopting a special Bill of Rights for the Union is that Europe generally would start to move in different speed concerning fundamental rights protection in Europe as a whole. It would mean establishing a dual system of human rights protection, one for the Community and one within the framework of the European Council. The European model, as Lenaerts calls it, rests on a division of human rights protection between two supranational legal orders.⁶⁵ Another fear is that the achievements of the judicial authorities within the ECHR might be weakened as a result of a possibility that individuals start to seek redress from the ECJ instead in breaches of fundamental rights protection within the Member States of the Union. In the opinion of Toth, spitting up of the present system of a single set of human rights in Europe would undermine the authority of the ECHR.⁶⁶

Turning now to the difficulties concerning the material content involved in drawing up a Bill of rights for the Union. It is not the intention to discuss exactly which fundamental rights should be included. One of the most problematic issues in drawing up a Bill of Rights would be whether the catalogue should only include civil and political rights or whether it also should cover economic and social rights. The problem lies in whether Member States could agree on the content of such a Bill of Rights as it is unclear what constitutional traditions are common to the Member States. The risk of conflicting opinions among Member States on what should be contained in such a Bill of Rights could in fact have a limiting affect on the content.

⁶⁴ O’Leary, 1996, p. 375.

⁶⁵ Lenaerts, 1991, pp. 371-372.

⁶⁶ Toth, 1997, p. 501.

Clearly, the option of adoption of must ensure flexibility, which is very essential in a Union composed of different states.

In the discussion on the protection of fundamental rights with the European Union, an issue which has to be considered is whether the classical concept of fundamental rights alone would be codified or whether second generation human rights should be included in strengthening the fundamental rights protection. In a study on 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 to include social fundamental rights.⁶⁷ Social rights are not only less capable of being formulated in a clear and unequivocal manner than protective rights, but they are also less susceptible for direct application and enforcement by the courts. By protective rights he meant classical civil and political rights. He argued that discussion on the protection of fundamental rights within the EC is based on the requirements of the rule of law and which the Court therefore can protect. The inclusion of social rights into a catalogue of fundamental rights would probably have an effect on the judicial protection according to Bernhardt.⁶⁸

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 Bill of Rights. This, due to the fact that it would be a difficult for the Member States to agree on the definition economic and social rights in the short term. The general feeling was that agreement could not be reached between Member States particularly with regard to economic and social rights. A Community Charter of Fundamental Social Rights of Workers is the closest the EU has got with regard to a catalogue of fundamental social rights. The Charter was adopted by eleven of the Member States. The United Kingdom did not adopt the Charter. The basis for evaluating certain social rights as fundamental rights can be traced in the ECJ's case law and in the Preamble to the SEA.⁶⁹

⁶⁷ Bulletin of the EC – S 5/76, Annex.

⁶⁸ Ibid.

⁶⁹ According to the Preamble, Member states are “determined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the

2.3. *Other alternative means to improve the protection of fundamental rights*

2.3.1. *Accession to the European Convention on Human Rights?*

Opinion 2/94 of the European Court of Justice, regarding the competence for the Community to accede to the ECHR, raised once again the attention on the relationship between the European Community and the ECHR. The request for an opinion of the Court came from the Council prior to any decision to be taken to open negotiations with the authorities of the Council of Europe regarding formal accession the Community to the ECHR.⁷⁰ The Council requested the ECJ to give its opinion whether an accession by the Community would be compatible with the Treaty establishing the European Community. The Council was of the view that a request of an opinion was necessary despite the fact that any text of an agreement did not yet exist. The Court divided the question on admissibility between competence and compatibility. Due to the fact that any formal decisions to start accession negotiations had not been taken, the Court dealt with the request as an “envisaged agreement” and ruled therefore that the question of competence of accession was admissible as required by the former article 228(6). This article provides that the Court may give an opinion on an envisaged agreement to determine its compatibility with the Treaty establishing the European Community. Despite the fact that any agreement on accession did not exist, the court argued on behalf on admissibility by turning to the purpose of the request. Amongst Member States, the Commission and the Parliament, there was different opinions concerning the admissibility for a request of an opinion.⁷¹ The Court argued that the Community organs as well as the Council of Europe have a legitimate interest in knowing in advance whether or not the Community has the competence to accede to the convention. On the question on compatibility, the Court ruled that it had insufficient information to be able to give an opinion. In order to answer the question on compatibility, the Court stated that it in particular lacked information regarding the arrangements by the Community on how it envisages

Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice”. Szyszczak, 1995, p. 212.

⁷⁰ Borrows, 1997, p. 58.

⁷¹ The Commission, Parliament, Belgium, France, Germany, Italy and Portugal argued in favour of an envisaged agreement in accordance with article 228 (6). Ireland and the United Kingdom were of the opinion that a request was not admissible. The Danish, Swedish and the Finnish governments raised the question whether a request was premature. Opinion 2/94, pp. 7-9.

submitting to the present and future judicial control established by the ECHR. The Court had not been given sufficient information as to the solutions envisaged to the submission of the Community to the jurisdiction of an international court.

The Court was of the opinion that the Community has no 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 on the following reasons that the Community has no competence on acceding to the ECHR “as the Community law now stands”:⁷²

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 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.

It was suggested that the former article 235 of the EC Treaty could be used as the legal basis for an accession.⁷³ Amongst Community institutions and Member States there was no real consensus regarding the legal base for a Community accession. France, Spain, the United Kingdom and Ireland argued that there was no legal base in the Treaty for an accession. They argued that respect for human rights is not an objective for the Community. On the other hand, Austria, Belgium, Germany, Greece, Italy, Finland and Sweden underlined that the protection of human rights is very much

⁷² Opinion 2/94, para. 34-35.

⁷³ Article 235 stated that “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”.

an objective of the Community and that external judicial control is necessary for the protection of individual fundamental rights. The Council observed in its request for an opinion that the Treaty does not confer any specific powers on the Community in the field of human rights. Human Rights are protected by way of general principles of Community law as stated in article F (2) in the Maastrich Treaty.⁷⁴ The Council argued also that article 235 could be used as the legal basis for an accession. The “implied powers” article provides a legal basis for Community objectives when more specific legislative provisions are not available. However, the Court found that article 235 cannot form the legal basis for an accession. 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.⁷⁵ The implied powers doctrine cannot be used as a substitute for treaty amendment. The Court stated clearly 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.

2.3.2. Arguments in favour and problems with an accession

An accession by the Community to the ECHR could provide a constitutional basis for the protection of fundamental rights within the Community legal order. It would show a firm commitment to the protection of human rights by the Community by ratifying a legally binding human rights convention. As a result of accession, Community measures could be challenged before the European Court of Human Rights. Furthermore, the Community institutions including the ECJ would be subject for review of an independent and impartial human rights court. There would be a written catalogue which would enhance legal certainty and therefore also a clear legal basis for the Court’s decisions.⁷⁶ The problem with divergent interpretations between ECJ and the European Court of Human Rights could also be solved. The ECJ would be bound by the jurisprudence of the European Court of Human Rights. Now, the ECJ draw “inspirations” and “guidelines” from the ECHR in interpreting the protection of

⁷⁴ Opinion 2/94, para. 8.

⁷⁵ Borrows, 1997, p. 60.

⁷⁶ Toth, 1997, p. 503.

fundamental rights as general principles of Community law. This might lead to different interpretation of the same rights under the ECHR. An accession by the Community would eliminate the risk of a divided interpretation of human rights jurisprudence in Europe.⁷⁷ The symbolic value of a formal accession cannot be underlined too much, as it would demonstrate to the citizens of the Union and also to others that human rights protection is taken seriously within the European Union.⁷⁸

However, in its opinion on accession, the ECJ did not address the question whether an accession would be incompatible with former articles 164 and 219 of the EC Treaty. The present article 220 (former article 164) of the Treaty states that “the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed”. Also the present article 292 (former article 219) states that “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”. In the opinion 1/91⁷⁹, the Court did in fact accept that an international agreement which submits the Community including the Court to binding decisions of another court to be compatible with existing Community law. However, the ECJ added that this is only the case when another court interprets the agreement and does not interfere with the interpretation of Community law itself.⁸⁰ As a result, O’Leary finds it difficult to contend that accession to the ECHR is not a realistic option “due to the potential threat to the Court’s jurisdictional autonomy”.⁸¹

Opinion 2/94 shows that there is a disagreement among Member States and Community institutions on whether an accession of the Community is compatible with Community law. The Commission, the Parliament as well as the Austrian, Belgian, Danish, German, Finnish, Greek, Italian and Swedish governments are of the opinion that an accession would be compatible with present Treaty provisions. The Parliament, for example, referred to opinion 1/91 of the Court in which the ECJ recognized that the Community could be submitted to decisions of an international

⁷⁷ Kokott & Hoffmeister, 1996, p. 667.

⁷⁸ O’Leary, 1996, p. 369.

⁷⁹ ECR I – 6079 (1991).

⁸⁰ In the 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”.

court. The submission to an international court in matters concerning human rights is consistent with the development of the Community legal order, which is no longer only concerned with economical matters but also with the citizens of the Union. The Parliament stressed the importance of being able to bring direct action before an international court if a Community institution act is not compatible with human rights and argued that an accession does not question the jurisdictional competence of the ECJ concerning Community law. Also the Commission stressed that it cannot be asserted that the control machinery of the ECHR could be a threat to the autonomy of the Community legal order. On the other hand, the French, Portuguese, Spanish, Irish and the government of the United Kingdom argued that an accession would be incompatible with the Treaty and in particular with articles 164 and 219. They argued that in accordance with the Court's opinion 1/91, the envisaged accession questions the autonomy of the Community legal order and the monopoly of the jurisdiction of the ECJ in interpreting Community law. For example, the Spanish government argued that control machinery of the ECHR would not simply interpret but also examine the legality of Community law in the light of the ECHR, which would have impact on the ECJ.

Also amongst scholars there are divergent opinions if an accession would be compatible with the present articles entrusting the ECJ alone to be the public "watchdog" of legality and the final interpreter of Community law. For example, in the opinion of Toth, it seems almost inevitable that the European Court of Human Rights would get involved with interpretation of Community law, if only to establish whether Community legislation or practice is compatible with the ECHR. According to him, this might be incompatible with the present rules entrusting the ECJ alone to be the final interpreter of Community law.⁸² On the other hand, one could argue that this would precisely be the objective of an accession. As noted above, accession would mean subjecting the ECJ to the control machinery established by the ECHR. This would mean that the European Court of Human Rights would interpret Community law concerning human rights in accordance with the objectives of the ECHR. On the other hand, the interpretations of the European Court of Human Rights will only assist the ECJ in its task of defining fundamental rights as a special category

⁸¹ O'Leary, 1996, p. 370.

⁸² Toth, 1997, p. 503.

of general principles of law. At present the ECJ interprets the ECHR in accordance with the objectives of Community law. In other words, the European Court of Human Rights would give priority to the objectives of the ECHR over Community law. However, as noted above, the Court addressed the question of compatibility of an accession with the Treaty provisions by stating that “in order to fully answer the question whether accession by the Community to the Convention would be compatible with the rules of the Treaty, in particular with articles 164 and 219 relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention”.⁸³ As a result of lack of information, the Court did not give an answer to the question of compatibility of an accession with the Treaty establishing the Community. The only conclusion that can be drawn for the opinion is that there exist different opinions among Member States and Community institutions on the question on compatibility. The question of compatibility may therefore also be an obstacle for accession alongside with the question of competence.

Accession does also raise some questions concerning institutional and technical problems. The question concerning the juridical-technical issue of an accession can be divided in three parts. First of all, an accession would require an amendment in the EC Treaty provisions stating that the Community is a contracting party to the ECHR and that all the Community institutions would be bound by the ECHR. This would be the legal basis within the Community legal order for an accession of the Community to the ECHR. An accession would also incorporate the ECHR into the Community legal order.⁸⁴ This would have institutional as well as constitutional implications as a result of accession as the ECJ implied in its opinion 2/94. It would also be necessary to amend the Convention and the Protocols, which are currently open only for Member States of the Council of Europe. An external formal requirement would be to adopt an additional protocol to the ECHR, which would make it possible for the EC to become a contracting party to the ECHR. This additional protocol should take into account the role for the EC in, for example, the control organs established in accordance with the convention. The Council of Europe and the ECHR does only envisage states as

⁸³ Opinion 2/94, para. 20.

⁸⁴ Scheinin & Ojanen, 1996, p. 25 (unpublished material).

members and signatories. One has also to keep in mind the role of the Community in, for example, the European Court of Human Rights. In the opinion 2/94, the Council suggested various possibilities regarding the role of the Community in the Human Rights Court.⁸⁵ However, this is more a technical matter rather than a real obstacle for an accession. An accession would however require a large support not only from the Member States of the European Union, but also from the Member States of the Council of Europe. This means not only a unanimous decision from the European Union part. Another question has been whether or not the Community should also become a member of the Council of Europe and should the Community accede to the ECHR as a whole including all the additional protocols. The Council felt in the opinion 2/94 that the Community only should become a contracting party to the convention and not become a member of the Council of Europe. Discussion concerning accession has also raised the question whether the Community should accede to all of the convention provisions and additional protocols. The Commission has argued that the Community should accede to the convention as a whole.

Amongst certain Member States there has been a fear that an accession would have the affect of extending the Community competence and entrust the ECJ to supervise national activities and compatibility with fundamental rights. The Commission has responded that by underlining that accession would only relate to field of competence of the Community and that ECJ would not be entrusted as a result of accession to review matters falling outside the scope of competence of the Union.⁸⁶ It has been argued that only the provisions of the ECHR including the protocols would affect the Member States in so far as community law is concerned. In other words, the Community and the Member States would only be bound by the Convention within the limits of their respective powers. The Community would be responsible for violating human rights falling within its competence and Member States as members of the Council of Europe and contracting parties to the ECHR within their own competence. However, this would require a precise determination of the division of competence in relation to other contracting parties and to the Convention authorities between the Member States and the EU before the Convention authorities.

⁸⁵ For example, an appointment of a permanent judge with special status, entitled to vote only in cases concerning Community law. Also the possibility of not appointing a judge representing the Community was one alternative. Opinion 2/94, para. 5.

In conclusion, there seems to be a number of reasons why the European Community should consider the possibility of an accession to the ECHR. Opinion 2/94 of the ECJ does not exclude a possibility of accession in the future. In its opinion, the Court only stated that an accession couldn't take place without a Treaty amendment. The legal arguments in favour of accession has been summarised by the Commission as follows: 1) The legal acts could be made subject for review mechanism in accordance with the ECHR, which would enable the European Court of Human Rights to review judgements of the ECJ for compliance with the convention. 2) Accession would afford citizens better protection of their fundamental rights against Community measures. 3) Accession would concern only the areas covered by Community law. 4) Community accession would be a complementary rather than an alternative measure to the idea of adopting a fundamental rights catalogue specific to the Community.⁸⁷ In other words, the Commission feels that accession does not exclude the possibility of adopting a Community catalogue of fundamental rights. However, the option of an accession does also raise some difficulties. Despite the possible problems connected with institutional and technical issues of accession, the problem lies within the willingness of Member States to reach agreement of whether an accession is the best possible way of strengthening the human rights and fundamental rights protection within the Community legal order.

Certainly, if an accession of the European Community/Union to the ECHR is a real option in the future, it should also be considered whether the EC/EU should accede to some other human rights conventions as well. One natural possibility would be to adhere to the 1961 European Social Charter. As an additional mean to strengthen the human rights protection, it would be worth considering the possibility to incorporate with a Treaty amendment also other human rights conventions into the Community legal order without a formal accession. The 1966 UN Covenants on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights could be an alternative as already suggested by the European Parliament in 1984.⁸⁸

⁸⁶ O'Leary, 1996, p. 370.

⁸⁷ Commission communication SEC (90) 2087.

⁸⁸ Scheinin & Ojanen, 1996, p. 36.

2.3.3. Further development by the ECJ

One possible option is continuing of the status quo in leaving it to the ECJ to continue to develop the fundamental rights protection within the European Union. The Treaty of Amsterdam did affirm the Unions commitment to human rights and fundamental freedoms by stressing the respect of fundamental rights guaranteed by the ECHR and by common constitutional traditions of the Member States as general principles of Community law. The Treaty of Amsterdam did not however introduce an explicit recognition of particular fundamental rights, but continued instead with the previously adopted system of references to international instruments protecting human rights. For example, the Preamble and article 136 of the EC Treaty refer to fundamental social rights in referring to the 1961 European Social Charter and to the 1989 Community Charter of the Fundamental Social Rights of Workers. Article 136 of the EC Treaty does determine social rights as guidelines for the activities of the Community as well as for the Member States. As noted already in chapter one, the Treaty of Amsterdam did make changes to the jurisdiction of the ECJ affecting the protection of fundamental rights. According to article 46 of the EU Treaty, it is within the jurisdiction of the court to ensure the protection of article 6 (2) is observed by the institutions of the European Union. In other words, the protection of fundamental has perhaps been clarified, but still the Treaty of Amsterdam does not recognize specific rights to be protected within the legal framework of the Community. The Treaty of Amsterdam has however 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”.⁸⁹

The system of references, leaving it to the ECJ to develop further the fundamental rights protection, has the advantage that it does not require difficult political decisions in order to reach agreement on, for example, the adoption of a Bill of Rights. The chosen solution in the Amsterdam Treaty is flexible for the ECJ in that it is not bound by the ECHR and the court can interpret and adapt these general principles to the needs and objectives of the Community. However, the system of references does not rectify the problem of legal certainty. The ECJ uses the ECHR as “guidelines” and

⁸⁹ Report of the expert group on Fundamental rights, 1999, p. 11.

“inspiration”. The Convention does only “form a integral part of the general principles of law whose observance the Court must ensure”. In the opinion of Toth, it is however 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”.⁹⁰ Furthermore, the Court cannot determine the cases and issues brought before it and therefore the development only on a case by case basis.⁹¹ Therefore, the protection of fundamental rights is developing only on case by case basis. The Court’s decisions can only operate on the *ex post facto* basis, which does not ensure legal certainty.⁹² Continuing on the present system of fundamental rights protection does not make it possible to bring complaints against the Community institutions before the European Court of Human Rights, because the Community is not a contracting party. The idea with accession is precisely based on the possibility for individual complaints against Community institutions on alleged violations of human rights. As a result of accession, the Community institutions including the ECJ would be under the same international control as the Member States. Continuing the system of references to international human rights instruments in protecting fundamental rights within the Community legal order has been described as disappointing, since the Treaty of Amsterdam did not include a list or Charter of fundamental rights and no commitment was made to proceed with the idea of accession of the Community to the ECHR.

3. The Intergovernmental Conference

On 29 March 1996, the Intergovernmental Conference (IGC) was opened in Turin. The Council of Europe adopted a declaration outlining the objectives for the Conference. Amongst the objectives for the Conference was the need to bring the Union closer to its citizens, to make the functioning of the institutions more efficient and democratic. These issues were also commented on in the final Report of the Reflection Group. The issue of human rights and fundamental freedoms was also covered in the report, which was delivered on 5 December 1995.⁹³ The Reflection

⁹⁰ Ibid, p. 494.

⁹¹ O’Leary, 1996, p. 369.

⁹² Toth, 1997, p. 495.

⁹³ A strategy for Europe. Final Report from the Chairman of the Reflection group on the Intergovernmental Conference, Brussels, 5th December 1995.

Group felt that during the current process of European construction, there is a need to ensure full observance of fundamental rights both in the relationship between the EU and Member States and between the States and individuals. It was suggested that an article should be inserted into the Treaty providing for penalties in case where a Member State commits serious and repeated breach of fundamental human rights or basic democratic principles.⁹⁴ The Reflection Group suggested the possibility of including in article F (2) an obligation for Member States to respect human rights and fundamental freedoms to be connected with certain sanctions for Member States in breach of respecting fundamental rights. The report also expressed the majority feeling that the Community should accede to the ECHR in order to address the present inconsistency that the Community institutions are not subject for review by the European Court of Human Rights. Also the advantages of adopting a Bill of Rights were pointed out by some of the members reflecting the divergent views among the Member States. It was felt that that only by accession by the Community to the ECHR or by adopting a Bill of Rights would confer additional protection to the present protection of fundamental rights within the Community legal order. All the relevant actors during the preparatory process had addressed the issue of human rights and fundamental freedoms including the Community institutions.

As noted above, the idea of adopting a Bill of Rights for the European Union has been an objective for the Commission since the late 1970s. However, the Commission has not pursued the idea mainly because there are several difficulties involved in drawing up such a bill. In 1996, Mr Marcelino Oreja (member of the former Commission) stated “the idea of the Union having its own list of fundamental rights has unfortunately been set aside for good”. Mr Oreja was responsible for monitoring the IGC starting in 1996 aiming to revise the Treaty of European Union. At that time, the commissioner felt that it is still a possibility for the Community to join the ECHR or to incorporate the provisions of the convention into the Treaty by way of reference without formally being a contracting party to the Convention. The Commission had argued in favour of an accession to the ECHR already in 1979 and repeated its position in 1990. The Commission felt that an accession would not be incompatible with an establishment of a specific catalogue of fundamental rights for the citizens of

⁹⁴ Ibid., p. 20.

the European Union. In its report on the operation of the Treaty of European Union,⁹⁵ the Commission stressed the need for a fundamental text summarizing the rights and duties of citizens. The Commission stated: “the Treaty makes citizenship an evolving concept, and the Commission recommends developing it to the full. Moreover, although the task of building Europe is centred on democracy and human rights, citizens of the Union have at this stage no fundamental text, which they can invoke as a summary of their rights and duties. The Commission thinks this gap should be filled, more especially since such an instrument would constitute a powerful means of promoting equal opportunities and combating racism and xenophobia”. The Commission added in 1996 that the IGC should incorporate in the treaties banning all forms all discrimination and condemning racism and xenophobia.

The Parliament adopted a resolution with the view to the Intergovernmental Conference in 1996.⁹⁶ The Parliament stressed the importance of defining in precise terms the legal substance of European citizenship. The Parliament suggested that the rights and obligations affecting the citizen should be developed on the basis of the Declaration of the Fundamental Rights and Freedoms adopted by the Parliament in 1989.⁹⁷ The Parliament also supported the idea that the Commission should be entrusted to start the negotiations with the Council of Europe preparing for the accession of the Community to the ECHR. The Parliament therefore supported both an accession by the Community as well as adopting a fundamental rights catalogue for the citizens of the European Union. The list of fundamental rights should contain economic and social rights and especially the individual and collective rights of employees. The Parliament also stressed the importance of including into the Treaty the principle of non-discrimination on the grounds of race, gender, age, handicap religion and sexual orientation. In addition, the Parliament emphasized that the Treaty should contain a clear rejection of racism, xenophobia, sexism, anti-semitism and of all forms discrimination.⁹⁸ Also the equal treatment between men and women should be recognized as a fundamental right and extended to all aspects of equal opportunities in all areas, notably economic, social and family life.

⁹⁵ SEC (95) 0731 final.

⁹⁶ A4-0068/96.

⁹⁷ The European Parliament has also in 1994 adopted a draft constitution of the European Union, which includes a list of human rights to be guaranteed by the Union. The list of human rights is based on the declaration of fundamental rights drawn up by the Parliament in 1989. A3-0064/94.

The ECJ considered that the question of drawing up a catalogue of fundamental rights into the Treaty would raise a problem with regard to article 173 of the EC Treaty.⁹⁹ In considering a fundamental rights catalogue, the ECJ raised the question of the mechanism for reviewing observance of those fundamental rights in legislative and administrative measures adopted within the framework of Community law. The Court also raised the question whether the right to bring annulment in accordance with article 173 of the EC Treaty is sufficient enough to guarantee effective judicial protection against possible infringements of fundamental rights arising from the legislative activity of Community institutions. The Court noted that it would not be taking on a new role in reviewing the respect for fundamental rights once the respect for fundamental rights are more firmly rooted in the Treaty by way of adopting a written catalogue. The Court already examines the whether fundamental rights have been respected by the legislative and executive authorities of the Community institutions as well as by Member States in acting within the field of Community law.

The Council did not address the question of improving the protection of fundamental rights within the Community legal order to the preparations of the IGC. However, some of the Member States took a rather positive attitude towards annexing a catalogue of human rights and fundamental freedoms to the revised Treaty or by acceding to the ECHR. For example, in favour of accession to the ECHR are the Belgian Government and the Swedish government. The Belgian government expressed its willingness to discuss the option of an accession to the ECHR and to other human rights conventions defining fundamental rights and freedoms, including the Social Charter of 1961 (Council of Europe). However, The Belgian government also expressed its willingness to consider incorporating a list of fundamental rights and freedoms into the Treaty. The Portuguese government favoured giving a higher profile to the concept of citizenship, especially with respect to social and economic rights and that the Treaty should include a more detailed definition of the human rights dimension. Portugal also was in favour of the accession of the Union to the ECHR including its protocols. On the other hand, a position in favour of annexing a catalogue of human rights and fundamental freedoms to the Treaty was stated by the Italian government. The Italian government proposed that the essential constitutional

⁹⁸ A4-0102/95.

⁹⁹ Intergovernmental Conference, Briefing No. 22, p. 4.

principles should be explicitly spelt out, such as the basic rights of European citizens. The Italian government suggested that a full catalogue of fundamental freedoms should be drawn up in the context of a People's Europe. The Spanish government expressed the view that a catalogue of rights contained in the existing chapter on "Citizenship of the Union" should be substantially extended or as an alternative a charter of fundamental rights of the citizens of the Union containing of the rights considered as basic in the context of *acquis communautaire*. The positions of the Länder of the Federal Republic of Germany responsible for European affairs are in favour if including a list of fundamental rights in European law in the long term. The IGC could combine European citizenship with a few fundamental rights already guaranteed by the EC Treaty and add to it certain specific rights. The positions of the Member States on fundamental rights can be summarized as ranging from accession to the ECHR to simple requirement that the respect for human rights at the Union level should comply with the European Standards.¹⁰⁰ However, one could detect a certain support among a few Member States that the Community should adopt a fundamental rights catalogue connected to the development of the concept of the Union citizenship.

However, the Treaty of Amsterdam does not contain any specific list or charter of fundamental rights and neither does it contain a provision which would make an accession of the Community to the ECHR possible. A number of Member States maintained the view that it would be more appropriate of guaranteeing judicial control of fundamental rights for the Community or the Union to accede to the ECHR. However, agreement couldn't be reached on the question, so it was suggested that the jurisdiction of the ECJ should be extended to bring matters covered by all three pillars within the jurisdiction insofar as human rights are concerned. The result was that article 46 of the EU Treaty ensures that article 6(2) is now within the jurisdiction of the ECJ. However, the jurisdiction of the ECJ is although in principle restricted to the "first pillar". In other words, the jurisdiction of the ECJ has been extended to ensure that the Union institutions do respect fundamental rights, as guaranteed by the ECHR

¹⁰⁰ Intergovernmental Conference. Briefing No. 22 Fundamental rights. See also the positions of the Member States concerning fundamental rights in the White Paper on the 1996 Intergovernmental Conference, Volume II: Summary of positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference. European Parliament. Intergovernmental Conference Task Force.

as well by the constitutional traditions common to the Member States. The Treaty of Amsterdam does however not contain any specific list or any charter of fundamental rights, which would have led to an explicit recognition of particular fundamental rights. It has also been criticised that the protection of fundamental rights still is very much limited to the scope of Community law and do not cover the second (Common Security and Foreign Policy) and the third pillar (Justice and Home Affairs). For instance, the Expert Group on Fundamental Rights has taken a quite critical approach to the developments made in the Amsterdam Treaty in 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”.¹⁰¹ In their view, fundamental rights should be “primary and decisive criteria” in all the activities of the institutions of the Union.

Although one cannot say that Treaty of Amsterdam did make decisive steps in recognising specific fundamental rights, the amendments made in the Treaty are not to be underestimated. During the drafting process of the Amsterdam Treaty, certain Member States did take a positive approach towards adopting a catalogue of fundamental rights or otherwise incorporate certain fundamental rights into the Treaty. However, during the drafting procedure, the general feeling was that agreement could not be reached in order to start drafting a Bill of Rights for the European Union. The text suggested by the Presidency reaffirmed the principle that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. There was no mention about incorporating into the Amsterdam Treaty any kind of Charter of Fundamental Rights or making it possible for the Community to accede to the ECHR. Especially the European Commission has been active in maintaining a dynamic concerning the human rights protection within the European Union. In 1996, the “Comité des Sages appointed by the Commission presented its report¹⁰² underlining the need to recognise a number of fundamental civil and social rights to be incorporated into the Treaty of Amsterdam. It was suggested that the European Union should first include in the

¹⁰¹ Report of the Expert Group of fundamental rights, p. 9.

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 to strengthen the concept of citizenship and democracy in the European Union by formulating fundamental rights that reflect the evolution of the human rights protection. The report did not focus only on short-term solutions for the Amsterdam Treaty, but focused on a longer a process of elaborating a European Bill of Civic and Social Rights. The Comités proposal was largely discussed in 1997 among NGSs dealing with human rights in various Member States and gained large support, especially with regard to the incorporation of civil and social rights in the Treaty. However, the Treaty of Amsterdam does not contain any basic set fundamental civil and social rights in the form of a Bill of Rights. The need to continue the debate for explicit recognition is therefore still of great importance.

4. Towards a Charter of Fundamental Rights?

4.1. Report of the Expert Group on Fundamental Rights

The European Parliament and the Commission tried to mobilise political activity during to the IGC in order to revise the Treaties in recognising specific fundamental rights to be protected within the Community legal order. The Commission and the European Parliament have on several occasions stressed the need to improve the protection of fundamental rights. In its Social Action Programme 1998-2000¹⁰³, the Commission stressed the need of carrying forward the debate on the question of fundamental rights in the European Union. The Commission felt that it is worth having the question of fundamental rights studied in grater detail. Therefore, the Directorate General for Employment and Social Affairs, within the European Commission, established an Independent Group of Experts on Fundamental Rights to review the status of fundamental rights in the treaties, in particular in the new Treaty of Amsterdam. Special attention was to be given to a possible inclusion of a Bill of Rights in the next revision of the Treaties. The quest for explicit recognition is even more apparent after the adoption of the Amsterdam Treaty. This view is often presented in connection with the eventual enlargement towards Eastern Europe. The

¹⁰² For a Europe of Civic and Social Rights (1996).

¹⁰³ Com (98) 259 29.4. 1998.

enlargement of the Union's task will bring a new set human rights challenges which demonstrates that fundamental rights protection is no longer a long term policy but rather a short term necessity.¹⁰⁴ The Expert Group debated the question of future fundamental rights protection and presented its report in February 1999.¹⁰⁵ The Expert Group made some suggestions on how the fundamental rights protection should be further developed in the European Union. The Expert Group underlined the importance the visibility of fundamental rights. "Fundamental rights can only be fulfil their function if citizens are aware of their existence and conscious of the ability to enforce them". The current lack of visibility and legal certainty violates the principle of transparency. It was argued that it is of great importance that where fundamental rights are concerned, the Union must find ways and means to make the protection of fundamental rights more transparent. This could be done by spelling out the protected rights within the Community legal order and not merely refer to international human rights conventions. In the opinion of the Expert Group, it is not justifiable to keep up the system of references that conceals the fundamental rights and makes them incomprehensible for the individuals.

The Expert Group suggested a comprehensive and thorough review of fundamental rights, in order to achieve explicit recognition and to secure the best possible integration to the Community legal order, would seem to be the best way of developing further the fundamental rights protection. However, the risk of formulating a Charter of Fundamental Rights would certainly involve already familiar problems, such as the discussion about which rights should be included. On the other hand, the expansion of the union activities does speak in favour of a need for explicit recognition of fundamental rights. The Expert Group stressed the need for a clear decision. Having in mind the problems connected with drawing up a new Bill of Rights, it was suggested that the recognition of specific rights should be built in particular based on the ECHR. However, the acceptance of the ECHR as the guiding convention does not mean that the formulation of an explicit Bill of Rights could not take into account the specific needs of the European Union as more attention focuses of new aspects of the European Union, such as the judicial and police co-operation in

¹⁰⁴ Report of the Expert Group, 1999.

criminal matters. The Expert Group suggested that the new Bill of Rights should include articles 2-13 of the ECHR as such including the relevant provisions of the Protocols to the Convention. Additional rights to be included in the in the list of fundamental rights could be;

- The right to equality of opportunity and treatment, without any distinction such as race, colour, ethnic, national or social origin, culture or language, religion, conscience, belief, political opinion, sex or gender, marital status, family responsibilities, sexual orientation, age or disability.
- Freedom of choice of occupation, the right to determine the use of personal data
- The right to family reunion
- The right to bargain collectively and to resort to collective action in the event of a conflict of interests
- The right to information, consultation and participation in respect of decisions affecting the interests of workers.

In other words, the Expert Group stressed the need to take into account civil and political rights as well as fundamental social rights. In defining fundamental rights, also other international human rights treaties should be taken into account, in particular, the conventions of the ILO. The suggestion from the Expert Group was by no way exhaustive. The Expert Group underlined that the recognition of fundamental rights must be understood as a process of incorporating and expanding the ECHR adapted to the experiences and exigencies of the European Union. In the long run, the process of recognising fundamental rights should remain an open one as a result of the of a society of constant changes posing new challenges for fundamental rights protection. The Expert Group stressed the importance of explicit recognition of fundamental rights but underlined as well the importance of carrying out the equally important fundamental policies outlined in article 136 and 137 of the EC Treaty. Fundamental rights and fundamental policies cannot be separated, but are closely interlinked in a system of fundamental rules, which governs the activities of the European Union. In order to achieve explicit recognition and to ensure clarity, it was suggested that all rights should be set out in a single text instead of the current system

¹⁰⁵ The Expert Group started its work in March 1998 and held six meetings discussing the issues concerned with representatives of the Platform of European Social NGOs and with other European Social Partners.

where certain fundamental rights are spread throughout the Treaties including the references to certain international treaties and other human rights instruments. The suggestion was that the fundamental rights catalogue should be inserted under a particular title or a special part of the Treaties.

4.2. An initiative presented during the German Presidency

The Amsterdam Treaty strengthened to some extent the protection of fundamental rights. However, the discussion on developing further the fundamental rights protection within the European Union has not been set aside. This is mainly due to the fact that agreement could not be reached among Member States, during the 1996 ICG, on drawing up a legally binding list of fundamental rights for the Union. Neither was a decision taken on inserting an amendment committing to the drafting and adoption of a written catalogue. Some Member States have not been very supporting of the idea of adopting a legally binding Bill of Rights for the European Union. Neither could agreement be reached on committing to an accession of the European Community to the ECHR. During their Presidency the German Government has introduced an idea of adopting a European Charter of Fundamental Rights. It is worth noting that the German Social Democratic Party together with the Alliance 90 - Green Party introduced the idea of adopting a Charter of Fundamental Rights for the European Union and made it an objective for the German Government to start the process during the German Presidency.¹⁰⁶ European policies as well as the policies in Member States should demonstrably respect the protection of fundamental rights. Therefore Germany strongly supports the idea of drawing up a Charter of Fundamental Rights.

A Conference on fundamental rights was jointly organised by the German Ministry of Justice and the Commission representation in Germany on 27 April in Cologne. The purpose of the conference was to discuss further development and strengthening the fundamental rights protection in the European Union. At the conference, German Minister of Justice announced the German Presidency's intention to put forward a European Charter of Fundamental Rights to the European Council in Cologne in June 1999. The German Minister of Justice stated at the conference that the best way of

¹⁰⁶ Koalitionsvereinbarung zwischen der Sozialdemokratischen Partei Deutschlands und Bündis 90/Die Grünen, Bonn 20. Oktober 1998.

guaranteeing fundamental rights protection within the European Union is to draw up a European Charter of Fundamental Rights for all the citizens of Europe. The German Minister of Justice stated that “particularly in days such as these, when human rights are being trodden underfoot in Kosovo, it is important that Europe consciously live up to its duty to protect human rights in the EU”. The Charter of Fundamental Rights is intended to be binding for the European Union institutions and to ensure clear and transparent enforceable rights for the citizens of the European Union. Furthermore, the idea is to make it clear that the European Community law is based on shared values including fundamental civil rights of the European Member States and to promote the strengthening of European awareness among EU citizens.

In the Presidency conclusions, it was stated that there “seems 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 Unions citizens”.¹⁰⁷ The European Council stated that the Charter should be built on fundamental rights and freedoms and on basic procedural rights guaranteed by the ECHR as well as on general constitutional traditions common to the Member states, as general principles of law. Economic and social rights should be included in the Charter as contained in the European Social Charter and in the 1989 Community Charter of Fundamental Rights of the Workers (article 136 of the EC Treaty). The Charter should also include certain fundamental rights only connected to the citizens of the European Union. This Charter should be drawn up by a body consisting of representatives of the Heads of State and Government and the President of the European Commission as well as of members of the European Parliament and of national parliaments.¹⁰⁸ The composition of the ad hoc body is expected to include one representative of the Heads of State or Government from all the member states and one representative from the President of the Commission. In addition, two representatives of national parliaments from each Member State are to be included in the body as well as some representatives from the European Parliament. The Council entrusted the General Affairs Council to take the necessary steps prior to the next extraordinary meeting of the European Council in Tampere on 15 and 16 October

¹⁰⁷ Annex IV to the Presidency Conclusions, Cologne European Council 3 and 4 June 1999, p.25.

1999. In sum, the body is therefore expected to be consisted of more or less over fifty representatives from the above mentioned institutions. The objective is that the Charter of fundamental rights should be jointly proclaimed by the Council, the European Parliament and by the Commission. In other words, the proposed idea of adopting a charter of fundamental rights would not be a legally binding instrument but rather have a “soft law” status. The idea is to proclaim a common declaration by these three political institutions affirming the respect for fundamental rights in the same manner as the 1977 joint declaration. However, the idea is to try to draw up a catalogue of fundamental rights based on basic civil and economic and social rights. Later on it will be considered whether or not the Charter of fundamental rights should be integrated into the Treaties.

It remains to be seen whether or not agreement can be reached within the drafting body on which specific fundamental rights should be included in the Charter of Fundamental Rights. The fact that the Charter is meant to be a non-binding “soft-law” instrument might have an impact on the drafting process. If agreement is to be reached within the drafting body on the content of such a Charter of Fundamental Rights, it will most certainly have an affect on the fundamental rights protection within the European Union. It would be difficult for the ECJ not take into account such a political declaration on fundamental rights. According to the statement made by the Council in Cologne, the drafting body should present a draft document in advance of the European Council in December 2000.

5. Summary and conclusions of the ongoing discussion

The discussion about fundamental rights protection within the European Union can be traced back to early 1970s. Since the beginning of the 1970s there has been a ongoing discussion about the status and role of human rights protection within the Community/Union. This is partly due to the fact that the founding Treaties of the Community did not contain any specific catalogue of fundamental rights. In other words, the question of fundamental rights was not considered as important in the early

¹⁰⁸ In the view of the Council, representatives of the ECJ should participate as observers and the Economic and Social Committee as well as the Committee of regions and social groups and other experts should be invited to give their views on the Charter of Fundamental Rights.

days in establishing the Community. However, it soon became apparent that fundamental rights could not be set aside within the framework of the Community. Despite of the fact that the founding Treaties did not raise special attention to the question of fundamental rights, the ECJ has developed the fundamental rights protection and played a significant role in strengthening the human rights doctrine within the European Community/European Union. The ECJ has mainly due to its dynamic work conceded that fundamental rights form an integral part of general principles of Community law, which the court is obliged to protect. In protecting fundamental rights, in general, the Court makes reference to constitutional principles that are common to the Member States as well as to international treaties and conventions, which the Member States are parties too. The Court has specifically relied on the ECHR as a source of inspiration in protecting fundamental rights in the Community legal order. However, the protection of fundamental rights has over the years raised discussion among the political institutions of the European Union on how the protection of fundamental rights could be strengthened within the Community legal order. The latest amendment of the Treaties is the Treaty of Amsterdam. The Treaty of Amsterdam has further developed the Union's commitment to the principle of fundamental rights protection by affirming the Union's commitment to human rights and fundamental freedoms. Still the current problem with fundamental rights protection seems to be the lack of visibility and transparency, which therefore has an affect on legal certainty. The Commission stated already in 1979 that "the European Citizen has a legitimate interest in having his rights vis-à-vis the Community laid down in advance". The current discussion on fundamental rights protection is very much focused on the question of legal certainty.

The discussion among Community institutions has focused more or less on the options of adopting a written catalogue of fundamental rights and on the possibility for the Community to adhere to the ECHR. The Commission was in 1976 of the opinion that it is not necessary for the Community, as such, to become a party to the Convention. The Commission was on the other hand of the opinion that a written catalogue of fundamental rights would have many advantages. In its report to the Parliament in 1976, the Commission was in favour of adopting a catalogue of fundamental rights. Such a catalogue would improve legal certainty and would emphasize the importance of fundamental rights and remove any remaining doubts

about their relevance in Community law. However, the Commission felt that in its report that codifying a Bill of Rights cannot be realized in a short period of time. Therefore, it acknowledged the possibility for the time being. However, 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 Bill of Rights or by accession of the Community to the ECHR. In 1979, the Commission had changed its mind and believed that the best way of protecting fundamental rights was to adhere to the ECHR. Therefore, the Commission proposed an accession as soon as possible. The idea of adopting a Bill of Rights for the Community was not totally abandoned. It has been argued that an accession of the Community to the ECHR does not cancel the need for an independent Community Catalogue of fundamental rights, since the ECHR does only set a minimum standard of protection. An accession would only be the first step in the direction of the objective of adopting a Bill of Rights according to the Commission's memorandum. In 1990, the Commission formally asked the Council to allow the Commission to start negotiating on Community accession. The Council wanted the ECJ to make its statement whether or not an accession would be compatible with Community law. In 1996, the Court found that the Community has no 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 European Parliament Declaration of Fundamental Rights and Freedoms was the first attempt to produce a catalogue of fundamental freedoms for the Community. This was a response to the weakness in the current system of protection. The Declaration was meant to be a symbolic act demonstrating the Parliament's concern for the welfare of Community citizens. One goal for the Parliament was that the ECJ could incorporate the Declaration of Fundamental Rights and Freedoms into the Community legal order, either gradually or in one go. The ultimate aim for the Parliament was to invite the other Community institutions to associate themselves formally with the declaration and also that the declaration could be incorporated into the Treaties during the next Intergovernmental Conference. Today, one can say that the Declaration has had little success in its ultimate goals. Neither of the Community institutions has been associated themselves with the Parliament's Declaration of 1989.

The advantages of adopting a Bill of Rights for the Union can be summarized as follows: First of all, it would emphasize the importance of fundamental rights and remove any remaining doubts about their relevance in Community law. Secondly, the Bill of Rights could be adopted strictly according to the requirements of the Union. Thirdly, it would enhance legal certainty and would of support to the judiciary. In addition, it would enable the exercise of economic and social rights, most of which would require legislative measures to take effect and therefore be more completely assured.

It has been argued that a Bill of Rights should be adopted based on the common tradition of fundamental rights protection within national constitutions as well as on international instruments to which the Member States are parties too. The difficulties involved with such an adoption of a Bill of Rights are not merely judicial, but rather political. It might be difficult for certain Member States to accept a binding codification of fundamental rights for the Union institutions as well as for the Member States acting within the Community legal order, especially if the rights included differ from their own national constitutional traditions. One of the principal concerns with adopting a special Bill of Rights for the Union is that Europe generally would start to move in different speed concerning fundamental rights protection in Europe as a whole. It would mean establishing a dual system of human rights protection, one for the Community and one within the framework of the Council of Europe. Another fear is that the achievements of the judicial authorities within the ECHR might be weakened as a result of a possibility that individuals start to seek redress from the ECJ instead in breaches of fundamental rights protection within the Member States of the Union.

So far, some Member States have strongly objected to any inclusion of written catalogues by acceding by the Community to international instruments, notably to the ECHR in order to improve the protection of fundamental rights. However, there have recently been some considerations of adopting a Charter of fundamental rights. At a recently held conference held in Cologne in April organised jointly by the German Ministry of Justice and the Commission representation in Germany, it was stated by many that it would be favourable to take advantage of the current political climate and to come with a rapid decision on reconstructing fundamental rights protection in the

European Union. The European Council stated in its presidency conclusions in June that there “seems 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 Unions citizens”. The European Council stated that the Charter should be built on fundamental rights and freedoms and on basic procedural rights guaranteed by the ECHR as well as on general constitutional traditions common to the Member states, as general principles of law. Economic and social rights should be included in the Charter as contained in the European Social Charter and in the 1989 Community Charter of Fundamental Rights of the Workers (article 136 of the EC Treaty). The Charter should also include certain fundamental rights only connected to the citizens of the European Union. It remains to be seen whether or not agreement can be reached within the drafting body on which specific fundamental rights should be included in the Charter of Fundamental Rights. The fact that the Charter is meant to be a non-binding “soft-law” instrument might have an impact on the drafting process. If agreement is to be reached within the drafting body on the content of such a Charter of Fundamental Rights, it will most certainly have an affect on the fundamental rights protection within the European Union. It would be difficult for the ECJ not take into account such a political declaration on fundamental rights.

The recent developments during the German Presidency have more or less focused on the idea of adopting a non-binding Charter of Fundamental Rights. Member States could not reach an agreement during the 1996-97 ICG on neither the idea that the Community would commit itself to accession of the Community to the ECHR nor committing to formulate a specific fundamental rights catalogue for the European Union. The idea of adopting a non-binding Charter of Fundamental Rights to be proclaimed jointly by the three institutions could be seen as the first step towards adopting a written catalogue of fundamental rights to be included in the Treaties in the next IGC. The Treaty of Amsterdam have most likely not changed the situation that the Community does not have competence to accede to the Convention as stated by the ECJ in the opinion 2/94. It is interesting to note that the discussion within the European Union concerning the idea of adopting a Human Rights Bill for the European Community has changed over the years. The Commission was at first of the opinion that the best way of securing fundamental rights protection was to adopt an

enforceable Bill of Rights, but this could not merely be achieved in a short period of time. In the late 1970s, the discussion started to move in a direction that an accession of the EC to the ECHR would be a better solution for the EC due to the political obstacles with the idea of adopting a Bill of Rights. The idea of adopting a specific Bill of Rights was actually never abandoned. The idea of adopting a written catalogue of fundamental rights has in recent months, as noted above, gained support by the Council. This recent idea does however not preclude the other alternative of accession by the Community to the ECHR. Both of these options could in fact complement each other. The common factor that brings together the issue of accession and adoption of a separate catalogue of fundamental rights is the emphasis on judicial protection.

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